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## The characteristic performance of a reinsurer – Jurisdiction for reinsurance contracts

**In a recent decision, the Swiss Federal Supreme Court dealt with the question of the characteristic services performed by a reinsurer (BGer 4A\_408/2013 of 17 January 2014). Subject of the dispute in this leading court case was the determination of the place of fulfillment (performance) of the characteristic services in order to establish the jurisdiction for a conflict arising from an international reinsurance arrangement. The decision addresses the issues of the characteristic services performed under a reinsurance contract, the place of delivery of such services and the contractual party performing them.**

### The jurisdiction/venue

The Swiss Federal Supreme Court held that reinsurance agreements are contracts for the performance of services and that therefore article 5 para. 1 lit. b second lemma of the Lugano Convention applies for determining the jurisdiction for claims made under such agreements, i.e. the place of performance of the services determines the jurisdiction. The jurisdiction/venue at the place of performance ensures a proximity (or close connection) between the contract and the competent court. The special provisions of article 8 et seqq. of the Lugano Convention relating to insurance matters are not applicable, as reinsurance contracts are not within their scope.

The place of performance according to article 5 para. 1 lit. b second lemma of the Lugano Convention is determined primarily “according to the contract”, i.e. the parties’ agreement on the place of performance. If the place of performance cannot be established based on the contractual terms, the place where the (characteristic) services are performed shall apply instead, provided however that such place is not contrary to the parties’ intention under the terms of the agreement.

## The reinsurance contract

The Swiss Federal Supreme Court describes the performance of a reinsurer as follows: under a reinsurance contract, the reinsurer assumes all or part of the risks covered by the primary insurer (also called direct insurer). In consideration for the payment of a premium, the reinsurer promises insurance benefits in form of cash to the primary insurer in the event of an insured loss (realisation of the risk).

The legislation does not provide further details on the performance of such services. As in most jurisdictions, there are no special statutory provisions governing reinsurance contract law in Switzerland. Reinsurance contracts are expressly exempted from the scope of application of the Swiss Insurance Contract Act (article 101 para. 1 sub-para. 1 Insurance Contract Act) and therefore the Swiss Code of Obligations applies (article 101 para. 2 of the Insurance Contract Act). Reinsurance contracts are heavily influenced by reinsurance practice and are subject to the parties' autonomy and their individual design of a reinsurance agreement. In the event of uncertainties or a contractual lacuna, the customs and trade usages of international legal practice play an important role. The reinsurance practice itself is strongly influenced by English case law as well as by the practice of the London reinsurance market.

Among the principles which have been developed by international reinsurance practice are the "follow the fortunes" principle (i.e. the reinsurer must follow the underwriting fortunes and risks of the ceding insurer according to the arrangement) and the "follow the settlements" principle (i.e. the right of the primary insurer to manage the business and handle claims whereby the reinsurer must follow / is bound by the (settlement) decisions of the ceding insurer as long as they were made in good faith). Accordingly, the reinsurer does not undertake the actual loss assessment and claims handling in case of an insured event and is therefore not performing any characteristic "insurance services".

In its decision, the Swiss Federal Supreme Court held that the characteristic performance of a reinsurer under a reinsurance contract is not limited to the payment of cash benefit in the event of a loss. Rather, the main (and unconditional) performance of a reinsurer in consideration for a premium is the carrying of the risk of loss alongside the primary insurer (the court refers to the constitution of a risk-bearing community between the reinsurer and the primary insurer) and, as a consequence thereof, the on-going provision of a specific financial security. This requires the maintenance of an adequate administrative organisation and above all the permanent securing of liquidity by the reinsurer for the fulfillment of its cash benefit obligation in case of a loss event. This liquidity needs to reflect the level of risks assumed under the reinsurance agreements. The main characteristic performance or core function of a reinsurer is therefore not (only) the payment of cash benefit in case of a loss event but rather the assumption of risk and the conveyance of a certain financial security by the reinsurer under preservation of its appropriate on-going ability to perform. Based on these considerations, the Swiss Federal Supreme Court concluded that the services provided by a reinsurer are to be seen as services in a broader sense, as the (re)insurance coverage encompasses as indicated both the carrying of risk and the payment in case of an actual loss.

## Conclusion

The reinsurer renders its characteristic services, in particular the bearing of risk as well as the permanent provision of a certain financial security, essentially at its seat and not at the seat of the primary insurer. Hence, the place where the seat of the reinsurer is situated is considered as the place of performance which determines the jurisdiction according to 5 para. 1 lit. b second lemma of the Lugano Convention.

## Contact

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