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:

Continued Overleaf

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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?

The regulatory body in Switzerland is the Swiss Financial Market Authority (FINMA). Its mandate is to supervise banks, insurers, insurance intermediaries, collective funds and the financial markets. To ensure its institutional independence, FINMA was established as a public law institution in its own right.

On the other hand, the Swiss Federal Office of Social Insurance is competent for social insurance business (in particular old-age and survivors' insurance, disability insurance, mandatory health and accident insurance as well as occupational pension funds).

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

All insurance companies are obliged to obtain a licence from FINMA for their business activities. Each company must submit a business plan as part of the application. The insurers can commence their activities as soon as they have been licensed by FINMA.

The Insurance Supervision Act (ISA) determines the basic requirements for the licensing of an insurance company. Further requirements and provisions are described in more detail in the Insurance Supervision Ordinance (ISO) and FINMA's circulars. The basic requirements include:

- **legal form**: limited company or cooperative;
- **minimum capital requirement**: CHF 3 to 20 million, depending on the sector;
- **equity capital**: sufficient free and unencumbered equity capital (solvency);
- **establishment fund**: covered costs of foundation, organisation and extraordinary expansion of business activities; and
- **object of the company**: activities directly associated with insurance.

Whereas non-tied insurance intermediaries who offer or conclude insurance contracts on behalf of insurance companies or other individuals must be registered in the public register of insurance intermediaries, registration for tied insurance intermediaries is voluntary.

To register (see Article 44 ISA), tied and non-tied insurance intermediaries must:

- meet the personal requirements set out in Article 185 ISO;
- demonstrate that they hold appropriate professional qualifications (Article 184 ISO); and
- hold professional indemnity insurance or provide an equivalent financial surety (Article 186 ISO).

Once registered, insurance intermediaries are then not subject to ongoing monitoring. However, FINMA will conduct spot checks to verify whether the intermediaries comply with the regulatory requirements.

The operation of reinsurance in Switzerland also requires a licence from FINMA. Insurance supervision law treats, with some exceptions (such as the renunciation of tied assets), reinsurers in the same way as primary insurers. FINMA applies the provisions accordingly, which gives FINMA a certain margin of discretion to take account of the special features of reinsurance business.

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

Under Swiss insurance supervisory law, the freedom to provide services between Switzerland and abroad is only possible in reinsurance, in some limited areas of direct insurance as well as under the FL/CH Convention on direct insurance and insurance mediation in the exchange of services between Switzerland and the Principality of Liechtenstein.

This means that foreign insurance companies must establish a branch office in Switzerland, appoint a general agent as their head, deposit a surety and apply for authorisation according to Article 15 ISA.

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?

The Federal Act on Insurance Contracts (ICA) governs the civil law relationship between insurers and insureds. The ICA contains provisions which must not be modified by contractual agreement or by general conditions of insurance (Article 97 ICA), provisions which must not be modified to the disadvantage of the insured (Article 98 ICA), and provisions which may be modified at will. The characteristic of the absolutely imperative provisions (Article 97 ICA) is that they completely deprive the parties of their freedom of contract. Articles 97 and 98 ICA list several provisions which are to be assigned to the respective category. However, these lists are not exhaustive.

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

Yes. Today, scholars and the courts unanimously agree that this is allowed. However, this was discussed in the past.

1.6 Are there any forms of compulsory insurance?

The following types of insurance are legally required in Switzerland:

- basic health and accident insurance;
- cars and other vehicles must be insured to operate legally;
- building insurance (property owners only);
- fire insurance (usually part of building insurance);
- social security and unemployment insurance (AI/AVS/EO/APG) as well as the occupational pension (directly deducted from salary);
- insurance for railways;
- marine insurance;
- aviation insurance; and
- various professional liability insurances, etc.

However, this is only an exemplary list and there are over 100 additional compulsory insurances at both federal and cantonal level in individual special fields.

2 (Re)insurance Claims

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

Since 2016, the EU "Insurance Distribution" Directive has come into force to strengthen consumer protection. In Switzerland, on the other hand, various insurance law revisions with more consumer protection have failed in Parliament. Accordingly, consumer protection at the EU level is certainly more developed than it is currently under Swiss law.

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

In the event of damage caused by a vehicle, there is a direct right of claim against the liable insurance company (Article 65 of the Road Traffic Act). Every registered vehicle is compulsorily insured against liability.

Also the beneficiary from collective accident or health insurance is entitled to an independent claim against the insurer (Article 87 ICA). In addition, the attorney has a direct reason for claiming against the insured's legal protection insurance.

A direct action against an insurer is not foreseen for business or private liability claims yet. The current revision of the insurance law, which should be debated in Parliament this year, however, provides for a direct claim of the injured party against liability insurance also in the area of liability law.

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

No, it is the key principle of reinsurance that the policyholder of the primary insurer is not entitled to any direct claims against the reinsurer. This also applies if the primary insurer is insolvent or is unable to meet the coverage obligation for other reasons.

In some cases, however, deviating contractual clauses are agreed (so-called "cut-through" clauses). Such clauses shall, in principle, qualify as payment instructions or security assignments.

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

If, at the time of taking out the insurance, the notifiable person has incorrectly disclosed or concealed a significant risk which he knew or had to know, the insurer is not bound by the contract if he or she withdraws from the contract within four weeks after he or she has become aware of the breach of the notification obligation (see Article 6 ICA). Since the obligation to notify is relatively mandatory, the insurer may at any time, i.e. also in advance, waive the assertion of its right of withdrawal.

If the contract is terminated in accordance with Article 6 para. 1 ICA, the insurer's obligation to indemnify shall also lapse in the event of damage that has already occurred and the occurrence or extent of this damage has been influenced by the significant risk fact not or incorrectly notified (Article 6 para. 3 ICA). If the obligation has already been fulfilled, the insurer is entitled to restitution.

Under certain circumstances, the contract perpetuates despite the violation of the obligation to notify. These exceptions are listed in Article 8 ICA.

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 legislature rejects the applicant's independent declaration obligation. The insurer does not have to point out any other hazardous facts which he considers important, but which the insurer has not asked for (Article 4 ICA). The applicant only has to inform the insurer of this insofar or to the extent that the insurer asks a question and as far as the insurer's questions go. The questions must be asked in a sufficiently clear and unambiguous manner.

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?

Article 72 ICA provides a right of subrogation of the insurer. According to the provision, the claim for compensation which the beneficiary has against a third party based on tort is assigned to the insurer insofar as it paid indemnification. This provision does not apply if the damage was caused, in a slightly negligent way, by a person who lives in the same household with the beneficiary or for whose acts the beneficiary is responsible.

Article 72 VVG is not applicable if the insured person has only a contractual claim for damages against the third party. In addition, the insurer does not subrogate into the position of the insured person against a causally liable party.

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?

The cantons may designate a special court (as in Zurich, Berne, Aargau and St. Gallen) that has jurisdiction as sole cantonal instance for commercial disputes (so-called Commercial Court). Commercial proceedings are considered insurance matters if the value in dispute is of at least 30,000 francs and involves parties registered in the Swiss Commercial Registry or in an equivalent foreign registry. If only the defendant is registered and the abovementioned dispute value is reached, the claimant may choose between the Commercial Court and the ordinary court.

Commercial Court and High Court final decisions are subject to appeal to the Federal Supreme Court if the dispute value is at least 30,000 francs.

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

Depending on the complexity of the case and the workload of the particular court, it normally takes between three and six months to bring to court.

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?

Article 160 of the Swiss Code of Civil Procedure (CPC) provides in principle that both parties and non-parties have a duty to cooperate in the taking of evidence; in particular they have the duty to produce physical records upon request by the court.

A party to the action may refuse to cooperate under certain circumstances pursuant to Article 163 CPC; for example, if the taking of evidence would expose a close associate. But if a party refuses to cooperate without valid reasons, the court will take this into account when appraising the evidence (Article 164 CPC). However, the court may not impose any constraints on the parties.

Third parties have, however, an absolute right to refuse to cooperate as well as a limited right to refuse according to Articles 165 and 166 CPC. If a non-party refuses to cooperate without justification pursuant to these Articles, the court may impose a disciplinary fine of up to 1,000 francs, threaten sanctions under Article 262 of the Swiss Criminal Code, order the use of compulsory measures or charge the third party the costs caused by the refusal (Article 167 CPC).

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 lawyer shall, due to professional secrecy, not disclose any facts which the client has entrusted to the lawyer in order to enable him to exercise a mandate or which the lawyer has received in the exercise of his mandate. This professional secrecy is provided for in Article 13 of the Lawyers Act and protected under criminal law by Article 321 of the Swiss Penal Code.

Statements from out-of-court settlement negotiations cannot be used later in court proceedings.

In Switzerland, litigation shall in general be preceded by an attempt at conciliation before a conciliation authority (Article 197 *et seq*. CPC) to agree on a settlement and to avoid unnecessary litigation. The parties' statements may not be recorded in the hearing before the conciliation authority, nor may they be used later in court proceedings. "Statements" means all declarations made by the parties during the conciliation proceedings (Article 205 CPC).

A similar prohibition of exploitation is also provided in the context of mediation. Confidentiality refers to the mediation interviews, all information related to the mediation as well as all documents (protocols, video and audio recordings, etc.) that are produced within the framework of mediation.

The parties' statements may not be recorded in the actual arbitration procedure, nor may they be used later in the arbitration procedure. "Statements" means all declarations made by the parties during the arbitration proceedings (Article 205 CPC). A similar prohibition of exploitation is also provided in the context of mediation. Confidentiality refers to mediation interviews, all information related to the mediation as well as all documents (protocols, video and audio recordings, etc.) that are produced within the framework of mediation.

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

The court may agree on a witness as a precautionary measure according to Articles 158 and 261 *et seq*. CPC.

Otherwise, witnesses are generally heard during the taking of evidence and not only in the final hearing. Parties and third parties have a duty to cooperate in the taking of evidence. In particular, they have the duty to make a truthful deposition as a party or a witness (Article 160 para. 1 CPC). The conditions and procedure for taking witnesses are regulated in Article 171 CPC.

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

This is possible in the context of an interrogation by way of legal assistance, which has to be declared as such. In addition, it is permissible under Article 170 para. 3 CPC that the witness may be questioned at his or her place of residence. The parties must be notified thereof in advance.

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?

At the request of a person or *ex officio*, the court may obtain an opinion from one or more experts (Article 183 CPC). The court must hear the parties first but there are no further restrictions. However, in proceedings subject to the principle of production of evidence, the court should exercise restraint in order not to give unjustified preference to a party who has not sufficiently substantiated the facts of the case or who has not requested an expert opinion in time.

An expert witness is often involved in the process if two party opinions contradict each other or if the court misses the necessary knowledge for the perception or assessment of legally relevant facts.

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

One of the most important legal remedies is a precautionary taking of evidence pursuant to Article 158 CPC. According to this provision, the court shall take evidence at any time if the law grants the right to do so or if the applicant shows credibly that the evidence is at risk or that it has a legitimate interest.

In connection with a damage claim, this means, e.g., that a certain behaviour may be ordered by the court upon request of a party in order to ensure that the damage does not increase, or evidence is at risk if a witness wants to leave the country and his statement is relevant for the vehicle insurance.

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?

Pursuant to Article 308 *et seq*. CPC, an appeal before the High Court is admissible against final and interim decisions of first instance if the value for the claim in the most recent prayers for relief is at least 10,000 francs.

The appeal may be filed on grounds of incorrect application of law or incorrect establishment of the facts.

High Court final decisions are subject to appeal to the Federal Supreme Court if the dispute value is at least 30,000 francs.

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

The interest on damages starts from the time when the damaging event has a financial impact and ends with the invoice date (judgment date). From the invoice date (judgment date) onward, an interest of 5% on the damage and on the interest on damages shall be charged. The 5% represents a presumption and can be adjusted by proving that the injured party has incurred higher interest costs (e.g. due to actual credit costs).

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 procedural costs include court costs and party costs. The court awards party costs according to the cantonal tariffs, while court costs are determined and allocated *ex officio* (Article 105 CPC). The costs are charged to the unsuccessful party (Article 106 CPC).

The court may diverge from the general principles of allocation and allocate the costs at its own discretion; e.g. if an action has been upheld in principle but not the full amount claimed, if the party was caused to litigate in good faith or if there are extraordinary circumstances (*cf*. Article 107 CPC).

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

In commercial matters especially (including insurance and reinsurance), mediation is not very established in Switzerland.

The Swiss courts authorities do not force the parties to try mediation in advance but they may recommend it to the parties at any time (Article 213 *et seq*. CPC).

Furthermore, the parties may at any time make a joint request for mediation (Article 214 para. 2 CPC). The parties will be responsible for organising and conducting the mediation.

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

The recommendation of the court is not binding. In the event of non-observance, the court may not order any substitute performance or disadvantage with regard to the outcome of the proceedings, nor with regard to the distribution of costs.

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?

The questions under this section will be answered in the light of both national and international situations. The CPC is applied for domestic matters, whereas the Federal Act on International Private Law (IPLA) is applied for international matters. However, the parties may also exclude the application of the IPLA provision in international arbitration proceedings and declare the provisions of the CPC applicable (Article 176 para. 2 IPLA).

The parties may at any time appoint arbitral tribunals as private courts of arbitration in place of state courts to rule on a civil dispute. Although arbitral tribunals generally take the place of state courts, they cannot completely replace their functions. This may be the case if the arbitral tribunal is blocked by the disputing parties or in the case of functions which the State wishes to reserve for its own bodies. In some cases, for example, the state court appoints the members of the arbitral tribunal, decides on their rejection and dismissal, participates in the provision of evidence, adopts precautionary measures and assesses appeals against arbitration decisions.

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?

The arbitration agreement must be done in writing or in any other form allowing it to be evidenced by text (Article 358 CPC, Article 178 IPLA). The Swiss law does not provide any further formal requirements.

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

In the case of internal relations, only such legal relationships may be submitted to an arbitral tribunal, over which the parties may freely dispose (Article 354 CPC). Arbitration proceedings concerning personal and family relationships are therefore excluded. The IPLA does not provide such a condition regarding the free disposition, but pursuant to Article 177 IPLA, only disputes involving an economic interest may be the subject of an international arbitration.

The validity of an arbitration agreement may not be contested on the ground that the principal contract is invalid (Article 178 para. 3 IPLA).

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

Legal remedies are quite limited and Swiss national courts exercise restraint in interfering with private proceedings. The parties may, however, ask the state court to adopt a precautionary measure (Article 374 CPC). On the one hand, it comprises the precautionary measures regulated in Article 261 *et seq*. CPC and, on the other hand, the protective measures of the Federal Act on Debt Enforcement and Bankruptcy (DEBA), including attachment (Article 271 para. 1 DEBA), as well as any interim measures of interim legal protection provided in other laws.

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 384 para. 1 (e) CPC provides that, unless the parties have explicitly dispensed with this requirement, the award must contain details of the statement of the facts, the legal consideration and, if applicable, the considerations in equity.

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?

Articles 390 CPC provides that the parties may agree by express declaration, or in a subsequent agreement, that the arbitral award may be contested by way of objection to the cantonal court that has jurisdiction under Article 356 para. 1 CPC.

Unless the parties have agreed otherwise, an arbitral award is subject to objection to the Federal Supreme Court (Article 389 CPC).

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