The International Comparative Legal Guide to:

Insurance & Reinsurance 2019

8th Edition

A practical cross-border insight into insurance and reinsurance law

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Country Question and Answer Chapters:

EDITORIAL

Welcome to the eighth edition of *The International Comparative Legal Guide to: Insurance & Reinsurance*.

This guide provides corporate counsel and international practitioners with a comprehensive worldwide legal analysis of the laws and regulations of insurance and reinsurance.

It is divided into two main sections:

Six general chapters. These chapters are designed to provide readers with an overview of key issues affecting insurance and reinsurance work, particularly from the perspective of a multi-jurisdictional transaction.

Country question and answer chapters. These provide a broad overview of common issues in insurance and reinsurance laws and regulations in 40 jurisdictions.

All chapters are written by leading insurance and reinsurance lawyers and industry specialists, and we are extremely grateful for their excellent contributions.

Special thanks are reserved for the contributing editors Jon Turnbull and Michelle Radom of Clyde & Co LLP for their invaluable assistance.

Global Legal Group hopes that you find this guide practical and interesting.

The International Comparative Legal Guide series is also available online at www.iclg.com.

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1 Regulatory

1.1 Which government bodies/agencies regulate insurance (and reinsurance) companies?

Senegal is a Member State of CIMA (Interministerial Conference of Insurance Markets) which includes 16 Member States. The organisations regulating the insurance sector in Senegal exist both regionally and nationally.

In the regional plan:

- The Council of Ministers, which ensures the application of the single legislation by the Member States and constitutes the sole body of appeal against disciplinary sanctions pronounced by the regional insurance control commission.
- The Regional Insurance Control Commission is responsible for the control and supervision of insurance companies.
- The General Secretariat of the Conference, which, *inter alia*, prepares, executes and monitors the work of the Council of Ministers.

In the national plan:

- The Senegalese Ministry of Finance which is in charge of granting approvals requested by the insurance companies after having requested the opinion of the Commission of Control of the CIMA.
- The National Insurance Directorate which serves as a relay for the action of the Regional Control Commission in the Member States.

1.2 What are the requirements/procedures for setting up a new insurance (or reinsurance) company?

- For an insurance company incorporated as a public limited company and whose registered office is in the territory of a Member State of CIMA:
  - They must have an agreement with the Life or Property and Casualty branches, issued by the Ministry of Finance after having requested the opinion of the Regional Control Commission.
  - The share capital must be at least 5 billion XOF, excluding contributions in kind.
  - The company's equity cannot be less than 80% of the minimum share capital.
  - Any transaction consisting of entrusting a shareholder with a stake of more than 20% must be granted authorisation from the Minister of Finance, prior to obtaining the stake.
  - The rules of incorporation of public limited companies provided for by the OHADA's Uniform Act on Commercial Companies will apply.
- For mutual insurance societies:
  - They must be licensed to practice by the Life or Property and Casualty branches.
  - The social capital must be equal to 3 billion XOF at least.
  - The shareholders' equity of the company cannot be less than 80% of the minimum share capital.
  - The minimum number of members cannot be less than 500.
  - The statutes must provide for the constitution of a settlement fund intended to face the expenses of the first three years of exercise and to guarantee the engagements of the society.
- For mutual reinsurance societies:
  - They are validly constituted only when they have at least seven member societies.
  - No minimum amount is required for their settlement fund.
- Reinsurance acceptance transactions do not require accreditation.

1.3 Are foreign insurers able to write business directly or must they write reinsurance of a domestic insurer?

Article 308 paragraph 1 of the CIMA Code prohibits direct insurance of a risk relating to a person, property or liability located in the territory of a Member State of CIMA, from a company that has not been in accordance with the provisions of Article 326.

Article 326 requires an approval and Article 328-6 lays down the conditions for obtaining approval for foreign companies.

With regard to reinsurance, it is specified by paragraph 2 of Article 308 of the CIMA Code that any assignment in reinsurance abroad involving more than 50% of a risk relating to a person, property or a liability is subject to authorisation from the Minister in charge of the insurance sector. There is one exception to this: on the one hand, damages on the bodies of rail vehicles, air, sea, lake and fluvial and, on the other hand, responsibility resulting from the use of air, lake, maritime and river vehicles.

However, under no circumstances may the following be transferred abroad: health insurance; damage to non-railway land vehicles; damage to persons transported in case of accidents; goods transported; civil liability arising from the use of motorised land vehicles (including the liability of the carrier); life and death insurance; insurance related to an investment fund; tontines; and capitalisation operations.

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1.4 Are there any legal rules that restrict the parties' freedom of contract by implying extraneous terms into (all or some) contracts of insurance?

Article 2 of the CIMA Code specifies that any limitation periods provided for by the CIMA Code in the event of any dispute arising from the insurance contract, cannot be modified by the agreement of the parties.

E.g.: biennial prescription provided for in Article 28 in the event of direct action by the insured against the insurer, or the five-year prescription provided for by the same article when the action of the insured against the insurer is caused by the claim of a third party.

There are, however, exceptions to this principle, listed in Articles 4, paragraphs 2, 5, 9, 10, 35 to 38, 42, 45, 46, 50, 51, 53, 58 and 72 of the CIMA Code.

Article 3 also expressly prohibits any person resident or any legal entity for its establishments located in a Member State of CIMA, from signing direct insurance or life annuities not denominated in XOF, except Authorisation from the Minister of State Insurance.

The insurance contract can only be written in the official language(s) of a Member State of CIMA (Article 7).

1.5 Are companies permitted to indemnify directors and officers under local company law?

It must be borne in mind that insurance companies are necessarily formed as public limited companies or mutual insurance companies (Article 301 of Volume II of the CIMA Code relating to insurance companies). The Uniform Act on Commercial Companies, specifies in Article 439 that the agreements passed between the directors and the company, are authorised since they form part of the ordinary operations concluded under normal conditions. Ordinary operations are those that are routinely performed by the company in the course of its business.

Thus, a written insurance contract between a company and its managers forming part of the ordinary operations of an insurance company is perfectly valid and therefore the managers will be entitled to compensation in the event of the occurrence of a loss in the same way as any other insured.

1.6 Are there any forms of compulsory insurance?

Article 200 of the CIMA Code requires any natural or legal person other than the State, whose civil liability may be incurred by reason of damage suffered by third parties resulting from injury to persons or property and caused by a land motor vehicle and its trailers or semi-trailers, to be covered by insurance.

Article 278 also provides that the insurance of import faculties is compulsory in so far as national legislation provides that. In Senegal, this obligation is provided for by Act n° 83-47 of 18 February 1983 an obligation to secure the importation of goods and merchandise of all kinds. It also imposes an obligation to secure any vessel flying the Senegalese flag and armed to trade or fishing or any vessel chartered and armed to trade or fishing when the insurance contract imposes the insurance obligation on the charterer operating in Senegal.

2 (Re)insurance Claims

2.1 In general terms, is the substantive law relating to insurance more favourable to insurers or insureds?

Before the advent of the CIMA Code in 1992, the law was more advantageous for the victims of an accident. The national courts allocated to them huge sums fixed on the basis of the principle of full compensation, consisting of allotting damages and interest to the victim, which the judge considers equivalent to the loss suffered. This had caused the bankruptcy of many insurance companies.

However, with the CIMA Code, the scaling system of damages has meant that the indemnities, to which the insurance companies are condemned to pay, have become much less important. For example, the compensation due for the economic loss of the heirs of the deceased cannot exceed 85 times the annual minimum wage of the Member State in which the accident occurred.

2.2 Can a third party bring a direct action against an insurer?

Under the provisions of Article 231 of the CIMA Code, the insurer guaranteeing the liability of a motorised land vehicle is required to submit an offer within 12 months of the accident to the victim who has suffered damage to his person; and within eight months in the event of the death of the victim, to his beneficiaries.

In the absence of an offer within the time limit indicated, or where the parties have not reached agreement on the proposal made by the insurer, the aggrieved third party who has suffered bodily injury or the beneficiaries of the deceased victim, may initiate an action against the insurer.

However, in the writ of summons it will first be necessary to mention the name of the insured to avoid being opposed by the provisions of Article 51 of the CIMA Code according to which:

"The insurer is liable only if, as a result of the harmful event provided for in the contract, an amicable or judicial complaint is made to the insured by the injured party."

2.3 Can an insured bring a direct action against a reinsurer?

It follows from Article 4 of the CIMA Code that in all cases where the insurer reinsures itself against the risks it has insured, it remains solely responsible *vis-à-vis* the insured. So, under this Article, the insured cannot initiate action against the reinsurer.

2.4 What remedies does an insurer have in cases of either misrepresentation or non-disclosure by the insured?

According to the terms of Article 18, reluctance or intentional misrepresentation by the insured, results in the nullity of the contract when the reluctance or misrepresentation changes the object of the risk or diminishes the insurer's opinion for the risk, even if the risk omitted or denatured has no influence on the incident.

All premiums paid remain with the insurer, who is also entitled to premiums due by way of damages and interest.

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In case of unintentional misrepresentation, that is to say when the bad faith of the insured is not established, this does not result in the nullity of the insurance. In this case, if the false declaration is established before any loss, the insurer may either maintain the contract for a premium increase, or cancel the contract 10 days after notification is made to the insured by registered letter or countersigned.

Thus, the portion of the premium paid for the time the insurance no longer runs, is returned.

When the finding takes place only after the incident, the indemnity is reduced in proportion to the rate of the premiums paid in relation to the rate of the premiums which would have been due, if the risks had been completely and exactly declared.

2.5 Is there a positive duty on an insured to disclose to insurers all matters material to a risk, irrespective of whether the insurer has specifically asked about them?

The insured is entitled to two principal obligations at the time of the subscription of the insurance contract.

Firstly, he has to accurately answer the questions asked by the insurer, in particular on the circumstances that are likely to make the insurer appreciate the risks it assumes.

Then, he must declare during the course of the contract, the new circumstances which have the consequence of either aggravating the risks or creating new risks, and thereby rendering the answers he had given at the time of the conclusion of the contract inaccurate or obsolete.

Therefore, even if the insurer did not specifically ask, he must inform him of any circumstance likely to aggravate the risks assumed by the insurer (Article 12 CIMA Code).

2.6 Is there an automatic right of subrogation upon payment of an indemnity by the insurer or does an insurer need a separate clause entitling subrogation?

In regard to the provisions of Article 271 of the CIMA Code, the insurer who pays the money owed to the victim as well as third-party payers is subrogated in the rights of people compensated to the extent of payments made.

3 Litigation – Overview

3.1 Which courts are appropriate for commercial insurance disputes? Does this depend on the value of the dispute? Is there any right to a hearing before a jury?

Three Courts have jurisdiction over disputes arising from commercial insurance:

- The Court of Trade disputes established by Act n° 2017-24 of 28 June 2017 and which rules in first instance on commercial disputes the rate of which is above 25,000,000 XOF or indeterminate; and first and last resort on disputes the rate of which does not exceed 25,000,000 XOF.
- The Court of First Instance instituted by Decree 2015-1145 of 3 August 2015, which rules in commercial matters at first instance when the litigation rate does not exceed 2,000,000 XOF; and first and last resort when the rate of the dispute does not exceed 300,000 XOF.
- The High Court instituted also by Act n° 2015-24 mentioned above, which rules in all cases which are neither in the juris of the Court of Commerce nor that of the Court of Instance.

The referral of each court depends not only on the value but also the nature of the case. For example, the Court of Trade is not competent to rule on a purely civil case even if the issue of the dispute exceeds 25,000,000 XOF.

The jury existed in the Senegalese courts only in the context of proceedings relating to the jurisdiction of the High Criminal Court. But, since 2008, this function has been removed.

3.2 How long does a commercial case commonly take to bring to court once it has been initiated?

It depends on the nature and complexity of the case. For example, if the case requires the appointment of an expert to assess the damage suffered by a person, the expert usually has two to three months to carry out his expertise, and the law allows him to request an extension when he is unable to perform his work within the time limit set by the Court. Once the report is filed, the parties will have to read it and make their observations before the judge makes his final decision. It sometimes happens that the report is rejected at the request of a party because the expert has not observed formalities under penalty of nullity, and that the Court designates another for its replacement. So a case brought before the court can, in such circumstances, easily exceed one year of proceedings in the first instance.

4 Litigation – Procedure

4.1 What powers do the courts have to order the disclosure/discovery and inspection of documents in respect of (a) parties to the action, and (b) non-parties to the action?

Under Article 54-12 of the Code of Civil Procedure, the judge exercises all the powers necessary for the communication, the obtaining and the production of the documents. As such, he may enforce the parties to provide him with the original documents submitted to the proceedings or copies.

Article 54-19 of the above-mentioned Code also gives the judge the power to control the execution of the investigative measures he orders, including expertise. For this purpose it can enforce any party holding information useful to the expertise measure, to produce it.

4.2 Can a party withhold from disclosure documents (a) relating to advice given by lawyers, or (b) prepared in contemplation of litigation, or (c) produced in the course of settlement negotiations/attempts?

There is no legal obligation on parties to produce advice given to them by their lawyers in contemplation of a litigation or as part of a negotiation procedure.

Even in the context of a negotiation procedure between two lawyers, if the lawyer of a party does not wish that the information contained in his correspondence be produced by his opponent in the context of a judicial procedure, he must stamp his letter with the mention "confidential".

Article 40.2 of the Rules of Procedure of the Bar of Senegal stipulates that correspondence between lawyers bearing the mention "confidential" stamp cannot be produced in court.

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4.3 Do the courts have powers to require witnesses to give evidence either before or at the final hearing?

In the course of proceedings where the facts presented by the parties are contrary in such a way that it is necessary to have recourse to the hearing of a witness, Articles 132 to 152 of the Code of Civil Procedure empower the judge to order investigations in which one or more witnesses may be heard to shed light on the case.

4.4 Is evidence from witnesses allowed even if they are not present?

It follows from the provisions of Article 134 of the Code of Civil Procedure that when witnesses are distant and therefore not present in the area where the trial is taking place, the court hearing the case may order that the investigation will be made by the President of the Court designated for that purpose and who will be able to hear those non-present witnesses.

In any event, taking into account the testimonies of witnesses in the handling of the case is at the discretion of the judge.

4.5 Are there any restrictions on calling expert witnesses? Is it common to have a court-appointed expert in addition or in place of party-appointed experts?

In principle, there is no legal restriction to have recourse to expertise. Article 156 of the Code of Civil Procedure even gives the judge the power to resort to it when the treatment of the case requires technical knowledge not familiar to him.

If the parties file contradictory expert reports, or when the expert appointed by the Court itself submits a report the clarification of which is insufficient, Article 178 of the Code of Civil Procedure gives the judge the power to order *ex officio* a new expert report established by one or more other experts designated by him.

4.6 What sort of interim remedies are available from the courts?

Several types of interim measures are provided for by the Code of Civil Procedure as well as by the OHADA Uniform Act on Simplified Recovery Procedures. We will only mention a few:

- medical or accounting or real estate expertise etc.;
- seizure of receivables or movable property;
- registration of a conservatory mortgage; and
- provisional arrest of ship.

4.7 Is there any right of appeal from the decisions of the courts of first instance? If so, on what general grounds? How many stages of appeal are there?

It is possible for a party that has been unsuccessful at first instance to appeal the decision.

There are only two levels of call:

- The Court of Appeal (for decisions rendered by the High Courts or the Courts of Commerce).
- The High Court (for decisions rendered by the Courts of Instance).

The Supreme Court is not a Court of Appeal, it only knows about the decisions rendered in last resort by the courts and does not rule on the merits of the case. The office is normally limited to control whether the judge, who rendered the decision submitted to its control, has well applied the law.

In general, the appeal is lodged when the decision rendered is unfavourable to one of the parties. This is the case, for example, when the judge has decided on things not requested, if he failed to rule on one or more demands, if he has granted an amount more than the one requested, when the amount requested is not granted, or when the amount allocated falls far short of what was requested, or where the requests made have not been granted, etc.

4.8 Is interest generally recoverable in respect of claims? If so, what is the current rate?

When the insurer has not submitted its compensation offer within the legal period (eight months in case of death and 12 months in case of bodily injury), it is liable according to the provisions of Article 233 of the CIMA Code, to penalties corresponding to interest for late payment, equal to 5% of the amount of compensation due per month of delay.

Similarly, Article 277 provides that all amounts claimed and due, not reimbursed, shall bear interest at the discount rate as of the month following the date of the application. The discount rate is set each year by order of the Minister of Finance of Senegal. For the year 2018 the rate is 4.5%.

4.9 What are the standard rules regarding costs? Are there any potential costs advantages in making an offer to settle prior to trial?

The principle is that any party who has been unsuccessful is ordered to pay the costs; that is to say, all the costs that have been incurred in the process such as the costs of the registry, the expertise fees, etc.

To make an offer could thus save the unsuccessful party and, in general, the insurer, from paying the costs.

4.10 Can the courts compel the parties to mediate disputes? If so, do they exercise such powers?

Article 7 *ter* of the Code of Civil Procedure provides that the judge hearing a dispute may, after obtaining agreement from the parties, appoint a mediator.

So a party is free to resort to mediation or not and, in case of refusal, the judge cannot order it.

4.11 If a party refuses to a request to mediate, what consequences may follow?

As long as mediation can only be done with the consent of the parties, the refusal of a party to submit to mediation does not lead to particular consequences against him. The law does not provide for punishment of a party who has not accepted the judge's request for mediation. In this case, the process should proceed normally and result in a judgment.

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5 Arbitration

5.1 What approach do the courts take in relation to arbitration and how far is the principle of party autonomy adopted by the courts? Are the courts able to intervene in the conduct of an arbitration? If so, on what grounds and does this happen in many cases?

National courts cannot, in principle, intervene in arbitration proceedings that fall within the jurisdiction of the arbitral tribunal formed in accordance with the Arbitration Rules of the Common Court of Justice and Arbitration of OHADA (Organization for Harmonization of Business Law in Africa).

Article 23 of the OHADA Treaty provides that any court of a State Party hearing a dispute which the parties have agreed to submit to arbitration shall declare itself incompetent if one of the parties requests so, but incompetence cannot be raised *ex officio* by State jurisdiction (Article 13 of the Uniform Act on Arbitration).

However, in strict compliance with the principle of consensualism or the free will of the parties, the national courts may hear of a dispute in which an arbitration clause by reference to a document which stipulates it valid is considered as not opposable to the party to which it is opposed when the latter was not aware of the clause and therefore did not show his willingness to be bound by the arbitration agreement. The Court of Appeal of Ouagadougou Commercial Chamber, judgment n° 037, of 19 June 2009.

5.2 Is it necessary for a form of words to be put into a contract of (re)insurance to ensure that an arbitration clause will be enforceable? If so, what form of words is required?

For an arbitration clause to be applicable, it does not need to be necessarily included in the insurance or reinsurance contract. Article 3 of the Uniform Act on the Law of Arbitration provides that the arbitration agreement may be made in writing or by any other means allowing the proof to be administered; in particular, by reference to a document stipulating it.

The writing consists of any document signed by the parties, or letters, e-mails, telegrams or even exchanges of conclusions alleging the existence of an arbitration agreement not disputed by the parties.

Therefore, no particular form is required in relation to the validity of the arbitration agreement. A reference in the insurance or reinsurance contract, to a document stipulating it, may even suffice to establish its validity. However, as stated before, the party to whom it is opposed must have actual knowledge of this document and have given his consent to be bound to it.

5.3 Notwithstanding the inclusion of an express arbitration clause, is there any possibility that the courts will refuse to enforce such a clause?

Article 13 of the Uniform Act on the Law of Arbitration provides that in the case of an express arbitration clause and prior referral to the arbitral tribunal, the national court, at the request of a party, must declare itself incompetent.

When the national jurisdiction is seized previously to the arbitral tribunal, it must also declare itself incompetent unless the arbitration clause is manifestly null.

The notion of manifest nullity, however, must be interpreted restrictively, that is to say, it must have resulted from a mere extrinsic examination of the clause.

In any event, where the State's jurisdiction refuses to apply the arbitration clause by considering it to be manifestly void, it must show how that clause is manifestly void.

Similarly, when it comes to ordering provisional or protective measures at the request of one of the parties, the state judge may, in case of a recognised and motivated emergency, or where such a measure must apply in a State not party to the OHADA treaty, order such measures as long as those measures do not involve an examination of the dispute on the merits.

5.4 What interim forms of relief can be obtained in support of arbitration from the courts? Please give examples.

It follows from the provisions of Article 13 of the Uniform Act on Arbitration that even in the presence of an arbitration agreement, the State Judge may, in case of a recognised and reasoned emergency, order provisional or conservative measures, since these measures do not imply an examination of the dispute on the merits. This is the case, for example, of an accounting measure on a partners' current account or a provisional seizure of receivables on the bank account of a debtor company.

5.5 Is the arbitral tribunal legally bound to give detailed reasons for its award? If not, can the parties agree (in the arbitration clause or subsequently) that a reasoned award is required?

Article 20 of the Uniform Act on Arbitration requires the Arbitral Tribunal to give reasons for its decision.

The lack of reasoning of the arbitral award renders it even subject to an action for annulment under the provisions of Article 26 of the abovementioned Uniform Act.

5.6 Is there any right of appeal to the courts from the decision of an arbitral tribunal? If so, in what circumstances does the right arise?

The arbitration award is not subject to opposition, appeal (before a court of appeal) or cassation; it is only subject to three types of action:

- The third-party proceeding action, which is brought before the arbitral tribunal having rendered the award, by the third party who was not a party to the arbitral proceedings and when the execution of the arbitration award could harm his interests (Article 25).
- The action for review which is also brought by one of the parties before the arbitral tribunal in the event of discovery of a fact which could have had a decisive influence on the decision and which before the pronouncement of the arbitral award, was known by the court arbitral tribunal and by the party making the request.
- The action for annulment to be brought before the competent judge in the State Party in the following cases:
  - The court has ruled without an arbitration agreement or on the basis of a null or expired arbitration agreement.
  - The arbitral tribunal was irregularly composed or the sole arbitrator irregularly appointed.
  - The court ruled without complying with the mission entrusted to it.
  - The adversarial principle has not been respected.
  - The arbitral tribunal violated an international public policy rule of the signatory states of the treaty.
  - The arbitration award is not motivated.

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She graduated from University of Gaston Berger in St Louis (Senegal) with an LL.M. in Business and Economic Law as well as University of Paris-1 Panthéon-Sorbonne (France) with an LL.M. in International Transportation.

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SOW & PARTNERS is a firm set up by lawyers of various experiences and skills, devoting all their energy to advise, support and represent their clients in the achievement of their objectives both in Senegal and in many OHADA's jurisdictions. With teams specialised in business law such as project financing, private equity, PPP and public markets, insurance, transport, company law, labour law, but also maritime law, SOW & PARTNERS Law Firm is driven by the optimal satisfaction of its clients. As a result, the firm has been able to gain the trust of many national and international financial institutions, multinational corporations, but also many internationally renowned firms with whom they maintain a working relationship based on trust and quality.

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- Mining Law
- Oil & Gas Regulation
- Outsourcing
- Patents
- Pharmaceutical Advertising
- Private Client
- Private Equity
- Product Liability
- Project Finance
- Public Investment Funds
- Public Procurement
- Real Estate
- Securitisation
- Shipping Law
- Telecoms, Media & Internet
- Trade Marks
- Vertical Agreements and Dominant Firms

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