

Contract practice and arbitration

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Reinsurance contracts are negotiated between professionals, usually through brokers. A large part of the world's treaty business is renewed within a few weeks around 1 January, 1 April, 1 June and 1 July each year. The documentation reflects the speed of the market. A treaty is typically bound on the basis of a short slip or placement document that records the essential terms, while the full wording follows later. Standard clauses circulate between markets and are adapted to each programme, which explains the complaint of Justice Eve quoted above about wordings strung together from several precedents. Swiss practice uses both German-language and English-language wordings, with many treaties written in Zurich for international clients are drafted in English while choosing Swiss law.

The central clauses of a treaty mirror the economic functions discussed earlier. The cession clause defines which risks fall under the treaty, the retention and limit clauses define the layer, and the premium and commission clauses define the price. For non-proportional covers the definition of the loss occurrence, the hours clause for natural catastrophes and the reinstatement provisions, which determine whether and at what cost the cover is restored after a loss, are decisive. Claims clauses deal with notification, cooperation and control. Under a claims cooperation clause the cedant must consult the reinsurer before settling large claims, whereas a claims control clause gives the reinsurer the right to conduct the negotiations itself. The follow-the-settlements clause, by contrast, obliges the reinsurer to accept the cedant's settlements provided they were made in good faith and in a businesslike manner and fall within the terms of the reinsurance. Where the treaty is silent, a Swiss court or tribunal will look to trade custom and, increasingly, to the PRICL as evidence of international practice.

Disputes are resolved almost exclusively by arbitration. Heiss lists the reasons: the parties can appoint arbitrators with industry expertise, the proceedings remain confidential and the business relationship is protected from public litigation, and the parties enjoy greater freedom in choosing the applicable law.¹ Traditional reinsurance arbitration clauses provide for a tribunal of three arbitrators, often with the requirement that the arbitrators be current or former executives of insurance or reinsurance companies, and sometimes allow the tribunal to decide as “*amiables compositeurs*” on the basis of the honourable engagement between the parties. Such clauses express the old idea of reinsurance as a gentlemen’s agreement, in which the parties expect a commercially sensible result more than a strict application of the wording.

Switzerland offers an established framework for such proceedings. International arbitration with a seat in Switzerland is governed by Chapter 12 of the Federal Act on Private International Law, Articles 176 to 194, in force since 1 January 1989 and revised with effect from 1 January 2021. The law applies whenever at least one party had its domicile, habitual residence or place of business outside Switzerland when the arbitration agreement was concluded, which is almost always the case in international reinsurance. An arbitration agreement is valid if made in writing or in any other form allowing it to be evidenced by text. Awards can be challenged before the Federal Supreme Court only on the five limited grounds of Article 190, such as the irregular constitution of the tribunal, an erroneous decision on jurisdiction or a violation of public policy, and parties without any connection to Switzerland may exclude the challenge altogether.² Institutional proceedings are commonly conducted under the Swiss Rules of International Arbitration in their 2021 version, administered by the Swiss Arbitration Centre.³

In practice, the choice between London, New York and Zurich as a seat of reinsurance arbitration usually turns on three considerations: the governing law of the underlying policies, the nationality of the arbitrators that the parties wish to appoint and the degree of court supervision that the parties are prepared to accept. Zurich scores well on the last point. The Swiss courts intervene rarely, the grounds of challenge are narrow and the Federal Supreme Court now accepts submissions in English in arbitration-related proceedings.⁴ London, by contrast, offers the depth of English case law on reinsurance and a specialised commercial court, while New York is the natural forum for disputes concerning American risks. The existence of an experienced community of arbitration lawyers and insurance specialists in Zurich makes the city a credible alternative for disputes between European and Asian parties in particular.

1 Notes

1. Heiss, “The Principles of Reinsurance Contract Law (PRICL)”, [https://www.ius.uzh.ch/dam/jcr:8de5ebeb-d50d-45de-8c36-304a82bd66f5/Heiss, %20PRICL_Scandinavian%20Studies%20in%20Law.pdf](https://www.ius.uzh.ch/dam/jcr:8de5ebeb-d50d-45de-8c36-304a82bd66f5/Heiss,%20PRICL_Scandinavian%20Studies%20in%20Law.pdf). ↩
2. CMS, “International arbitration law and rules in Switzerland”, CMS Expert Guide to International Arbitration, <https://cms.law/en/int/expert-guides/cms-expert-guide-to-international-arbitration/switzerland>. ↩
3. Swiss Arbitration Association, “New Swiss Arbitration Centre and Revised Swiss Rules”, <https://www.swissarbitration.org/new-swiss-arbitration-centre-and-revised-swiss-rules/>, which announces the new Swiss Arbitration Centre and the revised Swiss Rules in force from 1 June 2021. The text of the rules is available at <https://www.swissarbitration.org/wp-content/uploads/2023/08/Swiss-Rules-2021-EN.pdf>. ↩
4. Swiss Arbitration Association, English translation of Chapter 12 PILA (as in force from 1 January 2021), cited above, which reproduces Art. 77 para. 2bis of the Federal Supreme Court Act (BGG): “Written submissions may be in English.” The provision was introduced with the revision of the IPRG in force since 1 January 2021. ↩

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