ICLG

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1 Regulatory

1.1 Which government bodies/agencies regulate insurance (and reinsurance) companies?

The responsible regulatory authority in Switzerland is the Swiss Financial Market Supervisory Authority (**FINMA**). It is in charge of approving the establishment of (re)insurance companies, as well as their on-going prudential supervision. FINMA also has statutory supervisory authority over various other financial market participants, such as banks, securities dealers, collective investment schemes and insurance intermediaries.

For social insurance (such as the compulsory health, accident, old age, invalidity insurance, etc.), the responsible authority is the Federal Social Insurance Office.

1.2 What are the requirements/procedures for setting up a new insurance (or reinsurance) company?

The rules governing insurance supervision are set out in the Insurance Supervision Act (**ISA**) and the Insurance Supervision Ordinance (**ISO**). Pursuant to section 3 (1) ISA, an authorisation from FINMA is required in order to carry out insurance business in Switzerland (see question 1.3 below for exemptions). To this end, a local physical presence needs to be established, which might consist of either a Swiss legal entity or a Swiss branch office of a foreign insurer. Both types of establishment require a registration with the local commercial register, which takes two to three weeks from filing a complete application.

From a regulatory point of view, the company must submit an application to FINMA, including a business plan setting out essentially: the type of business the company intends to write; the proposed corporate structure and organisation of the company (including ownership, risk management, any outsourcing, etc.); its personnel (directors/managers, responsible actuary, etc.); as well as its financial resources and technical reserves (minimum capital, organisation fund, solvency requirements, tied assets, financial projections, investment policy, etc.) (section 4 (1-2) ISA).

The application is based on various standard forms and is usually submitted as a discussion draft, following which FINMA reverts with feedback and/or additional requests. The authorisation is generally issued within three months from filing a final version of the business plan.

1.3 Are foreign insurers able to write business directly or must they write reinsurance of a domestic insurer?

As a rule, foreign insurers carrying out insurance activities in or from Switzerland are subject to FINMA's authorisation. An insurance activity is deemed to take place in Switzerland if a Swiss-domiciled individual or legal entity is the policyholder or the insured, or if the insured risk is located in Switzerland (section 1 para 1 ISO).

Exemptions apply to foreign incorporated insurers without establishment in Switzerland that underwrite exclusively the following (direct) insurance risks: marine; aviation; cargo; and war. For all other lines of business, foreign insurers are not able to write business directly (on a cross-border basis, i.e. without FINMA authorisation), and may only write reinsurance of a domestic insurer. Provided that they only carry on reinsurance business in Switzerland, such foreign incorporated insurers are not subject to authorisation (irrespective of whether they are only operating on a cross-border basis or through a Swiss branch office; section 2 (2) (a) ISA).

FINMA requires a domestic ceding (direct) insurer to retain a percentage of the risk it has underwritten, usually at least 10 per cent of its overall risk exposure.

1.4 Are there any legal rules that restrict the parties' freedom of contract by implying extraneous terms into (all or some) contracts of insurance?

The parties' freedom of contract is restricted by certain mandatory legal rules that can be found either in general private and/or public law statutes (e.g. the Swiss Code of Obligations or the Federal Data Protection Act) or in statutes governing specific types of contracts, such as the Federal Insurance Contract Act (**ICA**).

The ICA, in particular, contains a number of provisions which cannot be overridden by contract, as for instance in relation to excess coverage and the replacement value (see full list in section 97 ICA). Further provisions of the ICA are partially mandatory in the sense that they may not be overridden to the detriment of the insured. Such clauses include the pre-contractual duty of information of the insurer, the consequences for the insured of a breach of duty of disclosure and of premium payment default, as well as the duties of the insured in case of risk increase, etc. (see full list in section 98 ICA).

Finally, contractual provisions may also be deemed unenforceable if they are contrary to Swiss public policy.

1.5 Are companies permitted to indemnify directors and officers under local company law?

The indemnification by the company of its directors and officers is not specifically addressed under Swiss law. Given the directors' and officers' statutory responsibility towards the company (sections 754 *et seqq*. CO), the question whether indemnification agreements are valid remains the subject of controversy. If at all, only indemnification for negligent acts or omissions would be permissible.

It is, however, commonly accepted to have directors' and officers' liability insurance in place (the company may even pay the concerned premiums). A further option is for another entity, e.g. the parent company, or the shareholder(s) to grant the indemnification for the directors and officers.

1.6 Are there any forms of compulsory insurance?

There are various forms of compulsory insurance in Switzerland. For instance, liability insurance is required for motor vehicles and other means of transportation (such as aircraft and ships), certain professions (such as lawyers, doctors and insurance intermediaries), and for various types of infrastructure (such as nuclear facilities and gas pipelines). Another typical example is building insurance.

Compulsory social insurance includes, amongst other things, basic health insurance, employee accident insurance, the occupational pension plan, old age and survivors' insurance as well as invalidity and unemployment insurance.

2 (Re)insurance Claims

2.1 In general terms, is the substantive law relating to insurance more favourable to insurers or insureds?

The ICA is a rather "balanced" law in terms of equity between the rights and obligations of the parties to an insurance contract. Sections 97 and 98 ICA list the various rules applicable to the insurance contract that may not be altered in any way (mandatory provisions) or only to the advantage of the insured (partially mandatory provisions) respectively. Whilst both types of rules restrict the parties' freedom of contract, they do not systematically favour the same party. Although many mandatory provisions are indeed more favourable to the insured, a number of them are rather insurer-friendly.

This can be partly explained by the fact that the existing version of the ICA is over 100 years old and thus dates back to a time of less consumer protection awareness. A few provisions of the ICA have, however, been introduced and/or amended in the past 10 years that increase the insureds' rights. Where necessary, adjustments have also been made by the courts through their interpretation of the provisions of the ICA.

2.2 Can a third party bring a direct action against an insurer?

As a rule, and unless provided for in the insurance contract, a third party does not have a direct claim against the insurer.

Some statutory exceptions apply, mainly in the context of compulsory liability insurance policies, such as, for instance, with regard to motor vehicles, nuclear facilities and gas pipelines. In case of such direct third party action, the insurer is prevented by law from raising any defences based either on the policy or the ICA with respect to the insurance cover. However, if the insurer would have been entitled to reduce or refuse the cover on such basis, it may take recourse against the insured.

With respect to non-compulsory third party liability insurance, where no such right of direct action exists, the injured (third party) has a statutory lien on the insurance benefit, and the insurer is allowed to pay the benefit directly to the injured (section 60 ICA).

2.3 Can an insured bring a direct action against a reinsurer?

The insured cannot bring a direct action against a reinsurer (not even in the case of insolvency of the insurer). However, the reinsurance agreement between the insurer and the reinsurer can provide for the insured's right to claim payment directly against the reinsurer ("cut through" clause).

2.4 What remedies does an insurer have in cases of either misrepresentation or non-disclosure by the insured?

In the case of non-disclosure or misrepresentation by the insured, the ICA provides for a statutory right of cancellation which has to be exercised by the insurer within four weeks of it becoming aware of the breach (section 6 (2) ICA). If the insurer does not cancel within four weeks, the policy remains valid. Upon cancellation, the insurer is released from its obligations (including for past insured events if their occurrence was indeed influenced by the non-disclosure or misrepresentation). The insured is in turn entitled to claim the premium paid *pro rata* as from the date of cancellation.

However, the insurer is pre-empted from exercising its cancellation right under the circumstances set out in section 8 ICA (e.g. the insurer was aware or should have been aware of the misrepresentation or non-disclosure).

2.5 Is there a positive duty on an insured to disclose to insurers all matters material to a risk, irrespective of whether the insurer has specifically asked about them?

The insured's pre-contractual duty of disclosure is limited to questions specifically raised in writing by the insurer (section 4 ICA).

2.6 Is there an automatic right of subrogation upon payment of an indemnity by the insurer or does an insurer need a separate clause entitling subrogation?

The ICA only provides for a statutory right of subrogation in the context of non-life insurance and where the claim against the third party is based on tort (section 72 ICA). However, jurisprudence also admits a right of subrogation by analogy for contractual claims – at least in cases of gross negligence.

If subrogation arises, the right to claim against the third party passes *ex lege* to the insurer, who may then bring the claim in its own name.

3 Litigation – Overview

3.1 Which courts are appropriate for commercial insurance disputes? Does this depend on the value of the dispute? Is there any right to a hearing before a jury?

International jurisdiction is subject to the Lugano Convention and/or Switzerland's Federal Code on Private International Law (**PIL**).

Regarding contractual claims between domestic parties, the courts of the canton of the domicile/registered office of the defendant, or of the place where the characteristic performance must be rendered, have jurisdiction (section 31 Civil Procedure Code (**CPC**)). The insurance companies must perform their contractual duties – the characteristic performance – at the Swiss domicile/registered office of the policyholder or insured (section 46a ICA). Furthermore, insurance policies can, under certain circumstances, qualify as consumer contracts. In these cases, the courts of the canton of domicile/registered office of one of the parties are competent for actions brought by the consumer (the policyholder or the insured) and the courts of the canton of domicile of the defendant are competent for actions brought by the insurance company (section 32 CPC).

The law of the canton in which the claim must be filed – in accordance with the abovementioned – determines which cantonal court(s) has/have jurisdiction over the concerned commercial insurance dispute (section 4 CPC). The answer to the present question thus depends on the canton in which the claim must be filed.

Usually, there are two cantonal instances and, depending, *inter alia*, on the amount in dispute, one federal instance. Furthermore, litigation generally has to be preceded by an attempt at conciliation before a special conciliation authority (see also question 4.10 *et seq*. below). There is no jury-system in Switzerland. Four Swiss cantons have designated a special court which, under certain circumstances, has jurisdiction as sole cantonal instance for commercial (insurance) disputes (the so called "Commercial Court"). The preconditions for the jurisdiction of these Commercial Courts are that: (i) the dispute relates to the commercial activity of at least one of the parties; (ii) the amount in dispute is of at least CHF 30,000; and (iii) at least the defendant is registered in the Swiss Commercial Registry or an equivalent foreign registry (section 6 CPC).

In the case that suit gets filed with a court in the "wrong" canton, the seized court has jurisdiction if the defendant enters an appearance on the merits without objecting to the court's jurisdiction (section 18 CPC). Consumers can, however, neither by advance agreement, nor by entering an appearance on the merits, waive the jurisdiction provided for in section 32 CPC (section 35 CPC).

3.2 How long does a commercial case commonly take to bring to court once it has been initiated?

An average commercial case commonly takes up to two to three years to reach a first instance judgment. Obviously, this time span varies depending, among other things, on the canton, the court and especially the proceeding in respect of which the claim is filed. Also, the complexity of the case and the parties' behaviour can have a great impact on the time needed.

4 Litigation – Procedure

4.1 What powers do the courts have to order the disclosure/discovery and inspection of documents in respect of (a) parties to the action, and (b) non-parties to the action?

The CPC does not provide for a standard discovery procedure as is known in common-law jurisdictions. Fundamentally, each party only submits the documents that support its case.

However, parties and non-parties have a procedural duty to cooperate in the taking of evidence, and therefore, under certain circumstances, to produce documents (section 160 CPC). Hence, the courts do have the power to order parties and non-parties to produce certain documents. However, the courts will only do so if the requesting party describes and identifies each requested document in sufficient detail and if such document is reasonably believed to exist. In other words, "fishing expeditions" are not permitted and the content of the requested document should be relevant to the case.

The CPC lists what it deems valid reasons for parties and non-parties to refuse cooperation in the taking of evidence (sections 163 and 165 *et seq*. CPC). If a party refuses to produce documents without valid reasons, the court shall take this into account when appraising the evidence (section 164 CPC). If a non-party refuses to produce documents without justification, the court may, among other things, impose a disciplinary fine of up to CHF 1,000 (section 167 CPC).

Under certain circumstances, production of documents may be ordered by the courts even prior to the commencement of the main proceeding (section 158 CPC).

4.2 Can a party withhold from disclosure documents (a) relating to advice given by lawyers, or (b) prepared in contemplation of litigation, or (c) produced in the course of settlement negotiations/attempts?

Parties and non-parties to an action are not under the obligation to produce documents constituting correspondence (including draft contracts, memoranda, personal notes, etc.) between them and a lawyer, who is entitled to act as a professional representative, or a patent attorney (section 160 CPC). It is further common practice in Switzerland to explicitly declare documents, such as settlement proposals, produced during settlement negotiations/attempts as confidential and without prejudice to the parties' position in impending court proceedings.

4.3 Do the courts have powers to require witnesses to give evidence either before or at the final hearing?

The duty to render a truthful testimony is a general civic duty in Switzerland (section 160 CPC). Witnesses domiciled in Switzerland can, therefore, be summoned by the Swiss courts. Again, they have, under certain circumstances, the right to refuse cooperation (sections 165 *et seq*. CPC). If they refuse to testify without justification, the court may, *inter alia*, order the use of compulsory measures or impose a disciplinary fine of up to CHF 1,000 (section 167 CPC).

If witnesses domiciled abroad do not voluntarily testify, the proper procedure for judicial assistance must be applied.

4.4 Is evidence from witnesses allowed even if they are not present?

In principle, witnesses are required to testify in front of the judges in person. They cannot choose to make a written statement. If a witness is sick, the court hearing can be postponed. Furthermore, under certain circumstances, a witness may be questioned at his/her place of residence (section 170 CPC). Only exceptionally may the courts obtain information in writing from individuals if the formal examination as a witness seems unnecessary (section 190 CPC). However, information obtained in writing by the courts does not have the same evidentiary value as an oral testimony. It should be furthermore noted that, by Swiss standards, written witness statements obtained by the parties can even decrease the evidentiary value of a subsequent oral testimony of the concerned witness.

4.5 Are there any restrictions on calling expert witnesses? Is it common to have a court-appointed expert in addition or in place of party-appointed experts?

Party-appointed expert opinions are not covered by the CPC and, according to the Swiss Federal Supreme Court, they cannot be qualified as evidence but rather as mere party allegations (BGer 4A_178/2015 E. 2.6). The party bearing the burden of proof should, therefore, always request the court to appoint an independent expert.

The courts may obtain an expert opinion about aspects of the factual circumstances of the case at hand from one or more independent court-appointed experts at the request of a party or *ex officio* (section 183 CPC). If a court lacks the required technical knowledge for a case and if one of the parties requests an expert opinion, the court should generally obtain one in order not to violate the concerned party's right to be heard. However, the assessment of the evidence and the legal analysis of the case always remain within the competence of the court.

Experts must be independent and prior to their appointment, the court must give the parties the opportunity to comment on the suggested expert – or to suggest experts themselves – as well as on the proposed instructions/questions (sections 183 and 185 CPC).

With the authorisation of the court, the expert may carry out his/her own inquiries (section 186 CPC). An expert can, therefore, even meet with a party *ex parte* (e.g. if an expert medical doctor has to assess the health state of a party). However, at the request of a party or *ex officio*, the court may order that the expert's inquiries be carried out once more in accordance with the rules on taking evidence (section 186 CPC).

Ultimately, the courts are not bound by expert opinions, but form their opinion based on their free assessment of the evidence taken (section 157 CPC).

The party requesting the court to obtain an expert opinion has to make an advance payment (section 102 CPC; see question 4.9 below regarding the final allocation of costs).

4.6 What sort of interim remedies are available from the courts?

In the case that the applicant credibly shows an (anticipated) violation of his/her rights which threatens to cause not easily reparable harm, the courts may order any interim measure suitable to prevent this imminent harm: e.g. an injunction; an order to remedy an unlawful situation; an order to a registry authority or to a third party; or an order to make a performance in kind (sections 261 *et seq*. CPC, in international disputes in conjunction with section 10 PILA or section 31 Lugano Convention).

Moreover, under certain circumstances, a creditor can also apply for a freezing order with regard to its debtor's assets in order to secure payment (section 271 of the Swiss Debt Enforcement and Bankruptcy Act).

4.7 Is there any right of appeal from the decisions of the courts of first instance? If so, on what general grounds? How many stages of appeal are there?

As described under question 3.1 above, there are usually two cantonal instances and – depending, among other things, on the amount in dispute – one federal instance. In Switzerland, there are, therefore, generally two (one cantonal and one federal) stages of appeal. In the case that one of the four cantonal Commercial Courts is competent as first instance, there is only one (federal) stage of appeal.

Appeals may be filed on grounds of incorrect application of the (Swiss federal) law and/or (obviously) incorrect establishment of the facts (sections 310 and 320 CPC and sections 95 *et seqq*. Swiss Federal Supreme Court Act).

4.8 Is interest generally recoverable in respect of claims? If so, what is the current rate?

Yes, a debtor in default must generally pay an interest rate of 5 per cent *per annum* (section 104 Swiss Code of Obligations).

4.9 What are the standard rules regarding costs? Are there any potential costs advantages in making an offer to settle prior to trial?

At the very beginning of the proceedings, the courts usually demand an advance payment from the plaintiff up to the amount of the expected court costs and, at the request of the defendant, the plaintiff must, under certain circumstances, provide security for party costs (sections 98 *et seq*. CPC).

At the end of the proceedings, the court and party costs are usually charged to the unsuccessful party or, if no party entirely succeeded, the costs are allocated in accordance with the outcome of the case (section 106 CPC). The courts have a certain discretion regarding the allocation of costs (section 107 CPC), thus, there might be a cost advantage in making an offer to settle prior to trial, but in most cases there probably is not. However, as a standard rule, settling the dispute during trial substantially decreases the costs.

The *quantum* of the costs is set out in cantonal tariffs (section 96 CPC) and mainly depends on the amount in dispute.

4.10 Can the courts compel the parties to mediate disputes? If so, do they exercise such powers?

Generally, litigation has to be preceded by an attempt at conciliation before a special conciliation authority or – if all the parties so request – an attempt at mediation with a private mediator (section 197 and section 213 CPC). Usually, therefore, the claimant can only submit its statement of claim to the competent court together with the "authorisation to proceed", i.e. a document issued by the conciliation authority in the case that no agreement is reached in conciliation or in mediation (sections 209 and 213 CPC).

However, conciliation and mediation proceedings do not have to be held if, among other things, one of the four cantonal Commercial Courts is competent (section 198 CPC).

During court proceedings, the courts can, at any time, recommend mediation to the parties (section 214 CPC); however, Swiss courts never compel parties to mediate commercial disputes.

4.11 If a party refuses to a request to mediate, what consequences may follow?

There are no consequences for refusing a request to mediate.

If the defendant does not appear at the conciliation hearing before the special conciliation authority, the latter proceeds as if no agreement had been achieved and issues the "authorisation to proceed" (Art. 206 CPC).

5 Arbitration

5.1 What approach do the courts take in relation to arbitration and how far is the principle of party autonomy adopted by the courts? Are the courts able to intervene in the conduct of an arbitration? If so, on what grounds and does this happen in many cases?

Switzerland is a very arbitration-friendly jurisdiction and a party to the New York Convention (**NYC**). In the case that the seat of arbitration is in Switzerland, either the 12th chapter of the PIL or the 3rd part of the CPC is the law governing the arbitration, depending on whether at least one of the parties was domiciled or resided outside of Switzerland at the time the arbitration agreement was concluded. Both sets of law and, therefore, Swiss courts widely accept the principle of party autonomy. For instance, the parties are free to choose the law applicable to their contract (section 187 PIL and section 381 CPC), to control the composition of the arbitral tribunal (section 179 PIL and sections 360 *et seq*. CPC), and they can directly or by reference to (institutional) rules regulate the arbitral procedure as long as their equal treatment and their right to be heard in an adversarial proceeding are guaranteed (section 182 PIL and section 373 CPC), etc. If the parties are unable to agree, e.g. on procedural issues or the appointment of an arbitrator, fallback provisions exist.

The assistance of local courts can be requested with regard to the appointment, challenge, removal and replacement of the arbitrators, the taking of evidence or any other procedural act of the arbitral tribunal, interim relief as well as the challenge of arbitral awards (albeit only on very limited grounds, see question 5.6 below) and, last but not least, with regard to the recognition and enforcement of arbitration agreements and foreign arbitral awards.

5.2 Is it necessary for a form of words to be put into a contract of (re)insurance to ensure that an arbitration clause will be enforceable? If so, what form of words is required?

With regard to the enforcement of arbitration clauses, Swiss courts are bound by section II(3) NYC (see also section 7 PIL and section 61 CPC). Thus, no specific wording other than that contained in the well-established model arbitration clauses (e.g. as suggested by arbitral institutions or the UNCITRAL) is needed.

5.3 Notwithstanding the inclusion of an express arbitration clause, is there any possibility that the courts will refuse to enforce such a clause?

As long as the agreement to arbitrate is in writing (section II(2) NYC, section 178(1) PIL and section 358 CPC), parties can either agree on an arbitration clause before any dispute has arisen or conclude a submission agreement after a specific dispute has actually arisen. With regard to international arbitration, all pecuniary claims (section 177 PIL), and with regard to domestic arbitration, any claim over which the parties may freely dispose (section 354 CPC), can be submitted to arbitration.

5.4 What interim forms of relief can be obtained in support of arbitration from the courts? Please give examples.

State courts are – even when the arbitral tribunal is not yet constituted – cumulatively, alongside the arbitral tribunal authorised to grant interim relief (section 183 PIL and section 374 CPC and related doctrine). Furthermore, the arbitral tribunal can request the assistance of the state courts if the party concerned does not voluntarily comply with interim measures ordered by the arbitral tribunal.

The forms of interim relief available before Swiss state courts are the ones set out under question 4.6, first paragraph, above. Interim relief also includes orders to preserve evidence. However, Swiss state courts do not order injunctions against starting litigation in contravention of an arbitration clause.

5.5 Is the arbitral tribunal legally bound to give detailed reasons for its award? If not, can the parties agree (in the arbitration clause or subsequently) that a reasoned award is required?

According to section 189 PIL and section 384 CPC, an arbitral award must be in writing and shall state the reasoning upon which it is based – unless the parties have explicitly dispensed with this requirement.

However, the fact alone that an award fails to state the reasons by which it is supported, although the parties have not explicitly waived such right, is – according to the Swiss Supreme Court – neither reason enough to annul the award, nor to prevent its enforcement (BGE 130 III 125 E. 2.2).

5.6 Is there any right of appeal to the courts from the decision of an arbitral tribunal? If so, in what circumstances does the right arise?

According to section 190 PIL and section 393 CPC, an arbitral award can only be challenged if:

- the arbitral tribunal was composed in an irregular manner;
- the arbitral tribunal erroneously held that it had or did not have jurisdiction;
- the arbitral tribunal ruled on matters beyond the claims submitted to it or if it failed to rule on one of the claims;
- the principles of equal treatment of the parties or the right to be heard were violated;
- the award is incompatible with Swiss public policy (only PIL);
- the award is arbitrary in its result because it is based on findings that are obviously contrary to the facts as stated in the case files or because it constitutes an obvious violation of law or equity (only CPC); and/or
- the costs and compensation fixed by the arbitral tribunal are obviously excessive (only CPC).

If neither party is domiciled, resides or has a place of business in Switzerland, the parties may waive the right to appeal by an express declaration in the arbitration agreement or in a subsequent written agreement (section 192 PIL).

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