

Switzerland: mountains, lakes and pitfalls – some practical considerations

by Christopher Bell, Partner; Emmanuelle Imbert, Of-counsel and Nando Stauffer von May, Associate, gbf Attorneys-at-law



Switzerland is now an increasingly popular place for reinsurers to locate or re-locate themselves. It is certainly somewhere that is almost always considered, if a reinsurer is considering re-locating to Europe. Once the decision to come here has been taken, however, the putting into effect of the business plan carries with it some practical, but perhaps unforeseen, consequences.



Branching out – the view from inside

The view is seductive. Lakes and mountains abound. The branches, subsidiaries and representative offices of a multitude of multi-national reinsurers, and suppliers of services to them, are already represented in Switzerland: all corporate life is here. Once the decision to move has been made, an important consideration, in many cases the next one is the precise structure that will be used.

Looking at the position from inside Switzerland, if one intends to do business here, as opposed to merely marketing, a representative office would not, from a regulatory point of view, suffice. The establishment of a branch is, however, reasonably simple in Switzerland; legally what is required is a “permanent establishment”. If a company rents space here, or employs people, or sends bills from its Swiss establishment, each of those could normally be considered as an indication, at least, that a branch has been established. While a subsidiary will only be recognised once it has been registered in the Commercial Register (*Handelsregister*), once a branch has been established, it is obligatory to register it.

Establishing a company here is also relatively simple and there may be good reasons for wishing to do that. There are a number of corporate forms in Switzerland, but for a reinsurer coming here, the only serious candidate is the *Aktiengesellschaft* (AG). The liability of an AG is limited to the value of its share capital and is broadly similar to a British limited liability company. If one is thinking of moving substantial amounts of capital here, this may well be the preferred structure when compared, say, to a branch.

In order to register a branch or to establish a company, certain Board Resolutions will need to be passed and apostilled copies of the memorandum and articles of association of the company, which may need to be translated, provided. You will need to identify a person as being the general representative of the company for the purposes of the branch or to appoint at least one member of the board of

directors of the subsidiary and that person must be resident here in Switzerland.

If the company, branch or subsidiary is to be regulated by the Financial Markets Authority (FINMA), which will only apply if the establishment here is not a pure reinsurer; the general representative or the members of the board of directors must be able to show that they have the necessary prior experience of insurance business. They can be a person whom you are seeking to employ here, but if such a person does not have citizenship of any of the countries of the European Union, residence permit issues will need to be considered in that respect as well (see ‘Immigration issues’, to follow).

Regulation

FINMA – regulation of foreign reinsurers in Switzerland

Whether one is considering a branch or a subsidiary company, under Swiss law the regulation of a pure reinsurer (a reinsurer or a combined insurer and reinsurer; which will only conduct the business of reinsurance in Switzerland) will be the responsibility of the regulator that regulates the company of which the AG here is a subsidiary or to which the branch belongs. An insurer (a company or branch that is not a pure reinsurer) will, however, need to establish a concrete presence here and will be regulated by the FINMA.

Employees

Once it has been decided whether to incorporate a company or establish a branch, after the *Handelsregister* entry has been made, followed by the signing of a lease and the opening of bank accounts, the step of employing the people who will perform the business will need to be finalised.

Immigration issues – some are more equal than others

Employing a Swiss citizen is, of course, not difficult and there is a readily available pool of well educated people, who are mostly multi-lingual. Despite that, one

may wish to bring in employees from outside of Switzerland. If so, there are a number of aspects that need to be considered; not the least the nationality of the person whom it is intended should work here.

EU citizens, as a result of the agreement on freedom of movement between Switzerland and the EU, are able to enter the country, stay and work here. This should now apply to all EU citizens, except those from Bulgaria and Romania who are still subject to transitional arrangements until 2016.

For citizens of countries outside the EU/EFTA, in respect of the person or persons that one wishes to employ, it will need to be demonstrated that no Swiss or EU/EFTA citizen is available, or that they have special qualifications.

Taxes/employee benefits/pensions

Attention needs to be paid and advice, including tax advice, sought and gathered concerning, amongst other matters: pensions, health schemes and employee share plans. It should not be assumed that one can merely mirror other arrangements across the relevant group without possible untoward consequences.

Of those, of special note are the pensions of EU and EFTA citizens. Again advice should be sought, but in essence, the obligatory part of such citizens' pensions are not portable and cannot be removed from Switzerland on their departure, if they are moving to an EFTA or EU country, although they will be paid out on retirement to the relevant person. If the relevant person moves permanently to a non-EU or EFTA country, however, they ought to be able to remove the funds.

Doing business from Switzerland

Bilateralism

While Switzerland is a member of the European Free Trade Association (EFTA), this country, although situated more or less in the middle of Europe, like the hole in the centre of the CERN collider, is neither a part of the European Union (EU) nor of the European Economic Area (EEA). For Switzerland, the political consequence of not being member of the EEA or EU has been a move towards so-called 'bilateralism'. This is, essentially, a word describing the process of the negotiation of specific agreements by Switzerland with, for instance, the EU. It is important, therefore, not to assume that something is possible, or has been agreed, but to consider in each case, what has actually been agreed and with whom.

SST or Solvency II

Following the crash of 2007, the effects of which are still being felt around the world, the solvency of financial institutions has been the subject of increased debate and regulation. The test applied in Switzerland, and which is already in force, is the Swiss Solvency Test

(SST). This is comparable to, but not the same as Solvency II. While the regulator, FINMA was deemed to have 'equivalency' (that is, to EU Regulators) on February 1, 2010, the European Union, at the time of writing, has not yet decided whether the same will be true for the SST, although a decision is expected in the summer of 2011. Solvency II is the test that will be used and applied by Regulators throughout the European Economic Area (EEA) as of January 1, 2012. In July 2010, the Committee of European Insurance and Occupational Pensions Supervisors (CEIOPS) – now the European Insurance and Occupational Pensions Authority (EIOPA) – made a proposal to the European Commission that the Swiss supervisory system should be considered, along with Bermuda, in the first wave of the third country equivalence assessment with regard to all three articles on equivalence in the Solvency II directive (Art. 172 Equivalence for Re-insurance Supervision, Art. 227 Calculating Group Solvability, Art. 260 Equivalence for Third Country Group Supervision).

Why is equivalency important?

In brief, because it will make life easier (and cheaper) for Swiss and Swiss-based reinsurers to do business within the EEA. Article 172 Equivalence will, for instance ensure that an EEA cedant buying reinsurance from a Swiss reinsurer can do so in the knowledge that the contract will be treated equally with reinsurance contracts made with EEA reinsurers.

The relevant local EEA regulator will, when assessing reinsurance contracts, have to apply the same criteria, even though the reinsurer has its headquarters in a non-EEA country, as would be applied to an equivalent regulatory regime or in any EEA country. If no Equivalency is granted, there are likely to be significant impacts, which will translate into additional difficulties and costs of doing business with EEA cedants for reinsurers in Switzerland.

Data Protection Act

Data protection is certainly an issue that needs to be carefully considered. Servers not situated in Switzerland may well be in receipt of data from a Swiss-based reinsurer, part of a multi-national group. Under the Swiss Data Protection Act (DPA), protection is given to 'personal data', which is "all information relating to an identified or identifiable person".

Article 6 of the DPA deals with trans-border data flows and provides that no "personal data" may be transferred abroad "if the personal privacy of the persons affected could be seriously endangered" and "in particular in cases when there is no legislation that can guarantee an appropriate level of protection". There is a list of countries judged by the Federal Data Protection and Information Commissioner (FDPIC) to have an appropriate level of data protection provided on its website.

While some EU countries have implemented protection for companies, that is not true for all; the issue has to be dealt with on a case by case basis. If data is not flowing to an EU country the same applies. The transfer of data includes not only transferring data out, by say, logging in to a server in London, but also by allowing persons in other countries to have access to the data, so the issue is not resolved by having the data in Switzerland, if others can get access to it from outside.

If the test set out above is not satisfied, there are various steps that can be taken to resolve the position set out in Article 6. These include entering into a contract that provides sufficient guarantees (for outsourcing, for instance) and group-wide data protection rules of an adequate nature for intra-group transfers.

Doing business outside Europe

Most companies that have set up or moved here have done so with a view to doing at least some business in Europe. Switzerland is well-placed geographically in order to do that, but is not a member of the EEA. Swiss insurers have, for some lines of business at least, the right to establish branches and subsidiaries in EEA countries. This does not, however, apply to reinsurers and it is a right of establishment, not a right to provide services.

Since there is no agreement between the EEA and Switzerland with regards reinsurance, it becomes necessary to consider the Reinsurance Directive (2005/68/EC). In particular, how it has been implemented in any country in which it is intended to conduct the business of reinsurance, and separately in each case, since they have not all interpreted the Directive in the same way.

In principle Reinsurers from non-EEA countries should not be treated better than those from EEA countries. That leaves open, however, the question as to how each country will deal with non-EEA reinsurers. One example is the differing treatment applied by the UK and France. That these two countries handle such issues differently is hardly likely to hit the headlines. That they each approach the matter in such a substantially different way indicates, however, the need for reinsurers based in Switzerland to pay attention to the regulatory framework of the countries that surround it.

For instance, in the UK the fact that the reinsured or the risks ultimately insured lie within the UK does not cause difficulty: non-admitted reinsurance is allowed. A non-EEA reinsurer can, in principle, provide reinsurance to a cedant in the UK provided it is not in breach of the relevant legislation when doing so. The requirement for authorisation relates to the carrying on of a regulated activity by way of a business in the UK. The rules governing carrying a reinsurance

business in the UK are set out in the Financial Services and Markets Act 2000. The principal regulated activities likely to affect a reinsurer are the 'effecting' or 'carrying out' of contracts of reinsurance as a principal. There is no statutory definition of those activities and the matter has been left to case law. The cases, which are admittedly based on the relevant prior legislation, indicate, for instance, that the offering of reinsurance services and negotiation of contractual terms, amongst other things, can constitute a regulated activity.

In France, however, the position of a pure reinsurer situated outside of the EEA, in general terms is that it is allowed to reinsure on a non-admitted basis, under certain conditions or circumstances. One of those is that a non-EEA reinsurer will most likely need to provide collateral to the cedant in the form of pledged assets or a cash deposit and may find that the *Autorité de contrôle prudentiel* (the authority of prudential supervision, ACP) is interested to carry out prudential and solvency checks. The ACP will liaise with the original controlling authority of the party seeking authorisation.

Briefly

In brief, for a pure reinsurer thinking of opening a branch or company here, the process could hardly be simpler; but that is only the start of the story. And there are potential pitfalls awaiting new entrants who are more entranced by the siren song of the lakes and the mountains, scenic though they are, than the regulatory environment.

This is not and is not intended to be a detailed and comprehensive guide to the issues referred to: appropriate advice should be sought at all stages.

Authors:

Christopher Bell – England and Wales, Partner
Email: bell@gbf-legal.ch

Emmanuelle Imbert – France, Of-counsel
Email: imbert@gbf-legal.ch

Nando Stauffer von May – Switzerland,
Notary, Associate
Email: stauffer@gbf-legal.ch

gbf Attorneys-at-law
Hegibachstrasse 47
PO Box 1661
CH-8032 Zurich, Switzerland
Tel: +41 (43) 500 48500
Fax: +41 (43) 500 4860
Web: www.gbf-legal.ch