The International Comparative Legal Guide to:

Insurance & Reinsurance 2019

8th Edition

A practical cross-border insight into insurance and reinsurance law

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General Chapters:

Country Question and Answer Chapters:

Continued Overleaf →

Country Question and Answer Chapters:

EDITORIAL

Welcome to the eighth edition of *The International Comparative Legal Guide to: Insurance & Reinsurance*.

This guide provides corporate counsel and international practitioners with a comprehensive worldwide legal analysis of the laws and regulations of insurance and reinsurance.

It is divided into two main sections:

Six general chapters. These chapters are designed to provide readers with an overview of key issues affecting insurance and reinsurance work, particularly from the perspective of a multi-jurisdictional transaction.

Country question and answer chapters. These provide a broad overview of common issues in insurance and reinsurance laws and regulations in 40 jurisdictions.

All chapters are written by leading insurance and reinsurance lawyers and industry specialists, and we are extremely grateful for their excellent contributions.

Special thanks are reserved for the contributing editors Jon Turnbull and Michelle Radom of Clyde & Co LLP for their invaluable assistance.

Global Legal Group hopes that you find this guide practical and interesting.

The International Comparative Legal Guide series is also available online at www.iclg.com.

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1 Regulatory

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

Insurance and reinsurance companies are regulated by the Austrian Financial Market Authority (the 'FMA'). This federal agency is responsible both for monitoring insurance and reinsurance undertakings as well as for controlling their activities. The FMA offers a wide range of information in German and English, *inter alia*, on its website, concerning mandatory legal provisions and procedures to adhere to (www.fma.gv.at).

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

As a general rule, in order to write business in Austria, both local and foreign insurers are required to obtain a licence from the FMA, the requirements being laid down in sec. 8 of the Austrian Insurance Supervision Act. Insurance and reinsurance undertakings must operate under the legal form of a stock company, a *Societas Europaea* (SE) or a mutual insurance company. Moreover, the undertaking's administrative headquarters have to be located in Austria. Apart from fulfilling minimum capital requirements as well as ensuring the sufficient professional qualifications of the undertaking's board members, applicants must submit a detailed business plan to the FMA. Additional licensing requirements apply for insurance undertakings from outside the European Economic Area (*cf.* sec. 16 *et seq*. of the Austrian Insurance Supervision Act).

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

While insurers are generally required to obtain a licence from the FMA (*cf.* above, question 1.2), no licence is necessary for insurance undertakings already licensed in another Member State of the European Union or the European Economic Area. However, where such undertakings want to write business in Austria, they have to notify the FMA of the intended establishment of a branch or of the intended commencement of cross-border services (*cf.* sec. 21 and sec. 23 of the Austrian Insurance Supervision Act, respectively).

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

The parties' freedom of contract is, to some extent, limited by mandatory substantive law as well as by settled case law. First of all, the writing of insurance contracts is regulated by the Austrian Insurance Contract Act, which governs the rights and duties of both the insurer and the insured, and also sets certain minimum requirements for different insurance branches. It also contains a general section, applicable to all types of insurance. For some branches, such as motor vehicle third-party liability insurance, separate laws exist, which set forth special terms as well.

Nevertheless, the parties' freedom of contract remains virtually unrestricted for some branches such as credit insurance and transport insurance. For these scenarios, the legislator assumes that the insured is sufficiently experienced in the area of business and equally familiar with the risk to be insured, thus not requiring the same level of statutory protection.

Another aspect limiting freedom of contract stems from the fact that insurance policies and conditions not individually negotiated are considered general terms and conditions and are thus subject to an unfairness test. In general, a certain provision is deemed to be unfair, if – contrary to the requirement of good faith – it significantly alters the balance of the parties' contractual rights and obligations to the detriment of the other party. While the standard is especially strict *vis-à-vis* consumers, it also applies, in its basic form, to entrepreneurial insureds.

Ambiguities of a policy's wording are resolved by carrying out a hypothetical interpretation: how would an average and reasonably well-informed insured interpret the provision? Such fictitious interpretation by the (equally) fictitious insured has to take into account customs and usage as well as linguistic usage. If the ambiguity cannot be resolved by way of this hypothetical interpretation, such ambiguity will, as a general rule, be at the expense of the insurer as the author of the relevant provision.

While the principles on interpretation established by doctrine and case law do give guidance, certainty – to the greatest degree possible – can ultimately only be determined by the courts. Experience and pertinent knowledge of the case law will, of course, help make use of the overlapping general principles and rulings.

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

Under Austrian company law, the shareholders of a company are free to decide on whether or not to indemnify the company's directors and officers. For stock companies, the members of the Executive Board and Supervisory Board can be discharged by way of a resolution of the annual shareholders' meeting.

Notwithstanding the possibility to discharge directors and officers with retrospective effect, a growing number of companies doing business in Austria are deciding to take out directors' and officers' insurance ('D&O insurance') with the aim of mitigating the consequences of misconduct on the part of the executives. Unlike other European legal systems such as Germany, Austrian law does not provide for a certain minimum deductible to be borne personally by the executive. In fact, D&O-specific statutory provisions do not exist at all.

1.6 Are there any forms of compulsory insurance?

Apart from areas covered by the Austrian social security insurance system, insurance coverage is mandatory in a number of different areas. Arguably, one the most important examples is the compulsory motor vehicle third-party liability insurance with a minimum insured sum of €7.6 million. Moreover, professional liability insurance is compulsory for various freelance professionals such as lawyers, architects, engineers, public accountants, tax advisers and most medical professionals such as doctors and dentists.

2 (Re)insurance Claims

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

The most important statutory provisions on substantive insurance law are contained in the Austrian Insurance Contract Act, complemented by the general provisions of the Austrian Civil Code. In fact, of course, a number of further acts and statutes may be of importance, especially where the insured is a consumer.

Due to various acts of European Union secondary law, provisions aiming at increasing the protection of insureds have increased considerably. However, declaring Austrian substantive law as overly consumer-friendly would, at least by European standards, fall short of the mark.

It is, nevertheless, true that the courts are quite strict in interpreting insurance policies and conditions (*cf.* above, question 1.4).

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

Generally, direct action can only be brought by the policyholder and – under certain circumstances – by other insured persons in case of insurance for the account of another. Third parties, on the other hand, lack the necessary contractual or other legal relationship with the insurer necessary to bring a claim.

The most relevant exception to the general rule concerns cases involving motor vehicle third-party liability insurance. Where a third person has a claim resulting from a car accident, he or she may bring a direct action against the liable person's insurer. In this constellation, the insurer and the person causing the accident are joint and several debtors. Similar provisions exist, e.g., for claims resulting from the operation of aircraft.

Another situation, in which a third party gains capacity to sue, of course, is where the insured assigns contractual rights to be performed by the insurer to a third party.

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

No, the insured does not have capacity to sue the reinsurer. Exceptions may apply where the reinsurance agreement itself confers direct rights onto the insured; e.g. by way of a cut-through provision.

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

Where an insurer's decision to underwrite a certain risk is based on an intentional fraudulent misrepresentation by the insured, the insurer may avoid the contract based on principles of general contract law.

The Austrian Insurance Contract Act provides a set of additional remedies for cases of misrepresentation or non-disclosure. The availability of these remedies depends on the time of the breach against the duty to disclose (i.e., before conclusion of the contract, during the insurance period or after the occurrence of a loss) and the degree of culpability. In practical terms, the insurer may be entitled to terminate the contract, to cancel the contract or to refuse (full) settlement of an insurance claim.

As a general rule, the insurer is required to formally assert its rights against the insured in writing within one month after becoming aware of the infringement.

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

The Austrian Insurance Contract Act distinguishes between duties to disclose prior to the taking out of the insurance, during the insurance period, and duties after the occurrence of a loss. After the occurrence of a loss, for example, the insured is only required to provide information at the insurer's request.

Prior to the taking out of insurance, however, comprehensive pre-contractual disclosure duties require the insured to provide information on all aspects germane to the insurer's decision on whether or not (or under what conditions) to underwrite the specific risk. If the insured intentionally refrains from notifying the insurer of an important circumstance, the insurer has a right to terminate the insurance contract.

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

The Austrian Insurance Contract Act provides for a statutory subrogation of claims for damages that an insured has against a third person. More specifically, such claim for damages is *de jure* transferred to the insurer to the extent that the insurer compensates the insured for the loss suffered. As a consequence, the insurer can directly initiate recourse proceedings against the third party without having to bring the claim in the name of the insured.

3 Litigation – Overview

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

Depending on the amount at issue, the local district courts will hear cases in which the dispute value does not exceed €15,000, whereas the regional courts are competent where higher amounts are in dispute. For a more detailed illustration of the Austrian court system and the various stages of appeal, *cf.* below (question 4.7).

The courts have specialised departments for commercial matters. In Vienna, there are even stand-alone specialised commercial courts – both at the district and regional level. Resorting to these specialised departments or courts can be advantageous in complex proceedings, such as cross-border or major loss insurance disputes.

As a general rule, claims have to be brought before the competent court. If the defendant does not challenge the territorial jurisdiction of the court, a proceeding can also be conducted before a different court. Equally, the parties may jointly request the dispute to be transferred to a different court of the same type.

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

The first court hearing is usually scheduled a few months after the claim has been lodged and the defendant has, in turn, filed a statement of defence. However, in very rare cases where a court or single judge is temporarily overburdened with cases already pending, this period may surpass 12 months.

4 Litigation – Procedure

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

The concept of pre-trial discovery or disclosure is alien to Austrian civil procedural law. Thus, pre-trial, courts cannot order documents to be disclosed. In any event, a party intending to bring a claim should ascertain it has the necessary evidence at its disposal. The burden of proof generally lies with the party bringing the claim or invoking a fact.

During the proceedings, a party may – under limited circumstances – request document production, e.g. where its claim depends on a document in the possession of the other party and the document's context relates to the legal relationship between the parties. The court may also issue an order to disclose where the requesting party has an enforceable claim against the possessing party under substantive law.

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

Austrian civil procedural law does not recognise the concept of pre-trial disclosure (*cf.* question 4.1). Where disclosure of documents is ordered during the course of a trial, the aggrieved party may refuse such production under certain circumstances. Grounds for refusal include the protection of business secrets, the adherence to non-disclosure obligations or the risk of exposure to criminal prosecution.

However, contrary to the common law concept of privilege, correspondence between lawyer and client is not protected by strict attorney-client privilege. Thus, documents relating to advice given by lawyers may be subject to disclosure during trial.

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

Once a court has summoned a witness, this witness is, in principle, required to appear and testify, although grounds to refuse testimony exist. These grounds are similar to the grounds for refusing to provide documents (*cf.* question 4.2) but are broader in scope. For example, attorneys can refuse testimony regarding information entrusted to them in their professional capacity by clients.

A witness refusing to testify has to state the underlying reasons or, where the stated reasons are self-contradictory, to furnish more detailed corresponding *prima facie* evidence. If a witness fails to attend a hearing or give testimony without sufficient excuse, the court can enforce the testimony by ordering fines or even an arrest for contempt of court.

Where a party presents a witness who is domiciled in another country, the Austrian court will contact the foreign court at the witness' domicile and – provided there is an intergovernmental collaborative basis stipulating a mutual legal assistance framework – seek for the foreign court to either directly interview the witness or serve the request to appear before the Austrian court.

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

The Austrian Code of Civil Procedure does not allow written witness statements. Such written statements do not comply with the procedural principles of oral presentation and of directness.

Rather, witnesses can only provide oral testimony before the court. Where a party wishes to introduce an expert witness, such party-appointed expert witness may also submit a written expert report.

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

Each party may request the court to appoint an expert witness with regard to specific questions of evidence disputed by the other party. Court-appointed expert witnesses must be impartial and conduct their inspections and examinations thoroughly and to the best of their ability. If the object of investigation requires a physical inspection or examination, the expert will usually invite both parties to attend.

The expert witness will give a written expert report and, where at least one party so requests, clarify the report or answer additional questions (in writing or during a court hearing). The expert's costs will initially be paid by advances on costs as ordered by the court and, once the court decides on the merits of the case, be included in the decision on costs (*cf.* question 4.9).

The evidential value of a court-appointed expert witness is regarded to be considerably higher than that of a party-appointed expert. Hence, court-appointed expert witnesses are more common than party-appointed experts.

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

Interim remedies may be granted by the courts to protect the enforceability of a claim or to protect a party from irreparable harm. Austrian law distinguishes between three types of interim measures: interim measures to secure a monetary claim; interim measures to secure a claim for specific performance; and interim measures to secure a right or a legal relationship.

Monetary claims may be secured, *inter alia*, by an order for the deposit of money or moveable assets, by an order prohibiting the selling of moveable property or by an order prohibiting the transferring or encumbering of immoveable property. With regard to interim measures securing claims for specific performance or rights, other means such as establishing a right of retention or ordering the debtor to refrain from any action adversely affecting the claim, right or object are available.

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

The Austrian civil court system provides for proceedings in three instances. District courts have jurisdiction for general civil law matters where the amount in dispute is below €15,000. Regional courts are competent where higher amounts are in dispute or district courts do not have competence for other reasons.

Appeals from district courts are heard before regional courts. If a regional court was acting as the first instance court, appeals against its decision are heard by one of the higher regional courts. In cases concerning legal issues of fundamental importance, a further appeal may be made to the Austrian Supreme Court of Justice as the third and final instance.

Reasons for appealing against a judgment of a court of first instance include nullity (serious procedural errors), procedural irregularities, the wrong establishment of facts or an incorrect legal assessment. Appeals may be filed within four weeks after the passing of the original judgment. The court of appeal will, usually after purely written proceedings, either dismiss the appeal, amend or set aside the original decision. Where the judgment is set aside, the court of appeal may either retry the case itself or refer it back to the first instance court.

Appeals against first instance decisions do not require admission by the first instance court or, as in other jurisdictions such as Germany, require the adverse effect for the unsuccessful party to surpass a certain minimum amount. The duration of appeal proceedings varies considerably depending on the complexity and the competent court of appeal. Usually, appeals take at least several months.

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

Where a court awards a monetary sum and the winning party expressly claimed interest, the court will also award such additional claim for interest. The interest rate is currently 4 per cent or, in cases where both parties are entrepreneurs, 9.2 per cent above the base interest rate, as published by the Austrian National Bank.

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

The court renders its decision on costs together with the decision on the merits. In general, Austrian law provides that the losing party has to reimburse the winning party for all costs. If neither party fully succeeds, only partial reimbursement will be ordered. Costs to be reimbursed include legal and court fees as well as certain expenses. Legal fees are calculated in accordance with the Austrian Lawyers' Fees Act, which might be lower than the fees individually agreed upon between attorney and client.

Depending on the merits of the case and the burden of proof, settlement negotiations may prove to be a viable path in seeking to avoid or reduce legal fees, be it prior to the trial or even during proceedings. Where a settlement is reached out of court, however, regard should be had to a special characteristic of Austrian law – the Austrian Fee Act. According to this act, a fee of 1 or even 2 per cent of the matter value may be incurred.

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

Austrian courts have launched pilot projects in which judges are supposed to propose the initiation of mediation proceedings prior to commencing litigation, if deemed appropriate. However, at least in insurance and reinsurance disputes, the courts cannot force parties to resort to mediation or otherwise reach an amicable agreement. For various reasons, most judges will still encourage the parties to reach a settlement before taking evidence.

While the transposition of the EU Mediation Directive 2008/52/EC into national law introduced the possibility to file a request for pre-trial mediation prior to the formal initiation of legal proceedings (before the district courts), this procedural option is rarely made use of in practice.

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

As participating in mediation proceedings is not mandatory, there are no detrimental consequences in refusing requests or offers to reach an amicable solution.

5 Arbitration

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

Austria is generally considered a very arbitration-friendly jurisdiction. Courts will refrain from intervening in arbitral proceedings unless requested by one of the parties or the tribunal.

In particular, a party may request a court:

- to appoint an arbitrator if the parties cannot agree or a party fails to do so;
- to grant an interim or protective measure;

- to decide on the challenge of an arbitrator; or
- to intervene if an arbitrator's mandate has been terminated and the arbitrator does not resign or the other party does not agree to the termination.

Also, the arbitral tribunal itself can request judicial assistance from a court:

- to enforce an interim or protective measure; or
- to gather evidence for which the arbitral tribunal has no authority (e.g. to apply coercive measures).

Of the above powers, only the competence of courts to issue interim measures upon a party's request, the right to challenge an arbitrator before a court, as well as the tribunal's competence to request judicial assistance by the courts, are mandatory and unalterable. All other powers may be set aside by the parties' agreement.

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

Under Austrian law, the only formal requirement for validly concluding an arbitration agreement is that the arbitration agreement must be in writing, i.e. in a written document signed by both parties or in letters, faxes, emails or other forms of communication that prove the existence of the agreement.

Aside from the writing requirement, in order to be enforceable, an arbitration agreement must also fulfil certain substantive requirements, such as identifying the parties and clearly expressing their intention to specifically submit a dispute to arbitration. However, no specific form of words is required for the enforceability of the arbitration clause.

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

As a general rule, if the arbitration agreement is valid and the subject matter is arbitrable, Austrian courts will uphold and enforce the arbitration clause.

Only if the clause is invalid, or the subject matter of the dispute is inarbitrable, will the courts refuse to enforce it. All proprietary claims are arbitrable, with some exceptions to be found in family law and cooperative apartment ownership rules. Moreover, consumer and employment-related matters are only arbitrable if the parties entered into the arbitration agreement after the dispute arose. Also, if a contract containing an arbitration clause is rescinded, the arbitration clause is no longer enforceable, unless the parties have expressly agreed on its continuation.

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

Arbitral tribunals and state courts may order interim measures in support of an arbitration. In general, a party is free to choose whether it directs its request towards the courts or the tribunal. For the relief to be granted, certain conditions need to be met. First, relief can only be granted in respect of the subject matter of the dispute. Second, the granting of the relief must be crucial for preventing the otherwise impeding frustration or complication of future enforcement or for preventing irreparable harm.

An arbitral tribunal may order any interim relief it deems appropriate. However, arbitral tribunals lack coercive powers and their decisions must be enforced by state courts, which are limited to the enforcement measures foreseen under Austrian law. Thus, the enforcing court may transform the tribunal's order into such interim measure it is authorised to enforce.

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

Austrian arbitration law stipulates that the arbitral tribunal must state the reasons on which it bases its award. However, the parties may deviate from this requirement by mutual agreement.

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

The grounds for challenging an award are set out in the Austrian Code of Civil Procedure. The grounds closely mirror those provided for in Article V of the New York Convention and Article 34 of the UNCITRAL Model Law on International Commercial Arbitration. The list is exhaustive and there is no right to a further appeal.

The grounds are as follows:

- the invalidity of an arbitration agreement or a lack thereof;
- a party's incapacity to conclude an arbitration agreement;
- a violation of the right to be heard;
- the subject matter is beyond the scope of the arbitration agreement;
- a failure in the constitution or composition of the tribunal;
- the proceedings violate Austrian public policy;
- the requirements for an action for revision are fulfilled;
- the matter in dispute is not arbitrable; and/or
- the award violates Austrian public policy.

As of 2013, the Austrian Supreme Court of Justice acts as the only instance in proceedings for challenging an award. Challenges to the award have to be brought before the court within three months after the award has been handed down.

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Vavrovsky Heine Marth

Vavrovsky Heine Marth is a business law firm with offices in Vienna and Salzburg. The firm's core areas of expertise are Controversy and Real Estate and, at the Salzburg office, Insolvency and Restructuring as well as Private Clients. In Controversy, Vavrovsky Heine Marth supports clients in conflict prevention as well as conflict management and represents them before national and international courts and arbitral tribunals. Main areas of expertise include insurance and reinsurance law, M&A, corporate and commercial, capital markets, banking, competition law, IP, IT and media law as well as real estate- and construction- related disputes.

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