IBA Insurance Committee Substantive Project 2010

Insurance Portfolio Transfers:

"Move On and Let Go"

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INTERNATIONAL BAR ASSOCIATION

the global voice of the legal profession

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About the International Bar Association Insurance Committee

Insurance is present in every facet of commercial, industrial and private life. Lawyers practising in many different fields encounter insurance and its problems and can greatly benefit from the knowledge which membership of this committee provides.

The Insurance Committee aims to provide its nearly 600 members, and the IBA Legal Practice Division as a whole, with information about developments in insurance and reinsurance law and markets throughout the world as well as with specialist knowledge to assist in the efficient solution of practical insurance problems. New insurance products are also brought to the attention of members.

In addition to this publication, the Committee produces a newsletter for its members which provides updates and commentary on developments and issues in the field.

The Committee also presents sessions at the IBA Annual Conference every year. In 2011, the Conference will be held in Dubai. Please see http://www.ibanet.org for more information on this and other upcoming events.

If you would like to join the Insurance Committee, or if you would like further information on the Committee's activities, please visit http://www.ibanet.org.

We also invite you to contact the IBA membership department on

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or by email at member@int-bar.org.

Note from the IBA Insurance Committee

Following the excellent response to our 2009 substantive project, which dealt with the liabilities to which corporate representatives are exposed and the insurance and indemnification products available to cover such liabilities, we decided to explore yet another topical issue of global relevance.

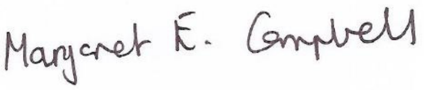
We have conducted a comparative analysis of the ways in which insurance and reinsurance portfolios can be transferred from one entity to another, with a focus on statutory procedures available to this effect.

With contributions from our members from 27 jurisdictions, this publication offers insights into the requirements, procedure and effects of insurance portfolio transfers around the world.

As insurance companies continue to restructure their businesses both domestically and internationally, often in anticipation of important regulatory changes, we hope this comparative analysis will be valuable to lawyers and other insurance professionals alike.

We would like to thank those of you who generously contributed your time and expertise to successfully complete this project.

Best regards,



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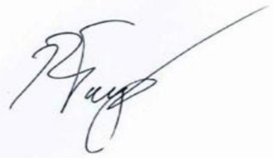

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Editorial

INSURANCE - THE INS AND OUTS

Insurance (and reinsurance) is often seen by the outsider as an easy way to make money. It is a proposition based on the almost unique propensity of the buyer (the policyholder) to part with large sums of cash in favour of the seller (the insurer/reinsurer) against the mere promise by the latter of a substantial return on the payment in the event of something untoward occurring in a defined space of time and circumstances.

Many jurisdictions have accordingly experienced difficulties with optimistic and well-heeled entrants into this apparently lucrative market who were looking to make a quick turn on a relatively modest investment of capital, and for whom variable levels of market entry barrier proved quite easy, when compared to those applied to other financial institutions.

However, insurance and reinsurance, once contracted, can produce legal and financial commitments which turn out to stretch far beyond the imagination and time-horizon of even the most slow-moving and complacent capital provider.

Entry strategies are easy; exit solutions are not so obvious.

THE LLOYD'S-EQUITAS PARADIGM

Long-tail casualty and liability business may produce claims years after the demise of the underwriters and the original investors, as the process of Reconstruction and Renewal of Lloyd's of London served to demonstrate.

Traditional "reinsurance to close" and whole account portfolio coverages by reinsurers and retrocessionaires allowing the original carrier to sit back and take his investment were all very well on paper, and simple to operate at most levels of practice, but what if the reinsurer were to fail? Or suffer a downgrade?

Where is the reserve held against such an eventuality? And how does the original policyholder identify and even sue the original carrier, whose business has been operated for decades by a de facto alternative carrier who now denies any direct nexus?

Such was the dark and unfathomable legal abyss into which the creditors of 1992 and prior Names, latterly reinsured by Equitas, were forced to gaze, were such unthinkables to be contemplated.

And yet Equitas as a concept plainly made sense; it enabled the institution of Lloyd's to move onward and upward, to regain its pre-eminence as an insurance market, whilst corraling the vagaries of the past in a form that was economically and regulatorily acceptable, well managed, and staffed by people who could concentrate on the past, whilst their colleagues could look to the future.

The process of Lloyd's Reconstruction and Renewal culminated last year in a form of transfer of insurance and reinsurance business from the former Names to a separate vehicle, funded by Berkshire Hathaway, and was achieved by a form of transfer which the UK has developed to a considerable degree over many decades.

A statutory transfer of all the liabilities and all the assets of the original insurance carriers was effected to a new entity, which, under English law, became the insurer (or reinsurer, on contracts of reinsurance) in the place of the original Names at Lloyd's, many, if not all of whom, were now no longer in the business of writing insurance. Indeed the majority of them had long since died.

For Lloyd's and Equitas, its run-off vehicle for 1992 and prior business, the process required statutory amendments, themselves building upon a long and evolving history of UK legislation which favours the ability of an insurer to "*move on and let go*" of the business, by passing responsibility to another carrier with the energy, capital, and commitment to perform the promises of the past.

VARIANTS ON THE THEME

The transfer of insurance business away from the entity which originally transacted it is not always an easy process, legally, economically, or emotionally. Insurance contracts are peculiar things; personal attributes of both insured and insurer are very important to the parties. Insurance is not (at least not usually) a commoditised and tradable asset like a bag of cotton or a barrel of oil.

Not all jurisdictions and not all policyholders are so positive about allowing an insurer to lay down the burden in favour of another, fitter, carrier.

But the pressure is now on all carriers to clean up their capital management act, as ***Solvency II*** looms ever larger on the scale of insurers' worries. Moving defunct or unhelpfully capital-intensive business to somebody else's balance sheet is a huge advantage to an insurance group that has found itself with multiple portfolios of disconnected and/or discontinued business, developed over many years and in many formats, some now inappropriate or resource-draining to the modern entity.

How to achieve this transfer is a many-facetted and variable project even within one's own jurisdiction. For business written across frontiers, the challenge can be insuperable. The present project sets forth to explore some of the uncharted waters of this financial operation, and to compare the approaches taken by different legislators, markets and regulators to a perennial and ever more pressing problem.

In the course of the project's construction, the Editorial Team were struck by both the similarities and the differences encountered around the world.

SIMILARITIES

- Almost all jurisdictions surveyed had some form of statutory mechanism for transferring insurance portfolios. Increasingly, and contrary to the past, where reinsurance has flourished in unregulated waters, such processes now include reinsurance - but with limitations and exceptions.
- The main exceptions to the general rule as to the availability of formal transfer processes seem to be Canada (where a statutorily and regulatorily overseen form of "assumption reinsurance" is used), the USA, where, again, "assumption reinsurance" under a myriad local regulatory regimes is the general trend, and Bermuda (where, although life business can be transferred fully, "schemes of arrangement" are used for shifting non-life portfolios from the original debtor to a substitute).
- Timelines, whether prescribed or conventional, are surprisingly similar. In most jurisdictions, a "portfolio transfer" - of whatever variety or shape - takes about 6 months to complete.

DIFFERENCES

- In most jurisdictions, the business is regulated, and portfolio transfers must be approved by the regulator. A minority of jurisdictions operate a Court-based mechanism (UK, Australia, Ireland, Israel and, for life portfolios only, Bermuda, Malta and South Africa) with input from the regulator. There is an established consent mechanism for certain cross-border transfers within the EEA that require the approval of more than one regulator.
- In most jurisdictions, approval of the transfer, whether by the competent Court or regulator, cannot dispense with usual transfer formalities in accordance with their applicable laws for ancillary assets and liabilities (e.g. consent will be required by a reinsurer or other counterparty to the transfer of their contracts). In some jurisdictions, however, the Court has been granted very far-reaching powers by the legislature to dispense with some of these requirements if it considers fit (UK, Australia). Whilst the counterparty in question is granted some form of right of audience, the Court is given power to over-ride terms of such contracts which would defeat the legislative purpose of facilitating transfers.
- In most jurisdictions, policyholders have some form of right to register an objection to the proposed transfer. The objections will either be considered by the competent Court or regulator or, in some jurisdictions (South Korea), may automatically stop the transfer once a certain level of objections is reached. In a number of jurisdictions, policyholders do not have a right to object but have a right to terminate their insurance contract after the transfer (a right which, in the case of an old but active long-tail liability contract, seems rather a lame remedy for the policyholder, and one which a transferor and transferee would doubtless accept with alacrity).
- It is also worth noting that a system of harmonisation and consolidation of the rules governing portfolio transfers operates among EEA member states. However, there are important differences in the ways EEA member states have implemented relevant EU Directives with regard to the transfer process itself. In fact, almost the entire range of differences outlined above can also be found within the EEA's state-level jurisdictions and regimes.

THE FUTURE OF THE INSURANCE PORTFOLIO TRANSFER

The use and the process of portfolio transfers of insurance business are matters of some variability across the world. In certain states, commonplace; in others, incipient; in places, almost unheard of.

By the publication of the contributions to this project, the Editorial Team hope that a substantial piece of research will thereby be placed at the disposal of insurance lawyers across the globe, so as to facilitate their efficient and appropriate advice to their clients and correspondent firms.

The Team would like to thank each and every contributor to the project for the serious and detailed research and drafting that has been offered by those contributors, often under great pressure of chargeable work, and against some challenging editorial deadlines.

It has been a pleasure to collaborate with so many skilled and thoughtful practitioners, and the publication of the combined project stands as testimony to their dedication, professionalism and skill.

THE EDITORIAL TEAM AT HOGAN LOVELLS:

- Peter Taylor, Partner
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If you would like further information on any aspect of this report, please contact the relevant contributor or the person with whom you usually deal.

The information contained in this report is current as at July 2010.

New York State Notice: Attorney Advertising.

Argentina

MARTIN D MANZANO AND ELIAS F BESTANI, MARVAL, O'FARELL & MAIRAL

1. General

1.1 Can insurance portfolios be transferred from one entity to another in your jurisdiction?

Yes, under Chapter I, Section VIII of the Insurance Entities Act 20,091 ("IEA"), as regulated by Resolution 30,742/2005 of the Argentine Superintendence of Insurance ("ASI"), provided certain conditions are met.

1.2 Can reinsurance portfolios be transferred?

Yes. It is unclear, however, if reinsurance portfolios may be transferred according to the same rules and regulations set forth for the transfer of insurance portfolios.

In any event, reinsurance portfolios may always be transferred by assigning each individual reinsurance contract, in which case the express or implied consent of the other party (i.e., the cedant) will be required to perfect the transfer among all parties involved (i.e. the transferor, the transferee, and the cedant). The transferee must be licensed as a reinsurer by the ASI.

1.3 Are the rules the same for the transfer of direct insurance portfolios as for reinsurance portfolios?

See Sections 1.1 and 1.2 above.

1.4 Are the rules the same for the transfer of life portfolios as for non-life portfolios?

There are no specific rules for the transfer of life portfolios.

2. What are the requirements for an Insurance Portfolio Transfer ("IPT")?

2.1 What requirements must be met by a *transferor* to undertake an IPT?

The transferor must be an insurance company licensed by the ASI and must comply - together with the transferee - with the applicable rules and regulations to undertake an IPT (see Sections 9 and 10 below).

2.2 What requirements must be met by a *transferee* to undertake an IPT?

The transferee must be an insurance company established in Argentina in accordance with the requirements set forth by the IEA (Article 46 of the IEA).

In order for a company to obtain an insurance license the company must be organised as: (i) a *sociedad anónima* (equivalent to a corporation), a cooperative, or a mutual company; (ii) a branch or agency of a foreign company organised as any of the types mentioned in (i); or (iii) a state-owned or mixed capital organ or entity, be it federal, provincial or municipal.

In addition, it has to satisfy various other conditions such as exclusive corporate purpose (or separate management of insurance affairs in the case of state-owned or mixed capital companies), minimum capital requirements, approval of insurance plans etc.

In connection with the insurance contracts being transferred, the transferee must have all necessary insurance plans previously authorised by the ASI.[1]

2.3 Are there any requirements relating to the financial condition of the *transferor*?

There are no specific requirements relating to the financial condition of the transferor in the IPT rules and regulations. Generally, insurance companies must comply with certain minimum capital and solvency requirements, although an insurance portfolio may potentially be authorised in the context of a transferor's reorganisation and financial adequacy plan.

2.4 Are there any requirements relating to the financial condition of the *transferee*?

The transferee must be in sound financial condition pursuant to the capital and solvency requirements established by the ASI.

In any event, the IPT regulations specifically require an assessment of the effects of the portfolio transfer by an independent auditor registered with the ASI (see Section 10(c) below), an actuarial report as to the sufficiency of the assigned technical reserves on the effective day of the transfer and as to the compliance with the approved plans (see Section 10(f) below), and certain actions in respect of the reinsurance plans for the portfolio involved in the transfer (see Section 10(g) below).

2.5 Is the place where the portfolio was originally underwritten a relevant factor?

Although in principle Argentine-licensed insurance companies are authorised to establish branches or agencies abroad, it is most infrequent.

2.6 Is the governing law or applicable jurisdiction of the insurance portfolio transferred a relevant factor?

Under Argentine law, all insurance plans and proposed policy wordings must be approved by the ASI before being marketed. The ASI will not approve policy wordings providing for non-Argentine law and jurisdiction. Therefore, an IPT subject to the ASI's approval will only include Argentine law policies.

2.7 What criteria will be applied by the relevant authority in approving the transfer?

Under Article 47 of the IEA, the ASI may reject the transfer application if it finds that the insureds' interests are not sufficiently protected by the proposed transaction.

A resolution by the ASI rejecting the transfer may be appealed directly to the Commercial Court of Appeals of the City of Buenos Aires.

2.8 Are there any other requirements?

See Sections 9 and 10 below.

[1] Point I.1.c of the regulation issued by Resolution 30,742/2005 of the ASI.

3. **What can be transferred along with the insurance or reinsurance contract?**

(a) **Assets**

Yes. This may be done by means of a transfer of a going concern (see Section 12(a) below), by means of a merger into another insurer, or by means of a sale of all the shares of the company.

In all cases, prior approval of the ASI is mandatory to perfect the transfer.

(b) **Liabilities**

Yes. See Section 3(a) above.

(c) **Real property**

Yes. See Section 3(a) above.

(d) **Reinsurance/retrocession contracts and other ancillary contracts**

See Section 10(g) below.

4. **Who must be notified of what, and how?**

(a) **Local regulator(s)**

The ASI is the only insurance regulator in Argentina. Portfolio transfers must be perfected through the procedures and with the filings summarised in Sections 9 and 10 below.

(b) **Other regulator(s)**

When the transaction involves a merger or acquisition or a transfer of a going concern, it will require certain registrations with the Public Registry of Commerce.

(c) **Policyholders**

The transaction must be announced in the official gazettes of the headquarters and any other authorised branch of the parties to a portfolio transfer. These notices are addressed to the insureds of each insurer involved in the proposed transaction.

These notices must: (i) include the main details of the proposed transaction; (ii) notify insureds that special financial statements for both insurers showing the effects of the portfolio transfer are available for their review at a specified address; and (iii) announce the time period for insureds to submit their grounds for objecting to the proposed transaction (see Section 6(b) below).

IPT regulations do not provide for circulars to be sent directly to policyholders for notification purposes.

(d) **Beneficiaries of cover other than actual policyholders**

In principle, the notices and opposition rights provided for in the IPT regulations refer only to "insureds". However, the effects of an approval of the transaction by the ASI would make the transaction binding upon the insureds and their beneficiaries.

(e) **Reinsurers**

See Section 10(g) below.

(f) **Brokers**

There is no specific regulation in respect of notices to brokers. If the transaction involves a transfer of a going concern or a corporate reorganisation, applicable rules and regulations governing the transfer of a bulk of assets or merger and acquisition may be applied (see Sections 12(a) and 14(c) below).

(g) **Others**

Not applicable.

(h) **Further notice requirements**

Further notice requirements may be applicable if the transaction involves a transfer of a going concern or a corporate reorganisation (see Sections 12(a) and 14(c) below).

5. **What publicity requirements are there for IPTs?**

(a) **Newspapers**

Announcements in newspapers will only be required when the proposed transfer involves a transfer of a going concern or a corporate reorganisation, in order for creditors to file objections to the transfer and be afforded an opportunity to secure their credits.

(b) **Official Gazette/Journal**

Yes (see Section 4(c) above).

(c) **Trade magazines**

There is no legal requirement, although the parties may freely choose to announce a portfolio transfer in insurance trade magazines.

(d) **Register of Companies**

A transfer involving the transfer of a going concern or a corporate reorganisation will require to be recorded in the relevant Public Registry of Commerce of each company.

(e) **Other**

Not applicable.

6. **Who has the right to object to the transfer?**

(a) **Regulator(s)**

IPTs must be approved by the ASI. As to the criteria to be applied by the ASI, see Section 2.7 above.

(b) **Policyholders**

The insurance regulations refer to "insureds" rather than to "policyholders", although it should be taken for granted that policyholders in possession of the policy have the right to object to the transfer.[2]

It should be noted that objections to the transaction may be submitted at the office or offices announced by the transferor and the transferee in their notices in the official gazettes, notwithstanding the insureds' right to submit their objections directly to the ASI.[3]

[2] Article 23 of the Insurance Contract Act 17,418.

[3] Point I.7 of the regulation issued by Resolution 30,742/2005 of the ASI.

(c) **Beneficiaries of cover**

In principle, applicable insurance regulations do not contemplate objections from beneficiaries of cover. In fact, however, since an approval by the ASI would be binding upon them, an objection by the beneficiaries should be communicated by the transferor and the transferee to the ASI, notwithstanding the possibility that these objections can be submitted directly to the ASI.

(d) **Reinsurers**

See Section 10(g) below.

(e) **Trade associations**

There is no legal regulation allowing trade associations to object to IPTs.

(f) **Employees**

In principle, there is no legal regulation authorising employees to object to an IPT. See, however, Section 12(b) below.

(g) **Others**

Creditors, other than insureds, may object to the transfer when the transaction involves a transfer of a going concern or a corporate reorganisation.

7. <u>Who must approve and/or sanction the transfer?</u>

(a) **Local regulator**

As mentioned in Section 4(a), the ASI is the only insurance regulator in Argentina.

Portfolio transfers involving Argentine-licensed insurers must be approved by the ASI.

(b) **Other regulator(s)**

See Section 7(a) above.

(c) **Court**

In principle, the authority to approve or reject a proposed IPT rests with the ASI. If the IPT is rejected by the ASI, the parties are entitled to appeal the decision directly before the National Commercial Court of Appeals of the City of Buenos Aires (Articles 47 and 83 of the IEA).

8. <u>What jurisdictional conditions apply to the transfer?</u>

8.1 What types of insurance portfolios are capable of transfer in Argentina?

Any type of insurance portfolio of an Argentine-licensed insurer may be transferred in Argentina, provided certain conditions are met.

8.2 Does the transferring portfolio need to be legally or commercially connected to the state where the transfer is effected?

There is no legal regulation in this respect. However, IPTs subject to the ASI's approval will usually only include policies subject to Argentine law and jurisdiction (see Section 2.6 above).

8.3 Will the transfer be effective in jurisdictions other than those of the transferor and/or transferee?

Whether an IPT approved by the ASI will be given effect outside Argentina will depend on the deference given by the relevant non-Argentine jurisdiction to such approval.

Although, in principle, insurance companies licensed in Argentina may set up branches or agencies outside Argentina, this is unusual.

8.4 What effect will the transfer have on arbitration clauses?

Under Argentine law, arbitration clauses contained in insurance policies are null and void.[4]

9. <u>What is the procedure and timing of the transfer?</u>

9.1 What is a typical timeline for a transfer?

The procedure and timing of a transfer is the following:

(a) **Application to the ASI**

Both insurers are required to comply with the filings required by the regulation issued by Resolution 30,742/2005 of the ASI (see Section 10 below).

(b) **Notices**

Both insurers must announce the proposed portfolio transfer for three days in the official gazettes of their headquarters and any other authorised branch.

(c) **Insureds' Oppositions**

Within 15 days after the last publication of the proposed transaction as referred to in (b), the concerned insureds may submit their grounds for objecting to the proposed portfolio transfer.

(d) **ASI Timing**

Within 30 days following the lapse of the 15-day term for insureds to submit their objections, the ASI should decide whether or not to approve the portfolio transfer. This term, however, may in practice be extended.

(e) **ASI Resolution**

Approval of the portfolio transfer by the ASI makes it binding on the transferor, the transferee, the insureds and their beneficiaries. A rejection by the ASI may be appealed directly to the National Commercial Court of Appeals of the City of Buenos Aires.

(f) **Other Creditors**

If the transfer involves a partial transfer of a going concern, the Transfer of Bulk of Assets Act will govern the rights and remedies available to all other creditors that are not insureds of the parties.

9.2 Are there any hard legislative or regulatory deadlines?

See Section 9.1 above.

[4] Article 57 of the Insurance Contract Act 17,418.

10. What key documentation will be produced for the transfer?

Under point I.1 of the regulation issued by Resolution 30,742/2005 of the ASI the following documents need to be produced by the transferor and the transferee in order to undertake an IPT:

(a) Portfolio Transfer Agreement

The parties must submit a certified copy of the portfolio transfer agreement. This agreement must detail: (i) the parties involved in the transaction; (ii) the subject matter of the transfer (i.e., the contents of the transfer); (iii) the effective date as from which the transferee will assume the transferred rights and obligations, specifying which insurer will retain the losses occurred before the effective date and reported after such date; (iv) the transferee's covenant to reimburse the transferor, within five days, any monies that the latter may pay in connection with an assigned obligation; and (v) the portfolio transfer agreement may not be subject to any resolutory or suspensive conditions to be fulfilled by the parties after the date the transfer is approved by the ASI.

The transfer of litigation rights must be perfected by means of a public deed (*escritura pública*) and noted in the financial statements.

As mentioned in Section 9(1)(f) above, if the transfer involves a partial transfer of a going concern, the Transfer of Bulk of Assets Act 11,867 will need to be complied with, in which case, if the transfer includes real estate or registered movable property, the portfolio transfer agreement will also need to be perfected by means of a public deed (*escritura pública*) with details of the properties involved in the transfer and their respective registry specifications.

(b) Corporate Resolutions

Both companies must submit copies of the board resolution calling a shareholders' meeting and copies of the resolutions adopted by the shareholders approving the portfolio transfer.

(c) Special Financial Statements

The companies are also required to produce special financial statements for both insurers signed by independent external auditors registered with the ASI, showing the effects of the portfolio transfer. These financial statements must be made available to the insureds.

(d) Notices

The parties must submit copies of the notices published for three days in the official gazettes of their headquarters and any other authorised branch.

(e) Sworn Statements

Each party must submit a sworn statement as to any objection to the portfolio transfer received by the insurers from their respective insureds.

(f) Actuaries' Report

A certified actuarial report has to be produced (see Section 11(c) below).

(g) Reinsurance Clearance

The companies must submit evidence of the consent of the transferor's reinsurers to the portfolio transfer and their position in respect of such transfer. The companies must also submit evidence of the reinsurance covers available for the assigned portfolio and a list of the reinsurers along with the corresponding notices of the transfer to the transferee's reinsurers.

11. What professional agents are involved in the transfer and what are their roles?

(a) Lawyers

Lawyers play a critical role in a portfolio transfer. They conduct the administrative procedures before the ASI and, in the case of a refusal of the ASI's approval, they represent the parties at any appeal to the Court of Appeals. They also draft the portfolio transfer agreement, all necessary filings with the ASI and the Public Registry of Commerce, and the notices to be given, and they advise on the corporate resolutions and actions that need to be taken. They deal with the objections made by the interested parties and with any court injunctions that may be ordered in cases involving a transfer of a going concern or a merger or acquisition.

Lawyers also closely interact with accountants, actuaries and independent auditors during the whole process.

(b) Accountants

Accountants often act as project managers and often deal with tax authorities.

(c) Actuaries

As mentioned in Section 10(f) above, an actuarial report needs to be produced in connection with the technical reserves to be assigned on the effective date of the transfer, as to the sufficiency of the reserves, and whether this complies with the authorised plans or the applicable regulations.

(d) Independent Expert

As mentioned in Section 10(c) above, independent external auditors need to sign the special financial statements to be submitted to the ASI, showing the likely effects of the portfolio transfer.

(e) Other

Not applicable.

12. What legal issues are frequently encountered in transfers?

The following are some of the legal issues typically encountered in IPTs:

(a) Protection of Creditors other than Insureds (or Policyholders)

Insurance regulations dealing with portfolio transfers are aimed specifically at protecting insureds' (or their beneficiaries') interests (Article 47 of the IEA). If the transaction involves a transfer of a going concern, other creditors are afforded the rights and remedies provided for in the Transfer of Bulk of Assets Act 11,867. This regime provides for specific disclosures, publications and opposition procedures, including the possibility of securing previously unsecured debts.

However, the applicable rules and regulations do not provide clear-cut guidelines when a portfolio transfer involves a transfer of part or all of a going concern.

Generally, the Transfer of Bulk of Assets Act will be triggered when the proposed transaction involves all or substantially all of the insurance contracts of the transferor.

(b) **Process of Transferring Employees**

If the transfer involves a transfer of a going concern or is a result of a merger or acquisition, depending on how the transaction is structured, labour law issues will need to be addressed.

(c) **Assignment or Sale of Contractual Rights**

The assignment or transfer of real estate, registered movable property, debts, credits and contracts would need to satisfy the formalities set out in the applicable legislation. The assignment of credits would require each debtor of the transferor to be given notice of the assignment pursuant to Article 1469 of the Argentine Civil Code, which, to be effective *vis-à-vis* third parties, must be made by means of a notary public pursuant to the provisions set forth in Article 1467 of the Argentine Civil Code. The transfer of certain other assets, such as real estate or registered assets, will require registration in the relevant registries (for example, the Real Estate Public Registry and the Vehicles Public Registry) and in the case of real estate and other registered properties, the transfer will need to be perfected by means of a public deed (see Section 10(a) above).

(d) **Existing Litigation**

Different procedural issues may arise depending on the provisions of the portfolio transfer in this regard and on whether the transferor is a plaintiff or a defendant or *citada en garantía*[5] in the existing litigation. In addition, the lawyers representing the transferor in the existing litigation may try to secure their professional fees, claiming that any fees arrangement will be terminated by operation of the transfer and requesting a court award of their fees.

13. **<u>How frequently is the transfer mechanism used?</u>**

13.1 **Is the transfer mechanism commonly used? For what purposes is it used?**

It is relatively infrequent. It is typically used when a transferor intends to close a certain line of business. It may also be used as a restructuring or a run-off mechanism.

13.2 **Are there any statistics of the use of the transfer mechanism?**

There were 18 transfers approved by the ASI between 2004 and May 2010.

14. **<u>What alternative methods can be used to transfer insurance portfolios, and what are the advantages and disadvantages of such methods?</u>**

(a) **Novation**

In practice, novation or the transferring of each individual contract is not used for purposes of transferring insurance portfolios, as it would require the consent of all policyholders involved.

(b) **100% reinsurance (also described as "run-off"/"portfolio"/"assumption" reinsurance or retrocession, "portfolio transfer" or "reinsurance to close")**

Some authors consider that, under Argentine law, fronting arrangements are simulated acts and therefore null and void. In addition, they argue that they are a way of evading applicable offshore insurance prohibitions.

Fronting schemes, however, are quite frequent in the Argentine market and, as far as we know, are tolerated by the ASI.

In any event, as the insurer remains obliged to the policyholder under the terms and conditions of the insurance contract, fronting arrangements may not prove a practical way of transferring the business to another entity (particularly in cases where the size of the insurance portfolio is considerable).

(c) **Corporate reorganisation**

Corporate reorganisations involving a sale of shares or a merger or acquisition are subject to specific disclosures, publication and opposition procedures. ASI prior approval is mandatory.

These forms of reorganisation may prove to be a valid alternative for a portfolio transfer, particularly when the transfer involves all or substantially all of the insurance contracts of the transferor.

(d) **Arrangement/compromise**

These sorts of schemes are not regulated by insurance regulations.

(e) **Other**

Not applicable.

15. **<u>What are the relevant sources of law or guidance?</u>**

(a) **Statutes**

IEA, Chapter I, Section VIII, Articles 46 and 47.

Insurance Contract Act 17,418, Article 20.

Transfer of Bulk of Assets Act 11,867.

[5] By means of a *citación en garantía* a person who brings an action against another person who has taken out insurance coverage may add the insurer as a party to the litigation.

Commercial Companies Act 19,550, Chapter I, Section XI, Articles 82 to 88, dealing with mergers and acquisitions of commercial companies.

Civil Code provisions for the transfer of contracts. As opposed to other civil law jurisdictions, the transfer of contracts is not specifically regulated in Argentina's Civil Code, but it can be based on various provisions of the Civil Code (for example, Articles 1197, 1583 et seq, 1924 et seq and 1671 et seq.).

(b) **Regulations**

ASI's regulations set forth in Resolution 30,742/2005.

(c) **Guidance**

Not applicable.

(d) **Jurisprudence**

There is very little case law, if any, on the transfer of insurance or reinsurance portfolios.

Corso, Felipe vs. BBVA Banco Francés et al (March 24, 2003), Division A of the National Commercial Court of Appeals, AR/JUR/5934/2003, in respect of a termination of a collective life insurance contract after an insurance portfolio transfer.

(e) **Other**

Not applicable.

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1. General

1.1 Can insurance portfolios be transferred from one entity to another in your jurisdiction?

Yes. Insurance portfolios can be transferred from one entity to another in Australia regardless of the Australian State or Territory in which the entities are located. This is made possible by federally enacted legislation which has created specific regimes for the transfer of general and life insurance business. These regimes are set out in:

(a) Part III, Division 3A of the Insurance Act 1973 (Cth) ("Insurance Act") in respect of general insurance; and

(b) Part 9 of the Life Insurance Act 1995 (Cth) ("Life Insurance Act") in respect of life insurance (together the "Acts").

1.2 Can reinsurance portfolios be transferred?

Yes, see Section 1.3 below.

1.3 Are the rules the same for the transfer of direct insurance portfolios as for reinsurance portfolios?

Yes, reinsurance portfolios are capable of transfer under Part III, Division 3A of the Insurance Act.[6] The rules are the same for the transfer of direct insurance portfolios as for reinsurance portfolios as Part III, Division 3A makes no distinction between the two types of business.

1.4 Are the rules the same for the transfer of life portfolios as for non-life portfolios?

The rules for the transfer of life and non-life portfolios are essentially the same. The portfolio transfer provisions of the Acts are for the most part identically worded. Given the similarities between the portfolio transfer provisions of the Acts, Courts cite cases from both Acts when interpreting particular provisions.

2. What are the requirements for an Insurance Portfolio Transfer ("IPT")?

2.1 What requirements must be met by a *transferor* to undertake an IPT?

Under the Acts, an IPT must be undertaken pursuant to a scheme approved by the Federal Court of Australia (the "Court"). The exceptions to this requirement are:

(a) where immediately before the transfer or amalgamation, the insurance business is carried on outside Australia and the transfer or amalgamation will result in the insurance business being carried on outside Australia;[7]

(b) where there is a transfer of life insurance business made under the Financial Sector (Business Transfer and Group Restructure) Act 1999 pursuant to a written determination by the Australian Prudential Regulation Authority ("APRA") (Australia's prudential regulator).[8]

Under the Acts an application for confirmation of a scheme for an IPT may not be made unless:

(a) a copy of the scheme and any actuarial report on which the scheme is based have been given to APRA; and

(b) notice of intention to make the application has been published by the applicant; and

(c) an approved summary of the scheme has been given to every affected policyholder/policy owner.[9]

The notice of intention to make the application must include, in relation to each company affected by the scheme, details of the place and time at which an affected policy owner may obtain a copy of the scheme.[10]

In relation to a particular scheme, the Federal Court of Australia may dispense with the requirement to give every affected policyholder/policy owner a summary of the scheme if it is satisfied that, because of the nature of the scheme or the circumstances attending its preparation, it is not necessary that it be complied with.[11]

2.2 What requirements must be met by a *transferee* to undertake an IPT?

In order to undertake an IPT a transferee must give APRA the following documents.[12]

(a) a statement of the nature and terms of the transfer or amalgamation;

(b) a certified copy of each of the following documents:

- (i) the scheme providing for the transfer or amalgamation;
- (ii) an actuarial report, or other report, on which the scheme, and the agreement or deed, are founded;
- (iii) the agreement or deed under which the transfer or amalgamation is effected;
- (iv) the Court order confirming the scheme; and
- (v) a statement of the assets and liabilities of each insurer associated with the transfer or amalgamation, before and after the transfer or amalgamation, and

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6 See for example, Westport Insurance Corporation, in the matter of Westport Insurance Corporation [2009] FCA 1357; IAG Re Limited, in the matter of IAG Re Limited [2007] FCA 981.

7 Section 17B(4) Insurance Act; section 190(4) Life Insurance Act.

8 See section 190(5) Life Insurance Act; section 25 Financial Sector (Business Transfer and Group Restructure) Act 1999.

9 Section 17C Insurance Act; section 191 Life Insurance Act.

10 Section 17C(3) Insurance Act; section 191(3) Life Insurance Act.

11 Section 17C(5) Insurance Act; section 191(5) Life Insurance Act.

12 See section 17I Insurance Act, paragraph 18 APRA Prudential Standard GPS 410 ("Transfer and Amalgamation of Insurance Business for General Insurers") in respect of general insurance; section 197 Insurance Act, regulation 9.04 *Life Insurance Regulations 1995* (Cth) in respect of life insurance.

(c) a statutory declaration by a Director (general insurance) or principal executive officer (life insurance):

 (i) setting out, in relation to the transfer or amalgamation:

  (1) each payment made;

  (2) a reasonable estimate of each payment to be made, and

 (ii) stating that he or she reasonably believes that no other payment has been made, or will be made, by, or with the knowledge of, a party to the transfer or amalgamation.

The documents specified above must be lodged with APRA within 30 days after the transfer or amalgamation is completed.[13]

2.3 Are there any requirements relating to the financial condition of the *transferor*?

The Acts do not contain any express requirements relating to the financial condition of a transferor. However an assessment of the financial condition of a transferor is relevant to the exercise of the Court's discretion to approve a scheme.

In deciding whether to confirm a scheme the Court will normally examine and compare the financial condition (in particular the solvency ratio and excess capital) of the transferor and the transferee, as set out in the actuarial reports supporting the scheme.[14] This necessarily involves assessing the transferor and transferee's financial condition against the capital adequacy requirements of APRA.

The Court will then determine whether the security of policyholders whose policies are subject to the transfer[15] (the "Affected Policyholders") will be disadvantaged as a result of having their policies transferred from the transferor to the transferee. The Court will need to be satisfied that the transfer of policies from the transferor will not cause detriment to the security of the Affected Policyholders before approving the scheme.[16]

2.4 Are there any requirements relating to the financial condition of the *transferee*?

As is the case for a transferor, the Acts do not contain any express requirements relating to the financial condition of a transferee. Rather, as noted for Section 2.3, the Court will examine the transferee's financial condition against the capital adequacy requirements of APRA and against the financial condition of the transferor when deciding whether to exercise its discretion to approve a scheme.

The Court will then determine whether the financial condition and management of the transferee provides sufficient security to protect the interests of the Affected Policyholders following the transfer.[17] The Court will need to be satisfied that the transfer of the policies to the transferee will not cause detriment to the Affected Policyholders before approving the scheme.[18]

2.5 Is the place where the portfolio was originally underwritten a relevant factor?

The place where the portfolio was originally underwritten may be a relevant factor in determining whether a transfer or amalgamation of insurance business is subject to the portfolio transfer provisions of the Acts and needs approval by the Federal Court. The Acts apply if either before or after the transfer or amalgamation, insurance business is carried on in Australia. If both prior to and after the transfer or amalgamation, the insurance business is carried on outside Australia then a scheme is not subject to the Acts and does not need the approval of the Federal Court to be effective.[19]

Otherwise, the location where the portfolio was underwritten is not a relevant factor. Insurance business, whether underwritten in Australia or overseas, can be transferred to or amalgamated with the business of an Australian insurer under the Acts.

2.6 Is the governing law or applicable jurisdiction of the insurance portfolio transferred a relevant factor?

The Acts do not deal expressly with the relevance of the governing law or jurisdiction of the insurance portfolio being transferred. Accordingly there is nothing in the Acts that prevent the Court from approving a scheme that has binding effect on policies governed by a foreign law.

However, commentators have noted that a scheme approved by the Court may not affect a debt that is subject to the jurisdiction of a foreign Court or a debt for discharge governed by a foreign law. In those circumstances, it may be prudent to effect schemes both in Australia and in the foreign jurisdiction governing the portfolio.[20]

2.7 What criteria will be applied by the relevant authority in approving the transfer?

APRA acts as a watchdog in relation to transfers under the Acts.[21] APRA's role begins at the application phase where it approves scheme documentation[22] prior to the

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[13] An insurer may apply to APRA, in writing, before the end of the 30 day period, for an extension of the time in which to lodge the documents. If APRA believes that the insurer cannot reasonably provide the documents within 30 days, APRA must, within 14 days of receiving an application for an extension, give a written extension of up to 30 days.

[14] See for example, Re Westport Insurance Corporation (No 2) (2010) 181 FCR 530; SCOR Switzerland Ltd (ACN 098 315 176), in the matter of SCOR Switzerland Ltd (ACN 098 315 176) [2009] FCA 1114 at [19] to [29]; Cavell Insurance Co Ltd, in the matter of Cavell Insurance Co Ltd [2008] FCA 1984 at [22] to [35]; Mercantile and General Reinsurance Company of Australia Ltd [2004] FCA 1773 at [19] to [22].

[15] *Insurance Australia Ltd* (2004) 139 FCR 450 at [19].

[16] Ibid.

[17] Ibid.

[18] Ibid.

[19] Section 17B(4) Insurance Act; section 190(4) Life Insurance Act.

[20] J Gleeson and N Owens, 'Schemes under the Insurance Act 1973 (Cth)' (2006) 17 *Insurance Law Journal* 93 at 103.

[21] Colonial Portfolio Services Ltd v APRA [1999] FCA 1779 at [28].

[22] The scheme documentation which is submitted to APRA, includes the proposed scheme, proposed transfer deed, actuarial reports, proposed summary of scheme to be distributed to affected policyholders, proposed notice of intention to make an application for transfer and notice of trigger

documents being made available for distribution, publication or inspection. APRA's role then continues right through to the confirmation phase where it can object to the Court approving a scheme if it is dissatisfied with the substance or procedural compliance of an application.

The Acts do not specify what criteria APRA takes into account when considering whether to approve scheme documents or object to a scheme confirmation. It is likely APRA will consider matters such as:

(a) whether the actuarial reports submitted in support of the scheme adequately reflect the financial impacts of the scheme on policyholders;[23]

(b) whether scheme applicants have given Affected Policyholders an approved summary of the scheme, or have gone to sufficient lengths to bring the scheme to the attention of as many Affected Policyholders as possible;[24] and

(c) consistent with the test supplied by the Court, whether policyholders whose policies are being transferred or amalgamated under the scheme would be detrimentally affected by the scheme.[25]

2.8 Are there any other requirements?

See below.

3. What can be transferred along with the insurance or reinsurance contract?

(a) Assets

The Acts do not contain any restrictions on what assets can be transferred for the purpose of an IPT. It is up to the parties to decide as part of the transfer agreement what is transferred along with the portfolio. This is a commercial decision which, ultimately, is subject to the Court's approval of the scheme.[26]

(b) Liabilities

In approving a scheme, the Court may allow the transferor to transfer to the transferee any liabilities of the transferor.

(c) Real property

See answer to Section 3(a) above.

(d) Reinsurance/retrocession contracts and other ancillary contracts

Reinsurance/retrocession contracts and other ancillary contracts are capable of being transferred for the purposes of an IPT in the same way as other assets and liabilities.

The Acts provide that when a scheme for transfer or amalgamation of insurance business is confirmed by the Court, it becomes binding on all persons.[27] This has been held as applying to reinsurers who have reinsured policies which are subject to a scheme.[28] The Insurance Act also gives the Court the power to make such orders as it thinks fit in relation to reinsurance.[29] These provisions have been used by scheme applicants to obtain specific orders from the Court substituting the transferee for the transferor on any reinsurance policies applicable to the insurance policies being transferred (which in effect, is a statutory novation of the contract).

In exercising its discretion to make such orders, the Court will be mindful of whether reinsurers have been notified of the proposed substitution and whether any of them have made objections.[30]

4. Who must be notified of what, and how?

(a) Local regulator(s)

An insurer cannot make an application to the Court for confirmation of a scheme of transfer or amalgamation of insurance business unless the insurer provides a copy of the scheme and any actuarial reports on which the scheme is based to APRA.[31]

When a scheme has been confirmed the insurer on whose application the scheme was confirmed must cause a copy of the scheme to be lodged at an office of the Australian Securities and Investments Commission ("ASIC") (Australia's corporate regulator) in every State and Territory in which a company affected by the scheme carried on business.[32]

(b) Other regulator(s)

The Acts contain no explicit requirement to notify a foreign regulator if a scheme involves a cross-border element. However a scheme for transfer or amalgamation of insurance business involving a foreign general insurer may be required to be notified pursuant to the laws governing portfolio transfers of insurance business in the particular jurisdiction in which the foreign general insurer is located.[33]

(c) Policyholders

A summary of a scheme to transfer or amalgamate insurance business that has been approved by APRA has to be given to each Affected Policyholder before an

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event under the Insurance Acquisitions and Takeovers Act 1991 (Cth) (if applicable).

[23] This is likely given APRA's power under section 17D of the Insurance Act and section 192 of the Insurance Act to appoint an independent actuary to make a written report on the scheme. See also *National Mutual Life Association of Australasia Limited v Challenger Life No. 2 Limited* [2009] FCA 1.

[24] See Westport Insurance Corporation, in the matter of Westport Insurance Corporation [2009] FCA 1357 at [48].

[25] See In the Application of Budget Insurance Company Ltd and Auto & General Insurance Company Ltd [2008] FCA 636 at [17].

[26] See section 17F Insurance Act; section 194 Life Insurance Act.

[27] Section 17G(a) Insurance Act; section 195(a) Life Insurance Act.

[28] See MDU Australian Insurance Company Pty Limited, in the matter of MDU Australian Insurance Company Pty Limited [2008] FCA 490; SGIC General Insurance Limited [2004] FCA 1639.

[29] Section 17F(2) Insurance Act.

[30] See *SGIC General Insurance Limited* [2004] FCA 1639 at [27].

[31] Section 17C(2)(a) Insurance Act and APRA Prudential Standard GPS 410 ("Transfer and Amalgamation of Insurance Business for General Insurers"); section 191(2)9a) of the Life Insurance Act.

[32] Section 17G(c), Insurance Act; 195(c), Life Insurance Act.

[33] See for example, *Re Westport Insurance (No 2)* (2010) 181 FCR 530.

application for confirmation of a scheme by the Court can be made.[34]

The insurer should, at a minimum, advise Affected Policyholders:[35]

(i) that the insurer proposes to transfer the policyholder's policy or policies to another insurer, on or after a specified date;

(ii) of the full name and contact details of the other insurer;

(iii) of the effect of the transfer (this explanation may be brief and may, for example, explain that from the date of the transfer all rights and liabilities under the policies will be transferred to the other insurer, so that premiums will have to be paid to, and claims will have to be lodged with, that insurer);

(iv) of any action the policyholder will need to take before or as a result of the transfer (for example, any changes in arrangements relating to paying premiums or lodging claims);

(v) if the policyholder does not need to take any action before or as a result of the transfer - advise the policyholder accordingly;

(vi) how the policyholder can obtain further information and inspect relevant documents as may be available for public inspection; and

(vii) that the policyholder has the right to attend the Federal Court.

The approved summary must be sent to Affected Policyholders before the scheme is released for public inspection.

The Court has the discretion to dispense with the need for compliance with the above requirements in relation to a particular scheme if it is satisfied that, because of the nature of the scheme or the circumstances attending its preparation, the requirements are not necessary to be complied with.[36]

For example, the Court waived compliance where an insurer did not have up-to-date contact information for all policyholders or where the effort and expense in notifying every policyholder was too onerous.[37]

When deciding whether to exercise its discretion to waive compliance with the requirement to notify all Affected Policyholders the Court may have regard to:[38]

(i) the diligence of the search that has been undertaken;

(ii) the likelihood of policyholders making a claim;

(iii) the undertaking of additional steps to draw the attention of the scheme to Affected Policyholders;

(iv) whether the scheme is an intra-group structure (i.e. involves no real change in the practices and the culture of the insurer); and

(v) whether APRA has raised an objection.

(d) **Beneficiaries of cover other than actual policyholders**

There are no express notification requirements for beneficiaries of cover in relation to proposed amalgamations or transfers of insurance business.

(e) **Reinsurers**

The portfolio transfer regimes under the Acts contain no explicit requirement to notify reinsurers of a scheme for the transfer or amalgamation of insurance business. However, notification to reinsurers and their response may be relevant to the Court's discretion to approve a scheme.[39]

(f) **Brokers**

There are no express notification requirements for brokers in relation to proposed amalgamations or transfers of insurance business.

(g) **Others**

Under the Insurance Acquisitions and Takeovers Act 1991 (Cth), an insurer is required to notify the Federal Treasurer of its proposal to acquire any or all of the interests, rights or benefits of another insurer under contracts of insurance if the transfer amounts to 15% or more of the transferring insurer's premiums or outstanding claims liabilities.[40]

Under the Foreign Acquisitions and Takeovers Act 1975 (Cth), if the portfolio transfer involves foreign investment into Australia and there is a possibility that the arrangement will deliver influence or control over an Australian company either currently or in the future, there may be a requirement to notify the arrangement to the Government. Notification will only be required if the investment triggers certain thresholds.[41]

[34] See section 191(2)(c) Life Insurance Act and section 17C(2)(c) Insurance Act.

[35] Paragraph 14, APRA Prudential Standard GPS 410 ("Transfer and Amalgamation of Insurance Business for General Insurers").

[36] Section 17C(5) Insurance Act; section 191(5) Life Insurance Act.

[37] See HDI-Gerling Australia Insurance Company Pty Limited, in the matter of HDI-Gerling Australia Insurance Company Pty Limited (ABN 16 069 085 196) [2010] FCA 505; Westport Insurance Corporation, in the matter of Westport Insurance Corporation [2009] FCA 1357 at [38] to [48].

[38] Westport Insurance Corporation, in the matter of Westport Insurance Corporation [2009] FCA 1357 at [38] to [48].

[39] See *Insurance Australia Limited* [2004] FCA 524 at [77].

[40] Sections 36, 37 and 40 of the Insurance Acquisitions and Takeovers Act 1991 (Cth).

[41] For further information see Foreign Acquisitions And Takeovers Act 1975 (Cth).

(h) **Further notice requirements**

If an Affected Policyholder requests a copy of the scheme, he or she must be provided with a copy of the scheme free of charge.[42]

5. **What publicity requirements are there for IPTs?**

(a) **Newspapers**

Before making an application to the Court for the transfer or amalgamation of insurance business, the insurer must publish a notice of intention to make the application in one or more newspapers, approved by APRA, circulating in each State and Territory in which Affected Policyholder reside.[43]

The notice must at the very least:

(i) state the places, dates and times that an Affected Policyholder may obtain a copy of the scheme and any associated documentation; and

(ii) give the address of each place at which a copy of the scheme and any associated documentation may be obtained.

(b) **Official Gazette/Journal**

The notice referred to in Section 5(a) above must also be published in the Government Gazette.[44]

(c) **Trade magazines**

There are no express requirements to publish a transfer or amalgamation of insurance business in trade magazines.

(d) **Register of Companies**

When a scheme has been confirmed, the insurer on whose application the scheme was confirmed must cause a copy of the scheme to be lodged at an office of ASIC in every State and Territory in which a company affected by the scheme carried on business.[45]

(e) **Other**

Not applicable.

6. **Who has the right to object to the transfer?**

(a) **Regulator(s)**

APRA is required to approve the summary of a scheme before a summary can be provided to Affected Policyholders.[46] APRA can refuse to approve the summary of a scheme if it objects to an aspect of the scheme as contained in the scheme documents. APRA is also entitled to he heard on an application to the Court for the transfer or amalgamation of life and general insurance.[47] On such a hearing APRA may raise an objection to the transfer.

Although it is not an express requirement of the Acts that APRA approve a scheme, normally the approval of, or lack of objection by, APRA is a necessary condition for the Court to exercise its discretion to confirm a scheme.[48]

(b) **Policyholders**

The policy transfer regimes under the Act do not explicitly provide for policyholders to appear at a hearing to object to a transfer. Courts have nevertheless allowed policyholders to make a written submission to, or appear before, the Court to argue that the Court should refuse to approve a scheme or, confirm it with conditions.[49]

Furthermore, case law has indicated that in some cases it may be appropriate for the Court to appoint a representative policyholder to act as an objector.[50]

(c) **Beneficiaries of cover**

Beneficiaries of cover are given no explicit right by the Acts to appear at a hearing to object to a transfer or amalgamation. Courts have nevertheless permitted beneficiaries to raise objections for consideration by the Court at an application hearing.[51]

(d) **Reinsurers**

Reinsurers are given no explicit right by the Acts to appear at a hearing to object to a transfer or amalgamation. Courts have nevertheless permitted reinsurers to raise objections for consideration by the Court at an application hearing.[52]

(e) **Trade associations**

The policy transfer regimes under the Acts do not explicitly provide for trade associations to appear at a hearing to object to a transfer.

(f) **Employees**

The policy transfer regimes under the Acts do not explicitly provide for employees to appear at a hearing to object to a transfer.

(g) **Others**

The Federal Treasurer may object to a scheme involving a proposal to acquire any or all of the interests, rights or benefits of another insurer under contracts of insurance if the transfer amounts to 15% or more of the transferring insurer's premiums or outstanding claims liabilities.[53] The Federal Treasurer may object on grounds that the proposal

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42 Section 17C(4) Insurance Act; Section 191(4) Life Insurance Act.

43 Section 17C(2)(b) Insurance Act and APRA Prudential Standard GPS 410 ("Transfer and Amalgamation of Insurance Business for General Insurers"); section 191(2)(b) Life Insurance Act.

44 See paragraphs 7 to 11 APRA Prudential Standard GPS 410 ("Transfer and Amalgamation of Insurance Business for General Insurers"); regulation 9.02 *Insurance Regulations 1995* (Cth).

45 Section 17G(c) Insurance Act; section 195(c) Life Insurance Act.

46 Section 17C(3)(a) Insurance Act; 191(2)(a) Life Insurance Act.

47 Section 17E(3), Insurance Act; section 193(3), Life Insurance Act.

48 See Re MetLife Insurance Ltd (ABN 75 004 274 882) [2007] FCA 1327 at [30], Westport Insurance Corporation, in the matter of Westport Insurance Corporation [2009] FCA 1357 at [48], National Mutual Life Association of Austrasia Limited v Challenfer Life No. 2 Limited [2009] FCA 1 at [38].

49 See In the matter of Reward Insurance Ltd [2004] FCA 151.

50 See *Re MetLife Insurance* (2007) 63 ACSR 492 at 502 at [58].

51 *Re MetLife Insurance* (2007) 63 ACSR 492 at 500 at [31].

52 *Re MetLife Insurance* (2007) 63 ACSR 492 at 500 at [31].

53 See Insurance Acquisitions and Takeovers Act 1991 (Cth).

involved an undue concentration of power or is contrary to the national interest.[54]

7. **Who must approve and/or sanction the transfer?**

(a) **Local regulator**

It is not an express requirement of the Acts that APRA approve or sanction a transfer. However, normally the approval of, or lack or objection by, APRA is a necessary condition for the Court to exercise its discretion to confirm a scheme.[55]

(b) **Other regulator(s)**

As noted at Section 4(g) above, where a proposal to acquire any or all of the interests, rights or benefits of another insurer under contracts of insurance amounts to 15% or more of the transferring insurer's premiums or outstanding claims liabilities the transferee insurer is required to notify the Federal Treasurer. In such a case, the Treasurer must issue a "go-ahead decision" before the scheme can proceed.[56]

(c) **Court**

No part of the insurance business of an insurer may be transferred to another insurer or amalgamated with the business of another insurer except under a scheme confirmed by the Federal Court[57] (subject to the exceptions noted under Section 2.1 above).

8. **What jurisdictional conditions apply to the transfer?**

8.1 **What types of insurance portfolios are capable of transfer in Australia?**

All types of insurance portfolios may be transferred. This includes general, life, reinsurance and retrocession portfolios.

8.2 **Does the transferring portfolio need to be legally or commercially connected to the state where the transfer is effected?**

The Acts do not contain any express requirements relating to the governing law or jurisdiction of the insurance portfolio being transferred. Accordingly there is nothing in the Acts that prevents the Court from approving a scheme that has binding effect on policies governed by a foreign law. However, conflict of law issues may arise when trying to enforce the scheme in foreign Courts or under a foreign law.

8.3 **Will the transfer be effective in jurisdictions other than those of the transferor and/or transferee?**

If a scheme for transfer or amalgamation of insurance business is approved by the Federal Court it will be effective in all Australian State and Territory jurisdictions.

In relation to non-Australian jurisdictions, see Section 8.2 above.

8.4 **What effect will the transfer have on arbitration clauses?**

Any rights and obligations under an arbitration clause contained in a policy subject to a scheme will be transferred along with the rest of the policy from the transferor to the transferee. This is subject to the orders of the Court approving the scheme.

9. **What is the procedure and timing of the transfer?**

9.1 **What is a typical timeline for a transfer?**

Approximate Time	Action
H - 24 weeks	Identify business to be transferred; conduct due diligence; prepare scheme documents to submit to APRA (i.e. proposed scheme, proposed transfer deed, actuarial reports, proposed summary of scheme to be distributed to Affected Policyholders, proposed notice of intention to make an application for transfer ("Notice of Intention"), notice of a trigger event under the Insurance Acquisitions and Takeovers Act 1991 ("IATA") (if applicable)).
H - 16 weeks	Submit scheme documents to APRA; provide any further documentation requested by APRA; provide notice of a trigger event to Treasurer pursuant to IATA (if applicable).
H - 12 weeks	Treasurer provides go-ahead decision under IATA; APRA approves scheme summary to provide to policyholders and notice of intention.
H - 11 weeks	Directions Hearing (at which Court will fix final hearing date and confirm extent of publicity and notice requirements by granting dispensations - e.g. dispensation from sending policyholder statement to all policyholders).
H - 10 weeks	Provide Affected Policyholders with a copy of the approved scheme summary.
H - 10 weeks	Publish notice of intention in Australian Government Gazette and newspapers approved by APRA.
H - 8 weeks	Make a copy of the scheme available for public inspection.
H - 2 weeks	Submit application to the Court for

[54] See Insurance Acquisitions And Takeovers Act 1991 - Decision-Making Principles IDM 1/1992 (Cth).

[55] See Re MetLife Insurance Ltd (ABN 75 004 274 882) [2007] FCA 1327 at [30], Westport Insurance Corporation, in the matter of Westport Insurance Corporation [2009] FCA 1357 at [48], National Mutual Life Association of Austrasia Limited v Challenger Life No. 2 Limited [2009] FCA 1 at [38].

[56] See section 40 Insurance Acquisitions and Takeovers Act 1991 (Cth).

[57] Section 17B(1) Insurance Act, in respect of general insurance business and section 190(1) Life Insurance Act, in respect of life insurance business.

Approximate Time	Action
	confirmation of the scheme.
H - 1 week	Lodge witness statements and other documentation with Court.
H	Final hearing (at which objectors are heard and the Court grants order sanctioning business transfer scheme if it thinks fit).
30 days after H	Provide transfer documents to APRA.

9.2 **Are there any hard legislative or regulatory deadlines?**

The insurer must publish the notice of intention in the Government Gazette and newspapers before the scheme is released for public inspection.[58]

The approved summary must be sent to Affected Policyholders before the scheme is released for public inspection.[59]

The scheme must be made available for public inspection from 9.00 am to 5.00 pm every day (excluding weekends and public holidays) for 15 days.[60]

An application to the Court for confirmation of the scheme may be made no earlier than: (a) the day after the day on which the public inspection period ends; and (b) 15 days after the approved summary has been given to every Affected Policyholder (whichever occurs later).[61]

10. **<u>What key documentation will be produced for the transfer?</u>**

(a) **Scheme summary**

A scheme summary providing details of the nature of the proposed scheme must be provided to APRA (section 17(2)(a) Insurance Act; section 191(2)(a) Life Insurance Act). The prudential standards published by APRA provide further details of what information must be contained in a scheme summary in relation to the transfer of a general insurance portfolio. There is no equivalent prudential standard in relation to life insurance portfolios. However, the scheme summary for a Life IPT would need to address similar issues.

(b) **Actuarial report**

An actuarial report must be provided to APRA (Insurance Act section 17(2)(a); Life Insurance Act section 191(2)(a)). The report will set out the assets being transferred to the transferee insurer to demonstrate their sufficiency to actuarially match the value of the liabilities being transferred.[62] APRA may arrange for an independent actuary to make a written report on the scheme if it deems this appropriate (section 17D(1) Insurance Act).

(c) **Notice of Intention to Transfer**

A Notice of Intention to Transfer must be published in the Government Gazette and one or more newspapers circulating in each state or territory of Australia in which a policyholder resides.[63]

(d) **Statement of the nature and terms of the transfer**[64]

(e) **Transfer Scheme**

A detailed document setting out in full the terms of the transfer.[65]

(f) **Agreement or Deed of Transfer**[66]

(g) **Evidence**

The application to the Court will need to be supported by evidence regarding compliance with obligations to provide policyholders with the scheme summary, to publish the notice of intention and to make the scheme documents available for public inspection.

(h) **Statement of the Assets and Liabilities**

of each insurer associated with the transfer before and after the transfer.[67]

(i) **Statutory Declaration**

A Statutory Declaration is required from a Director setting out each payment made in relation to the transfer and a reasonable estimate of each payment to be made.[68]

11. **<u>What professional agents are involved in the transfer and what are their roles?</u>**

(a) **Lawyers**

Lawyers will typically be involved at all stages of the transfer process. Ordinarily they are closely involved in the drafting and preparation of all documentation identified at Section 10 above in addition to any Court documentation. Appearances before the Federal Court in significant or contested transfers will ordinarily involve both Solicitors and Counsel.

[58] Prudential Standard GPS 410 para11; *Life Insurance Regulations 1995* (Cth) reg 9.02(3).

[59] Prudential Standard GPS 410 para15.

[60] Prudential Standard GPS 410 para16; *Life Insurance Regulations 1995* (Cth) Reg 9.02(4).

[61] Prudential Standard GPS 410 para17; *Life Insurance Regulations 1995* (Cth) Reg 9.03(1).

[62] J Gleeson and N Owens, 'Schemes under the Insurance Act 1973 (Cth)' (2006) 17 *Insurance Law Journal* 93 at 97.

[63] Prudential Standard GPS 410 para 9; *Life Insurance Regulations 1995* (Cth) Reg 9.02(1).

[64] Prudential Standard GPS 410 para18 (a); *Life Insurance Regulations 1995* (Cth) Reg 9.04(1)(a).

[65] Prudential Standard GPS 410 para18 (b) (i); *Life Insurance Regulations 1995* (Cth) Reg 9.04(1)(b)(i).

[66] Prudential Standard GPS 410 para18 (b) (iii); *Life Insurance Regulations 1995* (Cth) Reg 9.04(1)(b)(iii).

[67] Prudential Standard GPS 410 para18 (b) (v); *Life Insurance Regulations 1995* (Cth) Reg 9.04(1)(b)(v).

[68] Prudential Standard GPS 410 para 18 (c); *Life Insurance Regulations 1995* (Cth) Reg 9.04(1)(c)(i).

(b) **Accountants**

Accountants may be involved in the production of statements of assets and liabilities required to be submitted to APRA within 30 days of Court approval of the transfer scheme (See Section 10 above). They may also assist Actuaries in the preparation of actuarial reports.

(c) **Actuaries**

Actuaries are involved in the production of an actuarial report as required by section 17(2)(a) of the Insurance Act and section 191(2)(a) of the Life Insurance Act. This role is mandated under the Insurance Act.[69] APRA may arrange for an independent actuary to prepare a written report on the scheme under section 17D(1) of the Insurance Act and s 192(1) of the Life Insurance Act.

(d) **Independent Experts**

See Section 11(c) above on actuaries as independent experts.

(e) **Other**

Not applicable.

12. **<u>What legal issues are frequently encountered in transfers?</u>**

(a) **Notification**

Insurers frequently encounter difficulties attempting to satisfy the requirement of sections 17(2)(c) of the Insurance Act and 191(2)(c) of the Life Insurance Act that they give a summary of the scheme to every Affected Policyholder. Most commonly this is because the insurer is unable to identify all of its Affected Policyholders.

This may be as a result of dealing through a broker who is unable or unwilling to provide contact details of individual policyholders (*In the matter of Westport Insurance Corporation* [2009] FCA 1357). In unusual cases the difficulty of giving effect to the notification requirement may also be because the insurer has difficulty "giving"[70] the scheme summary to policyholders with no address for service within Australia.

The notification requirement may be dispensed with.[71]

(b) **Solvency considerations**

In assessing whether to confirm a portfolio transfer under the Acts the Court will consider any adverse effect for policyholders flowing from the transfer. Typically, this analysis will focus on whether sufficient assets have been transferred to the transferee insurer to match the liabilities accepted. This can be a complex and difficult calculation as seen in In the application of *Budget Insurance Company Limited and Auto & General Insurance Company Limited* [2008] FCA 636.[72]

13. **<u>How frequently is the transfer mechanism used?</u>**

13.1 **Is the transfer mechanism commonly used? For what purposes is it used?**

Portfolio transfers under the Acts are reasonably common. They can be used for:

(a) repatriation of capital;[73]

(b) rationalisation of group insurance business (by reducing the number of APRA authorisations held by the group, thereby reducing compliance costs and capital adequacy requirements);[74]

(c) divestment of run-off business;[75]

(d) intra-group reorganisations;[76]

(e) sales of blocks of insurance business;[77] and

(f) fund restructuring, particularly for life companies.[78]

In Australia portfolio transfers under the Acts are also capable of being used for domestications of overseas branches; demutualisation of mutual insurance companies; re-attributions of inherited estate by life companies; exit solutions, with or without an intended solvent scheme of arrangement to follow.

13.2 **Are there any statistics of the use of the transfer mechanism?**

In the last 15 years[79] there have been more than 20 confirmations of schemes for transfer or amalgamation of insurance business under each of the Acts.

14. **<u>What alternative methods can be used to transfer insurance portfolios, and what are the advantages and disadvantages of such methods?</u>**

(a) **Novation**

A transfer could be achieved by novating each individual insurance contract. The disadvantages with this method include the considerable time required and the difficulty and expense of having to obtain the consent of each individual policyholder.

[69] Section 49K Insurance Act 1973 (Cth). See also Prudential Standard GPS 310 at para 25. The role of actuaries is discussed in *In the application of Budget Insurance Company Limited and Auto & General Insurance Company Limited* [2008] FCA 636 at [31] to [34].

[70] Section 121 of the Insurance Act provides various ways that a document may be given to a person for the purposes of the Act.

[71] Section 17C(5) of the Insurance Act; section 191(5) of the Life Insurance Act.

[72] Under the Life Insurance Act see *Re Metlife Insurance Ltd* (2007) 63 ACSR 492.

[73] See SCOR Switzerland Ltd (ACN 098 315 176), in the matter of SCOR Switzerland Ltd (ACN 098 315 176) [2009] FCA 1114.

[74] See PMI Indemnity Limited (No 2) [2005] FCA 1842.

[75] See Re Sphere Drake Insurance Ltd (ARBN 001 263 001) [2009] FCA 854.

[76] See IAG Re Limited, in the matter of IAG Re Limited [2007] FCA 981.

[77] See National Mutual Life Association of Australasia Ltd v Challenger Life No 2 Ltd [2009] FCA 1.

[78] See Application of Commonwealth Life Ltd & Anor [2003] FCA 637.

[79] The *Insurance Act* has only been in force for 8 years at the time of writing.

(b) **Corporate reorganisation**

Insurance portfolios may be transferred as a result of one insurer formally acquiring or merging with another insurer. The disadvantage of this method is that the whole of an insurer's book of business must be acquired/merged rather than just particular parts of the insurer's business. The consequence is that the acquiring insurer may be stuck with undesirable risks (for example, long-tail asbestos risks). Despite this disadvantage, Australia has seen a number of large-scale acquisitions in the insurance industry over the last 15 years.[80]

(c) **100% reinsurance (also described as "run-off"/"portfolio"/"assumption" reinsurance or retrocession, "portfolio transfer" or "reinsurance to close")**

Complete reinsurance is not treated as an insurance portfolio transfer for the purposes of the Insurance Act or Life Insurance Act and so remains available to insurers. Since the effect of reinsurance does not shift primary insurance liability from the insurer it is not the same as a transfer of an insurance liability.

(d) **Other**

There are no other methods available.

15. **<u>What are the relevant sources of law or guidance?</u>**

(a) **Statutes**

- (i) Part III, Division 3A, Insurance Act 1973 (Cth).
- (ii) Part 9, Life Insurance Act 1995 (Cth).
- (iii) Insurance Acquisitions and Takeovers Act 1991 (Cth).
- (iv) Foreign Acquisitions and Takeovers Act 1975 (Cth).
- (v) Corporations Act 2001 (Cth).

(b) **Regulations**

- (i) Life Insurance Regulations 1995 (Cth).
- (ii) APRA Prudential Standard GPS 410 ("Transfer and Amalgamation of Insurance Business for General Insurers").
- (iii) Insurance Acquisitions and Takeovers (Notices) Regulations (Cth).

(c) **Guidance**

Not applicable.

(d) **Jurisprudence**

The following are a selection of recent, relevant cases:

- (i) *St Andrew's Life Insurance Pty Ltd, the application of St Andrew's Life Insurance Pty Ltd and The Colonial Mutual Life Assurance Society Limited (No 2) [2010] FCA 637;*
- (ii) *HDI-Gerling Australia Insurance Company Pty Limited, in the matter of HDI-Gerling Australia Insurance Company Pty Limited (ABN 16 069 085 196) [2010] FCA 505;*
- (iii) *Re Westport Insurance Corporation (No 2) (2010) 181 FCR 530;*
- (iv) *Westport Insurance Corporation, in the matter of Westport Insurance Corporation [2009] FCA 1357;*
- (v) *SCOR Switzerland Ltd, in the matter of SCOR Switzerland [2009] FCA 1114;*
- (vi) *Re Sphere Drake Insurance Ltd (2009) 73 ACSR 123;*
- (vii) *Wesfarmers Federation Insurance Limited ABN 18 009 027 221, in the matter of Wesfarmers Federation Insurance Limited ABN 18 009 027 221 [2009] FCA 381;*
- (viii) *National Mutual Life Association of Australasia Ltd v Challenger Life No 2 Ltd [2009] FCA 1;*
- (ix) *Cavell Insurance Co Ltd, in the matter of Cavell Insurance Co Ltd [2008] FCA 1984;*
- (x) *In the Application of Budget Insurance Company Ltd and Auto & General Insurance Company Ltd [2008] FCA 636;*
- (xi) *MDU Australian Insurance Company Pty Ltd [2008] FCA 490;*
- (xii) *Calliden Group Limited in the matter of Calliden Group Limited [2007] FCA 2019;*
- (xiii) *Re MetLife Insurance Ltd (ABN 75 004 274 882) (2007) 63 ACSR 492*
- (xiv) *IAG Re Limited, in the matter of IAG Re Limited [2007] FCA 981;*
- (xv) *PMI Indemnity Limited (No 2) [2005] FCA 1842;*
- (xvi) *Mercantile and General Reinsurance Company of Australia Ltd [2004] FCA 1773;*
- (xvii) *Munich Reinsurance Company of Australasia Limited (ACN 004 804 013) [2004] FCA 1772;*
- (xviii) *SGIC General Insurance Limited [2004] FCA 1639;*
- (xix) *Calliden Limited, in the matter of Calliden Limited [2009] FCA 186;*

[80] For example, HIH Insurance's takeover of FAI, AMP Limited's acquisition of GIO Australia Holdings Limited and the acquisition of AMP's general insurance interests by Suncorp Metway Ltd.

(xx) *In the Application of Budget Insurance Company Ltd and Auto & General Insurance Company Ltd [2008] FCA 636;*

(xxi) *Insurance Australia Limited [2004] FCA 524*;

(xxii) Application *of Commonwealth Life Ltd & Anor [2003] FCA 637;* and

(xxiii) *Colonial Portfolio Services Ltd v APRA [1999] FCA 177*.

(e) **Other**

J Gleeson & N Owens, 'Schemes under the Insurance Act 1973 (Cth)' (2006) 17 *Insurance Law Journal* 93.

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Preliminary comments – Assumptions

Prior to the recent change of the Belgian government, the Belgian Parliament passed, in May 2010, three draft bills regarding the new supervision system of the Belgian financial markets. The first bill (not published yet) will split responsibilities between the Banking, Finance and Insurance Commission (the "BFIC"), who will assume responsibility for consumer protection, and the Belgian National Bank who will assume the financial regulation and supervision of financial institutions.

According to two other bills of 2 June 2010 (published on 14 June 2010) the Belgian State will be able to order the transfer of the assets or the shares of this company where a financial company (such as a bank or an insurance company) encounters serious financial problems.[81]

In order to do so, the Belgian State will have to file a request with the Court of First Instance of Brussels. The President of the court will, within 72 hours after filing of the request, schedule a hearing that will take place within 7 days after filing. The transferor must also publish such judgment on its website within 24 hours after receipt.

At the hearing the court will hear the Belgian State, the transferor and the transferee as well as shareholders who voluntarily intervene in the proceedings. The court will then consider (i) the legality of the transfer and (ii) if the proposed compensatory indemnity seems fair. Within 20 days of the hearing, the court will render its judgment. If the judgment approves the transfer, the shares or assets will automatically be transferred. Such judgment is notified to the Belgian State, the transferor and the transferee by a court letter and will also be published in the Belgian Official Gazette (*Moniteur belge/Belgisch Staatsblad*). Such publication will render the transfer binding on third parties, without any other formalities.

Such judgment organising the transfer cannot be appealed. Only the shareholders of the transferor have the right, within two months after the publication of the judgment in the Belgian Official Gazette, to introduce a claim for revision of the compensatory indemnity and this is again before the Court of First Instance of Brussels.

1. **General**

1.1 **Can insurance portfolios be transferred from one entity to another in your jurisdiction?**

Yes, under the Act of 9 July 1975 regarding supervision of insurance undertakings (the "1975 Supervision Act"),[82] if certain conditions are met (see Section 2 below).

1.2 **Can reinsurance portfolios be transferred?**

Yes, under the Act of 16 February 2009 on Reinsurance (the "2009 Reinsurance Act"),[83] if certain conditions are met (see Section 2 below).

1.3 **Are the rules the same for the transfer of direct insurance portfolios as for reinsurance portfolios?**

No, see Section 2 below.

1.4 **Are the rules the same for the transfer of life portfolios as for non-life portfolios?**

The Belgian legislation does not make any distinction between the transfer of life or non-life portfolios.

Specific rules are provided for depending on whether or not the portfolio is transferred between (re)insurance companies (or their branches) located in the territory of a member state of the European Economic Area (the "EEA").

2. **What are the requirements for an Insurance Portfolio Transfer ("IPT")?**

2.1 **What requirements must be met by a *transferor* to undertake an IPT?**

Specific provisions of the 1975 Supervision Act or the 2009 Reinsurance Act apply depending on whether the transfer relates to direct insurance or to reinsurance contracts.

In this respect, it should be noted that insurance companies authorised to write insurance business in Belgium are, without any additional licence requirement, authorised to carry on reinsurance business. Insurance companies which, in addition to their insurance business, carry on reinsurance activities are subject to the provisions of the 1975 Supervision Act relating to portfolio transfers. This is regardless of whether or not the proposed portfolio transfer consists in the transfer of their insurance business or of their reinsurance business.

On the contrary, the provisions of the 2009 Reinsurance Act relating to portfolio transfers only apply to authorised reinsurance companies which exclusively conduct reinsurance activities.

(a) Portfolio transfer of an <u>insurance</u> company

The provisions of the 1975 Supervision Act relating to portfolio transfers by an insurance transferor apply to:

(i) (1) Belgian insurance companies; (2) Belgian branches of EEA-insurance companies; or (3) Belgian branches of non EEA-insurance companies;

(ii) in relation to a transfer of all or part of a portfolio of insurance contracts (including related rights and obligations) covering risks located in the territory of the EEA; and

(iii) under certain conditions, to one or more: (1) Belgian insurance companies or their branches; (2) insurance companies or their branches located in the EEA; or (3) insurance companies or their branches not located in the EEA.

[81] For example, where it does not have a sufficient solvency margin anymore, or that the financial situation of an insurance company does not give sufficient guarantees for the future, or that the intern control of the insurance company is lacking.

[82] Articles 74 to 78 of the 1975 Supervision Act.

[83] Article 28 of the 2009 Reinsurance Act.

(b) Portfolio transfer of a reinsurance company

The provisions of the 2009 Reinsurance Act relating to portfolio transfers by a reinsurance transferor apply to:

(i) Belgian reinsurance companies and their branches (whether within the EEA or not) which exclusively carry on reinsurance activities;

(ii) in relation to the transfer of all or part of the portfolio; and

(iii) under certain conditions, to one or more reinsurance or insurance companies.

2.2 What requirements must be met by a *transferee* to undertake an IPT?

If the transferee is a Belgian company, the BFIC must approve the transfer.

If the transferee is an EEA insurance company, the home country controller of the transferee must give the BFIC a certificate attesting that the transferee will meet the applicable solvency margin requirements after the transfer.[84]

The 1975 Supervision Act provides[85] for an additional requirement when the transferor is the Belgian branch of a non EEA-insurance company: the transferee must have the authorisation required to enable the business which is to be transferred to be carried on in the state where the risks are situated.

2.3 Are there any requirements relating to the financial condition of the *transferor*?

No.

Neither the 1975 Supervision Act nor the 2009 Reinsurance Act provide for specific requirements regarding the financial condition of the transferor.

2.4 Are there any requirements relating to the financial condition of the *transferee*?

Yes. If the transferee is a Belgian company, the BFIC will first verify its financial situation.

If the transferee is an EEA insurance company, the home country controller of the transferee must give the BFIC a certificate attesting that the transferee will meet the applicable solvency margin requirements after the transfer (see Section 2.2).

2.5 Is the place where the portfolio was originally underwritten a relevant factor?

No.

Only the transfer of all or part of a portfolio of insurance contracts covering risks located in the territory of the EEA is allowed.

2.6 Is the governing law or applicable jurisdiction of the insurance portfolio transferred a relevant factor?

No.

The BFIC will not make its approval conditional upon the (insurance or reinsurance) contracts transferred being governed by Belgian law or subject to Belgian jurisdiction. Based on other grounds, however (such as the principle of the 'General Good'), the BFIC may object to any contravention of the EU Directive on conflict of law rules in the insurance contract.

2.7 What criteria will be applied by the relevant authority in approving the transfer?

The criteria applied by the BFIC in approving the transfer vary depending on whether the proposed transfer relates to insurance or reinsurance business.

(a) **Business transferred by insurance companies**

(i) The transferor is a Belgian insurance company or a branch of a Belgian insurance company:

(1) The transferee is established within the EEA: the BFIC will only approve the transfer by written decision if:

i. it receives a certificate, issued by the regulatory authorities of the state where the transferee is established, certifying that the transferee will meet the applicable solvency margin requirements after the transfer;

ii. the transfer concerns risks situated in the EEA;

iii. if the transferor is a branch located in a member state of the EEA other than Belgium, it receives an opinion of the regulator of the state where such branch is located; and

iv. if the transferred risks or commitments are located in a member state of the EEA other than Belgium, it receives the consent of the regulatory authorities of the state where the risk[86] or commitment is located.

Pursuant to section 5.1.2 of the Revised Sienna Protocol,[87] the solvency margin certificate, the opinion and consent shall be given by the relevant regulatory authority as soon as possible and in any

[84] Article 74, § 3, first line and 75, § 3, first line of the 1975 Supervision Act and Article 28, § 1, second line of the 2009 Reinsurance Act.

[85] Article 75, § 3, second line of the 1975 Supervision Act.

[86] The state of the location of the risk is considered to be the state where the policyholder has his main place of residence or, if the policyholder is a legal entity, the state where said legal entity has a place of business to which the contract relates.

event no later than three months after the date of receipt of the request by the BFIC.

(2) The transferee is not established within the EEA: the BFIC will only approve the transfer by written decision if:

i. the transfer concerns risks situated in Belgium;[88] and

ii. the transferee is the Belgian branch of this non-EEA insurer.

(ii) The transferor is the Belgian branch of a non EEA-insurance company:

(1) The transferee is established within the EEA: the BFIC will only approve the transfer by written decision if:

i. it receives a certificate, issued by the regulatory authorities of the state where the transferee is established, certifying that the transferee will meet the applicable solvency margin requirements after the transfer;

ii. the transfer concerns risks situated in the EEA; and

iii. it has received the consent of the regulatory authorities of the state where the risk or commitment is located.

(2) The transferee is not established within the EEA: the BFIC will only approve the transfer by written decision if:

i. it receives a certificate, issued by the regulatory authorities of the state where the transferee is established, certifying that the transferee will meet the applicable solvency margin requirements after the transfer;

ii. the transfer concerns risks situated in Belgium;

iii. the transferee is the Belgian branch of this non-EEA insurer; and

iv. it has received the consent of the regulatory authorities of the state where the risk or commitment is located.

(b) **Business transferred by a pure reinsurer**

The BFIC only approves the transfer if it has received a certificate, issued by the regulatory authorities of the state where the transferee is established, certifying that the transferee will meet the applicable solvency margin requirements after the transfer.

2.8 **Are there any other requirements?**

The IPT will be carried out within the framework of a corporate deal. The Belgian Company Code[89] provides for specific requirements for the transfer of a universality of goods[90] or of a branch of activity.[91]

3. **<u>What can be transferred along with the insurance or reinsurance contract?</u>**

(a) **Assets**

From a corporate law point of view, all assets deriving from the universality of goods or from the branch of activity that is transferred will be transferred together with the (re)insurance contracts.

(b) **Liabilities**

From a corporate law point of view, all liabilities deriving from the universality of goods or from the branch of activity that is transferred will be transferred together with the (re)insurance contracts.

(Re)insurance contracts are reciprocal contracts: the (re)insurer and the (re)insured have rights and obligations towards the other party. The transferor will therefore transfer all his liabilities towards the insured to the transferee.

(c) **Real property**

Depending on the provisions of the IPT agreement, if the commercial unit of the transferred (re)insurance business was located in some specific premises, such premises can also be transferred together with the (re)insurance business provided the specific requirements for such real estate property transfer are effectively fulfilled.

(d) **Reinsurance/retrocession contracts and other ancillary contracts**

Depending on the provisions of the reinsurance/retrocession treaty, the reinsurance or retrocession contracts will be transferred together with the insurance/reinsurance contracts.

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[87] General Protocol relating to the Collaboration of the Insurance Supervisory Authorities of the member states of the European Union (Revised Siena Protocol), CEIOPS-DOC-07/08, March 2008.

[88] Risks are situated in Belgium:

For property insurance: where the insured good is situated in Belgium;

For liability insurance: where the policyholder has his residence or registered office in Belgium;

For life insurance: where the policyholder has his residence in Belgium.

[89] Articles 678-680 of the Belgian Company Code.

[90] "Universality of goods" is a concept of Belgian law that refers to all assets and liabilities of a business.

[91] "Branch of activity" is a concept of Belgian law that refers to all assets and liabilities of an independent business unit.

In case of a simple IPT, the reinsurer must consent to the transfer of the business. He therefore has the right to object to the transfer or to request different conditions (see Section 6(d)).

In case of an IPT following the provisions of the Company Code, the reinsurer does not have the right to refuse the transfer of the business. He therefore has no right to object to the transfer and the reinsurance contracts will automatically be transferred (see Section 6(d)).

4. <u>Who must be notified of what, and how?</u>

(a) Local regulator(s)

A request for approval of the IPT must be made by the transferor and the transferee and a complete application form must be filed by them with the BFIC.

The application form must contain, among others:

(i) a letter of intent from the transferor, describing the transfer operation that will take place;

(ii) the draft portfolio transfer agreement;

(iii) the draft letter informing the policyholders of the IPT (see Section 4(c));

(iv) a report of the auditor, if any;

(v) a statement from the transferor regarding the status of its solvency margin (or where the transferee is located in another member state, a certificate, issued by the regulatory authorities of the state where the transferee is established, certifying that the transferee will meet the applicable solvency margin requirements after the transfer);

(vi) the Minutes of the competent management bodies of both the transferor and the transferee; and

(vii) a declaration of renunciation by the transferor in respect of the insurance category in which it was registered with the BFIC if this category is wholly transferred to the transferee.

(b) Other regulator(s)

Depending on the location of establishment of the transferee and/or the transferor and the location of the risks that are to be transferred, the BFIC has to seek co-operation of foreign regulators of member states of the European Union.

(i) In relation to a <u>portfolio transfer of an insurance or reinsurance company</u>, if the transferee has its registered office in an EEA member state other than Belgium, the regulatory authority of the state where the transferee is established must certify that the latter, considering the transfer, has the required solvency margin.

(ii) In relation to a <u>portfolio transfer of an insurance company</u>:

(1) if the transferor is a branch located in an EEA member state other than Belgium, the BFIC shall, prior to giving its approval, notify and obtain the opinion of the regulator of the state where the branch is located; and

(2) if the "state of the commitment"[92] for any transferring policy is an EEA member state other than Belgium, the BFIC shall, prior to giving its approval, notify and obtain the consent of the regulator of the "state of the commitment".

(c) Policyholders

There is no general requirement under Belgian law to give notice of the transfer to the policyholders which are informed of the IPT once the approval decision of the BFIC is published in the Belgian Official Gazette (*Moniteur belge/Belgisch Staatsblad*). Such publication will render the IPT legally binding on policyholders. It will also mention the date on which the IPT will have effect and practical information, for instance how and to whom an insurance claim must be notified in the future.

It is however market practice to send a letter to policyholders in order to inform them about the IPT. Such letter is preferably sent out after the publication of the approval decision in the Belgian Official Gazette because the IPT transfer will only be binding on policyholders after such publication, and not before. Such letter should refer to the effective date of the IPT, and to the publication that would already have been made in the Belgian Official Gazette (mentioning the date of publication).

(d) Beneficiaries of cover other than actual policyholders

There is no general requirement under Belgian law to give notice of the transfer to the beneficiaries which are informed of the IPT once the approval decision of the BFIC is published in the Belgian Official Gazette (*Moniteur belge/Belgisch Staatsblad*). Such publication will render the IPT binding on beneficiaries and other concerned parties.

As the insurer does not always know the identity of the beneficiaries of the insurance policies, it will be difficult for him to inform all beneficiaries by letter as he can do for the policyholders.

(e) Reinsurers

There is no general requirement under Belgian law to give notice to reinsurers which are informed of the IPT once the approval decision of the BFIC is published in the Belgian Official Gazette.

As a practical matter, reinsurance treaties generally require the prior consent of the reinsurer to the IPT and/or provide for termination rights of the reinsurer and/or the cedant company, if and when insurance contracts which cover risks ceded to a reinsurer are to be transferred.

[92] The state of commitment is considered to be the state where the policyholder has his main place of residence or, if the policyholder is a legal entity, the state where said legal entity has a place of business to which the contract relates.

Therefore, the reinsurance treaties need to be carefully reviewed in anticipation of a (partial or total) IPT.

The reinsurer of the transferor may not be willing to deal with the transferee and to provide reinsurance coverage to the transferee under the same conditions as those agreed with the transferor in relation to the contracts to be transferred.

Alternatively, the transferee may well decide to include the transferred risks in its reinsurance program either by extending the scope of coverage of existing reinsurance treaties or by entering into a new reinsurance treaty with its "usual" reinsurer(s) and accordingly request from the transferor to terminate the reinsurance treaties prior to the completion of the insurance portfolio transfer.

(f) **Brokers**

There is no general requirement under Belgian law to give notice to brokers which are informed of the IPT once the approval decision of the BFIC is published in the Belgian Official Gazette.

It is, however, market practice for the transferor and the transferee to inform their respective brokers of the planned IPT.

In case of a simple IPT, brokers have the right to object to the transfer of their distribution agreement or to ask for amended (better) conditions. This may lead to the signing of a new contract or to an endorsement to the existing contract.

In case of an IPT following the provisions of the Company Code, brokers do not have the right to refuse the transfer of the business. They therefore have no right to object to the transfer and their contract will automatically be transferred to the transferee.

(g) **Others**

Not applicable.

(h) **Further notice requirements**

Not applicable.

5. **<u>What publicity requirements are there for IPTs?</u>**

(a) **Newspapers**

There is no legal or regulatory obligation to publish a notice of the application in a newspaper.

(b) **Official Gazette/Journal**

(i) In relation to a (insurance or reinsurance) <u>portfolio transfer</u>, the BFIC will, at its own cost, publish an extract of its approval decision of the portfolio transfer in the Belgian Official Gazette. Such publication renders the transfer binding on the policyholders, the insured and any interested third party.[93]

(ii) In relation to a reinsurance <u>portfolio transfer</u>, the 2009 Reinsurance Act only provides for an approval decision from the BFIC. The 2009 Reinsurance Act does not oblige the BFIC to publish its approval decision of the portfolio transfer in the Belgian Official Gazette.

Unlike for portfolio transfers of insurance companies, the approval by the BFIC is not the subject of a publication. In the absence thereof, the mere approval by the BFIC does not render the transfer binding upon the cedant companies. In order to render the transfer enforceable against the cedant companies, the consent of each individual cedant company has to be obtained, unless otherwise provided in the reinsurance treaty.

(iii) As for corporate law, an extract of the approval decision of the transferee must be published in the annexes to the Belgian Official Gazette in order to render such decision binding on third parties.[94]

(c) **Trade magazines**

There is no legal or regulatory obligation to publish a notice of the application in a trade magazine.

(d) **Register of Companies**

If a commercial establishment is transferred with the branch of activity or the universality of goods, the change of the commercial establishment (from the transferor to the transferee) must be published in the Database of Undertakings (*Banque-Carrefour des entreprises/Kruispuntbank van Ondernemingen*).

(e) **Other**

Not applicable.

6. **<u>Who has the right to object to the transfer?</u>**

(a) **Regulator(s)**

(i) **Insurance or reinsurance portfolio transfers by insurance companies**

The BFIC has the right to object to the transfer when the requirements referred to in our Preliminary Comments above are not fulfilled (i.e. if and when: (i) the regulator of the transferee having its registered office in a EU member state cannot certify that the transferee will meet the applicable solvency margin requirements after the transfer; (ii) the transfer concerns risks situated outside the EEA; (iii) the regulator of the state of the branch whose portfolio is to be transferred has given a negative opinion on the transfer; or (iv) the EEA regulator of the "state of commitment" has not given its consent to the proposed transfer.

[93] Articles 76 and 78 of the 1975 Supervision Act.

[94] Article 765 Company Code.

Except as set out under Section 4(b), other EEA regulators do not have a right to object to the transfer.

(ii) **Reinsurance business transfer by pure reinsurers**

The BFIC has in principle the right to object to the transfer if it has not received the solvency margin certificate referred to under Section 2.4.

(b) **Policyholders**

The policyholders' consent for the transfer of their insurance policy is not required.

The transfer of rights and obligations deriving from insurance contracts regarding risks situated in Belgium can be invoked vis-à-vis the policyholders, the insureds and all concerned third parties only if the BFIC or the competent authorities of another EEA member state have consented to the transfer.

This can be invoked as from the date of the publication in the Belgian Official Gazette of the BFIC's approval decision.[95]

The policyholders have the right to terminate their insurance contract within a period of 90 days as from the date of such publication. This termination will come into force 30 days after the sending of the termination letter, or at the annual renewal date if the latter falls prior to the abovementioned period of 30 days.

Such termination right is however not granted[96] in case of mergers and acquisitions of insurance companies, nor in relation to transfers in the context of a contribution[97] of the universality of goods of assets and liabilities or a contribution of a branch of activity, nor from cession between insurance companies that are part of the same consolidated group.

(c) **Beneficiaries of cover**

Beneficiaries have no right to object to the transfer. Such transfer will be binding on beneficiaries of cover as from the date of the publication in the Belgian Official Gazette of the BFIC's approval decision of the transfer.

(d) **Reinsurers**

If Belgian law is applicable to the reinsurance treaty (which is seldom the case) and if the reinsurance treaty does not provide otherwise:

(i) when the transfer is a simple IPT: the reinsurer must consent to the transfer of the business. It therefore has the right to object to the transfer, or to ask for amended conditions;

(ii) when the transfer is an IPT following the provisions of the Company Code: the reinsurer does not have the right to refuse the transfer of the business. It therefore has no right to object to the transfer and the reinsurance contracts will automatically be transferred.

(e) **Trade associations**

Trade associations have no right to object to the transfer.

(f) **Employees**

Employees have no right to object to the transfer.

(g) **Others**

Not applicable.

7. Who must approve and/or sanction the transfer?

(a) **Local regulator**

All portfolio transfers must be approved by the BFIC.

(b) **Other regulator(s)**

Where another regulator is requested to issue a solvency margin certificate (see Section 2.7(a)), the BFIC approves the transfer only if the regulatory authority of the state where the transferee is established certifies that the latter will have the required solvency margins after the transfer. This certificate has to be issued by the relevant EEA regulator as soon as possible and in any event no later than three months after the BFIC's request.[98] Where the EEA regulator has not issued the certificate within three months, it cannot be presumed that the solvency margin requirements will be met by the transferee after the transfer.

Where notice is given to an EEA regulator of the "state of the commitment" (see Section 2.7(a)) the BFIC may only approve the transfer subject to having obtained the consent of the EEA regulator. In case of a refusal by the EEA regulator, the affected part of the insurance portfolio cannot be transferred. Consent of the EEA regulator is, however, deemed to have been given where the EEA regulator has not responded to the BFIC within three months of notification.[99]

(d) **Court**

An IPT does not need to be approved and/or sanctioned by any court.

8. What jurisdictional conditions apply to the transfer?

8.1 What types of insurance portfolios are capable of transfer in Belgium?

All types of insurance or reinsurance contracts can be transferred.

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[95] Article 78 of the 1975 Supervision Act.

[96] Article 77, §2 of the 1975 Supervision Act.

[97] The Belgian Company Code distinguishes the sale of a branch of activity or a universality of goods where the buyer will have to pay a cash amount from the "contribution" of a branch of activity or a universality of goods where the buyer will receive shares of the company to which he is contributing the universality of goods or the branch of activity.

[98] Section 5.1.3 of the Revised Sienna Protocol.

[99] Section 5.1.2 of the Revised Sienna Protocol.

8.2 **Does the transferring portfolio need to be legally or commercially connected to the state where the transfer is effected?**

In order to be transferred the risks must be located in the territory of an EEA member state (see Section 2.5). No other connection is legally required.

8.3 **Will the transfer be effective in jurisdictions other than those of the transferor and/or transferee?**

The home country controller of the transferee must give to the BFIC a certificate attesting that the transferee will meet the applicable solvency margin requirements after the transfer (see Section 2.4). The transfer will be effective and binding on policyholders in other EEA countries as soon as the approval decision by the BFIC will have been published in the Belgian Official Gazette.

8.4 **What effect will the transfer have on arbitration clauses?**

To the extent permissible under Belgian law,[100] clauses in Belgian insurance contracts continue to apply after the transfer.

9. **<u>What is the procedure and timing of the transfer?</u>**

9.1 **What is a typical timeline for a transfer?**

(a) **Insurance or reinsurance portfolio transfer**

Approximate Time	**Action**
[___]	Request for approval filed by the transferor and the transferee with the BFIC.[101]
A - 3 months	BFIC notifies relevant EEA regulators and 3 month consultation period begins.
A	End of the 3-month time limit awarded to the EEA regulators to consent to the proposed transfer.
A	***Approval by the BFIC of the proposed insurance portfolio transfer.***
A	Publication of the approval decision by the BFIC in the Belgian Official Gazette *(Moniteur belge/Belgisch Staatsblad).*
A + 90 days	End of the time limit awarded to the policyholders to terminate their contract.
A + 90 days + max. 30 days	Termination of contracts becomes effective.

(b) **Reinsurance portfolio transfer by a pure reinsurer**

The 2009 Reinsurance Act does not provide for specific time limits for informing the BFIC, or for rendering the BFIC's approval decision binding on reinsureds or other parties.

Any modification of the reinsurance activity in comparison with the activity described in the procedure in order to obtain the authorisation must be notified to the BFIC within one month after the reinsurer's approval.[102]

9.2 **Are there any hard legislative or regulatory deadlines?**

Relevant EEA regulators have 3 months to respond to notification by the BFIC of the proposed transfer.[103]

10. **<u>What key documentation will be produced for the transfer?</u>**

The following key documents will typically be produced for the purposes of a transfer:

(a) **Portfolio Transfer Agreement:** The transferor and the transferee will sign an (insurance or reinsurance) portfolio transfer agreement, by which the transferor agrees to transfer, and the transferee agrees to accept, the portfolio to be transferred;

(b) **Actuaries' reports:** where applicable, actuaries of the transferor and transferee report on the terms and likely effects of the transfer. Such reports are internally used by the transferor and the transferee in order to conduct the transfer;

(c) **Expert's report:** where applicable an Independent Expert will report on the likely effects of the transfer on relevant classes of policyholders. Such report is internally used by the transferor and the transferee in order to conduct the transfer.

11. **<u>What professional agents are involved in the transfer and what are their roles?</u>**

(a) **Lawyers**

Lawyers are generally involved in insurance and reinsurance portfolio transfers (even though their involvement is not mandatory from a pure legal perspective). They play a key role in the setting up and implementation of the process since they are usually in charge of the drafting of the legal documentation required for the process (including, if the parties decide to apply for an approval by the BFIC, preparing the application request for approval by the BFIC). They may also deal with objections raised by interested parties and with the BFIC on regulatory issues.

(b) **Accountants**

Accountants are not required but they may become involved in the process in relation to tax issues along with lawyers.

[100] Article 36 of the 1992 Statute on non-marine insurance contracts.

[101] According to Article 22 of the 1975 Supervision Act, the BFIC must be provided, at least 3 weeks before the venue of the general assembly that must approve decisions having impact on the insurance contracts, with the draft of such decision. Foreign insurance companies must give such decisions to the BFIC within one month after their approval.

[102] Article 38 of the 2009 Reinsurance Act.

[103] Sections 5.1.2, 5.1.3 and 5.1.5, 5.2.1 and 5.2.4 of the Revised Siena Protocol.

(c) **Actuaries**

Actuaries may be asked to provide reports on the terms and likely effects of the transfer.

(d) **Independent Expert**

An independent expert is not required in relation to insurance or reinsurance portfolio transfers. However, a party may appoint such an expert in order to estimate the value of the portfolio to be transferred and collect his opinion of the likely effects of the transfer on the different groups of policyholders affected by the transfer.

(e) **Other**

Not applicable.

12. **<u>What legal issues are frequently encountered in transfers?</u>**

(a) **Clauses in contracts purporting to prohibit or restrict a party's ability to transfer the business**

Many contracts of insurance or reinsurance purport to restrict a party's right to transfer the contract to a third party. These contracts usually require the prior consent of the counterparty or provide for a right to terminate the contract absent such prior consent. Therefore, in order to avoid this sanction, it is necessary to obtain the consent of the counterparty prior to the transfer.

(b) **Solvency considerations**

In order to avoid issues in relation to solvency considerations,[104] the BFIC approves the insurance or reinsurance transfer only if the regulatory authorities of the state where the transferee is established certifies that the latter, considering the transfer, has the required solvency margin (see Section 2.7).

(c) **Disclosure - for example, to interested parties or objectors**

As regards IPTs, policyholders, insureds, beneficiaries and creditors are informed of the proposed transfer by the notice published in the Belgian Official Gazette as described under Sections 4(c) and 4(d).

There is no disclosure procedure under Belgian law allowing the interesting parties to collect more information concerning the proposed transfer.

(d) **VAT**

From a Belgian VAT point of view, the following principles apply:

- the transfer of an insurance portfolio is subject to Belgian VAT in so far as the buyer, who qualifies as a taxable person within the meaning of article 4 of the Belgian VAT Code, is established in Belgium.[105] No exemption is applicable (cf. ECJ, C-242/08, *Swiss Re Germany Holding GmbH*); the transfer is in principle subject to VAT at the rate of 21%.

  It should be noted that if the transfer of the IPT could be qualified as the "transfer of a going concern", no Belgian VAT is due.[106]

- In contradiction to the European VAT Directive and the aforementioned case law, the Belgian VAT-code provides a specific VAT exemption for the transfer of an insurance portfolio.[107]

<u>Note</u>: It should be noted that the "transfer of a going concern" exemption is only enforceable against the Belgian tax authorities after the expiry of one month after the month in which the Belgian tax authorities received the deed of conveyance. The buyer is severally liable for the tax debts of the vendor after expiry of this month. This liability is limited to the amount that the buyer already paid to the vendor for the transfer or to the par value of the shares which are attributed in exchange for the transfer. This "non-enforceability" can be avoided by requesting a certificate from the competent tax authorities, in which it is stated that the vendor has no tax debts. This certificate should be added to the deed of conveyance.

The VAT Code as well as the Belgian Income Tax Code provide such a regulation.[108]

13. **<u>How frequently is the transfer mechanism used?</u>**

13.1 **Is the transfer mechanism commonly used? For what purposes is it used?**

IPTs by way of transfer of the universality of goods or a branch of activity are not unusual. They are used because they allow the transferor to transfer a "package" (including insurance contracts, assets, liabilities, real estate, see Section 3) with one operation.

13.2 **Are there any statistics of the use of the transfer mechanism?**

No.

14. **<u>What alternative methods can be used to transfer insurance portfolios, and what are the advantages and disadvantages of such methods?</u>**

(a) **Novation**

Under Belgian law, novation by means of change of the debtor requires the creditor's consent. As (re)insurance contracts are reciprocal contracts, where each party has rights and obligations towards the other party, it is impossible to obtain all ((re)insurance) policyholders' consent on such novation. It is therefore never used under Belgian law.

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[104] Articles L. 324-1 and L. 324-1-2 of the FIC.

[105] Article 21, §2 Belgian VAT Code.

[106] Articles 11 and 18, §3 Belgian VAT Code.

[107] Article 44, §2, 13° Belgian VAT Code – VAT Manual, No. 328/5 and VAT comments, No. 18/643.

[108] Article 93undeciesB Belgian VAT Code and article 442bis of the Belgian Income Tax Code.

(b) **100% reinsurance (also described as "run-off"/"portfolio"/"assumption" reinsurance or retrocession, "portfolio transfer" or "reinsurance to close")**

Run-off reinsurance is often used under Belgian law, especially by foreign (re)insurance companies wishing to close their business on the Belgian territory.

(c) **Corporate reorganisation**

Mergers or demergers of (re)insurance companies ("asset deal"). Mergers of (re)insurance companies can be carried out either by acquisition of another company or by incorporation of a new company. In order to be enforceable against third parties, the transfer of certain assets requires compliance with certain formalities and conditions provided for by the Belgian Company Code.

Purchase of shares in exchange for a cash amount or shares ("share deal"). The acquisition will be valid once the parties agree on the price and the shares to be transferred. The articles of association or a shareholders' agreement can provide for restrictions on the transfer of shares (such as an approval clause, pre-emptive rights or tag-along rights). The Belgian Company Code also provides for certain restrictions on the transfer of shares.

(d) **Arrangement/compromise**

Not applicable.

(e) **Other**

Not applicable.

15. **What are the relevant sources of law or guidance?**

(a) **Statutes**

Articles 74 to 78 of the Act of 9 July 1975 relating to portfolio transfer from insurance companies.

Article 28 of the Act of 16 February 2009 on Reinsurance relating to portfolio transfer from reinsurance companies.

(b) **Regulations**

Communication No. 5 of the BFIC of 13 July 1976.[109]

(c) **Guidance**

Not applicable.

(d) **Jurisprudence**

Not applicable.

(e) **Other**

Not applicable.

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[109] Despite the fact that such communication is based on Article 25 of the 1975 Supervision Act, which has been abrogated in 1994, the essence of this communication has to be followed.

Bermuda

ROBIN MAYOR AND CHRISTIAN LUTHI, CONYERS DILL & PEARMAN

1. **General**

1.1 **Can insurance portfolios be transferred from one entity to another in your jurisdiction?**

Long-term insurance portfolios can be transferred under the provisions of section 25 of the Insurance Act 1978 (the "Act"). For this purpose, this generally refers to life insurance. This requires a court application, an independent actuarial report and a mailing to all policyholders affected. Either the transferor or the transferee can make the application. Section 25 does not apply to reinsurance long-term business portfolios.

There is no provision under Bermuda law for a non-life portfolio transfer although this has been done by way of a scheme of arrangement under the provisions of section 99 of the Companies Act 1981.

1.2 **Can reinsurance portfolios be transferred?**

Again, these can only be transferred by way of a scheme of arrangement. Long-term reinsurance business is expressly excluded from the provisions of section 25 of the Act.

1.3 **Are the rules the same for the transfer of direct insurance portfolios as for reinsurance portfolios?**

No. There are no specific rules under the Act for the transfer of reinsurance portfolios. Indeed, the transfer of reinsurance long-term business is expressly carved out of the provisions for long-term insurance portfolio transfers.

1.4 **Are the rules the same for the transfer of life portfolios as for non-life portfolios?**

See the answer to Section 1.1 above.

2. **What are the requirements for a Life Insurance Portfolio Transfer ("Life IPT")?**

2.1 **What requirements must be met by a *transferor* to undertake a Life IPT?**

The applicant must prepare the scheme of transfer (the "Transfer Scheme") showing what is proposed – i.e. what is to be transferred and from whom to whom, the assets to be transferred and whether there is an agreement governing the portfolio transfer between transferor and transferee.

An actuarial report from an approved actuary must be prepared identifying the business to be transferred and concluding that the transfer will not negatively impact on the life insureds. An "approved actuary" is one that has been approved by the insurance regulator in Bermuda, the Bermuda Monetary Authority (the "BMA"). Although not an express requirement, the BMA will normally require that he be independent as a condition of its approval

In addition to approval by the BMA of the actuary, the BMA has the standing to appear at the hearing of the petition to sanction the Transfer Scheme (see Sections 6 and 7(a) below). As a matter of general practice, it is prudent to present the papers to the BMA to obtain an indication as to whether it will not object to the Transfer Scheme, prior to mailing information to policyholders.

Notice of the Transfer Scheme, which would include the terms of the transfer, or a summary with details of where the full Transfer Scheme can be obtained, must be sent to each policyholder to be affected by the Transfer Scheme, and it must also be advertised in the local newspaper. The court must be satisfied that the notice is "sufficient". What constitutes sufficiency will depend on the factual matrix of the Transfer Scheme, its complexity, the business, the number and residence of policyholders etc.

At the hearing of the petition any person who alleges that they would be adversely affected by the carrying out of the Transfer Scheme and the BMA can attend and be heard.

As a matter of practice, an affidavit updating the court on any events that have occurred between providing notice of the Transfer Scheme to policyholders, filing the petition and the petition hearing date will be presented and will include a list of any objections or other comments received together with a letter from the BMA indicating their position on the Transfer Scheme.

Assuming that there are no objections, or if there are, where such objections are dismissed or considered immaterial, the court will make an order sanctioning the Transfer Scheme. The effect of that order is to approve the transfer under the terms of the Transfer Scheme of the subject insurance policies to the transferee, together with any related assets.

2.2 **What requirements must be met by a *transferee* to undertake a Life IPT?**

The transferee can be an applicant on the petition, and if not will generally undertake to be bound by the terms of the Transfer Scheme. The transferee must provide such information as may be required by the independent actuary for the purpose of his report or by the BMA or the court.

2.3 **Are there any requirements relating to the financial condition of the *transferor*?**

Not expressly. However, the transferor will have to have complied with its solvency and other regulatory requirements under the Act.

2.4 **Are there any requirements relating to the financial condition of the *transferee*?**

The financial condition of the transferee must be satisfactory to the BMA in order for them not to object to the Transfer Scheme. In addition, the actuarial report will contain information referring to the financial position of the transferee such that there will be no adverse consequences to the policyholders resulting from the Transfer Scheme. Ultimately the court must be satisfied as to the transferee's financial condition.

There is no specific set of rules and regulations as to what would constitute "satisfactory financial condition" – each case will be determined on its own facts; the BMA and the court must be satisfied that the transferees are not going to be worse off than they would be were the portfolio not to be transferred.

2.5 **Is the place where the portfolio was originally underwritten a relevant factor?**

No.

2.6 **Is the governing law or applicable jurisdiction of the insurance portfolio transferred a relevant factor?**

No.

2.7 **What criteria will be applied by the relevant authority in approving the transfer?**

The court will be concerned about how the transfer will impact the policyholders and whether they will be materially adversely affected. If the transfer can be effected without adverse consequences or interruption of cover to the policyholder and the transferee entity is properly regulated, the BMA and the court will generally approve the Transfer Scheme.

2.8 **Are there any other requirements?**

A petition must be prepared and filed in the Supreme Court of Bermuda (the "Court") seeking the Court's sanction of the Transfer Scheme.

This petition must be accompanied by:

(a) the approved actuary's report; and

(b) affidavit evidence which exhibits those materials that are to be mailed to the policyholders.

The petition will be returned to the applicant endorsed with a hearing date. Thereafter the petition must be served on the BMA.

3. **<u>What can be transferred along with the life insurance contract?</u>**

(a) **Assets**

Assets (including security and collateral) directly related to the policies can be transferred along with any additional consideration for the transfer.

(b) **Liabilities**

Those liabilities which are directly attributable to the policies, i.e. the policy benefits, and any liabilities which are directly linked to assets that are being transferred (for example, an asset which is subject to a third party security interest) can be transferred along with the insurance contract.

(c) **Real property**

As part of the underlying agreement, real property can be transferred separately.

(d) **Reinsurance/retrocession contracts and other ancillary contracts**

As part of the underlying agreement, reinsurance can be transferred separately.

4. **<u>Who must be notified of what, and how?</u>**

(a) **Local regulator(s)**

The BMA.

(b) **Other regulator(s)**

If the company operates in other jurisdictions, local regulatory approval may be required.

(c) **Policyholders**

Yes, all those affected. Regard will have to be had to the terms of the policies as to notice requirements. Notices would normally be delivered to the policyholders in accordance with the terms of the policies themselves. In other words, if the communications by the transferor were normally sent to brokers or investments advisors, then the notices of the scheme would be sent to them as well.

There are no rules or regulations regarding the time for notices. It is what is deemed reasonable in light of the particular circumstances of the transfer, including, for example, the location and sophistication of the policyholders etc. We would generally recommend not less than 21 days' notice.

(d) **Beneficiaries of cover other than actual policyholders**

Generally there is no statutory requirement that beneficiaries receive notice. This is, however, subject to the terms of the policy.

(e) **Reinsurers**

As a courtesy if they are to be affected.

(f) **Brokers**

As a courtesy.

(g) **Others**

No.

(h) **Further notice requirements**

No.

5. **<u>What publicity requirements are there for Life IPTs?</u>**

(a) **Newspapers**

The place and extent of advertising (other than that required under Section 5(b) below) depends on whether the transferor is satisfied that its records are up to date such that policyholder contact details are accurate. If in doubt the transferor should advertise in those jurisdictions in which the transferor underwrote policies.

(b) **Official Gazette/Journal**

Local Bermuda paper that is designated from time to time the Official Gazette.

(c) **Trade magazines**

See answer to Section 5(a) above.

(d) **Register of Companies**

A courtesy copy of the petition can be served on the Registrar but it is not required.

(e) **Other**

No.

6. **<u>Who has the right to object to the transfer?</u>**

(a) **Regulator(s)**

Yes, the BMA has the right to object. The type of objections to be expected would be as regarding fairness to the policyholders, and any adverse consequences that might flow from the transfer to policyholders (individually or collectively).

In addition the BMA might wish for more information regarding the regulatory regime in the place of the transferee although we would expect this to be satisfied by the existence of an approval certificate form the transferee regulator.

(b) **Policyholders**

Yes, as above.

(c) **Beneficiaries of cover**

Yes, if they allege that they will be adversely affected by the carrying out of the scheme.

(d) **Reinsurers**

Yes, if they allege that they will be adversely affected by the carrying out of the scheme.

(e) **Trade associations**

Not applicable.

(f) **Employees**

Not applicable.

(g) **Others**

The statute provides that any person who alleges that he will be adversely affected by the carrying out of the scheme is entitled to be heard (section 25(4) of the Act).

We are not aware of any objections that have been raised by any of the groups listed in this section which have been outstanding and unresolved by the time of the court hearing.

7. **<u>Who must approve and/or sanction the transfer?</u>**

(a) **Local regulator**

The BMA may object to a Life IPT. While generally a positive approval from the BMA is sought, as a matter of practice the BMA will provide a "no objection" letter to the transferor.

(b) **Other regulator(s)**

Depending on the location of the transferee company, the transferee may require approval from the regulator(s) in countries in which it operates prior to entering into the scheme which will effect the transfer.

If the transferor carries on business in a jurisdiction other than Bermuda, the transferor may be required to obtain approval from the regulator in that jurisdiction in addition to the "no objection" sign-off from the BMA (see Section 7(a) above).

(c) **Court**

Yes.

8. **<u>What jurisdictional conditions apply to the transfer?</u>**

8.1 **What types of insurance portfolios are capable of transfer in Bermuda?**

Long-term (i.e. life insurance as a matter of practice). Reinsurance, including long-term reinsurance, is expressly excluded.

8.2 **Does the transferring portfolio need to be legally or commercially connected to the state where the transfer is effected?**

No, but the insurer must be. Legal or commercial connections are usually established by reference to whether the insurer does business in the state or whether the majority of the policyholders is located there.

8.3 **Will the transfer be effective in jurisdictions other than those of the transferor and/or transferee?**

Whether the transfer is effective in other jurisdictions will depend on the laws of those jurisdictions in which it is sought to give effect to the transfer.

8.4 **What effect will the transfer have on arbitration clauses?**

Rights and obligations under an insurance contract, including arbitration clauses, remain in force pursuant to the Court order sanctioning the transfer unless specifically amended.

9. **<u>What is the procedure and timing of the transfer?</u>**

9.1 **What is a typical timeline for a transfer?**

This is driven by how long it takes to prepare the actuarial report and agree the terms of the scheme. It can be done in as little as 8 weeks but could take much longer. Typically, it will take approximately 4 months.

9.2 **Are there any hard legislative or regulatory deadlines?**

No.

10. **<u>What key documentation will be produced for the transfer?</u>**

As noted above, the following documentation is required:

(a) the scheme itself;

(b) an explanatory document/letter summarising the terms of the scheme for policyholders;

(c) the petition to the Court supported by affidavit evidence; and

(d) the actuarial report.

11. **<u>What professional agents are involved in the transfer and what are their roles?</u>**

(a) **Lawyers**

Legal advisors will be retained by the parties to advise on those legal aspects of the scheme of transfer and the Court application, together with the regulatory requirements that must be complied with.

(b) **Accountants**

Accountants will be hired to advise on the financial position of both the transferor and the transferee, and subject to the actuarial advice, any impact the transfer will have on the policyholders. They will also advise on the compliance of the parties with regards to the financial aspects of the regulatory regimes involved in the transaction.

(c) **Actuaries**

An actuarial report from an approved actuary must be prepared identifying the business to be transferred and concluding that the transfer will not negatively impact on policyholders. An "approved actuary" is one that has been approved by the BMA. Although not an express requirement, the BMA will normally require that he be independent as a condition of its approval.

(d) **Independent Expert**

See Section 11(c) above – the only expert one would expect to see involved is an actuary.

(e) **Other**

Regulator/the BMA.

12. **<u>What legal issues are frequently encountered in transfers?</u>**

The legal issues that are frequently encountered usually relate to whether or not the permission of a local regulator other than the BMA is required in order to effect the transfer. This is the case where the insurer, although incorporated in Bermuda, does business elsewhere and is answerable to a foreign regulator as well as the Bermuda regulator. How this issue will be resolved will depend upon the law of the foreign jurisdiction and whether recognition will be granted to the Bermuda transfer process, i.e. that a court sanction is sufficient under that foreign law.

13. **<u>How frequently is the transfer mechanism used?</u>**

Although they are not frequent there are usually around 4-5 such transfers per year.

13.1 **Is the transfer mechanism commonly used? For what purposes is it used?**

See above.

13.2 **Are there any statistics of the use of the transfer mechanism?**

No.

14. **<u>What alternative methods can be used to transfer insurance portfolios, and what are the advantages and disadvantages of such methods?</u>**

(a) **Novation**

This requires 100% agreement of all policyholders and is therefore not always achievable. One hold-out policyholder will mean that the policy cannot be transferred.

(b) **100% reinsurance (also described as "run-off"/"portfolio"/"assumption" reinsurance or retrocession, "portfolio transfer" or "reinsurance to close")**

This is permissible but may be expensive. It is also not an answer to being able to close a company that no longer wishes to write business and to distribute its capital to shareholders. Reinsurance will not necessarily reduce capital requirements such that the majority of assets can be distributed by way of dividend.

(c) **Corporate reorganisation**

This could be achieved by way of an amalgamation, provided both entities are solvent. If they are owned by the same parent, this is achievable quite simply. If not, then the process is slightly more complex. If an insurer is amalgamated with a company in the UK, for example, and the surviving entity is a UK entity, then a portfolio transfer could be effected under Part VII of the FSMA transfer provisions.

(d) **Arrangement/compromise**

A scheme of arrangement under the provisions of section 99 of the Companies Act 1981 could be used for the purpose of transferring a portfolio of business from the "scheme" company to another company (subject always to the requirement that a sanction under section 25 of the Act must be obtained if the business to be transferred is long-term insurance business under the Act). A scheme can provide for the transfer of the reinsurance also and associated assets to the book being transferred. However, the reinsurers would need to agree to the transfers; they could not be unilaterally moved.

Schemes require a majority in number representing 75% in value of those attending and voting at a scheme meeting called for that purpose. This may not be achievable without considerable buy-in from policyholders. It is necessary to persuade policyholders that the company into which their insurance is being transferred is of equal or superior credit worthiness than the transferring insurer, and also that the regulatory regime governing the transferee company is satisfactory.

(e) **Other**

The following two options are also available:

(i) liquidation with a scheme of arrangement presented by a liquidator is a possibility; and

(ii) liquidation with an estimate by the liquidator of the company's liabilities. This is not ideal and adds another layer of cost but will ensure the ability of the company to estimate its liabilities and close down.

15. **<u>What are the relevant sources of law or guidance?</u>**

(a) **Statutes**

The Companies Act 1981, Insurance Act 1978.

(b) **Regulations**

The Insurance Accounts Regulations 1980.

The Insurance Returns and Solvency Regulations 1980.

Any other regulations or policy statements made by the BMA from time to time.

(c) **Guidance**

Not applicable.

(d) **Jurisprudence**

Bermuda case law. UK case law is highly persuasive. Other Commonwealth or former Commonwealth states' case law is persuasive.

(e) **Other**

There are no other sources of law or guidance.

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Preliminary comments – Assumptions

Canada is a federal jurisdiction. Various of the provinces permit incorporation of companies under provincial legislation. The responses below, except as specifically noted, are confined to those entities incorporated ("companies") or foreign entities ("foreign companies") licensed under the federal Canadian legislation, the *Insurance Companies Act* (the "Act").

The Act addresses companies, foreign companies and fraternal benefit societies. In this note, we have excluded consideration of fraternal benefit societies.

The Act addresses related party transactions and prohibits any related party transaction, unless specifically permitted. Again, we have excluded consideration of related party transactions.

As discussed below, under the Act, there are essentially two ways to effect an insurance portfolio transfer. The first is by way of a sale or other transfer. It is the position of the Canadian federal regulator, the Office of the Superintendent of Financial Institutions ("OSFI"), that no sale or transfer can be effected without novation. In the absence of statutory novation, that has effectively precluded direct transfers.

The second is by way of assumption reinsurance under which the company or foreign company causes itself to be reinsured on an assumption basis.

We have not addressed indemnity reinsurance in answering this questionnaire.

1. **General**

1.1 **Can insurance business be transferred from one entity to another in your jurisdiction?**

By way of assumption reinsurance, a company can transfer its insurance portfolio pursuant to Section 254 and a foreign company can transfer its insurance portfolio pursuant to Section 587.1, in each instance, of the Act (see Section 2 below).

1.2 **Can reinsurance business be transferred?**

Yes, under the same sections as described in Section 1.1 above.

1.3 **Are the rules the same for the transfer of direct insurance portfolios as for reinsurance portfolios?**

Yes.

1.4 **Are the rules the same for the transfer of life portfolios as for non-life portfolios?**

Yes, although there are additional information requirements for life portfolios (see Section 2.7 below).

2. **What are the requirements for an Insurance Portfolio Transfer ("IPT")?**

2.1 **What requirements must be met by a *transferor* to undertake an IPT?**

The approval of the Minister of Finance is required by a company under the Act to assumption reinsurance of all or substantially all of the risks undertaken under its policies (Section 254(2) of the Act).

The assumption reinsurance must be with one or more of the following entities:

(a) a company or a society;

(b) a foreign company that, in Canada, reinsures those risks;

(c) a provincial entity if the Superintendent of Financial Institutions (the "Superintendent") has entered into appropriate arrangements with it or its provincial regulator; or

(d) an entity that is authorised to reinsure those risks if the risks were undertaken outside Canada by the company.

The Superintendent's approval is required for assumption reinsurance of less than all or substantially all of the risks undertaken under its policies (by the same entities as referred to in respect of the approval of the Minister).

The approval of the Superintendent is also required by a foreign company to assumption reinsure all or any portion of the risks undertaken under its policies by one or more of the following entities:

(a) a company or a society;

(b) another foreign company that, in Canada, reinsures those risks; or

(c) a provincial entity if the Superintendent has entered into appropriate arrangements with it or its provincial regulator.

OSFI considers "substantially all" to be 75% or more.

A company proposing to cause itself to be reinsured on an assumption basis against all or substantially all of the risks undertaken in its policies is required to obtain the approval by way of special resolution at a meeting of the shareholders (with certain rights to vote by class and with all shares carrying the right to vote) and policyholders who are entitled to vote (being holders of policies entitling the holder to participate in the profits of the company, or otherwise to vote, or policyholders entitled to vote pursuant to the terms of the company's bye-laws). A special resolution requires two-thirds approval of the votes cast by each entitled group.

Note: See also Section 2.6 below.

2.2 **What requirements must be met by a *transferee* to undertake an IPT?**

While the approval obligation under the Act rests with the transferor, in fact the application for approval is effectively made by the transferee (see Section 2.6 below).

As is noted under Section 2.1 the transferee must be one of a defined group of entities.

2.3 **Are there any requirements relating to the financial condition of the *transferor*?**

There is no strict requirement regarding the financial condition of the transferor but the financial condition of the transferor will be contrasted with that of the transferee in assessing whether the proposed transfer is fair to the policyholders.

2.4 Are there any requirements relating to the financial condition of the *transferee*?

There are no express provisions, subject to meeting minimum capital requirements. However, as noted in Section 2.7 below, various pieces of information are required by OSFI in evaluating the application and making its recommendation to the Superintendent or Minister.

2.5 Is the place where the business was originally underwritten a relevant factor?

Not under Canadian law (except in connection with as described in part (d) of Section 2.1 above).

2.6 Is the governing law or applicable jurisdiction of the insurance portfolio transferred a relevant factor?

For contracts of insurance made in the province of Alberta, a copy of the contract of reinsurance must be provided to the Minister designated under the *Insurance Act* (Alberta) and the Minister may require a notice be given to those Alberta policyholders (Division 10 of Subpart 2 of Part 2 of the *Insurance Act* (Alberta)).

2.7 What criteria will be applied by the relevant authority in approving the transfer?

Based on administrative guidance published by OSFI, criteria including:

(a) the reason for the proposed transaction;

(b) the terms of the proposed assumption reinsurance agreement;

(c) the nature of the business to be transferred;

(d) the expertise of the reinsurer to manage the acquired business if such business differs from its existing business;

(e) the current and projected financial/capital position of the parties, including after giving effect to the proposed transaction;

(f) the report of an independent actuary, if such a report is required by the Superintendent;

(g) the content of all documentation to be provided to shareholders and policyholders of the company;

(h) the nature of any objections received to the transaction and how they were dealt with by the applicant;

(i) confirmation that other relevant regulators, including the Canadian Competition Bureau, have no objection to the proposed transaction; and

(j) compliance with all other procedural requirements under the Act.

2.8 Are there any other requirements?

The provisions of other Canadian legislation, particularly the *Competition Act*, may apply. Most insurance transactions will exceed the thresholds under the *Competition Act* (currently CDN $70,000,000).

3. <u>What can be transferred along with the insurance or reinsurance contract?</u>

(a) Assets

To the extent permitted by their terms, assets may be transferred. With respect to assets vested in trust under an agreement with OSFI, with OSFI's approval, assets can be transferred. Contracts, licences and the like, which prohibit assignment or require consent, cannot be assigned without approval.

(b) Liabilities

Liabilities may be assumed but there is no statutory novation and the transferor will not be released without novation or satisfaction.

(c) Real property

Yes, as with other assets.

(d) Reinsurance/retrocession contracts and other ancillary contracts

Yes, as with other assets.

4. <u>Who must be notified of what, and how?</u>

(a) Local regulator(s)

OSFI as part of the approval process and the Minister under the *Insurance Act* (Alberta), where required (see Section 2.6). In addition, if required under the *Competition Act*, a filing will be required.

(b) Other regulator(s)

It is usual practice to file courtesy notices with each jurisdiction in which either the transferor or the transferee is licensed.

(c) Policyholders/Cedant companies

In addition to the publicity requirements under Section 5 below, notices are required to be given to each policyholder who is entitled to vote. All transferring policyholders of life insurers are to be notified. In addition, as noted under Section 2.6 above, the Minister under the *Insurance Act* (Alberta) may require a notice be given to policyholders of insurance contracts made in Alberta.

Certificates of assumption will be issued to all transferring policyholders upon completion of the transaction.

(d) Beneficiaries of cover other than actual policyholders

None by legislation but notice will be given under Section 5 below.

(e) Reinsurers

None by legislation but notice will be given under Section 5 below. Further, reinsurers whose policies are being reinsured will also be given notice, as a practical matter, in the event that reinsurance is being assigned as part of the transaction.

(f) Brokers

None by legislation but notice will be given under Section 5 below. As a practical matter, brokers will be given notice as the relationship of the client with the insured rests with the broker.

(g) **Others**

Not applicable.

(h) **Further notice requirements**

Not applicable.

5. **<u>What publicity requirements are there for IPTs?</u>**

(a) **Newspapers**

For any application requiring the Minister's or Superintendent's approval, a notice must be published at least 30 days (unless the period is abridged by the Superintendent) before application is made by the company or foreign company, as applicable, in a newspaper of general circulation at or near where the head office of the company or the chief agency is situated, stating the date on or after which the application will be made.

(b) **Official Gazette/Journal**

The same notice as in Section 5(a) above must be made in the Canada Gazette.

(c) **Trade magazines**

Not applicable.

(d) **Register of Companies**

Not applicable.

(e) **Other**

Not applicable.

6. **<u>Who has the right to object to the transfer?</u>**

(a) **Regulator(s)**

Either the Minister or the Superintendent is required to approve the transaction and any objections which that individual or, as a practical matter, OSFI, has, must be addressed.

OSFI, in preparing its recommendation to either the Superintendent or the Minister, may solicit the views of the provincial regulators, the Competition Bureau and other bodies.

(b) **Policyholders/Cedant companies**

The policyholders have no defined right (subject to the right to vote). However, any objections are to be disclosed to OSFI by the company/foreign company and their disposition addressed as part of the application process.

(c) **Beneficiaries of cover**

No defined right. However, any objections are to be disclosed to OSFI by the company/foreign company and their disposition addressed as part of the application process.

(d) **Reinsurers**

See Section 6(c) above.

(e) **Trade associations**

See Section 6(c) above.

(f) **Employees**

See Section 6(c) above.

(g) **Others**

See Section 6(c) above.

7. **<u>Who must approve and/or sanction the transfer?</u>**

(a) **Local regulator**

The Minister or the Superintendent, as the case may be (see Section 2.1). Procedurally, the application for approval is made to OSFI, and upon satisfactory completion and review of the application, OSFI staff forward a recommendation to the Minister or the Superintendent, as the case may be.

(b) **Other regulator(s)**

If the transfer exceeds the monetary threshold (currently CDN $70,000,000) the provisions of the *Competition Act* may apply.

(c) **Court**

Not applicable.

8. **<u>What jurisdictional conditions apply to the transfer?</u>**

8.1 **What types of insurance portfolios are capable of transfer in Canada?**

All types of insurance or reinsurance risks can be assumed.

8.2 **Does the transferring portfolio need to be legally or commercially connected to the state where the transfer is effected?**

No, it does not.

8.3 **Will the transfer be effective in jurisdictions other than those of the transferor and/or transferee?**

Canadian law does not address this issue.

8.4 **What effect will the transfer have on arbitration clauses?**

Absent novation, the contractual terms would be unamended. The transferee would not have a right to engage in direct arbitration, although the transferor would retain that right.

9. **<u>What is the procedure and timing of the transfer?</u>**

9.1 **What is a typical timeline for a transfer?**

(a) Prior to submission of initial application to OSFI (likely 1 to 3 months total):

- (i) complete necessary due diligence (third party consents, tax, etc);
- (ii) initial discussion/dialogue with OSFI;
- (iii) draft/negotiate assumption reinsurance agreement;
- (iv) preparation of independent actuary's report, if required by the Superintendent (see Section 11(d)) (could add additional time depending on complexity of transaction and report);

(v) draft application for approval and prepare/compile drafts of all required supporting documents; and

(vi) prepare meeting materials, if meeting of shareholders/policyholders required.

(b) Review of initial application by OSFI and completion of application (likely 3 to 4 months total):

(i) review of application materials by OSFI and addressing of any concerns;

(ii) publication of required newspaper/Canada Gazette notices (once a week for four consecutive weeks);

(iii) addressing any objections received;

(iv) obtaining approvals of boards of relevant legal entities, if required by OSFI; and

(v) if applicable, calling and holding shareholder/policyholder meeting to approve the proposed transaction (could add up to approximately 6 weeks in order to comply with additional newspaper publication requirements and record date determination and notice requirements under the Act).

(c) Obtaining of regulatory approvals and closing of transaction (up to 1 month)

9.2 **Are there any hard legislative or regulatory deadlines?**

There are none, except as set out in Section 5(a) above.

10. **<u>What key documentation will be produced for the transfer?</u>**

(a) Assumption reinsurance agreement;

(b) Form of required newspaper and Canada Gazette notices;

(c) Independent actuary's report, if required by the Superintendent (see Section 11(d));

(d) Resolutions of boards of the parties approving the transaction, if required by the Superintendent;

(e) Documentation to be sent to shareholders and policyholders of the company, to the extent required by the Superintendent; and

(f) Application for regulatory approval, including or attaching the following, based on administrative guidance published by OSFI:

(i) reason for the proposed transaction;

(ii) draft copy of assumption reinsurance agreement;

(iii) description of the business being transferred;

(iv) reinsurer's expertise to manage the acquired business if such business differs from its existing business;

(v) copies of most recent financial statements and statutory financial returns for any party not regulated by OSFI;

(vi) pro forma financial statements for each of the parties immediately before and after the transaction, if the transaction is material;

(vii) 3 year financial projections, with assumptions, including balance sheets and income statements, and, for entities regulated by OSFI, capital adequacy ratio calculations;

(viii) copy of the independent actuary's report, if applicable;

(ix) draft text of the required newspaper and Canada Gazette notices;

(x) copies of all documentation required by the Superintendent to be sent to shareholders and policyholders of the company;

(xi) certified copies of the special resolutions of policyholders and shareholders, if applicable, or of the resolutions of the boards of the parties, if applicable;

(xii) details regarding any objections received and how they were addressed by the applicant; and

(xiii) confirmation that all applicable regulators, including the Canadian Competition Bureau, have no objection to the proposed transaction.

11. **<u>What professional agents are involved in the transfer and what are their roles?</u>**

(a) **Lawyers**

Lawyer involvement is not mandatory. However, they are generally involved in drafting documentation, providing taxation advice and participating in the application process.

(b) **Accountants**

Accountants' involvement is not mandatory. However, they may be involved in tax issues and in the preparation of the required financial projections.

(c) **Actuaries**

Actuaries' involvement is not mandatory but they may be involved in preparation of projections and in any liaison with the required independent actuaries.

(d) **Independent Expert**

Under the Act, the Superintendent is entitled to require the production, and delivery to the company's shareholders and policyholders, of an independent actuary's report on the transaction. Such a report is usually required in connection with a life sector transaction, but seldom required in connection with a property and casualty sector transaction. Whether the report will be required in a property and casualty sector transaction will depend on all the circumstances of the transaction, including particularly the nature of the policies (whether long-tail, etc).

(e) **Other**

Not applicable.

12. **<u>What legal issues are frequently encountered in transfers?</u>**

There is no statutory novation in Canada. As a consequence, as discussed under the preliminary comments above, a pure transfer in most circumstances is not available.

To the extent there are provisions in contracts either requiring consent or prohibiting assignment, those provisions remain in effect.

13. **<u>How frequently is the transfer mechanism used?</u>**

13.1 **Is the transfer mechanism commonly used? For what purposes is it used?**

Given the absence of statutory novation, a transfer mechanism is very seldom, if ever, used. Rather, transfers are effected by assumption reinsurance as described herein.

13.2 **Are there any statistics of the use of the transfer mechanism?**

Not to our knowledge.

14. **What alternative methods can be used to transfer insurance business, and what are the advantages and disadvantages of such methods?**

(a) **Novation**

As a practical matter, given the time and expense and the difficulty of securing consent, this is not normally a viable alternative.

(b) **100% reinsurance (described as "run-off"/"portfolio"/"assumption" reinsurance or retrocession, "portfolio transfer" or "reinsurance to close")**

Described in this note.

(c) **Corporate reorganisation**

The Act does permit amalgamation which can be effected without court intervention. As a consequence of an amalgamation, two entities come together as one and it would not be appropriate for the transfer of part of a book of business.

(d) **Arrangement/compromise**

Not applicable.

(e) **Other**

Not applicable.

15. **<u>What are the relevant sources of law or guidance?</u>**

(a) **Statutes**

The Act. Provincial insurance legislation and the *Competition Act* (Canada) may also be relevant.

(b) **Regulations**

Regulations under the Act.

(c) **Guidance**

Guidelines and other advisories issued by OSFI.

(d) **Jurisprudence**

Generally.

(e) **Other**

Not applicable.

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1. <u>General</u>

1.1 Can insurance portfolios be transferred from one entity to another in your jurisdiction?

Yes, according to Article 27 of the Chilean Insurance Companies Act (the "CICA") an insurer can transfer its portfolio, totally or partially, to another insurer operating in Chile.

1.2 Can reinsurance portfolios be transferred?

While the CICA is silent in this respect, in principle the transfer of a reinsurance portfolio to another reinsurer operating in Chile would be possible.

1.3 Are the rules the same for the transfer of direct insurance portfolios as for reinsurance portfolios?

On the basis that transfers of reinsurance portfolios are possible in Chile, the rules would be the same.

1.4 Are the rules the same for the transfer of life portfolios as for non-life portfolios?

Yes, the rules are the same.

2. <u>What are the requirements for an Insurance Portfolio Transfer ("IPT")?</u>

2.1 What requirements must be met by a *transferor* to undertake an IPT?

The requirements and the procedure to complete an IPT under Chilean law have been set out by Circular No. 925 dated 30 January 1990 ("Circular No. 925") issued by the Securities and Insurance Superintendent (Chilean regulator), hereinafter "SVS".

While there are no specific requirements to be met by the transferor apart from the one mentioned in Section 2.3 below, an authorisation must be obtained from the SVS to carry out an IPT. Additionally, publicity requirements are to be fulfilled as explained in Section 5(a) below. Also, there is an obligation on the parties to enter into a transfer contract by means of a public deed, which has to be sent to the SVS (see Section 9.1 below). Should these requirements not be fulfilled, the IPT application may be rejected.

2.2 What requirements must be met by a *transferee* to undertake an IPT?

The only requirement under Chilean law is that the transferee must be an insurer operating in Chile. However, see Section 2.4 below.

2.3 Are there any requirements relating to the financial condition of the *transferor*?

There are no specific requirements relating to the financial condition of the transferor. Even if liquidation proceedings have been commenced in respect of the transferor or a resolution for its bankruptcy has been passed, an IPT can be carried out.

2.4 Are there any requirements relating to the financial condition of the *transferee*?

An IPT will not be authorised by the SVS if:

(i) liquidation proceedings have been commenced in respect of the transferee;

(ii) a resolution for its bankruptcy has been passed or the transferee is in breach of its obligations relating to its maximum indebtedness ratio; or

(iii) there is a deficiency in its investments representative of its technical reserves or risk assets.

2.5 Is the place where the portfolio was originally underwritten a relevant factor?

The CICA refers to portfolio transfers made by insurers operating in Chile, so the portfolio must originally be written in Chile. Nonetheless, see Section 7(a) below for insurance of risk located outside Chile.

2.6 Is the governing law or applicable jurisdiction of the insurance portfolio transferred a relevant factor?

While there is no restriction as to a foreign law governing an insurance contract written by an insurer operating in Chile, it is very uncommon to see a choice of law other than Chilean. Conversely, the CICA prescribes that every insurance or reinsurance contract governed by the CICA is to be subject to the jurisdiction of Chilean courts.

2.7 What criteria will be applied by the relevant authority in approving the transfer?

The SVS, before granting an authorisation for an IPT, will check whether the details of the IPT have been disclosed, the proposed date for its completion indicated and whether agreement has been reached with their relevant reinsurers. Additionally, the SVS will check whether the transferee meets the financial requirements set out in Section 2.4 above.

2.8 Are there any other requirements?

Circular No. 925 sets out a procedure that must be followed for an IPT to be successful. This procedure, which we will address in the following questions, refers mainly to publicity and documents that have to be submitted by the transferor and the transferee to the SVS.

3. <u>What can be transferred along with the insurance or reinsurance contract?</u>

Circular No. 925, specifically, and the CICA, generally, address the transfer of insurance portfolios, however nothing in these rules prohibits transfers of assets, liabilities, real property or other contracts. Nonetheless it must be taken into account that specific formalities may apply in some cases for example, transfers of real property.

Without prejudice to the procedure set out for transfers of insurance portfolios, and given the silence of the CICA in respect of the transfer of reinsurance portfolios, it may be relevant to consider the rules contained in the Chilean Civil Code regarding cession of rights, which in general terms impose the obligation to notify the counterparty of the cession and hand over the title that represents the right (i.e. the insurance policy).

Additionally, reinsurance agreements may contain special provisions in connection with transfers of portfolios and/or other assets. Therefore, it is important to examine these provisions in order to determine whether transfers are allowed, as well as their requirements, in order to avoid a breach of the agreement.

(a) **Assets**

See comments above.

(b) **Liabilities**

See comments above.

(c) **Real property**

See comments above.

(d) **Reinsurance/retrocession contracts and other ancillary contracts**

See comments above.

4. **<u>Who must be notified of what, and how?</u>**

(a) **Local regulator(s)**

A request for carrying out the portfolio transfer must be submitted to the SVS.

(b) **Other regulator(s)**

There is no obligation to notify other regulators.

(c) **Policyholders**

Every policyholder whose insurance contract is to be transferred has to be notified by means of a certified letter sent to the policyholder's domicile registered with the insurer. This letter has to be sent within 30 days from the authorisation of the SVS to complete the transfer. However, if the transfer is made during a liquidation process, there is no obligation upon the liquidator to notify the policyholders, unless the transfer affects pension insurance plans.

(d) **Beneficiaries of cover other than actual policyholders**

There is no obligation to notify beneficiaries.

(e) **Reinsurers**

While notification of an IPT is not mandatory in respect of reinsurers, the authorisation request submitted to the SVS must indicate the agreements reached with the transferor's reinsurer(s), so that these will normally be aware of the transfer procedure.

Further, and as mentioned in Section 3 above, rules for the cession of rights in accordance with the Chilean Civil Code impose additional obligations upon the cedant. Likewise, reinsurance agreements may contain special provisions in connection with the transfer of portfolios and may impose on the cedant special obligations with regard to the notification of a portfolio transfer.

(f) **Brokers**

There is no general requirement either under the CICA or the Circular No. 925 to give notice to brokers. They will be informed of the proposed portfolio transfer by the notice published in a newspaper of national circulation (see Section 5(a) below).

(g) **Others**

Not applicable.

(h) **Further notice requirements**

Not applicable.

5. **<u>What publicity requirements are there for IPTs?</u>**

(a) **Newspapers**

Every IPT must be announced in a newspaper of national circulation within 15 days from the date of the authorisation by the SVS to carry out an IPT.

(b) **Official Gazette/Journal**

Not applicable.

(c) **Trade magazines**

Not applicable.

(d) **Register of Companies**

Not applicable.

(e) **Other**

Not applicable.

6. **<u>Who has the right to object to the transfer?</u>**

(a) **Regulator(s)**

The SVS can deny authorisation to carry out an IPT if a transfer request does not contain all the necessary information detailed in Section 2.7 above.

(b) **Policyholders**

Policyholders can object to the transfer of a portfolio, provided their objection is submitted within 30 days from the date of the dispatch of the certified letter informing them of the transfer. In this case the insurance contract cannot be transferred and it remains with the transferor, unless it has been expressly agreed that an objection by the insured to the transfer of an insurance contract entails its termination. Should the contract of insurance be terminated, a proportional premium must be returned to the insured.

(c) **Beneficiaries of cover**

Under the CICA, beneficiaries of cover are not entitled to object to a portfolio transfer.

(d) **Reinsurers**

While reinsurers are not formally entitled to object to a portfolio transfer, they must in principle agree to any transfer, since this information must be contained in the transfer request submitted to the SVS (see Section 2.7 above).

As already mentioned above, rules for the cession of rights in accordance with the Chilean Civil Code impose additional obligations upon the cedant, which if not fulfilled may give the counterparty a right to object to the cession. In addition, reinsurance agreements may contain special provisions with regard to transfers of portfolios and may give reinsurers the right to object to the transfer of a portfolio. Therefore, these provisions should be reviewed before determining who is entitled to object to a transfer.

(e) **Trade associations**

These are not entitled to oppose any transfers.

(f) **Employees**

These are not entitled to oppose any transfers.

(g) **Others**

Not applicable.

7. **<u>Who must approve and/or sanction the transfer?</u>**

(a) **Local regulator**

As explained in Section 2 above, any portfolio transfer must be authorised by the SVS and will produce effects only if all formalities have been observed.

As mentioned in Section 1.1 above, an IPT can only be made to an insurer operating in Chile, therefore cross-border transfers are not allowed in Chile.

However, insurers and reinsurers operating in Chile can insure or reinsure risks located outside Chile and such insurance contracts can be transferred, provided the transfer is made to an insurer or reinsurer operating in Chile.

(b) **Other regulator(s)**

Not applicable.

(c) **Court**

Not applicable.

8. **<u>What jurisdictional conditions apply to the transfer?</u>**

8.1 **What types of insurance portfolios are capable of transfer in your jurisdiction?**

In Chile insurance portfolios are divided into two groups: the first group is property insurance and the second group is life and health insurance.

Policies from both groups can be transferred.

8.2 **Does the transferring portfolio need to be legally or commercially connected to the state where the transfer is effected?**

As explained above, under Chilean law for an IPT to be valid it must be made to an insurer operating in Chile, whether the risk is located in Chile or abroad. Therefore there will always be either a legal connection, i.e. transferee operating in Chile, or a commercial connection, i.e. risk located in Chile.

8.3 **Will the transfer be effective in jurisdictions other than those of the transferor and/or transferee?**

The CICA and Circular No. 925 only regulate transfers of portfolios made by companies operating in Chile. As explained in Section 2.6, insurance and reinsurance contracts subject to the CICA are subject to the jurisdiction of the Chilean courts and while there are no mandatory rules as to the governing law, it is the general rule that the governing law will be Chilean law. Therefore, it is not expected that IPTs would have any effect beyond Chilean borders except in the cases where the risk is located outside Chile, in which case it is for that jurisdiction to determine whether the transfer is valid under its laws. The Chilean regulator and the Chilean courts cannot issue an order for the necessary steps to be taken to assure that the transfer is recognized under those other laws.

8.4 **What effect will the transfer have on arbitration clauses?**

In Chile, the rights and obligations under an arbitration clause will transfer along with the insurance or reinsurance portfolio to the transferee.

9. **<u>What is the procedure and timing of the transfer?</u>**

9.1 **What is a typical timeline for a transfer?**

Approximate Time	Action
[___]	Request for approval of the transfer to the SVS.
Depending on the complexity of the IPT, it may take somewhere between 2 to 3 months.	Approval by the SVS of the transfer request.
30 days as from the authorisation	Letter addressed to all policyholders informing them of the transfer.
15 days as from the authorisation	Publication in a newspaper of national circulation of a notice of the portfolio transfer.
30 days as from receipt of the letter notifying policyholders of the transfer	Time period where policyholders can object to the transfer.
10 days as from the issuance of the transfer public deed	Submission of public deed and additional documents to the SVS.

9.2 Are there any hard legislative or regulatory deadlines?

Apart from those mentioned in Section 9.1 above, there are no further legislative or regulatory deadlines.

10. <u>What key documentation will be produced for the transfer?</u>

Where there is no opposition to the transfer, the transferor and the transferee will agree on the details of the transfer through a public deed issued before a Public Notary. Simultaneously, a list of all insurance contracts and assets being transferred, together with a certificate from the mail company confirming that all policyholders were sent a certified letter informing them of the transfer, are registered with the same Public Notary where the public deed was issued.

11. <u>What professional agents are involved in the transfer and what are their roles?</u>

(a) **Lawyers**

While under current insurance legislation there is no obligation for lawyers to be involved in the transfer process, they will be involved in drafting the transfer deed and possibly the letters addressed to the policyholders, and the notice to be published in a newspaper of national circulation will be drafted by lawyers as well.

(b) **Accountants**

It is also expected that accountants will be involved in the process of transfer, especially if taxation issues arise.

(c) **Actuaries**

Not applicable.

(d) **Independent Expert**

While not mandatory under current legislation, an independent expert may be retained in consideration of the complexity of the transfer.

(e) **Other**

Not applicable.

12. <u>What legal issues are frequently encountered in transfers?</u>

Provided the insurance contract allows for the transfer the issues most likely to be encountered are related to the fulfilment of requirements, the completion of the transfer process and related due diligence assessment and process.

13. <u>How frequently is the transfer mechanism used?</u>

13.1 Is the transfer mechanism commonly used? For what purposes is it used?

The transfer of an insurance portfolio is a rare occurrence in Chile. According to the figures available on the SVS website, in the last 5 years only 3 transfers have been authorised, all of which referred to a partial transfer or were limited to a specific line of business. There were no transfers of full portfolios.

13.2 Are there any statistics of the use of the transfer mechanism?

Statistics are available on the SVS website (www.svs.cl).

14. <u>What alternative methods can be used to transfer insurance portfolios, and what are the advantages and disadvantages of such methods?</u>

(a) **Novation**

Given the existence of a specific procedure for transferring insurance portfolios, it is unlikely that the regulator would authorize the transfer of an insurance portfolio by means of a novation.

(b) **100% reinsurance (also described as "run-off"/"portfolio"/"assumption" reinsurance or retrocession, "portfolio transfer" or "reinsurance to close")**

While under Chilean insurance regulation, 100% reinsurance is allowed, the cedant (insurer) will still owe his obligations under the contract to the insured, who has no direct action against the reinsurer, except for a few specific situations.

(c) **Corporate reorganisation**

The merger or division of an insurance company has to be authorised by the SVS. In this case the transfer of an insurance portfolio is one of many consequences of the merger or division of an insurance company and therefore is not intended to be its sole objective, given the specific procedure established for transfers.

(d) **Arrangement/compromise**

If the insurance contract allows for the insurer to transfer its portfolio, the procedure described above has to be followed.

(e) **Other**

Not applicable.

15. <u>What are the relevant sources of law or guidance?</u>

(a) **Statutes**

The Insurance Companies Act (also known as DFL 251).

(b) **Regulations**

Circular No. 925 dated 30 January 1990 issued by the SVS.

(c) **Guidance**

The SVS is entitled to issue guidance, however apart from the statute and the circular quoted above no guidance has been issued in this regard.

(d) **Jurisprudence**

Under Chilean law, jurisprudence is not binding in other cases than the one actually resolved by the relevant decision, but it may provide useful guidance.

(e) **Other**

Not applicable.

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Introduction

Under Danish law insurance portfolios can be transferred with the effect that the transferor is relieved from his obligations if each policyholder accepts the transfer of their policy or if the transfer is approved by the Danish Financial Services Authority under the applicable procedure as described below.

1. **General**

1.1 **Can insurance portfolios be transferred from one entity to another in your jurisdiction?**

Yes, under the Danish Financial Business Act and executive orders,[110] provided fulfilment of certain conditions and subject to approval by the Danish Financial Services Authority (the "DFSA") (see Section 2 below).

1.2 **Can reinsurance portfolios be transferred?**

Yes, under the Danish Financial Business Act and executive orders if certain conditions are met and subject to approval by the DFSA (see Section 2 below).

1.3 **Are the rules the same for the transfer of direct insurance portfolios as for reinsurance portfolios?**

Yes.

1.4 **Are the rules the same for the transfer of life portfolios as for non-life portfolios?**

Yes. In general the procedures for transfer of life and non-life insurance business are the same. However, given the difference in nature of life and non-life insurance business slightly different criteria apply to approval of the transfer.

2. **What are the requirements for an Insurance Portfolio Transfer ("IPT")?**

2.1 **What requirements must be met by a *transferor* to undertake an IPT?**

Under Danish rules on transfer of insurance portfolios it is the transferor who is obliged to apply to the DFSA for approval of the IPT.

Danish rules on transfer of insurance portfolios apply to transferors who are:

(i) Danish authorised insurance or reinsurance companies with their registered office in Denmark who carry out insurance or reinsurance business in Denmark;[111]

(ii) Danish authorised insurance or reinsurance companies with their registered office in Denmark who carry out insurance or reinsurance business in a non-EEA member state;[112]

(iii) Danish authorised insurance or reinsurance companies with their registered office in Denmark who carry out insurance or reinsurance business in an EU member state or in an EEA member state; or[113]

(iv) foreign authorised insurance or reinsurance companies with their registered office in a non-EEA state who carry out insurance or reinsurance business in Denmark through a branch.[114]

2.2 **What requirements must be met by a *transferee* to undertake an IPT?**

The transferee must have the necessary authorisation required to carry out the insurance or reinsurance business comprised by the IPT.

2.3 **Are there any requirements relating to the financial condition of the *transferor*?**

No. However, if only part of an insurance portfolio is transferred, the DFSA will take into account the financial condition of the transferor when determining whether the contemplated transfer is fair to the policyholders remaining with the transferor.

2.4 **Are there any requirements relating to the financial condition of the *transferee*?**

Depending on the regulatory status of the transferee (being under the authority of the DFSA or an EEA regulator), the transferee must be able to prove that upon the IPT it is able to meet the general requirements for solvency laid down in the Danish Financial Business Act or the EEA regulator of the transferee has confirmed that the transferee is able to meet the solvency requirements.

2.5 **Is the place where the portfolio was originally underwritten a relevant factor?**

No.

2.6 **Is the governing law or applicable jurisdiction of the insurance portfolio transferred a relevant factor?**

No.

2.7 **What criteria will be applied by the relevant authority in approving the transfer?**

(a) For domestic IPTs (the insurance business comprised by the IPT is underwritten in Denmark for Danish risks):[115]

[110] section 204 of the Danish Financial Business Act (Consolidated Act no 467 of 29 April 2010), Executive Order No. 313 of 28 March 2007 and Executive Order No. 1167 of 1 December 2004.

[111] Cf. section 204 of the Danish Financial Business Act.

[112] Cf. section 204 of the Danish Financial Business Act.

[113] Cf. Executive Order No. 313 of 28 March 2007. EU member states and EEA member states are in the following together referred to as EEA states.

[114] Cf. Executive Order No. 1167 of 1 December 2004. The Order implements Directive 91/371 EEC of 20 June 1991 on insurance companies having their registered seat in Switzerland.

[115] Cf. section 204 of the Danish Financial Business Act.

The transfer of an insurance or reinsurance portfolio must be approved by the DFSA unless all the policyholders individually accept the transfer of their policy.

When approving the transfer, the DFSA takes into consideration objections made by the policyholders, substantial social considerations such as the protection of the general interests of policyholders and creditors and the public's continued trust in the financial sector. Furthermore, the DFSA ascertains that the policyholders' rights and obligations will remain the same after the transfer of their policies to another insurance or reinsurance company.

The DFSA will also take into consideration the solvency and administrative capacity of the transferee as well as, in cases where only part of an insurance portfolio is transferred, the assets and liabilities remaining with the transferor.

If the insurance business comprised by the IPT is underwritten in Denmark for Danish risks by a branch of a foreign authorised insurance or reinsurance company with a registered office in a non-EEA state and the transferee is established in an EEA state, the EEA regulator of the transferee must declare that the transferee is able to meet the applicable solvency requirements, before the DFSA will approve the IPT. [116]

(b) For cross-border IPTs (the insurance business comprised by the IPT is underwritten on a cross-border basis within the EEA or through a branch in an EEA state):[117]

The transfer must be approved by the DFSA. The DFSA will approve the IPT when: (i) the EEA regulator of the transferee has declared that the transferee is able to meet the solvency requirements; (ii) the EEA regulator of the place of the risk has consented to the IPT; and (iii) in case of underwriting by a branch, the EEA regulator of the place of the branch has been heard.

2.8 **Are there any other requirements?**

See below.

3. **<u>What can be transferred along with the insurance or reinsurance contract?</u>**

According to section 204 of the Danish Financial Business Act, the transfer of an insurance or reinsurance portfolio may be carried out as:

(i) a transfer of the whole or part of an insurance portfolio without the transfer of other assets and liabilities;

(ii) a transfer of the whole or part of an insurance portfolio including the transfer of other assets including real property and liabilities;

(iii) an acquisition of the whole or a part of an insurance or reinsurance company; or

(iv) a merger between two or more insurance or reinsurance companies.

[116] Cf. Section 18(2) of Executive Order No. 1167 of 1 December 2004.

[117] Cf. Executive Order No. 313 of 28 March 2007.

(a) **Assets**

Please see above.

(b) **Liabilities**

Please see above.

(c) **Real property**

Please see above.

(d) **Reinsurance/retrocession contracts and other ancillary contracts**

Reinsurance contracts and other ancillary contracts can be transferred in the same way as other assets and liabilities.

4. **<u>Who must be notified of what, and how?</u>**

(a) **Local regulator(s)**

The transferor applies to the DFSA for the approval of the transfer of the insurance or reinsurance portfolio.

If all policyholders have individually accepted the transfer of their policies, the DFSA's approval of the transfer is not necessary. In such case the DFSA will only have to be informed of the contemplated transfer by the transferor. In practice, this procedure is not feasible.

(b) **Other regulator(s)**

Depending on the location of the establishment of the transferee and/or the transferor and the location of the risks that are to be transferred, the regulatory authorities in other countries have to be included in the approval procedure (see Section 2.7 above).

(c) **Policyholders**

The following applies to the transfer of insurance or reinsurance portfolios pursuant to section 204 of the Danish Financial Business Act.

Upon receiving the application for approval of the transfer of the insurance or reinsurance portfolio, the DFSA publishes a notice of the contemplated transfer in the Danish Official Gazette ("*Statstidende*") as well as in one of the Danish national newspapers.

The notice describes the transfer including the companies involved, the time frame for the transfer and an assessment that no changes to the general terms and conditions of the policies will incur upon transfer.

In the notice the DFSA requests the policyholders to object to the transfer in writing no later than three months after the publication of the notice.

When the DFSA publishes the notice, the transferor must at the same time inform all policyholders, in writing to an address known to the company, of the contemplated transfer.

(d) **Beneficiaries of cover other than actual policyholders**

Beneficiaries of cover are not entitled to be notified of the contemplated transfer separately.

(e) **Reinsurers**

Reinsurers are not entitled to be notified of the contemplated transfer separately. However, reinsurance contracts generally require the prior consent of the reinsurer to an IPT and/or provide for termination rights of the reinsurer if insurance contracts which cover risks ceded to a reinsurer are to be transferred. Therefore, it is often necessary to inform the reinsurer of the contemplated transfer in order to obtain approval for the transfer by the reinsurer.

(f) **Brokers**

Brokers are not entitled to be notified of the contemplated transfer separately.

(g) **Others**

No other people, legal entities or authorities are entitled to be notified of the contemplated transfer separately. However, if the transfer of an insurance or reinsurance portfolio also includes the transfer of other assets or liabilities or if the transfer is carried out as a merger or acquisition, the general rules on change of debtor set out in the Danish legislation apply in addition to section 204.

(h) **Further notice requirements**

Not applicable.

5. **<u>What publicity requirements are there for IPTs?</u>**

The following applies to the transfer of insurance or reinsurance portfolios pursuant to section 204 of the Danish Financial Business Act.

(a) **Newspapers**

The DFSA must publish a notice of the contemplated transfer in a national Danish newspaper, please see Section 4(c).

(b) **Official Gazette/Journal**

The DFSA must publish a notice of the contemplated transfer in the Danish Official Gazette, please see Section 4(c).

(c) **Trade magazines**

There is no legal or regulatory obligation to publish a notice of the contemplated transfer in a trade magazine.

(d) **Register of Companies**

There is no legal or regulatory obligation to publish a notice of the contemplated transfer with the Register of Companies ("*CVR-Registret*").

(e) **Other**

There is no legal or regulatory obligation to publish a notice of the contemplated transfer anywhere else other than as mentioned under Sections 5(a) and 5(b).

6. **<u>Who has the right to object to the transfer?</u>**

The following only applies to the transfer of insurance or reinsurance portfolios pursuant to section 204 of the Danish Financial Business Act.

(a) **Regulator(s)**

Before publishing the notice of the transfer, the DFSA decides whether or not it will approve the transfer on the basis of the information at hand, see Section 4(a). Upon the expiry of the three-month period mentioned above under Section 4(c), the DFSA will take into account any objections raised by the policyholders when finally deciding whether to approve the transfer.

(b) **Policyholders**

Policyholders may object to the transfer within the three-month period mentioned under Section 4(c). The objections will be taken into account by the DFSA when considering the approval of the transfer. However, the transfer does not give the policyholders the right to cancel their policy.

(c) **Beneficiaries of cover**

Beneficiaries of cover have no right to object to the transfer.

(d) **Reinsurers**

Reinsurers have no right to object to the transfer. However, reinsurance contracts generally require the prior consent of the reinsurer to the insurance portfolio transfer and/or provide for termination rights of the reinsurer.

(e) **Trade associations**

Trade associations have no right to object to the transfer.

(f) **Employees**

Employees have no right to object to the transfer.

(g) **Others**

Others have no right to object to the transfer.

7. **<u>Who must approve and/or sanction the transfer?</u>**

(a) **Local regulator**

Transfers must be approved by the DFSA. However, if all policyholders have individually accepted the transfer of their policies, the DFSA's approval of the transfer is not necessary. Please see Section 4(a).

(b) **Other regulator(s)**

Depending on the location of the establishment of the transferee and/or the transferor and the location of the risks that are to be transferred, the regulatory authorities in other countries have to be included in the approval procedure (see Section 2.7 above).

(c) **Court**

The transfer of an insurance or reinsurance portfolio does not need to be approved by a court.

8. **<u>What jurisdictional conditions apply to the transfer?</u>**

8.1 **What types of insurance portfolios are capable of transfer in Denmark?**

All types of insurance or reinsurance portfolios can be transferred.

8.2 **Does the transferring portfolio need to be legally or commercially connected to the state where the transfer is effected?**

No.

8.3 **Will the transfer be effective in jurisdictions other than those of the transferor and/or transferee?**

Further to the doctrine of reciprocal recognition of decisions made by the respective regulators, the transfer will be effective within the EEA states.

Whether effect will be given to a transfer under the laws of a non-EEA jurisdiction is a question of the law of the forum and rules of private international law.

8.4 **What effect will the transfer have on arbitration clauses?**

The rights and obligations under an arbitration clause will be transferred to the transferee.

9. **<u>What is the procedure and timing of the transfer?</u>**

9.1 **What is a typical timeline for a transfer?**

The following applies to transfers carried out pursuant to section 204 of the Danish Financial Business Act.

Approximate Time	**Action**
9 months	The transferor applies for the approval of the transfer with the DFSA. The DFSA can request further information and documentation with the effect that the timeframe is prolonged.
7-9 months	The DFSA publishes a notice of the transfer in a Danish national paper and in the Danish Official Gazette, and the 3-month period in which the policyholders can object to the transfer begins. Individual notification of the contemplated transfer to the policyholders by the transferor.
4-6 months	End of the 3-month period during which the policyholders can object to the transfer.
0 months	No later than 9 months after having received the transferor's application for approval of the transfer the DFSA decides whether to approve the transfer.

9.2 **Are there any hard legislative or regulatory deadlines?**

For transfers carried out pursuant to section 204 of the Danish Financial Business Act, policyholders must object to the transfer within 3 months as from the date the DFSA publishes the notice of the transfer. The DFSA must decide whether or not to approve the transfer within 9 months of having received the transferor's application for approval of the transfer.

10. **<u>What key documentation will be produced for the transfer?</u>**

(a) **Minutes of meeting:** Minutes of meetings of the relevant corporate bodies of both the transferor and the transferee approving the IPT.

(b) **Portfolio Transfer Agreement:** The transferor and the transferee sign an insurance or reinsurance Portfolio Transfer Agreement. The Portfolio Transfer Agreement must be approved by the DFSA. The Portfolio Transfer Agreement must contain information regarding the companies who have entered into the agreement, a description of the insurance or reinsurance portfolio to be transferred, including a balance sheet for the portfolio, and provisions determining which party to the agreement will indemnify the DFSA for the costs of the approval process.

(c) **Letter to the policyholders:** The transferor must prepare letters to be sent to the policyholders at an address known to the transferor informing the policyholders of the contemplated transfer and enclosing a copy of the notice of transfer prepared by the DFSA.

(d) **Accountants' or actuaries' reports:** The transferor's and the transferee's accountants or actuaries can produce reports establishing the solvency of the transferor and the transferee prior to and upon the transfer. These reports will be considered by the DFSA when deciding whether the transferor and the transferee have the necessary solvency to go through with the transfer.

(e) **Life insurance:** If life insurance portfolios are transferred, the Portfolio Transfer Agreement must enclose documentation, including a statement from the actuary of the transferor, stating that no policyholder's position will be impaired upon the transfer.

(f) **Liquidation:** If the transferor's entire insurance or reinsurance portfolio is transferred, the transferor must subsequently be liquidated. If the transferor will be liquidated upon the transfer, the transferor must make available to the DFSA the relevant documents for liquidation.

11. **<u>What professional agents are involved in the transfer and what are their roles?</u>**

(a) **Lawyers**

Lawyers are generally involved in insurance and reinsurance portfolio transfers even though their involvement is not mandatory. Lawyers often play a key role in setting up and implementing the process, including preparing the necessary legal documents and structure.

(b) **Accountants**

Accountants prepare reports on the transferor's and the transferee's solvency to be considered by the DFSA when deciding whether to approve the transfer, see Section 10(d).

(c) **Actuaries**

Actuaries prepare reports on the transferor's and the transferee's solvency to be considered by the DFSA when deciding whether to approve the transfer, see Section 10(d). Furthermore, the actuary of the transferor must produce a statement stating that no policyholder's position will be impaired upon the transfer of a life insurance portfolio, see Section 10(e).

(d) **Independent Expert**

The transfer of an insurance or reinsurance portfolio does not require the involvement of an independent expert unless the transfer is conducted as a merger which requires involvement of an independent expert pursuant to the Danish Companies Act.

(e) **Other**

Not applicable.

12. **<u>What legal issues are frequently encountered in transfers?</u>**

Clauses in contracts purporting to prohibit or restrict a party's ability to transfer the business

Many contracts of reinsurance purport to restrict a party's right to transfer the business to a third party. These clauses are, however, subordinated to the rules on transfer of insurance and reinsurance portfolios.

13. **<u>How frequently is the transfer mechanism used?</u>**

13.1 **Is the transfer mechanism commonly used? For what purposes is it used?**

The transfer mechanism is used on a frequent basis considering the number of companies on the Danish market. On average, it is used two or three times a year.

The transfer mechanism is used as the more simple way in which an insurance or reinsurance portfolio may change hands.

13.2 **Are there any statistics of the use of the transfer mechanism?**

No.

14. **<u>What alternative methods can be used to transfer insurance portfolios, and what are the advantages and disadvantages of such methods?</u>**

(a) **Novation**

Novation is not commonly used since it requires the novation of each individual insurance or reinsurance policy. The disadvantages of novation include the time, practicality and expense of having to identify and deal with all individual policyholders and the problems caused if some of them do not wish to have their policies transferred.

(b) **100% reinsurance (also described as "run-off"/"portfolio"/"assumption" reinsurance or retrocession, "portfolio transfer" or "reinsurance to close")**

100% reinsurance does not achieve the same effect as a transfer according to section 204 since the liability under the policies remains with the cedant and the cedant acquires the credit risk of the reinsurer.

(c) **Corporate reorganisation**

As described under Section 3, section 204 of the Danish Financial Business Act also applies to the transfer of insurance and reinsurance portfolios when the transfer of the portfolios is conducted as a merger. A merger is, however, subject to additional legislative requirements set out in, for example, the Danish Companies Act. Section 204 does not apply if the transfer is conducted as a share transfer. However, transfer of an insurance company is also subject to the approval from the DFSA, see section 61 of the Danish Financial Business Act.

(d) **Arrangement/compromise**

Not applicable.

(e) **Other**

Not applicable.

15. **<u>What are the relevant sources of law or guidance?</u>**

(a) **Statutes**

Section 204 of the Danish Financial Business Act (Consolidated Act No. 467 of 29 April 2010).

(b) **Regulations**

Executive Order on Transfer of Danish Insurance Companies' Insurance Portfolios Established Applying the Freedom of Establishment or the Freedom to Provide Services (Executive Order No. 313 of 28 March 2007).

Executive Order on Branches of Insurance Companies which Have Been Granted a License in a Country Outside the European Union with which the Community Has Not Entered into an Agreement for the Financial Area (Executive Order No. 1167 of 1 December 2004).

(c) **Guidance**

Not applicable.

(d) **Jurisprudence**

Not applicable.

(e) **Other**

Decisions by the DFSA.

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Preliminary comments – Assumptions

The French Insurance Code (the "FIC") provides for specific approval procedures before the French regulator (*Autorité de Contrôle Prudentiel* – the "ACP") in relation to both insurance and reinsurance portfolio transfers.

We emphasise that compliance with these approval procedures before the ACP is not mandatory and accordingly the transferor and transferee of an insurance or reinsurance portfolio may well decide to proceed with a transfer without applying for the approval of the ACP. In this case, in accordance with the general provisions of the French Civil Code relating to the transfer of contracts, individual consent of the other contracting party to be transferred is required, unless otherwise provided for in the contract.

However, in relation to insurance portfolio transfers, the approval procedure before the ACP is commonly used and complied with since the approval by the ACP renders the transfer *ex officio* binding upon third parties. Conversely, as regards reinsurance portfolio transfers, the approval by the ACP does not render the transfer enforceable against third parties, depriving the procedure of any practical value accordingly.

When answering this questionnaire we have assumed that, unless otherwise indicated, the insurance and reinsurance portfolio transfer are undertaken in compliance with the approval procedures provided for under the FIC.

1. **General**

1.1 **Can insurance business be transferred from one entity to another in your jurisdiction?**

Yes, under the FIC,[118] if certain conditions are met (see Section 2 below).

1.2 **Can reinsurance business be transferred?**

Yes, under the FIC,[119] if certain conditions are met (see Section 2 below).

1.3 **Are the rules the same for the transfer of direct insurance portfolios as for reinsurance portfolios?**

No, see Section 2.1 below.

1.4 **Are the rules the same for the transfer of life portfolios as for non-life portfolios?**

The provisions of the FIC do not distinguish between transfers of life or non-life insurance portfolios.

Slightly different rules apply to the transfer of (life[120] and non-life) insurance and reinsurance portfolios and specific requirements are provided for depending on whether or not the portfolio is transferred between insurance companies (or branches of such companies) located in the territory of a member state of the European Union (the "EU") or a state which is a part of the European Economic Area ("EEA")).

Given the difference in nature of life and non-life business, the documents/information to be filed with the ACP vary depending on whether a life or non-life insurance portfolio is to be transferred (see Section 4(a) below).

2. **What are the requirements for an Insurance Portfolio Transfer ("IPT")?**

2.1 **What requirements must be met by a *transferor* to undertake an IPT?**

Specific provisions of the FIC apply, depending on whether the transfer relates to direct insurance or reinsurance contracts.

Note that insurance firms authorised to write direct insurance business in France are, without any additional license requirement, authorised to carry on reinsurance business. Such insurance firms which, in addition to their direct insurance business, carry on reinsurance activities are subject to the provisions of the FIC relating to direct IPTs. This is regardless of whether or not the proposed portfolio transfer consists in the transfer of a pure reinsurance portfolio.

Conversely the provisions of the FIC relating to reinsurance portfolio transfers only apply to reinsurance firms authorised as such and which exclusively conduct reinsurance activities.

(a) The provisions of the FIC[121] relating to (insurance or reinsurance) portfolio transfers of <u>insurance firms</u> apply to:

 (i) (1) French insurance firms and their branches,[122] (2) French branches of non-EU insurance firms whose registered office is located in an EEA member state or in Switzerland[123] as well as (3) French branches of specially authorised firms whose registered office is located in a non-EEA state;[124]

 (ii) in relation to the transfer of all or part of a portfolio of insurance contracts (including related rights and obligations) covering risks or commitments located in the territory of a member state of the EU;

 (iii) to one or more (1) French insurance firms and their branches, (2) insurance firms whose state of origin is a member state of the EU (or their branches established on the territory of the EU) or (3) insurance firms established in the state

[118] Articles L. 324-1 and L. 364-1 of the FIC.

[119] Articles L. 324-1-2 and R. 324-1 of the FIC.

[120] Specific requirements are provided for in Article L. 354-1 of the FIC in relation to portfolio transfers concerning life insurance or capitalisation companies.

[121] Articles L. 324-1 of the FIC.

[122] Article L. 310-2 1° of the FIC.

[123] Article L. 310-2 3° of the FIC. The reference to insurance firms having their registered seat in Switzerland is limited to firms covering, in the form of direct insurance, risks of bodily injury related to accidents and illness or other risks (including assistance activities).

[124] Article L. 310-2 4° of the FIC.

where the risk or commitment is located and licensed in the said state.

(b) The provisions of the FIC[125] relating to reinsurance portfolio transfers of pure reinsurance firms apply to:

(i) French reinsurance firms and their branches which carry on exclusively reinsurance activities;

(ii) in relation to the transfer of all or part of a portfolio of contracts or claims to be paid; and

(iii) to one or more reinsurance or insurance firms established in France, another member state of the EU, or an EEA member state or to their branches established in an EEA member state.

2.2 What requirements must be met by a *transferee* to undertake an IPT?

A transfer must result in the (insurance and reinsurance) business transferred being carried on from an establishment of the transferee in an EEA member state (see Section 2.1 above). The transferee must have the authorisation required to enable the business which is to be transferred to be carried on in the place to which it is to be transferred.

2.3 Are there any requirements relating to the financial condition of the *transferor*?

The FIC does not provide for specific requirements regarding the financial condition of the transferor.

In relation to IPTs, however, the ACP only approves a transfer where it considers that the transfer does not adversely affect the interests of creditors and policyholders. Therefore the ACP may, where only part of an insurance portfolio is transferred, take into account the financial condition of the transferor after the transfer to assess whether the proposed transfer is likely to prejudice creditors of the transferor and/or policyholders remaining with the transferor (see Section 2.7(a) below).

2.4 Are there any requirements relating to the financial condition of the *transferee*?

Yes, there are. Where the registered office of the transferee of the insurance or reinsurance portfolio is located in France, the entity must, taking into account the proposed transfer, conform to normal standards of financial solvency, in order to maintain its authorisation in France.

Where the registered office of the transferee is located in a state other than France, the ACP only approves the proposed transfer if it has been provided with a certificate from the relevant regulatory authority of the state where the transferee is established confirming that the latter will meet the applicable solvency margin requirements after the transfer.[126]

[125] Articles L. 324-1 of the FIC.

[126] Article L. 324-1 para 3 (insurance portfolio transfers) and Article L. 324-1-2 para 2 (reinsurance portfolio transfers).

2.5 Is the place where the business was originally underwritten a relevant factor?

No; it is however, a requirement that the business be carried on in either France or the EEA (see Section 2.1 above).

2.6 Is the governing law or applicable jurisdiction of the insurance portfolio transferred a relevant factor?

The ACP will not make its approval conditional upon the (insurance or reinsurance) contracts transferred to be governed by French law or subject to French jurisdiction.

2.7 What criteria will be applied by the relevant authority in approving the transfer?

The criteria applied by the ACP in approving the transfer vary depending on whether the proposed transfer relates to an insurance or reinsurance business.

(a) Insurance or reinsurance business transfers by insurance firms

The ACP approves the transfer by written decision if it considers that, on the basis of comments made by the creditors, policyholders, insured parties or beneficiaries (see Section 4(c) below), the transfer will not adversely affect the interests of creditors and insured.

Other than the documents/information to be filed with the application for the approval of the proposed IPT (see Section 4(a) below), the transfer will only be approved after the ACP has received the following:

(i) a certificate, issued by the regulatory authorities of the state where the transferee is established,[127] certifying that the transferee will meet the applicable solvency margin requirements after the transfer (see Section 2.4 above);

(ii) if the transferor is a branch located in a member state of the EU other than France, an opinion of the regulator of the state where the branch is located;

(iii) if the transferred risks or commitments are located[128] in a member state of the EU other than France, the consent of the regulatory authorities of the state where the risk or commitment is located.

Pursuant to Section 5.1.2 of the Revised Siena Protocol,[129] the solvency margin certificate, the opinion and consent shall be given by the relevant regulatory authority as soon as possible and in any event no later than three months after the date of receipt of the request by the ACP.

[127] However, when the state of origin of the transferee is a party to the European Economic Area agreement, the certificate shall be issued by the regulatory authority of said state.

[128] The state of the location of the risk is considered to be the state where the policyholder has his main place of residence or, if the policyholder is a legal entity, the state where said legal entity has a place of business to which the contract relates.

[129] General Protocol relating to the Collaboration of the Insurance Supervisory Authorities of the Member States of the European Union (Revised Siena Protocol), CEIOPS-DOC-07/08, March 2008.

(b) **Reinsurance business transfer by a pure reinsurer**

The ACP only approves the transfer if it has received a certificate, issued by the regulatory authorities of the state where the transferee is established, certifying that the transferee will meet the applicable solvency margin requirements after the transfer.

2.8 **Are there any other requirements?**

The FIC does not provide for any other requirements in relation to (insurance and/or reinsurance) portfolio transfers.

3. **<u>What can be transferred along with the insurance or reinsurance contract?</u>**

(a) **Assets**

Transfers of insurance and reinsurance portfolios in accordance with the procedure provided for under the FIC merely result in the transfer of the insurance and reinsurance contracts included in the portfolio (along with the rights and obligations arising from such contracts).

However, the transferor and the transferee may contractually agree on the transfer of other kinds of assets (and, under certain conditions, liabilities) either by means of a transfer of a business as a going concern (*cession de fonds de commerce* – "CFC") or a contribution in kind (*apport partiel d'actif* or *apport d'une branche complète d'activité* ("APA")) the modalities of which can respectively be summarised as follows:

(i) A CFC is subject to a specific statutory regime. Under this regime, certain assets are deemed to legally form part of the business and therefore automatically transfer to the transferee of the business (unless otherwise agreed between the parties).[130] A *fonds de commerce* is composed of the elements which are necessary for the carrying out of a given commercial activity. Its main and requisite element is the clientele.[131] It also includes the tangible assets (equipment, fixtures), intangible assets (leasehold rights, trade name, trade marks, patents and other intellectual property rights) which are specific to the business and rights and obligations arising under employment contracts relating to the business.

A *fonds de commerce* does not include the elements which are only the result of operation of the business (i.e. liabilities (*dettes*), receivables (*créances*) and contracts).[132] If the transferee wishes to purchase assets which do not legally form part of the *fonds de commerce* and hence do not automatically transfer, these assets must be transferred individually or by category.

Whether or not the transfer is automatic, the transfer of certain assets is subject to specific requirements and formalities to render the transfer enforceable against third parties. (For example, specific notification and publication obligations must be made in legal journals to enable third parties to seek protection of their interests).

(ii) The contribution of a CFC entails that the business is contributed in consideration for the allocation of new shares in the beneficiary of the contribution by way of an increase in its share capital. Assuming that the entire business of the French branch is transferred and that this business is capable of being run as an independent operation, the transfer could qualify as an APA. Under an APA all the assets and liabilities relating to the going concern are contributed, subject to certain formalities that need to be complied with in relation to particular contracts/assets.

An APA is subject to a specific procedure from a corporate standpoint (which is more cumbersome than a CFC). It includes the requirement for one or more external auditors (c*ommissaires aux apports*) to be appointed (by a court). Their role is to carry out a valuation of the contribution and in particular to ascertain that the valuation of the contribution provided for in the contribution agreement is not in excess of the real value of the assets.

(b) **Liabilities**

Liabilities can be transferred by means of an APA. Since liabilities do not automatically transfer under a CFC, these must 'voluntarily' be transferred by the transferor to the transferee (individually or by category). This is done using mechanisms such as novation or tripartite transfer (*délégation parfaite*) depending on the circumstances.

(c) **Real property**

The transferor and the transferee may contractually agree upon the transfer of real property in the context of an APA or a CFC, subject to such contract being drawn up before a notary (Notarial deed).

[130] If any assets which compose the *fonds de commerce* are expressly excluded from the transfer, the transfer will be regarded as partial (*cession partielle de fonds de commerce*).

[131] A clientele constitutes a potential trading flow with customers and is distinct from the contracts entered into between the company and its customers. To a certain extent, the concept of clientele under French law can be compared to the Anglo-Saxon concept of "goodwill".

[132] Contractual rights and obligations relating to the *fonds de commerce* are excluded from the transfer, except those provided for in insurance contracts (covering risks relating to the business), lease agreements and employment contracts.

(d) **Reinsurance/retrocession contracts and other ancillary contracts**

The transferor and the transferee may contractually agree on the transfer of such contracts, subject to obtaining the consent of the other contracting party to be transferred (unless otherwise provided for under the relevant contract).

4. **<u>Who must be notified of what, and how?</u>**

(a) **Local regulator(s)**

Under French law, the insurance as well as the reinsurance portfolio transfer procedure within the ACP is not mandatory. As a consequence, the parties may well decide to proceed with a purely contractual transfer without applying for the approval of the ACP.

If the parties decide to apply for such approval, they need to follow the procedure provided for by the FIC[133] described below.

A request for approval of the portfolio transfer must be made by the transferor and transferee and a complete application form must be filed by the same with the ACP.

The application form must contain, among others:

(i) the portfolio transfer agreement;

(ii) the Minutes of the competent management bodies of both insurance firms approving the IPT;

(iii) a copy of the opinion of the works council (if any);

(iv) the accounts of the transferor and the transferee (including details of the coverage of the insurance contracts and the solvency margins) as at 31 December of the preceding financial year;

(v) details in relation to the coverage and the solvency margins of the transferor and the transferee after the transfer;

(vi) for transfers of life insurance or capitalisation firms, information on actual inspection data provided for under Article L. 344-1 of the FIC (i.e. the year end statements to be attached to their accounts (i) setting out the book value and the realisation value of all investments listed as assets and (ii) showing the share of investments that corresponds to commitments towards insured and beneficiaries of the contracts, such as such share as would be recorded in the event of the transfer of the portfolio of contracts); and

(vii) if applicable, a list of the states which are party to the European Economic Space Agreement in which the insurance undertakings carry on their insurance business through branches under the principle of freedom of establishment and/or carry on their insurance business under the principle of freedom to provide services.

(b) **Other regulator(s)**

Depending on the location of establishment of the transferee and/or the transferor and the location of the risks that are to be transferred, the ACP has to seek co-operation of foreign regulator of member states of the European Union.

The FIC lists exhaustively the cases in which foreign regulators have to be consulted in the course of the approval procedure, as follows:

(i) In relation to a <u>portfolio transfer of an insurance or reinsurance firm</u>, if the transferee has its registered office in an EU member state other than France, the regulatory authority of the state where the transferee is established must certify that the latter has the required solvency margin.

(ii) In relation to <u>portfolio transfer of an insurance firm</u>:

(1) if the transferor is a branch located in an EU member state other than France, the ACP has to, prior to giving its approval, notify and obtain the opinion of the regulator of the state where the branch is located; or

(2) if the "state of the commitment"[134] for any transferring policy is an EU member state other than France, the ACP has to, prior to giving its approval, notify and obtain the consent of the regulator of the "state of the commitment".

Whilst the FIC makes no provision for consultation between the ACP and foreign (non-EEA) regulators, in practice the ACP will wish to be satisfied that the regulator of a foreign entity carrying on business in France (for example, by a branch) will not object to the transfer.

(c) **Policyholders/Cedant companies**

(i) **Insurance or reinsurance business transfers by insurance firms**

Where an insurance or reinsurance portfolio is transferred by an insurance firm, its creditors (including policyholders, insured parties or beneficiaries) are informed of the request for approval of a portfolio transfer by a notice published in the Official Journal (*Journal Officiel*), which offers such creditors the opportunity to

[133] Article L. 324-1 and L. 324-1-2 of the FIC.

[134] The state of the location of the risk is considered to be the state where the policyholder has his main place of residence or, if the policyholder is a legal entity, the state where said legal entity has a place of business to which the contract relates.

comment on the proposed transfer during a two-month period from the date of the publication.

Comments will be considered by the ACP but creditors may not object to the transfer.[135]

(ii) **Reinsurance business transfer by pure reinsurers**

If a reinsurance firm applies for the approval of the reinsurance portfolio transfer by the ACP, the latter informs the ceding companies and creditors of the transferor by a notice published in the Official Journal. Ceding companies and creditors may then comment on the proposed transfer during a two-month period from the date of the publication.[136]

This publication does not however release the reinsurance firm (or branch) that transfers its portfolio of contracts from giving individual notice to and obtaining the consent from every cedant company whose contracts of reinsurance are to be transferred.

(d) **Beneficiaries of cover other than actual policyholders**

Beneficiaries are informed of the proposed IPT by the notice published in the Official Journal (see Section 4(c) above). There is no general requirement under the FIC to give separate notice to beneficiaries of cover other than policyholders.

(e) **Reinsurers**

Reinsurers are informed of the proposed IPT by the notice published in the Official Journal (see Section 4(c) above). The FIC does not provide for a separate notice to be given to reinsurers.

As a practical matter however, reinsurance treaties generally require the consent of the reinsurer prior to the IPT and/or provide for termination rights of the reinsurer and/or the cedant company, if and when insurance contracts which cover risks ceded to a reinsurer are to be transferred.

Therefore, the reinsurance treaties need to be carefully reviewed in anticipation of a (partial or total) IPT.

The reinsurer of the transferor may not be willing to deal with the transferee and to provide reinsurance coverage to the transferee under the same conditions as those agreed with the transferor in relation to the contracts to be transferred.

The transferee may well decide to include the transferred risks in its reinsurance program either by extending the scope of coverage of existing reinsurance treaties or by entering into a new reinsurance treaty with its "usual" reinsurer(s). It may accordingly request from the transferor to terminate the reinsurance treaties prior to the completion of the IPT.

(f) **Brokers**

There is no general requirement under the FIC to give notice to brokers which are informed of the proposed portfolio transfer by the notice published in the Official Journal (see Section 4(c) above).

(g) **Others**

There are no further notification requirements to be complied with in relation to insurance or reinsurance portfolio transfers that are undertaken in compliance with the procedures provided for under the FIC.

Specific notification requirements have to be complied with if and when, in addition to insurance and reinsurance contracts composing the portfolio, the transferor and the transferee contractually agree upon the transfer of other contracts, assets and liabilities (see Section 3 above).

(h) **Further notice requirements**

See Section 4(g) above.

5. **<u>What publicity requirements are there for IPTs?</u>**

IPTs are subject to various publicity requirements which are set out below.

We emphasise that the below does not include any specific publicity requirements that would be required if and when, in addition to the insurance and/or reinsurance contracts, other assets are transferred under the mechanism of either a CFC or a APA (see Section 3 above).

(a) **Newspapers**

There is no legal or regulatory obligation to publish a notice of the application in a newspaper.

(b) **Official Gazette/Journal**

(i) In relation to a (insurance or reinsurance) <u>portfolio transfer</u>, notice of the request for approval of the portfolio transfer must be published in the French Official Journal (see Section 4(c)(i) above). If the ACP approves the transfer, its decision is published in the French Official Journal.[137] Such second publication renders the transfer binding on the insured, policyholders and beneficiaries of cover.

(ii) In relation to a reinsurance <u>portfolio transfer of a reinsurance firm</u>, notice of the request for approval of the portfolio transfer is published by the ACP in the French Official Journal (see Section 4(c)(ii) above).

As a reminder, unlike for portfolio transfers of insurance firms, the approval by the ACP is not subject of a publication. In the absence of such publication, the mere approval by the ACP does not render the transfer binding

[135] Article L. 324-1 para 2 of the FIC.

[136] Article R. 324-1 of the FIC.

[137] Article L. 324-1 para 7.

upon the cedant companies. In order to render the transfer enforceable against the cedant companies, the consent of each individual cedant company has to be obtained, unless otherwise provided in the reinsurance treaty.

(c) **Trade magazines**

There is no legal or regulatory obligation to publish a notice of the application in a trade magazine.

(d) **Register of Companies**

There are no general publication requirements as regards the Companies' Registry (*Registre du Commerce et des Sociétés*). Publication requirements with the Companies' Registry do, however, arise if the transfer results in the dissolution of the transferor.

(e) **Other**

Not applicable.

6. **<u>Who has the right to object to the transfer?</u>**

(a) **Regulator(s)**

(i) **Insurance or reinsurance portfolio transfers by insurance firms**

The ACP has the right to object the transfer when the requirements referred to under Section 2.7(a) above are not fulfilled, that is if and when:

(1) it considers that the transfer harms the interests of creditors and insured parties;

(2) the regulator of the transferee having its registered office in an EU member state cannot certify that the transferee will meet the applicable solvency margin requirements after the transfer;

(3) the regulator of the state of the branch whose portfolio is to be transferred has given a negative opinion on the transfer; or

(4) the EEA regulator of the "state of commitment" has not given its consent to the proposed transfer.

Save from our comments in our Preliminary Comments above, other EEA regulators do not have a right to object the transfer.

(ii) **Reinsurance business transfer by pure reinsurers**

The ACP has in principle the right to object the transfer if it has not received the solvency margin certificate referred to under Section 2.4 above.

(b) **Policyholders/Cedant companies**

As described in our Preliminary Comments above, policyholders and cedant companies are informed of the request for approval of the transfer by a notice published in the Official Journal. This offers them the opportunity to comment on the proposed transfer during a two-month period following this publication. Comments are considered by the ACP but policyholders may not object to the transfer.

In cases of insurance or reinsurance portfolio transfers of an insurance firm, policyholders are entitled to terminate the contract within one month following the date of the publication of the approval of the transfer by the ACP in the Official Journal.

(c) **Beneficiaries of cover**

Beneficiaries are given the possibility to comment on the proposed IPT (see Section 4(c)(i) above) but have no right to object to the transfer.

(d) **Reinsurers**

Reinsurers may not object to the IPT. In practice however, reinsurance treaties generally require the prior consent of the reinsurer to the IPT and/or provide for termination rights of the reinsurer and/or the cedant company, if and when insurance contracts which cover risks ceded to a reinsurer are to be transferred (see Section 4(e) above).

(e) **Trade associations**

Trade associations have no right to object to the transfer.

(f) **Employees**

Employees have no right to object to the transfer.

(g) **Others**

Not applicable.

7. **<u>Who must approve and/or sanction the transfer?</u>**

(a) **Local regulator**

Subject to our Preliminary Comments above, transfers are approved by the ACP.

(b) **Other regulator(s)**

Where another EEA regulator is requested to issue a solvency margin certificate (see Section4(b) above), the ACP only approves the transfer if the regulatory authority of the state where the transferee is established certifies that the latter will have the required solvency margins after the transfer. This certificate shall be issued by the relevant EEA regulator as soon as possible and in any event no later than three months after the ACP's request.[138] Where the EEA regulator has not issued the certificate within three months, it cannot be presumed that the solvency margin requirements will be met by the transferee after the transfer.

Where notice is given to an EEA regulator of the "state of the commitment" (see Section 4(b) above) the ACP may only approve the transfer, subject to having obtained the consent of the EEA regulator. In the event of a refusal by the EEA regulator, the affected part of the insurance portfolio cannot be transferred. Consent of the EEA

[138] Section 5.1.3 of the Revised Sienna Protocol.

regulator is, however, deemed to have been given where the EEA regulator has not responded to the ACP within three months of notification.[139]

(c) **Court**

An IPT need not to be approved and/or sanctioned by the court.

8. **<u>What jurisdictional conditions apply to the transfer?</u>**

8.1 **What types of insurance portfolios are capable of transfer in your jurisdiction?**

All type of insurance or reinsurance contracts can be transferred.

8.2 **Does the transferring portfolio need to be legally or commercially connected to the state where the transfer is effected?**

The FIC does not expressly provide for any such legal or commercial link to the state where the transfer is effected. In particular, insurance and reinsurance portfolios can be transferred under the transfer procedure provided for under the FIC even though the transferring policies are not governed by French law (see Section 2.6 above) which is generally the case if the "state of the commitment" for any transferring policy is an EU member state other than France.

It is a requirement under the FIC that:

(a) the business be carried on by the transferor in either France or the EEA (see Sections 2.1 and 2.5 above); and

(b) the transferee is located in either France or the EEA and has the required authorisations to carry on the transferred insurance business (see Section 2.2 above).

8.3 **Will the transfer be effective in jurisdictions other than those of the transferor and/or transferee?**

See Section 12(b) below.

8.4 **What effect will the transfer have on arbitration clauses?**

In France, unless otherwise provided for in the relevant contract, the rights and obligations under an arbitration clause will transfer along with the insurance or reinsurance contract to the transferee.

9. **<u>What is the procedure and timing of the transfer?</u>**

9.1 **What is a typical timeline for a transfer?**

(a) **Insurance or reinsurance portfolio transfer**

Approximate Time	**Action**
4-6 weeks before the next meeting of the ACP	Filing of joint request for approval with the ACP.
	Note that the special committee of the ACP reviewing the request for approval of an IPT meets six times a year (at regular 2 months intervals). The meeting dates are fixed in advance (at the beginning of each year). In order for a request for approval to be put on the agenda of such meetings, the ACP generally requires to be provided with (at least a draft of) the request for approval 4-6 weeks before the date of the next meeting. It is in any case recommended to liaise with the ACP at an early stage of an IPT to seek guidance on its expectations in terms of timing and documents/ information to be provided.
A - 3 months	Meeting of the special committee of the ACP reviewing the request for approval.
A - 3 months	Publication of the notice of the request for approval of the portfolio transfer in the Official Journal.
A - 3 months	ACP notifies relevant EEA regulators/ requests solvency certificate from the regulatory authority of the transferee and 3 month consultation period begins.
A - 1 month	End of the two-month time limit awarded to the creditors to comment on the proposed transfer.
A	End of the three-month time limit awarded to the EEA regulators to comment on the proposed transfer and for the regulatory authority of the transferee to issue a solvency certificate (see however Section 7(b)).
A	***Approval by the ACP of the proposed IPT.***
A	Publication of the approval decision by the ACP in the Official Journal.
End of month following A	End of the time limit awarded to the insured to terminate their contract.

(b) **Reinsurance portfolio transfer by a pure reinsurer**

Approximate Time	**Action**
4-6 weeks before the next meeting of the ACP	Filing of joint request for approval with the ACP. Note that the special committee of the ACP reviewing the request for approval of a reinsurance portfolio transfer meets six times a year (at regular 2 months intervals). The meeting dates are fixed in advance (at the beginning of each year). In order for a request for approval to be put on the agenda of such meetings and reviewed by the ACP, the ACP generally requires to be provided with (at least a

[139] Section 5.1.2 of the Revised Sienna Protocol.

Approximate Time	Action
	draft of) the request for approval 4-6 weeks before the date of the next meeting. It is in any case recommended to liaise with the ACP at an early stage of a reinsurance portfolio transfer to seek guidance on its expectations in terms of timing and documents/ information to be provided.
A - 3 months	Publication of the notice of the request for approval of the portfolio transfer in the Official Journal.
A -3 months	ACP notifies relevant EEA regulators/ requests a solvency certificate from the regulatory authority of the transferee and 3 month consultation period begins.
A - 1 month	End of the two-month time limit awarded to the creditors to comment on the proposed transfer.
A	End of the three-month time limit awarded to EEA regulators to comment on the proposed transfer and for the regulatory authority of the transferee to issue solvency certificate (see however Section 7(b)).
A	***Approval by the ACP of the proposed reinsurance portfolio transfer.*** We emphasise that the approval by the ACP of a reinsurance portfolio transfer is not published in the Official Journal and accordingly the approval by the ACP does not render the transfer enforceable against third parties. As a consequence, in order for the transfer to be binding upon the cedant companies, the reinsurance firm (or branch) that transfers its portfolio of contracts must give individual notice to and obtain the consent from every cedant company whose contracts of reinsurance are to be transferred (see Preliminary Comments above).

9.2 Are there any hard legislative or regulatory deadlines?

Policyholders and cedant companies are given the opportunity to comment on the proposed transfer during a two-month period following the notice published in the Official Journal informing them of the request for approval of the proposed insurance and/or reinsurance portfolio transfer. (See Section 4(c) above.)

Relevant EEA regulators have 3 months[140] to respond to notification by the ACP (see Sections 4(b) and 7(b) above). However, even though EEA regulators are given a maximum of three months, our experience shows that in practice the relevant EEA regulators provide their comments or issue the solvency certificate much quicker. This accordingly allows the ACP to approve the (insurance or reinsurance) portfolio transfer immediately after the expiry of the two-month period during which policyholders and cedant companies are given the opportunity to comment on the proposed transfer (see Section 4(c) above).

10. <u>What key documentation will be produced for the transfer?</u>

The following key documents will typically be produced for the purposes of a transfer:

(a) **Portfolio Transfer Agreement:** The transferor and the transferee will sign an (insurance or reinsurance) portfolio transfer agreement, by which the transferor agrees to transfer, and the transferee agrees to accept, the portfolio to be transferred;

(b) **Actuaries' reports**: when applicable reports on the terms and likely effects of the transfer, prepared by the actuaries of the transferor and the transferee;

(c) **Circulars/notices**: notices to be published in the Official Journal;

(d) **Expert's report**: when applicable a report describing the likely effects of the transfer on relevant classes of policyholders, prepared by an independent expert; and

(e) **"Back-up" reinsurance**: prior to the transfer, the transferor and the transferee identify the policies which are concerned by the portfolio transfer. In principle, un-transferred contracts will remain under the scope of the entity which has underwritten the risk. However in relation to policies for which it is uncertain whether their transfer will be effective, under French law, nothing prevents the transferor and the transferee to enter into a "back-up" reinsurance contract. This transfers the economic burden of the relevant policies to the transferee while the legal obligation towards the policyholders remains with the transferor. The back-up reinsurance will terminate if and when the transfer of the relevant policies becomes wholly effective.

11. <u>What professional agents are involved in the transfer and what are their roles?</u>

(a) Lawyers

Lawyers are generally involved in IPTs even though their involvement is not mandatory from a pure legal perspective. They play a key role in the setting up and implementation of the process since they usually are in charge of drafting the legal documentation required for the process. (This includes, if the parties decide to apply for an approval by the ACP, preparing the application request for approval by the ACP). They may also deal with objections raised by interested parties and with the ACP on regulatory issues.

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[140] Sections 5.1.2, 5.1.3 and 5.1.5, 5.2.1 and 5.2.4 of the Revised Sienna Protocol.

(b) **Accountants**

Accountants' intervention is not required but they may intervene in the process in relation to tax issues along with lawyers.

(c) **Actuaries**

Actuaries may intervene in order to provide reports on the terms and likely effects of the transfer.

(d) **Independent Expert**

The process in relation to IPTs does not require the intervention of an independent expert. However the party may well appoint such an expert in order to estimate the value of the portfolio to be transferred and get his opinion of the likely effects of the transfer on the different groups of policyholders affected by the transfer.

(e) **Other**

Not applicable.

12. **<u>What legal issues are frequently encountered in transfers?</u>**

(a) **Clauses in contracts purporting to prohibit or restrict a party's ability to transfer the business**

Many contracts of insurance or reinsurance purport to restrict a party's right to transfer the contract to a third party. These contracts usually require the prior consent of the counterparty or provide for a right to terminate the contract absent such prior consent. Therefore, in order to avoid this sanction, it is required to obtain the consent of the counterparty prior to the transfer.

(b) **Enforcement of the transfer in foreign jurisdictions?**

Whether effect will be given to an insurance or reinsurance portfolio transfer under the laws of foreign jurisdiction is a question of local law and rules of private international law.

(c) **Solvency considerations**

In order to avoid issues in relation to solvency considerations,[141] the ACP approves the insurance or reinsurance transfer only if the regulatory authority of the state where the transferee is established certifies that the latter has the required solvency margin (see Section 2.3 above).

(d) **Disclosure - for example to interested parties or objectors**

As regards IPTs, policyholders, insured, beneficiaries and creditors are informed of the proposed transfer by the notice published in the Official Journal as described under Sections 4(c), 4(d) and 4(e) above.

Similarly, as regards reinsurance portfolio transfers, the ceding companies and creditors of the transferor are informed by the notice published in the Official Journal. The ceding companies whose contracts of reinsurance are to be transferred are also informed by individual notice of the proposed reinsurance portfolio transfer that has to be sent by the reinsurer (or branch).

There is no disclosure procedure under French law allowing the interesting parties to collect more information concerning the proposed transfer.

(e) **VAT**

The recent ECJ judgment in the case of *Swiss Re Germany Holding GmbH v Finanzamt München für Körperschaften* (Case C-242/08) held that an IPT constituted a supply of services which was not a banking, financial or insurance transaction and so did not benefit from any exemption from VAT. Despite this judgement, the French tax administration has maintained the exemption from VAT regarding the assignment of insurance and reinsurance portfolios between companies established in France.[142]

Such exemption is triggered by the necessary transfer of the assets and liabilities along with the insurance or reinsurance portfolio.

Moreover, the assignment and acquisition of insurance or reinsurance portfolios between a French company and a company whose registered office is located outside of France may be subject to VAT. Therefore this issue should be carefully considered when planning a cross-border portfolio transfer.

13. **<u>How frequently is the transfer mechanism used?</u>**

13.1 **Is the transfer mechanism commonly used? For what purposes is it used?**

In relation to insurance and reinsurance portfolio transfers <u>of insurance firms</u>, the transfer mechanism is commonly used mainly to avoid the constraints associated with individual consent of each insured, policyholder and/or beneficiary which, in the absence of approval by the ACP, is required to render the transfer binding upon third parties. Indeed the main advantage of the insurance portfolio transfer is to render enforceable the transfer to third parties through a single procedure.

Conversely as regards reinsurance portfolio transfers <u>by pure reinsurers</u>, the transfer approval procedure with the ACP has, to our knowledge, never been used. This is mainly because as the approval of the transfer by the ACP is not published in the Official Journal (see Section 5(b)(ii) above), the transfer is not enforceable against third parties. This deprives the procedure of any practical value.

13.2 **Are there any statistics of the use of the transfer mechanism?**

Between August 2004 and December 2009,[143] 92 IPTs by French insurance firms have been approved by the ACP (formerly known as the *Comité des Entreprises d'Assurances* - "CEA").

Reinsurance portfolio transfers: none.

[141] Article L. 324-1 and L. 324-1-2 of the FIC.

[142] *Rescrit* of 26 January 2010.

[143] *Source*: Annual report 2009 of the CEA (now the ACP) dated March 2010, page 2.

14. **What alternative methods can be used to transfer insurance business, and what are the advantages and disadvantages of such methods?**

(a) **Novation**

A traditional method of transferring an insurance or reinsurance portfolio from one entity to another would be to novate each individual contract as between the policyholders and the transferees. Disadvantages of this method include the time, practicality and expense of having to deal with all individual policyholders and the problems caused if any of them do not wish their policies to be transferred.

(b) **100% reinsurance (described as "run-off"/"portfolio"/"assumption" reinsurance or retrocession, "portfolio transfer" or "reinsurance to close")**

100% reinsurance of the relevant book of business does not achieve the same effect as insurance or reinsurance portfolio transfers since the liability under the policies remains with the cedant and the cedant acquires the credit risk of the reinsurer.

(c) **Merger**

A formal process of merger of the transferor and the transferee can be used to transfer a book of business between the two entities. However, the merger of the two entities will often not be attractive where insurers or reinsurers want to simply transfer part of a book of business.

(d) **Societas Europaea**

Public limited companies (PLCs) may form a European Company (also known as a "Societas Europaea" or "SE") by way of merger and may then transfer the seat of the company within the EU without having to wind up or reincorporate. This may be suitable for companies seeking to consolidate their European operations or to re-domesticate within Europe. This procedure has already been used in France for instance by SCOR.

(e) **Arrangement/ compromise**

French laws and regulations do not provide for any legal mechanism similar or comparable to a scheme of arrangement under Part 26 of the Companies Act 2006 which could result in the change of the identity of the relevant obligor under insurance or reinsurance contracts.

(f) **Other**

An IPT may be ordered *ex officio* by the ACP to sanction an insurance firm that either uses practices that endanger its solvency margin or the performance of the commitments that it has towards insured,[144] or that is no longer able to meet its commitments as part of an insolvency procedure.[145]

15. **What are the relevant sources of law or guidance?**

(a) **Statutes**

Articles L. 324-1 et seq and R. 324-1 et seq of the FIC relating to insurance and reinsurance portfolio transfers.

Article L. 354-1 of the FIC relating to IPTs of life insurance or capitalisation firms carrying on business in France on a freedom of services basis.

Article L. 364-1 of the FIC relating to IPTs of insurance firms carrying on business in France on a freedom of establishment or freedom of services basis.

(b) **Regulations**

General Protocol relating to the Collaboration of the Insurance Supervisory Authorities of the Member states of the European Union (Revised Siena Protocol), CEIOPS-DOC-07/08, March 2008.

(c) **Guidance**

The list of documents to be filed with the ACP for the approval of an IPT is set out on the Internet site of the ACP and can be consulted by clicking on the following link:

http://www.ceassur.fr/sections/procedures/transfert_de_portefe/downloadFile/attachedFile/CEAcompositiondossier0106.pdf?nocache=1140531361.33

(d) **Jurisprudence**

Not applicable.

(e) **Other**

Not applicable.

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[144] Article L. 310-18-6 of the FIC.

[145] Article L. 423-2 of the FIC.

Germany

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1. General

1.1 Can insurance portfolios be transferred from one entity to another in your jurisdiction?

Insurance portfolio transfers are possible under German law and are regulated in Section 14 and other sections of the German Insurance Supervisory Act (*Versicherungsaufsichtsgesetz – "VAG*"). The transfer generally requires the prior approval of the supervisory authorities responsible for the participating insurance entities, in Germany this being the Federal Financial Supervisory Authority (*Bundesanstalt für Finanzdienstleistungsaufsicht – "BaFin"*).

1.2 Are the rules the same for the transfer of direct insurance portfolios as for reinsurance portfolios?

Reinsurance portfolio transfers are admitted but require the prior approval of BaFin pursuant to Section 121f VAG. This applies to:

(a) transfers from a domestic reinsurance entity to another insurance company having its seat in a member state of the European Union ("EU") or of the European Economic Area ("EEA"); or

(b) transfers from a domestic reinsurance entity to a branch of an insurance or reinsurance entity having its seat in a third country.

It has to be noted that insurance companies that are authorised to underwrite direct insurance business in Germany normally receive the permit to conduct reinsurance business in Germany without having to fulfil any additional requirements. The transfer of a reinsurance portfolio is therefore also possible from a direct insurer to another insurance entity.

1.3 Are the rules the same for the transfer of direct insurance portfolios as for reinsurance portfolios?

Generally, the same or similar rules apply with differences in the details as set out below.

1.4 Are the rules the same for the transfer of life portfolios as for non-life portfolios?

The basic rules are the same but tighter rules apply to the transfer of assets in connection with life insurance portfolios, see Section 2.7 below.

2. What are the requirements for an Insurance Portfolio Transfer ("IPT")?

It has to be kept in mind that distinctions exist between the transfer of insurance portfolios and reinsurance portfolios and between the transfer to domestic entities, to entities located in the EU or EEA member states, or to entities located in third countries. However the basic legal provisions contain more or less similar regulations for all of these alternatives, as will be shown below in more detail.

2.1 What requirements must be met by a *transferor* to undertake an IPT?

The requirements that have to be met by a transferor depend on the status of the transferor.

The VAG provides several regulations as to the requirements for transferors.

The transfer of German direct insurance portfolios can be conducted by:

(a) direct insurance entities under German law (see Section 14 para 1 VAG);

(b) branches of insurance companies located in the EU or the EEA (see Section 110d para 2 VAG and Section 111d VAG);

(c) insurance companies located in the EU or the EEA that have acquired the portfolio under the European freedom of movement of services (Section 111d VAG); and

(d) third country insurance entities (see Section 105 para 3 and Section 108 paras 1 and 2 VAG).

In this context note that insurance companies that are authorised to underwrite direct insurance business in Germany are normally also authorised to conduct reinsurance business in Germany.

Reinsurance portfolio transfers can be conducted by domestic direct insurance entities (see above), German reinsurance entities (see Section 121f paras 1 and 2 VAG) and the German branch of third country reinsurance entities (Section 121i para 4 VAG). Direct insurers transferring a reinsurance portfolio have to follow Section 14 para 1 VAG and not the provisions applying to reinsurers.

2.2 What requirements must be met by a *transferee* to undertake an IPT?

The transferee must be an authorised insurance entity. If the transferee does not have permission to underwrite the class of the insurance portfolio, this permission may be granted upon application in the course of the approval of the IPT subject to all applicable pre-requisites having been fulfilled. It has to be noted that the underwriting of life and non-life classes or substitutive health insurance by one insurance entity is incompatible, Section 8 para. 1a VAG.

2.3 Are there any requirements relating to the financial condition of the *transferor*?

The VAG does not provide for any specific requirements relating to the financial condition of the transferor.

However, even after the IPT, the general requirements on solvency margin etc have to be met by the transferor. BaFin has more than once exercised gentle pressure on an insurer to induce it to dispose of a loss-making portfolio of a specific class of business.

2.4 Are there any requirements relating to the financial condition of the *transferee*?

Generally, the interests of the insured have to be safeguarded when transferring an insurance portfolio.

It also has to be ascertained that the transferee, after having acquired the portfolio, has funds of its own in the amount of the solvency margin. In the event that a domestic insurance entity transfers its foreign EU/EEA-portfolio (acquired via a branch or via the freedom of services) to another EU/EEA insurance entity, the sufficient solvency margin will be proven in the form of a certification from the supervisory authority of the host member state, Section 14 para 2 sentence 2 No. 1 VAG.

2.5 Is the place where the portfolio was originally underwritten a relevant factor?

In the event that a German insurer has established branches in other states (irrespective of whether those states are EU/EEA member states or third states), a policy or book of business underwritten by such branch will have to be allocated to such branch. The same rules obviously apply to foreign insurers having established a branch in Germany. In connection with portfolio transfers between reinsurers, the business would have to be carried out either in Germany or in other member states of the EU/EEA whilst a portfolio transfer between direct insurers could also include portfolios located in third states.

2.6 Is the governing law or applicable jurisdiction of the insurance portfolio transferred a relevant factor?

In principle this is not an issue. However, one has to take into account that a German insurer intending to transfer a portfolio acquired in a host member state has to make sure that the transfer agreement also complies with the laws of the host state. In most respects this is assured by the harmonisation of the respective insurance regulations in the EU/EEA member states. But the laws of the host member state could, for instance, contain additional formal requirements which have to be observed (e.g. pertaining to the transfer of title in land). Portfolios acquired in third states make it necessary to verify that an IPT is also possible under the laws of the non-EEA state, and, if so, the requirements of the non-EEA state have to be complied with in addition to the requirements of the home state.

2.7 What criteria will be applied by the relevant authority in approving the transfer?

For IPTs between direct insurers, BaFin has to ensure that:

(a) the interests of the policyholders have been taken into account to a reasonable extent; and

(b) that the parties to the IPT have proven that the transferee complies with the solvency margin requirements.

Agreements pertaining to the transfer of pure reinsurance portfolios will only be examined under the requirement that the transferee complies with the solvency margin requirements.

Concerning non-life portfolios, the safeguard of the interests of the policyholders is confined in essence to the verification of the sufficient solvency margin of the transferee.

In connection with the transfer of life portfolios, the legislator has recently specified more precisely what is meant by the interests of the policyholders in connection with such transfer.

A life assurer, as had been the case, might want to transfer its life portfolios to another insurer together with assets, the value of which slightly surpasses the solvency margin for such portfolios. This could be disadvantageous to the policyholders if the transferring life insurer has over the years accumulated more assets than necessary to cover the solvency margin and also if some assets, which it wants to retain, contain significant silent reserves. Section 14 para 4 VAG now requires that all policies promising to the policyholder a participation in the surplus must only be transferred (and the transfer must only be approved) if the value of the (future) surplus provided by the transferee does not fall short of the respective value of the transferor. The test for this requirement makes a valuation of all assets and liabilities of the transferor and the transferee (together with the portfolio to be acquired) necessary. This could trigger an expensive exercise.

2.8 Are there any other requirements?

Apart from the requirement that the application must be in writing, the applicants (the transferor and transferee) have to submit:

(a) the draft transfer agreement; and

(b) if a life insurance portfolio is concerned, the valuation of the assets and liabilities of the transferor and transferee (after the planned acquisition) in order to prove that the surplus expectation of the policyholders will not be impaired by the transfer.

The transferor will further have to supply BaFin with a copy of its annual accounts together with the audit report as at a date which is no more than 6 months prior to the date on which the application is filed. As a consequence, most applications for the approval of an IPT will be filed in June of any year in order to be able to use the annual financial statement, which, in Germany, normally covers the calendar year. For mutual societies, see also Section 10 below.

3. <u>What can be transferred along with the insurance or reinsurance contract?</u>

(a) Assets

The insurance portfolio cannot be transferred without also transferring the assets and liabilities allocated to it, i.e. the respective technical provisions and the funds covering such provisions. These have to be identified individually in the transfer agreement and also have to be transferred individually. The IPT agreement only functions as the commitment to transfer the assets and liabilities, but may already contain the transfer as such - subject to the prior approval of BaFin. Please note that German laws relating to the transfer of title in assets differentiate between the obligatory agreement, the transfer agreement (at rem) and the actual transfer.

(b) Liabilities

See above.

(c) **Real property**

Real property as an asset covering the technical provisions of the portfolio to be transferred can also be transferred along with the portfolio. As a rule, the commitment to transfer real property requires notarisation, Section 311b para 1 German Civil Code (*Bürgerliches Gesetzbuch, BGB*). However, as Section 14 para 6 VAG only requires written form for the IPT agreement in which such commitment to transfer real property is contained, the general opinion in the legal literature is that written form is sufficient for the undertaking to transfer real estate property in IPTs. As stated above, the IPT agreement contains only the commitment to a transfer of the assets. The actual transfer of real estate therefore has to be agreed on in a – then notarised – contract between transferor and transferee.

(d) **Reinsurance/retrocession contracts and other ancillary contracts**

Reinsurance contracts signed by direct insurers with reinsurers or retrocession contracts signed by reinsurers with other reinsurers or insurers and also all other ancillary contracts like, for instance, distribution agreements with intermediaries, lease agreements and other supply agreements or service agreements are not privileged under the legal provisions providing for the possibility of an IPT. As a result of this, the parties to an IPT agreement have to enter into separate individual negotiations with such third parties, whose consent is necessary for the transfer of the contract if they want to achieve that the transferee will become a party to such ancillary agreements instead of the transferor. Therefore sales of larger portfolios making out the entire business of an insurer to a third party insurer are normally replaced by the sale of the insurance entity, which means that all of these ancillary contracts remain unaffected. Separate negotiations with third party suppliers or service providers are only necessary if an agreement contains a change of control clause.

4. **<u>Who must be notified of what, and how?</u>**

(a) **Local regulator(s)**

The BaFin has to be notified as the authority competent for giving approval. For very small local insurers the supervisory authority of the respective state (Land) may have to be notified instead of BaFin.

(b) **Other regulator(s)**

If certain turnover thresholds are exceeded, the German Federal Cartel Office or the EU Commission have to be notified and have to sign off the transfer.

Foreign insurance supervisory authorities, see Section 7(b) below.

(c) **Policyholders**

Despite the usual requirement that a party to a contract has to consent to the change of the other party, Section 14 para 5 VAG provides that the approval of the policyholders is not necessary.

The policyholders have to be notified of the transfer of their respective insurance policy after completion of the transaction by the transferee insurance entity informing them about the transfer, the reason(s) for the transfer and the consequences thereof.

(d) **Beneficiaries of cover other than actual policyholders**

See Section 4(c) above.

(e) **Reinsurers**

The relevant provision of the VAG does not provide for a notification of the reinsurer of the transferred portfolio. The reason is that such reinsurance contract is not subject to automatic transfer together with the portfolio but requires an individual and separate agreement among the parties concerned.

(f) **Brokers**

See Section 4(e) above.

(g) **Others**

No other notification requirements are provided for in the VAG.

(h) **Further notice requirements**

None.

5. **<u>What publicity requirements are there for IPTs?</u>**

(a) **Newspapers**

There is no requirement to publish the IPT in the press.

(b) **Official Gazette/Journal**

Once approved by the BaFin the IPT has to be published in the German Federal Gazette.

(c) **Trade magazines**

There is no requirement to publish the IPT in trade magazines.

(d) **Register of Companies**

There is no requirement to publish the IPT in the Register of Companies (*Handelsregister*).

(e) **Other**

There is no other requirement to publish the IPT. BaFin usually publishes its approved IPTs in its monthly BaFinJournal which is published online under www.bafin.de.

6. **<u>Who has the right to object to the transfer?</u>**

(a) **Regulator(s)**

BaFin has to permit the transfer in order to validate it, which gives it the de facto right to object to the IPT by not granting its approval. However, if the requirements provided for in the VAG are met by the transferor and the transferee, the parties to the IPT have an actionable right to receive approval.

In addition, if certain turnover thresholds are exceeded, the German Federal Cartel Office or the EU Commission have to be notified, which could object to the IPT if it could negatively impact on competition among insurers.

(b) **Policyholders**

The policyholders cannot object to the transfer itself. However, as the approval granted by BaFin is a public act of a federal administration, the individual policyholder can file a reconsideration appeal to BaFin. This, however, will only be successful if BaFin, by granting its approval, has violated pertinent law. If BaFin rejects the complaint, the policyholder can file a complaint with the Administrative Court in Frankfurt/Main, Section 1 para 3 of the Act on the Federal Financial Supervisory Authority (*Finanzdienstleistungsaufsichtsgesetz – FinDAG*). The same applies to members of mutual societies.

(c) **Beneficiaries of cover**

See Section 6(b) above.

(d) **Reinsurers**

Unless otherwise provided for in the relevant reinsurance agreements between the transferee and its reinsurer, the reinsurer does not have a right to object to the transfer. It has to be taken into account that the reinsurance agreement cannot be transferred by way of IPT.

(e) **Trade associations**

Trade associations have no right to object to the IPT.

(f) **Employees**

Employees or employees' representatives have no right to object to the IPT. However, the interests of the employees have to be taken into account and the works council has to be informed prior to the transfer if the transfer of the insurance portfolio results in a business alteration pursuant to Section 111 Works Constitution Act (*Betriebsverfassungsgesetz, BetrVG*), which will be the case for most larger IPTs. Please note that if there is a business alteration affecting the rights of the staff, the works council may request to enter into negotiations about a compromise of interest including a social plan. As long as such negotiations are pending the completion of the IPT could be blocked.

(g) **Others**

There is no right for other third parties to object to the IPT.

7. **<u>Who must approve and/or sanction the transfer?</u>**

(a) **Local regulator**

See Section 6(a) above.

(b) **Other regulator(s)**

In the event that a domestic insurance entity transfers its foreign EU/EEA-portfolio (acquired via a branch or via the freedom of services) to another EU/EEA insurance entity, the supervisory authorities of all EU/EEA states in which the risk is located have to approve the transfer, Section 14 para 2 sentence 2 No 2 VAG.

If the insurance portfolio of a domestic insurance entity's branch in another EU/EEA member state is to be transferred, the supervisory authority of such EU/EEA member state shall be consulted, Section 14 para 2 sentence 2 No. 3 VAG.

(c) **Court**

Not applicable.

(d) **Other**

Under certain circumstances the consent of other corporate bodies may be required, for example the consent by a shareholders' meeting or the consent by the supervisory board. This is necessary if the insurance entities have to adopt capital measures, i.e. increase of share capital in order to implement the acquisition of a portfolio.

Pursuant to Section 44 sentence 1 VAG, where a mutual society transfers parts or the whole of its portfolio to another undertaking, the approval of the Senior Representative Body ("*Oberste Vertretung"* – assembly of members or of representatives of members) is required with a 75% majority of the votes.

8. **<u>What jurisdictional conditions apply to the transfer?</u>**

8.1 **What types of insurance portfolios are capable of transfer in Germany?**

All kinds of insurance portfolios are capable of being transferred, be it direct or reinsurance, non-life or life.

8.2 **Does the transferring portfolio need to be legally or commercially connected to the state where the transfer is effected?**

If a German insurer has acquired an English motor insurance portfolio, be it through freedom of services or a local branch in the host state, it may transfer such portfolio to another German insurer subject to the approval of BaFin. BaFin will not give its approval unless it has first obtained the prior approval of the English Regulator. In such event we believe that the transfer is done in Germany, even if the consequences of the transfer attach to English policyholders.

8.3 **Will the transfer be effective in jurisdictions other than those of the transferor and/or transferee?**

Yes, but with many restrictions. The transfer of insurance policies should operate once the IPT has been approved, despite the fact that Section 14 para 2 No. 2 VAG requires that all EU/EEA member states in which an insured risk is located have to be informed, with the consequence that their approval will also be required. In practice, this requirement will not always be meticulously fulfilled. If a German insurer, having issued more than 100,000 policies, has also issued a policy to a French citizen who took out the policy while travelling in Germany, the French authority might not be informed and its approval may not have been acquired. We would consider the transfer of the French policy together with all other German policies to have become effective in such event despite the missing approval from the French authorities. If otherwise third jurisdictions are affected in connection with the IPT, for instance because assets are kept in custody in such third state, the question of whether the approved IPT and the additional transfer actions will be recognised in the third state will have to be decided pursuant to the laws of such third state. Therefore, for instance, the transfer of securities held by a New York custodian bank might require additional acts and documents under New York security laws.

8.4 **What effect will the transfer have on arbitration clauses?**

Arbitration clauses in direct insurance policies are very uncommon in Germany. However, if the individual insurance contract is transferred to another insurance entity by way of IPT, the transferee enters into all rights and obligations in this insurance contract, i.e. also in any arbitration agreement.

It is more common to agree arbitration clauses in reinsurance contracts. The same principle applies as set out above. If the individual reinsurance contract is transferred by way of IPT, the transferee will then become party to that contract including the arbitration clause.

9. **<u>What is the procedure and timing of the transfer?</u>**

9.1 **What is a typical timeline for a transfer?**

BaFin, being an administrative body, is subject to Section 74 Administrative Procedure Act and, as a consequence, BaFin should react to any application for approval of an IPT within three months. Should BaFin fail to react within this time period, this will unfortunately not signify that approval can be deemed to have been given. The only result is that the applicant would have the right to file a suit against BaFin before the competent administrative court, pleading illegitimate inactivity.

If another EU/EEA regulator has to be involved, be it for the issuance of the Solvency Margin Compliance Certificate, or be it for consent because some risks of the portfolio are located in such other member state, a further waiting period will arise. German law does not contain a provision which would allow BaFin to assume that the solvency margin requirement is fulfilled or the consent has been given in the event that the foreign regulator does not respond within a certain time limit.

However, this is not the way it works in practice. Once a German insurer has filed the application with BaFin it will see to it that it enters into a discussion with BaFin without any undue delay in order to clarify whether the application and the additional documents are complete and to the satisfaction of BaFin and whether BaFin would want to obtain any additional information. If the application is well prepared and any additional queries of BaFin are answered without undue delay, one may expect to get the approval within 2 to 3 months unless a foreign regulator has to be contacted. It would also be permissible to supply to BaFin at an early stage of the transaction a draft transfer agreement, which might be expedient if other documents to be filed, such as, for instance, the audited accounts, are not yet available. Then the discussion with BaFin is opened before the official filing of the application and we have had cases where the transfer of a portfolio had then been approved within days after the official filing of the application together with the complete documentation. This obviously refers only to cases where no foreign regulator has to be involved.

Subject to a filing before the end of June, approval may be granted by BaFin with retroactive effect as of 1 January of that current year.

9.2 **Are there any hard legislative or regulatory deadlines?**

There are no deadlines connected with the proceedings to obtain the approval for an IPT. However, in the event that the application should be rejected by BaFin, one or both insurers concerned would have to file a reconsideration appeal against the decision within a period of one month if they are unhappy with the decision.

10. **<u>What key documentation will be produced for the transfer?</u>**

The following documents have to be filed:

(a) The application for approval to BaFin in which a confirmation has to be given that no side agreements have been made;

(b) the IPT agreement;

(c) in the event of a transfer of a life portfolio, the valuation report of the assets and liabilities of the transferee and transferor together with proof that the surplus expectation of the policyholders will not be impaired by the transfer;

(d) in the event of a transfer of a portfolio of a mutual society to an insurance corporation, a valuation report concerning the value of the membership together with a compensation plan in favour of the members who will be losing their membership in the society as a result of the transfer;

(e) audited annual accounts of the transferor company; and

(f) solvency margin calculation of the transferee with the new portfolio added (recommended).

11. **<u>What professional agents are involved in the transfer and what are their roles?</u>**

(a) **Lawyers**

Lawyers are involved in drafting the pertinent transfer agreements and the application to the BaFin for permission. Most portfolio transfers pertain to inner-group restructurings and to small portfolios. The application and transfer agreement would be prepared in such cases by in-house lawyers. Only in the event of a large portfolio sale and transfer between unrelated parties would outside counsel be hired.

(b) **Accountants**

Accountants will normally play a role in connection with an IPT as tax issues will normally arise which they will handle together with the lawyers.

(c) **Actuaries**

You will need actuaries for the internal calculation of the solvency margin after acquisition of the new portfolio and you will need actuaries in connection with the transfer of life portfolios or of portfolios of mutual societies in the event that members of the same thereby lose their membership.

(d) **Independent Expert**

Independent experts are not normally required. Should complex valuation issues arise, BaFin may appoint an independent expert in order to be on the safe side.

(e) **Other**

Loss adjusters, in the event that the transferee takes over long-tail claims.

12. **<u>What legal issues are frequently encountered in transfers?</u>**

(a) **Change of Control clauses**

You do not normally find change of control clauses in German direct insurance contracts, even if you look into major industrial insurance policies. This is different for reinsurance agreements, where many direct insurers do not want to be confronted with another contractual party without their prior approval. Thus far, no reinsurance portfolios outside of reinsurance groups have been transferred. Therefore it cannot be established whether and to what extent these change of control clauses might hamper the transferability of reinsurance portfolios. The views in the legal literature are split: some say that the possibility of a portfolio transfer by regulatory approval prevails over the change of control clauses, others say just the opposite.

(b) **Intervention by Policyholders**

German policyholders cannot impair the success of an IPT by an extraordinary termination of the policy but would have to use the termination possibilities as provided by the policy vis-à-vis the new insurer. The administrative courts have, however, acknowledged that the rights of the policyholders are affected in connection with an IPT comprising their policies. As a consequence, they may attack the approval of an IPT first by a reconsideration appeal, and if this is not successful, by a complaint to the administrative court. Albeit such legal remedy is available to each individual policyholder, you may expect that an association for the protection of the interests of policyholders would normally use the same. Such legal remedies may block the transfer becoming effective and final for a very long period of time. It therefore has to be carefully examined whether a contemplated portfolio transfer could hamper the interests of the policyholders before entering into the application proceedings.

(c) **VAT**

Since the recent ECJ Judgment in the case of *Swiss Re Germany Holding GmbH v Finanzamt Munich*, some uncertainty has arisen concerning the issue of whether or not a transfer of an IPT is subject to VAT (though note that the case judged by the ECJ concerned a portfolio of just 187 reinsurance contracts altogether and that the court held that such small number of insurance contracts could not make out an insurance portfolio). We continue to assume that a portfolio transfer will not trigger VAT if that portfolio comprises the entire book of business of an insurer or comprises a separate independent business unit in the sense of Section 1(a) German VAT Act. It is not always easy to decide whether a portfolio which is only a part of the business of an insurer can be qualified as a separate business unit. Such unit will most likely be given if the portfolio transfer is not just a transfer of insurance policies alone, but includes the transfer of staff and other assets which are necessary or expedient to carry on an insurance business.

13. **<u>How frequently is the transfer mechanism used?</u>**

Adding the IPTs published by BaFin in the monthly BaFinJournal, 15 IPTs have been permitted by BaFin in 2009 and a further 20 IPTs have been permitted with the collaboration of BaFin.

13.1 **Is the transfer mechanism commonly used? For what purposes is it used?**

Yes, it is commonly used in Germany. The motivations for IPTs are various and range from group restructuring to the strategic disposal of certain risks. Cases where this mechanism is used for the sale of large portfolios between unaffiliated insurers or reinsurers can be qualified as an exception rather than the rule.

13.2 **Are there any statistics of the use of the transfer mechanism?**

There is no official statistical analysis of the IPT mechanisms being used in Germany.

14. **<u>What alternative methods can be used to transfer insurance portfolios, and what are the advantages and disadvantages of such methods?</u>**

(a) **Novation**

The novation of an insurance portfolio, i.e. the transfer of the individual insurance contracts with the consent of the policyholder (or the insurer in the event of a transfer of a reinsurance portfolio), has largely been made redundant by the possibility of conducting an IPT under German law, as then the consent of the individual policyholder is not required but is substituted by the approval of BaFin.

(b) **100% reinsurance (also described as "run-off"/"portfolio"/"assumption" reinsurance or retrocession, "portfolio transfer" or "reinsurance to close")**

The advantage of reinsuring 100% of the risk under an insurance portfolio is that in contrast to the IPT no approval of the BaFin is required. Also, a reinsurance (or for reinsurers a retrocession) is in any event a VAT-exempt insurance contract which prevents a mark-up of 19%.

(c) **Corporate reorganisation**

Corporate reorganisations such as spin-off and split-off or a merger pursuant to the German Reorganisation Act (*Umwandlungsgesetz, UmwG*) are independent measures separate from IPTs. The multitude of formal requirements, valuation issues and the participation of shareholders or members of mutual societies result in these mechanisms seldom being used outside of inner-group restructurings.

(d) **Arrangement/compromise**

Not applicable.

(e) **Other**

Not applicable.

The two participating insurance companies can also agree on a service agreement by which the service provider undertakes to manage the insurance portfolio on behalf of the insurance company, which maintains its position as the insurer and, as such, however, continues to bear the risk.

15. **What are the relevant sources of law or guidance?**

(a) **Statutes**

The following provisions of the VAG apply to the various alternatives as set out above:

Direct insurance portfolio

Section 14 para 1 VAG: IPT from insurance entity to other insurance entity

Section 14 para 2 VAG: Transfer of foreign portfolio of insurance entity to other insurance entity

Section 105 para 3 VAG in connection with Section 14 VAG: IPT from third country entity to other insurance company

Section 108 para 1 VAG: IPT from third country entity's German branch to other third country entity's German branch

Section 108 para 2 VAG: IPT from third country entity's German branch to EU/EEA insurer

Section 110d para 2 sentence 1 VAG in connection with Sec. 14 VAG: IPT from EU/EEA insurer's German branch to other insurance entity

Section 111d VAG: Transfer of an EU/EEA insurer's portfolio acquired via a branch or freedom of services to other EU/EEA insurer

Reinsurance portfolio

Section 14 para 1 VAG: IPT from direct insurer's reinsurance portfolio to other insurance entity

Section 121f para 1 VAG: IPT from German insurer to EU/EEA reinsurer

Section 121f para 2 VAG: IPT from German insurer to third country insurer or third country reinsurer

Section 121i para 4 VAG: IPT from third country reinsurer to third country reinsurer or third country insurance entity or EU/EEA insurance entity

(b) **Regulations**

The VAG's provisions are based on the respective European directives, for example the reinsurance directive.

BaFin is a member of the Committee of European Insurance and Occupational Pensions Supervisors (CEIOPS) and, as such, is bound by the General Protocol relating to the Collaboration of the Insurance Supervisory Authorities of the Member States of the European Union (Revised Siena Protocol), CEIOPS-DOC-07/08 dated March 2008.1.

(c) **Guidance**

BaFin has not published guidance as to the transfer of insurance portfolios.

(d) **Jurisprudence**

There is only limited jurisprudence with respect to IPTs. The most prominent are two rulings by the German Federal Constitutional Court (*Bundesverfassungsgericht, "BVerfG"*) in which the BVerfG held that the previous version of Section 14 VAG was incompatible with the German Constitution (*Grundgesetz, "GG"*). The court held that the provisions of Section 14 para 1 sentence 3 in connection with Section 8 para 1 sentence 3 VAG (old version) did not sufficiently protect the interests of life policyholders by permitting the transferor to retain assets accumulated with the funds provided by the policyholders.

As a result of the change of the law, earlier judgments of the Federal Administrative Courts have become obsolete. The judgments of the Constitutional Court required the Federal Government to amend the respective provisions by 31 December 2007. This has resulted in a comprehensive revision of Section 14 VAG.

(e) **Other**

There are several commentators in the legal literature who describe the prerequisites and legal consequences of an IPT.

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1. General

1.1 Can insurance portfolios be transferred from one entity to another in your jurisdiction?

Yes, subject to the conditions set out in Act LX of 2003 on insurance companies and insurance activity (Insurance Act).[146] Insurance portfolios may be transferred in part or in whole by agreement between a transferor and a transferee subject to the condition that the terms and conditions of the policies affected must remain unchanged.

1.2 Can reinsurance portfolios be transferred?

Yes, subject to the conditions set out in Act CLIX of 2007 on reinsurance (Reinsurance Act).[147] Reinsurance portfolios may be transferred in part or in whole by agreement between a transferor and a transferee subject to the condition that the terms and conditions of the contracts affected must remain unchanged.

1.3 Are the rules the same for the transfer of direct insurance portfolios as for reinsurance portfolios?

Although the rules for insurance portfolio transfers in respect of direct insurance and reinsurance are set out in different pieces of legislation, the rules applicable to such transfers are basically the same.

1.4 Are the rules the same for the transfer of life portfolios as for non-life portfolios?

Yes. Neither the Insurance Act, nor the Reinsurance Act differentiates between the transfer of life portfolios and non-life portfolios.

2. What are the requirements for an Insurance Portfolio Transfer ("IPT")?

2.1 What requirements must be met by a *transferor* to undertake an IPT?

Insurance portfolios may be transferred to any insurance company having its registered office in Hungary or within the territory of another EU member state or to any branch office of a company having its registered office in a non-EU member state, provided that such branch office is in Hungary or in another EU member state. The transfer must be approved by the Hungarian Financial Supervisory Authority (the "HFSA").

The insurance portfolio of a Hungarian branch office of an insurance company having its registered office in another EU member state may be transferred subject to the approval of the regulatory authority in its home state.

Applications for authorisation must contain:

- an exact description of the portfolio to be transferred and the contractual terms of the portfolio;
- either a conditional contract between the transferor and the transferee on the transfer or the draft of such contract;
- a description of the technical reserves connected to the portfolio to be transferred and the coverage for such reserves;
- the date of the transfer and the consideration payable for the portfolio;
- if the transferee is a company having its registered office in Hungary, or a branch office located in Hungary, evidence provided by the transferee that its solvency margin is sufficient for the portfolio transferred in addition to the minimum solvency margin required for its own portfolio (in the case of an insurance company having its registered office in another EU member state, or a branch office located in another EU member state, this evidence is obtained by the HFSA from the home country regulator directly); and
- a draft of the letter informing policyholders of the transfer and consequences thereof.

We note that the consent of the insured persons (or insurance companies in the case of the transfer of reinsurance portfolios) to the transfer is not required.

2.2 What requirements must be met by a *transferee* to undertake an IPT?

There are no specific IPT related requirements. However, the transferee must have a license to carry on insurance/reinsurance activity.

2.3 Are there any requirements relating to the financial condition of the *transferor*?

There are no specific requirements relating to the financial condition of the transferor. However, the HFSA approves a transfer only if it believes that the transfer is not detrimental to the interests of the policyholders. Thus, in the case of a partial IPT, the financial condition of the transferor should not change in a way that is detrimental to the interests of the policyholders remaining with the transferor.

2.4 Are there any requirements relating to the financial condition of the *transferee*?

Yes.

The HFSA approves the proposed transaction only if it has been provided with evidence that the transferee's solvency margin will be sufficient for the portfolio transferred in addition to the minimum solvency margin required for its own portfolio. Where the HFSA obtains this evidence from the home country regulator directly (see Section 2.1 above), the evidence is considered to have been obtained if the home country regulator does not respond to the request within 3 months.

2.5 Is the place where the portfolio was originally underwritten a relevant factor?

No.

[146] Articles 93-95 of the Insurance Act.

[147] Articles 50-52 of the Reinsurance Act.

2.6 **Is the governing law or applicable jurisdiction of the insurance portfolio transferred a relevant factor?**

No.

2.7 **What criteria will be applied by the relevant authority in approving the transfer?**

If the conditions set out in Section 2.1 above are not met or if the HFSA is of the opinion that the transfer would be detrimental to the interests of the policyholders (or, in the case of reinsurance portfolio transfers, the transfer would endanger fulfilment of the obligations arising out of the reinsurance policies), the HFSA refuses the application.

2.8 **Are there any other requirements?**

Insurance or reinsurance portfolios may only be transferred provided that the terms of the insurance/reinsurance policies remain unchanged.

3. **<u>What can be transferred along with the insurance or reinsurance contract?</u>**

(a) **Assets**

The transfer of a portfolio does not mean in itself the transfer of any other assets. However, assets can also be transferred simultaneously with the portfolio transfer. The approval of the HFSA is only required for the transfer of the insurance/reinsurance portfolio.

(b) **Liabilities**

Same as Section 3(a) above.

(c) **Real property**

Same as Section 3(a) above.

(d) **Reinsurance/retrocession contracts and other ancillary contracts**

The transfer of a portfolio does not mean in itself the transfer of reinsurance/retrocession contracts. However, such contracts can also be transferred simultaneously with the portfolio transfer. The approval of the HFSA is required for the transfer of the reinsurance/retrocession portfolio.

4. **<u>Who must be notified of what, and how?</u>**

(a) **Local regulator(s)**

A request for approval of the IPT must be made to the HFSA. It must contain the information set out in Section 2.1 above.

(b) **Other regulator(s)**

In respect of the transfer of an insurance portfolio, where the transferee is an insurance company that has its registered office in, or is a branch office located in, an EU member state other than Hungary, the HFSA must request a certificate from the home state regulator confirming the solvency margin of the transferee. Where the state of commitment[148] is an EU member state other than Hungary, or where the insurance portfolio of a branch office of an insurance company having its registered office in another EU member state is transferred, the HFSA must request consent of the relevant foreign regulator.

In respect of the transfer of a reinsurance portfolio, where the transferee is an insurance company that has its registered office in, or is a branch office located in, an EU member state other than Hungary, the HFSA must request a certificate from the home state regulator confirming the solvency margin of the transferee. Where the transferor has its registered office in an EU member state other than Hungary, or where the reinsurance portfolio of a branch office of an insurance company having its registered office in another EU member state is transferred, the HFSA must request consent of the relevant foreign regulator.

(c) **Policyholders**

All policyholders must be notified in writing by the transferee within 30 days following the receipt of the declaration of the HFSA approving the portfolio transfer. In the case of the merger of insurance companies, the above period commences on the date of the registration of the merger by the competent court of registration.

The policyholders are entitled to unilaterally terminate the insurance contract within 30 days of receipt of such notification.

(d) **Beneficiaries of cover other than actual policyholders**

Not applicable.

(e) **Reinsurers**

Not applicable.

(f) **Brokers**

Not applicable.

(g) **Others**

Not applicable.

(h) **Further notice requirements**

Not applicable.

5. **<u>What publicity requirements are there for IPTs?</u>**

(a) **Newspapers**

In the case of IPTs, the HFSA must publish its decision on the approval of the IPT in two national newspapers. This provision is not applicable in the case of reinsurance portfolio transfers.

(b) **Official Gazette/Journal**

Not applicable.

(c) **Trade magazines**

Not applicable.

(d) **Register of Companies**

Not applicable.

[148] The state of commitment is considered to be the state where the policyholder has its main place of residence or, if the policyholder is a legal entity, the state where the legal entity has a place of business to which the contract relates.

(e) **Other**

Not applicable.

6. **Who has the right to object to the transfer?**

(a) **Regulator(s)**

According to the Insurance Act and the Reinsurance Act, if the conditions set out in the respective Act (see Section 2.1 above) are not complied with, or, as a result of the portfolio transfer, the interests of the policyholders would be harmed (or, in the case of reinsurance portfolio transfers, the transfer would endanger fulfilment of the obligations arising out of the reinsurance policies), the HFSA must refuse the application submitted to approve the IPT.

(b) **Policyholders**

The approval of the policyholders is not required for the portfolio transfer.

(c) **Beneficiaries of cover**

In the case of the transfer of a reinsurance portfolio, the Reinsurance Act expressly provides that the consent of the beneficiaries is not required for the portfolio transfer.

(d) **Reinsurers**

Not applicable.

(e) **Trade associations**

Not applicable.

(f) **Employees**

Not applicable.

(g) **Others**

The decision of the HFSA on the approval of the portfolio transfer can be challenged before the court, by the transferor or the transferee.

7. **Who must approve and/or sanction the transfer?**

(a) **Local regulator**

Domestic transfers (i.e. where insurance portfolios are transferred to any insurance company having its registered office in Hungary or in the territory of another EU member state or where portfolios are transferred to any branch office of a company having its registered office in a non-EU member state, provided that such branch office is in Hungary or in another EU member state) are subject to approval by the HFSA.

(b) **Other regulator(s)**

In respect of the transfer of an insurance portfolio, where the state of commitment is an EU member state other than Hungary, or the insurance portfolio of a branch office of an insurance company having its registered office in another EU member state is transferred, the HFSA must request consent of the relevant foreign regulator.

In respect of the transfer of a reinsurance portfolio, where the transferor has its registered office in an EU member state other than Hungary, or the reinsurance portfolio of a branch office of an insurance company having its registered office in another EU member state is transferred, the HFSA must request consent of the relevant foreign regulator.

(c) **Court**

With the exception of a merger of insurance/reinsurance companies, the approval of the court is not required for the portfolio transfer. In the case of a merger of insurance/reinsurance companies, the court of registration only reviews the merger-related corporate documents and does not examine the insurance portfolio transfer.

8. **What jurisdictional conditions apply to the transfer?**

8.1 **What types of insurance portfolios are capable of transfer in Hungary?**

All types of insurance or reinsurance contracts can be transferred subject to the prior approval of the HFSA.

8.2 **Does the transferring portfolio need to be legally or commercially connected to the state where the transfer is effected?**

No, insurance contracts can be transferred without restrictions to any insurance company having its registered office in Hungary or within the territory of another EU member state or to any branch office of a company having its registered office in a non-EU member state, provided that such branch office is in Hungary or in another EU member state.

8.3 **Will the transfer be effective in jurisdictions other than those of the transferor and/or transferee?**

Hungarian law does not contain restrictions in this regard. Thus, this question would be answered under the laws of the relevant jurisdiction. As the transfer of portfolio of contracts provisions of the Insurance Act and the Reinsurance Act are the result of the implementation of the transfer of portfolio of contracts provisions of Directive 2002/83/EC and Directive 2005/68/EC, we assume that, in the case of EU member states, the answer will be based on the way these Directives have been implemented in the relevant jurisdiction.

Although there is no specific legal provision in relation to mutual recognition of transfers under Hungarian law, as a result of Hungarian law recognising EU legislation, a transfer carried out under an EU Directive in other EU member states is to be recognised in Hungary as well.

Where the relevant jurisdiction is a non-EU member state jurisdiction, the answer should be based on the rules of conflict of laws in respect of Hungary and the relevant jurisdiction.

8.4 **What effect will the transfer have on arbitration clauses?**

As the insurance and reinsurance contracts are transferred on the same terms, if the contract contains an arbitration clause, such clause will remain effective.

9. **<u>What is the procedure and timing of the transfer?</u>**

9.1 **What is a typical timeline for a transfer?**

Approximate Time	Action
Commencement date of the procedure	Submission of the application for approval filed with the HFSA.
Commencement date + 2 months (or + 4 months)	The HFSA must decide on the approval of the transfer within 2 months. However, this deadline may be extended by another 2 months (for example, if the relevant EU regulator does not respond to the notification within 2 months). As mentioned in Section 4(b) above, under certain circumstances, the HFSA must request either a certificate or the consent of the relevant EU regulator. If the relevant EU regulator fails to provide such certificate or fails to provide an answer to the request for consent within 3 months, the certificate or the consent is considered to be given. ***Approval of the proposed insurance/reinsurance portfolio transfer by the HFSA***
Following the approval (no exact deadline is indicated in the applicable laws)	Publication of the decision on the approval of the IPT in two national daily newspapers by the HFSA (not applicable in the case of reinsurance portfolio transfers).
Within 30 days following the approval	The transferee is obliged to notify all policyholders about the transfer in the language of the policy.
Within 30 days following the receipt of the notification	The policyholders are entitled to unilaterally terminate their insurance contract with a 30-day notice period by sending a termination notice to the transferee.

9.2 **Are there any hard legislative or regulatory deadlines?**

The HFSA has 2 months to approve or reject the transfer application, which could be extended by another 2 months (see Section 9.1).

The HFSA must allow 3 months for the relevant EU regulators to respond to the request for certificate or the request for consent of the HFSA.

10. **<u>What key documentation will be produced for the transfer?</u>**

(a) **Portfolio Transfer Agreement:** The transferor and the transferee will sign an (insurance or reinsurance) portfolio transfer agreement, by which the transferor agrees to transfer, and the transferee agrees to accept, the portfolio to be transferred.

(b) **Letter to be sent to the policyholders:** the transferee must send a letter to the policyholders notifying them of the transfer and the consequences thereof.

11. **<u>What professional agents are involved in the transfer and what are their roles?</u>**

(a) **Lawyers**

Lawyers or legal experts are generally involved in insurance and reinsurance portfolio transfers as they play a key role in the drafting of the legal documentation required for the process.

(b) **Accountants**

The involvement of accountants is not required by law, however, such involvement is usually necessary in the course of the transfer process.

(c) **Actuaries**

Actuaries may be involved in order to provide reports on the terms and the possible effects of the transfer.

(d) **Independent Expert**

The process in relation to insurance or reinsurance portfolio transfers does not require the involvement of independent experts. However, the parties may decide to appoint tax advisers and other experts in order to estimate the value of the portfolio to be transferred and the possible effects of the transfer on the various groups of policyholders affected by the transfer.

(e) **Other**

Not applicable.

12. **<u>What legal issues are frequently encountered in transfers?</u>**

Contracts might restrict the insurer's/reinsurer's right to transfer the contract to a third party. Such contracts usually require the prior consent of the other party or provide for a right to terminate the contract in the absence of such prior consent. However, as insurers and reinsurers are usually in a stronger position than the policyholders, generally speaking, insurance or reinsurance contracts do not require the prior consent of the other party for the transfer of the contracts. However, under the Insurance Act and the Reinsurance Act, within 30 days following the notification of the policyholders and contracting parties about the transfer by the transferee, contracting parties are entitled to unilaterally terminate the insurance contract with a 30-day notice period by sending a termination notice to the transferee.

13. **<u>How frequently is the transfer mechanism used?</u>**

13.1 **Is the transfer mechanism commonly used? For what purposes is it used?**

The main purpose of a transfer is to transfer the whole or part of the portfolio of an insurance or reinsurance company through one single procedure.

Transfers are usually used for the following purposes:

(a) portfolio reorganisations;

(b) sales of specific blocks of insurance business;

(c) domestications of overseas branches; or

(d) exit solutions.

13.2 Are there any statistics of the use of the transfer mechanism?

Between 2005 and 2009, the HFSA approved 9 insurance portfolio transfers.

14. <u>What alternative methods can be used to transfer insurance portfolios, and what are the advantages and disadvantages of such methods?</u>

(a) **Novation**

A traditional method of transferring insurance or reinsurance contracts from one entity to another would be to assign each individual contract to the transferee. The main disadvantage of this method is that the assignment of each contract requires the consent of each contracting party.

(b) **100% reinsurance (also described as "run-off"/"portfolio"/"assumption" reinsurance or retrocession, "portfolio transfer" or "reinsurance to close")**

100% reinsurance does not achieve the same effects as a transfer since the liability under the policies remains with the insurance company and the reinsurer only enters into the process if the insurance company cannot comply with its payment obligations.

(c) **Corporate reorganisation**

The merger of the transferor and the transferee is another solution for the transfer of the portfolio. However, this is not an option if the transferor wishes to transfer only a part of its portfolio. In addition, in the case of a merger or demerger, the same provisions apply to the notification of the policyholders and the right of the policyholders to terminate the policy as in the case of an IPT.

(d) **Arrangement/compromise**

Not applicable.

(e) **Other**

Not applicable.

15. <u>What are the relevant sources of law or guidance?</u>

(a) **Statutes**

Act LX of 2003 on Insurance Institutions and the Insurance Business (Articles 93-95).

Act CLIX of 2007 on Reinsurance (Articles 50-52).

Act CXXXV of 2007 on the Hungarian Financial Supervisory Authority.

(b) **Regulations**

Not applicable.

(c) **Guidance**

Guidance of the HFSA on insurance portfolio transfers.

(d) **Jurisprudence**

Not applicable.

(e) **Other**

Published answer of the HFSA on the division of the obligation to keep documentation between transferor and transferee.

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1. General

1.1 Can insurance portfolios be transferred from one entity to another in your jurisdiction?

Yes, subject to certain conditions being met (please see Section 2 below), insurance portfolios can be transferred under Section 13 of the Assurance Act 1909 (the "1909 Act"), Section 36 of the Insurance Act 1989 (the "1989 Act"), Section 35 of the European Communities (Life Assurance) Framework Regulations 1994 (the "Life Regulations") and Section 12 of the European Communities (Non-Life Insurance) Framework Regulations 1994 (the "Non-Life Regulations").

1.2 Can reinsurance portfolios be transferred?

Yes, under Section 22 of the European Communities (Reinsurance) Regulations, 2006 (the "Reinsurance Regulations").

1.3 Are the rules the same for the transfer of direct insurance portfolios as for reinsurance portfolios?

No. The rules vary considerably in relation to reinsurance portfolio transfers and are governed by the Reinsurance Regulations.

1.4 Are the rules the same for the transfer of life portfolios as for non-life portfolios?

The rules pertaining to the transfer of life insurance business and non-life insurance business are similar, however, there are some key differences which are outlined in more detail below.

Unless where expressly stated otherwise, references below to an 'insurance portfolio' refer to a portfolio of either life or non-life insurance policies.

2. What are the requirements for an Insurance Portfolio Transfer ("IPT")?

2.1 What requirements must be met by a *transferor* to undertake an IPT?

Where the transferor's insurance business is transferred to another body (in whole or in part) and will be carried on from an establishment of the transferee in any EEA state, section 13 of the 1909 Act and section 36 of the 1989 Act will apply.

For an IPT to be sanctioned by the Irish courts, the transferor must meet one of the following requirements:

(a) The transferor is an Irish authorised insurance company and the insurance business to be transferred is carried on in either a freedom of services or freedom of establishment basis in one or more EEA state.

(b) The transferor is neither an Irish authorised insurance company nor an EEA authorised insurance company but the insurance business to be transferred is carried on in Ireland and the transferor has permission to carry on such business in Ireland.

(c) The transferor is a direct insurer authorised to carry out insurance business by an EEA supervisory authority other than the Financial Regulator and the business being transferred is reinsurance business carried on in Ireland.

2.2 What requirements must be met by a *transferee* to undertake an IPT?

The transferee must have sufficient authorisation to allow the insurance business which is being transferred to it to be carried on in the place to which it is being transferred.

In addition, once complete, the business being transferred must be carried on from an establishment of the transferee in an EEA member state.

2.3 Are there any requirements relating to the financial condition of the *transferor*?

No.

There are no express requirements in the relevant legislation.

It should be noted that the financial position of the transferor will be considered by the court when determining the validity of the transfer and the possible effect on policyholders. In the petition to the court, the grounding affidavit will set out the history and financial position of both transferor and transferee. In addition, and as part of the transfer of a life insurance portfolio, section 13 of the 1909 Act requires that a report of an independent actuary (the "Report") is prepared and transmitted to each policyholder of each company. The Report will set out the potential consequences of the proposed transfer including any possible implications of the transfer scheme on the security of policyholders' benefits and the impact of the proposed transfer on the benefits ultimately payable under the policies it is proposed will be transferred.

2.4 Are there any requirements relating to the financial condition of the *transferee*?

Yes.

Under the Life Regulations and the Non-Life Regulations, and where an Irish insurance undertaking proposes to transfer an insurance portfolio to either an Irish or other EEA state insurance entity, the court will not sanction the transfer until it is provided with a certificate of solvency from the EEA supervisory authority responsible for supervising and regulating the transferee confirming that the transferee will meet the applicable EU solvency margin requirements after the transfer.

2.5 Is the place where the portfolio was originally underwritten a relevant factor?

Not necessarily.

Before the Financial Regulator will give its consent to any transfer of an insurance portfolio, it is required to consult with and obtain consent to the transfer from the supervisory authorities of each and every EEA state in which any of the direct risks included in the transfer were underwritten. The test of where a risk is "situate" is set out in the Life Regulations and the Non-Life Regulations, respectively. In the majority of cases, this will be where the policyholder in question habitually resides or has his principal establishment.

2.6 **Is the governing law or applicable jurisdiction of the insurance portfolio transferred a relevant factor?**

The governing law and applicable jurisdiction of an insurance portfolio may have a bearing on the enforceability of the Irish court order in non-EEA states.

The court may give directions on advertising the proposed IPT in non-EEA states on the hearing of the petition. The court has jurisdiction to sanction the transfer despite a number of policyholders being outside the EEA. Whether effect will be given to such an IPT under the laws of a non-EEA jurisdiction is ultimately a question of local law and the rules of private international law.

2.7 **What criteria will be applied by the relevant authority in approving the transfer?**

The court will not sanction a proposed IPT unless certain pre-conditions set out under the relevant legislation are met.

Section 13 of the 1909 Act sets out the following requirements that must be met before an application can be made to the court:

(a) Notice of the proposed transfer must be made in Iris Oifigiúil, the Irish State Gazette (see Section 5 below for further details on advertising requirements).

(b) In relation to a life IPT, a statement summarising the transfer, including abstracts from the scheme document and a copy of the independent actuary's report, must be provided to policyholders. This circular includes details of where the scheme documents can be inspected. Commonly, this also incorporates a 'Frequently Asked Questions' section in order to set out in clear terms for policyholders the effect of the proposed transfer. Practically speaking, this tends to avoid a wave of queries from concerned policyholders and commonly reduces the administrative burden involved in dealing with queries.

(c) The scheme document must be open for inspection to policyholders and shareholders of each company at their offices for a period of 21 working days after the publication in Iris Oifigiúil. However, this period will be extended to comply with the maximum inspection period required by the relevant supervisory authorities in the EEA.

Most significantly, the consent of the Financial Regulator as the relevant Irish supervisory authority is required. Before giving its consent, the Financial Regulator will require the following:

(i) consultation with and the consent of the supervisory authorities of each EEA state in which any direct risks of the transferor included in the transfer were underwritten;

(ii) where the transferor is an EEA branch of an Irish insurance entity, the consent of the supervisory authorities of the EEA member states of the branch and the supervisory authorities of the EEA member states in which the risks are situated;

(iii) an independent actuary report (in the case of a life insurance transfer) (as discussed at Section 2.3 above);

(iv) a certificate of solvency issued by transferee's supervisory authority, stating that the transferee will maintain the prescribed EU minimum solvency margin level after taking the proposed assignment into account (as discussed at Section 2.4 above); and

(v) confirmation that the advertising requirements and document inspection requirement of the relevant supervisory authorities in each of the affected member states are complied with. Most notably, there are marked differences in advertising requirements from country to country; some member states require advertising both pre and post-transfer.

In considering the proposed IPT, the Financial Regulator will carefully consider this information and will look generally at whether the transfer will prejudice the rights of the policyholders of both the transferor and the transferee. In the case of life transfers, the independent actuary's report will be a key indicator for the Financial Regulator as to whether the proposed transfer is fair to policyholders or not and as to whether the proposed transfer will have a material adverse effect on policyholder security.

If the Financial Regulator does not consent to the proposed transfer, is it highly unlikely that the Court will proceed to sanction it.

2.8 **Are there any other requirements?**

See below.

3. **<u>What can be transferred along with the insurance or reinsurance contract?</u>**

Section 36(1)(a) of the 1989 Act states that, on approval by the court of the IPT, "the whole or any part of the undertaking and of the property or liabilities of any transferor company" shall be transferred to the transferee company. In practice it is often the case that the court sanction is limited to the insurance portfolio and the required assets to ensure solvency and the parties execute a separate transfer agreement in respect of other assets being transferred.

Section 36 does not expressly grant the court power to transfer outwards reinsurance contracts that may be in place to protect the portfolio. However, section 36(1)(d) of the 1989 Act grants the court power to make provision for "such incidental, consequential and supplementary matters as are necessary to secure that the amalgamation or transfer shall be fully and effectively carried out".

Whilst the wording of the statute is not conclusive, it is arguable that sections 36(1)(a) and (d) of the 1989 Act give power to the court to transfer the benefit of reinsurance protection along with the portfolio itself. This will be important both for the transferor and transferee, particularly if the reinsurance contracts would otherwise prohibit assignment or transfer.

(a) **Assets**

Yes. "Property" for the purposes of section 36 includes property, rights and powers of every description. This would include any assets listed in the business transfer agreement between the parties. Commonly, this could include intellectual property, books and records, information technology systems as well as any rights to refund or rebate in respect of the policies subject to the proposed transfer.

(b) **Liabilities**

"Liabilities" for the purposes of section 36 includes duties owed by the transferor. This would commonly include any liabilities attaching to the policies subject to the proposed insurance portfolio such as any liabilities associated with the marketing, sale and administration of said policies as well as claims admitted but not yet discharged under the policies.

(c) **Real property**

Given the broad definition of "property" in section 36 (see Section 3(a) above), it would appear that real property can be transferred in the same way as other assets. It should also be noted that adherence to local conveyancing property laws and tax laws will also be required when transferring real property as part of an IPT but the scheme could be the operative document if required.

(d) **Reinsurance/retrocession contracts and other ancillary contracts**

A question arises as to whether the reinsurance protection offered by reinsurance contracts, reinsuring an insurance portfolio to be transferred, are 'assets' that can be transferred along with the insurance portfolio. Generally, where this arises the protections are included in the scheme document as assets. It is for the court to consider if they are ultimately assets suitable for transfer. If not, another method of transfer could be employed, such as a novation or a scheme of arrangement, however this would add to the complexity and cost of the entire IPT.

4. **<u>Who must be notified of what, and how?</u>**

(a) **Local regulator(s)**

With regard to IPTs, the Financial Regulator should be notified of the proposed portfolio transfer as soon as is reasonably practicable in advance of the proposed transfer. Notification is normally by way of a written submission to the Financial Regulator and should include an outline of the transfer scheme, its purpose and the proposed timeframes. This is normally followed up with a meeting with the Financial Regulator to discuss the proposed transfer and the proposed timetable. Practically speaking, the transfer timetable is built around the court process and will be prepared in consultation with the Financial Regulator (see Section 9 below for more detail).

With regard to reinsurance portfolio transfers, the transferee's competent authority must give its consent to the transfer. Therefore, the Financial Regulator's consent is required for an inbound transfer of reinsurance portfolios to an Irish entity. Accordingly, any such proposed reinsurance portfolio transfer should be notified to the Financial Regulator as soon as reasonably practicable.

While the consent of the Financial Regulator is not required in relation to an outbound reinsurance portfolio transfer (i.e. where an Irish established and Financial Regulator regulated undertaking is transferring its portfolio to a transferee located outside of Ireland), the Financial Regulator should, as a matter of prudence be advised of the proposed transfer in advance. Note that no court sanction is required in respect of a transfer of reinsurance contracts.

(b) **Other regulator(s)**

As outlined at Sections 2.5 and 2.7 above and in relation to IPTs, the supervisory authority of the transferor must consult with, and obtain consent from, the supervisory authorities of each and every state in the EEA within which the transferor's direct risks included in the transfer are underwritten. The test of where a risk is "situate" is set out in the Life Regulations and the Non-Life Regulations respectively. In most cases, this will be where the policyholder in question habitually resides or has his principal establishment. The supervisory authorities of the relevant EEA state are given 3 months within which to object to the transfer, after which time they are deemed to have agreed. It is important to note in that this 3 month period will have to be built into the process timetable.

If the business to be transferred is carried out in an EEA branch of an Irish insurance company, the relevant host state supervisory authority must also be notified of the IPT and such a transfer cannot proceed without the consent of that state's supervisory authority.

In addition to the above, and in relation to IPTs, the transferor's supervisory authority must obtain a certificate of solvency from the transferee's supervisory authority, stating that the transferee will maintain the prescribed EU minimum solvency margin level after taking the proposed assignment into account.

With regard to a life transfer, if an individual policyholder is domiciled in another EEA state other than Ireland, the Financial Regulator will be required to notify the supervisory authority in that EEA state. With regard to non-life transfers, the state within which the risk is located will be relevant and the Financial Regulator will be required to notify and seek the consent of the supervisory authority in that state.

The Reinsurance Regulations do not stipulate a requirement to consult with other supervisory authorities in relation to reinsurance portfolio transfers. However, a process of consultation would generally be engaged in between the Financial Regulator and relevant supervisory authorities in respect of an inbound/outbound reinsurance portfolio transfer pursuant to the Reinsurance Regulations.

(c) **Policyholders**

Where the transfer relates to non-life insurance business only, there is generally no requirement to circulate the documentation to all policyholders save where an individual EEA regulator makes a direction which has the effect that its consent will not be given without it. This can occur from time to time.

Otherwise, and in relation to life insurance business, notice of the application to transfer must be given to every policyholder of the transferor and the transferee. The 1909 Act requires that prior to the transfer, each of the policyholders must be provided with a statement of the nature of the transfer, together with an abstract containing the material facts embodied in the agreement or deed under which the transfer is proposed to be effected, and copies of the actuarial or other reports upon which the transfer is founded, including a copy of the independent actuary's report (see Section 2.7 above). There is an ability to apply to the court to waive the provision to send all of this documentation and the court may agree that a summary document is more appropriate.

Practically speaking, having to send the documentation to policyholders causes some difficulties where a book of business is not active – addresses may not be up to date and notification can prove impossible or unrealistic.

The Life Regulations and the Non-Life Regulations set out specific advertising requirements (discussed in more detail at Section 5 below). The parties can apply to the court for a dispensation in relation to the notice requirement in part or in full. The court can use its discretion to absolve the parties of the notification where it is of the view that the policyholders are unlikely to be affected by the transfer or that other methods of notification will more effective in securing the attention of the effected policyholders.

In respect of reinsurance portfolio transfers involving a reinsurance undertaking established in Ireland, there are no formal policyholder notification obligations stipulated in the Reinsurance Regulations. Notwithstanding this, it may be prudent to take steps to inform reinsureds of a proposed portfolio transfer. Such steps would commonly follow the steps taken in IPTs as set out above.

(d) **Beneficiaries of cover other than actual policyholders**

There is no requirement to give notice to beneficiaries of cover other than policyholders. However, it is considered prudent and best practice to give notice to anyone interested in the policies transferred who has notified the transferor of their interest.

In respect of reinsurance portfolio transfers, there are no formal notification obligations stipulated in the Reinsurance Regulations in respect of beneficiaries.

(e) **Reinsurers**

There is no specific provision requiring that reinsurers be notified of the transfer and it would appear that doubts relating to whether notification is required or not may only be relieved by obtaining the individual consent of the reinsurers of the individual policies. However, each individual reinsurance treaty may contain terms that require an insurance company to notify a reinsurer reinsuring that insurance company's risk of any transfer or assignment of such risk. These treaties would need to be examined on a case by case basis.

(f) **Brokers**

There is no general requirement to give notice to brokers (save reinsurance brokers as explained above). However, the transferor or the transferee may not always have adequate records of their policyholders where the contracts were placed through brokers.

In respect of reinsurance portfolio transfers, there are no formal notification obligations stipulated in the Reinsurance Regulations in respect of brokers.

(g) **Others**

Not applicable.

(h) **Further notice requirements**

Publication requirements vary between the EEA states and some states have both pre and post-transfer publication requirements. Individual advice should be sought from each state as to the exact requirements relating to transfers of risk located within that state.

5. **<u>What publicity requirements are there for IPTs?</u>**

(a) **Newspapers**

A notice of the application for transfer of an insurance portfolio must be published in a minimum of two national newspapers in Ireland and in Iris Oifigiúil, the Irish State Gazette. Where the insurance policyholder is domiciled outside of Ireland or where the risk is located outside of Ireland, the notice of the application for transfer must also be published in accordance with the publicity requirements in the relevant EEA state within which the policyholder is domiciled or the risk is located. As previously noted, these requirements vary between the EEA states and some states have both pre and post-transfer publication requirements.

The Reinsurance Regulations do not specify any specific publication requirements, however, it is prudent that, where non-Irish reinsurance contracts are included in the transfer, a notice of the application for transfer be published in a business newspaper in any EEA state where an interested reinsurer was established at the time when the reinsurance contract was entered into. This reflects the practice in the UK.

Each notice of a proposed IPT to be published must be approved by the court and must set out details of where the policyholders can view the scheme document and the independent actuary's report. All documents must be made available to policyholders free of charge.

Practically speaking, once the court petition has been issued, the court will then issue directions to the parties at the hearing of the motion for directions (application). This is usually heard within 2 – 3 weeks of the petition being issued. It is at this point that the court will hear applications for dispensation from publication and/or circulation of documentation and will issue the transferor with directions on the advertising required and as to where and in what form the scheme documents must be inspected and as to whether circulation of the scheme documentation to all policyholders is required.

(b) **Official Gazette/Journal**

A notice of the application for an IPT must be published in Iris Oifigiúil, the Irish State Gazette.

(c) **Trade magazines**

There is no legal or regulatory obligation to publish a notice of the application for an insurance or reinsurance portfolio transfer in trade magazines. However, where the transferor is of the view that it is too onerous or futile a task to notify a certain class of policyholder, a dispensation can be sought from the court and it is possible that a publication in a trade magazine could count as a welcome substitute in the eyes of the court.

(d) **Register of Companies**

There are no express requirements relating to publication of any of the insurance or reinsurance portfolio documents with the Companies Registration Office.

(e) **Other**

None specified.

6. **<u>Who has the right to object to the transfer?</u>**

(a) **Regulator(s)**

As noted above, the consent of the Financial Regulator is required before the court will issue its consent to an IPT. Accordingly, the Financial Regulator has the right to object to such a transfer. Such an objection would most likely arise where the Financial Regulator finds that the scheme is unfair to a class of policyholders or has a material adverse effect on policyholders' security. While the final decision about a proposed IPT lies with the court, in practice the court is highly unlikely to sanction a transfer if the Financial Regulator objects to it.

In practice, the Financial Regulator is very involved in the IPT process from the informal discussions with the parties to the transfer and the informal approval of all documentation to the consultation and liaison with any relevant EEA supervisory authorities to seek consent to and approval of the proposed transfer.

With regard to reinsurance portfolio transfers, the Financial Regulator's consent is required in respect of the transfer of a portfolio of reinsurance contracts to a reinsurance undertaking established in Ireland, whether or not the transferor is established in Ireland.

In the case of outbound reinsurance portfolio transfers, as the supervisory authority of the entity to which the portfolio is to be transferred is the approving authority, it would appear that the role of the Financial Regulator would be limited to making representations to the supervisory authority of the transferee.

(b) **Policyholders**

Policyholders have the right to be heard at the hearing of the court petition to transfer an insurance portfolio. In addition, each policyholder can make written submissions or objections to the Financial Regulator in relation to the proposed IPT.

In respect of reinsurance portfolio transfers, the Reinsurance Regulations do not specify any formal mechanism pursuant to which a policyholder may object. It is unclear therefore, as to how a policyholder's objections would be formally raised and indeed how objections would be dealt with by the Financial Regulator. It would, of course, be open to such policyholders to submit objections to the Financial Regulator; however, it would appear that the Financial Regulator would not be compelled to take any action on foot of an objection.

(c) **Beneficiaries of cover**

Beneficiaries of cover (such as beneficiaries of life policies or beneficiaries under trust arrangements) could be argued to be in the same position as policyholders given that they may be adversely affected by an IPT. Therefore, while it is accepted practice that they have the right to be object to the transfer, it would appear that the Financial Regulator would be not compelled to take any action on foot of an objection.

With regard to reinsurance portfolio transfers, please see responses in relation to policyholders above at Section 6(b).

(d) **Reinsurers**

As with beneficiaries of cover, reinsurers may also be adversely affected by the transfer and could, accordingly, have a right to object to the transfer. It is not clear, however, what grounds, if any, a reinsurer would base an objection to the Financial Regulator on. Little guidance has been published in this regard and it would appear that the Financial Regulator deals with each case on its own individual merits.

(e) **Trade associations**

Trade associations have no right to object to the transfer.

With regard to reinsurance portfolio transfers, please see responses in relation to policyholders above at Section 6(b).

(f) **Employees**

Employees have no specific right to object to the transfer however, it is arguable that, as employees, they may also be adversely affected by the transfer and could, accordingly, have a right to object to the transfer. It would appear, however, that the Financial Regulator would be not compelled to take any action on foot of an objection.

With regard to reinsurance portfolio transfers, please see responses in relation to policyholders above at Section 6(b).

(g) **Others**

Section 13 of the 1909 Act states that the court may sanction an arrangement to transfer policies only after hearing from "the directors and other persons whom it considers entitled to be heard upon the petition". This could be argued to include parties such as creditors who the court may see as having an interest in the transfer and it would fall to the court's inherent jurisdiction to determine who can be heard under this section.

7. Who must approve and/or sanction the transfer?

(a) Local regulator

The Irish High Court approves the IPT – the Financial Regulator does not do so. However, as outlined above, the court will rarely sanction the transfer if the Financial Regulator objects to it.

As part of the approval process, the Financial Regulator will outline to the court its objections to or approval of the proposed IPT. Given the ongoing liaison that the transfer parties have with the Financial Regulator throughout the process of the IPT, it would be unusual for the Financial Regulator to raise issue with the transfer at a late stage – any material issues would be raised by the Financial Regulator with the transfer parties at an early stage of proceedings and the documents would be amended to reflect and deal with the Financial Regulator's concerns regarding the proposed IPT.

The same applies in respect of a reinsurance portfolio transfer, as the approval of the Financial Regulator is required where the portfolio of reinsurance contracts is transferred to a reinsurance undertaking established in Ireland, whether or not the transferor is established in Ireland. The approval of the Financial Regulator is not required in respect of a transfer of a reinsurance portfolio where the transferee is a reinsurance undertaking established outside Ireland.

(b) Other regulator(s)

Where the Financial Regulator is required to notify an EEA supervisory authority of the proposed IPT affecting risk or policyholders located within that EEA state, such EEA supervisory authority has the right to refuse to consent to the proposed transfer. In that case, the affected part of the insurance business cannot be transferred. Consent will, however, be presumed where the EEA supervisory authority has not responded to the Financial Regulator within 3 months of notification.

The Reinsurance Regulations do not stipulate a right for other supervisory authorities to object to a proposed reinsurance portfolio transfer. Generally, a process of consultation would be engaged in between the Financial Regulator and relevant supervisory authorities in respect of an inbound/outbound reinsurance portfolio transfer pursuant to the Reinsurance Regulations.

(c) Court

The transfer of an IPT cannot proceed without Irish High Court sanction.

No court sanction is required in respect of the transfer of a reinsurance portfolio pursuant to the Reinsurance Regulations.

8. What jurisdictional conditions apply to the transfer?

8.1 What types of insurance portfolio are capable of transfer in Ireland?

All types of insurance business can be transferred.

8.2 Does the transferring portfolio need to be legally or commercially connected to the state where the transfer is effected?

Recent case law in the UK[149] suggests that insurance business can be transferred even where only a small proportion of transferring policies is governed by local law. A comparable case has not arisen before the Irish courts and it is not clear how persuasive a decision of the English High Court may be in the event that such a case were to arise in Ireland.

Transferors should also be mindful of potential enforceability problems in foreign jurisdictions where the policies are not governed by Irish law.

8.3 Will the transfer be effective in jurisdictions other than those of the transferor and/or transferee?

Please see Section 12(b) below.

8.4 What effect will the transfer have on arbitration clauses?

Rights and obligations under an arbitration clause will transfer to the transferee pursuant to the court order sanctioning the transfer.

9. What is the procedure and timing of the transfer?

9.1 What is a typical timeline for an IPT?

Stage	Step	Timing
1.	Parties to negotiate business transfer agreement, conditional on regulatory approval.	Variable depending on the progress of negotiations between the parties.
2.	Parties to approach Financial Regulator and any other relevant regulators to inform them of the proposed IPTs when negotiations are sufficiently advanced to permit this.	Requires assessment of relationship with Financial Regulator and any other relevant EEA regulators, but should be done in good time before signing binding contract.
3.	Once transfer agreement is negotiated and agreed, commence drafting of petition and preparation of grounding affidavit and supporting evidence.	Requires liaison with barrister and actuarial input for life transfer, but in principle three to four weeks is sufficient; August/September are court vacations and this needs to be factored into the timeframe.
	Consider relevant EEA jurisdictions and the pre-IPT advertisement requirements in each	Timeframe depends on the requirements of each relevant EEA jurisdiction. Timelines vary from 30 to 60 days notice.

149. Sompo v Transfercom, [2007] EWHC 146 (Ch)

Stage	Step	Timing
	relevant EEA state. Place pre-IPT notification advertisements in relevant EEA jurisdictions.	
4.	Issue petition and lodge evidence in support.	Commence court process.
5.	Motion for directions heard by Court.	Within two weeks of issue of petition.
6.	At hearing, court directs: a) the method by which the proposed IPT must be advertised and will approve the template for the advertisement; b) the methods by which policyholders will be notified; c) the method by which the scheme and proposed IPT documents must be made available for inspection; d) makes directions in relation to dealing with policyholder queries and notification of policyholders; and e) will set the date for the hearing of the petition.	Ideally, and in order to allow for the delay in the Financial Regulator making contact with the other relevant regulators in the EEA and for the requirements and advertising to be adhered to, a period of 4 to 5 months should be budgeted to allow consent to issue if necessary. Time should also be budgeted for any tax issues that may arise.
7.	Comply with court directions at Section 6 above.	In Ireland, documentation relating to the proposed IPT must be available for 21 working days and in the case of a life transfer there will need to be a circulation to policyholders; other EEA regulators may have additional requirements.
8.	Irish Financial Regulator consults other relevant EEA regulators (if applicable) in relation to the proposed IPT.	EEA state regulators have up to three months to respond, and may impose further requirements in relation to advertising in their territories, or notifications to policyholders in their territories.
9.	Comply with requirements of other EEA state regulators.	Timing varies and depends on complexity of each individual EEA state requirements.
10.	Once all requirements are complied with, obtain consent of Irish Financial Regulator and return to court for final approval.	Variable, but in principle two to three weeks from completion of all requirements.
11.	Various parties (as outlined at Section 6 above) have the right to audience at the petition hearing. At this hearing, the court will assess the transfer application on its merits and, if it sanctions the proposed IPT, it is subject to compliance with any post-transfer advertisement requirements imposed by the Irish Financial Regulator or by the regulators of the various relevant EEA states.	Petition hearing date is set at the motion for directions – this is usually no earlier than 1 month after the directions hearing and would normally be 4 to 5 months after the directions hearing.
12.	Comply with any post-transfer notification and advertisement requirements imposed by Irish Financial Regulator or other EEA state regulators.	

Note that in respect of the transfer of a reinsurance portfolio pursuant to the Reinsurance Regulations, Steps 1, 2 and 3 above (only to the extent of entering into transfer agreements) would apply as no court sanction is required in respect of reinsurance portfolio transfers.

9.2 Are there any hard legislative or regulatory deadlines?

Relevant EEA regulators have 3 months to respond to notification by the Financial Regulator of the proposed IPT. However there can be delays in the Financial Regulator making the request so a period of 4 months should be budgeted for these responses.

Documentation relating to the proposed IPT must be available for inspection for a minimum of 21 working days. This period may require extension to take account of other EEA regulator requirements.

There are no stipulated legislative or regulatory deadlines in respect of the transfer of a reinsurance portfolio pursuant to the Reinsurance Regulations.

10. **<u>What key documentation will be produced for the transfer?</u>**

The following key documents will typically be produced for the purposes of an IPT:

(a) **Board Resolutions:** the proposed IPT must be approved and ratified by the board of directors of each of the transferor and transferee companies. These documents would be attached as an exhibit to the Grounding Affidavit detailed at (e) below.

(b) **Scheme of Transfer:** the scheme records the terms on which the insurance portfolio is to be transferred and states the conditions precedent to the transfer (principally regulatory approvals and court approval). It defines the operative time of the transfer, specifies the effect of the transfer, defines the portfolio to be transferred and specifies the assets to be transferred. The scheme will usually exhibit a listing of the policies to be transferred.

(c) **Transfer Agreement:** it is optional to move the petition on the basis of a full transfer agreement where tangible or intangible assets other than reserves or solvency margin items are to be transferred; it will take the form of a standard asset transfer agreement specifying the assets to transfer and making provisions relating to the transfer of any employees, pension arrangements and so forth.

(d) **Petition:** this exhibits the draft scheme of transfer and petitions the court's approval for the scheme.

(e) **Grounding Affidavit**: this will rehearse the history of both transferor and transferee companies, confirms the authorisation status of each company, states the rationale for the IPT and confirms that each company is authorised to enter into the IPT and that the transfer has been approved by each company's respective board of directors. The affidavit confirms the steps that are proposed to be taken in relation to advertising the proposed IPT and consulting the Irish and relevant overseas regulators and also confirms (which should be the case) that after the transfer, the transferor will be in a position to meet its liabilities until it is wound up or dissolved (if applicable).

(f) **Exhibits to Grounding Affidavit**: these will comprise copies of the certificates of incorporation and authorisation and memorandum and articles of association of both transferor and transferee, together with a copy of the draft scheme. Copies of the accounts of both companies are usually also exhibited.

(g) **Notice of Motion for Directions**: this will specify the directions sought in relation to advertising and publication of the proposed IPT.

(h) **Form of Advertisement of the IPT**: this will be annexed to the Notice of Motion for Directions and the court's approval of the specific form of the advertisement will thereby be obtained.

(i) **Verifying Affidavit**: before the final hearing of the petition, a verifying affidavit is required certifying that all conditions precedent to the scheme (other than court approval) have been met and that all requirements of the court in the order for directions have been complied with. This will exhibit the Financial Regulator's approval letter referred to above.

(j) **Affidavits of Service**: Affidavits of Service of the Notice of Motion and Grounding Affidavit and of the Verifying Affidavit are exhibited as evidence of the service of such documents on the Financial Regulator in Ireland.

(k) **Certificate of Solvency**: this will be required before the Financial Regulator will give its approval to the proposed IPT.

(l) **Regulator's Approval Letter**: this will be forthcoming following the conclusion of the consultation/publication process, and the terms thereof are generally agreed between the Financial Regulator and lawyers acting in the matter.

In addition to the above, and specifically in relation to life IPTs, the following further documents are required:

(m) **List of policyholders**: this will be drawn up by the transferor and will be in accordance with the latest information on file for each policyholder. This is used as an exhibit to the court documents and when circulating the necessary documents to the relevant policyholders.

(n) **Independent Actuary's Report**: as discussed, an independent actuary's report must be commissioned in relation to a proposed IPT. A copy of this report must be made available to policyholders and must be made available for inspection in accordance with court directions. More details on this report are set out at Section 2.3 above.

(o) **Circular/Notice to Policyholders**: as discussed, life insurance policyholders must receive a specified level of information in relation to a transfer of life insurance policies. More details of the content of this circular are set out at Section 2.7 above.

(p) **Affidavit of Print Company**: companies undertaking an IPT often engage print and distribution companies to assist in distributing the circulars to policyholders. In such an event, the transfer parties would prepare a list of all relevant policyholders to whom notice and a copy of the scheme document must be provided and would provide this list to the print company. The print company would swear an affidavit swearing that the circulars were distributed in accordance with such instructions. This affidavit would be exhibited before the Court before the final hearing.

Note that in respect of the transfer of a portfolio of reinsurance contracts pursuant to the Reinsurance Regulations, the documents mentioned in Sections 10(a), (b) and (c) are relevant. Regulatory certification of the Financial Regulator will be required where the transferee is a reinsurance undertaking established in Ireland (see Section 10(i) above). The Financial Regulator may also require sight of a certificate of solvency (see Section 10(j) above) in respect of outbound reinsurance portfolio transfers (i.e. where a reinsurance undertaking established in Ireland is a transferor).

11. **<u>What professional agents are involved in the transfer and what are their roles?</u>**

(a) **Lawyers**

Given the level of court interaction in an IPT, lawyers play a key role. Other than the drafting of all of the legal documentation required for the process, including the Business Transfer Agreement, the scheme document, the relevant circulars and notices to be issued as well as all relevant affidavits, the lawyers would usually act as the liaison between those parties objecting to the transfer and the transfer parties. Lawyers would also deal with the national newspapers and relevant publications in relation to the publication of relevant notices.

(b) **Accountants**

Accountants play a more minor role in the transfer process and would commonly deal with the tax authorities in relation to any possible taxation issues that may arise.

(c) **Actuaries**

In relation to life transfers, the actuaries provide a key element to the process in the form of the Independent Actuary's Report. Without this report, life IPTs will not be possible and the appointed actuaries of each of the transferor and the transferee will work with the independent actuary to assist with the completion of its report. In addition, the actuaries will also work with the Financial Regulator and any relevant authorities to assist in explaining the relevant report.

(d) **Independent Expert**

Not applicable.

(e) **Other**

Not applicable.

12. **<u>What legal issues are frequently encountered in transfers in your jurisdiction?</u>**

(a) **Clauses in contracts purporting to prohibit or restrict a party's ability to transfer the business**

It is possible that the contracts of insurance or reinsurance may contain provisions that restrict a party's right to transfer the business the subject of the contract to another person. Each contract must be reviewed in order to ascertain what parties consent is required from before the transfer can take place.

(b) **Enforcement of the transfer in foreign jurisdictions?**

Whether an order of the Irish court sanctioning the proposed IPT will be effective in a non-EEA jurisdiction is ultimately a question of local and international law and will vary according to the jurisdiction the transfer is being conducted into and within which the risk and/or the policyholders are located. If such a question falls to be decided within the EU, the question will ultimately be decided in accordance with Brussels I (Regulation (44/2001)) which replaced the Brussels Convention on Jurisdiction and Enforcement of Judgments of 1968.

An issue which arises in relation to the transfer of reinsurance portfolios pursuant to the Reinsurance Regulations is the binding nature of a transfer. In most instances, the governing law of the relevant reinsurance contracts will not be Irish law and the relevant cedants will not be in Ireland. Where the cedants are based in another EU/EEA member state and the contract is governed by the law of an EU/EEA member state, it would appear that the transfer is binding on those reinsureds as a matter of EU/EEA. However, the position of non-EU/EEA member states is less clear and it would be necessary to take advice in the relevant territories to establish what legal effect (if any) could be given to a portfolio transfer effected pursuant to the Reinsurance Regulations.

(c) **Solvency considerations**

The independent actuary, in preparing its report, will consider the post-solvency of the parties involved in a life insurance transfer and will report accordingly to the Financial Regulator.

As a reinsurance undertaking established in Ireland may not acquire a portfolio of reinsurance contracts held by another reinsurance undertaking unless it has obtained approval from the Financial Regulator, a certificate to the effect that, after taking the acquisition into account, the undertaking will have the solvency margin required by the Reinsurance Directive is required and, on this basis, solvency could be considered to be a material consideration in respect of a reinsurance portfolio transfer.

(d) **Disclosure (for example to interested parties or objectors)**

As outlined above, and in relation to life IPT, policyholders are entitled to copies of the proposed scheme documents and the independent actuary's report. It is possible that some policyholders may request further information and the parameters of what level of information can be extended to individual policyholders is not set out in the relevant legislation. We have not yet encountered such difficulties in this jurisdiction.

In respect of reinsurance portfolio transfers, please see various responses above relating to notification and objection requirements.

(c) **VAT**

The accepted view in Ireland is that, given the exception from VAT for insurance services, any transfer of an insurance portfolio would also be exempt from VAT. It is noted that recent ECJ case law in relation to a reinsurance portfolio transfer suggests that such reinsurance transfers could be liable for VAT[150] and, therefore, careful consideration must be given to each case on its merits.

13. **How frequently is the transfer mechanism used?**

13.1 **Is the transfer mechanism commonly used? For what purposes is it used?**

Portfolio transfers are very common in Ireland and are used in many different circumstances, including:

(a) intra-group reorganisations;

(b) sales of blocks of insurance business;

(c) domestications of overseas branches;

(d) demutualisation of mutual insurance companies;

(e) re-attributions of inherited estate by life companies;

(f) fund restructuring, particularly for life companies; and

(g) exit solutions, with or without an intended solvent scheme of arrangement to follow.

13.2 **Are there any statistics of the use of the transfer mechanism?**

None available.

14. **What alternative methods can be used to transfer insurance portfolios, and what are the advantages and disadvantages of such methods?**

(a) **Novation**

Where there is a small volume of policyholders it may be possible to novate the contracts of insurance at common law whereby the incoming insurer steps into the shoes of the outgoing insurer. To do so, it would be necessary to argue that the proposed arrangement is not a portfolio transfer for the purpose of Irish legislation. Accordingly, and where no material issues arise, it seems difficult to see how the Financial Regulator would object to individual consents to the transfer being obtained as opposed to embarking on a court approved procedure, particularly in circumstances where there are a small number of policyholders and where the policyholders are commercial entities rather than ordinary individuals.

However, one must remember that the Financial Regulator has inherent supervisory jurisdiction and it would be necessary to notify the Financial Regulator of any such transfers/novations. The Financial Regulator would have the right to object to any transfer that was, in its view, likely have an affect on the solvency of the parties. Other disadvantages of this method include the time, practicality and expense of having to identify and deal with all individual policyholders and the problems caused if any of them to not wish their policies to be transferred however, in certain circumstances where only a few policies exist, this is an option to consider.

(b) **100% reinsurance (also described as "run-off"/"portfolio"/"assumption" reinsurance or retrocession, "portfolio transfer" or "reinsurance to close")**

Liability under the policies remains with the cedant and the cedant acquires the credit risk of the reinsurer. Therefore, when compared to the transfer as we have outlined, this process does not achieve the same effect.

(c) **Corporate reorganisation: Merger**

Section 13 (4) of the 1909 Act states that no assurance company shall "amalgamate" with another or transfer its business unless the court has sanctioned the transfer/amalgamation in accordance with section 13. There is potentially an argument that a merger falls within the scope of section 13.

(d) **Arrangement/compromise**

A scheme of arrangement is a statutory procedure provided for by section 201 of the Companies Act 1963 whereby an insurance company can make a compromise or arrangement with its members, a class or classes of its members or its creditors or class of creditors. In practice, the scheme changes the obligor under each of the insurance contracts and has the effect of transferring the portfolio of policies from the transferor to the transferee. The provisions of such a scheme can provide for the dissolution of the acquired company. However, a Scheme is administratively burdensome and a crucial aspect in respect of a Scheme is the identification of the proper classes of members and creditors. Court approval of the scheme of arrangement is required.

(e) **Other**

Not applicable.

15. **What are the relevant sources of law or guidance?**

(a) **Statutes**

Assurance Act 1909.

Insurance Act 1989.

Companies Acts 1963-2009.

(b) **Regulations**

European Communities (Reinsurance) Regulations 2006.

European Communities (Non-Life Insurance) Framework Regulations 1994.

European Communities (Life Assurance) Framework Regulations 1994.

(c) **Guidance**

Not applicable.

150 Swiss Re Germany Holding GmbH v Finanzamt München für Körperschaften (Case C-242/08).

(d) **Jurisprudence**

Swiss Re Germany Holding GmbH v Finanzamt München für Körperschaften (Case C-242/08).

(e) **Other**

Not applicable.

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1. General

1.1 Can insurance portfolios be transferred from one entity to another in your jurisdiction?

There is no specific set of provisions dealing with the transfer of insurance portfolios. An insurance portfolio can be transferred in accordance with the general legal principles of contracts, corporations and insurance as detailed hereunder.

1.2 Can reinsurance portfolios be transferred?

Yes (see Section 1.1 above).

1.3 Are the rules the same for the transfer of direct insurance portfolios as for reinsurance portfolios?

Both the transfer of insurance business and reinsurance business are subject to the Contracts Law (General Part) 1973 (the "Contracts Law") and to the Assignment of Obligations Law 1969 (the "Assignment of Obligations Law"). In addition, both transactions are subject to the procedures set under the Companies Law 1999 (the "Companies Law") for approval of an arrangement with a company's creditors (see further details hereunder).

Insurance companies are subject to the Supervision over Financial Services (Insurance) Law 1981 (the "Supervision Law"), which requires the approval of the Commissioner of Insurance to the insurance portfolio transfer. Reinsurance business is not subject to this Law.

1.4 Are the rules the same for the transfer of life portfolios as for non-life portfolios?

Yes.

2. What are the requirements for an Insurance Portfolio Transfer ("IPT")?

2.1 What requirements must be met by a *transferor* to undertake an IPT?

There is no specific set of provisions which deals with an IPT and thus, such transaction is subject to the general rules which apply to transferring business from one company to another. Pursuant to section 6 of the Assignment of Obligations Law the liability of a debtor can generally be transferred by agreement between the debtor and the transferee; such agreement must receive the consent of the creditor. Accordingly, the IPT requires the consent of the insureds.

The Companies Law sets out a procedure according to which a company may reach an arrangement with its creditors without obtaining explicit consent from each creditor. This procedure includes receiving the court's approval for calling a creditors' assembly, approving the arrangement with a majority of three-fourths of the voting powers and eventually receiving the court's approval for the arrangement. After following this procedure the arrangement is binding on all creditors including those who did not participate in the creditors' assembly or objected to the arrangement.

In past IPTs carried out in Israel the transferor acted in accordance with the procedure set out in the Companies Law and received approval of the transaction in court and in creditors' assemblies (including assemblies of insureds, brokers and other creditors of the company).

Another requirement which must be met by the transferor is set out in section 63 of the Supervision Law, pursuant to which an insurer who decided to cease writing insurance (generally or in a certain branch) is required to immediately notify this decision to the Commissioner of Insurance.

2.2 What requirements must be met by a *transferee* to undertake an IPT?

The IPT requires the approval of the Commissioner of Insurance who will ensure that:

(a) the transferee is licensed to carry out insurance business in the relevant field;

(b) the financial condition is sufficient; and

(c) the transaction is not to the detriment of the insureds.

2.3 Are there any requirements relating to the financial condition of the *transferor*?

No.

2.4 Are there any requirements relating to the financial condition of the *transferee*?

There are no specific requirements as to the financial condition of the transferee. However, its financial condition will be examined by the Commissioner of Insurance before approving the transaction. In addition, the transferee must have the means to maintain sufficient reserves for the risks it has accepted.

2.5 Is the place where the portfolio was originally underwritten a relevant factor?

The Supervision Law applies to an insurer underwriting business in Israel or to an insurer that was incorporated in Israel. A foreign insurer that does not underwrite its business in Israel is not subject to the supervision of the Commissioner of Insurance.

2.6 Is the governing law or applicable jurisdiction of the insurance portfolio transferred a relevant factor?

An insurer underwriting business in Israel will be subject to the supervision of the Commissioner of Insurance no matter the governing law or applicable jurisdiction agreed upon in the policy.

2.7 What criteria will be applied by the relevant authority in approving the transfer?

See above.

2.8 Are there any other requirements?

As mentioned, there is no specific requirement set by the law. The Commissioner of Insurance and the court have broad discretion to examine any factor they find relevant.

3. **What can be transferred along with the insurance or reinsurance contract?**

(a) **Assets**

Assets can be transferred along with insurance policies just as in any sale of property as long as both the transferor and the transferee continue fulfilling the rules set out under the Supervision over Insurance Business (Means of Investment of the Capital and Funds of an Insurer and the Management of its Liabilities) Regulations 2001 (the "Supervision (Means of Investment) Regulations").

(b) **Liabilities**

Pursuant to the Assignment of Obligations Law, liabilities can be transferred subject to the agreement of the creditors.

(c) **Real property**

Real property can be transferred subject to the Supervision (Means of Investment) Regulations.

(d) **Reinsurance/retrocession contracts and other ancillary contracts**

According to the law, the rights of a creditor can be transferred without the consent of the debtor. Therefore, in the absence of contradictory contractual terms the right to receive reinsurance benefits can be transferred even without the reinsurer's consent. Conversely, the duties undertaken by the insurer under the reinsurance contract cannot be assigned without the reinsurer's specific consent. In any case, if the reinsurance agreement prohibits the insurer from assigning its rights the contractual term must be followed.

It should be noted that in previous IPTs made in Israel, the Commissioner of Insurance conditioned his approval on receiving all reinsurers' consent to the transaction.

4. **Who must be notified of what, and how?**

(a) **Local regulator(s)**

A notification must be sent to the Commissioner of Insurance for approval. The Commissioner of Insurance will examine the IPT agreement and any information which he deems relevant. Under certain circumstances the IPT agreement must also be notified to and approved by the Anti-Trust Supervisor.

(b) **Other regulator(s)**

See (a) above.

(c) **Policyholders**

Policyholders should be informed of the proposed IPT and they should be given the opportunity to object to the transaction within the framework of the creditors' assembly to which they will be invited.

(d) **Beneficiaries of cover other than actual policyholders**

The law is not clear as to the duty to notify the beneficiaries of the IPT. In our opinion no such notification has to be given.

(e) **Reinsurers**

Reinsurers must be notified of the IPT.

(f) **Brokers**

If the portfolio transferred includes the insured's obligation towards brokers then the brokers must be notified of the transaction and they should be given the opportunity to object to the transaction within the framework of the creditors assembly to which they will be invited.

(g) **Others**

Any creditor of the transferor who might be adversely affected by the transaction must be notified.

(h) **Further notice requirements**

As the IPT has tax implications, notification should be given to the tax authorities.

5. **What publicity requirements are there for IPTs?**

(a) **Newspapers**

If the court does not order otherwise, the IPT should be published in four daily newspapers which are widespread in Israel, one of which is in Arabic and another in Russian.

(b) **Official Gazette/Journal**

Not required.

(c) **Trade magazines**

Not required.

(d) **Register of Companies**

The motion to approve the IPT and the court's decision must be notified to the Companies Registrar.

(e) **Other**

When a publicly traded insurer is involved in an IPT, notification must be given to the Securities Authority.

6. **Who has the right to object to the transfer?**

(a) **Regulator(s)**

The Commissioner of Insurance and - under certain circumstances - the Anti-Trust Supervisor have the right to object to the transfer.

(b) **Policyholders**

Policyholders can object to the transfer. If the transaction is approved by the court and by the creditors' assembly with a majority of 75%, the decision is binding on all policyholders.

(c) **Beneficiaries of cover**

The law is not clear as to the beneficiaries' right to object to the transfer. In our opinion, they do not have such a right.

(d) **Reinsurers**

In cases where the reinsurance agreement restricts the insurer's right to assign his rights or duties, then the terms of the agreement must be followed. If the agreement does not include such a restriction the reinsurer cannot object to the transfer of the insurer's right to receive insurance benefits.

However, reinsurers can object to the transfer of the insurer's duties under the reinsurance agreement. In fact, in previous IPTs made in Israel, the Commissioner of Insurance required reinsurers' consent to the transfer before he approved the transaction.

(e) **Trade associations**

Not applicable.

(f) **Employees**

As long as no employment agreement is breached within the framework of the IPT, employees cannot object.

(g) **Others**

The IPT must be approved by creditors' assemblies of all types of creditors which may be adversely affected as a result thereof, including insurance brokers and banks.

7. **<u>Who must approve and/or sanction the transfer?</u>**

(a) **Local regulator**

An approval of the transaction must be received from the Commissioner of Insurance and in certain circumstances also by the Anti-Trust Commissioner.

(b) **Other regulator(s)**

See (a) above.

(c) **Court**

The court must first approve the convening of the creditors' assembly. After their approval, the court has to approve the IPT as well.

8. **<u>What jurisdictional conditions apply to the transfer?</u>**

8.1 **What types of insurance portfolios are capable of transfer in Israel?**

All types of insurance portfolios can be transferred.

8.2 **Does the transferring portfolio need to be legally or commercially connected to the state where the transfer is effected?**

There is no legal limitation in this respect, however, this can be a factor considered by the Commissioner of Insurance when examining whether to approve the transfer.

8.3 **Will the transfer be effective in jurisdictions other than those of the transferor and/or transferee?**

The effectiveness of a transfer approved by the Israeli regulator and court in other jurisdictions depends on the local law. Generally, according to the rules of private international law, the Israeli court will give effect to a transfer made properly in the jurisdiction to which the policy is subject.

8.4 **What effect will the transfer have on arbitration clauses?**

If the policies include an arbitration term, the term will apply to the relationship between the transferee and the insured (C.A. 532/86 HaMoatsa Leyitsur Pirchey Noy v. Pirchey Shomron, P.D. 43(1) 252, 255).

9. **<u>What is the procedure and timing of the transfer?</u>**

9.1 **What is a typical timeline for a transfer?**

After the IPT agreement is reached, the parties act together to receive the approvals of the Commissioner of Insurance, the Anti-Trust Commissioner and of the court. Pursuant to the company's request, the court can order a creditors assembly.

9.2 **Are there any hard legislative or regulatory deadlines?**

Within 14 days after the creditors assembly approves the IPT, the company will file in court a motion for approval of the arrangement. Any party wishing to object to the IPT can file its objection in court. The court's decision must be published within 48 hours after it is received.

10. **<u>What key documentation will be produced for the transfer?</u>**

The following documents will need to be produced:

(a) all documents connected to the portfolio transferred including the policies, lists of the insureds' reported claims and IBNR claims, sums paid, etc;

(b) decisions of both companies' boards of directors approving the agreements;

(c) approvals of third parties which may have rights in connection with the portfolio transferred;

(d) a list of court claims filed against the transferor;

(e) the agreements with the reinsurers and their consent to the transaction;

(f) the employment agreements with the transferred employees;

(g) a list of insurance brokers; and

(h) agreements with service suppliers.

11. **<u>What professional agents are involved in the transfer and what are their roles?</u>**

(a) **Lawyers**

Lawyers will be involved in preparing the agreements, handling the court procedures and receiving the approval of the regulator of the transfer.

(b) **Accountants**

The accountant's involvement is required to handle the tax issues and other accounting aspects of the transaction, for example, to ensure that the parties comply with the Supervision (Means of Investment) Regulations.

(c) **Actuaries**

Actuaries assist in determining the value of the portfolio.

(d) **Independent Expert**

Economic experts for the evaluation of the portfolio.

(e) **Other**

The court is entitled to appoint any expert it wishes to opine on the IPT.

12. **<u>What legal issues are frequently encountered in transfers?</u>**

IPTs are not common in Israel and thus, there are no frequently encountered legal issues.

In one instance, the Supreme Court addressed the interpretation of a contractual term included in a portfolio transfer agreement. The Supreme Court ruled that similar to any agreement, the portfolio transfer agreement should be interpreted according to the parties' intention as reflected in the wording of the agreement and, if no such intention was reflected, according to the transaction (C.A. 633/88 Halevaron Insurance Co. Ltd. v. Yardenia Insurance Co. (in Liquidation) PD 45(1) 563).

13. **<u>How frequently is the transfer mechanism used?</u>**

13.1 **Is the transfer mechanism commonly used? For what purposes is it used?**

The transfer mechanism is commonly used in cases where an insurer faces financial difficulties and the Commissioner orders the transfer of its portfolio, or as an interim stage on the way to a full merger between insurance companies.

13.2 **Are there any statistics of the use of the transfer mechanism?**

No.

14. **<u>What alternative methods can be used to transfer insurance portfolios, and what are the advantages and disadvantages of such methods?</u>**

(a) **Novation**

As mentioned above, the benefits arising from a contract can be assigned without receiving the consent of the debtor. Conversely, contracts can be novated only if all parties consent. In fact, the novation method has never been used in an IPT in Israel.

(b) **100% reinsurance (also described as "run-off"/"portfolio"/"assumption" reinsurance or retrocession, "portfolio transfer" or "reinsurance to close")**

100% reinsurance does not release the insurer from its duty towards the insured, and thus the insurer must continue to maintain certain risk reserves.

(c) **Corporate reorganisation**

IPTs were used in the past in Israel as a step in the process of merger. However, in cases where the transferor wishes to transfer only part of its business within the framework of the IPT, a merger is not the proper method to be used.

(d) **Arrangement/compromise**

As there is no specific law dealing with transfers of portfolios, this is the procedure used in order to execute such transaction.

(e) **Other**

Not applicable.

15. **<u>What are the relevant sources of law or guidance?</u>**

(a) **Statutes**

The Contracts Law.

The Assignment of Obligations Law.

The Supervision Law.

The Companies Law, sections 350-351 (Compromise and Settlement).

The Anti-Trust Law.

(b) **Regulations**

The Supervision over Insurance Business (Means of Investment of the Capital and Funds of an Insurer and Management of its Liabilities) Regulations 2001.

The Supervision over Insurance Business (Details in Financial Reports) Regulations 1998.

The Companies (Motion for Approving Settlement or Arrangement) Regulations 2002.

(c) **Guidance**

Not applicable.

(d) **Jurisprudence**

C.A. 633/88 Halevanon Insurance Co. Ltd. v. Yardenia Insurance Co. Ltd. (in Liquidation) PD 45(1) 563.

(e) **Other**

Not applicable.

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1. **General**

1.1 **Can insurance portfolios be transferred from one entity to another in your jurisdiction?**

Yes, subject to certain conditions described further in Section 2.

1.2 **Can reinsurance portfolios be transferred?**

Yes, subject to certain conditions described further in Section 2.

1.3 **Are the rules the same for the transfer of direct insurance portfolios as for reinsurance portfolios?**

The Italian Code of Private Insurance enacted with Legislative Decree 7 September 2005 209 (the "ICP") contains separate, albeit similar, provisions for the transfer of direct portfolios and reinsurance portfolios. Moreover, the Italian regulatory authority ISVAP - *Istituto per la Vigilanza sulle Assicurazioni Private e di Interesse Collettivo* ("ISVAP") enacted two separate regulations:

(a) Regulation 14 of 18 February 2008 "*Regulation Concerning the Definition of the Procedures for the Approval of Changes to the Articles of Association and to the Scheme of Operations, for the Authorisation of the Portfolio Transfers and Mergers and Divisions Referred to in Title XIV of Legislative Decree 209 of 7 September 2005 – Code of Private Insurance*" containing, among others, specific provisions for the transfer of direct insurance portfolios ("Regulation 14"); and

(b) Regulation 33 of 10 March 2010 "*Regulation Concerning the Access and Performance of Reinsurance Activity Referred to in Titles V, VI, XIV, XVI of Legislative Decree 209 of 7 September 2005 – Code of Private Insurance*" containing, among others, specific provisions for the transfer of reinsurance portfolios ("Regulation 33").

1.4 **Are the rules the same for the transfer of life portfolios as for non-life portfolios?**

Yes, the procedure is the same regardless of the type of insurance being transferred; however, the contents of the documents to be filed with ISVAP may differ in accordance with the type of insurance included in the transfer.

2. **What are the requirements for an Insurance Portfolio Transfer ("IPT")?**

2.1 **What requirements must be met by a *transferor* to undertake an IPT?**

Transfer of an Insurance Portfolio

The ICP states different requirements in accordance with the country of incorporation of each party to the transaction; on the side of the transferor:

(a) Transferor is an Italian insurance undertaking (i.e. companies incorporated and having registered offices in Italy)[151] – ICP requires transferor to apply for authorisation by ISVAP.

(b) Transferor is an insurance undertaking incorporated in a member state carrying out business in Italy[152] - ICP requires transferor to notify ISVAP that it is seeking authorisation by the regulatory authority of the member state for the IPT of contracts underwritten in Italy under the right of establishment or the freedom to provide services.

(c) Transferor is an insurance undertaking incorporated in a non-EEA state having a branch in Italy[153] - ICP requires transferor to apply for authorisation by ISVAP.

Furthermore, Regulation 14 applies to IPT involving a transferor/insurer with registered offices in Italy assigning its portfolio:

(i) to another insurance company with registered offices in Italy or in a member state;

(ii) to the Italian branch of an insurance company established in an EEA state; or

(iii) in relation to the transfer of all or part of a portfolio of the Italian branch of an insurance company established in an EEA state to an insurance company established in Italy or in a member state.

Transfer of a Reinsurance Portfolio

Regulation 33 applies to any IPT involving:

(i) Italian Reinsurance undertakings;[154] and

(ii) Reinsurance undertakings incorporated in a Non-EEA state having a branch in Italy.[155]

2.2 **What requirements must be met by a *transferee* to undertake an IPT?**

In general terms, according to ICP, Regulation 14 and Regulation 33 – the transferee must be authorised by the local Supervisory Authority or be duly passported in order to provide insurance business under the right of establishment or under the freedom of services.

Transfer of an Insurance Portfolio

The ICP states different requirements in accordance with the country of incorporation of each party of the transaction. In particular:

(a) **Transferor is an Italian insurance undertaking**

(i) Transferee is an Italian insurance undertaking - ICP requires that:

[151] Article 198 ICP.

[152] Article 199 ICP.

[153] Article 200 ICP.

[154] Article 202 ICP.

[155] Article 202 ICP.

(1) the transferee is duly authorised to carry out the activity subject to transfer; and

(2) as a result of the transfer, the transferee holds the solvency margin required by law.

According to Art 198 of ICP, the following applies:

(1) If the portfolio includes risks accepted outside the territory of the Italian Republic, ISVAP has to also verify that the undertaking meets the conditions for the performance of insurance business under the right of establishment or the freedom to provide services in the member state of the transferor.

(2) If the transfer includes the portfolio of branches located in other member states the favourable opinion of the relevant regulatory authority must be obtained.

(3) If the transfer includes contracts concluded in other member states under the freedom to provide services, the favourable opinion of the supervisory authorities of the member states of the commitment and of the member states where the risk is located must also be obtained.

(ii) Transferee is an insurance undertaking incorporated in a member state (including the case of portfolio transfer to a branch of such undertaking established in Italy) - ICP requires that the regulatory authority of such member state certify to ISVAP that:

(1) the transferee is duly authorised to carry out the activity subject to transfer; and

(2) as a result of the transfer, the transferee holds the solvency margin required by law.

If the transferee is a branch located in a member state, ISVAP has to verify that transferee is complaint with the provisions stated for undertakings carrying out business under the freedom to provide services in Italy as a result of the transfer.[156]

(iii) Transferee is an insurance undertaking incorporated in a non-EEA state - the ICP requires that:

(1) the transferee is authorised in Italy to carry out the activity subject to transfer under the right of establishment;

(2) the transfer is limited to the contracts underwritten by the transferor in Italy under the right of establishment;

(3) the portfolio is transferred to the Italian branch of the transferee; and

(4) as a result of the transfer, the branch holds the solvency margin required by law.[157]

(b) **Transferor is an insurance undertaking incorporated in a member state**

(i) Transferee is an Italian insurance undertaking – the ICP requires ISVAP to give its consent to the regulatory authority of the member state of the transferor once it has ascertained that:

(1) the transferee is duly authorised to carry out the activity subject to transfer; and

(2) as a result of the transfer it holds the solvency margin required by law.

(ii) Transferee is the Italian branch of an insurance undertaking incorporated in a member state – the ICP requires ISVAP to give its consent to the regulatory authority of the member state of the transferor once it has ascertained that:

(1) the transferee meets the conditions to carry out in Italy the activity subject to transfer under the right of establishment; and

(2) the regulatory authority of the member state of the transferor has verified that, as a result of the transfer, the transferee holds the solvency margin required by law.

(iii) Transferee is an insurance undertaking incorporated in a member state or the branch established in another member state – ICP requires ISVAP to give its consent to the regulatory authority of the

[156] Article 198 ICP.

[157] ICP Article 198 also allows the transfer to insurance undertaking incorporated in a non-EEA state of those parts of portfolio including contracts underwritten under the right of establishment or the freedom to provide services, in the non-EEA state where the undertaking is incorporated.

member state of the transferor once it has ascertained that:

(1) the transferee meets the conditions to carry out in Italy the activity subject to transfer under the freedom to provide services; and

(2) the regulatory authority of the member state of the transferor has verified that, as a result of the transfer, the transferee holds the solvency margin required by law.

(iv) Transferee is the Italian branch of an insurance undertaking incorporated in a non-EEA State – the ICP requires ISVAP to give its consent to the regulatory authority of the member state of the transferor once ISVAP has ascertained that:

(1) the branch has been authorised to carry out the activities subject to transfer; and

(2) the regulatory authority of the member state of the transferor has verified that, as a result of the transfer, the transferee holds the solvency margin required by law.

(v) Transferee is a branch of the transferor in a non-EEA state – ICP prohibits such transfer.

(c) **Transferor is an insurance undertaking incorporated in a non-EEA state**

(i) Transferee is an Italian insurance undertaking – the ICP requires that:

(1) ISVAP verifies that the transferee is duly authorised to carry out the activity subject to transfer; and

(2) ISVAP verifies that as a result of the transfer, the transferee holds the solvency margin required by law.

(ii) Transferee is an insurance undertaking incorporated in a member state – the ICP requires that the regulatory authority of such member state certify to ISVAP that:

(1) the transferee is duly authorised to carry out the activity subject to transfer; and

(2) as a result of the transfer, the transferee holds the solvency margin required by law.

(iii) Transferee is an insurance undertaking incorporated in a non-EEA state – the ICP requires that:

(1) the portfolio is transferred to a branch of the transferor in Italy;

(2) ISVAP verify that the branch of the transferee is authorised to carry out the activity subject to the transfer; and

(3) ISVAP verify that, as a result of the transfer, the branch holds the solvency margin required by law.[158]

Transfer of a Reinsurance Portfolio

(a) **Transferor is an Italian Reinsurance undertaking**

(i) Transferee is an Italian insurance undertaking established in Italy – the ICP requires ISVAP verify that:

(1) the transferee meets the conditions to carry out the activity; and

(2) the transferee holds the solvency margin required by law.

(b) **Reinsurance undertakings incorporated in a non-EEA state having a branch in Italy**

(i) Transferee is an Italian insurance undertaking established in Italy – the ICP requires ISVAP verify that:

(1) the transferee meets the conditions to carry out the activity; and

(2) the transferee holds the solvency margin required by law.

2.3 Are there any requirements relating to the financial condition of the *transferor*?

The ICP does not impose any specific requirement regarding the financial condition of the transferor.

Regulation 14[159] and Regulation 33[160] provide that a financial prospect regarding the transferor's solvency margin before the transaction must be filed with the ISVAP.

[158] If the control over the solvency for the activities carried out under the right of establishment in Italy is carried out by the Regulatory Authority of another member state where the insurance undertaking is also established, the latter authority will release a certification to ISVAP.

[159] Article 14 Regulation 14.

[160] Article 108 Regulation 33.

2.4 **Are there any requirements relating to the financial condition of the *transferee*?**

As stated under Section 2.2 above, the ICP requires that as a result of the transfer the transferee holds the solvency margin required by the law.

Regulation 14[161] and Regulation 33[162] provide that ISVAP approval to the proposed IPT is subject to the local regulatory authority of the state where the transferee is established or where it has its registered offices issuing a certificate confirming that the applicable solvency margin requirements will, in any case, be met after the transfer.

2.5 **Is the place where the portfolio was originally underwritten a relevant factor?**

An IPT from an Italian insurance undertaking to an Italian insurance undertaking as in Section 2.2(A)(i) above, where the portfolio includes obligations undertaken out of Italy is subject to the verification by ISVAP that the transferee meets the conditions to carry out the transferred activity under the right of establishment or the freedom to provide services in the member state of the transferor.

An IPT from an insurance undertaking incorporated in a member state to an Italian insurance undertaking is subject to the conditions under Section 2.2(B)(i) above also if the portfolio includes obligations undertaken out of Italy.

Regulation 14[163] provides that should the portfolio – involved in the IPT – be originally underwritten in a member state under the freedom to provide services, a favourable opinion on the transaction is required by the regulatory authority of the member state where the portfolio has been underwritten.

2.6 **Is the governing law or applicable jurisdiction of the insurance portfolio transferred a relevant factor?**

No, not under the ICP provisions.

2.7 **What criteria will be applied by the relevant authority in approving the transfer?**

In general terms, different criteria are required depending on the type of transaction determining the IPT; in particular, according to Regulation 14[164] and Regulation 33[165], an insurance or reinsurance portfolio transfer might be achieved by means of a transfer contract or of a contribution in a share capital increase of the transferee.

In both cases, in order to obtain ISVAP's approval, the IPT (both for insurance or reinsurance undertakings) has to meet the following requirements:

(a) <u>Transfer from an insurance company with registered offices in Italy to another insurance company with registered offices in Italy</u> under the condition that:

(i) the transferee must be authorised to perform the business subject to transfer, the activities have to cover the actuarial reserve and the solvency margin requirements have to be complied after the transfer;

(ii) the transferee has to meet the requirements provided by chapter II, Title II of the ICP in order to carry out insurance business in Italy (also under the freedom to provide services or the right of establishment) and by chapter II, Title V of the ICO in order to carry out reinsurance business in Italy; further requirements must be met with specific reference to IPT involving insurance business, and namely Regulation 14 provides that:

(1) an authorisation of the regulatory authority of the member state of the undertaking or of the risk is required, should the portfolio include undertakings or risks underwritten in a member state or under the freedom to provide services;

(2) an authorisation of the regulatory authority of the member state where the transferee's branch is established or where the obligation or the risk are underwritten, should the transfer include the portfolio of a branch established in an another member state (insurance portfolio); and

(iii) the portfolio is not transferred to a branch in Italy of an insurance undertaking established in a Non-EEA state.

(b) <u>Transfer from an insurance undertaking with registered offices in Italy to an insurance undertaking with registered offices in a member state</u> under the condition that:

(i) the regulatory authority of the member state certifies that the transferee:

(1) has the authorisation required to carry out insurance business;

(2) complies with the criteria regarding activities owned in order to cover the actuarial reserves; and

(3) complies with the solvency margin requirements required also after the transfer.

(ii) the transferee has to meet the requirements provided by Chapter II, Title II of the ICP in order to carry out insurance business in Italy (also under

[161] Article 16, lett. (a) Regulation 14.

[162] Article 109, lett. (a) Regulation 33.

[163] Article 16, lett. (c) Regulation 14.

[164] Article 11 Regulation 14.

[165] Article 105 Regulation 33.

the freedom of services or the right of establishment) and by Chapter II, Title V of the ICP in order to carry out reinsurance business in Italy; and

(iii) the portfolio is not transferred to a branch in Italy of an insurance undertaking established in a non-EEA state.

(c) Transfer from an insurance undertaking with registered offices in Italy to an insurance undertaking with registered offices in a non-EEA State under the condition that:

(i) the portfolio is transferred to a branch in Italy of an insurance undertaking established in a non-EEA State;

(ii) the transferee met the condition required by Chapter IV, Title II, of ICP in order to carry out insurance business in Italy (also under the freedom to provide services or the right of establishment);

(iii) the portfolio includes undertakings and risks underwritten in Italy or in the non-EEA state where the transferee was originally established; and

(iv) the transferee meets the activities to cover actuarial reserve and the solvency margin requirements.

(d) Transfer from a reinsurance company based in Italy to a reinsurance company based in a non-EEA state under condition that:

(i) the regulatory authority of the non-EEA state where the transferee is established certifies that the transferee met the conditions of the patrimonial suitability requirements after the transfer, on the basis of the applicable law.

(e) Transfer from a reinsurance company based in Italy to the Italian branch of a reinsurance company based in a Non-EEA state on the condition that

(i) ISVAP verifies the transferee compliance with:

(1) article 60-*bis* of the ICP;

(2) rules contained in Part II, Title II of Regulation 33; and

(3) with specific reference to insurance companies authorised also to carry out reinsurance business – with the rules contained in Chapter IV, Title II of the ICP.

(f) Transfer from the Italian branch of an insurance or reinsurance undertaking with registered offices in a non-EEA state on the condition that:

(i) should the portfolio be transferred to an insurance or reinsurance company with registered offices in Italy, the requirements set forth under Section 2.7(A)) above (Article 16 of Regulation 14 and Article 109 of Regulation 33) are met;

(ii) should the portfolio be transferred to an insurance or reinsurance company with registered offices in a member state, requirements set forth under Section 2.7(B)) above (Article 16 of Regulation 14 and Article 109 of Regulation 33) are met;

(iii) should the portfolio be transferred to an insurance or reinsurance company with registered offices in a Non-EEA state or to its Italian branch, requirements set forth under Section 2.7(C) above (Article 16 of Regulation 14 and Article 109 of Regulation 33) are met.

2.8 Are there any other requirements?

None.

3. What can be transferred along with the insurance or reinsurance contract?

(a) Assets

The assets attached to a policy subject to transfer are not automatically transferred with that policy. However, the terms of the transfer agreement have to include the transfer of the assets attached to the policy in order to grant the solvency margin required by law.

(b) Liabilities

According to the Italian civil code,[166] should an IPT be achieved by means of transfer (assignment) contract, transfer of business or contribution in a share capital increase, the original contract with the insured is not terminated and, as a consequence, liabilities should follow the insurance or reinsurance contract.

(c) Real property

It could be possible, in the case of real property attached as collateral of life/non-life insurance or reinsurance contract.

(d) Reinsurance/retrocession contracts and other ancillary contracts

There are no specific rules or mandatory provisions regarding automatic transfer of reinsurance in the transfer of an insurance portfolio. Usually, general clauses are included in the reinsurance treaty in order to regulate the transfer processes and its impact on the reinsurance policies.

4. Who must be notified of what, and how?

(a) Local regulator(s)

ICP requires an insurance undertaking incorporated in a member state carrying out business in Italy to promptly notify ISVAP of its submission to the regulatory authority of

[166] Article 1406 and following of the Civil Code.

the member state of an application for authorisation to the transfer of the portfolio of contracts underwritten in Italy under the right of establishment or the freedom to provide services (See Section 2.1(B)).

Article 14 of Regulation 14 and Article 108 of Regulation 33 provide that a request for approval of an IPT must be made by the transferor and the transferee and a complete application form together with the documents required by Article 106 (for reinsurance business) and by Article 12 (for insurance companies) must be filed with ISVAP.

The application form has to contain, among others:

(i) the resolution adopted by the competent management bodies of both insurance firms approving the IPT;

(ii) the minutes of the transferred portfolio and all the information regarding the transaction;

(iii) a detailed calculation of solvency margins of the transferor and the transferee before and after the transfer;

(iv) the report of the activities needed to cover the actuarial reserve;

(v) financial statements of the transferor and the transferee as at the date of transfer of the portfolio;

(vi) profit and loss accounts;

(vii) a copy of draft letter of transferee to the policyholders transferred; and

(viii) a copy of the transfer contract (whose execution is subject to ISVAP's approval).

If the transfer is made by means of contribution in an increase of share capital of the transferee, the application form is filed with a copy of the resolution adopted by the management bodies and shareholdings of the transferee and a sworn report rendered by the independent expert appointed by the competent court certifying the adequacy of the increase.

(b) **Other regulator(s)**

ISVAP might require cooperation of foreign regulatory authorities with regards to IPTs involving a transferee based in member or non-EEA states and to some extent depending on the location of the risks subject to transfer (see Section 2.1 above).

(c) **Policyholders**

The ICP provides that in case of an IPT authorised in compliance with Articles 198 and 200 of ICP, policyholders domiciled in Italy (if natural persons) or having registered offices in Italy (if entities) are entitled to withdraw from the policy within 60 days from the date ISVAP authorisation is published in the ISVAP Bulletin if the contracts are transferred to an insurance undertaking incorporated in a foreign country or to a foreign branch of an insurance undertaking incorporated in Italy.

Similarly, the ICP states that in case of an IPT of a member state duly authorised by the regulatory authority of the relevant member state of the transferor and performed with the consent of ISVAP, policyholders domiciled in Italy (if natural persons) or having their registered offices in Italy (if entities) are entitled to cancel their policy within 60 days from the date ISVAP publishes on the Bulletin the opinion rendered and the authorisation of the regulatory authority of other member states in respect of the IPT.

(d) **Beneficiaries of cover other than actual policyholders**

Not applicable.

(e) **Reinsurers**

Not applicable.

(f) **Brokers**

Not applicable.

(g) **Others**

Not applicable.

(h) **Further notice requirements**

None.

5. **<u>What publicity requirements are there for IPTs?</u>**

(a) **Newspapers**

Not applicable.

(c) **Official Gazette/Journal**

ISVAP's approval of any IPT has to be notified to the undertakings involved and published on ISVAP Bulletin and on its website.[167]

Furthermore, with regards to reinsurance portfolio transfer, the approval has to be also notified to the regulatory authority where the transferee is based.[168]

(d) **Trade magazines**

Not applicable.

(e) **Register of Companies**

Not applicable.

(f) **Other**

None.

6. **<u>Who has the right to object to the transfer?</u>**

(a) **Regulator(s)**

According to Regulation 14 and Regulation 33, should the companies involved in the IPT (i) not comply with the requirements set forth above or, (ii) fail to follow the recommendations received by ISVAP (in particular with regards to the request of further documentation), ISVAP could deny its approval of the IPT.

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[167] Article 19 Regulation 14.

[168] Article 112 Regulation 33.

(b) **Policyholders**

Policyholders may not object but ICP grants a right of withdrawal under certain conditions. See Section 4(c) above.

(c) **Beneficiaries of cover**

Italian legislation does not provide beneficiaries with the right to object.

(d) **Reinsurers**

Not applicable.

(e) **Trade associations**

Not applicable.

(f) **Employees**

Not applicable.

(g) **Others**

Not applicable.

7. **<u>Who must approve and/or sanction the transfer?</u>**

(a) **Local regulator**

The ICP requires the transfer of the portfolio of an Italian insurance undertaking to be authorised (preventively) by ISVAP.

The ICP requires ISVAP to give its consent to the regulatory authority of the member state of the transferor if the transferee:

(i) is an Italian insurance undertaking;

(ii) is an Italian branch of an insurance undertaking incorporated in a member state;

(iii) is an insurance undertaking incorporated in another member state or a branch established in another member state; or

(iv) is the Italian branch of an insurance undertaking incorporated in a Non-EEA state.

(b) **Other regulator(s)**

See above.

(c) **Court**

Italian Courts are not involved in the IPT.

8. **<u>What jurisdictional conditions apply to the transfer?</u>**

8.1 **What types of insurance portfolios are capable of transfer in Italy?**

All types of insurance and reinsurance contracts can be transferred.

8.2 **Does the transferring portfolio need to be legally or commercially connected to the state where the transfer is effected?**

No, subject to the condition set forth above.

8.3 **Will the transfer be effective in jurisdictions other than those of the transferor and/or transferee?**

The transfer would, for instance, be effective where the beneficiary of the insurance contracts involved in an IPT is domiciled in jurisdictions other than those of the transferor and/or transferee.

8.4 **What effect will the transfer have on arbitration clauses?**

None with regards to arbitration clauses in the insurance contracts subject to the IPT.

9. **<u>What is the procedure and timing of the transfer?</u>**

9.1 **What is a typical timeline for a transfer?**

Pursuant to Article 19, paragraph 1 of Regulation 14 and to Article 112, paragraph 1, of Regulation 33, ISVAP has to conclude its examination of any insurance or reinsurance portfolio transfer within a 120-days term from the filing of the form by the undertakings involved. It is worth mentioning that this term could be interrupted or suspended in the event that ISVAP considers insufficient the documentation provided by the transferor and the transferee with the form or requests further clarifications on the transaction.

9.2 **Are there any hard legislative or regulatory deadlines?**

No.

10. **<u>What key documentation will be produced for the transfer?</u>**

Please see Section 4(a) above.

11. **<u>What professional agents are involved in the transfer and what are their roles?</u>**

(a) **Lawyers**

Lawyers are not required. They could be involved in order to provide assistance and advice in drafting the contract and follow the proceeding with the regulatory authority or coordinate cross-borders activities.

(b) **Accountants**

Accountants are not required. They could be involved in order to provide assistance and advice in drafting the contract.

(c) **Actuaries**

Actuaries are usually involved in order to prepare the documentation required under Section 4(a) and for preparing the relevant filing with ISVAP.

(d) **Independent Expert**

Independent experts might be involved in case of contribution in share capital increase as per Section 4(a).

(e) **Other**

None.

12. **<u>What legal issues are frequently encountered in transfers?</u>**

According to our experience, the main issues encountered in an IPT are the following:

(a) Insurance or reinsurance contracts might include restrictions/exclusions for transfers to a third party.

(b) Risk of forfeiture of the authorisation to carry out insurance and reinsurance business with regards to specific risks, whether the IPT determine the complete transfer of all insurance/reinsurance contracts issued with regards to a specific risk.

(c) In case of cross-border transfers, difficulties with regards to solvency considerations during the proceedings aimed at obtaining the approval from the regulatory authority of the state where the transferee is based.

(d) Possible tax issues. The tax treatment applied to the policies in the jurisdiction of the transferee may differ from that applied in the jurisdiction of the transferor.

13. **<u>How frequently is the transfer mechanism used?</u>**

According to ISVAP's website, in the period from November 2006 to May 2010, 19 IPTs have been approved by the Italian regulatory authority.

13.1 **Is the transfer mechanism commonly used? For what purposes is it used?**

The transfer mechanism is not very common; it is usually used in execution of M&A transactions or in case of intra-group reorganisation of the insurance/reinsurance activities.

13.2 **Are there any statistics of the use of the transfer mechanism?**

No official statistics.

14. **<u>What alternative methods can be used to transfer insurance portfolios, and what are the advantages and disadvantages of such methods?</u>**

(a) **Novation**

According to Italian law, novation appears inapplicable in case of an IPT involving a great number of insurance/reinsurance contracts, as the consent of all the policyholders involved would be required.

(b) **100% reinsurance (also described as "run-off"/"portfolio"/"assumption" reinsurance or retrocession, "portfolio transfer" or "reinsurance to close")**

Italy does not have a strong expertise on reinsurance activity.

(c) **Corporate reorganisation**

Not applicable.

(d) **Arrangement/compromise**

Not applicable.

(e) **Other**

Not applicable.

15. **<u>What are the relevant sources of law or guidance?</u>**

(a) **Statutes**

ICP Articles 168, 198, 199, 200, 202.

(b) **Regulations**

Regulation 14.

Regulation 33.

(c) **Guidance**

Not applicable.

(d) **Jurisprudence**

Not applicable.

(e) **Other**

Not applicable.

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ANTONIO DEPASQUALE, MA&A ADVOCATES

1. <u>General</u>

1.1 Can insurance portfolios be transferred from one entity to another in your jurisdiction?

Yes. The transfer of insurance portfolios is regulated under Part VIII of the Insurance Business Act (IBA).[169]

1.2 Can reinsurance portfolios be transferred?

Yes, under Article 37 of the IBA.

Where a company authorised under the IBA carrying on business restricted to reinsurance (the "transferor") proposes to transfer all or part of its business, the competent authority, presently the Financial Services Authority, will approve a transfer once it is satisfied with the following two requisites:

Firstly, the transferee is, or immediately after the approval will be authorised under the IBA to carry on business of reinsurance, and the transferee is, or immediately after the approval will be, authorised under Article 4 of EC Directive 2005/68[170] to carry on in a member state or an EEA state, business of reinsurance to be transferred under the scheme. Alternatively, the transferee must have the authorisation required (if any) to enable the business, or part which is to be transferred, to be carried on in the place to which it is to be transferred or will have it before the transfer scheme takes effect.

Secondly, the transferee possesses, after taking the proposed transfer into account, the margin or margins of solvency required to be maintained under the IBA and under Articles 37 to 39 of EC Directive 2005/68. Alternatively, if the transferee does not meet these requirements, it may instead comply with the solvency requirements under the law applicable in the place to which the business is being transferred.

Furthermore, if the transferee is a company authorised under the IBA, the transferee's financial resources must, consequential to the transfer, be adequate to fulfil the other obligations required of it under the IBA, and if the transferee is a company whose head office is in a country outside Malta, the transferee's financial resources are, consequential to the transfer, adequate to fulfil (if any) the other obligations required of it under the law applicable in the place to which the business is being transferred.

1.3 Are the rules the same for the transfer of direct insurance portfolios as for reinsurance portfolios?

The rules for the transfer of reinsurance portfolios are as described under Section 1.2 above and differ from the rules for the transfer of direct insurance portfolios as shall be outlined throughout this document.

1.4 Are the rules the same for the transfer of life portfolios as for non-life portfolios?

The rules for the transfer of life portfolios and those for the transfer of non-life portfolios are provided for in different articles of the IBA as set out below.

2. <u>What are the requirements for an Insurance Portfolio Transfer ("IPT")?</u>

2.1 What requirements must be met by a *transferor* to undertake an IPT?

The transferor must fall into one of the following categories:

(a) a company whose head office is in Malta, and the performance by it of the obligations to be transferred constitutes the carrying on of business of insurance in or from Malta;

(b) a company whose head office is in Malta, and the performance by it of the obligations to be transferred constitutes the carrying on of business of insurance in or from a country outside Malta; or

(c) a company whose head office is in a country outside Malta, and the performance by it of the obligations proposed to be transferred constitutes business of insurance in or from Malta.

It is in these three scenarios that the transferor is required to apply to the Financial Services Authority for approval of the relevant transfer scheme.

In cases relating to life portfolios the approval has to be requested by the transferor company or the transferee company, which in each case has to request approval of the transfer by application filed before the Financial Services Tribunal.

2.2 What requirements must be met by a *transferee* to undertake an IPT?

The transferee must meet the following requirements:

(a) the transferee is, or immediately after the approval will be, authorised under the IBA to carry on general business of the class or classes or part classes to be transferred;

(b) the transferee is, or immediately after the approval will be, authorised[171] to carry on general business of the class or classes or part classes to be transferred under the transfer scheme in an EU member state or EEA state; or

(c) if the transferee does not fall within any of the above, the transferee has the authorisation required to enable the business, or part which is to be transferred, to be carried on in the place to which it is to be transferred, or will have it before the transfer scheme takes effect.

[169] Chapter 403 of the Laws of Malta.

[170] Directive 2005/68/EC of the European Parliament and of the Council of 16 November 2005 on reinsurance and amending Council Directives 73/239/EEC, 92/49/EEC and Directives 98/78/EEC and 2002/83/EC.

[171] Under Article 6 or Article 23 of the First Council Directive of 24 July 1973 on the co-ordination of laws, regulations, and administrative provisions relating to the taking up and pursuit of direct insurance other than life assurance (73/239/EEC).

2.3 **Are there any requirements relating to the financial condition of the *transferor*?**

No. However, consideration may be given to the financial condition of the transferor by the Financial Services Authority or by the Financial Services Tribunal.

2.4 **Are there any requirements relating to the financial condition of the *transferee*?**

It is a requirement that the transferee possesses, after taking the proposed transfer into account, the margin or margins of solvency required to be maintained under the IBA and under the relevant Articles[172] of EC Directive 73/239.[173]

If the transferee does not fall within the above then the transferee must possess, at least immediately before the transfer scheme takes effect, the margin or margins of solvency required under the law applicable in the place to which the business is being transferred.

If the transferee is a company authorised under the IBA, the transferee's financial resources must consequential to the transfer remain adequate to fulfil the other obligations required of it under the IBA. Alternatively, if the transferee is a company whose head office is in a country outside Malta, the transferee's financial resources must, consequential to the transfer, still be adequate to fulfil the other obligations required of it under the law applicable in the place to which the business is being transferred.

In the case of life portfolios, the transferee company must produce evidence that after taking the transfer into account, it possesses the margin or margins of solvency required to be maintained under the IBA and under the relevant Articles[174] of EC Directive 2002/83.[175] Alternatively, if the transferee does not fall within the above, the transferee must possesses at least immediately before the transfer scheme takes effect, the margin or margins of solvency required under the law applicable in the place to which the business is being transferred.

2.5 **Is the place where the portfolio was originally underwritten a relevant factor?**

No.

2.6 **Is the governing law or applicable jurisdiction of the insurance portfolio transferred a relevant factor?**

Certain transfers of insurance portfolios with overseas elements may give rise to enhanced notification and consent requirements (see Section 4(b) below).

[172] Articles 16a, 25 or 26.

[173] The First Council Directive of 24 July 1973 on the co-ordination of laws, regulations, and administrative provisions relating to the taking up and pursuit of direct insurance other than life assurance.

[174] Articles 28, 55 or 56.

[175] Directive 2002/83 EC of the European Parliament and of the Council of 5 November 2002 concerning life assurance.

2.7 **What criteria will be applied by the relevant authority in approving the transfer?**

The following criteria will be applied by the Financial Services Authority or the Financial Services Tribunal (as applicable):

(a) Relevant notices are approved, submitted and/or published as provided for by the IBA (see Section 5);

(b) Third parties claiming an interest under a policy, including policyholders, are notified;

(c) Copies of a statement setting out particulars of the transfer and approved for the purpose by the Financial Services Authority have been made available for inspection as provided by the IBA;

(d) Requirements relating to the transferee are to the satisfaction of the Financial Services Authority (see Sections 2.2 and 2.4);

(e) Notification of the overseas regulatory authority where applicable (see Section 2.6); and

(f) Feedback from the overseas regulatory authority where applicable (see Section 2.6).

2.8 **Are there any other requirements?**

Any other directions issued by the Financial Services Authority or by the Financial Services Tribunal must be followed.

Nonetheless it is to be noted that until today no subsidiary legislation on this subject has ever been tabled in Parliament and thus there are no further statutory requirements.

3. **<u>What can be transferred along with the insurance or reinsurance contract?</u>**

(a) **Assets**

Yes, subject to the Financial Services Authority or the Financial Services Tribunal not having any reason for an objection.

There are no express restrictions on transfers of any assets or liabilities and whilst normal contract law would apply, such transfers would require the final approval of the Financial Services Authority.

(b) **Liabilities**

Please see (a) above.

(c) **Real property**

Please see (a) above.

(d) **Reinsurance/retrocession contracts and other ancillary contracts**

Please see (a) above.

4. **<u>Who must be notified of what, and how?</u>**

(a) **Local regulator(s)**

An application must be made to the Financial Services Authority or the Financial Services Tribunal (as applicable).

(b) **Other regulator(s)**

If the transferor is a company whose head office is in Malta, and the establishment from which the policies are to be transferred is situated in a member state or EEA state, the overseas regulatory authority in that member state or EEA state must be consulted about the proposed transfer, and the overseas regulatory authority must either have responded or the period of three months beginning with the consultation must have elapsed.

If the transferor is a company which carries on business from Malta or in or from a country outside Malta, as regards any insurance policy where the risk is situated outside Malta, the overseas regulatory authority in the country where the risk is situated must be notified of the proposed transfer, and either the overseas regulatory authority has consented to the transfer or has not refused its consent to the transfer within the period of three months beginning with the date of the notification.

Similarly, in the case of life portfolios, if the transferor is a company whose head office is in Malta, and the establishment from which the policies are to be transferred is situated in a member state or EEA state, the overseas regulatory authority in that member state or EEA state must be consulted about the proposed transfer, and the overseas regulatory authority has either responded or the period of three months beginning with the consultation has elapsed.

Where the transferor company is a company which carries on business from Malta or in or from a country outside Malta and, as regards any policy included in the proposed transfer which evidences a contract of insurance, a country outside Malta is the country of the commitment, the Financial Services Tribunal will not approve the transfer unless the Financial Services Authority certifies that the overseas regulatory authority in that country has been notified; and that either that authority has consented to the transfer or that the authority has not refused its consent to the transfer within the period of three months beginning with the date of the notification.

(c) **Policyholders**

All interested third parties must be notified (see Section 2.7 above).

(d) **Beneficiaries of cover other than actual policyholders**

All interested third parties must be notified (see Section 2.7 above).

(e) **Reinsurers**

All interested third parties must be notified (see Section 2.7 above).

(f) **Brokers**

Not applicable.

(g) **Others**

All interested third parties must be notified (see Section 2.7 above).

(h) **Further notice requirements**

As per references made throughout this document.

5. **<u>What publicity requirements are there for IPTs?</u>**

(a) **Newspapers**

A notice approved by the Financial Services Authority, or by the Financial Services Tribunal as the case may be, in respect of the transfer must be published in at least two local daily newspapers of which one is published in the Maltese language and the other in the English language. The text of the notice shall be in Maltese in the Maltese daily and in English in the English daily.

Where the transferor is a company which carries on business from Malta or in or from a country outside Malta and, as regards any insurance policy included in the proposed transfer where the risk is situated outside Malta, publication must be carried out in two daily newspapers in the country where the risk is situated.

(b) **Official Gazette/Journal**

On determining an application for an IPT the Financial Services Authority will publish a notice of its decision in the government gazette and in such other manner as it may deem fit.

(c) **Trade magazines**

Not applicable.

(d) **Register of Companies**

The Register of Companies must be made aware of the transfer process as it is part of the same competent authority (currently the Malta Financial Services Authority) that is responsible for the overall transfer.

(e) **Other**

On determining an application for an IPT the Financial Services Authority must send a copy of the notice of its decision to the transferor, the transferee and every person who made representations.

6. **<u>Who has the right to object to the transfer?</u>**

(a) **Regulator(s)**

Local and (where applicable) overseas regulators must approve and/or consent to the transfer as set out in Sections 4(a) and 4(b) above.

(b) **Policyholders**

Policyholders can object to the transfer formally in writing to the Financial Services Authority.

(c) **Beneficiaries of cover**

Please see Section 6(b) above.

(d) **Reinsurers**

Please see Section 6(b) above.

(e) **Trade associations**

Not in their capacity as a trade association.

(f) **Employees**

Please see Section 6(b) above.

(g) **Others**

Other interested parties can object in the same way as policyholders (see Section 6(b) above).

7. Who must approve and/or sanction the transfer?

(a) **Local regulator**

For general insurance business, the Financial Services Authority must approve the transfer.

(b) **Other regulator(s)**

Overseas regulators may be involved in the approval process as described in Section 4(b) above.

(c) **Court**

For "long term" (i.e. life) business the Financial Services Tribunal must approve the transfer.

8. What jurisdictional conditions apply to the transfer?

8.1 What types of insurance portfolios are capable of transfer in Malta?

These are provided for under the Second and Third Schedule of the IBA and include:

Life and annuity; marriage and birth; linked long-term; permanent health; tontines; capital redemption; pension fund management; collective insurance; social insurance; accident and health; motor; marine and transport; aviation; fire and other damage to property; liability; and credit and suretyship.

8.2 Does the transferring portfolio need to be legally or commercially connected to the state where the transfer is effected?

Yes. Please refer Section to 2.1 above.

8.3 Will the transfer be effective in jurisdictions other than those of the transferor and/or transferee?

Yes if this is permitted by the law of such foreign jurisdiction and is in accordance with relevant provisions of such jurisdiction.

8.4 What effect will the transfer have on arbitration clauses?

Any such rights and obligations will be transferred to the transferee unless otherwise provided by the Financial Services Authority or by the Financial Services Tribunal (as applicable).

9. What is the procedure and timing of the transfer?

9.1 What is a typical timeline for a transfer?

There is no typical timeline for a transfer and the timeline is very much dependent on the circumstances of the parties involved. The relevant local authorities are known to be very efficient.

9.2 Are there any hard legislative or regulatory deadlines?

Throughout the process, wherever documents are to be made available for inspection, they are to be made available for a period of not less than 30 days.

Reports to be served on the Financial Services Authority in relation to an application for an IPT require that 30 days have elapsed from their date of service before the Financial Services Authority commences with the process of deciding on the transfer scheme. This allows time for further documentation to be provided to the Financial Services Authority.

Where a transfer scheme is approved by the Financial Services Tribunal the transferee company must, within ten days from the date on which approval is granted or such longer period as the Financial Services Authority may allow, deposit two office copies of the approval with the Financial Services Authority.

There are no further statutory deadlines and this presumably allows the regulators to take a flexible approach to timing. It is nonetheless to be noted that the Financial Services Authority is very businesslike and hands-on in its approach and unnecessary delays are not the norm.

10. What key documentation will be produced for the transfer?

The application itself and the report on the terms of the transfer scheme as prepared by an independent actuary.

11. What professional agents are involved in the transfer and what are their roles?

(a) **Lawyers**

Lawyers usually see to the preparation of all legal documentation, including the relevant contracts and furthermore handle the compliance involved. The case for the transfer is put forward, and when necessary defended, by lawyers.

(b) **Accountants**

They are usually involved throughout the process as coordinators.

(c) **Actuaries**

In the case of transfers of long term business, the application must be accompanied by a report on the terms of the transfer scheme by an independent actuary.

(d) **Independent Expert**

Not necessary but independent auditors are sometimes brought into the team to assist as consultants and to put forward the case where necessary.

(e) **Other**

Not applicable.

12. What legal issues are frequently encountered in transfers?

No information available.

13. **How frequently is the transfer mechanism used?**

13.1 **Is the transfer mechanism commonly used? For what purposes is it used?**

The transfer mechanism is not commonly used.

When used it is mainly as part of a business transaction, and could also be used for tax planning. The latter is not common since the Maltese jurisdiction provides for better means of tax planning.

13.2 **Are there any statistics of the use of the transfer mechanism?**

Statistics are not public and information has not been made available.

14. **What alternative methods can be used to transfer insurance portfolios, and what are the advantages and disadvantages of such methods?**

(a) **Novation**

Use of the Civil Code provisions that used to provide for this is no longer allowed.

(b) **100% reinsurance (also described as "run-off"/"portfolio"/"assumption" reinsurance or retrocession, "portfolio transfer" or "reinsurance to close")**

Does not serve the same purpose.

(c) **Corporate reorganisation**

Merger is an alternative but may not be appropriate in the circumstances.

(d) **Arrangement/compromise**

Not applicable.

(e) **Other**

Not applicable.

15. **What are the relevant sources of law or guidance?**

(a) **Statutes**

Chapter 403 of the Laws of Malta namely the "Insurance Business Act".

(b) **Regulations**

Not applicable.

(c) **Guidance**

Not applicable.

(d) **Jurisprudence**

Not applicable.

(e) **Other**

Not applicable.

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1. General

1.1 Can insurance portfolios be transferred from one entity to another in your jurisdiction?

Mexican insurance companies may transfer insurance portfolios from one insurance entity to another pursuant to Article 66 of the General Law of Insurance and Mutual Companies (*Ley General de Instituciones y Sociedades Mutualistas de Seguros*) ("LGISMS"). The transfer of insurance portfolios requires prior authorisation by the Ministry of the Treasury and Public Credit (*Secretaría de Hacienda y Crédito Público*) ("SHCP"), which may decide on the matter on a discretionary basis.

1.2 Can reinsurance portfolios be transferred?

Reinsurance portfolios may also be transferred from one Mexican insurance or reinsurance company to another.

Article 76 of the LGISMS, regulating reinsurance companies, provides that reinsurance companies operations have to abide by the provisions set forth in Part One (*Título Primero*) of the LGISMS (in which Article 66 of the LGISMS is included). Therefore, in accordance with Article 66 of the LGISMS, the transfer of reinsurance portfolios from one reinsurance entity to another or between insurance companies requires the prior authorisation from the Ministry of the Treasury and Public Credit (*Secretaría de Hacienda y Crédito Público*) ("SHCP"), which may decide on the matter on a discretionary basis.

Article 76 of the LGISMS further provides that the SHCP and the CNSF has authority to establish specific regulations (i.e. legally binding regulatory provisions) applicable to the operations of reinsurance companies, taking into account the nature and characteristics of reinsurance operations.

1.3 Are the rules the same for the transfer of direct insurance portfolios as for reinsurance portfolios?

Yes, both transfers of direct insurance and reinsurance portfolios are regulated by Article 66 of the LGISMS, which requires the prior authorisation from the SHCP and certain disclosures and notification requirements further explained in Section 2 below.

However, as explained in Section 1.2 above, the SHCP and the CNSF have authority to issue specific regulations applicable to the transfer of reinsurance portfolios, taking into account the nature and characteristics of reinsurance operations. To date, the SHCP and CNSF have not issued general rules with specific regulations applicable to the transfer of reinsurance portfolios.

1.4 Are the rules the same for the transfer of life portfolios as for non-life portfolios?

The same rules apply to the transfer of life and non-life portfolios.

2. What are the requirements for an Insurance Portfolio Transfer ("IPT")?

2.1 What requirements must be met by a *transferor* to undertake an IPT?

The transferor must obtain the prior authorisation from the SHCP to undertake an IPT. For such purposes, the transferor must file an application with the SHCP requesting its opinion on the transfer of the corresponding insurance portfolio.

The transferor must enclose with the application a draft of the following documents:

(a) the IPT agreement, which will be entered into by and between the transferor and the transferee;

(b) the Extraordinary General Meeting ("EGM") Minutes in which terms the shareholders of each of the transferor and transferee will authorise the transfer of the corresponding insurance portfolio from transferor to transferee in the terms of the IPT agreement; and

(c) the notices that will be posted on the IPT.

Upon receiving a ruling from the SHCP with its opinion on the IPT in terms of the draft documents filed with the SHCP, transferor and transferee may:

(i) enter into the IPT agreement;

(ii) hold the respective EGMs in which the shareholders of each of the transferor and transferee will authorise the transfer of the corresponding insurance portfolio from the transferor to the transferee;

(iii) post the notices on the IPT in the central offices, branches and other customer service offices of transferor and transferee during the time that the transfer proceeding lasts; and

(iv) publish on three occasions and at their own expense, in the Official Gazette of the Federation (*Diario Oficial de la Federación*) ("DOF") and in two wide circulation newspapers of the domicile and the branches of the transferor, notices on the insurance portfolio transfer.

Such three publications must be made within a period of 20 calendar days from the date of the first publication. The last publication will be deemed a non-refutable notice on the transfer to the policyholders and their successors, giving right to any party with an interest to object to such a transfer of portfolio within 45 days following the last publication.

Once the period of 45 days to object to the transfer has elapsed, the transferor must file with the SHCP a supplementary brief informing the number of insured subject matter of the IPT, the number of objections received or of which the insurance company has knowledge.

Upon confirming the requirements set forth above have been met, that is, that the Transfer Agreement has been entered into, that the shareholders of each of transferor and transferee have approved the transfer of portfolio, the notices have been posted and publications have been made, the SHCP may approve the IPT and authorise the registration of the IPT Agreement with the Public Registries of Commerce (*Registros Públicos de Comercio*) ("RPC") with jurisdiction in the corporate domiciles of the transferor and transferee.

2.2 **What requirements must be met by a *transferee* to undertake an IPT?**

The transferee must also obtain the prior authorisation of the SHCP to acquire the insurance portfolio and, for such purposes, must enter into the IPT agreement with the transferor. The shareholders of the transferee have to approve the terms and conditions of the IPT in an EGM. The transferee must also provide to the SHCP such information and documentation that may be required to analyse and in its case approve the transfer of insurance portfolio.

2.3 **Are there any requirements relating to the financial condition of the *transferor*?**

The LGISMS does not provide any specific requirements on the financial condition of the transferor for the purposes of the IPT; however, in our experience, the SHCP and the National Insurance and Bonding Commission (*Comisión Nacional de Seguros y Fianzas*) ("CNSF") only approve IPTs in which the financial condition of the transferor is not affected as a consequence of such transfer.

2.4 **Are there any requirements relating to the financial condition of the *transferee*?**

The LGISMS does not provide any specific requirements as regards the financial condition of the transferee for the purposes of the IPT; however, since the transferee is subject to the financial regulations applicable to insurance companies, it may well require to provide to the SHCP and the CNSF information on the effects of the IPT on its financial condition to confirm the effects of the transfer. In our experience, the SHCP and the CNSF only approve IPTs in which the financial condition of the transferee is not and will not be affected as a consequence of such transfer and it does not adversely affect the interests of policyholders, insured and beneficiaries.

2.5 **Is the place where the portfolio was originally underwritten a relevant factor?**

No, it is not.

2.6 **Is the governing law or applicable jurisdiction of the insurance portfolio transferred a relevant factor?**

No, governing law is not a factor.

2.7 **What criteria will be applied by the relevant authority in approving the transfer?**

The SHCP has discretionary authority to grant or deny authorisation to transfer an insurance portfolio.

The criteria consist in:

(a) verifying that the terms and conditions set forth in the LGISMS are complied with;

(b) that the transferee has the capacity to undertake the obligations under the insurance portfolio in accordance with applicable laws and regulations;

(c) that the transfer will not have negative consequences to the insurance companies involved in such transfer (transferor and transferee); and

(d) that the policyholders, insured or beneficiaries will not be harmed or affected as a consequence of the transfer.

2.8 **Are there any other requirements?**

There are no further requirements.

3. **<u>What can be transferred along with the insurance or reinsurance contract?</u>**

(a) **Assets/Reserves**

The IPT may include assets such as financial instruments, securities and cash representing reserves of the corresponding insurance portfolio, as well as rights arising under the portfolio to collect premiums from the insured.

(b) **Liabilities**

The transfer of an insurance and reinsurance contract includes the obligations arising from any casualty covered by the corresponding policy, including, indemnification of the damages suffered by the insured or beneficiaries and any other ancillary obligation contained under the corresponding insurance or reinsurance contract.

(c) **Real property**

Yes, provided that it forms part of the assets/reserves of the insurance portfolio.

(d) **Reinsurance/retrocession contracts and other ancillary contracts**

The reinsurance/retrocession contracts are transferred or assigned along with the insurance or reinsurance contract, provided, however, that no prohibition is expressly agreed under the corresponding reinsurance or retrocession contract that does not allow the cedant to assign or transfer the rights and obligations under the portfolio.

Approval of the transfer by the regulator does not overrule contractual restrictions and usual legal requirements.

4. **<u>Who must be notified of what, and how?</u>**

(a) **Local regulator(s)**

A request for an opinion on the IPT must be filed by the transferor with the SHCP through a preliminary application. Such application has to contain, among others, a draft of:

(i) the IPT agreement;

(ii) the EGM Minute of the transferor approving the terms and conditions of the insurance portfolio transfer; and

(iii) the advertisement or notice on the insurance portfolio transfer.

Once the notification period has elapsed and the transferor has complied with all requirements referred to in Section 2.1 above, the transferor has to file with the SHCP a supplementary application, by which the transferor informs:

(i) the number of policyholders and policies involved in the IPT; and

(ii) the number of objections received from the interested parties or those of which the transferor has knowledge.

(b) **Other regulator(s)**

In case the transfer of the insurance portfolio exceeds certain thresholds set forth in the Antitrust Law (*Ley Federal de Competencia Económica*), it may be required to give notice on the transfer of the insurance portfolio to the antitrust commission.

No other notices or authorisations on the IPT are required.

(c) **Policyholders**

Policyholders are deemed to have been informed of the proposed IPT by the advertisements or notices (see Section 5 below).

It is common market practice that most insurance companies acquiring insurance portfolios conduct a marketing campaign among the policyholders once the transfer is completed.

(d) **Beneficiaries of cover other than actual policyholders**

Deemed notice (see Section 5 below).

(e) **Reinsurers**

Deemed notice, as above.

(f) **Brokers**

Deemed notice, as above.

(g) **Others**

Not applicable.

(h) **Further notice requirements**

There are no further notice requirements.

5. **<u>What publicity requirements are there for IPTs?</u>**

(a) **Newspapers**

The transferor has to publish (at its own expense) the advertisement or notice about the proposed IPT on three occasions in the DOF and in two wide circulation newspapers in the place where the transferor has its registered office address.

Such publications have to be made within a period of 20 calendar days from the first publication. The last publication will be considered fully effective before the insured or successors so that any interested party may state what it deems convenient and whether it objects to the transfer.

(b) **Official Gazette/Journal**

The transferor has to publish in the DOF on three occasions and at its own expense, the corresponding advertisement or notice on the IPT.

Such publications shall have to be made within a period of 20 calendar days from the first publication. The last publication will be considered fully effective before the insured or successors so that any interested party may state what it deems convenient and whether it objects to the transfer.

(c) **Trade magazines**

There is no legal obligation to publish the advertisement or notice on the IPT in trade magazines.

(d) **Register of Companies**

The transferor and transferee shall have to register the IPT Agreement with the competent RPC over the place where the corporate domicile of the transferor and transferee is located.

(e) **Other**

Not applicable.

6. **<u>Who has the right to object to the transfer?</u>**

(a) **Regulator(s)**

The SHCP has the discretionary authority to authorise or deny the IPT.

(b) **Policyholders**

Policyholders may object to the IPT within the 45 calendar days following the date of the last publication of the IPT notice. During such time, the policyholders may object to the transfer.

The SHCP will take into account the number of objections to the transfer in deciding whether to grant or deny its authorisation to the transfer of the insurance portfolio.

(c) **Beneficiaries of cover**

See Section 6(b) above.

(d) **Reinsurers**

Reinsurers have no legal right to oppose the transfer; however, depending on the terms and conditions of the reinsurance contracts, they may have a contractual right to oppose the transfer.

(e) **Trade associations**

Trade associations have no right to object to the transfer.

(f) **Employees**

Employees have no right to object to the transfer.

(g) **Others**

Not applicable.

7. Who must approve and/or sanction the transfer?

(a) Local regulator

The SHCP is the only regulatory governmental agency with discretionary authority to grant or deny the corresponding authorisation for the transfer of the insurance portfolio.

The SHCP will request the opinion of the CNSF on the effects of the transfer in the insurance market and take into account its opinion to grant or deny its authorisation to the transfer of the insurance portfolio.

(b) Other regulator(s)

Mexican Antitrust Commission may have to be informed about the transfer and be satisfied that it does not breach competition rules.

(c) Court

The courts have authority to determine the merits of any objections to the IPT.

8. What jurisdictional conditions apply to the transfer?

8.1 What types of insurance portfolios are capable of transfer in Mexico?

All types of insurance contracts can be transferred no matter the line of business in which they are classified. Mexican insurance companies are licensed to carry out insurance activities (*operaciones activas de seguros*) within Mexican territory and therefore the insurance portfolios that may be transferred between Mexican insurance companies are governed by Mexican law.

On the other hand, there is no legal prohibition that restricts the transfer of reinsurance portfolios between Mexican insurance and reinsurance companies regardless of the law governing the corresponding reinsurance contracts.

8.2 Does the transferring portfolio need to be legally or commercially connected to the state where the transfer is effected?

No, please see Section 8.1 above.

8.3 Will the transfer be effective in jurisdictions other than those of the transferor and/or transferee?

Pursuant to the Principles of International Private Law, any legal act validly created in accordance with the legal provisions of one jurisdiction shall be recognised as valid in another jurisdiction; on the understanding, however, that such legal act does not breach:

(a) any fundamental principles of law in the country in which such legal acts will become effective; or

(b) a mandatory law or public policy.

8.4 What effect will the transfer have on arbitration clauses?

The rights and obligations under an arbitration clause will be assigned along with the insurance and reinsurance portfolio pursuant to the terms of each and every insurance or reinsurance policy.

9. What is the procedure and timing of the transfer?

9.1 What is a typical timeline for a transfer?

Approximate Time	Action
Day 1	File the preliminary application with the SHCP.
Day 60	Response from the SHCP with an opinion regarding the documents enclosed to the preliminary opinion.
Day 61	Publication of the IPT notice in the DOF and two wide circulation newspapers.
Day 81	Period granted to the interested parties to oppose the transfer.
Day 125	File the supplementary opinion with the SHCP, including, the final versions of the transaction documents duly executed.
Day 160	Final resolution by the SHCP and in its case, the authorisation to record the IPT agreement with the RPC.
Day 161	Record the IPT agreement with the RPC.
Day 180	Obtain the recording evidence from the RPC.

9.2 Are there any hard legislative or regulatory deadlines?

Pursuant to the LGISMS, the SHCP has 6 months to resolve any application on an IPT. The period of time in which:

(i) the publication in the DOF and two wide circulation newspapers of the corresponding transfer notices occurs;

(ii) the RPC records in its files the IPT agreement; or

(iii) the transferor complies with any requirement of information or any commentaries made by the SHCP on the transaction documents,

will not count towards that time.

10. What key documentation will be produced for the transfer?

The following documents have to be produced in order to implement the IPT:

(a) **The IPT agreement:** the transferor and transferee enter into an IPT agreement, by which the transferor agrees to assign or transfer the insurance policies to the transferee, and the transferee agrees to accept same.

(b) **The EGM Minute:** the transferor has to obtain the corresponding authorisation from its EGM to validly transfer the insurance portfolio.

(c) **Notices and Advertisements:** the transferor has to prepare and place the corresponding IPT notices in its central offices, branches and other customer service offices, as well as publish such advertisements in the DOF and in two wide circulation newspapers.

(d) **The Preliminary Brief:** the transferor has to prepare and file a preliminary brief to the SHCP requesting an opinion on the transaction documents. In addition to the information regarding the general information about the transferred policies, amounts of technical reserves involved and other similar information such brief has to contain a draft of:

(i) the IPT agreement;

(ii) the transferor's EGM by which the transferor authorises the transfer; and

(iii) the notices and publications informing the policyholders, insured and other interested parties the transfer of the insurance portfolio.

(e) **The Supplementary Brief:** the transferor has to prepare and file a supplementary brief to the SHCP requesting its final approval to the transfer and informing the amount of claims and oppositions received from interested parties.

11. **<u>What professional agents are involved in the transfer and what are their roles?</u>**

(a) **Lawyers**

Lawyers are generally involved in IPTs in order to set up and implement the transfer process. They are in charge of drafting the legal documents required in the process, attending the commentaries and objections raised by the interested parties during the process and deal with the objections and claims filed by the policyholders, insured and beneficiaries of the policies.

(b) **Accountants**

Accountants have an active role on the estimation of tax contingencies or dealing with tax issues, such as filing tax returns with the tax authorities.

(c) **Actuaries**

Actuaries are generally involved in the preparation of technical reports on the estimate value of the transferred portfolio and potential effects arising from the transfer of the insurance policies, including the effect on the reserves.

(d) **Independent Expert**

Independent experts are not required to participate or intervene during the transfer process.

(e) **Other**

Not applicable.

12. **<u>What legal issues are frequently encountered in transfers?</u>**

(a) **Opposition from Policyholders, Insureds and Other Interested Parties**

Pursuant to the LGISMS, the policyholders, insured and other interested parties, such as creditors in case the transfer is made as a consequence of a corporate reorganisation, are entitled to object to a transfer within the next 45 calendar days from the date of the last publication of the insurance portfolio transfer notice. During such time, interested parties may state the reasons for their objection to the transfer.

The objections filed by interested parties do not suspend the transfer proceeding and only give the insured the right to terminate their insurance policies (where such policies give such right) and receive the amounts set forth under the policies in case of termination. The SHCP will take into account the number of objections in deciding whether to grant or deny its authorisation to the transfer.

(b) **Insufficiency of Technical Reserves**

In an IPT, the parties must calculate the effects arising from such transfer in its financial condition and agree on the price being paid for the transfer and in its case, the assets being transferred with the liabilities under the insurance portfolio. The parties must calculate their respective solvency margins required under applicable law and regulations after the transfer takes effect to determine their compliance with applicable laws and regulations and facilitate the authorisation from the SHCP.

(c) **Tax Liabilities**

The assignment and acquisition of insurance or reinsurance portfolios may be subject to VAT and Income Tax. The tax consequences of the transfer must be duly calculated prior to the transfer.

(d) **Assignment Restrictions**

Many insurance and reinsurance contracts provide specific provisions to restrict a party's right to assign or transfer a contract to a third party. These contracts usually require the express and prior consent of the counterparty under such contract.

It is therefore advisable to review the terms and conditions of the corresponding insurance or reinsurance contracts in order to avoid any potential legal liability (damages and loss of profits) arising from an unlawful assignment and transfer of insurance or reinsurance portfolio.

13. **<u>How frequently is the transfer mechanism used?</u>**

13.1 **Is the transfer mechanism commonly used? For what purposes is it used?**

The transfer of insurance or reinsurance portfolios is frequently used on bankruptcy proceedings, corporate reorganisations or termination of a specific line of business and as an alternative or mechanism to complete a merger or acquisition.

13.2 **Are there any statistics of the use of the transfer mechanism?**

Insurance transfers: No.

Reinsurance transfers: No.

14. **<u>What alternative methods can be used to transfer insurance portfolios, and what are the advantages and disadvantages of such methods?</u>**

(a) **Novation**

Novation may be used as an alternative method to IPT; however, such method is not advisable since the transferor has to obtain an express consent from the policyholders in order to substitute the original obligation.

It is also important to bear in mind that the novation entails additional administrative costs arising from the execution of a new contract with the new insurance company. As an advantage, the new insurance company will not be assuming any liability or contingency from the previous policies and in its case, may propose to the policyholder revised terms and conditions in order to underwrite the new insurance policy.

(b) **100% reinsurance (also described as "run-off"/"portfolio"/"assumption" reinsurance or retrocession, "portfolio transfer" or "reinsurance to close")**

100% reinsurance is an alternative method to transferring insurance portfolios; however, Article 18 of the Insurance Contract Law *(Ley sobre el Contrato de Seguro*), provides that the insurance company will remain the only party liable to the insured even though it reinsures the corresponding insurance contract.

In such regard, entering a reinsurance contract as an alternative method to transfer an insurance portfolio will neither eliminate nor transfer the liabilities arising from the policies of the respective insurance portfolio. Moreover, the underwriter will still have to comply with all the obligations under each policy and therefore, the main objective of a transfer which is assigning the obligations under same, will not be accomplished.

(c) **Corporate reorganisation**

Corporate reorganisations, such as mergers and spin-offs, are regulated in a similar way as to a conventional assignment or an IPT. The main difference between a conventional transfer and a transfer arising from a corporate reorganisation stems from the special opposition proceeding that creditors are entitled to initiate before a competent court to request payment in full of the transferor's debts.

In both cases, the transferor shall have to request authorisation to the SHCP, publish and place the transfer notices, and respect the opposition right from any interested party.

(d) **Arrangement/compromise**

Not applicable.

(e) **Other**

Not applicable.

15. **<u>What are the relevant sources of law or guidance?</u>**

(a) **Statutes**

Articles 66, 95 and 124 of the General Law of Insurance and Mutual Companies (*Ley General de Instituciones y Sociedades Mutualistas de Seguros*).

Chapters I and II, Title I, Book IV of the Federal Civil Code (*Código Civil Federal*).

Chapter IV, Title V, Book V of the Federal Civil Code (Código Civil Federal).

Article 18 of the Insurance Contract Law (*Ley sobre el Contrato de Seguro*).

(b) **Regulations**

Not applicable.

(c) **Guidance**

Ruiz Rueda, Luis, El Contrato de Seguro, Editorial Porrúa, México City Federal District, 1978.

Sepulveda Sandoval, Carlos, El Contrato de Seguro, Editorial Porrúa, México City Federal District, 2006.

(d) **Jurisprudence**

Not applicable.

(e) **Other**

Not applicable.

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1. General

We will restrict our response below to transfers of portfolios to life insurance policies, non-life insurance policies and reinsurance. We do not cover any insurance regarding funeral expenses and benefits in kind.

We will use the following definitions:

FSA: Dutch Financial Supervision Act (*Wet op het financieel toezicht).*

Member State: A state of the European Economic Area ("EEA").

1.1 Can insurance portfolios be transferred from one entity to another in your jurisdiction?

Yes, under certain conditions, insurance portfolios can be transferred.

1.2 Can reinsurance portfolios be transferred?

Yes, under certain conditions, reinsurance portfolios can be transferred.

1.3 Are the rules the same for the transfer of direct insurance portfolios as for reinsurance portfolios?

The rules are comparable. We cover the differences in our responses below.

1.4 Are the rules the same for the transfer of life portfolios as for non-life portfolios?

The rules under the FSA are similar. Transfers of non-life as well as life portfolios are possible after approval by the Dutch Central Bank (*De Nederlandsche Bank N.V.*).

A difference is that a non-life insurer has two options to transfer. It can:

(a) acquire the consent of each policyholder as well as any beneficiary under the insurance policies; or

(b) transfer the portfolio according to part 3.5.1.a of the FSA with the consent of the Dutch Central Bank.

A life insurer can in principle only transfer its portfolio on the basis of part 3.5.1.a of the FSA with the consent of the Dutch Central Bank.

Another difference is that life insurance policyholders have a right to object to the transfer. If 25% or more of the relevant policyholders object to the proposed transfer, the Dutch Central Bank will not give approval. Non-life insurance policyholders do not have this right to object. However, they have a right to terminate their insurance policy within a three-month period after the publication of the transfer of the portfolio in the Government Gazette (*staatscourant*).

2. What are the requirements for an Insurance Portfolio Transfer ("IPT")?

2.1 What requirements must be met by a *transferor* to undertake an IPT?

The provisions of the FSA require the following to be met:

(a) the transferor (which should be an insurer) should obtain approval from the Dutch Central Bank to transfer the portfolio. If it concerns a life insurance portfolio the intended transfer should be published in the Government Gazette.

(b) the transferor should, once the portfolio has been transferred, publish a notification of the transfer in the Government Gazette.

If it concerns a non-life insurer, the transfer should also be published in another way, to be determined by the Dutch Central Bank. Further, it may be necessary to publish the transfer in another Member State.

For an overview of when the rules included in the FSA are applicable see Section 7.

2.2 What requirements must be met by a *transferee* to undertake an IPT?

The transferee must be an insurer. A transfer from a transferor with its statutory seat in the Netherlands will only be approved by the Dutch Central Bank if the transferee fulfils the following requirements:

(a) If it is a life insurer or non-life insurer having its registered office in the Netherlands:

  (i) this life insurer or non-life insurer has to possess the minimum amount of solvency margin, especially in view of the proposed transfer; and

  (ii) the Dutch Central Bank has not required a recovery scheme (*herstelplan*) from that life insurer or non-life insurer;

(b) if it is a life insurer or non-life insurer having its registered office in another Member State, it is required that:

  (i) the supervisory authority of that Member State has declared, at the Dutch Central Bank's request, that this life insurer or non-life insurer possesses the minimum amount of solvency margin, especially in view of the proposed transfer.

(c) if it is a life insurer or non-life insurer having its registered office in a non-EEA state in the context of that insurer's operations from a branch situated in the Netherlands:

  (i) the branch concerned should possess the minimum amount of solvency margin, especially in view of the proposed transfer; and

  (ii) the Dutch Central Bank has not required a recovery scheme (*herstelplan*) from that life insurer or non-life insurer.

If a supervisory authority of a Member State is responsible for supervising the solvency margin of the branch, the Dutch Central Bank only grants its consent after that supervisory authority has declared that the branch possesses the minimum amount of solvency margin, especially in view of the proposed transfer, and that, where applicable, no scheme equivalent to a recovery has been required from the branch.

2.3 Are there any requirements relating to the financial condition of the *transferor*?

There are no special requirements with respect to the financial condition of the transferor, but the financial condition of the transferor can affect the decision of the Dutch Central Bank when it comes to giving approval. For instance, a refusal to give approval is possible in case of a partial transfer, when the interests of policyholders that are not part of the transferred portfolio may be adversely affected.

2.4 Are there any requirements relating to the financial condition of the *transferee*?

Yes, the transferee has to meet the applicable solvency margin. See Section 2.2.

2.5 Is the place where the portfolio was originally underwritten a relevant factor?

No, this is not a relevant factor.

2.6 Is the governing law or applicable jurisdiction of the insurance portfolio transferred a relevant factor?

No, this is not a relevant factor.

2.7 What criteria will be applied by the relevant authority in approving the transfer?

The Dutch Central Bank will only approve the transfer if it has no objections against the portfolio transfer (*bedenkingen*).

Further requirements are:

(a) the applicant must have handed over the requested documents and information (see Section 4 below);

(b) the transferee has to meet the required solvency margins;

(c) the transferee is not subject to a recovery plan;

(d) a consent of the regulatory authority that has supervision in the state where the risks or contract are located, in the event that the transferred risks or commitments are located in a Member State other than the Netherlands (given no later than three months after the request by the Dutch Central Bank);

(e) in case of a life insurance: no objections raised by 25% or more of the policyholders; and

(f) publications.

2.8 Are there any other requirements?

No, there are no further requirements.

3. <u>What can be transferred along with the insurance or reinsurance contract?</u>

An IPT is the transfer of the rights and obligations under the contract. Nothing else will be transferred with the insurance contract.

Obviously, it is possible that a portfolio transfer is part of the transfer of a business or of a company.

(a) Assets

See comments above.

(b) Liabilities

See comments above.

(c) Real property

See comments above.

(d) Reinsurance/retrocession contracts and other ancillary contracts

See comments above.

4. <u>Who must be notified of what, and how?</u>

(a) Local regulator(s)

Under Dutch law, when transferring a life insurance portfolio, the transferor and transferee are obliged to obtain approval from the Dutch Central Bank.

Non-life insurance portfolios can be transferred without the permission of the individual policyholders with approval from the Dutch Central Bank. Non-life insurance portfolios can also be transferred by means of individual contracts without obtaining approval from the Dutch Central Bank (which boils down to obtaining permission from each individual policyholder).

The application including the request for approval should contain the following documents:

(i) a draft transfer agreement;

(ii) a description of the rights and duties to be transferred;

(iii) draft texts of the announcements from the transferor in the Government Gazette and other newspapers and/ or trade journals (to be determined by Dutch Central Bank);

(iv) a specification by the transferee of the acquisition price of the rights and duties that will be transferred;

(v) a statement of the changes in the available solvency margin as a consequence of the transfer;

(vi) a statement of the extent of the technical provisions to be maintained in connection with the rights and obligations;

(vii) a statement of the nature and extent of the investments to be transferred to cover the technical facilities; and

(viii) in the event of profit sharing, a description of the profit definition.

(b) **Other regulator(s)**

Under specific circumstances the consent of other relevant (foreign) supervisory authorities is also required, for example when it concerns a life insurance policy written in a branch situated in another Member State to another life insurer having its registered office in a non-EEA state in the context of that insurer's operations from a branch situated in a Member State.

Informing another Dutch regulator is not required.

(c) **Policyholders**

In the Netherlands there are differences between informing life insurance and non-life insurance policyholders. The differences relate to the moment that the policyholders are informed and the remedies that the policyholders have. The remedies will be further explained in Section 6(b) below.

(i) **Life IPTs**

Life insurance policyholders have to be informed of the proposed transfer before the Dutch Central Bank gives its actual approval. The intention of the transferring parties has to be announced in the Government Gazette and in another way, determined by the Dutch Central Bank. In practice this 'other way' generally means that the intention has to be published in three newspapers. Once the Dutch Central Bank gives its approval, the transfer has to be announced in the Government Gazette.

If the transfer involves life insurance policies which are contracted in another Member State, the life insurance firm also has to announce the IPT in that Member State. This announcement has to be approved by the Dutch Central Bank.

(ii) **Non-life IPTs**

The policyholders of non-life insurance will only be informed about the intention of the parties after the approval of the Dutch Central Bank. The second day after the announcement is the day that the transfer will come into force for the policyholders. The transfer has to be announced in the Government Gazette and in another way, determined by the Dutch Central Bank. In practice this 'other way' generally means that the transfer also has to be published in three newspapers.

If the transfer involves insurance of risks in other Member State, the transfer should also be published in that Member State.

(d) **Beneficiaries of cover other than actual policyholders**

Not applicable.

(e) **Reinsurers**

Not applicable.

(f) **Brokers**

Not applicable.

(g) **Others**

According to Dutch law, a company established in the Netherlands which has more than 50 employees is obliged to have a works council. The works council has to be informed about decisions that constitute a change in the identity of the company, so it has an opportunity to give its opinion. Under very specific circumstances the works council may therefore need to be informed about the intended transfer.

(h) **Further notice requirements**

Not applicable.

5. **<u>What publicity requirements are there for IPTs?</u>**

(a) **Newspapers**

When the parties have to inform the parties concerned for the first time (whether it regards the proposed transfer or the actual transfer, see Section 4(c)) the Dutch Central Bank gives further instructions on the announcements. Generally this means that the parties have to place three announcements in trade journals or newspapers, determined by the Dutch Central Bank, which makes its decision in view of the best way to reach the target group. The Dutch Central Bank has to give its approval of the contents of the announcement and provides the insurer with a template.

(b) **Official Gazette/Journal**

In the event of a proposed transfer of a life insurance portfolio, an announcement has to be made in the Government Gazette. In the event of an actual transfer all transfers (life insurance, non-life insurance and reinsurance) have to be announced again in the Government Gazette.

(c) **Trade magazines**

See Section 5(a) above.

(d) **Register of Companies**

Not applicable.

(e) **Other**

Not applicable.

6. **<u>Who has the right to object to the transfer?</u>**

(a) **Regulator(s)**

The Dutch Central Bank may withhold its approval for the portfolio transfer. Furthermore, under certain circumstances approval or advice should be obtained from other supervisory authorities.

(b) **Policyholders**

Life insurance policyholders have the right to object to the proposed transfer. The Dutch Central Bank will establish a period for policyholders to object to the proposed transfer. If 25% or more of all policyholders object to this transfer, the Dutch Central Bank will not give its approval.

Non-life insurance policyholders do not have the right to object to the proposed transfer. Instead, the policyholders have the right to terminate their individual contract within a period of three months after the announcement of the transfer in the Government Gazette with effect of the date upon expiry of the three month period.

(c) **Beneficiaries of cover**

If payment under the insurance is already due and payable, the beneficiary of a life insurance policy has the right to object to the proposed transfer.

(d) **Reinsurers**

Reinsurers do not have a specific right to object to the transfer of an insurance portfolio. Since it concerns professional parties, they are considered to be well equipped to include appropriate provisions such as consent or termination rights in their individual contracts.

(e) **Trade associations**

Trade associations have no right to object to the transfer.

(f) **Employees**

Employees have no right to object to the transfer.

(g) **Others**

Not applicable.

7. **<u>Who must approve and/or sanction the transfer?</u>**

(a) **Local regulator**

The local supervisory authority, the Dutch Central Bank, has to give approval for a portfolio transfer.

Registered office in the Netherlands

(I) A *life insurer* having its registered office in the Netherlands that wishes to transfer rights and obligations under a life insurance contract requires the consent of the Dutch Central Bank where it concerns:

(a) the transfer of rights and obligations under a life insurance contract, concluded from a place of business in a Member State, to another life insurer having its registered office in a Member State in the context of that insurer's operations from a place of business in a Member State;

(b) the transfer of rights and obligations under a life insurance contract, concluded from a place of business in the Netherlands, to another life insurer having its registered office in a non-EEA State in the context of that insurer's operations from a branch situated in the Netherlands; and

(c) the transfer of rights and obligations under a life insurance contract, concluded from a branch situated in another Member State, to another life insurer having its registered office in a non-EEA State in the context of that insurer's operations from a branch situated in a Member State.

(II) A *non-life insurer* having its registered office in the Netherlands that wishes to transfer rights and obligations under a non-life insurance contract, may carry out this transfer subject to the consent of the Dutch Central Bank without the co-operation or permission of those parties that may derive rights from those non-life insurance contracts where it concerns:

(a) the transfer of rights and obligations under a non-life insurance contract, concluded from a place of business in a Member State, to another non-life insurer having its registered office in a Member State in the context of that insurer's operations from a place of business in a Member State;

(b) the transfer of rights and obligations under a non-life insurance contract, concluded from a place of business in the Netherlands, to another non-life insurer having its registered office in a non-EEA State in the context of that insurer's operations from a branch situated in the Netherlands; and

(c) the transfer of rights and obligations under a non-life insurance contract, concluded from a branch situated in another Member State, to another non-life insurer having its registered office in a non-EEA State in the context of that insurer's operations from a branch situated in a Member State.

(III) A *reinsurer* having its registered office in the Netherlands that wishes to transfer rights and obligations under a reinsurance contract, may carry out this transfer subject to the consent of the Dutch Central Bank's without the co-operation or permission of those parties that may derive rights from those reinsurance contracts where it concerns:

(a) the transfer of rights and obligations under a reinsurance contract, concluded from a place of business in a Member State, to another reinsurer having its registered office in a Member State in the context of that reinsurer's operations from a place of business in a Member State;

(b) the transfer of rights and obligations under a reinsurance contract, concluded from a place of business in the Netherlands, to another reinsurer having its registered office in a non-EEA State in the context of that reinsurer's operations from a branch situated in the Netherlands;

(c) the transfer of rights and obligations under a reinsurance contract, concluded from a branch situated in another Member State, to another reinsurer having its registered office in a non-EEA State in the context of that reinsurer's operations from a branch situated in a Member State; or

(d) the transfer of rights and obligations under a reinsurance contract, concluded from a branch situated in another Member State, to another reinsurer having its registered office in a non-EEA State in the context of that reinsurer's operations from a branch situated in a Member State.

Registered Office in another Member State

A life IPT may be carried out subject to the Dutch Central Bank's consent if the legislation of another Member State does not provide for an approval procedure for a life insurer having its registered office in that Member State regarding the transfer of rights and obligations under a life insurance contract, concluded from a branch situated in the Netherlands, to another life insurer having its registered office in a non-EEA State with a branch situated in the Netherlands.

A non-life IPT may be carried out subject to the Dutch Central Bank's consent, without the cooperation or permission of those parties which may derive rights from those non-life insurance contracts if the legislation of another Member State does not provide for an approval procedure for a non-life insurer having its registered office in that Member State regarding the transfer of rights and obligations under a non-life insurance contract, concluded from a branch situated in the Netherlands, to another non-life insurer having its registered office in a non-EEA State with a branch situated in the Netherlands.

Registered Office in a non-EEA State

A *life insurer* having its registered office in a non-EEA State that wishes to transfer rights and obligations under a life insurance contract shall require the Dutch Central Bank's consent where it concerns:

(a) the transfer of rights and obligations under a life insurance contract, concluded from a branch situated in the Netherlands, to another life insurer having its registered office in a Member State in the context of that insurer's operations from a place of business in a Member State; or

(b) the transfer of rights and obligations under a life insurance contract, concluded from a branch situated in the Netherlands, to another life insurer having its registered office in a non-EEA State in the context of that insurer's operations from a branch situated in the Netherlands.

A *non-life insurer* having its registered office in a non-EEA State that wishes to transfer rights and obligations under a non-life insurance contract, *may* carry out this transfer subject to the Dutch Central Bank's consent without the co-operation or permission of those parties that may derive rights from those non-life insurance contracts where it concerns:

(a) the transfer to another non-life insurer having its registered office in a Member State in the context of that insurer's operations from a place of business in a Member State; or

(b) the transfer to another non-life insurer having its registered office in a non-EEA State in the context of that insurer's operations from a branch office situated in the Netherlands.

(b) **Other regulator(s)**

If it concerns the scenarios mentioned under Sections 7(I)(c), 7(II)(c) and 7(III)(c), the Dutch Central Bank shall only consent to the transfer if the relevant foreign supervisory authorities have also consented to this at the request of the Dutch Central Bank.

If it concerns the scenarios mentioned under Section 7, sub-heading "Registered office in another Member State", the Dutch Central Bank shall not grant its consent before the supervisory authority of the Member State where the transferring insurer has its registered office has declared, at the Dutch Central Bank's requests, that it consents to the transfer.

When notification of the Dutch Central Bank is given and there is no reaction of the relevant supervisory authority, approval is considered to be given.

(c) **Court**

Not applicable.

8. **<u>What jurisdictional conditions apply to the transfer?</u>**

8.1 **What types of insurance portfolios are capable of transfer in the Netherlands?**

On the basis of part 3.1.5.a FSA, both life and non-life (re)insurance portfolios can be transferred.

8.2 **Does the transferring portfolio need to be legally or commercially connected to the state where the transfer is effected?**

No. For the requirements for the FSA to be applicable see Section 7.

8.3 **Will the transfer be effective in jurisdictions other than those of the transferor and/or transferee?**

This depends on the laws and regulations of the relevant jurisdiction. Dutch law provides, on the basis of the FSA after publication of the transfer, that the transfer shall take effect towards all the parties involved (other than the insurers concerned) on the second day following the publication date of the Government Gazette in which the notification was published.

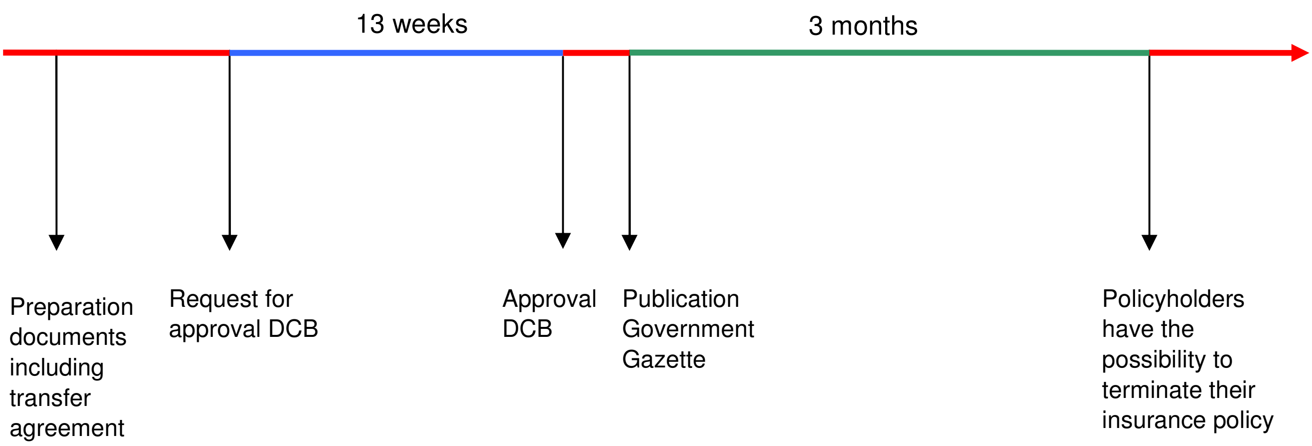
8.4 **What effect will the transfer have on arbitration clauses?**

The transfer of an insurance policy involves a transfer of all rights and duties. Arbitration clauses will transfer along with the (re)insurance portfolio to the transferee.

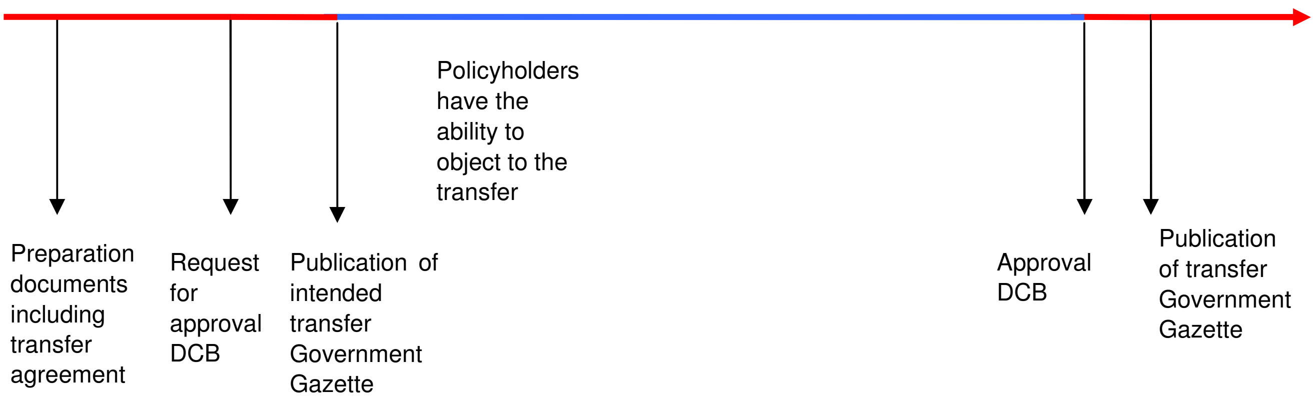
9. **<u>What is the procedure and timing of the transfer?</u>**

9.1 **What is a typical timeline for a transfer?**

Timeline: Non-life IPT



Timeline: Life IPT



9.2 **Are there any hard legislative or regulatory deadlines?**

(a) The Dutch Central Bank in principle decides on the request for approval of a portfolio transfer within 13 weeks.

(b) Relevant EU supervisory authorities have 3 months to respond to a request from the Dutch Central Bank for advice or approval regarding the proposed transfer. If the supervisory authority does not respond, the absence of any response is considered a positive advice or approval.

(c) The Dutch Central Bank has 3 months to respond to a request for advice or approval from a supervisory authority of another member state.

(d) Non-life insurance policyholders have three months to terminate their insurance contract after the announcement in the Government Gazette.

10. **<u>What key documentation will be produced for the transfer?</u>**

(a) Portfolio transfer agreement: at the initial stage of the portfolio transfer which the parties will sign;

(b) Circulars/Notices: official announcements to be published in the Government Gazette, which should be approved by the Dutch Central Bank; and

(c) a statement of the changes in the available solvency margin as a consequence of the transfer.

11. **<u>What professional agents are involved in the transfer and what are their roles?</u>**

It is not mandatory to involve professional agents in a transfer and it is therefore possible for parties to transfer an insurance portfolio without any (external) agent. In practice, it is common to involve one or more of the following advisers:

(a) **Lawyers**

Even though their involvement is not mandatory from a pure legal perspective, lawyers play an important role in the whole process of the IPT for example by setting up the documentation for the application with the Dutch Central Bank and the (draft) contracts. They represent the parties if there are regulatory issues with the Dutch Central Bank.

(b) **Accountants**

May be involved in the solvency calculations and they may intervene in relation to tax issues.

(c) **Actuaries**

May provide reports on the terms and likely effects of the transfer and review the calculations provided by the accountants.

(d) **Independent Expert**

It is possible to involve an independent expert, but this is less common in the Netherlands.

(e) **Other**

Not applicable.

12. **<u>What legal issues are frequently encountered in transfers?</u>**

(a) **Clauses in contracts purporting to prohibit or restrict a party's ability to transfer the business**

Some contracts of insurance or reinsurance purport to restrict a party's right to transfer the contract to a third party. If the insurance portfolio is transferred with the consent of the Dutch Central Bank (see Section 1.4(b) above), the prior consent of the counterparty is not required despite such a clause being in the contract.

(b) **Enforcement of the transfer in foreign jurisdictions**

In the event of a cross-border portfolio transfer, adjustment of the Dutch interpretation of the Directive and the interpretation in the relevant other jurisdictions will take place.

(c) **Solvency considerations**

Solvency considerations are part of the IPT procedure.

(d) **Disclosure, for example to interested parties or objectors**

Information of the relevant parties is part of the procedure.

There is no disclosure procedure under Dutch law allowing the interesting parties to collect more information concerning the proposed transfer.

(e) **VAT**

As a consequence of *Swiss Re Germany Holding GmbH v Finanzamt München für Körperschaften* (Case No. C-242/08) the transfer of (re)insurance portfolios is subject to VAT in the Netherlands at the standard rate of 19% (rate: 2010). Following this ruling such a transfer can no longer benefit from the VAT exemption for banking, financial or insurance services.

The transfer of (re)insurance portfolios to a VAT taxable person, residing outside the Netherlands will be outside the scope of Dutch VAT. A Dutch resident taxable person acquiring a (re)insurance portfolio from a non-Dutch resident supplier will be liable to account for Dutch VAT under the reverse charge scheme.

The ECJ did not rule in detail about the possibility of applying the concept of a transfer of a going concern to the transfer of (re)insurance portfolios. A transfer of a going concern will not result in a VAT liability. There is currently some uncertainty within the Netherlands as to whether this concept of a transfer of a going concern can be applied in the Netherlands to the mere transfer of (re)insurance portfolios.

(f) **Other tax issues**

The transfer of (re)insurance portfolios by a Dutch taxable entity is a disposal from a Dutch corporate income tax (CIT) perspective. Any loss on the disposal of the portfolios would in principle be tax deductible. Any gain realised is in principle subject to 25.5% CIT (first EUR 200,000 of profit is taxed at 20%, 2010 rates). In principle, such gain could be offset against loss carry forward available (if any) provided that certain conditions are met. Under conditions, capital gains realised on the disposal of business assets may be placed in a reinvestment reserve. In case of a transfer of the portfolios to a related party, Dutch tax law prescribes that such transfer should take place at arm's length and should be properly documented.

13. **How frequently is the transfer mechanism used?**

13.1 **Is the transfer mechanism commonly used? For what purposes is it used?**

The transfer mechanism is commonly used in the Netherlands. The purpose is to avoid a procedure in which individual consent of each insured, policyholder and (under certain circumstances) beneficiary is required. Moreover, life insurers have no other method to transfer their portfolio (except when a policyholder requests a transfer). As regards reinsurance portfolio transfers, we are not aware of a case of a transfer approval procedure.

13.2 **Are there any statistics of the use of the transfer mechanism?**

No, we are not aware of any statistics of the use of the transfer mechanism.

14. **What alternative methods can be used to transfer insurance portfolios, and what are the advantages and disadvantages of such methods?**

(a) **Novation**

Novation is in fact a transfer of an insurance contract by obtaining consent of the individual policyholder. This is only possible with regard to non-life insurance contracts.

(b) **100% reinsurance (also described as "run-off"/"portfolio"/"assumption" reinsurance or retrocession, "portfolio transfer" or "reinsurance to close")**

100% reinsurance is not the same as a transfer of an insurance portfolio. The transferor remains the carrier of the risk vis-à-vis the policyholders.

(c) **Corporate reorganisation**

If there is a merger (*fusie*) or if a company is split up (*gesplitst*), the rules regarding a portfolio transfer included in the FSA are applicable.

(d) **Arrangement/compromise**

It is possible to transfer non-life insurance policies on the basis of the consent of each policyholder.

(e) **Other**

Not applicable.

15. **What are the relevant sources of law or guidance?**

(a) **Statutes**

Financial Supervision Act (*Wet op het financieel toezicht*).

(b) **Regulations**

Decree on Special Prudential Measures, Investor Compensation and Deposit Guarantees pursuant to the Financial Supervision Act (*Besluit bijzondere prudentiële maatregelen, beleggerscompensatie en depositogarantie Wft*).

(c) **Guidance**

Not applicable.

(d) **Jurisprudence**

Not applicable.

(e) **Other**

Not applicable.

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Peru

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1. General

1.1 Can insurance portfolios be transferred from one entity to another in your jurisdiction?

Yes. Pursuant to Article 321 of the General Law of Banking and Insurance (Law 26702, hereinafter the "Law"), insurance companies may transfer one or more of their business portfolios to other enterprises of the same nature duly authorised to issue policies, provided that certain conditions are met.

1.2 Can reinsurance portfolios be transferred?

Although there is no specific provision in respect of reinsurance, Article 321 of the Law should also apply to reinsurance portfolio transfers.

1.3 Are the rules the same for the transfer of direct insurance portfolios as for reinsurance portfolios?

There should not be any material differences in the rules applying to transfers of insurance and reinsurance portfolios.

1.4 Are the rules the same for the transfer of life portfolios as for non-life portfolios?

The same legislation applies to transfers of life portfolios and non-life portfolios. However, the Superintendence of Banking and Insurance (the "SBS" or the "Regulator"), will monitor that specific provisions relating to life and non-life insurance are complied with.

2. What are the requirements for an Insurance Portfolio Transfer ("IPT")?

2.1 What requirements must be met by the *transferor* to undertake an IPT?

There is no special procedure required by the SBS for IPT applications. As with other filings, the SBS sets the requirements on a case by case basis.

In order to transfer an insurance portfolio, the transferor needs to obtain:

(a) the policyholder's consent to transfer the insurance policy, which is normally granted in advance upon execution of the insurance contract; and

(b) prior authorisation from the SBS.

In order to obtain the authorisation from the SBS to carry out an IPT, the transferor needs to fulfil certain requirements that include filing a copy of the Business Portfolio Transfer Agreement and a certified copy of the Board minutes approving the transfer decision, among others.

2.2 What requirements must be met by a *transferee* to undertake an IPT?

It must be a licensed insurance company authorised to issue policies of the type which is the subject matter of transfer. Please see Section 2.3 below.

2.3 Are there any requirements relating to the financial condition of the *transferor*?

The Law does not establish any special requirements. However, all insurance companies are required to maintain a solvency level that must not be less than either the Solvency Margin[176] or the Minimum Capital[177] required for incorporation, as may be amended from time to time.

2.4 Are there any requirements relating to the financial condition of the *transferee*?

Please see Section 2.3 above.

2.5 Is the place where the portfolio was originally underwritten a relevant factor?

There is no provision in this regard, but the SBS could take this issue into account in certain circumstances, such as where the country in which the portfolio originated does not follow certain regulatory standards. In this situation, the SBS could deny authorisation of the IPT.

2.6 Is the governing law or applicable jurisdiction of the insurance portfolio transferred a relevant factor?

See Section 2.5 above.

2.7 What criteria will be applied by the relevant authority in approving the transfer?

The SBS will be closely involved in the transfer process and it will most likely object to the transfer if it concludes that it is prejudicial to policyholder's interests or if as a result of the transfer either insurer could be placed in a position where compliance with regulatory provisions may be put at risk. The SBS will also focus on the transparency and effects of the transfer, as well as its impact on policyholders.

2.8 Are there any other requirements?

See Section 10 below.

3. What can be transferred along with the insurance or reinsurance contract?

(a) Assets

There are no provisions restricting the transfer of other assets along with the insurance or reinsurance contract, although the SBS will look into the various aspects of the transaction prior to granting authorisation. If the portfolio transfer does not comply with both requirements needed to undertake an IPT (the reinsurer's consent and the SBS's authorisation), the portfolio transfer will not be carried out.

(b) Liabilities

See (a) above.

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[176] The SBS determines the Solvency Margin depending on the following criteria:
- Annual amount of premiums; and
- Margin of losses in the last three legal exercises.

[177] The following minimum capital is required in order to incorporate in Peru:
- Insurance company: Approximately US$ 1,300,000 depending on whether the company has life or non-life business portfolios, or both);
- Insurance and Reinsurance company: Approximately US$ 3,100,000;
- Reinsurance company: Approximately US$ 1,900,000.

(c) **Real property**

See (a) above.

(d) **Reinsurance/retrocession contracts and other ancillary contracts**

See (a) above.

4. **Who must be notified of what and how?**

(a) **Local regulator(s)**

In order to carry out an IPT a prior authorisation from the SBS is required. The transferor must submit the required documentation to the SBS.

Additionally, the SBS should also be notified of every significant step taken during the transfer process in order to identify any adverse effect on the policyholders' interests or the market.

(b) **Other regulator(s)**

Not applicable.

(c) **Policyholders**

Policyholders of the transferor must be notified of the proposal to undertake an IPT. However, as this may cause some difficulties where the insurance company's records are incomplete or out-of-date, notification may be achieved by means of a widely circulated newspaper.

(d) **Beneficiaries of cover other than actual policyholders**

Not applicable.

(e) **Reinsurers**

In the case of reinsurance portfolio transfers, notice of the application must be given to reinsurers of the transferor whose contracts of reinsurance are being transferred.

The same mechanism used for IPTs applies in this case.

(f) **Brokers**

There is no requirement under the Law to give notice to brokers. However, the SBS will most likely require that notice be given to all brokers acting as agents of policyholders. This has a practical reason since most contracts are placed through brokers and the best way to reach the policyholders is through their brokers.

(g) **Others**

Not applicable.

(h) **Further notice requirements**

Not applicable.

5. **What publicity requirements are there for IPTs?**

(a) **Newspapers**

The SBS usually requires a notice to be published in the official gazette and another widely circulated newspaper. Please see Section 4 above regarding notification of policyholders.

(b) **Official Gazette/Journal**

See (a) above.

(c) **Trade magazines**

Not applicable.

(d) **Register of Companies**

Not applicable.

(e) **Other**

Not applicable.

6. **Who has the right to object to the transfer?**

(a) **Regulator(s)**

The SBS is entitled to object to the IPT mainly if it concludes that it can cause the breach of insurance regulatory provisions or if the transfer is unfair to certain policyholders or has an adverse effect on the benefits or terms originally stated in their insurance policies.

However, as the SBS is closely involved in the transfer process since the early stages, it may constantly make comments or remarks to insurers or reinsurers involved in order to continue with the process. This enables the companies to acknowledge any objections and deal with them properly.

(b) **Policyholders**

Any person who claims to be adversely affected by the IPT has the right to object to the transfer. Objections may be raised in person or by legal representatives. Any such person who claims to be adversely affected by the IPT may object to the transfer at any time before the authorisation is granted.

(c) **Beneficiaries of cover**

Not applicable.

(d) **Reinsurers**

Reinsurers may also be adversely affected by the transfer and have a right to object before the SBS. Any such reinsurer who claims to be adversely affected by the IPT may object to the transfer at any time before the transfer is authorised.

(e) **Trade associations**

Not applicable.

(f) **Employees**

Not applicable.

(g) **Others**

Not applicable.

7. **Who must approve and/or sanction the transfer?**

(a) **Local regulator(s)**

The SBS must grant the insurance or reinsurance company the required authorisation in order to carry out the IPT.

It is not likely for an insurance or reinsurance portfolio to be transferred without the approval of the SBS, as the SBS monthly supervises these companies and their operations. Any significant operation will therefore be monitored by the SBS.

The SBS is also entitled to impose sanctions on companies that, despite the regulation, carry out an IPT without fulfilling all the requirements.

(b) **Other regulator(s)**

Not applicable.

(c) **Court**

Not applicable.

8. **<u>What jurisdictional conditions apply to the transfer?</u>**

8.1 **What types of insurance portfolios are capable of transfer in your jurisdiction?**

There are no restrictions on the type of insurance business that can be transferred. Both life and non-life business insurance can be transferred.

8.2 **Does the transferring portfolio need to be legally or commercially connected to the state where the transfer is effected?**

There is no provision in this regard but the SBS could raise this issue if considered relevant.

8.3 **Will the transfer be effective in jurisdictions other than those of the transferor and or transferee?**

This will depend on the relevant applicable laws in the other jurisdictions, but the SBS will most likely request that an assurance of recognition in other relevant jurisdictions be given, when it is not clear whether the foreign jurisdiction will recognise the transfer.

8.4 **What effect will the transfer have on arbitration clauses?**

This will depend on the applicable laws in the relevant jurisdiction. Peruvian arbitrators would acknowledge the transferee's submission to the arbitration under the arbitration clause stipulated by the transferor.

9. **<u>What is the procedure and timing of the transfer?</u>**

9.1 **What is a typical timeline for a transfer?**

It can take months and it can vary depending on the time taken by the SBS to authorise the transfer. Based on the SBS's experience, the time period for an IPT varies between one and six months. Nevertheless, the timeline will mostly depend on the complexity of the portfolio being transferred, as for example, the number of individual policyholders that will need to consent to the transfer and the particularities and characteristics of the portfolio transfer transaction.

9.2 **Are there any hard legislative or regulatory deadlines?**

No.

10. **<u>What key documentation will be produced for the transfer?</u>**

- Business Transfer Agreement by which the transferor agrees to transfer and the transferee agrees to accept the business being transferred, subject to the SBS's approval.
- Corporate documentation relating to the IPT and corporate authority.
- Notices published in widely circulated newspapers to notify the policyholders and the public. These notices must specify the type of transfer to be carried out, the insurance conditions that will be modified, the term the policyholder has in order to give notice of its decision to terminate the contract or otherwise, among others.
- Financial documentation relating to the risks involved in the transferred portfolios. This documentation depends on the requirements made by the SBS. The SBS will assess regulatory compliance, and in particular whether the company's liabilities are duly covered by its assets.

11. **<u>What professional agents are involved in the transfer and what are their roles?</u>**

(a) **Lawyers**

Lawyers draft the legal documents required for the process by the SBS and render advice on the various legal aspects of the transaction. They will also deal with the objections raised by any interested party and the SBS.

(b) **Accountants**

Accountants produce the financial figures in relation to the transfer and compliance of the parties with the regulatory provisions, and prepare the relevant reports on the terms and likely effects of the transfer.

(c) **Actuaries**

Not applicable.

(d) **Independent Expert**

Not applicable.

(e) **Other**

Not applicable.

12. **<u>What legal issues are frequently encountered in transfers?</u>**

- Certain insurance agreements establish a restriction on a party's right to transfer the business to a third party. If the insurance agreement between the insurance company and the policyholder contains a restriction on transfer, the insurance company will not be able to carry out the IPT. The only exception to the above is if both the policyholder and the insurance company agree to modify the terms of the insurance agreement in order to allow the insurance company to transfer the policyholder's policy. In practice, if a policyholder refuses to consent to the transfer, the insurer can terminate the contract and exclude the same from the IPT.

- Solvency considerations are essential for the SBS when considering approval of the IPT, especially compliance with the Solvency Margin or Minimum Capital requirements (see Section 2.3 above).

13. **How frequently is the transfer mechanism used?**

13.1 **Is the transfer mechanism commonly used? For what purposes is it used?**

The transfer mechanism is used from time to time for IPTs.

However, to date, the SBS has no record of a single specific reinsurance portfolio transfer carried out, except as part of transfers of general portfolios in mergers and acquisitions.

13.2 **Are there any statistics of the use of the transfer mechanism?**

There are no publicly available statistics regarding the use of the transfer mechanism.

14. **What alternative methods can be used to transfer insurance portfolios and what are the advantages and disadvantages of such methods?**

Any legal way to transfer assets and obligation can, in principle, be used for the transfer of insurance portfolios.

(a) **Novation**

Novation is a way to extinguish obligations assumed by contract. Novation would require, in addition to the agreement between the old and new debtors, the creditor's consent. This can be applied to the IPT where the debtors are the transferor and the transferee and the creditor is the policyholder. Accordingly, insurance or reinsurance business can be transferred from one entity to another by means of novation of the individual contracts.

Disadvantages of this method are the substantial time involved, the impracticality and expense of having to identify and deal with all individual policyholders and the potential objections to the IPT.

(b) **100% reinsurance (assumption reinsurance)**

100% reinsurance of the relevant book of business does not release the transferor from its obligations under the policies, who thus remains liable towards the policyholders.

(c) **Corporate reorganisation**

A formal process of merger of the transferor and the transferee can be used to transfer a book of business between the two entities. However, in ordinary circumstances the merger triggers the IPT and not the other way around. The complexity of a merger would normally not be justified just because the parties intend to perform an IPT.

(d) **Arrangement/compromise**

Not applicable.

(e) **Other**

Not applicable.

15. **What are the relevant sources of law or guidance?**

(a) **Statutes**

The main law that regulates the IPT is Law 26702. It contains a specific provision on portfolio transfers, and the SBS may provide guidelines for any interested insurance or reinsurance company to carry out this type of transaction.

(b) **Regulations**

There are a few Resolutions of the SBS relating to requirements to be fulfilled for reinsurance agreements, as well as financial requirements for insurance and reinsurance companies that are interested in incorporating a company in Peru.

(c) **Guidance**

Not applicable.

(d) **Jurisprudence**

Not applicable.

(e) **Other**

Not applicable.

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1. General

1.1 Can insurance portfolios be transferred from one entity to another in your jurisdiction?

Yes, it is possible to transfer an insurance portfolio from one entity to another in accordance with Polish law. In order to be valid, such transfer must meet the conditions stipulated in the Insurance Activity Act.

1.2 Can reinsurance portfolios be transferred?

Reinsurance portfolios can also be transferred from one entity to another in accordance with Polish law. In order to be valid, such transfers must meet the conditions stipulated in the Insurance Activity Act.

1.3 Are the rules the same for the transfer of direct insurance portfolios as for reinsurance portfolios?

According to the Insurance Activity Act the rules for the transfer of direct insurance portfolios are the same as for the transfer of reinsurance portfolios.

1.4 Are the rules the same for the transfer of life portfolios as for non-life portfolios?

According to the Insurance Activity Act the rules for the transfer of life portfolios are almost the same as for the transfer of non-life portfolios. The only difference relates to the situation where a domestic insurance company is carrying out a transfer to an insurance company having its seat in an EU member state. In such case, prior to the approval of the transfer, the Polish Financial Supervisory Authority (Komisja Nadzoru Finansowego – "KNF") must consult with the appropriate authority, depending on the type of insurance which is transferred. In the case of life insurance, this will be the competent authority of the EU member state where the insurance company has its permanent domicile or seat of the management board, whereas in the case of non-life insurance, it will be the competent authority of the EU member state in which the risk is situated. Apart from the above, all other rules apply irrespective of the type of insurance agreements being the subject of the transfer.

2. What are the requirements for an Insurance Portfolio Transfer ("IPT")?

2.1 What requirements must be met by a *transferor* to undertake an IPT?

An IPT is subject to the prior approval of the KNF. The transferor and transferee must jointly apply to the KNF for approval of an IPT, submitting an application with the necessary documentation. Detailed information regarding the application and attachments to it is provided in Section 4(a) below.

In accordance with the Insurance Activity Act, in order to undertake an IPT, a transferor has to have, after the IPT, own funds in an amount of at least the solvency margin, as well as assets for covering the technical provisions. The KNF may exempt the transferor from this condition if an IPT is aimed at protecting the interests of the policyholders, the insureds or beneficiaries under the insurance contract, where there is a threat to the solvency of the transferor.

2.2 What requirements must be met by a *transferee* to undertake an IPT?

The same requirements as in Section 2.1 above apply.

2.3 Are there any requirements relating to the financial condition of the *transferor*?

As stated above, a transferor, after the IPT, has to have own funds in an amount of at least the solvency margin, as well as assets for covering the technical provisions.

2.4 Are there any requirements relating to the financial condition of the *transferee*?

As already stipulated above, a transferee, after the execution of an IPT, has to have own funds in an amount of at least the solvency margin and assets for covering the technical provisions.

2.5 Is the place where the portfolio was originally underwritten a relevant factor?

Yes, as the KNF is the appropriate authority for approval of IPTs only where the portfolio relates to insurance contracts concluded in the territory of Poland.

2.6 Is the governing law or applicable jurisdiction of the insurance portfolio transferred a relevant factor?

The governing law and applicable jurisdiction of the insurance contract being the subject of an IPT are not relevant factors in respect of an IPT. Please note that the choice by the parties of the governing law and jurisdiction of insurance contracts is significantly limited.

2.7 What criteria will be applied by the relevant authority in approving the transfer?

The KNF must approve an IPT if the following conditions are met:

(a) an appropriate application together with all required information has been submitted;

(b) the transferor and the transferee, after the IPT, will have own funds in an amount of at least the solvency margin, as well as assets for covering the technical provisions; and

(b) the interests of the policyholders, insureds and beneficiaries under the insurance contracts are duly protected.

2.8 Are there any other requirements?

The transfer of assets of the transferor to the transferee together with the IPT must take place in an amount of the technical provisions determined for the insurance portfolio being transferred.

Where justified by the protection of the interests of the policyholders, the insureds or beneficiaries under the transferring insurance contracts, the KNF may, at the request of the interested insurance company, determine the value of assets being transferred together with the insurance portfolio or give its approval to an insurance portfolio transfer without transfer of funds.

3. What can be transferred along with the insurance or reinsurance contract?

(a) Assets

The Insurance Activity Act specifies that the IPT must take place together with the transfer of assets of the transferor to the transferee in an amount of the technical provisions determined for the insurance portfolio being transferred. The Insurance Activity Act does not specify what kinds of assets must be transferred along with an IPT.

In practice, all categories of assets and liabilities may be transferred along with an IPT, as in each case, an IPT is subject to the prior approval of the KNF. Therefore, the KNF will in each case evaluate whether a given asset can be transferred and whether the conditions stipulated in the Insurance Activity Act are met, in particular those relating to the solvency requirements and the assets for covering the technical provisions.

The issue of transfer of assets or other property together with the IPT is complicated and must be clearly separated from the IPT itself.

(b) Liabilities

See Section 3(a) above.

(c) Real property

See Section 3(a) above.

(d) Reinsurance/retrocession contracts and other ancillary contracts

Particular issues arise in relation to reinsurance/retrocession contracts and other ancillary contracts which include non-assignment provisions. In principle, such provisions constitute only contractual obligations between the insurance company and the reinsurer. However, where transferring the reinsurance contract were to infringe a non-assignment provision, the cession of the reinsurance contract would be ineffective.

We assume that non-assignment provisions could be relevant to the KNF when assessing whether the conditions for an IPT are met. Most probably in such case, the KNF would refuse to issue its approval for an IPT on the basis that the assets to be transferred by the transferor to the transferee together with the IPT are not in an amount of the technical provisions determined for the relevant insurance portfolio.

4. Who must be notified of what, and how?

(a) Local regulator(s)

According to Polish law, only IPTs with the approval of the KNF are deemed to be valid and enforceable. The Insurance Activity Act stipulates that the application for approval of the IPT submitted to the KNF must contain the documents listed in Section 10 below.

(b) Other regulator(s)

Where the planned IPT is to take place between a Polish and a foreign insurance company, some additional notifications may be required.

Where the IPT is between a Polish branch of a non-EU domiciled insurance company and an insurance company having its seat in an EU member state, the KNF will approve it after having received, from competent bodies of that EU member state, information on:

(i) the admissibility of the portfolio transfer under the domestic law of that EU member state;

(ii) approval to effect the portfolio transfer; and

(iii) possession by the transferee of own funds in an amount of the solvency margin.

The same requirements apply where the IPT is carried out between a Polish branch of a non-EU domiciled insurance company and a branch of a foreign insurance company conducting its activity in another EU member state.

In the case of a Polish insurance company seeking to transfer an insurance portfolio to an <u>insurance company with its seat in an EU member state</u>, the KNF will issue its approval after receiving a confirmation from the competent supervisory body of the EU member state in which the transferee has its seat, that the transferee, after taking over the portfolio, will have own funds in an amount of the solvency margin. In addition, the KNF must consult with:

(i) in the case of life insurance, the competent authority of the EU member state where the insurance company has its permanent domicile or seat of the management board; or

(ii) in the case of non-life insurance, the competent authority of the EU member state in which the risk is situated.

An IPT of insurance policies concluded in the territory of Poland by any insurance company established in an EU member state (operating in Poland on the basis of EU provisions relating to freedom of establishment or freedom to provide services) requires a positive opinion of the KNF passed to a competent body of the EU member state in which that foreign insurance company has its seat.

Where a portfolio of insurance policies concluded in the territory of Poland is to be transferred to a domestic insurance company, the KNF must pass to a competent body of the EU member state in which the foreign insurance company has its seat, information establishing whether that domestic insurance company will have own funds in an amount of the solvency margin after the transfer.

(c) Policyholders

Policyholders are notified about the IPT by way of a newspaper announcement. For further details regarding such notification, please see Section 5(a) below. In practice, the KNF may require as a condition for its approval that the transferor and the transferee inform policyholders of the IPT by way of regular correspondence.

(d) **Beneficiaries of cover other than actual policyholders**

There is no legal duty to notify these of the IPT. In practice, however, the KNF may require notification of beneficiaries as well.

(e) **Reinsurers**

There is no legal duty to notify these of the IPT. However, such duty may arise on a contractual basis, if the parties have made such provision.

(f) **Brokers**

There is no legal duty to notify these of the IPT.

(g) **Others**

Not applicable.

(h) **Further notice requirements**

Not applicable.

5. **<u>What publicity requirements are there for IPTs?</u>**

(a) **Newspapers**

In accordance with the Insurance Activity Act, after approving the IPT the KNF must make an announcement about the IPT in a Polish daily newspaper of countrywide circulation, at the cost of the transferor and the transferee. At this instance, policyholders are invited to lodge objections within 3 months following the day of the announcement.

The policyholders that lodge an objection have the right to terminate their insurance contract being transferred until the last day of the 3 months following the announcement of the IPT.

(b) **Official Gazette/Journal**

Not applicable.

(c) **Trade magazines**

Not applicable.

(d) **Register of Companies**

Not applicable.

(e) **Other**

Not applicable.

6. **<u>Who has the right to object to the transfer?</u>**

(a) **Regulator(s)**

The KNF may refuse to issue its approval if any of the conditions listed in Section 2.7 above are not met.

Please note that an IPT agreement in relation to an IPT which has not been approved by the KNF is null and void.

(b) **Policyholders**

Policyholders do not have the right to object to the IPT. However, if a policyholder has lodged an objection within 3 months from the announcement of the IPT in a daily newspaper, such policyholder has the right to terminate his insurance contract (see Section 5(a) above).

It is worth mentioning that in one resolution, passed as a result of a particular case involving a policyholder whose contract was to be transferred by means of an IPT, the Supreme Court stated that failure to notify the policyholder of the IPT does not undermine the validity of the IPT. The only consequence of such failure is ineffectiveness of the 3-month period for termination of the contract as against a policyholder who was not informed of the transfer.

In addition, a policyholder who has not been informed of the transfer of his/her insurance contract can only sue for damages from the transferee. After an IPT has been carried out, the transferor is free from any liability towards the policyholder whose contract has been transferred. The liability of the transferor and the transferee is not joint and several. Please note that the above resolution has been passed under the former legal regime, where the insurance company was obliged to directly notify the policyholders of the planned IPT. Nevertheless, the resolution is still relevant as regards the relationship between an IPT and each insurance contract which is the subject of the transfer.

(c) **Beneficiaries of cover**

Beneficiaries cannot object to the IPT under Polish law.

(d) **Reinsurers**

Reinsurers cannot object to the IPT under Polish law.

(e) **Trade associations**

Trade associations cannot object to the IPT under Polish law.

(f) **Employees**

Employees cannot object to the IPT under Polish law.

(g) **Others**

Not applicable.

7. **<u>Who must approve and/or sanction the transfer?</u>**

(a) **Local regulator**

Please see Section 6(a) above.

(b) **Other regulator(s)**

Please see Section 4(b) above.

(c) **Court**

Under Polish law, the court does not have competence to approve or sanction the IPT. The court will analyse the IPT only in the case of a claim regarding the IPT that may be submitted by an interested party in ordinary court proceedings.

8. **<u>What jurisdictional conditions apply to the transfer?</u>**

8.1 **What types of insurance portfolios are capable of transfer in Poland?**

The Insurance Activity Act provides for insurance portfolio transfers in relation to both life and non-life insurance.

8.2 **Does the transferring portfolio need to be legally or commercially connected to the state where the transfer is effected?**

The Insurance Activity Act does not provide for such a requirement.

8.3 **Will the transfer be effective in jurisdictions other than those of the transferor and/or transferee?**

In principle, the transfer must be effective in European Economic Area member states on the basis of mutual recognition. The effectiveness of the transfer in other jurisdictions is subject to the laws of the relevant state, rather than Polish law.

8.4 **What effect will the transfer have on arbitration clauses?**

The Insurance Activity Act does not make provisions in this respect. Therefore, the general rules apply and the rights and obligations of the transferor under the arbitration clause are transferred to the transferee.

9. **<u>What is the procedure and timing of the transfer?</u>**

9.1 **What is a typical timeline for a transfer?**

It is hard to specify a typical timeline due to the fact that IPTs are not frequent in Poland and each case depends on its facts. Generally it can be said that the process of obtaining approval from the KNF usually lasts for about half a year. We have experienced proceedings that were shorter and lasted for about 3 months. On the other hand, we have faced a situation where it took almost a year from the submission of the application to the KNF to the approval of the transfer.

The above time periods relate only to the proceedings before the KNF. Prior to launching the proceedings it is necessary to sign the IPT agreement and produce an application with relevant documents. After issuing its approval, the KNF will make an announcement in a daily newspaper of countrywide circulation and invite the policyholders to lodge an objection to the IPT.

9.2 **Are there any hard legislative or regulatory deadlines?**

There are no regulatory deadlines whatsoever, apart from the 3-month period in which policyholders can lodge an objection to the IPT (see Section 5(a) above).

10. **<u>What key documentation will be produced for the transfer?</u>**

The application to the KNF must include the following information:

(a) the names and seats of the transferor and the transferee;

(b) the list of insurance contracts being transferred;

(c) the statement of technical provisions determined for the insurance contracts being transferred; and

(d) the statement of assets being transferred together with the insurance contracts.

The following documents must be attached to the application:

(a) the contract underlying the IPT;

(b) evidence that the transferor and the transferee have own funds in an amount of the solvency margin, or an application for exemption from this condition; and

(c) evidence that the transferor and the transferee have assets to cover their technical provisions, except where the transferor or the transferee are exempt from this condition.

It should be noted that the Insurance Activity Act sets out quite general requirements for evidence of own funds and assets. In practice, the KNF often asks for additional documentation in relation to these requirements.

11. **<u>What professional agents are involved in the transfer and what are their roles?</u>**

(a) **Lawyers**

There is no legal obligation that would require participation of lawyers in the IPT process. However, lawyers are usually involved in the process of agreeing and carrying out an IPT. In particular, lawyers are responsible for preparing the IPT agreement together with relevant documentation, and they represent the transferor and the transferee before the KNF in the process of obtaining approval for the IPT. It must be stressed, however, that there is no legal obligation that the proceedings for obtaining approval must be conducted by lawyers and insurance companies may conduct the proceedings on their own. In practice, due to the complex nature of the proceedings, insurance companies usually engage professional law firms for this purpose.

(b) **Accountants**

Accountants may assist with the process of assessing the assets to be transferred together with the insurance portfolio. There is, however, no legal duty which would require an assessment of assets by accountants.

(c) **Actuaries**

Actuaries are usually necessary for the purpose of assessing whether after an IPT, the transferor and the transferee will have own funds in an amount of at least the solvency margin and will have assets for covering the technical provisions. However, the Insurance Activity Act does not impose any legal obligation that own funds and assets be assessed by actuaries.

(d) **Independent Expert**

There is no legal duty for an independent expert to be involved in the IPT process.

(e) **Other**

Not applicable.

12. **<u>What legal issues are frequently encountered in transfers?</u>**

There are no extraordinary problems or issues which frequently arise in the proceedings relating to the approval of IPTs. The legal issues usually depend on the circumstances of each particular transaction.

13. **How frequently is the transfer mechanism used?**

13.1 **Is the transfer mechanism commonly used? For what purposes is it used?**

Transfers of insurance portfolios are not frequently used in the Polish insurance market. Usually an IPT is carried out once or twice a year. An IPT is used for various purposes, for example, reorganisation of the insurance company, change of business profile, or reorganisation of the group to which the insurance company belongs.

13.2 **Are there any statistics of the use of the transfer mechanism?**

There are no official statistics provided by the KNF in this respect.

14. **What alternative methods can be used to transfer insurance portfolios, and what are the advantages and disadvantages of such methods?**

(a) **Novation**

Novation is possible under Polish law, however due to the large number of steps involved, it appears that such method is rather complicated and can cause significant problems.

Where this method is used, each individual insurance contract (which originally would be transferred as part of an insurance portfolio) must be novated, so that the intended transferee becomes the new insurer under the policy. Therefore, the main problem of this method relates to obtaining the consent of each policyholder. In practice such operation would be very time-consuming, taking into account the necessity to offer such change of insurer to every policyholder. In addition, it cannot be excluded that at least part of the policyholders would refuse the proposed changes and terminate the insurance contract.

(b) **100% reinsurance (also described as "run-off"/"portfolio"/"assumption" reinsurance or retrocession, "portfolio transfer" or "reinsurance to close")**

Although such method is perfectly possible, in our opinion it would not achieve the same objective as an IPT. In the case of 100% reinsurance, the intended transferor remains liable under the original insurance contract. The advantage of such method is that the relevant reinsurance agreement is concluded only between the intended transferor and the transferee at their discretion and no further requirements or conditions have to be met.

(c) **Corporate reorganisation**

Such method would consist of either the merger of the transferor with the transferee or the acquisition of shares of the transferor by the transferee. Such processes are rather complicated, time-consuming and require much effort from both entities. In addition, such processes are subject (or may be subject) to control by various authorities - the KNF, the National Court Register or the Office for Competition and Consumer Protection. This method may therefore be an alternative option for the transferor and the transferee in cases where all or a significant part of an insurance portfolio is to be transferred.

(d) **Arrangement/compromise**

Not applicable.

(e) **Other**

In our opinion, an outsourcing/service agreement between the transferor and the transferee may also constitute an alternative method for an IPT. Obviously, in such case, similarly to a reinsurance contract, the party to the original insurance contract would still be primarily liable to the policyholder, while the "transferee" could organise administration and claims handling for remuneration. The effect of this method is therefore rather limited.

There is also the possibility of cession of every single insurance contract from a given insurance portfolio. However, in such case the consent of each policyholder of a given insurance portfolio would be necessary. In practice such scenario would be extremely time-consuming and therefore does not constitute a realistic alternative solution.

15. **What are the relevant sources of law or guidance?**

(a) **Statutes**

Act dated 23 May 2003 on Insurance Activity (unified text: Journal of Laws 2010, No. 11, item 66).

(b) **Regulations**

The Regulation issued by the Minister of Finance dated 28 November 2003 on the manner of calculation of the amount of the solvency margin and the minimum amount of guarantee capital for branches and insurance groups (Journal of Laws, No. 211, item 2060 with amendments).

The Regulation issued by the Minister of Finance dated 6 February 2006 on the detailed manner of calculation of own funds of domestic insurance companies belonging to an insurance capital group (Journal of Laws, No. 20, item 156 with amendments).

(c) **Guidance**

KNF has not issued any guidance or similar document relating to IPTs.

(d) **Jurisprudence**

Jurisprudence regarding IPTs is rather limited due to the short history of this institution in Polish practice and also due to the fact that IPTs are not subject to approval or control by the court.

The resolution which is discussed in Section 6(b) above is a resolution of the Supreme Court dated 21 October 1994, sign. no. III CZP 133/93.

(e) **Other**

Not applicable.

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BÁRBARA ALEXANDRE, ALMEIDA & ATHAYDE

1. <u>General</u>

1.1 Can insurance portfolios be transferred from one entity to another in your jurisdiction?

Yes. According to the Portuguese Regime of Insurance and Reinsurance Activity (the "PRIRA"), if certain conditions are met.[178]

1.2 Can reinsurance portfolios be transferred?

Yes. According to the PRIRA, if certain conditions are met.[179]

1.3 Are the rules the same for the transfer of direct insurance portfolios as for reinsurance portfolios?

No. There are different nuances.

1.4 Are the rules the same for the transfer of life portfolios as for non-life portfolios?

The provisions of the PRIRA do not distinguish between the transfers of life and non-life insurance portfolios. However, there are more requisites to satisfy related to life portfolios:[180]

(a) all the insureds are notified of the authorisation request to transfer the portfolio, and have 60 days, from the notification, to object to the transfer; and

(b) a transfer cannot be authorised if at least 20% of the insureds object to the transfer.

2. <u>What are the requirements for an Insurance Portfolio Transfer ("IPT")?</u>

2.1 What requirements must be met by a *transferor* to undertake an IPT?

Specific rules of the PRIRA apply, depending on whether the transfer relates to direct insurance or reinsurance contracts.

Insurance firms based in Portugal can partially or totally transfer a portfolio to a transferee based in the EU. Insurance companies can carry on both insurance and reinsurance activity, but reinsurance companies can only carry on reinsurance activity.

The rules of the PRIRA relating to portfolio transfers between insurance companies apply in the following scenarios: [181]

(a) transferor with a branch in Portugal and headquarters outside the EU and transferee established in Portugal;

(b) transferor with a branch in Portugal and headquarters outside the EU and transferee established in another EU member state;

(c) transferor with a branch in Portugal and headquarters outside the EU and transferee with headquarters outside the EU and a branch in another member state; or

(d) transferee with headquarters in Portugal, or a branch in Portugal and headquarters outside the EU, and transferee with headquarters in Switzerland.

The rules of the PRIRA related to reinsurance portfolio transfers apply in the following scenarios:[182]

(a) transferor with headquarters in Portugal and transferee established in the EU; or

(b) transferor with a branch in Portugal and headquarters outside the EU and transferee established in Portugal.

2.2 What requirements must be met by a *transferee* to undertake an IPT?

The transferee must be based or established in an EU member state, and have the required authorisation to carry on the business to be transferred.

2.3 Are there any requirements relating to the financial condition of the *transferor*?

No. The PRIRA does not provide for any specific requirements regarding the financial condition of the transferor.

2.4 Are there any requirements relating to the financial condition of the *transferee*?

Yes. The ISP (*Instituto de Seguros de Portugal* – Portugal Insurance Institute) only approves the proposed transfer if it has been provided with a certificate from the relevant regulatory authority of the state where the transferee is established, confirming the solvency margin requirements after the transfer.

2.5 Is the place where the portfolio was originally underwritten a relevant factor?

No. However, the business must be carried on in Portugal or the EU.

2.6 Is the governing law or applicable jurisdiction of the insurance portfolio transferred a relevant factor?

This is not established as a requisite in our legislation.

2.7 What criteria will be applied by the relevant authority in approving the transfer?

In order for the transfer to be approved, the following steps need to be taken:

(a) a certificate is to be issued by the regulatory authorities of the state where the transferee is established, certifying that the transferee will meet the applicable solvency margin requirements after the transfer;

(b) the competent authorities of the member state where the risks are situated or the member state

[178] Article 148 PRIRA.

[179] Article 155-A PRIRA.

[180] Article 155 PRIRA.

[181] Articles 148 to 151-A PRIRA.

[182] Article 155-A PRIRA.

of the commitment[183] are to give their consent to the transfer; and

(c) the competent authorities of the member state where the risks are situated or the member states of the commitment, when they are not the same as the member state where the transferor branch is located, are to give their consent to the transfer.

For **reinsurance transfers**, the following steps need to be taken:

(a) a certificate is to be issued by the regulatory authorities of the state where the transferee is established, certifying that the transferee will meet the applicable solvency margin requirements after the transfer; and

(b) in respect of a transfer of all or part of a portfolio of reinsurance between the Portuguese branch of a transferor based outside the EU and a transferee established in Portugal, authorisation must be obtained from the ISP in respect of the solvency margin required after the transfer.

2.8 Are there any other requirements?

No.

3. <u>What can be transferred along with the insurance or reinsurance contract?</u>

(a) Assets

These can be transferred if such transfer is provided for in the IPT agreement.

(b) Liabilities

Please see (a) above.

(c) Real property

Please see (a) above.

(d) Reinsurance/retrocession contracts and other ancillary contracts

Please see (a) above.

4. <u>Who must be notified of what, and how?</u>

(a) Local regulator(s)

As IPTs must be authorised by the ISP, the ISP must be notified.[184]

Our legislation does not specify which documents must accompany this request.

(b) Other regulator(s)

Depending on the location of the establishment of the transferee and/or the transferor and the location of the risks that are to be transferred, the ISP has to seek the co-operation of foreign regulator(s) of member states of the EU (see Section 2.7 above).

(c) Policyholders

An insurance company effecting an IPT must notify its policyholders of the transfer of insurance portfolios using registered official mail or other means for which a written record can be kept, at least 60 days before the date of the transfer (see also Section 4(d) below).[185]

(d) Beneficiaries of cover other than actual policyholders

The following applies to life insurance (see Section 1.4).

Where transfers of insurance portfolios cover risks located in Portuguese territory or in respect of which Portugal is a state of the commitment, policyholders and insurance beneficiaries have a period of 30 days counting from the publication on the ISP's website during which they can rescind their contract. During this period the transfer cannot be invoked against them.[186]

(e) Reinsurers

The PRIRA does not provide for separate notice to be given to reinsurers.

(f) Brokers

The PRIRA does not provide for separate notice to be given to brokers.

(g) Others

The PRIRA does not provide for separate notice to be given to others.

(h) Further notice requirements

Not provided for under the PRIRA.

5. <u>What publicity requirements are there for IPTs?</u>

(a) Newspapers

Authorisations of IPTs granted by the competent authorities of relevant EU member states in respect of a transfer including contracts that cover risks located in Portugal or in respect of which Portugal is a state of the commitment, must be properly drafted and published in Portuguese on the website of the ISP and in two daily newspapers of wide circulation.

(b) Official Gazette/Journal

There is no obligation to publish a notice in an official gazette.

(c) Trade magazines

There is no obligation to publish a notice of the application in a trade magazine.

(d) Register of Companies

There is no general publication requirement as regards the Companies Registry (*Conservatória de Registo Comercial*), unless the transfer extinguishes the transferor in which case a Registry entry must be made.

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[183] The member state of the commitment is the member state where the policyholder is habitually resident or, in the case of a legal person, the member state where the establishment of the legal person to which the contract or transaction relates is situated.

[184] Article 153 PRIRA.

[185] Article 44 Decreto-Lei No. 144/2006.

[186] Article 154 PRIRA.

(e) **Other**

Not applicable.

6. **Who has the right to object to the transfer?**

(a) **Regulator(s)**

If the requirements set out in Section 2.7 are not fulfilled, the ISP can reject the application for a transfer.

(b) **Policyholders**

See Sections 4(c) and (d) above.

Policyholders can rescind their contract but cannot prevent the transfer unless more than 20% of policyholders object to that transfer.

A specific restriction applies to life portfolios, where no transfer can be authorised when at least 20% of the insureds object to the transfer.

After receiving the request for transfer of the portfolio the ISP has to notify all of its policyholders by registered letter sent to the last known address in the contract, who have a period of 60 days from the receipt of the same to object to the transfer.

This does not apply if it is recognised by the ISP that the portfolio transfer is part of a "healing" process from a situation of financial shortage, merger or dissolution of an insurance company (Article 155 of Decree Law 2/2009 of 5 January).

(c) **Beneficiaries of cover**

See Section 6(b) above.

(d) **Reinsurers**

No, unless the reinsurance contract includes a provision to that effect.

(e) **Trade associations**

Not applicable.

(f) **Employees**

Not applicable.

(g) **Others**

Not applicable.

7. **Who must approve and/or sanction the transfer?**

(a) **Local regulator/Other regulator(s)**

Transferor with head office in Portugal and transferee established in the EU – Article 148 of Decree Law 2/2009 of 5 January

Insurance companies based in the Portuguese territory may, in accordance with laws and regulations in force, transfer all or part of their portfolio, concluded under either the establishment regime or the freedom to provide services regime, to a transferee established in the EU.

This transfer may be allowed provided that, cumulatively:

(i) the competent authority of the member state of origin of the transferor, if applicable, certifies that the transferee has, in respect of that transfer, the available solvency margin required for that purpose; and

(ii) the competent authorities of the member state where the risks are situated or the authorities of the member state of the commitment give their consent to the transfer.

If the transfer refers to all or part of a portfolio of contracts of the branch of an insurance company based in Portugal, the member state of the branch should also be consulted.

Branch of transferor based outside the EU and having a branch in Portugal, and transferee established in Portugal – Article 149 of Decree Law 2/2009 of 5 January

The branches of insurance companies whose headquarters are located outside the EU and which have a branch in Portugal may, in accordance with laws and regulations in force, transfer all or part of their portfolio to a transferee also established in Portugal.

The transfer may be allowed provided that, cumulatively:

(i) the ISP or, where applicable, the competent authorities of the member state of the transferee, certify that the transferee has, in respect of that transfer, the available solvency margin necessary for that purpose; and

(ii) the competent authorities of the member state where the risks are situated or the member states of the commitment, when they are not the same as the state where the transferor branch is located, give their consent to the transfer.

The ISP will not give the certification referred to in subparagraph (i) above where it has reasonable doubts about the financial situation of the transferee insurance company, in particular, where a financial situation recovery plan has been requested and where the rights of policyholders and beneficiaries of insurance contracts are at risk.

Branch of transferor based outside the EU and having a branch in Portugal, and transferee based in another member state – Article 150 of Decree Law 2/2009 of 5 January

The branches of insurance companies with headquarters outside the EU and a branch in Portugal may, in accordance with laws and regulations in force, transfer all or part of their portfolio to an insurance company with headquarters in another member state. The transfer may be allowed provided that, cumulatively:

(i) the competent authorities of the member state of origin of the transferee, if applicable, certify that the transferee has, in respect of that transfer, the available solvency margin required for that purpose; and

(ii) the competent authorities of the member state where the risks are situated or the member states of the commitment, when they are not the same as the state where the transferor branch is located, give their consent to the transfer.

Branch of transferor based outside the EU and having a branch in Portugal, and transferee based outside the EU and established in another member state – Article 151 of Decree Law 2/2009 of 5 January

The branches of insurance undertakings having their registered office outside the EU and having a branch in Portugal may, in accordance with laws and regulations in force, transfer all or part of their portfolio of contracts to a branch of an entity whose headquarters is also located outside the EU but where the branch is established in another member state.

The transfer may be allowed provided that, cumulatively:

(i) the competent authorities of the member state of establishment of the transferee or, where appropriate, the competent authorities of the member state where the transferee is based, attest not only that the transferee has, in respect of the transfer, the available solvency margin required for that purpose, but also certify that the laws of the relevant state permit such a transfer, and give their agreement to the transfer; and

(ii) the competent authorities of the member state where the risks are situated or the member states of the commitment (where they are not the same as the state where the transferor branch is located) give their consent to the transfer.

Transferor with headquarters in Portugal or based outside the EU and having a branch in Portugal, and transferee branch based in Switzerland – Article 151-A of Decree Law 2/2009 of 5 January

Insurance companies based in Portugal and branches of insurance companies with headquarters outside the EU and a branch in Portugal may, upon authorisation by the ISP, transfer all or part of a portfolio to branches of insurance companies which carry on "non-life" business, with headquarters in Switzerland and a branch in Portuguese territory, provided that the competent authority of the transferee's country states that the transferee has, upon that transfer, the solvency margin required for that purpose.

Opinion or consent of the competent authorities - Article 152 of Decree Law 2/2009 of 5 January

If the competent authorities consulted for the purposes of the transfer do not notify the ISP of their opinion or consent within three months from the date of receipt of the request, it will be presumed that there has been a favourable opinion or implied agreement of these authorities.

(b) **Court**

The court does not intervene in IPTs.

8. **<u>What jurisdictional conditions apply to the transfer?</u>**

8.1 **What types of insurance portfolios are capable of transfer in Portugal?**

Generally all types of insurance portfolios can be transferred, but note the specific requirements for life portfolios (see Section 6(b) above).

8.2 **Does the transferring portfolio need to be legally or commercially connected to the state where the transfer is effected?**

There are no provisions of Portuguese law in this respect.

8.3 **Will the transfer be effective in jurisdictions other than those of the transferor and/or transferee?**

The transfer will be effective where the beneficiary of the insurance contracts involved in the IPT is in a different jurisdiction than the transferor and/or transferee. Recognition in other jurisdictions will depend on the private international law of such jurisdictions.

8.4 **What effect will the transfer have on arbitration clauses?**

The arbitration clauses included in the insurance/ reinsurance contracts will be transferred along with the insurance or reinsurance portfolio to the transferee.

9. **<u>What is the procedure and timing of the transfer?</u>**

9.1 **What is a typical timeline for a transfer?**

There are no provisions of Portuguese law in this respect.

9.2 **Are there any hard legislative or regulatory deadlines?**

There are no provisions of Portuguese law in this respect.

10. **<u>What key documentation will be produced for the transfer?</u>**

Insurance portfolios are wholly or partially transferable by written contract and the transferee must be in a position to act as an insurance mediator in respect of the relevant insurance contracts.

The transfer of insurance portfolios to another insurance company should be preceded by notice to the policyholders by the insurance company. The notice should:

(a) be made by registered letter or other means for which a written record is kept; and

(b) be made at least 60 days before the date of the intended transfer.

The notice should refer to the fact that the transferor ceases to exist as a mediator under the insurance contract, but that the insured maintains the right to choose and appoint, in legal terms, an insurance mediator for their contracts.

A transfer of contracts forming an insurance portfolio only takes effect on their anniversary date or, in respect of renewable contracts, on the date of their renewal (Article 44 of Decree Law 144/2006 of 31 July).

11. **What professional agents are involved in the transfer and what are their roles?**

(a) **Lawyers**

Lawyers are not required, but they are generally involved in the IPT to ensure that the transaction complies with all legal requirements, so as to ensure the effectiveness and enforceability of the deal, as well as supervising the documents involved in the transfer and drafting the IPT contract**.**

(b) **Accountants**

The involvement of accountants is not required. However, they can intervene in the process in order to ensure that the required financial statements are available.

(c) **Actuaries**

The involvement of actuaries is not required.

(d) **Independent Expert**

The involvement of an independent expert is not required.

(e) **Other**

Not applicable.

12. **What legal issues are frequently encountered in transfers?**

In the case of cross-border transfers difficulties can arise with regard to solvency issues when approval is sought from the regulatory authority of the state where the transferee is based.

The tax treatment applied to the policies in the jurisdiction of the transferee may differ from that applied in the jurisdiction of the transferor.

13. **How frequently is the transfer mechanism used?**

13.1 **Is the transfer mechanism commonly used? For what purposes is it used?**

The transfer mechanism is not very common in Portugal.

13.2 **Are there any statistics of the use of the transfer mechanism?**

On the ISP website there are 20 transfers published since 6 January 2009 and the present date.

14. **What alternative methods can be used to transfer insurance portfolios, and what are the advantages and disadvantages of such methods?**

(a) **Novation**

It is usually possible to novate each individual contract between the policyholders and the transferees, but it can take too much time, and it is not very convenient as all policyholders have to be indentified. This method may also cause problems if any policyholders do not wish their policies to be transferred.

(b) **100% reinsurance (also described as "run-off"/"portfolio"/"assumption" reinsurance or retrocession, "portfolio transfer" or "reinsurance to close")**

Not usually used in these circumstances.

(c) **Corporate reorganisation**

Not applicable.

(d) **Arrangement/compromise**

Not applicable.

(e) **Other**

Not applicable.

15. **What are the relevant sources of law or guidance?**

(a) **Statutes**

Decree Law 2/2009, of 5 January.

Decree Law 72/2008, of 16 April.

Decree Law 144/2006, of 31 July.

(b) **Regulations**

Directive 2005/68/CE of the European Parliament and of the Council, of 16 November 2005.

(c) **Guidance**

Not applicable.

(d) **Jurisprudence**

Not applicable.

(e) **Other**

Not applicable.

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1. **General**

1.1 **Can insurance portfolios be transferred from one entity to another in your jurisdiction?**

Yes, subject to regulatory processes and control. In respect of the short-term insurance industry ("STI"), see sections 36 to 39 of the Short-Term Insurance Act 1998, and in respect of the long-term insurance industry ("LTI"), see sections 37 to 40 of the Long-Term Insurance Act 1998 respectively.

1.2 **Can reinsurance portfolios be transferred?**

Yes.

1.3 **Are the rules the same for the transfer of direct insurance portfolios as for reinsurance portfolios?**

Yes.

1.4 **Are the rules the same for the transfer of life portfolios as for non-life portfolios?**

The significant difference between the short-term and long-term industry is that STI transfers require application to and consent of the Registrar whereas LTI transfers require approval of the High Court of South Africa. Any transfer agreement should be subject to a suspensive condition, namely that the approval is required. Certain concessions are made in respect of transfer and stamp duties and other fees which will otherwise be payable. Please refer to section 39(3) of the Short-Term Insurance Act 1998 ("SIA") and section 40(3) of the Long-Term Insurance Act 1998 ("LIA").

2. **What are the requirements for an Insurance Portfolio Transfer ("IPT")?**

2.1 **What requirements must be met by a *transferor* to undertake an IPT?**

Short-term insurance:

Application must be made to the Registrar of short-term insurance. The parties to the transaction must:

(i) at least 60 days before lodging an application to the Registrar of the STI give notice to the Registrar together with full particulars of the transaction;

(ii) at least 30 days before lodging the application cause a notice in the form and containing the information required by the Registrar to be published in such official languages in the Gazette and in other newspapers as the Registrar may determine; and

(iii) upon making the application, provide the Registrar with:

   (1) the application and all of the documents relating thereto and supporting the application; and

   (2) a special resolution (if received) by members of a short-term insurer confirming the transaction and the terms and conditions of the transaction certified by the Chairperson of the meeting and by the public office of the short-term insurer to be a true and correct copy, within 60 days of the passing of the resolution.

The Registrar can then appoint a person, at the cost of the parties to the transaction, to enquire into and report on the desirability or otherwise of the transaction. The parties must also comply with the Registrar's direction to provide the Registrar with all information and documents relating to the transaction which they may require.

Portfolios of business funds under the control of intermediaries are sometimes moved informally by the intermediaries on behalf of their clients in terms of a mandate to do so.

Long-term insurance:

The High Court of South Africa must approve any transfer of the business of a long-term insurer or compromise, arrangement or amalgamation contemplated in Chapter X of the Companies Act.

When application is made to the court for approval, the parties to the transaction must jointly:

(a) at least 60 days before lodging the application, give notice to the Registrar thereof together with full particulars of the transaction. The Registrar is the Registrar or Deputy Registrar of long-term insurance;

(b) at least 30 days before lodging the application, cause a notice in the form and containing the information required by the Registrar to be published in such official languages in the Gazette and in such other newspapers as the Registrar may determine; and

(c) before lodging the application, serve upon the Registrar a copy of the notice of motion and all accompanying affidavits and other documents relating thereto and to be found in support of the application.

The Registrar could appoint a person, at the cost of the parties to the transaction, to enquire into, and report to the Registrar on the desirability or otherwise of the transaction. The parties must also comply with any direction by the Registrar to provide the Registrar with all information and documents relating to the transaction which the Registrar may require.

The Registrar, any policyholder, shareholder or creditor of the long-term insurer may file affidavits and other documents relating to the application and appear and be heard at the application.

Guidelines

The Financial Services Board has also published guidelines for the transfer of business of long-term or short-term insurers pursuant to the Insurance Acts. The notification in respect of a transfer must be in the form as required by the Registrar. The Financial Service Board has published an application form for approval for an arrangement of the transfer of long- or short-term insurance businesses where the policyholders are made aware of the nature of the substitution of their liabilities. Consent in writing by the policyholders is required by the Insurance Acts.

The notification or application must be at least 60 days before the application is lodged with the court or for the approval of the Registrar.

Financial statements must be prepared in accordance with the statements of General Accepted Accounting Practice ("GAAP"). The Statutory Returns must be prepared in accordance with the requirements laid down in the Insurance Acts.

The guidelines set out time periods for compliance with relevant sections of the Insurance Acts and time periods to be observed after confirmation by the court or approval by the Registrar.

Where there is an LTI transfer the LIA, and where applicable, Chapter 12 of the Companies Act, provide guidelines on the role of the transferee's statutory actuary. He has to prepare a report on what effect the proposals have on the policyholders of the long-term insurer.

The guidelines also set out:

(i) the form of advertisement;

(ii) the format of a written consent to be given by policyholders as contemplated by the Insurance Acts;

(iii) the format of a transfer agreement;

(iv) the format of written information to be given to a policyholder by the transferor and transferee insurers in terms of the relevant provisions of the Insurance Acts prior to the substitution of the policy which has taken place;

(v) the format for a list of assets to be transferred which makes provision for a description of the assets other than cash and cash to be transferred;

(vi) the format of the certificate issued by the auditor of the transferor insurer in the case of a transfer of insurance business;

(vii) the format of the certificates to be issued by the auditor of the transferor and transferee in the case of transfer of insurance businesses;

(viii) the format of the certificate to be issued by the statutory actuary of both the transferor and transferee insurers in the case of the transfer of long-term insurance business; and

(ix) the format for the certificates to be issued by the public officers of the transferor and transferee insurers after the transfer of business in terms of the relevant Insurance Acts.

2.2 What requirements must be met by a *transferee* to undertake an IPT?

See Section 2.1.

2.3 Are there any requirements relating to the financial condition of the *transferor*?

The transferor must meet the solvency requirements for insurers after the transfer is effected.

2.4 Are there any requirements relating to the financial condition of the *transferee*?

The transferee must be in a financial condition to meet all obligations towards transferred policyholders.

2.5 Is the place where the portfolio was originally underwritten a relevant factor?

No, the laws govern the insurers not the portfolios.

2.6 Is the governing law or applicable jurisdiction of the insurance portfolio transferred a relevant factor?

The applicable jurisdiction will always be the jurisdiction where the insurers are registered.

2.7 What criteria will be applied by the relevant authority in approving the transfer?

(a) Compliance with the requirements set out in Section 2.1 above.

(b) Consideration whether the transaction is inconsistent with the legislation.

(c) The interests and protection of relevant policyholders of the insurer concerned are of the highest importance.

2.8 Are there any other requirements?

No.

3. <u>What can be transferred along with the insurance or reinsurance contract?</u>

(a) **Assets**

Yes.

(b) **Liabilities**

Yes.

(c) **Real property**

Yes.

(d) **Reinsurance/retrocession contracts and other ancillary contracts**

Yes, subject to the consent of the reinsurers, retrocessionaires or other contracting parties.

4. <u>Who must be notified of what, and how?</u>

(a) **Local regulator(s)**

In both SIA and LIA arrangements the Registrar will consent if he is satisfied that the policyholders are made aware of the nature of the substitution and signify their consent in writing.

The relevant regulators are the Registrar or Deputy Registrars of short-term and long-term insurance.

(b) **Other regulator(s)**

The company's regulator if the transfer amounts to an amalgamation or a disposal of all or a major part of the assets of the company.

(c) **Policyholders**

Yes. By notice and publication referred to in Section 2.1.

(d) **Beneficiaries of cover other than actual policyholders**

Yes. By publication as contemplated in Section 2.1.

(e) **Reinsurers**

Only by publication as referred to in Section 2.1. Contractually, the reinsurer will have to be involved as well.

(f) **Brokers**

Yes, if the policyholders are represented by brokers.

(g) **Others**

By way of publication as referred to in Section 2.1.

(h) **Further notice requirements**

Not applicable.

5. **<u>What publicity requirements are there for IPTs?</u>**

(a) **Newspapers**

See Section 2.1 above.

(b) **Official Gazette/Journal**

See Section 2.1 above.

(c) **Trade magazines**

Not applicable.

(d) **Register of Companies**

Only if special resolutions or amalgamation needed.

(e) **Other**

Not applicable.

6. **<u>Who has the right to object to the transfer?</u>**

(a) **Regulator(s)**

Yes.

(b) **Policyholders**

Yes.

(c) **Beneficiaries of cover**

Any person who has an interest in the matter may, by giving notice to the Registrar within 15 days of publication in the Gazette of the notice referred to in Section 2.1 above, submit to the Registrar representations concerning the transaction as are relevant to their interests.

STI: Any policyholder, shareholder or creditor of the insurer concerned may, within that 15 day period, file affidavits and other documents relating thereto and appear before the Registrar and be heard in connection therewith.

LTI: The Registrar, any policyholder, shareholder or creditor of the insurer concerned may file affidavits and other documents relating thereto and appear and be heard at the hearing.

This will be contractual besides the general notice to the public in the media.

(d) **Reinsurers**

This will be contractual besides the general notice to the public in the media.

(e) **Trade associations**

No specific notice required.

(f) **Employees**

Employees will have to be involved if the transfer results in the dismissal, redeployment or transfer of employees.

(g) **Others**

As per Section 6(c) above.

The procedures referred to above are not necessary where the Registrar is satisfied that the policyholders have been or would be made aware of the nature of the substitution and have signified or will signify their consent thereto in writing.

The transaction approved by the court is binding on all persons and has the effect ordered by the court.

7. **<u>Who must approve and/or sanction the transfer?</u>**

(a) **Local regulator**

STI: The Registrar or Deputy Registrar of STI (unless all affected policyholders agree).

(b) **Other regulator(s)**

Not applicable.

(c) **Court**

LTI: The High Court (unless all affected policyholders agree).

8. **<u>What jurisdictional conditions apply to the transfer?</u>**

8.1 **What types of insurance portfolios are capable of transfer in South Africa?**

All.

8.2 **Does the transferring portfolio need to be legally or commercially connected to the state where the transfer is effected?**

No. The legislation governs the insurance companies not the portfolios.

8.3 **Will the transfer be effective in jurisdictions other than those of the transferor and/or transferee?**

Yes.

8.4 **What effect will the transfer have on arbitration clauses?**

Not applicable.

9. **<u>What is the procedure and timing of the transfer?</u>**

9.1 **What is a typical timeline for a transfer?**

Under the STI, we estimate 180 days.

Under the LTI, it can be 6 to 9 months.

9.2 **Are there any hard legislative or regulatory deadlines?**

Yes, see the details of the guidelines referred to in Section 2.1.

10. **<u>What key documentation will be produced for the transfer?</u>**

See Section 2.1 above.

11. **<u>What professional agents are involved in the transfer and what are their roles?</u>**

(a) **Lawyers**

STI: Yes, if required by the parties to provide advice and guidance in respect of the procedures and assist with the application to the Registrar.

LTI: Attorneys and counsel to prepare, launch and move the application to the court for approval.

(b) **Accountants**

Yes, to comply with the guidelines referred to in Section 2.1.

(c) **Actuaries**

Yes, to provide reports for the transferor, transferee and Registrar to comply with the guidelines referred to in Section 2.1.

(d) **Independent Expert**

Not normally; assistance of independent experts may be required if there is a specific query to be dealt with to the satisfaction of the Registrars.

(e) **Other**

Yes. Auditors, in order to ensure compliance with the guidelines as referred to in Section 2.1.

12. **<u>What legal issues are frequently encountered in transfers?</u>**

STI: The manner in which the insurer's liability towards policyholders to be substituted for the liability of another insurer towards policyholders is in the best interests of policyholders.

13. **<u>How frequently is the transfer mechanism used?</u>**

13.1 **Is the transfer mechanism commonly used? For what purposes is it used?**

It is compulsory in all affected transfers. However, it is infrequently used.

13.2 **Are there any statistics of the use of the transfer mechanism?**

Not published.

14. **<u>What alternative methods can be used to transfer insurance portfolios, and what are the advantages and disadvantages of such methods?</u>**

(a) **Novation**

If policyholders are made aware of the nature of the substitution and signify their consent thereto in writing, the transfer is effected contractually by novation (assignment) of the policies between transferor and transferee. Where this is possible it avoids a long formal process.

(b) **100% reinsurance (also described as "run-off"/"portfolio"/"assumption" reinsurance or retrocession, "portfolio transfer" or "reinsurance to close")**

Yes, but not without following the procedure described above.

(c) **Corporate reorganisation**

This is possible if two insurers are merging but the requirements are more onerous.

(d) **Arrangement/compromise**

Arrangements/compromises and amalgamations are also dealt with by sections 36 to 39 of the SIA and sections 37 to 40 of the LIA on the same basis as referred to above. In that regard reference should also be had to Chapter XII of the Companies Act.

(e) **Other**

Not applicable.

15. **<u>What are the relevant sources of law or guidance?</u>**

(a) **Statutes**

STI: sections 37 to 39 of the Short-Term Insurance Act.

LTI: sections 36 to 40 of the Long-Term Insurance Act.

(b) **Regulations**

Not applicable.

(c) **Guidance**

Yes, see Section 2.1.

(d) **Jurisprudence**

Limited Case law dealing with the predecessor under the then Insurance Act.

(e) **Other**

Interaction with the office of the Registrars concerned.

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South Korea

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1. General

1.1 Can insurance portfolios be transferred from one entity to another in your jurisdiction?

Yes, insurance portfolios may be transferred from one entity to another in Korea. Transfers of insurance portfolios may be classified into two types: (1) compulsory transfer and (2) voluntary transfer.

As the name suggests, a compulsory transfer is a type of transfer where the Korean Financial Service Commission (the "KFSC"), under its authority vested in it by the Act on the Structural Improvement of the Financial Industry, orders a transfer of insurance portfolios from one entity to another.

The second type of transfer, voluntary transfer, is a transfer of a portfolio of insurance contracts to another insurance company in which each insurance contract has the same calculation method for the amount of the liability reserve. For the purpose of this questionnaire, the focus of our discussion is on the second type - voluntary transfer.

1.2 Can reinsurance portfolios be transferred?

Yes, please see Section 1.1 above.

1.3 Are the rules the same for the transfer of direct insurance portfolios as for reinsurance portfolios?

Yes.

1.4 Are the rules the same for the transfer of life portfolios as for non-life portfolios?

There are no fundamental differences between the rules that apply to the transfer of life business and those that apply to non-life business.

2. What are the requirements for an Insurance Portfolio Transfer ("IPT")?

2.1 What requirements must be met by a *transferor* to undertake an IPT?

In Korea, an insurance company may be formed as a stock company or a mutual company. Because most insurance companies are organized as stock companies, the focus of our discussion for the purpose of this questionnaire will be on stock companies.

Generally, four requirements as set forth below must be met by a transferor to undertake an IPT:

(a) The KFSC's approval.

(b) If the insurance company is a stock company, a special resolution of a shareholders' meeting adopted by affirmative votes of no less than 2/3 of the voting rights of the shareholders present at the meeting and of no less than 1/3 of the total issued and outstanding shares.

(c) In the case that policyholders raise an objection within a fixed term (which must not be less than one month) following the publication of the transfer, the number of the policyholders who raise objections should not exceed 1/10 of the total number of policyholders of the insurance contracts to be transferred, or the amount of their insurance benefits should not exceed 1/10 of the aggregate amount of insurance benefits to be transferred. In addition, the number of policyholders who raise an objection to amendments to the contract provisions during the course of the transfer should not exceed 1/10 of the total number of policyholders subject to such change, or the amount of the insurance benefits attributable to objecting policyholders should not exceed 1/10 of the aggregate amount of the insurance benefits of policyholders subject to such change.

(d) Execution of an agreement to transfer insurance contracts.

2.2 What requirements must be met by a *transferee* to undertake an IPT?

The transferee must execute an agreement to transfer an insurance portfolio and obtain the KFSC's approval.

2.3 Are there any requirements relating to the financial condition of the *transferor*?

There is no requirement relating to the financial condition of the transferor.

2.4 Are there any requirements relating to the financial condition of the *transferee*?

The transfer may be objected to by the policyholders who are dissatisfied by the transferee's financial condition.

An insurance company intending to transfer its insurance contracts must publish a summary of the transfer of insurance contracts and balance sheets of both the transferor and the transferee within two weeks from the date on which the transfer is approved by a shareholders' meeting. The publication must provide that any policyholder who is dissatisfied with the transfer may raise an objection to the transfer within a fixed term, which must not be less than one month. If the number of policyholders or the amount of insurance benefits attributable to those that object to the transfer exceeds certain proportions (please see Section 2.1 above), the insurance may not be transferred. Policyholders may object to a transfer to a transferee with an unsound financial condition.

The KFSC may also withhold its approval of an IPT if it determines that the transfer to a transferee with an unsound financial condition would cause prejudice to the policyholders.

2.5 Is the place where the portfolio was originally underwritten a relevant factor?

In Korea, it does not matter whether the portfolio was originally underwritten in Korea or anywhere else. The transfer of the portfolio will be subject to applicable Korean law and regulations if both the transferor and the transferee are companies licensed pursuant to Korean law and regulations to do insurance business. Whether a portfolio originally underwritten in a foreign country could be properly transferred into Korea requires a separate review.

2.6 Is the governing law or applicable jurisdiction of the insurance portfolio transferred a relevant factor?

As discussed in Section 2.5 above, whether the transferor and the transferee are insurance companies approved under Korean law would be more important than the governing law or applicable jurisdiction of the insurance portfolio transferred.

2.7 What criteria will be applied by the relevant authority in approving the transfer?

The following criteria will be applied by the KFSC:

(a) the transfer is inevitable considering the transferor's business and financial conditions;

(b) the transfer does not disturb the soundness of the financial market and the rights of policyholders, beneficiaries and other interested parties; and

(c) the transferee maintains sufficient assets to protect the interests of the policyholders, creditors, etc.

2.8 Are there any other requirements?

No.

3. What can be transferred along with the insurance or reinsurance contract?

(a) Assets

In the insurance transfer agreement, the transferor and the transferee may agree assets to be transferred along with the insurance contract; *provided*, that any assets that are recognised by the KFSC as necessary for the protection of creditors' interests of the transferor must not be transferred.

(b) Liabilities

The liabilities to pay insurance benefits will certainly be transferred to the transferee. However, we are of the opinion that theoretically it is not possible to transfer other liabilities along with the insurance contract as there is no express basis to allow transfer of liabilities. In our phone conversation with the KFSC, the KFSC's staff indicated that a transfer of liabilities would need separate approvals and satisfaction of certain requirements because a transfer of liabilities may be characterized as a business transfer rather than a transfer of contract.

(c) Real property

Because real property is classified as an asset, it may be transferred for the same reasons as discussed in (a) above.

(b) Reinsurance/retrocession contracts and other ancillary contracts

We are of the opinion that these may be transferred although the law is silent on this issue. This is because broadly speaking they may be classified as assets. Another reason is that they are connected to payment of insurance benefits and transfer of these items benefits the transferee, the policyholders and the beneficiaries.

4. Who must be notified of what, and how?

(a) Local regulator(s)

The KFSC must be notified of the IPT through submission of the application for approval.

(b) Other regulator(s)

Not applicable.

(c) Policyholders

An insurance company intending to transfer an insurance portfolio must publish a summary of the transfer and balance sheets of both the transferor and the transferee within two weeks from the date on which a shareholders' meeting approves the transfer. The publication must provide that any policyholder who is dissatisfied with the transfer may raise an objection to the transfer within a fixed term which must not be less than one month (see Section 2.4 above). For further details regarding the mode of publication, see Section 5(a) below.

(d) Beneficiaries of cover other than actual policyholders

Not applicable.

(e) Reinsurers

Not applicable.

(f) Brokers

Not applicable.

(g) Others

Not applicable.

(h) Further notice requirements

Not applicable.

5. What publicity requirements are there for IPTs?

(a) Newspapers

As discussed in Section 4, an insurance company intending to transfer an insurance portfolio must publish a summary of the transfer. The law and regulations do not provide for the specific means of publication but in practice nationwide daily newspapers are generally used for publication.

(b) Official Gazette/Journal

Not applicable.

(c) Trade magazines

Not applicable.

(d) Register of Companies

Not applicable.

(e) Other

The public is often notified through the insurance company's internet homepage as a matter of voluntary practice.

6. **Who has the right to object to the transfer?**

(a) **Regulator(s)**

The KFSC must approve any transfer.

(b) **Policyholders**

As discussed in Section 2.1, if a certain number of policyholders object, the IPT cannot go ahead.

(c) **Beneficiaries of cover**

The relevant provisions of the Insurance Business Act are silent on whether the beneficiaries have the right to object to the transfer.

(d) **Reinsurers**

Not applicable.

(e) **Trade associations**

Not applicable.

(f) **Employees**

Not applicable.

(g) **Others**

Not applicable.

7. **Who must approve and/or sanction the transfer?**

(a) **Local regulator**

The KFSC has to approve the transfer of any insurance portfolio. The Insurance Business Act is silent on whether the KFSC can approve or sanction cross-border transfers because the insurance companies referred to in the Insurance Business Act are those licensed to conduct insurance business in Korea. However, we are of the opinion that there would be no differences between domestic and cross-border transfers as the KFSC will be likely to protect the interests of the policyholders in Korea and the soundness of the Korean insurance market.

(b) **Other regulator(s)**

Not applicable.

(c) **Court**

Not applicable.

8. **What jurisdictional conditions apply to the transfer?**

8.1 **What types of insurance portfolios are capable of transfer in South Korea?**

There are no restrictions regarding what types of insurance portfolios can be transferred.

8.2 **Does the transferring portfolio need to be legally or commercially connected to the state where the transfer is effected?**

The Insurance Business Act does not address this as it is designed to govern transfers between a transferor and a transferee licensed to do business in Korea.

8.3 **Will the transfer be effective in jurisdictions other than those of the transferor and/or transferee?**

See Section 8.2 regarding the scope of the Insurance Business Act.

8.4 **What effect will the transfer have on arbitration clauses?**

Unless the arbitration clauses of the insurance contracts are changed during the course of transfer, transfer of insurance has no effect on the arbitration clauses. Please see Section 12.

9. **What is the procedure and timing of the transfer?**

9.1 **What is a typical timeline for a transfer?**

Approximate Time	Action
A - 19 weeks	Notification of the convocation of the transferor's shareholders' meeting no less than two weeks before the date of the meeting.
A - 17 weeks	Resolution by the transferor's shareholders' meeting.
A - 16 weeks	Publication of a summary of the transfer and balance sheets of both the transferor and the transferee within two weeks following the transferor's shareholders' meeting.
A - 12 weeks	Any policyholders objecting to the transfer must object within a fixed term no less than one month from the publication date.
A - 10 weeks	Application for the KFSC's preliminary approval and/or application for the KFSC's approval. The preliminary approval is optional and the approval usually takes about two months as it may require one or two hearings before the KFSC and a due diligence exercise involving review of the documents relating to the transferring insurance portfolio.
A	The KFSC's approval.
A + 1 month	Notify the policyholders of the approval within one month of the date of the approval.
A + 6 months	Complete the transfer within six months following the KFSC's approval.
	The transfer needs to be publicised immediately after the transfer. The fact that the IPT is not going ahead, for example, due to objection by the policyholders, should also be publicised.

9.2 **Are there any hard legislative or regulatory deadlines?**

9.3 Please refer to Section 9.1 above.

10. **<u>What key documentation will be produced for the transfer?</u>**

(a) An agreement to transfer insurance contracts.

(b) The approval application submitted to the KFSC.

(c) Shareholder meeting's resolution and board of director's resolution.

(d) An asset list and financial statements of the transferor and the transferee.

(e) A document detailing the status (including the liability reserve and its calculation method) of insurance contracts being transferred and not being transferred.

(f) A document which contains the number of insurance contracts, the amounts of insurance contracts and the number of policyholders of the insurance contracts of the transferor and the transferee, as well as the number and amounts of insurance contracts and number of policyholders by type of insurance contract, and the amount of the liability reserve.

(g) A document setting out in detail the status of all assets being transferred and not being transferred.

11. **<u>What professional agents are involved in the transfer and what are their roles?</u>**

(a) **Lawyers**

Lawyers draft the transfer agreement, prepare the KFSC's approval application, act as representatives for the approval application process, and draft the board resolution and shareholders' resolution.

(b) **Accountants**

Accountants prepare the following documents:

(i) balance sheets and assets list of the transferor and the transferee (see Section 10(d) above);

(ii) a document setting out the liability reserve and its calculation method (see Section 10(e) above);

(iii) a document setting out the detailed status of the assets being transferred and those not being transferred (lawyers can also complete this work) (see Section 10(g) above); and

(iv) a document setting out details of policyholders and transferring insurance contracts (see Section 10(f) above).

(c) **Actuaries**

Not applicable.

(d) **Independent Expert**

Not applicable.

(e) **Other**

Not applicable.

12. **<u>What legal issues are frequently encountered in transfers?</u>**

Some provisions in the transferring insurance contracts may be changed during the course of the transfer. Frequently encountered legal issues during the transfer are changes in the calculation basis, deductions in the insurance benefit amounts, reductions of the premiums, amendments to contract provisions, etc. For instance, the policyholders would object to the transfer if the terms of their policies became less favourable than without the transfer or if the financial condition of the transferee were not as sound as that of the transferor.

The KFSC generally considers several factors including the above as part of the approval process of the IPT so that the transfer does not result in negative effects on the policyholders and the beneficiaries.

13. **<u>How frequently is the transfer mechanism used?</u>**

13.1 **Is the transfer mechanism commonly used? For what purposes is it used?**

The transfer mechanism is not frequently used. It is usually used when an insurance company is dissolved or declared bankrupt. For foreign insurance companies operating in Korea, the mechanism is commonly used when they decide to close their Korean business/office and leave the country.

13.2 **Are there any statistics of the use of the transfer mechanism?**

Not readily available.

14. **<u>What alternative methods can be used to transfer insurance portfolios, and what are the advantages and disadvantages of such methods?</u>**

(a) **Novation**

This requires consent from each of the transferor, the transferee and the policyholder. Also, the parties may disagree as to the premium paid, any termination refund, etc.

(b) **100% reinsurance (also described as "run-off"/"portfolio"/"assumption" reinsurance or retrocession, "portfolio transfer" or "reinsurance to close")**

An advantage of 100% reinsurance is that this method has similar economic effects as a transfer of insurance contracts without having a substantial effect on the transferor's corporate governance or business operation. However, the transferor's profit from the insurance business would proportionally decrease if the transferor were to obtain 100% reinsurance for a portfolio of insurance contracts.

(c) **Corporate reorganisation**

In a case where the insurance contract is transferred to the spin-off company and the original company dissolves or exists with equity reduction, the insurance contract is in effect transferred to the spin-off company. While the Insurance Business Act is silent as to its application to spin-off transactions, we are of the opinion that it applies to this type of transfer as the company created as a result of the spin-off will conduct insurance business and will be subject to the Insurance Business Act.

However, spin-offs are often complex as they require, among others, a special resolution of the shareholders' meeting, publication or notification of creditors that those wishing to object to the spin-off may do so within one month following the publication or notification date, and acquisition of shares of dissenting shareholders. Equity reductions or dissolutions of the original company also require the KFSC's approval and the publication process is identical to that for IPTs.

(d) **Arrangement/compromise**

If an arrangement or compromise requires agreements between the relevant parties, then the considerations in (a) above apply.

(e) **Other**

Not applicable.

15. **<u>What are the relevant sources of law or guidance?</u>**

(a) **Statutes**

Articles 138 to 148 of the Insurance Business Act, Article 75 of the Enforcement Decree of the Insurance Business Act and Articles 36 to 38 of the Enforcement Rules of the Insurance Business Act.

(b) **Regulations**

Articles 7-24 to 7-23 and Article 40 of the Insurance Business Supervisory Regulations.

(c) **Guidance**

Not applicable.

(d) **Jurisprudence**

Not applicable.

(e) **Other**

Not applicable.

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1. General

1.1 Can insurance portfolios be transferred from one entity to another in your jurisdiction?

Yes, under the Consolidated Act on the Regulation and Supervision of Private Insurance Activity (*Texto Refundido de la Ley de Ordenación y Supervisión de los Seguros Privados* "TRLOSSP") and the Regulation on Supervision of Private Insurance, approved by Royal Decree 2486/1998 of 20 November (*Reglamento de Ordenación y Supervisión de los Seguros Privados* "ROSSP") provisions, insurance portfolio transfers can be made as long as certain conditions are met (see Section 2 below).

1.2 Can reinsurance portfolios be transferred?

Yes, under Spanish law there are no specific legal provisions regulating or prohibiting the transfer of reinsurance portfolios; therefore, the transfer is permitted.

1.3 Are the rules the same for the transfer of direct insurance portfolios as for reinsurance portfolios?

As stated in Section 1.2, reinsurance portfolio transfers are not specifically regulated under Spanish law. Thus, the Spanish Insurance Authorities (*Dirección General de Seguros y Fondos de Pensiones*, “DGSFP”) subject their authorisation to the fulfilment of the same rules to those applicable to the transfer of direct insurance with certain nuances that we will analyse in Section 3.4 below.

1.4 Are the rules the same for the transfer of life portfolios as for non-life portfolios?

Yes, Spanish law does not distinguish between the transfer of life and non-life portfolios.

The Kingdom of Spain, following the EU Directive which refers to insurance classes, specifies in its regulation (in this specific case, the TRLOSSP) that only those IPTs involving the totality of the policies held by the transferor within a specific class of insurance are permitted. In other words, all the policies related to one class of insurance can be transferred. Conversely, a partial transfer from policies of different classes of insurance would not be valid. There are three exceptions to this rule:

(a) when the IPT includes the totality of the policies of one part of the risks included in a class of insurance;

(b) when the IPT includes the totality of the policies that being part of a class of insurance, are related to a specific geographic area; and

(c) when the IPT includes the totality of the policies that being part of a class of insurance, can be related to a group attending to an objective criterion. This criterion must be determined in the IPT Agreement. In practice, this opens a window of opportunity allowing a lot of flexibility in the system.

2. What are the requirements for an Insurance Portfolio Transfer ("IPT")?

We will explain only domestic IPTs here; the main differences between these and cross-border IPTs will be analysed in Section 7.

2.1 What requirements must be met by a *transferor* to undertake an IPT?

The transferor must comply with the requirements established in Section 23 of TRLOSSP and Section 70 of ROSSP.

The IPT is subject to the Treasury Department's approval. In order to obtain this authorisation, prior to the transfer, the transferor and the transferee must submit before the DGSFP the following documentation;

(a) Minutes from the shareholders' meeting of the transferor and the transferee companies concluding the Transfer Agreement.

(b) Transfer agreement between transferor and transferee containing the following data:

- (i) a detailed inventory of the assets and liabilities transferred;
- (ii) the date of the transfer completion;
- (iii) the price of the transfer; and
- (iv) a declaration stating that the transfer will be subject to the Authorities' approval.

(c) Annual Financial Statements of the companies involved in the transfer, produced within the previous 6 months to the execution of the Transfer Agreement. In those cases in which an audit report is mandatory according to Spanish Corporate law, it must be attached to the Financial Statements.

(d) The volume of gross and net technical provisions, established on the basis of the contracts to be transferred on the date the transfer agreement is executed.

(e) Solvency capacities of the transferee and, in case the transferor continues with their insurance activities, solvency capacities of the transferor.

2.2 What requirements must be met by a *transferee* to undertake an IPT?

Once the documentation described in Section 2.1 together with a request of authorisation is submitted by the parties of the transfer before the DGSFP, the DGSFP will announce the beginning of a public information period, ordering the transferor to publish the Transfer Agreement in two different newspapers.

In this notice, the right of the policyholders to object to the portfolio transfer must be established. The policyholders will be entitled to submit their objection within one month.

After this period, once the Treasury Department receives such matter from the DGSFP, the former will decide about the transfer. If the transfer is approved, then transferor and transferee will be authorised to execute a Public Deed on the transfer. This Deed must be registered at the

Companies House and finally, a registered copy has to be sent to the DGSFP.

2.3 **Are there any requirements relating to the financial condition of the *transferor*?**

Prior to the transfer, the transferor must comply with all the requirements established in TRLOSSP regarding the volume of gross and solvency capacities.

2.4 **Are there any requirements relating to the financial condition of the *transferee*?**

The transferee must increase their solvency capacity according to the new insurance contracts received due to the transfer.

2.5 **Is the place where the portfolio was originally underwritten a relevant factor?**

The place where the portfolio was originally underwritten is not a relevant factor in domestic transfers, but it is so in cross-border transfers as we will analyse in Section 7.

2.6 **Is the governing law or applicable jurisdiction of the insurance portfolio transferred a relevant factor?**

These can be relevant factors in cross-border transfers.

2.7 **What criteria will be applied by the relevant authority in approving the transfer?**

The Treasury Department, following the DGSFP recommendations, will mainly take into account the rights of the policyholders and any possible disadvantage to them derived from the transfer. As established in Section 2.2, the policyholders can submit their objections to the transfer before the DGSFP, who will then analyse them. If the objection is not considered relevant and the rest of the documents required by law are submitted, the transfer has to be authorised.

2.8 **Are there any other requirements?**

The policyholders will be entitled to terminate the insurance contracts affected by the transfer if the transferee does not assume all rights, liabilities and obligations contained in the contracts transferred.

3. **<u>What can be transferred along with the insurance or reinsurance contract?</u>**

There is no legal restriction regarding what can be transferred along with the contracts. The following items can be transferred:

(a) assets;

(b) liabilities;

(c) real property; and

(d) reinsurance/retrocession contracts and other ancillary contracts.

The regulator's approval does not overrule contractual restrictions to the IPT. There are two parallel processes: (i) approval by the regulator and (ii) compliance with any requirement that the contracts of the transferor company can include. The requirements of the contract must be complied with in any event.

4. **<u>Who must be notified of what, and how?</u>**

(a) **Local regulator(s)**

The DGSFP must be notified in accordance with the terms and attending to the requirements explained in Section 2.1 above.

(b) **Other regulator(s)**

In case of domestic IPTs only the DGSFP must be notified. Cross-border IPTs under Spanish regulation are fully explained and analysed in Section 7 below.

(c) **Policyholders**

Policyholders must be notified according to the procedure described in Section 2.1 above.

(d) **Beneficiaries of cover other than actual policyholders**

These beneficiaries must not be affected by the IPT, therefore they need not be notified unless the insurance contracts contain any provision to the contrary.

(e) **Reinsurers**

There is no legal provision requiring such notification; usually the contracts with the reinsurers include the obligation to do so.

(f) **Brokers**

There is no legal provision requiring such notification; usually the contracts with the brokers include the obligation to do so. According to common commercial practice of intermediaries, in the case of an IPT the rights and liabilities established in the mediation contracts are to be maintained.

(g) **Others**

Not applicable.

(h) **Further notice requirements**

Not applicable.

5. **<u>What publicity requirements are there for IPTs?</u>**

(a) **Newspapers**

Yes, according to the procedure described in Section 2.1 above.

(b) **Official Gazette/Journal**

The authorisation from the Treasury Department approving the IPT is published in the Spanish Official Gazette ("*Boletín Oficial del Estado*").

(c) **Trade magazines**

Not applicable.

(d) **Register of Companies**

Yes, according to the procedure described in Section 2.1 above.

(e) **Other**

Not applicable.

6. **<u>Who has the right to object to the transfer?</u>**

(a) **Regulator(s)**

Yes, according to the procedure described in Section 2.1 above.

(b) **Policyholders**

Yes, according to the procedure described in Section 2.1 above and in the special situation described in Section 2.8.

(c) **Beneficiaries of cover**

No, unless the insurance contract includes a provision to that effect.

(d) **Reinsurers**

No, unless the reinsurance contract includes a provision to that effect.

(e) **Trade associations**

Not applicable.

(f) **Employees**

In the case that the IPT includes the transfer of employees from the transferor to the transferee, the employees must be notified about the IPT and they can express their opinion.

(g) **Others**

Not applicable.

7. **<u>Who must approve and/or sanction the transfer?</u>**

After domestic IPTs have been fully explained in the previous points, in this point we will explain cross-border IPTs,[187] but only in respect of specific points regulated under Spanish law.

IPTs which involve insurance contracts written on a Right of Establishment basis or on a Freedom of Services basis, or contracts that after the IPT will be written under one of these regimes, are regulated in section 50 of the TRLOSSP and sections 97 and 129 of the ROSSP.

In these cases the IPT will require, in order to be valid under Spanish law:

(a) the authorisation from the Insurance Authority of the EEA member state where the risk is located;

(b) a certification from the transferor's Insurance Authority establishing the solvency capacities of the transferor; and

(c) in case of an IPT involving insurance contracts underwritten on a Right of Establishment basis, an official consultation with the Insurance Authority of the member state where the transferor's branch is located.

If in a three months period from filing of the request the relevant Insurance Authority does not issue the authorisation, the certificate or the answer to the enquiry as provided in the previous paragraph, the authorisation will be deemed to be given, the certificate provided and the consultation concluded. This means that the IPT will be considered as approved by the authority; it is a "*positive non response*" from the authorities.

After the publication of the IPT in the "*Boletín Oficial del Estado*", the policyholders will be entitled to terminate the insurance contracts within the following month.

8. **<u>What jurisdictional conditions apply to the transfer?</u>**

8.1 **What types of insurance portfolios are capable of transfer in Spain?**

All types of insurance contracts can be transferred.

8.2 **Does the transferring portfolio need to be legally or commercially connected to the state where the transfer is effected?**

Spanish law does not contain any provision in this sense and thus, no requirements exist.

8.3 **Will the transfer be effective in jurisdictions other than those of the transferor and/or transferee?**

If it is a cross-border IPT and the requirements of the TRLOSSP (section 50) have been complied with, the IPT should be effective in the other jurisdictions affected by the IPT.[188]

8.4 **What effect will the transfer have on arbitration clauses?**

The arbitration clauses included in the insurance/ reinsurance contracts will be transferred along with the insurance or reinsurance portfolio to the transferee.

9. **<u>What is the procedure and timing of the transfer?</u>**

9.1 **What is a typical timeline for a transfer?**

Approximate Time	Action
A -3 months	Approval of the draft Transfer Agreement by the companies' Boards of Directors and announcement of the general meetings ("GM") for both companies to approve the IPT.
A -2 month	GMs of both companies approving the Agreement. Request for approval filed by the transferor and the transferee before the DGSFP. If needed, request for approval filed by the transferor and the transferee before the Spanish Antitrust Authorities.
A -2 month	Publication of the notice of the approval request for the portfolio transfer in at least one national newspaper and in one of the

[187] We refer to IPTs concluded between EEA insurance undertakings.

[188] Portfolio transfers between EU insurers are regulated under (i) Article 12 of the Third Non-Life Directive amending article 11 of the Second Non-Life Directive and Article 14 of the Consolidated Life Directive, (ii) Article 20a(5) of the First Non-Life Directive and (iii) Article 38(5) of the Consolidated Life Directive. This regulation has been duly implemented in Spanish law in the TRLOSSP and ROSSP.

Approximate Time	Action
	most read newspapers in the region where the transferor is resident. The notice has to inform policyholders about their right to file their objection to the transfer before the DGSFP.
A -1 month	From the date of the publication of the notice, policyholders have 1 month to object to the portfolio transfer.
A	Treasury Department approval of the IPT. After its approval, the Portfolio Transfer Agreement has to be formalised in public deed and registered at the Companies House.
A +1 month	Once the Portfolio Transfer Agreement is registered, a certificate of proof of registration must be filed before the DGSFP within a month from its registration. DGSFP notifies the IPT to relevant EEA regulators and 3-month consultation period begins. Publication of the approval decision by the DGSFP in the Official Gazette *("Boletín Oficial del Estado").*
A +2 months	End of the time limit awarded to the insureds to terminate their contract (where they are entitled to do so).
A +3 months	End of the three-month time limit awarded to the EEA regulators to consent to the proposed transfer.

9.2 Are there any hard legislative or regulatory deadlines?

Not in domestic IPTs. For cross-borders IPTs, please see Section 7.

10. What key documentation will be produced for the transfer?

The following key documents will need to be produced for the purposes of a transfer:

(a) Portfolio Transfer Agreement: The legal representatives of the transferor and the transferee will conclude a portfolio transfer agreement by means of which the transferor agrees to transfer, and the transferee agrees to receive, the portfolio to be transferred. The Portfolio Transfer Agreement has to include:

  (i) a detailed inventory of the assets and liabilities transferred;

  (ii) the date of transfer completion;

  (iii) the price of the transfer; and

  (iv) the conditions for the corresponding administrative authorisation.

(b) Minutes of the meetings of the corresponding organs (Board of Directors or GM) approving the Portfolio Transfer Agreement, and, if needed, the dissolution of the company or the change of the company's purpose.

(c) Balance sheet and Profit and Loss statements of the intervening entities, produced within the previous six months, including, if needed, by the auditors.

(d) Status of the calculation and coverage of the technical provisions regarding the portfolio transferred.

(e) Solvency capacities of the transferee and, in case the transferor continues with their insurance activities, solvency capacities of the transferor.

(f) Notice to be published in the Public Gazette ("*Boletín Oficial del Estado*").

11. What professional agents are involved in the transfer and what are their roles?

(a) Lawyers

Lawyers are generally involved in the portfolio transfer in order to ensure that the transaction complies with all legal requirements, ensuring the effectiveness and enforceability of the deal. Thus, lawyers are involved in the drafting of the Portfolio Transfer Agreement and the legal documentation required for the approval of the DGSFP. Additionally, lawyers are usually involved in the supervision of the rest of the documentation to be handed in to the Authorities.

(b) Accountants

Accountants ensure that the required Financial Statements are available. They may participate in the process with respect to tax issues.

(c) Actuaries

These only intervene if the transferor is compelled to subject its accounting to auditing.

(d) Independent Expert

Their participation is not required, but the Board of Directors may count among its members independent experts whose opinion will be taken into account. Frequently, they will inform about likely effects and outcomes of the transfer, the value of the portfolio and the price.

(e) Other

Not applicable.

12. What legal issues are frequently encountered in transfers?

'Change of Control' clauses in insurance and reinsurance contracts typically restrict the possibility of IPTs. Many insurance or reinsurance contracts contain a 'change of control' clause or a provision regarding the assignment of business allowing the counterparty to rightfully terminate the contract if the control is shifted to another party. As a result, these usually require the consent of the counterparty.

Likewise, these kinds of clauses are frequent in financing contracts, and so their scope should be reviewed in advance in order to avoid unexpected events.

Antitrust concerns. Antitrust Authorities must be informed of the transaction and asked for their authorisation if as a result of the portfolio transfer any of the following two circumstances arise:

(a) an insurance group will count with a market share of 30% or more; or

(b) the income from sales of an insurance group for the previous tax year exceeds 240,000,000 Euros as long as at least two of its firms have a volume of sales of more than 60,000,000 Euros. (Source: Spanish Antitrust law ("Ley 15/2007, de 3 de julio, de defensa de la competencia") section 8.1).

The procedure for obtaining the authorisation of the DGSFP will be suspended for a month until the Antitrust Authorities decide upon the requested authorisation.

The main issue with respect to IPTs in Spain is dealing with the Insurance Authorities, as they always want to be fully informed about the transaction and its conditions. Usually the Authorities delay the IPT approval for different reasons that unfortunately cannot be foreseen. In order to avoid these problems, it is advisable to have previous informal contacts with the DGSFP since the very beginning of the IPT process.

13. <u>How frequently is the transfer mechanism used?</u>

13.1 Is the transfer mechanism commonly used? For what purposes is it used?

It is quite common in Spain regarding domestic business. It is simpler than a merger or any other corporate mechanisms.

The portfolio transfer mechanism is commonly used by insurance undertakings that decide to reduce the scope and risks covered, as well as by insurance groups restructuring their business, as it permits the avoidance of certain constraints related to the assignment of contracts. In this sense, the assignment of contracts requires the approval of all creditors, including policyholders and third parties affected/damaged (claimants), while in a portfolio transfer only policyholders can object.

Therefore, the main advantage of an insurance portfolio transfer is to limit possible objections and lines of negotiation, ensuring the enforceability of the transfer against third parties.

13.2 Are there any statistics of the use of the transfer mechanism?

No official statistics regarding portfolio transfers are available.

14. <u>What alternative methods can be used to transfer insurance portfolios, and what are the advantages and disadvantages of such methods?</u>

(a) Novation

In Spain, novation is not used as an alternative for portfolio transfers as it implies the conclusion of a new contract, substituting the previous one. Having said that, the method commonly used is the assignment of contracts. The assignment of contracts is not expressly provided for by Spanish Regulation but, according to case law, Article 1205 of the Spanish Civil Code on novation applies.

This transaction does not require the approval of the Spanish insurance authorities. Therefore, this method is usually quicker than portfolio transfers considering that the contract will not be subject to administrative proceedings.

However, the main disadvantage related to the assignment of contracts is that all the creditors of the transferor company have to give their approval. Consequently, the insurer not only has to rely on the policyholders' consent but also on third parties' acceptance, which multiplies the number of negotiating parties.

In conclusion, insurance undertakings have to take into account not only the size of the portfolio to be transferred but the actual number of parties involved to choose the most efficient mechanism.

(b) 100% reinsurance (also described as "run-off"/"portfolio"/"assumption" reinsurance or retrocession, "portfolio transfer" or "reinsurance to close")

Indeed this alternative method can produce the same effect; however, the transferor still owes obligations to third parties as direct insurer, and the advantageous effects of a pure portfolio transfer, where the transferor disposes of any future liabilities and all compliance-associated work, do not exist.

(c) Corporate reorganisation

The most frequent corporate reorganisation methods used are:

(i) a merger; and

(ii) the global transfer of the assets and liabilities from the transferor to the transferee, with subsequent liquidation of the transferor company.

These corporate mechanisms for reorganisation are more complicated and require more document production. In our opinion, these mechanisms are intended to address different situations and needs than IPTs.

(d) Arrangement/compromise

Arrangements, for instance commutations, are not frequent but still possible under Spanish law, due to the "*pacta sunt servanda*" principle. However, the same disadvantages as in the case of 100% reinsurance exist: the commutation does not extinguish the insurer's liabilities towards third parties, even if some instruments can be used to mitigate such liabilities and compliance associated duties.

(e) **Other**

Not applicable.

15. **What are the relevant sources of law or guidance?**

(a) **Statutes**

Articles 23 and 50 of TRLOSSP (Consolidated Act on the Regulation and Supervision of Private Insurance Activity).

Article 14 on the Act 16/1989, dated 17 July, on Antitrust Protection.

(a) **Regulations**

Articles 70, 97 and 129 of the ROSSP (Regulation on Supervision of Private Insurance, approved by Royal Decree 2486/1998 of 20 November).

Article 72.7 of the Royal Decree 2486/1998, dated 20 November, on the Regulation and Supervision of Private Insurance with respect to antitrust concerns.

(b) **Guidance**

Not applicable.

(c) **Jurisprudence**

Not applicable.

(e) **Other**

Not applicable.

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1. __General__

1.1 **Can insurance portfolios be transferred from one entity to another in your jurisdiction?**

Yes, under Chapter 15 of the Swedish Insurance Business Act (*Sw. Försäkringsrörelselagen (1982:713)*) (the "IBA").

1.2 **Can reinsurance portfolios be transferred?**

Yes, under Chapter 15 of the IBA.

1.3 **Are the rules the same for the transfer of direct insurance portfolios as for reinsurance portfolios?**

Yes.

1.4 **Are the rules the same for the transfer of life portfolios as for non-life portfolios?**

Yes.

2. __What are the requirements for an Insurance Portfolio Transfer ("IPT")?__

2.1 **What requirements must be met by a *transferor* to undertake an IPT?**

An insurance company licensed to conduct insurance business in Sweden may only transfer an insurance portfolio to a Swedish insurance company or a foreign insurer that has authority to conduct insurance business in Sweden or in another country within the European Economic Area (the "EEA"). In order to undertake an IPT, the IPT agreement must be approved by the transferor's general meeting and the approval has to be registered at the registration authority (*Sw. Bolagsverket)* (the "Registration Authority").

Under the IBA, both the transferor and the transferee must also apply for the Swedish Financial Supervisory Authority's (the "SFSA") approval prior to the IPT being conducted. The transferor's application must be made within four months after the general meeting's approval of the IPT. Should the SFSA approve the IPT, the SFSA's decision also has to be registered at the Registration Authority.

2.2 **What requirements must be met by a *transferee* to undertake an IPT?**

The transferee must have authority to conduct the relevant line(s) of insurance business in Sweden or in another EEA jurisdiction. The transferee may be required to establish an office in Sweden if the transferee does not already have such an office or a branch in the EEA.

As mentioned under Section 2.1, the transferee must apply for the SFSA's approval to undertake an IPT. If the SFSA grants the approval, the transferee must notify the Registration Authority. However, if the transferee is a non-Swedish (re)insurance undertaking, the notification to the Registration Authority must be made by the transferor.

If the transferee is a Swedish (re)insurance undertaking or a non-Swedish undertaking with authority to conduct (re)insurance business in Sweden, the transferee must notify all concerned policyholders and annuitants (*Sw. livräntetagare*) of the IPT. The SFSA has to decide on how the information is to be sent to the policyholders and annuitants.

2.3 **Are there any requirements relating to the financial condition of the *transferor*?**

In general, there are no financial requirements on the transferor. However, the transferor's financial position and condition is usually compared to the transferee's financial condition to ensure that policyholders and other creditors will not be treated unfairly as a consequence of the IPT. Furthermore, the transferor may not transfer an insurance portfolio if there is a risk that the remaining policyholders' rights under their insurance contracts may be at risk after undertaking the IPT.

2.4 **Are there any requirements relating to the financial condition of the *transferee*?**

The transferee must meet the general capital and solvency requirements set out in the IBA as well as the "principle of stability" (*Sw. Stabilitetsprincipen*) which implies that an insurer must have adequate solvency, capital and control of the risks involved in the business.

In order for the SFSA to evaluate a transferee's financial condition, the SFSA may, where the transferee is a non-Swedish (re)insurance undertaking which does not have authority to conduct insurance business in Sweden, ask an EEA regulator that supervises the undertaking for a certificate confirming that the undertaking has sufficient capital to conduct the business after the transfer. The SFSA may also require additional information from the transferee to ensure that the portfolio transfer is not unfair to any policyholder.

2.5 **Is the place where the portfolio was originally underwritten a relevant factor?**

It is not relevant whether the business was originally underwritten in Sweden or in another country. However, it is a requirement that the business is carried on in Sweden or otherwise within the EEA.

2.6 **Is the governing law or applicable jurisdiction of the insurance portfolio transferred a relevant factor?**

No, the relevant factor is that the transferor has authority to conduct (re)insurance business in Sweden.

2.7 **What criteria will be applied by the relevant authority in approving the transfer?**

Under the IBA, the relevant authority, *i.e.* the SFSA, shall approve the IPT if:

(a) the policyholders' (and other beneficiaries') rights are not impaired;

(b) the transferee has sufficient capital; and

(c) the competent authority in the applicable jurisdiction(s) of the insurance portfolio has approved or has not commented on the IPT. The applicable jurisdictions are the jurisdictions where the risks in the insurance portfolio are situated.

2.8 **Are there any other requirements?**

No.

3. **<u>What can be transferred along with the insurance or reinsurance contract?</u>**

(a) **Assets**

Under the IBA, there are no restrictions as to what may be transferred in addition to the (re)insurance portfolio and there is no general prohibition on transferring for example, assets, liabilities, real property or reinsurance contracts. Thus, if permitted under the relevant contract, it is possible to transfer assets along with the (re)insurance portfolio.

It should be noted that under Swedish labour law, a substantive IPT may entail that the employees of the transferor that work with the relevant insurance portfolio may be entitled to transfer to the transferee along with the portfolio.

(b) **Liabilities**

Please refer to 3(a) above.

(c) **Real property**

Please refer to 3(a) above.

(d) **Reinsurance/retrocession contracts and other ancillary contracts**

Please refer to 3(a) above.

4. **<u>Who must be notified of what, and how?</u>**

(a) **Local regulator(s)**

The SFSA should be notified as soon as possible of the contemplated IPT, preferably in writing. The notification should include the purpose, scheme, financial information and other relevant circumstances regarding the IPT in order for the SFSA to be able to decide on whether to approve the IPT or not.

In addition, the relevant Competition Authority (*Sw. Konkurrensverket*) may also need to be notified. As mentioned above, the Registration Authority must be informed of the approval by the transferor's general meeting and any approval from the SFSA to undertake the IPT.

(b) **Other regulator(s)**

Where relevant, the competent authority and regulator of a non-Swedish transferee should be notified. As has been mentioned under Section 2.7(c) above, the SFSA will ask for the relevant authority's comments on the IPT. The regulator may comment on the contemplated transfer but it has no right to prevent the transfer.

(c) **Policyholders**

Under the IBA, the policyholders must be notified regarding an IPT. Thus, the SFSA will notify the policyholders by announcing the proposed IPT in the Official Swedish Gazette (*Sw. Post och Inrikes Tidningar*) (see Section 5(a) below).

Where the transferee is a Swedish undertaking or a non-Swedish (re)insurance undertaking with authority to conduct (re)insurance business in Sweden, the transferee must notify all policyholders concerned after receiving the SFSA's approval to undertake the IPT. The SFSA has to decide on how the notification is to be made.

(d) **Beneficiaries of cover other than actual policyholders**

The same notification requirements which have been mentioned regarding policyholders apply to annuitants. There is no general duty to notify parties other than policyholders and annuitants under the IBA. However, it should be noted that insureds under some group insurance policies may be regarded as policyholders under the Swedish Insurance Contracts Act and should thus receive information concerning the IPT. In addition, duly appointed beneficiaries under life insurance policies may in special circumstances be considered as policyholders under an insurance policy and should in these circumstances also receive information on the IPT.

(e) **Reinsurers**

There is no requirement under the IBA that reinsurers must be notified. However, in practice it may be necessary to notify reinsurers to ascertain that the transferee can directly receive the benefits under the reinsurance contracts or, if not feasible, that the transferor will keep the benefits after the IPT.

Furthermore, if a transferee is to take over a reinsurance contract, the reinsurer should be notified in accordance with the applicable legislation governing the contract.

(f) **Brokers**

There is no requirement under the IBA that brokers must be notified. It should be noted that a broker may be entitled to receive remuneration from the insurer and a broker may also for example administer an insurer's insurance portfolio or enter into agreements on behalf of the insurer. In these circumstances, the broker should be notified regarding the IPT.

(g) **Others**

Not applicable.

(h) **Further notice requirements**

Not applicable.

5. **<u>What publicity requirements are there for IPTs?</u>**

(a) **Newspapers**

The SFSA must, as provided for by the IBA, announce an application to transfer an insurance portfolio in the Official Swedish Gazette and other local newspapers that the SFSA deems suitable. The announcement must contain information that an IPT agreement has been reached and where the agreement and other relevant material are made available. The announcement must also include a statement that concerned policyholders and possible annuitants must notify the SFSA within a specified period of time if they wish to oppose to the IPT. The period of time to object to an IPT may not be less than one month (which is also the usual period stipulated by the SFSA).

(b) **Official Gazette/Journal**

See Section 5(a) above.

(c) **Trade magazines**

See Section 5(a) above.

(d) **Register of Companies**

The approval of the transferor's general meeting as well as the approval of the SFSA to undertake an IPT must be registered with the Registration Authority (see Section 2.1 above).

(e) **Other**

See Section 5(a) above.

6. Who has the right to object to the transfer?

(a) **Regulator(s)**

The SFSA may object to and prevent an IPT. However, the SFSA may not prevent a portfolio transfer if the conditions stated in Section 2.1 above are met, that is: (i) the policyholders' rights are not impaired; (ii) the transferee has sufficient capital; and (iii) the competent authority in the applicable jurisdiction(s) of the insurance portfolio has approved or has not commented on the IPT.

(b) **Policyholders**

Policyholders may object to the transfer by submission to the SFSA when being informed by the SFSA but they do not have an express right to prevent an IPT. Policyholders usually have one month to object to the transfer after the SFSA has announced the proposed transfer in the Swedish Official Gazette or other newspaper(s) (see Section 5(a) above).

(c) **Beneficiaries of cover**

Beneficiaries as such do not have a right to object to the IPT. However, annuitants have been given an express right to object and have thus the same rights as policyholders.

(d) **Reinsurers**

The IBA does not provide reinsurers with a right to object to an IPT. The IPT may however affect the reinsurance contract and the insurer that should be eligible for cover under the contract in accordance with what has been mentioned in Section 4(e) above.

In addition, the relevant reinsurers may have a right to object under the law governing the relevant reinsurance contract (*i.e.* if the law governing the reinsurance contract is not Swedish law).

(e) **Trade associations**

Trade associations generally do not have a right to object to the transfer.

(f) **Employees**

Employees do not have a right to object to the transfer in order to prevent the transfer from taking place. However, employees do, under Swedish labour law, have a right to object to a transfer of the employer's employment contract, *i.e.* to move to a new employer as part of the IPT (see also Section 3 above).

(g) **Others**

Not applicable.

7. Who must approve and/or sanction the transfer?

(a) **Local regulator**

An IPT may not be undertaken without the approval of the SFSA. The SFSA has to authorise an IPT if the conditions stated in Section 2.7 above are met.

In addition, the Competition Authority's approval may also be necessary in certain circumstances. It should be noted that it may be necessary to get the EU Commission's approval of an IPT in accordance with the EU competition legislation.

(b) **Other regulator(s)**

Where the transferee is a (re)insurance undertaking located in another state within the EEA, the EEA regulator supervising the transferee has to certify that the transferee has the capital required to take over the insurance portfolio concerned. If the transferee is situated outside the EEA, the EEA regulator supervising the undertaking's solvency shall provide such certificate.

Furthermore, where the portfolio to be transferred contains risks situated in countries other than Sweden, the SFSA must, prior to approving the IPT, notify the relevant regulator(s) in the country/countries where the risks are located so that the latter may comment on the transfer. The SFSA may examine the IPT application after receiving comments from the other regulator(s) or, if the other regulator(s) have not replied to the notification, three months after the other regulator(s) have received the SFSA's notification. Other regulators do not have the authority to prevent a transfer of an insurance portfolio but the SFSA should take into account any comments from other regulator(s) in its decision to approve the transfer.

(c) **Court**

An IPT need not be approved and/or sanctioned by any Swedish court.

8. What jurisdictional conditions apply to the transfer?

8.1 What types of insurance portfolios are capable of transfer in Sweden?

All types of insurance or reinsurance contracts can be transferred.

8.2 Does the transferring portfolio need to be legally or commercially connected to the state where the transfer is effected?

Under the IBA, the relevant factor is if the transferor has authority to conduct (re)insurance business in Sweden. Thus, the insurance portfolio concerned can be transferred under the provisions of the IBA although only a small proportion of transferring policies is governed by Swedish law as long as the transferor is a Swedish (re)insurance undertaking.

8.3 Will the transfer be effective in jurisdictions other than those of the transferor and/or transferee?

The transfer will be effective in Sweden and also in other EEA jurisdictions in accordance with EU law. Whether effect will be given to an IPT under the laws of a non-EEA jurisdiction is a question of local law and rules of private international law.

8.4 What effect will the transfer have on arbitration clauses?

Provided that nothing to the contrary is stated in the transfer agreement, an arbitration clause will usually be deemed to have been transferred to the transferee. As the arbitration clause is considered to be an agreement in itself, one may for the avoidance of doubt consider specifying that the entire agreement has been assumed or even expressly noting that the transfer includes the obligation to adhere to the arbitration clause.

9. What is the procedure and timing of the transfer?

9.1 What is a typical timeline for a transfer?

The timescale below illustrates important periods that have to be observed when transferring the portfolio. It should however be noted that the timeline for a transfer differs depending on the size and complexity of the insurance portfolio to be transferred and on whether it is a domestic transfer or a transfer of an insurance portfolio that includes risks situated in several countries. Furthermore, many of the actions described below may be taken at the same time which may reduce the period required for the transfer.

Time	Action
E=date when the IPT becomes effective	
E- 30 weeks	Due diligence by the buyer, preliminary assessment of the insurance portfolio to be transferred.
E- 24 weeks	The transferor's general meeting decides to approve the transfer of insurance portfolio. This approval must be registered at the Registration Authority.
E- 20 weeks	Application by the transferor/transferee to the SFSA regarding the IPT. The SFSA announces the contemplated transfer in the Swedish Official Gazette and announces the period when policyholders and others may object to the transfer. Under the IBA, such period has to be not less than 1 month.
E- ~16 weeks	Where applicable, the SFSA notifies relevant EEA regulator regarding the transfer. The SFSA may not make a final decision regarding the transfer until the relevant EEA regulator has commented on the transfer or until 3 months have elapsed since the SFSA sent the notification without receiving the EEA regulator's comments.
E – ~16 weeks	Request for approval by the SFSA and/or other competent regulator. The SFSA's handling time for transfers of insurance portfolios which include risks situated in Sweden is up to 3 months. If the risks are situated outside Sweden, the handling time is up to 5 months.
E- 4 weeks	After the SFSA has approved the transfer, the transferee or (where the transferee is a non-Swedish undertaking) the transferor shall register the transfer at the Registration Authority.
E-2 weeks	The transferee shall notify the concerned policyholders and annuitants of the transfer.
E	The IPT becomes effective.

In conclusion, depending on the complexity of an IPT, a transfer may usually take about 30 weeks from undertaking due diligence to registering the SFSA's approval at the Registration Authority.

9.2 Are there any hard legislative or regulatory deadlines?

The SFSA must publish the contemplated transfer of an insurance portfolio in the Swedish Official Gazette at least one month before the SFSA makes its decision so that policyholders may object to the transfer. In addition, where applicable, the SFSA must notify any other relevant EEA regulator regarding the transfer. The SFSA may not make a final decision regarding the transfer until the EEA regulator has commented on the transfer or until 3 months have elapsed since the other regulator(s) received the SFSA's notification without replying to it.

Finally, the SFSA's handling time for examining a request for transfer of an insurance portfolio which includes risks situated in Sweden is up to 3 months. If the risks are situated outside Sweden, the handling time is up to 5 months.

10. What key documentation will be produced for the transfer?

The following key documents should be produced for the transfer:

(a) Sale and purchase agreement ("SPA")

At the initial stage of the IPT procedure, the transferor and the transferee should negotiate and sign an SPA by which the transferor agrees to transfer, and the transferee agrees to accept, the business to be transferred, and each party agrees to promote the transfer.

The agreement will detail the conditions for the IPT.

(b) **Certificate regarding the capital of the transferee**

Where the transferee is a non-Swedish undertaking, the relevant regulator within the EEA has to send a certification upon request by the SFSA illustrating whether the transferee has the capital required to take over the concerned insurance portfolio.

(c) **Notifications**

Notice by the SFSA to be published in the Swedish Official Gazette is necessary as well as notifications to be sent to policyholders and annuitants if the SFSA approves the transfer.

(d) **Registration to the registration authority**

After the SFSA has approved the transfer, the transfer must be registered with the Registration Authority.

(e) **Actuaries' reports**

Reports on the terms and likely effects of the transfer, prepared by the actuaries of the transferor and the transferee, should generally be produced. In practice, the actuaries analyse a portfolio to evaluate, for example, the value of the portfolio to be transferred. The actuaries also analyse the possible effects of the transfer on the involved companies' capital and solvency.

(f) **Statement by the transferor's Board of Directors**

Under the IBA, the transferor's Board of Directors shall make a statement on important circumstances that should be considered prior to deciding on the portfolio transfer. The statement has to be sent to the shareholders at least one week before the general meeting on which the decision regarding the IPT is to be taken (see Section 2.1 above).

(g) **Accountants' report**

The transferor's accountants have to comment on the above-mentioned statement from the Board of Directors, including on the financial impact that the transfer may have on the transferor's business.

11. **<u>What professional agents are involved in the transfer and what are their roles?</u>**

(a) **Lawyers**

Lawyers usually perform the due diligence which is undertaken initially in the IPT process and also assist in the negotiation and writing of the SPA.

Furthermore, lawyers are also involved in liaison with the SFSA, the registration process of the approved IPT, the notification of policyholders and annuitants as well as the contact with media. Thus, lawyers play a central role in an IPT.

(b) **Accountants**

Accountants may be involved in the transfer process in order to outline any tax issues. However, this is usually done in collaboration with lawyers. As mentioned under Section 10(g) above, accountants also have to provide comments on the Board of Directors' statement on important circumstances to consider regarding the contemplated IPT.

(c) **Actuaries**

Actuaries may provide reports on the terms and likely effects of the transfer. Actuaries play a central part in the evaluation of the involved companies' financial stability, the effects that the transfer will have on the companies' capital and solvency and in valuing the relevant insurance portfolio.

(d) **Independent Expert**

There is usually no need for independent experts in a portfolio transfer process. However, such expert may be appointed, for example in order to estimate the value of the portfolio to be transferred (if not done by the actuary).

(e) **Other**

Not applicable.

12. **<u>What legal issues are frequently encountered in transfers?</u>**

12.1 **Clauses in contracts purporting to prohibit or restrict a party's ability to transfer the business**

The SFSA's approval replaces the otherwise necessary consent from, for example, policyholders. However, the SFSA's approval does not replace the required approval from other third parties such as reinsurance counterparties. As many contracts restrict a party's right to transfer the contract to a third party or provide for a right to terminate the contract absent prior consent, the approval of these counterparties is usually required prior to carrying out the transfer. Therefore, in order to avoid sanctions stipulated in the contract, counterparties' permission is usually required.

12.2 **Capital adequacy and solvency considerations**

The SFSA must analyse the transferee's capital and solvency to ensure that the transfer does not adversely affect the policyholders and other creditors. Hence, it is rather common that queries regarding the financial position of the transferee arise. Since these questions are of significant importance for the SFSA in relation to the approval of the portfolio transfer, the SFSA will evaluate the transferee's financial situation carefully. The SFSA may also be required to request a certification from an EEA regulator regarding the transferee's capital and solvency situation.

12.3 **Disclosure to policyholders and annuitants**

Policyholders and, where applicable, annuitants are entitled to be provided with a notification of the IPT in order to potentially object to the transfer. Thus, questions involving objections from policyholders may arise. As mentioned above, policyholders and annuitants may object but they do not have an express right to prevent an IPT.

12.4 **VAT**

The European Court of Justice (the "ECJ") held in a recent ruling that a transfer of reinsurance contracts did not qualify as an exempt insurance or reinsurance transaction under the VAT Directive.[189] Instead, the ECJ held that the transfer constituted a supply of services and that the transfer was thus subject to VAT.

The case at hand involved a reinsurance portfolio transfer from a German to a Swiss company. However, the ruling is based on the VAT Directive and should thus apply to transfers of reinsurance portfolios throughout the EU, including Sweden. The implication of the ruling is not entirely clear. The judgment should however be taken into account prior to deciding on a (re)insurance portfolio transfer.

13. **How frequently is the transfer mechanism used?**

13.1 **Is the transfer mechanism commonly used? For what purposes is it used?**

IPTs are commonly used in different situations, for example:

(a) intra-group reorganisations;

(b) sales of blocks of insurance business;

(c) domestications of overseas branches;

(d) reorganisation of mutual insurance companies; and

(e) fund restructuring, particularly for life companies.

13.2 **Are there any statistics of the use of the transfer mechanism?**

There are unfortunately no updated statistics on how many IPTs have been undertaken. However, according to information available on the SFSA website,[190] roughly 40 IPTs were approved by the SFSA between April 2007 and May 2010.

14. **What alternative methods can be used to transfer insurance portfolios, and what are the advantages and disadvantages of such methods?**

(a) **Novation**

A method of transferring a (re)insurance portfolio would be to novate each individual contract as between the policyholders and the transferees. The disadvantages of this method include the time, impracticality and expense of having to identify and deal with all individual policyholders and the problems caused if the parties are not able to agree on an individual contract.

Novation is not a commonly used method for transferring insurance portfolios in Sweden. The method may however be used when transferring reinsurance contracts governed by foreign law.

(b) **100% reinsurance (also described as "run-off"/"portfolio"/"assumption" reinsurance or retrocession, "portfolio transfer" or "reinsurance to close")**

This method does not achieve the same effect as an IPT since the liability under the policies remains with the cedant and the cedant acquires the credit risk of the reinsurer.

(c) **Corporate reorganisation**

Under the IBA, insurance undertakings may undertake a merger and thus enable a transfer of the insurance portfolio. However, such a merger would include all of the undertaking's business and thus more than the insurance portfolio. Such a merger is therefore not commonly used.

(d) **Arrangement/compromise**

We are not familiar with this concept under Swedish law.

(e) **Other**

A method occasionally used to transfer a portfolio from one undertaking to another is for the transferor to first transfer the portfolio into a newly incorporated insurance company in the transferor’s group of companies. The shares of this new company are later sold to a buyer (the “transferee”). Thus, the buyer would in practice only purchase the insurance portfolio. The disadvantages of this method are the costs involved as well as the potential loss of time.

It should be noted that the IBA will be revised during 2011. It is currently proposed that the “new” IBA should enable an insurance company to undertake a *demerger.* A demerger entails that a company is split up and the company’s assets and liabilities are taken over by one or more other companies in exchange for consideration provided to the shareholders of the transferor company. If such an option was available to an insurance undertaking, the undertaking would be able to carry out a demerger instead of an IPT and achieve the same result.

15. **What are the relevant sources of law or guidance?**

(a) **Statutes**

The Swedish Insurance Business Act (mainly Chapter 15).

The Swedish Insurance Business Ordinance (*Sw. Försäkringsrörelseförordningen (1982:729)*).

(b) **Regulations**

Not applicable.

(c) **Guidance**

Not applicable.

(d) **Jurisprudence**

Not applicable.

[189] ECJ ruling C-242/08.

[190] www.fi.se.

(e) **Other**

Information presented by the SFSA, mainly on the SFSA's website (www.fi.se).

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1. **General**

1.1 **Can insurance portfolios be transferred from one entity to another in your jurisdiction?**

Yes, in accordance with the provisions of the Swiss Federal Act on the Supervision of Insurance Companies (Insurance Supervision Act, "ISA") and the Swiss Federal Act on Merger, Demerger, Conversion and Transfer of Assets and Liabilities ("Merger Act").

1.2 **Can reinsurance portfolios be transferred?**

Yes, by contract. There are no legal restrictions, such as those mentioned above, with regards to contracts of reinsurance, other than where the Merger Act applies. The Merger Act includes provisions facilitating the transfer of assets and liabilities and requires registration of the transfer in the Commercial Register before it can become effective.

1.3 **Are the rules the same for the transfer of direct insurance portfolios as for reinsurance portfolios?**

No, see Section 2.1 below.

1.4 **Are the rules the same for the transfer of life portfolios as for non-life portfolios?**

There is no distinction drawn in the relevant legislation between life and non-life portfolios.

2. **What are the requirements for an Insurance Portfolio Transfer ("IPT")?**

2.1 **What requirements must be met by a *transferor* to undertake an IPT?**

(a) **Direct life and non-life insurance**

From a supervisory perspective IPTs are only dealt with in Article 62 ISA. This article provides that in direct business any IPT requires an authorisation from the Swiss Financial Market Authority ("FINMA"). FINMA allows such transfers only where the interests of the assureds are properly protected.

Switzerland is not a member of the European Union ("EU") or the European Economic Area ("EEA") and the applicable bilateral treaties between Switzerland and the EU do not cover insurance business. A Swiss insurer is not able to take benefit of the freedom to provide services within the EU and EEA. As a consequence, Article 62 ISA regulates the transfer of Swiss portfolios only.

The transferor needs to be authorised to write such business in Switzerland and, as long as not all obligations of the transferor have been fully transferred to the transferee, remains under the supervision of FINMA (see also Section 3.6 below).

The Merger Act provides in Articles 69 to 77 how the transfer of assets and liabilities can be conducted in general.

Further provisions or guidelines do not exist. FINMA has, however, developed some principles in the past.

(b) **Reinsurance**

There are no particular laws, rules or regulations applying to the transfer of reinsurance business. No involvement of FINMA is legally required.

2.2 **What requirements must be met by a *transferee* to undertake an IPT?**

Pursuant to Article 62(3) ISA the transferee is obliged to inform the policyholders which have been taken over through an IPT that they are entitled to cancel the insurance policy by the giving of notice within three months, which period commences once the policyholder has been individually informed about the IPT. The right of cancellation can be excluded by FINMA, if the transfer has, economically, not changed the identity of the insurer (i.e. where the IPT was effected within the same group of companies).

The transferee must be authorised by FINMA to conduct business of the type to be taken over from the transferor. If the transferee is not licensed for this particular line of business, or if the new portfolio would lead to a considerable business expansion, the transferee needs to submit an amended business plan to FINMA. The business plan is based on a number of standard forms and the transferee only has to submit those forms which require any amendments.

It is, in principle, necessary to obtain a license prior to the transfer. However, draft business plans and draft applications for IPT can be submitted and discussed with FINMA at the same time.

2.3 **Are there any requirements relating to the financial condition of the *transferor*?**

No.

2.4 **Are there any requirements relating to the financial condition of the *transferee*?**

(a) **Direct life and non-life insurance**

The transferee has to set out in its application the existing solvency margin for the line of business at stake before and after the transfer. The transferee must meet the usual solvency margin requirements (100%). Solvency II (the so called Swiss Solvency Test, "SST") becomes effective on 1 January 2011. Any application after 31 December 2010 will also need to show that the requirements under the SST will be met.

(b) **Reinsurance**

There are no legal requirements, nor any particular requirements laid down by FINMA. As a matter of practice, the transferor will usually ensure that the transferee has a sufficiently high credit rating (not lower than its own).

2.5 **Is the place where the portfolio was originally underwritten a relevant factor?**

(a) **Direct life and non-life insurance**

No. Article 62 ISA only applies to an IPT of Swiss portfolios. There is a bilateral treaty between Switzerland and Liechtenstein according to which the principle of freedom of services between these two countries applies. As Switzerland belongs neither to the EU nor the EEA, foreign business can only exist in connection with the Principality of Liechtenstein. If part of an IPT is also Liechtenstein business the transferor and the transferee have to explain in their application how the Liechtenstein business will be affected by the transfer. In practice, this has not raised any issues so far.

(b) **Reinsurance**

In the case of a transfer of a portfolio of reinsurance business, from the point of view of Swiss law and regulation, it is not a relevant factor.

2.6 **Is the governing law or applicable jurisdiction of the insurance portfolio transferred a relevant factor?**

No.

2.7 **What criteria will be applied by the relevant authority in approving the transfer?**

In all cases where FINMA's approval is required, it will ensure that the requisite solvency capital is held by the transferee once the transfer has taken place.

2.8 **Are there any other requirements?**

Articles 69 to 77 of the Merger Act set out how assets and liabilities may be transferred between two undertakings. These provisions are of a general nature and do not apply only to insurance undertakings.

The key document in an IPT is a contract between the transferor and the transferee by which the tied assets and the reserves will be transferred (the so called "Transfer Contract"). Pursuant to Article 71(1) Merger Act the Transfer Contract shall contain at least:

(a) the identities of the transferor and the transferee;

(b) an inventory with the exact designation of the items of the assets and liabilities;

(c) the total value of the assets and liabilities to be transferred;

(d) the consideration, if any; and

(e) a list of all employment relationships to be transferred to the transferee.

The Transfer Contract is only valid if the inventory shows a surplus of assets over liabilities (Article 71[2] Merger Act).

The Commercial Registry Office examines if all requirements are met (Article 73 Merger Act). Once the transfer has been effected, for the duration of three years the transferor is jointly and severally liable with the transferee for debts incurred before the transfer of assets and liabilities (Article 75[1] Merger Act). For this period of time, the transferor will remain under the supervision of FINMA.

3. <u>**What can be transferred along with the insurance or reinsurance contract?**</u>

(a) **Assets**

When the IPT is sanctioned by FINMA and the Commercial Registry Office, the assets listed in the inventory are transferred upon entry in the Commercial Register (Article 73[2] Merger Act).

(b) **Liabilities**

The same as for assets applies to liabilities.

(c) **Real property**

Real property (for example, being part of the tied assets) may also be transferred by a Transfer Contract. While the Transfer Contract only needs to be concluded in writing, for the transfer of real property the respective parts of the Transfer Contract require a public deed.

(d) **Reinsurance/retrocession contracts and other ancillary contracts**

Current doctrine is divided on the issue as to whether, under Articles 69 to 77 of the Merger Act, contracts may be transferred from a transferor to a transferee solely by listing them in the inventory. We are of the opinion that, apart from employment contracts, the transfer of which is specifically dealt with in the Merger Act and the Code of Obligations, other contracts may not be transferred. Each contract has to be transferred in accordance with the requirements under the Code of Obligations. As a result, if the relevant contract does not provide a clause which deals with the transfer to a third party, a contract may only be transferred with the consent of the transferee and the other contracting party.

4. <u>**Who must be notified of what, and how?**</u>

(a) **Local regulator(s)**

FINMA as set out above.

(b) **Other regulator(s)**

Commercial Registry Office as set out above.

(c) **Policyholders**

Please see Section 2.2 above.

(d) **Beneficiaries of cover other than actual policyholders**

Not applicable.

(e) **Reinsurers**

Only if contractually obligated.

(f) **Brokers**

Not applicable.

(g) **Others**

Based on Article 74(1) Merger Act the supreme managing body of the transferor shall inform the shareholders of the transfer of assets and liabilities in the annex to the annual accounts. Such duty to inform does not exist if the assets transferred represent less than 5% of the balance sheet total of the transferor (Article 74[3] Merger Act).

(h) **Further notice requirements**

Not applicable.

5. **<u>What publicity requirements are there for IPTs?</u>**

(a) **Newspapers**

Not applicable.

(b) **Official Gazette/Journal**

The order of FINMA by which an IPT will be sanctioned has to be published in the Swiss Official Gazette of Commerce ("SOGC").

(c) **Trade magazines**

Not applicable.

(d) **Register of Companies**

The transfer of assets and liabilities between two undertakings has to be published in the Register of Companies and then the SOGC (Article 73 Merger Act).

(e) **Other**

Not applicable.

6. **<u>Who has the right to object to the transfer?</u>**

(a) **Regulator(s)**

Each IPT for direct insurance business requires permission from FINMA. If the documentation submitted (including the draft notifications to the shareholders), is not in accordance with their requirements, permission will not be granted.

(b) **Policyholders**

Policyholders may be able to object to the transfer by appealing to the Federal Administrative Tribunal, but there have been no decisions rendered so far. As policyholders are not parties to the proceedings before FINMA, they are required to demonstrate as part of their appeal that they would be particularly affected by the FINMA order and that they have an interest in being protected by the amendment or cancellation of such order. The Tribunal could approve such an appeal, if policyholders can further show that FINMA breached Federal law.

(c) **Beneficiaries of cover**

The same rules apply as for policyholders. There have been no decisions rendered in this regard to date.

(d) **Reinsurers**

Reinsurance contracts would not be affected by an IPT. Reinsurers would not therefore be afforded a right of appeal against the FINMA order.

(e) **Trade associations**

Not applicable.

(f) **Employees**

Employees are not entitled to object to the transfer but each of them can refuse the transfer of his or her employment contract to the transferee (Article 333[1] of the Code of Obligations). In such a case the transferor will remain as the employer.

(g) **Others**

Not applicable.

7. **<u>Who must approve and/or sanction the transfer?</u>**

(a) **Local regulator**

For domestic transfers of portfolios of life and non-life insurance business, FINMA and the Commercial Registry must approve the transfer. For reinsurance, no approval is needed.

(b) **Other regulator(s)**

Where a cross-border transfer is envisaged, the approval of the regulator in the receiving country may be required in addition.

(c) **Court**

No approval of the court is required.

8. **<u>What jurisdictional conditions apply to the transfer?</u>**

8.1 **What types of insurance portfolios are capable of transfer in Switzerland?**

All types of insurance portfolios may be transferred.

8.2 **Does the transferring portfolio need to be legally or commercially connected to the state where the transfer is effected?**

As Switzerland is not member of the EEA, only a "Swiss" portfolio, i.e. a portfolio which consists of policies insuring Swiss-based policyholders, could be transferred in Switzerland.

8.3 **Will the transfer be effective in jurisdictions other than those of the transferor and/or transferee?**

As apart from Liechtenstein, a Swiss IPT only affects Swiss portfolios, the issue of enforcing a Swiss IPT abroad has not yet arisen.

8.4 **What effect will the transfer have on arbitration clauses?**

In our opinion contracts are, apart from employment relationships, not automatically affected by the transfer. An IPT as such does not transfer any agreements to arbitrate to the transferee. There are, thus, two issues: (1) when is a transferee entitled to invoke an arbitration clause against a third party which is stipulated in a contract between the third party and the transferor; and (2) when is the third party entitled to do so against the transferee?

Contracts may not be transferred to the transferee without the consent of the other contractual party. If the third party gives such consent, both the transferee and the third party would be bound by the arbitration clause stipulated in the contract in issue.

One further option would be that the transferor assigns his or her claims arising from a contract with a third party to the transferee. In such a case, not the contract as such, but only the rights and claims would be transferred to the transferee. Except with regard to any differing contractual agreements, the transferee would normally also be entitled to bring these claims before an arbitral tribunal. The arbitration clause would then be a so-called ancillary right to the claim assigned.

Similarly to the assignment of a claim, a transferee may also assume all obligations of the transferor and thereby accept the arbitration clauses stipulated in the underlying contracts under the terms of the Transfer Contract. The third party can then bring the transferee before an arbitral tribunal.

9. What is the procedure and timing of the transfer?

9.1 What is a typical timeline for a transfer?

Compared to other European countries the process is fairly straightforward and not very costly. Usually, prior to the final application, the transferor and the transferee submit a draft application to FINMA. Usually FINMA gives its feedback within one month. Once the parties have made their amendments and submitted their final application, FINMA needs a further month to consider the final application.

If the applicants do not submit a draft application in advance, FINMA usually needs about two months.

Within 30 days after FINMA has sanctioned the IPT, the transferee has to inform all policyholders who have been taken over that they are entitled to cancel their insurance policy by the giving of notice within three months. Such period commences once the policyholder has been individually informed about the IPT.

9.2 Are there any hard legislative or regulatory deadlines?

No (apart from the deadlines stipulated for the notification letter to policyholders – see Section 9.1 above).

10. What key documentation will be produced for the transfer?

Normally these will be the document or documents that effect the transfer, plus any new or amended business plan that is required and any necessary application for a new or amended licence.

Essential documents for the IPT are the following:

- the application in which, amongst others matters, the transferor and the transferee set out the relevant tied assets and reserves and a calculation of the solvency margins (Solvency I) for both applicants before and after the transfer. The application also has to explain to what extent and how reinsurance contracts will be transferred to the transferee;
- the transfer contract by which the transferor transfers its tied assets and reserves to the transferee; and
- the draft notification letter to be sent to the policyholders.

Any application for an IPT which is to become effective after 1 January 2011 also has to set out that the solvency requirements under Solvency II are met.

11. What professional agents are involved in the transfer and what are their roles?

(a) Lawyers

In seeking to effect a portfolio transfer, the documentation may be extensive and will often play a crucial role. The involvement of lawyers, whether in-house or outside counsel, will likely be required.

(b) Accountants

The effect on the balance sheets of the parties are likely to form a vital part of the analysis and any reporting to FINMA. Accountants will play an important role.

(c) Actuaries

Modelling the portfolio to be taken over and valuing any assets to be transferred with it are normally significant steps in the process, both with regard to the parties' desire to conclude the transfer and keeping the regulator properly informed.

(d) Independent Expert

There is no requirement for an independent expert.

(e) Other

None required.

12. What legal issues are frequently encountered in transfers?

(a) Enforcement of foreign transfers

Transfers effected in foreign countries (for example, where one or more foreign branches of Swiss insurers are involved) could raise enforcement issues in Switzerland. Swiss insurers intending to transfer their business abroad are advised to examine in advance whether the transfer in question would be enforceable in Switzerland. Otherwise insurers face the risk that policyholders who were against the transfer may assert their claims against the Swiss head office.

(b) VAT

In relation to IPT, VAT issues have not yet arisen in Switzerland. In the case of complex IPTs it would be advisable to obtain a tax ruling from the competent tax authorities in advance. Such tax rulings are generally available in Switzerland. Where such a ruling is not available abroad legal advice should be sought.

13. How frequently is the transfer mechanism used?

13.1 Is the transfer mechanism commonly used? For what purposes is it used?

The transfer is regularly used for both intra-group transfers and transactions between independent enterprises.

The transfer is mainly used for:

(a) intra-group reorganisations; and

(b) sale of blocks of insurance business without completely dissolving the selling insurer.

13.2 **Are there any statistics of the use of the transfer mechanism?**

No.

14. **<u>What alternative methods can be used to transfer insurance portfolios, and what are the advantages and disadvantages of such methods?</u>**

(a) **Novation/Transfer and Assumption Agreement**

Novations can be and are used to transfer portfolios, especially in the reinsurance arena. Also common are "Transfer and Assumption Agreements". The difference between the two, in practice, is that the latter often does not involve the new party "stepping into the shoes" of the old (thereby becoming potentially liable for past breaches) but can be, as its name suggests, restricted to a transfer and assumption of present and future obligations under the relevant contracts.

(b) **100% reinsurance (also described as "run-off"/"portfolio"/"assumption" reinsurance or retrocession, "portfolio transfer" or "reinsurance to close")**

A relatively simple legal form that is likely to involve a great deal of actuarial work and a similar amount of accounting considerations.

(c) **Corporate reorganisation**

Mergers and demergers are also common means of transferring business. In both mergers and demergers Article 62 ISA is not applicable and does not give the policyholder a right to cancel the insurance policy. However, pursuant to Article 3(2) ISA any merger, demerger or conversion of an insurance company requires the prior approval of FINMA.

(d) **Arrangement/compromise**

Not often used in our experience.

(e) **Other**

Similarly, not often used in our experience.

15. **<u>What are the relevant sources of law or guidance?</u>**

(a) **Statutes**

The relevant provisions are Article 62 ISA and Articles 69 to 77 Merger Act.

(b) **Regulations**

There is only one regulation for health insurance (FINMA Circular 2008/15). Further regulations for other direct life and non-life business are currently in preparation.

(c) **Guidance**

Not applicable.

(d) **Jurisprudence**

Not applicable.

(e) **Other**

Not applicable.

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1. **General**

1.1 **Can insurance portfolios be transferred from one entity to another in your jurisdiction?**

Yes, under the Regulations Governing Establishment and Administration of Insurance Enterprises,[191] and/or the Regulations Governing Establishment and Administration of Foreign Insurance Enterprises[192] (together the "Taiwan IPT-related Laws and Regulations"), if certain conditions are met (See Section 2 below).

1.2 **Can reinsurance portfolios be transferred?**

Yes, under the Taiwan IPT-related Laws and Regulations,[193] if certain conditions are met (See Section 2 below).

1.3 **Are the rules the same for the transfer of direct insurance portfolios as for reinsurance portfolios?**

Yes.

1.4 **Are the rules the same for the transfer of life portfolios as for non-life portfolios?**

Yes.

2. **What are the requirements for an Insurance Portfolio Transfer ("IPT")?**

2.1 **What requirements must be met by a *transferor* to undertake an IPT?**

There is no specific regulatory requirement the transferor must meet to undertake an IPT. However, the Taiwan IPT-related Laws and Regulations will apply to IPTs where the transferor is a local insurance company or a foreign insurance company with an operation in Taiwan.

2.2 **What requirements must be met by a *transferee* to undertake an IPT?**

A transfer must result in the (insurance and reinsurance) business transferred being carried on from an establishment of the transferee in Taiwan. The transferee must have the authorisation required to enable the business which is to be transferred to be carried on in the place to which it is to be transferred. Under the insurance laws and regulations in Taiwan, certain licenses and qualifications are required for conducting life insurance business, non-life insurance business and/or reinsurance business. Therefore, in order to undertake an IPT, the transferee must have the required licenses and meet the required qualifications for the transferring business.

[191] Article 26 of the Regulations Governing Establishment and Administration of Insurance Enterprises.

[192] Article 27 of the Regulations Governing Establishment and Administration of Foreign Insurance Enterprises.

[193] Supra notes 1 and 2.

2.3 **Are there any requirements relating to the financial condition of the *transferor*?**

There is no specific regulatory requirement relating to the financial condition of the transferor under the Taiwan IPT-related Laws and Regulations.

2.4 **Are there any requirements relating to the financial condition of the *transferee*?**

There are no specific criteria relating to the financial condition of the transferee under the Taiwan IPT-related Laws and Regulations. However, in practice, meeting the minimum (or higher) financial conditions for conducting the insurance business is usually one of the key factors in the Financial Supervisory Commission's (the "FSC", the main regulator in Taiwan for insurance and other financial sectors) review of the IPT. The FSC would consider the financial condition of the transferee prior to and post the transfer.

2.5 **Is the place where the portfolio was originally underwritten a relevant factor?**

No.

Insurance business is highly regulated in Taiwan and the insurance portfolio to be transferred under the Taiwan IPT-related Laws and Regulations generally should have been originally underwritten in Taiwan. Therefore this question does not appear to be an issue in Taiwan.

2.6 **Is the governing law or applicable jurisdiction of the insurance portfolio transferred a relevant factor?**

Generally, most policies under the insurance portfolio transferred are in Taiwan and subject to Taiwan law. For those which are subject to other jurisdictions, if the transfers would raise issues or disputes under other jurisdictions, the FSC might request the transferor and the transferee to come up with certain measures (for instance, certain transitional arrangements) to deal with the potential foreign jurisdiction issues or disputes.

2.7 **What criteria will be applied by the relevant authority in approving the transfer?**

There are no specific criteria applied by the relevant authority in approving the transfer under the Taiwan IPT-related Laws and Regulations. However, if the transfer is carried out as a General Assumption[194] under the Financial Institutions Merger Law (the "FIM Law"), the FIM Law sets out certain general factors which the FSC is to take into account in its review of the transfer between financial institutions:[195]

(a) the influence on the expansion of the economic scale of the financial institutions, enhancement of operation efficiency, and upgrade of international competitiveness;

(b) the influence on the competition in the financial market;

[194] The term "General Assumption" defined under the FIM Law means general assumption of all assets, business and liabilities between financial institutions.

[195] Article 6 FIM Law.

(c) the financial status, management ability, and operational soundness of the transferee; and

(d) the influence on improvement of public interests, including promotion of financial stability, enhancement of financial service quality, provision of convenience, and handling of problematic financial institutions.

In addition, the FSC would take into account issues relating to, among others, the interests of policyholders.

2.8 Are there any other requirements?

See Section 10.2 below.

3. <u>What can be transferred along with the insurance or reinsurance contract?</u>

Generally the transferor is able to transfer all or part of its insurance contracts (or reinsurance contracts) to another insurance company or foreign insurance company. However the approval of the transfer by the regulator would not effectively overrule contractual restrictions (such as non-assignment provisions in reinsurance contracts) or usual legal requirements. Therefore an approved IPT may not operate to transfer ancillary reinsurance contracts where consent has not been obtained from the reinsurer in accordance with the reinsurance contract.

(a) **Assets**

Yes, but note that under Article 26 of the Regulations Governing Establishment and Administration of Insurance Enterprises, where the transferor assigns insurance contracts as well as property, the FSC may require the transferor to retain part of its property in order to protect creditors of the transferor.

(b) **Liabilities**

Yes.

(c) **Real property**

Real property can be transferred in the same way as other assets (see Section 3(a) above).

(d) **Reinsurance/retrocession contracts and other ancillary contracts**

Yes.

4. <u>Who must be notified of what, and how?</u>

(a) **Local regulator(s)**

The FSC should be notified of an IPT. The transferor would make an informal notification to the FSC before an announcement of the transfer. After the announcement, the transferor and/or the transferee should make applications/reports to the FSC and other regulators (for example, the Central Bank, the Fair Trade Commission (the "FTC"), and the Taiwan Stock Exchange (the "TSE")) if applicable and required. An application should be made to the FSC. An application/notification to the Central Bank would be required if the portfolio transfer involves foreign exchange. An application to the FTC would be required if any of the merger control thresholds are reached. A report to the TSE would be required if the transferor or the transferee is listed on the TSE.

(b) **Other regulator(s)**

Not applicable.

(c) **Policyholders**

If Article 297 of the Civil Code applies to the transfer, the transferor and/or the transferee should notify the transferor's creditors and contract counterparties (for example, policyholders) of the transfer.

However, if the transfer is carried out as a General Assumption under Article 18 of the FIM Law or Article 27 of the Business Mergers and Acquisitions Law (the "M&A Law"), Article 297 of the Civil Code will not apply and an announcement, in lieu of notifications, will suffice (though in practice notice would likely also be given to the policyholders in any event even if not legally required).

If the FIM Law applies to the transfer, the transferor and the transferee should make an announcement within 10 days after board resolutions on the transfer. The announcement should state the content of the board resolutions and the particulars required to be set out in a transfer agreement. Furthermore, the public announcement should specify a period of not less than 30 days within which creditors (for example, policyholders) may raise an objection in writing stating that the proposed transfer would damage their rights and interests. The public announcement has to be consecutively placed at all the business premises of the transferor and the transferee for at least 7 days and consecutively published in a local daily newspaper for at least 5 days.

(d) **Beneficiaries of cover other than actual policyholders**

There is no specific regulatory requirement under the Taiwan IPT-related Laws and Regulations to give separate notice to beneficiaries of cover other than policyholders.

(e) **Reinsurers**

There is no specific regulatory requirement under the Taiwan IPT-related Laws and Regulations to give separate notice to reinsurers. Like policyholders, reinsurers are creditors or contract counterparties of the transferor, and therefore notifications to reinsurers might be required (see Section 4(c) above).

(f) **Brokers**

Like policyholders, brokers are creditors or contract counterparties of the transferor, and therefore notifications to brokers might be required (see Section 4(c) above).

(g) **Others**

If the transferred portfolio involves foreign exchange (such as foreign currency policies), the transferor must notify the foreign exchange control authorities, i.e. the Central Bank, and may need to apply for the Central Bank's approval of transfer of such portfolio.

(h) **Further notice requirements**

Not applicable.

5. What publicity requirements are there for IPTs?

(a) Newspapers

There is no legal or regulatory obligation to publish a notice in a newspaper under the Taiwan IPT-related Laws and Regulations. However, if the transfer is carried out as a General Assumption under the FIM Law, the public announcement must be consecutively published in a local daily newspaper for at least 5 days, see Section 4(c) above.

(b) Official Gazette/Journal

There is no requirement with regard to publicity in official gazettes/journals.

(c) Trade magazines

There is no requirement with regard to publicity in trade magazines.

(d) Register of Companies

There is no requirement with regard to publicity in registers of companies.

(e) Other

Please see Section 4(c) above.

6. Who has the right to object to the transfer?

(a) Regulator(s)

An IPT is subject to the FSC's approval and therefore the FSC may object to the transfer. If the transfer is subject to approvals from the FTC and/or the Central Bank (see Section 4(a) above), these regulators may object to the transfer as well.

(b) Policyholders

Yes, see Section 4(c) above.

(c) Beneficiaries of cover

There is no regulation granting an objection right to the beneficiaries of cover.

(d) Reinsurers

Yes, if the General Assumption under the FIM Law applies to the transfer (please see Section 4(c) above).

(e) Trade associations

There is no regulation granting an objection right to trade associations.

(f) Employees

There is no regulation granting an objection right to employees. However, if the General Assumption under the FIM Law applies to the transfer, the FSC may reject the transfer if most of the employees of the transferor strongly object to the transfer.

(g) Others

None specified.

7. Who must approve and/or sanction the transfer?

(a) Local regulator

The FSC's approval is required.

Approval from the Central Bank would be required if the portfolio transfer involves a change in foreign exchange business or licences. Approval from the FTC would be required if any of the merger control thresholds are reached. Please see Sections 4(a) and 4(g) above.

(b) Other regulator(s)

Not applicable.

(c) Court

Not applicable.

8. What jurisdictional conditions apply to the transfer?

8.1 What types of insurance portfolios are capable of transfer in Taiwan?

All types of insurance portfolios can be transferred in Taiwan in accordance with the Taiwan IPT-related Laws and Regulations.

8.2 Does the transferring portfolio need to be legally or commercially connected to the state where the transfer is effected?

If the transferring portfolio has no strong connection with Taiwan (for example, a business operation in Taiwan, or most of the assets and liabilities are in Taiwan, etc) the Taiwan regulators might refuse to review the transfer due to lack of jurisdiction.

8.3 Will the transfer be effective in jurisdictions other than those of the transferor and/or transferee?

Whether the transfer is effective in jurisdictions other than those of the transferor and/or transferee would not be determined by Taiwan law and would be subject to relevant local laws and regulations of such jurisdictions.

8.4 What effect will the transfer have on arbitration clauses?

In Taiwan, the rights and obligations under an arbitration clause will transfer along with the insurance or reinsurance portfolio to the transferee pursuant to the approval decision of the transfer.

9. What is the procedure and timing of the transfer?

9.1 What is a typical timeline for a transfer?

The timeline varies depending on a number of factors (deal structures, scope of transferring portfolio, size of deals, financing, due diligence, negotiation, regulatory clearance, etc). In Taiwan, a simple and straightforward IPT might take 4-6 months to complete, including the FSC's approval (which would take approximately 2 months if all required documents are complete).

9.2 **Are there any hard legislative or regulatory deadlines?**

There are no hard legislative or regulatory deadlines for an IPT. Generally, if application documents are complete, the FSC would make a decision on an application of an IPT in approximately 2 months.

10. **<u>What key documentation will be produced for the transfer?</u>**

There is no specific regulatory requirement relating to the key documentation required for the transfer under the Taiwan IPT-related Laws and Regulations. However, pursuant to the oral response from the FSC, the transferee has to submit an application for the IPT along with the following documents:

(a) the business transfer plan (including how to protect the interest of policyholders and employees);

(b) an estimation of the financial impact on the transferee after the IPT;

(c) a financial projection for the coming 10 years including its capital adequacy ratio and its capital increase plan and supporting documents to prove the feasibility of the capital increase plan (if needed);

(d) a legal opinion issued by a lawyer; and

(e) a fairness opinion on the purchase price.

If the General Assumption under the FIM Law applies to the transfer, the transferor and the transferee together have to submit an application for the portfolio transfer to the FSC, along with the following documents:

(a) portfolio transfer plan, stating the content of the portfolio transfer plan (including the method of portfolio transfer, evaluation of economic efficiency, general condition of business area after portfolio transfer, business items, business development plan, and financial projection for the coming 3 years), expected progress, feasibility, necessity, reasonableness, legality, and other analysis;

(b) the portfolio transfer agreement, which should set out the required information;

(c) minutes of shareholders' meeting of the transferor and the transferee (if applicable);

(d) supporting documents of public announcement/notice of resolution on the portfolio transfer and particulars that should be set out in the portfolio transfer agreement;

(e) a fairness opinion issued by a CPA;

(f) pro forma statements of capital adequacy stating the relevant figures for one month prior to the transfer;

(g) balance sheets, income statements, property lists, statements of change in shareholders' equity, and cash flow statements audited and certified by a CPA for the record date of the portfolio transfer;

(h) a legal opinion issued by a lawyer; and

(i) other documents as required by the FSC.

In practice, the transferor and the transferee would discuss the required documents with the FSC before submitting the documents.

11. **<u>What professional agents are involved in the transfer and what are their roles?</u>**

(a) **Lawyers**

Lawyers usually play a role in setting deal structures, conducting legal due diligence, contract drafting required for the transfer, negotiation, regulatory applications/filings, etc. They will also deal with objections raised by interested parties and with the FSC on regulatory issues.

(b) **Accountants**

Accountants usually play a role as independent experts in issuance of fairness opinions. Also, accountants usually advise clients with respect to tax issues.

(c) **Actuaries**

Actuaries' involvement is not required, but they may be involved in order to provide reports on the terms and likely effects of the transfer.

(d) **Independent Expert**

Independent experts will provide fairness opinions. The process in relation to the transfer does not require the intervention of an independent expert. However the parties may well appoint such an expert in order to estimate the value of the portfolio to be transferred and provide an opinion of the likely effects of the transfer.

(e) **Other**

Not applicable.

12. **<u>What legal issues are frequently encountered in transfers?</u>**

Irrespective of the mechanism to carry out the transfer, if a contract explicitly prohibits or restricts the transferor from transferring the contract or the counterparty's consent is required under applicable law, the transferor should obtain the counterparty's consent to the contract transfer.

In addition, if the General Assumption under the FIM Law applies to the transfer, consent of the employees to be transferred is required in such transfer. Pension liabilities are usually one of the main employee issues for such transfer in Taiwan. In addition, if mass redundancy is triggered, the transferor and the transferee should pay attention to the procedures under laws and regulations with respect to mass redundancy.

13. **<u>How frequently is the transfer mechanism used?</u>**

13.1 **Is the transfer mechanism commonly used? For what purposes is it used?**

Besides the mechanism for IPTs in Taiwan under the Taiwan IPT-related Laws and Regulations, the General Assumption under the FIM Law is commonly used in Taiwan. Which mechanism applies depends on, among other factors, the scope of transfer and whether the transferor and the transferee are local or foreign entities. If the transferor and the transferee are both foreign companies, and the intent is to transfer all of the assets and liabilities, General Assumption might be an easier and simpler mechanism under Taiwan law.

13.2 **Are there any statistics of the use of the transfer mechanism?**

No.

14. **<u>What alternative methods can be used to transfer insurance portfolios, and what are the advantages and disadvantages of such methods?</u>**

(a) **Novation**

Novation of each insurance contract is legally possible in Taiwan but might not be preferable because individual counterparties' consent is required and could be very complex and cumbersome to obtain. Disadvantages of this method include the time, practicality and expense of having to identify and deal with all individual policyholders and the problems caused if any of them to not wish their policies to be transferred.

(b) **100% reinsurance (also described as "run-off"/"portfolio"/"assumption" reinsurance or retrocession, "portfolio transfer" or "reinsurance to close")**

100% reinsurance of the relevant book of business does not achieve the same effect as the IPT since the liability under the policies remains with the cedant and the cedant acquires the credit risk of the reinsurer.

(c) **Corporate reorganisation**

In the context of troubled insurers, the FSC might place the insurers under receivership and sell the business of the insurers via auctions.

(d) **Arrangement/compromise**

Not applicable.

(e) **Other**

Not applicable.

15. **<u>What are the relevant sources of law or guidance?</u>**

(a) **Statutes**

Article 26 of the Regulations Governing Establishment and Administration of Insurance Enterprises.

Article 27 of the Regulations Governing Establishment and Administration of Foreign Insurance Enterprises.

Article 18 of the FIM Law.

Article 3 of the Regulations Governing Mergers and General Assignment and Assumption between Foreign Financial Institutions and Local Financial Institutions

Article 27 of the M&A Law.

Article 297 of the Civil Code.

(b) **Regulations**

Please see Section 150 above.

(c) **Guidance**

Not applicable.

(d) **Jurisprudence**

Not applicable.

(e) **Other**

Not applicable.

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1. General

1.1 Can insurance portfolios be transferred from one entity to another in your jurisdiction?

Yes, under Part VII FSMA,[196] if certain conditions are met (see Section 2 below).

1.2 Can reinsurance portfolios be transferred?

Yes, under Part VII FSMA, if certain conditions are met (see Section 2 below).

1.3 Are the rules the same for the transfer of direct insurance portfolios as for reinsurance portfolios?

Yes.

1.4 Are the rules the same for the transfer of life portfolios as for non-life portfolios?

There are no fundamental differences between the rules that apply to the transfer of life business and those that apply to non-life business.

Slightly different rules apply to the transfer of life and non-life business in respect of the EEA regulators that need to be notified of the transfer (see Section 4(b) below).

Given the difference in nature of life and non-life business, the Financial Services Authority (the "FSA") guidance sets out different requirements as regards the qualifications of the independent expert (the "IE") and the content of his report (SUP[197] 18.2.16, 18.2.17 and 18.2.39). The role of the IE and his report is explained in Section 11(d) below.

2. What are the requirements for an insurance portfolio transfer ("IPT")?

2.1 What requirements must be met by a *transferor* to undertake an IPT?

Part VII FSMA will apply to IPTs where the transferor's insurance business is transferred to another body in whole or in part and will be carried on from an establishment of the transferee in an EEA state. One of the following conditions must also be satisfied:

(a) The transferor is a UK authorised person and the business is carried on in one or more member states with permission.

(b) The business is reinsurance carried on in the UK by a direct insurer authorised to carry out insurance by an EEA supervisory authority (other than the FSA).

(c) The business is carried on in the UK and the transferor is neither a UK authorised person nor an EEA firm but has permission to carry on insurance in the UK.

2.2 What requirements must be met by a *transferee* to undertake an IPT?

A transfer must result in the business transferred being carried on from an establishment of the transferee in an EEA member state. The transferee must have the authorisation required to enable the business which is to be transferred to be carried on in the place to which it is to be transferred.

2.3 Are there any requirements relating to the financial condition of the *transferor*?

There is no strict requirement regarding the financial condition of the transferor, but the financial condition of the transferor will be taken into account in determining whether the proposed transfer is fair to the policyholders remaining with the transferor (see Section 2.7 below). The IE's report will consider the transferor's assets and liabilities and how the transfer affects the financial condition of the transferor.

2.4 Are there any requirements relating to the financial condition of the *transferee*?

Before the Court sanctions the transfer, it must have been provided with a certificate from either the FSA or the relevant EEA regulator (depending on the regulatory status of the transferee) confirming that the transferee will meet the applicable solvency margin requirements after the transfer.

2.5 Is the place where the portfolio was originally underwritten a relevant factor?

In the UK, it does not matter whether the business was originally underwritten in the UK, the EEA or anywhere else. It is, however, a requirement that the business be carried on in either the UK or the EEA - see Section 2.1 above.

2.6 Is the governing law or applicable jurisdiction of the insurance portfolio transferred a relevant factor?

The Court will not make an order for transfer if it considers that the order will be of no enforceable value, and it would be a relevant factor, if the business to be transferred was all subject to the laws and jurisdiction of places that might not recognise the English judgment. The Court decided in *Sompo v Transfercom*[198] that a Part VII transfer would be sanctioned notwithstanding the fact that only 27% of the transferring policies were subject to English or other UK law.

2.7 What criteria will be applied by the relevant authority in approving the transfer?

The FSA, the UK insurance and financial services regulator, is closely involved in the Part VII transfer process. The FSA is likely to object to a transfer if it concludes that it is unfair to a class of policyholders, for instance:

(a) transferring policyholders;

(b) policyholders of the transferor whose contracts will not be transferred; or

[196] Financial Services and Markets Act 2000.

[197] Chapter 18, "Transfers of business", of the FSA's Supervision Manual.

[198] [2007] EWHC 146 (Ch).

(c) existing policyholders of the transferee.

The FSA is also likely to object to a transfer if it considers that is has a material adverse effect on policyholders' security (SUP 18.2.53G[199]).

The IE's report is crucial in establishing whether any such concerns exist with regard to the proposed transfer, and will specifically address these issues (see FSA Guidance on content of IE Report: SUP 18.2.31 to SUP 18.2.41).

Both the IE and FSA's reports are carefully considered by the Court. If either the IE or the FSA consider the proposed transfer as being unfair, or having a material adverse effect on policyholders' security, the Court is highly unlikely to sanction it.

2.8 **Are there any other requirements?**

See below.

3. **<u>What can be transferred along with the insurance or reinsurance contract?</u>**

(a) **Assets**

The Court may, when sanctioning the IPT, provide for the transfer to the transferee of the whole or part of the relevant insurance undertaking and any property of the transferor (section 112(1) FSMA), even if the transferor does not otherwise have the capacity to effect such transfer (section 112(2)(a) FSMA).

This includes property held by the transferor as trustee (section 112(2)(b) FSMA). The Court may also order that assets be transferred free of existing charges (section 112(5) FSMA).

Special considerations apply to the transfer of certain contractual rights and obligations (see Section 3(d) below).

(b) **Liabilities**

Similarly, the Court may provide for the transfer to the transferee of any liabilities of the transferor (section 112(1)-(2) FSMA).

(c) **Real property**

Real property can be transferred in the same way as other assets (see Section 3(a) above).

(d) **Reinsurance/retrocession contracts and other ancillary contracts**

Reinsurance contracts and other ancillary contracts can be transferred in the same way as other assets and liabilities.

Until recently, it was unclear whether the Court had the power to provide for a transfer of contracts where contractual provisions prohibited assignment or required the consent of the counterparty for a transfer. Section 112(2A) of FSMA now clearly provides that the Court may override such contractual restrictions on transfer.

If the relevant contract entitles the counterparty to terminate the contract in the event of a transfer, the termination right can only be exercised to the extent expressly permitted in the Court order sanctioning the transfer (section 112A FSMA).

However, the transfer of the contract in question to the transferee does not prevent the counterparty from terminating without cause (if such a right exists under the contract), for example, where the counterparty does not want to deal with the transferee.

4. **<u>Who must be notified of what, and how?</u>**

(a) **Local regulator(s)**

The FSA should be notified of the proposals for a Part VII transfer as soon as reasonably practicable, including a broad outline of the transfer scheme and its purpose. This will enable the FSA to consider what issues are likely to arise and allow a practical timetable for the transfer to be agreed (SUP 18.2.12G and 18.2.13G). The FSA should also be notified of every significant step taken during the transfer process (Principle 11).

(b) **Other regulator(s)**

In relation to life business, if the "state of the commitment" (i.e. the domicile of the policyholder at the time the contract was entered into) for any transferring policy is an EEA state other than the UK, the FSA must notify the regulator in that EEA state (paragraph 4 of the Schedule).[200]

In relation to non-life business, if the state where the risk is located is an EEA state other than the UK, the FSA must notify the regulator in that EEA state (paragraph 5 of the Schedule).

In respect of any kind of insurance, if the business to be transferred is carried out in an EEA branch, the relevant host state regulator must be notified (paragraph 3 of the Schedule).

(c) **Policyholders**

Notice of the application must in principle be given to every policyholder of the transferor and the transferee (section 3(2)(b) of the Regulations).[201] This can cause difficulties where records are incomplete or out-of-date. Where a book of business has been inactive for many years, notification may prove impossible or disproportionately costly. The parties can apply to the Court for a dispensation in relation to the notice requirement in part or in full. The Court is likely to grant a dispensation where it is demonstrated either that the policyholders are unlikely to be affected by the transfer (for example, a particular group of policyholders whose "business" has been completely run off, or the retained policyholders are with a large transferor) or that alternative methods of notification will be as, or more, effective in drawing the proposed transfer to the attention of interested policyholders.

The FSA normally requires notice to be accompanied by a statement setting out the terms of the transfer scheme and containing a concise summary of the IE report on the terms of the scheme (together, the "Policyholder Circular") (or to

[199] "SUP 18" refers to Chapter 18, "Transfers of business", of the FSA's Supervision Manual.

[200] Schedule 12 of FSMA.

[201] Financial Services and Markets Act 2000 (Control of Business Transfers) (Requirements on Applicants) Regulations 2001 (SI 2001/3625) (the "Regulations").

indicate where such details can be obtained) (SUP 18.2.48G).

Where it is impossible or impracticable to notify policyholders, the Court may expect a notification of the application to be published in national newspapers or relevant trade publications.

(d) **Beneficiaries of cover other than actual policyholders**

There is no requirement under the Regulations to give notice to beneficiaries of cover other than policyholders. However, under SUP 18.2.42G, it may be appropriate to give notice to anyone interested in the policies transferred who has notified the transferor of their interest.

As a matter of practice, where life business is proposed to be transferred, notice will often be given to beneficiaries such as beneficiaries of trusts, beneficiaries of life assurance policies etc.

Notifying beneficiaries is less of an issue with respect to general insurance as policyholders are usually the only beneficiaries of the cover.

(e) **Reinsurers**

Notice of the application must be given to every reinsurer of the transferor whose contracts of reinsurance are to be transferred (Regulation 3(2)(c)(i)). The parties can apply to the Court for a dispensation in relation to this notice requirement. If the contract has been placed through a broker, notice must be given to the reinsurance broker (Regulation 3(2)(c)(ii)).

(f) **Brokers**

There is no general requirement under the Regulations to give notice to brokers (save reinsurance brokers as explained above). However, the transferor or the transferee may not always have adequate records of their policyholders where the contracts were placed through brokers. Moreover, under English law, the broker is normally (though not invariably) treated as the agent of the policyholder. As a practical matter therefore the parties may offer to notify all relevant brokers where all policyholders would not otherwise be reached. The Court will ultimately decide to whom notice is given, and how.

(g) **Others**

Not applicable.

(h) **Further notice requirements**

Any notice to policyholders, beneficiaries of cover, reinsurers and brokers must be approved by the FSA and must contain the address from which a copy of the IE's report and the transfer document can be obtained free of charge (Regulation 3(3)).

5. **<u>What publicity requirements are there for IPTs?</u>**

(a) **Newspapers**

A notice of the application for the transfer must be published in two national newspapers in the UK, and, where non-UK direct insurance policies are included in the transfer, in two national newspapers in any EEA state that is the domicile of the policyholder or the state in which the risk is situated in respect of such policies.

Where non-UK reinsurance contracts are included in the transfer, a notice of the application must also be published in a business newspaper in any EEA state where an interested reinsurer was established at the time when the reinsurance contract was entered into (Regulation 3(2)(iv)).

Each notice must be approved by the FSA and must contain the address from which a copy of the IE's report and the scheme document can be obtained free of charge.

A dispensation regarding the publication requirements in respect of non-UK publications can be obtained from the Court.

(b) **Official Gazette/Journal**

A notice of the application for the transfer must be published in the London, Edinburgh and Belfast Gazettes (Regulation 3(2)(a)(i)).

(c) **Trade magazines**

There is no legal or regulatory obligation to publish a notice of the application in trade magazines. However, a publication in trade magazines or professional publications may be used where it is impossible or impracticable to write directly to all policyholders, and the parties wish to obtain a dispensation.

(d) **Register of Companies**

There are no publication requirements as regards Companies House. The requirement does, however, arise if the transfer results in the dissolution of the transferor.

(e) **Other**

Not applicable.

6. **<u>Who has the right to object to the transfer?</u>**

(a) **Regulator(s)**

Under section 110 of FSMA, the FSA has a right to be heard at the sanction hearing. The FSA is likely to object to a transfer if it concludes that the scheme is unfair to a class of policyholders or has a material adverse effect on policyholders' security (see Section 2.7 above). While the final decision about a proposed transfer lies with the Court, in practice the Court is highly unlikely to sanction a transfer if the FSA objects to it.

The FSA is involved in the transfer process from the early stages. It formally approves the appointment of the IE, the form and content of the IE's report and, informally, all other key documents relating to the transfer, such as the Policyholder Circular.

Other EEA regulators do not have a right to object to the transfer before the Court. However, under certain circumstances their consent is required (see Section 7(b) below).

(b) **Policyholders**

Under section 110 of FSMA, any person who alleges that he would be adversely affected by the carrying out of the transfer has the right to object to the transfer. This is aimed primarily at policyholders.

Policyholders may raise objections at the sanction hearing or in advance of the hearing to the transferor or the transferee following the distribution of the Policyholder Circular. Objections may be raised either by objectors in person or by their legal representatives.

(c) **Beneficiaries of cover**

Beneficiaries of cover (such as beneficiaries of life policies or beneficiaries under trust arrangements) may be adversely affected by the transfer and therefore have the right to object to the transfer under section 110 of FSMA like policyholders.

(d) **Reinsurers**

Reinsurers may also be adversely affected by the transfer and have a right to object under section 110 of FSMA like policyholders.

(e) **Trade associations**

Trade associations have no right to object to the transfer.

(f) **Employees**

Employees of the transferor and the transferee have a right to object to the transfer under section 110 of FSMA.

(g) **Others**

None specified.

The general law however allows interested parties to intervene in legal proceedings upon demonstration of the relevant interest and at the Court's discretion.

7. **<u>Who must approve and/or sanction the transfer?</u>**

(a) **Local regulator**

The FSA does not "approve" transfers. However, as a matter of practice, the Court will not sanction the transfer if the FSA objects to it. The FSA prepares a report for the Court in which it states whether it objects or not to the transfer. As transferor and transferee cooperate with the FSA throughout the Part VII process, any objections by the FSA will normally be dealt with at an early stage and the relevant documents or conditions modified accordingly.

(b) **Other regulator(s)**

Where notice is given to another EEA regulator in respect of life or non-life business (see Section 4(b) above), the EEA regulator may refuse to consent to the transfer. In that case the affected part of the insurance business cannot be transferred under Part VII. Consent will, however, be presumed where the EEA regulator has not responded to the FSA within 3 months of notification.

(c) **Court**

Every Part VII transfer must be sanctioned by the Court (section 111 FSMA).

8. **<u>What jurisdictional conditions apply to the transfer?</u>**

8.1 **What types of insurance portfolio are capable of transfer in the United Kingdom?**

All types of insurance business can be transferred under Part VII.

8.2 **Does the transferring portfolio need to be legally or commercially connected to the state where the transfer is effected?**

Insurance business can be transferred under Part VII even where only a small proportion of transferring policies is governed by English law (see Section 2.6 above).

However, there are issues concerning the enforceability of a Part VII transfer in foreign jurisdictions where the policies are not governed by English law.

8.3 **Will the transfer be effective in jurisdictions other than those of the transferor and/or transferee?**

See Section 12(b) below.

8.4 **What effect will the transfer have on arbitration clauses?**

In the UK, the rights and obligations under an arbitration clause will transfer to the transferee pursuant to the Court order sanctioning the transfer (see Section 3(d) above).

9. **<u>What is the procedure and timing of the transfer?</u>**

9.1 **What is a typical timeline for a transfer?**

Approximate Time	Action
H - 28 weeks	Preliminary identification of business to be transferred; due diligence on steps required; secure FSA approval of proposed IE; IE prepares drafts of report for discussion; draft transaction documents.
H - 20 weeks	Submit to FSA draft IE's report, business transfer agreement, scheme, draft statement to policyholders, notice, claim form and associated court documents and proposed dispensations.
H - 16 weeks	FSA approves form of draft statement to policyholders, notice, and associated court documents and proposed dispensations and expert's report.
H - 16 weeks	FSA notifies relevant EEA regulators and 3-month consultation period begins.
H - 15 weeks	Claim form seeking order sanctioning the scheme issued.

Approximate Time	Action
H - 14 weeks	**Directions hearing** (at which Court will fix final hearing date and confirm extent of publicity and notice requirements by granting dispensations - for example, dispensation from sending policyholder statement to all policyholders).
H - 12 weeks	Publication of statutory notices in Gazettes and newspapers.
H - 12 weeks	Policyholder statement sent to affected policyholders.
H - 12 weeks	Copy of IE's report and summary made available on website and in hard copy.
H - 14 days	FSA provides certificate of solvency and certificate of EEA regulators' consents and confirms that it does not intend to be present at final hearing.
H - 7 days	Lodge witness statements and original notices at Court.
H	**Final hearing** (at which objectors are heard and the Court grants order sanctioning business transfer scheme if it thinks fit).
End of month following H	Scheme becomes effective.

9.2 **Are there any hard legislative or regulatory deadlines?**

Relevant EEA regulators have 3 months to respond to notification by the FSA of the proposed transfer (section 3-5 of the Schedule).

There should normally be at least six weeks between notification of policyholders and the date of the sanction hearing (SUP 18.2.46G).

10. **What key documentation will be produced for the transfer?**

The following key documents will typically be produced for the purposes of a transfer:

(a) **Business Transfer Agreement:** At the initial stage of the Part VII transfer process, the transferor and the transferee will sign a Business Transfer Agreement by which the transferor agrees to transfer, and the transferee agrees to accept, the business to be transferred, and each party agrees to promote the transfer.

(b) **Scheme**: a detailed document which sets out in full the terms of the transfer.

(c) **Circulars/notices**: Notices to be published in gazettes and newspapers, and circulars to be sent to policyholders for notification purposes.

(d) **Claim form and supporting evidence**: In England, a claim form will be used to apply to the Court, and the supporting evidence will consist of witness statements and affidavits.

(e) **IE's report**: A report that informs the Court of the likely effects of the transfer on relevant classes of policyholders, prepared by an independent actuary who is approved by the FSA.

(f) **Actuaries' reports (for life companies only)**: reports on the terms and likely effects of the transfer, prepared by the actuaries of the transferor and the transferee.

(g) **"Back up" reinsurance agreement**: Where it is uncertain whether the transfer of certain policies will be effective (for example, where additional approvals are required in respect of policies governed by the law of a jurisdiction in which the transfer may be of dubious effect), the transferor and the transferee will often enter into a "back-up" reinsurance contract which transfers the economic burden of the relevant policies to the transferee while the legal obligation towards the policyholders remains with the transferor. The back-up reinsurance will terminate if and when the transfer of the relevant policies becomes wholly effective.

11. **What professional agents are involved in the transfer and what are their roles?**

(a) **Lawyers**

A Part VII transfer is a court-driven process, so lawyers play a central role. They draft the legal documents required for the process, such as the Business Transfer Agreement, the scheme, the circulars and notices, the claim form and the supporting witness statements. They will deal with objections raised by interested parties and with the FSA on regulatory issues.

(b) **Accountants**

Accountants often liaise with HMRC in relation to tax issues. They may act as project managers for a transfer process.

(c) **Actuaries**

On life transfers, actuaries of the transferor and the transferee usually provide reports on the terms and likely effects of the transfer. They also assist the FSA and the IE with information needed for their respective reports.

Where life business is being transferred, the FSA requires reports from the Actuarial Function Holder and the With Profits Actuary of both the transferor and the transferee.

(d) **Independent Expert**

The IE has a key role in the Part VII process. He drafts a report in which he provides his opinion of the likely effects of the transfer on the different groups of policyholders affected by the transfer (SUP 18.2.33). This report is heavily relied on by the Court when it considers whether it is appropriate to sanction the transfer.

(e) **Other**

Not applicable.

12. **What legal issues are frequently encountered in transfers in your jurisdiction?**

(a) **Clauses in contracts purporting to prohibit or restrict a party's ability to transfer the business**

Many contracts of insurance or reinsurance purport to restrict a party's right to transfer the business to a third party. These clauses are now subordinated in their effect to the UK's business transfer legislation. See Section 3(d) above.

(b) **Enforcement of the transfer in foreign jurisdictions?**

The English Court has jurisdiction to transfer English law policies under Part VII.

To the extent that the transferred business includes policies subject to other laws, the English Court can order the transferor to take steps to ensure that the transfer is recognised under those other laws (section 112(4) FSMA).

Reciprocal arrangements are in place for the recognition of Part VII transfers in the EEA (for the corresponding UK provision, see section 116 FSMA).

Whether effect will be given to a Part VII transfer under the laws of a non-EEA jurisdiction is a question of local law and rules of private international law.

(c) **Solvency considerations**

Part of the IE's remit is to consider whether the security position of the policyholders of the transferor or the transferee is materially adversely affected by the transfer.

(d) **Disclosure – for example, to interested parties or objectors**

Policyholders are entitled to be provided with a circular that includes a summary of the proposed scheme document, and they may also request copies of the IE's report (see Section 4(c) above). However, in order to support their objections, policyholders frequently ask for more detailed information to be disclosed to them, in particular the information on which the IE's report was based. The Court has resisted giving policyholders such information unless it can be shown that there is a manifest error in the IE's report.

(e) **VAT**

A recent ECJ judgment in the case of *Swiss Re Germany Holding GmbH v Finanzamt München für Körperschaften* (Case C-242/08) has created some uncertainty as to whether insurance portfolio transfers constitute supplies of services subject to VAT. In this case the ECJ decided that the transfer of a portfolio of reinsurance contracts constituted a supply of services which was not a banking, financial or insurance transaction and so did not benefit from any exemption from VAT.

As the ECJ did not consider the application of the "transfers of going concern" (TOGC) rules in this case, there is currently some uncertainty as to the application of these rules to insurance portfolio transfers.

13. **How frequently is the transfer mechanism used?**

13.1 **Is the transfer mechanism commonly used? For what purposes is it used?**

Part VII transfers are common in the UK and are used in different circumstances, including:

(a) intra-group reorganisations;

(b) sales of blocks of insurance business;

(c) domestications of overseas branches;

(d) demutualisation of mutual insurance companies;

(e) re-attributions of inherited estate by life companies;

(f) fund restructuring, particularly for life companies; and

(g) exit solutions, with or without an intended solvent scheme of arrangement to follow (for example, Deutsche Rueck).

13.2 **Are there any statistics of the use of the transfer mechanism?**

For non-life business, there were 81 transfers between December 2001 (when FSMA came into effect) and the end of 2008.

14. **What alternative methods can be used to transfer insurance portfolios, and what are the advantages and disadvantages of such methods?**

(a) **Novation**

A traditional method of transferring a book of insurance or reinsurance business from one entity to another would be to novate each individual contract as between the policyholders and the transferees. Disadvantages of this method include the time, practicality and expense of having to identify and deal with all individual policyholders and the problems caused if any of them to not wish their policies to be transferred.

(b) **100% reinsurance (also described as "run-off"/"portfolio"/"assumption" reinsurance or retrocession, "portfolio transfer" or "reinsurance to close")**

100% reinsurance of the relevant book of business does not achieve the same effect as a Part VII transfer since the liability under the policies remains with the cedant and the cedant acquires the credit risk of the reinsurer.

(c) **Corporate reorganisation**

(i) **Merger**

A formal process of merger of the transferor and the transferee can be used to transfer a book of business between the two entities. However, the merger of the two entities will often not be attractive where insurers or reinsurers want to simply transfer part of a book of business. In the UK, merger is a recent introduction inspired by EU legislation, and is not widely used. Its efficacy and the conditions that would be applied to it as an alternative to a Part VII process, where that would otherwise be available, are as yet untested in the UK courts.

(ii) **Merger to form a Societas Europaea**

Public limited companies (PLCs) may form a European Company (also known as a "Societas Europaea" or "SE") by way of merger and may then transfer the seat of the company within the EU without having to wind up or reincorporate. This may be suitable for companies seeking to consolidate their European operations or to redomesticate within Europe.

(d) **Arrangement/compromise**

A scheme of arrangement under Part 26 of the Companies Act 2006 can be used to change the identity of the relevant obligor under insurance policies or reinsurance contracts and thereby effectively transfer a book of business from one entity to another. The main difference between a Part VII transfer and a scheme of arrangement is that a scheme of arrangement involves a compromise of policyholders' claims. Under Part VII claims are transferred elsewhere, but not generally compromised. A Part VII transfer should therefore be a less contentious procedure in most cases.

(e) **Other**

(i) **Friendly societies**

IPTs by friendly societies cannot be effected using the Part VII procedure (section 105(3)-(4) FSMA).

(ii) **Certain transfers approved by overseas courts or regulators, intra-group transfers and consensual transfers of pure reinsurance business**

The following types of transfer are exempt from the Part VII procedure, but the powers granted to the Court under Part VII may nevertheless be used to obtain an order sanctioning the transfer (section 105(3)-(4) FSMA):

(1) certain transfers approved by overseas courts or regulators;

(2) certain intra-group transfers which have been consented to by all affected policyholders; and

(3) transfers of pure reinsurance contracts consented to by all affected policyholders.

15. **<u>What are the relevant sources of law or guidance?</u>**

(a) **Statutes**

Part VII and Schedule 12 of the Financial Services and Markets Act 2000.

(b) **Regulations**

Financial Services and Markets Act 2000 (Control of Business Transfers) (Requirements on Applicants) Regulations 2001 (SI 2001/3625).

(c) **Guidance**

Chapter 18, "Transfers of business", of the FSA's Supervision Manual.

(d) **Jurisprudence**

Re Axa Equity & Law Life Assurance Society plc and Axa Sun Life plc [2001] 1 All ER (Comm) 1010.

Re Allied Dunbar Assurance plc and other companies [2005] EWHC 28 (Ch).

Re Norwich Union and other companies [2004] EWHC 2802 (Ch).

Re Sompo Japan Insurance Inc [2007] EWHC 146 (Ch).

(e) **Other**

Not applicable.

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Preliminary Comments

In the US, insurance is generally regulated at the state level, not the federal level, and state regulatory regimes often differ in many important respects. In addition, different types of insurance, such as life and non-life insurance, may be subject to different rules.

However, financial reform legislation recently enacted in the US creates a new Federal Insurance Office (FIO), the first US federal agency ever created to oversee the insurance industry. The full extent of the FIO’s activities remains to be determined, but according to its mandate the FIO will have general authority to “monitor all aspects of the insurance industry” and identify gaps in existing state regulation that may pose systemic risk to the insurance industry or to the US financial system. The FIO also will “perform such other related duties” as may be assigned by the Secretary of the Treasury, though it is not yet clear what those other duties may be. While the FIO may add an additional layer of oversight to insurance transactions, it will have only limited authority to pre-empt state law. Thus it will not replace the varied state law framework currently in place in the US.

This questionnaire focuses on the laws governing reinsurance in New York State. New York has been chosen because the headquarters of many insurers and reinsurers are located there, and because it is the venue for a substantial portion of reinsurance transactions as well as litigation and arbitration related to insurance and reinsurance. Some specific provisions from other states will be noted where they differ from those of New York, but a detailed state-by-state discussion of differing laws is beyond the scope of this questionnaire. A reinsurance transaction involving a New York-domiciled reinsurer will be subject to New York reinsurance law, but the laws of other jurisdictions also may apply depending on the location of the ceding insurer and its policyholders.

This questionnaire will primarily focus on indemnity reinsurance, which is the predominant form in the United States.

1. **General**

1.1 **Can insurance portfolios be transferred from one entity to another in your jurisdiction?**

Yes, in two ways. The more common method is indemnity reinsurance, whereby insurance liabilities and, in some cases, the corresponding asset reserves are transferred, but the original issuer still remains liable to the policyholder.

Alternatively, the actual policies may be transferred in what is called assumption reinsurance. However, in the US, insurance policies generally may not be transferred without the consent of the policyholders. This can be a long and complicated process that in some jurisdictions may require the affirmative consent of each individual policyholder, and therefore indemnity reinsurance is generally preferred.

Both methods require various regulatory approvals. In New York, individual review and approval of a reinsurance transaction is required only in the case of assumption reinsurance or when an indemnity reinsurance transaction involves the reinsurance of 100% of a book of business, or if the transaction is between affiliates.

1.2 **Can reinsurance portfolios be transferred?**

Yes. The transfer of reinsurance portfolios is known as retrocession.

1.3 **Are the rules the same for the transfer of direct insurance portfolios as for reinsurance portfolios?**

In New York the rules are the same for the transfer of direct insurance portfolios as for reinsurance portfolios.

1.4 **Are the rules the same for the transfer of life portfolios as for non-life portfolios?**

Generally, an insurer may reinsure only the lines of insurance business which it is licensed to conduct directly, or which it is otherwise authorised to reinsure by the terms of its licence.

In some cases, the rules are different for the transfer of life and non-life portfolios. For example, a domestic insurer other than a life insurer is generally forbidden, during any period of 12 consecutive months, from ceding, by any reinsurance agreement or agreements, an amount of its insurance on which the total gross reinsurance premiums are more than 50% of the unearned premiums on the net amount of its insurance in force at the beginning of such period (N.Y. Ins. Law § 1308(e)(1)(A)).

Life insurance companies also are subject to certain specific constraints. Absent permission from the New York Superintendent of Insurance, a New York life insurance company is forbidden from reinsuring its whole risk on any individual life or joint lives, as well as from reinsuring a substantial portion of its life insurance in force (N.Y. Ins. Law §1308(f)(1)(A)).

Non-life insurers also are subject to numerous regulations. There are special provisions for property/casualty insurance companies (N.Y. Ins. Law § 4101(c)), cooperative property/casualty insurance companies (N.Y. Ins. Law § 6606(a)), domestic mutual property/casualty insurance companies (N.Y. Ins. Law § 4107(d)), advance premium corporations (N.Y. Ins. Law § 6604(b)), and financial guaranty insurance corporations (N.Y. Ins. Law § 6906(a)).

2. **What are the requirements for an Insurance Portfolio Transfer ("IPT")?**

2.1 **What requirements must be met by a *transferor* to undertake an IPT?**

Most states have “bulk reinsurance” laws which require regulatory approval from the transferor’s domiciliary state if the transferor insurer plans to reinsure all or substantially all of its business.

Some states — including New York — require a foreign licensed insurer (i.e., an insurer domiciled in another state but licensed to do business in that state) to obtain bulk reinsurance approval from the state in which it is domiciled as well. As mentioned above, New York requires approval for an authorised insurer to cede its whole risk on any individual life or joint lives. N.Y. Ins. Law § 1308(f).

California requires approval from its Insurance Department in order to cede or assume liabilities or premiums equal to 75% or more of the ceding or assuming insurer's total liabilities or premiums, and requires notice for any cession or assumption of liabilities or premiums equal to 50% or more of the ceding insurer's total liabilities or premiums (Cal. Ins. Code § 1011(c) and Cal. Code of Regulations Title 10 § 2303.15).

Almost all states also require compliance with withdrawal statutes if an insurer is withdrawing completely from a line of business. Most states require advance notice of a withdrawal, and some require submission of a withdrawal plan prior to the effective date of the withdrawal.

2.2 What requirements must be met by a ***transferee*** to undertake an IPT?

As insurers, reinsurers are subject to the same solvency regulations as all other insurance companies (N.Y. Ins. Law § 1114). These regulations require licensing in their domiciliary state and submission to financial scrutiny by regulators in their domiciliary jurisdiction. See also the above-mentioned requirements regarding California.

The transferee also may be subject to state Third-Party Administrator (TPA) requirements, which require the transferee to be licensed as a TPA in the states in which policyholders reside, or to be exempt from the licensing requirements.

2.3 Are there any requirements relating to the financial condition of the ***transferor***?

With regard to the transferor, regulators are primarily concerned with the extent to which reinsurance can be included as an asset on the transferor's balance sheet against which the insurer can write new policies. Regulators in each state determine the conditions under which an insurance company can take credit for reinsurance as an asset and thus reduce its loss reserves. Recognition of this credit depends on whether the transferee meets certain conditions. This may vary from state to state, and is discussed in general terms below. Absent this credit, there is no financial incentive for reinsurance.

Regulators are also concerned with the use of reinsurance recoverable by the ceding insurer as an asset. See, for example, N.Y. Ins. Law § 1301. Reinsurance recoverable by the ceding insurer may be recognised as an admitted asset by the state insurance department for the purpose of determining the ceding insurer's financial condition. In New York, recovered assets will be admitted if the reinsurer is "authorised" or "accredited" according to the requirements of N.Y. Ins. Law § 107(a)(2). If the reinsurer is not accredited, then reinsurance will be allowed only under certain conditions. N.Y. Ins. Law § 1301(a)(9).

2.4 Are there any requirements relating to the financial condition of the ***transferee***?

Regulators will primarily be concerned with the solvency of the reinsurer in order to ensure that reinsurers can meet their claims obligations. The transferee will be required to maintain reserves that correspond to the reinsured policies on its financial statements.

Each state has its own requirements that the reinsurer must meet in order for the reinsurance to be recognised as an asset by the ceding insurer. For example, N.Y. Ins. Law § 1308 governs the effect of reinsurance on the transferor's reserve requirements. Credit to the transferor is generally allowed if the reinsurer is licensed or accredited in the same state where the transferee does business. Additionally, credit is generally allowed if the reinsurer is domiciled and licensed in a state with similar licensing requirements to the transferor's domiciliary state. Most US reinsurers meet one of these requirements.

If the reinsurer is a non-US company that is not licensed in the transferor's domicile, heightened financial requirements may apply. Reinsurance transactions with non-US reinsurers will generally be permitted by state regulators if the non-US reinsurer maintains (i) a branch licensed in at least one other state meeting the financial requirements of the transferor's domicile, provided that the reinsurance is undertaken by that branch, or (ii) a trust fund in the US for the payment of claims on the reinsurance. The amount required to be held in the trust fund varies by state. New York requires a $20 million trust fund, in addition to a trust amount at least equal to the liabilities attributable to US insurers and beneficiaries under the reinsurance policies held by the foreign reinsurer. There are also restrictions on the assets and investments or letters of credit that can be used to fund these trusts. 11 NYCRR § 125.4.

2.5 Is the place where the portfolio was originally underwritten a relevant factor?

Possibly. If the reinsurer is licensed in New York, then it does not matter to the New York regulators where the policies were originally underwritten. However, the state where the policies were originally underwritten may have its own requirements.

2.6 Is the governing law or applicable jurisdiction of the insurance portfolio transferred a relevant factor?

No, unless the transfer is deemed to be "fronting," i.e., is designed to avoid New York insurance law. See Section 2.7 below.

2.7 What criteria will be applied by the relevant authority in approving the transfer?

Indemnity reinsurance transactions will generally be approved so long as the reinsurer is licensed or accredited in its domiciliary state and the solvency requirements are met, as discussed above. However, regulators may exercise control over numerous aspects of transactions, including profit commissions, loss portfolio transfers, and the financial stability of the reinsurer, by disallowing recognition of the reinsurance as an asset on the ceding insurer's balance sheet.

New York regulators also will scrutinise a reinsurance transaction for "fronting." Fronting occurs when an insurer underwrites policies in another state with the intent of reinsuring them in New York in order to avoid being subject to New York insurance law. Such a transaction will be blocked by the New York Insurance Department. However, a reinsurance transaction with a legitimate business purpose other than evading New York insurance law will generally not be rejected on this basis.

As discussed below, assumption reinsurance requires additional scrutiny in order to determine that the policyholders have been effectively notified and given an opportunity to accept or reject the transfer of their policies.

2.8 **Are there any other requirements?**

There are certain other conditions that may apply. New York requires an insolvency clause that provides for payment by the reinsurer regardless of the insolvency of the transferor (N.Y. Ins. Law § 1308). New York also requires the reinsurer to assume all credit risks of any intermediary related to payments to the intermediary (11 NYCRR § 125.6).

3. **<u>What can be transferred along with the insurance or reinsurance contract?</u>**

(a) **Assets**

Generally, any assets may be transferred in connection with the transaction.

(b) **Liabilities**

Generally, any liabilities may be transferred.

(c) **Real property**

Generally, any real property may be transferred in the same way as other assets.

(d) **Reinsurance/retrocession contracts and other ancillary contracts**

Transfer of reinsurance or retrocession contracts would be considered a retrocession and would have to meet the ordinary requirements for the transfer of reinsurance.

4. **<u>Who must be notified of what, and how?</u>**

(a) **Local regulator(s)**

The New York Insurance Department must be notified in the case of either:

(i) assumption reinsurance; or

(ii) when an indemnity reinsurance transaction involves the reinsurance of 100% of a book of business; or

(iii) if the transaction is between affiliates.

Individual review and approval of the aforementioned transactions is required.

(b) **Other regulator(s)**

New York does not require notice to regulators in other states that are connected to the transaction (for example, as the domiciliary state of the ceding insurer or the state in which the policies were underwritten), but those states may themselves require notice.

(c) **Policyholders**

For indemnity reinsurance, notice to policyholders is not required. See below for a discussion of policyholder consent in connection with assumption reinsurance.

(d) **Beneficiaries of cover other than actual policyholders**

Not applicable.

(e) **Reinsurers**

If the portfolio is currently being reinsured, reinsurer consent may be needed.

(f) **Brokers**

Not applicable.

(g) **Others**

Not applicable.

(h) **Further notice requirements**

Not applicable.

5. **<u>What publicity requirements are there for IPTs?</u>**

(a) **Newspapers**

Not applicable.

(b) **Official Gazette/Journal**

Not applicable.

(c) **Trade magazines**

Not applicable.

(d) **Register of Companies**

Not applicable.

(e) **Other**

Not applicable.

6. **<u>Who has the right to object to the transfer?</u>**

(a) **Regulator(s)**

As discussed above, if the transaction is subject to review, state regulators can block the transfer if the statutory and regulatory requirements are not met.

(b) **Policyholders**

As discussed above, in assumption reinsurance policyholders can object to transfer of their policies. In indemnity reinsurance, policyholders cannot object and indeed may not even be aware that their policies have been reinsured.

(c) **Beneficiaries of cover**

Not applicable.

(d) **Reinsurers**

If the portfolio is currently being reinsured, reinsurer consent may be needed.

(e) **Trade associations**

Not applicable.

(f) **Employees**

Not applicable.

(g) **Others**

Not applicable.

7. **<u>Who must approve and/or sanction the transfer?</u>**

(a) **Local regulator**

Approvals from state regulators in the domiciliary states of the reinsurer and, in some cases, the ceding insurer, may be required. See above.

(b) **Other regulator(s)**

In some cases, filings with other regulators may be required, such as antitrust filings with the Department of Justice and Federal Trade Commission.

(c) **Court**

Courts generally do not review reinsurance transactions unless some aspect of the transaction is challenged.

8. **<u>What jurisdictional conditions apply to the transfer?</u>**

8.1 **What types of insurance portfolios are capable of transfer in the US?**

See above. Any type of insurance portfolio can be transferred, as long as the transferee is licensed to write that type of insurance. Different requirements may apply for different types of insurance. There are no types of insurance that are barred from reinsurance in every state, although the process varies across jurisdictions.

8.2 **Does the transferring portfolio need to be legally or commercially connected to the state where the transfer is effected?**

So long as the transaction meets the statutory and regulatory requirements and the required documents are filed it does not matter where the transfer is effected.

8.3 **Will the transfer be effective in jurisdictions other than those of the transferor and/or transferee?**

New York requires the transferee to get approval from New York authorities. However, if the transferor or its policyholders do business in other states as well, then additional regulatory approvals may be necessary to effect the transfer in those jurisdictions.

8.4 **What effect will the transfer have on arbitration clauses?**

In New York, the transfer will have no effect on arbitration clauses.

9. **<u>What is the procedure and timing of the transfer?</u>**

9.1 **What is a typical timeline for a transfer?**

From a regulatory perspective, approvals could take a few months or even up to a year, depending on the complexity of the proposed agreement.

9.2 **Are there any hard legislative or regulatory deadlines?**

No, there are not.

10. **<u>What key documentation will be produced for the transfer?</u>**

Reinsurance transactions are subject to New York Insurance Department review only if they constitute the transfer of 100% of a book of insurance business, or if the transaction is between affiliates. Documents that must be submitted for review prior to consummation of the transaction are: the draft agreement, proof of trust (if required by N.Y. Ins. Law § 114) or letters of credit (if required by N.Y. Ins. Law § 133), financial reports and any other information requested by the Insurance Department.

In an assumption reinsurance transaction, the Insurance Department will need to approve the consent form that is sent to policyholders.

Once the transaction is complete, copies of executed agreements must be filed with the Insurance Department.

11. **<u>What professional agents are involved in the transfer and what are their roles?</u>**

(a) **Lawyers**

Internal counsel will typically be involved for both the transferor and transferee. Internal counsel is generally the most well suited to evaluate the position of each party and the structure of the deal. External counsel will typically be responsible for providing extra resources and expertise on structuring and managing the deal documents and process.

(b) **Accountants**

Accountants and tax counsel will play a role in designing the financial structure of the reinsurance transaction in order to minimise the adverse tax consequences of the transaction and maximise the advantage to each party's balance sheet.

(c) **Actuaries**

Actuaries will be responsible for evaluating the likely risk exposure for each party in the transaction and designing the financial structure of the deal.

(d) **Independent Expert**

Investment bankers may also be involved in structuring and brokering the transaction.

(e) **Other**

Not applicable.

12. **<u>What legal issues are frequently encountered in transfers?</u>**

All of the issues discussed above arise in reinsurance transactions. In addition, if the reinsurance transaction is part of a merger or sale of a substantial portion of a company's business, then general corporate, securities, corporate governance, tax, employee benefits, and other issues may need to be addressed.

13. **<u>How frequently is the transfer mechanism used?</u>**

Indemnity reinsurance is fairly common; assumption reinsurance is much less common.

13.1 **Is the transfer mechanism commonly used? For what purposes is it used?**

Indemnity reinsurance is common practice for insurance companies interested in reducing risk exposure and reducing reserves associated with the current portfolio, thereby facilitating the ability to write additional policies. Assumption reinsurance is rare due to the cumbersome notice requirements.

13.2 **Are there any statistics of the use of the transfer mechanism?**

No, although indemnity reinsurance is the overwhelmingly predominant transfer mechanism. Assumption reinsurance is far less common.

14. **<u>What alternative methods can be used to transfer insurance portfolios, and what are the advantages and disadvantages of such methods?</u>**

(a) **Novation**

Novation involves substituting a new party in place of the original insurer so that the reinsurer is in privity of contract with the policyholder. This arises in connection with assumption reinsurance, discussed below.

(b) **100% reinsurance (also described as "run-off"/"portfolio"/"assumption" reinsurance or retrocession, "portfolio transfer" or "reinsurance to close")**

The main advantage of assumption reinsurance is that it creates privity between the policyholder and the reinsurer, so that the transferor no longer has any residual duties to the policyholder.

However, assumption reinsurance is used much less frequently than indemnity reinsurance due to the burdensome regulatory and notice requirements, which generally include obtaining the consent of each individual policyholder. Receiving these approvals may take many months or even years, and if not all policyholders consent, then the transferor may have no choice but to retain those policies.

Some states recognise implied consent. The insurer notifies the policyholders of the proposed transfer of their policies, and policyholders who do not object to the transfer of their policy are considered to have implicitly consented to the transfer. The implied consent period can range from 30 days to 24 months, the period required by the NAIC Assumption Reinsurance Model Act. A small number of states do not recognise implied consent at all, and require affirmative consent for the transfer of any insurance policy.

New York has a form of implied consent, according to which policyholders must be notified of, and consent to, the novation of their policies, even if the law where the policies were underwritten does not require this affirmative consent. The insurer must contact all policyholders and receive their consent in response. If the insurer does not receive a response from all policyholders whose policies are to be transferred within 30 days, the insurer may seek an exemption from the Insurance Department. The Insurance Department will require the insurer to demonstrate the methods that it used to attempt to notify and solicit a response from the policyholders. If those efforts are determined to have been reasonable and sufficient, the Insurance Department may approve the transaction even if not all policyholders responded.

Assumption reinsurance is more common when a life insurer is insolvent and is selling whole blocks of life and annuity insurance. In this case, assumption reinsurance can be approved by a bankruptcy court without the need to obtain actual policyholder consent.

(c) **Corporate reorganisation**

If an entire insurance company or a division of a company is to be sold, rather than only a portfolio of policies, then the reinsurance transaction may be structured as an entity sale. An entity sale may be effected either through a stock sale or a merger or, if the insurer is a public company, a tender offer.

This type of transaction is regulated by state laws on change of control of insurance companies, many of which generally follow NAIC's Model Insurance Holding Company Act. The transaction will typically require approval by target insurance company's state insurance regulator.

Internal corporate approvals also will be required, such as the approval of both companies' boards of directors. Both seller and buyer also must seek consent from third parties for, for instance, the seller's outstanding reinsurance agreements on the business being sold that contain a retention requirement.

(d) **Arrangement/compromise**

Not applicable.

Other

Not applicable.

15. **<u>What are the relevant sources of law or guidance?</u>**

(a) **Statutes**

State insurance statutes, here in particular New York Insurance Law.

(b) **Regulations**

State insurance regulations, here in particular New York Codes, Rules and Regulations Title 11, Chapter IV, Subchapter D (Reinsurance).

(c) **Guidance**

State insurance departments issue opinions and interpretive letters that give guidance to the application of statutes and regulations. In New York these are issued in the form of Circular Letters and opinions from the Office of General Counsel of the New York Insurance Department.

(d) **Jurisprudence**

Judicial precedent may be useful for determining the enforceability of a reinsurance contract and to ascertain the duties of the parties to a reinsurance contract.

(e) **Other**

Treatises on insurance law, such as *Holmes' Appleman on Insurance 2d,* can provide useful guidance.

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Template

This template, accompanied by sample contributions from the UK and France, was sent to contributors to the project in May 2010. Responses were received in June, followed by an editing process that was carried out in close cooperation with contributors and concluded in early August with the publication of this report.

Comparative Survey of Insurance Portfolio Transfers - Questionnaire	
1.	<u>General</u>
1.1	**Can insurance portfolios be transferred from one entity to another in your jurisdiction?**
1.2	**Can reinsurance portfolios be transferred?**
1.3	**Are the rules the same for the transfer of direct insurance portfolios as for reinsurance portfolios?**
1.4	**Are the rules the same for the transfer of life portfolios as for non-life portfolios?**
2.	<u>What are the requirements for an Insurance Portfolio Transfer ("IPT")?</u>
2.1	**What requirements must be met by a *transferor* to undertake an IPT?**
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2.3	**Are there any requirements relating to the financial condition of the *transferor*?**
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2.5	**Is the place where the portfolio was originally underwritten a relevant factor?**
2.6	**Is the governing law or applicable jurisdiction of the insurance portfolio transferred a relevant factor?**
2.7	**What criteria will be applied by the relevant authority in approving the transfer?**
2.8	**Are there any other requirements?**

3. **<u>What can be transferred along with the insurance or reinsurance contract?</u>**

(a) **Assets**

(b) **Liabilities**

(c) **Real property**

(d) **Reinsurance/retrocession contracts and other ancillary contracts**

4. **<u>Who must be notified of what, and how?</u>**

(a) **Local regulator(s)**

(b) **Other regulator(s)**

(c) **Policyholders**

(d) **Beneficiaries of cover other than actual policyholders**

(e) **Reinsurers**

(f) **Brokers**

(g) **Others**

(h) **Further notice requirements**

5. **<u>What publicity requirements are there for IPTs?</u>**

(a) **Newspapers**

(b) **Official Gazette/Journal**

(c) **Trade magazines**

(d) **Register of Companies**

(e) **Other**

6. **<u>Who has the right to object to the transfer?</u>**

(a) **Regulator(s)**

(b) **Policyholders**

(c) **Beneficiaries of cover**

(d) **Reinsurers**

(e) **Trade associations**

(f) **Employees**

(g) **Others**

7. **<u>Who must approve and/or sanction the transfer?</u>**

(a) **Local regulator**

(b) **Other regulator(s)**

(c) **Court**

8. **<u>What jurisdictional conditions apply to the transfer?</u>**

8.1 **What types of insurance portfolios are capable of transfer in your jurisdiction?**

8.2 **Does the transferring portfolio need to be legally or commercially connected to the state where the transfer is effected?**

8.3 **Will the transfer be effective in jurisdictions other than those of the transferor and/or transferee?**

8.4 **What effect will the transfer have on arbitration clauses?**

9. **<u>What is the procedure and timing of the transfer?</u>**

9.1 **What is a typical timeline for a transfer?**

9.2 **Are there any hard legislative or regulatory deadlines?**

10. **<u>What key documentation will be produced for the transfer?</u>**

11. **<u>What professional agents are involved in the transfer and what are their roles?</u>**

(a) **Lawyers**

(b) **Accountants**

(c) **Actuaries**

(d) **Independent Expert**

(e) **Other**

12. **<u>What legal issues are frequently encountered in transfers?</u>**

13. **<u>How frequently is the transfer mechanism used?</u>**

13.1 **Is the transfer mechanism commonly used? For what purposes is it used?**

13.2 **Are there any statistics of the use of the transfer mechanism?**

14. **<u>What alternative methods can be used to transfer insurance portfolios, and what are the advantages and disadvantages of such methods?</u>**

(a) **Novation**

(b) **100% reinsurance (also described as "run-off"/"portfolio"/"assumption" reinsurance or retrocession, "portfolio transfer" or "reinsurance to close")**

(c) **Corporate reorganisation**

(d) **Arrangement/compromise**

(e) **Other**

15. **<u>What are the relevant sources of law or guidance?</u>**

(a) **Statutes**

(b) **Regulations**

(c) **Guidance**

(d) **Jurisprudence**

(e) **Other**