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THE LIBERALISATION OF THE BRAZILIAN INSURANCE MARKET IN THREE SECTIONS

There have been a number of recent milestones in the liberalisation and de-regulation of insurance in Brazil, which are key for the international market. In this briefing we set out developments in more detail.

Greater Freedom of Contract and De-Regulation of the Brazilian Market

1. Together with the Ministry of Economy, the Brazilian Insurance Regulators – the National Council of Private Insurance (CNSP) and the Superintendence of Private Insurance (SUSEP) – have been implementing gradual reforms to allow more economic freedom in Brazilian insurance and reinsurance markets, since the enacting of the *Economic Freedom Law* (Federal Law No. 13,874/2019).
2. This is an important part of the agenda of the Brazilian Federal Government, which has recently enacted various pieces of legislation with the objective of consolidating sparse regulations, revoking obsolete rules and ensuring that business in general is given more contractual/economic freedom.
3. Article 2, item III, of the *Economic Freedom Law* sets out that the Brazilian State should only intervene in good-faith economic activities in exceptional circumstances and in an ancillary manner. For that reason, SUSEP and CNSP have been revising their various regulations to align with the new free market legislation.
4. In April 2021, CNSP finally enacted the highly anticipated Resolution No. 407/2021. In summary, this provides different treatment for so-called "Large Risks", as distinguished from smaller risks or retail insurance (known in Brazil as 'mass insurance').
5. The old regime was characterised by mandatory standardised wordings for most lines of business, with only minor amendments allowed (e.g. provided that such amendments did not alter the "structure or essence" of the products and were only implemented to benefit the insureds). Such amendments previously needed to be endorsed by SUSEP through a complicated and overly technical approval process.
6. The new rules allow Brazilian insurers to adopt a more flexible approach to "Large Risks" policies, which, pursuant to Resolution No. 407/2021, are applicable to "oil risks, bank risks, aviation, marine and nuclear risks" and, in some cases, also "suretyship, credit and export risks".
7. Other lines of business also fall within the definition of "Large Risks", provided at least one of the following conditions are met, at the time of contracting or renewing the cover:
 - Maximum Limit of Guarantee of the contract is above BRL 15 million (c. USD 2.7 million);
 - Insured with total declared assets above BRL 27 million (c. USD 4.8 million);
 - Insured with total gross revenue in previous year above BRL 57 million (c. USD 10.1 million).
8. Under the new regime, the Terms & Conditions for "Large Risks" policies can now be freely agreed between the contracting parties. This freedom of contract supersedes the former regulatory regime which was confusing and scattered among various sources of Brazilian law and regulation. It also brings to an end the requirement to contract on mandatory pro-forma wordings, which are often poorly drafted or unsuitable for the complex risk being underwritten.

9. However, insurance contracts are still required to contain a few mandatory clauses, which SUSEP calls the "*minimum characteristics of the contract*". In the case of "Large Risks" these include separate clauses expressly dealing with the following issues:
 - Geographical scope;
 - Premium payment;
 - Covered and excluded perils;
 - Loss of rights;
 - Policy periods;
 - Renewal procedures;
 - Documents required for the notification and adjustment of losses;
 - Deductibles, Excesses and Reinstatements;
 - Maximum Limits of Indemnity and Guarantee;
 - Dispute resolution mechanisms.

10. Interestingly, the new rules also provide more flexibility with respect to retail/mass contracts. SUSEP's Ordinance No. 621/2021, which is applicable to all "*non-life insurance policies*", replaces the much stricter Ordinance No. 256/2004, which contained obsolete and confusing rules. Contracts issued under the regulatory framework of Ordinance No. 256/2004 were often disputed by consumers, and local courts tended to err on the side of insureds.

11. In general lines, the most significant change brought about by Ordinance No. 621/2021 is related to the process of registering new products, which is now mostly automatic. Insurers are no longer required to ratify their wordings with SUSEP, nor comply with extensive "*verification lists*" or present actuarial documents and calculations.

12. However, insurers are still required to provide their clients with a full copy of the contractual conditions before the policies are issued. Likewise, a few prescriptive rules remain in force regarding the organisation of the policies (e.g. clauses extending cover should be followed by the exclusions). Also, as with the "Large Risks" regime, contracts concerning smaller risks are subject to a set of mandatory clauses which govern the operational aspects of the insurance.

Simplification of Rules for Registering Foreign Reinsurers in Brazil:

1. In early November 2021, CNSP issued Resolution no. 422/2021 which proposes simplifying the rules and procedures for the registration and licensing of Brazilian insurers, capitalisation entities, local and foreign reinsurers, as well as reinsurance brokers. The draft resolution was circulated for public consultation by SUSEP through its Public Call no. 30/2021. The new rules will come into force on 3 January 2022.

2. In summary, the new rules set forth different levels of control and supervision over regulated entities, depending on the risks and regulatory importance of their operations. For instance, Brazilian insurers and local reinsurers will be required to obtain the pre-authorisation from SUSEP for various acts (e.g. mergers, acquisitions, selling of books of businesses, changes in the geographical area of operations, reduction in capital, etc.), which only need to be notified to SUSEP by "less regulated" entities, such as foreign reinsurers and reinsurance brokers.

3. As far as non-Brazilian reinsurers are concerned, Admitted and Occasional Reinsurers are referred to only as "Foreign Reinsurers". However, Resolution no. 422/2021 does not take precedence over Complementary Law 126 of 2007, so the categories of Admitted and Occasional Reinsurer shall continue to have meaning.

4. The minimum solvency rate required for any applicant for a Foreign Reinsurer license is the same as the previous regime for Occasional Reinsurers. Pursuant to Article 28, item II of Resolution 422/2017, the requirements are as follows:
 - Standard & Poor's: BBB (currently BBB- for admitted reinsurers);
 - Fitch: BBB (currently BBB- for admitted reinsurers)

5. Another relevant change relates to the applicant's minimum corporate equity to be certified by an auditing company, which is currently USD 100 million for Admitted and USD 150 million for Occasional reinsurers. The regulation provides (Article 28, item I) that all Foreign Reinsurers operating in Brazil must prove they have at least USD 150 million in net equity.
6. On the one hand, the new rules make the licensing of foreign reinsurers slightly stricter in relation to capital requirements. On the other hand, the regulation dispenses with the requirement for admitted reinsurers to establish a representative office in Brazil. Instead, foreign reinsurers may be represented by a third-party company, provided that such company is not based in a tax heaven.
7. Another relevant proposed change concerns the need to make a technical presentation to SUSEP even before the necessary documents for the application are filed. Under the new rule, CNSP intends to facilitate discussion between the applicants' lawyers/representatives and SUSEP's personnel, making the process swifter and somewhat more personal.

New Regulated Intermediary - Insurance Representatives (Agents and MGAs formally authorised in Brazil):

1. In mid-November 2021, CNSP issued Resolution 431/2021, which came into force on 1 December 2021, and which regulates the role of 'insurance representatives', acting for insurance companies (as opposed to brokers). A draft resolution had been circulated for market consultation through Public Call No. 33/2021. The Resolution is remarkable because it authorises the operation of Managing General Agents.
2. Until the issuance of CNSP Resolution 431/2021 scattered regulations authorised Brazilian insurers to hire "*Representantes de Seguro*", which are similar to an Agent. However, this was only in respect of very limited classes of insurance (typically microinsurance and extended warranty/electronic devices cover sold by large retail stores). SUSEP also provided for "*estipulantes*" to act as the main policyholder of a group of insureds (e.g. a company for its employees on life insurance policies).
3. CNSP Resolution 431/2021 has revoked the limited rules currently in force (CNSP's Resolution No. 297/2013, 308/2014 and 314/2014) to create a new regulatory benchmark. Its objective, in the words of SUSEP's Director Rafael Scherre, is "*amplifying the scope of operation of Insurance Representatives, eliminating the current restrictions and providing the rules for their operation as intermediaries acting for the insurance companies*".
4. In summary, CNSP Resolution 431/2021 makes the following changes to the existing regime:
 - Confirmation that the Insurance Representative does not have powers to represent the Insured and is an intermediary;
 - There will be no more limitations as to the classes of business in which an Insurance Representative/Agent can operate;
 - Insurance Representatives can now also operate as group policyholders (i.e. "*estipulantes de seguros*"), albeit not a policyholder and representative in the same contract;
 - Broader scope of operation is permitted, including not only the offering and distribution of insurance but also general management, underwriting, adjustment of claims and other kinds of service, provided that they are regulated by a contract entered into with the insurer;
 - Insurance Representatives can be remunerated according to the operational results of their clients.

Conclusion

1. Resolution No. 407/2021 and Ordinance No. 621/2021 represent an important 'opening' in the development of the Brazilian insurance market. These rules, together with recently enacted CNSP Resolutions 422/2021 and 431/2021, provide evidence of the liberal agenda of the Ministry of the Economy and CNSP/SUSEP's intention to create a regulatory environment with less state intervention.

2. In the wake of Resolution 407, there is a new appetite in the local and international markets to provide truly bespoke wordings for aerospace, marine and other "Large Risks". Ultimately, with collaboration between both local and international markets, the potential to raise the quality of policy wordings and provide more legal certainty is clear.
3. In addition, the regulators' intention to stimulate competition and reduce regulatory burdens by facilitating the licensing of foreign reinsurers and MGAs is to be welcomed. Brazil has developed a solid reinsurance market since the end of the Government monopoly in 2007 and the local market is ready for further reform.

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