The International Comparative Legal Guide to:

Insurance & Reinsurance 2017

6th Edition

A practical cross-border insight into insurance and reinsurance law

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Germany

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1 Regulatory

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

The Federal Financial Supervisory Authority (Bundesanstalt für Finanzdienstleistungsaufsicht – BaFin) is responsible for the supervision of all insurance and reinsurance companies, as well as pension funds having their registered seat in Germany. This does not include supervison of the social insurance carriers and about 1,000 small mutual insurance companies which are supervised by the respective federal state. BaFin acts on behalf of the federal government and only in the public interest on the basis of the rules set out in the German Insurance Supervision Act (Versicherungsanlaufsichtsgesetz – VAG), which was re-enacted effective as of 1 January 2016 to implement the EU-directive on Solvency II. For companies domiciled within the European Union or the European Economic Area (EEA) carrying out business in Germany, responsibility for functional and financial supervision remains with the home Member State, while the BaFin exercises a complementary supervisory role with respect to legal compliance unless the insurance activities are confined to railways, aviation, shipping and transport insurance. Companies domiciled outside the EU or the EEA acting in Germany are subject to full supervision by the BaFin.

The European Insurance and Occupational Pensions Authority (EIOPA), which is part of the European System of Financial Supervision, monitors and identifies trends, potential risks and vulnerabilities stemming from the micro-prudential level, across borders and across sectors.

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

In order to carry out insurance activities within Germany, an official approval (commonly: licence) is required. BaFin gives such approval upon application and fulfilment of various criteria:

Firstly, the insurance company has to file a detailed business plan setting forth, inter alia, the purpose of the company, the intended classes of insurance offered and the types of covered risks, the financial viability, corporate matters and any agreements on the functional outsourcing of core activities. The insurance company has to evidence sufficient capital to meet the required guarantee funds and the business expenses envisaged for the coming three business years. It has to provide information on the intended reinsurance and on the structure of the administration and distribution, as well as details on the management and their reliability and professional qualifications. Finally, qualified participations in the insurance undertaking are to be detailed.

Life and health insurance, which cannot be combined in a single legal entity with other types of insurance, are subject to additional requirements. The approval requirements for reinsurance companies are lower; in particular, significant changes to the business plan require the BaFin’s approval only in the case of an expansion of the scope of business.

Finally, only a few types of corporate entities are admitted to conduct insurance business: the German stock corporation (Aktiengesellschaft – AG) including its European form (Societas Europaea – SE), mutual societies and corporations and institutions under public law.

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

The introduction of the EU single passport provided insurance companies located in the EEA Member States the possibility to write insurance business in Germany under the European Freedom of Services and Freedom of Establishment by offering insurance contracts directly or to establish a branch in Germany.

Insurance companies located outside the EEA that are willing to write insurance business via an intermediary must establish a branch in Germany and obtain BaFin’s approval before being able to do so. In this context, the term “intermediary” is to be understood broadly and includes all kinds of persons that the insurer makes use of. This does not apply to insurers that exclusively underwrite reinsurance authorised under the provisions of their country of origin. Pure home-foreign insurance business does not require a permit in Germany.

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?

Insurance contracts in Germany and their content must comply with the German Insurance Contract Act (Versicherungsvertragsgesetz – VVG) as well as with the – quite strict – laws on general terms and conditions. Additionally, more general laws such as the German Equal Treatment Act (Allgemeines Gleichstellungsgesetz – AGG) have to be observed.

The VVG contains several semi-mandatory provisions, from which the insurer cannot deviate to the detriment of the policyholder or the insured person. These restrictions, however, do not apply to
so-called “jumbo risk” insurance contracts. These are major risks defined in Sec. 210 VVG and include certain risks of transport and liability insurance, risks of credit and suretyship insurance and risks of property, liability and other indemnity insurance where the policyholders exceed at least two of the following characteristics: (i) EUR 6,200,000 balance sheet total; (ii) EUR 12,800,000 net turnover; and (iii) an average of 250 employees per fiscal year. If the policyholder belongs to a group of companies which prepare consolidated financial statements, these consolidated figures apply.

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

Generally, German companies are not prohibited from indemnifying their directors and officers against liability vis-à-vis the company itself as well as vis-à-vis third parties, while some general restrictions (which are not characteristic to companies) as well as company law restrictions apply. In particular, German companies may only waive a claim against any of its directors or officers under very narrow prerequisites, e.g. a German stock corporation can only waive own claims against its management board members after three years provided that the shareholders’ meeting approves such indemnification by simple majority.

Companies may take out Directors and Officers Liability insurance (D&O) cover for third parties and own claims, which, however, in the case of stock corporations must provide for a retention of 10 per cent of the damage capped not below one-and-a-half year’s fixed remuneration of the respective management board member; this mandatory retention does not apply to members of the supervisory board.

1.6 Are there any forms of compulsory insurance?

German law provides for various compulsory insurances. The most important are third-party vehicle liability insurance, social security insurances, such as unemployment and health insurance, and professional liability insurance for certain professions, e.g. for lawyers, accountants, physicians and architects.

2 (Re)insurance Claims

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

The VVG (see above) had been revised wholly as of 1 January 2008. This revision was conducted to promote consumer protection and thus strengthen the rights of the policyholders and insured persons. This aim was implemented by introducing several of the above-mentioned semi-mandatory provisions (such as the insurer’s obligations to inform and advise) from which the insurer does not apply to members of the supervisory board.

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

Generally, a third party is not allowed to bring a direct action against an insurer due to the fact that third parties do not have a direct legal relationship with the insurer. Only policyholders/insured persons can bring direct actions. It has to be noted that the policyholder can assign its indemnity claim against a liability insurer to the third party and that this assignment cannot be excluded in the general terms of insurance, Sec. 108 para. 2 VVG.

As an exception to this rule, Sec. 115 VVG gives third parties the right to bring a direct claim against the insurer where a compulsory vehicle liability insurance is in place; or where the policyholder is insolvent; or where the policyholder’s whereabouts are unknown.

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

No, an insured may not raise direct claims against the reinsurer which reinsurance the insured’s insurer. Only the reinsured insurer can bring direct action under the reinsurance contract against the reinsurer. This also applies in the case of the insurer’s insolvency.

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

Secs. 19 et seqq. VVG provide the legal framework for the policyholder’s obligations regarding pre-contractual disclosure and the insurer’s remedies in the case of misrepresentation or non-disclosure.

Prior to conclusion of the insurance contract, the policyholder (or, where applicable, his representative) shall disclose to the insurer the risk factors known to him which are relevant to the insurer’s decision to conclude the contract with the agreed content and which the insurer has requested in writing. If the policyholder breaches this duty, the insurer may withdraw from the contract but only in the event the policyholder breached his duty of disclosure intentionally or by acting with gross negligence. If the breach was neither intentional nor grossly negligent, the insurer can terminate the contract by giving one month’s notice. The insurer’s withdrawal and termination rights shall be ruled out if the insurer would also have concluded the contract in the knowledge of the facts which were not disclosed, albeit with other conditions. These other conditions shall become an integral part of the contract with retroactive effect upon the request of the insurer; in the case of a breach of duty for which the policyholder does not bear responsibility, they shall become an integral part of the contract as of the current period of insurance.

The insurer may not make use of these remedies if it did not inform the policyholder in writing separately of the consequences of any breach of the duty of disclosure or if the insurer was aware of the disclosed risk factors or the incorrectness of the disclosure. Finally, if other conditions becoming an integral part of the contract lead to an increase in the insurance premium of more than 10 per cent, or if the insurer refuses to cover the risk for the undisclosed circumstance, the policyholder may terminate the contract without prior notice within one month of receipt of the insurer’s communication.

The insurer must assert the rights afforded him in writing separately of the consequences of any breach of the duty of disclosure or if the insurer was aware of the disclosed risk factors or the incorrectness of the disclosure. Finally, if other conditions becoming an integral part of the contract lead to an increase in the insurance premium of more than 10 per cent, or if the insurer refuses to cover the risk for the undisclosed circumstance, the policyholder may terminate the contract without prior notice within one month of receipt of the insurer’s communication.

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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?

No. The policyholder’s duty to disclose only refers to matters the insurer has specifically asked for and which are relevant to the insurer’s decision to conclude the insurance contract. A recent court decision held that an insurance broker’s questionnaire is deemed to be questions of the insurer if the insurer adopts this questionnaire.

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?

Pursuant to Sec. 86 VVG, a claim for damages by the policyholder against a third party automatically transfers to the insurer insofar as the insurer compensates for the loss. The provision further requires that the policyholder has to safeguard his claim for damages or his right serving as a security for this claim in accordance with the applicable formal and timing requirements, and to assist the insurer wherever necessary in asserting them. If the policyholder intentionally breaches this obligation, the insurer is not obligated to effect payment insofar as it cannot obtain compensation from a third party as a result of this breach. In the event of a grossly negligent breach of the obligation, the insurer is entitled to reduce the benefits payable commensurate to the severity of the policyholder’s fault.

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?

Competent courts for commercial insurance disputes are the German civil courts which are the 639 Local Courts (Amtsgerichte – AG) up to, and including, a claim in dispute of EUR 5,000 and 115 Land (or District) Courts (Landgerichte – LG) for claims exceeding this sum. These courts usually have specialised departments (AG) or chambers for insurance matters (LG).

The LG also serve as courts of appeal against AG judgments. The 24 Higher Regional Courts (Oberlandesgerichte – OLG) are the competent courts of appeal against LG judgments. The Federal Court of Justice (Bundesgerichtshof – BGH) is the final appellate court for all matters.

The AG department is composed of one professional judge, the LG chambers and OLG senates are composed of three professional judges (with the exception of LG chambers for commercial matters which expressly have to be called and which are composed of one professional judge and two commercial judges). BGH senates are composed of five professional judges. German law of civil procedure does not provide for a hearing before a jury.

Additionally, policyholders have the right to bring claims before the insurance ombudsman regarding matters of a value of up to EUR 100,000 against insurers that are members of the Insurance Ombudsman Association (Versicherungsombudsmann e.V.). Decisions by the ombudsman are binding for these insurers but not for the policyholders.

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

For insurance matters (excluding traffic accidents), the most current statistics issued for 2015 show that the average duration of matters at court was: in the first instance at AG, 4.4 months; and at LG – where only general figures unrelated to insurance matters are available – 9.9 months. The average duration of appeals proceedings before LG or OLG was 6.5 to 9.2 months (in addition to the first instance duration). It has to be borne in mind that insurance matters may be more complex than typical civil cases and may involve the taking of evidence which then would extend the duration of such cases. However, cases which are not settled but decided by court take approximately twice as long.

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?

Pursuant to the German Code of Civil Procedure (Zivilprozessordnung – ZPO), each party has to prove the facts of its case and therefore has to produce any evidence (documents, witnesses, etc.) supporting these facts relevant to the case. The ZPO does not provide for pre-trial discovery, or for general disclosure obligations which are common in UK and US proceedings. However, a party to civil proceedings has to disclose those documents which it refers to in its pleadings or to which the other party has a statutory right of surrender.

In two circumstances, the court may order a party to disclose certain documents or records: firstly upon application of one party, if this party can only prove its case on the basis of a document which is in possession of the other party. Secondly, if a party is in possession of a document or record which either of the parties referred to. The latter also refers to documents in the possession of a third party which can be ordered by the court to disclose. In each of the cases, the court may order disclosure of such document or record within a certain deadline.

Should the other party fail to comply with the order to produce the record or document, or should the court become convinced that a party has not carefully researched the whereabouts of the record or document, a copy of the record or document produced by the party tendering evidence may be deemed to be proper evidence. Where no copy of the record or document has been produced, the allegations made by the party tendering evidence regarding the nature and content of the record or document may be assumed to be proven.

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?

The court will only issue an order to disclose upon application of a party (see above) if the applying party has an enforceable claim for delivery of specific documents and by taking aspects of confidentiality or privilege into consideration when exercising its
discretion. Yet, the other party may have defences against such claim, e.g. resulting from confidentiality obligations, under civil law. A further defence may be that the production of documents can be denied under procedural rules of privilege, e.g. lawyers may, and must, refuse to give evidence on confidential issues according to professional rules and under criminal law unless authorised to do so by the client. However, this privilege does not extend to documents in the possession of the lawyer’s client, in-house lawyers or another party.

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

Pursuant to provisions in the ZPO, a witness has a duty to give evidence if the court summons him for a hearing subject to certain rights to refuse testimony, e.g. in the case of kinship with a party or where statutory confidentiality obligations apply. If a witness refuses to attend the hearing without sufficient excuse, the court may order that the witness bears the costs incurred by his default and that the witness’ hearing will be enforced.

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

Generally, evidence from witnesses may only be made by personal testimony. However, the court may order that the question regarding which evidence is to be taken may be answered in writing should it believe that, in light of the content of the question and taking into consideration the person of the witness, it suffices to proceed in this manner.

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?

In the case a fact is disputed by the other party, the party bearing the burden of proof can make a motion to the court to appoint an expert witness. The neutral expert will render a written expert opinion on which the parties may comment and may subsequently be summoned by the court for questioning at the evidence hearing. In addition, the parties are allowed to introduce their own expert witness reports as part of the pleadings (party opinion) which, however, are generally not accepted as sufficient evidence by the courts if disputed.

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

Upon motion, a court may award a preliminary injunction where the concern is given that a change in the status quo might frustrate the realisation of the right enjoyed by a party, or might make its realisation significantly more difficult. By this injunction, the court orders the respondent to perform, or to refrain from, a certain action. Further, with respect to assets, a court upon motion may issue an attachment order preventing removal or dissipation of the other party’s assets. In both cases, the applicant has to show with preponderance of the evidence that he has a substantive claim against the respondent and that the matter is urgent.

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?

A party may appeal a final first instance judgment in questions of fact and law if the decision deviates from the appealing party’s application by more than EUR 600 irrespective of whether the first instance was at AG or at LG. Below this threshold, the court of first instance may allow the appeal if the matter has fundamental relevance or if a decision by the court of appeal is required for the further development of the law or to secure a consistent judicature. A further appeal to the final appellate court (Bundesgerichtshof – BGH) against final decisions of the court of appeal is possible if the court of appeal granted leave to appeal of if the BGH allowed the appeal.

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

As of commencement of the proceedings, the defendant is liable for interest at an interest rate of 500 base points above the base interest rate; respectively 900 base points above the base interest rate if neither of the parties is a consumer and the claim is for payment of goods or services (i.e. 5 per cent apply to claims for insurance cover and 8 per cent to claims for premium payments from non-consumers). The base interest rate is determined by the German Central Bank (Bundesbank) and as of 1 January 2017 is minus 0.88 per cent.

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

Costs of litigation comprise court fees and expenses and parties’ costs, in particular lawyers’ fees. While the plaintiff has to advance the court fees up front, both court and lawyers’ fees are, as a rule, recoverable by the winning party. Following this rule, the defeated party has to bear the costs of the litigation. Court costs and lawyers’ fees are determined by statutory rates in relation to the value in dispute (usually, the amount claimed by the plaintiff) and the procedural stages (first, second, third instance). If a party agrees to pay its lawyer a higher rate, e.g. based on hourly rates, this party generally has to bear the extra fees regardless of the court’s decision as only statutory fees are recoverable, unless the fees in excess of the statutory rates constitute recoverable damages. Also, contingency fees are permissible only under narrow prerequisites. If the plaintiff partly wins and partly loses its case, costs are either proportionally allocated by reference to the degree of success and loss, or court costs are split up and each party bears its own out-of-court costs. While a settlement prior to the trial decreases the court costs significantly by two-thirds, additional statutory lawyers’ fees might be incurred. Depending on the value of the case, on the procedural stage and on how the parties agree on the bearing of the costs, a settlement may be desirable in respect of fees. For example, for a case with a value in dispute of EUR 10,000 which is decided by judgment, court costs of EUR 723 and lawyers’ fees of EUR 1,684 for each party would apply. If this case was settled before the oral hearing, the court costs would be reduced to EUR 241 and the lawyers’ fees to EUR 1,551 each. A value of EUR 10,000,000 would lead to the following figures: court costs of EUR 113,208; or EUR 37,736, respectively, and lawyers’ fees of EUR 94,370 or EUR

4.10 How are costs assessed? Are there any costs capping schemes?

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86,822, respectively, in the case of a settlement. Beyond a value in dispute of EUR 30 million, the statutory fees do not increase further. In case of an in-court settlement after the oral hearing, the court costs would again be reduced, but the lawyers’ fees would be increased by approximately 40 per cent.

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

Some federal state laws provide that where the value in dispute is below EUR 750, a complaint is only permitted in court if the parties have initiated mediation proceedings at a state-recognised conciliation office.

Apart from this, German courts are obliged under statutory law to promote an amicable resolution of the dispute at any stage of the proceedings. Prior to the trial, usually at the beginning of the hearing, a conciliation hearing has to take place and judges actively promote settlements by giving their own proposals after discussing the factual and legal circumstances of the case.

Only recently, the German Mediation Act was enacted adopting the EU Mediation Directive which led to a slight increase of mediation having been very rarely made use of in the past. The court can propose to the parties mediation as well as other alternative dispute resolution proceedings but it is at the parties' discretion whether or not they pursue this possibility. If they choose to do so, the court proceedings will be stayed as long as the mediation runs.

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

Generally, there are no consequences if a party refuses to mediate. However, in the mandatory mediation proceedings (see above) an attempt to conciliate must be made which will be declared failed if a party refuses to participate.

### 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?

The ZPO sets forth specific rules applying to arbitration proceedings making arbitration a fully recognised alternative to court proceedings in Germany. These rules set out basic procedures for commencing arbitration, establishing the tribunal and its competencies, carrying out the proceedings as well as on the enforcement of arbitration awards. Mainly, these statutes are non-binding and can be overruled by either rules the parties have agreed upon (so-called *ad hoc* proceedings) or by a set of rules from a third party, e.g. the ICC or the equivalent German institute (*Deutsche Institution für Schiedsgerichtsbarkeit e.V. – DIS*), if agreed between the parties.

Hence, if a matter is pending at a regular court, although the parties have validly agreed on arbitration proceedings, the German courts are no longer competent to decide on the matter if one of the parties makes a respective motion to the court prior to the oral hearing.

The case would then be dismissed. Generally, courts must not intervene in the conduct of an arbitration, but may be called upon for support, e.g. when executing enforcement measures ordered by the arbitral tribunal or when taking of evidence requires acts beyond the competency of the arbitral tribunal.

#### 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?

Arbitration proceedings can only be initiated if based on an arbitration agreement between the parties. It is not necessary – but in the reinsurance industry commonly done – that the arbitration agreement is included in the insurance contract. However, the agreement must be made in a form allowing proof that an agreement on the arbitration was reached, e.g. by exchange of letters, faxes or other means of communication, which is why it is usually done in writing. In the case of consumers, the agreement must be made by way of a separate signed document.

Although there are no specific phrase to be used, it must be clear from the agreement that the parties wish to subject certain, or all, existing or future claims arising under a specific contractual or other legal relationship between them to arbitration.

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

If the arbitration agreement is valid, German courts will uphold and enforce the arbitration by dismissing the case, when either party makes a respective motion. To this end, the courts may decide upon the admissibility of arbitration proceedings until an arbitral tribunal has been established, which may then decide about the validity of the arbitration agreement itself.

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

Upon motion of a party, the arbitral tribunal is free to order such preliminary or interim measures of protection as it considers necessary in respect of the subject matter in dispute, unless otherwise agreed by the parties. Enforcement of any preliminary measures is, however, left to the courts. Since courts can also be called upon directly for interim measures, arbitral tribunals do not frequently issue orders of preliminary protection. In any event, the same prerequisites set out above (question 4.6) apply as to preliminary measures outside of arbitral of proceedings.

#### 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?

Unless the parties to a dispute agree otherwise, the award has to include the reasoning for the decision. As a rule, the parties to arbitration proceedings in Germany will waive their right to obtain an award with reasoning.
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?

Arbitration awards can be appealed by a motion of one party to the locally competent Higher Regional Court (Oberlandesgericht), but only in the following limited circumstances:

- a party was not competent to enter into an arbitration agreement or the arbitration agreement was invalid under German law;
- a party was not properly notified of the proceedings or was otherwise hindered from defending itself in an orderly manner;
- the arbitration award was not on the matters agreed to be subject to arbitration or went beyond such agreed matters;
- the arbitral tribunal or the proceedings did not follow the applicable statutory or agreed rules to such an extent that it affected the arbitration award;
- the subject matter of the arbitration is not capable of being settled by arbitration proceedings under German law; or
- the award or its enforcement violates the public order (ordre public).

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