

William D Torchiana, Mark F Rosenberg and Marion Leydier

GETTING THE
DEAL THROUGH 

Insurance & Reinsurance 2016

Contributing editors

William D Torchiana, Mark F Rosenberg and Marion Leydier
Sullivan & Cromwell LLP

Publisher
Gideon Roberton
gideon.roberton@lbresearch.com

Subscriptions
Sophie Pallier
subscriptions@gettingthedealthrough.com

Senior business development managers
Alan Lee
alan.lee@gettingthedealthrough.com

Adam Sargent
adam.sargent@gettingthedealthrough.com

Dan White
dan.white@gettingthedealthrough.com



Published by
Law Business Research Ltd
87 Lancaster Road
London, W11 1QQ, UK
Tel: +44 20 3708 4199
Fax: +44 20 7229 6910

© Law Business Research Ltd 2016
No photocopying without a CLA licence.
First published 2008
Ninth edition
ISSN 1757-7195

The information provided in this publication is general and may not apply in a specific situation. Legal advice should always be sought before taking any legal action based on the information provided. This information is not intended to create, nor does receipt of it constitute, a lawyer-client relationship. The publishers and authors accept no responsibility for any acts or omissions contained herein. Although the information provided is accurate as of June 2016, be advised that this is a developing area.

Printed and distributed by
Encompass Print Solutions
Tel: 0844 2480 112



CONTENTS

Introduction	5	Japan	90
William D Torchiana, Mark F Rosenberg and Marion Leydier Sullivan & Cromwell LLP		Keitaro Oshimo Nagashima Ohno & Tsunematsu	
Austria	9	Korea	96
Philipp Scheuba BLS Rechtsanwälte Boller Langhammer Schubert GmbH		Myung Soo Lee, Young Ho Kang and Hyun Suk Jung Yoon & Yang LLC	
Bermuda	16	Luxembourg	105
Nick Miles, Mark Chudleigh and Alex Potts Sedgwick Chudleigh Ltd		Chantal Keereman and Armel Waisse Bonn & Schmitt	
Brazil	22	Mexico	114
Paulo Luiz de Toledo Piza, Wolf Ejzenberg and Jessica Anne de Almeida Bastos Ernesto Tzirulnik Advocacia		Yves Hayaux-du-Tilly Laborde Nader, Hayaux & Goebel	
Canada	29	Nigeria	121
John L Walker, Sean G Sorensen, Margaret S Pak and Alana V Scotchmer Walker Sorensen LLP		Funke Agbor and Olugbenga Bello Adepetun Caxton-Martins Agbor & Segun	
Chile	36	Norway	127
Ricardo Rozas and Max Morgan Jorquiera & Rozas Abogados		Atle-Erling Lunder, Hege Dahl and Sven Iver Steen Arntzen de Besche Advokatfirma AS	
Germany	43	Russia	134
Peter Etzbach and Christoph Niemeyer Oppenhoff & Partner		Anna Arkhipova and Elena Popova Sokolov, Maslov & Partners Law Firm	
Greece	51	Spain	140
Takis Kakouris and Anastasia Makri Zepos & Yannopoulos		Javier Portales and Alfonso de Ochoa Albors Galiano Portales	
India	58	Switzerland	147
Neeraj Tuli and Celia Jenkins Tuli & Co		Lukas Morscher and Nicolas Jacquemart Lenz & Staehelin	
Indonesia	67	Turkey	155
Abadi Abi Tisnadisastra, Prihandana Suko Prasetyo Adi and Yosef Broztito Arfidea Kadri Sahetapy-Engel Tisnadisastra (AKSET)		Çağlar Coşkunsu and Burak Çavuş Çavuş & Coşkunsu Law Firm	
Israel	74	United Arab Emirates	162
Rachel Levitan and Yael Navon Levitan Sharon & Co Advocates & Notaries		Peter Ellingham and Simon Isgar Kennedys Dubai LLP	
Italy	82	United Kingdom	169
Alessandro P Giorgetti Studio Legale Giorgetti		Jeremy Hill and Edite Ligere Debevoise & Plimpton LLP	
		United States	177
		William D Torchiana, Mark F Rosenberg and Marion Leydier Sullivan & Cromwell LLP	

Austria

Philipp Scheuba

BLS Rechtsanwälte Boller Langhammer Schubert GmbH

Regulation

1 Regulatory agencies

Identify the regulatory agencies responsible for regulating insurance and reinsurance companies.

The Austrian Financial Market Authority (FMA) is the authority responsible for, inter alia, the supervision of the insurance and reinsurance market. The FMA is an autonomous and independent institution under public law and is supervised by the Federal Ministry of Finance.

Within the FMA, the Department of Insurance and Pension Fund Companies Supervision is the responsible body. The activities of the FMA in respect of the insurance market include, in particular, the ongoing supervision of all business activities of insurance companies and pensions funds companies, including on-site inspections, proposals for the continued development of legislation regarding the insurance business, as well as licensing issues and legal supervision.

2 Formation and licensing

What are the requirements for formation and licensing of new insurance and reinsurance companies?

Apart from explicit statutory exceptions, only companies that have been granted a licence by the FMA may conduct contractual insurance business in Austria. The requirements for the formation and licensing of insurance and reinsurance companies are set out in the Insurance Supervision Act (VAG).

Pursuant to article 8, VAG a company may only conduct contractual insurance business provided the company's legal form is one of the following: a joint stock company, a European company, a mutual association, or an equivalent and respectively comparable foreign company.

The administrative headquarters of the company must be located in Austria.

The requirements for obtaining the licence further include:

- professional qualifications of the directors and officers pursuant to article 120 et seq, VAG (see question 4);
- insurance and reinsurance undertakings shall hold eligible basic own funds, to cover the Minimum Capital Requirement pursuant to article 193; and
- the submission of a business plan (see further details below).

The business plan to be submitted with the application must contain the following information and documents:

- the type of risk the company intends to cover, and also, in the case of a reinsurance business, the type of reinsurance contracts the company intends to conclude with the primary insurers;
- the main features of the reinsurance policy;
- the composition of the equity capital;
- estimates relating to the expenses of installing the administrative services and the operation of the company, and proof that the necessary funds are available;
- estimates of the commission expenses and the operating expenditures (for the first three years of operation);
- estimates relating to the premium income and insurance payments (for the first three years of operation);
- budgeted balance sheets and profit and loss statements (for the first three years of operation);

- estimates of the financial resources intended to cover liabilities and equity capital requirements (for the first three years of operation); and
- the articles of association.

Additional documented information must be submitted when a foreign insurance company applies for a licence (articles 16 to 19, VAG).

3 Other licences, authorisations and qualifications

What licences, authorisations or qualifications are required for insurance and reinsurance companies to conduct business?

Other than the licence from the FMA, no other licences are required from companies to conduct contractual insurance business in Austria. However, it should be noted that, as a general rule, separate licences have to be obtained for each insurance line (the VAG distinguishes 23 lines of insurance). Nevertheless, annex B to the VAG provides for exceptions allowing companies to apply for shared licences valid for multiple insurance lines.

4 Officers and directors

What are the minimum qualification requirements for officers and directors of insurance and reinsurance companies?

In general, the VAG provides that the professional qualification, knowledge and experience of members of the board of directors or of the management board, or the managing directors, must be adequate to enable sound and prudent management. Furthermore, they have to be of good repute and integrity. The personal reliability is deemed not to be met if a person has been convicted of certain criminal or fiscal offences, or when the person's assets or the assets of an entity over which the person has had significant influence have been subject to an insolvency procedure.

At least two managing directors must have sufficient theoretical and practical knowledge in insurance business and management experience. These criteria are considered to be met provided a person has at least three years of managing experience in an insurance company of a comparable size and type of business.

In addition, at least one of the managing directors must be fluent in German.

The managing directors may not engage in a principal employment in a field other than the insurance or banking sector.

5 Capital and surplus requirements

What are the capital and surplus requirements for insurance and reinsurance companies?

At the time of the commencement of business operations there must be sufficient original own funds in the amount of the absolute floor of the Minimum Capital Requirement pursuant to article 193 para 2, namely:

- for non-life insurance, not including indemnity insurance, credit insurance and fidelity insurance: €2.5 million;
- for non-life insurance, including indemnity insurance, credit insurance and fidelity insurance: €3.7 million;
- for life insurance: €3.7 million;
- for exclusive operation of reinsurance: €3.6 million;
- in case of proprietary companies (captives): €1.2 million; and

- the necessary funds to cover the estimated expenditures with respect to the establishment of the management of the undertaking.

For the future, proof must be furnished that the company will have:

- sufficient funds to cover the technical provisions shown in the solvency balance sheet (article 10, paragraph 3, no. 4);
- sufficient eligible own funds (article 174) to cover the Solvency Capital Requirement (article 8, paragraph 2, no. 4); and
- sufficient original own funds to cover the Minimum Capital Requirement (article 8, paragraph 2, no. 5).

6 Reserves

What are the requirements with respect to reserves maintained by insurance and reinsurance companies?

The VAG provides for several types of technical reserves to be built in by insurance and reinsurance companies. These include, depending on the insurance line of business, among others, an ageing reserve in health insurance, a reserve for outstanding insurance claims, a reserve for profit-deferred premium refunds and provisions for deferred profit participation.

Furthermore article 45, VAG provides for a statutory hedge reserve aimed at covering losses arising from the business operation.

7 Product regulation

What are the regulatory requirements with respect to insurance products offered for sale? Are some products regulated by multiple agencies?

A company applying for an insurance licence must inform the FMA which type of risks the company intends to cover. In Austria, the principle of separation of the insurance lines of business applies. Article 7, VAG sets out that a company offering life insurance may, in addition, only offer health insurance and insurance against accident and reinsurance. However, this principle of separation does not apply for companies that, prior to 2 May 1992, in addition to life insurance, have offered other insurance lines of business.

In respect of insurance products, the general rules of the VAG relating to, inter alia, licensing and reporting apply to all insurance lines of business and products offered in this connection. However, in respect of certain insurance lines, the VAG provides for special provisions to be adhered to by the insurance company offering such products, that is, unit-linked and index-linked life insurance (a stricter conduct of business regime applies pursuant to article 254, VAG), companies offering life insurance must appoint an actuary, etc.

Further, in regard to the actual insurance products offered for sale, insurance companies have to comply with the Insurance Contract Act (VersVG). The VersVG provides for explicit regulations on matters including the rights and obligations of the insured person and the insurer, the content of the respective contracts and information requirements.

8 Regulatory examinations

What are the frequency, types and scope of financial, market conduct or other periodic examinations of insurance and reinsurance companies?

The FMA's supervisory activities include the continued supervision of all business activities of insurance and reinsurance companies, including but not limited to on-site inspections and legal supervision. For the purposes of its examinations the FMA may, at any time, request information concerning the business activities of insurance and reinsurance companies as well as the submission of relevant documents. The VAG does not provide for a minimum or maximum amount of on-site or off-site examinations, nor does it prescribe a period within which such examinations ought to be conducted.

9 Investments

What are the rules on the kinds and amounts of investments that insurance and reinsurance companies may make?

There are no specific requirements or restrictions relating to the types and amounts of investments that insurance and reinsurance companies may make. However, the VAG provides for detailed rules on the amount of equity capital that must be maintained by insurance and reinsurance

companies at all times, and this may limit the amount of investments that such companies make. In the event that the insurance or reinsurance company acquires or sells its participation in incorporated companies, the FMA needs to notify the VAG when:

- the direct or indirect participation exceeds 50 per cent of the equity capital;
- the purchase price exceeds 10 per cent of the insurance or reinsurance company's equity capital;
- the acquisition creates an affiliation pursuant to article 189a, no. 8 of the Austrian Company Code (UGB); or
- the sale effects the resolution of an affiliation pursuant article 189a, no. 8 UGB.

10 Change of control

What are the regulatory requirements on a change of control of insurance and reinsurance companies? Are officers, directors and controlling persons of the acquirer subject to background investigations?

The intended acquisition of a qualifying holding (ie, a direct or indirect holding in an undertaking which represents 10 per cent or more of the voting rights or of the capital or another possibility of exercising a significant influence over the management of that undertaking) in an insurance or reinsurance company has to be notified with and accepted by the FMA. The same applies for acquisitions of shares by persons already being shareholders in the event they intend to increase their participation to 20, 30 or 50 per cent.

The FMA may prohibit the acquisition if, following the assessment of the acquiring party, there are justified reasons to do so. The assessment criteria are set out in article 26, VAG and include:

- the reliability of the acquirer;
- the reliability and professional experience of the officers and directors responsible for the management of the insurance company;
- the financial soundness of the acquirer, particularly in respect of the actual transactions and services envisaged by the industry company to be acquired;
- whether the acquirer is and will be able to comply with the supervisory requirements set out in Directives 92/49/EEC (third non-life insurance directive), 98/78/EC, 2002/83/EC, 2002/87/EC and 2005/68/EC, in particular whether the group of which the acquirer will become a part has a structure that makes it possible to exercise effective supervision, effectively exchange information among the supervisory authorities and to distribute the competences among the competent supervisory authorities; and
- whether there are reasonable grounds to suspect that, in connection with the proposed acquisition, money laundering or terrorist financing within the meaning of article 1, Directive 2005/60/EC is taking place, has taken place or has been attempted, or that the proposed acquisition could increase the risk thereof.

Corresponding notification duties exist in the event a shareholder intends to sell his or her shares or to decrease his or her shares below 20, 30 or 50 per cent.

The acquisition or sale is considered approved if the FMA does not prohibit such within 60 days following the notification.

As stated above, the VAG explicitly provides that officers and directors responsible for the management of the insurance company will be examined for their reliability and professional experience. There is no specific provision regarding such an inspection in respect of the officers and directors of the acquiring party. However, to a certain extent this may be the case, as the FMA will examine the reliability of the acquiring party as such.

11 Financing of an acquisition

What are the requirements and restrictions regarding financing of the acquisition of an insurance or reinsurance company?

There are no specific requirements or restrictions relating to financing of an insurance company's acquisition. As stated above, in the event of an intended acquisition of an insurance company, the FMA will examine the financial soundness of the acquiring party.

12 Minority interest

What are the regulatory requirements and restrictions on investors acquiring a minority interest in an insurance or reinsurance company?

The regulatory requirements for a qualifying holding in an insurance or reinsurance company are set out in question 10. The acquisition of participations of less than 10 per cent of the share capital or voting rights, and that do not grant the acquirer significant influence on the management, are not subject to specific restrictions under the VAG.

13 Foreign ownership

What are the regulatory requirements and restrictions concerning the investment in an insurance or reinsurance company by foreign citizens, companies or governments?

In general, the VAG does not distinguish between national and foreign investors. Both groups are free to invest in Austrian insurance or reinsurance companies. Nevertheless, the VAG provides for a couple of (mainly technical) provisions in the event a foreign investor intends to acquire an Austrian insurance company. These include the prolongation of the period for the FMA to require additional information from the acquiring party from 20 to 30 days, provided the acquiring party has its registered office outside of the EEA or is being supervised by an authority outside of the EEA. Further, the VAG provides for close cooperation and exchange of information between the FMA and the responsible foreign authority, if the acquiring party is, inter alia, a foreign credit institution, assurance undertaking, insurance undertaking, reinsurance undertaking, investment company, or the parent undertaking of, or a natural or legal person controlling, such an institution.

14 Group supervision and capital requirements

What is the supervisory framework for groups of companies containing an insurer or reinsurer in a holding company system? What are the enterprise risk assessment and reporting requirements for an insurer or reinsurer and its holding company? What holding company or group capital requirements exist in addition to individual legal entity capital requirements for insurers and reinsurers?

The supervision of insurance groups includes the supervision of the group's solvency, the risk concentrations and intragroup transactions as well as the governance system at the group level. For example, by contrast with the VAG 1978, the supervision is only to be carried out at the level of the highest parent company with its head office in a member state. Additionally, the collaboration between supervisory authorities is intensified through the establishment of colleges of supervisors pursuant to article 228 VAG 2016 as well as a closer cooperation and consultation according to articles 229 and 230 VAG 2016.

Pursuant to article 222, paragraph 2 VAG, extensive requirements exist with respect to the governance system of insurance groups; however, they are largely identical to the requirements applicable at the individual level. In particular, risk management systems, internal control systems and the reporting system are to be implemented evenly throughout all companies of the group in order to be controllable at the group level.

The most important element with respect to group supervision is the calculation of the group solvency. At the group level, the solvency capital requirement of the group is to be calculated; in doing so, the varying financial interrelations between the companies of the group as well as the risks at the group level are taken into consideration. The calculation is to be performed at least once annually.

There is no provision for the calculation of the minimum capital requirement at the group level since the non-fulfilment of the minimum capital requirement ultimately results in the withdrawal of the licence based on the fact that only the individual companies, but not the group as a whole, can hold a licence.

15 Reinsurance agreements

What are the regulatory requirements with respect to reinsurance agreements between insurance and reinsurance companies domiciled in your jurisdiction?

Austrian law does not provide for any specific regulatory requirements in respect of reinsurance agreements. The Austrian Insurance Contract Act explicitly sets out that the same is not applicable to reinsurance agreements. Therefore, reinsurance agreements are governed by the general contract law.

16 Ceded reinsurance and retention of risk

What requirements and restrictions govern the amount of ceded reinsurance and retention of risk by insurers?

There is no statutory numerical limit for ceded reinsurance and retention of risk. However, a total or unreasonably high transfer of risk from the insurer to the reinsurer is not admissible.

When deciding on the placement of reinsurance, the feasibility of obligations arising from the insurer's own insurance contracts, the obligations arising from the reinsurer's contracts as well as a proper diversification of risk have to be taken into consideration. The first two points above are deemed to be met provided the ceding insurer has its registered seat in a member state of the EEA or if the reinsurer is in the possession of a domestic licence.

Pursuant to article 17c, VAG, a small insurance undertaking (Chapter 3, VAG) must demonstrably verify if the requirements for conclusion of a reinsurance agreement are met (primarily if the reinsurance company is in possession of a valid licence). Further, the insurer must demonstrably seek (and obtain) information about the assets, financial position and earnings of the reinsurance company in order to reliably assess whether the reinsurer will presumably fulfil its duties without delay and in accordance with the contract.

17 Collateral

What are the collateral requirements for reinsurers in a reinsurance transaction?

There are no additional requirements that have to be observed by reinsurance companies conducting reinsurance transactions.

18 Credit for reinsurance

What are the regulatory requirements for cedents to obtain credit for reinsurance on their financial statements?

Insurance companies must adhere to the general accounting principles enshrined in the UGB. However, the VAG provides for additional accounting rules, which insurance companies must observe when preparing their financial statements. In this regard, article 144, VAG stipulates the prescribed balance sheet structure for insurance companies outlining the individual items and the order in which they must be displayed. The item 'receivables from reinsurance business' is illustrated in the 'assets' section (subcategory 'claims'), and must therefore be included in an insurance company's financial statement.

19 Insolvent and financially troubled companies

What laws govern insolvent or financially troubled insurance and reinsurance companies?

As a general rule, the Austrian Insolvency Code, applicable to both natural and legal persons, also applies to insolvent insurance and reinsurance companies. However, articles 307 to 316, VAG provide for certain exemptions in respect of such companies; for example:

- the management of the insurance or reinsurance company is obliged to immediately inform the FMA of the existence of bankruptcy requirements (that is, an inability to pay or over-indebtedness). The application for opening of an insolvency procedure over an insolvent insurance and reinsurance company has to be filed by the FMA, contrary to the general provision that the debtor him or herself files for bankruptcy; and
- further, the VAG enables the FMA to take certain measures instead of filing for bankruptcy if this will benefit the insured parties. Such measures include the suspension of payments to the insured parties to the

extent necessary to overcome the cashflow problems or to reduce life insurance obligations of the insurer according to the assets available.

20 Claim priority in insolvency

What is the priority of claims (insurance and otherwise) against an insurance or reinsurance company in an insolvency proceeding?

The rules contained in the Austrian Insolvency Code also apply in cases of insolvent insurance and reinsurance companies. An explicit exception is made for insurance claims in article 314, VAG outlining the priority of insurance claims over any other insolvency claim (excluding claims against the insolvency estate). Further to this, if an insolvent insurance or reinsurance company has an established cover pool, this cover pool constitutes a separate insolvency estate that is used to satisfy the included insurance claims only.

21 Intermediaries

What are the licensing requirements for intermediaries representing insurance and reinsurance companies?

For the purpose of concluding insurance contracts, insurance companies may only employ employees having sufficient professional skills for such activity or independent insurance agents registered in the Insurance Intermediary Register.

The particular qualification of an insurance agent required by law differs depending on the actual activity of the intermediary. In order to act as an insurance agent, one has to pass the qualification examination (the certificate issued by the Austrian Insurance Industry Training Institute), obtain an academic degree in insurance economics, or have at least two or three consecutive years of experience as an insurance broker or consultant. Comparable licensing requirements apply for insurance brokers and insurance consultants.

Insurance claims and coverage

22 Third-party actions

Can a third party bring a direct action against an insurer for coverage?

Only in exceptional cases does Austrian insurance law provide for a direct right of action of a third party against an insurer.

In practice, the most important of such cases is the direct right of action of a person who has suffered damage in connection with the use of a vehicle being subject to compulsory motor third-party liability insurance (article 26 of the Act on Liability Insurance for Operating a Vehicle).

Further cases include damages that arise from the operation of an aircraft (article 166, Aviation Act), and from ionising radiation of nuclear facilities, nuclear materials or radionuclides (article 24, Nuclear Liability Act).

In all the above-mentioned cases, the respective law provides for joint and several liability of the person being liable for damages (insured) and of the liability insurer.

23 Late notice of claim

Can an insurer deny coverage based on late notice of claim without demonstrating prejudice?

Article 33, VersVG constitutes a duty of the insured to immediately notify the insurer of the occurrence of an insurance contingency. Non-compliance with this duty represents a breach of contract on the part of the insured.

Standard policy conditions usually contain a clause providing for the right of the insurer to deny coverage when the insured does not comply with his or her notification duty. However, paragraph 2 of the aforementioned regulation provides that the insurer may not draw on such clause if he or she, by any other means, became aware of the insurance contingency.

Further, pursuant to consistent jurisprudence of Austrian courts, insurers may not deny coverage due to a late notice of claim provided the delay occurred not culpably or if the late notice did not have any influence on the assessment of the insured event or on the insurance payment.

The burden of proof regarding the late notice of claim having no effect on the coverage obligation of the insurer lies with the insured party.

24 Wrongful denial of claim

Is an insurer subject to extracontractual exposure for wrongful denial of a claim?

As a general rule, a wrongful denial of a claim, when established by court, will result in the court awarding the insured party the claim arising from the insured event and interest from the date the payment became due. Provided the insured party can prove that additional damages were caused by the delayed payment, these damages may be claimed pursuant to statutory requirements.

However, since Austrian law does not recognise punitive damages, these will not be awarded even if the insurer acts in bad faith or refuses to settle legitimate claims.

25 Defence of claim

What triggers a liability insurer's duty to defend a claim?

In general, liability insurance embraces the duty of the insurer to satisfy justified claims and to defend unjustified claims. In practice, the insurer, on the basis of the existing facts, will decide whether he or she is willing to acknowledge and thus satisfy the claims of the person affected, or whether he or she will defend the claim. The insurance contract, however, may specify circumstances that trigger a duty of the insurer to defend certain claims.

26 Indemnity policies

For indemnity policies, what triggers the insurer's payment obligations?

As a general rule, the insurer's payment obligation is triggered by the occurrence of the insured event.

27 Incontestability period

Is there an incontestability period beyond which a life insurer cannot contest coverage based on misrepresentation in the application?

In general, in the event of a misrepresentation in the insurance application that results in the failure to disclose a material circumstance, the insurer may withdraw from the contract. However, in respect of life insurance, article 163, VersVG provides that, after the expiry of a period of three years starting from the conclusion of the contract, such a withdrawal is no longer permissible. The latter does not apply if the misrepresentation occurred fraudulently.

28 Punitive damages

Are punitive damages insurable?

The Austrian legal system is not familiar with the legal instrument of punitive damages. Therefore, there are no specific provisions in respect of punitive damages. However, due to the general rule of contractual freedom, parties are free to agree on the coverage of punitive damages. Nevertheless, we are not aware of punitive damages being subject to insurance contracts in practice. On the contrary, where relevant, in particular, in product liability insurance and prospectus liability insurance, the coverage of punitive damages is excluded in the majority of the insurance contracts.

29 Excess insurer obligations

What is the obligation of an excess insurer to 'drop down and defend', and pay a claim, if the primary insurer is insolvent or its coverage is otherwise unavailable without full exhaustion of primary limits?

There are no regulations relating to excess insurance in Austria. Therefore, parties are in general free to agree on the terms and conditions of the particular excess insurance contract. Basically, since the primary insurance contract constitutes an independent contract, the question as to whether or to what extent the excess insurer is obliged to pay a claim under the excess insurance contract has to be assessed solely on the basis of this very contract. In essence, the obligation of an excess insurer to pay a claim when the coverage of the primary insurer is not available depends on whether a drop-down clause has been agreed upon. The inclusion of such a drop-down clause will, in general, result in the obligation of the excess insurer to

drop down and pay the claim of the insured irrespective of why the coverage of the primary insurer lapsed, for example, due to insolvency or other circumstances on the part of the primary insurer.

30 Self-insurance default

What is an insurer's obligation if the policy provides that the insured has a self-insured retention or deductible and is insolvent and unable to pay it?

An insolvency or inability of the insured to pay the self-insured retention or deductible has no effect on the insurer's obligation to provide coverage. Where a self-insured retention has been agreed, the insurer will only be liable for the amount exceeding such a self-insured retention. It also should be noted that within compulsory liability insurance, no self-insured retention or deductible may be agreed in relation to third parties.

31 Claim priority

What is the order of priority for payment when there are multiple claims under the same policy?

For liability insurance article 156, paragraph 3, VersVG provides that claims of several third parties collectively exceeding the sum insured are to be satisfied in proportion to their respective amounts. For other insurance lines there are no explicit regulations. In essence, multiple claims of the insured have to be satisfied in the order of their submission and claims of third persons proportionally.

32 Allocation of payment

How are payments allocated among multiple policies triggered by the same claim?

The consequences of double or multiple insurances are regulated in articles 58 to 60, VersVG. The multiple insurers are jointly liable for the amount that every insurer owes under the respective insurance contract. The payment is, however, limited to the actual loss suffered by the injured party. In practice, the insured party is, in general, free to choose the insurer from which it requests the actual payment. In the relationship between the insurers involved, the insurers are obliged to compensate each other in proportion to the actual payment obligation under the respective insurance contract.

33 Disgorgement or restitution

Are disgorgement or restitution claims insurable losses?

In Austrian insurance practice, losses flowing from disgorgement or restitution claims are typically not covered by insurance policies and do not regularly constitute insurable losses.

34 Definition of occurrence

How do courts determine whether a single event resulting in multiple injuries or claims constitutes more than one occurrence under an insurance policy?

To date, the issue of whether a single event that results in multiple claims constitutes more than one occurrence under an insurance policy has not yet been subject to judicial review by the Austrian Supreme Court. There are also no published decisions by lower courts regarding this issue.

35 Rescission based on misstatements

Under what circumstances can misstatements in the application be the basis for rescission?

Pursuant to article 16 et seq VersVG a person seeking insurance must, at the time of filing an application, notify the insurance company of all facts and circumstances that are relevant for the insurance company's decision to insure the respective risk. Should the insured fail to comply with this obligation or negligently make misstatements in the application, the insurance company will be entitled to rescind from the insurance contract within one month upon gaining knowledge of the occurrence of such misstatements. In addition, the insurer may also rescind from an insurance contract for fraudulent misrepresentation, in which case the one-month limitation period does not apply.

Reinsurance disputes and arbitration

36 Reinsurance disputes

Are formal reinsurance disputes common, or do insurers and reinsurers tend to prefer business solutions for their disputes without formal proceedings?

Parties involved in a reinsurance dispute usually try to resolve disputes through out-of-court negotiations. Out of formal proceedings, arbitration is the preferred form of dispute resolution. To our knowledge, there are almost no decisions of the Austrian Supreme Court dealing with reinsurance issues.

37 Common dispute issues

What are the most common issues that arise in reinsurance disputes?

Reinsurance disputes most commonly concern performance obligations of the reinsurance company and the valuation of damages.

38 Arbitration awards

Do reinsurance arbitration awards typically include the reasoning for the decision?

Pursuant to article 606, paragraph 2, Code of Civil Procedure, arbitration awards must state the reasons for the decision unless otherwise agreed by the parties. In practice, parties usually do not waive the reasoning.

39 Power of arbitrators

What powers do reinsurance arbitrators have over non-parties to the arbitration agreement?

Due to the qualification of arbitration courts as private courts, arbitrators do not have any power over non-parties to the arbitration; therefore, unless otherwise agreed by the parties, arbitrators may only order interim or protective measures against the parties involved if this is necessary in order to secure the claim, or when the enforcement of the claim would be thwarted or made significantly more difficult or there would be a risk of major adverse effects.

However, the arbitral tribunal may request from the competent state court the performance of judicial acts that the arbitral tribunal is not empowered to carry out (article 602, Code of Civil Procedure).

40 Appeal of arbitration awards

Can parties to reinsurance arbitrations seek to vacate, modify or confirm arbitration awards through the judicial system?

What level of deference does the judiciary give to arbitral awards?

Within three months after being served the arbitration award, each party may lodge an action for annulment of an arbitration award before the competent state court. The grounds for annulment of the award are enumerated in article 611, Code of Civil Procedure and include the absence of a valid arbitration agreement, the violation of each party's right to be heard or to a fair trial, defects in the constitution of the arbitral tribunal or violation of public policy.

In general, arbitration awards have the same effects as judgments of state courts, namely, the same principles in respect of legal validity and enforceability apply.

Reinsurance principles and practices

41 Obligation to follow cedent

Does a reinsurer have an obligation to follow its cedent's underwriting fortunes and claims payments or settlements in the absence of an express contractual provision? Where such an obligation exists, what is the scope of the obligation, and what defences are available to a reinsurer?

There is no statutory obligation on the reinsurer to follow the cedent's underwriting fortunes and claims payments or settlements. Such an obligation, its scope and the possible defences have to be regulated in the reinsurance agreement.

Update and trends

On 1 January 2016 the former VAG has been replaced by the VAG 2016, which has as its main focus the implementation of Directive 2009/138/EC (Solvency II); the practical impact of the new regulatory framework has yet to be seen. In general, current Austrian insurance and reinsurance regulation and the corresponding jurisdiction reflect European trends. Currently there are no official proposals for major reforms of Austrian law concerning insurance and reinsurance regulation.

42 Good faith

Is a duty of utmost good faith implied in reinsurance agreements? If so, please describe that duty in comparison to the duty of good faith applicable to other commercial agreements.

The duty of good faith is a prevailing principle in Austrian law. Therefore, it is also implied in reinsurance agreements. Nevertheless, there is no notable difference in the interpretation of the principle of good faith in respect of standard commercial agreements and reinsurance agreements.

43 Facultative reinsurance and treaty reinsurance

Is there a different set of laws for facultative reinsurance and treaty reinsurance?

No; Austrian law does not provide for a specific set of laws for facultative reinsurance and treaty reinsurance. Both these reinsurance types are subject to contractual arrangements of the parties.

44 Third-party action

Can a policyholder or non-signatory to a reinsurance agreement bring a direct action against a reinsurer for coverage?

As there is no contractual relationship between the reinsurer and the policyholder or a non-signatory to a reinsurance agreement, such persons cannot, as a general rule, bring a direct action against a reinsurer for coverage. As far as can be ascertained, Austrian courts have not yet dealt with the issue of a right of direct action of an insured against the reinsurer. Nevertheless, according to German jurisprudence, in exceptional cases such direct action may exist. Due to comparable legislation in the field of insurance law in Austria and Germany, it is likely that Austrian courts would follow the decisions of German courts and, in exceptional cases, affirm a direct claim of the insured.

45 Insolvent insurer

What is the obligation of a reinsurer to pay a policyholder's claim where the insurer is insolvent and cannot pay?

In general, there is no obligation on the reinsurer to make a direct payment of a policyholder's claim, and claims of the insurer against the reinsurer

are determined solely on the basis of the reinsurance contract. However, the insured may assert his or her obligations under the insurance contract against the insolvent insurer within the insolvency procedure that has been opened over the insurer's assets. As regards the insurer, the insolvency administrator will, on the other hand, have the right to assert claims of the insurer against the reinsurer. As soon as the reinsurance makes a payment to the insolvency estate under a reinsurance agreement, such a payment will be subject to a right of separation on the part of the insured.

46 Notice and information

What type of notice and information must a cedent typically provide its reinsurer with respect to an underlying claim? If the cedent fails to provide timely or sufficient notice, what remedies are available to a reinsurer and how does the language of a reinsurance contract affect the availability of such remedies?

Austrian law does not provide for any specific regulations relating to the exchange of information between insurer and reinsurer. Usually these issues are regulated in the reinsurance agreement. It is common to pass on the information that is necessary to assess the claim in question.

In practice, the reinsurance contract will set out consequences triggered by the insurer's failure to provide timely notice. Although there are no decisions of the Austrian Supreme Court as to whether a reinsurer may deny coverage due to a late notice of claim, in our opinion the same applies in respect of insurance contracts (see question 23).

47 Allocation of underlying claim payments or settlements

Where an underlying loss or claim provides for payment under multiple underlying reinsured policies, how does the reinsured allocate its claims or settlement payments among those policies? Do the reinsured's allocations to the underlying policies have to be mirrored in its allocations to the applicable reinsurance agreements?

As there is no statutory law that regulates allocation of underlying claims, the reinsured has to allocate the claim and settlement payments according to respective reinsurance agreements. The reinsurance agreements may provide that the allocation of claims has to occur in proportion to the reinsured amounts. However, and more commonly, the reinsurance agreements establish a ranking (eg, layers) between the respective reinsurance policies. In such a case, the reinsured must exhaust the first-ranked policy, before turning to the second-ranked or subsequent reinsurance policies.

48 Review

What type of review does the governing law afford reinsurers with respect to a cedent's claims handling, and settlement and allocation decisions?

Austrian statutory law does not provide for any specific type of review rights in favour of the reinsurer. In practice, such a right of the reinsurer will be regulated in the reinsurance agreement, and will most commonly



Philipp Scheuba

philipp.scheuba@bls4law.com

Kärntner Straße 10
1010 Vienna
Austria

Tel: +43 1 512 1427
Fax: +43 1 513 8604
office@bls4law.com
www.bls4law.com

include the submission of information or documents proving the occurrence of the loss or the fact that allocation was made in accordance with the reinsurance contract.

49 Reimbursement of commutation payments

What type of obligation does a reinsurer have to reimburse a cedent for commutation payments made to the cedent's policyholders? Must a reinsurer indemnify its cedent for 'incurred but not reported' claims?

The 'follow-the-settlement' principle is common in reinsurance agreements. As far as the insurer complies with his or her due diligence duty while making payments, the reinsurer is obliged to reimburse all payments made by the insurer that are subject to the reinsurance contract.

50 Extracontractual obligations (ECOs)

What is the obligation of a reinsurer to reimburse a cedent for ECOs?

As stated above, it is a general rule of reinsurance that the reinsurer is bound by coverage decisions of the cedent and must therefore follow the cedent's settlements. Actions and decisions made by the cedent are thus generally binding for the reinsurer. However, the reinsurer is not obliged to reimburse the cedent for obligations that go beyond the risks and losses covered by the reinsurance policy, for payments or settlements made as a gesture of goodwill, and for fraudulent or collusive conduct on the part of the cedent.

Getting the Deal Through

Acquisition Finance	Equity Derivatives	Ports & Terminals
Advertising & Marketing	Executive Compensation & Employee Benefits	Private Antitrust Litigation
Air Transport	Foreign Investment Review	Private Client
Anti-Corruption Regulation	Franchise	Private Equity
Anti-Money Laundering	Fund Management	Product Liability
Arbitration	Gas Regulation	Product Recall
Asset Recovery	Government Investigations	Project Finance
Aviation Finance & Leasing	Healthcare Enforcement & Litigation	Public-Private Partnerships
Banking Regulation	Initial Public Offerings	Public Procurement
Cartel Regulation	Insurance & Reinsurance	Real Estate
Class Actions	Insurance Litigation	Restructuring & Insolvency
Construction	Intellectual Property & Antitrust	Right of Publicity
Copyright	Investment Treaty Arbitration	Securities Finance
Corporate Governance	Islamic Finance & Markets	Securities Litigation
Corporate Immigration	Labour & Employment	Shareholder Activism & Engagement
Cybersecurity	Licensing	Ship Finance
Data Protection & Privacy	Life Sciences	Shipbuilding
Debt Capital Markets	Loans & Secured Financing	Shipping
Dispute Resolution	Mediation	State Aid
Distribution & Agency	Merger Control	Structured Finance & Securitisation
Domains & Domain Names	Mergers & Acquisitions	Tax Controversy
Dominance	Mining	Tax on Inbound Investment
e-Commerce	Oil Regulation	Telecoms & Media
Electricity Regulation	Outsourcing	Trade & Customs
Energy Disputes	Patents	Trademarks
Enforcement of Foreign Judgments	Pensions & Retirement Plans	Transfer Pricing
Environment & Climate Regulation	Pharmaceutical Antitrust	Vertical Agreements

Also available digitally



Online

www.gettingthedealthrough.com



Insurance & Reinsurance
ISSN 1757-7195



THE QUEEN'S AWARDS
FOR ENTERPRISE:
2012



Official Partner of the Latin American
Corporate Counsel Association



Strategic Research Sponsor of the
ABA Section of International Law