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# Insurance & Reinsurance

Austria

BLS Rechtsanwälte Boller Langhammer Schubert GmbH

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## Law and Practice

*BLS Rechtsanwälte Boller Langhammer Schubert GmbH*

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**BLS Rechtsanwälte Boller Langhammer Schubert GmbH** has more than 40 years of experience and approximately 50 employees. BLS possesses know-how in all legal fields and provides legal advice to companies of all sizes and to private individuals. BLS is recognised as a business law firm focusing on company law and litigation, with a strong profile in the technical field. BLS is the sole Austrian member of the international AVRIO Advocati European Law Firms Association, representing many clients internationally. The firm advise and represent clients in almost all areas of law, but especially in connection with insurance matters. These include, for example, major claims settlement for well-known

national and international insurance companies and defense against liability and cover claims. In addition, the firm are regularly mandated with the support of complex mandates in the area of financial lines, in particular D&O and fidelity insurance, both as coverage and monitoring counsel and as direct representatives of insured persons in civil and criminal cases; it is also regularly commissioned in professional liability cases (ie, in relation to architects, doctors, lawyers, notaries, tax consultants). The development and processing of insurance conditions, brokerage fees and all other insurance-related issues are part of the firm's ongoing responsibilities.

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## 1. Basis of Insurance and Reinsurance Law

### 1.1 Sources of Insurance and Reinsurance Law

The central basis of private insurance law is the Insurance Contract Act (VersVG), which is based on general civil law provisions (in particular the General Civil Code Book (ABGB)) and supplements these, but in some cases also supersedes them. In particular, the insurance law provisions of the ABGB (Sections 1288 to 1291), which are still in formal force, have been replaced by the VersVG. Nevertheless, certain insurance contracts are excluded from the scope of application of the VersVG. This applies in particular to reinsurance contracts to which, in the absence of special statutory provisions, only general civil law applies.

The provisions of the VersVG are in turn supplemented – depending on the type of contract – by further regulations. For example, the provisions of the UGB (Commercial Code) apply to insurance contracts concluded by commercial enterprises; the provisions of the KSchG (Consumer Protection Act) apply to contracts with consumers.

In addition to contractual provisions, insurance law is significantly influenced by the Insurance Supervision Act 2016 (VAG 2016). For more details, see section 2.

In addition to these most important stipulations, there are other standards of importance to the insurance industry, such as stipulations on accounting, insurance tax law and motor vehicle liability insurance.

## 2. Regulation of Insurance and Reinsurance

### 2.1 Regulatory Bodies and Legislative Guidance

Insurance law is essentially determined by the Insurance Supervision Act 2016 (VAG 2016), which implements the Solvency II Directive of the European Union.

The supervisory provisions, which are supervised by the Austrian Financial Market Authority (FMA), are primarily aimed at protecting the insured person. For example, the operation of an insurance company requires a license from the FMA (license system). The insurer is also obliged to disclose certain data (disclosure system). Nevertheless, insurance companies are only subject to formal monitoring. Therefore, the supervisory authority cannot intervene in actual business activity.

At European level, the European Insurance and Occupational Pensions Authority (EIOPA) was established in 2011 to ensure a common supervisory practice and uniform application of European rules. Although EIOPA has no direct legislative competence, it has a considerable influence on European standards in so far as it draws up drafts of technical standards to which the European Commission subsequently gives binding legal effect in the form of resolutions or regulations. In certain exceptional cases, EIOPA also has regulatory jurisdiction.

### 2.2 The Writing of Insurance and Reinsurance

As mentioned in **2.1 Regulatory Bodies and Legislative Guidance**, the operation of an insurance company requires licensing or authorisation by the FMA in the form of a concession. If an undertaking in Austria is granted a license to operate an insurance undertaking, this license applies in principle to all member states of the EU.

A separate concession must be applied for each class of insurance, whereby the operation of certain forms of insurance excludes other classes of insurance. Thus, the parallel operation of a life insurance policy and a property insurance policy is excluded (under the principle of separation of lines of business).

Domestic insurance companies may only operate in the legal form of a joint-stock company, a European joint-stock company or a mutual company.

In order to obtain a concession, the company applying for a concession must meet certain requirements (such as a head office located in Austria, sufficient own funds, at least two board members who are able to comply with governance regulations, etc.).

### 2.3 The Taxation of Premium

The insurance premiums paid by the policyholder are generally subject to the Insurance Tax Act (VersStG), which provides different tax rates for different lines of business. A motor-related insurance tax is charged on motor vehicles registered in Austria, which is calculated on the basis of the engine's displacement or power. For motor vehicles that are not subject to motor-related insurance tax, the motor vehicle tax law applies. Insurance premiums paid for fire insurance are subject to the Fire Protection Act, which levies a tax of 8%.

## 3. Overseas Firms Doing Business in the Jurisdiction

### 3.1 Overseas-Based Insurers or Reinsurers

With regard to (re)insurance companies that do not have their headquarters in Austria, the Insurance Supervision Act 2016 (VAG 2016) does differentiate between (re)insurers domiciled in other signatory countries of the European Economic Area (EEA insurers) and (re)insurers based in other jurisdictions (referred to as "third-country insurance and third-country reinsurance undertakings" within the VAG 2016).

EEA insurers do not require an additional licence to do business in Austria. However, there is a duty to notify their intention to conduct insurance business in Austria to their competent home country supervisory authority. EEA insurers may carry out their business either by establishing a branch office in Austria or according to their freedom to provide services within the European Economic Area.

Other than EEA insurers, third-country (re)insurance undertakings require a licence according to the VAG 2016 in order to be able to conduct insurance business in Austria. Such licence may be obtained from the competent Austrian regulator, FMA. In addition, third-country (re)insurers need to establish a branch office in Austria before doing business there.

Section IV of the VAG 2016 does provide for specific licensing requirements for third-country (re)insurers. However, where the European Commission has determined the solvency regime of a third country to be equivalent in accordance with Article 172 (2) or (4) of Directive 2009/138/EC, the provisions of this Section shall not be applied to third-country reinsurance undertakings having their head office in that third country. Reinsurance contracts concluded with such undertakings shall be treated in the same manner as reinsurance contracts concluded with EEA reinsurance undertakings.

An overview of equivalence decisions taken by the European Commission can be found on the website of EIOPA.

### 3.2 Fronting

While there is no statutory numerical limit with regard to the cedent's retention, a complete transfer of risk from an insurance company signing business in Austria to a reinsurer is deemed inadmissible by the Austrian regulator, FMA. However, the complete passing of risk with respect to a part of the cedent's insurance portfolio may be allowed for certain reasons, provided that such fronting arrangement is limited in time.

## 4. Transaction Activity

### 4.1 M&A Activities Relating to Insurance Companies

As a general rule, Austrian law does not provide for a specific legal regime when it comes to merger and acquisition activities relating to insurance companies as such. Thus, acquisition of an interest in insurance companies may in principle be conducted on the basis of a regular share purchase agreement.

However, Austrian supervisory law does stipulate a number of preconditions that a buyer of an insurance company has to meet in order to gain a permit for the intended acquisition by the FMA.

Any acquisition of a qualifying holding (ie, a direct or indirect holding in an undertaking that represents 10% or more of the voting rights, or of the capital, or any other possibility of exercising a significant influence over the management of that undertaking) in an insurance or reinsurance company, has to be notified to the FMA in advance. 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%.

The FMA may prohibit the intended acquisition if, following the assessment of the acquiring party, there are justified reasons to do so. The assessment criteria are set out in Section 26 of the VAG 2016 and include:

- the reputation of the proposed acquirer;
- the reputation and experience of the officers and directors responsible for the management of the insurance company;
- the financial soundness of the proposed acquirer, in particular in relation to the type of business pursued and envisaged in the insurance or reinsurance undertaking in which the acquisition is proposed;
- whether the insurance or reinsurance undertaking will be able to comply and continue to comply with the requirements pertaining to contractual insurance activities and with the provisions of the Financial Conglomerates Act (FKG; Finanzkonglomeratengesetz), and in particular, whether the group of which the insurance or reinsurance

undertaking will become part has a structure that makes it possible to exercise effective supervision, effectively exchange information among the competent supervisory authorities and determine the allocation of responsibilities 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 is being or has been committed or attempted, or that the proposed acquisition could increase the risk thereof.

Corresponding notification duties exist in the case that a shareholder intends to sell his or her shares, or to decrease his or her shares below 20, 30 or 50%.

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

In line with European trends, the Austrian insurance market is subject to ongoing consolidation. The number of market participants has decreased by more than 20% since 2011, totalling 84 insurance companies at the end of 2018. The proportion of foreign participation in said companies is about 45%. Due to the existing market structure, major merger and acquisition activities are rather scarce.

## 5. Distribution

### 5.1 Distribution of Insurance and Reinsurance Products

The Austrian legal system has three basic forms of insurance intermediation, which differ in very important aspects – especially with regard to the accountability of the intermediary. What all the distribution channels described in more detail below have in common is that they must comply with the applicable regulations with regard to insurance distribution; these are above all the provisions of the Industrial Code (GewO) applicable to insurance agents and brokers, and the Insurance Supervision Act 2016 (VAG 2016) applicable to insurance undertakings. Depending on the type of distribution, the provisions of the Commercial Agents Act (HVertrG), the Brokers Act (MaklerG) and eventually the Banking Act (BWG) may also apply.

Insurance companies are able to sell insurance contracts by employees (direct sales). The employees act directly on behalf of the insurance company and can be attributed to it in all mediation activities. Cooperation is based on labour law regulations and is characterised above all by factual and (in contrast to other forms of mediation) personal binding instructions on the employee.

One form of direct sales that is becoming increasingly popular is the online mediation of insurance contracts, eg in the

form of an online shop on the insurance company's website. Online sales offers insurance companies unprecedented sales potential. In response to the increasing use of online comparison portals, operators of these portals now also fall under the term of insurance intermediaries and are subject to the corresponding statutory regulations.

A completely different contractual relationship characterises the cooperation between insurance companies and an insurance agent acting on their behalf. The agent is an independent entrepreneur and is therefore responsible for compliance with corporate, company and, above all, trade law regulations. An insurance agent can either act exclusively for just one insurance company or as a multiple agent for several. Despite this much broader relationship between insurance agents and insurance companies, cooperation is characterised by a tight connection. Thus the insurance agent is often contractually obligated to follow objective (but not personal) instructions. For example, the insurance agent is usually required to use the corporate identity of the insurance company to comply with internal insurance guidelines and business processes that are intended to ensure successful economic cooperation. For these reasons the insurance agent is equally attributable regarding contract mediation to its insurance company, like an employed insurance staff member when direct selling.

An insurance broker – just like an insurance agent – is an independent entrepreneur and must therefore be strictly separated from the insurance company. In contrast to the insurance agent, the insurance broker is not attributable to the insurance company. He or she is considered a confederate of the policyholder, to whom he/she is liable in the event of improper advice. Actions that the insurance broker undertakes vis-à-vis the insurance company on behalf of the policyholder are thus basically attributable to the latter, as are actions undertaken by the policyholder him or herself.

Note: Due to their practical relevance in Austria, which is not insignificant, distribution by credit institutions (banks) should also be mentioned here. In principle, they are not subject to any particular restrictions; all forms of insurance intermediation are at their disposal. However, a separate approval of the Austrian Financial Market Authority (FMA) is required, as this authority assumes the function of a trade authority in the case of insurance brokerage by a credit institution.

Not an insurance intermediary as such, but in a certain sense related, is the so-called Tippgeber. The giving of tips is not subject to the trade law regulations of Sections 137 et seq of the GewO and therefore belongs to the free trades. In contrast to the insurance mediator, the Tippgeber only names persons to the insurance mediator who are interested in the conclusion of insurance contracts.

## 6. Making an Insurance Contract

### 6.1 Obligations of the Insured and Insurer

The legal situation in Austria (in particular, the Insurance Contract Act) does not stipulate a special form for the conclusion of an insurance contract. Therefore, according to general civil law, only a concordant declaration of intent of the contracting parties is required, which can be made not only in writing but also, for example, conclusively or even verbally.

In general, the conclusion of the contract is initiated from a legal point of view by the potential policyholder. The potential policyholder submits an application to the insurer for the conclusion of an insurance contract. For this purpose, insurers provide their potential customers with an application form in which the policyholder (after consultation with his or her insurance adviser) discloses the desired coverage and the circumstances essential to the insurance contract about his or her person and the risk to be insured. In return, the policyholder can already see his or her insurance coverage and the premium to be paid on the application form. This means that all the circumstances necessary for concluding the contract (*essentialia negotii*) are already known at the time the application is submitted.

After submitting the application, the insurer reviews the application of the policyholder and, if the application is accepted, sends him or her the insurance policy corresponding to the coverage applied for, including insurance terms and conditions, which constitutes the insurance contract.

When the insurance contract is concluded, the policyholder must inform the insurer not only of his or her personal data but also of all circumstances that are relevant to the assumption of the risk to be insured (Section 16 (1) *VersVG*). This allows the insurer to assess the risk to be covered. All circumstances that may influence the insurer's decision to underwrite the contract are significant. These include, for example, previous damage to a motor vehicle in property insurance, accidents already suffered in personal accident insurance, or health risks in life insurance. This duty of disclosure is a statutory obligation.

In practice, the circumstances relevant for the assessment of the risk to be insured are usually requested in the application form mentioned above. If the applicant answers these questions truthfully and completely, it can usually be assumed that the applicant has fulfilled his or her obligation to disclose. According to the judicature of the Austrian Supreme Court (OGH), however, circumstances that are not expressly requested must be communicated additionally if an application question conclusively refers to them overall, or if their communication appears to be self-evident.

Cases in which difficulties of demarcation arise are rare, especially as the questions asked in the application cover the most essential circumstances according to the insurer's experience. In its decision 7 Ob 103/63, the Austrian Supreme Court (OGH) had to judge a case in which the insurer did not ask about the roadworthiness of a motor vehicle in the application and the applicant did not inform the insurer about the lack of roadworthiness of the vehicle. The Supreme Court considered the putting into service of a motor vehicle in an irregular condition to be an increase in risk excluded from insurance cover, even if that condition already existed at the time the insurance contract was concluded.

If an insured person culpably fails to report a significant circumstance, the insurer may in principle withdraw from the contract (Section 16 (2) VersVG). A withdrawal is nevertheless not possible if the policyholder is not to blame for the lack of notification or for the inaccuracy of his or her information (eg if the policyholder answers an application question incorrectly or incompletely because the insurer formulates it unclearly or if the policyholder's notification is lost by post).

The withdrawal of the insurer leads to the cancellation of the contract from the outset – in other words, the contract is cancelled retrospectively from the beginning of the contractual relationship. Any claims that have already arisen shall be voided and both contracting parties must defer the benefits drawn from the contract (Section 20 (2) VersVG).

Regarding the premium, despite the withdrawal, the insurer is entitled to that part of the premium that falls between the conclusion of the contract and the effectiveness of the withdrawal. In exchange, those events are covered that occur before the withdrawal becomes effective and do not fall within the hidden risk area.

If a withdrawal from the contract is not possible (eg, due to lack of culpability), the insurer can adjust the premium to the increased risk or, under certain circumstances, terminate the contract.

In addition to these notification obligations of the policyholder, there are also certain information obligations of the insurer towards the policyholder that have to be provided for the most part prior to the conclusion of the contractual declaration of the policyholder. In the event of a breach of these pre-contractual information obligations, the law grants the policyholder the right to withdraw from the contract under certain circumstances.

In addition to the policyholder who concludes the insurance contract and thus becomes a contractual partner of the insurer, other persons may also be directly affected by the contractual relationship. This applies in particular to persons differing from the policyholder whose risks are (also)

covered by the insurance policy. The law refers here to an "insured person." The risks of an insured person can be covered by the insurance contract in addition to those of the policyholder; or the policyholder concludes an insurance contract in his or her own name (as policyholder), but at the risk of a third party (the insured person). If the latter is the case, certain specific conditions must be taken into account.

Since insurance contract law is strongly influenced by the principles of general civil law, most of the relevant provisions apply equally to entrepreneurs and consumers. However, the law makes an explicit differentiation in connection with the period of engagement of the policyholder. Section 8 (3) of VersVG allows an insured person, if he or she is a consumer, to terminate the contract annually if at least three years have elapsed since the commencement of the insurance. The underlying reason for this provision (as is often the case with favourable regulations for consumers) is the imbalance between a consumer and the insurer superior to them. The legislator obviously assumes that an entrepreneur can better assess the consequences of his or her decision with regard to the commitment period than an average consumer, which is why it is not possible for the latter to terminate the contract in accordance with Section 8 (3) of VersVG.

Of course, even the judicature makes certain distinctions between entrepreneurs and consumers, which are similar to those in labour or tenancy law.

## 7. Alternative Risk Transfer

### 7.1 ART Transactions

In general, Austrian law distinguishes between classical forms of reinsurance and concepts of alternative risk transfer. Austrian supervisory law explicitly addresses finite reinsurance activities as well as activities by special purpose vehicles pursuant to Directive 2005/68/EC.

Finite reinsurance is defined as reinsurance under which the maximum economic risk transferred, arising both from a significant underwriting risk and timing risk transfer, exceeds the premium over the lifetime of the contract by a limited but significant amount. Further, a finite reinsurance contract must provide for either combined consideration of the time value of money or contractual provisions to moderate the balance of economic experience between the parties over time to achieve the target risk transfer.

According to Austrian supervisory law, insurance and reinsurance undertakings that pursue finite reinsurance activities shall ensure that they are able to properly identify, measure, monitor, manage, control and report the risks arising from those contracts or activities.

Whereas finite reinsurance contracts are widely considered as genuine (re)insurance contracts, business conducted by special purpose vehicles when signing alternative risk transfer transaction is usually not to be classified as insurance business.

Special purpose vehicles are defined as undertakings other than an existing insurance or reinsurance undertaking, which assume risks from insurance or reinsurance undertakings and which fully fund their exposure to such risks through the proceeds of a debt issuance or any other financing mechanism where the repayment rights of the providers of such debt or financing mechanism are subordinated to the reinsurance obligations of such an undertaking.

Special purpose vehicles with head offices in Austria require a licence pursuant to Section 105 of the VAG 2016 granted by the FMA in accordance with the provisions set forth in the implementing regulation 2015/462/EC. More detailed provisions may be found in the Commission Delegated Regulation (EU) 2015/35 (Articles 318 to 327).

However, special purpose vehicles pursuant to Section 105 of the VAG 2016 signing alternative risk transfer transactions do not play a major role in the Austrian insurance market as yet.

### 7.2 Foreign ART Transactions

As outlined in **6.1 ART Transactions**, alternative risk transfer transactions are generally not treated as insurance or reinsurance contracts under Austrian law. However, for solvency purposes, Austrian supervisory law does provide for the possibility to consider both recoverables from reinsurance contracts and special purpose vehicles pursuant to Directive 2005/68/EC when calculating the total amounts recoverable. Detailed provisions may be found in the EIOPA guidelines on the valuation of technical provisions (EIOPA-BoS-14/166).

## 8. Interpreting an Insurance Contract

### 8.1 Contractual Interpretation and Use of Extraneous Evidence

For the interpretation of insurance contracts, the general rules of civil law (Sections 914 et seq ABGB) basically apply. Therefore, it is primarily the will of the contracting parties that is relevant for the interpretation of the contract.

The peculiarities of insurance law do, of course, imply a number of other circumstances relevant to interpretation in this context. In future, the insurance intermediary will have to evaluate the customer's wishes and needs on the basis of the information provided by the customer and, as in the past, draw up a consultation protocol for the entire consultation process. Furthermore, the will of the contracting parties can

often be identified on the basis of the advertising materials used in the advisory process.

If, despite all this, it is not possible to ascertain a concurring will of the parties, the contractual declarations are to be interpreted – in accordance with the provisions of general civil law – on the basis of the bona fide exercise of traffic law. In this case, it depends on how a bona fide recipient of the declaration would have understood the contractual declaration in doubt.

If, after this interpretation, there are still unclear issues, the unclear declaration in accordance with Section 915 of the ABGB must be interpreted to the detriment of the person who made use of the unclear declaration. This is especially relevant in the context of the interpretation of insurance contracts, as it is generally not possible to determine a clear party's will regarding individual terms on the basis of the interpretation possibilities described above. Insurance contracts are therefore usually interpreted at the insurer's expense if they are unclear.

Occasionally, the Insurance Contract Act provides special rules of interpretation, for example in relation to the calculation of limitation periods or in the case of insurance for third-party accounts (Sections 74 (2), 80 (1) VersVG).

The interpretation of the obligations of the policyholder in the event of a claim plays a major role within the interpretation of an insurance contract. They define the obligations of the policyholder, which primarily aim to inform the insurer as quickly and completely as possible in order to enable the insurer to conduct a final examination of the claim. Obligations can consist of an action or an omission.

As the obligations are generally agreed in the terms and conditions of the contract, the same rules apply to their interpretation as to the remaining terms and conditions. In this respect, reference can be made to what has already been said.

### 8.2 Conditions Precedent

In the event of a breach of the agreed contractual obligations, the insurance conditions usually stipulate the insurer's discharge from liability. In this respect, it is essential for the policyholder to be aware of the obligations that apply to him/her and to fulfil them in the event of a claim. However, the insurer's discharge from liability does not apply pursuant to Section 6 (3) of the VersVG if the policyholder is not at fault for the breach of the obligation.

In addition to the contractual obligations, there are also obligations stipulated by law in the event of a claim, which above all define an immediate notification obligation and require the transmission of corresponding proofs and receipts to the insurer (Sections 33 et seq VersVG).



## 9. Disputes

### 9.1 Disputes Over Coverage

Insurance contract disputes are subject to general civil jurisdiction unless they are social insurance claims. Since insurance companies are operated in the form of a joint-stock company or a European joint-stock company, the civil courts, as district or regional courts in commercial matters, usually have jurisdiction in the event of an action filed by the policyholder against the insurer for the contractually owed insurance coverage.

### 9.2 Disputes Over Jurisdiction and Choice of Law

Commercial jurisdiction does not apply, however, if an insurer is sued for a tort claim. This may be the case after a traffic accident if a claim is asserted against the liability insurer of the policyholder who culpably caused the traffic accident. In these cases, the general district courts and regional courts have jurisdiction as civil courts.

As a general rule, uncertainties as to the (international, subject matter and local) jurisdiction of a court must already be examined by the court without the application of a party, *ie ex officio*. However, in most cases, potential lack of jurisdiction is only examined in detail following a respective motion by the defendant party. It must be taken into account that the parties may agree on the jurisdiction of a certain court within the limits set by law. In the absence of a valid agreement, statutory provisions stipulate which court has jurisdiction.

If the court seised decides to have jurisdiction, the following procedural step is to examine which law is applicable. In this context, the applicable law may result from the agreement of the parties and, in the absence thereof, from statutory provisions.

Of course, an agreement on jurisdiction as well as on the applicable law is not conceivable in the case of tortious claims.

In the event of the lack of jurisdiction, an action shall be dismissed without a decision on the merits.

### 9.3 Litigation Process

In general, there are several ways in which a court action can be initiated, whereby under certain circumstances the plaintiff has the choice, but in other cases a certain procedure is mandatory.

Most legal actions against insurers are filed using the national order for payment form. The court issues a so-called conditional order for payment on the basis of the plaintiff's alleged facts, in which the insurer is ordered to pay the sum of money claimed or to raise an objection within a certain period of time, after which ordinary court proceedings are initiated. This procedure must be carried out nationally up

to EUR75,000; internationally there is no obligation to carry out an order for payment procedure, and also no value limit.

In the case of amounts exceeding EUR75,000, or if the claim is not merely in the form of money, the regular court proceedings shall be instituted immediately, in which the parties submit their substantive and legal arguments, on which the court shall decide.

If the order for payment is not objected or a judgment is not appealed, the order for payment or judgment becomes effective. The prevailing party can then file an application for execution, which initiates the execution proceedings.

### 9.4 The Enforcement of Judgments

According to the EuGVVO, all judicial decisions of the civil and commercial courts of the EU Member States are recognised *ipso iure* (*ie* without a separate legal act) and are enforceable. However, recognition can be refused for certain reasons listed in the EuGVVO.

In the case of an application for enforcement of a foreign judgment, the actual enforcement is preceded by a so-called *exequatur* procedure, *ie* the procedure for declaring enforceability. Special conditions have to be considered in case of a European Enforcement Order according to EuVTVO.

In contrast to national decisions, a foreign judgment can be enforced even if it is not yet effective (*eg* because the limitation period for an appeal has not yet expired). This is to avoid a worse position for the judgment creditor, only because he has to enforce his title in a foreign country.

Special circumstances apply in the case of a European Enforcement Order under the EuVTVO. Enforcement shall then be determined by national law.

In addition to decisions on insurance contract disputes by state courts, there is the possibility to declare non-state courts (arbitral tribunals) competent for disputes arising out of a pre-determined legal relationship in the form of an agreement. This is usually achieved by an additional written agreement in the insurance contract and results in the decision authority and jurisdiction of the particular arbitral tribunal.

### 9.5 The Enforcement of Arbitration Clauses

See 9.4 The Enforcement of Judgments.

### 9.6 The Enforcement of Awards

Arbitration proceedings are initiated by filing a suit and usually end with the arbitral award. A domestic arbitral award usually has the effect of a legally binding court decision and is enforceable after expiry of the payment period stated in the arbitral award. Foreign arbitral awards are equivalent to domestic arbitral awards under the New York Conven-

tion and are therefore also enforceable. Conversely, Austrian arbitral awards are enforceable in states that have ratified the New York Convention. However, the enforcement of a foreign arbitral award may be refused in certain cases.

### 9.7 Alternative Dispute Resolution

The Alternative Dispute Resolution Act (AStG) provides a further possibility for consumers to resolve insurance disputes. According to this Act, a consumer can initiate an alternative dispute resolution procedure instead of a regular court procedure in advance in order to achieve a cost-effective, quick and simple settlement of the dispute. However, such a procedure requires the consent of the insurance company. For this reason, the parties are free to terminate the procedure at any stage.

## 10. InsurTech

### 10.1 InsurTech Developments

In general, quite a lot of InsurTech business activity can be observed in the Austrian insurance market.

Unlike within other fields of (digital) business, InsurTech undertakings in Austria appear not to be aimed at disrupting existing market structures or replacing “classical” insurance undertakings. As for now they rather seem to seek cooperation with established market players such as insurance undertakings or brokers.

According to a recent survey by the Austrian regulator FMA, almost one in three insurers in Austria has begun conducting business with at least one InsurTech undertaking. This is also why most InsurTechs are doing business related to insurance distribution and contract management rather than acting as a risk carrier themselves.

As for the legal framework for the business conducted by InsurTechs, it has to be noted that InsurTechs have to comply with the same legal standards applicable to “conventional” market participants. As a consequence, a large number of Austrian InsurTechs are to be classified as insurance intermediaries, which is why they have to obtain a respective licence according to the Austrian Industrial Code (GewO). For details regarding different types of insurance intermediaries in Austria please see section five.

In recent years, one of the most successful fields of business for InsurTechs has been providing web portals for consumers, enabling them to compare a variety of insurance products available. This business concept is subject to substantial change, since Austrian InsurTechs providing such web portals from now on will have to comply with the standards set out in the Insurance Distribution Directive, which has been fully transposed into national law effective from January 2019.

As well as cooperating with InsurTech start-ups, a number of Austrian insurance undertakings have also established their own online direct distribution channels, some of which use their established company brands, whilst others create their own brands for future online business. Most of these online distribution channels provide for the possibility of signing retail insurance contracts without consulting an insurance distributor in person.

As a matter of fact, the amount of regulation of insurance law can be seen as a major challenge for InsurTechs in Austria.

### 10.2 Regulatory Response

In order to facilitate ongoing development of innovative digital insurance solutions, the Austrian government is currently planning to introduce regulatory sandboxes especially aimed at (start-up) enterprises involved in pioneering technologies such as blockchain or artificial intelligence.

The Austrian regulator FMA has established a fintech point of contact (“FinTech Navigator”) on its webpage, which fintech companies, including InsurTechs, may contact regarding questions relating to, inter alia, licencing requirements and other legal frameworks, FMA procedures or costs involved. However, it has to be noted that with respect to InsurTechs conducting business as an insurance intermediary rather than as an insurance undertaking, the FMA is not the competent supervisory body. The Austrian trade authorities, being the supervisory body for activities of insurance intermediaries, have not yet established any comparable online tools.

In general it remains to be seen how Austrian supervisory bodies, being public agencies that have a history of coping only with traditional forms of insurance business conducted usually by well-known market participants, will adopt to the fast-moving developments that can be expected due to ongoing digitalisation.

## 11. Emerging Risks and New Products

### 11.1 Emerging Risks

Following international trends, insurance contracts relating to cyber risks have become increasingly popular in Austria. Even though market development appears to be less dynamic than in neighbouring countries such as Germany and Switzerland, observers expect cyber insurance to evolve into a main line of business next to established lines such as property insurance or third party liability insurance. Some even argue that cyber insurance will become the most important line of business in respect of intake of insurance premiums.

### 11.2 New Products or Alternative Solutions

With regard to the introduction of new insurance products relating to cyber risks, a top-down development can be

observed. Whereas cyber insurance was initially subscribed to mainly by large-scale enterprises, insurance undertakings in Austria have also begun to explicitly target small and medium-sized enterprises as potential customers. Furthermore, the Austrian insurance market has recently seen the introduction of retail cyber insurance products explicitly tailored for the needs of private persons, including coverage for damages suffered through the use of online shopping tools.

Climate change and extreme weather phenomena have led to a significant increase in damage suffered especially, but not only, by the Austrian agricultural industry. As a consequence, a private-public-partnership concept has been introduced that allows for premium subsidies to policyholders from the government budget in order to diminish the exposure of public disaster funds. Whereas premium subsidies were initially limited to the risks of hail and frost, the private-public-partnership has recently been expanded to damages from drought, windstorm and severe rain.

## 12. Recent and Forthcoming Legal Developments

### 12.1 Developments Impacting on Insurers or Insurance Products

The insurance industry has recently been characterised by highly dynamic legal developments. In addition to increased legal determination at a European level, the insurance industry is also often influenced by the jurisdiction of supreme courts. Due to their high relevance, two areas in particular are discussed in more detail below.

Section 165a of VersVG, which is mainly based on two European regulations, grants the policyholder a 30-day right of withdrawal from a life insurance contract that can be exercised without the need to state reasons. In its decision of 2 September 2015, the Supreme Court decided in AZ 7 Ob 107/15h, taking into account a previous ruling of the European Court of Justice, that in the event of incorrect information about the withdrawal period of Section 165a of VersVG, a policyholder is entitled to an unlimited right of withdrawal.

In response to this judicature, hundreds of policyholders filed lawsuits to unwind their life insurance contracts. The initial situation was different in the numerous proceedings. Due to many different interpretations of the above-mentioned judicature, there was a massive fragmentation of the first- and, partly, second-instance jurisdiction. While one court considered a written form requirement for withdrawal to be “incorrect instruction” as interpreted in the Supreme Court judgment, other courts rejected the claims of the policyholders in these cases.

Very soon it became apparent that there was a need to clarify the legal situation in order to create legal certainty for insurers and policyholders.

Two preliminary proceedings are currently pending at the European Court of Justice to clarify the interpretation of the withdrawal provisions.

In addition, the Austrian legislator has also taken action, and finally decided on 4 July 2018 on a comprehensive new regulation of withdrawal rights in insurance law.

It remains to be seen to what extent the expected decisions of the European Court of Justice will have an impact on the adopted legislative amendment.

On 23 February 2016 a new Insurance Distribution Directive (IDD) came into force. It is considered to be the successor to the previous Insurance Mediation Directive (IMD), but it does introduce significant and far-reaching new regulations for insurance sales, which poses major challenges for insurance intermediaries in future working practice.

The major difference compared to the IMD is the significantly extended scope of application of the IDD. Now, not only mediation by agents and brokers, but also the direct sales by employees of the insurer itself, is included in the scope of application. On the one hand, the conditions of intermediation for all distribution channels are therefore standardised in terms of fair competition; on the other, insurance customers should have the same standard regardless of the type of intermediation.

The IDD has often set itself the aim of offering insurance customers an even higher level of protection in the future. A major change in this respect is the obligation to train insurance intermediaries for at least 15 hours a year.

In order to offer the insurance customer the highest possible degree of transparency and professionalism, the IDD standardises extensive obligations to provide information and advice, which not only provide detailed explanations to the customer and advisory services, but are also intended to guarantee an honest and professional appearance of the intermediary.

With regard to the remuneration of the intermediary, regulations have been foreseen which, in turn, should provide the customer with a clear insight, namely with regard to intermediation costs. In this respect, the national rules must provide for a remuneration that does not interfere with the obligation of the best possible service in the interests of the customer.

The IDD had to be implemented in national law by 1 October 2018. In Austria, the corresponding legislative amendments were made by the Insurance Law Amendment Act 2018 and by the recently adopted Federal Act of the National Council amending the Industrial Code, the Banking Act, the Financial Market Supervisory Authorities Act, the Brokers Act and the Insurance Supervision Act (Insurance Mediation Amendment 2018).

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## 13. Other Developments

### 13.1 Additional Market Developments

On 25 May 2018, the General Data Protection Regulation (GDPR) and the accompanying legal changes came into force. As an EU regulation, GDPR is directly applicable in every EU member state and is partially supplemented by national provisions.

Although data protection is not a specific issue of insurance law, the change in the legal framework conditions poses many challenges for insurers, especially since insurers handle sensitive health data in connection with health or life insurances, which can be classified as especially sensitive.

Insurance companies are now required to take appropriate technical and organisational actions to ensure the best possible protection for their customers. A register of data processing activities must be created, whose content corresponds to the previous DVR reports. Any data protection violations must be reported to both the concerned person and the national supervisory authority without undue delay. In addition, the rights of persons involved in data processing to information and disclosure have been considerably extended and there is an obligation to nominate a data protection officer.

Violations of data protection regulations are now subject to fines, which under certain circumstances can reach up to 4% of global group sales.