Insurance & Reinsurance

Jurisdictional comparisons **First edition 2012**

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1. WHAT ARE THE SOURCES OF INSURANCE AND REINSURANCE LAW?

Insurance

The Swiss Federal Act on the Insurance Contract (ICA) is the source of insurance law. Where the ICA does not contain any provisions, general contract law, ie, the Swiss Code of Obligations (CO) applies. It should, however, be noted that the ICA does not apply to insurance business not supervised by the Swiss regulator FINMA ('*Finanzmarktaufsicht*' – Financial Market Supervisory Authority).

Reinsurance

The ICA explicitly excludes its applicability for reinsurance contracts. The general provisions on contracts of the CO apply to reinsurance contracts. The sources of reinsurance law are mainly to be found in the reinsurance contract itself and in reinsurance customs and usages, especially in internationally recognised general principles of reinsurance practice, such as follow-the-fortunes, follow-the-settlement and the reinsurer's right to inspect the cedent's file. Further, it is generally accepted in Swiss doctrine that, in absence of a contractual provision or a customary practice of reinsurance, certain provisions of the ICA can be applied by analogy to reinsurance contracts, provided this seems reasonable with regard to the reinsurance contract in question.

2. HOW AND BY WHOM IS INSURANCE/REINSURANCE REGULATED?

Swiss insurance companies and insurance intermediaries are regulated by the Swiss Federal Act on the Supervision of Insurance Entities (Insurance Supervisory Act, 'ISA'). The ISA imposes the same provisions on insurers as on reinsurers, with some exceptions for reinsurers. For example, the regulations on tied assets do not apply to reinsurers, so reinsurance companies have essentially no restrictions regarding the investment of their assets, provided they comply with general rules of risk diversification.

Social security insurance carriers are regulated by other federal laws.

Insurance and reinsurance companies are supervised by FINMA. Per 31 December 2011, FINMA supervised a total of 164 insurers and 61 reinsurers (34 of which were captives).

The situation is different for insurance companies which have their headquarters abroad and which are only involved in reinsurance operations

in Switzerland, either directly from abroad or via a Swiss branch office. These entities are exempt from supervision by FINMA and are supervised in the country of their incorporation.

3. FORMATION OF A CONTRACT OF INSURANCE/ REINSURANCE

3.1 What is the duty of utmost good faith?

Insurance

The *Uberrimae fidei* ('utmost good faith') principle is best known in common law countries in connection with the rule that the insured must disclose to the insurer everything it knows about the risk, and non-disclosure affords the insurer grounds to void the policy.

The concept of 'utmost good faith' is unknown in Swiss insurance law.

Instead, in Swiss insurance contracts one of the most important principles is the principle of good faith as described in article 2 para. 1 of the Swiss Civil Code, which states: *'Every person must act in good faith in the exercise of his or her rights and in the performance of his or her obligations'*. The principle of good faith is applicable to insurance and reinsurance contracts. As a consequence, the abuse of rights is not protected. Although a party acting in bad faith does not lose its rights *per se*, such rights cannot be enforced.

Given the specific nature of an insurance contract, the principle of good faith is very important and plays a vital role in various aspects of insurance law. For example, it is crucial in connection with the mutual information duties of the insurer and the insured in the pre-contractual stage as well as after the conclusion of the contract and after the occurrence of the insured event.

Reinsurance

In reinsurance, the principle of good faith is a critical component in the custom and practice of the reinsurance industry, as the reinsurance contract is based on a special relationship of trust between the parties. It protects both cedents and reinsurers when they are vulnerable to negligent or otherwise wrongful practices by the counterparty to the contract.

3.2 What are the requirements on a purchaser of insurance or reinsurance to disclose information about the risk to the insurer and to present the risk 'fairly'?

Insurance

In Swiss law, there is no concept of 'fair' presentation of the risk by the insured. Under the ICA, the insured only has to disclose information which the insurer asks for in writing. Therefore, it is in the insurer's control what information it wishes to obtain by asking the relevant questions regarding certain risks in a clear and unambiguous way. Only risk factors which are specifically addressed are deemed to be relevant for the assessment of the risk. Only non-disclosure in connection with these questions, ie, wrong or incomplete answers, is regarded as a misrepresentation. There is no duty of the applicant to volunteer information for which the insurer has not

asked, even if the applicant is aware that such facts are or could be relevant for the insurer's decision to conclude the contract at the basis of the terms agreed. As a consequence, incorrect or incomplete information contained in materials that the insured submitted voluntarily (ie, not in response to a written question from the insurer) does generally not entitle the insurer to terminate the insurance contract.

However, it is not only the insured who has information duties. Pursuant to the ICA, the insurer has an obligation to inform the prospective policyholder about the insurer's identity and the essential elements of the insurance contract (including the insured risks, the insurance coverage, the premiums due and the policyholder's other obligations, the term and termination of the insurance contract, the methods of calculation and the surrender and transformation values in a life insurance, the handling of personal data, etc.).

Reinsurance

In reinsurance, the situation presents itself slightly differently as, according to Swiss legal literature, certain provisions of the ICA can be applied by analogy. There is no reference in Swiss legal literature to 'fair' presentation of the risk. Although it is undisputed that the cedent has a duty to disclose material risk factors to the reinsurer, it is unclear whether the respective rules as set forth in the ICA should apply by analogy and if so, to what extent. There is no case law concerning this issue.

While it is fair to say that the cedent's pre-contractual information duties generally are broader than in direct insurance, it is unclear in Swiss doctrine whether the cedent has the pre-contractual duty to disclose all relevant information on its own initiative or only upon pertaining questions from the reinsurer. However, according to legal literature, unlike in direct insurance, the cedent already breaches its information duties if providing wrong or incomplete information which was not specifically asked for.

3.3 What are the remedies for breach?

Insurance

In case of misrepresentation or non-disclosure of a material risk factor by the insured in response to a written question of the insurer, the insurer can terminate the policy. The termination must be made unconditionally and within four weeks after discovery of the misrepresentation or non-disclosure. The four-week period is triggered as soon as the insurer obtains knowledge of reliable information regarding such misrepresentation or non-disclosure. As a matter of principle, certainty is needed by the insurer; a mere suspicion does not suffice. However, it should be noted that the Swiss Supreme Court softened this requirement by creating a concept of constructive knowledge. In case the misrepresented or concealed fact had an effect on the occurrence or extent of a loss already occurred, the insurer may deny insurance benefits, and is entitled to reimbursement of insurance benefits already paid. Insurance benefits for losses not connected to the misrepresentation or non-disclosure remain due.

The law provides for some exceptions to the right of the insurer to terminate the policy for non-disclosure or misrepresentation. This is the case, *inter alia*, if (i) the insurer knew or should have known the true facts that were misrepresented or not disclosed (in that respect, actual knowledge from previous proposal forms or gained in connection with prior losses are relevant as well), (ii) the insurer waived its right to terminate the contract, (iii) the insured did not answer a specific question and the insurer nevertheless concluded the insurance contract (unless, in the light of other information provided by the insured, the question must be considered as answered in a certain way, which constitutes a misrepresentation or non-disclosure).

Reinsurance

With regard to the consequences of non-disclosure or misrepresentations in reinsurance contracts, as already mentioned above (see para. 3.2), it appears generally accepted that the right to termination as applicable to direct insurance can be applied by analogy to reinsurance contracts. There is, however, a dispute on how far the specific rules of the ICA can be applied by analogy to termination of a reinsurance contract, for example, whether the four-weeks deadline for termination also applies to reinsurance contracts.

4. WHAT IS THE ROLE AND FUNCTION OF INTERMEDIARIES? FOR WHOM DO THEY ACT?

Insurance brokers are considered to be the representatives of the insured. They provide risk analyses, formulate risk strategies, oversee the insurance portfolios and attend to potential losses. Their function is to solicit offers from insurance companies suitable for their clients. During the policy period, they have the duty to supervise the market and have to inform the insured of new possibilities to insure a risk. Although the broker is the insured's agent, he is paid by the insurance companies, which is inherently problematic, but generally accepted in the market and not prohibited by the law.

Insurance intermediaries are subject to supervision by and have to register with FINMA, with a few exceptions regarding intermediaries closely affiliated with one or two insurance companies only.

5. WHAT ARE THE REQUIREMENTS AND DISTINGUISHING FEATURES OF INSURANCE CONTRACTS AND REINSURANCE CONTRACTS?

5.1 Requirements for insurable interest

Insurance

As a matter of principle, fortuity is regarded to be a necessary element of every insurance contract. There must be uncertainty with regard to the occurrence of the insured event or – for example in life insurance – at least with regard to the point in time when the insured event occurs. However, while there appears to be no case law on this issue, it seems widely undisputed in legal literature that the uncertainty must only exist in the

minds of the contracting parties (so-called subjective non-foreseeability). Therefore, the insurance contract is valid if the parties did not know that the insured event was objectively inevitable.

Reinsurance

As far as reinsurance is concerned, the insurable interest is easier to determine than in insurance contracts. The reinsurance contract always covers the risk or part of the risk that has been transferred from the insured to the cedent under the direct insurance contract.

5.2 Transfer of risk

The assumption of risk in return for a premium is a necessary element in the definition of insurance. The extent of the transfer of risk is defined by the description of the characteristics of the risks for which the insurance was taken out. The exclusion of particular events of insurance must be stated in a precise and unambiguous way.

5.3 Prohibition against gambling

In the ICA, there is no explicit prohibition of gambling on loss, but according to general contract law, no enforceable claims can arise out of gambling and betting. Under Swiss law, the insured must have some kind of connection to or interest in the insured risk. Therefore, an insured could not claim performance under a contract which qualifies as gambling on an unrelated loss. For example, it is possible for the policyholder to claim insurance benefits under a fire insurance contract for his own house, but not under an insurance contract for a public building or a stranger's house where there is no interest to or connection with the policyholder. Contrary to other jurisdictions, Swiss law does not consider the gambling on a loss a criminal offence. However, public offers on gambling need to be authorised by the state and are prohibited if no such permit has been granted to the offeror.

5.4 Form

Although insurance contracts are usually concluded in writing, the ICA does not contain any provisions on the form of insurance contracts. Therefore, according to the general provisions of the Code of Obligations, the insurance contract can be concluded free of form, therefore also orally (eg over the telephone). The same applies to reinsurance contracts.

The ICA provides that the insurer is obliged to issue a policy to the insured, stating the rights and the duties of the parties. However, the policy is only a document of proof and not necessary for the conclusion of the contract. If the contents of the policy do not correspond with the agreement of the parties, the insured is required to object within four weeks and request a change of the policy, otherwise the policy's contents shall be considered as accepted by the insured.

6. WHERE ARE THE CONTRACT TERMS TO BE FOUND?

6.1 Slip

Swiss insurance law does not know the 'slip system' as practiced for example on the Lloyd's insurance market. When insurance contracts are concluded in Switzerland, there are normally no slips, but sometimes cover notes which summarise the contents of the insurance cover provided.

The cover note has to be distinguished from a binder. A binder is intended to bridge the gap between the time when insurance coverage is needed and the (final) agreement on the specific terms and conditions of the insurance contract. It sometimes refers to general terms and conditions and is an insurance contract of its own, independent of the later policy. It may or may not be replaced by a permanent insurance contract later.

6.2 Wording

Insurance

Based on the principle of freedom of contract, the parties can agree on any wording as long as the contract is not illicit or unethical. However, in consumer contracts, it is usually the insurer who provides a standard wording for the policy. The interests of the insured are protected by various mandatory provisions of the ICA.

As mentioned above, if the contents of the policy do not correspond with the agreement of the parties, the policyholder must request a revision of the policy certificate within four weeks of its receipt, otherwise its contents shall be considered as accepted by the insured.

Pursuant to Swiss contract law, an agreement must be interpreted in such a way as to give effect to the parties' intention at the time it was entered into. What is decisive, therefore, is the actual intention of the parties. Only if the actual intention cannot be established, the presumed intention of the parties must be determined based on the (objective) interpretation of the contract by applying various interpretation methods (including an analysis of the wording, the accompanying circumstances under which the contract was concluded, customs and practices, the purpose of the contract) and rules on interpretation (such as interpretation *ex tunc*, interpretation in good faith, holistic interpretation, interpretation in conformity with the law, application of contractually agreed rules on the interpretation of the contract). The crucial factor is the principle of good faith according to which a contractual declaration must be understood in the way that it would be understood by an honest and prudent recipient of such a declaration in the relevant circumstances. This obviously implies that any contractual term must not be seen in isolation but in the context of the agreement as a whole and in a way that preserves its consistency with the other provisions of the agreement.

As far as General Terms and Conditions (GTC) are concerned, if the interpretation of the clauses does not lead to an unambiguous result, the principle *in dubio contra stipulatorem* applies, which entails that the interpretation of unclearly worded clauses will be interpreted to the disadvantage of the party which drafted them. In most of the cases and

especially in consumer contracts, this is the insurer. The *contra stipulatorem* rule does not apply where the contract is the result of negotiations between the parties and the wording cannot be seen as having been drafted by one party only. It should further be noted that the *contra stipulatorem* rule can also work to the disadvantage of the insured where the respective wording has been drafted by the insured's broker.

Reinsurance

In reinsurance, the contract terms are specified primarily by the individual reinsurance contract. Facultative reinsurance contracts are often very brief. Treaties usually contain more detailed provisions. In contrast to certain established principles of reinsurance (see para. 6.3), GTCs have not gained any practical relevance in the reinsurance business.

6.3 Implied terms, incorporated terms

Insurance

As a matter of principle, implied terms are possible under Swiss law. Whether a term is implied is a question of contract interpretation which follows the general rules of contract law. However, not all terms can be implied: exclusions must be explicitly stated in the contract to be valid. Thus, there is no such thing as an implied exclusion, but there can be implied duties of the parties. An implied duty of the insured is eg, the duty to avoid an imminent loss or to secure all available evidence.

As far as the ICA explicitly describes rights and duties of the parties, the respective provisions can be (i) strictly mandatory, ie, cannot be contractually modified, (ii) partly mandatory, ie, cannot be contractually modified to the disadvantage of the insured, or (iii) non-mandatory, ie, can be modified or invalidated without restrictions.

Reinsurance

Internationally recognised reinsurance standards and customs are considered to be independent sources of law or at least are considered being customary practice even when they are not explicitly stipulated. Paramount principles, such as follow-the-fortunes, the cedent's right to manage the direct insurance contract (including claims handling) and the reinsurer's obligation to follow the cedent (follow-the-actions/follow-the-settlements) are therefore considered as implied provisions of reinsurance contracts and apply also in the absence of a specific stipulation to this end. As far as the contents of these reinsurance principles are concerned, it appears questionable whether it can be said that a specific Swiss customary practice exists. Therefore, failing a contractual agreement, a Swiss judge will, *inter alia*, refer to foreign legal literature and case law and to the internationally recognised function of such principles.

In facultative reinsurance, it is quite common that the parties agree on 'reinsurance at original terms'. Terms of the underlying policies are incorporated by reference (see however para. 10.4).

7. CLASSIFICATION OF TERMS: WARRANTIES, CONDITIONS PRECEDENT: SUSPENSIVE CONDITIONS OR SIMPLE CONDITIONS

Insurance

Warranties: While the strict concept of warranties is unknown to Swiss insurance law, representations and warranties may be of importance under general contract law and with regard to risk control. In practice, warranties have not been a major issue in Swiss insurance litigation.

Conditions precedent (CP): In general, the parties to an insurance contract are free to agree upon contractual conditions, provided they are not in contradiction to mandatory law. It is therefore possible to draft a clause as a CP. However, the freedom to contractually agree on conditions to work as CP is partly restricted. Certain conditions and the effects of a breach thereof are subject to mandatory law, which excludes the possibility to draft them as a CP. The breach of a CP gives the insurer the rights and remedies as stipulated in the insurance contract. This includes the possibility to deny coverage and/or to terminate the policy with immediate effect. Until recently, it was unclear whether, in the absence of specific contractual language to this end, a CP can take effect without a causal link between the breach and the loss. In a decision of September 2010, the Federal Supreme Court eventually confirmed the validity of a CP in a case where the breach of the CP did not prejudice the insurer, although the policy did not stipulate that no causal link between the breach of the CP and the loss was required. However, the ICA in any event prohibits any conditions, including CPs, which are detrimental to the insured's rights from taking effect if no fault for the breach is attributable to the insured.

Suspensive/simple conditions: Suspensive, simple and other conditions are possible in insurance contracts. The parties can, for example, agree that the policy only comes into effect after the insured has paid the premium.

Reinsurance

In reinsurance, the principle of freedom of contract prevails. Therefore, basically all conditions and warranties can be validly agreed upon, as long as they are not unlawful or immoral.

8. LOSS

8.1 Triggers of loss (triggers of coverage)

The insured event which triggers coverage is different for each type of insurance. In certain types of insurance, it is easier to determine the insured event, eg, in property and accident insurance. In property insurance, the insured event is the occurrence of damage to the property. In accident insurance, the triggering event is the accident of the insured person. In life insurance, loss is triggered by death or by reaching a certain age.

In liability insurance, the insured event which triggers coverage can be contractually agreed upon by the parties. Therefore, it is essential what has been agreed in the policy. In consumer liability insurance, the parties more often agree on loss occurrence as the relevant trigger while in commercial

liability insurance, the claims made principle applies almost exclusively.

8.2 Proximate cause

We understand that, under English law, a proximate cause is 'an event sufficiently related to a legally recognisable injury to be held the cause of that injury'. In Swiss law, a similar concept is called 'adequate cause'. An event is qualified as having adequately caused a loss if according to the conceivable chain of events and the general experience of life it is qualified to cause such a loss. This question of sufficient proximity between cause and loss is a question of law to be determined by the court.

General considerations of causation are relevant for many provisions in the ICA. There must, for instance, be a causal link between a misrepresentation or non-disclosure of a material risk factor and the subsequent loss in order to entitle the insurer to deny coverage.

8.3 Burden of proof

Insurance

While the ICA provides that the insurance company is entitled to request any relevant information from the insured about the occurrence and extent of the loss, it does not contain any provision on the burden of proof. Therefore, the general rule in the Swiss Civil Code applies which states that, unless the law provides otherwise, the burden of proving an alleged fact lies with the party which derives rights from that fact. Generally, the law requires the insured to prove all elements necessary to establish coverage. Thus, it is the insured's burden of proof to show that an insured event has occurred, but the insurer's burden of proof to establish that the factual conditions for a contractual exclusion are met. However, in cases where such proof is not easy to bring forward, which, eg, is the case when an alleged liability claim that had been made against an insured is settled instead of being decided by a court, Swiss case law suggests that a reduced standard of proof applies, ie, predominant probability instead of a strict proof. In practice, the test to be applied is to assess whether it is objectively reasonable to assume under the circumstances that there was civil liability both as a matter of principle and in the amount of the respective settlement. However, if there are serious doubts with regard to the description of the relevant facts by the insured, the court can require full proof.

Reinsurance

The principle of the burden of proof as described above also applies to reinsurance contracts.

9. CLAIM PROCESS

9.1 Notification

Insurance

As a matter of principle, unless stipulated otherwise in the policy, the insured has to notify the occurrence of the insured event immediately.

Pursuant to the ICA, the insurer is entitled to reduce benefits if the

insured has violated its notification duty and such violation has had a negative impact on the loss; ie, the reduction is measured by the loss that could have been avoided if notification had been made in a timely manner. However, the prerequisite of causality as stated in the ICA is not mandatory law and can be excluded in the policy. Therefore, the notification duty can also be drafted as a condition precedent.

Reinsurance

Although the ICA is not directly applicable, the notification requirements are similar as in direct insurance.

9.2 Claims co-operation

Insurance

According to the ICA, the insured has a duty to co-operate with the insurer by providing information about the loss (see para. 8.3). The insurance contract can provide for broader co-operation duties of the insured. In case the insured violates such duties, the potential claim under the policy does not become due; again, the parties are free to contractually agree on more severe sanctions. In case the insured attempts to wilfully deceive the insurer, for example by submitting false information about the loss, the ICA sanctions this behaviour with the complete loss of all rights of the insured under the policy.

Reinsurance

The cedent has the right to business management. Due to the freedom of contract, the parties can agree on a restriction of these management rights, which can vary in intensity and scope. For example, the parties can agree on more or less restrictive claims co-operation clauses. Claims co-operation clauses usually leave the cedent its powers to manage claims, but can, eg, require the cedent not to settle claims without the reinsurer's prior approval.

The reinsurer's equivalent to the cedent's right to business management is the reinsurer's right to inspect all of the cedent's files pertinent to the claim at issue. Therefore, according to the generally recognised principle of reinsurer's inspection right, even if the parties did not agree on any co-operation, the cedent has the duty to give the reinsurer access to all information requested.

9.3 Proof of loss

The term proof of loss is no technical term under Swiss law and is not referred to in legal literature or case law. However, Swiss law knows a similar concept under the ICA. According to the ICA, the beneficiary is, upon the insurer's request, obliged to provide all information known to it which may help the insurer to establish the circumstances under which the insured event occurred, or the consequences of the event. The policy can stipulate in detail which documents the insured is obligated to provide. If the insured does not comply with the request after having been put on notice by the insurer, the contract can provide that the insured forfeits the insurance claim.

9.4 Fraud

Insurance

The insurance contract is a *bona fide* contract. The payments of the insurer are based on information and data mainly provided by the insured. Swiss law requires a strict standard of good faith in this regard. The legal consequences of a dishonest conduct of the insured in connection with the presentation of its claim to the insurer are severe: the insured and/or the beneficiary lose all rights under the policy and the insurer is no longer bound by the contract.

Reinsurance

In reinsurance, the relationship between the reinsurer and the cedent relies even more heavily on the concept of good faith than in direct insurance. Due to the lack of directly applicable law, the scope of the sanctions imposed for breach of good faith is somewhat vague. However, even if not specifically dealt with in the reinsurance contract, the standard of good faith in reinsurance is usually higher than in direct insurance and the consequences for a breach are at least as severe.

9.5 Subrogation

To the extent the insurer has indemnified the insured, it subrogates into the insured's rights against a third party which is liable *vis-à-vis* the insured for torts. Together with the main claim for compensation, all ancillary rights are passed on to the insurer. This includes possible objections and defences of the tortfeasor *vis-à-vis* the insured. However, the insured is entitled to the so-called preferential quota of damages which means that the insured's claim against the third party prevails over the insurer's subrogation claim to the extent that the insured is not fully made whole for its loss. Furthermore, the parties are free to exclude the insurer's right of subrogation, which in practice is often done in favour of family members or employees of the insured.

Where the claim of the insured against a third party is not a claim in tort, the subrogation provided in the ICA does not apply. Instead, the insurer can have an independent right of recourse based on the Code of Obligations. If several persons are liable for the same damages based on different legal grounds, the damages shall be borne as follows: (1) in the first instance by the person having caused the loss through an unlawful act, ie, tort; (2) in the second instance by the person who is liable based on contract; and (3) in the last instance by the person who is liable as a matter of law only (strict liability). According to Swiss case law, the insurer can only take recourse against a person who is liable based on contract if such person has breached its contractual duties wilfully or grossly negligently. A recourse of the insurer against a person who is liable as a matter of law only is not possible.

9.6 Double insurance

If the same interest is insured against the same risk and for the same period in time by more than one insurer so that the combined insurance limits

exceed the insurance value, the policy-holder is obliged to inform all insurers without any delay and in writing about this fact. In this case, the insured may only collect the maximum amount of its loss irrespective of the combined total insurance limits. The involved insurers have to indemnify the insured according to their share of the total combined insurance limits.

If the policyholder omits the notification of double insurance intentionally or if it concluded the double insurance with the intention to receive an illegal pecuniary advantage, the insurers are not bound by the contract *vis-à-vis* the policyholder. Each insurer may nevertheless claim the entire premium. This provision does not apply in case of stated benefit insurance, ie, where the insurance sum is owed irrespective of a loss suffered by the insured (eg life insurance).

10. REINSURANCE CLAIM ISSUES

10.1 Follow settlements

The duty of the reinsurer to follow the settlements of the cedent is regarded as internationally recognised reinsurance practice. It is generally accepted that the follow-the-settlements principle applies also if *not* explicitly stipulated in the reinsurance contract. It expresses the obligation of the reinsurer to accept as binding the decisions and measures taken by the cedent under its right to manage its business. The follow the settlement rule does not normally include ex-gratia payments.

The reinsurer's duty to follow the cedent's actions does no longer apply in case the cedent breaches the standards of prudent business management either by wilful misconduct or by serious carelessness (gross negligence), thus violating its associated duty to protect the reinsurer's interests.

10.2 Claims control

While the claims co-operation clause is a standard clause in reinsurance contracts, the claims control clause is more rarely agreed upon. It often appears in reinsurance policies where the cedent has retained little or no risk, as in a fronting arrangement. Often claims control clauses are used in an international context where reinsurers wish to have full control over a claim in a foreign jurisdiction (see also para. 9.2).

10.3 Aggregation

As in direct insurance, aggregation issues regularly arise when dealing with reinsurance claims. However, there is hardly any pertinent Swiss doctrine and next to no Swiss case law on the issue of aggregation. It can therefore be said that, in the absence of established legal principles, the wording of the aggregation clause is of utmost importance. Like every contractual provision, it has to be interpreted according to the principle of good faith (see para. 6.2). German, French and English case law on aggregation clauses may have a significant influence on such interpretation, in particular where the wording is typical for a specific market and one can therefore assume that the parties did not intend to deviate from the established understanding of an aggregation clause in the respective market.

10.4 Law and jurisdiction

The parties to a reinsurance contract can freely agree on the applicable law or the place of jurisdiction, as neither the ICA nor any consumer protection rules apply. To the extent the parties have not contractually agreed on these issues, a Swiss judge has to determine the applicable law and jurisdiction according to the Swiss Private International Law Act (PILA) and the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (Lugano Convention).

Applicable law

According to the PILA, the permissibility of a choice of law in reinsurance contracts – in contrast to the situation with direct insurance contracts – appears to be entirely undisputed. In principle, parties are free to decide on the applicable law. As a matter of fact, this is general practice in international reinsurance contracts (where the choice of law is often combined with an arbitration clause). It appears that Swiss law is often chosen by the parties, even when none of them is domiciled in Switzerland. The choice of law can also be implied. Indications for an implicit choice of law could be, for example: the agreement on a place of jurisdiction or arbitration, the reference to contractual wording which is typical for a specific market, the reference to specific legal provisions under a specific law or the contractual currency. A close connection with another contract can also be an indication for an implied choice of law. However, it is worth noting that pursuant to legal literature in Switzerland (there is no published case law on this issue) the clause 'reinsurance at original terms' should not be understood as an agreement that the reinsurance contract is to be governed by the law applicable to the original policy.

In absence of a choice of law by the parties, contracts are generally governed by the law of the state with which they have the closest connection. Such a connection is deemed to exist with the state of the ordinary residence of the party having to perform the characteristic obligation. It is not clear which party to a reinsurance contract must be deemed to perform the characteristic obligation. Both the risk assumption by the reinsurer and the claims handling obligation of the ceding company are typical for a reinsurance contract.

According to the prevailing but not undisputed academic opinion, it must be assumed that, as a matter of principle, reinsurance contracts are governed by the law of the domicile of the cedent. The cedent has a predominant interest to have all reinsurance contracts governed by the same law. If this were not the case, the cedent would need to take into account the provisions and rules of multiple (foreign) laws in its handling of one and the same loss in order not to lose its reinsurance coverage under one or multiple contracts. While, therefore, in general, the law of the domicile of the cedent will apply, there can be cases where the typical performance of the insurance contract is clearly attributable to the reinsurer, eg in the context of a run-off arrangement, where the cedent does not have any active management duties and does not handle the claims. In such cases the contract is governed by

the law of the domicile of the reinsurer.

Place of jurisdiction

The place of jurisdiction is determined – if not agreed on by the parties – by the Swiss Civil Procedure Act on a national level and by the PILA or the Lugano Convention on an international level. It is possible for two or multiple foreign parties with no connection to Switzerland to agree on Swiss jurisdiction if they also choose Swiss law as the applicable law. If such foreign parties agree on Swiss jurisdiction without the choice of Swiss law, a Swiss court may conclude that the parties' dispute lacks the necessary connection to Switzerland and may therefore not accept to hear the case.