



Contribution by the AIDA Swiss Chapter to
BILA's 50th Anniversary

Key Differences between Swiss and English Insurance Law

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Association Internationale
du Droit des Assurances
Swiss Chapter

A Short Welcome Address: It is with Pleasure.....



The screenshot shows the website for the AIDA Swiss Chapter. At the top, there is a navigation menu with links for Home, AIDA Swiss Chapter, Organizing Committee, Veranstaltungen, Bildergalerie, and Kontakt. The main content area is titled "Organizing Committee of AIDA Swiss Chapter" and lists five members with their photos and contact information:

- Christian Felderer, Chairman:** SCOR, Gusan-Quai 26, CH-8022 Zürich. Tel: +41 44 639 94 71, Fax: +41 44 639 74 71, Web: www.scor.com, E-Mail: cfelderer[at]scor.com.
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A red diagonal watermark reading "soon to be updated" is overlaid on the left side of the screenshot.

AIDA Swiss Chapter Organizing Committee

*Part of the Swiss Association of Liability and Insurance Law (SGHVR)**

* Founded 12 April 1961 in Zurich



Association Internationale
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Swiss Chapter

Supervisory Authority FINMA and its Tasks

Licensing / Ceasing Business

- FINMA is responsible for issuing licences to individuals and legal entities that are active in the regulated financial market.
- Anyone who meets the conditions is entitled to apply for a licence.
- The law provides for various forms of licence, involving everything from intensive, prudential supervision of the institution to a one-time authorisation without subsequent monitoring.

Supervision

- Prudential supervision is FINMA's core task.
- In its supervisory activities, FINMA is consistently guided by its statutory remit to protect creditors, investors and policyholders and ensure the smooth functioning of the financial markets.
- FINMA follows a risk-oriented approach, deliberately monitoring less risky areas less intensively while taking a much more rigorous line with areas that are crucial to the protection of individuals and critical functions.

Enforcement

- FINMA is charged with investigating possible breaches of financial market legislation and rectifying any shortcomings that are identified. In so doing, it establishes a level playing field for all market participants.
- Enforcement enables FINMA to ensure compliance with supervisory law, order corrective measures to be taken where necessary, or impose sanctions. FINMA does not have the power to issue fines.
- FINMA's rulings can be contested before the courts.

Regulation

- FINMA is committed to internationally compatible and principle-based regulation.
- Where expressly provided for in the legislation, FINMA issues its own ordinances covering details that are very technical or dynamic.
- FINMA sets out its supervisory practice in circulars.

Source FINMA Annual Report 2013



Swiss Insurance Market

Key Figures (2013)*	<i>(financials in CHF '000)</i>
Number of supervised companies	
Insurance	147
Reinsurance	62
Premium	
Life	35,115,846
Non-Life	51,315,241
Reinsurance	36,844,601
8 Swiss Groups' global consolidated premium	106,298,000***
Employees in the insurance/reinsurance sector**	48'400 (2013) / 47'832 (2014)

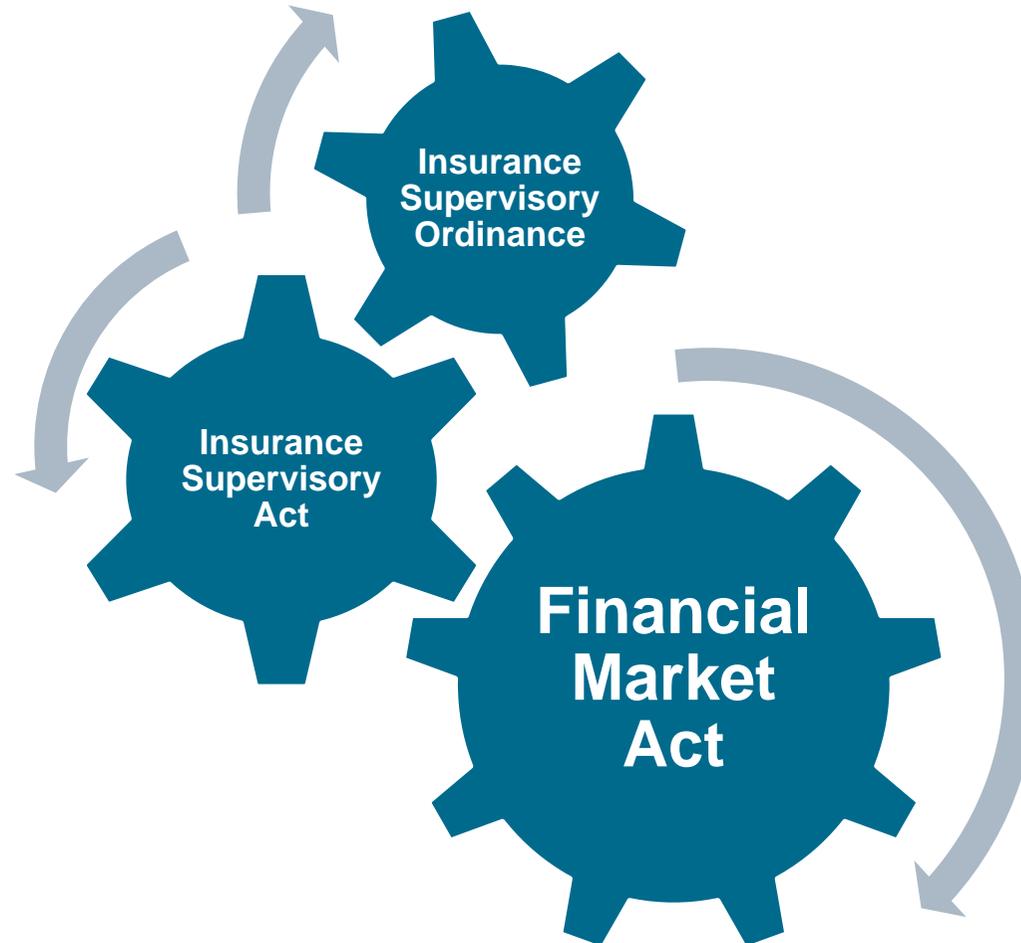
Sources/comments:

- * [FINMA Insurance market report 2013](#)
- ** Swiss Insurance Association
- *** IMF Country Report No. 14/143, p. 32



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Swiss Law - Main Regulatory Foundation



Note: Also the *Swiss Insurance Contract Law* entails certain regulations regarding matters addressed in the ISA or ISO (e.g. in conjunction with an insurer's insolvency or in relation to insurance agents)

Federal Act of 22 June 2007 on the Swiss Financial Market Supervisory Authority (Financial Market Supervision Act, FINMASA)

Swiss Federal Act of 17 December 2004 on the Supervision of Insurance Companies (Insurance Supervision Act, ISA)

Swiss Federal Ordinance of 9 November 2005 on the Supervision of Private Insurance Companies (Insurance Supervision Ordinance, ISO)



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Current Swiss Insurance Regulations: Key Elements

Quantitative

- Technical Reserves
- Tied assets
- Solvency I and Swiss Solvency Test (“SST”) as an economic capital measurement in parallel

Qualitative

- Governance
- Risk Management
- Responsible Actuary
- Internal & External Audit
- Tied agents / independent broker distinction
- Insurance group and insurance conglomerate supervision

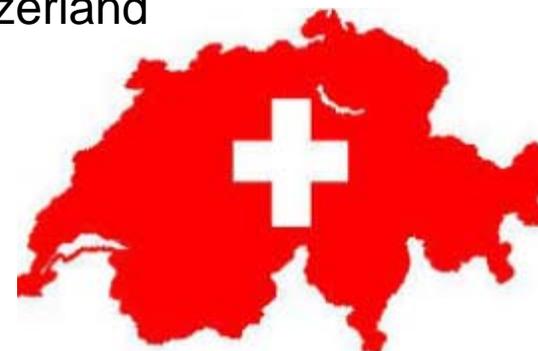


Practical Issues of Interest in Supervisory Landscape

Not subject to the ISA and thus exempt from FINMA supervision:

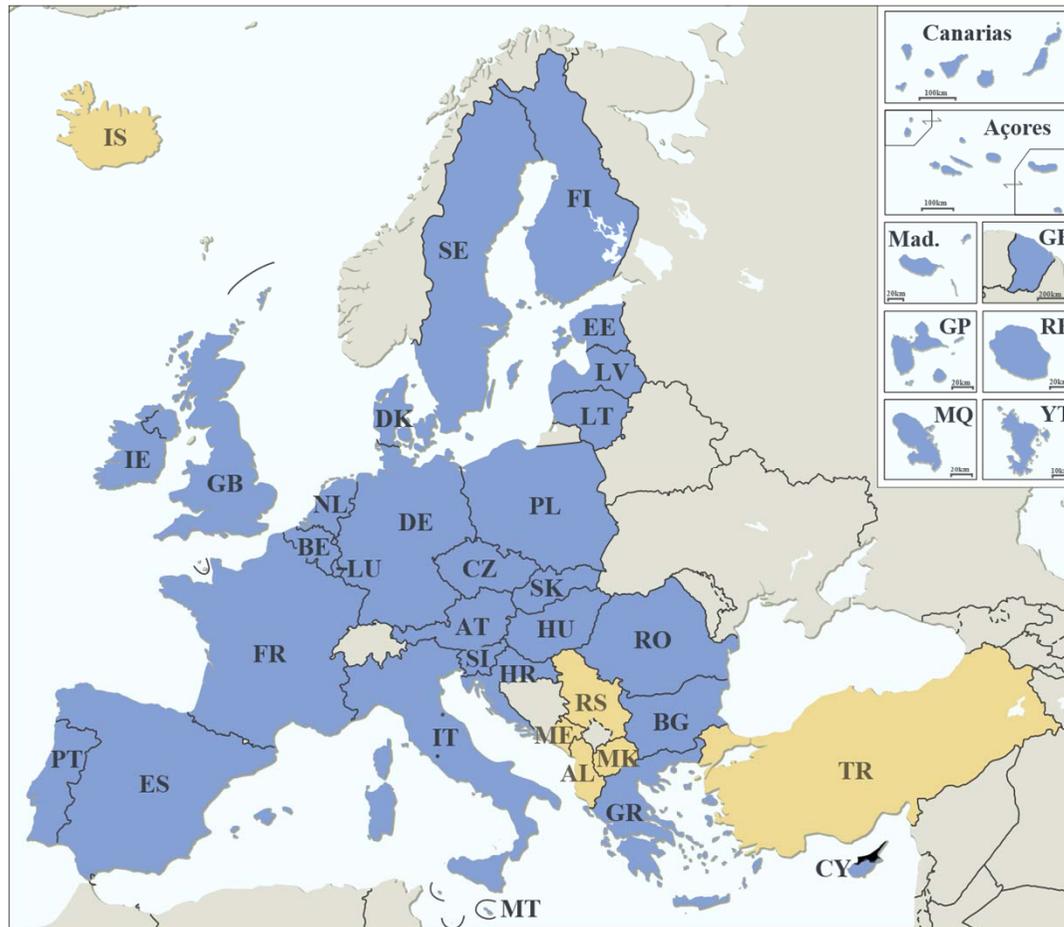
- Article 2 al. 2 item a ISA - Reinsurance undertakings with their seat abroad which only transact reinsurance in Switzerland (e.g. a Bermuda reinsurer with a Swiss branch office)

- Article 1 al. 2 items a - Insurance undertakings with their seat abroad covering risks related to
 - a) sea going vessels, aviation and cross boarder transport risks
 - b) Insurance cover for risks located outside of Switzerland
 - c) War risks



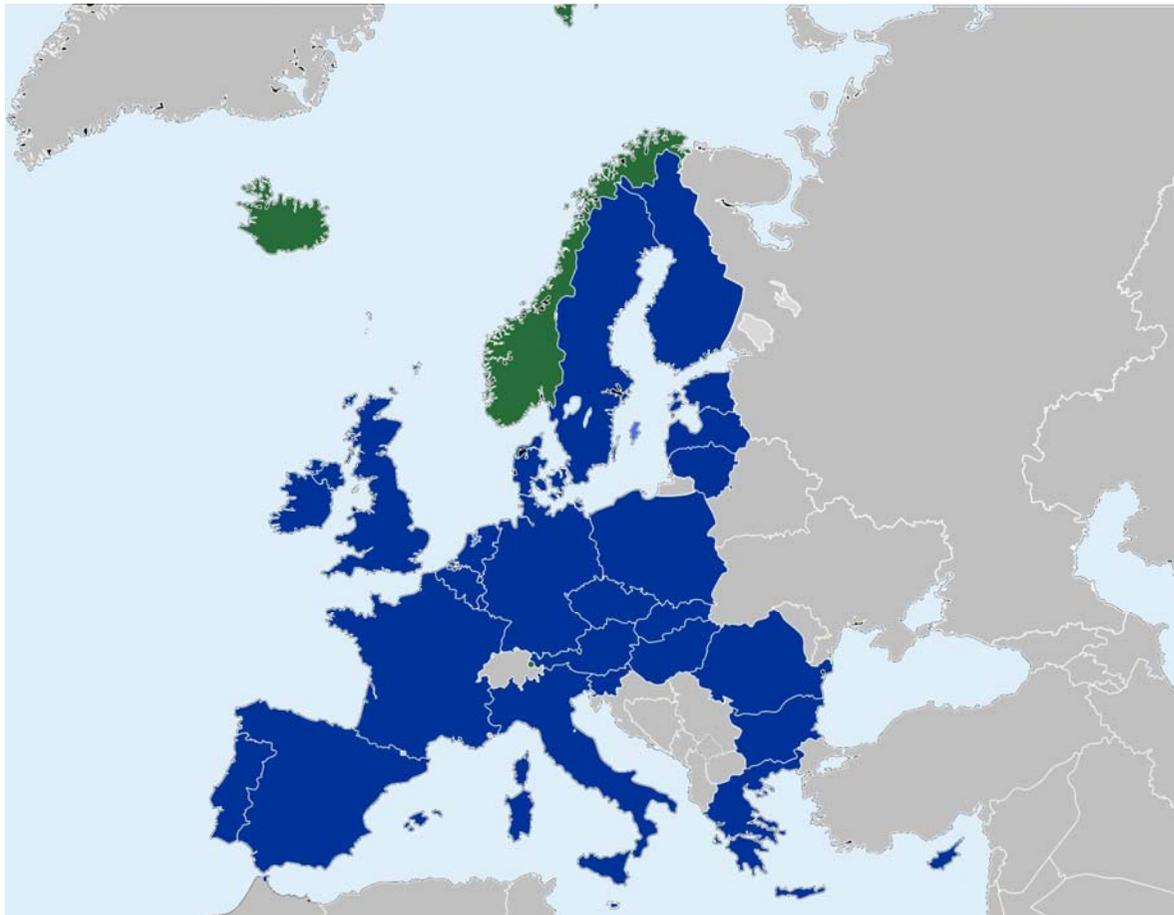
Switzerland and the rest of Europe

The 28 EU Member States



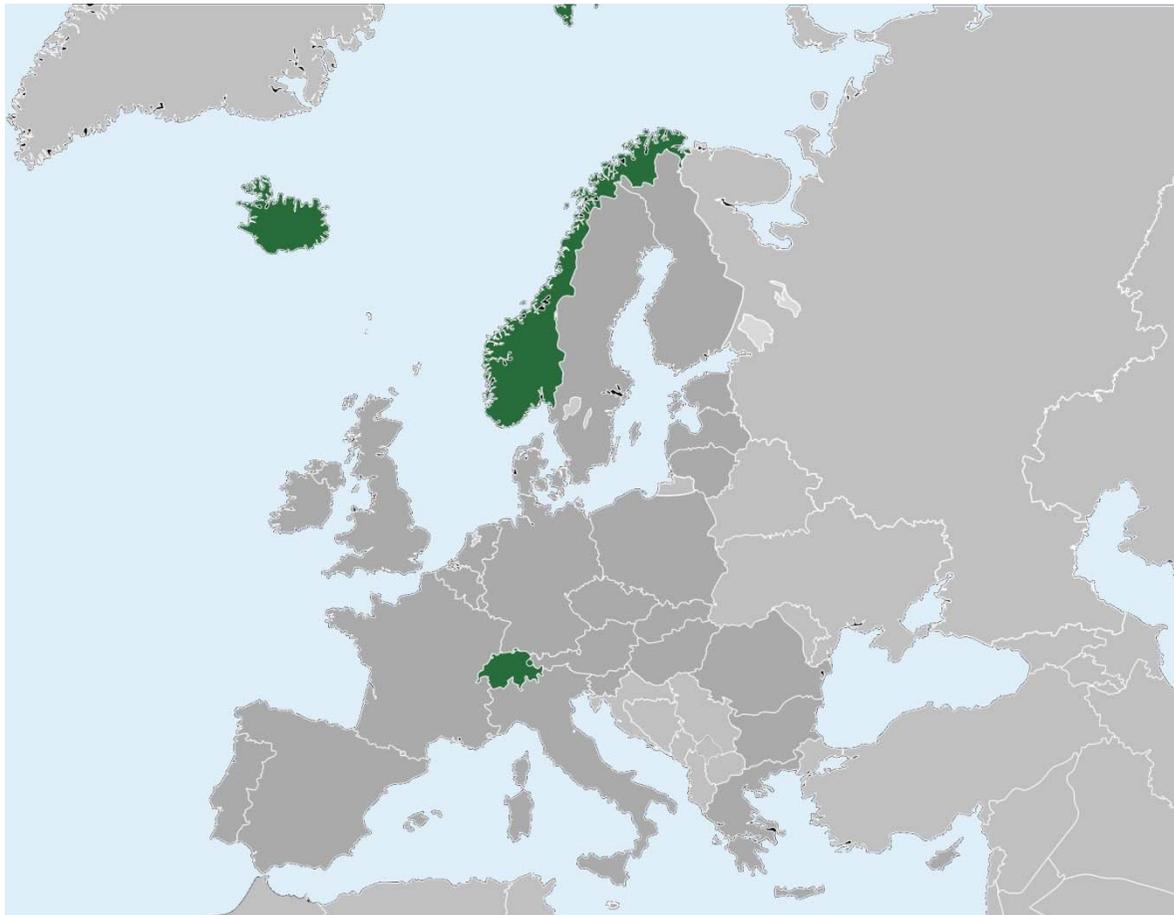
Switzerland and the rest of Europe

The 30 EEA Member States



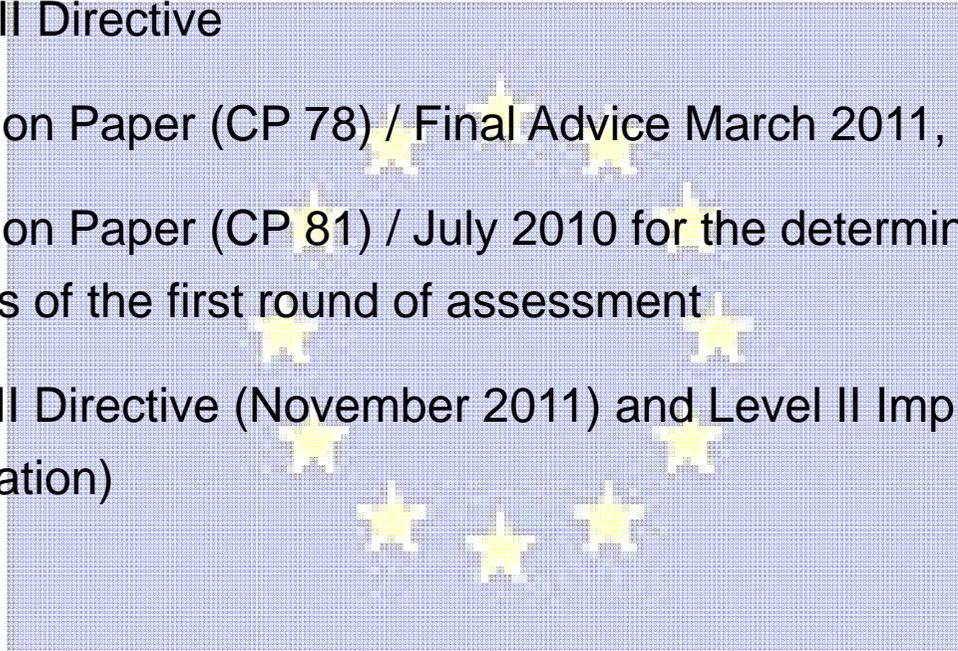
Switzerland and the rest of Europe

The 4 EFTA Member States

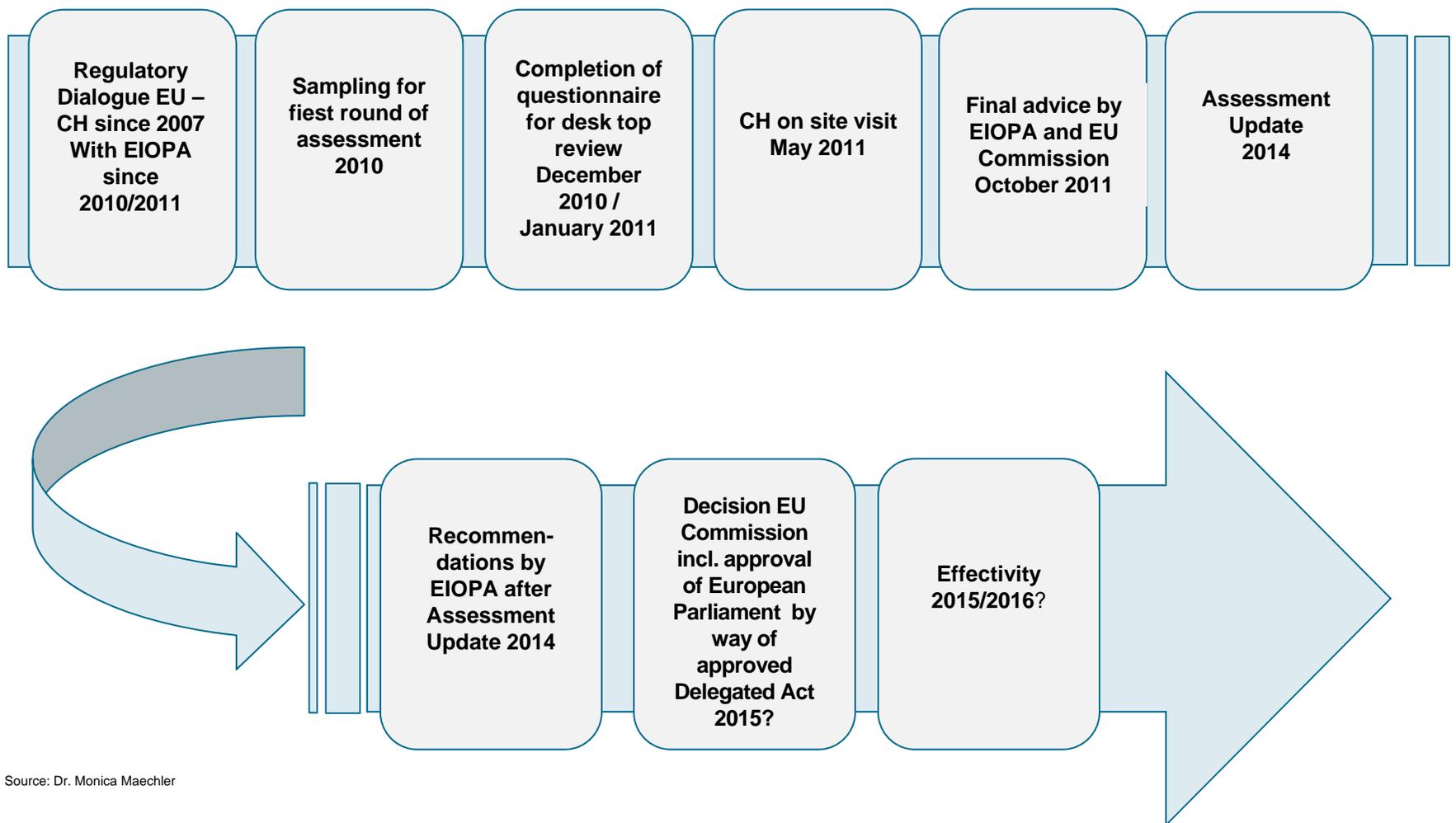


EU: Main Drivers for Assessment of Equivalence

- ❑ Solvency II Directive
- ❑ Consultation Paper (CP 78) / Final Advice March 2011, technical criteria
- ❑ Consultation Paper (CP 81) / July 2010 for the determination of the candidates of the first round of assessment
- ❑ Omnibus II Directive (November 2011) and Level II Implementing Measures (in preparation)



Achieved Milestones CH – Solvency II



Source: Dr. Monica Maechler



Drivers for Revision of ISO



**Insurance
Supervisory
Ordinance
2014?**

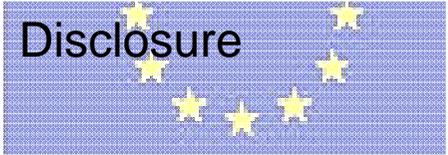
Draft bill for a revised ISO with commentary by the Finance Department issued on 19 May 2014

- Practical experience in the application of the law
- Lessons learnt from the 2007 Financial Crisis
- SST experience
- Solvency II Directive
- Equivalence Testing by *EIOPA* in fall of 2011 and Financial Services Action Plan (*FSAP*) in 2013
- International developments

Areas of Change in Swiss Regulatory Foundation



Rationale for Changes

Subject	Rationale
Solvency	No technical and/or commercial justification to maintain Solvency I method in the light of EU Solvency II / SST
 Qualitative Risk Management	ORSA related requirements, Compliance function, liquidity requirements to match Solvency II standards
 Disclosure	Improved disclosure matching international standards of ICPs and IAIS and under Solvency II
Technical Reserves	More detailed regulation of matters related to reserving
Intermediaries	Clarify registration requirements for tied agents Practical developments since 2006 revision: Certain (mainly) editorial/structural changes of the text

Recent Regulatory related Cases

❑ Retrocession / Commission

BGE 137 III 393 / Key words: Duty to surrender retrocessions; can only be waived by explicit waiver, agent to disclose all relevant facts and details relevant for waiver

- Issue: Pension fund takes action against the asset manager for surrender of remuneration received from the depositary bank

BGE 138 III 755 / Key words: Asset management; surrender of commission received by investment manager in combination with investment products

- Issue: A client demands information about surrender of payments which his bank received from a third party, relating to securities that were invested by and held in a deposit at the bank

❑ Clients as Party / «Klagemauer»

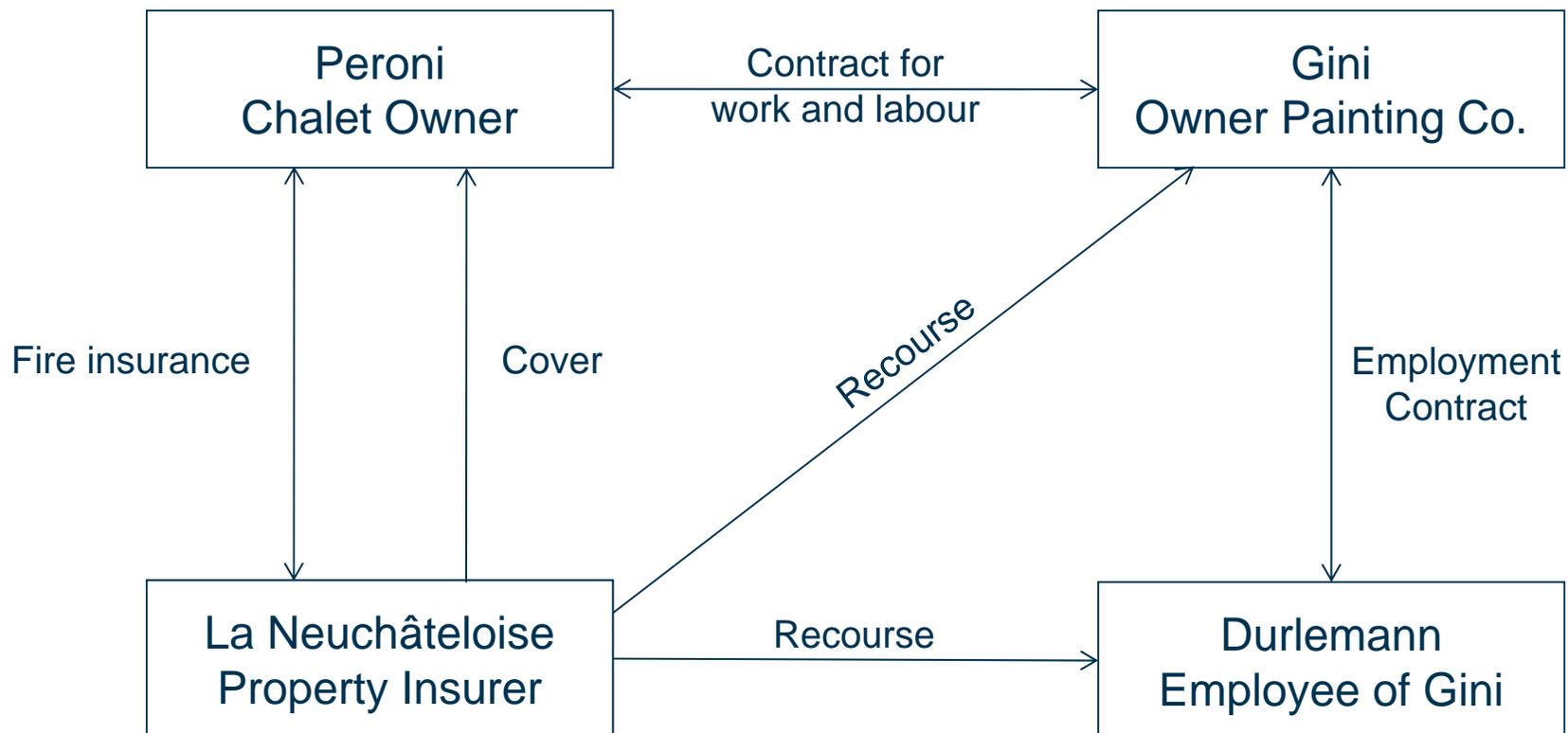
BGE 139 II 279 / Key words: Unless client is entitled to bring a claim pursuant to Article 24 of the Federal Banking Law, no direct right of claim as against the bank is available to a banking client in any administrative proceedings opened by FINMA

- Issue: A client of a bank files an administrative complaint with FINMA regarding the business practices of the bank and demands the execution of regulatory measures



Swiss contract law issues

Subrogation / Gini / Durlemann (BGE 80 II 248)



Swiss contract law issues

Subrogation / Gini/Durlemann

- Claimant insurance company insured a cottage of Peroni against fire. Peroni instructed Gini to paint his cottage
- The actual work was performed by Durlemann, Gini's employee.
- Before Durlemann painted the cottage he tried to remove the old coating by heating it with a blowlamp.
- Easily flammable wood shavings were inside the cottage. The wood shavings caught fire and the cottage burnt down.
- The Claimant insurance company indemnified Peroni for the loss and then pursued its recourse claims against Gini, based on the contract for work and labour with Peroni, and Durlemann (liability in tort).



Swiss contract law issues

Subrogation / Gini / Durlermann

- Art. 72 para. 1 of the Insurance Contract Act (ICA) / Subrogation

"If the insurer indemnifies the assured, the claim **in tort** of the insured against the third party that caused the loss will be transferred to the insurer to the extent of the indemnification."

- Art. 50 paras. 1 and 2 of the Code of Obligations (CO)

"Where two or more persons have **together caused damage**, whether as instigator, perpetrator or accomplice, they are **jointly and severally liable** to the injured party.

The court determines at its discretion whether and to what extent they have right of recourse against each other."

- Art. 51 CO

"Where two or more persons are liable for the same loss or damage on different legal grounds, whether under **tort law, contract law** or **by statute**, the provision governing recourse among persons who have jointly caused damage is applicable mutatis mutandis

As a rule, compensation is provided first by those who are liable **in tort** and last by those who are deemed liable **by statutory provision** without being at fault or in **breach of contractual** obligation."



Swiss contract law issues

Subrogation / Gini/Durlemann

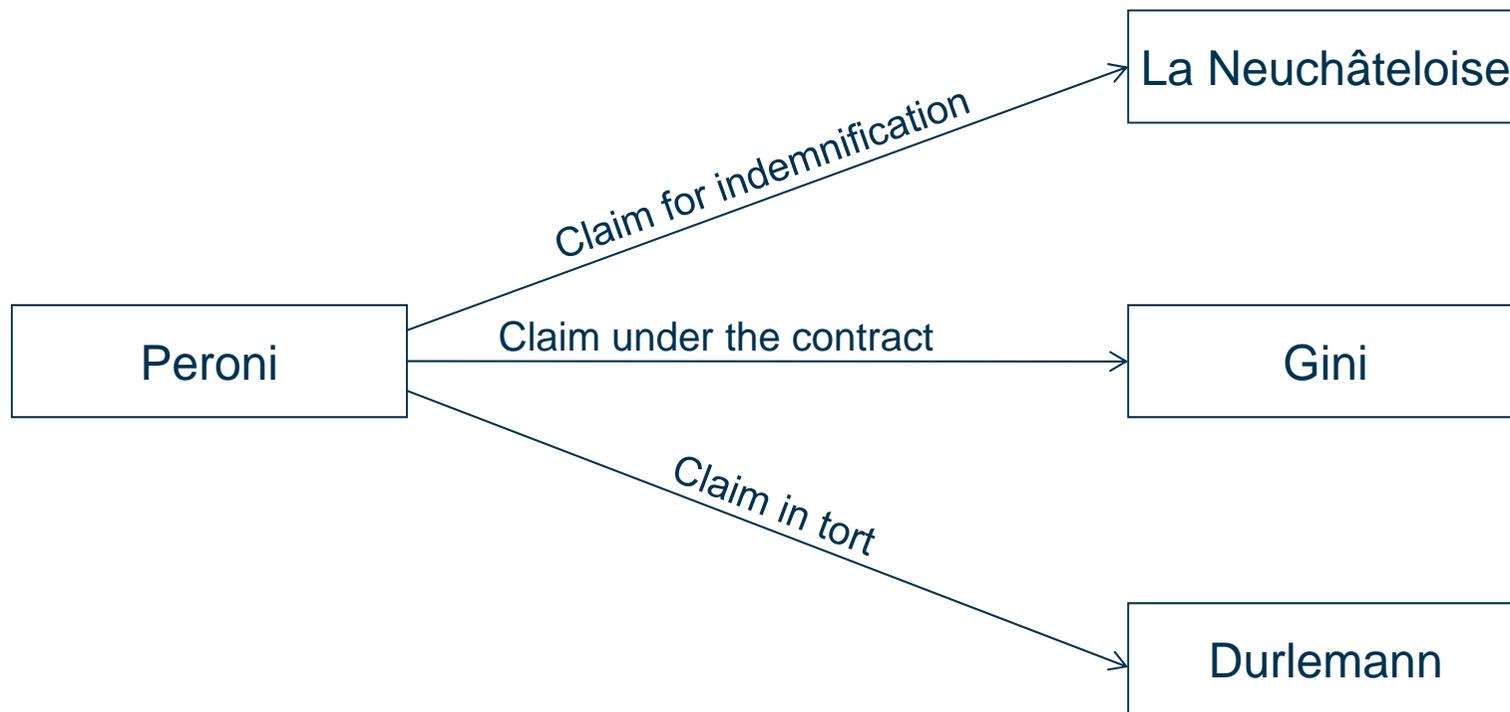
- A) Each liable party (be it a claim in tort, under a contract or based on causality only) is jointly and severally liable towards the injured party
- B) In the internal recourse the following party is eventually liable:
 - firstly, the party which was negligently liable
 - secondly, the party which is contractually liable (without fault), and
 - thirdly, the party which is liable based on causality only (without negligence, without a contract)
- C) If the liable parties are on the same level, the court applies its discretion to determine which party has a claim for recourse against the other.



Swiss contract law issues

Subrogation / Gini/Durlemann

Claims of Peroni prior to the indemnification



Swiss contract law issues

Subrogation / Gini/Durlemann

- Findings of the Supreme Court
 - The insurer only steps into the shoes of the assured for the claims of the assured in tort.
 - The insurer is one of the "contractually liable" parties and finds itself on level two.
 - When the insurer has indemnified the assured, it cannot claim for compensation against a party whose liability is based on causality only.
 - On the same level (i.e. against another contractually liable party) the insurer is only entitled to hold itself harmless if the contractually liable party caused the loss through gross negligence at least.
- As an additional hinderance, in 1989 Art. 144 Abs. 1 of the Swiss Federal Act on International Private Law has entered into force:
 - Principle of cumulation
 - If either the insurance policy or the contract based on which the insurer seeks indemnity are subject to Swiss law, the Swiss restrictive rights of recourse apply.



Swiss contract law issues

Subrogation / Gini/Durlemann

- Advice for the insurers
 - Before you pay, establish the potential liable parties and whether the requirement of gross negligence may be an issue.
 - Try to establish if there is a claim in tort against the employee (do you know the identity of the wrongful employee?).
 - Try to establish if you can sue the contractually liable party in the name of the insured (i.e. prior to payment).
 - Judgment of the Supreme Court of Switzerland (BGE 132 III 626): The Supreme Court held that international conventions (such as CMR [carriage of goods by road], Montreal Convention [by air] or CISG [international sale of goods]) would not belong to "Swiss law". If the insurance policy is not governed by Swiss law either, the Gini/Durlemann practice does not apply.



Swiss contract law issues

Warranties

- Warranties do not exist under Swiss law; a warranty clause in an English policy that is governed by Swiss law would need to be interpreted from a Swiss law perspective.
- Swiss law knows exclusions, conditions precedent (risk related and non-risk related)
- It needs to be established under which of these types a warranty clause falls.
- Exclusions:
 - Insurer can exclude certain risks from cover (Art. 33 ICA).
 - The requirements of negligence and causation are not required.
 - Article 33 ICA requires that the exclusion is unambiguous; ambiguous terms in the insurance policy are interpreted against the insurer.
 - Difference between conditions precedent and exclusions of coverage: whether or not the clause requires a certain behaviour from the assured. If the answer is yes, a clause is rather deemed a condition precedent.



Swiss contract law issues

Warranties

- Conditions precedent:
 - prescribe obligations an assured has to comply with
 - An insurer can deny coverage if the requirements of Art. 45 (1) ICA or 29 ICA are met.
- Risk related conditions precedent (Article 29 ICA):
 - Have the purpose to either diminish the risk of the occurrence of an insured event or aim at preventing the aggravation of a risk that could lead to an insured event.
 - The insurer may not, as a matter of mandatory law, deny coverage, unless the breach of that specific condition precedent caused the damage.
 - If the breach of a condition precedent had no impact on the loss then it may be difficult to invoke a condition precedent clause because it may lack causation.



Swiss contract law issues

Warranties

- Contractual conditions precedent (risk related conditions precedent and other; Article 45 paragraph 1 ICA):
 - “If it was agreed, that the assured or the beneficiary suffered a disadvantage due to the violation of a condition precedent, such disadvantage shall have no effect, if the violation according to the circumstances is not to be considered as being **the fault** of the assured or the beneficiary.”
- To sum up, the following requirements need to be met
 - risk-related conditions precedent → causation and negligence
 - general conditions precedent → only negligence
 - exclusions → neither negligence nor causation



Swiss contract law issues

Pre-Contract Disclosure

- Swiss law does not have a pre-contractual duty of disclosure. There is no duty of the assured to disclose any relevant facts.
- Article 4 ICA and court practice have developed the following rules
 - The insurer must ask the relevant questions in writing (questionnaire).
 - The answers must be given in writing.
 - The questions must be relevant for the assessment of the risk.
 - The questions must be unambiguous and precise (no catch-all questions).
 - The questions must relate to the presence or the past.
- If the policyholder is in breach of its duty of disclosure Article 6 ICA provides the following rules:
 - The insurer can terminate the contract within **four weeks** when the insurer has become aware of the breach.
 - If there is causation between the breach of the duty of disclosure and the loss the insurer is entitled to deny coverage and demand back any payments made in the past.



Swiss contract law issues

Change in Risks

- Increase in risks by the policyholder (Art. 28 ICA):
 - If the increase is considerable, the insurer is entitled to terminate the policy.
 - The change in risks is deemed considerable if the facts which increased the risk were considered to be relevant at the conclusion of the contract.
 - If the increased risks causes the insured event or increases the loss the insurer will not be obliged to cover the (additional) loss.
- Increase in risks without the policyholder (Art. 30 ICA):
 - The policyholder is obliged to notify the insurer without delay.
 - If the policyholder fails to do so the insurer is no longer bound by the policy.
- The right to terminate the policy extinguishes if the policyholder notifies the insurer of the increase in risks and the insurer does not terminate the contract within 14 days of receipt of the notification.



Thank you for your attention!

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