



The Legal 500 & The In-House Lawyer  
Comparative Legal Guide  
Germany: Insurance & Reinsurance

This country-specific Q&A gives a pragmatic overview of the law and practice of insurance & reinsurance law in the Germany.

It addresses topics such as **contract regulation, licensing, penalties, policyholder protection, alternative dispute resolution** as well as personal insight and opinion as to the future of the insurance market over the next five years.

This Q&A is part of the global guide to Insurance & Reinsurance. For a full list of jurisdictional Insurance & Reinsurance Q&As visit <http://www.inhouselawyer.co.uk/index.php/practice-areas/insurance-reinsurance>



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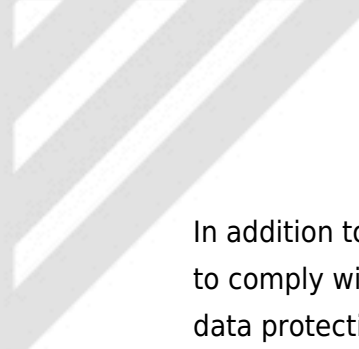


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## 1. **How is the writing of insurance contracts regulated in the jurisdiction?**

Insurance supervision in Germany is mainly regulated by the Insurance Supervisory Act (Versicherungsaufsichtsgesetz, VAG). The VAG contains provisions on, inter alia, authorisation, fund requirements and governance for insurance and reinsurance undertakings. The VAG was reformed in order to transpose the Directive 2009/138/EC ("Solvency II Directive") into domestic law as of 1 January 2016. The Solvency II Directive is supplemented by the Commission Delegated Regulation (EU) 2015/35 of 10 October 2014 which is directly applicable in Germany.



In addition to the provisions of the VAG, insurance and reinsurance undertakings have to comply with a wide range of provisions in German law, e.g. under civil, company and data protection law.

The relevant regulatory body in Germany for insurance and reinsurance activities is the Federal Financial Supervisory Authority (Bundesanstalt für Finanzdienstleistungsaufsicht, BaFin). It supervises all private and public insurance undertakings which carry on private insurance business within the scope of the VAG and have their registered office in Germany. In addition, there are supervisory authorities of the Federal States which are mainly responsible for supervising public insurers whose activities are restricted to the particular Federal State and private insurers who are of lesser financial and economic significance.

Insurance and reinsurance undertakings which have their registered office in another EU Member State, or in a state which is party to the Agreement on the European Economic Area (EEA), and conduct business in Germany under the European Passport or Single License Principle are mainly subject to their home country's supervision, especially in prudential matters. Additional requirements apply for establishing a branch. BaFin closely cooperates with foreign supervisory authorities, especially within the European System of Financial Supervision including the European Insurance and Occupational Pensions Authority (EIOPA).

## 2. **Are types of insurers regulated differently (i.e. life companies, reinsurers)?**

The VAG applies to direct life and non-life undertakings. As such, both types of insurers are regulated in the same way in principle, with special requirements applying, however, for example to life insurers given the long-term duration of liabilities for life business and to health insurers. Moreover, the VAG also regulates reinsurers and provides for special rules for insurance groups.

For reinsurance undertakings from third countries, i.e. countries that are not EU or EEA member states, specific authorisation requirements apply, as detailed above.

### **3. Are insurance brokers and other types of market intermediary subject to regulation?**

German law distinguishes between insurance brokers (Versicherungsmakler) acting for and representing the interests of the policy holder and insurance agents (Versicherungsvertreter) acting on behalf of the insurer. Pursuant to Section 34d of the German Commercial Code (Gewerbeordnung, GewO), both brokers and agents in general need to obtain authorisation from the Chamber of Industry and Commerce (Industrie- und Handelskammer, IHK) of the intermediary's registered seat. BaFin does not directly supervise brokers and other intermediaries, but, due to certain statutory provisions such as Sections 23, 26 and 48 VAG, BaFin is authorised to monitor insurers' sales activities. This includes, but is not limited to, supervision of contractual agreements between insurers and insurance intermediaries.

### **4. Is authorisation or a licence required and if so, how long does it take on average to obtain such permission?**

In order to carry on (re-)insurance business, an undertaking has to obtain authorisation from BaFin pursuant to Section 8 VAG. Section 9 VAG requires an undertaking to attach an operating plan to its application, disclose the purpose and structure of the business, the region in which business is to be conducted and clearly state the conditions under which the future liabilities of the undertaking are guaranteed. The operating plan has to include, inter alia, the articles of association as well as information about the classes of insurance the undertaking intends to carry on and which risks it intends to cover. Moreover, the operating plan must give evidence of the existence of own funds in the amount of the minimum guarantee fund and provide estimates for the first three financial years of commission expenses and other current operating expenses, expected premiums, the expected expenses for claims incurred and the expected liquidity situation.

If the undertaking has already obtained authorisation to carry on insurance business in another EU/EEA country, the authorisation will be valid in Germany as well as in all

other EU/EEA states under the single license regime. After going through a so-called notification procedure, an undertaking may carry on insurance business outside its home country through branches or through cross-border provision of services.

As a general rule, primary insurers and reinsurers from third countries, i.e. countries that are not Member States of the EU/EEA, wishing to carry on insurance or reinsurance business in Germany need to obtain authorisation from BaFin and establish a German branch office. The requirements for the authorisation application and the establishment of a branch office are predominantly based on Sections 68 and 69 VAG.

**5. Are there restrictions over who owns or controls insurers (including restrictions on foreign ownership)?**

Pursuant to Sections 16, 7 para. 3 VAG, holders of 10 % or more of the capital or voting rights in an entity must fulfil the requirements for sound and prudent management of the entity. In particular, they have to be trustworthy. If the shares are held by legal entities, the same requirements apply to their legal representatives.

Additionally, under Section 17 VAG, any person or legal entity has to immediately notify BaFin in writing if they intend to acquire 10 % or more of the capital or voting rights. If a holder of more than 10 % of the capital or voting rights intends to increase its shares beyond 20 %, 30 % or 50 %, they also have to inform BaFin. BaFin has to review the request within 60 days of receiving the notification.

**6. Is it possible to insure risks without a licence or authorisation? (i.e. on a non-admitted basis)?**

In order to carry on insurance business, an undertaking has to be authorised by BaFin unless it is headquartered in another member state of the EU/EEA. Any authorisation to carry on business obtained in an EU or EEA member state is valid in all other EU and EEA member states (European Passport or Single Licence Principle). Prior to conducting business, an insurer from an EU or EEA member state must notify BaFin of its intention



to conduct business.

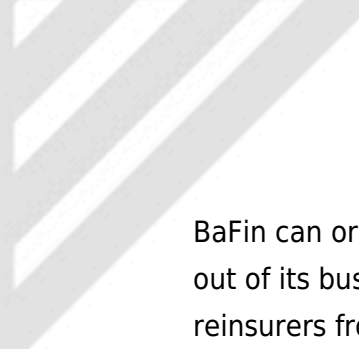
Third-country insurers wishing to carry on primary insurance business or reinsurance business in Germany are generally subject to authorisation and must establish a German branch office. However, there is an exception with regard to reinsurance business provided in Section 67 para. 1 VAG. According to this exception, the requirement for authorisation and the establishment of a branch office does not apply if primary insurers or reinsurers from third countries carry on reinsurance business in Germany solely through provision of cross-border services and if the European Commission has decided in accordance with Article 172 para. 2 or 4 of Directive 2009/138/EC that the solvency regimes for reinsurance activities carried out by undertakings in the relevant country are equivalent to the regime in that Directive. This currently applies to Bermuda, Switzerland and Japan.

According to BaFin's interpretative decision of 31 August 2016, the authorisation requirement does not apply to insurance by correspondence. Insurance by correspondence applies to reinsurance businesses if, at the instigation of an insurance undertaking situated in Germany, a reinsurance contract is concluded by correspondence with an insurer situated abroad without one of the parties being assisted by a professional intermediary in Germany or by a professional intermediary situated abroad but acting as intermediary in Germany. The initiative to conclude the reinsurance contract must come from the German insurer.

Further, in October 2017, the EU and the USA signed an agreement allowing US reinsurers and EU (re)insurers to conclude a contract without the US reinsurers being required to establish a branch in the respective EU Member State. US reinsurers must fulfil certain capital and local risk-based capital requirements and have to submit certain declarations to the supervisory authority responsible for the EU insurance undertaking.

## **7. What penalty is available for those who operate without appropriate permission?**

If an undertaking carries on insurance business without prior authorisation from BaFin,



BaFin can order the immediate cessation of its business activities or prompt carrying out of its business activities. The VAG provides for an exemption if primary insurers or reinsurers from third countries carry out reinsurance business in Germany solely through provision of cross-border services and if the European Commission has decided in accordance with Article 172 (2) or (4) of Directive 2009/138/EC that the solvency regimes for reinsurance activities carried out by undertakings in the relevant countries are equivalent to the regime described in that Directive. This is currently the case for Switzerland, Bermuda and Japan.

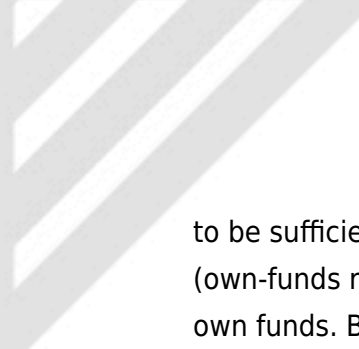
## **8. How rigorous is the supervisory and enforcement environment?**

BaFin has extensive supervisory powers which are, in particular, set out in Sections 294 to 310 of the Insurance Supervisory Act. In order to provide guidance on their supervisory practice, BaFin issues Interpretative Decisions (Auslegungssentscheidungen), Guidance Notices (Merkblätter) or Circular Letters (Rundschreiben) on several topics. Even though not technically legally binding, the Circular Letters in particular are usually deemed to be a clear indication of the regulator's expectations. Moreover, these publications will usually constitute a binding principle with the effect that BaFin has to treat similar cases alike.

## **9. How is the solvency of insurers (and reinsurers where relevant) supervised?**

In general, solvency refers to an insurer's level of own funds, meaning the undertaking's assets which are free of any foreseeable liabilities. It is important for insurers to have adequate own funds available to cover any unexpected losses they might incur, thereby ensuring that policyholders' claims are covered. The solvency regime is established by the Solvency II Directive. The Directive is made up of three pillars: quantitative requirements, qualitative requirements and provisions on market discipline, transparency and disclosure obligations.

An insurer's solvency, which falls into pillar 1 of the Solvency II Directive, is considered



to be sufficient if the level of own funds meets at least the required solvency margin (own-funds requirements). Own funds are made up of basic own funds and ancillary own funds. Basic own funds consists of the excess of assets over liabilities and subordinated liabilities while ancillary own funds are own-fund items other than basic own funds which can be called up to absorb losses.

BaFin is responsible for supervising that insurers fulfil these requirements.

#### 10. **What are the minimum capital requirements?**

Section 122 VAG provides that the minimum capital requirement corresponds to an amount of eligible basic own funds below which policyholders and beneficiaries would be exposed to an unacceptable level of risk if the insurer was allowed to continue its operations. Accordingly, BaFin will withdraw an insurer's authorisation when the insurer's amount of eligible basic own funds falls below the minimum capital requirement and the insurer is unable to re-establish the amount of eligible basic own funds within a short period of time. The calculation used to determine the minimum capital requirement is set out in the Delegated Regulation 2015/35/EU.

#### 11. **Is there a policyholder protection scheme?**

One of the primary aims of the Insurance Contract Act (Versicherungsvertragsgesetz, VVG) is to protect the policyholder who is, in general, considered to be the weaker party, even if the policyholder is not a consumer. As such, the Insurance Contract Act contains various provisions which cannot be waived to the detriment of the policyholder. Exceptions are made with regard to large risks (Section 210 para. 2 VVG) and open policies (cf. Section 53 et seq. VVG) where the legislator assumes that the policyholder has sufficient experience with insurance contracts to defend his or her own interests.

## 12. **How are groups supervised, if at all?**

Solvency II introduced important new provisions to strengthen the supervision of insurance groups. The regulations on group supervision can be found in the VAG, in particular in Part 5 (Sections 245 et seq.). Accordingly, insurance undertakings which are part of a group are, in addition to individual supervision, subject to certain group supervision provisions.

## 13. **Do senior managers have to meet fit and proper requirements and/or be approved?**

Since 2009, BaFin has been responsible for the supervision of the members of administrative and supervisory bodies. Over the years, BaFin has provided a number of guidance notices on fitness and propriety in order to assist insurers with the various requirements they have to meet. In accordance with the German Audit Reform Act, for example, insurers within the scope of Solvency II must ensure that when appointing members of the supervisory board, at least one member has professional knowledge of accounting or the audit of financial statements. Additionally, the members of the supervisory board as a whole must be familiar with the industry in which the company operates. To this end, the members of the supervisory board must demonstrate that they have sufficient basic knowledge of the insurance sector, the extent of which is based on the undertaking's individual risk profile, pursuant to the principle of proportionality.

## 14. **Are there restrictions on outsourcing parts of the business?**

In general, all insurers are allowed to outsource certain parts of their functions or insurance activities, but have to ensure compliance with all supervisory rules and requirements. To this end, insurers have to establish written guidelines. If insurers want to outsource one of the four key functions identified in the Solvency II Directive (risk management, compliance, internal audit and actuarial functions), they have to appoint an "outsourcing officer" responsible for supervising the outsourcing process.



Insurers intending to outsource important functions or the insurance activities of sales, portfolio management, claims administration, accounting or asset investment and management immediately have to notify BaFin of their intention, providing a draft of the contract they intend to conclude with the service provider pursuant to Section 47 No. 8 VAG. The notification submitted to BaFin has to contain the name of the service provider, its address, a description of the scope of the outsourced activities, the reasons for outsourcing and, if key tasks are outsourced (in particular one of the four key functions identified in the Solvency II directive) the name of the competent person at the service provider.

## 15. **How are sales of insurance supervised or controlled?**

Since 23 February 2018, the new rules for insurance sales implementing the Insurance Distribution Directive (IDD) have been applicable in Germany. To date, BaFin has summarised its position on insurance sales in a circular (Circular 10/2014 on cooperation with insurance intermediaries, risk management in sales). In the course of the implementation of the IDD, on 11 January 2018, BaFin provided a revised version of that circular for consultation. The draft gives an indication of the likely supervisory practice, not least with regard to the supervisory authority's interpretation of statutory provisions. Even though a circular from the supervisory authority does not have binding legal effect, BaFin is thereby establishing a framework in which market participants can, and generally should, ultimately find some direction.

There are also rules providing concrete specification of the IDD at the European level in the form of the directly applicable delegated regulations from the European Commission of September 2017 mentioned at the beginning on the product approval process under Section 23 para. 1(a) (new version) (VO 2017/2358) and on notification requirements and good conduct rules in the sale of insurance investment products (VO 2017/6229).

In addition, the EU Commission has defined standards for a product information sheet (Insurance Product Information Document, IPID) with an implementation regulation of 11 August 2017 (VO 2017/1469). This is implemented in Germany through a change in the regulation on notification duties from the Insurance Contract Act (VVG-InfoV).

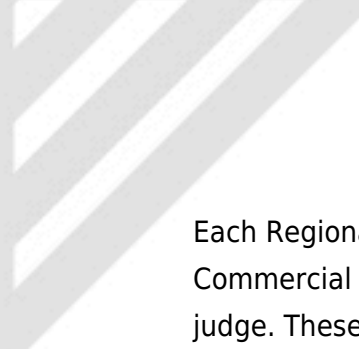
16. **Are consumer policies subject to restrictions? If so, briefly describe the range of protections offered to consumer policyholders.**

On its 100th anniversary, the Insurance Contract Act underwent comprehensive revision with its current version taking effect as of 1 January 2008. In revising the Insurance Contract Act, the legislator intended to promote consumer protection. For example, the new law, on the one hand, introduced extensive duties for insurers to inform and advise policyholders before the formation of the insurance contract and, on the other hand, restricted sanctions in case of breach of the policyholder's obligations to disclose material risks pre-contractually or to cooperate with the insurer in the claims handling process. Accordingly, most provisions of the Insurance Contract Act which serve consumer protection are mandatory.

In addition to the Insurance Contract Act, insurance contracts are further governed by the German Civil Code (Bürgerliches Gesetzbuch, BGB). Even where the Insurance Contract Act leaves room for party autonomy, standard insurance terms and conditions are subject to Sections 305 et seq. BGB. Accordingly, provisions which are so unusual that the other party to the contract does not need to expect to encounter them do not form part of the contract. This may, for example, apply to foreign provisions copied and pasted into German policies. Furthermore, pursuant to Section 305c para. 2 BGB, any doubts in the interpretation of standard business terms are resolved against the user. Moreover, provisions in standard business terms will be ineffective if they unreasonably disadvantage the insured. While this scrutiny plays a predominant role in consumer insurance, it is also relevant for business insurance.

17. **Are the courts adept at handling complex commercial claims?**

In broad terms, there are four courts in which civil disputes of a commercial nature may be heard. These are: the Local Courts (Amtsgerichte); the Regional Courts (Landgerichte); the Higher Regional Courts (Oberlandesgerichte) and the Federal Court of Justice (Bundesgerichtshof).



Each Regional Court in Germany also operates a Specialist Commercial Chamber. The Commercial Chambers allow for the appointment of lay judges alongside the presiding judge. These lay justices are not lawyers, but experienced merchants. For a case to be heard in the Commercial Chamber, the plaintiff must make a motion requesting this in his Statement of Claim. The defendant may also make such a motion later on and apply for the transfer of the action from the “ordinary” civil court to a Commercial Chamber.

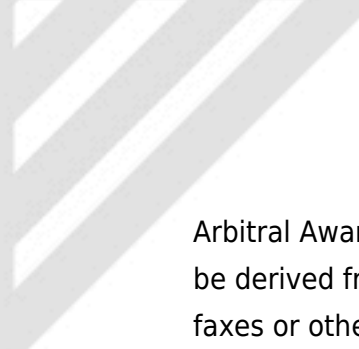
Further, some Regional Courts (usually those situated in larger cities) have the option of setting up additional specialist chambers, which hear cases that may benefit from specific judicial expertise such as, for example, construction, banking, insurance or professional liability disputes of lawyers, tax advisors and certified public accountants.

German judges decide independently and irrespective of the parties’ backgrounds. Corruption of judges is unknown. Judges have a thorough legal education and a high standard of professionalism. Most cases are decided in a timely and cost efficient manner and only very complex cases may result in lengthy litigation proceedings.

## 18. **Is alternative dispute resolution well established in the jurisdiction?**

Arbitration clauses in insurance and reinsurance agreements are generally enforceable, and Germany has become a more and more significant venue for international arbitration proceedings. As reinsurance disputes tend to be settled in private, the majority of reinsurance contracts contain arbitration clauses. In direct insurance contracts, arbitration clauses remain the exception but are, for example, frequently used in W&I policies, sometimes in D&O policies and in a few other lines of business. While most agreements so far provide for ad hoc arbitration, parties increasingly use institutional rules. The German Arbitration Institute (DIS) is an experienced and highly respected institution which just recently published its updated 2018 Arbitration Rules.

In business reinsurance and insurance, the arbitration agreement must generally be in writing. However, the form requirements under German law are far more lenient than those under the New York Convention on the Recognition and Enforcement of Foreign



Arbitral Awards and the UNCITRAL Model Law. The arbitration agreement may not only be derived from a document signed by the parties but also from an exchange of letters, faxes or other means of telecommunication which provide a record of the agreement. Further, the form requirement is deemed to have been complied with if the arbitration agreement is contained in a document transmitted from one party to the other party or by a third party to both parties and – if no objection was raised in good time – the contents of such document are considered to be part of the contract in accordance with common usage. Moreover, reference in a contract complying with the written form requirements to a document (e.g. standard insurance terms and conditions), containing an arbitration clause also constitutes an arbitration agreement provided that the reference is such as to make that clause part of the contract.


19. **What are the primary challenges to new market entrants?**

The German insurance market is a highly developed, regulated and mature market. Accordingly, competition is intense and consolidation is to be expected. At the same time, in many business lines, the market has been soft resulting in low premiums in many lines. In addition, the continuing low interest rate environment is challenging and exerting pressure on capital investments and, in particular, life insurers. A number of life insurance and other carriers are considering run off solutions, and are under increasing public scrutiny and political pressure.

Moreover, new market entrants will need to be ready to cope with existing and future regulation. 2017 and 2018 have seen a number of major developments affecting the insurance market, such as the European General Data Protection Regulation, the Insurance Distribution Directive, Brexit and new regulatory initiatives for collective redress mechanisms, to name a few.

20. **To what extent is the market being challenged by digital innovation?**

Digital innovation has been one of the major challenges for the insurance market in



recent years. The insurance sector in Germany is traditionally more conservative than other sectors and traditional business models have to be changed without disrupting day-to-day services. While many insurers are already now offering digital vehicles such as mobile phone apps, studies have shown that a large number of insurers do not have the necessary technological capabilities by just using their internal resources.

Furthermore, traditional insurers have recently received competition from insurtech entities. Whilst insurtech previously took on a supporting role for the most part, various insurtech entities are now starting to carry on insurance business themselves. Unlike traditional insurers, insurtech entities will be working predominantly or exclusively digitally; both in terms of selling their products and claims handling. As insurtech entities are currently still in the planning phase and, so far, have not underwritten risks, it remains to be seen whether they will catch on.

21. **Over the next five years what type of business do you see taking a market lead?**

For the market leaders of tomorrow, it will also be essential to encounter the opportunities and challenges of digitisation and to transform their business models accordingly, to come up with attractive and flexible products and to manage the client interface successfully. Further, due to the existing market pressure, we further expect increased consolidation activities and insurers continuing to consider growth opportunities in other markets, including emerging countries in Asia and Africa.