

How the “30 days period” to pay a claim in Latin America works in practice



Everyone dealing with Latin American claims will become familiar with the short deadlines imposed in these jurisdictions for paying a claim. However, how those deadlines are applied in practice can be a complex matter to work out.

In most Latin American jurisdictions, the law provides that insurers have 30 days from receipt of all relevant information enabling them to determine cover and quantum to pay the indemnity or state why they are not doing so. In general, the position is that once the 30 days period has come to an end, interest starts accruing. In certain jurisdictions, the consequence of failing to respond within 30 days is that the insurer must pay the claim, regardless of whether it has valid coverage or quantum defences.

In most cases, insureds provide all this information and adjusters are consequently able to adjust the loss without any unnecessary delays. However, there are some instances where insureds are reluctant to provide it. In our experience, the insured’s lack of co-operation is often linked to coverage or quantum concerns.

This can become frustrating when information is not provided and a seemingly endless exchange of further requests for information (“RFIs”) and partial responses between insureds and insurers follows.

Some legal experts consider that the 30 days period starts again following a RFI. However, in our view, this is not the correct analysis. The key point, according to the law, is whether the insured has provided all the relevant information to determine coverage and quantum. If it has not, the 30 days period will never have been triggered.

Any comments or queries?

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In most Latin American jurisdictions, with the notable exceptions of Peru and Ecuador, there is no limit as regards how many times insurers are entitled to request further information from the insured. In principle, insurers have until they secure all the relevant information necessary to determine coverage and quantum.

However, issuing several RFIs comes with its own risks. The relevant authority or judge considering an insurer's conduct may conclude that the required information could not have been materially relevant, since the adjustment of the loss continued despite the insurer not having a response to its request. There is a risk of insurers inadvertently waiving the right to enforce an exclusion if they do not enforce the exclusion within a reasonable period of time, once it has become clear that the insured is not going to provide the information to determine whether that exclusion applies.

Insurers are confronted with a dilemma. If insurers keep asking for information, then they are at risk of losing the right to enforce the exclusion. At the same time, however, insurers may consider they cannot decline coverage, as they have not been provided with the relevant information to determine whether the exclusion applies or not.

In our experience, if the insured continues to fail to respond to a RFI, it is likely that either such information does not exist, or if it does exist, it jeopardises the insured's position. In these circumstances, our advice is to inform the insured that such information has been requested several times, and that insurers believe that a certain exclusion applies unless proven otherwise. By proceeding in this way, insurers protect their position, and, ultimately, will be able to contend later on in court that no right has been waived.

Some insurers are concerned that by adopting this approach, they risk the insured stopping its co-operation with the adjuster/insurer. In our experience, this risk does not usually materialise. Moreover, we would question the value of continuing to adjust a loss (and incurring costs in doing so) if the claim is likely to be excluded.

Peru and Ecuador recently introduced new insurance regulations which impose strict time limits. Under the new laws, insurers have one opportunity to request further information in Peru and two opportunities in Ecuador. This has resulted in a drastic reduction in the time taken to adjust losses, regardless of their complexity. Some insurers, with good reason, are concerned that these rules mean that even if their requests do not produce the information sought, they are barred from making further requests.

However, as noted above, the law also requires that the insured provides all the information necessary to prove that the loss is covered under the policy, and if so, the quantum. If the insured refuses to provide information in response to additional requests relying on the argument that insurers have "used up" their opportunities, insurers are entitled to decline the insured's claim. If insurers decline a claim on this basis, the insured will usually follow one of two courses of action:

- a) In most cases, the insured realises that its case is weak, and that insurers are aware of this and are ready to stand by their declination of the claim. As a result, the insured becomes more realistic in its indemnity expectations and is prepared to agree a compromise.

- b) Occasionally, the insured files a legal action. However, this is not entirely bad news. In Latin America, in commencing a legal action at court (or arbitration), the claimant must submit all the evidence and information supporting its case.

As a result, this means that if the insured is to have its claim paid, it will ultimately have to provide the necessary information to determine coverage regardless of how many opportunities the insurer has had to request further information.

We often receive queries from reinsurers about whether these deadlines also apply to them.

In practice, some cedants (or brokers) require reinsurers to pay their share/reply within the 30 days period originally given to the cedant itself, even if reinsurers only got the information on day 28, for example. In these circumstances, where there may well be the further complication of documents that need translating, a timely response from reinsurers is impossible.

From a legal standpoint, the insurance policy and the reinsurance contract are two separate contracts, regardless of whether the reinsurance contract is in the form of back-to-back cover and stated to follow the same terms and conditions and settlements as the underlying policy. As such, reinsurers have a separate period of 30 days to pay the indemnity (or request further information), from the date when all the relevant information has been provided by the cedant in order to determine cover and quantum.

A further issue which can arise between the cedant and reinsurers concerns the loss adjuster's report. For example, in Chile insurers have only 10 days to challenge the conclusions of the adjuster's final report. If the adjuster's conclusions are not challenged, it is very likely that a judge will follow them. In Peru, insurers have 10 days to challenge the adjuster's conclusions and if they do not do so, those conclusions are binding on the insured and its insurer.

The 10 days requirement can create friction between cedants and reinsurers. Generally, however, in Latin American jurisdictions, if the cedant misses the opportunity to challenge an adjuster's conclusions and is forced to pay a claim as a result, this does not bind reinsurers, even if the reinsurance contract contains follow the fortunes language.

Brokers play a key role in ensuring compliance with the deadlines. The sooner the information is passed to reinsurers, the sooner reinsurers will be able to respond to the cedant. Brokers usually use official channels of communication such as ECF. Despite the existence of systems for keeping reinsurers updated, we would suggest it is helpful if brokers are creative and find alternatives to speed up the communication process.

Brokers may be reluctant to allow direct channels of communication between reinsurers and cedants. However, in our experience dealing with complex claims in the region, it is almost impossible to comply with such short deadlines without direct communication between the relevant parties.

In Latin American jurisdictions, communications between reinsurers and cedants can be used as evidence in any legal proceedings, and this is true regardless of whether those communications are direct or go through the broker. The court will look at these communications together with

all other relevant documents, and not in isolation. Bearing in mind that it might go before the court, however, reinsurers may of course not wish to share all information with the cedant.

Nevertheless, in our view, the benefit to reinsurers of maintaining good communications with the cedant outweighs this risk.

In conclusion, the 30 days period to pay a claim is prescribed by law in most Latin American jurisdictions and so insurers and reinsurers must comply with it. Properly understood, this deadline is not as onerous as it may seem at first sight. Further, the faster reinsurers receive all the necessary information to determine cover and quantum, the more they will be able to assist the cedant in complying with the local regulations and associated deadlines.

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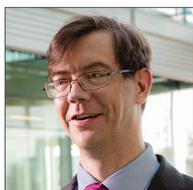
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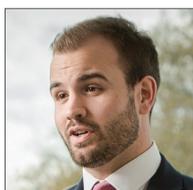
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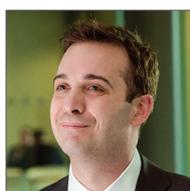
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