

Latin America insights – Ecuador



Ecuadorian (re)insurance claims have formed a part of RPC's Latin American practice for some years.

There are several aspects of Ecuadorian claims that need particular consideration. Some of these, but not all of them, feature in other Latin American jurisdictions. In this note, however, we would like to look at some of the difficulties for (re)insurers in proceedings before the insurance regulator, the Superintendent, and provide some practical advice on how to deal with them.

In recent years, Superintendence proceedings have turned into the favourite venue for insureds to pursue their claims, as they have several advantages for them.

- Insurance companies are required to pay claims under certain policies within 10 days following an award by the Superintendent finding in the insured's favour. If the insurer would like to appeal the Superintendent's decision, the insurer must pay the claim in advance. In other words, the insurer has to pay in order to play.
- The Superintendence is not a legal court. As a result, the rules for the assessment of evidence will not necessarily be applied with the same rigour as they would be by a judge at court.
- The Superintendence proceedings are significantly shorter than proceedings before the Civil Court. This presents a real challenge for reinsurers when exercising claims control, as documents going through official channels of communication (ie via brokers, not directly) could take days or even weeks to be received. Reinsurers also must consider that most documents (perhaps all documents) submitted to the Superintendent will be in Spanish. No hablar español puede ocasionar un gran problema.

Any comments or queries?

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- The same difficulties arise where the reinsurance contract contains a claims cooperation clause. The flow of communication between the relevant parties is slow, so that it can be very difficult to comply with the deadlines imposed by the Superintendent.
- The Superintendent can take a more relaxed approach to limitation. Simply put, the Superintendence is not a court of law and the Superintendent may not always consider limitation at least at the initial stage. This means that an insurer may be forced to pay a claim where the Superintendent finds in the insured's favour despite a claim being time-barred.
- As (re)insurers are aware, broadly speaking, the Superintendent in Latin America tends to be pro-insured. This is especially true if the claim concerns state-owned companies. Ecuador is no exception to this.

There are, however, some features of the Ecuadorian process which can assist (re)insurers in ameliorating these difficulties.

- Against a resolution issued by the Superintendent, insurers have two separate ways to appeal:
 - before the Superintendent. This appeal has to be submitted within 10 days following the notification of the Superintendent's decision
 - before the Administrative Court. This appeal has to be submitted within 90 days following notification of the Superintendent's decision.
- Insurers have access to separate proceedings before an Administrative Court (as above). This means that (re)insurers can prepare their case fully, with documentary and expert evidence and relying on all appropriate legal grounds, and that case will be assessed by a judge who, it can be expected, will review it in accordance with the applicable legal rules.
- Under article 26 of the Ecuadorian Commercial Code, the limitation period for bringing a claim under an insurance contract is two years from the date the cause of action accrues. Ecuadorian courts have interpreted the "date the cause of action accrues" as the date of loss. The limitation period is therefore relatively short.
- Even if the Superintendent decides not to look at limitation as a preliminary issue, it does not mean that the claim is not legally time-barred. This defence could yet be (re)insurers strongest defence at an appeal before the Administrative Court.
- The Ecuadorian government has a good system for allowing access to documents related, for example, to public-tenders and state-owned companies, through laws on public access. We have been able to access documents (eg EPC contracts and full documentation for the underlying policy) which in other jurisdictions would have been impossible to obtain.
- The new government elected in 2017 has targeted corruption and poor market practices. There is therefore an expectation that the Ecuadorian Superintendent will not wish to be seen as biased in favour of insureds.

The Superintendence procedure in Ecuador therefore presents challenges for (re)insurers but it is possible to navigate these claims successfully.

If you have a particular interest in issues raised in the above, for example, obtaining public documents, or claims in Ecuador generally, please contact us.

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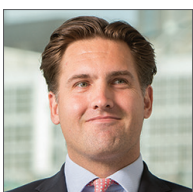
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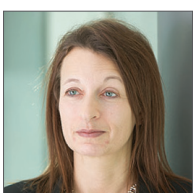
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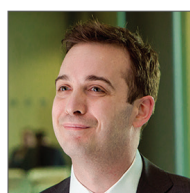
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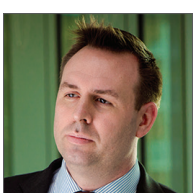
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