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Insurance & Reinsurance

Austria
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2021

AUSTRIA

Law and Practice

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1. Basis of Insurance and Reinsurance Law

1.1 Sources of Insurance and Reinsurance Law

The primary source for Austrian insurance and reinsurance law is the Austrian Insurance Contracts Act, which primarily focuses on the insurance contract itself excluding the application to reinsurance contracts according to Section 187 of the Insurance Contracts Act and stipulates obligations for both the policyholder and the insurer. Besides, the Austrian Civil Code applies especially with regard to the conclusion and the interpretation of an insurance or reinsurance contract as well as the applicability of terms and conditions.

Obligations for insurers, reinsurers and intermediaries can be found in the Insurance Supervision Act and the Industrial Code. The Insurance Supervision Act imposes most of the organisational obligations for insurance and reinsurance companies: it primarily governs the organisational and regulatory framework especially regarding concession, legal form, capital and liquidity requirements and governance of insurance and reinsurance companies. The Industrial Code primarily governs the organisational and regulatory framework as well as the activities of intermediaries.

Furthermore, there are a number of European guidelines for example from the European Insurance and Occupational Pensions Authority (EIOPA) as well as advisory opinions and guidelines from the national Financial Market Authority (FMA). Many provisions in the stated law are derived from European Union legal acts such as the Directive 2009/138/EC on the taking-up and pursuit of the business of insurance and reinsurance (Solvency II) or the Directive (EU) 2016/97 on Insurance Distribution (IDD).

Even though the Austrian jurisdiction as such does not have precedents in general, unlike other countries, the jurisdiction of the Austrian Supreme Court still creates a somewhat binding effect for the lower courts: Decisions of lower courts usually will be set aside by the Supreme Court if they are not in accordance with jurisdiction of the Supreme Court.

2. Regulation of Insurance and Reinsurance

2.1 Insurance and Reinsurance Regulatory Bodies and Legislative Guidance

The main Austrian regulatory framework can be found in the Austrian Insurance Supervision Act and a large number of EU directives and regulations. Applicable directives include the Solvency II Directive, which imposes most of the obligations for insurance and reinsurance companies, as well as the IDD, which stipulates most disclosing and information obligations. Worth mentioning is the Industrial Code, which primarily governs the activities of intermediaries. Besides these, there are a number of European guidelines and advisory opinions from the national regulator for the insurance and reinsurance sector.

The Insurance Supervision Act primarily governs insurance and reinsurance companies as well as the organisational and regulatory framework regarding inter alia concession, legal form, capital and liquidity requirements or governance.

The FMA, as the national regulatory body, and the EIOPA, as EU-level body, supervise the compliance of the regulatory framework. Particularly, the EIOPA frequently issues guidelines for the national authorities in which the realisation of EU directive and regulations is recommended. These recommendations become binding for the national authorities through national and EU legislation.

2.2 The Writing of Insurance and Reinsurance

Insurance and reinsurance contracts can be concluded either directly with the insurer and reinsurer or through an intermediary.

According to Section 6 of the Insurance Supervision Act, both insurer and reinsurer need a concession granted by the FMA to provide the relevant contractual insurance service. One of the key requirements is that the insurer or reinsurer must be established as a stock company, societas europaea or mutual insurance association. Besides this, strict capital, liquidity and governance requirements apply.

The concession is only granted if the headquarters of the insurance company is in Austria. There are no differences for writing consumer insurance or corporate insurance regarding the requirements. However, according to Section 7, paragraph 4 of the Insurance Supervision Act, any concession must be issued separately for the respective class of insurance.

General Requirements

General requirements include the establishment of an effective risk management system (Section 110 of the Insurance Supervision Act), which incorporates all the necessary strategies, processes and reporting procedures that are necessary to recognise, measure, monitor, manage and report on any potential risks. Pursuant to Section 107 of the Insurance Supervision Act, an effective governance system that ensures sound and prudent corporate governance and that is commensurate with the nature, scale and complexity of the business has to be set up. Capital and liquidity requirements follow the Solvency II Directive and the Delegated Regulation (EU) 2015/35 of the

Commission. Unlike the Insurance Contracts Act which stipulates the non-application for reinsurance contracts in Section 186, the Insurance Supervision Act applies fully according to Section 1, paragraph 1, number 1 of the Insurance Supervision Act, meaning that the above-mentioned requirements also have to be met by reinsurance companies. Excess layers as additional contracts are no exception to this.

For insurance and reinsurance intermediaries, a business licence is required. If the intermediary service is only a side business, then no special business licence is needed. A business licence can be obtained at the competent district administrative authority and a key requirement is a certificate of competence.

Ownership

Regarding ownership, any foreign providers (non-EU) must be aware that the headquarters of the insurance company must be located in Austria according to Section 8 of the Insurance Supervision Act otherwise the application for concession will be rejected by the FMA. According to Section 14 of the Industrial Code, foreign providers of intermediary insurance or reinsurance services need a domicile or branch in Austria unless bilateral treaties stipulate otherwise. Furthermore, any purchase of a qualified share in an insurance or reinsurance company must be notified to the FMA according to Section 24 of the Insurance Supervision Act.

A qualified share is any share which corresponds to at least 10% of the voting rights or the capital. Pursuant to Section 24 of the Insurance Supervision Act, persons or entities already having such a qualified share and wanting to increase it until it reaches or exceeds 20%, 30% or 50% of the voting rights or the capital, or increasing the share in any other way making the insurance or reinsurance company their subsidiary, must notify the FMA. The purchase is deemed to be approved in case of no prohibition of the FMA within 60 working days.

2.3 The Taxation of Premium

The taxation of premiums follows the Insurance Tax Act. Generally, health insurance premiums are taxed at 1%, while life insurance premiums are taxed at either 4%, 11% or 18%. However, a tax specialist should be consulted in any case as the Insurance Tax Act is very complex and contains many exemptions.

Regarding Value Added Tax, premiums are exempt according to Section 6 of the Value Added Tax Act and an input tax deduction is usually excluded.

For Legal entities, a tax rate of 25% generally applies according to Section 22 of the Corporate Income Tax Act and insurance or reinsurance services are no exception to this. However, mutual insurance associations with a gross premium income from the last three years of a maximum of EUR4,400 per year are exempt from corporate income tax under Section 5, paragraph 8 of the Corporate Income Tax Act.

3. Overseas Firms Doing Business in the Jurisdiction

3.1 Overseas-Based Insurers or Reinsurers

The general rule is that every insurer and reinsurer needs an Austrian concession to be able to offer their insurance and reinsurance services in Austria according to Section 6 of the Insurance Supervision Act. This rule does not apply to Insurers and reinsurers based in EEA countries due to the freedom of establishment pursuant to Section 20, paragraph 1 of the Insurance Supervision Act. According to Section 14, paragraph 1, number 2 of the Insurance Supervision Act, foreign (ie, non-EEA) based insurers and reinsurers fall under the general rule and additionally need a concession for their domestic country as well if no Bilateral Agreement states otherwise. Besides the concessions insurers and reinsurers based in third countries need a domestic branch in Austria pursuant to Section 13, paragraph 1 of the Insurance Supervision Act.

For the operation of reinsurance in Austria undertaken by a company domiciled in the United States of America, however, this can be facilitated due to a bilateral agreement with the EU. Such companies do not need a concession in Austria if the reinsurance business is not conducted through a domestic branch according to the provisions and conditions stipulated in the bilateral agreement. This applies only for the operation of reinsurance.

Generally, the Insurance Supervision Act provides for easier access to the Austrian insurance and reinsurance market only for EEA and EU countries but not for third countries and accordingly if a third-country company (head office outside the EEA) already has been granted or has applied for a concession in one of the EEA Member States according to Section 15 of the Insurance Supervision Act.

Brexit

Due to Brexit, Great Britain ceased to be a member of the European Union on 31 January 2020. Regarding the membership of the EEA a transition period until 31 December 2020 applies according to Article 126 of the Withdrawal Agreement between the European Union and Great Britain. During the transition period Great Britain is treated like a member of the EEA. After the transition period has ended, Great Britain will be a third country in terms of the EEA Agreement, which means the easier access to the Austrian insurance and reinsurance market will not apply to British companies. However, currently Great

Britain and the European Union are negotiating their future relationship.

Article 126 of the Withdrawal Agreement between the EU and the UK provides for a transition period until 31 December 2020. It follows from Article 129 of the Withdrawal Agreement that, during the transition period, the UK shall be bound by the obligations stemming from the international agreements concluded by the EU, including the EEA Agreement.

Concessions

Applicants for a concession have to follow the procedure is as set out in Section 10 of the Insurance Supervision Act: submission of a completed application form with a business plan initiates the concession procedure. The FMA as the competent authority provides an information leaflet with all needed documents for concession applicants on their homepage. The concession process is subject to a concession fee according to the Austrian Financial Authority Fees Regulation and the amount of the fee depends on the legal form and size of the insurance or reinsurance company.

The FMA has six months to make a decision on a concession application once all documents have been provided. The duration of the concession procedure can vary depending on the nature, extent and complexity of the business model to be assessed, the shareholder and organisational structure and the financial soundness of the license applicant.

As a general rule, once a concession has been granted by the FMA it is indefinitely effective. It can only expire for certain reasons, eg, according to Section 12 of the Insurance Supervision Act if the business activity is not commenced within 12 months after the concession is granted.

Exemptions

Some services are exempted from the regime of the Insurance Supervision Act, the consequence being that no concession under Section 6 of the Insurance Supervision Act is needed. This applies inter alia to pension funds which fall under the Pension Funds Act and some non-life insurance exceptions in Sections 2 to 4 of the Insurance Supervision Act.

Business activities without concession can be fined up to EUR100,000 by the FMA according to Section 329, paragraph 1 of the Insurance Supervision Act.

3.2 Fronting

Fronting is only partly permitted according to an opinion of the FMA: a complete transfer of the entire risk to one or more reinsurers ("fronting") is prohibited because it contradicts the nature of the insurance business. In this case, the primary insurer would only have to bear the default risk of the reinsurer. However, the transfer of parts of the risk is acceptable.

The right for retention of the transferring insurer follows the rules of civil law, commercial law and is also determined by the agreement between the cedant and the debtor. Generally, the cedant can either have all the defenses as the debtor has towards the insured person or the cedant has to pay without the possibility to raise any objections regarding the contractual relation of the debtor and the insured person.

4. Transaction Activity

4.1 M&A Activities Relating to Insurance Companies

Currently, M&A activities in Austria are not significant, either inbound or outbound. In the past, Austrian insurance companies have acquired a number of eastern European insurers and have established a strong market position in these countries. However, these tendencies have ceased in the last few years as demand was satisfied and companies had to reorganise their subsidiaries and bring them up to new EU-standards.

Austria has felt the impact of internal M&A transactions, for example, the acquisition of Chubb by ACE. Acquiring an Austrian insurance company also is quite complicated from a regulatory perspective: according to Section 28 of the Insurance Supervision Act, the stock of insurance and reinsurance contracts can be transferred without the prior consent of the policyholders if the FMA approves. Furthermore, every transfer of business needs an approval by the FMA, pursuant to Section 29 of the Insurance Supervision Act. Approval will be denied if the applying company is not authorised for the insurance or reinsurance business which is subject of the transfer.

In case the whole insurance business is merged the concession transfers automatically according to Section 29, paragraph 2 Insurance Supervision Act and no approval of the FMA is needed.

For Insurance stock companies which are listed on the Austrian stock exchange the Takeover Act may apply stipulating offering or notice obligations for example if a controlling share is obtained. Worth mentioning is Section 20, paragraph 5 of the Banking Act, regulating the exchange of information between the FMA and another EU authority if a reinsurance company wants to acquire a bank.

5. Distribution

5.1 Distribution of Insurance and Reinsurance Products

Besides insurance and reinsurance companies, certain intermediaries can also distribute insurance and reinsurance products. Insurance and reinsurance intermediaries need a business licence according to Section 94, number 76 of the Industrial Code for their intermediary services. Pursuant to Section 137, paragraph 3 of the Industrial Code, some intermediary services are considered as side businesses to an existing business licence and no further licence is required.

To obtain a business licence for intermediary services, a business registration together with a certificate of competence on behalf of the business wanting to be registered must be sent to the competent district administrative authority. Pursuant to Section 340 of the Industrial Code, the district administrative authority then has three months to make a decision.

Foreign Intermediaries

According to Articles 4 and 6 IDD foreign insurance intermediaries, reinsurance intermediaries and ancillary insurance intermediaries who were established or are resident in the EEA may act freely in Austria on the basis of freedom of establishment as well as freedom to provide services: According to Section 373c of the Industrial Code after application of the intermediary the competent authority in Austria is obliged to recognise the effective exercise of the intermediary activities in EEA state as a sufficient certificate of competence. Pursuant to Section 373a of the Industrial Code also a temporary exercise of intermediary services is possible without certificate of competence or an application for recognition of effective exercise due to the freedom to provide services.

For insurance intermediaries, reinsurance intermediaries and ancillary insurance intermediaries established and resident outside the EEA, the freedom of establishment or the freedom to provide services under EU law does not apply. Therefore, these persons must apply to the competent authority for an appropriate business license in Austria. The requirements for resident insurance intermediaries stated above apply.

According to Section 137, paragraph 2 of the Industrial Code intermediary services may be exercised either as insurance agent or insurance broker in accordance with the actual relationship to the insurance company. Despite working for both parties to the insurance contract, the insurance broker must primarily protect the interests of the insurance customer according to Section 27, paragraph 1 of the Brokers Act while the insurance agent primarily works for and protects the interests' insurance or reinsurance company. Nevertheless, insurance agents have information and disclosure obligations towards the customer (see below). Finally, every insurance company or person can provide his services only as an insurance agent or insurance broker and not both according to Section 137, paragraph 2 of the Industrial Code.

Furthermore, the bank insurance model or bankassurance where a bank offers insurance products to the bank's customers is also possible. For this purpose, the bank needs a special approval according to Section 21, paragraph 1, number 8 of the Banking Act. The above-mentioned information on the exercise as insurance agent or insurance broker also applies. Due to Section 21, paragraph 4, number 4 of the Banking Act the operational rules for intermediaries also apply to the respective bank.

6. Making an Insurance Contract

6.1 Obligations of the Insured and Insurer

According to Section 16, paragraph 1 of the Insurance Contracts Act, at the conclusion of the contract the policyholder must disclose to the insurer any circumstances that are known to them which could be significant for the insured risk. Circumstances which are likely to influence the insurer's decision to conclude the contract or to agree to the agreed terms are considered significant. Furthermore, circumstances which the insurer has asked explicitly and in written form are also considered to be significant in case of doubt. Even though insurers do not have to proactively seek information by law they generally use clauses in their terms and conditions stipulating a large number of disclosable information and circumstances. Depending on the insurance service, questionnaires must be answered.

After the contract has been concluded the insured person has to inform the insurer about any increases of the risk according to Section 23 of the Insurance Contracts Act. This increase of the risk is afterwards only included in the insurance contract if the insurer agrees to do so.

The insurer is obliged to inform the insured person about their right to withdraw from the insurance contract within 14 days and in case of a life insurance within 30 days. If the insured person was not informed, the time period to withdraw remains until they have been informed about their right. Furthermore, the insurer has obligations according to Section 128 and 128a of the Insurance Supervision Act which correspond with the disclosure and information obligations of intermediaries (see below).

6.2 Failure to Comply with Obligations of an Insurance Contract

The possible consequences of a breach of obligation depend on the provisions in the insurance contract and the obligation which was breached. Generally, in case of a breach the insurer has no liability to pay the insurance benefit and has the right to terminate the contract.

Sections 16 et seq of the Insurance Contracts Act stipulate that, at the conclusion of the contract, the insured person must disclose to the insurer any circumstances that are known to them which could be significant for the insured risk or the insurer has the right to terminate the contract and may claim for compensation. Circumstances which are likely to influence the insurer's decision to conclude the contract or to agree to the agreed terms are considered significant. Furthermore, circumstances which the insurer has explicitly enquired after and in written form are also considered to be significant in case of doubt. Insurers generally use questionnaires and ask a mix of specific and more general questions which are relevant for the insured risk before the contract is concluded.

Withdrawal and Termination

If a significant circumstance was not disclosed, the insurer may withdraw from the contract. According to Section 16, paragraph 3 of the Insurance Contracts Act a withdrawal is excluded, if the insurer knew about the circumstance anyway or if the insured person was not at fault. If, however, the insurer did not ask explicitly and in written form about this circumstance, then the withdrawal from the contract is only possible if the insured person was grossly negligent and omitted the disclosure.

A termination in any case is only possible within one month from the date the insurer became aware of the violation of the disclosure obligation. According to Section 21, the insurer must nonetheless cover, if they withdrew from the contract after the insured event has occurred, provided that the violation of the disclosure obligation has no influence on the occurrence of the insured event or insofar as it had no influence on the extent of the insurance benefit. If the insurer breaches an obligation, eg, the duty to provide information, the insured person may terminate the contract and reclaim paid premiums as well as claim further damages or the insurance benefit.

6.3 Intermediary Involvement in an Insurance Contract

Both insurance agents and insurance brokers must inform and advise the insurance customer about the insurance cover, as well as determine the wishes and needs of the insurance customer based on the information provided and give objective information about the insurance product in an understandable form, so that the customer can make a well-informed decision. Each contract offered must meet the wishes and needs of the customer with regard to the insurance. As insurance agents act on behalf of the insurance or reinsurance company breaches of these duties are considered as a breach of the insurance or reinsurance company.

Insurance brokers act for both parties but must primarily protect the interests of the insurance customer according to Section 27, paragraph 1 of the Brokers Act. The obligations of the insurance broker, according to Section 28, paragraph 1 of the Brokers Act, include in addition to the above-mentioned obligations inter alia the creation of an adequate risk analysis and an appropriate cover concept as well as examination of the insurance certificate ("Policy"). As Insurance brokers primarily protect the interests of the insurance customer, breaches of obligations generally cannot be deemed to be breaches of the insurance or reinsurance company.

6.4 Legal Requirements and Distinguishing Features of an Insurance Contract

In general, the freedom of form is the rule for all contracts in Austria. This also applies for insurance contracts where no special form is needed. Therefore, insurance contracts can be concluded orally as well as in writing. Although no special form is required for concluding an insurance contract, in some situations the written form must be observed: for example, the withdrawal from a contract must be in writing.

An insurance contract must stipulate the insured risk, the insurance fee and state the nature of the insurance (for example, personal or property insurance) according to civil law rules. Besides, there are no content requirements for insurance policies, either in the Insurance Contracts Act or in the Insurance Supervision Act or the Civil Code. General conditions which are used by the insurer for multiple contracts must, however, comply with the provisions of the Civil Code. Therefore, stipulating surprise clauses or clauses grossly disadvantageous in the general conditions is prohibited according to Section 864a and 879, paragraph 3 of the Civil Code. If the insured person is a consumer the Consumer Protection Act must be observed.

Regarding the content of an insurance contract the parties have no limitations besides illegal or immoral agreements which cannot be insured according to Section 879, paragraph 1 of the Civil Code. Therefore, a contract for killing cannot be insured. Punitive damages arising out of an agreement however, are insurable, even though such clauses are often excluded from the contract as the risk cannot be calculated by the insurer. Such an exclusion can be found in Article 7 of the General Conditions for Indemnity Insurance from the Insurance Association stipulating that damages that go beyond the extent of general tort law provisions and are based on an agreement or a promise of the

policyholder are not covered. Public law sanctions and penalties cannot be insured in Austria as there would be no preventive effect of the sanctions and penalties for the punished person. Such insurances are null and void.

6.5 Multiple Insured or Potential Beneficiaries

Differences to the legal requirements may apply in cases of insurances for third-party accounts, like D&O Insurances, where the company concludes an insurance contract for the company with coverage for the management as well. The insured persons do not have to be named in such cases, it is sufficient if they can be determined, in case of a D&O Insurance, by their function in the company (here, management, supervisory board, etc). According to Section 78 of the Insurance Contracts Act, in such cases as the knowledge and conduct of the policyholder (here, the company) are of legal significance according to the provisions of this Law, the knowledge and conduct of the insured person (here, management) is also taken into account for the insurance for a third-party account. This means that coverage can be declined in case the management violates an obligation.

6.6 Consumer Contracts or Reinsurance Contracts

In case the policyholder is a consumer, the Consumer Protection Act applies to the insurance contract. The Consumer Protection Act provides rules for the implementation and the content of general conditions which go beyond the requirements of the Civil Code and protect the consumer accordingly.

For example, according to Section 6, paragraph 3 of the Consumer Protection Act, general conditions must be clear and unambiguous otherwise they are void. Furthermore, consumers can claim that certain conditions are void according to Section 6, paragraph 1 of the Consumer Protection Act, even if they explicitly approved them. Some conditions stated in Section 6, paragraph 2 of the Consumer Protection Act only apply if the insurer individually negotiated these conditions with the consumer.

7. Alternative Risk Transfer

7.1 ART Transactions

ART Transactions are not common in Austria's jurisdiction. Such transactions fall under Article 13, paragraph 26 of the Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II) as so-called special purpose vehicles. Special purpose vehicles are distributed by special purpose entities and are not considered as insurance or reinsurance contracts.

Special purpose entities fall under the regime of the Austrian Insurance Supervision Act according to Section 1, paragraph 1, number 9 and are supervised by the FMA. A concession is mandatory pursuant to Section 105, paragraph 1 of the Insurance Supervision Act. The concession requirements are set out in the Commission Delegated Regulation (EU) 2015/35 of 10 October 2014, supplementing Directive 2009/138/EC of the European Parliament, and of the Council on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II).

According to Section 104, paragraph 1 of the Insurance Supervision Act any insurer or reinsurer engaging in "finite reinsurance activities" must ensure that they are able to properly identify, measure, monitor, manage and control the risks arising from such contracts or transactions.

7.2 Foreign ART Transactions

Foreign ART transactions are not considered reinsurance contracts as stated above. Generally, the Insurance Supervision Act only determines the supervision of special purpose entities by the FMA and the requirement of a concession. In fact, ART transactions are governed by the Securities Supervision Act because special purpose entities, unlike insurers or reinsurers (Section 2, paragraph 1, number 1 Securities Supervision Act), are not explicitly excluded from the application.

This is justified by the fact that special purpose entities are neither insurance undertakings in accordance with Article 2, paragraph 1 lit a of the Directive 2014/65/EU (MiFID II) of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU (MiFID) nor can they be considered to be equally regulated and supervised. Therefore, a supervision according to MiFID II and the Securities Supervision Act is necessary.

8. Interpreting an Insurance Contract

8.1 Interpretation of Insurance Contracts and Use of Extraneous Evidence

Besides special exceptions pursuant to the Insurance Contracts Act, insurance contracts are interpreted like any other contract according to the rules set out in Section 914 and 915 of the Civil Code. Any provision open to interpretation at first has to be interpreted according to the wording and the intention of both parties. If this does not lead to a clear understanding of the provision then the provision's interpretation follows the understanding of an average policyholder or, if this also does not lead to a clear understanding of the provision, the provision will be interpreted to the disadvantage of the party who stipu-

lated the provision (usually this is the insurance or reinsurance company).

If a certain aspect is not governed by the insurance contract, then non-mandatory law applies. If no relevant non-mandatory law exists, then the intention of both parties aids the interpretation. With regard to consumers the rules set out above apply. Furthermore, contracts concluded with a consumer are stricter considering the interpretation of grossly disadvantageous clauses according to Section 879, paragraph 3 of the Civil Code meaning that it is harder to argument any factual justification.

Use of extraneous evidence is permitted: evidence about the negotiations, the circumstances in which the contract was placed or the "usual practice" or understanding in relation to such contracts or particular terms in them generally can and factually are very commonly used in court proceedings as evidence. Although such evidence should be in accordance with law, even tape recordings which were recorded without the permission or the knowledge of the other party may, in certain circumstances, be used in court proceedings (for example, if the party lacks other evidence for its case).

8.2 Warranties

Any warranties which are needed by the insurer are already stipulated by the Insurance Contracts Act (see **6.2 Failure to Comply With Obligations of an Insurance Contract**) as well as the Civil Code.

After the contract has been concluded, the insured person has to inform the insurer about any increases of the risk according to Section 23 of the Insurance Contracts Act. This increase of the risk is afterwards only included in the insurance contract if the insurer agrees to. Insurance contracts generally include a corresponding provision to Section 23 of the Insurance Contracts Act. If the insured person after conclusion of the contract does not disclose any increase of the risk the insurer has the right to terminate the contract and may claim for compensation.

If such clauses similar to Section 16 or 23 of the Insurance Contracts Act are concluded in the contract, they do not have to be expressly described as warranty. Usually such clauses are described as notification obligations.

8.3 Conditions Precedent

Conditions precedent do not have to be expressly described as such. However, the condition should be described as clear as possible as the contract or a part of it only becomes effective if the condition is fulfilled. If the condition precedent is not fulfilled, then the part for which the condition was stipulated does not become effective. In the worst case, the condition precedent is set up for the whole contract with the consequence that the contract is ineffective until the condition is fulfilled. Conditions precedent can be connected with a certain time period. If the time period passes without the condition being fulfilled the contract is terminated automatically.

Besides conditions precedent also conditions subsequent can apply; often insurers only grant coverage subject to exclusions in the agreement. Insurers in D&O insurances often provide coverage providing that the deliberate act is not legally validly established by judicial or official verdict, settlement or acknowledgement (exclusion for intentional breaches).

9. Insurance Disputes

9.1 Insurance Disputes over Coverage

Usually, insurance contracts do not include clauses which explicitly address disputes over coverage. Typically, every insured person must submit a declaration of damage together with any documentation of the case to the insurer to apply for coverage. If the insurance rejects coverage the injured person often mandates a lawyer who then tries through correspondence to obtain coverage. Eventually, if this does not help the dispute is dealt with at the court. Alternatively, special arbitration boards can be consulted. This approach applies also to disputes over coverage regarding consumer or reinsurance contracts.

The general limitation period is three years and starts after the insured risk occurred. After a declaration of damage has been filed by the insured person to the insurer, the limitation period is suspended until the insurer sends a written decision about coverage. However, after ten years generally any possible claims become time-barred, even if the insurer did not send any written decision. If the insurer sends a written decision and denies coverage, the insured person has one year to assert its claim in court.

Insurance contracts generally can be enforced if the insured event occurs.

9.2 Insurance Disputes over Jurisdiction and Choice of Law

Generally, in the absence of choice the jurisdiction is determined by the Law on Court Jurisdiction for domestic cases (Austrian insured person versus Austrian insurer). In cases where a foreign connection is given, eg, the insurer or reinsurer has its seat in a foreign country, the jurisdiction follows the Regulation on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (EU) 1215/2012. In any case, if the insurer or reinsurer has its seat in a foreign country, the applicable law follows the Regulation on the Law Applicable to Contractual Obligations (EG) 593/2008 due to mandatory

provisions for insurance contracts in Article 7. Reinsurance contracts, however, are explicitly excluded from the scope of the Regulation on the Law applicable to Contractual Obligations (EG) 593/2008. For reinsurance contracts the (Austrian) Law on International Private Law is applicable.

9.3 Litigation Process

The litigation process is mainly governed by the Code of Civil Procedure. If no special rule applies in a subject matter, the jurisdiction is often determined by the amount in dispute. Disputes under EUR15,000 fall under the jurisdiction of the district courts while disputes above this amount fall under the jurisdiction of the regional courts. Although the Code of Civil Procedure stipulates the principle of orality for litigation processes, in fact, most of the litigation process is shifted to legal documents which are sent back and forth between the parties and the deciding court in preparation of the hearings.

The litigation process begins with filing the claim to the competent court. In response the other party files an answer to the complaint to the court or raises an objection. The oral litigation process then starts by the court summoning to a preparative hearing in which the parties discuss with the court the subject matter and the further process. In the further stage proceedings for taking evidence start with additional hearings. After the proceedings for taking evidence have been finished, the court makes a decision on the claim.

Appeals against decisions may be brought to the next higher court. An appeal can be based on questions of fact and law. Decisions of the second instance can be appealed against on questions of law only as the highest instance in Austria, the Supreme Court, does not take any new evidence and only applies law to the established facts. Furthermore, value limits apply if a decision of the Supreme Court is sought.

Regarding appeals against final decisions, an action for annulment and a resumption suit is possible in very small number of cases.

9.4 The Enforcement of Judgments

After the decision of the court becomes final, the other party has to comply with the verdict within the time period set out in the decision. If the other party fails, the party has to apply for a written confirmation of the legal force of the decision to the deciding court. This written confirmation then needs to be filed to the competent enforcement court and enforcement proceedings start.

Considering other EU countries, the enforcement follows the Regulation on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (EU) 1215/2012. The enforcement of judgment of other countries outside of the EU follows bilateral agreements between Austria and the relevant country if such were concluded. If no bilateral agreement exists, a foreign judgement needs a domestic written confirmation of enforcement.

9.5 The Enforcement of Arbitration Clauses

In general, arbitration clauses are enforceable with the only claims excluded from the scope of arbitral proceedings being family and tenancy law claims. Moreover, arbitration clauses are very common in reinsurance contracts and become more and more prevalent in large coverage disputes regarding liability insurance.

9.6 The Enforcement of Awards

After becoming final, awards in arbitration are enforceable according to the Execution Code. Arbitration awards made in other jurisdictions need a domestic written confirmation of enforcement. Such written confirmation of enforcement, as well as the recognition of arbitration awards in general, follow bilateral agreements or EU law.

Austria is party to the New York Convention and the Regulation on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (EU) 1215/2012 states that it is not applicable for arbitration and does not affect the application of the New York Convention. Therefore, the written confirmation of enforcement as well as the recognition of arbitration awards follows the New York Convention.

9.7 Alternative Dispute Resolution

Alternative dispute resolution, like mediation, is becoming generally more and more relevant. However, for insurance disputes they are only of minor importance even though new arbitration boards continue to emerge.

9.8 Penalties for Late Payment of Claims

As punitive damages have to be explicitly concluded in the agreement and the insured persons usually are facing standard terms and conditions of the insurer, provisions for penalties are uncommon. However, claims for damages which arose due to late payments can be raised on the grounds of the provisions in the Civil Code if the insurer improperly delayed settling the claims and the insured person has faced losses on this ground. Moreover, default interest can be claimed and the insured person can withdraw from the contract as well as reclaim paid premiums.

9.9 Insurers' Rights of Subrogation

Section 67, paragraph 1 of the Insurance Contracts Act stipulates that compensation claims of the insured person against third parties are subrogated to the insurer if the insurer com-

pensates the insured person. In case the insured person waives its compensation claims against a third party the insurer is relieved from his obligations to compensate, insofar as he could have claimed compensation out of such subrogated claims. The subrogation is excluded if the compensation claim would be directed against a family member who lives with the insured person in the same household, unless the family member caused the damage intentionally.

10. Insurtech

10.1 Insurtech Developments

More and more insurtech insurance providers are offering their products and services in Austria. One of the biggest Austrian insurers, Uniqua, invested in an insurtech startup which specialises in B2B2C models where partners of the insurtech startup, such as trading companies, energy suppliers or telecom companies, can offer directly appropriate insurance products for their services or goods. Other products can be comparison calculators for insurance companies, short-term insurances, digital contract management through applications or sales applications for the insurance sector.

10.2 Regulatory

The FMA states that the supervision should be neutral towards innovation and technological developments. However, as insurtechs can be both non-concessioned and concessioned companies, the FMA has to consider every case whether the activities performed are subject to a concession. Besides some risk, the FMA also sees chances for insurtech companies for example in the field of cyber-risk coverage where an increasing demand is noticeable.

11. Emerging Risks and New Products

11.1 Emerging Risks Affecting the Insurance Market

Emerging risks concern the insurance business itself as well as the economy as a whole, leading insurers to develop new products to address such risks.

Cyber-risks like data theft, phishing mails, malware infections (ransomware) and denial of service attacks are considered as an emerging risk which can lead to reputational damages and financial losses. To avoid this the FMA addresses cyber-risks by demanding high data security requirements from insurers. Therefore, in terms of privacy, data security and data sovereignty particularly stringent requirements have to be met to safe the insured persons data. Such risks also concern businesses in general and not only insurances.

The steady increase of global warming results in many local single events such as floods, hail or drought damage. The demand for insurances covering these risks is high and the risk management of the insurers provides more and more accurate data for such events. This gives rise to the issues that some risks will be difficult to insure in the future.

Further, the litigation environment has changed in regard of liability claims, leading to an increased number of court cases and higher risks for managers. Finally, exchange rate developments and certain insurance investment products have been highly controversial lately.

11.2 New Products or Alternative Solutions

New products that are being offered in the market or stronger in demand therefore are cyber-risk insurances, financial lines (D&O, E&O, M&A, etc) insurances, excess liability insurance, CAT-bonds, etc, to name but a few.

12. Recent and Forthcoming Legal Developments

12.1 Developments Impacting on Insurers or Insurance Products

Due to the COVID-19 pandemic many issues have arisen in the insurance jurisdiction, mostly because many insurers are trying to avoid coverage according to the insurance contract. Companies which concluded a business interruption insurance are claiming insurance benefits on the grounds of the lock downs which were decreed by the Austrian government. Most business interruption insurance contracts stipulate insurance benefits for business interruptions following an imposed closure of the particular insured company according to the Epidemics Act. They are not governing the actual situation due to the pandemic, thus the general prohibition to enter most of the plants besides for example supermarkets or pharmacies.

Although there is no jurisdiction of the Austrian Supreme Court by now, the lower instances have been agreeing with the insured companies to some extent with the argument that an insured company can not expect factual closures by a general prohibition to enter the plants to be excluded by the business interruption insurance contract while closures of individual plants according to the Epidemics Act are insured.

Some insurers are offering special COVID-19 insurance contracts with benefits for employers as well as the employees in case an employee infected with COVID-19 is hospitalised with the illnesses a result of the infection. The coverage period is three months following an initial 14 day waiting period and there are no pre-existing medical exclusions. The benefits

involve hospitalisation and convalescence benefits as well as employer disruption benefits.

13. Other Developments in Insurance Law

13.1 Additional Market Developments

With regard to indemnity insurance (especially directors' and officers' liability and professional negligence) the competition has been strong in the past. However, high numbers of claims and a negative litigation environment for defendants have led to insurers becoming more reluctant to settle claims, leading to a rise in insurance litigation, which also aids foreign insurers to enter the domestic market.

In general, a trend towards automatisation, data analytics and fintech services is noticeable. This already leads to changing conditions and a multitude of legal challenges for insurers.

In terms of product development, there has been a sharp rise in the demand for IT and cybersecurity insurance, as well as errors and omissions and fidelity insurance.

The demand for reinsurance becomes ever greater, especially regarding natural disasters and indemnity insurances. As a consequence, reinsurers monitor insurance cases ever more closely.

Völkl Rechtsanwälte is a boutique law firm in Vienna with a team of ten lawyers. In Austria, the firm co-operates with PSLR Attorneys-at-Law. Through its international network (IR Global), the firm also has access to partner firms in over 155 jurisdictions. Völkl Rechtsanwälte is highly experienced in supervisory and insurance contract law, with a focus on IDD, product development and governance, reinsurance law, business liability insurance, financial lines and litigation. Other key specialisations are banking and finance, professional liability, corporate law, investment disputes, labour law, real estate transactions, litigation, arbitration and ADR. Recent insurance-related work includes acting as monitoring counsel in various D&O cases with amounts of damage in excess of more than EUR400 million; acting as counsel for insurers, public entities and corporations in structuring various individual insurance programmes with coverage in excess of EUR200 million; and representing a large industrial conglomerate in negotiating a coverage deal regarding business liability insurance.

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