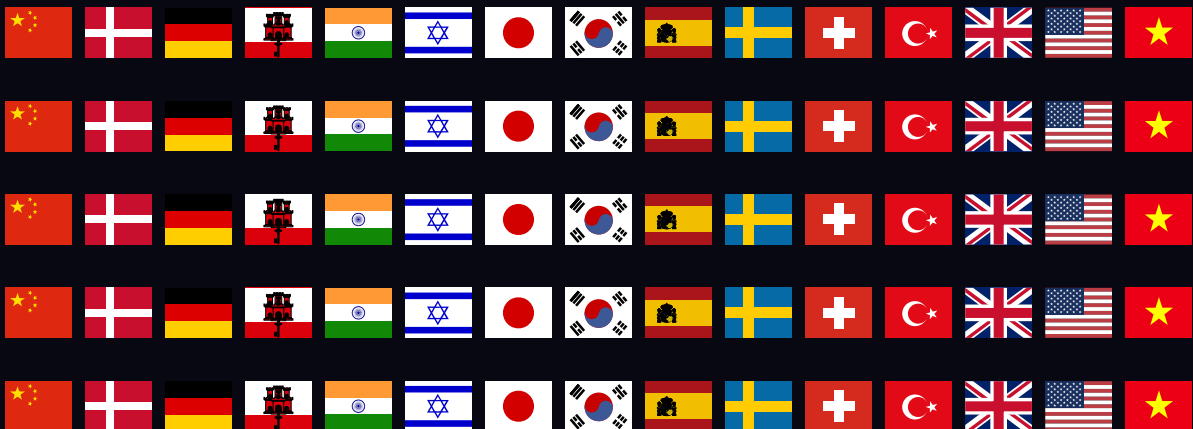


INSURANCE & REINSURANCE

Germany



Insurance & Reinsurance

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Quick reference guide enabling side-by-side comparison of local insights into insurance and reinsurance issues worldwide, including regulation of insurance and companies and their activities; insurance claims and coverage; reinsurance principles and practices; disputes (including arbitration); and recent trends.

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REGULATION

Regulatory agencies

Identify the regulatory agencies responsible for regulating insurance and reinsurance companies.

All private and public insurance undertakings that carry on private insurance and reinsurance business within the scope of the German Insurance Supervision Act (VAG) and have their registered office in Germany are subject to supervision either by the Federal Financial Supervisory Authority (BaFin), or by the supervisory authorities of the relevant Federal State. Under the European law principles of Freedom of Services and Freedom of Establishment, insurance and reinsurance undertakings regulated in another EU or EEA country may 'passport' their licensed status and conduct insurance or reinsurance business in Germany with or without a German branch. Passporting undertakings are primarily subject to supervision by their home state regulator. Breaches of the 'general good requirements' in Germany will be investigated by BaFin in consultation with the home state regulator.

Law stated - 31 March 2023

Formation and licensing

What are the requirements for formation and licensing of new insurance and reinsurance companies?

Any new (re)insurance undertaking in Germany requires a license pursuant to section 8 of VAG. Authorisation can only be granted to stock corporations, mutuals, corporations, institutions under public law and the German branch of a third country insurer or reinsurer. Special rules apply to the incorporation of insurance special purpose vehicles (ISPV) (section 168, VAG). The head office must be located in Germany. According to section 9 of VAG, the applicant must submit a scheme of operations covering three years. Details of the licensing requirements and process are contained in several guidance notices maintained by BaFin.

Law stated - 31 March 2023

Other licences, authorisations and qualifications

What licences, authorisations or qualifications are required for insurance and reinsurance companies to conduct business?

Subject to certain notification requirements under the Solvency II framework, an insurance or reinsurance licence granted by BaFin is valid for all EU and EEA member states, with the exception of licences for the German branch of a third-country undertaking. The licence includes, to a certain extent, the permission to conduct banking, investment and insurance distribution activities. Within this permitted scope, no separate banking or insurance intermediation, Markets in Financial Instruments Directive (MiFID) or insurance intermediary licence or top-up is required. General registration requirements for a trade licence apply, as well as, for example, employment, tax, social security and capital market provisions.

Law stated - 31 March 2023

Officers and directors

What are the minimum qualification requirements for officers and directors of insurance and reinsurance companies?

BaFin has issued guidance on fit and proper requirements for directors, officers and supervisory board members of German-regulated insurance undertakings. The requirements for 'key function holders' are set out in Circular 02/2017 (VA) . To avoid conflicts between incentives and regulatory duties, the type and structure of the remuneration of these persons must comply with certain requirements (as specified by the insurer's own guidelines). Details are set out in a local regulation . In its 2023 stakeholder consultation, BaFin proposes to emphasise diversity and gender requirements, specifies the details to be included in the notice to BaFin of any intention to appoint a new board member, and adds familiarity with the internal model as a requirement.

Law stated - 31 March 2023

Capital and surplus requirements

What are the capital and surplus requirements for insurance and reinsurance companies?

In line with the European Solvency II framework, sections 89 to 95 of VAG require insurers and reinsurers to be capitalised with 'own funds' (normally equity and long-term loss bearing (ie, subordinated) debt instruments), in the amount of their solvency capital requirements. The amount of solvency capital requirements is determined for certain main categories of economic risk (including insurance underwriting, market, counterparty risk) based on the Solvency II standard model, or an equivalent internal model approved by BaFin. A local regulation sets out certain absolute minimum amounts (section 1, KapAusstV).

Law stated - 31 March 2023

Reserves

What are the requirements with respect to reserves maintained by insurance and reinsurance companies?

In line with the European Solvency II framework, sections 74 to 88 of VAG require insurers and reinsurers to calculate technical reserves based on the 'best estimate', which is increased by a risk margin and, with regard to life insurance, modified by certain 'matching' and 'volatility' adjustments. Actual data (section 87, VAG) and regulatory action (section 88, VAG) may require further adjustments.

In parallel, European accounting rules, the corresponding local GAAP provisions and local regulations contain provisions regarding reserves . As one of only two EU member states, Germany has exercised its option to require an 'equalisation reserve' for non-life insurers reflecting material changes in the amount of claims over the three preceding years (section 341h, HGB). Further, local rules set minimum standards for life insurers offering policies with benefits based on the insurer's surplus achieved from investments, costs and technical reserves.

Law stated - 31 March 2023

Product regulation

What are the regulatory requirements with respect to insurance products offered for sale? Are some products regulated by multiple agencies?

In line with the European Insurance Distribution Directive, section 23 (1a) of VAG requires insurers and any other 'manufacturers' of insurance products to design and apply a product governance and oversight process. No prior approval by the insurance regulator or any other authority is required. The distribution of compulsory insurance (in particular, various types of third-party liability cover) and certain types of health insurance products require prior filing of the standard terms with the regulator, BaFin. The terms of compulsory insurance may also be checked by other authorities (eg, aviation) as a requirement for granting permits and licences.

Law stated - 31 March 2023

Regulatory examinations

What are the frequency, types and scope of financial, market conduct or other periodic examinations of insurance and reinsurance companies?

BaFin normally expects German regulated insurers and reinsurers to comply with all governance and regulatory requirements at their own initiative. BaFin will regularly discuss with them their applications, periodic reporting and filings and other documentation (such as applications to change the scheme of operations, the draft annual accounts, outsourcing contracts). BaFin conducts, normally in coordination with the European Insurance and Occupational Pensions Authority (EIOPA) and other regulators in the EU, market surveys and reviews for topics of general interest. Otherwise, there are few rules for periodic examinations. Investigations or audits are mostly conducted on an ad hoc basis.

Law stated - 31 March 2023

Investments

What are the rules on the kinds and amounts of investments that insurance and reinsurance companies may make?

In line with the European Solvency II framework, the rules on the eligibility of assets and permitted amounts of investments have largely been replaced by the 'prudent person principle' (as specified in the insurer's own guidelines), which applies in addition to solvency capital requirements reflecting investment-specific risks (eg, interest rate, equity, property, spread and counterparty risks). Direct investments by a primary insurer in derivatives are only permitted where they directly relate to its insurance business; for example, to hedge the market volatility of investments actually held (as opposed to, for example, short selling). An indirect restraint on investment strategies also results from the fact that Germany has, as one of very few EU and EEA member states, exercised the option under the European Solvency II Directive that assets in the amount of the covering assets must only be used to pay claims (under any policy) and investment-related expenses). To protect the relevant assets from other creditors, they must normally (1) consist of standard asset classes (such as loans, bonds, shares, real estate, investment fund units and cash); (2) be kept in the European Union; (3) be listed in a register; and (4) be subject to processes preventing use for non-permitted purposes. Details are contained in BaFin Circular 7/2016 (VA).

Law stated - 31 March 2023

Change of control

What are the regulatory requirements on a change of control of insurance and reinsurance companies? Are officers, directors and controlling persons of the acquirer subject to background investigations?

Section 16 and section 18 of VAG set out certain fit and proper requirements for any direct or indirect acquirer of control, normally up to the ultimate beneficial owner. These requirements also apply to the acquirer's officers, directors and controlling persons. The required disclosures are set out in a local regulation, which was amended in December 2022. On this basis, BaFin is entitled to object to the acquisition, normally within 60 days.

Law stated - 31 March 2023

Financing of an acquisition

What are the requirements and restrictions regarding financing of the acquisition of an insurance or reinsurance company?

The acquisition of a German regulated insurance or reinsurance undertaking will normally have to be financed by equity because the insurance undertaking must not take up debt (other than long-term subordinated debt meeting the requirements of own funds) and must not grant any upstream securities over its assets.

Law stated - 31 March 2023

Minority interest

What are the regulatory requirements and restrictions on investors acquiring a minority interest in an insurance or reinsurance company?

Sections 16 and 18 of VAG set out certain fit and proper requirements for any direct or indirect investor holding 10 per cent or more of the registered share capital of a German-headquartered insurer. In the absence of control, no restrictions apply to minority interests of less than 10 per cent. The required disclosures are set out in a local regulation. On this basis, BaFin is entitled to object to the acquisition, normally within 60 days. Any transaction by which an existing participation is increased to 20 per cent, 30 per cent or 50 per cent, or where control is acquired, is subject to the same rules.

Law stated - 31 March 2023

Foreign ownership

What are the regulatory requirements and restrictions concerning the investment in an insurance or reinsurance company by foreign citizens, companies or governments?

Normally, there are no foreign ownership restrictions. As an exception, the German Minister of Economic Affairs may prohibit the acquisition of an insurance undertaking by a non-EU investor if the target qualifies as an operator of a critical IT infrastructure pursuant to the applicable materiality thresholds (eg, where a life insurer processes more than 500,000 claims per year).

Law stated - 31 March 2023

Group supervision and capital requirements

What is the supervisory framework for groups of companies containing an insurer or reinsurer in a holding company system? What are the enterprise risk assessment and reporting requirements for an insurer or reinsurer and its holding company? What holding company or group capital requirements exist in addition to individual legal entity capital requirements for insurers and

reinsurers?

In line with the European Solvency II framework, sections 245 to 293 of VAG apply group supervision to insurers and reinsurers held by a parent that directly or indirectly holds other financial institutions, or that has a qualifying participation in another insurance undertaking. In this case, solvency capital requirements, governance and risk management will in addition be supervised across the group and on a consolidated basis. Group members headquartered in the EU or EEA may be subject to reporting and compliance requirements. Several EU and EEA regulators form a 'supervisory college', and one of these regulators is appointed to be the lead regulator. EIOPA has the power to resolve disputes between the lead regulator and other members of the supervisory college.

Law stated - 31 March 2023

Reinsurance agreements

What are the regulatory requirements with respect to reinsurance agreements between insurance and reinsurance companies domiciled in your jurisdiction?

In addition to European law requirements, reinsurance agreements must comply with the minimum requirements regarding risk transfer that are set out in a local regulation. Financial reinsurance transactions not meeting these requirements may qualify as borrowing that is permitted for primary insurers only as long-term subordinated debt meeting the requirements of own funds.

Law stated - 31 March 2023

Ceded reinsurance and retention of risk

What requirements and restrictions govern the amount of ceded reinsurance and retention of risk by insurers?

No mandatory retention of risk requirements apply. However, BaFin may scrutinise reinsurance without any retention under governance aspects.

Law stated - 31 March 2023

Collateral

What are the collateral requirements for reinsurers in a reinsurance transaction?

As stated in article 211 of the European Delegated Regulation (EU) 2015/35, no particular rating or collateral is required with regard to a reinsurance transaction ceding risks to an insurance or reinsurance undertaking or ISPV that is licensed in an EU or EEA member state, or in a third country that qualifies as Solvency II-equivalent for these purposes (Bermuda, Japan, Switzerland, etc). Under certain conditions, US insurers and reinsurers enjoy a similar status under the EU-US Covered Agreement. Other third-country insurers and reinsurers must have a sufficient credit rating. Otherwise, each cedent decides on its own, considering that collateral meeting the requirements set out in article 214 Delegate Regulation (EU) 2015/35 reduces its solvency capital requirements.

Law stated - 31 March 2023

Credit for reinsurance

What are the regulatory requirements for cedents to obtain credit for reinsurance on their financial statements?

In line with the European Solvency II framework, German-regulated insurers and reinsurers obtain credit for solvency capital purposes under the requirements for reinsurance and other risk mitigation methods that are set out in articles 208 to 215 of Delegated Regulation (EU) 2015/35. In particular, a reinsurance contract must normally be valid for a minimum period of 12 months and provide for a direct claim that is not subject to conditions or retroactive changes. No prior regulatory approval is required.

Law stated - 31 March 2023

Insolvent and financially troubled companies

What laws govern insolvent or financially troubled insurance and reinsurance companies?

As in all EU member states, BaFin enjoys the special powers to request the implementation of a restructuring plan or changes to the board, or to appoint a special administrator who will try to prevent an insolvency. Insolvency proceedings must only be started at the initiative of BaFin.

Law stated - 31 March 2023

Claim priority in insolvency

What is the priority of claims (insurance and otherwise) against an insurance or reinsurance company in an insolvency proceeding?

German insolvency law for primary insurers provides that assets that are registered as covering assets must only be used to pay investment expenses and claims under (any) insurance policy. Except for these permitted purposes, creditors cannot obtain collateral over, and cannot set off against, such registered assets, even in case of insolvency. No insurance-specific priorities exist. In particular, employees, tax and social security creditors rank equal to all other creditors. A subordination applies to shareholder (or quasi shareholder) loans, and where agreed. Further 'bail-in' provisions are expected to be introduced similar to the regime applicable to European credit institutions.

Law stated - 31 March 2023

Intermediaries

What are the licensing requirements for intermediaries representing insurance and reinsurance companies?

German-headquartered insurance intermediaries and web-based aggregators must normally be licensed either as a 'broker' or as an 'agent' by the local chamber of commerce, or act as a tied agent under the responsibility of one (but not more than one) specific insurer or licensed intermediary. No mixing of these licences or activities is permitted. As confirmed by the German Federal Supreme Court, claims handling by brokers normally constitute unlawful legal services and trigger administrative fines. Third-party administrators must be licensed as agents if their role extends to exercising, for example, cancellation, change or renewal rights under the policy. Contrary to the view prevailing in Germany so far, the European Court of Justice has decided that certain group policyholders may need to comply with

certain (and perhaps all) requirements of insurance intermediaries, except where the (de minimis) connected contracts exemption applies.

Insurance intermediaries headquartered in another EU or EEA country may 'passport' their regulatory status and conduct business in Germany with or without a German branch. In addition to home state regulation, the 'general good requirements' set out by BaFin apply. Intermediaries from a third country arguably do not require a licence if the intermediation falls within the 'connected contracts exemption'.

Law stated - 31 March 2023

INSURANCE CLAIMS AND COVERAGE

Third-party actions

Can a third party bring a direct action against an insurer for coverage?

Normally, only the insured has a claim for coverage against the insurer. For liability insurance, section 115 (1) of the German Insurance Contract Act (VVG) entitles the third-party beneficiary to bring a direct action:

- in the case of compulsory liability insurance (eg, third-party motor vehicle insurance);
- if the policyholder is insolvent; or
- if the policyholder's whereabouts are unknown.

Section 108 (2) of the VVG states that a liability insurer must not prohibit in its standard terms that the insured assigns its claim for indemnification to the third party bringing the damage claim. A prohibition of assignment can only be agreed upon individually or in the case of a large (jumbo) risk. If the assignment is valid, the third party is entitled to demand indemnification directly from the insurer. This also applies to directors and officers (D&O) insurance and the assignment of the insurance claim by an insured person to the insured company, which can then bring a direct claim for payment against the insurer.

Law stated - 31 March 2023

Late notice of claim

Can an insurer deny coverage based on late notice of claim without demonstrating prejudice?

Where agreed in the policy, section 30 of the VVG (in connection with section 28 of the VVG) grants the insurer the right to deny a claim based on late notice. However, this does not apply where the policyholder is able to demonstrate that the late notice does not result in a prejudice (section 28 (3) of the VVG), or the absence of an intentional or grossly negligent breach. Subject to the transparency and fairness test applicable to standard terms, a policy may generally specify or alter the details of the claim notice required, and, in the case of a large (jumbo) risk policy, also provide for more insurer-friendly consequences of a breach.

Law stated - 31 March 2023

Wrongful denial of claim

Is an insurer subject to extra-contractual exposure for wrongful denial of a claim?

No. There are no punitive or liquidated damages under German statutory law for wrongful denial of a claim. However,

the policyholder may have grounds to claim damages under general contract law. In addition, it is likely that default interest becomes payable on the claim.

Law stated - 31 March 2023

Defence of claim

What triggers a liability insurer's duty to defend a claim?

The liability insurer decides at its own discretion whether to pay the third-party loss or to defend the claim, without being subject to the instructions of the policyholder or insured person. A third-party claim must normally be notified by the policyholder within one week of the said policyholder becoming aware of the potential third-party claim and the underlying circumstances, or without undue delay after receiving the court notice regarding a third-party court action (section 104, VVG). The liability insurer will then have to request any information needed and act accordingly.

Law stated - 31 March 2023

Indemnity policies

For indemnity policies, what triggers the insurer's payment obligations?

The trigger for the insurer's payment obligation is usually defined in the relevant policy (the insured event). There is no general and universal definition of an insured event for indemnity policies in statutory German insurance law. Normally, an indemnity insurer will need to decide whether to pay or deny a claim when the relevant information is available regarding the insured event and the scope of its (potential) payment obligation.

Law stated - 31 March 2023

Incontestability

Is there a period beyond which a life insurer cannot contest coverage based on misrepresentation in the application?

There is no specific time limit for life insurers, and the same rules apply to the consequences of pre-contractual misrepresentation as for non-life policies.

Law stated - 31 March 2023

Punitive damages

Are punitive damages insurable?

The German law of damages is governed by the concepts of compensation and restitution. Thus, it does not acknowledge punitive damages. Therefore, the question of whether such claims are insurable does not arise under domestic law, only from time to time regarding foreign judgments. For claims arising from other jurisdictions, no statutory prohibition or authority exists that would prevent cover for punitive damages. Many insurance policies contain, however, a respective exclusion. Where coverage for punitive damages is prohibited by foreign law as a matter of public policy, this may also have an effect on the insurability under German law (eg, where the matter would, under German law, qualify as an intentional criminal offence).

Law stated - 31 March 2023

Excess insurer obligations

What is the obligation of an excess insurer to 'drop down and defend', and pay a claim, if the primary insurer is insolvent or its coverage is otherwise unavailable without full exhaustion of primary limits?

There are no specific statutory provisions or other authority on this point. The answer will largely depend on the provisions of the excess policy. In international insurance programmes, policyholders will normally try to negotiate a dropdown.

Law stated - 31 March 2023

Self-insurance default

What is an insurer's obligation if the policy provides that the insured has a self-insured retention or deductible and is insolvent and unable to pay it?

No specific authority exists under German law that suggests there is any difference in an insurer's obligation where the insured has a self-insured retention or deductible and is insolvent and unable to pay it.

Law stated - 31 March 2023

Claim priority

What is the order of priority for payment when there are multiple claims under the same policy?

Regarding multiple claims under a third-party compulsory liability policy, section 118 of the VVG contains a ranking giving priority to claims for personal injury and losses without cover (eg, under another insurance policy or social security), and to claims by the insured over recourse claims. For all other liability policies, section 109 of the VVG provides that the insurer must allocate the available sum insured proportionately between all claims that must be reasonably expected. The topic frequently arises regarding multiple insured persons under a D&O policy covering several officers and supervisory board members, as the German Federal Supreme Court (BGH) has, so far, not yet had a chance to determine the applicable principles.

Law stated - 31 March 2023

Allocation of payment

How are payments allocated among multiple policies triggered by the same claim?

Regarding the allocation of payments among multiple policies by the same policyholder, no general rule applies. The assessment normally depends on the wording of the policy, the type of risk and the merits of the case. There is generally no equivalent to the methodology developed by, for example, US courts.

Law stated - 31 March 2023

Disgorgement or restitution

Are disgorgement or restitution claims insurable losses?

So far, no clear statutory provision or authority exists. Normally, third-party liability policies will not cover such losses as they are not considered damages under German law. If the disgorgement or restitution results from an intentional unlawful act (which is a fairly broad notion under German law), the loss would normally not be insurable. Uncertainties remain regarding non-intentional unlawful acts.

Law stated - 31 March 2023

Definition of occurrence

How do courts determine whether a single event resulting in multiple injuries or claims constitutes more than one occurrence under an insurance policy?

Subject to the transparency and fairness rules applicable to standard terms under general contract law, serial loss clauses are normally valid. Otherwise, no general rule or methodology applies. The German Insurance Contract Act does not contain any general provisions relating to aggregation. For certain compulsory insurance, statutory law defines the minimum number of limits.

Law stated - 31 March 2023

Rescission based on misstatements

Under what circumstances can misstatements in the application be the basis for rescission?

In cases of fraudulent misstatement or non-disclosure, insurers are entitled to avoid the contract retroactively within one year of discovering the misstatement. In the absence of fraud, a rescission (or withdrawal) with retroactive effect normally has a number of requirements, including (1) a due alert on the consequences of non-disclosure; (2) non-disclosure with regard to a written question of the insurer pertaining to a material risk factor; and (3) exercise of the rescission right by the insurer within one month of actual knowledge. Where the policyholder can demonstrate the absence of gross negligence, the insurer is, within one month of actual knowledge, only entitled to terminate the policy for cause, and without retroactive effect. Avoidance, rescission and termination rights must not be exercised if the insurer or its agent was aware of the risk at the time of underwriting, or would normally cover the relevant risk under more onerous terms (eg, at a higher premium, or subject to exclusions), which will, at the request of the insurer, be applied retroactively. These rules also apply to professional policyholders but can be specifically disapplied by the parties in case of a large (jumbo) risk policy, normally by way of an individually negotiated provision.

Law stated - 31 March 2023

REINSURANCE DISPUTES AND ARBITRATION

Reinsurance disputes

Are formal reinsurance disputes common, or do insurers and reinsurers tend to prefer business solutions for their disputes without formal proceedings?

Key players in the continental European reinsurance market clearly prefer business solutions.

Law stated - 31 March 2023

Common dispute issues

What are the most common issues that arise in reinsurance disputes?

Recently, the covid-19 pandemic has increased the likelihood of reinsurance disputes. Reasons may include uncertainties relating to aggregation, the scope of sub-limits compared with general limits and non-compliance with binding authorities or claims cooperation clauses.

Law stated - 31 March 2023

Arbitration awards

Do reinsurance arbitration awards typically include the reasoning for the decision?

Where German law governs the arbitration proceeding, an arbitration award must include reasoning, except where the parties have agreed otherwise, or where the award is based on an agreement between the parties (section 1054 of the Code of Civil Procedure (ZPO)). A sufficiently detailed reasoning also mitigates the risk that the award is set aside due to a violation of mandatory due process requirements.

Law stated - 31 March 2023

Power of arbitrators

What powers do reinsurance arbitrators have over non-parties to the arbitration agreement?

Reinsurance arbitrators normally do not have powers over non-parties (except in the rare instances where an arbitration clause is also binding for a non-party, such as a guarantor or successor). To a certain extent, institutional arbitration rules allow multi-party or multi-contract arbitration across several connected contracts that contain compatible arbitration clauses.

Law stated - 31 March 2023

Appeal of arbitration awards

Can parties to reinsurance arbitrations seek to vacate, modify or confirm arbitration awards through the judicial system? What level of deference does the judiciary give to arbitral awards?

German courts recognise arbitration clauses as an obstacle to state court proceedings and normally defer to the arbitral tribunal to rule on the validity of an arbitration clause or agreement. Under German law, an arbitral award is final and cannot be appealed on the merits. The Higher Regional Courts are competent for the enforcement of both domestic and foreign awards, and for proceedings to set aside (ie, vacate) a domestic arbitral award. A révision au fond is not permitted. In line with article V of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, the Higher Regional Court will only refuse the enforcement of a foreign arbitral award under the very narrow requirements of the New York Convention, which apply directly (section 1061, ZPO). Modification of a foreign award is normally only possible where it is provided for in the award, or where clarification is required for execution under local laws. Set-off against an alleged counterclaim is not as restricted as in most other countries.

Law stated - 31 March 2023

REINSURANCE PRINCIPLES AND PRACTICES

Obligation to follow cedent

Does a reinsurer have an obligation to follow its cedent's underwriting fortunes and claims payments or settlements in the absence of an express contractual provision? Where such an obligation exists, what is the scope of the obligation, and what defences are available to a reinsurer?

As an implied principle of reinsurance agreements, the reinsurer normally follows the fortunes of the ceded risk. Further, the reinsurer will, regarding the cedent's decisions, actions or omissions, be subject to a general obligation to follow on the basis of general rules applicable to a 'quasi administrator'. Legal authors state that a reinsurer is bound by this obligation to follow only if the cedent manages claims as if uninsured (or with much lower reinsurance cover). Defences of the reinsurer include ex gratia payments (ie, where the insured accepts that the risk is not covered); an intentional failure by the cedent to rely on exclusions (or the insured's breach of obligations); or a grossly negligent claims handling by the cedent. Sometimes, the obligation to follow will be subject to the cedent's compliance with contractual reporting, consultation, cooperation or audit requirements.

Law stated - 31 March 2023

Good faith

Is a duty of utmost good faith implied in reinsurance agreements? If so, please describe that duty in comparison to the duty of good faith applicable to other commercial agreements.

In German insurance law, there is no special concept of utmost good faith with particular legal consequences comparable to the English doctrine of utmost good faith. Although the principle of good faith is a cornerstone of German civil law, its practical effects are more apparent in the interpretation of contracts that are governed by German law but have a close connection to a common law jurisdiction or market. Further, the duty of utmost good faith has, in many respects, an equivalent in the general German law principle stating that obligations in quasi-contractual and contractual relationships may arise from, or be subject to, fiduciary duties (Treu und Glauben). Many reinsurance agreements refer to prevailing market practices regarding the details of such fiduciary duties. A reinsurer may need to take care to manage conflicts of interest; for example, by avoiding favouring one cedent over another in the case of a diverging interest of these cedents regarding a certain loss. Reinsurers may have to take precautions to ensure that confidential information obtained from one cedent is not used to the detriment of another cedent.

Law stated - 31 March 2023

Facultative reinsurance and treaty reinsurance

Is there a different set of laws for facultative reinsurance and treaty reinsurance?

The same set of laws and jurisprudence apply to facultative reinsurance and treaty reinsurance. For each, a contractual clause will normally refer to prevailing market practice.

Law stated - 31 March 2023

Third-party action

Can a policyholder or non-signatory to a reinsurance agreement bring a direct action against a reinsurer for coverage?

Policyholders or non-signatories cannot bring a direct action against a reinsurer, except where the reinsurance agreement specifically provides for the relevant third-party rights.

Law stated - 31 March 2023

Insolvent insurer

What is the obligation of a reinsurer to pay a policyholder's claim where the insurer is insolvent and cannot pay?

Policyholders do not have a direct claim against the reinsurer in case of insolvency or other inability of the cedent to pay. A cut-through clause agreed by the reinsurer for the benefit of the insured would, where German law applies to the insolvency, normally not discharge the reinsurer from its obligation to fulfil its liabilities to the insurer's insolvent estate.

Law stated - 31 March 2023

Notice and information

What type of notice and information must a cedent typically provide its reinsurer with respect to an underlying claim? If the cedent fails to provide timely or sufficient notice, what remedies are available to a reinsurer and how does the language of a reinsurance contract affect the availability of such remedies?

The reinsurance agreement normally sets out the details of the cedent's obligation to notify the reinsurer and, pursuant to the reinsurer's requests (except where unreasonable), provide any relevant information. Facultative and non-proportional reinsurance agreements normally require more comprehensive notification and information and may also provide for specific consequences of a breach of such an obligation. Except where agreed as a condition, or in the case of the cedent's intentional misconduct, an alleged failure to duly provide notices or information will, in the absence of obvious exclusions or limitations of coverage, normally not entitle the reinsurer to deny cover or payment of a cash call. However, the reinsurer may have a counterclaim for damages arising from the breach and may reserve the right to claw back a payment if the breach is not remedied within a reasonable period.

Law stated - 31 March 2023

Allocation of underlying claim payments or settlements

Where an underlying loss or claim provides for payment under multiple underlying reinsured policies, how does the reinsured allocate its claims or settlement payments among those policies? Do the reinsured's allocations to the underlying policies have to be mirrored in its allocations to the applicable reinsurance agreements?

In the absence of an 'interlocking clause', legal authors state that a reinsurer would normally (1) allocate payments in accordance with the structure of the reinsurance agreement (eg, all losses relating to specified policies, or losses

occurring during a period, regardless of the underlying policies); and (2) have a fiduciary duty to handle claims and settlement payments among a number of affected reinsurance contracts in a neutral way; that is, strictly on the basis of each reinsurance contract, without favouring any cedent because of own business interests.

Law stated - 31 March 2023

Review

What type of review does the governing law afford reinsurers with respect to a cedent's claims handling, and settlement and allocation decisions?

Owing to the absence of any specific statutory provisions, the type and scope of a review by reinsurers is determined based on the contract language and the prevailing market practice. Probably not as frequently as in common law jurisdictions, the reinsurer's right to information will be exercised by requesting a file audit (which goes beyond a claims audit aimed at verifying the reinsurer's reserving). Normally, such a request will not be deemed to be unreasonable. 'Hard' or 'soft' claims cooperation clauses provide for varying degrees of interference by the reinsurer into the cedent's claims handling, and may reach from increased consultation and joint selection of loss adjusters to prior consent or even a transfer of the claims handling authority to the reinsurer. Under German law contracts, it is less common that compliance with review requirements is a pre-condition for the payment of cover or cash calls.

Law stated - 31 March 2023

Reimbursement of commutation payments

What type of obligation does a reinsurer have to reimburse a cedent for commutation payments made to the cedent's policyholders? Must a reinsurer indemnify its cedent for 'incurred but not reported' claims?

No specific statutory provisions apply. An obligation to adjust the reinsurance premium will normally only result from the principles of 'follow the fortunes' and a following clause (particularly regarding proportional and obligatory reinsurance) and be limited to changes beyond the control of the cedent. A commutation by the cedent does not automatically qualify for such an adjustment, except where (as in many life insurance products) the policyholder is entitled by law to surrender the policy.

Law stated - 31 March 2023

Extracontractual obligations (ECOs)

What is the obligation of a reinsurer to reimburse a cedent for ECOs?

No specific statutory provisions apply. Normally, coverage of ECO will require a specific provision in the reinsurance agreement. In addition, the reinsurer may become liable to the cedent if the ECO results from an unlawful or unreasonable exercise of its rights under a claims cooperation clause.

Law stated - 31 March 2023

UPDATES & TRENDS

Key developments

Are there any emerging trends or hot topics in insurance and reinsurance regulation in your jurisdiction?

Regulatory changes both at the European and the German law level require insurers and reinsurers to take further action in the areas of IT governance (eg, cybersecurity, artificial intelligence and machine learning, crypto); compliance, reporting and pre-contractual disclosures regarding sustainability or environmental, social and governance issues; and sanctions and data protection. Climate change is an important driver for the ongoing reform of the Solvency II framework, which is aimed at facilitating investments in renewable energy, and the introduction of better precautions for financially distressed situations of insurers. A similar regime as under the European Solvency II framework now also applies to occupational pension providers.

Another key emerging trend relates to new human rights-related liability exposures. As with other industries, insurers need to be mindful of supply chain regulation in Germany and Europe. The Supply Chain Due Diligence Act contains various obligations, such as a duty to conduct risk analysis and take measures if violations are discovered. Risk areas covered include forced labour, child labour and environmental damage. From 2023, the Act initially applies to enterprises with at least 3,000 employees, and, from 2024, additionally to enterprises with at least 1,000 employees in Germany. Administrative fines for non-compliance can amount to up to €8 million, or up to 2 per cent of annual global turnover, and exclusion from public procurement proceedings. Liabilities under tort law are still uncertain.

Law stated - 31 March 2023

Jurisdictions

	China	Jincheng Tongda & Neal
	Denmark	Poul Schmith/Kammeradvokaten
	Germany	Clyde & Co LLP
	Gibraltar	Hassans
	India	Tuli & Co
	Israel	Kennedys Law LLP
	Japan	Nagashima Ohno & Tsunematsu
	South Korea	Yoon & Yang LLC
	Spain	Bird & Bird LLP
	Sweden	Advokatfirman Hammarskiöld
	Switzerland	Lenz & Staehelin
	Turkey	Cavus & Coskunsu Law Firm
	United Kingdom	Debevoise & Plimpton
	USA	Sullivan & Cromwell LLP
	Vietnam	LNT & Partners