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MEXICO MADE SIMPLE

By Carlos Fane and Yves Hayaux-du-Tilly

The insurance market in Mexico is the second largest in Latin America, generating 25% of the region's gross premiums. This level of insurance activity has created significant opportunities for foreign reinsurers. Many foreign reinsurers have, as a result, been tempted into the Mexican market and are well established there. Others, however, have been more wary.

Among the factors that have deterred some reinsurers from entering this market are concerns about the functioning of the Mexican courts coupled with the widely held view that reinsurance contracts with Mexican cedants must be governed by Mexican law and subject to the jurisdiction of the Mexican courts.

These concerns have been exacerbated in recent months by the high profile insurance dispute between TV Azteca and AIG concerning D&O cover for a number of top executives at the company. During the course of the proceedings in Mexico concerning this dispute, TV Azteca took advantage of the possibility under Mexican law of bringing a criminal complaint against litigants in a civil action. As a result, a top executive at AIG Mexico (Norberto Luis Ferrara Perini) and one of AIG's external lawyers there (Néstor Díaz Barriga) were arrested. It was not until the insurance claim was settled that TV Azteca withdrew its complaint and charges against Messrs. Ferrara and Díaz were dropped. We understand that

TV Azteca's local excess carrier, Inbursa, has issued proceedings against its reinsurers.

So how well founded are these concerns?

The example given above of a criminal complaint being brought by an insured against its insurer in the context of an insurance dispute is not unique - ING Group N.V.'s Mexican affiliate, Seguros ING S.A. was reportedly on the receiving end of similar tactics previously in relation to a dispute concerning a claim by Grupo Fertinal S.A. in respect of damage to its mines in Baja California in Mexico caused by Hurricane Juliette in 2001. However, it is probably an extreme example (there were no reports of anyone at Seguros ING S.A. going to prison!).

More importantly, and possibly less well understood, is that it is probably not the case that there is any requirement on foreign insurers to submit to Mexican law or the jurisdiction of the Mexican courts.

It is true that under the rules that govern the registration of foreign reinsurers with the General Registry of Foreign Reinsurance Companies (el Registro General de Reaseguradoras Extranjeras) - a pre-condition for entry into the Mexican market - foreign reinsurers must "submit unconditionally to the laws and authorities of the United Mexican



Carlos Fane is a senior associate in the Insurance & Reinsurance Group at Mayer Brown International LLP and **Yves Hayaux-du-Tilly** is a partner at the Mayer Brown Alliance law firm in Mexico Jáuregui, Navarrete & Nader.

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States, in relation to legal acts that are to take effect within the country [Mexico] and to which the foreign entities [reinsurers] are a party” (Rule 5). However, this does not mean that reinsurance contracts with Mexican cedants must be governed by Mexican law. It merely means that any choice of foreign law that the parties to such a contract make must not be one that, under Mexican law, is not permitted. This will only be the case if the choice of law in question would involve contriving, fraudulently, to evade “fundamental principles of Mexican law” or if “the provisions of the foreign law or their application are contrary to principles or institutions fundamental to Mexican public order” (Federal Civil Code, Article 15). It is difficult to think of a foreign law that, if chosen as the governing law of a reinsurance contract, would have this effect. As there are no other restrictions imposed by Mexican law on choice of law in reinsurance contracts, the parties to such contracts are largely free to do as they please in this regard.

Nor are there any significant restrictions on the freedom of the parties to reinsurance contracts to submit to the jurisdiction of foreign courts or arbitration tribunals. In fact, in the absence of an express or implied choice to the contrary, the default position is that the courts of the country of domicile of the reinsurer (if it is the reinsurer that is being sued) will have jurisdiction over any dispute pertaining to the contract (Commercial Code, Article 1105).

There will, of course, be Mexican cedants prepared to argue that reinsurers do not have the freedom described above under Mexican law regarding choice of law and jurisdiction. Such arguments are widely subscribed to and, to some extent, supported by international practice (which, broadly, has been to choose Mexico as the governing law for reinsurance contracts). So, what the courts in Mexico will make of such arguments, is not entirely predictable. Therefore, to ensure that foreign choice of law clauses are upheld, it is likely to be important that a forum other than the Mexican Court has jurisdiction over such matters.

Achieving this may require more than simply putting a foreign jurisdiction clause in the reinsurance contract. For example, reinsurers should ensure, when providing an address for service of notices for the purposes of registration in Mexico, that this cannot be easily interpreted as agreeing to the service of proceedings in Mexico. To deal with these and other idiosyncrasies of the legal and regulatory regime in Mexico, reinsurers are likely to require the assistance of experienced and knowledgeable advisors. However, the obstacles to doing so are, in our view, far from insurmountable, and the rewards potentially available to those who succeed are likely to make the exercise worthwhile.