

**Response to the Questionnaire on Insurance and Arbitration
by the AIDA German Chapter**

**GERMAN NATIONAL REPORT
ON
INSURANCE AND ARBITRATION**

Arbitration has a long-standing history in Germany. It has been in wide and uninterrupted use since its reception from the Roman law in the 13th century (cf. P[ATRICK] M. M. LANE, The Appointment of an Arbitrator – Contract or Status, in: ADRLJ 1994, p. 91; JENS GAL, Die Haftung des Schiedsrichters in der internationalen Handelsschiedsgerichtsbarkeit, Tübingen 2009, pp. 15 et seqq. and 121 et seqq.). While the utilisation of the dispute resolution mechanism of arbitration was especially common in trade matters, one of the most common other fields of application has historically been that of insurance (HERMANN KRAUSE, Die geschichtliche Entwicklung des Schiedsgerichtswesens in Deutschland, Berlin 1930, p. 92). Insurance matters were, indeed, regarded to be as suited for arbitration that several territorial states of Germany up until the 19th century provided in their statutes that insurance disputes had (at least in first instance) to be resolved mandatorily by arbitration and not by state courts (cf. e.g. Book 1, Part 2, Title 6 § 44 Corpus Juris Fridericianum 1781 for Prussia). While such statutory obligations to submit (insurance) disputes to arbitration have long fallen into disuse and disrepute in Germany, arbitration, nevertheless, still plays an important role in the handling of certain kinds of insurance related disputes.

1. Is Arbitration to be Preferred as a Method of Insurance Disputes Resolution?

While arbitration is in Germany the preferred method of resolving reinsurance disputes (cf. c) – that is, if the parties are not able to resolve their dispute by way of negotiation which is even more common – arbitration plays a much less prominent role in dissolving insurance disputes between insurers and their policyholders or insured persons respectively. Only in the field of industrial and commercial insurance has arbitration managed to establish itself as a viable alternative to court adjudication (cf. a), while disputes relating to mass market insurance products are hardly ever submitted to arbitration for certain legal reasons which shall be highlighted at a later point (cf. a. and 3.). Other than disputes that relate directly to a (re-)insurance contract, many other arbitral disputes might be connected to insurance. This is especially true for (commercial) contracts between the insured and a third party (b). One could also think about other contractual relationships between insurers and third parties, such as insurance agents, brokers etc. Here also, arbitration may in some cases prove to offer more appropriate solutions than state court adjudication.

a) Under an Insurance Policy

In answering the question if arbitration is to be preferred as a method of dispute resolution for controversies relating to insurance contracts one has to distinguish between different kinds of

contracts in regard to the person of the policyholder (or the insured). While arbitration seems feasible and often even better suited for insurance contracts with an entrepreneur (i.e. a businessman in the sense of sec. 14 German Civil Code [in the following referred to as BGB]), the same is not true for contracts where the policyholder acts in the capacity of a consumer (in the sense of sec. 13 BGB).

It is a common conception of German scholars that arbitration clauses may only seldom if ever be found in contracts between insurers and their private customers (cf. HUBERTUS W. LABES, *Schiedsgerichtsvereinbarungen in Rückversicherungsverträgen*, Frankfurt et al. 1996, p. 2). Such is, however, not necessarily true for insurance contracts that regard the cover of commercial and industrial risks. In such contracts arbitration clauses are not only possible but are to some extent in use (cf. already HANS MÖLLER in Bruck & Möller (eds.), *Kommentar zum Versicherungsvertragsgesetz*, 8th ed., Berlin and New York 1980, sec. 84 German Insurance Contract Act [in the following referred to as VVG], note 8). While the model-clauses drafted by the German Insurance Association (GDV) do not commonly provide for an arbitration clause, several insurers have included them in certain kinds of contracts. As a general rule of thumb, the likelihood of a German insurance contract to contain an arbitration clause increases with the amount of the insured sum (i.e. large industrial insurance contracts will often be submitted to arbitration while smaller business insurance contracts will remain to be submitted to the jurisdiction of the state courts). Insofar German insurers are most commonly including arbitration clauses rather on a case by case basis into their insurance policies than in a systematic manner. Only for D&O-policies there seems to be a certain trend to include arbitration clauses (to cover at least certain disputes) into the general terms and conditions to apply to all insurance contracts (cf. MICHAEL BECKMANN in *idem* & Matusche-Beckmann (eds.), *Versicherungsrechts-Handbuch*, 2nd ed., Munich 2009, § 28 note 87). The inclusion of an arbitration clause in an insurance contract must even concerning these commercial and industrial insurance contracts, thus, be regarded as rather the exception (cf. EINIKO B. FRANZ & CHRISTINA KEUNE, *Schiedsvereinbarungen in Rückversicherungsverträgen – Fragen des Schiedsverfahrensrechts und des materiellen Rückversicherungsrechts*, [2013] *VersR* 12). The reasons for this apparent reluctance of insurers to submit commercial and industrial insurance disputes to arbitration might be manifold. Whether this reluctance should be regarded as deplorable, however, is a matter of taste. In view of the high efficiency, the relative low costs and the existence of specialized chambers for insurance matters of and within the German judicial system the advantages of arbitration, which will be addressed at a later stage (cf. 2.), cannot prevail in the same way as in other judicial settings. Nevertheless, for some contracts it would seem that arbitration should be regarded as preferable. The more international, the more commercial or the more industrial an insurance contract is to be regarded, the more the parties may gain from submitting their disputes to arbitration. Insurers might also gain another benefit from submitting all insurance contracts to arbitration. In light of the principle of confidentiality, which other than in some countries (cf. esp. High Court of Australia, *Esso v. Plowman* [1995] *Arb. Int'l* 235, which is, however, now in part superseded by the International Arbitration Amendment Act 2010) is undisputed in Germany, the existence of arbitration proceedings, the proceedings and the arbitral award are non-public and are to be held confidential (cf. already BGHZ 98, 32 at 35). Due to this fact insurers may apply arbitration as a means of preventing precedents by which their general terms and conditions of insurance (in the following referred to as GCI) could be given a binding interpretation which might force them to alter or amend their GCI (cf. JENS GAL, *Die Haftung des Schiedsrichters in der internationalen Handelsschiedsgerichtsbarkeit*, Tübingen 2009, p. 331). This advantage for the insurer is, however, not an advantage for the insurance sector as a whole, since ambiguous clauses might remain longer on the market despite the fact that several arbitral tribunals have

already ruled on them, which would not necessarily be the case where state courts have ruled on such clauses.

While there is a market and a need for arbitration in the field of commercial and industrial insurance contracts (at least what regards certain kinds of contracts), the same cannot be said for mass insurance contracts. To call arbitration in the field of such contracts uncommon would still be a crass understatement. It is virtually inexistent. This is, *prima facie*, to a certain degree surprising. While German law makes it almost impossible for insurance contracts with consumers to include forum selection clauses, since such clauses are – where legal relationships with consumer participation are concerned – for the most part only allowed where they are concluded after the dispute in question has arisen (cf. sec. 215 VVG; in detail on this provision and its relationship to the provisions of the Brussels I Regulation cf. MANFRED WANDT & JENS GAL, *Gerichtsstandsvereinbarungen in Versicherungssachen im Anwendungsbereich des § 215 VVG*, in Dammann *et al.* (eds.), *Gedächtnisschrift für Manfred Wolf*, Munich 2011, p. 579), such is not the case for arbitration agreements. In light of this fact, one might expect for insurance undertakings to make broad use of arbitration agreements in order to elect a dispute resolution forum, i.e. an arbitral forum. Such is not the case. One reason for this might be seen in sec. 1031 ZPO which provides that arbitration agreements with consumers must be concluded in the form of a signed (independent) document. As such, arbitration agreements cannot simply be included into the GCI but must be textually separated from the other clauses of the GCI and must be signed individually (cp. e.g. WOLFGANG VOIT in Musilak (ed.), *Kommentar zur Zivilprozessordnung*, 10th ed., Munich 2013, sec. 1031 note 11). More importantly, such clauses would remain to be general terms and conditions (so-called Allgemeine Geschäftsbedingungen [AGB]) and would as such be subject to the legal scrutiny of the legal regime provided for AGB under secc. 305 et seqq. BGB, which would in many cases result in such a clause to be considered null and void (cf. on this point *infra* 3.). Despite the advantages that arbitration might afford insurers, arbitration cannot be regarded to be *per se* preferable for insurance disputes with consumers. The risk that arbitration agreements might be used by some insurers – whether such would be held legal by the courts is another question – to deprive the insured of their lawful judge and a fair trial seems not completely insignificant, due to the fact that the consumers have virtually no bargaining power to influence the content of the GCI. That such a possibility to conclude arbitration agreements can very negatively influence the consumers' rights can be observed on the American insurance market (cp. e.g. RICHARD NEELY, *Arbitration and the Godless Bloodsuckers*, Sept./Oct. [2006] *The West Virginia Lawyer* 12). The German insurance market has, however, developed a special instrument of dispute resolution that is sort of a hybrid between conciliation and arbitration, the so-called *Ombudsmann für Versicherungen* (cf. MANFRED WANDT, *Versicherungsrecht*, 5th ed., Cologne 2010, notes 89 et seqq.). Any insured who has a dispute with his insurance undertaking – as long as such insurer is member of the *Ombudsmann für Versicherungen e.V.*, which a majority is – may bring such dispute before the Ombudsmann for conciliation free of any charge for the consumer. The Ombudsmann is allowed to hear disputes up until the amount of €100,000.-. Its decisions are not binding on the insured, who may at any time refer the case to the competent state courts. For the insurance undertaking, however, – and this is where the Ombusmann-procedure is approximated to a true arbitration proceeding – the decisions are binding as long as they do not exceed €10,000.-. Between €10,000.- and €100,000.- the decisions of the Ombusmann are mere recommendations. Indeed from a consumer protection point of view such an optional dispute resolution mechanism seems much better fitted to serve the mass insurance sector than an attempt to shift all disputes from the state courts to arbitration. Such an attempt would in all

likelihood bring about public outcry and further disregard for an industry which has, despite its very necessary and productive functions for society, always had to fight severe image problems.

b) Under a Commercial Contract Between the Insured and a Third Party;

For certain areas of trade and commerce, arbitration has already supplanted court adjudication as the standard form of dispute resolution. Such is especially the case for international trade, in which almost all contracts (with a German party) contain an arbitration clause. Whether this trend of having arbitration as the ubiquitous dispute resolution mechanism is preferable, seems to be a question unnecessary to ask since it has become such a reality no insurer would be able to alter. Nevertheless some insurers have shown some reluctance in regard to arbitration. The fact that the insured has submitted a dispute to arbitration which has some link to an insurance cover can indeed have negative effects for the insurer. One might for example bring forth that arbitration is often declared to be less expensive than court proceedings. Such is, however, often only the case if one compares the costs of court proceedings including all stages of appeal with a single arbitration proceeding. This comparison is, however, lopsided since, firstly, court proceedings may very often be limited to first instance proceedings while, secondly, arbitration proceedings are very often flanked by numerous court proceedings (on a global level) intended to hinder the arbitration proceedings or to set aside awards. Insofar arbitration may prove to be much more expensive in certain cases. German litigation insurers have reacted to this fact. Whilst § 2.3.3.2 General Conditions for Litigation Insurance 2012 (ARB 2012) – in the same sense hitherto § 5 [1] d ARB 1994/2000/2008 – grants cover for the costs of arbitration proceedings it limits such costs to the amount that would have been paid had the case been brought before a competent state court of first instance.

Also might insurers regard the guarantee for the quality of the arbitrators to be more questionable than that of German judges. In some instances, insurers have tried to counter this risk by obligating their insured to conclude arbitration agreements that provide for the arbitrators to have specific qualifications (esp. that all arbitrators must have a law degree that qualifies them to be named as a state court judge) and would regard any arbitral award passed by a tribunal constituted with members that did not fulfil such qualification as non-binding for the insurer (cp. for architect liability insurance RENATE TRACHTE in Terbille (ed.), Münchener Anwaltshandbuch Versicherungsrecht, 2nd ed., Munich 2008, § 20 notes 137 et seq.). On a more general level there has been a long lasting dispute among German scholars if the GCI of the professional liability insurance and other third party liability insurance disallows for the insured to conclude arbitration agreements without the prior agreement of the insurer (*Schiedsklauselobliegenheit*) and if, where such warranty (or rather *Obliegenheit*) is breached, the arbitral award has a *res iudicata*-effect in relation to any dispute that may subsequently arise between the insured and the insurer (cf. esp. ROBERT KOCH, *Schiedsgerichtsvereinbarungen und Haftpflichtversicherungsschutz*, [2007] *VersR* 281). This question will be addressed at a later stage (cf. 4.). All in all, arbitration is in many instances better suited for disputes between the insured and third parties. Insurers should take into consideration the fact that in many businesses a contractual party that would offer to draft a forum selection clause instead of an arbitration clause would be regarded as quaint at best. Insofar insurance products must allow for the insured to opt for arbitration whilst at the same time protecting the insurers' interest in not being saddled with undue costs or being bound to decisions taken by unqualified adjudicators.

c) Under a Reinsurance Contract?

Traditionally disputes under reinsurance contracts are brought neither before courts nor arbitral tribunals but are resolved by negotiation between the parties concerned. This reluctance to adjudicate disputes stems from the principle of *uberrimae fidei* or utmost good faith, which is one of the founding principles of reinsurance in Germany (and most the rest of the world). Benham once described this situation for the London market (up until the 80s) in that “when a reinsurer had a rare dispute with a ceding company, they would meet for lunch, tell a few bawdy jokes and, before dessert, resolve their differences with a sherry or two” (cf. RUSS BENHAM, What happened to handshakes?, October [1994] ReActions 18). This assessment is shared by Wollan who claims that where reinsurance disputes “did arise [they] were generally disposed of over the fine old port following a good lunch at the club (cf. EUGENE WOLLAN, Arbitration anyone?, July [1992] ReActions 33). Despite the less pronounced partiality of the average German director of a (re-)insurance undertaking for port and sherry, the situation in Germany was much the same. Even today, despite a significant “wind of change”, German insurers and reinsurers are far less likely than their English or American counterparts to submit a dispute before the courts or arbitral tribunals. Indeed upon a scholarly request in 1987 only one of the large reinsurance undertakings was able to find evidence of (one or two) arbitral proceedings within their files of the last hundred years (cf. HORST K. JANNOTT, Überlegungen zu Bedeutung und Ausgestaltung von Schiedsgerichtsvereinbarungen in der Rückversicherung, in Lutter (ed.), Festschrift für Ernst C. Stiefel zum 80. Geburtstag, Munich 1987, p. 359 at 379).

Despite this fact that adjudication is in reinsurance only a very, very last resort option, German reinsurers have traditionally made arrangements should it one day become necessary to take this route. For this reason state courts play literally no role in the resolution of reinsurance disputes since hardly any German reinsurance contract is missing to include an arbitration clause (cf. already KLAUS GERATHEWOHL, Rückversicherung – Grundlagen und Praxis, vol. I, Karlsruhe 1976, p. 502). The reasons for this practical preference for arbitration are manifold (and some of them should be discussed at a later stage, cf. 2.). One reason, however, appears to be of specific interest, since it regards a particularity of the reinsurance business. In Germany – as in much the rest of the world – there is no (or hardly any) written reinsurance (contract) law. Reinsurance is insofar one of the rare fields of the law, in which the contractual parties enjoy an almost limitless freedom of contract. In light of this fact, the reinsurance industry has established numerous customs on which reinsurance contracts are based but which are only known within the reinsurance industry. Should under such circumstances a state court be petitioned to resolve a dispute under a reinsurance contract it would be held to first establish the reinsurance law (certainly by taking into account the customs of the industry). As such, a decision by the application of a national law would create tremendous legal uncertainty and might in fact prove to be a very difficult if not impossible undertaking. Insofar parties to a reinsurance contract prefer to submit their disputes under said contract to arbitration, while at the same time empowering the arbitral tribunal to resolve the dispute as an *amicable compositeur* by asking it to rule *ex aequo et bono* and not by strictly applying the law (which is allowed under sec. 1051 subsec. 3 ZPO).

2. What are the Reasons why Arbitration is to be Preferred for the Resolution of Insurance Disputes?

The practical preference for arbitration, as it exists at least in the field of reinsurance, is for many instances due to the same reasons for which arbitration is preferred in other fields of

application. Some reasons – such as for example the aforementioned possibility to have the tribunal decide in equity or the confidentiality of arbitration – may, however, weigh more heavily in the (re)insurance sector than in other industries.

a) Choice of Experienced Arbitrators

The possibility to choose experienced arbitrators is especially important in the case of reinsurance arbitration. Since there is no written law on the reinsurance contract and for decades there have been no court proceedings on reinsurance matters in Germany, the state courts have not gained any expertise in reinsurance. If one, moreover, considers that most reinsurance arbitration clauses empower the arbitral tribunal to act as *amicable compositeur* one understands the parties' interest in having especially qualified arbitrators, since such arbitrators need to be very much accustomed with the practices in the reinsurance field, since there are no legal provisions that would serve as guidelines or that would provide legal limits. Paying heed to this fact, most arbitration clauses found in practice require the arbitrators to have certain qualifications (cf. for arbitration clauses found in practice and forwarded by scholars HUBERTUS W. LABES, *Schiedsgerichtsvereinbarungen in Rückversicherungsverträgen*, Frankfurt et al. 1996, pp. 185 et seq.). Usually arbitration clauses provide that only such persons who are or have been active (for a specific amount of time) in a senior position in insurance or reinsurance are eligible for the position of an arbitrator (cf. HUBERTUS W. LABES, *Schiedsgerichtsvereinbarungen in Rückversicherungsverträgen*, Frankfurt et al. 1996, pp. 20 et seq. [cf. *ibidem* esp. note 112 with further references]). While such a qualification standard is understandable under the given circumstances, it would certainly create significant difficulties in finding an arbitrator having the qualifications and the necessary time available and having the necessary level of impartiality (which might be difficult if the dispute touches on his personal professional activities). The market for arbitrators in the reinsurance sector is, thus, very limited. This limitation would prove detrimental if in the future more reinsurance disputes would be transferred to arbitration rather than being settled by negotiation as is the case today. As a personal comment one might add that the parties to a reinsurance contract would be well advised to limit the aforementioned qualification criteria to the party-nominated arbitrators and provide for the chairman to be a person from the legal sector with substantial expertise in arbitration. Even though such a chairman might have a more limited understanding of the reinsurance field he would work as a safeguard that the arbitral proceedings are in conformity with the law which would increase the likelihood that the award could not be set aside at a later stage.

In other fields of insurance, arbitration has not reached the same level of importance as in the field of reinsurance. Presumably this is also due to the fact that some state courts have provided for specialised chambers to hear insurance disputes and thus have built up special knowledge in the field. Before such a background the advantage of nominating experts in the course of arbitration proceedings does not hold the same importance as in other fields. Nevertheless, the more technical and specialised an insurance contract becomes (which is especially the case for industrial insurance products) the more such a possibility to nominate experts as adjudicators becomes a huge advantage.

b) Avoidance of Conflict of National Jurisdictions in Case of Transnational Relations

The avoidance of a conflict between national jurisdictions is a factor, which is often advocated as an advantage of arbitration in general. In the insurance sector this factor seems to be of rather minor importance. The parties to such insurance contracts that provide for arbitration usually have the legal capacity to freely agree on forum selection clauses and could, thus, resolve any imminent conflict between jurisdictions in advance by other means. Such a forum selection clause might, nevertheless, have some disadvantages since the concrete forum chosen might be regarded by one or the other party as favouring the contractual partner. This sort of perceived national bias, which a national court might be subject to, is presumed to be inexistence within an “international” arbitration tribunal. Which is also why arbitration has become the “natural” jurisdiction of international trade disputes.

c) Confidentiality

The existence of the principle of confidentiality in arbitration is paramount in explaining why arbitration has been established as the favoured dispute resolution mechanism in the reinsurance sector (though this primacy rather exists in theory and not in practice since disputes are almost always settled outside of formalised dispute resolution procedures). Reinsurers, but also insurers (concerning industrial insurance policies) are eager to avoid bad publicity which might be attached to any public procedures or published court rulings. In arbitration, both the hearings (and all briefs) and the award itself are to be held confidential by all parties concerned. This confidentiality is, however, not all encompassing – it reaches its limits where the arbitrators, lawyers or parties are under the legal obligation to disclose certain information. It could also not be understood to hinder a party from attacking an award with the available procedural means, e.g. setting aside procedure, before the state courts, which would also pierce the confidentiality of the award. Nevertheless confidentiality remains to be of prime importance in explaining the advantage of arbitration over court adjudication in the field of (re)insurance. Under a very broad understanding of the principle of confidentiality, as it is favoured in Germany, the parties concerned are even under a legal obligation to keep confidential the fact that a dispute exists between the parties and that arbitration proceedings have been lodged. As such, the principle of confidentiality is a suitable instrument in shielding the contractual parties’ reputation. Moreover the principle of confidentiality may in insurance disputes serve the special purpose of preventing precedents by which general terms and conditions of insurance would otherwise be given a binding interpretation which might force (re)insurers to alter or amend such terms and conditions (cf. JENS GAL, *Die Haftung des Schiedsrichters in der internationalen Handelsschiedsgerichtsbarkeit*, Tübingen 2009, p. 331). By choosing arbitration, insurers can make certain that their disputes are resolved rather on a case by case basis than with a view of establishing a general principle of law to apply to other cases. Insurers should, however, be made aware that there is a tendency for arbitral institutions to assume the right to publish awards at least in a anonymised manner. Such would very often go counter the interests of the parties to an insurance dispute. As such, the contractual parties should make certain that their arbitration clause unequivocally provides for such a practice to be disallowed.

d) Duration of the Proceedings

Whilst scholars praise the advanced swiftness of arbitration in comparison to the slowness of state courts, such a comparison is less true for Germany. Germany is provided with a rather swift and effective court system. The time advantages of arbitration is insofar less poignant if the alternative would have been proceedings before a German state court. One furthermore has to consider that arbitration offers both parties the possibility to attack or flank the arbitration proceedings with court proceedings in different national forums, which might in some instances, drag out the duration of the arbitration proceedings substantially. Considering these circumstances it appears as if any perceived time advantage of arbitration is not regarded as so substantial as to make arbitration the only choice for insurance disputes. These considerations may, however, be very different if the alternative to arbitration would not be German court proceedings but court proceedings in a jurisdiction whose courts are notorious for its backlogs.

e) Limited Recourse Against the Award

The fact that there is only limited recourse against a final arbitral award is instrumental in the utility of arbitration as a whole. If a state court were given the power to submit an award to a *revision au fond* all other advantages of arbitration (i.e. swiftness, cost efficiency, confidentiality) would be called into question and in fact would be cancelled out. Arbitration would be transformed into a mere preliminary dispute resolution mechanism which could always be followed by substantial court proceedings. Insofar arbitration as a whole is almost characterised by the fact that there are only limited grounds on which the award may be set aside. Insofar this fact also serves an important function in (re)insurance disputes without, however, being of increased importance in comparison to other sectors.

f) Better Enforceability of the Award

The facilitated enforceability of awards in comparison to foreign judgments, as made possible by the unprecedented success of the New York Convention, has certainly helped in promoting arbitration as the most logical choice of dispute resolution in all international contexts. If such has also played an important role in convincing reinsurance undertakings to submit all their contracts to arbitration clauses is rather dubious. Since reinsurance undertakings take all steps necessary to avoid any dispute to be adjudicated (by resolving disputes almost always by negotiation), they have apparently not concerned themselves too much with the fact how awards (or judgments for that matter) might be enforced should in one of the rare cases formalised proceedings become necessary. Nevertheless this advantage of enforceability might become more important in the future if the German reinsurance sector should follow the example of the US and the UK and become more prone to dispute.

g) Other

In reinsurance disputes, the possibility to empower the tribunal rule *ex aequo et bono* and not by strictly applying the (non-existent) written law serves, as already mentioned above, as a major advantage of arbitration. In this context one should also consider the procedural flexibility of arbitration as one of its advantages. By this way (re)insurance undertakings are put in a position to tailor the procedure to best suit their needs.

h) What are the Specific Disadvantages of Arbitration in Insurance Matters and the Reasons why in Certain Cases National Court Procedures Should be Preferred?

It is difficult to assess if there are any disadvantages of arbitration that would as a general rule make it appear more feasible to submit certain groups of insurance disputes not to arbitration. One such disadvantage might be from a consumer protection point of view that there is no analogous mechanism in arbitration to the court costs assistance granted by the state for state court proceedings (cf. secc. 114 et seqq. ZPO). As a more general remark, it might in Germany be ill regarded if an insurer were to systematically submit disputes under insurance contracts with consumers to arbitration and as such deprive such consumers of their lawful judge. Other than the question if such arbitration clauses could be validly concluded (cf. on this later at 3.), such an approach might create serious image problems for the insurer in question. From a scholastic point of view, it would also be problematic if such were to happen, since it would, in view of the principle of confidentiality, deprive scholars from access to practical examples and one would have to fear a stagnation of the development of insurance law as a whole.

3. Are There (Legal) Limitations to the Arbitrability of Disputes in the Field of Insurance?

Other than for example the Austrian law, modern German private law never provided for an insurance specific limitation to the arbitrability of disputes. Under Austrian law, the Austrian Insurance Contract Act of 1917 (cf. RGBI 1917, p. 501) provided under § 11 that agreements between the parties that disputes under the insurance contract shall be submitted to arbitration are to be considered null and void, while making an exception for such arbitration agreements that only submitted a dispute concerning the amount of benefits to be paid to the insured to the decision of an arbitral tribunal (cf. in more detail on § 11 Austrian VVG 1917 MICHAEL GRUBHOFER, Die Problematik des Verbraucherschutzes bei Schiedsklauseln in Gesellschaftsverträgen der GmbH, Dissertation University Vienna 2010, pp. 25 et seqq.). This limitation was abrogated when Austria rescinded the Austrian Insurance Contract Act of 1917 in 1939 to substitute it with the German VVG and was not reinstated within the Austrian Insurance Contract Act of 1958.

This absence of insurance specific limitations in Germany should, however, not be understood for the power to conclude arbitration agreements to be without boundaries in this field. Sec. 1030 subsec. 1 ZPO defines (objective) arbitrability in very broad terms by stating that “[a]ny claim involving an economic interest [in German: *vermögensrechtlicher Anspruch*] can be subject of an arbitration agreement. An arbitration agreement concerning claims not involving an economic interest shall have legal effect to the extent that the parties are entitled to conclude a settlement on the issue in dispute.” In the subsequent two subsections certain disputes concerning the lease of living quarters are excluded from arbitrability and limitations to arbitrability set in other laws outside the ZPO are declared to remain valid.

There is no general interdiction as provided by art. 2061 of the French Code Civil that would only allow entrepreneurs to conclude arbitration agreements, which would mean that arbitration would only be possible for the insurance of professional activities. There is, however, a special form requirement for such clauses provided by sec. 1031 subsec. 5 ZPO. Pursuant to this provision “[a]rbitration agreements to which a consumer is a party must be contained in a document which has been personally signed by the parties. [...]. No agreements other than those referring to the arbitral proceedings may be contained in such a

document or electronic document; this shall not apply in the case of a notarial certification.” This requirement in and by itself creates certain difficulties for the insurers concerning the conclusion in the realm of its mass insurance business. Even though insurers are no longer obligated to include arbitration clauses, if they wish to conclude them, into their GCI, as it was in the past required by supervisory law (cf. sec. 10 subsec. 1 n° 6 VAG as in force until 27 December 2000). Nevertheless insurers would presumably be held to conclude arbitration agreements at the same time at which the main contract is concluded, since hardly any consumer in the position of a policyholder would be willing to submit to arbitration after contract conclusion. This would mean that the insurer would have to create a single document which contains the arbitration agreement to be annexed to its GCI. Said document would have to be signed by both parties and it is rather questionable if the insurer would be allowed to base its rejection of a prospective policyholder on the mere fact that he was unwilling to submit to arbitration. Furthermore the conclusion of an arbitration agreement creates certain difficulties for the insurer concerning its information duties under sec. 7 VVG. Pursuant to the German Regulation on Informational Duties under Insurance Contracts (so-called *VVG-InfoVO*) insurers must inform their policyholders before the latter declare their intent to conclude a contract, about the competent courts (sec. 1 subsec. 1 n° 17 VVG-InfoVO) and about alternative dispute resolution methods available (sec. 1 subsec. 1 n° 19 VVG-InfoVO; this only relates to the Ombudsmann-procedure [see supra 1.a.] and similar procedures). Such information could not be precisely given without taking into consideration if the insurance contract to be concluded is to be submitted to an arbitration clause or not.

The aforementioned difficulties in concluding arbitration clauses in relation to consumer contracts may still be overcome. The same is, however, not necessarily the case concerning the limitations set by the legal regime in Germany on general terms and conditions (as applicable [esp.] to consumer contracts). Standard contractual terms, i.e. such contractual terms that are unilaterally introduced by a contractual party to the contract and that were drafted with the intent to apply to a multitude of contracts (cf. sec. 305 subsec. 1 BGB), are very thoroughly scrutinised by the German courts. An arbitration agreement which an insurer introduces and has drafted to apply to a multitude of contracts within its portfolio (which would always be the case) would constitute such a general term and condition and would thus have to meet the threshold provided by sec. 305 et seqq. BGB. Whilst sec. 308 and 309 BGB do not explicitly disallow for arbitration agreements to be concluded in the form of general terms and conditions, their conclusion in this form is nevertheless regarded as very problematic what concerns consumer contracts. On the one hand such arbitration agreement might be regarded as surprising clauses in the sense of sec. 305c since arbitration is very much out of the ordinary concerning consumer insurance products. In light of the fact that arbitration agreements with consumers are generally allowed, as can be taken from sec. 1031 subsec. 5 ZPO, and that the arbitration agreement would have to be contained in a single document (thus providing for an adequate warning function) such an evaluation seems, however, rather farfetched. Unless some other factors speak in that direction, an arbitration agreement should not be regarded as null and void on the grounds that it is considered surprising. The true problem for arbitration agreements in consumer insurance matters lies in the question if such an agreement meets the requirements of reasonableness as provided by sec. 307 BGB. Some scholars have advanced the idea that arbitration clauses are only to be considered reasonable if the party introducing the arbitration clause (*in casu* the insurer) relies on specific reasons deserving protection for the introduction of such a clause, which would in consumer disputes hardly ever be the case (cf. THOMAS HANNEMANN in *idem* & Wiegner (eds.), *Münchener Anwaltshandbuch Mietrecht*, 3rd ed., Munich 2010, § 48 note 247). Other scholars take the position that the introduction of an arbitration agreement may not *per se* be regarded as unreasonable. Unreasonableness must rather be decided on a case by case basis,

while taking into consideration that the European directive on unfair terms in consumer contracts (93/13/EEC) – the implementation of which sec. 307 BGB (*inter alia*) serves – provides in its Annex lit. q that any clause “excluding or hindering the consumer’s right to take legal action or exercise any other legal remedy, particularly by requiring the consumer to take disputes exclusively to arbitration not covered by legal provisions, unduly restricting the evidence available to him or imposing on him a burden of proof which, according to the applicable law, should lie with another party to the contract” shall be regarded as unfair. Under this approach unreasonableness may only be assumed where the arbitration agreement in question creates a situation which unfairly advantages the insurer (cf. WOLFGANG WURMNEST in MünchKommBGB, 6th ed., Munich 2012, sec. 307 notes 251 et seqq.). Considering that such an unfair advantage may already be seen in the geographic distance of the venue for the arbitral proceedings from the consumers domicile, in the nomination procedure and other procedural particularities (cf. for a overview INKA HANEFELD & MATHIAS A. WITTINGOFER, Schiedsklauseln in Allgemeinen Geschäftsbedingungen, [2005] SchiedsVZ 217 at 222 et seqq.), the conclusion of arbitration agreements in consumer matters is permanently threatened by the sword of Damocles of nullity and voidance. In such a situation of legal uncertainty, insurers are (often) better advised to refrain from concluding arbitration agreements all together.

4. Under Which Conditions can a Non-Signatory of the Arbitration Agreement be a Party to the Arbitration? Specifically, can the Insurer Join or be Joined in a Dispute Arising out of a Commercial Contract Between the Insured and a Third Party, Containing an Arbitration Clause?

Multi-Party Arbitration is one of the biggest (to some extent unresolved) problems of arbitration. It is one of the most revered principles of arbitral law that only such parties are bound to an arbitration agreement (and to the pursuant award) that agreed to said arbitration agreement. As a result, no party may be forced to join an arbitration proceeding which is not a signatory to the underlying arbitration agreement (or at least to an arbitration agreement that would allow a joining of two individual arbitration proceedings into one). This also applies in the insurance sector; hence an insurer cannot be forced to join the proceedings unless by its own free will. On the reverse side, parties to an arbitration agreement have the right that their proceedings are limited to such persons to which they agreed, meaning that no person can join the proceedings unless with the agreement between all signatories to the underlying arbitration agreement.

While German arbitration law, thus, does not provide for a legal power to join or be joined to arbitration proceedings of non-signatory parties, it puts a large premium on party autonomy. Insofar the arbitral parties are enabled to provide for multi-party procedures that allow for the joining of non-signatory parties and the latter are free in contractually agreeing to join arbitral proceedings and being bound to arbitral awards. Such a choice of the arbitral parties will especially be seen in the choice of arbitration rules that explicitly provide for multi-party solutions.

Leaving aside the possibility to join two arbitral proceedings into one (so-called *Verfahrensverbindung*), which might in the future (should insurance undertakings become more litigious concerning reinsurance disputes) play an important role in the handling of reinsurance disputes, two basic situations exist in which an insurer may join arbitral proceedings of its insured. Firstly it may join the proceedings by way of intervention (so-

called *Nebenintervention*) and secondly it may be joined by being served a third party notice (so-called *Streitverkündung*).

In the case of a third party intervention the insurer would out of its free will join the arbitral proceedings in support of either the claimant or the respondent, usually, yet not necessarily, in support of its insured. Since the insurer joins the proceedings out of its free will it is regarded to have no right in the establishment of the arbitral tribunal (i.e. no nomination rights). Since it joined the proceedings the content of any future award would have *res iudicata*-effect also between him and his insured. For the aforementioned reasons, such a third party intervention is, however, only possible where the parties agreed to such a possibility. Such was for example found by the Court of Appeal of Stuttgart which regarded the arbitral parties in question to having implicitly agreed to the possibility of such a third party intervention (cf. OLG Stuttgart [2003] NJW-RR 495 at 496). At least in such areas in which insurers cover commercial risks or other risks to be typically submitted to arbitration they might thus require their insured to conclude only such arbitration agreements that allow for third party intervention of the insurer. Whether such is done in practice has hitherto remained unclear.

More problematic is the question under what circumstances an insurer may be forced to join arbitral proceedings by serving him with a third party notice. The possibility of a true third party notice does not exist in the field of German arbitration law, since such would imply that a third party could be joined against its will or the will of one of the other parties concerned. All parties concerned are, however, free to contractually develop instruments that resemble the functioning of a third party notice. Such would, however, for example require that all signatory parties agree on the possible joining of the third party (i.e. the insurer), that the third party (but also the arbitrators) agrees to this possibility and that the third party's nomination right concerning the establishment of the arbitral tribunal is not unfairly limited (cf. on this subject JENS-PETER LACHMANN, *Handbuch für die Schiedsgerichtspraxis*, 3rd ed., Cologne 2008, notes 2830 et seqq.). This will of course require a substantial, coordinated effort by all parties concerned. It appears that at least in the field of reinsurance arbitration some arbitration agreements provide for such mechanisms.

For some insurance contracts the problems are solved in a more pragmatic way. If one takes for example a General Liability Insurance Contract in Germany based on the model clauses of the GDV (the AHB 2012). Under such a contract the insured has a legal right against the insurer to be held harmless in the sense that the insurer is to regulate any justified liability claims against the insured as long as they fall under the agreed cover. Secondly, however, German liability insurance contracts require the insurer to take over legal proceedings on its costs in order to defend the insured against claims that it regards as unjustified. This means that an insurer will in a first step elaborate if a claim directed against the insured appears to be based in law, in a second step, if it holds the claim to be unjustified, it can advise the insured to not settle the claim and is enabled and obligated to take over legal proceedings on its proper costs. If the proceedings end with a ruling in disfavour of the insured the insurer, in a third step, has to regulate the claim and hold the insured harmless. If a liability was held to exist by a court decision such decision binds the insurer in the sense that it is not able to claim in its legal relationship with the insured that the claim is unjustified (cf. n° 5.1 AHB 2012 and sec. 106 VVG). Both the AHB 2012 and the VVG only apply rather generic terms such as "final and binding decision". Due to this fact at least pursuant to some scholars (cf. ROBERT KOCH, *Schiedsgerichtsvereinbarungen und Haftpflichtversicherungsschutz*, [2007] *VersR* 281) an insurer is generally also obligated to take over the proceedings on its proper costs if such proceedings are not court but arbitral in nature. And furthermore a final and binding arbitral award would be granted the same effect as a court decision, in that an insurer could no

longer invoke that the claim against the insured had no legal basis. To counter these risks, insurers may react in two manners. Firstly they can limit their duty to take over the costs of arbitral proceedings to a specific amount (cf. 101 VVG). Secondly they can require for the arbitration agreement to provide for certain procedural safeguards. The GDV has for example drafted a clause which deals with the cover relating to claims that are submitted to arbitration. In it, it is stated that the conclusion of an arbitral agreement only then does not infringe the liability insurance contract (which would mean that cover might be suspended) if a) the arbitral tribunal is constituted of at least three arbitrators, of which the chairman must have a law degree that qualifies him to be named as a state court judge, b) the tribunal must decide by applying the law (and not by deciding *ex aequo et bono*) and c) the tribunal is to render a reasoned award (cf. for this clause e.g. ROBERT KOCH, Schiedsgerichtsvereinbarungen und Haftpflichtversicherungsschutz, [2007] VersR 281 at 283). If these requirements are met, the arbitral award has the same legal effect *vis-à-vis* the insurer that a court decision would have. Similar solutions have been found in other areas, where the insured on a regular basis conclude arbitration agreement concerning matters that at the same time touch upon insurance covers. Which again, goes to show that the contractual and party autonomy granted by German law leaves the insurance industry and its customers ample room to create a contractual framework in regard of arbitration proceedings to foster an effective dispute resolution mechanism even where more than two parties are concerned.

5. Can the Insurer that has Indemnified his Insured for a Loss Suffered Under a Commercial Contract, Initiate on the Basis of his Subrogation in the Insured's Rights, an Arbitration Procedure Against the (Third) Person who Entered into the said Commercial Contract with the Insured, when this Contract Contains an Arbitration Clause?

German jurisprudence holds that the assignment of a claim also results in the fact that the cessionary is bound to an arbitration agreement that has been concluded by the cedent to cover the claim in question (cf. JENS-PETER LACHMANN, Handbuch für die Schiedsgerichtspraxis, 3rd ed., Cologne 2008, note 521). This would mean that an insurer who is assigned a claim by its insured due to the fact that it has compensated said insured person's loss resulting from the same factual circumstances that underlie the claim against the third party is also the insured person's legal successor concerning the arbitration agreement (as a side note: this does not mean that the insured would for all purposes cease to be a party to the arbitration agreement, on the contrary may he still be sued under said agreement concerning any other claim covered by it). This means on the one hand that the insurer is enabled to compel the third party into arbitration and on the other hand that the third party, if the insurer were to sue it before the otherwise competent state court, may effectively raise the objection of an arbitration agreement, which will result in the state court rejecting the action as inadmissible. The result is no different in the area of indemnity insurance for which sec. 86 VVG provides for a statutory assignment of claims to the insurer that has indemnified its insured (meaning that no contractual agreement on assignment of such claims is necessary). Again, the insurer is held to be the insured's legal successor also what concerns the arbitration agreement.

6. Can the Award Rendered Against a Party Whose Liability is Covered by the Insurance Policy, be Opposed (“Opposable”, in the French Terminology) or Enforced Against the Insurer who was not a Party to the Arbitration Proceedings? Does it Make a Difference Whether the Insurer Acted in the Arbitration in Lieu of the Insured

Pursuant to the Clause in the Insurance Policy Granting him the Right to Take Charge of Legal Proceedings (Including Arbitration)?

As mentioned above (see supra 4.) it is believed by the prevailing opinion (cf. also WERNER LÜCKE in Prölss & Martin (eds.), *Versicherungsvertragsgesetz*, 28th ed., Munich 2010, sec. 106 note 7) that in the field of liability insurance an arbitral award – at least if the formal requirements for the nomination and procedure required by some insurers were met – is opposable to the insurer. This means that the final and binding award has a *res iudicata*-effect concerning the existence and the amount of the claim which constitutes the insured event. Any court or arbitral tribunal dealing with the insurance claim would have to give the arbitral award on the liability claim full legal consideration. In other areas of insurance law there is no such statutory rule as sec. 106 VVG which would lead to the same legal result. This means that opposability of arbitral awards would require for such to be provided within the insurance contract.

While there insofar are areas in which the award will have a limited legal effect against the insurer (in the sense that it is opposable), the award is not considered to be rendered against the insurer. As such, it may not be enforced against the insurer who was not a party to the proceedings. A winning third party would have to enforce the award against the insured, which would often mean that they will seize the insured's claim for indemnification against its liability insurer. Since the third party would be the legal successor of the insured concerning the claim, the insurer could raise all objections under the insurance contract against the third party (esp. concerning breaches of warranties [*Obliegenheiten*]), but again the arbitral award would be opposable concerning its content.

Concerning the question of opposability and enforcement it makes no difference if the insurer took over the proceedings in lieu of the insured person. This is insofar not surprising as German law, at least concerning liability insurance contracts, is rather modern in granting arbitral awards (at least pursuant to prevailing opinion) *per se* the same legal effect against the insurer as court decisions. The reason for which German law makes an award opposable irrespective if the insurer took over the legal proceedings or not, probably lies in the fact that a liability insurer is held by law responsible to grant so-called *Abwehrdeckung*, which means that it must provide the means to defend against a (perceived) unjustified claim. This will often mean that the insurer takes over the whole proceedings or that the insured must coordinate his efforts with the insurer. It is also not very surprising that the mere fact that the insurer took over arbitration proceedings in lieu of the insured cannot result in the award becoming enforceable against it. In such a situation the insurer is not a party to the arbitration proceedings but only acts on behalf of the insured person. Any award would, thus, be rendered against the insured and not against the insurer. An award may, however, not be executed against third parties, which an insurer would remain to be.

7. Are There any Arbitration Organs with Specific Competence in Insurance Disputes and/or in Reinsurance Disputes? If so, What is Their Legal Form (Association, Professional Organisation Like an Insurers Association, etc.) and are They Linked with AIDA?

ARIAS Europe e.V. is a German registered association whose purpose is the advancement and facilitation of arbitration in insurance and reinsurance matters in central and eastern Europe (cf. e.g. [CHRISTOPH] BA[LtZER], *Schiedsrichter gesucht – Bei der Mitgliederversammlung der Arias Mitte Juli in Düsseldorf ging es um Streitigkeiten in der*

Assekuranz, [2008] VW 1308). For this purpose ARIAS Europe, for example, drafts model arbitration agreements for the insurance sector, tries to establish rules of arbitration that pay heed to the specific needs of (re-)insurance arbitration and offers assistance in the nomination of suited arbitrators, which is aided by a list of suited arbitrators for insurance matters established by ARIAS Europe and by a rather recently introduced certification process for such arbitrators. As can be taken from its name, ARIAS is the acronym for AIDA Reinsurance and Insurance Arbitration Society, ARIAS Europe is strongly associated with AIDA and is established as one of the chapters of AIDA. ARIAS Europe insofar does not differ from its foreign counterparts ARIAS US, ARIAS UK and CEFAREA in France. For the moment ARIAS Europe has not established any arbitration rules for the application to insurance and reinsurance disputes (nor does it administrate arbitration proceedings). ARIAS Europe is rather intended to cooperate with the Deutsche Institution für Schiedsgerichtsbarkeit e.V. (DIS) and where the parties wish to submit their dispute to institutional arbitration it advocates the use of the DIS-arbitration rules.

The Deutsche Institution für Schiedsgerichtsbarkeit e.V.: (DIS), the most notable arbitral organisation in Germany, has in 2006 – hence in the same year the ARIAS Europe e.V. was established – founded a committee for “Direct Insurance and Reinsurance” with some of the most eminent scholars and practitioners of the insurance and reinsurance (arbitration) field as members (cf. ANONYMUS, Für klare Spielregeln in der deutschen Assekuranz – Die Deutsche Institution für Schiedsgerichtsbarkeit gründet einen Unterausschuss für Erst- und Rückversicherung mit prominenten Vertretern, [2006] VW 1463). While the DIS has not established arbitration rules to specifically apply to insurance or reinsurance disputes – such as for example the Reinsurance Offices Association (R.O.A.), the Reinsurance Association of America (RAA), the London Court of International Arbitration (LCIA), ARIAS US and UK (cf. CHARLOTTE ECHARTI & HUBERTUS LABES, in: Bruck & Möller (eds.), *Versicherungsvertragsgesetz Großkommentar*, 9th ed., Berlin 2013, sec. 209 note 176) – it has the necessary flexibility in its arbitration rules and due to the aforementioned committee the necessary know-how to administrate (re)insurance disputes in an effective manner.

Despite the fact that there is a German institution able and willing to administer reinsurance arbitrations and that on the international level several organisations open to German reinsurers have even established hand-tailored procedures to suit such disputes, institutional arbitration has for the moment remained rather insignificant in Germany. Almost all reinsurance contracts provide for *ad hoc*-arbitration (cf. CHARLOTTE ECHARTI & HUBERTUS LABES, in: Bruck & Möller (eds.), *Versicherungsvertragsgesetz Großkommentar*, 9th ed., Berlin 2013, sec. 209 note 174).