

Insurance and reinsurance in Switzerland: overview

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MARKET TRENDS AND REGULATORY FRAMEWORK

1. What were the main trends in the insurance and reinsurance markets over the last 12 months?

Insurance

Switzerland provides for an attractive environment for insurance and reinsurance undertakings. Many of the global key players are based in Switzerland.

The institutions subject to the supervision of the Swiss Financial Market Supervisory Authority FINMA (FINMA) include (by year end 2015, Insurance Market Report 2015, FINMA):

- 20 life insurance undertakings, including branches of foreign insurance undertakings (previous year: 21). The two insurance undertakings Swiss Life and AXA Leben have a combined market share of over 58%.
- 122 non-life insurance undertakings (also comprising supplementary health insurance), including branches of foreign insurance undertakings (previous year: 127). The four insurance undertakings *AXA Versicherungen*, *Schweizerische Mobiliar*, *Zürich Versicherungen* and *Allianz Suisse* have a combined market share of over 58%.
- 30 reinsurance undertakings (previous year: 29).
- 29 reinsurance captives (previous year: 33).
- Six insurance groups or insurance conglomerates (previous year: seven).

Total gross premiums booked by all market participants in Switzerland (including branches of foreign insurance undertakings) for the business year 2015 amount to CHF124.3 billion.

In the year 2016, non-life insurers in Switzerland managed to post consistent and high profits, despite saturated markets and stiff competition (*Annual Report 2016, FINMA*).

For information on the market trends and legal developments influencing reform in the insurance sector, see *Question 36*.

Reinsurance

The trend of relocations of reinsurance business into Switzerland continued, particularly the establishment of Swiss reinsurance branches.

However, the environment for the reinsurance business continues to be difficult. Especially in the property business, the decline in premium persisted. The outlook remains challenging due to the large available capacities in the industry (*Annual Report 2016, FINMA*).

2. What is the regulatory framework for insurance/reinsurance activities?

Regulatory framework

The Swiss regulatory framework on private insurance includes two main legislative acts, supplemented by a number of implementing ordinances:

- The Federal Insurance Supervision Act (ISA, substantially revised in 2006), the Federal Ordinance on the Supervision of Private Insurance Companies (ISO; a partial revision entered into force on 1 July 2015), the FINMA-Ordinance on the Supervision of Private Insurance Companies (ISO-FINMA, a partial revision entered into force on 15 December 2015) and the FINMA-Ordinance on Insurance Bankruptcy (IBO-FINMA), (entered into force on 1 January 2013) address the regulatory requirements for insurance and reinsurance undertakings and insurance intermediaries.
- The Federal Insurance Contract Act (ICA) applies to insurance contracts and regulates the civil law relationship between insurer, policyholder and insured. A partial revision of the ICA is currently being prepared (see *Question 36*).

In addition, the Swiss Financial Market Supervisory Authority FINMA (FINMA) further specifies financial regulation, including insurance regulation, in numerous circulars. FINMA circulars are in principle not binding for Swiss courts but constitute an interpretation of the applicable law by FINMA. However, FINMA circulars can in many instances be considered as *de facto* binding for insurance undertakings since a violation may potentially lead to regulatory sanctions.

Specific rules apply to insurance groups and insurance conglomerates (in particular, *Article 64 et seqq, ISA, Article 191 et seqq, ISO on insurance groups and Article 72 et seqq, ISA, Article 204 et seqq, ISO on insurance conglomerates*).

Two or more companies constitute an insurance group if all of the following conditions are met (*Article 64, ISA*):

- At least one company in the group is an insurance company.
- The companies are, as a whole, primarily engaged in the field of insurance.
- The companies constitute an economic unit or are otherwise connected to each other through influence or control.

Two or more companies constitute an insurance conglomerate if all of the following conditions are met (*Article 72, ISA*):

- At least one company in the group is an insurance company.
- At least one company in the group is a bank or securities dealer of major economic importance.
- The companies are, as a whole, primarily engaged in the field of insurance.
- The companies constitute an economic unit or are otherwise connected to each other through influence or control.

If a Swiss company belongs to an insurance group or conglomerate in the manner set out above, FINMA can impose its consolidated supervision on the insurance group or conglomerate, if one of the following conditions is met (*Article 65, ISA*):

- The group is effectively managed from Switzerland.
- The group is effectively managed abroad, but is not subject to an equivalent group supervision there.

Consolidated group supervision applies in addition to FINMA's individual supervision over the Swiss insurance undertakings (or other regulated Swiss entities) in a group or conglomerate.

Certain private insurance fields are exempt from the regime outlined above. They are regulated by special laws instead, such as the Health Insurance Act (HIA) (governing compulsory health insurance) and the Federal Law on Occupational Retirement (governing compulsory occupational pension schemes).

Regulatory bodies

FINMA is the supervisory authority for financial institutions, including insurance and reinsurance undertakings as well as insurance intermediaries within the scope of ISA. FINMA was established in 2009 by the Federal Act on the Swiss Financial Market Supervisory Authority (FINMASA), as a unified supervisory authority. FINMA also supervises other financial institutions (including banks, securities dealers and collective investment schemes). FINMA's primary tasks are to protect the interests of insured persons, creditors and investors and to ensure the proper functioning of the financial markets. To perform its tasks, FINMA applies instruments such as licensing, supervision, enforcement and regulation.

Certain private insurance undertakings are supervised by other authorities based on special federal legislation. For example, insurance undertakings offering compulsory health insurance are supervised by the Federal Office of Public Health and pension institutions by cantonal supervisory bodies.

REGULATION OF INSURANCE AND REINSURANCE CONTRACTS

3. What is a contract of insurance for the purposes of the law and regulation? How does it differ from a contract of reinsurance?

Swiss insurance legislation lacks a specific definition of the term insurance or contract of insurance. The Swiss Federal Supreme Court has defined a contract of insurance as a contract under which an insurer promises an economic performance to an insured (or a third person) in case of the realisation of a risk in exchange for payment of a premium (for example, *Swiss Federal Supreme Court decision 124 III 382, page 397*).

The basic defining elements for an insurance contract are the transfer of risk against payment. Transfer of risk means that the insured must have an interest that he is protecting against a certain danger by means of the insurers' economic performance.

The Swiss Federal Supreme Court has established two additional requirements that are particularly relevant from an insurance supervisory law perspective, but may also need to be considered in the context of the definition of a contract of insurance: one is the requirement that the insurance contract must be an autonomous or independent agreement and the other is that the insurer must compensate any risks according to the laws of statistics. Consequently, according to the practical definition elaborated and constantly used in case law, the concept of insurance in Swiss law rests on the following five elements:

- **Risk or danger.** Risk can be defined as a future event whose occurrence is both uncertain and in fact possible. There must be either uncertainty as to whether the future event will occur at all or uncertainty as to when the future event will occur (*incertus an or incertus quando*).
- **Performance by the insured (that is, a premium payment).** The premium is, in principle, the price the insured pays in exchange for the performance by the insurer in the event that the insured risk materialises. Although the Swiss Federal Supreme Court often uses the term "performance by the insured", it is also possible that the premium is not paid by the insured. For example, it could be paid by a policyholder.
- **Performance by the insurer.** The contract must include the obligation of the insurer (and therefore the right of the insured) to perform to the insured or another beneficiary if the insured risk materialises. Usually, the insurer pays to the insured an amount of money, but performance can also consist of a payment in kind, the waiver of a claim against the insured or any other conduct or benefit in favour of the insured or according to his will, including omissions. According to recent legal literature, performance can also consist of the rendering of services (for example, legal protection insurance).
- **Independence of the operation.** The contract of insurance must be an autonomous agreement, in contrast to the situation where the obligation to pay on realisation of a risk is ancillary to or a simple term of a non-insurance contract.
- **Compensation of risks according to the laws of statistics (systematic business activity).** Case law has not developed one single definition for this element. Instead, various court decisions have emphasised different criteria such as the systematic business activity, the distribution of risk according to the law of large numbers, the consideration of the principles of statistics, and the requirement that the earnings are equal to or supersede the expenses. However, the Supreme Court also held that it is not necessary that the business activity must be based on insurance mathematics.

Contracts of insurance often have similarities to other types of contracts. In particular, insurance contracts must be distinguished from:

- **Contracts of gambling and betting.** If a contract fulfils the above requirements but does not offer protection against possible future damage or loss, it qualifies as a contract of gambling and betting rather than as an insurance contract.
- **Warranties, guaranties and other surety contracts.** The qualification of such contracts as an insurance contract depends on the question whether they constitute an autonomous agreement. Especially in the field of surety contracts issued by banks, there are no clear-cut criteria to answer this question. In these cases an important, but not necessarily conclusive, fall-back indication is whether the contract has been concluded by a licensed bank or by a licensed insurance undertaking.

- **Financial contracts (for example, hedging contracts, swaps and derivatives).** Similar to surety contracts, there are financial contracts that meet the above criteria of insurance contracts without necessarily qualifying as insurance contracts. Again, there are no clear-cut criteria and the decision may be strongly influenced by the question of whether a financial institution or an insurance undertaking has entered into the contract.

The Federal Insurance Contract Act (ICA) contains a variety of mandatory and non-mandatory provisions regarding the contract of insurance. In the absence of specific ICA rules, the provisions of the Swiss Code of Obligations (CO) apply to insurance contracts.

By contrast, reinsurance contracts are excluded from the scope of the ICA. They are subject to the provisions of the CO to the extent that Swiss law applies.

4. Are all contracts of insurance/reinsurance regulated?

The Federal Insurance Contract Act (ICA) applies to all insurance contracts except for:

- Reinsurance contracts.
- Legal relationships between insurance institutions and their insured which are excluded from insurance supervision under the Federal Insurance Supervision Act (ISA) (*Article 101, paragraph 1, ICA*). The scope of this exception is very narrow (see *Questions 6. and 10.*).

Contracts excluded from the scope of the ICA are subject to the provisions of the Code of Obligations (CO) (*Article 101, paragraph 2, ICA*).

CORPORATE STRUCTURE

5. What form of corporate organisation can insurers take?

Insurance undertakings must take the legal form of a company limited by shares (*Aktiengesellschaft*), or a co-operative (*Genossenschaft*) (*Article 7, Federal Insurance Supervision Act (ISA)*). The predominant form of corporate organisation in the Swiss insurance market is the company limited by shares.

REGULATION OF INSURERS AND REINSURERS

6. Are all insurers and reinsurers regulated? Are they all regulated in the same way?

Both Swiss insurance and reinsurance undertakings and insurance undertakings domiciled abroad are supervised under the Federal Insurance Supervision Act (ISA) in respect of insurance activities conducted in or from Switzerland (subject to differing provisions in international treaties) (*Article 2, paragraph 1, ISA*). Insurance undertakings domiciled abroad engaged only in reinsurance activities in Switzerland are exempt from supervision under the ISA (*Article 2, paragraph 2a, ISA*).

While basic regulatory requirements are, in principle, the same for all supervised institutions, the following points are worth noting:

- The minimum capital requirements differ depending on the scope of insurance activities (*Article 8, ISA*).

- The ISA contains supplementary provisions which only apply to certain types of insurance activities (*Versicherungszweige*) (*Article 31 et seqq, ISA*).
- Additional requirements apply for foreign insurance undertakings (*Article 15, ISA*) (see *Question 9*).

Companies engaged only in the reinsurance business are exempt from certain regulatory requirements under the ISA (for example, the provisions on tied assets (*gebundenes Vermögen*) (*Article 35, ISA*). Special provisions apply to the consolidated supervision of insurance groups and insurance conglomerates (see *Question 2*).

In addition, the ISA does not apply to:

- Public insurance undertakings (for example, cantonal building insurance companies).
- Private insurance undertakings that are regulated by special federal legislation (for example, pension institutions or health insurance undertakings offering compulsory health insurance) (*Article 2, paragraph 2b, ISA*).

However, these insurers are either regulated by cantonal law or special federal legislation. In addition, certain insurance co-operatives with a very limited scope of business and where the insured are also members of the co-operative are exempt from supervision by the Swiss Financial Market Supervisory Authority FINMA (FINMA) under the ISA (*Article 2, paragraph 2d, ISA*). FINMA further has the option to apply a general *de minimis* exemption to undertakings whose activities are economically insignificant or only pertain to a small group of insured persons, but rarely does so in practice (*Article 2, paragraph 3, ISA*).

7. Can insurers and reinsurers carry on non-insurance business? Are there any restrictions on their business activities?

Insurance and reinsurance undertakings are, in principle, only allowed to engage in activities directly related to their primary business (*Article 11, paragraph 1, Federal Insurance Supervision Act (ISA)*). However, the Swiss Financial Market Supervisory Authority FINMA (FINMA) can approve the conduct of other activities if it considers they do not compromise the interests of the insured (*Article 11, paragraph 2, ISA*). A stricter rule applies to insurance undertakings engaging in life insurance, which are limited to supplementary engagements in accident and health insurance (*Article 12, ISA*). Furthermore, it is, in principle, possible for an insurance or reinsurance undertaking to indirectly engage in non-insurance activities through one or several separate subsidiaries. In such a case, FINMA has to be notified of the equity participation of the regulated entity in such subsidiaries. FINMA has the power to impose conditions or prohibit such participations (see *Question 12*).

Insurance companies that have obtained a specific licence within the subset of life insurance licences are allowed to conclude capitalisation contracts. These are contracts where the insurers do *not* carry any biometric risks, that is, risks related to the duration of an insured person's life, an insured person's disability or state of health or too little risk to qualify as life insurance in the meaning of ISA (*Appendix 1, Federal Ordinance on the Supervision of Private Insurance Companies (ISO), classification A.6*). The insurers offering such contracts remain under insurance supervision and do not fall under banking supervision. They are not, however, allowed to call such contracts "insurance contracts".

If an insurance undertaking seeks to acquire an equity stake in a non-insurance undertaking, a specific notification and approval process applies (see *Question 12*).

8. Are there any statutory limits or other restrictions on, or requirements relating to, the transfer of risk by insurance or reinsurance companies?

The approval of the Swiss Financial Market Supervisory Authority FINMA (FINMA) is required for the transfer of a Swiss insurance portfolio (in whole or in part) from one insurance undertaking to another. Approval is only granted where FINMA considers that the interests of the insured are protected (*Article 62, paragraph 1, Federal Insurance Supervision Act (ISA)*).

Within 30 days of notification of FINMA's approval, the acquiring insurance undertaking must individually notify the insured persons affected by the portfolio transfer about the transfer and their right of termination. An insured has the right to terminate the insurance contract within three months after that notice (*Article 62, paragraph 3, ISA*).

The approval requirement does not apply to reinsurance undertakings (*Article 35, ISA*).

OPERATING RESTRICTIONS

Authorisation or licensing

9. Does the entity or person have to be authorised or licensed?

Insurance/reinsurance providers

An insurance undertaking falling within the application of the Federal Insurance Supervision Act (ISA) must obtain an insurance licence from the Swiss Financial Market Supervisory Authority FINMA (FINMA) before commencing any insurance activities (*Article 3, paragraph 1, ISA*). The insurance undertaking must submit a formal application to FINMA accompanied by a business plan (as defined by ISA) to obtain a licence (*Article 4, paragraph 1, ISA*).

Licence requirements. The ISA defines the financial and organisational requirements necessary to obtain an insurance licence from FINMA. Certain additional requirements apply to foreign insurance undertakings seeking to become active in the Swiss market. The Federal Ordinance on the Supervision of Private Insurance Companies (ISO) further substantiates the requirements contained in the ISA.

An insurance undertaking domiciled in Switzerland must meet the following financial requirements:

- Minimum capital between CHF3 million and CHF20 million, depending on the classes of insurance that are part of its business plan. FINMA determines the actual capital requirement in each individual case (*Article 8, ISA and Articles 6 to 10, ISO*).
- Sufficient free and unencumbered capital resources in relation to all of its activities (solvency margin). The solvency margin is determined by reference to (*Article 9, ISA*):
 - the specific risk exposure;
 - the classes of insurance operated;
 - the volume and geographic scope of business;
 - internationally recognised principles.

- The ISO further specifies the solvency requirements and determines that the solvency of an insurance undertaking must be ascertained under the Swiss Solvency Test (SST) (*Articles 21 to 53a, ISO*). The SST defines the necessary capital resources in relation to the risks to which an insurance undertaking is exposed (target capital) and sets the resulting target capital against the creditable capital (risk-bearing capital). Before the partial revision of the ISO that entered into force on 1 July 2015, solvency was determined under the old Solvency I framework as well as under the SST, the two methods being applied in parallel. With the revision, Solvency I was abolished (unless prescribed by international treaties) and the SST is now the only accepted method for determining and evaluating compliance with solvency requirements. With effect from 1 January 2016, the European Commission recognises the SST as equivalent to European law. This decision had a positive impact for Swiss reinsurers in that they are now able to serve their European Union (EU) clients directly from Switzerland (www.admin.ch/gov/en/start/documentation/media-releases.msg-id-59099.html).

- Maintain an organisational fund to cover the costs of establishing and developing the business or an extraordinary business expansion. The organisational fund usually amounts to up to 50% of minimum capital (as defined above) at the start of business operations and should generally settle at an amount around 20% of minimum capital later on. The exact minimum amount is determined by FINMA in each individual case (*Article 10, ISA and Article 11, ISO*).
- Maintain sufficient insurance-related reserves (*versicherungstechnische Rückstellungen*) for all of its business activities (*Article 16, ISA*). In addition, the insurance undertaking must secure claims under insurance contracts with tied assets (*gebundenes Vermögen*) (*Article 17, ISA*). The required amount of tied assets is equal to the insurance-related reserves plus an appropriate surcharge (*Article 18, ISA*). For life insurance activities, the surcharge, in principle, amounts to 1% of the insurance-related reserves used as the basis for determining the required amount of the tied assets. For non-life insurance, the surcharge amounts to 4% of the insurance-related reserves and further specific reserves according to the business plan, but at least to CHF100,000 (*Article 1, paragraph 1 lit. b, FINMA-Ordinance on the Supervision of Private Insurance Companies (ISO-FINMA)*). The surcharge does not apply to life insurance if the insurance undertaking does not bear any investment risk (*Article 1, paragraph 2, ISO-FINMA*). The provisions concerning tied assets are not applicable to reinsurance undertakings (*Article 35, ISA*).
- Maintain sufficient liquidity in order to be able to satisfy all of its payment obligations, even in stress scenarios (*Article 98a, ISO*).

An insurance undertaking domiciled in Switzerland must meet the following organisational requirements:

- It must have the legal form of either:
 - a company limited by shares;
 - a co-operative (*Article 7, ISA*) (see *Question 5*).
- The persons responsible for its direction, supervision, control and management must pass FINMA's fit and proper test (that is, be of good standing and provide assurance of proper business conduct) (*Article 14, ISA*).
- It must be organised in a manner that allows it to recognise, limit and monitor all significant risks (*Article 22, ISA*). The

ISO substantiates this requirement with detailed provisions on risk management and liquidity planning (*Articles 96 to 98a, ISO and FINMA-Circular 2017/2 on corporate governance, risk management and the internal control system within the insurance sector*).

- It must appoint a responsible actuary and provide this person with access to all business records (*Article 23, ISA*). The responsible actuary must ensure that:
 - the solvency margin is calculated correctly;
 - the tied assets meet the requirements;
 - accurate accounting information is used;
 - sufficient insurance-related reserves are established (*Article 24, ISA*).
- It must establish an effective internal control system and an internal audit function which is independent from management (*Article 27, ISA*). In addition, the insurance undertaking must appoint a licensed audit firm to review its conduct of business (*Article 28, ISA*).

Article 15 of the ISA contains additional requirements for foreign insurance undertakings engaging in insurance business in Switzerland. They must (subject to differing rules in international treaties):

- Be authorised to engage in insurance business in the country where they are domiciled.
- Establish a presence in Switzerland and appoint a general agent (*Generalbevollmächtigter*), who must be of good standing and must provide assurance of proper business conduct. The general agent must:
 - reside in Switzerland (*Article 16, paragraph 1, ISO*);
 - have authority for, and be entrusted with, the actual management of the office for all of the Swiss business (*Article 16, paragraph 1, ISO*);
 - possess the knowledge necessary to manage the insurance undertaking (*Article 16, paragraph 2, ISO*).
- Have a minimum capital under Article 8 of the ISA and comply with solvency requirements under Article 9 of the ISA at the registered office in its home jurisdiction, also taking into account its business activities in Switzerland.
- Dispose of an organisational fund in Switzerland and the corresponding assets in accordance with Article 10 of the ISA (*see above*).
- Lodge a security deposit with the Swiss National Bank (SNB) that is proportionate to the solvency margin related to the business in Switzerland. FINMA determines the proportion and stipulates the calculation, the place of deposit and the creditable assets. Based on the Agreement between the Swiss Confederation and the European Economic Community on direct insurance other than life insurance, the security deposit requirement does not apply to EU-based insurance undertakings engaged in non-life insurance intending to conduct insurance business in Switzerland.

Business plan. The business plan of an insurance undertaking regulated by FINMA must contain the following information (*Article 4, paragraph 2, ISA*):

- The articles of incorporation.
- The management structure and the geographic scope of business of the insurance undertaking and, if applicable, of the insurance group or the insurance conglomerate of which it forms a part.

- In the case of an insurance activity outside of Switzerland, the licence from the responsible foreign supervisory body or an equivalent certification.
- Information about financial resources and reserves.
- The financial statements for the last three financial years, or the initial balance sheet of a newly established insurance undertaking.
- Information about the persons who:
 - directly or indirectly own at least 10% of the capital or voting rights of the insurance undertaking; or
 - are able to significantly influence its business activities in any other way.
- The names of the persons entrusted with the ultimate management, supervision, control and conduct of the business or, for foreign insurance undertakings, the general agent's name.
- The name of the responsible actuary.
- The contracts or other arrangements through which any of the insurance undertaking's significant functions are outsourced.
- The classes of insurance intended to be operated and the nature of the risks to be insured.
- Declarations of accession to the National Insurance Office (*Nationales Versicherungsbüro*) and the National Guarantee Fund (*Nationaler Garantiefonds*), if applicable.
- Information on the means to fulfil assistance services (*Beistandsleistungen*), if permission for this type of insurance activity is applied for.
- The reinsurance plan or, in case of an active reinsurance company, the retrocession plan.
- The expected costs of establishing the insurance undertaking.
- The plans for the balance sheets and income statements for the first three financial years.
- Information about the recognition, limitation and monitoring of risks.
- The premium scale and the general business terms and conditions which will be used in Switzerland for the insurance of all risks in occupational pension plans and supplementary insurance to the mandatory health insurance, if applicable.

Insurance/reinsurance intermediaries

Specific regulatory requirements apply to insurance intermediaries. Insurance intermediaries are defined as persons offering or concluding insurance contracts on behalf of insurance undertakings or other persons (often the insured: *Article 40, ISA*). FINMA maintains a register of insurance intermediaries (*Article 42, ISA*), and entry on the register is subject to certain qualifications. Whether an insurance intermediary must register with FINMA depends on whether it qualifies as an independent intermediary (that is, an insurance broker), or as a tied insurance intermediary (that is, an insurance agent). Independent insurance intermediaries (unlike tied insurance intermediaries), are defined as being neither legally, nor economically, nor in any other way dependant on an insurance undertaking (*Article 43, paragraph 1, ISA and Article 183, ISO*).

As a result, independent insurance intermediaries must register on the FINMA register (*Article 43, paragraph 1, ISA*). Tied

insurance intermediaries can register if they wish to (for example, for marketing reasons), but are not obliged to do so (*Article 43, paragraph 2, ISA*).

Registration requires:

- Proof of sufficient professional qualifications (*Article 44, paragraph 1a, ISA*).
- Proof of professional indemnity insurance with an annual policy limit for all damages up to at least CHF2 million (or equivalent financial security; *Article 44, paragraph 1b, ISA* and *Article 186, ISO*).

In addition, insurance intermediaries must meet the following personal requirements (*Article 185, ISO*):

- Capacity to act (*Handlungsfähigkeit*).
- No criminal record involving activities incompatible with the business of an insurance intermediary.
- No outstanding certificates of unpaid debts (*Verlustscheine*) connected to activities incompatible with the business of an insurance intermediary.

Insurance intermediaries must provide the insured with the following information (on a durable medium, usually a physical information leaflet, allowing the insured to store the information for future reference):

- The intermediary's identity and address.
- Whether the insurance coverage offered is provided by one or several insurance undertakings, and which insurance undertakings are involved.
- Their contractual relationships with the insurance undertakings on whose behalf they act, as well as the names of these insurance undertakings.
- The name of the person who can be held liable for negligence, mistakes or incorrect information in connection with their activities as insurance intermediaries.
- Information on the processing of personal information, in particular the purpose, scope and recipients of that data, as well as information regarding its storage (*Article 45, ISA*).

Insurance intermediaries are prohibited from engaging in any intermediary activities in Switzerland for the benefit of insurance undertakings which have not been granted a licence from FINMA for insurance activities in Switzerland even though they fall within the scope of the ISA (*Article 41, ISA*).

Other providers of insurance/reinsurance-related activities

Article 15 of the ISA contains additional requirements for foreign insurance undertakings engaging in insurance business in Switzerland, for example the appointment of a general agent (*Generalbevollmächtigter*). A general agent does not have to be licensed or registered, but must meet the following requirements:

- Be of good standing and provide assurance of proper business conduct (*Article 14, paragraph 1b, ISA*).
- Reside in Switzerland (*Article 16, paragraph 1, ISO*).
- Have authority for, and be entrusted with, the actual management of the office for all of the Swiss business (*Article 16, paragraph 1, ISO*).
- Possess the knowledge necessary to manage the insurance undertaking (*Article 16, paragraph 2, ISO*).

Before the appointment of the general agent, a curriculum vitae and a power of attorney containing the rights and obligations of

the general agent outlined in Article 17 of the ISO must be filed with FINMA (*Article 18, ISO*).

Consultants, claims adjusters and third party administrators are not subject to specific regulatory requirements to the extent that they do not qualify as an insurance/reinsurance undertaking or an insurance intermediary.

As part of its governance assessment tool, FINMA started at the end of 2015 to periodically conduct corporate governance online surveys with supervised insurance companies. The surveys include questions about company structure, governing bodies and control functions.

10. What are the main exemptions or exclusions from authorisation or licensing?

Insurance/reinsurance providers

Insurance undertakings only engaging in reinsurance activities in Switzerland that are domiciled outside of Switzerland are exempt from supervision under the Federal Insurance Supervision Act (ISA), and from the licensing requirement in Switzerland (see 6.).

Insurance undertakings domiciled abroad which do not have a subsidiary in Switzerland are not subject to supervision if they only engage in Switzerland in the following classes of insurance (*Article 1, paragraph 2, Federal Ordinance on the Supervision of Private Insurance Companies (ISO)*):

- Coverage of insurance risks in connection with maritime transport, air transport and cross-border transportation.
- Coverage for risks located abroad.
- Coverage for war risks.

Insurance undertakings that are subject to a special supervision under Swiss Federal law are also exempt from supervision under the ISA (for example, certain registered social security institutions) (*Article 2, paragraph 2b, ISA*), as are certain insurance co-operatives with a very limited scope of business (*Article 2, paragraph 2d, ISA*). The Swiss Financial Market Supervisory Authority FINMA (FINMA) can also apply a *de minimis* exemption in certain circumstances (*Article 2, paragraph 3, ISA*), though this is rarely used in practice.

Insurance/reinsurance intermediaries

The exemptions (see above, *Insurance/reinsurance providers*) apply in a similar way to insurance intermediaries. Insurance intermediaries representing only the interests of a single insured person or entity (and any companies controlled by that person or entity) are also exempt from supervision (*Article 2, paragraph 2c, ISA*).

Other providers of insurance/reinsurance-related activities

Consultants, claims adjusters and third party administrators are not subject to specific regulatory requirements so long as they do not pursue an insurance/reinsurance business or act as an insurance intermediary and therefore no specific exemptions or exclusions from authorisation or licensing apply.

Restrictions on ownership or control

11. Are there any restrictions on the ownership or control of insurance-related entities?

Insurance/reinsurance providers

The business plan submitted to the Swiss Financial Market Supervisory Authority FINMA (FINMA), with the application for a licence must include information on the persons who, directly or indirectly, either:

- Own at least 10% of the capital or voting rights of the insurance undertaking.
- Are able to significantly influence its business activities in any other way (see Question 9).

FINMA considers this information when assessing licence applications by applying a "fit and proper" test.

Insurance undertakings domiciled in Switzerland intending to acquire a participation which exceeds certain thresholds in another business must notify FINMA. Intended acquisitions or reductions of participations in insurance undertakings domiciled in Switzerland which reach or cross over certain thresholds must be reported to FINMA by the respective buyer(s) and seller(s) (see Question 12).

Insurance/reinsurance intermediaries

There are no specific restrictions on ownership or control.

Other providers of insurance/reinsurance-related activities

There are no specific restrictions on ownership or control for general managing agents, consultants, claims adjusters and third party administrators as they do not qualify as an insurance/reinsurance undertaking.

12. Must owners or controllers be approved by or notified to the relevant authorities before taking, increasing or reducing their control or ownership of the entity?

Insurance/reinsurance providers

The Federal Insurance Supervision Act (ISA) contains certain notification requirements concerning equity participations in or by insurance undertakings (*Article 21, paragraphs 1 to 3, ISA*):

- An insurance undertaking domiciled in Switzerland intending to acquire a participation in another business must notify the Swiss Financial Market Supervisory Authority FINMA (FINMA) if that participation equals or exceeds the thresholds of 10%, 20%, 33% or 50% of the capital or voting rights of the other business.
- A person or entity intending (directly or indirectly) to acquire or reduce a participation in an insurance undertaking domiciled in Switzerland must notify FINMA if the participation equals, exceeds or falls below the thresholds of 10%, 20%, 33% or 50% of the capital or voting rights of the insurance undertaking. A notification must also be filed in the event that the participation in the insurance undertaking no longer qualifies it as a subsidiary.

According to authors in Swiss legal literature, FINMA can be notified of a purchase of participation after signing the purchase agreement but before the closing of the transaction. However, in recent cases, FINMA took the view that the notification should take place ahead of the signing of the purchase agreement,

meaning at the point in time where the actual intent to acquire or reduce a participation is formed.

Following notification, FINMA can prohibit acquisitions or changes to participations, or subject them to conditions, if the nature and scope of the participation could endanger the insurance undertaking or the interests of the insured (*Article 21, paragraph 4, ISA*).

Since FINMA is not subject to any deadline under the ISA concerning the ordering of conditions to an outright prohibition of participations, it can be useful to seek FINMA's consent in advance to eliminate uncertainties.

Further disclosure and takeover obligations exist under the Federal Act on Stock Exchanges and Securities Trading (SESTA), where the securities of an insurance or reinsurance undertaking are listed in whole or in part on a Swiss stock exchange. In addition, further duties and restrictions under the Federal Act on Cartels and other Restraints of Competition (Cartel Act), may apply, depending on the circumstances.

Insurance/reinsurance intermediaries

There are no specific approval or notification requirements.

Other providers of insurance/reinsurance-related activities

There are no specific approval or notification requirements for owners or controllers of general managing agents, consultants, claims adjusters and third party administrators as long as these providers of insurance/reinsurance-related activities do not themselves qualify as an insurance/reinsurance undertaking.

Ongoing requirements for the authorised or licensed entity

13. What are the key ongoing requirements with which the authorised or licensed entity must comply?

Insurance/reinsurance providers

Licensed insurance undertakings must comply with all licence requirements (see Question 9.) but not limited to adequate organisation and solvency on an ongoing basis. Amendments to the following elements of the regulatory business plan of a licensed insurance undertaking must be reported to the Swiss Financial Market Supervisory Authority FINMA (FINMA) for prior approval (*Article 5, paragraph 1, Federal Insurance Supervision Act (ISA)*):

- The articles of incorporation.
- The name of the responsible actuary.
- The intended classes of insurance and the nature of the risks to be insured.
- The premium scale and the general business terms and conditions which will be used in Switzerland for the insurance of all risks in occupational pension plans and supplementary insurance to the mandatory health insurance.

Intended capital increases or reductions require an amendment of the articles of incorporation and must, therefore, be reported to FINMA for prior approval.

Also subject to FINMA's prior approval are any changes to the business plan resulting from a merger, spin-off or reorganisation of an insurance undertaking.

All other amendments to the key elements of the business plan under Article 4, paragraph 2, ISA must be reported to FINMA and are considered approved if FINMA does not initiate a review

of the submission within four weeks after receiving the notification (*Article 5, paragraph 2, ISA*).

Insurance/reinsurance intermediaries

Registered insurance intermediaries must report any changes to the information in the register of intermediaries (for example, change of name or address, represented insurance undertakings or termination of intermediation activities) to FINMA within 14 days of awareness of that change (*Article 189, Federal Ordinance on the Supervision of Private Insurance Companies (ISO)*).

Other providers of insurance/reinsurance-related activities

Before the appointment of a new general agent, a curriculum vitae and a power of attorney containing the rights and obligations of the general agent, outlined in Article 17 of the ISO, must be filed with FINMA.

Consultants, claims adjusters and third party administrators are not required to be registered to the extent that they do not qualify as an insurance/reinsurance undertaking or an insurance intermediary and, therefore, they are not subject to ongoing reporting requirements (*see Question 9*).

Penalties for non-compliance with legal and regulatory requirements

14. What are the possible consequences of an entity failing to comply with applicable legal and regulatory requirements? What recourse do policyholders have if they have done business with a non-approved entity?

Insurance/reinsurance providers

The Swiss Financial Market Supervisory Authority FINMA (FINMA) can revoke the licence of a supervised insurance undertaking if it no longer fulfils the licence requirements or if it seriously violates regulatory provisions (*Article 37, paragraph 1, Federal Act on the Swiss Financial Market Supervisory Authority (FINMASA)*). Furthermore, FINMA can initiate regulatory procedures and apply protective measures or sanctions under Article 29 et seqq of the FINMASA. The protective measures or sanctions can include:

- A reprimand in a declaratory ruling (*Article 32, FINMASA*).
- Specific orders to restore compliance with and preclude further breaches of the law or regulation (*Article 31, FINMASA*). Such orders may include the order to develop and implement a risk management and risk control system suitable to appropriately identify, limit and monitor the legal and reputational risks emanating from certain business activities.
- Publication of the supervisory ruling (*Article 34, FINMASA*).
- Disgorgement of illegally generated profits and avoided costs (*Article 35, FINMASA*). FINMA, in principle, does not have the competence to impose monetary fines. However, the possibility of the disgorgement of illegally generated profits and avoided costs under Article 35 of the FINMASA is a very effective measure.
- Specific orders to limit or terminate certain business activities, up to the revocation of the licence in severe cases (*Article 37, FINMASA*).

An insurance licence can also be fully or partially revoked if an insurance undertaking has ceased its business operations in the corresponding insurance classes for more than six months (*Article 61, ISA*). In that case, the insured are entitled to

withdraw from the insurance contracts with that insurance undertaking (*Article 36, Federal Insurance Contract Act (ICA)*).

The Federal Insurance Supervision Act (ISA) and the FINMASA also provide for the following criminal sanctions that are investigated by prosecutors and sentenced by criminal courts:

- Anyone who wilfully carries out an activity requiring a licence, recognition, or registration under Swiss financial market laws without first obtaining a licence, recognition or registration is liable to a custodial sentence of up to three years or to a monetary penalty (*Article 44, paragraph 1, FINMASA*). Persons acting negligently are liable to a fine of up to CHF250,000 (*Article 44, paragraph 2, FINMASA*).
- Imprisonment of up to three years or a monetary penalty will be imposed on any person that intentionally (*Article 87, ISA*):
 - violates the obligation to submit amendments to the business plan for FINMA's prior approval under Article 5, paragraph 1 of the ISA or who fails to notify FINMA of changes to the business plan under Article 5, paragraph 2 of the ISA;
 - removes or encumbers tied assets with the consequence that the required amount is no longer covered;
 - commits other acts which reduce the value of the tied assets.
- Persons acting negligently in these instances will be punished with a fine of up to CHF250,000 (*Article 87, paragraph 2, ISA*).
- A fine of up to CHF500,000 can be imposed on any person that intentionally (*Article 86, ISA*):
 - violates a notification duty under Article 21 of the ISA (*see 12.*);
 - fails to deliver the annual financial report and the regulatory report within the specified time period;
 - fails to establish the insurance-related reserves required by supervisory law or approved in a specific case.
- Persons acting negligently in these instances are punished with a fine of up to CHF150,000 (*Article 86, paragraph 2, ISA*).

Additional sanctions can apply (for example, with respect to violations of the Swiss Criminal Code (SCC) and the Swiss Anti-Money Laundering Act (AMLA)).

Insurance/reinsurance intermediaries

Insurance intermediaries that intentionally conclude or broker insurance contracts on behalf of an insurance undertaking that is not licensed to conduct insurance activities in Switzerland are liable to imprisonment of up to three years or a monetary penalty. In cases of negligence, a fine of up to CHF250,000 can be imposed (*Article 87, paragraphs 1a and 2, ISA*).

Insurance intermediaries violating a disclosure obligation towards the insured under Article 45 of the ISA (*see Question 9*), are liable to a fine of:

- Up to CHF500,000 in cases of wrongful intent.
- Up to CHF150,000 in cases of negligence (*Article 86, paragraphs 1e and 2, ISA*).

Finally, the sanctioning provisions of FINMASA and other Swiss laws as outlined above can also apply to insurance intermediaries (*see above, Insurance/reinsurance providers*).

Other providers of insurance/reinsurance-related activities

FINMA can adopt protective measures to safeguard the interests of the insured where an insurance undertaking or an insurance intermediary does not comply with:

- The provisions of the ISA.
- An implementing ordinance or an order of FINMA.
- Or if it appears that the interests of the insured are otherwise endangered (*Article 51, paragraph 1, ISA*).

In this context, FINMA can demand the dismissal of the general agent and prohibit it from engaging in any further insurance activities for a maximum of five years (*Article 51, paragraph 2, ISA*).

In addition other providers of insurance/reinsurance-related activities such as general agents, consultants, claims adjusters and third party administrators are subject to the general criminal sanctions under, for example, the Swiss Criminal Code (SCC).

Restrictions on persons to whom services can be marketed or sold

15. Are there any restrictions on the persons to whom insurance/reinsurance services and contracts can be marketed or sold?

There are no specific restrictions on the persons to whom insurance or reinsurance contracts can be marketed or sold. However, life insurance is null and void if the person whose life is covered in that insurance does not consent to the insurance, in writing, before the insurance contract is concluded (*Article 74, paragraph 1, Federal Insurance Contract Act (ICA)*).

With regard to potential customers who are not domiciled or resident in Switzerland, applicable international treaties as well as local laws and regulation must be considered. Switzerland has entered into a treaty with the Principality of Liechtenstein enabling insurers domiciled in either country to provide services on the territory of the other country under a uniform licence.

REINSURANCE MONITORING AND DISCLOSURE REQUIREMENTS

16. To what extent can/must a reinsurance company monitor the claims, settlements and underwriting of the cedant company?

There are no specific statutory law monitoring requirements. However, the reinsurance contract between the insurer and the reinsurer can contain relevant provisions.

17. What disclosure/notification obligations does the cedant company have to the reinsurance company?

There are no specific statutory law disclosure or notification requirements. However, the reinsurance contract between the insurer and the reinsurer can contain relevant provisions.

INSURANCE AND REINSURANCE POLICIES

Content requirements and commonly found clauses

18. What are the main general form and content requirements for insurance policies? What are the most commonly found clauses?

Form and content requirements

The validity of the insurance contract is not subject to compliance with any particular form, though the application for an insurance policy and acceptance by the insurer are customarily produced in writing. However, the insurer must:

- Issue a policy to the insured stating the rights and duties of the parties (*Article 11, Federal Insurance Contract Act (ICA)*).
- Inform the insured about the identity of the insurer and the main content of the insurance contract prior to the conclusion of the contract (subject to the insured's right to terminate if that duty to inform is not complied with by the insurer (*Article 3a, ICA*)).

Article 3 of the ICA lists the key elements of the contract that must be explained to the insured:

- The insured risks.
- The scope of insurance coverage.
- The premiums due and any other duty of the policyholder.
- The duration and methods of terminating the contract.
- The methods, principles and bases for calculating and distributing the surplus profits.
- The surrender and transformation values.
- The handling of personal data, including purpose and type of data collections as well as data recipients and data storage.

On the insured's request and against reimbursement, the insurer must provide the insured with a copy or transcript of the statements made by the insured in the application for the insurance contract or delivered in any other form, which were determining for the conclusion of the insurance contract (*Article 11, paragraph 2, ICA*).

Commonly found clauses

See above, *Form and content requirements*. Most insurers use their own general insurance terms and conditions as a basis for their insurance contracts. For certain types of insurance, standard terms have been published by the Swiss Insurance Association, which may give some general guidance on what terms and conditions one can expect in such types of policies (*see 22*).

19. Is facultative or treaty reinsurance more common? What are the most commonly found clauses in reinsurance policies?

Facultative/treaty reinsurance

Both facultative and treaty insurance are common in the Swiss market.

Commonly found clauses

Reinsurance contracts often contain "access to records" or "right to audit" clauses as well as "follow the fortunes" or "follow the

settlements" clauses. Various forms of claims control clauses are often found in facultative reinsurance.

Implied terms

20. Are there any terms that are implied by law or regulation (even if not included in the insurance or reinsurance contract)?

Certain provisions of the Federal Insurance Contract Act (ICA) cannot be contractually modified, including (*Article 97, ICA*):

- Rules and restrictions regarding the premium payment obligation upon premature cancellation of the insurance contract.
- Place of performance.
- The due date of insurance claims.
- Tacit renewal of insurance contracts.
- Rules relating to overinsurance or double insurance.
- Rules concerning replacement value.
- Rules concerning the assessment of damage.
- Assignment and pledge of personal insurance claims.
- Rules relating to insurance policies on the life of another person.

Other provisions contained in the ICA cannot be modified to the disadvantage of the policyholder or the insured (*Article 98, ICA*):

- Rules and restrictions regarding the application for insurance.
- The insurer's duty of information to the insured and the insured's right to cancel the contract of insurance.
- Consequences of default in the payment of premiums.
- Place of payment.
- Aggravation of risks with or without the policyholder's involvement.
- The insurer's liability for his intermediaries.
- Rules relating to justifying the insurance claim.
- Rules concerning partial damage.
- Rules concerning the statute of limitations.
- A statutory pledge of the injured third party in the area of indemnity insurance.
- The insurer's right of recourse.
- The policyholder's right of withdrawal in the area of life insurance.
- Rules relating to the conversion and surrender of life insurances.

On a more general level, Article 2, paragraph 1 of the Swiss Civil Code (CC) states that every person must act in good faith in the exercise of its rights and in the performance of its obligations.

Customer protections

21. How do customer protections in the general law affect insurance contracts? What customer protections are

generally included in insurance policies to supplement this?

General law

The use of general insurance terms and conditions (GTC) to govern the relationship between insurances and consumers is subject to regulation by Article 8 of the Swiss Act against Unfair Competition (AUC). Under this provision, the use of GTC that, to the detriment of consumers and contrary to the requirement of good faith, provide for a significant and unjustified imbalance between contractual rights and contractual obligations is prohibited. However, this provision only protects consumers and, therefore, is not applicable towards persons using insurance services that are related to their commercial or professional activities.

Insurance policies

There are no specific supplemental customer protections which are generally included in insurance contracts by insurers in Switzerland. Individual contracts may contain certain customer-friendly terms, such as a right of withdrawal from the contract within a defined time span.

Standard policies or terms

22. What are the main standard policies or terms produced by trade associations or relevant authorities?

The Swiss Insurance Association publishes standard terms (in German and French), for different types of indemnity insurance contracts (third-party liability insurance, property insurance, technical insurance and transport insurance), on its website (www.svv.ch/de/politik-und-recht/musterbedingungen/allgemeine-versicherungsbedingungen).

INSURANCE AND REINSURANCE POLICY CLAIMS

Establishing an insurance claim

23. What must be established to trigger a claim under an insurance policy?

The triggering events are usually defined in the insurance contract. Upon the occurrence of the insured event, the insured must notify the insurer as soon as he knows about the event and his insurance claims (*Article 38, paragraph 1, Federal Insurance Contract Act (ICA)*). If he violates that duty by fault, the insurer is entitled to reduce the indemnification by the amount by which the indemnification would have been reduced in case of a notice on time (*Article 38, paragraph 2, ICA*).

Third party insurance claims

24. What are the circumstances in which third parties can claim under an insurance policy?

If such a right has not been included in the insurance contract, it only exists where it is explicitly provided for in the law. An aggrieved third party usually has a direct claim against the insurer in the areas of mandatory liability insurance, such as:

- Motor liability insurance (*Article 65, paragraph 1, Federal Road Traffic Act (RTA)*).
- Mandatory liability insurance for, for example:

- airplanes;
- ships;
- fuel and gas pipes;
- dams;
- power plants.

In these cases, not only is there a direct claim provided, but this direct claim is also combined with the exclusion of the insurer's right to raise objections against the third party's direct claim on the basis of the Federal Insurance Contract Act (ICA) or the insurance contract (the insurer will have to take recourse against the policyholder or the insured).

If there is no explicit rule providing for a third party claim, the third party still has a lien on the claim of the insured person against his liability insurer. The insurer has the right (but not the obligation) to compensate the affected third party directly, without the consent of the insured (*Article 60, paragraph 1, ICA*).

A third party can also benefit from insurance cover where the insurance contract itself contains a provision to that effect.

Time limits

25. Is there a time limit outside of which the insured/reinsured is barred from making a claim?

Claims based on an insurance contract are, in principle, subject to a statute of limitations of two years from the date of the triggering event which raises the obligation to provide indemnification. This statute of limitations cannot be contractually shortened (*Article 46, Federal Insurance Contract Act (ICA)*).

As reinsurance contracts are not subject to the ICA, the provisions of the Code of Obligations (CO) apply. As a result, the statute of limitations for claims based on reinsurance contracts is ten years from the day on which the claim becomes due (*Article 127, CO*). This limitation period cannot be contractually altered (*Article 129, CO*).

The time limits above do not extinguish the claim, but, when invoked by the defendant, render the claim unenforceable.

Enforcement

26. Can the original policyholder or other third party enforce the reinsurance contract against a reinsurer?

There are no specific rules relating to reinsurance contracts. A policyholder can make a direct claim against a reinsurer to the extent that the reinsurance policy provides for that event (cut-through clause).

Remedies

27. What remedies are available for breach of an insurance policy?

Insurer

If the insured is in breach of one of his obligations under the insurance contract or under the Federal Insurance Contract Act (ICA), the insurer is entitled to reduce the indemnification (for example, if the insured causes the insured event in a grossly negligent way) or reject liability outright (for example, if the insured causes the insured event intentionally) (*Article 14, ICA*).

In certain circumstances, the insurer can terminate the contract by written notice (for example, if the insured omits to notify, or incorrectly notifies, the insurer of a significant risk factor (*Article 6, ICA*)).

Insured

The insured can terminate the insurance contract by written notice if the insurer does not perform its duty to inform the insured of the identity of the insurer and the material content of the insurance contract (see *Question 18*), prior to the conclusion of the contract (*Article 3a, ICA*). This termination right expires four weeks after the insured has become aware of the breach of duty by the insurer, and in any case one year after the breach of duty (*Article 3a, paragraph 2, ICA*).

Punitive damage claims

28. Are punitive damages insurable? Can punitive damages be reinsured if they are covered by an underlying policy?

Punitive damages are not available under Swiss law. Further, a Swiss court, in principle, cannot award or enforce an award of punitive damages even if the applicable foreign substantive law provides for those damages (*Article 135, paragraph 2, Swiss Private International Law Act (SPILA)*). As a result, the insurability of punitive damages has found very little attention in Swiss legal literature.

INSOLVENCY OF INSURANCE AND REINSURANCE PROVIDERS

29. What is the regulatory framework for dealing with distressed or insolvent insurance or reinsurance companies, or other persons or entities providing insurance or reinsurance related services? What regulatory and/or other protections exist for policyholders if the insurance company is insolvent?

In the case of the insolvency of insurance and reinsurance undertakings, the provisions of the Swiss Federal Statute on Debt Enforcement and Bankruptcy (DEBA) are applicable to the extent that the more specific provisions of the Federal Insurance Supervision Act (ISA) (*Article 51 et seqq, ISA*), do not provide otherwise (*Article 54, paragraph 2, ISA*). As from 1 January 2013, the provisions of the ISA are supplemented by the FINMA-Ordinance on Insurance Bankruptcy (IBO-FINMA).

The Swiss Financial Market Supervisory Authority FINMA (FINMA) can adopt protective measures to safeguard the interests of the insured where an insurance undertaking or an insurance intermediary does not comply with the provisions of the ISA, an implementing ordinance or an order of FINMA, or if it appears that the interests of the insured are otherwise endangered (*Article 51, paragraph 1, ISA*).

In particular, FINMA can (*Article 51, paragraph 2, ISA*):

- Prohibit the unrestricted disposition of the insurance undertaking's assets.
- Order the deposit or blocking of assets.
- Assign, in whole or in part, the responsibilities and authorities of the officers and directors of an insurance undertaking to a third person.
- Assign the portfolio of insurance policies and the related tied assets to another insurance undertaking (with the consent of that insurance undertaking).

- Order the liquidation of the tied assets.
- Demand the dismissal of the persons entrusted with the ultimate management, supervision, control or conduct of the business, or the general agent, as well as the responsible actuary, and prohibit them from engaging in any further insurance activities for a maximum of five years.
- Remove an insurance intermediary from the register.
- Assign assets to the tied assets that are required by Article 18 of the ISA.
- Order the extension of the terms of payment and the adjournment of due dates in cases of financial distress.

If FINMA revokes an insurance undertaking's licence, it becomes subject to liquidation. FINMA appoints and oversees the liquidator (*Article 52, ISA*).

Where there is good cause to suspect that an insurance undertaking is overindebted or has liquidity problems and where recapitalisation is not possible, FINMA will revoke the licence and initiate bankruptcy proceedings (which are then published) (*Article 53, paragraph 1, ISA*).

Insurance claims that can be recognised from the insurance undertaking's records are deemed to have been submitted in the bankruptcy proceedings. The claims where security was provided in the form of tied assets will be the first to be covered by the proceeds of the tied assets. Any remaining proceeds become part of the bankruptcy estate (*Article 54a, ISA and Article 26, IBO-FINMA*). In some cases, transferring insurance portfolios under Article 62 of the ISA before a liquidation can be a way of protecting the interests of the insured.

Additional provisions apply to the insolvency of life insurance undertakings (*Article 55 et seq, ISA*).

30. Can excess insurance policies "drop down" to provide coverage if the primary insurer goes into insolvency?

Swiss statutory law does not provide for any "drop down" of insurance coverage of an excess insurer in the case of the insolvency of an insurer belonging to an underlying layer of coverage. However, an excess insurer and the insured can contractually agree to a "drop down".

31. Is a right to set-off mutual debts and credits recognised in an insolvency proceeding involving an insurer or reinsurer?

A creditor can set off mutual debts (*Article 213, paragraph 1, Federal Statute on Debt Enforcement and Bankruptcy (DEBA)*). However, in certain circumstances a set-off is not permitted (for example, where a creditor of the bankrupt did not become debtor of the bankrupt or the bankrupt estate until after the opening of bankruptcy proceedings).

From an insurance law perspective, it must be noted that an insurer cannot set-off its liabilities against claims which are counted towards the tied assets (*Article 84, paragraph 2, Federal Ordinance on the Supervision of Private Insurance Companies (ISO)*), since the tied assets serve as security for the claims of the insured under the insurance contracts (there are specific rules concerning the use of proceeds from tied assets in insurance bankruptcy proceedings) (*Article 54a, Federal Insurance Supervision Act (ISA)*). Consequently, the insurer must ensure that its counterparties cannot declare set-off against liabilities if the insurer's claim against the counterparties

forms part of the tied assets (for example, by contractually excluding set-off in these circumstances).

TAXATION OF INSURANCE AND REINSURANCE PROVIDERS

32. What is the tax treatment for insurers, reinsurers, and other persons or entities providing insurance and reinsurance-related services?

Under the Federal Stamp Tax Act, stamp taxes are levied on the payment of insurance premiums. However, several types of insurance are exempt from this tax (for example, stamp taxes are not levied on reinsurance (*Article 22, Federal Stamp Tax Act (STA)*)).

Insurance and reinsurance turnovers are exempt from Swiss VAT without the possibility to reclaim input VAT (input VAT refers to the VAT on purchases of goods and services used to carry on the business, which can usually be reclaimed if taxable turnovers are made).

Generally, the ordinary Swiss tax regime applies to insurance and reinsurance providers. Consequently, insurance undertakings are subject to:

- Corporate income tax, which is assessed based on the income according to the statutory profit and loss statement in accordance with the provisions of the CO.
- Corporate capital tax, which is assessed based on the equity according to the statutory balance sheet in accordance with the provisions of the CO and any deemed equity.

Foreign insurance and reinsurance undertakings with activities in Switzerland can apply for preferential tax regimes. In Switzerland, losses can be carried forward seven years for tax purposes. The applicable tax rates depend on the canton and municipality where the insurance or reinsurance undertaking is domiciled.

INSURANCE AND REINSURANCE DISPUTE RESOLUTION

33. Are there special procedures or venues for dealing with insurance or reinsurance complaints or disputes?

Private law disputes between insurance undertakings or between insurance undertakings and the insured are, in principle, subject to the jurisdiction of the civil courts (*Article 85, paragraph 1, Federal Insurance Supervision Act (ISA)*). The regular courts can hear disputes arising out of insurance contracts. However, some cantons have established a specialised commercial court, which is the appropriate venue for commercial disputes and disputes relating to the law of commercial companies and co-operatives (*Article 6, Swiss Code of Civil Procedure (CCP)*). In general, the commercial court decides on disputes where both parties are registered in the Swiss Commercial Registry or in an equivalent foreign registry. However, under certain conditions, the commercial court can be chosen by a non-registered claimant (*Article 6, CCP*).

Furthermore, the parties can agree on an arbitration clause (see *Question 34*).

34. Are arbitration clauses in insurance and reinsurance agreements enforceable?

Arbitration clauses in insurance and reinsurance agreements are, in principle, enforceable, as any monetary claims can be submitted to arbitration proceedings, both in disputes with or without an international element (*Article 177, paragraph 1, Swiss Private International Law Act (SPILA) and Article 354, Swiss Code of Civil Procedure (CCP)*). Arbitration clauses must be put in writing or agreed by a means of communication which permits them to be evidenced by text (*Article 178, paragraph 1, SPILA and Article 358, CCP*).

35. Are choice of forum, venue and applicable law clauses in an insurance or reinsurance contract recognised and enforced?

Choice of forum

In disputes without an international element, choice of forum clauses are, in principle, admissible under the Swiss Code of Civil Procedure (CCP) rules. However, where an insurance contract qualifies as a consumer contract under Article 32 of the CCP, a choice of forum can only be made in an agreement which is entered into after the dispute has arisen (*Article 35, paragraph 1a, CCP*). An insurance contract may qualify as a consumer contract if the insurance relates to services or goods for usual consumption (for example, an insurance for household contents or private liability insurance).

If a dispute with an international element falls within the scope of the Lugano Convention, the relevant jurisdiction in insurance matters is determined by the provisions set out in Articles 8 to 14 of the Lugano Convention. A choice of forum can only be made in an agreement which is (*Article 13, Lugano Convention*):

- Entered into after the dispute has arisen.
- Structured to allow the policyholder, the insured or a beneficiary to bring proceedings in courts other than those indicated in Articles 8 to 14 of the Lugano Convention.
- Concluded between a policyholder and an insurer, both of whom, at the time the contract is concluded, are domiciled or habitually resident in the same contracting state, and which has the effect of conferring jurisdiction on the courts of that state even if the harmful event were to occur abroad (provided that such an agreement is not contrary to the law of that state).
- Concluded with a policyholder who is not domiciled in a contracting state, except insofar as the insurance is compulsory or relates to immovable property in a contracting state.
- Related to a contract of insurance insofar as it covers one or more of the risks set out in Article 14 of the Lugano Convention (for example, any loss of or damage to seagoing ships, installations situated offshore or on the high seas or aircraft arising from perils which relate to their use for commercial purposes).

These provisions do not apply to reinsurance matters.

If a dispute with an international element falls outside of the scope of the Lugano Convention, the provisions of the Swiss Private International Law Act (SPILA), apply. In principle, the relevant jurisdiction is determined based on the rules regarding contracts (*Articles 112 and 113, SPILA*). Under these rules, choice of forum clauses are admissible in principle. However, if

the insurance contract qualifies as a consumer contract under Article 120 of the SPILA, the consumer cannot waive jurisdiction at its domicile or usual place of residence in advance (*Article 114, paragraph 2, SPILA*).

Choice of applicable law

Swiss courts apply the SPILA with respect to the choice of applicable law in an international dispute. In principle, choice of applicable law clauses are permissible (*Article 116, SPILA*). The choice of law must be explicit or clearly evident from the contract or the circumstances. Furthermore, the choice of law can be made or modified at any time. However, where an insurance contract qualifies as a consumer contract, a choice of applicable law clause is not admissible (*Article 120, paragraph 2, SPILA*).

Further to the provisions of the SPILA, Articles 101b and 101c of the Federal Insurance Contract Act (ICA) state specific conflict of laws rules with regard to direct insurance. However, the scope of application of these rules is very limited, as they only apply to insurance contracts covering risks situated in a state which has entered into an international treaty with Switzerland regarding the recognition of regulatory requirements and measures ensuring that equivalent rules apply in that contracting state when compared to Switzerland (*Article 101a, ICA*). Such an international treaty currently exists between Switzerland and the Principality of Liechtenstein.

REFORM

36. What proposals are there for reform of the law, regulation or rules relating to the provision of insurance or reinsurance services?

In a response to market trends and legal developments, the following reforms are planned or have been recently enacted:

- On 1 January 2017, the Swiss Financial Market Supervisory Authority FINMA (FINMA) enacted a number of fully revised circulars in the area of insurance to reduce the volume of regulation (this is the second revision package following an initial set of amended circulars in connection with the revision of the Federal Ordinance on the Supervision of Private Insurance Companies (ISO) in 2015). The main changes are as follows:
 - The new FINMA-Circular 2017/5 "Business Plans - Insurers" consolidates and harmonises the rules on the regulatory business plans of insurers, which had previously been distributed among a number of different documents.
 - The revised FINMA-Circular 2017/2 "Corporate Governance -Insurers" defines corporate governance principles for the organisation, management and control of insurance companies. It includes provisions on the composition and organisation of the board of directors, the required number of board members and their independence. It also incorporates the provisions previously set out in the circular "Internal Audit -Insurers" which has been revoked.
 - The restructured and simplified FINMA-Circular 2017/3 "Swiss Solvency Test" (SST) further specifies the provisions of the ISO relating to the SST and codifies the current practice of the regulator.
 - The revised FINMA-Circular 2017/4 "Responsible Actuary" now requires that a deputy for the responsible actuary is appointed.
- FINMA is in the process of revising its outsourcing regulations, harmonising the requirements for banks,

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- securities dealers and insurance undertakings where possible. The consultation period for the new FINMA-Circular 2017/xx "Outsourcing – Banks and Insurers" ended on 31 January 2017 and the new regulations can be expected to enter into force in the course of the year.
- In September 2016, the Federal Council instructed the Swiss Federal Department of Finance to draft a legislative proposal for the amendment of the Federal Insurance Supervision Act (ISA) with regard to client protection based supervision and to establish restructuring rules for insurance undertakings.
 - The Swiss Parliament rejected the proposed total revision of the Federal Insurance Contract Act (ICA) in March 2013, instructing the Federal Council to draft a new proposal for a partial revision of the ICA. The consultation process of an initial draft of the partially revised ICA took place between 6 July 2016 and 27 October 2016. The partial revision addresses the following topics, amongst others:
 - introduction of an appropriate right of revocation;
 - rules regarding interim cover;
 - admission of retroactive cover;
 - elimination of deemed approval rules adversely affecting consumers;
 - extension of the statute of limitations; and
 - introduction of an ordinary right of termination.
 - The Federal Council is expected to issue a dispatch on the partial revision of the ICA to Parliament in June 2017. The revised legislation could enter into force by 2019.
 - On 1 January 2016, a new Social Health Insurance Supervisory Act (SHISA) entered into force. The SHISA replaces the former provisions on supervision in the HIA but continues to rely on a dual system of supervision in the health insurance market:
 - health insurance companies are supervised by the Federal Office of Public Health; and
 - private insurance companies are (for offering supplemental health insurance) supervised by FINMA.
 - The SHISA contains additional solvency requirements for health insurance companies. New competences and instruments will strengthen the supervisory bodies.
 - The new Financial Market Infrastructure Act (FMIA) entered into force on 1 January 2016 and introduces certain new rules in respect of OTC derivative transactions, including:
 - clearing duty of important transactions with a central counterparty;
 - reporting duty to a central transactions register;
 - risk mitigation duties; and
 - the option to introduce a duty to trade on an accredited platform.
 - Insurance undertakings are qualified as "financial counterparties" under FMIA and are on this basis affected by the new rules. Relief regarding some of the new duties may be available for small financial counterparties subject to certain thresholds.
 - The draft bill for the new Financial Services Act (FinSA) originally included a number of provisions that referred to insurers and insurance intermediaries. However, in the parliamentary debate on the legislative proposal, it was decided to exclude insurance matters from the scope of the FinSA and address these at a later stage in the course of the contemplated revision of the ISA regarding bankruptcy/restructuring of insurers.
 - Currently, the Swiss legislature is in the process of amending large parts of the CO. In this context, it has been discussed to facilitate the enforcement of claims in connection with long term health damages or death (for example, asbestos) by extending the absolute statute of limitations from 10 to 30 years. This extension of the absolute statute of limitations may also affect insurance undertakings.
 - In a recent decision of the cantonal court of Basel-Stadt, the court decided that broker commissions paid by an insurance undertaking to an insurance intermediary must be passed on by the insurance intermediary to the client unless it has obtained an informed waiver by the client. Such waiver requires, in particular, transparent disclosure on the calculation parameters of the expected broker commissions. The court based its decision on the case law of the Swiss Federal Supreme Court regarding retrocessions received by asset managers and banks in the context of asset management and asset advisory services. The appeal court of the canton of Basel-Stadt subsequently decided that this case law does not apply on broker commissions paid by an insurance undertaking to an insurance intermediary. In the end, the Swiss Federal Supreme Court had to rule on the matter. However, in its decision it did not comment on the obligation of insurance intermediaries to pass broker commissions to the client. Thus, uncertainty regarding the question whether broker commissions paid by an insurance undertaking to an insurance intermediary must, in principle, be passed on to the client remains and potential future developments in this regard might need to be considered.

MAIN INSURANCE/REINSURANCE TRADE ORGANISATIONS

Swiss Insurance Association (*Schweizerischer Versicherungsverband*) (SVV)

Main activities. The SVV, a private Swiss association, is an umbrella organisation representing the private insurance industry. Members are small and large, national and international, primary insurers and reinsurers.

W www.svv.ch

Swiss Association of Insurance Inspectors and Agents (*Schweizerischer Verband der Versicherungs-Inspektoren und Agenten*) (SVVIA)

Main activities. SVVIA is a private association representing persons working in the insurance field service.

W www.svvia.ch

Swiss Association of certified Insurance Specialists (*Schweizerische Vereinigung der diplomierten Versicherungsfachleute*) (ASDA)

Main activities. ASDA is a private association representing insurance specialists at all levels of private, health and social insurance.

W www.asda.ch

Swiss Insurance Brokers Association (*Verband Schweizerischer Versicherungsbroker*) (SIBA)

Main activities. SIBA is a private association representing insurance brokers in Switzerland.

W www.siba.ch

Swiss Association of Insurance General Agents (*Schweizerischer Verband der Versicherungs-Generalagenten*) (SVVG)

Main activities. SVVG is a private association representing general agents of insurance undertakings in Switzerland.

W www.svvg-fsaga.ch

Ombudsman of Private Insurance and of SUVA (*Ombudsman der Privatversicherung und der SUVA*)

Main activities. The Swiss Ombudsman of Insurance is a foundation established by the Swiss Insurance Association in 1972. Its main functions are to mediate complaints, disputes and claims in connection with or arising out of private insurance contracts and to provide guidance and advice to insurance customers. It aims to facilitate the settlement of claims and the resolution of disputes.

W www.ombudsman-assurance.ch

ONLINE RESOURCES

Swiss federal legislation

W www.admin.ch/bundesrecht/

Description. Homepage of the Swiss Federation containing the systematic collection of federal acts and ordinances as well as international treaties. The homepage is available in German, French and Italian and a reduced version in Romansh. Selected acts and ordinances are available in English.

Practical Law Contributor profiles



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Professional qualifications. Switzerland (Zurich bar), 2002; US (New York Bar), 2005 (not practising)

Areas of practice. Insurance; banking; financing; capital markets; M&A transactions.

Recent activities

- A partner at Bär & Karrer, Peter Hsu is a member of the Banking, Insurance & Financing practice group and head of the sub-group Banking & Insurance. He concentrates on advising Swiss and foreign insurance and reinsurance companies, groups, conglomerates and insurance intermediaries as well as banks, securities dealers and other financial institutions with regards to regulatory and contract law matters.
- Regularly advising clients on M&A transactions, including private and public transactions (as well as mergers, spin-offs and portfolio transfers) in the financial sector as well as in other industry sectors.
- Advising insurance undertakings on capital and solvency requirements as well as on investment restrictions for tied assets.
- Advising Swiss insurance intermediaries.
- Filing licence applications and registrations with FINMA and obtaining FINMA rulings as well as drafting and negotiation of contractual documentation.
- The Legal 500 2014 refers to Peter Hsu as "a key individual within the banking and insurance sector". He is ranked as a leading individual in the practice area Insurance & Reinsurance (Who's Who Legal). Peter Hsu is "the 'go-to guy' for clients in need of insurance and reinsurance regulatory advice" (Who's Who Legal 2013) and a "key player in the Swiss insurance and reinsurance regulatory field" (2014).

Publications. Peter Hsu has published books and articles on topics in banking, insurance and capital markets and is regularly invited to speak on these topics.

Professional qualifications. Switzerland (Zurich Bar), 2011

Areas of practice. Insurance; banking; financing; M&A transactions.

Recent activities

- A senior associate with Bär & Karrer, Daniel Flühmann is a member of the Banking, Insurance & Financing practice group. His practice focuses on banking, insurance and financial market laws as well as on general corporate and commercial matters and related areas.
- Advising Swiss and foreign insurance and reinsurance companies, groups, conglomerates and insurance intermediaries in legal and regulatory matters and in the context of enforcement proceedings.
- Advising purchasers and sellers in M&A transactions, in particular in the financial and insurance sector.
- Filing licence applications and registrations with FINMA and obtaining FINMA rulings.
- Drafting and negotiation of contractual documentation.