



Insurance & Reinsurance

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Luxembourg

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Regulation

1 Regulatory agencies

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

The Commissariat aux Assurances (the Commissariat) is in charge of the supervision of insurance and reinsurance undertakings, as well as insurance intermediaries (agents and brokers). It is in charge of examining the applications for licences. The Commissariat also assists the Luxembourg public authorities in European and international negotiations. It takes an active part to the preparation of Luxembourg laws and regulations within its field of competence.

The Commissariat is a public establishment vested with legal personality and is financially independent. It is under the authority of the ministry of treasury and budget.

2 Formation and licensing

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

The licence is delivered by the ministry of treasury upon recommendation of the Commissariat, subject to:

- conditions relating to the founders or shareholders (identification, transparency, adequacy);
- prior consultation by the Commissariat of the supervisory authorities of other EU member states in case the newly formed company is a subsidiary of a EU insurance or a reinsurance company;
- compliance with one of the corporate forms permitted by law;
- physical presence of the central administration in Luxembourg;
- corporate object exclusively limited to the insurance or reinsurance activity;
- delivery of a programme of activity;
- evidence of availability of the minimum guarantee funds required; and
- evidence that their management fulfils the required professional expertise and honourability.

3 Other licences, authorisations and qualifications

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

A distinction must be drawn up between the conditions which are required in for the establishment of Luxembourg branches of insurance or reinsurance companies constituted under the laws of a EU member states and those who originate from a non-EU member state. The same distinction applies with respect to the supply of services.

Luxembourg branches of non-EU companies or supply of services in Luxembourg by such companies are subject to conditions similar

to those required for the formation of a Luxembourg company (see question 2). In addition, the delivery of the licence is subject to the evidence of:

- three years' minimum expertise in the insurance or reinsurance field;
- authorisation to exercise the activity in the country of origin; and
- the appointment of a permanent representative in Luxembourg.

Luxembourg branches of insurance or reinsurance companies constituted under the laws of EU member states as well the supply of services in Luxembourg by such companies are covered by the European passport rule.

4 Officers and directors

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

With respect to reinsurance companies, any director or officer must provide guarantees of honesty as well as evidencing a high-level professional expertise in the field of reinsurance. The Ministry of Treasury may require them to take an examination so as to demonstrate their professional knowledge.

Directors or officers of an insurance undertaking must also provide guarantees of honesty as well as evidencing sufficient professional expertise within the insurance sector. With respect to the latest requirement, the applicants must take an examination. However, they can be exempted from this examination where: they have a four-year degree in law, economics or insurance and a minimum of three years' experience in an insurance or reinsurance undertaking; or they have at least 10 years' experience in an insurance or reinsurance undertaking with three years in functions in the vicinity of management responsibilities.

5 Capital and surplus requirement

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

The minimum capital required depends on the corporate form under which the insurance or reinsurance company is being formed (minimum share capital is €31,000 for a *société anonyme*). However, these minimum capital requirements are theoretical, given that the law requires significant guarantee funds, which comprise the share capital. Subject to calculations, which must be made on a case-by-case basis, the minimum guarantee fund is: for captive companies, €1.225 million; for reinsurance companies, €3 million; and for insurance companies, depending on their activity branches, either €2.2 million or €3.2 million (eg, life insurance branches). At any time, the guarantee fund must not be less than one-third of the solvency margin.

6 Reserves

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

Insurance and reinsurance companies are bound to maintain technical provisions aiming to cover their whole activities. The technical provisions, the principle of which is set forth in the Law of 6 December 1991 on the insurance sector, as amended (the Insurance Sector Law), are more detailed in the Law of 8 December 1994 on the annual accounts and consolidated accounts of insurance and reinsurance undertakings. Technical provisions cover the provisions for non-acquired premiums; the life-insurance reserves; the damages' reserves; the reserves for participation to the benefit and discounts; and the equalisation reserves.

7 Insurance products

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

In addition to the general requirements applicable to all types of insurance products, extra requirements or specificities apply to:

- credit insurance (requirement of an extra re-balancing provision in addition to the standard technical provisions);
- legal protection insurance; and
- assistance insurance.

The cumulated exercise of life and non-life branches by the same undertaking are prohibited as a principle. The licence is delivered branch by branch, as listed by law, any request for extension being subject to the submission to the Commissariat of an additional programme of activity.

All insurance products are regulated by the Commissariat.

8 Change of control

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

This field is regulated by the Insurance Sector Law and in more detail by the Law of 17 July 2008 regarding acquisitions in the financial sector, transposing Directive 2007/44/EC of 5 September 2007 as regards procedural rules and evaluation criteria for the prudential assessment of acquisitions and increase of holdings in financial sector.

Any natural or legal person or such persons acting in concert who have taken a decision either to acquire, directly or indirectly, a qualifying holding in an insurance or reinsurance undertaking or to further increase, directly or indirectly, such a qualifying holding in an insurance undertaking, as a result of which the proportion of the voting rights or of the capital held would reach or exceed 20 per cent, 33 per cent or 50 per cent or so that the insurance undertaking would become its subsidiary, must notify the Commissariat in writing.

The Commissariat then has a maximum of 60 working days (which may, in some cases, be extended up to 90 days) to assess the expected transaction.

If the Commissariat, upon completion of the assessment, decides to oppose the proposed transaction, it shall notify the potential acquirer by explaining the reasons for its opposition.

The evaluation criteria used by the Commissariat to reach its decision are:

- the reputation of the potential acquirer;
- the reputation and experience of any person who will direct the business of the insurance or reinsurance undertaking;
- the financial soundness of the potential acquirer;

- the ability of the insurance undertaking to comply and continue to comply with the prudential requirements provided by law; and
- the existence of reasonable grounds to suspect that, in connection with the proposed acquisition, money laundering or terrorist financing is being or has been committed or attempted, or that the proposed acquisition could increase the risk thereof.

9 Financing of an acquisition

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

There are no particular requirements or restrictions in terms of methods of financing an insurance or reinsurance Luxembourg undertaking. However, reference must be made to the anti-money laundering regulations (Law of 12 November 2004) pursuant to which any financing through Luxembourg shall be scrutinised in terms of origin of the funds and identification of the ultimate economic beneficiaries by the professionals who are subject to this legislation (banks, notaries, attorneys-at-law).

10 Foreign private investment

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

Subject to ordinary licensing rules or the prior consultation procedure of article 29-1 of the Insurance Sector Law, Luxembourg imposes no particular requirements and restrictions to investments made by foreign citizens or companies other than differences due to whether the Luxembourg insurance or reinsurance companies are subsidiaries of companies established or not in a EU jurisdiction.

With respect to investors which are insurers, reinsurers, banks or investment undertakings duly licensed in a EU jurisdiction, the Commissariat must consult the supervisory authorities of these undertakings so as to value the quality of the shareholders and the professional expertise of the management, in case the shareholders and/or management have an influence on the subsidiary's activity.

With respect to other investors, see question 2.

11 Foreign state investment

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

With the exception of UN embargos or similar restrictions raised at the EU level, there are no other specific requirements or restrictions than those discussed in question 10. A subsequent important issue relates to the state immunities foreign governments may invoke to the benefit of the insurance or reinsurance undertakings which could possibly qualify as state emanations. In the absence of Luxembourg legal provisions and in the absence of recent published case law on sovereign immunities, Luxembourg courts would turn for guidance to the current French case law, which applies the doctrine of relative immunity and pursuant to which:

- immunity of jurisdiction is granted only where the litigious act committed by a private or a public emanation of a sovereign state is an act of public power (*acte de puissance publique*) or is committed in the interest of public welfare (*intérêt de service public*); and
- immunity of execution or attachment is refused where, with respect to emanations of a sovereign state, the assets are affected to a non-public activity.

12 Reinsurance agreements

What are the regulatory requirements with respect to agreements for reinsurance ceded and assumed by insurance and reinsurance companies domiciled in your jurisdiction?

The Insurance Sector Law does not regulate reinsurance agreements, which it considers 'business to business' operations negotiated between professionals. It regulates only the transfer of a portfolio of reinsurance agreements assumed by a Luxembourg undertaking to a reinsurance undertaking established in the European Community or in a non-EU jurisdiction. However, according to a Grand-ducal regulation dated 5 December 2007, the opposability, regime and effects of the transfer are generally declared as being governed by the provisions of the reinsurance treaty, which is subject to transfer.

13 Ceded reinsurance and retention of risk

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

The amount of ceded reinsurance and the retention of risks by insurers are not expressly regulated by law. As a result, 100 per cent of portfolio insurance can be ceded to reinsurers. With respect to the transfer of reinsurance portfolio reinsurance made by a Luxembourg reinsurance undertaking to a EU or non-EU reinsurance undertaking, the transfer is allowed once the supervisory authorities of the country of origin confirm to the Commissariat that, in proportion to the transfer effected, the solvency margin of the reinsurance undertaking is satisfactory by application of the EU requirements (as transposed into Luxembourg law by the Law of 5 December 2007 on the supervision of reinsurance undertakings).

14 Collateral

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

At any time, the technical provisions must be secured by assets for which Luxembourg, as permitted by the opting-out clause set forth by the Reinsurance Directive 2005/68/EC, did not opt for a quantitative rule limiting the types of assets invested. However, the Grand-ducal regulation of 5 December 2007 addresses the following requirements:

- in its investment policy, the reinsurance undertaking must consider the specific risks incurred by its activity;
- the invested assets must be diversified and well-balanced;
- investment in assets non tradable on regulated financial markets must be kept at a reasonable level; and
- investments in derivative instruments must be made on a prudent basis.

15 Insolvent and financially troubled companies

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

With respect to insolvency or financially troubled insurance or reinsurance companies, it must be noted that the Insurance Sector Law deals with insurance and reinsurance undertakings in different manners.

For insurance companies, article 55 of the Insurance Sector Law declares that the general rules of book III of the Commercial Code (bankruptcy rules) and the other ordinary insolvency procedures are not applicable, but that specific insurance reorganisation and liquidation provisions implemented from the Winding-Up Directive and set forth by the Insurance Sector Law shall apply. The EC Regulation 1346/2000 on insolvency proceedings does not apply.

For reinsurance undertakings, the Insurance Sector Law has

implemented article 42 and 43 of the Reinsurance Directive, in such a way that for several scenarios, authority has been given to the Commissariat to deal with:

- 'reorganisation plans' or 'financing plans' in case of insufficient solvency margins;
- with provisional measures for restriction or over the assets of the reinsurance business;
- supervising the liquidation operations in case of renunciation by the reinsurance company to its licence;
- supervising of the liquidation of the reinsurance contracts and the assets representing the technical provisions, in case of a voluntary liquidation of the reinsurance business.

The above are not really scenarios of a 'compulsory' liquidation or insolvency. The Luxembourg legislature has also authorised the Commissariat to supervise the liquidation of reinsurance contracts and assets representing the technical provisions in case of a liquidation subsequent to the withdrawal of the license of the reinsurance business.

The withdrawal of a licence is organised in article 100-6, and it thus implements article 44 of Directive 2005/68/EC on reinsurance. But the new article 100-6 of the amended Insurance Sector Law (within chapter IV, dealing with reinsurance undertakings) does much more. It organises the liquidation of the reinsurance contracts and the assets representing the technical provisions of the reinsurance undertaking: the Commissariat will have the power to nominate and appoint one or more liquidators in charge of that liquidation, and authority is given to the Commissariat to supervise it and to determine the fees of those liquidators. Additionally, article 100-6 organises issues of liability of liquidators and the related time limitation. For circumstances other than those discussed here before, EC Regulation 1346/2000 on insolvency proceedings and the national ordinary insolvency procedures would apply.

16 Intermediaries

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

Insurance and reinsurance intermediaries (brokers, sub-brokers, agents) cannot exercise their activities in Luxembourg or from Luxembourg without a licence delivered by the ministry of treasury. Similarly to the rules applicable to directors or officers, intermediaries must provide guarantees of honesty as well as evidencing a sufficient level professional of expertise in the field of insurance or reinsurance. Subject to specific exemptions (professional expertise regarded as giving sufficient comfort), applicants are required to take a special written examination so as to demonstrate their knowledge of the Luxembourg legislation.

Within the limits set forth by their licence delivered by another EU jurisdiction and subject to prior information given to the Commissariat by the supervisory authorities of the country of origin, EU intermediaries can freely operate in Luxembourg either by a Luxembourg branch or under the regime of freedom of supply of services.

Insurance claims and coverage

17 Third-party actions

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

Yes. Such kind of direct action by a third party against an insurer is set forth by article 89 of the Law of 27 July 1997 on insurance contracts, as amended (the 1997 Law). This provision states that the injured third party who suffered a loss has a direct action right against the liability insurer of the party who caused the injury. As a result, the insurer and the insured party are jointly (in solidum) liable

for the indemnification to the third who suffered the damage and this third party can take direct indemnification proceedings against the insurer. One particular interest of this direct action is that the indemnity amount bypasses the insured party's own assets, which eliminates the risk of any competing claims by other creditors of the insured party.

18 Late notice of claim

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

No. It used to be the case before 1997, when the Luxembourg legislature decided to regulate the delay with which notice should be given and the effects of a late notice of a claim.

Article 26 of the Law 1997 provides that the insured party shall inform the insurer as soon as he or she is aware thereof and no later than the time set out in the contract of any loss that may involve the insurer's cover. However, the insurer is not entitled to oppose to the insured party any late notice, if the notice was given as quickly as it was reasonably possible to do.

If the insured party does not comply with the aforementioned rules, the insurer cannot, except in case of fraud, refuse to cover the loss, but if the late notification caused a prejudice to the insurer, it can reduce the amount of the indemnification accordingly.

19 Wrongful denial of claim

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

Yes. If the insurer denies coverage for wrongful reasons, its extra-contractual liability could be potentially engaged against the insured party, eg, in case the insured party directly indemnifies the victim and does not receive reimbursement from his insurer. The insurer will then be bound to pay him damages in addition to the indemnity due pursuant to the insurance contract. The insured party must, however, prove that the behaviour of the insurer, which refused to pay the indemnity due according to the contract, caused him a specific prejudice.

20 Defence of claim

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

The insurer is bound to defend a claim if: one of the risks covered by the insurance contract occurs; and the injured third party claims for damages either against the insured party, which gives notice of the claim to his insurer, or against the insurer through a direct action.

21 Indemnity policies

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

The insurer's indemnity obligations are triggered by the occurrence of the uncertain event covered by the insurance policy. The payment of the indemnity is regulated by article 29 of the 1997 Law, according to which the insurer shall carry out the performance provided in the insurance policy as soon as it is given all useful information regarding the circumstances having given birth to the damage as well as the information necessary for the determination of the related indemnity amount. The insurer must pay the indemnity 30 days at the latest after the settlement of the indemnification amount. After this 30-day period, legal interest compounded on a daily basis is due to the beneficiary of the indemnity.

22 Incontestability period

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

Article 101 of the Law 1997 provides that as soon as the life insurance contract takes effect, the insurer is not entitled to challenge any longer the validity of the life insurance contract for reasons of non-intentional omissions or misrepresentations in the application made by the policyholder (except in case of fraud). As a derogation to this principle, the law allows however the parties to provide that the life insurance contract will only become incontestable after expiration of a period up to one year after the effective date of the contract.

23 Punitive damages

Are punitive damages insurable?

The common-law concept of punitive damages is not applicable under Luxembourg law. Indeed, according to the indemnification principles applicable in Luxembourg, an injured person shall not be entitled to receive an indemnification higher than the damage effectively suffered.

24 Excess insurer obligations

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

Luxembourg law currently reserves a different treatment to risks covered by multiple insurers, among which some have provided in their insurance contracts so-called subsidiary clauses and risks covered by in-line insurers.

Subsidiary clauses are, for example, clauses such as 'the insurance shall only provide coverage to the extent that the insured is not entitled to indemnity under any other insurance policy' or 'the insurance shall only take effect after the first insurance policy has reached its guaranteed limit', which in our opinion are not valid under Luxembourg law. Indeed, article 55 of the 1997 Law provides that if the same interest is insured against the same risk by different insurers, the insured can, in case of a claim, claim for indemnification against each insurer for indemnification in the limits of its own obligations and to the limits of the indemnity to which he can pretend. This legal provision adds that except in case of fraud, each of the insurers that should cover the loss is not authorised to take advantage of the existence of the other contracts covering the same risk in order to deny their particular cover. As a result, an insurance company is not entitled to deny coverage by claiming the existence of one or several other insurance contracts. This legal provision seems to render the so-called subsidiary clauses ineffective. This principle shall certainly apply if the sole purpose of such a clause is to avoid the application of article 55 of the 1997 Law. The question is to determine the exact scope of article 55 of the 1997 Law and in particular whether this provision prohibits any subsidiary clauses, including those organising a complementary nature of several insurance contracts. To the best of our knowledge, this issue has not yet been ruled out by Luxembourg courts. The question is quite controversial in France and Belgium, that is, the two legal systems to which the Luxembourg courts jurisdictions usually refer in the absence of specific Luxembourg regulations. In a nutshell, part of the French doctrine criticises the utter prohibition of subsidiary clauses, considering that some of these clauses favour a healthy management of risk. Only clauses having as sole purpose for insurers to escape their indemnification obligations should be prohibited. Adversely, nothing should prevent an insured from subscribing a complementary insurance in addition to an insurance previously subscribed by another insurance company,

for example, a contract providing coverage in case the first contract is without effect owing to an event of forfeiture or in case of insolvency of the primary insurer. In such case, the insurance contracts could not be considered as cumulative, as they would not cover the same risk, the second one covering only the risk of disqualification of the first contract.

The developments above do not apply to 'in-line insurance'. Indeed, the first insurer will cover the risk up to a certain amount only and the second insurer will cover the risk exceeding the first insured amount. This type of programme is valid under Luxembourg law, and normally, the payment by the second insurer is not subject to the payment by the first insurer. In other words, even if the premium insurer does not pay, for example, for reasons of insolvency, the second insurer will nevertheless be bound to pay the part exceeding the amount that should have been paid by the premium insurer, except if otherwise stated in the contract. Parties are free to settle the modalities of payment between the insurers and the insured party.

25 Order of payment

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

The settlement of multiple claims arising under the same policy is submitted to contractual freedom. This question can be of importance when a guarantee ceiling is provided in the insurance contract and when this ceiling is not sufficient to cover all claims occurring during the same period of guarantee. The ceiling is generally provided for per loss or per insurance year. If the contract contains a unique ceiling for the whole period of guarantee, the contract often provides that in case of succeeding losses, the second loss will only be indemnified in the limit of the outstanding amount available after payment of the indemnity relating to the first loss until the guarantee ceiling has been reached.

26 Allocation of payment

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

Article 55 of the Law 1997 sets forth the applicable principles. The purpose of this provision is the protection of the insured with respect to a claim covered by more than one policy. The insured can turn towards anyone of the insurance companies, and, except in the case of fraud, the demanded insurance company cannot refuse to pay by opposing the other policies. The insurer must pay the insured person within the limits of the policy, but after the payment the insurance company has the right to act for repayment against the other insurance companies covering the same risk. Except specific agreements between the insurers, the burden of the claim is shared as follows:

- if the value of the insurable interest is determinable, the distribution between the insurers is made proportionally to their respective obligations;
- if the value of the insurable interest is not determinable, the distribution is made in equal parts between all contracts up to the common maximum amount insured by all contracts. Once each contract has reached its maximum of coverage, any excess of claim is covered in equal parts by the other contracts for which the maximum of coverage has not yet been reached;
- if one or several insurers cannot pay its or their full quota, or part of it, that portion is split between the other insurers similarly as described in the point above. However, the stipulated maximum of coverage in each contract cannot be exceeded; or
- if one or several insurers cannot pay its or their entire quota, or part of it, the other insurers have a recourse against them to the extent of their additional charge.

Reinsurance

27 Reinsurance disputes

Are formal reinsurance disputes common, or do insurers almost always reach business solutions for their disputes without formal proceedings?

To the best of our knowledge, there is no published Luxembourg case law dealing with reinsurance matters. One reason is that the Luxembourg reinsurance market has so far mainly been composed of captive companies for which the litigation issues are less frequent than with respect to reinsurance companies. Another reason lies in the fact that mostly disputes are subject to a prior conciliation clause and then to arbitration disputes resolution. Arbitration is most often attributed to non-Luxembourg-based professional arbitrators (ARIAS (UK), ARIAS (US), CEFAREA).

28 Common dispute issues

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

See question 27.

29 Arbitration awards

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

According to article 1244, No. 8, of the NCCP, the award shall be well reasoned unless the parties have expressly exempted the arbitrators from the obligation to motivate the award. However, given the scarcity of Luxembourg arbitration procedures, it is uneasy to identify a common practice in this respect.

30 Power of arbitrators

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

Arbitrators have in principle all the powers attributed to them by the parties in the arbitration agreement as well as all non-coercive powers otherwise available to judicial courts (eg, right to appoint experts). Adversely, as a general principle of law, arbitrators cannot exercise coercive powers against third parties, in particular order them to appear, witness or otherwise provide documents. If the witness fails to appear the arbitral tribunal is not competent for ordering the witness to attend and the parties may then only apply to the Luxembourg jurisdiction competent in urgency matters so to obtain an order requiring the witness to produce his or her oral testimony.

31 Appeal of arbitration awards

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

Luxembourg law contains a comprehensive set of provisions relating to arbitration (book III of the New Code of Civil Procedure (NCCP)), which covers the conditions, regime and effects of a submission by the parties to arbitration, by way of awards obtained either in Luxembourg or abroad. In this respect, it can be said that Luxembourg gives full deference to arbitral awards.

With respect to procedure, a distinction must be drawn between arbitration awards rendered in Luxembourg or abroad. The only way to challenge awards rendered in Luxembourg is the procedure of opposition to the enforcement order of the award rendered by the president of the district court. If the opposition procedure is successful, the arbitration award is declared null and void. No proce-

Update and trends

Luxembourg is a fully diversified financial centre with particular strengths in the insurance and reinsurance sector. Luxembourg has the largest captive reinsurance domicile in the European Union. A large number of companies are also active in the life insurance market, most of which conduct domestic and international business. The principal activity is cross-border sales, which account for over 95 per cent of premiums. Despite of the international financial crisis, the Luxembourg insurance sector showed an outstanding ability to resist in this environment. According to the available figures, the collected premiums during the fourth quarter of 2008 fell only by 4.25 per cent compared to fourth quarter of 2007 in the life insurance market, while they increased by 112.56 per cent in property & casualty (non-life) market. Luxembourg, due to its economic, social and political stability, ensuring a secure and attractive legal and tax framework, will therefore probably continue to attract in the coming years numerous insurance and reinsurance companies from all over the world.

duration of appeal is granted against the judicial order rendered upon opposition. With respect to arbitration awards rendered abroad, the Luxembourg judge to which the enforcement request is submitted examines whether the award is not manifestly contrary to Luxembourg public order. On appeal, more extended conditions of enforcement of the foreign award will be verified pursuant to article 1251 of the NCCP.

With respect to the motives for which the award can be declared null and void or the enforcement refused, a distinction must be drawn up between the awards obtained in Luxembourg, awards obtained in a jurisdiction that is a party to the New York Convention of 10 June 1958 and awards obtained in a foreign jurisdiction which is not a party to the New York Convention. With respect to awards obtained in Luxembourg or in a jurisdiction not party to the New York Convention, articles 1244 and 1251 of the NCCP list the cases for which the annulment or non-recognition may be declared. With respect to arbitration awards rendered in a jurisdiction that is a party to the New York Convention, the limited cases of non recognition as set forth by article V of the New York Convention apply.

Reinsurance principles and practices

32 Obligation to follow cedent

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

The Luxembourg legislation on reinsurance mainly deals with regulatory issues and not with substantial principles and practices. As a result, contractual principles (freedom of parties) prominently apply.

The issue whether a reinsurer has the obligation to follow its cedent's underwriting fortunes and claims payments or settlements is not regulated by the Law of 5 December 2007 on the supervision of reinsurance undertakings and therefore contractual provisions shall be fully applicable. In this respect, the determination of the governing law of the reinsurance agreement or treaty as well as the contractually agreed provisions shall be decisive as for the scope of contractual obligations between the cedent and the reinsurer, in particular with respect to the defences possibly available to the reinsurer.

33 Good faith

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

No, but utmost good faith can be contractually stipulated. General contractual law principles, including the principle of execution of the agreements bona fide (article 1135, paragraph 3 of the Civil Code) are therefore applicable to the reinsurance agreements. This duty of good faith can be regarded as a general principle of Luxembourg contractual law.

34 Facultative reinsurance and treaty reinsurance

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

This issue is not regulated by law.

35 Coverage action

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

Although this issue is not covered by Luxembourg law, in particular the Law of 5 December 2007 on the supervision of reinsurance undertakings, based on the general contractual law principle of the relativity of the contract between the parties, that is, the contract has a binding character only between the parties thereto and may not benefit to or prejudice third parties (article 1165 of the Civil Code), the recognition of cut-through clauses in Luxembourg is doubtful.

36 Insolvent insurer

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

Given the non-effectiveness of cut-through clauses stipulated between policyholder and insurer which are not specifically accepted by the reinsurer and except tripartite agreement or specific assignments of claim for the purpose of security, there would be no specific obligations for the reinsurer to pay directly the policyholder.

37 Notice and information

What type of notice and information must a cedent typically provide its reinsurer with respect to an underlying claim? If the cedent fails to provide timely or sufficient notice, what remedies are available to a reinsurer?

Based on the principle of good faith set forth in article 1134, paragraph 3, of the Civil Code, the cedent must give the reinsurer, during the pre-contractual and contractual periods, all information necessary or useful so as to protect the reinsurer's rights or expectations and mitigate to the possible extent the risks incurred to the reinsurer. Contractual stipulations in the reinsurance agreements typically reflect such principles. For instance, although non-voluntary errors or omissions by the cedent do not exempt the reinsurer from its obligations, any such error or omission, when known, must be promptly rectified by the cedent. Similarly, the cedent is generally required to inform promptly the reinsurer on the losses.

38 Allocation of underlying claim payments or settlements

In the case of multi-year occurrences, such as pollution, how are underlying claim payments or settlements allocated among policy years covered by multiple reinsurance agreements?

This is an issue that should be anticipated in the reinsurance agreement. If this has not been dealt with, in the case of reinsurance disputes, arbitrators or courts would have to decide on the allocation.

39 Review

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

This issue is not specifically regulated by the Insurance Sector Law and should be subject to contractual stipulations.

40 Reimbursing of commutation payments

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

The reimbursement of commutation payments is not regulated by law and is subject to contractual stipulations.

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