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REGISTRATION OF RE-INSURANCE BROKERS

(Belgium, Bermuda, Germany, Ireland, Nevada, New York,
Spain, Sweden, United Kingdom, USA)

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K. Nadakavukaren et al.

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BELGIUM

1. Introduction

Belgian law imposes strict requirements on reinsurance intermediation (along the lines of those applicable to insurance intermediation). It does so through the Law on Insurance of 4 April 2014¹, which partially transposes the Directive 2009/138/EC on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II).

1.1. Legislative background

Reinsurance was explicitly excluded from the Belgian Law on Land Insurance Contract (*contrat d'assurance terrestre*) of 25 June 1992² because it was deemed to usually have an international character and because professional insurance companies do not need the same protections as ordinary insured individuals. At that time, the governing law therefore remained the Law of 11 June 1874, essentially meaning the free will of the parties involved.³ Reinsurance continues to be minimally regulated, with very few binding rules. The notable exception, however, is the regulation of reinsurance intermediation.⁴

More specifically on intermediation, the Law of 27 March 1995 initially did not provide for provisions on reinsurance intermediaries.⁵ This only changed following the Law of 22 February 2006⁶ and Law of 1 March 2007.⁷ These legislative changes to the Law of 27 March 1995⁸ were in part due to the Directive 2002/92/CE, which required the Belgian legislature to apply some rules to reinsurance intermediaries. The Law of 1995 was renamed as *la loi relative à l'intermédiation en assurances et en réassurances et à la distribution d'assurances*.

The successor to the aforementioned laws, the Law of 4 April 2014⁹ is now the main piece of regulation under Belgian law (essentially serving as the Code on insurance law).

1.2. Relevant laws and provisions

The Law of 4 April 2014 defines an insurance intermediary (*"intermédiaire d'assurance"*) as:

"any legal or natural person who is self-employed within the meaning of social legislation, other than an insurance or reinsurance company and other than an insurance intermediary on an

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- 1 La loi du 4 avril 2014 relative aux assurances, https://www.fsma.be/sites/default/files/media/files/2024-01/2014-04-04_Wet-Loi.pdf.
 - 2 La loi du 25 juin 1992 sur le contrat d'assurance terrestre, https://www.fsma.be/sites/default/files/legacy/sitecore/media%20library/Files/fsmafiles/wetgeving/wet_loi/1992-06-25_Wet_Loi.pdf.
 - 3 P. Colle, *Algemene beginselen van het Belgisch verzekeringsrecht*, 4th ed., Antwerp 2006, p. 124.
 - 4 M. Fontaine, *Droit des assurances*, 5th ed., Brussels 2016, p.106 and 620-622.
 - 5 Art. 2 la loi du 27 mars 1995 relative à l'intermédiation en assurances et à la distribution d'assurances, https://www.ejustice.just.fgov.be/mopdf/1995/06/14_1.pdf#page=5.
 - 6 <https://www.ejustice.just.fgov.be/eli/loi/2006/02/22/2006011087/moniteur>.
 - 7 <http://www.ejustice.just.fgov.be/eli/loi/2007/03/01/2007200604/moniteur>.
 - 8 <https://www.ejustice.just.fgov.be/eli/loi/1995/03/27/1995011169/justel>.
 - 9 La loi du 4 avril 2014 relative aux assurances, https://www.fsma.be/sites/default/files/media/files/2024-01/2014-04-04_Wet-Loi.pdf.

*ancillary basis, who, in return for remuneration, takes up or carries out the activity of insurance distribution.”*¹⁰

A re-insurance intermediary (*“intermédiaire de réassurance”*) is similarly defined as:

*“any natural or legal person who is self-employed within the meaning of social legislation, other than a reinsurance undertaking, and who, in return for remuneration, takes up or pursues the business of reinsurance distribution.”*¹¹

A (re-)insurance intermediary who is not tied to specific (re-)insurance companies is referred to as a *courtier d'assurance* or *courtier de réassurance*.¹² If intermediaries are tied to one or few (re-)insurance companies, they are referred to as *agents d'assurance* or *agents de réassurance*.¹³ The law also contains definitions for (re-)insurance sub-agents, called *sous-agents d'assurance* or *sous-agents de réassurance*.¹⁴

Part 6 of the Law of 4 April 2014 covers (re)insurance intermediation and (re)insurance distribution. It extends the registration obligation to reinsurance intermediaries (*les intermédiaires de réassurance*) (Art. 259 §1). The regulator (*L'autorité des services et marchés financiers*, FSMA¹⁵) keeps a specific register of reinsurance intermediaries. The register includes the categories of: *“courtiers de réassurance”*, *“agents de réassurance”* and *“sous-agents de réassurance”*. In principle, no distinction is made regarding the required professional competence and organizational requirements for insurance, ancillary insurance and reinsurance intermediaries (Art. 264 *et seq.*). This is also the case for the requirements of professional competence and the organizational requirements for insurance and reinsurance companies (Art. 272 *et seq.*).

Other laws that are relevant are the following:

- *La loi du 2 août 2002 relative à la surveillance du secteur financier et aux services financiers*;¹⁶
- *La loi du 13 mars 2016 relative au statut et au contrôle des entreprises d'assurance ou de réassurance*;¹⁷
- *L'arrêté royal du 22 février 1991 portant règlement général relatif au contrôle des entreprises d'assurances*;¹⁸
- *L'arrêté royal du 18 juin 2019 portant exécution des articles 5, 19°/1, 264, 266, 268 et 273 de la loi du 4 avril 2014 relative aux assurances*;¹⁹

¹⁰ “intermédiaire d'assurance”: toute personne morale ou physique ayant la qualité de travailleur indépendant au sens de la législation sociale, autre qu'une entreprise d'assurance ou de réassurance et autre qu'un intermédiaire d'assurance à titre accessoire, qui, contre rémunération, accède à l'activité de distribution d'assurances ou l'exerce’ Art. 5 (20°) Law of 4 April 2014.

¹¹ “intermédiaire de réassurance”: toute personne morale ou physique ayant la qualité de travailleur indépendant au sens de la législation sociale, autre qu'une entreprise de réassurance, qui, contre rémunération, accède à l'activité de distribution de réassurances ou l'exerce’ Art. 5 (21°) Law of 4 April 2014.

¹² Art. 5 (21°/1 and 21°/2) Law of 4 April 2014.

¹³ Art. 5 (21°/3 and 21°/4) Law of 4 April 2014.

¹⁴ Art. 5 (21°/5 and 21°/6) Law of 4 April 2014.

¹⁵ See below, text accompanying footnote 22.

¹⁶ https://www.fsma.be/sites/default/files/legacy/sitecore/media%20library/Files/fsmafiles/wetgeving/wet_loi/2002-08-02_wet_loi.pdf.

¹⁷ https://www.fsma.be/sites/default/files/media/files/2024-03/2016-03-13_Wet_Loi.pdf.

¹⁸ https://www.fsma.be/sites/default/files/legacy/sitecore/media%20library/Files/fsmafiles/wetgeving/kb_ar/rd_22-02-1991.pdf.

¹⁹ https://www.fsma.be/sites/default/files/legacy/content/wg/kbar/2019-06-18_kb_ar.pdf.

- *L'arrêté royal du 12 décembre 2021 visant à l'harmonisation de différents arrêtés royaux relatifs à l'intermédiation dans le secteur financier et des assurances.*²⁰

In contrast to the rules regarding the requirements and registration, laws with the purpose of protecting consumers apply to insurance activities but not to reinsurance activities. The clearest example would be the general provisions of Book VI the Economic Law Code (*Code de droit économique*) about market practices in relation to consumers and consumer protection.²¹ These consumer protection rules apply to all types of services, including financial services such as insurance activities. However, they will not be applicable to reinsurance because reinsurance occurs between professionals.

1.3. Supervisory authorities

L'autorité des services et marchés financiers (FSMA) is responsible for enforcement of the rules applying to reinsurance intermediaries.²² The authority also provides for specific information on the subject,²³ including a detailed information sheet regarding the provisions applicable to insurance intermediaries, reinsurance intermediaries and incidental intermediaries governed by the law of another member state of the European Economic Area (but with activities in Belgium).²⁴ Although Belgium adheres to the "Twin Peaks" supervision model of financial markets, the National Bank does not seem to focus much attention on (re-)insurance intermediaries, focusing on (re-)insurance companies instead.²⁵

2. Questions

2.1. Regulatory pre-conditions for registration

Except for very minor differences explained below in subsection 2.2., the Law of 4 April 2014 imposes the same professional and organizational requirements upon insurance intermediaries, ancillary insurance intermediaries and reinsurance intermediaries.

Notably, one or multiple²⁶ persons must be identified as responsible for the intermediary's reinsurance distribution. With respect to these "responsible" individuals and all persons in contact with the public, the reinsurance intermediary must provide the FSMA with a dossier indicating that the obligations of Article 266, 1° to 3° are individually met (Art. 264).

Those regulatory pre-conditions are:

1° the intermediary, those responsible for distribution, and those in contact with the public must possess the requisite professional knowledge and skills, as more specifically determined in Articles 12 to 17 of the Royal Decree of 18 June 2019; the professional knowledge and skills referred to in the Royal Decree must be kept up to date through frequent retraining (Art. 18 Royal Decree).

2° the intermediary, those responsible for distribution and those in contact with the public must have the appropriate expertise and professional repute required to perform their duties.

20 https://www.fsma.be/sites/default/files/media/files/2022-01/2021-12-12_kb_ar.pdf.

21 https://www.fsma.be/sites/default/files/media/files/2024-04/2013-12-21mpWet_Loi.pdf

22 Art. 304 et seq. Law of 4 April 2014.

23 <https://www.fsma.be/fr/intermediaire-de-reassurance>

24 https://www.fsma.be/sites/default/files/legacy/content/FR/dispositions/ab9_fr.pdf

25 <https://www.nbb.be/fr/supervision-financiere/controle-prudentiel/domaines-de-controle/entreprises-dassurance-ou-de>

26 Art. 8 Royal Decree of 18 June 2019.

3° the intermediary, those responsible for distribution and those in contact with the public may not have been sentenced for one of the crimes listed in Article 20 of the Law of 25 April 2014 relating to the status and control of credit establishments;²⁷ they may also not have been declared bankrupt less than ten years previously, unless they have been “rehabilitated”.

Thus, both the intermediary (natural or legal person) and its employees responsible for distribution and those who are in contact with the public must fulfil certain conditions. The Royal Decree explains in more detail what documents need to be submitted in relation to all parties involved. For instance, it specifically refers to an excerpt from the criminal records, proof of professional civil liability insurance, and other documents related to proving professional competence (Art. 5 and 6 Royal Decree).

The Law of 4 April 2014 also adds additional obligations constraining the intermediary itself, such as the duty to have a legally required mechanism to handle complaints, the duty to supervise subagents, and the duty to refrain from participating in the promotion, conclusion and performance of (re)insurance contracts that are manifestly contrary to the rules of Belgian law applicable to these contracts themselves and/or to the rules of Belgian law applicable to the offer and conclusion of such contracts (Art. 266 4° *et seq.*) Many of these requirements are more related to maintaining the registration rather than the process of initially obtaining it.

The requirements for registration are largely similar for the intermediaries that are legal instead of natural persons, but there are some additional requirements. For example, there are rules related to the shareholder structure of legal persons (Art. 267 of the Law and Art. 6 Royal Decree).

2.2. Differences between insurance and reinsurance intermediaries

The differences between insurance and reinsurance intermediaries seem minimal. Most notably, insurance intermediaries that carry on the business of mandated underwriters (i.e., those that have the power to agree to cover risks and to conclude and manage insurance contracts) are subject to additional requirements.²⁸ This does not seem to be the case for reinsurance intermediaries even if they were to have similar powers.

Furthermore, as noted above, (re)insurance intermediaries have the duty to refrain from participating in the promotion, conclusion and performance of (re)insurance contracts that are manifestly contrary to the rules of Belgian law applicable to these contracts themselves and/or to the rules of Belgian law applicable to the offer and conclusion of such contracts. Since consumer law does not apply to reinsurance intermediaries (contrary to insurance intermediaries), the former will bear less burdens in this respect.

Lastly, insurance intermediaries are subject to criminal sanctions that do not seem to apply to reinsurance intermediaries (e.g., Art. 324 of the Law),²⁹ even if it would in theory have been possible to likewise apply the sanction to reinsurance intermediaries.

27 Article 20 of the Law of 25 April 2014,
<https://www.ejustice.just.fgov.be/eli/loi/2014/04/25/2014003194/justel>.

28 Art. 267/1 Law of 4 April 2014.

29 Art. 324 Law of 4 April 2014 : « Sont punis d'un emprisonnement d'un mois à cinq ans et d'une amende de 1.000 à 10.000 euros ou d'une de ces peines seulement, les intermédiaires d'assurances qui sont intervenus dans la souscription d'un contrat d'assurance en contravention avec l'[article 266, alinéa 1er, 6°]. » Art. 266, 6° mentions : « en ce qui concerne son activité de distribution d'assurances ou de réassurances en Belgique, l'intermédiaire ne peut traiter, selon le cas, qu'avec des entreprises d'assurance autorisées en application de la législation de contrôle belge pertinente à exercer des

2.3. Exposure when using non-registered intermediaries

Distributors of insurance or reinsurance products who have an establishment in Belgium or who carry on business in Belgium without being established there may not use the services of an insurance intermediary, an insurance intermediary on an ancillary basis, or a reinsurance intermediary who is not registered in accordance with the provisions of the Belgian Insurance Code. If they do so anyway, they are civilly liable for acts performed by the intermediary in the course of distributing insurance or reinsurance.³⁰

Criminal sanctions also exist. Anyone subject to the Law of 4 April 2014 who, with fraudulent intent, accepts insurance contracts presented by an unregistered insurance or reinsurance intermediary or offers an agency contract to an unregistered insurance or reinsurance intermediary will be punished by imprisonment of between eight days and three months and a fine of between 200 and 2,000 euros, or by one of these penalties only. If these offences are due to negligence, they are punishable by a fine of between 1 and 25 euros.³¹

activités d'assurance en Belgique, ou avec des entreprises de réassurance autorisées en application de la législation de contrôle belge pertinente à exercer l'activité de réassurance en Belgique ; »

³⁰ Art. 259 § 1er/1 Law of 4 April 2014.

³¹ Art. 328 Law of 4 April 2014 : « Sans préjudice de l'application de peines plus sévères prévues par le Code pénal, sera puni d'un emprisonnement de huit jours à trois mois et d'une amende de 200 à 2.000 euros ou d'une de ces peines seulement, celui qui dans une intention frauduleuse : [...] - accepte des contrats d'assurance présentés par un intermédiaire d'assurances ou de réassurance non inscrit; - offre un contrat d'agence à un intermédiaire d'assurances ou de réassurance non inscrit; [...] Si ces infractions sont dues à la négligence, elles seront punies d'une amende de 1 à 25 euros. »

BERMUDA

1. Introduction

Unlike the other jurisdictions examined in the present report, Bermuda is not a sovereign state. This jurisdiction, formally named The Bermuda or Somers Islands, is a British Overseas Territory according to the British Overseas Territories Act 2002 (United Kingdom) and constitutes part of His Britannic Majesty's dominions. The international relations of the territory are largely conducted by the Crown acting on the advice of the British government. In the 21st century, the jurisdiction maintains a largely independent internal legal order, the principal organs of which are the Supreme Court, a bicameral legislature (an appointed Senate and an elected House of Assembly) and an executive that is politically responsible to the House of Assembly. The Crown is represented by a Governor, who retains certain powers of veto over legislative and executive acts.³²

The law and regulation of insurance in Bermuda is strongly influenced by British legal and regulatory traditions. The relevant legislative provisions are almost entirely contained in the Insurance Act 1978. That law has been heavily modified since 1978,³³ most recently by the Bermuda Monetary Authority Amendment Act 2023, with effect from 1 January 2024.

It is also important to bear in mind that Bermuda is a very small jurisdiction, in terms of geography, population and economy. The insurance industry plays an enormously important role in the Bermudan economy. By far the most important market for Bermudan insurances services is that of the United States of America, essentially due to geographical and cultural proximity.³⁴

1.1. Insurance intermediaries

The Insurance Act 1978 does not deal with "insurance intermediaries" (*Versicherungsvermittler*) as a specific category. It defines³⁵ five categories of insurance industry service providers who are not insurers:

- "insurance brokers" – persons who act on behalf of policy-holders (insureds) and place the insurance business of the policy-holders with insurers;
- "insurance agents" – persons who act on behalf of insurers, principally receiving proposals, issuing policies and collecting premia;
- "insurance salesmen" – persons who attract potential customers and negotiate insurance business on behalf of insurers, brokers or agents, but are not employees of any insurer, broker or agent;
- "insurance marketplace providers" – persons who offer and manage platforms for buying, selling or otherwise trading insurance business;

³² The Constitution of Bermuda was officially promulgated by the British Crown in the form of the Schedule 2 to the Bermuda Constitution Order 1968, an order of Her Majesty in Council. The full text is freely accessible on the Bermudan governmental internet site <https://www.bermudalaws.bm/#> (last consulted on 04.06.2024).

³³ An up-to-date text of the Insurance Act, consolidated with all amendments introduced since 1978, is freely accessible via the Bermudan governmental internet site <https://www.bermudalaws.bm/#> (last consulted on 04.06.2024), by following the link to "Consolidated Laws" and then consulting the Acts with titles beginning with "I".

³⁴ Refer to I.R.C. Kawaley (ed), *Offshore Commercial Law in Bermuda*, 2nd ed, London: Wildy, Simmonds & Hill Publishing, 2018, pp. 80-83.

³⁵ In subsection 1(1).

“insurance managers” – persons who describe themselves as managers of the insurance business of one or more insurers, but are not employees of any insurer.

Central to these definitions is the concept of “insurance business”. That concept is in turn defined³⁶ as making and carrying out contracts to either pay out upon the occurrence of a defined event (essentially a form of gambling) or to protect a person against loss or liability (essentially indemnification). The Act specifies³⁷ that “re-insurance business” is included within the concept of “insurance business”.

It is interesting to note that the authors of the leading textbook on Bermudan commercial law dedicate a short section of their chapter on insurance law to “Insurance managers and intermediaries”³⁸ and deal in that section exclusively with insurance managers. Insurance intermediaries are apparently not worth mentioning.

The Insurance Act 1978, on the other hand, describes collectively as “innovative intermediaries” those insurance agents, brokers, managers and marketplace providers who are “carrying on [...] business [...] in an innovative and experimental manner”.³⁹ The Act was amended in 2018 to enable the insurance industry regulator to encourage “insurtech innovation” in Bermuda.⁴⁰ It now issues short-term licences to “companies looking to test new technologies or business models on a limited number of clients in a controlled environment” on the basis that, if the experiment is judged successful, the service provider will graduate to a long-term licence.⁴¹ By way of example, Kettle Limited was licensed in 2021 as an “innovative intermediary – insurance agent” using artificial intelligence and machine learning technology (software) to accurately advise re-insurers about the risks of forest fires in specific areas of California.⁴² Although the innovative intermediary licence would not have expired until March of 2023, a full insurance agent’s licence was issued to Kettle Limited in August of 2022.

Our research has not revealed any current plans to introduce further legislative amendments concerning insurance intermediaries.

1.2. Regulation of insurance intermediaries

By virtue of section 9 of the Insurance Act 1978, a person commits a criminal offence if she carries on business as *inter alia* an insurance agent, broker or salesman in or from Bermuda without being registered in Bermuda to that effect.

The Insurance Act 1978 dedicates only two short sections to the regulation of registered insurance intermediaries. Section 28 applies only to insurance agents, managers and marketplace providers.⁴³

³⁶ *Idem.*

³⁷ *Idem.*

³⁸ Kawaley, *Offshore Commercial Law in Bermuda*, *op. cit.*, pp. 85-86.

³⁹ Subsection 1(1).

⁴⁰ Refer to Conyers Dill & Pearman, “Bermuda Creates Legislative Framework to Promote Insurtech Innovation”, electronic text dated August 2018 and freely accessible at <https://www.conyers.com/publications/view/bermuda-creates-legislative-framework-to-promote-insurtech-innovation/> (last consulted on 04.06.2024).

⁴¹ Refer to the section of the website of the Bermuda Monetary Authority that is dedicated to “Innovation”: <https://www.bma.bm/insurance-innovation/> (last consulted on 04.06.2024).

⁴² Refer to S. Evans, “AI focused reinsurtech Kettle licensed as Innovative Agent in Bermuda”, electronic text dated 21.04.2021 and freely accessible at <https://www.artemis.bm/news/ai-focused-reinsurtech-kettle-licensed-as-innovative-agent-in-bermuda/> (last consulted on 04.06.2024). The case of Kettle Limited is also listed on the “Innovation” pages of the Bermuda Monetary Authority’s website, *ibid.*

⁴³ For definitions of these categories, refer above, to point 1.1. of this national report on Bermuda.

They must maintain accurate lists of all the insurers for whom they act and must provide copies of those lists to the regulatory authority on demand. Section 29 is a consumer (policy-holder) protection provision. It states that, where an agent, broker, salesman or marketplace provider (whether “innovative” or not) has apparent authority to act for an insurer and receives a premium paid in pursuance of a contract between a policy-holder and that insurer, then the insurer will be deemed to have received the premium. This provision departs from the definitional presumption that insurance agents act on behalf of insurers, while insurance brokers act on behalf of insureds.⁴⁴

Additional regulation of registered insurance intermediaries is delegated by the Act to the insurance industry supervisory authority. Section 6A authorises that body to “make Rules prescribing prudential or technical standards” for *inter alia* agents, brokers, managers, insurance marketplace providers and “innovative intermediaries”. Those “standards” are expressed to include “reporting requirements” for agents, brokers, managers, insurance marketplace providers, “innovative insurers” and “innovative intermediaries”,⁴⁵ but all of those actors are also required⁴⁶ to comply with the other standards, such as “capital and solvency returns”⁴⁷, “public disclosures”⁴⁸ or “recovery plans”⁴⁹.

Upon application or on its own initiative, the supervisory authority may⁵⁰ decide to grant a particular agent, broker or “innovative intermediary” an exemption from compliance with any prudential or technical rule that is applicable to it. The exemption may be granted subject to conditions.⁵¹ When deciding whether or not to grant an exemption, the authority must “have regard to the nature, scale and complexity of the business to be conducted by the” agent, broker or “innovative intermediary”.⁵²

The prudential and technical standards currently applicable to agents and brokers are set out in the *Insurance Brokers and Insurance Agents Code of Conduct* issued by the supervisory authority in 2019 and published on its website⁵³. The authors explain⁵⁴ that regulation of insurance agents and brokers in Bermuda is governed at the highest level by the “proportionality principle”: the governance, operational control and risk management requirements imposed on each agent or broker will be proportionate to the level of risk to which that agent or broker is exposed. The individual risk level is assessed according to the complexity, volume and nature of that agent or broker’s business. The “nature” of a business is explained⁵⁵ as a concept including the type of services actually provided by an agent or broker and the agent’s or broker’s relationships with insurers and/or policyholders. The concept therefore encompasses the possibility that an agent or broker may or may not be “tied” to a particular insurer, but that distinction is not expressly mentioned in the *Code of Conduct*.

According to a respectable commentary,⁵⁶ this approach to regulation has attracted a substantial proportion of British and US insurance business to Bermuda. New insurance service entities can be

⁴⁴ Compare above, point 1.1. of this national report on Bermuda.

⁴⁵ Insurance Act 1978, paragraphs 6A(1)(g) and (h).

⁴⁶ By subsection 6A(1A) of the Insurance Act 1978.

⁴⁷ Insurance Act 1978, paragraph 6A(1)(b).

⁴⁸ Insurance Act 1978, paragraph 6A(1)(e).

⁴⁹ Insurance Act 1978, paragraph 6A(1)(j).

⁵⁰ By virtue of subsection 6C(1) of the Insurance Act 1978.

⁵¹ Insurance Act 1978, subsection 6C(2).

⁵² Insurance Act 1978, subsection 6C(3A).

⁵³ <https://www.bma.bm/viewPDF/documents/2019-03-26-09-20-45-Insurance-Brokers-and-Insurance-Agents-Code-of-Conduct.pdf> (last consulted on 05.06.2024).

⁵⁴ In paragraph 5 of the *Insurance Brokers and Insurance Agents Code of Conduct*.

⁵⁵ In paragraph 6 of the *Insurance Brokers and Insurance Agents Code of Conduct*.

⁵⁶ Kawaley, *Offshore Commercial Law in Bermuda*, *op. cit.*, pars. 5.1 *et seq.*

quite quickly formed and registered in Bermuda and they operate there under a relatively light regulatory burden and low administrative costs.

Material standards of business conduct are set out in the *Insurance Brokers and Insurance Agents Code of Conduct* under five principal headings:⁵⁷

- A. Sound and prudent business management (not inherently connected to the insurance industry);
- B. Adequate accounting, record-keeping and reporting systems;
- C. Due skill, care and diligence in client relationships;
- D. Disclosure of information to clients;
- E. Complaint handling standards and procedures.

The *Code* also mentions⁵⁸ the need for agents and brokers to formulate, maintain and (where necessary) implement plans to deal with fraud, cases of conflict of interest and business recovery in cases of disaster (hurricanes, pandemics, etc.), to comply with Bermudan legislation combatting money laundering and terrorist financing and to avoid activities that would compromise the international reputation of Bermuda.

1.3. Responsible authority

Regulatory authority for the insurance industry of Bermuda is attributed to the Bermuda Monetary Authority (hereinafter: “BMA”).⁵⁹ The BMA is responsible for supervising more or less the entire financial sector of the Bermudan economy, including banks and other financial intermediaries (most recently digital asset platforms), corporate and trust services providers and investment managers, as well as insurers.⁶⁰

2. Questions

2.1. Regulatory pre-conditions for registration

Section 10 of the Insurance Act 1978 permits the BMA to register insurance agents, brokers, salesmen and “innovative intermediaries” upon submission of an application in the required form and subject to “such conditions as the [BMA] may see fit to impose”.

The relevant application form has been published as Appendix II to the BMA’s IALC Information Bulletin.⁶¹ When the completed form is submitted, it must be accompanied by an essentially formless letter, explaining the applicant’s situation and commercial intentions, together with supporting documentation. A detailed list is set out in the BMA’s IALC Information Bulletin.⁶² It should be noted

⁵⁷ Paragraphs 13 to 33 of the *Insurance Brokers and Insurance Agents Code of Conduct*.

⁵⁸

⁵⁹ This is specified by subsection 1(1) of the Insurance Act 1978.

⁶⁰ Refer to the website of the BMA (<https://www.bma.bm/> - last consulted on 05.06.2024), under the principal heading, “Regulated Sectors”.

⁶¹ Bermuda Monetary Authority, *Information Bulletin – Insurance Assessment and Licensing Committee (IALC) Update*, 28 July 2020, freely accessible on the website of the BMA at <https://www.bma.bm/viewPDF/documents/2020-07-29-11-44-40-Information-Bulletin---Insurance-Assessment-and-Licensing-Committee.pdf> The BMA also provides an overview of its licensing procedures at <https://www.bma.bm/insurance-licensing> (both last consulted on 05.06.2024).

⁶² *Ibid*, at pp. 7-9, under the heading “IALC considerations related to registration as an Insurance Manager, Insurance Broker, Insurance Agent, Insurance Marketplace or Innovative Intermediary”.

that the list is not exhaustive; the applicant is free to add any explanations or documents that it considers to be relevant.

One of the amendments introduced into the Insurance Act 1978 in 2018 allows the BMA to modify or waive certain pre-conditions to registration of inter alia an “innovative intermediary”⁶³. According to subsection 6E(5), the BMA may consider that requirements “including but not limited to corporate governance, capital and risk management requirements are inappropriate given the risk profile of the [...] innovative intermediary [...]”.

The Insurance Act 1978 places three restrictions on the discretionary power of the BMA to register an intermediary of any kind.

First, the applicant for registration must “fulfil the minimum criteria”.⁶⁴ These criteria are set out in the “Schedule” at the end of the Act. One criterion is the likelihood that the applicant’s business will, if registered, “be carried on with integrity and the professional skills appropriate to the nature and scale of its activities”.⁶⁵ Closely linked thereto is the characterisation of each individual who holds a controlling position within the applicant entity (for example, a major shareholder or a director) as “a fit and proper person to perform functions in relation to any activity carried on by the registered person”.⁶⁶ That formulation might lead the reader to conclude that only corporations can be registered. This conclusion is negated by the caveat preceding the criterion according to which the applicant’s business must be effectively directed by at least two individuals: this criterion is applicable only “[i]f [the applicant is] a body corporate”.⁶⁷ That formulation clearly implies that a registered entity does not necessarily have to be a corporation. It may be a partnership, or even an individual. Only one criterion is expressly and exclusively applicable to insurance intermediaries: paragraph 4(2B) of the Schedule requires each agent, broker, manager or insurance marketplace provider to maintain indemnity insurance cover “sufficient [...] to meet his business obligations given the nature, scale and complexity of his business”.

Secondly, the person must have “knowledge of the insurance business adequate to enable him to act in the capacity in which he has applied for registration”.⁶⁸ This restriction obviously overlaps the “minimum criteria” of professional skill and of personal fitness and propriety that are formulated in the Schedule to the Act.

Thirdly, the BMA is required to refuse the registration of an applicant “if of opinion that it is not in the public interest that registration should be granted”.⁶⁹ This provision effectively allows the BMA to exclude insurance service providers for policy (political) reasons, even when they fulfil all the legislative criteria, have complied with all application requirements and are willing to comply with any conditions attached to registration.

⁶³ For the meaning of this concept, refer above, to point 1.1. of this national report on Bermuda.

⁶⁴ Insurance Act 1978, paragraph 11(a).

⁶⁵ Paragraph 6 of the Schedule to the Insurance Act 1978.

⁶⁶ Subparagraph 1(1) of the Schedule to the Insurance Act 1978.

⁶⁷ Paragraph 2 of the Schedule to the Insurance Act 1978.

⁶⁸ Insurance Act 1978, paragraph 11(b).

⁶⁹ Insurance Act 1978, section 12.

2.2. Differences in requirements for insurance and reinsurance intermediaries

In general, neither the Insurance Act 1978, nor the regulatory materials issued by the BMA make and distinction between insurance and re-insurance intermediaries, or between insurance and re-insurance in other respects.

The only exception that we have come across appears in the definition of the criminal offence committed by persons who arrange contracts on behalf of unlicensed insurers; refer below.⁷⁰

2.3. Criminal sanctions for companies working with non-registered brokers

No criminal sanctions are provided by the law of Bermuda specifically in respect of insurers who conduct insurance business with unregistered brokers, agents or other forms of intermediary.

It may be interesting to note that, on the contrary, a criminal penalty is provided in respect of intermediaries who conduct insurance business with unregistered insurers. According to subsection 47(1) of the Insurance Act 1978,

“[...] any person who solicits another person, or causes him to enter into, or make application to enter into a contract of domestic business with a person who is not a registered insurer, commits an offence”

The offence is punishable by imprisonment for up to three years and/or a fine of up to BD\$150'000 (about CHF 135'000).⁷¹ When the offence is committed by a corporation, any director, manager or “other similar officer” of that corporation is deemed to be also guilty of the same offence if it was committed due to the consent, connivance or negligence of the individual.⁷²

According to paragraph 47(2)(b) of the Insurance Act 1978, no offence is committed where the intended or concluded contract is “any contract of re-insurance”. In effect, it is lawful for Bermudan agents / brokers to arrange contracts with foreign re-insurers, who are not registered with the BMA.

⁷⁰ The last paragraph under point 2.3. of this national report on Bermuda.

⁷¹ Insurance Act 1978, subsection 55(1).

⁷² Insurance Act 1978, subsection 55(2).

DEUTSCHLAND

1. Einleitung

1.1. Überblick

Das Versicherungsrecht allgemein und das Rückversicherungsrecht im Besonderen sind in Deutschland **sehr unübersichtlich geregelt**. Insbesondere zur **Vermittlung von Rückversicherungen** finden sich nur **wenige Vorgaben**, da die beteiligten Parteien jeweils Versicherungsunternehmen sind und grundsätzlich keine rechtlich schutzbedürftiger ist als die andere.⁷³

1.2. Definition

Eine ausdrückliche Regelung zu Versicherungsvermittlern für Rückversicherungsverträge findet sich in **§ 34d der Gewerbeordnung**, welcher die Versicherungsvermittlung allgemein sowie für Rückversicherungen **legaldefiniert**.

Demnach ist Versicherungsvermittler, **«[w]er gewerbsmäßig den Abschluss von Versicherungs- oder Rückversicherungsverträgen vermitteln will.»**⁷⁴ Das Gesetz unterscheidet sodann zwischen zwei Arten von Versicherungsmittelnden:

«Versicherungsvermittler ist, wer

1. als Versicherungsvertreter eines oder mehrerer Versicherungsunternehmen oder eines Versicherungsvertreters damit betraut ist, Versicherungsverträge zu vermitteln oder abzuschließen oder
2. als Versicherungsmakler für den Auftraggeber die Vermittlung oder den Abschluss von Versicherungsverträgen übernimmt, ohne von einem Versicherungsunternehmen oder einem Versicherungsvertreter damit betraut zu sein.»⁷⁵

Ebenfalls in § 34d Gewerbeordnung findet sich auch die Definition⁷⁶ der sogenannten **gebundenen Versicherungsvermittler**. Demnach handelt es sich um eine Person, die «[ihre] Tätigkeit als Versicherungsvermittler ausschließlich im Auftrag eines oder, wenn die Versicherungsprodukte nicht in Konkurrenz stehen, mehrerer Versicherungsunternehmen ausübt, die im Inland zum Geschäftsbetrieb befugt sind, und durch das oder die Versicherungsunternehmen für ihn die uneingeschränkte Haftung aus seiner Vermittlertätigkeit übernommen wird [...]».⁷⁷

⁷³ U. Schönleiter, in Landmann/Rohmer: Gewerbeordnung, 92. EL, München 2023, § 34d, Rn. 59.

⁷⁴ § 34d Abs. 1 S. 1 Gewerbeordnung (GewO), verfügbar unter <https://www.gesetze-im-internet.de/gewo/index.html> (31.05.2024):

⁷⁵ § 34d Abs. 1 S. 2 Nr. 1, 2 GewO.

⁷⁶ Es handelt sich hierbei allerdings nicht um eine Legaldefinition. Tatsächlich verwendet § 34d GewO nicht den Begriff «gebunden»; dieser findet sich jedoch, zusammen mit einem Verweis auf § 34d Abs. 7 S. 1 Nr. 1 GewO in § 8 S. 1 Nr. 3 lit. b) sublit. bb) in Verbindung mit Nr. 8 VersVermV.

⁷⁷ «§ 34d Versicherungsvermittler, Versicherungsberater

(7) Abweichend von Absatz 1 bedarf ein Versicherungsvermittler keiner Erlaubnis, wenn er

1. seine Tätigkeit als Versicherungsvermittler ausschließlich im Auftrag eines oder, wenn die Versicherungsprodukte nicht in Konkurrenz stehen, mehrerer Versicherungsunternehmen ausübt, die im Inland zum Geschäftsbetrieb befugt sind, und durch das oder die Versicherungsunternehmen für ihn die uneingeschränkte Haftung aus seiner Vermittlertätigkeit übernommen wird oder
2. in einem anderen Mitgliedstaat der Europäischen Union oder in einem anderen Vertragsstaat des Abkommens über den Europäischen Wirtschaftsraum niedergelassen ist und die Eintragung in ein Register nach Artikel 3 der Richtlinie (EU) 2016/97 des Europäischen Parlaments und des Rates vom 20. Januar 2016 über Versicherungsvertrieb (ABl. L 26 vom 2.2.2016, S. 19) nachweisen kann.»

1.3. Rechtliche Regelung

Wie bereits dargestellt findet sich mit § 34d eine zentrale Vorschrift über Rück- und andere Versicherungsvermittler in der **Gewerbeordnung**. Aus dieser geht ausser der zuvor genannten Definition auch hervor, dass Versicherungsvermittler für die Ausübung ihrer Tätigkeit grundsätzlich eine Genehmigung benötigen, sofern kein Ausnahmetatbestand vorliegt^{78, 79}. Die Vorschrift wurde im Rahmen der Umsetzung der Richtlinie über Versicherungsvertrieb⁸⁰ erweitert. § 34 d Gewerbeordnung regelt auch, dass sich Rück- und andere Versicherungsvermittler in das Vermittlerregister eintragen lassen müssen.⁸¹

Das **Versicherungsvertragsgesetz** hingegen findet auf Rückversicherungsverträge jedoch ausdrücklich **keine Anwendung**.⁸² Gemäss der Lehre verbiete sich zwar aufgrund dieser klaren Regelung eine analoge Anwendung des Versicherungsvertragsgesetzes auf Rückversicherungen. Dennoch sollen zumindest die allgemeinen Grundsätze des Gesetzes «interpretationsleitend» anwendbar sein, sofern die vertraglichen Regelungen Lücken aufweisen.⁸³ Die Legaldefinition der Versicherungsvermittler aus dem zuvor genannten § 34d Gewerbeordnung stimmt jedenfalls mit derjenigen aus dem Versicherungsvertragsgesetz⁸⁴ überein.

⁷⁸ Siehe hierzu unter Punkt 2. in diesem Gutachten.

⁷⁹ § 34d Abs. 1 S. 1, S. 2 Nr. 1, 2 Gewerbeordnung (GewO), verfügbar unter <https://www.gesetze-im-internet.de/gewo/index.html> (31.05.2024):

«(1) Wer gewerbsmäßig den Abschluss von Versicherungs- oder Rückversicherungsverträgen vermitteln will (Versicherungsvermittler), bedarf nach Maßgabe der folgenden Bestimmungen der Erlaubnis der zuständigen Industrie- und Handelskammer. Versicherungsvermittler ist, wer

1. als Versicherungsvertreter eines oder mehrerer Versicherungsunternehmen oder eines Versicherungsvertreters damit betraut ist, Versicherungsverträge zu vermitteln oder abzuschließen oder

2. als Versicherungsmakler für den Auftraggeber die Vermittlung oder den Abschluss von Versicherungsverträgen übernimmt, ohne von einem Versicherungsunternehmen oder einem Versicherungsvertreter damit betraut zu sein.»

⁸⁰ Richtlinie (EU) 2016/97 des Europäischen Parlaments und des Rates vom 20. Januar 2016 über Versicherungsvertrieb (Neufassung), verfügbar unter <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32016L0097> (03.06.2024).

⁸¹ Siehe hierzu unter Punkt 2.1. in diesem Gutachten.

⁸² Gleiches gilt auch für Seeversicherungsverträge, § 209 Versicherungsvertragsgesetz (VVG), verfügbar unter https://www.gesetze-im-internet.de/vvg_2008/index.html (31.05.2024):

«§ 209 Rückversicherung, Seeversicherung

Die Vorschriften dieses Gesetzes sind auf die Rückversicherung und die Versicherung gegen die Gefahren der Seeschifffahrt (Seeversicherung) nicht anzuwenden.»

⁸³ R. Rixecker, in *Versicherungsvertragsgesetz*, 7. Aufl., München 2022, § 209, Rn. 1; D. Looschelders, in T. Langheid & M. Wandt (Hrsg.), *Münchener Kommentar zum Versicherungsvertragsgesetz*, 3. Aufl., München 2024, § 209, Rn. 34; D. Klimke, in *Prölss/Martin: Versicherungsvertragsgesetz*, 31. Aufl. München 2021, § 209, Rn. 3b.

⁸⁴ § 59 Abs. 1 S. 1 in Verbindung mit Abs. 2, Abs. 3 S. 1 VVG:

«§ 59 Begriffsbestimmungen

(1) Versicherungsvermittler im Sinn dieses Gesetzes sind Versicherungsvertreter und Versicherungsmakler.

(2) Versicherungsvertreter im Sinn dieses Gesetzes ist, wer von einem Versicherer oder einem Versicherungsvertreter damit betraut ist, gewerbsmäßig Versicherungsverträge zu vermitteln oder abzuschließen.

(3) Versicherungsmakler im Sinn dieses Gesetzes ist, wer gewerbsmäßig für den Auftraggeber die Vermittlung oder den Abschluss von Versicherungsverträgen übernimmt, ohne von einem Versicherer oder von einem Versicherungsvertreter damit betraut zu sein.»

Schliesslich ist auch das **Versicherungsaufsichtsgesetz**⁸⁵ zu nennen. Dieses regelt sehr detailliert die Aufsicht über Versicherungsunternehmen jeglicher Art. Dabei enthält es auch Vorschriften zum Rückversicherungsvertrieb sowie zu Versicherungsvermittlern.

1.4. Zuständige Behörde

Zuständig für die Genehmigung, als Rückversicherungsmittelnde tätig werden zu dürfen, sind die jeweils örtlich zuständigen **Industrie- und Handelskammern**.⁸⁶ Dabei richten sich die Voraussetzungen für die Genehmigung nach der Versicherungsvermittlungsverordnung⁸⁷.

2. Fragen

2.1. Rechtliche Regelung der Aufsicht

Um gewerblich als Rück- oder andere Versicherungsvermittlende tätig werden zu dürfen, ist grundsätzlich eine **Genehmigung nach der Gewerbeordnung** erforderlich.⁸⁸ Eine solche Genehmigung wird von der jeweils örtlich zuständigen Industrie- und Handelskammer erteilt. Dem Antrag müssen zusätzliche Angaben beiliegen, welche es der Industrie- und Handelskammer erlauben, die Person später zu überwachen.⁸⁹ Zudem muss die Person eine Sachkundeprüfung über fachliche Grundlagen und Kundenberatung vor der Kammer⁹⁰ ablegen.⁹¹ Rück- und andere Versicherungsvermittlende

⁸⁵ VAG, verfügbar unter https://www.gesetze-im-internet.de/vag_2016/index.html (31.05.2024).

⁸⁶ § 34d Abs. 1 S. 1 GewO.

⁸⁷ VersVermV, verfügbar unter https://www.gesetze-im-internet.de/versvermv_2018/index.html (31.05.2024).

⁸⁸ § 34d Abs. 1 S. 1 GewO.

⁸⁹ § 1 Abs. 1 Nr. 1-3 VersVermV:

«§ 1 Zusätzliche Angaben bei der Antragstellung

(1) Mit einem Antrag auf Erteilung einer Erlaubnis nach § 34d Absatz 1 oder 2 der Gewerbeordnung hat der Antragsteller der zuständigen Industrie- und Handelskammer zum Zwecke der späteren Überwachung des Erlaubnisinhabers zusätzlich folgende Angaben zu übermitteln:

1. die natürlichen oder juristischen Personen, die eine unmittelbare oder mittelbare Beteiligung von über 10 Prozent an den Stimmrechten oder am Kapital des Antragstellers halten, sowie die jeweilige Höhe der Beteiligung,

2. die natürlichen oder juristischen Personen mit engen Verbindungen im Sinne des § 7 Nummer 7 des Versicherungsaufsichtsgesetzes zum Antragsteller, die zu Interessenkonflikten führen können,

3. die Tatsachen, die ausschließen, dass die Beteiligungen im Sinne der Nummer 1 und die engen Verbindungen im Sinne der Nummer 2 die Überwachung durch die zuständige Industrie- und Handelskammer beeinträchtigen.»

⁹⁰ § 3 Abs. 1 VersVermV:

«§ 3 Zuständige Stelle und Prüfungsausschuss

(1) Die Sachkundeprüfung kann bei jeder Industrie- und Handelskammer abgelegt werden.»

⁹¹ § 2 Abs. 1 VersVermV:

«§ 2 Sachkundeprüfung

(1) Gegenstand der Sachkundeprüfung nach § 34d Absatz 5 Satz 1 Nummer 4 der Gewerbeordnung sind die erforderlichen Kenntnisse und Fähigkeiten auf folgenden Gebieten und deren praktische Anwendung:

1. fachliche Grundlagen:

a) rechtliche Grundlagen für die Versicherungsvermittlung und -beratung,

b) sozialversicherungsrechtliche Rahmenbedingungen, insbesondere gesetzliche Rentenversicherung, private Vorsorge durch Lebens-, Renten- und Berufsunfähigkeitsversicherung, Grundzüge der

müssen sich unverzüglich nach Aufnahme ihrer Tätigkeit in das Vermittlerregister der örtlich zuständigen Industrie- und Handelskammer⁹² eintragen^{93, 94}.

Das Gesetz sieht jedoch auch **Ausnahmen von der Genehmigungspflicht** für Rück- und andere Versicherungsvermittler vor. Demnach benötigt keine Genehmigung, wer als sogenannte gebundene versicherungsvermittelnde Person tätig wird oder wer eine Erlaubnis aus einem anderen Mitgliedstaat der Europäischen Union (EU) oder des Europäischen Wirtschaftsraumes (EWR)⁹⁵ innehat.⁹⁶ In beiden Fällen müssen die Versicherungsvermittler allerdings dennoch im Vermittlerregister eingetragen sein, wenn auch auf unterschiedliche Weise⁹⁷.

Gebundene Versicherungsvermittler

Der erstgenannte Ausnahmetatbestand betrifft **gebundene Versicherungsvermittler**, also solche versicherungsvermittelnden Personen, die ihre Tätigkeit ausschliesslich im Auftrag eines⁹⁸ Versicherungsunternehmens ausübt. Dabei muss es sich um ein Versicherungsunternehmen handeln, das in Deutschland zum Geschäftsbetrieb befugt ist und das die uneingeschränkte Haftung für die Tätigkeit der versicherungsvermittelnden Person übernimmt. In diesem Fall muss das Versicherungsunternehmen prüfen, ob die gebundene versicherungsvermittelnde Person die Voraussetzungen für ihre Tätigkeit erfüllt.⁹⁹ Diese Regelung gilt jedoch nicht für den

betrieblichen Altersversorgung, staatliche Förderung und steuerliche Behandlung der privaten Vorsorge und der durch Entgeltumwandlung finanzierten betrieblichen Altersversorgung,

c) Unfallversicherung, Krankenversicherung und Pflegeversicherung,

d) verbundene Hausratversicherung und verbundene Gebäudeversicherung,

e) Haftpflichtversicherung, Kraftfahrtversicherung und Rechtsschutzversicherung;

2. Kundenberatung:

a) Bedarfsermittlung,

b) Lösungsmöglichkeiten,

c) Produktdarstellung und Information.»

⁹² § 11a Abs. 1 S. 1, 2 GewO:

«§ 11a Vermittlerregister

(1) Jede Industrie- und Handelskammer (Registerbehörde) führt ein Register der nach § 34d Absatz 10 Satz 1, § 34f Absatz 5, § 34h Absatz 1 Satz 4 und § 34i Absatz 8 Eintragungspflichtigen. Die örtliche Zuständigkeit richtet sich nach dem Landesrecht.»

⁹³ Siehe zu den erforderlichen Angaben § 8 VersVermV.

⁹⁴ § 34d Abs. 10 S. 1 GewO:

«§ 34d Versicherungsvermittler, Versicherungsberater

(10) Gewerbetreibende nach Absatz 1 Satz 2, Absatz 2 Satz 2, Absatz 6 Satz 1 und Absatz 7 Satz 1 Nummer 1 sind verpflichtet, sich und die Personen, die für die Vermittlung oder Beratung in leitender Position verantwortlich sind, unverzüglich nach Aufnahme ihrer Tätigkeit in das Register nach § 11a Absatz 1 Satz 1 nach Maßgabe einer Rechtsverordnung nach § 11a Absatz 5 eintragen zu lassen.»

⁹⁵ Ein Abkommen, wodurch auch Versicherungsvermittler aus der Schweiz von diesem Ausnahmetatbestand profitieren könnten, scheinen nicht zustande gekommen zu sein, vgl. U. Schönleiter, in Landmann/Rohmer: Gewerbeordnung, 92. EL, München 2023, § 34d, Rn. 5, 211.

⁹⁶ § 34d Abs. 7 S. 1 Nr. 1, 2 GewO.

⁹⁷ Siehe unter Punkt 2.1. die Erklärungen zu gebundenen und ausländischen Versicherungsvermittlern.

⁹⁸ Es kann sich auch um mehrere Versicherungsunternehmen handeln, sofern die Versicherungsprodukte nicht in Konkurrenz zueinanderstehen, § 34d Abs. 7 S. 1 Nr. 1 GewO.

⁹⁹ § 48 Abs. 2 S. 2 Nr. 1 in Verbindung mit S. 1 VAG:

§ 48 Anforderungen an den Versicherungsvertrieb

(2) Die Versicherungsunternehmen müssen sicherstellen, dass ihre unmittelbar oder maßgeblich am Versicherungsvertrieb beteiligten Angestellten zuverlässig sind, in geordneten Vermögensverhältnissen leben und über die zur Vermittlung der jeweiligen Versicherung angemessene Qualifikation verfügen und sich regelmäßig fortbilden. Mit gewerbsmäßig tätigen Versicherungsvermittlern, die

Rückversicherungsvertrieb im Zusammenhang mit Risiken, die nicht in einem Mitglied- oder Vertragsstaat belegen sind.¹⁰⁰ Grund hierfür ist, dass die Zedenten in diesem Fall weniger schutzbedürftig sind.¹⁰¹

Da diese Überprüfung jedoch nicht mehr in den Zuständigkeitsbereich der Industrie- und Handelskammern fällt, kommt bei gebundenen Versicherungsvermittlern **indirekt** der Bundesanstalt für Finanzdienstleistungsaufsicht (**BaFin**) zu. Diese kontrolliert allerdings nicht die versicherungsvermittelnde Person selbst, sondern das Versicherungsunternehmen, für welches die Person arbeitet.¹⁰²

Auch gebundene Rück- und andere Versicherungsvermittler müssen sich in das **Vermittlerregister** eintragen lassen.¹⁰³ Ohnehin handelt es sich bei dieser Privilegierung lediglich um eine Möglichkeit, sodass es gebundenen Versicherungsvermittlern auch offensteht, eine Genehmigung zu beantragen und sich entsprechend in das Vermittlerregister eintragen zu lassen.¹⁰⁴

Ausländische Versicherungsvermittler

Der zweitgenannte Ausnahmetatbestand dient der europäischen Dienstleistungsfreiheit. Jedoch müssen **ausländische Versicherungsvermittler** vor Beginn ihrer Tätigkeit in Deutschland über die Aufsichtsbehörde in ihrem Heimatland dem deutschen Vermittlerregister gemeldet werden. Die Industrie- und Handelskammer sieht für ausländische Versicherungsvermittler eine eigene Rubrik im Vermittlerregister vor.¹⁰⁵

-
1. nach § 34d Absatz 7 Satz 1 Nummer 1 der Gewerbeordnung nicht der Erlaubnispflicht unterliegen [...] dürfen die Versicherungsunternehmen nur zusammenarbeiten, wenn diese Versicherungsvermittler die in Satz 1 genannten Voraussetzungen erfüllen.»
- ¹⁰⁰ Vgl. § 48 Abs. 6 S. 2 in Verbindung mit § 48 VAG:
«§ 48 Anforderungen an den Versicherungsvertrieb
(6) [...] Für den Rückversicherungsvertrieb im Zusammenhang mit Risiken, die nicht in einem Mitglied- oder Vertragsstaat belegen sind, gelten die §§ 48 und 51 nicht.»
- ¹⁰¹ G.W. Bähr, in D. Kaulbach *et al.* (Hrsg.), Versicherungsaufsichtsgesetz, 6. Aufl., München 2019, § 48, Rn. 32.
- ¹⁰² U. Schönleiter, in Landmann/Rohmer: Gewerbeordnung, 92. EL, München 2023, § 34d, Rn. 210; BaFin, Aufsicht über den Versicherungsvertrieb, verfügbar unter https://www.bafin.de/DE/Aufsicht/VersichererPensionsfonds/Allgemeines/Vermittlerwesen/vermittlung_node.html (31.05.2024).
- ¹⁰³ Vgl. § 8 S. 1 Nr. 3 lit. b) sublit. bb) in Verbindung mit Nr. 8 VersVermV:
«§ 8 Angaben zur Speicherung im Vermittlerregister
Im Vermittlerregister nach § 11a der Gewerbeordnung werden folgende Angaben zu den Eintragungspflichtigen gespeichert:
[...] 3. die Angabe, ob der Eintragungspflichtige tätig wird
[...] b) als Versicherungsvertreter
[...] bb) als gebundener Versicherungsvertreter nach § 34d Absatz 7 Satz 1 Nummer 1 der Gewerbeordnung,
[...] 8. bei einem Versicherungsvermittler, der nach § 34d Absatz 7 Satz 1 Nummer 1 der Gewerbeordnung keiner Erlaubnis bedarf, das oder die haftungsübernehmenden Versicherungsunternehmen, [...]».
- ¹⁰⁴ Deutscher Bundestag, Drucksache 16/1935 vom 23.06.2006, verfügbar unter <https://dserver.bundestag.de/btd/16/019/1601935.pdf> (31.05.2024), S. 19.
- ¹⁰⁵ U. Schönleiter, in Landmann/Rohmer: Gewerbeordnung, 92. EL, München 2023, § 34d, Rn. 210.

2.2. Aufsichtserleichterungen gegenüber anderen Versicherungsvermittlern

Materiellrechtlich unterliegen Rückversicherungsvermittler deutlich weniger Vorschriften als anderen Versicherungsvermittler. Insbesondere finden die Vorgaben des Versicherungsvertragsgesetzes auf Rückversicherungsverträge keine Anwendung.¹⁰⁶ Zudem finden sich auch in der Versicherungsvermittlungsverordnung Privilegierungen für Rückversicherungsvermittler. Diese betreffen die Informationspflichten der Versicherungsvermittler gegenüber den Versicherungsnehmenden beim ersten Kontakt¹⁰⁷ sowie die Zahlungssicherung zugunsten der Versicherungsnehmenden¹⁰⁸. Zu beachten ist jedoch, dass viele dieser Privilegierungen auch für andere Versicherungsvermittler gelten, sofern der Versicherungsvertrag ein sogenanntes Grossrisiko¹⁰⁹ betrifft.¹¹⁰

Im Hinblick auf die **Aufsicht** scheint es hingegen **keinen Unterschied** zu geben zwischen denjenigen über Rückversicherungsvermittler und denjenigen über anderen Versicherungsvermittler. Die unter Punkt 2.1. dargestellten Regelungen zur Aufsicht gelten sowohl für Rück- als auch für andere Versicherungsvermittler.

Auch das Versicherungsaufsichtsgesetz scheint nach unseren Erkenntnissen keine nennenswerte Privilegierung von Rückversicherungsvermittlern im Hinblick auf die Aufsicht über diese zu enthalten.

¹⁰⁶ § 209 VVG.

¹⁰⁷ § 15 Abs. 3 VersVermV:

«§ 15 Information des Versicherungsnehmers

(3) Die Absätze 1 und 2 gelten nicht für Tätigkeiten in Bezug auf Rückversicherungen und Versicherungsverträge über Großrisiken nach § 210 Absatz 2 des Versicherungsvertragsgesetzes.»

¹⁰⁸ § 25 VersVermV:

«§ 25 Rückversicherungen

Die §§ 20 bis 24 gelten nicht für die Vermittlung von und die Beratung über Rückversicherungen.»

Die §§ 20-24 VersVermV regeln die Sicherheitsleistung und Versicherung (§ 20), den Nachweis (§ 21), die Aufzeichnungspflicht des Gewerbetreibenden (§ 22), die Prüfungen (§ 23) sowie die Rechte und Pflichten der an der Prüfung Beteiligten (§ 24).

¹⁰⁹ § 210 Abs. 2 S. 1 VVG:

«§ 210 Großrisiken, laufende Versicherung

(2) Großrisiken im Sinne dieser Vorschrift sind:

1. Risiken der unter den Nummern 4 bis 7, 10 Buchstabe b sowie den Nummern 11 und 12 der Anlage 1 zum Versicherungsaufsichtsgesetz erfassten Transport- und Haftpflichtversicherungen,
2. Risiken der unter den Nummern 14 und 15 der Anlage 1 zum Versicherungsaufsichtsgesetz erfassten Kredit- und Kautionsversicherungen bei Versicherungsnehmern, die eine gewerbliche, bergbauliche oder freiberufliche Tätigkeit ausüben, wenn die Risiken damit in Zusammenhang stehen, oder
3. Risiken der unter den Nummern 3, 8, 9, 10, 13 und 16 der Anlage 1 zum Versicherungsaufsichtsgesetz erfassten Sach-, Haftpflicht- und sonstigen Schadensversicherungen bei Versicherungsnehmern, die mindestens zwei der folgenden drei Merkmale überschreiten:

a) 6 600 000 Euro Bilanzsumme,

b) 13 600 000 Euro Nettoumsatzerlöse,

c) im Durchschnitt 250 Arbeitnehmer pro Wirtschaftsjahr.»

¹¹⁰ § 210 Abs. 1 VVG für Beschränkungen der Vertragsfreiheit nach dem VVG:

«§ 210 Großrisiken, laufende Versicherung

(1) Die Beschränkungen der Vertragsfreiheit nach diesem Gesetz sind auf Großrisiken und auf laufende Versicherungen nicht anzuwenden.»

§ 15 Abs. 3 VersVermV für Informationspflichten beim Erstkontakt.

2.3. Strafbarkeit der Versicherungsunternehmen

Wer mit Rück- oder anderen Versicherungsvermittlern zusammenarbeitet, die keine Genehmigung für ihre Tätigkeit haben, obwohl sie der Genehmigungspflicht unterfallen, oder die die Voraussetzungen für eine Tätigkeit als gebundene Versicherungsvermittler nicht erfüllen, macht sich **nicht strafbar**, begeht jedoch eine **Ordnungswidrigkeit**.¹¹¹ Gleiches gilt bei der Zusammenarbeit mit gebundenen oder ausländischen Versicherungsvermittlern, wenn diese die jeweiligen Voraussetzungen¹¹² für eine Ausnahme von der Genehmigungspflicht nicht erfüllen. Der Tatbestand erfasst sowohl vorsätzliches als auch fahrlässiges Handeln und richtet sich gegen die Organe des Versicherungsunternehmens, nicht gegen die Mitarbeitenden oder die Versicherungsvermittler. Zu beachten ist, dass im Ordnungswidrigkeitenrecht in Deutschland der sogenannte Einheitstäterbegriff gilt.¹¹³ Demnach wird nicht wie im Strafrecht zwischen Mittäterschaft, Anstiftung und Beihilfe unterschieden, sondern jegliche beteiligte Person handelt ordnungswidrig.¹¹⁴

Die Ordnungswidrigkeit kann mit einer Geldbusse von bis zu 500'000 Euro sanktioniert werden. Handelt es sich um eine juristische Person oder um eine Personenvereinigung, so kann eine Geldbusse von bis zu 500 Millionen Euro verhängt werden.¹¹⁵ Alternativ kann die Tat mit einer Geldbusse bis zum Doppelten des aus der Tat gezogenen wirtschaftlichen Vorteils geahndet werden, wobei dieser erzielte Gewinne und vermiedene Verluste umfasst und geschätzt werden kann.¹¹⁶

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- ¹¹¹ § 332 Abs. 3 Nr. 3 VAG:
«§ 332 Bußgeldvorschriften
(3) Ordnungswidrig handelt, wer vorsätzlich oder fahrlässig
[...] 3. entgegen § 48 Absatz 1 oder Absatz 2 Satz 2 mit einem Versicherungsvermittler zusammenarbeitet, [...]»
- ¹¹² Siehe unter Punkt 2.1. die Erklärungen zu gebundenen und ausländischen Versicherungsvermittlern.
- ¹¹³ S. Göertz, in D. Kaulbach *et al.* (Hrsg.), Versicherungsaufsichtsgesetz, 6. Aufl., München 2019, § 332, Rn. 1; Ch. Coen, in J. Graf (Hrsg.), BeckOK OWiG, 34. Ed., München 2024, § 14, Vorbemerkung.
- ¹¹⁴ § 14 Abs. 1 S. 1 Ordnungswidrigkeitengesetz (OWiG), verfügbar unter https://www.gesetze-im-internet.de/owig_1968/index.html (12.09.2024):
«§ 14 Beteiligung
(1) Beteiligen sich mehrere an einer Ordnungswidrigkeit, so handelt jeder von ihnen ordnungswidrig.»
- ¹¹⁵ § 332 Abs. 5 S. 1, 2 in Verbindung mit Abs. 3 Nr. 3 VAG:
«§ 332 Bußgeldvorschriften
(5) Die Ordnungswidrigkeit kann in den Fällen der Absätze 4e und 4h bis 4k mit einer Geldbuße bis zu fünf Millionen Euro, in den Fällen des Absatzes 4d mit einer Geldbuße bis zu siebenhunderttausend Euro, in den Fällen des Absatzes 1 Nummer 2 Buchstabe b, des Absatzes 2 Nummer 3, des Absatzes 3 Nummer 3, 3a, 3b und 3c, der Absätze 4a und 4b sowie 4g mit einer Geldbuße bis zu fünfhunderttausend Euro, in den Fällen des Absatzes 2 Nummer 2, des Absatzes 3 Nummer 2 Buchstabe a, der Absätze 4 und 4f mit einer Geldbuße bis zu zweihunderttausend Euro, in den Fällen des Absatzes 3 Nummer 7 mit einer Geldbuße bis zu hunderttausend Euro, in den übrigen Fällen mit einer Geldbuße bis zu fünfzigtausend Euro geahndet werden. In den Fällen des Absatzes 3 Nummer 3 kann gegenüber einer juristischen Person oder Personenvereinigung über Satz 1 hinaus eine höhere Geldbuße von bis zu fünf Millionen Euro verhängt werden.»
- ¹¹⁶ § 332 Abs. 7 S. 1, 2 VAG:
«§ 332 Bußgeldvorschriften
7) Über die in den Absätzen 5, 6, 6a, 6b, 6c und 6d genannten Beträge hinaus kann die Ordnungswidrigkeit in den Fällen des Absatzes 3 Nummer 3, 3a, 3b, 3c, 4d, 4f, 4h, 4i und 4j mit einer Geldbuße bis zum Zweifachen, in den Fällen des Absatzes 4e und 4g mit einer Geldbuße bis zum Dreifachen des aus dem Verstoß gezogenen wirtschaftlichen Vorteils geahndet werden. Der wirtschaftliche Vorteil umfasst erzielte Gewinne und vermiedene Verluste und kann geschätzt werden.»

IRELAND

1. Introduction

In 2018, the European Union's ("EU") Insurance Distribution Directive 2016/97 was transposed into Irish law, bringing about much needed clarification to the existing legislation governing intermediaries operating in Ireland.¹¹⁷

Like in England, from which most of Irish insurance law emanates, little distinction has been made historically between the regulation of insurance and reinsurance. The two are therefore often discussed using the umbrella term of "(re)insurance". As will be seen, a number of distinctions are made between insurance and reinsurance, particularly with regard to consumer protection regulation, which typically does not apply in the same way – or at all – to reinsurers (and reinsurance intermediaries).

1.1. Insurance intermediaries

"Insurance intermediary" is defined in secondary legislation, namely the *European Union (Insurance Distribution) Regulations 2018* (the "IDR").¹¹⁸ The IDR adopts the definition employed by the EU's Insurance Distribution Directive 2016/97 ("IDD"):

"insurance intermediary" means any person, other than an insurance or reinsurance undertaking or their employees and other than an ancillary insurance intermediary, who, for remuneration, takes up or pursues the activity of insurance distribution."

Likewise, the definition of "reinsurance intermediary" contained in the IDR is the same as that established by the IDD.

"Tied insurance intermediary" is explicitly defined in the IDR.¹¹⁹ Article 9 of the IDR establishes the requirements for application for registration as an insurance, reinsurance or ancillary insurance intermediary. It also states that nothing shall prevent an intermediary from making arrangements under which they act as a tied insurance intermediary. However, the relevant regulator, the *Central Bank of Ireland* (see below) explains that whereas previously only insurance/reinsurance undertakings

¹¹⁷ The previous *European Union (Insurance Mediation) Regulations 2005* ("IMR") were repealed in full and references to insurance in the *Investment Intermediaries Act 1995* ("IIA") were revoked: Sharon Daly, Darren Maher and April McClements, *Chambers Global Practice Guide – Insurance & Reinsurance, Ireland*, Matheson lawyers, 2019, available at [https://www.matheson.com/docs/default-source/practice-area-attachments/chambers_insurance_and_reinsurance_2019_ireland_guide.pdf?sfvrsn=4a87d395_1#:~:text=\(Re\)insurance%20brokers%20%2F%20intermediaries,an%20insur%2D%20ance%20intermediary%20on](https://www.matheson.com/docs/default-source/practice-area-attachments/chambers_insurance_and_reinsurance_2019_ireland_guide.pdf?sfvrsn=4a87d395_1#:~:text=(Re)insurance%20brokers%20%2F%20intermediaries,an%20insur%2D%20ance%20intermediary%20on) (27.05.2024), at p. 8.

¹¹⁸ *European Union (Insurance Distribution) Regulations 2018* ("IDR"), Statutory Instrument No. 229/2018, available at <https://www.irishstatutebook.ie/eli/2018/si/229/made/en/print#> (27.05.2024).

¹¹⁹ Regulation 9(11) of the IDR defines "tied insurance intermediary" as any person who:

- "(a) undertakes insurance or reinsurance distribution for and on behalf of one or more insurance or reinsurance undertakings or other intermediaries, in the case of insurance products that are not in competition,*
- (b) acts under the responsibility of those insurance or reinsurance undertakings or other intermediaries, and*
- (c) is subject to oversight of compliance with conditions for registration by the insurance or reinsurance undertaking or other intermediary on whose behalf it is acting."*

could appoint Tied Insurance Intermediaries, under IDR, intermediaries may now also appoint other intermediaries as Tied Insurance Intermediaries to act on their behalf.¹²⁰

It states:

“A Tied Insurance Intermediary may only be appointed if it is of good repute and possesses the appropriate general, commercial and professional knowledge and competence to enable the Tied Insurance Intermediary to deliver to the client or potential client the proposed services of the entity for whom the Tied Insurance Intermediary will act. An insurance/reinsurance undertaking or other intermediary that appoints a Tied Insurance Intermediary remains fully and unconditionally responsible for any act or omission on the part of the Tied Insurance Intermediary when acting on its behalf.”

A special application form exists for the application to be appointed as a tied insurance intermediary.

1.2. Regulation of insurance intermediaries

Regulation of reinsurance intermediaries is principally governed by the IDR, which transposed the EU’s IDD into Irish law with effect from 1st October 2018.¹²¹

Various authorization and supervision requirements for retail intermediaries and relevant standards are also contained in the *Investment Intermediaries Act 1995* (“IIA”) (for investment intermediaries), the *European Union (Consumer Mortgage Credit Agreements) Regulations 2016* (“CMCAR”) (for mortgage credit intermediaries) and the *Consumer Credit Act 1995* (“CCA”) (for mortgage intermediaries), although – as will be discussed below – reinsurance business is excluded from many provisions aimed at the protection of consumers.¹²²

1.3. Responsible authority

The Central Bank of Ireland (the “Central Bank”)¹²³ is responsible for the authorisation of, and has primary responsibility for, the prudential supervision and regulation of insurance and reinsurance undertakings in Ireland.¹²⁴ This takes place through the monitoring and ongoing supervision of regulated firms and the issuing of standards, policies and guidance with which (re)insurance undertakings are required to comply.

¹²⁰ Central Bank of Ireland, *Insurance Brokers/Intermediaries – Tied Insurance Intermediary Appointments under the European Union (Insurance Distribution) Regulations 2018*, available at [Insurance Brokers / Intermediaries | Central Bank of Ireland](#) (28.05.2024).

¹²¹ Previously, two pieces of legislation governed intermediaries operating in Ireland – the *European Union (Insurance Mediation) Regulations 2005* (the “IMR”) and the *Investment Intermediaries Act 1995* (“IIA”).

¹²² See Central Bank of Ireland, *Brokers/Retail Intermediaries*, available at <https://www.centralbank.ie/regulation/industry-market-sectors/brokers-retail-intermediaries> (29.05.2024).

¹²³ See Central Bank of Ireland, *Insurance & Reinsurance*, available at <https://www.centralbank.ie/regulation/industry-market-sectors/insurance-reinsurance> (27.05.2024).

¹²⁴ IDR, Regulation 4. See Darren Maher and April McClements, *Insurance & Reinsurance Laws and Regulations Ireland 2024*, in ICGL, *Insurance & Reinsurance Laws and Regulations*, available at <https://iclg.com/practice-areas/insurance-and-reinsurance-laws-and-regulations/ireland> (27.05.2024).

2. Questions

2.1. Regulatory pre-conditions for registration

The Central Bank maintains a register of authorised (re)insurance intermediaries in Ireland. According to the IDR, reinsurance intermediaries, like all insurance intermediaries, must be authorised and registered with the Central Bank (unless authorised and registered by the supervisory authority in another EEA member state)¹²⁵ in order to carry out the activity of (re)insurance distribution.¹²⁶

Registration requirements for (re)insurance intermediaries are set out at Regulation 9 of the IDR and include making an application in the prescribed form, providing such information as the Central Bank requires and the payment of any applicable fee.¹²⁷ Regulation 20 sets out various competence requirements for (re)insurance distributors and their employees and Regulation 21 requires (re)insurance intermediaries to hold appropriate professional indemnity insurance and to take steps to protect customers in relation to premiums and other monies paid to the intermediary. Regulation 22 requires that (re)insurance distributors have in place internal procedures for dealing with complaints.

(Re)insurance intermediaries are subject to ongoing supervision by the Central Bank of their compliance with the registration requirements.¹²⁸ This includes completing an annual return and holding an adequate policy of professional indemnity insurance.

Insurance undertakings involved in the distribution of insurance products must also comply with the national *General Good Rules*.¹²⁹ These principally concern (re)insurance distributors operating in Ireland on a cross-border basis and serve to consolidate national legal provisions and other rules which go beyond the requirements of the IDD with regard to how insurance products are sold and marketed to consumers in Ireland.¹³⁰ Significantly however, many of the *General Good Rules* constitute consumer protection rules derived from the Central Bank's *Consumer Protection Code 2012*,¹³¹ and the Code itself states that it does not apply to reinsurance business.

¹²⁵ See Central Bank of Ireland, *Explainer – What is “passporting” and what do I need to know about it?*, available at <https://www.centralbank.ie/consumer-hub/explainers/what-is-passporting-and-what-do-i-need-to-know-about-it> (03.06.2024).

¹²⁶ IDR, Part 3. See Sharon Daly, Darren Maher and April McClements, *Chambers Global Practice Guide – Insurance & Reinsurance, Ireland*, Matheson lawyers, 2019, available at [https://www.matheson.com/docs/default-source/practice-area-attachments/chambers_insurance_and_reinsurance_2019_ireland_guide.pdf?sfvrsn=4a87d395_1#:~:text=\(Re\)insurance%20brokers%20%2F%20intermediaries,an%20insur%2D%20ance%20intermediary%20on](https://www.matheson.com/docs/default-source/practice-area-attachments/chambers_insurance_and_reinsurance_2019_ireland_guide.pdf?sfvrsn=4a87d395_1#:~:text=(Re)insurance%20brokers%20%2F%20intermediaries,an%20insur%2D%20ance%20intermediary%20on) (27.05.2024), at p. 8.

¹²⁷ IDR, Regulation 9(2).

¹²⁸ Part 5 of the IDR establishes organisational requirements, including competence requirements; Part 7 provides for information and transparency requirements and conduct of business rules.

¹²⁹ Central Bank of Ireland, *General Good Rules – Arising from the Directive (EU) 2016/97 on Insurance Distribution*, 2023, available at <https://www.centralbank.ie/docs/default-source/regulation/industry-market-sectors/insurance-reinsurance/solvency-ii/requirements-and-guidance/general-good-rules.pdf> (29.05.2024). Article II IDD requires the publication of these Rules.

¹³⁰ These principally include rules found in the Central Bank's *Consumer Protection Code 2012*, as well as the *Minimum Competency Code and Regulations 2017* and a variety of other domestic legislation.

¹³¹ See below.

2.2. Differences in requirements for insurance and reinsurance intermediaries

Ireland's common law legal system means that much of its law in relation to insurance contracts is governed by common law principles derived from case law. The common law has historically made little distinction between the insurance and reinsurance business, and there are therefore few differences with regard to its regulation. This is also reflected in the IDD and IDR.

However, one area where differences can be identified is with regard to consumer protection. Recognising that reinsurance undertakings and intermediaries do not deal directly with consumers, many legislative provisions and other rules which place requirements on insurance undertakings and intermediaries do not apply to reinsurers and reinsurance intermediaries. Although the legislative framework under which such protections arise is too fragmented and broad in its scope to be addressed comprehensively here, the *Consumer Protection Code*¹³² issued by the Central Bank of Ireland (the binding provisions of which consolidate the requirements that regulated firms must comply with when dealing with consumers) is explicitly identified as applying to firms which include insurance intermediaries, while the reinsurance business is excluded from its scope.¹³³

Domestic requirements on those engaged in insurance distribution which go beyond corresponding provisions in the IDD are set out in the *General Good Rules*.¹³⁴ This document reveals a considerable number of standards which are stricter than those set out in the IDD and which principally concerned with the conduct of business by insurers and insurance distributors.¹³⁵ The large majority of these requirements, however, are derived from the *Consumer Protection Code*. As this code does not apply to the reinsurance business, it is understood that such requirements in the *General Good Rules* do not apply to reinsurance intermediaries.

2.3. Criminal sanctions for companies working with non-registered brokers

The IDR prohibits insurance companies and intermediaries from working with non-registered insurance intermediaries. Its Regulation 9(9) states:

"Insurance and reinsurance undertakings and intermediaries shall only use the insurance and reinsurance distribution services of registered insurance and reinsurance intermediaries or ancillary insurance intermediaries [...]"

However, the specific offence established by the IDR is targeted only at the unregistered person or body which undertakes insurance or reinsurance distribution.¹³⁶ A person who commits an offence by

¹³² Central Bank of Ireland, *Consumer Protection Code 2012*, updated 2015, available at https://www.centralbank.ie/docs/default-source/regulation/consumer-protection/other-codes-of-conduct/4-gns-4-2-7-cp-code-2012.pdf?sfvrsn=435dd71d_6 (29.05.2024).

¹³³ *Ibid*, pp.5-6.

¹³⁴ *Op. cit.*

¹³⁵ But which also include registration requirements, such as those applying to insurance undertakings carrying on the business of health insurance, and the registration of pensions products by insurance undertakings and intermediaries (see *General Good Rules*, *op. cit.*, with reference to Article 3 of the IDD).

¹³⁶ IDR, Regulation 57 states:

"(1) A person shall not undertake, or purport to undertake, insurance or reinsurance distribution in the State unless the person—
(a) is registered as an insurance intermediary, reinsurance intermediary or ancillary insurance intermediary in the State or in another Member State, or
(b) is exempt from registration under these Regulations.
(2) A person who contravenes paragraph (1) commits an offence."

undertaking reinsurance distribution where not registered nor exempt from registration is liable to a maximum penalty of imprisonment of up to 3 years and/or a maximum fine of 500,000 Euros.¹³⁷

There is no known offence specifically aimed at those who, knowingly or otherwise, work with non-registered insurance intermediaries, but it is possible that more general offences of criminal law may be relied on to prosecute such conduct.

¹³⁷

IDR, Regulation 58.

SPAIN

1. Introduction

1.1. Regulatory framework

The reinsurance regulatory framework in Spain comprises several laws and norms that establish the rules and guidelines for the operation of reinsurance entities. The primary sources of regulation include:

- a. Law on the Regulation, Supervision and Solvency of Insurance and Reinsurance Entities (*Ley 20/2015 de ordenación, supervisión y solvencia de las entidades aseguradoras y reaseguradoras* – LOSSEAR).¹³⁸ This law, passed in 2015, is one of Spain's centerpieces of insurance and reinsurance regulation. It transfers Directive 2009/138/EC (Solvency II),¹³⁹ which establishes rules on the prudential supervision of insurance and reinsurance entities, including capital and solvency requirements, to the Spanish legal system.
- b. Regulation on Regulation, Supervision and Solvency of Insurance and Reinsurance Entities (*Real Decreto 1060/2015, Reglamento de ordenación, supervisión y solvencia de las entidades aseguradoras y reaseguradoras* – ROSSAR).¹⁴⁰ This regulation develops LOSSEAR and establishes specific provisions on the requirements to be met by reinsurance entities, including operational, risk management and governance aspects.
- c. Royal Decree-Law 3/2020 (*Real Decreto Ley 3/2020*),¹⁴¹ through which the transposition, among others, of Directive (EU) 2016/97 of the European Parliament and of the Council of January 20, 2016, on insurance distribution (*Distribución de seguros* – DDS) is carried out. Although primarily focused on insurance, it also includes provisions relevant to reinsurance, particularly regarding customer protection and transparency in the distribution of reinsurance products. Discussion of this instrument below will only address those aspects relevant to reinsurance.
- d. Law 50/1980, on Insurance Contracts (*Ley 50/1980, de Contrato de Seguro*).¹⁴² This law establishes the basic regulation of insurance and reinsurance contracts in Spain.

These policy and regulatory instruments establish a detailed framework ranging from capital and solvency requirements to governance practices and risk management. Reinsurance entities must comply with these regulations in order to operate legally in Spain, ensuring the protection of

¹³⁸ Ley 20/2015, de 14 de julio, de ordenación, supervisión y solvencia de las entidades aseguradoras y reaseguradoras, available at: <https://www.boe.es/eli/es/l/2015/07/14/20/con> (27.05.2024)

¹³⁹ Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II), available at: <http://data.europa.eu/eli/dir/2009/138/oj> (27.05.2024).

¹⁴⁰ Real Decreto 1060/2015, de 20 de noviembre, de ordenación, supervisión y solvencia de las entidades aseguradoras y reaseguradoras, available at: <https://www.boe.es/eli/es/rd/2015/11/20/1060/con> (27.05.2024).

¹⁴¹ Real Decreto-ley 3/2020, de 4 de febrero, de medidas urgentes por el que se incorporan al ordenamiento jurídico español diversas directivas de la Unión Europea en el ámbito de la contratación pública en determinados sectores; de seguros privados; de planes y fondos de pensiones; del ámbito tributario y de litigios fiscales, available at: <https://www.boe.es/eli/es/rdl/2020/02/04/3/con> (29.05.2024).

¹⁴² Ley 50/1980, de 8 de octubre, de Contrato de Seguro, available at: <https://www.boe.es/eli/es/l/1980/10/08/50/con> (29.05.2024)

policyholders and the stability of the market. At the moment, no revisions have been made or are being considered in the above-mentioned legal framework relevant to reinsurance intermediaries. In accordance with the provisions of Article 149.1 N° 11 of the Spanish Constitution,¹⁴³ the State has exclusive competence over the bases for the regulation of insurance and reinsurance. Likewise, the power to grant and revoke the administrative authorization for the exercise of insurance and reinsurance activity remains with the State, which shall inform the respective Autonomous Community, as appropriate.¹⁴⁴

The different Autonomous Communities¹⁴⁵ are responsible for the implementation of the regulation and supervision of private insurance and reinsurance activity contained in Decree-Law 3/2020 and in the regulatory provisions that complement it. Significantly, however, they also have a subsidiary competence in regulation for entities that are located and operating within their respective territories. This is discussed below.

Supervisor

The powers of the general state administration in the management and supervision of private insurance, including reinsurance, are exercised through the Ministry of Economy, Trade and Enterprise,¹⁴⁶ in particular through the Directorate General of Insurance and Pension Funds (*Dirección General de Seguros y Fondos de Pensiones* – DGSFP).¹⁴⁷ The DGSFP¹⁴⁷ is the regulatory and supervisory authority for reinsurance companies in Spain and enforces the rules applying to reinsurance intermediaries. For that purpose, it issues circulars and guides that provide additional details and clarifications on the application of LOSSEAR and ROSSAR. The DGSFP and the competent bodies of the Autonomous Communities shall maintain the necessary cooperation for the purpose of homogenizing documentary information and coordinating their supervisory activities.¹⁴⁸

1.2. Royal Decree-Law 3/2020

Definitions

Currently, the regulation of reinsurance intermediaries is mainly found in the Royal Decree-Law 3/2020. Article 128 of that regulation defines “insurance intermediary” as “any natural or legal person, other than an insurance or reinsurance undertaking and its employees, and other than an ancillary insurance intermediary, who, for remuneration, undertakes or carries on the business of insurance distribution”. In the same provision, “reinsurance intermediary” is defined as “any natural or legal person, other than a reinsurance undertaking and its employees, who, for remuneration, takes up or pursues the business of reinsurance distribution”. These definitions follow the one found in Article 2.3. of the Directive (EU) 2016/97.¹⁴⁹ However, the Royal Decree-Law uses the Spanish word “mediador de seguros”, whereas the official Spanish translation of the Directive uses “intermediario de seguros”.

¹⁴³ Art. 149.1, N° 11 Constitución Española, available at: [https://www.boe.es/eli/es/c/1978/12/27/\(1\)/con](https://www.boe.es/eli/es/c/1978/12/27/(1)/con) (27.05.2024).

¹⁴⁴ Art. 19.1 b), Ley 20/2015.

¹⁴⁵ There are a total of 17 autonomous communities and two autonomous cities: Ceuta and Melilla.

¹⁴⁶ Real Decreto 410/2024, de 23 de abril, por el que se desarrolla la estructura orgánica básica del Ministerio de Economía, Comercio y Empresa, available at: <https://www.boe.es/eli/es/rd/2024/04/23/410/con> (29.05.2024).

¹⁴⁷ Dirección General de Seguros y Fondos de Pensiones, available at: <https://dgsfp.mineco.gob.es/en/Paginas/Iniciocarrousel.aspx> (29.05.2024).

¹⁴⁸ Art. 132.4, Real Decreto-ley 3/2020.

¹⁴⁹ Art. 128.1 and 128.3 Real Decreto-ley 3/2020.

The Royal Decree-Law 3/2020 does not make a distinction between “tied” and “untied” intermediaries. Still, it distinguishes between “tied insurance agents” (“agentes de seguros vinculados”), where an insurance agent intends to act as such by concluding insurance agency contracts with several insurers (Article 149), and “exclusive insurance agents” (“agentes de seguros exclusivos”). This natural or legal person concludes an agency contract with a single insurance company (Article 147).

Article 132 of the Royal Decree-Law 3/2020

While regulation of reinsurance activities is mainly reserved to the national government, under Article 132 of the Royal Decree-Law 3/2020,¹⁵⁰ the Autonomous Communities may assume powers in matters of insurance regulation and supervision to the extent that they do not conflict with national laws on the subject. The scope of the powers, includes reinsurance companies whose registered office is in the respective Autonomous Community and whose scope of operations and location of the risks they insure are limited to the territory of the respective Autonomous Community. To date, almost all the Autonomous Communities (the exceptions are Ceuta, Melilla, and Murcia) have exercised this competence and maintain an administrative register of insurance and reinsurance distributors.¹⁵¹

2. Questions

2.1. Regulatory pre-conditions

All reinsurance brokers must be registered in the administrative register of insurance and reinsurance brokers.¹⁵² Either the DGSFP or the competent body of the Autonomous Community, keeps the administrative register. Registration is required for insurance intermediaries and reinsurance brokers resident or domiciled in Spain. These must register before commencing their activities. Insurance and reinsurance intermediaries domiciled in other EU Member States who carry on business in Spain under the right of establishment or under the freedom to provide services must also be registered.¹⁵³ This registration is for information purposes only.¹⁵⁴

In order to be registered as a reinsurance broker in the administrative registry, the following pre-conditions must be met and maintained at all times:¹⁵⁵

- i. Legal capacity to carry on business (including registration in the commercial register prior to application for administrative registration for legal persons¹⁵⁶).
- ii. The broker’s compliance with the requirements of “commercial and professional honorability”.¹⁵⁷ the reinsurance brokers (or persons responsible for the management and distribution), meet

¹⁵⁰ Art. 132, Real Decreto-ley 3/2020.

¹⁵¹ Dirección General de Seguros y Fondos de Pensiones, Competencias de las Comunidades Autónomas, available at: <https://dgsfp.mineco.gob.es/es/Distribuidores/Paginas/competenciasCCAA.aspx> (27.05.2024).

¹⁵² Art. 131 Real Decreto-ley 3/2020.

¹⁵³ Arts. 133 and 162.1 Real Decreto-ley 3/2020.

¹⁵⁴ Id.

¹⁵⁵ Arts. 1571.1 and 162.2 Real Decreto-ley 3/2020.

¹⁵⁶ The corporate purpose of a legal person applicant shall include carrying out reinsurance activities as a reinsurance broker. When the company is a joint-stock company, the shares must be nominative.

¹⁵⁷ According to Art. 128.19, Real Decreto-ley 3/2020, this condition will be attributable to those persons who do not have a criminal record for having committed criminal offenses related to the exercise of

- iii. Successful completion of training courses¹⁵⁸ and continuous training as established by the DGSFP.
- iv. Liability insurance or guarantee valid throughout the EU.
- v. Provision of an up to date list of:
 - shareholders or partners who hold a direct or indirect shareholding of 10 percent or more of the voting rights or capital in the reinsurance broker; and
 - persons who have close links with the reinsurance broker.

The applicant must also make a statement that such shareholdings or close links do not prevent the DGSFP from effectively exercising its supervisory functions.

2.2. Difference in requirements for insurance brokers vs. reinsurance brokers

Insurance and reinsurance brokers have largely the same regulation, with a few exceptions. The main exceptions are Section 4 (conflict resolution mechanisms)¹⁵⁹ and Section 6 (related to the duties of information, sales practices and product control)¹⁶⁰ of Chapter III of Title I of the Royal Decree-Law 3/2020, which do not apply to reinsurance brokers.¹⁶¹

2.3. If criminal sanctions are foreseen for companies working with non-registered brokers

According to the Real Decreto-ley 3/2020, acceptance by insurance or reinsurance brokers of services provided by persons who are not registered in a register legally admissible for that purpose under the regulations of the home Member State, or exceeding the activities for which the registration entitles them, is considered a “very serious infraction” (“*infracción muy grave*”).¹⁶² For the commission of very serious infractions by reinsurance brokers, any of the following sanctions shall be imposed:

- i. cancellation of their registration in the administrative register
- ii. suspension for a maximum period of 10 years from the exercise of the activity
- iii. fines in amounts that vary according to the annual turnover, or the amount of benefits obtained from the violation, whichever is greater.

Sanctions shall be publicized, indicating the conduct constituting the very serious infraction, the natural or legal person responsible, the nature of the infringement, and the sanction imposed.

¹⁵⁸ financial activities, and who have not been sanctioned in the administrative field in insurance, banking, securities market, Public Treasury, Social Security, defense of competition, movement of capital, economic transactions with foreign countries, money laundering and financing of terrorism and protection of consumers and users for the commission of offenses classified as very serious or serious. in accordance with the provisions of Title I of the Royal Decree-Law 3/2020 and its implementing regulations.

¹⁵⁹ Section 4 refers to conflict resolution mechanisms, considering the obligation to attend to and resolve complaints and claims (Art. 166), the establishment of a customer ombudsman (Art. 167), and the administrative protection of the financial services customer (Art. 168).

¹⁶⁰ Section 6 deals with the information obligations and rules of conduct of insurance companies and insurance intermediaries, in particular the duties of prior information (Arts. 172 - 177), distribution of insurance-based investment products (Arts. 178 - 181), modalities of transmission of information (Arts. 182 - 183), combined and linked sales practices (Art. 184) and product control and governance requirements (Art. 185).

¹⁶¹ Art. 162.7 Real Decreto-ley 3/2020.

¹⁶² Art. 192.2.b) Real Decreto-ley 3/2020.

We could not find any provision establishing criminal sanctions for companies working with non-registered brokers. However, such a situation is included in the list of prohibited activities for reinsurance intermediaries found in Article 136.2 of the Royal Decree-Law 3/2020, which also applies to reinsurance brokers.

According to Article 136.2, reinsurance brokers shall not (inter alia) carry out activities in favor of insurance and reinsurance companies that do not comply with the legal requirements to operate in Spain or that act in breach of the limits of the authorization granted.¹⁶³

¹⁶³

Art. 162.6 Real Decreto-ley 3/2020.

SWEDEN

1. Introduction

1.1. Regulatory framework

Reinsurance in Sweden is largely regulated by legislation that transposes EU law instruments (in particular by the Solvency II Directive¹⁶⁴). The main piece of legislation transposing Solvency II is the Insurance Business Act (*Försäkringsrörelselag* (2010:2043)). This Act sets out the requirements for the licensing, operations, and supervision of insurance and reinsurance companies. It is supplemented by a number of government ordinances¹⁶⁵ and regulations adopted by the **Financial Supervisory Authority (*Finansinspektionen*)**, the public authority tasked with financial market supervision.¹⁶⁶

Reinsurance and insurance intermediaries are regulated in the **2018 Insurance Distribution Act (*Lag* (2018:1219) *om försäkringsdistribution*)**¹⁶⁷, which largely transposes the EU Insurance Distribution Directive¹⁶⁸. The aim of this Directive is to harmonize national rules on insurance and reinsurance and to improve consumer protection standards. It is a minimum harmonizing directive, which means that Member States can introduce more stringent provisions, as long as they are consistent with the directive.¹⁶⁹

The **Swedish regulation includes a few provisions that go beyond the EU Insurance Distribution Directive**, in particular as regards marketing and links to third parties.¹⁷⁰ These provisions apply equally to insurance and reinsurance activities.

We are not aware of any calls for revision of the current rules on reinsurance and insurance intermediaries.

¹⁶⁴ Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (solvency II).

¹⁶⁵ See in particular the Insurance Business Ordinance (*Försäkringsrörelseförordning* (2011:257)).

¹⁶⁶ Information about the Financial Supervisory Authority is available in English at the authority's website <https://www.fi.se/en/about-fi/> (16.05.2024).

¹⁶⁷ Available in Swedish at https://www.riksdagen.se/sv/dokument-och-lagar/dokument/svensk-forfattningssamling/lag-20181219-om-forsakringsdistribution_sfs-2018-1219/ (17.05.2024).

¹⁶⁸ Directive (EU) 2016/97 of the European Parliament and of the Council of 20 January 2016 on insurance distribution.

¹⁶⁹ See information about the Directive at https://www.eiopa.europa.eu/browse/regulation-and-policy/insurance-distribution-directive-idd_en (21.05.2024).

¹⁷⁰ For a commentary in English, see for instance F. Ekeblad *et al*, Insurance & Reinsurance Laws and Regulations Sweden 2024 (ICLG.com) at <https://iclg.com/practice-areas/insurance-and-reinsurance-laws-and-regulations/sweden> (17.05.2024). For instance, intermediaries are prohibited from including their own products or those of related companies in advice that is claimed to be impartial. T. Gransbo *et al.*, *Lagen om försäkringsdistribution En kommentar*, Juno 2023, kommentar till 4 kap 2 §. Moreover, an intermediary must provide the customer with information on the remuneration received by the intermediary from a third party for the insurance or reinsurance in question. *Ibid*, kommentar till 5 kap. 7 §.

1.2. Definition of “insurance intermediary” and the concept of “tied” and “untied” intermediaries

The definition of an “insurance intermediary” (*försäkringsförmedlare*) is laid down in Chapter 1 section 9(11) of the Insurance Distribution Act. The definition also covers reinsurance intermediary¹⁷¹ and states as follows:

“insurance intermediary means a natural or legal person, with the exception of insurance undertakings or their employees, who conducts insurance distribution for remuneration;”¹⁷²

This corresponds to the definition of insurance and reinsurance intermediary laid down in the EU Insurance Distribution Directive.¹⁷³

The **Insurance Distribution Act distinguishes between tied (*anknuten*) and untied (or regular) intermediaries.**¹⁷⁴ A tied intermediary is defined in Chapter 1 section 9(1) in the Insurance Distribution Act:

“an insurance intermediary who has concluded agreements with one or more insurance undertakings to distribute insurance products, where such products do not compete with each other and the agreement entails that the insurance undertaking is liable for pure economic loss pursuant to Chapter 4, section 16;”¹⁷⁵

Essentially, this entails that liability for an intermediary’s actions (in relation to its customer) remains with the insurance company to which the intermediary is tied.

While the rules in the Insurance Distribution Act apply to both kinds of intermediaries, there are a few rules targeting only tied intermediaries. This concerns minor matters such as requirement of providing the customer with information regarding liability of the insurance company to which the intermediary is tied..¹⁷⁶ It should be noted that basic requirements such as having an authorization and being registered apply to both tied and un-tied intermediaries.¹⁷⁷

1.3. The regulation of reinsurance intermediaries

Reinsurance and insurance intermediaries are regulated in the **2018 Insurance Distribution Act (*Lag (2018:1219) om försäkringsdistribution*)**.¹⁷⁸ It is based on the EU Insurance Distribution Directive and applies to all distributors of insurance and reinsurance products.¹⁷⁹ Supplementary and more detailed rules, in particular regarding the application in practice, are laid down in Insurance Distribution

¹⁷¹ See Lag (2018:1219) om försäkringsdistribution Chapter 1 section 3. See also A. Krzymowska Larsson & A. Krzymowska, *Lagen om försäkringsdistribution*, Juno 2023, kommentar till 1 kap 9(11) §.

¹⁷¹ Ibid, kommentar till 5 kap. 7 §.

¹⁷² Non-official translation by Norsedts Juridik JUNO legal database.

¹⁷³ Article 2(1)(5) of the Directive states that “‘reinsurance intermediary’ means any natural or legal person, other than a reinsurance undertaking or its employees, who, for remuneration, takes up or pursues the activity of reinsurance distribution;”.

¹⁷⁴ Lag (2018:1219) om försäkringsdistribution Chapter 1 section 4 and 9.

¹⁷⁵ Non-official translation by Norsedts Juridik JUNO legal database.

¹⁷⁶ See Lag (2018:1219) om försäkringsdistribution Chapter 5 section 4.

¹⁷⁷ See Lag (2018:1219) om försäkringsdistribution, Chapter 2.

¹⁷⁸ Available in Swedish at https://www.riksdagen.se/sv/dokument-och-lagar/dokument/svensk-forfattningssamling/lag-20181219-om-forsakringsdistribution_sfs-2018-1219/ (17.05.2024).

¹⁷⁹ Directive (EU) 2016/97 of the European Parliament and of the Council of 20 January 2016 on insurance distribution.

Ordinance (*Förordning (2018:1231) om försäkringsdistribution*)¹⁸⁰ and in regulations issued by the Financial Supervisory Authority (FFFS 2018:10 - *Finansinspektionen's regulations regarding insurance distribution*)¹⁸¹.

Rules on **cross-border activity** (EEA state and third state intermediary's business activity in Sweden and Swedish intermediary activity in an EEA state) are laid down in Chapter 3 of the Insurance Distribution Act. With regards to EEA, the provisions in Chapter 3 transpose the rules on freedom to provide services and freedom of establishment laid down in Chapter III of the EU Insurance Distribution Directive.

1.4. Authority responsible for enforcement of the rules applying to reinsurance intermediaries

The **Financial Supervisory Authority (*Finansinspektionen*)** is the public authority tasked with the supervision of the financial market, including insurance and reinsurance intermediaries.¹⁸² The mandate includes the issuing of regulations and general guidelines.

2. Questions

2.1. Regulatory pre-conditions

As mentioned above, reinsurance and insurance intermediaries are regulated in the 2018 Insurance Distribution Act (*Lag (2018:1219) om försäkringsdistribution*) supplemented by the Insurance Distribution Ordinance (*Förordning (2018:1231) om försäkringsdistribution*)¹⁸³ and the Financial Supervisory Authority's regulation *Finansinspektionens FFFS 2018:10 regulations regarding insurance distribution*¹⁸⁴.

The requirements of authorisation and registration for insurance and reinsurance intermediaries are laid down in Chapter 2 of the Insurance Distribution Act. The general rule provides that **distribution of insurance and reinsurance requires both an authorization from the Financial Supervisory Authority (*Finansinspektionen*) and a subsequent registration with the Swedish Companies Registration Office (*Bolagsverket*)**.¹⁸⁵

Sections 7 and 8 in Chapter 2 of the Insurance Distribution Act list a number of conditions to be fulfilled by an insurance intermediary. Largely transposing Article 3.6, 3.7 and 10.1–10.5 of the EU Insurance Distribution Directive, the provisions distinguish between natural and legal persons and include requirements relating to **suitable knowledge and training for individuals, solid finances, insurance**

¹⁸⁰ Förordning (2018:1231) om försäkringsdistribution. Available in Swedish at https://www.riksdagen.se/sv/dokument-och-lagar/dokument/svensk-forfattningssamling/forordning-20181231-om-forsakringsdistribution_sfs-2018-1231/ (17.05.2024).

¹⁸¹ The regulations are available in English at <https://www.fi.se/en/our-registers/fffs/search-fffs/2018/201810/> (17.05.2024).

¹⁸² Information about the Financial Supervisory Authority is available in English at the authority's website <https://www.fi.se/en/about-fi/> (16.05.2024).

¹⁸³ Förordning (2018:1231) om försäkringsdistribution. Available in Swedish at https://www.riksdagen.se/sv/dokument-och-lagar/dokument/svensk-forfattningssamling/forordning-20181231-om-forsakringsdistribution_sfs-2018-1231/ (17.05.2024).

¹⁸⁴ The regulations are available in English at <https://www.fi.se/en/our-registers/fffs/search-fffs/2018/201810/> (17.05.2024).

¹⁸⁵ Lag (2018:1219) om försäkringsdistribution, Chapter 2 section 1 and 3.

coverage, and absence of criminal convictions and of close links to a third party that may impede effective supervision. They read as follows:

Section 7 Conditions for licensing a natural person

A licence for a Swedish natural person to conduct insurance distribution may only be granted if the natural person:

1. *is not a minor child, in bankruptcy, subject to a trading prohibition, or does not have a guardian pursuant to Chapter 11, section 7 of the Parental Code;*
2. *is not entered in the register maintained pursuant to the Criminal Records Act (SFS 1998:620) in respect of certain serious property crimes or certain serious economic crimes and has shown conscientiousness in financial matters;*
3. *has suitable knowledge and expertise for the activities which are to be conducted;*
4. *satisfies the requirements of continuing education and professional development;*
5. *is covered under an insurance policy for liability in damages which may be incurred if he or she breaches his or her obligations;*
6. *is also otherwise suitable to conduct the activities; and*
7. *does not have, or cannot be expected to have, such close links with any third party as may impede effective supervision of the natural person.*

The first paragraph, subsection 5, shall not apply to tied insurance intermediaries who intend to distribute insurance-based investment products or such pension insurance policies as referred to in Chapter 7, section 1.

Section 8 - Conditions for licensing a legal person

A licence for a Swedish legal person to conduct insurance distribution may be granted only where:

1. *the legal person is not in bankruptcy or liquidation;*
2. *the legal person is covered under an insurance policy for liability in damages in the event it breaches its obligations;*
3. *any individual who is to be included in the management of the legal person or as a replacement for any such person satisfies the requirements set forth in section 7, first paragraph, subsection 2, and has sufficient insight and experience to participate in the management of a legal person which conducts insurance distribution and is otherwise appropriate to serve in a management capacity;*
4. *employees who directly participate in the distribution of insurance on behalf of the legal person meet the requirements set forth in section 7, first paragraph, subsections 1–4; and*
5. *the legal person does not have, and is not expected to have, such close links with any other person which will impede effective supervision of the legal person.*

The legal person shall verify that the conditions pursuant to the first paragraph, subsection 4 are satisfied. In connection therewith, the legal person shall request that an extract from the register maintained pursuant to the Criminal Register Act (SFS 1998:620) be presented to verify that the requirements set forth in section 7, first paragraph, subsection 2 in this respect have been satisfied. The first paragraph, subsection 2, shall not apply to tied insurance intermediaries which intend to distribute insurance-based investment products or such pension insurance policies as referred to in Chapter 7, section 1.¹⁸⁶

Authorisation and registration in cross-border situations

Rules on authorisation and registration in cross-border situations are laid down in the Chapter 3 of the Distribution Act. Section 1 of that Chapter implements Article 6.1 of the EU Insurance Distribution Directive, providing that an **insurance intermediary based in another EEA country** can conduct insurance distribution in Sweden without being subject to either the authorization or registration obligations described above. The intermediary must simply inform the competent authority of its home state which then informs the Swedish Financial Supervisory Authority. The same conditions apply for a Swedish intermediary seeking to conduct insurance distribution in another EEA country.¹⁸⁷

¹⁸⁶ Non-official translation by Norsedts Juridik JUNO legal database.

¹⁸⁷ Lag (2018:1219) om försäkringsdistribution, Chapter 3 section 6.

An **insurance intermediary from a third country** (non-EEA country) requires authorization and registration for their activities in Sweden.¹⁸⁸

2.2. Difference in requirements for insurance intermediaries vs. reinsurance intermediaries

As mentioned initially, the rules in the Insurance Distribution Act cover both insurance and reinsurance intermediaries. However, **reinsurance intermediaries are exempted from some of the requirements in the Act (in particular, various information obligations in relation to the customer)** on the grounds that the consumer protection dimension is less important in the area of reinsurance than for regular insurance products. For instance, reinsurance intermediaries are not bound by the obligation to provide information to the customer about the intermediary's relationship with the insurer or to give information stating how the insurance in question corresponds to the customer's needs.¹⁸⁹

Moreover, certain obligations in the Distribution Act are optional (*dispositiva*) for reinsurance intermediaries. This means that the parties can agree not to apply the obligation to observe "good insurance distribution practice".¹⁹⁰ The concept of "good insurance distribution practices" (*god försäkringsdistributionssed*) is a key concept according to which an intermediary (to avoid liability) must act honourably, fairly, professionally and in the best interest of the client.¹⁹¹

It should be pointed out that the *travaux préparatoires* to the Distribution Act focus on insurance and therefore do not provide much guidance on the application of the rules on *reinsurance intermediaries*. T. Gransbo *et al.* attribute this to the fact that issues that arise generally concern consumer protection which is more relevant for insurance than reinsurance and to the fact that the market for reinsurance appears to be functioning well.¹⁹²

2.3. Criminal sanctions foreseen for companies working with non-registered intermediaries

There are no criminal sanctions foreseen for a reinsurer or an insurer that, for the distribution of insurance, uses a party who is not entitled to conduct insurance distribution. There are, however, administrative sanctions: the Financial Supervisory Authority can order the insurer or reinsurer to stop the use of unauthorized intermediaries and impose a conditional fine in conjunction with such order.¹⁹³

¹⁸⁸ Lag (2018:1219) om försäkringsdistribution, Chapter 3 section 3.

¹⁸⁹ Lag (2018:1219) om försäkringsdistribution, Chapter 5 section 22.

¹⁹⁰ Lag (2018:1219) om försäkringsdistribution, Chapter 1 section 8. See also T. Gransbo *et al.*, Lagen om försäkringsdistribution En kommentar, Juno 2023, kommentar till 1 kap 8 §.

¹⁹¹ Good insurance distribution practices entails that the intermediary must adapt its advice based on the customer's wishes and needs, and shall only recommend solutions which are appropriate for the customer. See Lag (2018:1219) om försäkringsdistribution, Chapter 4 section 1 and 3. See also F. Ekeblad *et al.*, Insurance & Reinsurance Laws and Regulations Sweden 2024 (ICLG.com) at <https://iclg.com/practice-areas/insurance-and-reinsurance-laws-and-regulations/sweden> (17.05.2024)

¹⁹² T. Gransbo *et al.*, Lagen om försäkringsdistribution En kommentar, Juno 2023, kommentar till 1 kap 7 §.

¹⁹³ Lag (2018:1219) om försäkringsdistribution, Chapter 9 section 26 and 35.

UNITED KINGDOM

1. Introduction

In the UK, there is very little difference between the regulation of a reinsurer and the regulation of a direct insurer.¹⁹⁴ UK legislation has rarely distinguished between insurance and reinsurance business and the principal sources of law governing insurance assume that insurance includes reinsurance. This is true for the *Financial Services and Markets Act 2000* (“FSMA 2000”)¹⁹⁵ and the regulations made under it. Rules contained in these legal instruments continue to be based on implementation of the EU’s *Insurance Distribution Directive* (Directive 2016/97/EU) (“IDD”),¹⁹⁶ including those for the authorization of insurance intermediaries and rules for insurance and reinsurance distribution activities. Any reference to ‘insurance’ or an ‘insurance intermediary’ will therefore usually be read as including a reference to reinsurance, unless the contrary is indicated.

A notable exception to the lack of regulatory distinction is in the conduct of business rules concerning financial services firms in the UK. These are aimed rather at protection of consumers in insurance arrangements and only have limited application to reinsurance.

It may also be noted that member agents and brokers of the specialist insurance market, the *Society of Lloyd’s* (commonly known as “Lloyd’s”) as well as other insurance brokers are regulated by the same regulator as other insurance intermediaries, discussed below.

1.1. Insurance intermediaries

The definitions of ‘insurance intermediary’ and ‘reinsurance intermediary’ established by the IDD (at Articles 2.1(3) and 2.1(5), respectively) were, and continue to be, mirrored in UK law in both secondary legislation related to the FSMA 2000 (in particular, the *Financial Services and Markets Act 2000 (Regulated Activities) Order 2001* (“FSMA Order 2001”)) and financial conduct rules and guidance (discussed below).¹⁹⁷ The definition of “reinsurance intermediary” referred to in the FSMA Order 2001 continues to be based on that of the IDD following the UK’s departure from the European Union:

“‘reinsurance intermediary’ means a person other than (a) a reinsurance undertaking, or (b) an employee of a reinsurance undertaking, who, for remuneration, takes up or pursues the activity of reinsurance distribution;”¹⁹⁸

A definition of ‘insurance intermediary’ can be found in the Handbook of the national regulator of financial services firms and financial markets, the *Financial Conduct Authority* (“FCA”). The *FCA Handbook of rules and guidance*¹⁹⁹ (the “FCA Handbook”) does not contain a definition of reinsurance

¹⁹⁴ P. T. O’Neill and J. W. Woloniecki, *The Law of Reinsurance*, Sweet & Maxwell, 2019, at para. 15-011.

¹⁹⁵ *Financial Services and Markets Act 2000*, available at <https://www.legislation.gov.uk/ukpga/2000/8/contents> (21.05.2024).

¹⁹⁶ Although the UK is no longer part of the European Union, authorization and other requirements for insurance intermediaries continue to be based on implementation of the IDD.

¹⁹⁷ *Financial Services and Markets Act 2000 (Regulated Activities) Order 2001* (as updated), available at <https://www.legislation.gov.uk/uksi/2001/544> (22.05.2024).

¹⁹⁸ Reference can be found at Article 33B(4) to a ‘reinsurance intermediary’, and Part 6 of the *Financial Services and Markets Act 2000 (Regulated Activities) Order 2001* replicates the definitions of this term under the IDD with regard to the meaning of ‘reinsurance distribution’ in the 2001 Order’s Article 4(5) concerning specified activities.

¹⁹⁹ The *FCA Handbook*, available at <https://www.handbook.fca.org.uk/handbook> (21.05.2024). This consolidated the FCA’s legislative and other provisions made to the FCA by the FSMA 2000 and is made

intermediary, but defines ‘insurance intermediary’ as, “a firm carrying on insurance distribution activity other than an insurer”.²⁰⁰ “Firm” is defined broadly to include natural and legal persons authorized by the FCA,²⁰¹ and “insurance distribution activity” (and “reinsurance distribution”) is given the meaning set out in the IDD.²⁰²

Intermediation includes arranging a contract of insurance, making arrangements with a view to someone entering into a contract of insurance, dealing in a contract of insurance as agent, advising on a contract of insurance or assisting in the administration and performance of a contract of insurance.²⁰³ The terminology of “tied” and “untied” intermediaries is not used under UK law, and regulations are not known to apply with reference to such a classification.

1.2. Regulation of insurance intermediaries

Regulation of insurance and reinsurance distribution in the UK continues to be based on the EU’s IDD. The IDD is implemented in the UK through the FSMA 2000 and associated secondary legislation (statutory instruments) such as the *Financial Services and Markets Act 2000 (Regulated Activities) Order 2001*²⁰⁴ (which specifies the kind of activities which are regulated by the FSMA 2000)²⁰⁵ as well as through the FCA Handbook.

1.3. Responsible authority

Under the FSMA 2000, insurers and reinsurers in the UK are regulated by the *Prudential Regulation Authority* (“PRA”), which is part of the Bank of England, and the FCA. They are responsible for authorized firms’ prudential regulation and conduct supervision, respectively. Insurance intermediaries, however, are regulated by the FCA only and, as discussed below, these must apply to the FCA for permission to carry on intermediary activities in the UK.

up of instruments made by the FCA Board (pursuant to section 138G of FSMA 2000). These contain a mix of provisions mainly classified as rules, principles or guidance. Statements of principles for approved persons are described as binding, and rules are said to create binding obligations on firms, such that if a firm contravenes such rules, it may be subject to enforcement action by the FCA and action for damages: see FCA, *Reader’s Guide: An introduction to the Handbook*, January 2019, available at https://www.fca.org.uk/publication/handbook/readers-guide_0.pdf (21.05.2024), at p. 11.

²⁰⁰ FCA, *FCA Handbook – Glossary – insurance intermediary*, available at <https://www.handbook.fca.org.uk/handbook/glossary/G1351.html> (27.05.2024).

²⁰¹ Or, alternatively, by the *Prudential Regulation Authority*, another regulatory body responsible for the prudential regulation of financial institutions.

²⁰² This is defined widely to cover regulated activities carried on or in relation to a contract of insurance or right to or interests in a life policy. See FCA, *FCA Handbook – Glossary – insurance distribution activity*, available at <https://www.handbook.fca.org.uk/handbook/glossary/G3493i.html> (27.05.2024).

²⁰³ Chambers and Partners Practice Guide – Insurance & Reinsurance 2024, last updated January 23rd, 2024, available at <https://practiceguides.chambers.com/practice-guides/insurance-reinsurance-2024/uk> (21.05.2024), section 5.1.

²⁰⁴ *Financial Services and Markets Act 2000 (Regulated Activities) Order 2001*, *op. cit.*

²⁰⁵ For the purposes of section 22 of the FSMA 2000, *op. cit.*

2. Questions

2.1. Regulatory pre-conditions for registration

Insurance intermediaries (who are not also (re)insurers) must apply to the FCA for permission to carry on intermediary activities in the United Kingdom. Moreover, all intermediaries must be recorded on a register maintained by the FCA, known as the Financial Services Register.²⁰⁶

The UK regulatory system is ‘activity based’, and section 19 of the FSMA 2000 (the general prohibition) read together with section 22 (‘regulated activities’) provides that no person may carry on a regulated activity in the UK by way of business, unless he is authorized or exempt.

‘Regulated activities’ are defined in the *Financial Services and Markets Act (Regulated Activities) Order 2001* (as amended)²⁰⁷ and include effecting and carrying out (re)insurance contracts.²⁰⁸ A firm intending to conduct (re)insurance business in the United Kingdom must obtain a Part 4A FSMA 2000 permission (Part 4A permission) from the PRA unless it is exempt.²⁰⁹

Insurance mediation activities (ie, broking, distribution and other intermediary services), however, are regarded as separate regulated activities.²¹⁰ (Re)insurance intermediaries require authorisation from the FCA primarily, but if the intermediary is part of a group that includes a firm authorised by the PRA, then the FCA will also have to consult with the PRA before granting any Part 4A permission for insurance mediation.²¹¹ The IDD includes several exclusions and exemptions from the need for intermediaries to be authorised and the UK retains the system according to which an intermediary can itself be an ‘appointed representative’ of another authorised person, thereby obviating the need for individual authorisation of the intermediary.²¹² However, like intermediaries, appointed representatives must be recorded on the FCA’s Financial Services Register.²¹³

²⁰⁶ See article 93 of the *Financial Services and Markets Act (Regulated Activities) Order 2001*, *op. cit.* Details of the FCA’s *Financial Services Register* can be found at <https://www.fca.org.uk/firms/financial-services-register> (27.05.2024).

²⁰⁷ *Financial Services and Markets Act (Regulated Activities) Order 2001*, *op. cit.*

²⁰⁸ *Ibid*, article 10.

²⁰⁹ This would include, by way of example, appointed representatives and those exempt as a result of an exemption order.

²¹⁰ Note that the IDD applies to, and requires, authorisation both of independent intermediaries (eg, insurance brokers) and of (re)insurers insofar as they conduct (re)insurance mediation activities. All those intermediaries involved in selling and underwriting a (re)insurance contract will require a licence unless they can benefit from an exemption: See James C. Scoville, Clare Swirski, Benjamin Lyon, *Insurance & Reinsurance – United Kingdom*, in William D. Torchiana, Marion Leydier, Nicholas F. Menillo (eds.), *Lexology GTDT – Insurance & Reinsurance*, updated 17th August 2023, available at <https://www.debevoise.com/-/media/files/pdf/2023-insurance--reinsurance--united-kingdom-v1.pdf?rev=29a4944ee4114c19a8fcaa71609bd937&hash=B904440905880743818795072B26DD85> (22.05.2024), at p. 15.

²¹¹ FSMA 2000, section 55E(3). See James C. Scoville, Clare Swirski, Benjamin Lyon, *Insurance & Reinsurance – United Kingdom*, *ibid*, at p. 16.

²¹² See, for example, *Financial Services and Markets Act (Regulated Activities) Order 2001*, *op. cit.*, Schedule 4, with reference to art. 2.2 regarding what shall not be considered to constitute insurance distribution or reinsurance distribution.

²¹³ See article 93 of the *Financial Services and Markets Act (Regulated Activities) Order 2001*, *op. cit.* Details of the FCA’s *Financial Services Register* can be found at <https://www.fca.org.uk/firms/financial-services-register> (27.05.2024).

2.2. Differences in requirements for insurance and reinsurance intermediaries

As mentioned above, UK law has rarely distinguished between insurance and reinsurance business, including that of intermediaries, and reinsurance is usually considered as a type of insurance activity. References to the effecting and carrying out of contracts of insurance in the *Financial Services and Markets Act (Regulated Activities) Order 2001* are widely considered to include reinsurance, and references to authorization requirements for insurance intermediaries include reinsurance intermediaries.

However, rules applying to the conduct of business of financial services firms in the UK do not generally apply to reinsurance. Specific conduct of business rules of the FCA Handbook (called the *Insurance Conduct of Business Sourcebook* ("ICOBS"))²¹⁴ have very limited application to reinsurance,²¹⁵ and this includes reinsurance intermediaries.²¹⁶ This distinction, which is explicitly referable in the ICOBS to recital 51 of the of the IDD,²¹⁷ recognizes that clients of reinsurers do not require consumer protection, and is achieved either by specifically exempting reinsurers from the application of a conduct of business rule or by applying a rule only in relation to dealings with "individual" clients or "customers".²¹⁸

Customers, as defined in the FCA Handbook, do not include cedants of reinsurance contracts for the purposes of the *Principles of Business* contained in the Handbook. The *Principles of Business* module²¹⁹ of the FCA Handbook apply in whole or in part to every firm and constitute a general statement of the fundamental obligations of firms and other persons to whom they apply under the regulatory system. Like direct insurers, reinsurers are subject to most of the *Principles of Business* set out in the FCA Handbook,²²⁰ and so a reinsurance intermediary subject to FCA oversight will also need to comply with these broad principles, such as the conduct of business with integrity and due skill, care and diligence, and to observe proper standards of market conduct.

2.3. Criminal sanctions for companies working with non-registered brokers

There are no known criminal sanctions specifically targeted at companies working with non-registered brokers. However, the carrying on of an unauthorized reinsurance business in the UK in contravention of the general prohibition in section 19 of the FSMA 2000 (against carrying on a regulated activity unless authorized or exempt) is a criminal offence, subject to imprisonment of up to two years or a

²¹⁴ With regard to insurance, ICOBS (the "Insurance: Conduct of Business sourcebook) sets out the day-to-day conduct rules that apply to firms. As with other provisions of the FCA Handbook, these principally contain a mix of rules and guidance.

²¹⁵ See ICOBS 1, Annex 1 Application, "Part 2: What? – Para. 1.1, available at <https://www.handbook.fca.org.uk/handbook/ICOBS/1/?view=chapter> (21.05.2024). This states: "This sourcebook does not apply to activities carried on in relation to a reinsurance contract."

²¹⁶ Chapter 4.1 of ICOBS sets out general requirements for insurance intermediaries and insurers carrying on insurance distribution activities: see <https://www.handbook.fca.org.uk/handbook/ICOBS/4/1.html> (21.05.2024).

²¹⁷ Namely, that: "There is less of a need to require that such information be disclosed when the customer is seeking reinsurance or insurance cover for commercial and industrial risks, or solely for the purposes of distributing insurance-based investment products, when the customer is a professional client as defined in Directive 2014/65/EU".

²¹⁸ P. T. O'Neill and J. W. Woloniecki, *The Law of Reinsurance*, op. cit., para. 15-039.

²¹⁹ 'Principles for Business' (PRIN), available at <https://www.handbook.fca.org.uk/handbook/PRIN/1/?view=chapter> (23.05.2024).

²²⁰ See FCA, PRIN – Principles for Business – PRIN 2.1 The Principles, available at <https://www.handbook.fca.org.uk/handbook/PRIN/2/1.html> (27.05.2024).

fine or both. Offences also apply to individuals to hold themselves out as being authorized to carry on reinsurance business (or to suggest that they are exempt from the authorization requirement) as well as to others if committed with their consent or connivance or due to neglect on their part.

A reinsurance contract made by an authorised reinsurer which has been entered into as a result of something said or done by a third party, such as a broker, who is carrying on unauthorized regulated activities in contravention of the general prohibition, will not be null and void, but will be unenforceable at the option of the cedant (the prospective insured party).²²¹ There is no indication that would constitute a criminal offence, although it cannot be discounted that, depending on the specific circumstances, other more general or financial criminal offences may be relied on to prosecute insurers which work with non-registered brokers.

The FSMA 2000 also provides for administrative fines to be imposed on those engaged in regulated activities who contravene the *Principles of Business* set out in the FCA Handbook, as well as creating a mechanism known as a statutory duty allowing private persons who suffer loss as a result of such contravention to be compensated pursuant to a civil action for breach of that statutory duty.²²²

²²¹ P. T. O'Neill and J. W. Woloniecki, *The Law of Reinsurance*, *op. cit.*, para. 15-018.

²²² Sections 67 and 71 of the FSMA 2000 set out, respectively, the framework in relation to disciplinary measures and the possibility for an aggrieved person to bring an action for damages pursuant to breaches of these conduct rules.

UNITED STATES

1. Introduction

In the United States (US), the individual states are largely responsible for governance of insurance and reinsurance.²²³ However, there are also pieces of federal legislation that are applicable to these sectors. As such, this report will first discuss the federal influences on the reinsurance market before turning to the state contribution.

1.1. Federal Law

A. Insurance Governance Generally

The federal government plays a relatively small role in insurance regulation. This is due largely to the *McCarran-Ferguson Act* (passed in 1945), which assured that states would have the primary role in regulating insurance. To the extent that federal law involves itself in the insurance market, it does so principally to help ensure the financial solvency of the industry. Perhaps the most notable piece of legislation in this regard is the *Dodd-Frank Wall Street Reform and Consumer Protection Act* (Dodd-Frank). Enacted after the financial crisis in 2008, Dodd-Frank created the Federal Insurance Office (FIO) and the Financial Stability Oversight Council. The FIO, which sits with the US Department of the Treasury,²²⁴ is authorized to (inter alia):

- monitor all aspects of the insurance industry, including identifying issues or gaps in the regulation of insurers that could cause (or contribute to) a systemic crisis in the insurance industry or the US financial system;
- monitor the extent to which traditionally underserved communities and consumers have access to affordable non-health insurance products;
- coordinate federal efforts and develop federal policy on aspects of international insurance matters;
- determine, in accordance with certain standards and processes prescribed by law, whether state insurance measures are preempted by certain covered agreements; and
- consult with states regarding insurance matters of national and international importance.

There are other federal statutes that bear upon the provision of insurance. These include:²²⁵

- **Title 18 US Code Section 1033**, which prohibits anyone who has been convicted of a felony involving dishonesty or a breach of trust from conducting the business of insurance unless they have obtained the written consent the relevant insurance regulatory official;
- The 2015 *National Association of Registered Agents and Brokers Reform Act*, which streamlined approval for non-resident insurance sellers to operate across state lines²²⁶;

²²³ Certainly, this is not always the case. Federal requirements dominate many areas/markets (e.g. securities regulation).

²²⁴ See: <https://home.treasury.gov/policy-issues/financial-markets-financial-institutions-and-fiscal-service/federal-insurance-office/about-fio>. Note that Dodd-Frank also included the Nonadmitted and Reinsurance Reform Act of 2010 ("NRRRA"), in order to make it easier for surplus-line insurers and brokers to conduct business across states.

²²⁵ Indeed, some federal acts relate to particular types of insurance. For example, the *Affordable Care Act* has provisions that relate to the provision of private health insurance markets.

²²⁶ See: <https://iclg.com/practice-areas/insurance-and-reinsurance-laws-and-regulations/usa>

- **The Liability Risk Retention Act (LRRA)**, passed in 1986, allows the formation of risk retention groups, which are entities through which similar businesses – with similar risk exposure – create their own insurance company to minimize their risks. Such entities, once licensed, are generally exempt from most insurance regulations for any other state in which the entity operates.

B. Reinsurance

Recent years have evidenced an increased willingness of the US government to involve itself in the realm of reinsurance regulation, too. Indeed, the *Nonadmitted and Reinsurance Reform Act of 2010* (“NRRRA”) was included in the broad coverage of Dodd-Frank. As one article summarized,

Among other things, the NRRRA compelled states to adopt a more or less uniform approach with respect to excess and surplus lines insurer eligibility requirements, including what amounts to ‘one-stop shopping’ for non-US insurers seeking participation in the US surplus lines marketplace via listing by the International Insurers’ Department of the NAIC.²²⁷

These same authors suggested that “[p]erhaps nowhere has the increased activism of the federal government in insurance regulatory issues traditionally left to the states been more pronounced than in the area of international reinsurance transactions”.²²⁸ The authors highlight, in this respect, certain Covered Agreements arrived at through US trade policy, which aimed to facilitate “a fairer and more equitable system of cross-border trade in reinsurance involving the United States.”²²⁹

1.2. State Law

The *McCarran Ferguson Act* ensured that insurance markets (including reinsurance) would be addressed principally by state law. In practice, this means that each of the 50 states is in charge of regulating the operations of insurance businesses within its borders and has its own rules concerning the appropriate contractual terms to which parties may legally agree.

Despite the differences in laws, much of the content is similar across the different jurisdictions. As a general matter, all states require agents, brokers and other intermediaries to be licensed in order to sell, solicit or negotiate insurance and they prohibit anyone without a license from performing these activities. Moreover, state insurance commissioners generally regulate insurance market intermediaries through monetary penalties and the ability to suspend or revoke licenses.²³⁰

²²⁷ John Mulhern, Sara Manske and Robert Mancuso, “USA: A regulatory overview of the world’s largest insurance market”, *Research handbook on international insurance law and regulation (Handbook)*, Elgar, 2023, at 712. Note that ‘excess and surplus lines insurance’ generally refers to coverage for risks that are too high (and thus, too expensive) for a traditional insurance company to bear. Parties may be able to pay for this type of coverage from ‘non-admitted carriers’ (or ‘unlicensed carriers’). Non-admitted (unlicensed) carriers are not subject to the same regulations as other insurance companies. They do not need to be licensed in the states where they sell insurance. However, they must typically be licensed in their home state. Importantly, non-admitted carriers are not backed by the state. That is, a given state’s guaranty fund will not help to pay for claims if the carrier is unable to do so.

²²⁸ Id.

²²⁹ Id., at 713.

²³⁰ See pp. 2-3 of: https://www.debevoise.com/-/media/files/pdf/inhouselawyer_co_uk_united_states_insurance_amp_reinsurance.pdf ‘Insurance Commissioner’ is a state-level position in all 50 states. The duties of the position vary from state to state, but their general role is as a consumer protection advocate and insurance regulator. The position is elected in 11 states and appointed in 39.

Each of the state insurance regulators is a member of the National Association of Insurance Commissioners (“NAIC”). The NAIC wields considerable influence in the insurance industry²³¹, in particular because of its ability to foster harmonized regulatory approaches. One author noted,

« Much of the NAIC's power lies in its production of various “handbooks” and “manuals” that have the force of law because they are incorporated by reference in state insurance codes. Under this statutory scheme, when the NAIC updates or changes its various manuals, handbooks, or accounting forms, it also changes state insurance regulation.²³² »

Partly as a result of NAIC’s harmonization efforts, it is possible to make some general observations relating to state coverage of the insurance market.

- Most insurance regulations focus on insurers themselves, as these are the parties assuming the risk. These rules relate to licensure and many other requirements, depending upon the type of insurance provided. For example, states will generally not issue a license to an ‘alien’ insurer (i.e., one that is formed under the law of a jurisdiction outside the US).²³³
- Reinsurers are generally less regulated than direct insurers. For example, the typical licensure requirements that exist for direct insurers do not apply to cross-border reinsurance businesses, even though reinsurers who desire to establish an office in one of the states must generally be licensed in that state.²³⁴
- Parties that either have an ownership interest in (or which are affiliated with) insurers, or which act as so-called ‘producers’ of risk (agents, brokers, reinsurance intermediaries, etc.)²³⁵ are also subject to regulatory oversight/supervision which generally includes licensure requirements.
- With respect to intermediaries (including both brokers/producers and reinsurance intermediaries), regulatory requirements tend to be less onerous than those imposed upon insurers and reinsurers²³⁶ Furthermore, and generally speaking, intermediaries who act as facilitators between direct insured persons/entities and direct insurers (e.g. brokers and insurance agents) are subject to greater regulatory burdens than those acting between a ceding insurer and reinsurers.²³⁷
- The issuance of licenses by a state’s insurance department/commission represents the primary mode of authorizing a broker/intermediary to act in that capacity within the state. Each such department/commission is responsible for overseeing adherence with the process. Notably, the NAIC, collaborating with relevant industry stakeholders, created the National Insurance Producer Registry (NIPR), the stated purpose of which is “to work with the states and the NAIC to re-engineer, streamline, and make more uniform the producer licensing process for the

A list of current commissioners is found online at:

https://ballotpedia.org/List_of_current_insurance_commissioners_in_the_United_States.

²³¹ For more on NAIC, one can consult their website, at: [NAIC - Supporting Insurance, Regulators, & Public Interest](#).

²³² Daniel Schwarcz, *Is U.S. Insurance Regulation Unconstitutional*, 25 CONN. INS. L.J. 191 (2018).

²³³ See *Handbook*, note 5 *supra*, at p. 719.

²³⁴ *Id.*, at 724.

²³⁵ A summary of governance in the US (re)insurance market by the International Law Firm, Mayer Brown – in the US edition of its Country Comparative Guides on Insurance and Reinsurance – notes that “Insurance intermediaries of all types—including insurance agents, brokers, managing general agents, surplus lines brokers, reinsurance intermediaries, third party administrators, claims adjusters and other intermediaries” are “usually referred to collectively as insurance ‘producers’”.

²³⁶ See, *Handbook*, note 5 *supra*, at 715.

²³⁷ *Id.*, at 716.

benefit of state insurance regulators, the insurance industry, and consumers.”²³⁸ The use of this registry is not required by the Model Act. However, the NAIC notes that “The states use NIPR to link state insurance departments with the entities they regulate. Applicants and licensees can transmit licensing applications, insurers can transmit appointments and terminations, and both can transmit other information to state insurance regulators in multiple states, thereby creating electronic solutions that are easy and efficient to use by the states and industry.”²³⁹

Turning to regulation of reinsurance intermediaries more specifically, it is important to note that the NAIC has developed a Model Act to shape the requirements associated with acting in this capacity. The NAIC summarizes the Act as follows,

« The NAIC has adopted the Reinsurance Intermediary Model Act (#790), which contains a simplified registration process for nonresident reinsurance intermediaries. Nonresident reinsurance intermediaries verify that they are licensed in their home states under similar laws as in the nonresident states—i.e., Model #790—and the nonresident reinsurance intermediaries are granted reciprocity.²⁴⁰ »

The referenced law has been adopted by the vast majority states.²⁴¹ In fact, only two states seem to have not substantially adopted the Act: New York and Nevada.

1.3. The NAIC Model Act

Section 2.F of the Model Act provides a definition of “Reinsurance intermediary” that is inclusive of both “reinsurance intermediary-brokers” (RBs) and “reinsurance intermediary-managers” (RMs).²⁴² These definitions would seem to approximate the ‘tied’ and ‘untied’ distinction that is made in the Swiss Insurance Supervision Act, which entered into force on 1 January 2024. Under the Model Act, an RB (i.e., untied intermediary) is

« a person, other than an officer or employee of the ceding insurer, firm, association or corporation who solicits, negotiates or places reinsurance cessions or retrocessions on behalf of a ceding insurer without acting as a RM on behalf of the insurer.²⁴³ »

Section 2.G states that an RM (i.e., tied intermediary) is

« a person, firm, association or corporation, whether known as a RM, manager or other similar term, who has authority to bind or manages all or part of the assumed reinsurance business of a reinsurer (including the management of a separate division, department or underwriting office) and acts as an agent for the reinsurer except the following:

- (1) An employee of the reinsurer;

²³⁸ NAIC, State Licensing Handbook 2020, p. 6. Found online at: <https://content.naic.org/sites/default/files/inline-files/State%20Licensing%20Handbook%20-%20Complete%20and%20Final.pdf>

²³⁹ Id.

²⁴⁰ Chapter 26 of the State Licensing Handbook. Found online at: <https://content.naic.org/sites/default/files/inline-files/Chapter%2026.pdf>. A copy of Model Act #790 can be found online at: <https://content.naic.org/sites/default/files/inline-files/MDL-790.pdf>.

²⁴¹ A table evidencing the high level of adoption was recently (2022) produced by NAIC and can be found online at: <https://content.naic.org/sites/default/files/model-law-state-page-790.pdf>. Note that there may be deviations from the Model Act in various states. This report has not examined each state to determine the extent of these deviations.

²⁴² Note that the definitions provided in the California Statute are essentially a duplication of the NAIC Model Act.

²⁴³ Section 2.F of the Model Act

- (2) A U.S. manager of the U. S. branch of an alien reinsurer;
- (3) An underwriting manager that, pursuant to contract, manages all or part of the reinsurance operations of the reinsurer, is under common control with the reinsurer, subject to the Holding Company Act, and that is not compensated based on the volume of premiums written.
- (4) The manager of a group, association, pool or organization of insurers which engage in joint underwriting or joint reinsurance but only if the group association, pool or organization of insurers (as distinguished from its members) is subject to examination by the [Insurance Commissioner] of the state in which the manager's principal business office is located »

2. Questions

2.1. Regulatory pre-conditions

As noted in the introduction to Section III, licensure (as opposed to notation in a registry) is the primary requirement for authorizing a party to act as an insurer, broker, reinsurer, reinsurance intermediary, etc. in the US. As such, the US report focuses on the state requirements associated with obtaining and retaining a relevant license.

Section 3 of the Model Act provides the prerequisites for operating as an RB or RM in a state that that has adopted the Act. With respect to an RB, 3.A provides that,

No person, firm, association or corporation shall act as an RB in this state if the RB maintains an office either directly or as a member or employee of a firm or association, or an officer, director or employee of a corporation:

- (1) In this state, unless the RB is a licensed producer or reinsurance intermediary in this state; or
- (2) In another state unless the RB is a licensed producer or reinsurance intermediary in this state or another state having a law substantially similar to this law.

Importantly, the Model Act puts the burden on the reinsurers to refrain from using unlicensed RB's, stating that an insurer "shall not engage the services of any person, firm, association or corporation to act as an RB on its behalf unless the person is licensed as required by Section 3A of this Act."²⁴⁴

Section 3.B of the *Model Act*, sets out the corollary requirements for RMs in a given state, providing that,

No person, firm, association or corporation shall act as a RM:

- (1) For a reinsurer domiciled in this state, unless the RM is a licensed producer or reinsurance intermediary in this state;
- (2) In this state, if the RM maintains an office either directly or as a member or employee of a firm or association, or an officer, director or employee of a corporation in this state, unless the RM is a licensed producer or reinsurance intermediary in this state.

²⁴⁴

See Section 6.A of the Model Act. Additionally, Article 6.B states that an insurer may not employ an individual who is employed by an RB with which it transacts business, unless the RB is under common control with the insurer. Moreover, an insurer is required to annually obtain a copy of the financial statements of the RB.

Thus, both RBs and RMs must be licensed in the jurisdiction in which they are operating or in a jurisdiction that regulates with similar rules.

In addition to the aforementioned, the Model Act contemplates vesting a state's Commissioner with the power to require a resident RM to (i) file a bond in an amount from an insurer acceptable to the commissioner for the protection of the reinsurer²⁴⁵ and (ii) maintain an errors and omissions policy in an amount acceptable to the commissioner.

Pertinent to this report is the licensure requirements for non-residents. Section 3.D(2) provides information about the ability of such parties to obtain a license to operate as a reinsurance intermediary. It takes a reciprocal recognition approach to licensing, essentially offering licensed non-resident intermediaries a near-automatic licensing if they are from a jurisdiction that reciprocates. Specifically, the Section provides:

The commissioner shall issue a nonresident reinsurance intermediary license if:

- (a) The person is currently licensed as a resident reinsurance intermediary or insurance producer and in good standing in his or her home state;
- (b) The person has submitted the proper request for licensure and has paid the fees required by [insert appropriate reference to state law or regulation];
- (c) The person has submitted or transmitted to the insurance commissioner the application for licensure that the person submitted to his or her home state, or in lieu of that application, a completed application deemed appropriate by the commissioner; and
- (d) The person's home state awards nonresident licenses to residents of this state on the same basis.

More detailed provisions on Reciprocity are set forth in Section 13. That Section limits states' licensing requirements to those of Section 3 if there is reciprocity and eliminates the imposition of additional continuing education requirements. It states:

- A. The insurance commissioner shall waive any requirements for a nonresident license applicant with a valid license from the applicant's home state, except the requirements imposed by Section 3 of this Act, if the applicant's home state awards nonresident licenses to residents of this state on the same basis.
- B. A nonresident reinsurance intermediary's satisfaction of any applicable home state continuing education requirements, if any, for licenses insurance producers or reinsurance intermediaries shall constitute satisfaction of this state's continuing education requirements if the nonresident producer's home state recognizes the satisfaction of its continuing education requirements imposed upon producers or reinsurance intermediaries from this state on the same basis.

Recall that the great majority of US states have adopted the Model Act. From a practical standpoint, this means that most states will 'award nonresident licenses on the same basis', leaving the requirements of Section 3.D as the primary prerequisites for licensure by nonresidents.

2.2. Differences in Treatment of Reinsurance Brokers relative to Insurance Brokers/Producers

As noted above, the literature generally presents direct insurance producers/brokers as operating in a more regulated environment than reinsurance intermediaries. While writers are unified in the

²⁴⁵ See Section 3.C. Note that the Model Act advises that one bond per reinsurer represented would be required.

underlying rationale for the disparity in treatment – i.e. the relative sophistication of the parties to the relative transactions – the literature is less explicit about the ways in which the more onerous regulatory burdens of producers manifests itself relative to regulation of reinsurance intermediaries.

In surveying the regulations, a few differences were noted:

First, reinsurance intermediaries are generally allowed to work with unlicensed reinsurers without negative consequences; something which direct brokers are not typically allowed to do. This is important because it opens up a rather large market (one that includes parties domiciled outside the US) for reinsurance intermediaries that is not as readily available to direct producers.

A second aspect seems to be the difference(s) in licensure itself. The steps required for obtaining and maintaining licensure for insurance brokers/producers is more cumbersome than those which exist for reinsurance intermediaries. For, if issued to a firm/association, a reinsurance intermediary license will normally also authorize all of the members of said firm or association to act as reinsurance intermediaries. By contrast, a typical insurance broker/producer must obtain an individual license.

Finally, insurance producers are generally subject to additional regulatory requirements, such as the requirement that insurance agents appointed to act for an insurer do so subject to a written agreement and that the insurer must notify the states in which the insurance agent will be acting on behalf of the insurer.²⁴⁶ Such requirements were not as frequently observed for reinsurance intermediaries.

2.3. Scope of applicable Sanctions for Working with Unlicensed Reinsurance Intermediaries

Penalties relating to violations of the Model Act are set forth in Section 12 thereof. While clearly aimed at punishing transgressions by reinsurance intermediaries, the Section is sufficiently broad to encapsulate violations by (re)insurers and others as well. The sanctions provided for include administration fines, revocation of the license, and the possibility of civil liability. While the Section leaves room for the commissioner to ‘impose any other penalties provided for in the insurance law (Section 12.C), there is no explicit reference to criminal sanctions in the Model Act. The Section states,

Section 12. Penalties and Liabilities

A. If the commissioner determines that the reinsurance intermediary or any other person has not materially complied with this Act, or any regulation or order promulgated thereunder, after notice and opportunity to be heard, the commissioner may order:

- (1) For each separate violation, a penalty in an amount not exceeding \$5,000;
- (2) Revocation or suspension of the reinsurance intermediary’s license; and
- (3) If it was found that because of such material non-compliance that the insurer or reinsurer has suffered any loss or damage, the commissioner may maintain a civil action brought by or on behalf of the reinsurer or insurer and its policyholders and creditors for recovery of compensatory damages for the benefit of the reinsurer or insurer and its policyholders and creditors or seek other appropriate relief.

B. If an order of rehabilitation or liquidation of the insurer has been entered pursuant to [insert state’s rehabilitation or liquidation statute],²⁴⁷ and the receiver appointed under that order

²⁴⁶ See note 12, supra at p. 3.

²⁴⁷ Note, with respect to the bracketed language, that the Model Act includes a drafting note, which states “If state law does not otherwise provide, amend the bracketed citation in the preceding paragraph to

determines that the reinsurance intermediary or any other person has not materially complied with this Act, or any regulation or order promulgated thereunder, and the insurer suffered any loss or damage therefrom, the receiver may maintain a civil action for recovery of damages or other appropriate sanctions for the benefit of the insurer.

C. Nothing contained in this section shall affect the right of the commissioner to impose any other penalties provided for in the insurance law.

D. Nothing contained in this Act is intended to or shall in any manner limit or restrict the rights of policyholders, claimants, creditors or other third parties or confer any rights to such persons.

It is worth keeping in mind that the penal codes of the individual states may feature additional penalties relating to the provision of insurance. For example, all states punish insurance fraud.

include the rehabilitation or liquidation statute of any reciprocal state. This is intended to codify the standing of a receiver to maintain a civil action in a reciprocal state.”

NEW YORK

1. Introduction

New York Insurance Law Article 21 contains the provisions relating to agents, brokers and adjusters. N.Y. Ins. Law § 2101(f) (McKinney 2001-2002) states in pertinent part as follows:

(f) In this article, “reinsurance intermediary” means any person, firm, association or corporation who acts as broker in soliciting, negotiating or selling any reinsurance contract or binder, or acts as an agent in accepting any reinsurance contract or binder on behalf of an insurer, except that such term shall not include:

- (1) licensed attorneys at law of this state acting in their professional capacity as such;
- (2) regular salaried officers, employees or attorneys in fact of an authorized insurer or of an underwriting office of such insurer while acting in their capacity as such in discharging the duties of their employment or appointment;
- (3) licensed insurance agents acting within the scope of their agency authority in the placement or acceptance of reinsurance on risks produced or managed by such agents; or
- (4) licensed insurance brokers, in the placement of reinsurance on risks produced by such brokers.

2. Questions

2.1. Regulatory pre-conditions²⁴⁸

N.Y. Ins. Law § 2102 prohibits any person from acting as an agent or broker without a license.²⁴⁹

N.Y. Ins. Law §2106 sets forth the licensing process for Reinsurance intermediaries. Notably, §2106(f)(1) provides that the provisions of §2106 (and also §§ 2102, 2110 and 2120) apply to both resident and non-residential reinsurance intermediaries.²⁵⁰

²⁴⁸ Some of the practical administrative aspects of licensure in Nevada can be found online at: https://doi.nv.gov/Licensing/License_Types/Reinsurance_Intermediary/Reinsurance_Intermediary_Broker/.

²⁴⁹ §2102(c) makes clear that “Unless licensed as a reinsurance intermediary, no person, firm, association or corporation shall in this state act as a reinsurance intermediary or use any other designation or title which is likely to mislead the public or hold himself or itself out in any manner as a reinsurance intermediary.” Similarly, §2102(e)(1) states that “No person shall accept any commission, service fee, brokerage or other valuable consideration for selling, soliciting or negotiating insurance in this state if that person is required to be licensed under this article and is not so licensed.” N.Y. Ins. Law § 2117 broadly prohibits any person from acting as an agent on behalf of an unauthorized insurer, or broker, in soliciting, negotiating or otherwise effectuating or placing risks with an unauthorized insurer, or in any way or manner aiding an unauthorized insurer in effecting any insurance or contract.

²⁵⁰ The section defines ‘non-resident reinsurance intermediary’ as “a person who is a non-resident of this state and who is licensed to act as a reinsurance intermediary in their home state.”

While §2106 establishes a degree of uniformity in licensure, New York law, like the Model Act, also features a ‘Reciprocity’ provision.²⁵¹

2.2. Notable Differences in Treatment of Reinsurance Brokers relative to Insurance Brokers

Please see general remarks made in Section III.A.2 above.²⁵²

2.3. Sanctions Applicable to Unlicensed Reinsurance Intermediaries

Unlicensed reinsurance intermediaries may be subject to fines as well as other administrative penalties. In fact, N.Y. Ins. Law §2102, which sets forth the penalties for acting without a license,²⁵³ establishes a relatively high rate for those who serve as reinsurance intermediaries (\$5,000, per transaction),²⁵⁴ relative to the typical fine assessed under the section (\$500 per transaction according to §2102(g)).²⁵⁵

²⁵¹ §2136 of the N.Y. Ins. Law states that the superintendent “shall waive” any requirements for a nonresident license applicant otherwise applicable under the Chapter if the applicant: (a) has a current and valid license (and is in good standing) in his/her home state; (b) has submitted a completed application; (c) has paid the fees required by the Chapter; and (d) hails from a state which awards nonresident insurance “producer licenses to residents of this state on the same basis as provided in this subsection.”

²⁵² For a comparison of licensure, see §2104 of the NY Ins Law on brokers and §2106 on reinsurance intermediaries. Certainly, there are similarities between the regulatory coverage of the two types of intermediaries as well (See, for example, §2120 provides similar fiduciary duties for each type of intermediary). Publicly available online at: <https://law.justia.com/codes/new-york/2022/isc/article-21/>.
²⁵³ § 2127(a) further notes that, in lieu of revoking or suspending a license in connection with a violation of Article 21, the superintendent may “require the licensee to pay to the people of this state a penalty in a sum not exceeding five hundred dollars for each offense, and a penalty in a sum not exceeding twenty-five hundred dollars in the aggregate for all offenses.”

²⁵⁴ Paragraph (a)1 provides:
 (1)(A) No person, firm, association or corporation shall act as an insurance producer, insurance adjuster or life settlement broker in this state without having authority to do so by virtue of a license issued and in force pursuant to the provisions of this chapter.

(B) No person, firm, association or corporation shall act as an excess line broker in this state without having authority to do so by virtue of a license issued and in force pursuant to section two thousand one hundred five of this article, provided, however, that such person, firm, association or corporation shall not be required to be licensed as an excess line broker where the insured's home state is a state other than this state and such person, firm, association or corporation is otherwise licensed to sell, solicit or negotiate excess line insurance in the insured's home state.
 §2102(a)(2) states that “(2) Any person, firm, association or corporation who or which acts as a reinsurance intermediary in violation of paragraph one hereof shall, in addition to other penalties prescribed by law, be subject to a penalty not to exceed five thousand dollars for each transaction.”
²⁵⁵ § 2102 (g) states that “Any person, firm, association or corporation who or that violates this section shall be subject to a penalty not to exceed five hundred dollars for each transaction, except as provided in paragraph two of subsection (a) of this section.”

NEVADA

1. Introduction

In line with the Model Act, §681A.330 of the Nevada Revised Statutes (NRS) defines “Intermediary” broadly, making the term inclusive of both brokers and managers of/for reinsurance.

2. Questions

2.1. Regulatory pre-conditions

NRS §681A.420(1) stipulates that a person may not act as a broker for reinsurance for a domestic insurer or reinsurer unless the person is either a licensed ‘producer’²⁵⁶ in Nevada or is licensed as a nonresident intermediary for reinsurance in Nevada. Significantly, there is no mention of eased processes of licensing based on reciprocal recognition of existing out-of-state licenses. The second paragraph of the same section simply provides that,

A person shall not act as a broker for reinsurance for a foreign or alien insurer or reinsurer if the person maintains an office, directly or as a member or employee of a firm or association or as an officer, director or employee of a corporation in this state, unless the person is:

- (a) A licensed producer in this state; or
- (b) Licensed as a nonresident intermediary for reinsurance in this state.²⁵⁷

2.2. Notable Differences in Treatment of Reinsurance Brokers relative to Insurance Brokers

Please see general remarks made in Section III.A.2 above.²⁵⁸

2.3. Scope of applicable Sanctions for Working with Unlicensed Reinsurance Intermediaries

NRS §681A.570 sets forth the ‘Actions that may be taken against an intermediary who fails to comply with laws’. As can be seen below, this section largely mimics that found in Section 12 of the Model Act, providing for administrative fines, revocation or suspension of licenses, and/or civil liability. Criminal sanctions are not mentioned with respect to reinsurance intermediaries.²⁵⁹ The provision states:

²⁵⁶ NRS §679A.117 defines “Producer of insurance” as “a person required to be licensed under the laws of this state to sell, solicit or negotiate insurance”.

²⁵⁷ Similar requirements are set forth for ‘managers’ (the definition, which is found in § 681A.550, is essentially the same as that put forth in the Model Act) for reinsurance.

²⁵⁸ The relevant sections of the NRS governing licensure of producers can be found online at: <https://www.leg.state.nv.us/nrs/NRS-683A.html#NRS683ASec201>. For contrast, the statutes relating to Reinsurance Intermediaries can be seen at: <https://www.leg.state.nv.us/nrs/NRS-681A.html#NRS681ASec430>

²⁵⁹ This is not to say that criminal proceedings and penalties are not considered in other aspects of Nevada insurance law. For example, NRS §692C.480 allows the Commissioner to “cause criminal proceedings to be instituted” where ‘it appears’ that there has been ‘willful violation’ of the regulations relating to insurance holding companies (i.e. NRS Chapter 692C).

1. If the Commissioner believes that the reinsurance intermediary or any other person has not materially complied with NRS 681A.250 to 681A.560, inclusive, or any regulation adopted or order issued pursuant thereto, the Commissioner may, after a hearing conducted in accordance with NRS 679B.310 to 679B.370, inclusive, order:

(a) For each separate violation, the payment of a penalty in an amount not exceeding \$5,000; and

(b) The revocation or suspension of the license of the reinsurance intermediary.

2. If the Commissioner finds that the material noncompliance of the reinsurance intermediary has caused the insurer or reinsurer any loss or damage, the Commissioner may initiate a civil action against the intermediary on behalf of the insurer or reinsurer and the policyholders and creditors of the insurer or reinsurer to recover compensatory damages or other appropriate relief for the benefit of the insurer or reinsurer and the policyholders and creditors.

3. If an order of rehabilitation or liquidation of the insurer has been entered and the receiver appointed by that order determines that:

(a) The reinsurance intermediary or any other person has not materially complied with NRS 681A.250 to 681A.560, inclusive, or any regulation adopted or order issued pursuant thereto; and

(b) The insurer has suffered any loss or damage as a result of that noncompliance, the receiver may bring a civil action for the recovery of damages or for any other appropriate sanctions on behalf of the insurer.

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