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Insurance & Reinsurance

Switzerland

2020

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SWITZERLAND

Law and Practice

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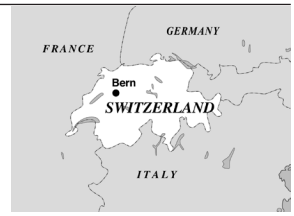

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1. Basis of Insurance and Reinsurance Law

1.1 Sources of Insurance and Reinsurance Law

The Swiss legal framework for private insurance is based in particular on the laws and regulations set out below.

The Federal Insurance Contract Act (ICA) and, subsidiarily, the Swiss Code of Obligations (CO) govern the contractual relationship between insurer, policyholder and insured (Article 100 paragraph 1 ICA). The ICA applies to direct insurance contracts underwritten by insurance undertakings subject to supervision by the Swiss Financial Market Supervisory Authority FINMA (FINMA; Article 101 paragraph 1 No 2 e contrario ICA). Reinsurance contracts are outside the scope of the ICA and are consequently only subject to the general contract law provisions of the CO (Article 101 paragraph 1 No 1 ICA; see **6.6 Consumer Contacts or Reinsurance Contracts**). At its core, the ICA dates back to the year 1908. A proposal of the Swiss Federal Council for a total revision of the ICA was rejected by the Swiss parliament in favour of a partial revision of the ICA (Draft revICA) that is currently being deliberated in the Swiss parliament (see **12. Recent and Forthcoming Legal Developments**). It is currently expected that the partially revised ICA might enter into force in the year 2021.

The Federal Insurance Supervision Act (ISA) sets out the regulatory requirements for insurance and reinsurance undertakings and insurance intermediaries (see **2. Regulation of Insurance and Reinsurance**). A public consultation on an initial draft for a partial revision of the ISA (Consultation Draft revISA) ended on 28 February 2019. In a next step, the Swiss Federal Council will issue a dispatch along with a revised draft for deliberation in Swiss parliament, which is currently expected for spring 2020 (see **13. Other Developments**). However, the partial revision of the ISA might enter into force only in 2022/2023.

The ISA is supplemented by the following implementing ordinances:

- the Federal Ordinance on the Supervision of Private Insurance Companies (ISO);
- the FINMA-Ordinance on the Supervision of Private Insurance Companies (ISO-FINMA); and
- the FINMA-Ordinance on Insurance Bankruptcy.

In addition to the core insurance laws and ordinances listed above, other bodies of law contain relevant provisions with regard to insurance and reinsurance, (eg, general consumer protection law, data protection law or the law against unfair competition). Furthermore, Switzerland is a party to the following three international treaties on direct insurance that supersede the ISA (see **3.1 Overseas-Based Insurers or Reinsurers**):

- The Agreement of 10 October 1989 between the Swiss Confederation and the European Economic Community (now the EU) on Direct Insurance other than Life Insurance (EU Direct Insurance Treaty);
- the Agreement of 19 December 1996 between the Swiss Confederation and the Principality of Liechtenstein on Direct Insurance and Insurance Intermediaries (Liechtenstein Direct Insurance Treaty) that is supplemented by the agreement of 10 July 2015 on insurance against natural disasters by private insurance undertakings; and
- the Agreement of 25 January 2019 between the Swiss Confederation and the UK on Direct Insurance other than Life Insurance (UK Direct Insurance Treaty) (to enter into force once the EU Direct Insurance Treaty ceases to apply to the UK).

FINMA further specifies matters of insurance regulation in numerous circulars. Given their nature as administrative directives, FINMA circulars are, in principle, not binding for Swiss courts. However, as a practical matter – and acknowledging the role and standing of FINMA as the main Swiss financial regulator – the courts in Switzerland often take the circulars into account when interpreting the laws and ordinances. In addition, FINMA publishes less formal guidance documents and FAQs on supervisory matters.

Switzerland is a civil law country. However, precedent cases of Swiss courts still play an important role in interpreting and developing the statutory law (Article 1 paragraph 2 Swiss Civil Code).

2. Regulation of Insurance and Reinsurance

2.1 Regulatory Bodies and Legislative Guidance

Swiss insurance supervisory law is codified in the ISA and its implementing ordinances (see **1. Basis of Insurance and Reinsurance Law**), FINMA being the overall competent licensing and supervisory authority. In general, the ISA applies to:

- Swiss-domiciled insurance and reinsurance undertakings;
- foreign-domiciled insurance undertakings engaging in insurance business in or from Switzerland (see **3.1 Overseas-Based Insurers and Reinsurers**);
- insurance intermediaries (see **5. Distribution**); and
- insurance groups and insurance conglomerates (see **2.2 The Writing of Insurance and Reinsurance** ; Article 2 paragraph 1 litterae a-d ISA).

Certain specific types of activities and undertakings are exempted from the scope of application of the ISA, namely:

- insurance undertakings domiciled abroad that only engage in reinsurance activities in Switzerland (Article 2 paragraph 2 littera a ISA, see **3.1 Overseas-Based Insurers and Reinsurers**);
- public insurance undertakings (eg, cantonal building insurance companies);
- private insurance undertakings that are regulated by special federal legislation (eg, pension institutions or health insurance undertakings offering compulsory health insurance only; Article 2 paragraph 2 littera b ISA);
- certain insurance co-operatives (*Versicherungsgenossenschaften*) with a very limited scope of business where the insured are at the same time members of the co-operative (Article 2 paragraph 2 littera d ISA).

Other regulatory bodies exist – eg, in the area of mandatory health insurance (the Federal Office of Public Health), pension schemes (the Federal Occupational Pension Supervisory Commission) or certain cantonal building insurances (supervisory authority of the relevant Swiss canton).

2.2 The Writing of Insurance and Reinsurance

Insurance and reinsurance undertakings that are within the scope of application of the ISA must obtain an insurance licence from FINMA before engaging in any regulated activities – ie, writing insurance and reinsurance business (Article 3 paragraph 1 ISA). The main licence requirements are set out below.

Organisational Requirements

Legal form as a company limited by shares (*Aktiengesellschaft*) or a co-operative (*Genossenschaft* ; Article 7 ISA).

Good standing and assurance of proper business conduct by the persons responsible for direction, supervision, control and management of the insurance undertaking (Article 14 ISA; Article 12 et seq ISO).

Organisational structure allowing the recognition, limitation and monitoring of all significant risks (Article 22 ISA; Articles 96 to 98a ISO; FINMA-Circular 2017/2 Corporate Governance – Insurers).

Appointment of a responsible actuary who has access to all business records (Article 23 ISA).

Effective internal control system and an internal audit function which is independent from management (Article 27 ISA).

Appointment of a licensed audit firm to review the conduct of business (Article 28 ISA).

Financial Requirements

Minimum capital between CHF3 million and CHF20 million, depending on (i) the classes of insurance (*Versicherungszweige*) that are part of the business plan, and (ii) further specifics of the individual case (Article 8 ISA; Articles 6 to 10 ISO).

Sufficient solvency margin – ie, sufficient free and unencumbered capital resources in relation to all insurance activities (Article 9 ISA)), to be ascertained pursuant to the methodology of the Swiss Solvency Test (SST; Articles 21 to 53a ISO; the SST is the Swiss solvency standard recognised by the European Commission as a standard equivalent to Solvency II with effect from 1 January 2016 (Commission Delegated Decision (EU) 2015/1602 of 5 June 2015)).

Maintenance of an organisational fund (*Organisationsfonds*) to cover the costs of establishing and developing the business or an extraordinary business expansion (Article 10 ISA; Article 11 ISO).

Sufficient insurance-related reserves (*versicherungstechnische Rückstellungen*) for all business activities (Article 16 ISA; Article 54 et seq ISO).

Claims based on insurance contracts have to be covered at all times by tied assets *(gebundenes Vermögen* ; Article 17 ISA), the required amount of assets to be assigned being equal to the insurance-related reserves plus an appropriate surcharge (Article 18 ISA; Article 1 ISO-FINMA);

Maintenance of sufficient liquidity in order to be able to satisfy all of its payment obligations, even in stress scenarios (Article 98a ISO).

Other Requirements

Building on the basic regulatory requirements, certain additional requirements or reliefs apply depending on the specifics of the case or the business. These include:

- additional provisions (eg, regarding the scope of admissible activities or the preventive control of insurance tariffs) apply to specific classes and types of insurance only (Article 31 et seq ISA; Article 120 et seq ISO);
- additional requirements apply for foreign insurance undertakings (Article 15 ISA; see **3.1 Overseas-Based Insurers and Reinsurers**); and
- companies, engaging in reinsurance business only, are exempt from certain regulatory requirements under the

ISA, inter alia from the requirement to maintain tied assets (*gebundenes Vermögen*).

Special provisions apply to the consolidated supervision of insurance groups, and insurance conglomerates (Articles 65 and 73 ISA; FINMA-Circular 2016/4 Insurance Groups and Conglomerates). An insurance group consists of two or more companies, whereby (i) at least one company in the group is an insurance company; (ii) the companies are, as a whole, primarily engaged in the field of insurance; and (iii) the companies constitute an economic unit or are otherwise connected to each other through influence or control (Article 64 ISA). In the case of an insurance conglomerate, the insurance group additionally includes at least one bank or securities dealer of major economic importance (Article 72 ISA). FINMA may impose consolidated supervision on an insurance group or insurance conglomerate, if, alternatively, the group or conglomerate is either effectively managed from Switzerland or, while effectively managed abroad, is not subject to equivalent consolidated group supervision there (Articles 65 and 73 ISA). Consolidated group supervision applies in addition to FINMA's individual supervision over the Swiss insurance undertakings (or other regulated Swiss entities; Articles 66 and 74 ISA).

Procedurally, to obtain an insurance licence, an insurance undertaking has to submit a formal application to FINMA accompanied by a regulatory business plan (Article 4 paragraph 1 ISA). The latter must include, for example, information on the type of business the insurance undertaking intends to write, its management and organisational structure, its geographic scope of business and the persons directly or indirectly owning at least 10% of the capital or voting rights of the insurance undertaking or that are otherwise able to significantly influence its business activities (Article 4 paragraph 2 ISA).

Upon being granted an insurance licence, the insurance undertaking has to comply with all licence requirements on a continuing basis. Amendments to the regulatory business plan must be reported to (and approved or not objected to by) FINMA (see **4. Transaction Activity**).

2.3 The Taxation of Premium

Insurance premium payments are subject to stamp taxes if (i) the policy is part of a Swiss portfolio of an insurance undertaking subject to Swiss insurance supervision or of a Swiss insurance undertaking enjoying public law status or (ii) a Swiss policyholder concluded the policy with a foreign insurance undertaking not subject to Swiss insurance supervision (Article 21 Federal Stamp Tax Act (STA)). Several types of insurance are exempt from this tax, including, in particular, premiums on reinsurance policies (Article 22 STA). In principle, the stamp tax amounts to 5% of the cash premium, with the exception of life insurance policies, where it amounts to 2.5% (Article 24 STA).

Meanwhile, insurance and reinsurance turnovers are exempt from Swiss VAT (Article 21 paragraph 2 No 18 Value Added Tax Act).

3. Overseas Firms Doing Business in this Jurisdiction

3.1 Overseas-Based Insurers or Reinsurers

Insurance undertakings with registered seat abroad engaging in insurance activities in or from Switzerland fall within the scope of the ISA (see **2.1 Regulatory Bodies and Legislative Guidance**), unless an international treaty provides otherwise (see below) or an exemption under the ISA applies. An important exemption in practice concerns foreign insurance undertakings engaging only in reinsurance activities in Switzerland (Article 2 paragraph 2 littera a ISA). Such activity currently does not require a Swiss insurance licence and is not subject to insurance supervision in Switzerland, regardless if conducted cross-border or through a Swiss branch office. Separately, foreign insurance undertakings that have not established a branch office in Switzerland do not require a Swiss insurance licence and are not subject to insurance supervision in Switzerland if their insurance activity in Switzerland exclusively covers (i) insurance risks in connection with ocean shipping, aviation and cross-border transports; (ii) risks located abroad; and/or (iii) war risks (Article 1 paragraph 2 ISO). The term "risk location" is subject to interpretation and must be determined in each individual case.

Furthermore, FINMA has discretion to exempt undertakings engaging in activities that are economically insignificant or only involve a small group of insured persons from insurance supervision pursuant to a de minimis provision in the law (Article 2 paragraph 3 ISA). However, in practice, FINMA rarely, if ever, applies this exemption.

In the Consultation Draft revISA, a new exemption for innovative business models has been proposed (see **13. Other Developments**).

An insurance activity is deemed to take place in Switzerland, irrespective of the place and circumstances of the conclusion of the contract, if (i) the policyholder or the insured is a natural person or a legal entity domiciled in Switzerland or (ii) the insured goods are located in Switzerland (Article 1 paragraph 1 ISO).

Foreign insurance undertakings that fall within the scope of the ISA are required to obtain a licence from FINMA prior to

taking up insurance activities in or out of Switzerland (Article 3 paragraph 1 ISA) and are subject to ongoing supervision by FINMA (Article 2 paragraph 1 littera b ISA; Article 3 littera a Federal Act on the Swiss Financial Market Supervisory Authority). Compared to a Swiss-domiciled insurance undertaking (see **2.1 Regulatory Bodies and Legislative Guidance**), a foreign insurance undertaking seeking to obtain a licence to be active in or from Switzerland has to fulfil additional regulatory requirements (subject to differing rules in international treaties; Article 15 paragraph 2 ISA). It is, in particular, required to establish a branch in Switzerland and appoint a general agent (*Generalbevollmächtigter*) for that branch (Article 15 paragraph 1 littera b ISA). The general agent has to be a Swiss resident and have the knowledge necessary to operate in the insurance business (Article 16 ISO). Furthermore, the foreign insurance undertaking has to comply with the following additional licence requirements:

- being authorised in its country of domicile to engage in the relevant insurance activities (Article 15 paragraph 1 littera a ISA);
- provide, at its head office, for capital in accordance with Article 8 ISA and a solvency margin in accordance with Article 9 ISA, also taking into account the business activities in Switzerland (Article 15 paragraph 1 littera c ISA);
- establish an organisational fund (*Organisationsfonds*) in Switzerland in accordance with Article 10 ISA (Article 15 paragraph 1 littera d ISA); and
- lodge security (*Kaution*) in Switzerland corresponding to a certain percentage of the solvency margin attributable to the Swiss business (Article 15 paragraph 1 littera e ISA).

The EU Direct Insurance Treaty facilitates the access of EU insurance companies to the Swiss market. While it does not exempt them from a Swiss licence requirement in connection with the establishment of a Swiss insurance branch, relief is granted, inter alia, regarding the obligations to establish an organisational fund as well as the posting of a security deposit.

Under the Liechtenstein Direct Insurance Treaty, insurance undertakings domiciled in Liechtenstein may engage in direct insurance business in Switzerland either on a pure cross border basis or through a Swiss branch office without requiring a FINMA licence. Liechtenstein-domiciled insurance undertakings may take up such insurance activities as soon as the Liechtenstein Financial Market Authority has provided FINMA in the individual case with the following information and confirmations (Article 23 Annex Liechtenstein Direct Insurance Treaty):

- a confirmation that the insurance undertaking has the required solvency margin for all of its activities and that it is allowed to do business outside of Liechtenstein;
- a confirmation of the classes of insurance the insurance undertaking may operate; and
- a list of the types and the nature of the risks the insurance undertaking in-tends to cover in Switzerland.

From the perspective of the EU Direct Insurance Treaty, the UK will – upon a potential Brexit – be deemed a third country. In October 2016, the Swiss Federal Council initiated the so-called "Mind the gap" strategy to maintain or even expand the current reciprocal rights and duties in relation to the UK in various areas of trade, traffic, and business, including also in the area of direct insurance. In this context, Switzerland and the UK concluded the UK Direct Insurance Treaty that guarantees freedom of establishment for insurance undertakings operating in the field of direct insurance by converting the content of the EU Direct Insurance Treaty to apply to the bilateral relationship between Switzerland and the UK post Brexit. There are two scenarios for the entry into force of the UK Direct Insurance Treaty.

Deal Scenario

If the treaty between the EU and the UK provides for a temporary continuation of certain EU third country treaties towards the UK, including the EU Direct Insurance Treaty, the EU Direct Insurance Treaty would remain applicable between Switzerland and the UK until the end of the relevant transitional period. This would, however, be formalised by way of a reciprocal notification between the EU and Switzerland. After the expiry of the transitional period, the UK Direct Insurance Treaty between Switzerland and UK would enter into force.

Hard-Brexit/No-Deal Scenario

The UK Direct Insurance Treaty would enter into force on the day the UK formally leaves the EU in the event of "No Deal".

3.2 Fronting

In Switzerland, fronting is, in principle, permitted. Swiss law does not provide for a specific retention obligation on the part of the cedent in fronting arrangements.

4. Transaction Activity

4.1 M&A Activities Relating to Insurance Companies

In recent years, transaction activity in Switzerland has been noticeably high. In particular in the context of preparing themselves for Brexit, several insurance groups have restructured, consolidated and realigned their group operations. Further, a number of private equity investors have become very active buyers of insurance and reinsurance undertakings, including in particular businesses in run-off (and such buyers have become increasingly accepted by FINMA as qualified or con-

trolling investors in insurance undertakings). Moreover, a certain consolidation in the Swiss insurance brokerage industry can be observed.

5. Distribution

5.1 Distribution of Insurance and Reinsurance Products

In Switzerland, insurance and reinsurance products may be distributed directly (ie, by the insurance and reinsurance undertakings themselves) or through insurance intermediaries. Insurance intermediaries in the meaning of the law are persons who offer or conclude insurance contracts in the interest of insurance undertakings or other persons (Article 40 ISA). The law furthermore distinguishes between so-called tied and untied insurance intermediaries (regarding the distinction between brokers and agents see **6.3 Intermediary Involvement**).

Untied insurance intermediaries are insurance intermediaries that are neither legally, nor economically, nor in any other way tied to an insurance undertaking. They are required to register in the public register of insurance intermediaries maintained by FINMA (Article 43 paragraph 1 ISA). In contrast, tied insurance intermediaries are those that are, in a relevant manner, legally or economically tied to an insurance undertaking. Tied insurance intermediaries have a right, but no obligation, to register in the public register of insurance intermediaries (Article 43 paragraph 2 ISA).

The ISO provides for an exemplary list of criteria in order to distinguish between tied and untied intermediaries. For example, insurance intermediaries that generate more than 50% of their commission volume in the course of a calendar year with one or two insurance undertakings, exercise a managerial function in an insurance undertaking, have a direct or indirect holding of more than 10 % in the equity of the insurance undertaking or otherwise influence the business of an insurance undertaking are considered to be tied (Article 183 ISO).

For an intermediary to be eligible for registration in the FINMA register, certain requirements must be fulfilled, including the demonstrable capacity to act (*Handlungsfähigkeit*), proof of appropriate professional qualifications and professional indemnity insurance (Article 44 ISA in conjunction with Article 184 ISO).

In addition, insurance intermediaries (both tied and untied) are subject to information duties vis-à-vis the insured (see **6.1 Obligations of the Insured and Insurer**).

Registered insurance intermediaries are not subject to ongoing prudential supervision by FINMA, but FINMA may examine them from time to time to verify their compliance with regulatory requirements. Furthermore, in case of any indication of irregularities, FINMA may take enforcement action.

Any intermediary activities in Switzerland for the benefit of insurance undertakings that fall within the scope of the ISA, but are not licensed by FINMA to carry out insurance activities in or from Switzerland are prohibited (Article 41 ISA).

6. Making an Insurance Contract

6.1 Obligations of the Insured and Insurer

When concluding an insurance contract, the policyholder has a duty of disclosure which is limited in its content and scope by the written questions provided by the insurer (Article 4 paragraph 1 ICA). The insurer has to proactively seek information as the policyholder need not disclose any facts which the insurer has not asked about. The policyholder must answer the questions and in this context inform the insurer in writing of all facts relevant to the assessment of the risk, to the extent and as they are known or should have been known to him or her when the contract was concluded. Facts are considered relevant for the risk assessment if they may potentially influence the insurer's decision to conclude the contract at all or on the agreed terms (Article 4 paragraph 2 ICA). The duty of disclosure is not a legal obligation to which the insurer would have an upfront enforceable claim, but rather entitles the insurer to legal remedies pursuant to Article 6 ICA in the event of a violation (see **6.2. Failure to Comply With Obligations**).

An insurer must inform the policyholder, prior to conclusion of the contract, of (i) the identity of the insurer and (ii) the main content of the insurance contract (Article 3 paragraph 1 ICA). It may delegate its information obligations (eg, to an insurance intermediary). However, in relation to third parties (including the policyholder) the insurer remains solely responsible for the performance of the information obligation as Article 3 ICA is mandatory and cannot be contractually modified to the disadvantage of the policyholder (Article 98 paragraph 1 ICA).

Furthermore, information duties apply to insurance intermediaries who must provide their clients with information on, for example, the intermediary's identity and address, its contractual relationships with the insurance undertakings on whose behalf it acts and the names of these insurance undertakings on a durable medium before taking up any intermediation activity (Article 45 ISA).

6.2 Failure to Comply With Obligations

If the policyholder breaches its information duty pursuant to Article 4 ICA and misinforms or fails to inform the insurer of a material risk factor (see **6.1 Obligations of the Insured and Insurer**), the insurer may terminate the contract by written notice within four weeks after it becomes aware of the breach of the information duty (Article 6 ICA). The contract is terminated retroactively, and the insurer is not liable to pay any benefits under the insurance contract and may reclaim insurance benefits already paid together with default interest of 5%. Despite of a breach of the duty of disclosure by the policyholder, an insurer may not terminate the contract in circumstances described in Article 8 ICA – eg, if the insurer knew or should have known the incorrect or concealed fact or concluded the contract even though the policyholder did not answer a question (Article 8 ICA).

If the insurer fails to comply with its information duty pursuant to Article 3 ICA, the policyholder has the right to terminate the insurance contract by written notice (Article 3a ICA). This right of termination expires four weeks after the policyholder becomes aware of the breach of duty, but no later than one year after the breach of duty.

The information duties of the insurance intermediary are supervisory duties and their breach may expose the insurance intermediary to administrative and criminal sanctions, including punishment with a fine of up to (i) CHF500,000 if the breach is committed intentionally, and (ii) CHF150,000 if committed negligently (Article 86 ISA). Furthermore, this breach may also result in civil liability for the intermediary.

6.3 Intermediary Involvement

An insurance intermediary is either a tied intermediary or an untied intermediary (see **5. Distribution**). In an untechnical sense, tied insurance intermediaries are often referred to as insurance agents and untied insurance intermediaries are often referred to as insurance brokers, indicating the typical set-up of the contractual relationship between the insurance intermediaries, the insurance undertakings and/or the policyholders. However, the contractual qualification pursuant to Swiss private law does not always correspond with the qualification pursuant to Swiss insurance supervisory law.

An insurance agent has a dominant contractual relationship with an insurance undertaking and primarily acts in its interest and/or on its behalf. The knowledge of the insurance agent is, in principle, attributed to the insurance undertaking (Article 34 ICA). The insurance undertaking pays the insurance agent the remuneration agreed in their contract.

An insurance broker is typically in a contractual relationship with both the insurance undertaking and the policyholder but acts primarily in the interest and/or on behalf of the policyholder, to whom it owes diligent advice on suitable insurance from an adequate spectrum of available products. The knowledge of an insurance broker is, in principle, attributed to the policyholder. However, the broker's remuneration/commission is typically paid by the insurance undertaking with which the policy is ultimately concluded. The commission is typically priced into the insurance premiums the insured pays to the insurance undertaking. Consequently, from an economic perspective, it is the insured that ultimately pays the insurance broker. This regularly entails potential conflicts of interest which must be adequately mitigated by the broker.

Under the Consultation Draft revISA (**13. Other Developments**), untied insurance intermediaries are under a duty to expressly inform the policyholder about any commissions they receive. If the amount of the commission cannot be determined in advance, the insurance intermediary needs to provide at least the applicable calculation parameters and the approximate range (Article 45a Consultation Draft revISA). Moreover, if the insurance intermediary not only receives a commission from the insurance undertaking, but also payments from the policyholder, the insurance intermediary must either pass on the commission to the policyholder or obtain an express waiver from the latter (Article 45a paragraph 2 Consultation Draft revISA)

6.4 Legal Requirements and Distinguishing Features of an Insurance Contract

There is no specific statutory definition of the term insurance or contract of insurance. Based on precedent cases of the Swiss Federal Supreme Court, the following five elements characterise an insurance contract.

Risk Transfer

The insured person must have an interest which he or she protects against a certain risk through the economic performance of the insurers. A risk in this context is a future event that is in fact possible but for which it is either uncertain when it will occur (incertus quando) or whether it will occur at all (incertus an).

Payment of a Premium

The premium is, in principle, the price the insured (or the policyholder) pays in exchange for the performance by the insurer in the event that the insured risk materialises.

Performance by the Insurer/Cover

The insurer must be under an obligation to perform to the insured or another beneficiary if the insured risk materialises. Performance typically consists in an amount of money the

insurer pays to the insured, but may also consist in any other conduct or benefit for the benefit of the insured.

Independence of the Operation
The insurance contract refers to an independent operation that is not an ancillary agreement or a mere feature or term of a non-insurance contract (eg, a warranty for a purchased good is usually not an insurance).

Compensation of Risks According to the Laws of Statistics (Systematic Business Activity)
While it is not necessary for the business to be conducted on the basis of actuarial mathematics according to case law, different criteria have been developed and applied over time, such as the distribution of risk under the law of large numbers, the systematic nature of the business, the consideration of statistical principles and the requirement that earnings must correspond to or supersede the expenses.

The first three elements are generally considered to be the defining and essential elements of an insurance contract (essentialia negotii), while the last two are particularly relevant from a supervisory law perspective.

In principle, insurance contracts are subject to the freedom of form and the freedom of content. Consequently, the insurance contract, in principle, need not comply with any particular form requirements to be valid, with some exceptions (eg, with regard to individual life insurance, where the third person whose life is covered under the life insurance has to agree to the insurance in writing before the insurance contract is concluded (Article 74 paragraph 1 ICA)). Nevertheless, the application for an insurance policy and acceptance by the insurer are usually in writing. In addition, the insurer must issue a policy to the insured stating the rights and duties of the parties (Article 11 ICA) and on the insured's request and against reimbursement, the insurer must provide a copy or transcript of the insured's statements in the application, which were determining for the conclusion of the insurance contract (Article 11 paragraph 2 ICA).

Further, a number of mandatory provisions (and provisions that are mandatory for the insurer only) in the ICA limit the freedom of content for insurance contracts. The statutory rules regarding the premium payment obligation upon premature cancellation of the insurance contract and the place of performance or the tacit renewal of insurance contracts, for example, cannot be contractually modified (Article 97 ICA). The statutory rules regarding, for example, the insurer's duty of information and the insured's termination right or the insurer's liability for his or her intermediaries cannot be modified to the disadvantage of the policyholder or the insured (Article 98 ICA). Furthermore, insurance-specific grounds for nullity (eg, the prohibition of retroactive insurance, apply) (Article 9 ICA; though this provision might be changed in the context of the Consultation Draft revISA, see **13. Other Developments**), as well as general restrictions on the freedom of content (eg, Article 20 CO).

6.5 Multiple Insured or Potential Beneficiaries

A collective insurance contract is generally described as a legally uniform contract that insures several persons or several independent objects (Article 3 paragraphs 3, 7, 31 and 87 ICA). It might be an indication of the existence of a collective insurance contract if – eg, the insured is not identical with the policyholder.

In principle, the same rules as for individual insurance contracts apply. However, there are certain provisions in the law that are specific to collective insurance, inter alia the following:

Information Duties
If the collective insurance contract grants a direct entitlement to benefits to persons other than the policyholder, the policyholder is under an obligation to inform the insured about (i) the essential content of the agreement (needs to be determined on a case-by-case basis and is not identical with Article 3 paragraph 1 ICA), (ii) any amendments and (iii) its termination, whereby the insurer has to provide the necessary information (Article 3 paragraph 3 ICA).

Breach of the Information Duty
If the information duty of the policyholder is only breached in respect of a part of the insured objects or persons, the insurance remains effective for the remaining part, provided that the insurer would have insured this part alone under the same conditions (Article 7 ICA).

Requirements for Entering into the Insurance Contract
Some legal authors suggest that the requirement that the person whose life is covered by the life insurance has to agree in writing (Article 74 paragraph 1 ICA), is limited to individual life insurance and does not extend to collective life insurance. The reason is based on the fact that the speculation with the life of a third party is hardly possible with collective life insurance policies.

6.6 Consumer Contracts or Reinsurance Contracts

Consumer Contracts
So-called "formal consumer law" that only applies to consumers as defined by the applicable acts may be distinguished from so-called "social private law" that applies to all natural and legal persons acting within its scope and generally limits private autonomy by considerations of fairness.

The ICA itself forms part of the social private law and aims to protect insured through – eg, information duties of insurers and mandatory and semi-mandatory provisions that limit the contractual freedom of insurance undertakings (see **6.1 Obligations of the Insured and Insurer**, **6.2 Failure to Comply with Obligations** and **6.4 Legal Requirements and Distinguishing Features of an Insurance Contract**). In addition, the ISA aims to protect the insured in particular against the insolvency risk of insurance undertakings and against abuses (Article 1 paragraph 2 ISA).

Some provisions of formal consumer law are expressly not applicable to insurance contracts, such as the right of revocation for door-to-door sales and similar contracts (Article 40a paragraph 2 CO).

So far, various insurance law revisions with more consumer protection have failed in the Swiss parliament. However, the ICA is currently being revised with regard to certain aspects of consumer protection (see **12. Recent and Forthcoming Legal Developments**).

Reinsurance Contracts

Reinsurance is the insurance of the risk assumed by an insurer. The defining characteristic of reinsurance contracts is the transfer of risk within the insurance industry against a premium payment. Consequently, a reinsurance contract consists of the same basic elements as an "ordinary" insurance contract (see **6.4 Legal Requirements and Distinguishing Features of an Insurance Contract**).

Reinsurance contracts are excluded from the scope of the ICA (Article 101 ICA). In Switzerland, as in many other countries, there is no specific and distinct reinsurance contract law. Reinsurance contracts are governed by the general provisions of the CO and by generally (and often internationally) recognised reinsurance customs and standards. The latter are applied based on the general Swiss law principle that a court must – in the absence of any express, contractual or statutory, provisions – determine the content of the contract with due regard to the nature of the transaction (Article 2 paragraph 2 CO). Reinsurance customs and standards may in practice supersede certain statutory provisions in the CO to the extent they are not mandatory law. On the other hand, the parties to a reinsurance contract may, in the individual case, agree on provisions that deviate from the recognised reinsurance customs and standards.

The reinsured insurer/cedent is subject to an information duty which is based on a special relationship of trust vis-à-vis the reinsurer. The latter must – eg, rely on the reinsured insurer's/cedent's careful selection of the risk, the competent settlement of claims and the correct preparation of accounts. Because of this special relationship of trust, the reinsured insurer/cedent (in contrast to an insured under Article 4 ICA) is obliged to disclose information about the risk that is relevant for the reinsurers' underwriting on its own initiative and not solely upon request.

7. Alternative Risk Transfer

7.1 ART Transactions

Alternative Risk Transfer (ART) includes, in particular, the passing on of insurance risks to investors on the capital market through securitisation, including – eg, the issuance of insurance-linked securities (ILS) such as catastrophe bonds (Cat Bonds) or industry loss warranties (ILW). In many cases, the risk transfer is effected by way of the conclusion of a risk transfer contract between the insurer/reinsurer and a special purpose vehicle (SPV) specially created for this purpose. The insurer/reinsurer transfers its own risk while the SPV agrees to pay an agreed amount upon occurrence of a certain trigger. The SPV then issues bonds in the capital market, the term, interest and repayment of which are linked to the occurrence of the trigger.

The exact legal nature of the contracts between (i) the insurer/reinsurer and the SPV, and (ii) the SPV and investors is controversial in Swiss legal literature, as is the question of whether the SPV and/or the investors are subject to insurance supervision. The contract between the insurer/reinsurer and the SPV on the one hand will generally fulfil all requirements of an insurance/reinsurance contract (see **6.4 Legal Requirements and Distinguishing Features of an Insurance Contract** and **6.6 Consumer Contracts or Reinsurance Contracts**), at least in such cases where no or only a low risk remains with the insurer/reinsurer. As Swiss law does not provide for a tailored regulatory regime nor for a specific exemption from insurance supervision for (insurance) SPVs, ART securitisations are typically handled through other financial centres. The contract between the SPV and investors on the other hand is unlikely to qualify as an insurance contract under Swiss law.

7.2 Foreign ART Transactions

A risk transfer agreement is treated as a reinsurance contract under Swiss law if it fulfils all five insurance contract criteria (see **7.1 ART Transactions**). This is generally the case for ILS transactions. The place of domicile or the qualification of the counterparty as a (regulated) reinsurer abroad is not decisive.

The SST explicitly provides for the recognition of reinsurance and retrocession in the context of quantified risk transfers (Article 46 paragraph 4 ISO). Consequently, if the risk transfer through ILS fulfils the requirements of a reinsurance contract, the cover claims against SPVs may, in principle, be credited to the insurance/reinsurance undertaking's solvency capital.

Moreover, the risk transfer through ILS may be credited to the insurance-related reserves or, if the transfer agreement cannot be qualified as a reinsurance contract, it may be treated as a derivative financial instrument. Because reinsurance companies in Switzerland – unlike direct insurance companies – do not have to form tied assets, it is much easier for them to effectively resort to risk transfer through ILS.

8. Interpreting an Insurance Contract

8.1 Contractual Interpretation and Use of Extraneous Evidence

The rules applying to the interpretation of insurance contracts and general insurance terms and conditions (GTC) under Swiss law correspond with those applicable to the interpretation of contracts in general (Article 100 paragraph 1 ICA). The same applies to reinsurance contracts (Article 101 paragraph 2 ICA). This means that the starting point of every interpretation is the wording of the agreement (ie, grammatical interpretation), based on the usual meaning of the words and expressions used. Furthermore, not only the wording but the mutually agreed true intention of the parties is decisive (Article 18 paragraph 1 CO). To establish the true intention of the parties under Swiss law, all relevant circumstances must be taken into consideration. These include, in particular:

- the place, time and other circumstances of the formation of the contract;
- the behaviour of the parties previous to the formation of the contract and during contract negotiations, including possible drafts of the contract;
- the behaviour of the parties after the formation of the contract, such as performance of an obligation under the contract;
- the interests of the parties at the formation of the contract; and
- the prevailing custom in the industry.

The relevant clause must not be interpreted separately, but within the context of the entire agreement. If the true intention of the parties cannot be established, their behaviour must be interpreted in accordance with the principle of good faith: the true intention is replaced by the intention that reasonable parties would have agreed on.

GTC form an integral part of the insurance contract if the parties have accepted them in the context of the conclusion of the insurance contract in advance. Acceptance of GTC in practice typically takes the form of global acceptance where the policyholder has not necessarily read or understood the entire GTC. However, global acceptance is limited in that it does not include "unusual clauses" (in the meaning of the court practice) that have not been separately pointed out or highlighted. In terms of interpreting the terms that have been validly accepted and agreed between the parties in GTC, generally the same rules apply as for individually drafted contractual clauses (see above). However, specifically, if neither the true intention nor the intention that reasonable parties would have agreed on can be ascertained, the rule of ambiguity (*Unklarheitsregel*) applies – ie, ambiguous statements are constructed to the disadvantage of their author in case of doubt (in dubio contra stipulatorem). This general law principle has further implications in insurance contract law as the insurer is, in principle, liable for all events which bear the characteristics of the insured risk, unless the contract excludes specific events in a certain, unambiguous way (Article 33 ICA).

Moreover, the insurer is under an insurance-specific duty to provide the GTC to the policyholder before the conclusion of the contract (Article 3 paragraph 2 ICA). If the insurer fails to do so, the policyholder may terminate the insurance agreement (Article 3a ICA; see **6.2 Failure to Comply With Obligations**).

In the context of consumer contracts, the use of GTC that, to their detriment and contrary to the requirement of good faith, provides for a significant and unjustified imbalance between contractual rights and contractual obligations, is prohibited by unfair competition law (Article 8 Swiss Federal Act against Unfair Competition).

8.2 Warranties

Swiss law does not require warranties to be specifically identified as such.

8.3 Conditions Precedent

In Switzerland, parties may agree that the liability of the insurer is subject to the condition that the policyholder has complied with certain specific obligations. However, the insurer may not deny coverage based on a breach of a condition precedent, if the breach cannot be regarded as the fault of the policyholder (Article 45 paragraph 1 ICA). The insurer may not deny coverage if the policyholder's breach of its duty to reduce the risk or to prevent an increase in risk did not influence the occurrence of the feared event and/or the scope of insurer's obligation (Article 29 ICA).

The ICA itself provides for certain obligations of the policyholder. Accordingly, the insured is obliged to notify the insurer as soon as he or she becomes aware of the occurrence of the insured event and of the claims under the insurance policy (Article 38 paragraph 1 ICA). In principle, late notification does not have any legal consequences for the insured except where it is at fault and the delay leads to an increase in the loss. In severe

cases, the compensation may be forfeited entirely. Furthermore, in the event of gross negligence causing the insured event, the insurer may reduce the compensation (Article 14 paragraph 2 ICA). If the insured event is caused intentionally, the compensation can be refused entirely (Article 14 paragraph 1 ICA).

9. Disputes

9.1 Disputes Over Coverage

In Switzerland, the parties to an insurance contract often seek out-of-court settlements and litigation and arbitration are relatively rare. Consequently, disputes between the insurer and the policyholder or beneficiary are often resolved bilaterally. An insured may also consult the Swiss Ombudsman of Private Insurance and of Suva (Ombudsman) if the insurance undertaking is a member company. However, the Ombudsman has no decision-making powers and, consequently, solutions can only be found on a voluntary basis.

If no out-of-court settlement can be reached, claims under insurance contracts need to be settled in civil proceedings. They are, in principle, subject to the jurisdiction of the civil courts (Article 85 paragraph 1 ISA), unless the contract provides for an arbitration clause (see **9.5 The Enforcement of Arbitration Clauses**).

In a domestic context, the general rules of the Swiss Civil Procedure Code (CPC) apply and, in principle, the ordinary court at the domicile or registered office of the defendant, or at the place where the characteristic performance must be rendered, has jurisdiction (Article 31 CPC). There are only a few insurance-specific (Article 38 paragraph 1 CPC with regard to motor vehicle or bicycle accidents) and consumer-specific provisions (Article 32 paragraph 1 CPC). The Swiss cantons (or "states") are, in principle, obliged to provide two court levels, a District Court and a Superior Court, for civil jurisdiction, so-called "double instance", before a dispute may be brought before the Swiss Federal Supreme Court, the highest court in Switzerland.

However, four cantons (Zurich, Berne, Aargau and St. Gallen) have established a specialised Commercial Court that, in general, decides in disputes if both parties are registered in the Swiss commercial register or in an equivalent foreign register. Under certain conditions, the Commercial Court can also be chosen by a non-registered claimant (Article 6 CPC) and insurance matters are often dealt with in the Commercial Court. The Commercial Court is an exception to the double instance principle as it is the first and only cantonal court to decide on the matters brought before it.

Claims based on an insurance contract are, in principle, subject to a statute of limitations of two years from the date of the triggering event which raises the obligation to provide indemnification. This statute of limitations cannot be contractually shortened (Article 46 ICA). The Draft revICA proposes substantially extended limitation periods of up to five years.

Reinsurance contracts are not subject to the ICA (see **6.6 Consumer Contracts or Reinsurance Contracts**). Therefore, the general provision of the CO on the statute of limitations for contractual claims of ten years running as of the day on which the claim becomes due applies to claims based on a reinsurance contract (Article 127 CO). This limitation period cannot be contractually altered (Article 129 CO).

9.2 Disputes Over Jurisdiction and Choice of Law

In a domestic context, choices of forum are, in principle, admissible (Article 17 CPC). However, if an insurance contract qualifies as a consumer contract under Article 32 CPC, a choice of forum can be concluded only after a dispute has arisen (Article 35 paragraph 1 littera a and Article 35 paragraph 2 CPC).

Switzerland is a contracting state of the Lugano Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters ("Lugano Convention"). The Lugano Convention applies if there is, inter alia, a connecting factor to a contracting state. The connecting factors need to be determined separately for each provision in the Lugano Convention. The Lugano Convention provides for special jurisdiction rules with regard to insurance matters (Article 8 et seq Lugano Convention; however, these provisions do not apply to reinsurance matters). It provides, in particular, that the policyholder, insured or beneficiary may also sue an insurer domiciled in a contracting state in the courts at his or her own domicile. If the (defendant) insurer is not domiciled in a contracting state, a fiction of domicile is assumed nonetheless if a branch, agency or other establishment exists in the contracting state (Article 9 paragraph 2 Lugano Convention). A choice of forum is only possible to a limited extent – eg, only if the choice of forum was concluded after the dispute had arisen (Article 13 Lugano Convention).

In the context of a dispute that does not fall within the scope of the Lugano Convention, the general provisions of the Swiss Private International Law Act (PILA) apply. The jurisdiction pursuant to the PILA is determined on the basis of the contractual agreement (Articles 112 and 113 PILA) and choice of forum clauses are generally admissible (Article 5 PILA). However, if an insurance contract qualifies as a consumer contract pursuant to Article 120 PILA, the consumer cannot waive in advance the jurisdiction at his or her domicile of residence or usual place of residence (Article 114 paragraph 2 PILA).

When determining the choice of law in an international dispute, Swiss courts apply the PILA, except where the special provisions of Articles 101b and 101c ICA apply (as this is currently only the case with regard to the Principality of Liechtenstein we will not discuss it in detail). Under the PILA, choice of law clauses are generally admissible (Article 116 PILA), if they are explicit or clearly evident from the contract or the circumstances. However, if an insurance contract qualifies as a consumer contract, choice of law clauses are inadmissible (Article 120 paragraph 2 PILA).

9.3 Litigation Process

In principle, before the commencement of litigation proceedings, a conciliation proceeding (*Schlichtungsverfahren*) has to take place (Article 197 et seq CPC). If no agreement can be reached during the conciliation proceeding, the conciliation authority grants authorisation to proceed with litigation. Within three months, the plaintiff has to initiate proceedings before the ordinary court by filing the statement of claim (Articles 209, 220 CPC). An exchange of written submissions (Articles 221, 222, 225 CPC) is in general followed by the main hearing, where the parties present their claims and legal arguments and evidence is taken (Article 228 et seq CPC). Afterwards, the court renders the final decision (Article 236 CPC).

The losing party may file an appeal (*Berufung*) against a final decision of the ordinary court with the superior cantonal court within 30 days (Article 311 paragraph 1 CPC) if the amount in dispute amounts to at least CHF10,000 (Article 308 CPC). This appeal may be filed on grounds of incorrect application of the law or incorrect establishment of the facts (Article 310 CPC). Alternatively, if the amount in dispute is less than CHF10,000 (Article 319 littera a CPC), the losing party may file an objection (*Beschwerde*) with the superior cantonal court within 30 days (Article 311 paragraph 1 CPC). The objection may only be filed on grounds of an incorrect application of the law or obviously incorrect establishment of the facts (Article 320 CPC).

Final decisions of the superior cantonal court are subject to appeal before the Swiss Federal Supreme Court if (i) the amount in dispute amounts to at least CHF30,000 or (ii) the legal question is of fundamental importance (Article 74 Swiss Federal Supreme Court Act (FSCA)). The Swiss Federal Supreme Court is competent with regard to the review of allegations of infringement of federal law. Meanwhile, factual findings of a prior instance may only be overruled if they are obviously wrong (Article 105 paragraph 2 FSCA).

Rules that differ from the procedure described above apply, in particular, to proceedings before a Commercial Court (see **9.1 Disputes Over Coverage**), where, inter alia, no conciliation proceedings are required (Article 198 littera f CPC) and – because it is the only cantonal court – the decision may only be appealed directly to the Swiss Federal Supreme Court. Further differences apply to – eg, disputes in simplified (Article 243 et seq CPC) or summary proceedings (Article 248 et seq CPC; as opposed to ordinary proceedings).

9.4 The Enforcement of Judgments

The enforcement procedure in Switzerland differs depending on the type of judgment that is to be enforced: the enforcement of cash and surety payments is governed by the Swiss Federal Debt Enforcement Bankruptcy Act (DEBA; Article 335 paragraph 2 CPC), while any other claims must be enforced in accordance with the CPC (Article 337 et seq CPC). In order to enforce claims under insurance contracts, which are typically cash payments, the creditor has to file an application for debt enforcement (Article 67 paragraph 1 DEBA) and take further steps under the DEBA.

With regard to the enforcement of foreign judgments, Switzerland is, inter alia, a contracting state of the Lugano Convention. Under the Lugano Convention, as a general principle, a judgment of a contracting state is enforceable in any other contracting state, where the creditor requests a declaration of enforceability. The procedure to gain a declaration of enforceability could be described as follows: The creditor must produce a copy of the judgment which satisfies the conditions necessary to establish its authenticity (Article 41 in conjunction with Article 53 Lugano Convention). At this stage, the debtor does not participate in the proceeding and therefore cannot raise any objections and the decision is declared enforceable without delay (Article 41 Lugano Convention). However, both parties may appeal against the decision (Article 43 No 1 Lugano Convention). In this second proceeding, any potential objections of the debtor (eg, if the recognition of the judgment is manifestly contrary to public policy) are examined (Article 45 paragraph 1 in conjunction with Article 34 Lugano Convention). However, the foreign judgment may not be reviewed as to its substance (Article 45 paragraph 2 Lugano Convention). Moreover, in principle, the jurisdiction of the foreign court is not reviewed, with the exception of insurance matters (Article 35 Lugano Convention). Therefore, a review of the jurisdiction takes place for insurance contracts, but not for reinsurance contracts. The actual enforcement of the judgment itself is not subject to the Lugano Convention but rather to the law of the state enforcing the judgment – ie, with regard to Switzerland pursuant to the DEBA or the CPC (see above).

If no international or bilateral treaty applies, a foreign judgments is only enforceable in Switzerland if it has been recognised pursuant to Article 25 et seq PILA. A foreign judgment is recognised if:

- the courts or authorities of the country where the decision was rendered had jurisdiction from a Swiss law perspective;
- the judgment is final and absolute; and
- there are no grounds for refusal (Article 25 PILA).

Upon the request of the creditor, the recognised judgment is declared enforceable (Articles 28 and 29 PILA). The actual enforcement is governed by the DEBA or the CPC (see above).

Only in the event that neither international treaties nor the PILA provide otherwise, the CPC applies for the recognition, declaration of enforceability and enforcement of foreign judgments as so-called lex fori (Article 335 paragraph 3 CPC).

9.5 The Enforcement of Arbitration Clauses

In Switzerland, in principle, any monetary claim can be submitted to arbitration proceedings in an international context (Article 177 paragraph 1 PILA). The admissibility to arbitration in a domestic context requires an arbitrable claim (Article 354 CPC). Consequently, arbitration clauses in insurance and reinsurance agreements are generally enforceable, if the arbitration clause is in writing or in any other form allowing it to be evidenced by text (Article 7 and Article 178 paragraph 1 PILA; Articles 61 and 358 CPC).

9.6 The Enforcement of Awards

Regarding the enforcement of foreign arbitral awards, the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (NYC), to which Switzerland is a party, applies. The NYC applies irrespective of whether the award is rendered in another contracting state or not (Article 194 PILA). Foreign arbitral awards have to be recognised in principle (Article III NYC). However, the NYC also provides grounds for objections to the enforcement (Article V NYC). Grounds pursuant to paragraph 2 must even be observed ex officio (ie, they do not have to be put forward by the other party). The requesting party must submit the duly authenticated signature of the award and the signature of the arbitration agreement together with the application for recognition or enforcement (Article IV paragraph 1 NYC). Moreover, if the arbitral award is not written in an official language of Switzerland, a translation must be enclosed. According to the Swiss Federal Supreme Court, awards in English do not have to be fully translated, a translation of the holdings of the court is sufficient. The procedure for the enforcement of the foreign arbitral award is governed by domestic law – ie, in Switzerland by the CPC or the DEBA (Article III NYC).

9.7 Alternative Dispute Resolution

Alternative dispute resolution has steadily gained in importance and is ideally suited for large liability cases where very unequal parties are involved, and the injured party tends not to be able to afford long disputes.

If the insurance undertaking is a member company, the insured may refer to the Ombudsman before commencing litigation proceedings (see **9.1 Disputes Over Coverage**). There have been attempts in the past to strengthen the position of the Ombudsman – eg, by providing that insurance undertakings are required by law to become a member company. Under the Consultation Draft revISA, a similar provision is proposed (see **13 Other Developments**).

In Switzerland, mediation, where an impartial third party helps to resolve disputes by facilitating settlement negotiations, is not very established in commercial matters (including insurance and reinsurance matters). The mediator has no decision-making power. Upon request of all parties, mediation may replace conciliation proceedings (Article 213 CPC). The parties may also request mediation at all times during the court proceedings (Article 214 paragraph 2 CPC). However, the court cannot oblige the parties to mediate their dispute but only recommend that they do so (Article 214 CPC). Moreover, it is for the parties to organise the mediation (Articles 214 and 215 CPC). Mediation is non-binding; however, the parties may jointly apply for approval of the agreement reached in mediation by a court, which gives the approved agreement the effect of a legally binding decision (Article 217 CPC).

9.8 Penalties for Late Payment of Claims

Punitive damages are not available under Swiss law. However, there are certain specific provisions under Swiss law that generate results that may, to a very limited extent, seem similar, such as the disgorgement of profits under supervisory law.

Further, a Swiss court, in principle, cannot award or enforce the full award of punitive damages even if the applicable foreign substantive law provides for those damages as this usually constitutes a violation of Swiss public policy.

An insured's claim becomes due four weeks after the date on which the insurer has received sufficient information to assess whether the claim is correct (Article 41 paragraph 1 ICA). As soon as the claim is due, the insured may demand payment from the insurer and may put the insurer in default by sending a reminder (Article 102 paragraph 1 CO). No reminder is necessary, if an expiry date has been agreed (Article 102 paragraph 2 CO). Default triggers the obligation to pay interest that amounts to 5% per annum absent any other agreement (Article 104 CO) and possibly further damages that arose because of late payment, such as the cost of obtaining "replacement money" (Article 103 CO).

10. Insurtech

10.1 Insurtech Developments

Insurtech combines traditional insurance business with modern technologies and fosters alternative business models and distribution channels, inter alia in the following areas:

- contract management/digital brokers offer brokerage of insurance policies through online platforms and mobile apps and facilitate the management of insurance policies for the customer (eg, Knip in Switzerland);
- comparison portals offer easy comparison between various (insurance) products and provider types (eg, Comparis, Anivo and wefox in Switzerland);
- peer-to-peer insurance enables grouping of insured persons (eg, Versicherix in Switzerland);
- health insurance uses health data originating from new data sources; and
- on-demand insurance offers short-term and situation-related insurance (eg, Simpego in Switzerland).

Furthermore, insurtech encompasses new technology solutions for insurance undertakings, enabling them to increase efficiency of their own value chain through the use of artificial intelligence, blockchain applications or "Internet of things" devices. In Switzerland, for example, the B3i Initiative, cardossier or Fizzy are examples of blockchain-based insurtechs that, in particular, aim at automating the insurance business.

If an insurance undertaking participates in an insurtech start-up, the licensing and information requirements pursuant to the ISA must be observed (see **4. Transaction Activity**). Moreover, insurance undertakings have to obtain FINMA permission to conduct non-insurance business (Article 11 ISA).

10.2 Regulatory Response

Since 2016, the Swiss Federal Council has gradually been introducing regulatory reliefs for fintech and insurtech businesses.

In particular, under the Consultation Draft revISA, a new rule has been proposed which would enable FINMA to exempt insurance undertakings with innovative business models from supervision (see **13. Other Developments**).

11. Emerging Risks and New Products

11.1 Emerging Risks

Emerging risks are new risks that are not recognisable or only recognisable to a very limited extent. Their damage potential is difficult to estimate and there is often a long time gap between the cause and the occurrence of the consequences or the realisation of the risk. The full damage potential usually only crystallises at a later point in time. Dealing with emerging risks poses a major challenge for society, the regulator and the insurance industry.

Examples of emerging risks include risks in the technology sector (eg, cyber, internet of things, fracking and nano risks), health risks (eg, health risks from electromagnetic fields, antibiotic resistance) and environmental risks (eg, natural disasters). Probably the most prominent emerging risk from the past is asbestos, which for a long time was regarded as the perfect material, especially for façade cladding and panels. The serious health risks were only discovered around 100 years after asbestos was used professionally for the first time.

In connection with emerging risks, the question arises, in particular, as to who should be liable for risks that were not identifiable, according to the state of the art in science and technology, at the time of their placement on the market (so-called development risks). In Switzerland, liability may, inter alia, arise from contractual law, the Swiss Federal Product Safety Act (ProdSA), the Swiss Federal Product Liability Act (PLA) or the employment relationship. In this context, the statute of limitation plays a major role. Under present regulation, the statute of limitation is relatively short in Switzerland (general non-contractual liability: one year after the injured party has become aware of the damage and of the liable person or ten years after the date on which the damage was caused; product liability: three years after the injured party has become aware of the damage, the mistake and of the person of the producer (Article 9 PLA) or ten years after the date on which the product that caused the damage was placed on the market (Article 10 PLA); contractual liability ten years (Article 127 CO)). However, with the entry into force of the amended CO (revCO) on 1 January 2020, the absolute statute of limitations, for example, was extended from 10 to 20 years with regard to claims in connection with long term health damage or death (eg, asbestos; Article 60 paragraph 1bis revCO; see also **12. Recent and Forthcoming Legal Developments**).

11.2 New Products or Alternative Solutions

Generally speaking, measures to address emerging risks can be taken at the level of the legislature or by the insurers themselves. Risks can, for example, be countered by means of regulatory prohibitions, restrictions or conditions regarding the handling of certain technologies or, indirectly, by the introduction of strict liability in favour of the injured (ie, as is the case in the field of nuclear energy).

From the perspective of the insurer, new policy types have been developed in respect of emerging risks, such as policies to cover computer and network hacking risks, data or identity theft or

loss of reputation. The Swiss market still shows substantial room for development in the area of emerging risks.

12. Recent and Forthcoming Legal Developments

12.1 Developments Impacting on Insurers or Insurance Products

After the Swiss parliament's rejection of the proposal of a total revision of the ICA in March 2013, it is now deliberating on a partial revision of the ICA (see **1.1 Sources of Insurance and Reinsurance Law**). The Swiss Federal Council issued the proposed Draft revICA together with the dispatch to the Draft revICA on 28 June 2017. After the National Council and the Council of States deliberated on the draft legislation in May and September 2019, respectively, the Economic Affairs and Taxation Commission of the Swiss National Council (Commission) discussed the adjustments made by the Council of States. In a next step it is expected that the National Council will deliberate on the Draft revICA for a second time.

The Draft revICA in particular proposes to introduce a number of consumer-friendly provisions, such as the introduction of a right of revocation (Article 2a and 2b Draft revICA), the elimination of deemed approval rules adversely affecting consumers (abolishing Article 12 ICA), the extension of the statute of limitations from two to five years (with some exceptions, Article 46 Draft revICA) and the introduction of an ordinary right of termination (Article 35a Draft revICA). In addition, the Commission requested, inter alia, that the absolute statute of limitations regarding claims arising from a breach of information should be set at two years (Article 3a ICA currently provides for one year, while Article 6 ICA currently does not provide for an absolute statute of limitations; see **6.2 Failure to Comply With Obligations**). The Draft revICA further partially admits retroactive cover (Article 10 Draft revICA) and introduces more relaxed rules for "professional policyholders", such as, inter alia, financial intermediaries pursuant to the Swiss Federal Banking Act and Swiss Federal Collective Investment Schemes Act, other insurance undertakings pursuant to the ISA or companies with professional risk management (Article 98a Draft revICA; eg, the mandatory and semi-mandatory provisions in the ICA will not apply). It is currently expected that the revised legislation might enter into force in the year 2021.

Moreover, the amended CO will, inter alia, extend the absolute statute of limitations from 10 to 20 years with regard to claims in connection with long term health damages or death (eg, asbestos; Article 60 paragraph 1bis revCO; see also **11.1 Emerging Risks**). This may also affect insurance undertakings. The revCO entered into force on 1 January 2020.

13. Other Developments

13.1 Additional Market Developments

The Swiss Federal Council instructed the Swiss Federal Department of Finance to draft a legislative proposal of the ISA in September 2016. On 14 November 2018, the Swiss Federal Council issued the Consultation Draft revISA. The Consultation Draft revISA currently, in particular, proposes to introduce the following provisions:

- Swiss reinsurance branches of foreign insurance undertakings to become subject to a regulatory licence requirement;
- requirement for all insurance undertakings and untied insurance intermediaries to become Ombudsman member companies (Article 83 Consultation Draft revISA; see **9.7 Alternative Dispute Resolution**);
- information duty of untied insurance intermediaries to (i) inform the policy-holder about the possibility of commencing mediation proceedings before the Ombudsman (Article 45 paragraph 1 littera f Consultation Draft revISA) and (ii) about the commission they receive from insurance undertakings or third parties (Article 45a Consultation Draft revISA; see **6.3 Intermediary Involvement**);
- rules of conduct for the insurance industry and the distribution of investment products (Article 39a et seq Consultation Draft revISA);
- new category of "professional clients" – insurance undertakings that only provide services to professional policyholders (see **12 Recent and Forthcoming Legal Developments**) benefit from regulatory relief (Article 30a et seq Consultation Draft revISA);
- restructuring of insurance undertakings (Article 52a et seq Consultation Draft revISA) – currently, there are no provisions allowing for the restructuring of insurance undertakings, which rather have to be liquidated directly; and
- FINMA can exempt insurance undertakings with innovative business models from supervision if this serves to safeguard the future viability of the Swiss financial centre and the protection of the insured remains guaranteed (Article 2 paragraph 3 littera b Consultation Draft revISA).

The consultation process on the Consultation Draft revISA lasted until 28 February 2019. In a next step, the Federal Council is expected to draft a dispatch for the partial revision of the ISA for deliberation in Swiss parliament.

Further, the amended PILA, as entered into force on 1 January 2019, simplifies, in particular, the recognition of foreign bankruptcy decrees. The PILA (including the revised provisions) only applies if the ISA does not provide for special rules.

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