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CHAMBERS GLOBAL PRACTICE GUIDES

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# Insurance Litigation 2024

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**Austria: Law and Practice**

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# AUSTRIA

## Law and Practice

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**GRAF ISOLA Rechtsanwälte GmbH** was founded in 1994, and is one of Austria's leading independent business law firms, with 25 qualified lawyers, and offices in Vienna and Graz. The full-service firm advises on all areas of Austrian and European commercial law and has a client base from all sectors of Austrian and foreign industry and public authorities. The firm is internationally recognised for its diligent approach and efficient, creative and solution-oriented

handling of complex cases. The experienced litigation team focuses on complex litigation in the key areas of insurance and liability (financial loss), with a particular emphasis on insolvency litigation. In this area, the insolvency and litigation teams work together on disputes relating to directors' and officers' liability, auditors' and advisers' liability, capital maintenance and capital substitution rules, and shareholder disputes.

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## 1. Rules Governing Insurer Disputes

### 1.1 Statutory and Procedural Regime

The most important substantive law is the Insurance Contract Act (VersVG), which essentially regulates the legal relationship between the insurer and the policyholder. The Consumer Protection Act (KSchG) also plays a role, particularly if a consumer is involved in the contractual relationship.

In Austrian procedural law, in addition to the *Jurisdiktionsnorm* (JN), which governs the jurisdiction of courts and the venue of proceedings, there is also the *Zivilprozessordnung* (ZPO). The ZPO regulates the procedural rules for civil litigation before the state courts, outlining the framework for how cases are to be conducted, including the filing of claims, the conduct of trials, and the enforcement of judgments. Together, the JN and ZPO provide the foundational legal structure for determining the competent court and the procedural guidelines for civil litigation in Austria.

In addition to statutory provisions, court decisions from the highest courts or appellate courts must also be considered when evaluating a legal

issue. While Austrian law does not adhere to the principle of *stare decisis* (the Anglo-American doctrine of precedent), lower courts generally follow the rulings and legal interpretations of higher courts in most cases. Although these decisions are not formally binding, they exert significant influence on the judicial process and contribute to legal consistency.

### 1.2 Litigation Process and Rules on Limitation

#### Out-of-Court Proceedings and Statute of Limitations

Most insurance disputes begin with an out-of-court claim made by the policyholder or insured party for coverage of a loss or reimbursement of legal representation costs. Unless it involves an association action, this out-of-court claim is typically the starting point.

If the insurer denies the claim following its coverage review, the rejection can take either a “simple” or “qualified” form, as outlined in Section 12 of the Austrian Insurance Contract Act (VersVG). The distinction between the two forms of rejection is critical. In the case of a simple rejection, the claim is subject to a three-year statute of limitations. However, in the case of a qualified

rejection – where specific formalities must be followed – the policyholder or insured party has only one year to file a court action. Failure to initiate legal proceedings within this one-year period results in the claim expiring.

## Legal Proceedings

In Austria, the competent court for insurance law matters is determined by the amount in dispute. District courts have jurisdiction over disputes involving amounts up to EUR15,000, while regional courts have jurisdiction over higher amounts.

Local jurisdiction is generally based on the domicile or registered office of the defendant, unless valid jurisdiction or arbitration clauses have been agreed upon in the contract.

Once a judgment has been issued by the court of first instance, it may be appealed to the responsible appellate court. Austria's civil litigation system has three levels of judicial instances. However, appealing to the Supreme Court (third instance) requires specific conditions to be met. A Supreme Court appeal (Revision) is only permitted if the case involves a substantial legal question – whether substantive or procedural – that is critical for maintaining legal consistency, certainty, or development. This may be the case, for example, if the decision of the appellate court differs from the case law of the Supreme Court or if there is a lack of consistent case law on the matter.

## 1.3 Alternative Dispute Resolution (ADR)

While alternative dispute resolution mechanisms are available in Austria, traditional civil litigation and out-of-court dispute resolution without the involvement of professional mediators remain the norm in insurance disputes.

Arbitration proceedings are relatively rare in Austria and occur only in specific areas, such as reinsurance law or warranty and indemnity (W&I) insurance.

In the consumer sector, arbitration clauses are only valid if agreed upon after a dispute has arisen. Although alternative dispute resolution options are available, they play a relatively minor role in practice. Consumers can, in certain cases, seek recourse through dispute resolution bodies, but their use remains limited. Two notable examples are the “Legal Service and Arbitration Board of the Professional Association of Insurance Brokers and Consultants in Insurance Matters (RSS)” and the state-recognised “*Verbraucherschlichtung Austria*” for consumer mediation.

## 2. Jurisdiction and Choice of Law

### 2.1 Rules Governing Insurance Disputes

Regulation No 1215/2012 (Brussels Ia Regulation) applies across the European Union, including Austria, and governs the question of jurisdiction in cross-border insurance disputes. Articles 10–16 of the regulation set out specific rules for determining jurisdiction in such cases. Insurers may be sued in the courts of the member state where (i) the insurer is domiciled, (ii) the policyholder (as the plaintiff) is domiciled, or (iii) (in the case of co-insurance) where the lead insurer is sued. If the insurer does not have a registered office in any member state, it may be sued in the member state where it has a branch, agency, or other establishment. On the other hand, an insured party can only be sued in the member state where they are domiciled.

The Rome I Regulation (Regulation (EC) No 593/2008) serves as the substantive counterpart

to the Brussels Ia Regulation, governing the law applicable to cross-border contractual obligations. As a general rule, under Article 3(1) of the Rome I Regulation, the contract is subject to the law chosen by the parties. However, this freedom of choice is restricted in many insurance contracts by Article 7(3) of the Rome I Regulation. In cases where no law has been chosen, the contract is governed by the law of the member state in which the risk was located at the time the contract was concluded.

Insurance relationships and disputes that do not fall within the scope of the Brussels Ia or Rome I Regulations are governed by Austria's national rules on international jurisdiction and applicable law, particularly those found in the *Jurisdiktionsnorm* (JN) and the Act on Private International Law (IPR Act).

## 2.2 Enforcement of Foreign Judgments

In Austria, foreign court decisions can be enforced, but the process varies depending on whether the judgment originates from a court in an EU member state or a third country. The primary legal framework governing the enforcement of foreign judgments in Austria is the Austrian Enforcement Code (EO).

Judgments from courts of EU member states are automatically recognised across the EU under the Brussels Ia Regulation (Article 36(1)). Consequently, no separate recognition procedure is required. The prevailing party only needs to obtain a certificate pursuant to Article 53 of EU Regulation 1215/2015 (enforcement confirmation) to initiate enforcement proceedings within the European Union. Additionally, courts in the state where enforcement is sought are prohibited (Article 5, Brussels Ia Regulation) from reassessing a judgment issued in another member state. However, certain grounds for refusal, as

outlined in Articles 45 et seq of the Brussels Ia Regulation, may still prevent recognition or enforcement.

For judgments from Switzerland, Norway, and Iceland, the Lugano Convention provides the relevant provisions, mirroring the Brussels Ia Regulation's rules on jurisdiction, recognition, and enforcement within these countries and the EU.

The enforceability of judgments from third countries is determined either by applicable bilateral or multilateral agreements or by the Austrian Enforcement Code. In the absence of such agreements, an *exequatur* procedure must be conducted to determine enforceability. Once a judgment has been declared enforceable through this procedure, enforcement proceedings can be brought before the competent enforcement court.

## 2.3 Unique Features of Litigation Procedure

In Austria, civil proceedings do not include a phase equivalent to the "discovery phase" found in some other legal systems. As a result, the outcome of a case heavily depends on the parties' submissions and the evidence they present. Austrian law has specific rules on the burden of proof, which determine which party must provide evidence to support a claim. If a relevant document is in the possession of the opposing party, the other party may, under certain conditions, request that it be produced.

A notable feature of Austrian civil proceedings is that evidentiary proceedings can be initiated and completed during the first hearing (preparatory hearing), allowing for a judgment to be issued at or shortly after this initial hearing. In more complex cases, particularly those involving expert witnesses, it is very unlikely that the case will be



closed at the first hearing. However, it is advisable for parties to present all submissions and relevant evidence by the first hearing, or at the latest, during this hearing.

In out-of-court dispute resolution, parties should also be aware of the requirement to pay a fee to the Austrian state if a settlement is reached. This fee ranges from 1% to 2% of the total settlement value, depending on whether the dispute is already pending in court. This can result in significant additional costs, especially in cases involving large claims.

Furthermore, German insurance law has had a substantial impact on Austrian insurance law, given that the Austrian Insurance Contract Act (VersVG), which came into force in 1959, is largely based on the German Insurance Contract Act of 1908. Despite numerous amendments, German case law continues to influence the Austrian insurance landscape. Consequently, many German insurers operating in Austria often use German insurance terms and conditions in their contracts with Austrian policyholders, frequently without significant adaptation to Austrian legal conditions.

## 3. Arbitration and Insurance Disputes

### 3.1 Enforcement of Arbitration Provisions in Commercial Contracts

When the parties have validly agreed to resolve their dispute through arbitration, the ordinary court will typically declare that it has no jurisdiction, requiring the parties to submit their case to an arbitral tribunal as stipulated in the arbitration clause. The legal framework for arbitration is outlined in Sections 577 et seq of the Austrian Code of Civil Procedure (ZPO).

It is important to note that, under the Code of Civil Procedure, only disputes arising from or potentially arising in the future from a specific legal relationship can be subject to arbitration. Additionally, all relevant formal requirements must be met, and the dispute must involve a claim that is arbitrable.

For third countries such as Switzerland, Norway, and Iceland, the Lugano Convention provides analogous rules regarding arbitration.

In consumer matters, however, arbitration agreements can only be validly concluded between an entrepreneur and a consumer if the dispute has already arisen.

### 3.2 The New York Convention

Austria's accession to the New York Convention in 1961 is still in force today. Consequently, Austria recognises and enforces arbitral awards under the New York Convention, unless one of the grounds for refusal outlined in Article V of the Convention applies (the provisions of the Austrian Enforcement Code apply to the recognition and declaration of enforceability only to the extent that international law or EU regulations do not provide otherwise, see Section 614 (1) of the ZPO).

For arbitral awards rendered outside of Austria, the award must first be formally recognised and declared enforceable by the district court responsible for enforcement, in accordance with the New York Convention or other relevant multilateral or bilateral treaties. Once the foreign arbitral award has been declared enforceable, it is treated as a domestic arbitral award and thus has the same status as a judgment of an Austrian court.



In the interest of procedural efficiency, an application for the declaration of enforceability may be combined with a request for an enforcement order, allowing the competent court to decide on both applications simultaneously.

### 3.3 The Use of Arbitration for Insurance Dispute Resolution

#### Arbitration in Insurance Disputes

Arbitration plays almost no role in “mass insurance” in Austria. This is largely due to the prohibition of arbitration clauses in consumer contracts before a dispute has arisen, which affects agreements between insurers and consumers. Moreover, even in insurance contracts with entrepreneurs, arbitration clauses are rare. As a result, disputes arising from insurance contracts are typically resolved in the ordinary courts.

In contrast, arbitration clauses are commonly included in international reinsurance contracts. They are also frequently found in W&I insurance agreements. However, these contracts are relatively few compared to the vast number of insurance contracts in the mass market.

#### Applicable Rules and Confidentiality

Sections 577–616 of the Austrian Code of Civil Procedure govern arbitration proceedings when the seat of the arbitral tribunal is in Austria. Nevertheless, the parties are free to submit their disputes to an institutional arbitration court. In Austria, the Vienna International Arbitral Centre (VIAC), established by the Austrian Federal Economic Chamber in 1975, is a prominent institution, and it operates under its own set of rules known as the “Vienna Rules”.

Arbitration proceedings are generally not open to the public. While the parties could theoretically agree to make the proceedings public, this is rare in practice.

#### Appeals Against Arbitration Awards

In Austria, arbitration awards cannot be challenged through ordinary legal remedies. The only way to challenge an arbitration award is by filing an action for annulment under Section 611 of the ZPO. The grounds for setting aside an award, as outlined in Section 611 of the ZPO, are exhaustive and cannot be expanded. The Supreme Court serves as both the first and final instance in such cases. Any action for annulment must be filed within three months of the service of the arbitration award.

Possible grounds for termination are the following:

- a valid arbitration agreement does not exist, or the arbitral tribunal has denied its jurisdiction despite the existence of a valid arbitration;
- agreement, or a party was under an incapacity to conclude a valid arbitration agreement under the law governing its personal status;
- a party was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was for other reasons unable to present its case;
- the award deals with a dispute not covered by the arbitration agreement, or contains decisions on matters beyond the scope of the arbitration agreement or the plea of the parties for legal protection – if the default concerns only a part of the award that can be separated, only that part of the award shall be set aside;
- the composition or constitution of the arbitral tribunal was not in accordance with a provision of this Chapter or with an admissible agreement of the parties;
- the arbitral proceedings were conducted in a manner that conflicts with the fundamental

- values of the Austrian legal system (ordre public);
- the requirements according to which a court judgment can be appealed by an action for revision under Section 530, paragraph (1), numbers 1 to 5 have been met;
- the subject-matter of the dispute is not arbitrable under Austrian law; or
- the arbitral award conflicts with the fundamental values of the Austrian legal system (ordre public).

## 4. Coverage Disputes

### 4.1 Implied Terms

In Austria, the principle of freedom of contract generally applies, allowing parties considerable flexibility in drafting their contracts. However, this freedom is subject to certain limitations in the insurance sector, particularly under the Austrian Insurance Contract Act (VersVG) and, for consumer contracts, the Consumer Protection Act (KSchG).

The VersVG establishes the legal framework for insurance contracts, containing both discretionary provisions and others that are either absolutely mandatory or unilaterally mandatory in favour of the policyholder. Due to these unilaterally mandatory provisions, policyholders can negotiate terms with insurers that are more favourable than those provided by law.

While the Consumer Protection Act does not prescribe specific clauses in insurance contracts, it does prohibit certain clauses entirely or requires their negotiation in detail. The KSchG also ensures that contracts adhere to principles of fairness and transparency.

Although there is no statutory regulation of the principle of good faith (bona fide) in insurance law, the insurance relationship between the policyholder and the insurer is to a large extent governed by the principle of good faith according to case law. The principle of good faith requires both parties to act in good faith and not to deceive or withhold material information from the other party.

### 4.2 Rights of Insurers

Under Section 16 of the Insurance Contract Act (VersVG), insurers are protected under certain conditions if a policyholder conceals or misrepresents material facts when concluding the contract. Material circumstances refer to those factors that are likely to influence the insurer's decision to either enter into the contract or determine the terms under which the contract is concluded. If a policyholder fails to disclose or misrepresents such a circumstance, the insurer may have the right to withdraw from the contract.

If the insurer has specifically asked written questions regarding material circumstances, the failure to disclose information that was not explicitly asked about will only justify withdrawal if it was fraudulently concealed.

The information that insurers generally require before underwriting varies, but typically focuses on information relating to past or current claims against the policyholder, the policyholder's financial position and knowledge of potential risks.

### 4.3 Significant Trends in Policy Coverage Disputes

Identifying trends in insurance disputes is challenging due to the lack of official statistics. However, some observable patterns have emerged.

Disputes related to business interruption insurance stemming from the COVID-19 pandemic, which significantly impacted the insurance landscape in recent years, have been steadily declining.

Looking ahead, the growing digitalisation and the increasing use of AI tools are expected to bring cyber-insurance disputes into greater focus, a trend that has already been evident for some time. This increase is driven by the rising frequency of cyber-attacks and the fact that nearly half of all companies now have cyber-insurance, according to recent studies. At present, however, current research indicates that the majority of claims arising from cyber-attacks still relate to first-party losses rather than third-party liability.

There has also been an increase in disputes involving Directors and Officers (D&O) insurance. The COVID-19 pandemic and the Ukraine crisis have led to a rise in corporate insolvencies, with managing directors increasingly facing liability claims.

#### 4.4 Resolution of Insurance Coverage Disputes

A significant number of insurance disputes can often be resolved out of court once policyholders receive a clear and understandable explanation of why their claim is not covered (eg, due to a breach of policy obligations or the exclusion of certain risks from coverage).

When an out-of-court agreement cannot be reached, coverage disputes are typically resolved in the ordinary courts. There are no special procedural rules for these cases; they are governed by the general provisions of the Austrian Code of Civil Procedure (ZPO). Such proceedings are usually handled by the commercial courts. In Vienna, due to the high volume of commercial disputes, a dedicated district court for commercial matters and a commercial

court have been established. In the other federal states, commercial jurisdiction is handled by the district and regional courts.

Disputes between insurance companies and their reinsurers are frequently resolved through settlements. If an amicable agreement is not possible, these disputes are generally adjudicated by arbitration tribunals rather than ordinary courts.

#### 4.5 Position If Insured Party Is Viewed as a Consumer

If the policyholder is a consumer, in addition to traditional dispute resolution methods, they also have the option to appeal to an alternative dispute resolution board. For instance, as mentioned in **1.3 Alternative Dispute Resolution (ADR)**, consumers can seek assistance from the “Legal Service and Arbitration Board of the Professional Association of Insurance Brokers and Consultants in Insurance Matters – RSS” or the state-recognised “*Verbraucherschlichtung Austria*”.

If these alternative dispute resolution mechanisms do not lead to a resolution, the claims can still be pursued in court. However, it is important to note that a consumer can only be sued in the court of their place of residence. Additionally, arbitration agreements between an insurer and a consumer are only valid if made after the legal dispute has arisen.

#### 4.6 Third-Party Enforcement of Insurance Contracts

As a general rule, third parties who are not policyholders and therefore not contractual partners cannot assert claims against the insurer under the insurance contract.

However, there are notable exceptions. For instance, individuals who are not parties to the

contract but are designated as “insured persons” within the policy may assert claims directly against the insurer. Additionally, in the case of motor vehicle liability insurance, an injured party in an accident may pursue damages not only from the responsible driver but also from the driver’s motor vehicle liability insurer. Similarly, patients may bring claims against a hospital’s liability insurer in cases of medical malpractice according to the Austrian Supreme Court.

If insolvency proceedings are initiated against the policyholder’s assets, injured third parties do not have a direct right of action against the insurer. However, they may seek separate satisfaction from the policyholder’s compensation claim, thereby obtaining a right to distinct recovery.

#### 4.7 The Concept of Bad Faith

Austrian law acknowledges the concept of good faith and bad faith, which is reflected in various legal contexts. Although this principle is not explicitly codified in insurance law, it is deeply embedded in the legal framework governing the relationship between insurer and policyholder, largely as a result of established case law. As a result, neither party may act in bad faith by misleading the other about material facts. Should bad faith occur, the affected party retains the right to challenge or contest the contract.

#### 4.8 Penalties for Late Payment of Claims

Austrian insurance law generally does not prescribe specific penalties for insurers in the event of delayed claim payments. However, under Section 11 of the Austrian Insurance Contract Act (VersVG), cash payments by the insurer become due once the analysis to establish the insured event and the extent of the insurer’s liability have been completed. If the insurer unjustifiably delays payment, the policyholder is entitled to claim statutory or contractual interest on the overdue

amount. Any agreement exempting the insurer from paying interest on late payments is invalid.

If there is a persistent or systematic delay in the payment of insurance benefits, then this may be a trigger for regulatory action as it may be an indication of potential solvency problems.

#### 4.9 Representations Made by Brokers

When policyholders engages and authorises an insurance broker, they assume the risk that the broker may make inaccurate statements to the insurer or fails to properly fulfil the mandate. Consequently, the policyholder is held accountable for the broker’s actions or omissions.

If the policyholder incurs a loss due to the broker’s negligent behaviour, they may seek compensation from the broker. In such cases, the broker’s liability insurance should ideally cover the resulting damages.

#### 4.10 Delegated Underwriting or Claims Handling Authority Arrangements

In Austria, it is common for individuals or companies to be authorised to sign insurance policies, a role referred to as insurance agents. These agents are permanently entrusted by an insurance company to either broker or finalise insurance contracts. It is possible for them to represent multiple insurers, even if the products they offer are in direct competition.

A specific type of insurance agent is the underwriting agent, who typically receives broad authority from insurance companies. Underwriting agents are often empowered to negotiate terms and pricing, collect premiums, and handle claims. They generally operate in specialised sectors, such as transportation and logistics, rather than in the mass insurance market, where their expert knowledge is particularly valuable.

## 5. Claims Against Insureds

### 5.1 Main Areas of Claims Where Insurers Fund the Defence of Insureds

One of the key areas where insurers cover the costs of defending claims is liability insurance. This includes claims related to professional, business, motor vehicle, managerial, and product liability. Coverage applies only to insured risks, provided that the policyholder has not triggered an exclusion clause. Generally, all court and out-of-court expenses that are necessary and reasonable for effective legal defence are reimbursed.

Another important area is legal expenses insurance, where the insurer protects the policyholder's legal interests and covers the costs of both court proceedings and pre-litigation advice. These costs are covered regardless of whether the policyholder is the plaintiff or defendant in the proceedings.

### 5.2 Likely Changes in the Future

No changes are to be expected with regard to the financing of the policyholder's defence costs.

### 5.3 Trends in the Cost or Complexity of Litigation

Court proceedings have generally become both more expensive and more complex in recent years. Costs have risen due to periodic adjustments in lawyers' tariffs and court costs, which are aligned with inflation, as well as increasing hourly rates for legal services. The growing complexity of cases also leads to longer proceedings, driving up costs further. Moreover, with the rise of digitalisation, there is often a significant increase in the volume of evidence, requiring more time and effort to review, adding to the overall expense and complexity of litigation.

### 5.4 Protection Against Costs Risks

One option for mitigating the financial risks associated with legal proceedings is legal expenses insurance. This type of insurance covers court costs, expert fees, and lawyer's fees (to the extent they are billed according to statutory rates rather than hourly rates). If the case is lost, the insurance also covers the opposing party's legal costs, which the losing party may be required to reimburse.

Another option for additional protection against cost risk is to engage a litigation financier. The extent of their financial contribution depends on the specific agreement, but litigation financiers in Austria typically only accept individual cases with a significant amount in dispute, as smaller cases are not considered financially viable.

However, when relying on legal expenses insurance or a litigation financier, it is important to recognise that these entities will often have considerable influence over the management of the case, given that they bear the financial risk.

In the realm of criminal law, cost protection can be obtained through criminal law insurance. Historically, Austrian law provided for very limited reimbursement of legal costs in criminal proceedings, even in the event of acquittal, leaving defendants "alone" with their defence costs. Although recent reforms have increased reimbursement amounts based on the type of court, these amounts still often fall short of covering the full costs of a criminal defence.

## 6. Insurers' Recovery Rights

### 6.1 Right of Action to Recover Sums From Third Parties

Under Austrian law, if a third party is responsible for the damage suffered by the policyholder

and the insurer has settled the claim, the policyholder's right to pursue damages against the responsible party is automatically transferred to the insurer. The extent of this transfer depends on the amount of the damage covered by the insurer. If the insurer settles the entire claim, the full right to recover damages is transferred to them; if only a portion of the damage is covered, the transfer is proportional to the amount settled.

## 6.2 Legal Provisions Setting Out Insurers' Rights to Pursue Third Parties

This principle (see 6.1 Right of Action to Recover Sums From Third Parties), is codified in Section 67 of the Austrian Insurance Contract Act (VersVG). Following the transfer of the claim, the insurer becomes the rightful holder of the claim. As such, the insurer can pursue legal action against the responsible party in its own name and seek compensation directly from them.

## 7. Impact of Macroeconomic Factors

### 7.1 Type and Amount of Litigation

One of the key factors shaping the insurance market and influencing related court cases is the rise of cyber-insurance, driven by the increasing digitalisation of businesses.

Additionally, the frequency of natural disasters, such as flooding in Austria due to climate change, is likely to lead to more disputes over coverage and the extent of insurance benefits in the future.

The ongoing impacts of the war in Ukraine, including the energy crisis, disrupted supply chains, and temporary raw material shortages, are also contributing to a rise in corporate insolvencies. This trend is evident in the insolvency statistics for the first half of 2024, which show a

26% increase compared to 2023. As insolvency administrators scrutinise the actions and potential mismanagement of directors, an increase in related lawsuits is to be expected. These lawsuits may involve Directors and Officers (D&O) insurance and/or criminal liability insurance.

### 7.2 Forecast for the Next 12 Months

The risks outlined in 7.1 Type and Amount of Litigation are likely to remain significant in the future. The unpredictable impacts of climate change, coupled with the growing risks associated with digitalisation – such as data breaches, cyber-attacks, and server failures – will continue to challenge the insurance industry and drive related disputes.

### 7.3 Coverage Issues and Test Cases

Due to the ongoing war in Ukraine, sanctions against Russia are frequently extended, affecting various aspects of insurance, including coverage and benefits. Insurance companies must regularly verify whether individuals or entities involved are subject to sanctions to avoid potential criminal liability when paying out benefits. Consequently, insurers will increasingly need to conduct thorough sanction checks to effectively implement any relevant sanction clauses.

While much attention has recently been focused on COVID-19-related cases interpreting business interruption policies, the Austrian Supreme Court has recently addressed issues raised by the Austrian Consumer Association concerning certain legal expenses insurance clauses. These include the applicability of catastrophe exclusions and the lack of transparency surrounding the term “exceptional circumstances”.

### 7.4 Scope of Insurance Cover and Appetite for Risk

The war in Ukraine has significantly impacted coverage and risk appetite across various lines



of business, particularly in political risk insurance. As a result, premiums in these areas are widely anticipated to rise.

In the realm of cyber-insurance, the implementation of higher retention levels and risk mitigation measures has led to a greater willingness to assume risk. However, this shift has also resulted in increased obligations for policyholders in the cyber-insurance sector.

## 8. Emerging Risks

### 8.1 Impact of ESG on Underwriting and Litigating Insurance Risks

In Austria, ESG (environmental, social and governance) factors are increasingly shaping both underwriting practices and insurance litigation. Insurers are integrating ESG criteria into their underwriting processes, favouring companies with robust ESG practices. Consequently, there is a growing number of ESG-related claims, including those related to environmental liability and corporate governance failures. Additionally, potential claims may arise from “greenwashing” lawsuits, where companies face legal action from investors for making unsubstantiated or misleading ESG claims, or for failing to meet their net-zero commitments.

### 8.2 Data Protection Laws

Data protection regulations in Austria are primarily governed by the General Data Protection Regulation (GDPR) and the Austrian Data Protection Act (DSG). Additionally, Sections 11a et seq of the Insurance Contract Act (VersVG) provide specific provisions for insurers regarding the management of health data.

Data protection laws frequently lead to Directors and Officers (D&O) claims following cyber-incidents, particularly when management is alleged to have failed in implementing sufficient data protection measures. Consequently, D&O losses related to data breaches are becoming an increasing concern for insurers.

## 9. Significant Legislative and Regulatory Developments

### 9.1 Developments Affecting Insurance Coverage and Insurance Litigation

In January 2023, the European Union adopted a new version of the Network and Information Security Directive (NIS2). EU member states are required to transpose NIS2 into national law by 17 October 2024.

The updated directive introduces enhanced risk management requirements and extends its coverage to additional sectors to bolster cybersecurity across the EU.

As of now, NIS2 has not been incorporated into Austrian law. The proposed legislation, known as the “Network and Information System Security Act 2024” (NISG 2024), failed to reach the necessary majority in the National Council in July 2024. Consequently, further negotiations will be required, and it is uncertain when the new legislation will come into effect.

Once enacted, the NISG 2024 may give rise to disputes related to breaches of duty by directors and officers. Notably, Article 21, paragraph 1 of the NIS2 Directive also stipulates personal liability for directors in this context.



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