



C L I F F O R D  
C H A N C E

**THE TRANSFER OF INSURANCE AND REINSURANCE PORTFOLIOS**

16 OCTOBER 2024 – JOINT CONFERENCE OF ALJB/AIDA AND CLIFFORD CHANCE  
UDO PRINZ & ISADORA ROUSSELLE (CLIFFORD CHANCE) IN DISCUSSION  
WITH PETER VERMEULEN (ALJB/AIDA)

# INTRODUCTION

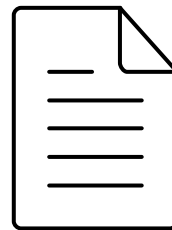
**Increase** of insurance portfolio transfers (“IPT”), both domestic and cross-border, in recent years.

## Numerous reasons, including:

- Brexit
- Consolidation in the market
- Strategic choices (unorganic growth etc.)
- Reorganisation or liquidation
- Decisions of the regulator.

## Additional aspects in IPT transactions, e.g.:

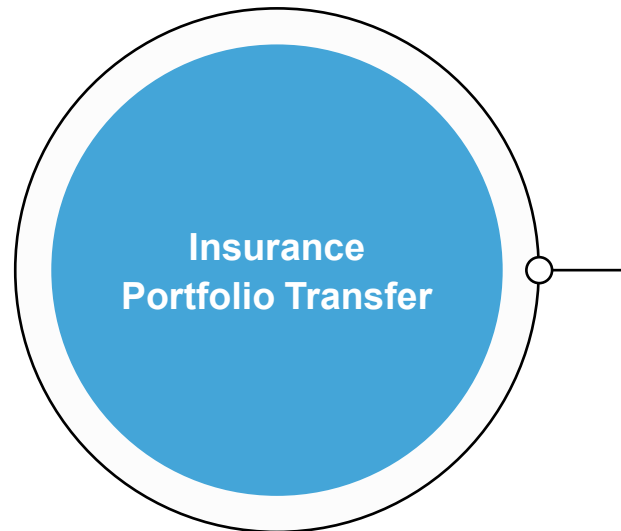
- Insurance secrecy
- Data protection
- Competition law
- Transfer of reserve assets
- AML/CTF
- Company law
- Tax law
- Etc.



## Strictly regulated IPT procedure

(Art. 39 and 164 Solvency II = Art. 66 *et seq.* and 160 ISL).

# THE CONCEPT OF (RE-)INSURANCE PORTFOLIO



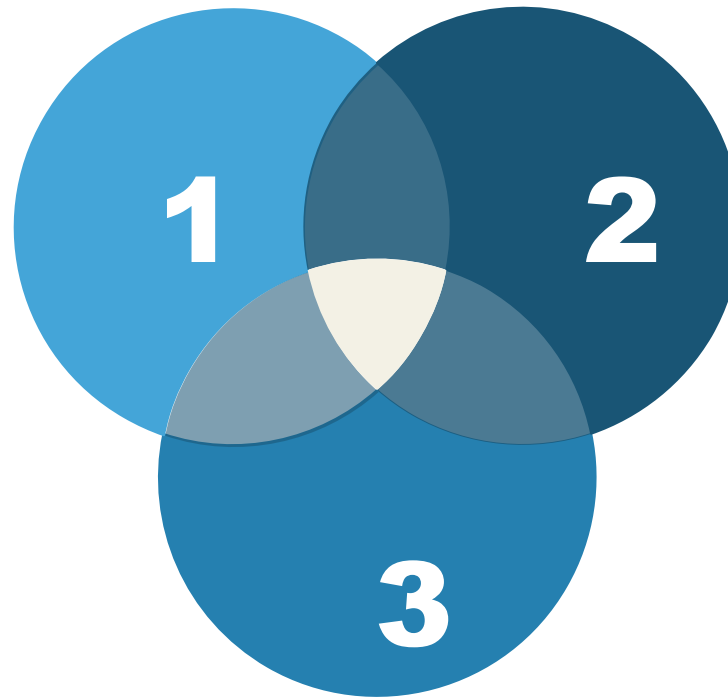
Transaction whereby a set of (re-)insurance contracts is transferred by a ceding (re-)insurance undertaking to an accepting (re-)insurance undertaking

- No legal definition of ‘insurance portfolio’.
- Transfer of “all or part of an insurance or reinsurance portfolio”.
- Distinct from other transactions, such as:
  - risk transfer to (re-)insurance undertakings, or
  - transfer to reinsurance securitisation vehicles.

# DUE DILIGENCE AND STRUCTURING PHASE

## Identification of the parties

- Domestic or cross-border transfer?
- Link with Luxembourg and other countries due to location of risk insured or commitment taken?



## Nature and scope of the transaction

- Insurance contract only or other contracts, assets or liabilities in connection with the portfolio?
- Corporate law mechanism or not?
- Risks (legal and other) inherent in portfolio and transfer?
- Impact of the transfer on the organisations and infrastructures?
- Transitory servicing arrangements needed?

## Type of portfolio and required authorisations

- Classification between life and non-life insurance (and respective Solvency II classes) and reinsurance portfolios.
- Required transferee licences, authorisations and EEA passports.

# INSURANCE PORTFOLIO TRANSFER REGIME

## (Re-)insurance portfolio transfer (Art. 39 Solvency II):

*Ex ante* authorisation by home Member State authority.

> this authorisation will supersede the requirement of the individual consent of the transferred counterparty.

Conditions for authorisation:

- i. accepting undertaking disposes of necessary eligible own funds to cover solvency capital requirements (solvency confirmation by authority competent for transferee), and
- ii. approval of relevant foreign national competent authorities or non-objection within three months following their consultation (for insurance).

# FOUR SCENARIOS

## Transfer by Luxembourg (re-)insurance undertaking (Art. 66 ISL)

Prior notification and authorisation procedure with the CAA (home Member State authority of transferor)

Consultation of other supervisory authorities concerned with the transaction

## Transfer by non-Luxembourg EEA (re-)insurance undertaking (Art. 68 ISL)

The CAA will be consulted as authority of the host Member State in case of insurance undertaking transfer or if home Member State authority of transferee



## Transfer of claims fluctuation provision (“PFS”) (Art. 67 ISL)

Two conditions need to be met:

- Mandatory equalisation provision for the categories of risks concerned with the transfer in transferee jurisdiction
- Financial resources represented by the transferred provision may only be used to guarantee the contractual commitments resulting from claims fluctuation within the transferred portfolio

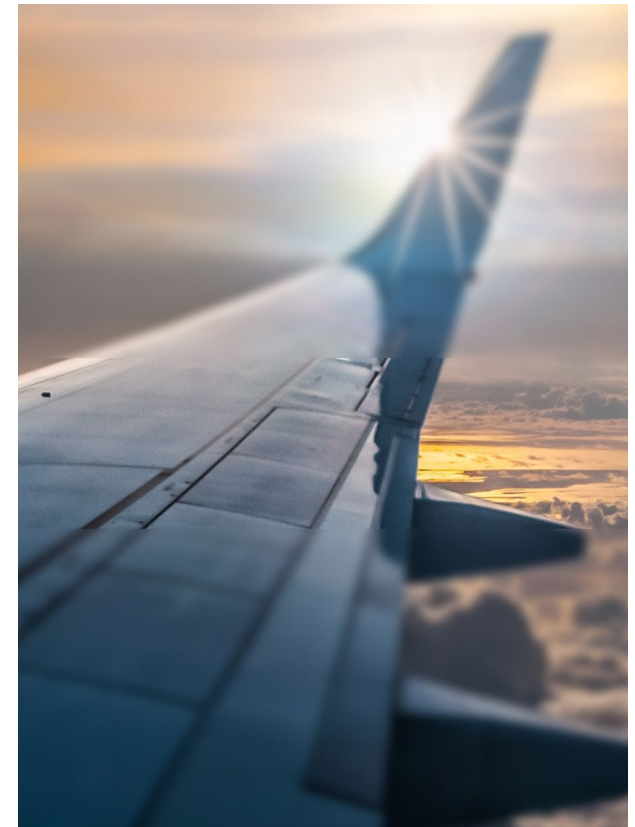
## Transfer by Luxembourg branch of non-EEA (re-)insurance undertaking (Art. 160 ISL)

Prior notification and authorisation procedure with the CAA

Art. 66(3) to (5), 68 and 69(1) and (2) only applicable to insurance undertakings.

# PUBLICATION AND ENFORCEABILITY

- **No prior consent** of the policyholders required.
- Possibility for the CAA to give policyholders an ***option to cancel*** their contracts within three months of the publication > rarely used in practice.
- A transfer approved under Luxembourg law or EU/EEA law (if risks/commitments in Luxembourg) is ***automatically binding*** upon the policyholders from a Luxembourg law perspective in the following conditions:
  - insurance undertaking: as of **publication in *Mémorial*** (Art. 69(2) ISL)
  - reinsurance undertaking: enforceability in accordance with the **conditions fixed by the relevant reinsurance agreement** (Art. 7 of CAA Regulation N°15/3 & Art. 69(3) ISL).
- If transfer from/to a Luxembourg branch of non-EEA (re-)insurance undertaking (with risks/commitments in Luxembourg): as of **publication in *Mémorial***.



# INSURANCE SECRECY & GDPR

## Insurance Secrecy

- Article 300 of the ISL.
- No express exemption in case of transfer of (re-)insurance portfolio.
- Phases: Due diligence and transfer agreement conclusion – transfer – post-transfer.
- Consent for transfers from Luxembourg to abroad with loss of insurance secrecy protection – possibility to set up a Luxembourg branch in case of cross-border transfer to avoid loss of protection.

## GDPR

- The transfer generally implies also the transfer of personal data protected by GDPR – sometimes “sensitive data” (e.g. health or medical data, especially in life or health insurance).
- Phases: Due diligence and transfer agreement conclusion – transfer – post-transfer.
- Legitimate interest in transfer and change of data controller (from transferor to transferee) and related information obligations (‘welcome letter’, information notice) – Art. 6 of GDPR.
- Transfer of sensitive data – justification under Art. 9 of GDPR (notably prior explicit consent, important public interest?).
- Post-transfer servicing agreement – data controller-processor relationship under Art. 28 of GDPR



# OTHER ASPECTS TO CONSIDER

## ○ Ancillary procedures:

- Modification of the business plan
- Changes to activities conducted under freedom to provide services
- Change of control
- Other.

## ○ Corporate Law mechanisms:

**Merger or de-merger:** CAA Circular letter 98/3 on the various types of operations and related regulatory procedures.

## ○ AML/CTF:

- In-scope entities: insurance undertakings and intermediaries involved in activities such as life insurance or credit insurance as well as other investment-related services
- CAA Regulation 20/03:
  - Obligation for the transferee to analyse the AML policies and procedures implemented by the transferor before the transfer and to review the audit reports of last three years
  - Update of customer due diligence measures post-transfer – remediation action plan as the case may be.

## ○ Employment law:

Possibility to trigger the application of the 'TUPE' regime depending on scope of overall transfer.

# WHAT'S NEXT?



## Solvency II Review

No changes to the (re-)insurance portfolio transfer regime.



## IRRDR

- Credible set of tools, allowing resolution authorities to intervene early and quickly when an undertaking is failing or likely to fail and resolution is in public interest.
- IRRDR proposal foresees different transfer instruments, including transfer, bridge and separation of assets and liabilities instruments – could be used to transfer (re-)insurance portfolio of an undertaking under resolution.



**THANK YOU FOR YOUR ATTENTION 😊**

# CONTACTS



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If you want to know more about our insurance practice in Luxembourg, take a look at our brochure

 <https://www.cliffordchance.com/content/dam/cliffordchance/PDFDocuments/insurance-luxembourg-A5-2024.pdf>

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