Switzerland

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1. WHAT RISKS MUST BE INSURED?

1.1 What are the compulsory classes of insurance?

Before addressing the matter of compulsory classes of insurance in Switzerland, it is necessary to take into account the interaction between the public and private law insurance sectors. The distinction between private insurance contracts and social insurances (and other insurances based on public law) is important under Swiss law, since these types of insurance are based on or governed by differing legal sources and processes with respect to the enforcement of rights and duties.

Switzerland is not a member of the European Union (EU) or of the European Economic Area (EEA), and the bilateral treaties applicable between Switzerland and the EU do not cover insurance business. A Swiss insurer is not able to take benefit of the freedom to provide services within the EU and EEA.

In the private insurance sector, insurance supervision of insurance companies is regulated by the Insurance Supervisory Act (ISA) and the Insurance Supervisory Ordinance (ISO). According to Article 2 ISA, Swiss insurance companies that offer direct insurance or reinsurance and foreign insurance companies that conduct insurance activities in or from Switzerland (and therefore do Swiss business) fall under the supervision of the Swiss Financial Market Authority (FINMA). These insurance undertakings need to obtain a licence to conduct insurance business in Switzerland. Insurance contracts concluded based on mutual agreement concerning the essential terms and the expression thereof by the parties are private insurance contracts. The main source to be referred to in the field of private insurance contracts is the Insurance Contracts Act (ICA).

As a matter of principle, insurance cover is required if there is a need for the injured person to be protected or the potentially liable party is performing an activity that may cause considerable loss or damage. Typical examples for compulsory private law insurances are professional liability covers (ie for doctors, pharmacists, dentists, lawyers, insurance intermediaries, foster parents, circus operators, etc), liability covers for vehicle and transportation owners (ie for cars, aircraft, ships, trains, aerial cableways, ski lifts, etc), liability covers for operators of hazardous facilities (nuclear power plants, damming structure, pipeline systems, etc) and a number of other compulsory liability covers (for parachutes, hang-gliders, unmanned aerial vehicles or model aeroplanes heavier than 500 grams, dog owners (depending on the canton), accomplishing xenotransplantations or placing xenotransplantation products on the market, etc). This list is not exhaustive.

Social insurance providers and other public law insurance authorities do not fall within the scope of Article 2 ISA. Public law insurers are established based on public law provisions, or they perform some or all of the public sector functions in a particular area. Public law insurances, such as social insurances, insurance of buildings against fire risk (based on public cantonal laws) or the Swiss export risk insurance, are generally subject to specific supervision from a public department or administrative organ. For example, the Swiss Federal Department of Social Security supervises, *inter alia*, those organisations active in the field of occupational pension funds, invalidity insurance and unemployment insurance. Social insurances are of substantial practical importance in Switzerland. The ICA is not applicable to social insurances and, in the same way, the respective public law provisions are not applicable to private insurance contracts.

The distinction between private insurances and public law insurances is not always easy to draw and cannot be made based solely on legal requirements (legal source, legal nature of the insurer, etc). There are also hybrid forms, such as public insurances and private insurers. For example, the purchase of a minimum amount of health cover in Switzerland is compulsory. One is at liberty, however, to voluntarily buy more. Thus, when it comes to health insurance supervision, the Federal Office of Public Health is responsible for compulsory health insurance pursuant to the Swiss Federal Law on Health Insurance and the ISA does not apply, while FINMA is responsible for supplementary health insurance policies and the ISA is applicable.

Generally speaking, social insurances are established based on law, orders or by accession to the social insurance system. The Swiss social security system covers the following five areas:

- old-age, survivors' and invalidity insurance;
- protection against the consequences of illness and accidents;
- income compensation allowances in the cases of service (such as army service, the Red Cross or civilian service) and maternity;
- unemployment insurance; and
- family allowances.

Compulsory social insurances are:

- old-age and survivors insurance;
- occupational pension funds;
- health insurance;
- accident insurance;
- unemployment insurance;
- income compensation cover;
- allowances insurance; and (in the majority of the cantons)
- insurance of buildings against fire risk.

These compulsory social insurances are regulated in detail in specific federal laws and in the respective ordinances. In the field of social insurances, the individual economic capacity of the insured is generally taken into account and a social redistribution can take place, whereas private insurances are generally based on a risk-based premium calculation, irrespective of the individual economic capacity of the insured.

1.2 Who must they be insured with?

1.2.1 Locally admitted insurers

Swiss private insurance companies that have their seat in Switzerland and carry out direct insurance or reinsurance business need to obtain a FINMA licence. Private insurance undertakings have to have the legal form of either a stock corporation (*Aktiengesellschaft*) or an incorporated cooperative (*Genossenschaft*). Only those two legal forms are compliant with the supervisory regulations. The conclusion of an insurance contract in respect of a risk based in Switzerland without the appropriate licence from FINMA is prohibited (Article 3, paragraph 2 ISA).

The compulsory private insurance classes, as set out above, can be insured with any local insurance company with a FINMA licence that offers cover for the specific risk. In connection with compulsory insurances, the assured is generally free to choose a locally admitted insurer. With respect to compulsory social insurances, the specific federal law sets out the requirements for the local insurer. For example, the Swiss Federal Law on Health Insurance sets out in Article 12 that health insurance companies must be legal entities under private or public law (a stock corporation or an incorporated cooperative), they should be of a non-profit nature and they must mainly operate in the line of social health insurance. Further, they have to be recognised by the Federal Department of Home Affairs. As far as compulsory social health insurance is concerned, the insurers are supervised by the Federal Office of Public Health, while complementary insurance is supervised by FINMA.

In the majority of cantons, the cantonal law provides that compulsory insurance of buildings against fire risk is to be insured with a specific public-law institution. That institution is, therefore, a monopoly provider.

1.2.2 Foreign insurers

Foreign insurance companies (with their seat abroad, but with a branch or a subsidiary registered in Switzerland) that conduct insurance activities in Switzerland and, therefore, do Swiss business can be insurers for compulsory private insurance classes, provided that their branch or subsidiary has obtained a FINMA licence. Insurance activities are conducted or deemed to be conducted in Switzerland when the policyholder or any of the assureds is domiciled in Switzerland or property located in Switzerland is insured (Article 1, paragraph 1 ISO). Foreign direct insurance companies without registered offices in Switzerland may not lawfully conduct insurance activities in Switzerland.

Compulsory social insurances can be insured by admitted foreign insurance companies (with registered offices in Switzerland) as well as by locally admitted insurers, but only insofar as the Swiss Social insurance laws allow private insurance companies to provide such insurances.

2. WHO CAN INSURE NON-COMPULSORY CLASSES OF RISK?

2.1 Locally admitted insurers

Private insurance companies that have their seat in Switzerland, carry out direct insurance business and hold a FINMA licence can insure non-compulsory classes. As set out above, private insurance undertakings have to have the legal form of either a stock corporation or an incorporated cooperative.

2.2 Foreign insurers

Foreign insurance companies (with registered offices in Switzerland) that conduct insurance activities in Switzerland and hold a FINMA licence for their Swiss branch can be insurers for non-compulsory private insurance classes.

2.3 Excess and surplus lines markets

The Swiss private insurance market is basically free, and the insurance companies and their clients are able to set terms and conditions, as well as price products, in whatever manner they agree and see fit, subject to the ISA and ISO. The usual rules for private insurers apply to that extent as the insurers hold a licence for the relevant insurance class.

3. WHICH REINSURERS CAN BE USED?

3.1 Must they be locally admitted?

There are no legal or regulatory provisions requiring the use of locally admitted reinsurers by Swiss insurance or reinsurance companies.

Reinsurance companies domiciled in Switzerland and conducting reinsurance businesses in or from Switzerland must be licensed by the FINMA. Foreign reinsurers (including the pure reinsurance Swiss branch of a foreign (re)insurer) may transact reinsurance business in Switzerland without a licence from FINMA; however, they must be licensed to do that business by another regulator, which would normally be their home state regulator.

A supervised reinsurer is required to have sufficient free and unencumbered capital in relation to all of its activities (taking into account the risks that the insurer is exposed to, the lines of business it writes, the geographic scope of its activities and any international standards – just like the supervised insurer).

3.2 If not, are security requirements imposed?

See the answer to question 3.1. There are no legal or regulatory provisions requiring the establishment of security by a reinsurer, whether locally based or otherwise. In practice, whether such security is required by the reinsured company will depend on the credit rating of the reinsurer and the type of cover being provided. Thus, a non-rated Bermudian Segregated Accounts Company is likely, in practice, to be asked by its counterparty to provide security for its obligations under the contract in all cases.

4. THE TAXATION OF INSURANCE

4.1 What taxes are levied on insurance premium?

The Swiss tax authorities levy Swiss federal stamp duty of 5 per cent on insurance premiums. VAT is not levied on insurance or reinsurance premiums.

4.2 What exceptions are there?

The Swiss federal stamp duty of 5 per cent does not apply to reinsurance premiums. There are certain exceptions for compulsory social insurances as well, such as cargo, health, unemployment, life and accident insurance (Article 132, paragraph 1 of the Swiss Constitution and Article 22 Federal Stamp Duty Act).

5. INSURANCE REINSURANCE AND CAPITAL MARKETS

5.1 How is finite reinsurance treated?

5.1.1 What constitutes risk transfer?

Questions of risk transfer need to be considered from a number of perspectives. The FINMA does not require that a reinsurance contract involve risk transfer in order for it to be considered a valid contract of reinsurance by that body. Either or both of the parties, however, may owing to the accounting system that they use for reporting, or because of the system used by their ultimate parent when it is reporting, be the subject of the risk transfer requirements of US GAAP, IFRS and/or SWISS GAAP FAIR (a version of SWISS GAAP used by some Swiss companies listed on the Swiss Stock Exchange).

5.2 Derivatives, ILWs and wagering agreements

5.2.1 What constitutes insurable interest?

The provisions of the ICA are based on the 'interest theory' (*Interessentheorie*; Article 48 ICA), according to which the subject matter of the insurance is a specific economic interest. The 'stakeholder', the person who can legitimately purchase insurance, is the person who would have to bear the economic loss of the damage caused if no insurance contract were in place.

Most legal scholars refute the interest theory and instead tend to consider the 'subject matter' (*Gegenstandslehre*). According to this theory, the subjects of the insurance are objects, persons or assets. Article 16 ICA provides that insurance can be concluded on one's own account or on the account of a third party. In case of doubt, it is assumed that the assured has concluded the insurance contract on his own account (Article 16, paragraph 2 ICA). If one were to follow the subject matter theory, it would be assumed that the assured is the owner of the asset or object and has concluded the insurance on their own account (so-called self-insurance). On the other hand, if the object or the assets are owned by a third party, it is assumed that the insurance is for the account of the third party (so-called third-party insurance).

The differentiation is based on the ownership of the insured objects or assets. The claim in case of damage is available to the owner of the insured object or assets only. The subject matter theory does not, therefore, cover the following case: an assured who wants to insure an object or assets owned by a third party for his own account. This case is relevant in practice; in particular, if someone who is not the owner of the object bears the economic risk of loss or damage. The interest theory takes into account this practical need. According to the interest theory, there is the possibility of parties other than the insured having a relationship with the insured interest other than ownership. In other words, it is possible to insure objects owned by third parties in the interest of the assured who is bearing the risk of damage. According to this theory, the question whether insurance is to be qualified as self-insurance or third party insurance depends on the point of view of the person bearing the risk connected with the insured object or assets.

Further, if there is no economic interest (ie threatened losses) involved, the business can be seen as betting in the sense of Article 513, paragraph 1 of the Swiss Code of Obligations (an imperfect obligation, which can be complied with, but not enforced in front of a court) rather than as an insurance.

Industry loss warranties (ILWs) are essentially a form of contract that can be written either as a reinsurance or as a derivative contract (swap). The reinsured obtains cover based not on their own losses from a specified event, but on the total insured loss experienced by the industry. The contracts have a specified limit that sets the maximum amount of compensation the buyer may receive if a pre-agreed trigger amount (basically the amount that the 'industry' is stated to have lost owing to the happening of an event or an occurrence as published in a pre-agreed publication, such as the Swiss Re's 'SIGMA' – see, for example, http://www.swissre.com/sigma/) is equalled or exceeded, depending on the terms of the contract. ILWs, which constitute an increasingly large part of the capital available in the reinsurance market, can be written as a pure swap (no requirement for the reinsured to suffer a loss arising from a particular event or occurrence is stated in the contract; if it has suffered a loss, the amount recoverable under the contract is not related to it) or as a reinsurance, and the reinsured must have suffered a loss or losses arising from a particular event or occurrence; further the reinsured will be indemnified in respect of its loss suffered (although this may be defined in different ways).

If a Swiss reinsured enters into an ILW that is in the form of a swap contract, this could be seen as falling under Article 513, section 1 of the Swiss Code of Obligations, as referred to above.

5.3 Side cars and CAT bonds

5.3.1 To what extent are these governed by the law relating to insurance contracts?

A side car is a limited purpose company that is established to work in tandem (hence the name) with insurance companies. Reinsurance side cars will reinsure a part or all of an insurance policy or policies from an insurance company, thereby sharing in the profits and risks.

There is no law, rule or regulation that deals with the establishment of or doing business with side cars in the Swiss market. Any company established in Switzerland that is set up to operate as a side car could do so provided that it meets Swiss corporate legal requirements and also the regulatory requirements of FINMA, including the Swiss Solvency Test.

Since such constructions are often established with the shorter term in mind (capital markets investors, which are the usual parties with an interest in the company, will look to obtain a return from their investment), thought has to be given to the parties' exit strategy (see section 10 below). Basically, the side car will only be allowed to close completely once the FINMA approves of it doing so.

Catastrophe bonds, or CAT bonds, are a form of insurance-linked security (ILS) designed to allow insurers (and reinsurers) to have access to capital markets investors and to provide such investors with a financial instrument the value of which is driven by events or losses in the insurance market. The basic format is: a sponsor (the party that will eventually receive the benefit of any cover put into place) establishes a company for the purposes of the particular ILS (a special purpose vehicle or SPV). The SPV issues debt in the form of bonds, which capital markets investors purchase. There are a number of other institutions that are involved, but they are not important for the present purposes.

The SPV enters into a contract with the sponsor. This is usually in the form of a swap (no risk transfer is needed and it is not an indemnity product). Of late, an increasing number of indemnity-based CAT bonds have been placed, but they are still not the norm. The payout, or otherwise, under the swap is geared to the size of the loss of the insurance markets (the loss trigger) in respect of predefined events, in predefined locations for predefined lines of business. In order to ascertain whether the loss trigger amount has been met, the usual method, currently, is to commission a loss modelling agency to model the estimated loss to the insurance market in respect of the events or occurrences covered. If the model, once it is run, produces a loss amount that is of sufficient size (regardless of the actual loss), the SPV will pay the sponsor and the bondholders will lose some or all of their investment, depending on the contract. If nothing happens, they will receive interest and the capital that they invested will eventually be repaid.

There are many variations on this basic theme, including second and third event covers and various different triggers. There is also a healthy secondary market for the bonds. Note that the above is not intended to be a comprehensive description, and setting up a CAT bond structure is complex. A number of considerations need to be looked at before entering into such a deal, not least the tax considerations.

We are not aware of any legal reason why a CAT bond could not be placed by or through a Swiss company, provided the requirements of Swiss law and regulations are met. A very brief overview of the bonds most recently placed through Swiss Re Capital Markets, however, shows that, for instance, the last two placements were made over Green Fields II Capital Limited, an Irish special purpose company established with limited liability. To date, so far as we are aware, despite Swiss companies being strongly placed in the market, Switzerland is not a popular destination for such products.

5.4 Other ILS and ART products

Other forms of securitisation include:

- longevity swaps;
- life settlements securitisation;
- embedded value securitisation;
- extreme mortality securitisation; and
- reserve funding securitisation.

Switzerland is home to a number of institutions that are involved in the placing, purchasing and selling of such risks, and it is to be expected that Swiss capital markets advisers and reinsurance companies will continue to play major roles in this business.

6. COMMISSIONS

6.1 What commissions and brokerages are permissible? What disclosure of commissions is required?

The remuneration for insurance intermediaries is generally made in the form of commissions (payments made by insurers or reinsurers). The amount payable is fixed as a percentage of the premium for the policy placed, including any subsequent additional revenues from the adjustment of premiums following the original placement. The insurance premium paid by the assured consists, in this case, of the actual price for obtaining coverage of the risk as well as the fee for the intermediation services. This remuneration system is called 'courtage'. It is also possible that the assured pays the insurance intermediaries directly (based on an hourly fee).

From a regulatory point of view, brokers are obliged to disclose to potential customers at first contact various pieces of information (ie the broker's or insurer's identity, persons who can be held liable for negligence or for information regarding the processing of personal information; see Article 45 ISA). There is no regulatory provision according to which disclosure of commission is required. From a private law perspective, there is the possibility that, based on the mandate contract, the assured is entitled to receive information about the commission the intermediary receives.

7. HOW ARE AGENTS (BROKERS AND UNDERWRITING AGENTS AND THIRD PARTY CLAIMS ADMINISTRATORS) REGULATED?

Insurance intermediaries are persons who offer or conclude insurance contracts on behalf of insurance businesses or other persons (Article 40 ISA). The notion 'insurance intermediaries' refers to all persons offering or concluding such insurance or reinsurance contracts. This extends to agents, brokers and independent insurance advisers, as well as the sales force members of insurance companies. All intermediaries falling under the provision of Article 40 ISA are subject to the supervision of FINMA.

Article 43 ISA deals with the obligation of the intermediary to register in the Swiss Register. It sets out the following: '*Insurance intermediaries which are neither legally nor economically, nor in any other way affiliated with an insurance business,* must *be registered in the Swiss Register. All other insurance intermediaries* have the right *to be registered in the Swiss Register'* (emphasis added).

Therefore, only insurance intermediaries who are not affiliated to a particular insurance company, legally, financially or in any other capacity (in essence, that means brokers), are subject to compulsory registration. Affiliated insurance intermediaries (tied agents), on the other hand, are free to register, but are not obliged to do so. Rules as to the question of when 'affiliation' is assumed can be found in Article 183 ISO:

'1 No registration obligation exists under the Article 43 paragraph 1 ISO for insurance intermediaries if:

a. the majority of the commissions they receive during a calendar year are predominately from one or two insurance businesses;
b. they receive compensation or other financial advantages from insurance businesses that do not conform to customary compensation for insurance intermediation and therefore could affect their independence;
c. they have entered into cooperation agreements or other agreements with insurance businesses which affect their freedom to act on behalf of other insurance businesses;
d. they have a direct or indirect participation in more than 10 per cent of the equity capital of an insurance business; or
e. they have a management function in an insurance business or otherwise exercise influence on the business process of an insurance business.

2 There is no registration obligation under Article 43, paragraph 1 ISO if an insurance business:

a. owns directly or indirectly more than 10 per cent of the equity capital of the insurance intermediary;
b. has a management function with the insurance intermediary or otherwise can exercise influence on the business of the insurance intermediary.'

If one of these exceptions applies, the intermediary is to be qualified as a tied agent and therefore has no duty to register.

Legal entities (public and private limited companies, cooperatives, foundations, associations, establishments) are subject to registration. Companies with other corporate legal forms (eg sole proprietorships, non-trading (ordinary) partnerships, and general and limited partnerships) are subject to registration as natural persons.

The following registration requirements apply:

- The insurance intermediary must be able to show proof of suitable professional qualification.
- A company subject to registration (legal entity) must have a sufficient number of qualified client advisers.
- The insurance intermediary must have either taken out professional indemnity insurance or furnish proof of equivalent security (Article 44 ISA). Article 186, section 1 ISO provides that an insurance intermediary

must possess professional indemnity insurance cover for financial loss in respect of his or her liability ensuing from any violation of applicable professional standards. The sum insured for all claims in any one year must amount to CHF 2 million at minimum.
- Satisfaction of personal prerequisites.

8. IS TAKAFUL POSSIBLE?

We are not, and do not pretend to be, Islamic scholars. We have had some experience with clients seeking to establish such entities, however, and our understanding of the position concerning takaful insurance or reinsurance is as set out below.

In 1985, the Grand Council of Islamic Scholars reached an agreement concerning insurance according to which the standard commercial insurance contract, as provided by commercial insurance companies in, for instance, Europe, is defective from an Islamic viewpoint. Consequently, the commercial insurance contract is, in principle, forbidden. An alternative contract, which respects the principles of Islamic transactions, is the cooperative insurance contract. This form of insurance, called takaful, is based on the principle(s) of mutual assistance and voluntary contributions in the interests of righteousness. According to some, the following must be avoided:

- payment or receipt of interest;
- excessive risk taking;
- uncertainty and unclear terms in contracts; and
- investment in anything unacceptable from a religious point of view, such as pork, alcohol, gambling and pornography.

The same applies to reinsurances, which should also be built on the principles of mutual cooperation.

Given the varying interpretations of Islamic law, different insurance models have emerged, such as non-profit mutual insurance and models that closely resemble conventional insurance, with funds invested in Sharia-compliant assets. Takaful is a form of mutual insurance based on the following four principles:

- cooperative risk sharing: takaful participants contribute to the takaful fund pool and receive help from that pool when a risk becomes a reality. While a conventional insurance policyholder pays ongoing premiums, a takaful participant makes ongoing contributions (gifts or donations) to the takaful fund pool. Any surplus that results from the pool will be shared amongst the takaful participants;
- mutual responsibility: the main purpose of the takaful entity is not for participants to make a profit, but mutual assistance;
- mutual protection: each participant helps protecting all other participants against loss or damage; and
- solidarity among groups of participants.

Founding a takaful provider involves the following main aspects: (i) the creation of a Sharia supervisory board that oversees insurance operations and compliance with the principles of Sharia; (ii) the separation of shareholder funds from the policyholder funds (therefore, the takaful operator generally manages two separate funds); (iii) the commitment to distribute technical profits to policyholders; and (iv) the avoidance of investment in non-Sharia-compliant assets (for example, unlike conventional insurance, the stockholders of the takaful company do not receive interest payments for their investments, and it does not accrue interest on its investments).

There are three popular takaful models, based on two Islamic contracts (*wakalah* and *mudarabah*), that are used for two different sets of activities: managing and investing the takaful fund.

Takaful models are implemented slightly differently, depending on the market and the company. Today, most takaful companies are profit-oriented stock companies, with mutuality applying to the takaful pool. Non-profit takaful companies are similar to traditional mutual companies (*Versicherungsgenossenschaften*).

A takaful insurance would be admissible in Switzerland as long as it could be qualified as a private insurance contract under Swiss law and the insurer is admitted in Switzerland for the relevant insurance business. There is no definition of the term ‘insurance contract’ in the ISA or ISO. However, the Swiss Federal Supreme Court has consistently defined the following vital elements of an insurance contract:

- the risk or the danger (the financial consequences of the possible risk or danger are transferred from the insured to the insurer);
- the premium (the duty of the insured to pay premiums to the insurer);
- the duty of the insurer (if the risk or danger is realised, the insured has the right to receive the contribution agreed from the insurer; in most cases, this will be a financial contribution);
- independence of the operation (the performance of the insurance has to be the core of the specific business operation; the insurance business operation should not be only a sideline business or a modality of a different business operation); and
- compensation of the risks based on the rules of statistics.

Provided the takaful undertaking has structured itself correctly and the assistance provided can be qualified as insurance for the purposes of Swiss regulation as opposed to the purposes its own governance principles, in our view it is unlikely that FINMA would see it as a circumvention, or attempted circumvention, of the regulations, in which case the takaful insurance should be admissible under Swiss insurance law.

At the moment there are no regulations in place in case of possible overlapping responsibilities of the governing Sharia board and FINMA, but we consider that the views of FINMA would govern in all cases under the law. Depending on the extent to which the Sharia board (as an external actor) controls the insurance undertaking, this control activity could be qualified as an outsourcing in the sense of the business plan which has to be submitted to FINMA in order to obtain a licence. The ultimate supervision and control should remain with the insurance undertaking and cannot be outsourced.

However, in order to avoid different approaches to the distribution of surpluses, the conditions for interest-free loans and regarding the ensuring of the separation of the shareholder and takaful participant pools within the different takaful types, the development of common regulations would undoubtedly be helpful. The Islamic Finance Services Board and the International Association of Insurance Supervisors have been working to establish core principles in this respect.

The same considerations, in our view, would apply to reinsurers, noting that FINMA does not require there to be risk transfer in order for a reinsurance contract to qualify as such; thus, since the transfer of risk, as opposed to the mutualisation thereof, is one issue that is of concern for takaful entities, there may be less difficulty in establishing a takaful reinsurer in Switzerland.

9. WHAT SCOPE IS THERE FOR MICROINSURANCE?

The current state of the Swiss economy leaves little room, in our view, for the development of a market in microinsurance.

10. EXIT SOLUTIONS – WHAT SOLUTIONS ARE AVAILABLE AND HOW DO THEY OPERATE? HOW ARE FOREIGN SOLUTIONS RECOGNISED?

10.1 Portfolio transfer

Swiss direct insurance portfolios can be transferred in accordance with the provisions of the ISA and the Swiss Federal Act on Merger, Demerger, Conversion and Transfer of Assets and Liabilities (Merger Act). Reinsurance and non-Swiss direct insurance portfolios can also be transferred in accordance with the Merger Act (the ISA is not applicable in these cases).

From a supervisory perspective, insurance portfolio transfers are only dealt with in Article 62 ISA (which regulates the transfer of Swiss portfolios only). This provision provides that, in Swiss direct business, any insurance portfolio transfer requires an authorisation from FINMA. FINMA allows such portfolio transfer contracts only where the interest of the assureds are properly protected.

The transferee needs to be authorised to write such business in Switzerland and, as long as not all of the obligations of the transferor have been fully transferred to the transferee, remains under the supervision of FINMA. The Merger Act provides in Articles 69–77 how the transfer of assets and liabilities can be conducted in general. The Merger Act provisions are also applicable for transfers of non-Swiss direct, domestic and foreign reinsurance portfolios.

No further provisions or guidelines exist. FINMA has, however, developed a number of principles in the past, such as the regulation for health insurance, FINMA Circular 2008/15, regarding mergers, demergers, conversions, and transfers of assets and liabilities by health insurance companies.

10.2 Statutory portfolio transfer
See the answer to question 10.1 above.

10.3 Novation
Novations can be and are used to transfer portfolios, especially in the reinsurance field.

10.4 Commutation
There are no specific legal provisions for commutation. However, generally any insurance company is free to end its activity at any time or to decide its liquidation. According to Article 60 ISA, an insurance company which renounces a licence must submit a winding-up plan to FINMA for approval. If the insurance company fails to comply with the approved winding-up plan, Article 61, paragraph 2 ISA is applicable in its intended sense. This provision reads as follows: *'The supervisory authority undertakes all measures, particularly those as per Article 51 ISA, which are required in order to protect the interests of the insured parties'*.

In practice, however, the (re)insurer will just stop writing the specific business without requesting FINMA's approval to the winding-up plan.

10.5 Policy buy-back
With respect to life insurance, Article 90 ICA provides that the assured has the right to buy back the life insurance, in whole or in part, if the insured event is certain and at least three annual premiums have been paid. An example is whole life insurance for a fixed amount.

10.6 Solvent scheme
The concept of a solvent scheme of arrangement does not exist in Switzerland.

The German Federal Court of Justice found, in its decision dated 15 February 2012 (BGH IV ZR 194/09), that a solvent scheme of arrangement relating to Equitable Life did not fall within the EU solvency regulation (Council Regulation (EC) No 1346/2000 on insolvency proceedings) or the Brussels Regulation on Enforcement of Foreign Judgments (Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters). A solvent scheme is a compromise between a company and its creditors rather than an insolvency process or a judgment respectively recognised under the above regulations.

There is no jurisdiction regarding the recognition of a solvent scheme of arrangement in Switzerland yet. The effect of non-recognition for policyholders in Switzerland would depend on the circumstances of the individual case. The outcome of such a claim in Switzerland is difficult to estimate due to the lack of local court decisions.

10.7 Assignment

The assignment of an insurance contract is possible based on a specific assignment provision in the contract.

Under Swiss law, in the absence of an assignment clause, individual claims can be transferred. A simple written form is required for the assignment of claims. The consent of the obligor is not required, but the obligor should be notified of the assignment, as such notification deprives the obligor from the possibility of paying in good faith for the former obligor. The assignment of claims is not valid if the parties have concluded a non-assignment agreement or if the law or the nature of the legal relationship does not allow assignment. For the transfer of a whole contract containing claims and obligations, it is necessary to obtain the assent of the obligee. The transfer of a whole contract can be realised with a tripartite assignment contract between the assignor and the new and former contract parties.