The Insurance and Reinsurance Law Review

Third Edition

Editor
Peter Rogan

Law Business Research

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Third Edition

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CONTENTS

EDITOR'S PREFACE

It is hard to overstate the importance of insurance in personal and commercial life. It is the key means by which individuals and businesses are able to reduce the financial impact of a risk occurring. Reinsurance is equally significant; it protects insurers against very large claims and helps to obtain an international spread of risk. Insurance and reinsurance play an important role in the world economy. It is an increasingly global industry, with the emerging markets of Brazil, Russia, India and China developing apace.

Given the expanding reach of the industry, there is a need for a source of reference that analyses recent developments in the key jurisdictions on a comparative basis. This volume, to which leading insurance and reinsurance practitioners around the world have made valuable contributions, seeks to fulfil that need. I would like to thank all of the contributors for their work in compiling this volume.

Looking back on 2014, Aon Benfield's Annual Global Climate and Catastrophe Report (of 13 January 2015) reveals that 258 global natural disasters occurred worldwide. The two costliest insured loss events of 2014 were both as a result of severe thunderstorms, in the USA in May and Europe in June, although the September floods in northern India and Pakistan resulted in the largest economic loss of the year. The combined total insured loss for 2014 was US$39 billion, 38 per cent below the 10-year average of US$63 billion and the lowest annual insured loss total since 2009. However, we should not of course forget the cost in human terms: the deadliest event of 2014 was a stretch of flooding and landslides that killed an estimated 2,600 people in Afghanistan. Events such as these test not only insurers and reinsurers but also the rigour of the law. Insurance and reinsurance disputes provide a never-ending array of complex legal issues and new points for the courts and arbitral tribunals to consider. I hope that you find this third edition of *The Insurance and Reinsurance Law Review* of use in seeking to understand them and I would like once again to thank all the contributors.

Peter Rogan
Ince & Co
London
April 2015

Chapter 28

SWITZERLAND

Lars Gerspacher and Roger Thalmann[1]

I INTRODUCTION

The Swiss insurance and reinsurance market is very diverse. All types are represented, from globally operating all-liners to locally based providers of customised solutions. However, the Swiss insurance market does not only consist of large, internationally orientated companies. In addition to a broad midfield, a large number of small, locally established companies are characteristic of Switzerland's insurance landscape. Some of these companies were founded as social self-help organisations and are run on cooperative lines to this day.[2]

In 2013 the total number of insurance and reinsurance companies under supervision was 209 (of which 48 were branches of foreign insurance companies).[3] The total number of reinsurers was 62 (of which 34 were reinsurance captives) and has remained the same since 2010.

II REGULATION

The regulatory body in Switzerland is the Swiss Financial Market Authority (FINMA),[4] which regulates banks, insurers, insurance intermediaries, collective funds and the financial markets. The insurance sector of FINMA (including reinsurance) is dealt with by some 100 employees. For social insurance businesses (such as mandatory health and accident insurance as well as occupational pension funds) the Swiss Federal Office of Social Insurance is the competent regulator.

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1 Lars Gerspacher is a partner and Roger Thalmann is an associate at gbf Attorneys-at-law.

2 'Nothing works without insurance', Swiss Insurance Association, 2010, at p. 16.

3 FINMA Insurance market report 2013, dated 29 August 2014, at p. 3.

4 www.finma.ch.

As Switzerland is neither a member of the EU nor the EEA, the freedom of services regime and the possibility to apply for local passporting rights do not come into play. Although there are bilateral treaties between the European Community and Switzerland in place there is no single passport of licences between the EEA Member States and Switzerland. There is, however, one bilateral treaty between Switzerland and Liechtenstein that gives freedom of services in insurance matters between these two countries.

Insurance supervision is regulated by the Insurance Supervisory Act (ISA) and the respective Insurance Supervisory Ordinance (ISO). According to Article 2 of the ISA the following insurance undertakings fall under the supervision of FINMA:

a Swiss insurance companies that have their seat in Switzerland and carry out direct insurance or reinsurance business; and

b foreign insurance companies (without their seat in Switzerland) that conduct insurance activities in Switzerland (and are therefore doing Swiss business).

Business is considered to be Swiss business if the policyholder or any of the insureds is domiciled in Switzerland or if the insured property is located in Switzerland.[5] Whether or not the product is physically distributed in Switzerland is irrelevant.

Exempt from supervision are foreign insurance companies (i.e., companies that have their seat abroad) if they only operate reinsurance in Switzerland[6] or write as primary insurer the following risks only:

a risks in relation to marine, aviation and international transport;

b risks lying abroad (irrespective of whether or not the policyholder or the insured is domiciled in Switzerland); and

c war risks.[7]

If none of the above-mentioned exceptions apply, the insurance company is subject to Swiss supervision and needs to obtain approval from FINMA before it commences insurance activities.[8] If a foreign insurance company does not intend to apply for authorisation it is, apart from the above-mentioned exceptions, only permitted to write business in Switzerland as a reinsurer. Policies would then have to be issued by a Swiss licensed fronting company and the foreign insurance company would act as a reinsurer and be exempt from Swiss supervision.

Insurance intermediaries also fall under the supervision of FINMA. The law basically makes a difference between those that are affiliated with insurance undertakings and those that are not (i.e., brokers). Both fall under the supervision of FINMA but only the non-affiliated intermediaries need to be registered in the register of insurance intermediaries.[9] Supervision of FINMA only relates to the intermediary's activities in

5 Article 1(1) ISO.

6 Article 2(a) ISA.

7 Article 1(2) ISO.

8 Article 3(1) ISA.

9 Articles 42 and 43 ISA.

Switzerland; activities of the intermediary performed abroad are not supervised by FINMA even if the intermediary is based in Switzerland.[10]

As far as Swiss reinsurers are concerned they do not face any passporting issues when they do business with the rest of Europe. When EC Directive No. 2005/68 (the Reinsurance Directive) was enacted in 2005 it became unclear how third-country reinsurers (i.e., those that are neither based in the EU nor the EEA) would be affected by such Directive. The Reinsurance Directive has not been incorporated into Swiss law.

Questions arose as to whether EU and EEA Member States would change their view and require from third-country reinsurers a licence to do business in their country. In September 2009 the European Insurance and Occupational Pensions Authority (then CEIOPS, now EIOPA) published a report on third-country treatment based on a questionnaire sent to all EEA Member States. The result was that all EEA Member States allow third-country reinsurers to write reinsurance business on a freedom to provide services basis from their home state or, if not, by means of correspondence (i.e., when the reinsurance cessions are arranged at the proposer's own initiative and the contract is concluded and serviced in the jurisdiction of the third country).[11]

Pursuant to Article 50 of the Reinsurance Directive there is no contract between the Commission and Switzerland regarding the means of exercising supervision over reinsurance undertakings having their head offices in a third country in place yet, but EIOPA has confirmed in its report of February 2010 (Sec-09-2010) that FINMA's supervision of reinsurers is equivalent to that applying to EU reinsurers under the Reinsurance Directive. At present, the Swiss solvency ordinance is being amended with a view (among others) to maintaining the equivalency status between the Swiss and EU supervision regimes when Solvency II enters into force. Any considerable discrimination of Swiss reinsurers compared to those based in the EEA is therefore not expected.

An insurer or reinsurer seeking approval to carry out insurance or reinsurance activities has to submit an application to FINMA together with a business plan.[12] The application and the business plan are based on a number of standardised forms. In short, the applicant needs to show:

a what type of business it intends to carry out;
b which classes it would like to insure in;
c how it will meet the financial requirements; and
d who will be the persons responsible for the management and supervision with a good reputation and sufficient professional qualifications.

FINMA usually needs one month to review a first draft of the business plan and one further month to review the final business plan and draft its order. The process of

10 Article 182 ISO.

11 Report on the responses to the Questionnaire on the Regulatory Treatment of Third Country Reinsurance Undertakings and on Existing Equivalence Procedures of 19 January 2009 (CEIOPS-ConCo-05/09) and Questions 1a of Part IB and 5a of Part IB of the Public Database.

12 Article 4(1) ISA.

obtaining all documents and drafting of all forms of the business plan normally takes three to four months.

As far as taxation is concerned, the Swiss tax authorities levy Swiss federal stamp duty of 5 per cent on insurance premiums. It does not apply to reinsurance premiums and there are certain exceptions for primary insurance as well (such as cargo, health, life and accident insurance). VAT is levied neither on insurance nor on reinsurance premiums.

III INSURANCE AND REINSURANCE LAW

i Sources of law

Switzerland is a civil law country and as such the law recognised as authoritative is statutory law passed by the competent legislature, which may be at cantonal or federal level depending on what the Federal Constitution of the Swiss Confederation (CSC) provides. The legislation for private insurance is in the competence of the federal state.[13]

Key source of private insurance contracts is the Federal Act on Insurance Contracts (ICA). Complementary to that the Swiss Civil Code and the Code of Obligations (CO) have to be considered. The ambit of the ICA is limited by its Article 100, according to which reinsurance contracts are not regulated by the ICA but by the CO. In an international context the Federal Act on Private International Law Act (PILA) has to be consulted to determine the relevant governing law.

In a broader sense insurance law comprises not only these core provisions but also of the law of special subjects. Examples include, but are not limited to, consumer protection law, data protection law and the law against unfair competition.

ii Making the contract

Conclusion of the contract

Where an offer is made by the insured and no time limit is set, it remains binding on the offeror for 14 days.[14] If the insurance requires a medical examination, the application period is stretched to four weeks.[15]

The conclusion of an insurance contract necessitates mutual consent with respect to the essential terms and the expression thereof by the parties.[16] For this reason an insurance contract is reached if the parties agree that by the occurrence of a specified event the insurer has to deliver a specific performance and in return the insured has to pay the premium.

Pre-contractual duty of disclosure and representations

In the ambit of the ICA Swiss law differs from the risk-declaration paradigm adhering to the doctrine of utmost good faith and its associated subdivision of representations and non-disclosure.

13 Article 98(3) CSC.

14 Article 1(1) ICA.

15 Article 1(2) ICA.

16 Article 1(1), Article 2(1) and Article 18(1) CO.

The insurer is responsible for obtaining the necessary information in order to assess the risks.[17] With respect to such relevant risk factors a customer only has to disclose information that the insurer explicitly requests in writing.

However, the principle of utmost good faith is relevant in the field of reinsurance business. The insurer is obliged to disclose all information needed by the reinsurer to make its underwriting decision (e.g., tariffs, contract terms or underwriting guidelines).[18]

Further it is worth mentioning that the concept of 'warranty' as such is not known to Swiss law. What appears to best correspond with that are the duties that insureds take on at the conclusion of the contract for loss avoidance. However, the infringement of such duty has only an effect if it has an impact in a concrete insured event.[19]

Recording of the contract

Freedom of formality

Article 11 CO states the freedom of formality. Thereafter the CO does not require the parties to follow a specific form to achieve legally binding contracts unless the law provides otherwise. Since neither the CO nor the ICA demand observance of form, insurance contracts can be effected orally or even without using words by consenting behaviour. However, the insurer has to inform the insured before or at the conclusion of the contract about the identity of the insurer and the essential terms of the insurance contracts (i.e., the insured perils, the premiums as well as the inception and termination of the insurance contract).[20]

Decisiveness of the insurance policy

On conclusion of an insurance contract the ICA commits the insurer to issue an insurance policy that records the parties' rights and obligations. Thereby the policy performs the function of an instrument of evidence and in conjunction with the insurer's signed offer it gives certain alleviations in recovery proceedings for premiums.[21]

Pursuant to Article 12 of the ICA the policyholder has to claim correction within four weeks in the event that the policy deviates from the original contract terms. In case of default the insurance policy has constitutive effect in the sense that its purport shall be deemed approved.

17 Article 4(1) ICA.

18 Stephan Fuhrer, *Schweizerisches Privatrechtversicherungsrecht*, Zurich/Basle/Geneva 2011, No. 18.30; Rolf Nebel, in: Heinrich Honsell, Nedim Peter Vogt, Anton K Schnyder, Kommentar zum Schweizerischen Privatrecht, Bundesgesetz über den Versicherungsvertrag (VVG), Basle/Geneva/Munich 2001, Article 101 No. 35.

19 Article 29 ICA.

20 Article 3 ICA.

21 Stephan Fuhrer, op cit, No. 3.96.

iii Interpreting the contract

Article 18 CO provides that the genuine will of the parties to the contract is key to any interpretation. Accordingly a judge has first and foremost to establish the parties' real intent which might differ from their written legal act.

If a court cannot ascertain the parties' intentions or if there is no consensus the court will resort to the parties' presumptive intent. The court thereby establishes objectively how the parties, considering all circumstances, could and should have understood the contract's contested clause or clauses in good faith.[22]

In interpreting the contract a judge avails him or herself of different means and rules. The primary instrument with precedence over the other means relates to the wording used by the parties. The whole circumstances under which the contract has been concluded also need to be considered. For that reason the judge particularly takes into account:

a the purpose of the contract and the parties' interests in the performance thereof;[23]

b the history of the contractual negotiations and the conduct of the parties before entering into the contract (the 'historical interpretation');[24] or

c usages in the specific field.

Findings based on such means of interpretation are subject to further rules of interpretation. The most important are as follows.

a Of outstanding importance is the 'principle of trust'. Based on this principle, a statement made by one party is to be interpreted from the addressee's objective point of view.

b Contract provisions should be interpreted with regard to the place they occupy in the contract's structure and the purpose they serve within that structure (systematic interpretation).

c Swiss statutory rules. Statutory provisions of Swiss contract law are divided into two types: mandatory and supplemental rules. Where the contract regulates an issue, but the meaning of the contract's provisions is unclear, the parties can be presumed to have ascribed to their agreement the same meaning as that resulting from supplemental law.[25] This rule of interpretation does not extend to mandatory statutory provisions, as these will apply in any event and take precedence over the contract's terms.

d The interpretation in *dubio contra stipulatorem*. Wording that can be understood in good faith in different ways will normally be interpreted in accordance with

22 Peter Gauch/Jörg Schmid/Susan Emmenegger, *Schweizerisches Obligationenrecht Allgemeiner Teil*, Vol. I, 9. ed., Zurich/Basle/Geneva 2008, No. 207; Swiss Supreme Court judgments, reported at BGE 133 III 675, at p. 681 and reported at BGE 122 III 106, at p. 109.

23 Swiss Supreme Court judgments, reported at BGE 129 III 702, at p. 707; and at BGE 119 II 368, at p. 373.

24 See for instance the Swiss Supreme Court judgment, reported at BGE 114 II 265, at p. 267.

25 Gauch et al, op cit, No. 1230.

the understanding of the party that did not draft the disputed provision.[26] For insurance matters this rule is specifically reflected by Article 33 of the ICA.

The field of direct insurance agreements essentially consists in the practice of two types of contract terms: those in separate agreements on the one hand and the insurers' general standard terms and conditions (GTCs) on the other hand. The latter only take effect if they are being specifically referred to on the occasion of concluding the contract and only insofar as no other specific individual agreement exists.[27]

The admissibility of GTCs in insurance contracts is furthermore subject to Article 8 of the Federal Act Against Unfair Competition (UCA). According to that norm GTCs shall be deemed abusive where they create a significant and unjustified disparity between contractual rights and obligations to the detriment of consumers, in a manner that breaches the principle of good faith. This norm empowers the courts to review the content of GTCs in business-to-consumer contracts and to void any clauses that do not meet the requirements of Article 8 of the UCA.

iv Intermediaries and the role of the broker

Pursuant to Article 40 ISA 'insurance intermediaries' refers to all persons offering or concluding insurance or reinsurance contracts. This extends to agents, brokers and independent insurance advisers as well as the sales force of insurance companies.

As a consequence all intermediaries falling under the provision of Article 40 of the ISA are subject to the supervision of FINMA. However, only insurance intermediaries that are not affiliated with an insurance company legally, financially or in any other capacity (in essence that means brokers) are subject to registration.[28] The affiliated insurance intermediaries on the other hand are free to register (hereinafter 'tied agents'). Rules as to the question of when 'affiliation' is assumed can be found in Article 183 of the ISO. Especially noteworthy are letters (a) and (b) from Paragraph 1, which state that no registration is required if:

a the majority of the commissions the intermediaries receive during a calendar year are predominately from one or two insurers; and

b the intermediaries receive compensation or other financial advantages from insurers that do not conform to customary compensation for insurance intermediation and therefore could affect their independence.

From a regulatory point of view brokers are obliged to disclose to potential customers at first contact various information (i.e., the broker's or the insurer's identity, persons that can be held liable for negligence or information regarding the processing of personal information).[29]

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26 Swiss Supreme Court judgments, reported at BGE 119 II 368, at p. 372, and Swiss Supreme Court judgment No. 4C.215/2002 of 11 November 2002, consid. 2.4.

27 Gauch et al, op cit, Nos. 1128 et seq and 1138 et seq.

28 Article 43(1) ISA.

29 Article 45 ISA.

Many Swiss brokers are members of the Swiss Insurance Brokers Association (SIBA),[30] which has its own conduct rules.[31] These rules set out the ethical standards, the duties of the broker (providing risk analysis, drafting of policies, customer support and assistance in claims handling) and his or her relationships with the insured and the insurer.

The qualification of intermediaries as either tied agents or brokers has an impact on their duties while contracting. The relation between broker and customer is deemed a mandate under Swiss law that provides a duty of care of the brokers for the customer's interest in a comprehensive manner. Failing to do so may lead to liability. And since such liability arises in connection with commercial activities conducted under official licence, any exclusion thereof may apply at most to slight negligence.[32] To cover such claims brokers are under regulatory law obliged to have professional indemnity insurance or similar financial security.[33]

The loyalties and duties of a tied agent as against a prospective client are far more limited. Since the agent is to assign to the legal sphere of the insurer the duty to advise ranges only over their own products. Market expertise is not required. Unlike with brokers, a breach of a duty of care may be attributed to the insurer who can be held liable for it.[34]

v Claims

The insured has to inform the insurer about an event covered by the policy as soon as he or she becomes aware of such incident and the resulting claims.[35] Unless otherwise agreed there is no form that has to be followed. Negligent delay in providing this information entitles the insurer to reduce claims to the extent that the loss could have been avoided or mitigated in case of timely notification.

At the insurer's request the beneficiary must disclose all circumstances relevant to the course or the future development of the incident in question.[36] Deliberate misrepresentation or concealment of such facts that could diminish or suspend an insurer's obligations void the coverage. An insurer is furthermore released from its obligations if the insured does not report a loss with the intent to ameliorate his or her position.[37]

In the event of a partial loss both the insurer and the policyholder may terminate the insurance policy.[38]

30 See www.siba.ch.

31 SIBA published its Code of Conduct at www.siba.ch/index.php?id=14.

32 Article 101(3) CO.

33 Article 44 ISA.

34 Article 34 ICA.

35 Article 38(1) ICA.

36 Article 39 ICA.

37 Article 39 ICA and Article 40 ICA.

38 Article 42 ICA.

Insurance payments are due after four weeks from the date the insurer received sufficient information to legitimate a claim under the policy.[39] Should there be outstanding premiums the question of set-off arises. In line with Article 120 of the CO, where two persons owe each other sums of money and provided that both claims have fallen due, each party may set off their debt against their claim (i.e., a person who has undertaken an obligation in favour of a third party may not set off that obligation against said party).[40] However, there is an exception in direct insurance for the account of third parties. In this case the insurer can set-off claims for outstanding premiums against the beneficiary even though the latter is not the debtor of the premium.[41]

As regards dispute resolution clauses, jurisdiction and arbitration clauses are permitted and often found in insurance and reinsurance contracts, the latter particularly in reinsurance contracts. Mediation clauses are legally possible, although in practice are very rare.

IV DISPUTE RESOLUTION

i Jurisdiction, choice of law and arbitration clauses

Jurisdiction

In a domestic context the court at the domicile or registered office of the defendant or at the place where the characteristic performance must be rendered has jurisdiction over actions related to contracts.[42] For actions arising out of the commercial or professional activity of an establishment or branch, the court at the defendant's domicile or registered office or at the location of the establishment has jurisdiction.[43] However, in disputes concerning consumer contracts for actions if brought by the consumer the court at the domicile or registered office of one of the parties has jurisdiction.[44]

International disputes in Switzerland are ruled by the PILA and international treaties as applicable. In the European field the Lugano Convention is of particular importance.[45] It must be borne in mind that it includes a special chapter concerning insurance disputes. The consumer-related norms in Article 15 et seq do not apply.

Jurisdiction clauses have to be in line with the body of law applicable according to the situation. In pure domestic situations the Civil Procedure Code (CPC) has to be consulted. International disputes demand the consideration of the PILA or international treaties. In European matters again the Lugano Convention is relevant.

39 Article 41 ICA.

40 Article 122 CO.

41 Article 18(3) ICA.

42 Article 31 of the Civil Procedure Code.

43 Article 12 CPC.

44 Article 32 CPC.

45 Convention of 30 October 2007 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

Choice of law

Choice of law under consumer contracts is prohibited.[46] In all other cases parties may diverge from the general rules.[47] However, provisions of the Swiss law, the application of which, due to their particular purpose, is compulsory irrespective of the governing law designated by the parties, remain unaffected.[48] Relevant case law in this respect has yet to be established.

ii Litigation

Stages

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 (Commercial Court). As commercial proceedings are considered insurance matters with a value in dispute of at least 30,000 Swiss francs and involving parties registered in the Swiss Commercial Registry or in an equivalent foreign registry.[49] If only the defendant is registered and the said value in dispute is reached the claimant may choose between the Commercial Court and the ordinary court.[50] In Zurich, ordinary courts are the district courts and for proceedings where the sum in dispute is less than 30,000 Swiss francs, the single-judge courts also. All these courts have the function of trial courts.

Appeal in line with Article 308 *et seq* of the CPC is admissible against final decisions of ordinary courts if the value for the claim in the most recent prayers for relief is at least 10,000 Swiss francs.[51] The appeal may be filed on grounds of incorrect application of law or incorrect establishment of the facts.[52]

For commercial court decisions no internal cantonal remedy is given. That is, the remedies mentioned only apply if claims are filed with the ordinary courts.

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 Swiss francs.[53] With respect to allegations of infringement of federal law the judges' cognition is not limited. Factual findings of the prior instance may only be overruled if they are obviously wrong.[54]

Evidence

Admissible evidences are testimony, physical records (documents), inspection, expert opinion, written statements, questioning and statements of the parties. Primary means of evidence in insurance proceedings are testimonies, expert opinions and physical records. Of minor importance are statements of the parties.

46 Article 120(2) PILA.

47 Article 116 PILA.

48 Article 18 PILA.

49 Article 6(1) CPC.

50 Article 6(2) CPC.

51 Article 308 CPC.

52 Article 310 CPC.

53 Article 74 Federal Supreme Court Act (SCA).

54 Article 105(2) SCA.

Costs

Procedural costs include court and party costs that the unsuccessful party must bear. In both cases the courts mostly award costs by reference to a cantonal tariff. The courts have discretion to amend the amount payable under the tariff by reference to a number of factors such as the complexity of the case, the number of hearings and the number of documents processed.

The fee agreement between clients and lawyer can be made without regard to the cantonal tariffs and provisions. It is most common to agree on an hourly rate. Lump-sum agreements are admissible as long as such fee is in line with the estimated services being rendered by the lawyer.

The limits within which success fees are allowed are unclear under Swiss law. However, one can state that such fees are permitted if there is an agreed hourly fee (which must cover the lawyer's costs) and an incentive payment comes only in addition to the hourly rate and is not of predominant significance to the extent that conflicts of interest could arise.

Funding the process

A person is entitled to legal aid if he or she does not have sufficient financial resources and the case does not seem to devoid of any chances of success.[55]

If the person seeking aid wins, the losing party pays the successful party's legal fees. If the person seeking aid loses, his or her legal fees will be paid by the canton. An indemnity for the opposing party, if any, still has to be paid by the person seeking aid.[56] Rendered legal aid must be reimbursed as soon as the beneficiary is in a position to do so.[57]

The costs of a lawsuit can be insured by means of legal assistance insurance, although such insurance in Switzerland usually provides a waiting period of three months or more.

Third-party funding is lawful in Switzerland, but it is not specifically regulated.

iii Arbitration

Although it would be permitted to provide an arbitration clause in an insurance policy it is not seen very often. However, arbitration clauses sometimes appear in D&O and other financial lines of business policies.

A special form of arbitration is compulsory in legal assistance insurance where the insurer and policyholder have different opinions in respect of the measures to be used for the handling of the claim.[58]

In reinsurance matters arbitration is the usual means to resolve potential disputes. Swiss arbitration is, however, not very often seen but usually arises in retrocession agreements. If the parties agree on Swiss arbitration they usually prefer *ad hoc* rather than

55 Article 117 CPC.

56 Article 122 CPC.

57 Article 123 CPC.

58 Article 169(1) ISO.

institutional arbitration. If the reinsurance contract does not provide in detail the type of proceedings they would like to follow, the arbitrators will decide how they will proceed[59] and will normally refer to the UNCITRAL Arbitration Rules. In *ad hoc* arbitration the arbitrators usually work on an hourly-rate basis.

In international arbitration the role of the courts is limited. The arbitral panel renders its own procedural orders, provides precautionary measures and takes evidence on its own.

The influence of the national courts is limited to those cases where its assistance is necessary (i.e., where one party does not comply with precautionary orders[60] or where evidence can only be taken with the assistance of the courts).[61] Further intervention of the national courts could be for the appointment, removal or replacement of an arbitrator in the event that one of the parties defaults.

The grounds for appeal against awards in international arbitration are very much restricted. The only remedy would be an appeal to the Federal Supreme Court and the grounds for appeal would be limited to the violation of fundamental procedural rights:[62]

a the sole arbitrator was designated or the arbitral tribunal was constituted in an irregular way;

b the arbitral tribunal wrongfully accepted or declined jurisdiction;

c the arbitral tribunal decided on points of dispute that were not submitted or it left undecided prayers for relief that were submitted;

d the principle of equal treatment of the parties or the right to be heard was violated; or

e the award is incompatible with public policy.

Where no party has its domicile or a business establishment in Switzerland, the parties may exclude any challenge to the arbitral award (or confine the exclusion to specified grounds for challenge) by an explicit declaration in the arbitration agreement or in a subsequent written agreement.[63]

iv Alternative dispute resolution

In primary insurance policies methods for alternative dispute resolution (including mediation) are hardly used in the wording.

In reinsurance contracts the parties are usually obliged to try to settle their claims amicably or go to a mediator before they initiate arbitration. But the binding effect and consequences of a breach of such obligation are not very clear apart from the fact that such obligation could not prevent one party from initiating arbitration without having followed the required methods laid down in the reinsurance contract.

59 Article 182(2) PILA.

60 Article 183(2) PILA.

61 Article 184(2) PILA.

62 Article 190(2) PILA.

63 Article 192(1) PILA.

v Mediation

Mediation is not very established in commercial matters (including insurance and reinsurance) and there are no known mediation centres in Switzerland. If the parties intend to go to a mediator they would do so abroad (particularly in England, the United States or Singapore).

The Swiss courts do not encourage the parties to go to mediation. But some judges (in particular in the Commercial Courts of Zurich and Berne) prefer the mediation style when they summon the parties to a hearing and try to convince them to settle the claim.

V YEAR IN REVIEW

The ongoing period of low interest rates keeps affecting the insurance industry. Live insurers are particularly challenged. Nevertheless, according to the Swiss Financial Market Supervisory Authority (FINMA) the insurance sector as a whole is in stable-to-good condition. FINMA is watching developments continuously and closely, and will be addressing problem areas by conducting supervisory consultations, risk dialogues and supervisory reviews.[64]

At present, the FINMA Annual Report 2014 has not yet been published. However, it is interesting to note that the 'too big to fail' expert committee did not identify as yet any tendency of systematically important risks being formed in the conventional insurance sector.[65]

VI OUTLOOK AND CONCLUSIONS

On 9 February 2014 the Swiss people voted for an initiative 'against mass immigration' by a very slim majority. The declared objective of this initiative is to fight the negative consequences that result from mass immigration, such as scarcity of living space and raising infrastructure costs. However, it is highly disputed whether (1) immigration is responsible for these issues at all and (2) whether the initiative is an answer to such problems.

The initiative against mass immigration demands quotas on residence permits granted to foreign nationals. Such quotas are incompatible with the concept of the free movement of persons which is a key pillar in Switzerland's relations with the EU. Because of this incompatibility there is some uncertainty as to how the relations between the EU and Switzerland will develop.

The quotas do, however, not have the purpose of preventing businesses from recruiting specifically qualified staff that cannot be found in Switzerland. In that respect the impact of the initiative on the insurance and reinsurance industry might be less strong than on others. Unlike today, though, the administrative costs to hire people from outside Switzerland, in particular the EU, are very likely to increase. Presumably, one of

64 FINMA Annual Report 2013, at p. 52.

65 FINMA Annual Report 2013, at p. 58.

the requirements for qualified staff to receive a residence permit will be that the employer gives evidence they could not recruit Swiss nationals (priority of Swiss nationals).

Switzerland has long been an important centre for the reinsurance industry for a variety of reasons. The trend of moving reinsurance business to Switzerland was originally started by companies with large exposures in the US (such as ACE). The process is known in Switzerland as 'redomestication', since under Swiss corporate law it is possible to move a foreign-domiciled company into Switzerland without dissolving it. Recent entrants were Amlin Re Europe, Catlin Re, Novae Re and Q-Re. Both the movement of existing businesses from offshore centres to Switzerland and the establishment of new businesses in the country continue to be hot topics in the reinsurance world. To what extent the initiative against mass immigration will affect and influence such discussion, remains to be seen.

Appendix 1

ABOUT THE AUTHORS

LARS GERSPACHER

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Lars Gerspacher is a partner at gbf Attorneys-at-law and focuses his activities in the areas of insurance and reinsurance law, aviation and maritime law as well as transport and trade law.

He is on hand to advise and give support to his clients whenever needed, conduct international proceedings and represent them in litigation or arbitration in various lines of business (such as marine, aviation, D&O liability, E&O, fidelity and other financial lines). He also specialises in policy drafting and regulatory work for the insurance and reinsurance industries, whom he advises upon any aspect of regulation by the Swiss Financial Market Authority. He handles authorisations in Switzerland and Liechtenstein, including the drafting and submission of required business plans to the competent regulators. He particularly advises reinsurers in re-domesticating their business to Switzerland.

Lars Gerspacher is recognised in *Who's Who Legal: Insurance & Reinsurance*, among others, as one of the leading practitioners in these fields.

ROGER THALMANN

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Roger Thalmann practises in particular in the field of insurance and reinsurance law, transportation and corporate law, with a special interest in liability matters. His work includes both consulting and litigation.

Roger received his law degree from the University of Zurich. Before joining gbf Attorneys-at-law he worked at a district court in the canton of Zurich. He speaks German, English, Italian and French.

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