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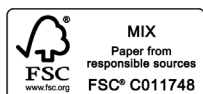
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## General Chapters:

1	<b>Insurance Law in the UK – The Next Chapter: Late Payment Damages and Third Party Rights –</b> Jon Turnbull & Michelle Radom, Clyde & Co LLP	1
2	<b>Recent Developments in Canadian Coverage Law: The Faulty Workmanship Exclusion –</b> Dominic T. Clarke & David R. Mackenzie, Blaney McMurtry LLP	6
3	<b>The Implications of Brexit for the Insurance Industry –</b> Darren Maher, Matheson	12
4	<b>Mexico’s Financial Ombudsman: A New Mandate for Protecting the Interest of Insureds –</b> Leonel Perezniето del Prado & María José Pinillos Montaña, Creel, García-Cuéllar, Aiza y Enríquez, S.C.	16

## Country Question and Answer Chapters:

5	<b>Australia</b>	MinterEllison: Kemsley Brennan & James Stanton	20
6	<b>Canada</b>	McMillan LLP: Carol Lyons & Lindsay Lorimer	27
7	<b>Cayman Islands</b>	Maples and Calder: Abraham Thoppil & Luke Stockdale	36
8	<b>Chile</b>	Sahurie & Asociados: Emilio Sahurie	42
9	<b>Colombia</b>	DAC Beachcroft Colombia Abogados SAS: Gabriela Monroy Torres & Camila de la Torre Blanche	47
10	<b>England &amp; Wales</b>	Clyde & Co LLP: Jon Turnbull & Michelle Radom	54
11	<b>Finland</b>	Railas Attorneys Ltd.: Lauri Railas	62
12	<b>Germany</b>	Oppenhoff & Partner Rechtsanwälte Steuerberater mbB: Dr. Peter Etzbach, LL.M.	67
13	<b>Greece</b>	Christos Chrissanthis & Partners: Dr. Christos Chrissanthis & Xenia Chardalia	73
14	<b>India</b>	Tuli & Co: Neeraj Tuli & Celia Jenkins	81
15	<b>Ireland</b>	Arthur Cox: Elizabeth Bothwell & David O’Donohoe	88
16	<b>Israel</b>	Levitan, Sharon & Co.: Rachel Levitan, Adv. & Peggy Sharon, Adv.	95
17	<b>Italy</b>	Studio Legale Giorgetti: Avv. Alessandro P. Giorgetti	101
18	<b>Japan</b>	Chuo Sogo Law Office, P.C.: Hironori Nishikino & Koji Kanazawa	107
19	<b>Malaysia</b>	Suflan T H Liew & Partners: Liew Teck Huat	112
20	<b>Malta</b>	Camilleri Preziosi Advocates: Malcolm Falzon & Diane Bugeja	118
21	<b>Mexico</b>	Creel, García-Cuéllar, Aiza y Enríquez, S.C.: María José Pinillos Montaña & Lilian Fernández Suárez	125
22	<b>Netherlands</b>	Dirkzwager advocaten & notarissen N.V.: Daan Baas & Niels Dekker	130
23	<b>New Zealand</b>	Jones & Co: Greg Jones & Sarah Wroe	137
24	<b>Portugal</b>	Gouveia Pereira, Costa Freitas & Associados: José Limón Cavaco & Ana Isabel Serra Calmeiro	143
25	<b>Russia</b>	AKP Best Advice Law Firm: Lilia Klochenko	149
26	<b>Scotland</b>	Morton Fraser LLP: Jenny Dickson	155
27	<b>Singapore</b>	Niru & Co LLC: Niru Pillai & Priya Pillay	161
28	<b>Spain</b>	DAC Beachcroft: José María Pimentel & José María Álvarez-Cienfuegos	167
29	<b>Sweden</b>	Advokatfirman Vinge KB: Fabian Ekeblad	173
30	<b>Switzerland</b>	Altenburger Ltd legal + tax: Melissa Gautschi & Anna Neukom Chaney	180
31	<b>Taiwan</b>	LCS & Partners: Mark J. Harty & Alex Yeh	186
32	<b>Turkey</b>	Cavus And Coskunsu Law Firm: Caglar Coskunsu & Burak Cavus	191
33	<b>United Arab Emirates</b>	Hamdan AlShamsi Lawyers and Legal Consultants: Hamdan Alshamsi	197
34	<b>USA</b>	Paul, Weiss, Rifkind, Wharton & Garrison LLP: H. Christopher Boehning	201

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# Chile

Sahurie & Asociados

Emilio Sahurie



## 1 Regulatory

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

The main regulator supervising insurance and reinsurance activity in Chile is the Securities and Insurance Superintendence (SVS). The Superintendent is the higher authority, and he is seconded by an insurance intendant, who leads several divisions made up of specialised officers in the various areas for the control and supervision of the market.

Governmental agencies envisaged in the Consumer Protection Law 2004 may play a role in the defence of “collective and diffuse interest of consumers”, who may be entitled to commence a class action or collective lawsuit.

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

#### Chilean insurance and reinsurance companies

Insurance and reinsurance companies can be formed in Chile only as a *sociedad anónima*, a public company with at least two shareholders. The insurance rules establish that the company needs at least five members in its board of directors and ratings from two risk assessment companies.

There are no restrictions on foreign capital participation in the formation of an insurance or reinsurance company or taking control thereof.

Insurance companies can be formed to conduct only one of the following kinds of business: general and casualty insurance; credit insurance (including fidelity and guarantee); and life insurance.

The requirements to organise an insurance company for any of the above lines of business include a minimum capital, which has to be completely underwritten and paid in order to obtain the authorisation to conduct business. It amounts to 90,000 *Unidades de Fomento* – UF, which is a unit of indexation that varies daily on the basis of the previous month’s inflation). In accordance with the values on 16 January 2017, the minimum capital required to form an insurance company amounts to approximately USD 3,592,000.

Other requirements include: a submission to the SVS evidencing that the shareholders of the company have a net patrimony equivalent to the investment proposed for the company; to inform of the identity of the shareholders, the controlling parties and holders of 10% or more of the shareholder equity; and provide evidence of the following:

- that the controllers, majority shareholders, directors, administrators and officers have not been convicted of crimes or other criminal offences;
- that none of them has been subject to any prohibition or incapacity to conduct business; and
- that none of them has been subject to any sanction, fine or penalty imposed by the regulator.

#### Foreign insurance subsidiaries

Chilean legislation allows foreign insurers to open a branch in Chile. The capital and other requirements are the same as those imposed upon domestic insurance companies in Chile.

Operations between the branch offices and their parent companies are deemed to have been effected between different entities. The parent company is not responsible for the obligations assumed by the Chilean branch office and may reinsure its risks without any limitation.

#### Direct sale of MAT business

Insurance for international marine transportation, international commercial aviation, cargo in international transit, and satellites and their cargo (moving annual total – MAT) may be commercialised in Chile by foreign insurance companies. This is an exception to the general rule that, save for some compulsory insurances, any Chilean citizen may buy insurance abroad and approach a foreign insurer for such purpose; however, foreign insurers were banned from offering intermediate insurance in Chile.

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

Foreign insurers cannot write business in Chile; this is strictly forbidden and may constitute a criminal offence. However, any person domiciled or resident in Chile may contract insurance out of Chile. In this case, the insurance premium due to a foreign insurer is subject to a 22% withholding tax. This tax would not be applicable in respect of the states that currently have a Tax Treaty Convention in force with Chile, including Argentina, Australia, Belgium, Brazil, Canada, China, Colombia, Croatia, Denmark, Ecuador, France, Ireland, Korea, Malaysia, Mexico, New Zealand, Norway, Paraguay, Peru, Portugal, Spain, Thailand, the United Kingdom, Russia, South Africa, Sweden, and Switzerland.

Foreign insurers are allowed to reinsure Chilean risks, provided that they are registered before the SVS. For that, foreign reinsurers shall present two risk assessment reports with a minimum BBB rating, and appoint a legal representative domiciled in Chile. There is a withholding tax of 2% of the reinsured amount. This tax would not be applicable in respect of most of the states that currently have a Tax Treaty Convention in force with Chile.

#### 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?

In respect of large risks, there is absolute freedom of contract. Large risks are those in which the insured party and beneficiary are a company or legal entity (as opposed to an individual), and the annual premium exceeds 200 UF, which according to the values on 16 January 2017 amounts to approximately USD 8,000. In those cases, and always in respect of cargo insurance and marine and hull insurance (no matter who the parties and beneficiaries of the insurance contract or the insurance premium are), there are no restrictions on freedom of contract, and therefore the policy forms are not subject to a previous deposit before the insurance regulator.

In contracts that are not deemed "large risks", freedom of contract is restricted. The restrictions include mandatory regulations, which are imperative to all insurance contracts, and specific regulation, which apply to particular kinds of insurance contracts. Only policy forms that have been previously deposited before the regulator can be commercialised by insurance companies.

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

Companies are permitted to indemnify their directors and officers. However, there is a legal norm that expressly forbids companies (or associated entities) to indemnify or cover the costs of fines imposed upon directors or officers for infractions to norms that protect free competition. The prohibition, however, does not expressly extend to insurance indemnities.

#### 1.6 Are there any forms of compulsory insurance?

Under Chilean law, there are multiple different forms of compulsory insurance:

- 1) Compulsory insurance on pension funds.
- 2) Compulsory insurance on motorised vehicles.
- 3) Personal accident insurance for schools.
- 4) Professional liability cover for insurance and reinsurance brokers.
- 5) Insurance against oil pollution from vessels.
- 6) Different forms of compulsory insurance on civil liability caused by environmental harm.
- 7) Different forms of compulsory insurance for passengers on air transportation.

## 2 (Re)insurance Claims

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

In respect of large risks (as defined in question 1.4 above) the law is neutral and due respect is given to the parties' contractual freedom, which can derogate any legal provision which is not considered to belong to the public order.

Regarding all other contracts of insurance, the rules governing insurance contracts basically protect the insured or beneficiary, and the contract is highly regulated by the Code of Commerce. Any stipulation or provision of the policy that infringes the mandatory

provisions of the Code which protect the insured is null and void, unless it is more favourable to the insured.

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

As a rule, third parties cannot bring a direct action against an insurer for coverage. One exception is in marine insurance: the beneficiary or holder of a letter of undertaking issued by a liability marine insurer can claim directly against the insurer.

A few authors hold that, under the insurance contract regulation, third parties have direct action against liability insurers. This is a highly debated issue and so far there has not been any court ruling on the matter.

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

An insured cannot bring direct action against the reinsurer, with the exception of the bankruptcy of the insurer. Additionally, the parties to the insurance and reinsurance contract can stipulate a cut-through clause, allowing the insured to bring direct action against the reinsurer.

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

The provisions of the Code of Commerce impose upon the insured the obligation to "honestly answer all the queries asked by the insurer to identify and perceive the nature of the risks". Therefore, the requirement is to give honest answers to the insurer's specific queries, placing the burden on the insurance company to discover the aspects or matters which specifically require full disclosure. Regarding matters in which no queries have been made by the insurer, it cannot invoke non-disclosure to nullify or rescind the insurance contract.

If a query is made, and the insured's response results in material errors, misrepresentation or inaccuracies, the insurer is entitled to rescind the contract of insurance. If the material errors, misrepresentations or inaccuracies are not material, the insurer may propose to amend the contract, either to modify the insurance premium or the cover terms. If the insured does not accept or respond within 10 days, the insurer may rescind the contract. In such a case, the insurance terminates 30 days after the insurer's communication.

If a loss has taken place, the insured is relieved from indemnifying the loss if it has been caused by a risk that could have grounded the rescission of the contract, as indicated in the above paragraph. Otherwise, if the error, misrepresentation or inaccuracy has not been material, the insurer is entitled to reduce the indemnity to the same rate as it would have been for the higher premium he would have charged for the extent of the risk assessed without error, misrepresentation or inaccuracy.

#### 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 obligated to honestly answer only the questions raised by the insurer, and no more than that. Regardless of the materiality of the information, if the insurer intentionally withholds or misrepresents the risk, the insurer is entitled to rescind the contract.

### 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?

By virtue of payment of the insurance indemnity, the insurer subrogates all rights and actions of the insured against third parties that may be liable for the loss. The insured party is also responsible to the insurance company of all actions or omissions that could lessen or weaken the subrogated right.

This legal subrogation has limits. The insurer will not subrogate the insured in respect of any of the following third parties: a spouse or close relative; and those for which the insured has to respond, unless there is fraud, or the third party is insured.

## 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?

Commercial disputes regarding insurance shall be resolved in arbitration. This is regarded as an appropriate alternative as it allows the parties to resort to specialised arbitrators, with specific knowledge on the subject matter who may resolve disputes in an expedited manner. However, if the quantum of the dispute is less than 10,000 UF (approximately USD 400,000 according to the values on 16 January 2017), the insured may opt to bring his claim to ordinary courts.

The parties cannot designate the arbitrator before the loss or claim occurs. Once the loss takes place, if the parties do not agree on the name of the arbitrator, he or she shall be appointed by Ordinary Courts.

First instance courts in Chile offer a good number of legal resolutions but they are not specialised in insurance or reinsurance commercial disputes. The duration of proceedings is longer than for an arbitration. Resolution of appeals or cassation before superior courts, such as the appellate courts and particularly the Supreme Court, have a high level of legal analysis.

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

Arbitration usually takes at least one year to be resolved. If an arbitration appellate court has been stipulated in the arbitration agreement, the appeal may take approximately six additional months.

Before ordinary courts, the first instance takes no less than two years. The appeal takes one more year, and taking cases to the Supreme Court usually adds another year.

## 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?

The courts have the power to order any party to the dispute, or even third parties, to disclose any documents that are not confidential, as long as they pertain directly to the disputed matter. Disclosure can also be ordered in a pre-trial phase, in order to prepare for the commencement of proceedings.

### 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?

The advice given by lawyers to their clients is confidential and both the lawyers and the clients can withhold that information from the courts, although there are exceptions in criminal matters. If documents are prepared in contemplation of litigation, they may be deemed as privileged information between clients and lawyers.

The documents produced in the course of the negotiation of a settlement are not protected by any confidentiality law but they can be protected by the negotiating parties with a confidentiality agreement.

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

Under Chilean jurisdiction, ordinary courts have the power to compel witnesses to appear before the court and surrender testimony. If the witness does not comply with the order, the court may apply fines, and even short imprisonment. If the witness resides in a different jurisdiction, the court can issue a Letter Rogatory to the court corresponding to the domicile, for the production of the evidence. If the witness resides outside of Chile, the Letter Rogatory will be conducted to the appropriate foreign courts, officially translated, if necessary, through the Ministry of Foreign Affairs. The rules of the country where the witness resides shall determine whether or not the witness is compelled to attend.

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

In ordinary courts, witnesses have to attend a hearing and give their testimony in person, and the other party has the right to cross-examine. In arbitration proceedings, the parties can agree that a written statement can be presented, and in those cases, usually it will be the right of the other party to determine whether or not the witness' personal appearance will be required for cross-examination.

### 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?

There are no restrictions in calling expert witnesses, which shall be appointed by the court. It is common practice, however, that the parties request the opinion of experts, and then require their testimony as witnesses. Experts appointed by the court usually have more weight in the judge's assessment than experts who have not been appointed by all the parties or the court and are not "first hand" witnesses.

The cost of the expert is borne by the party who requested it, without prejudice to the court's decision on costs.

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

The court may order interim measures, which may include seizure or freezing of goods or assets, disclosures of documents, exhibition of documents, and prohibition to celebrate or execute certain civil acts in respect of the disputed goods.



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**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?**

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The right to seek review of a judicial decision is guaranteed by the Constitution and is part of the due process of law. However, the parties may renounce their right to appeal.

The general ground for renunciation of the right of appeal is non-conformity of the decision to the law (including the contract).

In Chile there is only one appellate stage: before the appellate courts (there are 17 such courts throughout the country). However, there is also a special recourse of cassation with the Supreme Court, which is the highest court in Chile.

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

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Interest is recoverable from the date of the claim or from the date of the award or judicial decision. Courts fix the applicable interest rate, and for that, they take as a reference the prevailing banking interest rate.

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

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The rule is that the party that is completely defeated in the sentence shoulders the costs of that trial, which can be waived by the court if it considers that there were plausible grounds for the defeated party to litigate.

There are no costs advantages in making offers to settle prior to the trial. Such offers and the possibility of settlement are not taken into consideration in the proceedings or in the potential award of costs.

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

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Courts have no power to compel the parties to mediate insurance or reinsurance disputes.

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

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Mediation is voluntary and refusal to mediate bears no consequences.

## 5 Arbitration

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**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?**

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Chilean courts recognise and uphold arbitration. The arbitration process and the autonomy of the parties to resort to arbitration is respected by higher courts. Courts intervene if the parties have not renounced their right to appeal before the appellate courts, and in such cases, they may revoke the arbitral decision if it does not conform to the law.

If the parties have renounced their right to appeal, higher courts can intervene only if there has been a clear grave fault or abuse of powers by the arbitrator. They can also nullify a sentence in case of lack of competence or *ultra petita* (the arbitrator exceeds that which was claimed).

The institutional arbitration of the Santiago Chamber of Commerce is well recognised. It has an extensive list of qualified arbitrators and their decisions are periodically published, keeping the parties' identity confidential.

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**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?**

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In some jurisdictions, a particular form of wording is needed in order to ensure the enforceability of an arbitration clause.

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

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If the quantum of the dispute is less than 10,000 UF (approximately USD 400,000 according to the values on 16 January 2017), the insured may opt to bring his claim to the ordinary courts.

The parties cannot designate the person of the arbitration before the loss or claim occurs. Once the loss takes place, if the parties do not agree on the name of the arbitrator, he or she shall be appointed by the ordinary courts.

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

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Courts have the power to make orders before and during arbitration proceedings, but any compelling order can only be executed through ordinary courts.

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**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?**

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The tribunal is bound to give a reasoned award unless the parties have agreed on arbitration in equity.

The tribunal has to state in its award the grounds and reasons (regarding the facts and the law) that found the award. It also has to mention the laws or the principles of equity in accordance with which the award is given. If these requirements are not complied with, the higher court may annul the award.

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**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?**

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The parties can always appeal, unless they have renounced their right to it. In general, the success of an award challenge would depend on the finding by the superior court of a wrong application of substantive provisions of the law or the contract, or the infringement of a procedural rule which would have influenced the establishment by the arbitrator of the material facts.



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Mr. Sahurie has published several articles on insurance and reinsurance law matters. He is a member of the Panels of the Santiago Arbitration and Mediation Center, the International Insurance Law Association (AIDA-Chile), Arbitration Commission for Disputes on Public Works Concessions, and the China Maritime Arbitration Commission.

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**SAHURIE & ASOCIADOS**  
LAW FIRM

In August 2011, Sahurie & Asociados law firm was set up by Emilio Sahurie and an excellent team of attorneys, all of whom have experience and professional backgrounds focused in insurance and reinsurance in a range of matters including corporate and regulatory aspects as well as arbitration and litigation.

The firm has well-known expertise in all fields of insurance and reinsurance, and its clients include several local and foreign insurance and reinsurance companies and insurance and reinsurance brokers.

Its services include the preparation of policies, insurance and reinsurance contracts, analysis of coverage, litigation and arbitration, defence of third parties under liability policies, and subrogation actions.

We assist clients in regulatory matters and services, including the formation of insurance companies and brokers and the registration of foreign reinsurers and brokers before the regulator.