



# Bermuda

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## MARKET TRENDS AND REGULATORY FRAMEWORK

### 1. Please give a brief overview of the insurance and reinsurance markets in your jurisdiction, identifying market trends.

The Bermuda insurance market is focused primarily at reinsurers and captive service providers.

The insurance market has evolved considerably from its earliest days when it was primarily an insurance laboratory for the alternative risk market, in which captive insurance companies dominated. Captives were devised by Fred Reiss in the 1960s and were probably the world's first truly alternative risk product. It is still an integral part of the insurance landscape in Bermuda. However, Bermuda has evolved into a significant insurance and reinsurance market of choice, and is home to a number of large global players who operate in all major markets and write all classes of business worldwide.

This evolution process occurred in several phases, starting with the excess liability crisis in North America in the mid 1980s, and continuing with the emergence in 1993 of the "cat pack" of property and catastrophe reinsurers who emerged following Hurricane Andrew. A similar trend also followed the events of 11 September 2001 and the hurricanes Katrina, Rita and Wilma.

The captive is still thriving in Bermuda despite tough recessionary times.

### 2. What is the regulatory framework for insurance/reinsurance activities?

Companies that carry on insurance or reinsurance business must be authorised to do so (*see Question 8*). Since 2002, the Bermuda Monetary Authority (BMA) (*see box, Main insurance/reinsurance trade organisations*) has been the sole regulator for all Bermudian financial services industries, and is responsible for approving the authorisation of any new insurance or reinsurance company.

The day-to-day functions of the BMA under the Insurance Act 1978 (as amended) (Insurance Act) have been delegated to the Supervisor of Insurance (Supervisor). The Supervisor is appointed by the BMA and sits as an *ex-officio* member on the BMA's board of directors. The BMA is also assisted by the Insurance Advisory Committee (IAC), which must advise the BMA on any matter relating to the development of the insurance industry. It can also recommend legislative changes, as it considers appropriate.

The IAC has several sub-committees, the most important of which is the Assessment and Licensing Committee (ALC). This has a large influence on the insurance market in Bermuda through its role in insurance companies' incorporation process.

The Insurance Act sets out the legal framework for insurance regulation together with the related regulations, mainly the Insurance Accounts Regulations 1980 and the Insurance Returns and Solvency Regulations 1980.

The Insurance Amendment Act 1995 introduced a multi-class licensing system (*see Question 5*) reflecting the diversity and volume of business carried on by insurers in Bermuda, allowing a graduated approach to regulating regime insurance companies. All insurers are subject to continuing financial reporting requirements, which vary by category and class of licence.

The Insurance Amendment Act 2006 was introduced to confer a number of new supervisory and investigative powers on the BMA, to ensure the BMA can continue to be able to effectively supervise persons carrying on insurance business. An important change was the concept of a "controller", and the requirement that any person planning to become a controller of an insurance company must give notice to the BMA (*see Question 11*).

The Insurance Amendment Act 2008 came into operation on 31 December 2008, and made important changes to the regulation of insurance and reinsurance business in Bermuda. In particular, it:

- Imposes new requirements on Class 4 (re)insurers to prepare financial statements in accordance with generally accepted accounting principles (GAAP) or international financial reporting standards (IFRS).
- Permits the BMA to make orders that set prudential standards for the enhanced capital requirements and capital and solvency returns with which insurers and reinsurers must comply.
- Redefines Class 3 insurers by reclassifying them into sub-categories 3, 3A and 3B.
- Allows the establishment of a special purpose insurer to conduct special purpose insurance.
- Contains certain additional reporting requirements.

The Insurance Amendment Act 2010 and Insurance Amendment (No.2) Act 2010 (2010 Amendments) provide for supplemental supervision of insurance groups. It has particular implications for group companies, and potentially widens the scope of regulations for group insurance companies (*see below*). The aim of the 2010 Amendments is to enable the BMA to monitor the risk exposure of an insurance group. To do this, the 2010 Amendments have introduced a number of new definitions and extended others. There are now new statutory definitions for parent company, subsidiary company, group, insurance group and designated insurer.

New group supervision rules increase the BMA's reach to be a group supervisor. They require the BMA to take into account



certain matters, before deciding whether it is appropriate for it to be the group supervisor of a particular insurance group. As group supervisor, the BMA has a number of functions relating to group supervision, such as:

- Co-ordination of the gathering and dissemination of relevant or essential information, including the dissemination of information which is important for the supervisory task of other competent authorities.
- Supervisory review and assessment of the financial situation of insurance groups.
- Assessment of compliance of insurance groups with the rules on solvency and risk concentration and intra-group transactions.
- Assessment of the system of governance of insurance groups.
- Planning and co-ordination of supervisory activities in co-operation with the competent authorities.
- Co-ordination of any enforcement action that may be taken against insurance groups or any of their members.
- Planning and co-ordinating, as required, meetings of colleges of supervisors, to be chaired by the BMA where it acts as group supervisor, to facilitate exercise of the functions set out above.

An Insurance Code of Conduct (Code) based on international standards was introduced in 2010, which builds on and codifies the governance standards already established in the Bermuda insurance market. It establishes the principle of proportionality, duties, requirements and standards, including the procedures and sound principles to be observed by firms in the areas of:

- Corporate governance.
- Risk management.
- Governance mechanisms.
- Outsourcing.
- Market discipline.
- Disclosure.

Failure to comply with the Code is a factor taken into account by the BMA in determining whether an insurer is conducting its business in a sound and prudent manner. The transition period for insurers to ensure their companies are fully compliant with the Code expires on 1 July 2011.

The 2010 Amendments also widened the scope of offenders under the Insurance Act, to include offences in relation to non-compliance with the power to obtain information and reports and to require production of documents (see Question 13).

## REGULATION OF INSURANCE AND REINSURANCE CONTRACTS

### 3. What is a contract of insurance for the purposes of the law and regulation in your jurisdiction? How does it differ from a contract of reinsurance?

There is no accepted statutory definition of insurance or reinsurance. However, the term "contract of insurance" is defined in the Third Parties (Rights against Insurers) Act 1963 to mean "a contract whereby the insured is covered against the risk of liability to third parties".

In the regulatory context, the term "insurance business" is defined in the Insurance Act to mean the business of effecting and carrying out contracts either:

- Protecting persons against loss or liability to loss in relation to risks to which these persons may be exposed.
- To pay a sum of money or render money's worth on the occurrence of an event, and includes re-insurance business.

The latter does not require the (re)insured to have an insurable interest of any kind, and does not require the transfer of any risk to the (re)insurer.

In addition, being a party to a "designated investment contract" does not constitute carrying on insurance business, and a designated investment contract does not constitute a contract of insurance, for any purposes (*section 57(A)(4), Insurance Act*) (see Question 4). Any contract (including any option contract, futures contract, swap contract, derivative contract, contract for differences or security) is a "designated investment contract" under section 57A of the Insurance Act, if both:

- The purpose of the contract is to secure a profit or avoid a loss either:
  - by reference to fluctuations in the value or price of property of any description, or in an index, or other factor, specified for that purpose in the contract; or
  - based on the happening of a particular event specified for that purpose in the contract.
- The BMA has given a direction in relation to the contract under section 57A(2) of the Insurance Act.

A direction under this section can be made with retroactive effect.

### 4. Are all contracts of insurance/reinsurance regulated in your jurisdiction?

The Bermuda legislative framework currently applies both to captive insurers and to commercial third-party insurers and reinsurers. The core principle of the Insurance Act and subsequent amending legislation is that all those conducting insurance business "in or from within Bermuda" must be licensed and regulated by the Minister of Finance and, since the transfer of responsibility (see Question 2), the BMA.

The law recognises the convergence of the insurance and capital markets, enabling the BMA to categorise certain contracts, for example, swaps and insurance derivatives, as "designated investment contracts" and not "insurance business" as such. These are statutorily deemed not to constitute insurance business (*section 57(A)(4), Insurance Act*) (see Question 3). As a result, so-called "transformer companies" can offer both insurance and capital markets products, without the need to obtain a separate insurance licence in relation to designated investment contracts.

## REGULATION OF INSURERS AND REINSURERS

### 5. Are all insurers and reinsurers regulated in the same way in your jurisdiction?

Bermuda regulates reinsurance companies in a similar way to insurance companies, and both fall under the definition in the Insurance Act of insurance business (see Question 3).



Bermuda law recognises the following types of insurers and reinsurers. It regulates them differently, having adopted a multi-class licensing system to reflect the breadth and diversity of the Bermuda insurance market, particularly following the emergence of the “big cats” after the devastation wreaked by Hurricane Andrew in 1992. The Classes comprise:

- **Class 1.** These are single-parent or “pure” captives writing risks of the parent and its affiliates only.
- **Class 2.** These are multi-owner captives and single-parent captives writing up to 20% unrelated business.
- **Class 3.** This category of Class 3 insurer includes those whose percentage of unrelated business represents more than 20% but less than 50% of unrelated business (on a net premium written basis).
- **Class 3A.** This category applies to most former Class 3 insurers. It includes those insurers whose percentage of unrelated business exceeds, or is expected to exceed, 50% of net premium written and/or net loss and loss expense provisions, and the unrelated business premium does not, or is not projected to, exceed US\$50 million.
- **Class 3B.** This category includes insurers whose percentage of unrelated business exceeds, or is projected to exceed, 50% of net premium written and/or net loss and loss expense provisions, and where the unrelated business premium does exceed, or is projected to exceed, US\$50 million. Class 3B insurers are subject to restrictions on payment of dividends.
- **Class 4.** This is a special category of insurer who writes excess liability and/or property catastrophe insurance risks.

Special purpose insurers (SPI) are identified separately to the above Class system. Their basic form is a special purpose, single transaction (re)insurance company, though it can be possible to reuse the same SPI vehicle where prior BMA approval is obtained. It typically funds its exposure to such risks through the proceeds of a debt issuance (or other financing mechanism).

The multi-class system allows a graduated approach to the regulation of insurance companies. The Insurance Act requires insurance companies to satisfy prescribed minimum capital and surplus requirements, which vary depending on the class of the insurance company (see *Question 12*). A proposed graduated class regime for long-term insurers has also been proposed (see *Question 31*).

## 6. Can insurers or reinsurers carry on non-insurance business? Please summarise any restrictions on their business activities.

There is no general prohibition in place but the BMA can impose restrictions on the licence. In practice, the licences include activity restrictions so the licensee can only carry on the activities set out in its business plan submitted to the BMA at incorporation. Therefore, if the business plan submitted to the BMA states that the applicant intends to write reinsurance, the licence is usually restricted to writing reinsurance, and not direct insurance.

In relation to transformer companies, see *Question 4*.

## 7. Are there any statutory limits or other restrictions on, or requirements relating to, the transfer of risk by insurance or reinsurance companies?

Insurers are not required to retain any liability and are not restricted from transferring all of their liabilities to reinsurers, provided the insurer maintains the required solvency margins (see *Question 12*).

There are no regulatory requirements concerning collateral requirements for assuming reinsurance companies. However, the ceding company can have its own requirements.

## OPERATING RESTRICTIONS

### *Authorisation or licensing*

## 8. Does the entity or person have to be authorised or licensed in your jurisdiction? If so, please outline the key steps involved in this process and the requirements that must be satisfied.

### **Insurance/reinsurance providers**

Any company proposing to carry on insurance business must be authorised to do so. No person can carry on insurance business in or from Bermuda unless the person is registered as an insurer under the Insurance Act. An insurance company that is not incorporated in Bermuda but in another domicile can be licensed under section 134 of the Companies Act 1981 to do insurance business in Bermuda.

The application to license an insurance company typically includes details of the ownership structure, business plan and pro-forma financials. Applications are made on Mondays each week. The ALC hears all applications to establish new insurers at its weekly Friday meeting. The ALC is composed completely of employees of the BMA. Members of the TAG, consisting of experienced insurance professionals, actuaries and accountants, can be invited to meetings of the ALC, which generally happen in Class 2, 3, 3A, 3B and 4 applications. The application is carefully examined by the ALC, with particular attention to the viability of the proposed insurance programme and the financial resources required. If the application is approved at this meeting, the application to become fully licensed as an insurer can be made during the following week.

### **Marketing insurance/reinsurance services**

The Insurance Act applies to any persons carrying on insurance business in or from Bermuda, and requires the registration of all insurers as well as insurance managers, brokers and agents. In addition, it is necessary to apply to the BMA for permission to incorporate the company (and to submit personal declaration forms for each of any proposed individual non-Bermudian beneficial owners as part of that application). If the beneficial owner is a company, financial statements are required.

The answers applicable for insurance/reinsurance providers in *Question 9* to *13* also apply to those marketing and providing other insurance/reinsurance-related services, unless stated otherwise.





**9. Please summarise the main exemptions or exclusions from authorisation or licensing that are available in your jurisdiction, if any.**

Transformer companies represent the main exemption from authorisation or licensing requirements (see *Question 4*).

**Restrictions on ownership or control**

**10. Are there any restrictions on the ownership or control of insurance-related entities in your jurisdiction (for example, age, nationality, qualification or other restrictions)?**

An insurance or reinsurance company is incorporated under and subject to the Companies Act 1981 (*Companies Act*). Most insurance companies are established as exempted companies under the Companies Act, and are therefore exempt from the requirement (applicable to "local" companies) that at least 60% of the company is owned by Bermudians. The Companies Act therefore allows an exempt company to be 100% foreign owned.

Shareholders, directors and officers of (re)insurance companies must satisfy a "fit and proper" test. Evidence supporting that the test is met must be submitted at the time of application for incorporation.

A Bermuda-exempted company which, by definition, is incorporated in Bermuda by non-Bermudians to conduct business outside Bermuda, requires at least one representative ordinarily resident in Bermuda. This requirement is satisfied by, at minimum, a director or a secretary (either an individual or a company) or a resident representative (either an individual or a company) who is ordinarily resident in Bermuda.

There are no requirements or restrictions concerning investment by a foreign government in an insurance or reinsurance company.

**11. Do owners or controllers have to be pre-approved by or notified to the relevant authorities before taking, increasing or reducing their control or ownership of the entity?**

Owners or controllers must be pre-approved by the relevant authorities. A subscriber to shares or a transferee of shares must submit a Shareholder Controller Notification (*section 30E, Insurance Act*). Notification to the Controller of Foreign Exchange under the Exchange Control Act 1972 is made on the same application. The transferee must file a section 30E notice with the BMA Insurance Division and deal with the Controller of Foreign Exchange. There is general permission to transfer shares where the shares are listed on an appointed stock exchange (including the Bermuda Stock Exchange). If the transaction involves delisting, the buyer must seek prior approval to the transfer. The insurer must also file a section 30J notice informing the BMA there has been a change of a controller.

The Insurance Amendment Act 2006 introduced the concept of a controller and the requirement that any person planning to become a controller of an insurance or reinsurance company must give notice to the BMA. The definition of a controller includes a managing director or chief executive of an entity registered under

the Insurance Act. The definition of controller also includes a shareholder holding or entitled to exercise at least 10% of the voting shares at a general meeting. Notification to the BMA must be given when any person intends to become a 10%, 20%, 33% or 50% shareholder controller of an insurance company. The BMA ensures that the controller meets the "fit and proper" test, in the same way that it ensures that shareholders and directors meet the same test at the time of incorporation (see *Question 10*).

**Ongoing requirements for the authorised or licensed entity**

**12. Please summarise the key ongoing requirements that the authorised or licensed entity must comply with.**

**Insurance/reinsurance providers**

The Insurance Act requires that insurance companies must satisfy prescribed minimum capital and surplus requirements, which vary depending on the Class of the insurance company (see *Question 5*). The solvency capital requirements must be maintained by the insurer at all times and is a standard condition imposed on every insurer's licence. They are the minimum standards required and may need to be adjusted upwards, depending on the actual net written premium of the insurer:

- Classes 1, 2, 3, 3A and 3B must maintain a solvency margin (that is, capital and surplus) of 20% of net premiums, for the first US\$6 million of premiums written.
- If premiums are written above US\$6 million, the solvency margin is:
  - US\$1.2 million plus 10% of the excess for Classes 1 and 2,
  - 15% of the excess for Classes 3, 3A and 3B.
- Class 4 insurers must maintain a solvency margin of 50% of net premiums written.

If the relevant percentage (10% for Classes 1 and 2 and 15% for Classes 3, 3A, 3B and 4) of the loss and loss expense provision of an insurer is greater than the solvency margin set out above, the insurer must have a level of statutory capital which is the greater of either:

- The relevant solvency margin.
- The relevant percentage of the loss and expense provision.

The minimum paid up share capital for:

- Long-term business is US\$250,000 (as at 1 January 2011, US\$1 was about EURO0.7).
- Composite insurers (who write both general (Classes 1, 2, 3, 3A and 3B) business and long-term business) is US\$370,000.
- A Class 4 insurer who writes long-term business is US\$1.25 million (about EUR831,764), although the minimum capital and surplus must be US\$100 million.

A composite insurer must also satisfy the required solvency margins for long-term business set out above.

**Marketing insurance/reinsurance services**

Insurance managers must maintain an accurate list of all insurers for which they act as insurance manager, and must, if required by the BMA, provide the BMA with a copy of that list (*/Insurance Act*).



In relation to any insurance contract to which an insurer is a party and in relation to which an insurance broker, agent or salesman has apparent authority to act for the insurer and receives a premium under the contract, both (*Insurance Act*):

- The broker, agent or salesman is deemed to be the agent of the insurer.
- The insurer is deemed to have received the premium.

#### **Penalties for non-compliance with legal and regulatory requirements**

- 13. Please outline the possible consequences of an entity failing to comply with applicable legal and regulatory requirements (including the disciplinary powers any relevant regulators have, as well possible customer remedies). What recourse do policyholders have if they have done business with a non-approved entity?**

Section 30G(3) of the Insurance Act states that any person who contravenes section 30E, by failing to give the notice required by subsection (2) of that section, is guilty of an offence (liable on summary conviction to a fine of US\$25,000 (*section 30G(6)*)). Failure to give notice under section 30J carries a fine of US\$50,000 (*section 30J(3)*).

In addition, the BMA can serve a notice of objection on a buyer under section 30H, stating that the BMA objects to the buyer being a controller of a registered person, on the grounds that it is not a fit and proper person to be a controller. Failure to comply with a notice of objection can, on indictment, carry a fine of US\$100,000 or imprisonment for two years, or both. Under section 30I, the BMA can additionally impose voting restrictions and restrictions on transfers of shares.

No business is void or voidable by reason only that, at the relevant time, any party to the transaction is in breach of any provision of the Insurance Act (*section 46, Insurance Act*).

#### **Restrictions on persons to whom services can be marketed or sold**

- 14. Are there any restrictions on the persons to whom insurance/reinsurance services and contracts can be marketed or sold?**

There are numerous restrictions on the ability of insurers and reinsurers based in Bermuda to provide insurance and reinsurance services (see *Question 8*).

In relation to the types of products offered for sale in Bermuda, the focus of the Bermuda insurance market is primarily reinsurers and captive service providers (very little business in Bermuda is transacted with individual policyholders).

Most Bermuda insurers are incorporated as Bermuda-exempted companies, which:

- Are generally prohibited from carrying on any business in Bermuda, unless they obtain specific permission under section 129A of the Companies Act.
- Conduct business from within Bermuda, which means they carry on business outside Bermuda but have a registered office in Bermuda.

Accordingly, local insurance business (defined as “domestic business” in the Insurance Act) is carried out by local Bermuda insurance companies.

Foreign-incorporated insurers can operate in or from within Bermuda with the consent of the Minister of Finance under section 134 of the Companies Act, and with the approval of the Insurance Department of the BMA.

#### **REINSURANCE MONITORING AND DISCLOSURE REQUIREMENTS**

- 15. To what extent can/must a reinsurance company monitor the claims, settlements and underwriting of the cedant company?**

The right of a reinsurance company to monitor the claims, settlements and underwriting of the cedant company is available as a contractual entitlement.

When a reinsurance claim is made, unless the contrary is clearly stated in the policy, the reinsurer is entitled to ask the ceding company to prove its actual underlying liability. However, reinsurance contracts contain “follow the settlements” clauses, which regulate how the cedant can less onerously prove its claim to the reinsurer (subject to certain key provisos). These standard clauses typically require sufficient information to be provided to the reinsurer to establish the “real basis” on which the underlying claims settlement was reached. The reinsurer has a common interest in privileged legal advice which the cedant may have received in relation to its own claims liability, from which the real basis of how the cedant agreed or settled liability can be understood.

Before presentation of the loss, claims co-operation clauses in facultative reinsurances (which require prompt claims notification to the reinsurer) can provide the right to claims settlement control, or simply to receive regular reports if control is not exercised. Reinsurers with claims control cannot unreasonably withhold their agreement to the cedant to settle an underlying claim.

Treaty reinsurances can often contain clauses which require detailed accounts to be regularly submitted, containing details of actual or predicted loss deterioration on the underlying account ahead of claims presentation.

Reinsurance contracts, particularly in relation to treaty reinsurances, frequently contain Inspections of Books and Records clauses, which allow the reinsurer to review the:

- Administration of the underlying book of business, including claims settlement activity.
- Premium accounting and the underwriting records of the underlying business.

Although there is no Bermuda law on the point, English authority (*Phoenix General Insurance Co of Greece SA v Halvanon Insurance Co Ltd [1985] 2 LI Rep 599*, albeit on London market practice) suggests that proportional reinsurances have implied rights of inspection, and therefore do not require express contractual language for inspecting the underlying account’s administration (see also *Question 18*).



In addition, it is arguable that a reinsurer owes a duty of care to its own retrocessionaires (that is, a reinsurer that accepts from another reinsurer a portion of the cedant's underlying reinsurance risk), under proportional policies of reinsurance, to monitor the underlying book of business. In *Phoenix General Insurance Co of Greece SA v Halvanon Insurance Co Ltd*, it was common ground between the parties that under a facultative obligatory reinsurance contract, the reinsured was, among other things, under a general implied obligation to exercise due skill and care in the conduct of its business. The decision has been followed by Justice of Appeal Georges *In the Matter of Chesapeake Insurance Co Ltd, Bermuda Civ. App. No.7 of 1991, 28 November 1991*.

#### **16. What disclosure/notification obligations does the cedant company have to the reinsurance company?**

Reinsurance contracts typically require the cedant to give prompt notice of claims to its reinsurer. The notice provision can form part of the claims co-operation clause. If strict compliance with this clause is a condition precedent to liability, then breach of the notice condition entitles the reinsurer to deny liability, and it is unnecessary for the reinsurer to show that any prejudice has resulted from the lack of notice. However, if it is not a condition precedent, the reinsurer must show that it has suffered prejudice as a result of the lack of notice. However, the degree of prejudice required before the reinsurer is entitled to deny liability is unclear at law.

### **POLICIES – CONTENT REQUIREMENTS AND IMPLIED TERMS**

#### **17. Please outline the main general form and content requirements for insurance policies in your jurisdiction, including a description of the most commonly found clauses.**

The Insurance Act sets out the legal framework for insurance regulation. In relation to the types of products offered for sale in Bermuda, the Bermuda insurance market is focused primarily at reinsurers and captive service providers and little business is transacted with individual policyholders.

There is a self-imposed contract certainty code of practice between members of the Association of Bermuda Insurers and Reinsurers (see box, *Main insurance/reinsurance trade organisations*). The code was adopted in 2008, in conjunction with the Bermuda Insurance and Reinsurance Brokers Association, and in consultation with the Bermuda Monetary Authority. It binds its members to specific contract completion practices. A copy is available at: [www.abir.bm/downloads/](http://www.abir.bm/downloads/).

#### **18. Please identify any terms found in insurance policies in your jurisdiction that are implied by law or regulation (identifying the applicable laws or regulations and any mandatory provisions).**

Each party to a (re)insurance contract must observe the utmost good faith towards the other throughout contract negotiations and at all times thereafter (unless and until litigation or arbitration commences).

The reinsured and his agent must disclose to the reinsurer all material facts relating to the risk which are known (or which ought to be known) at the time the contract was entered into. A fact is material if it would influence the judgement of a prudent underwriter in fixing the premium, or determining whether he will take the risk or the terms under which he would take it. Material non-disclosure by the reinsured entitles the reinsurer to avoid the contract, if the reinsurer was induced to enter into the contract by reason of the non-disclosure.

There is no express statutory duty on the reinsurer in relation to non-disclosure of facts to the reinsured. While a deliberate non-disclosure by the reinsurer is a breach of the duty of utmost good faith, and allows the reinsured to avoid the contract, an innocent non-disclosure by the reinsurer may not.

Although the duty of utmost good faith continues to apply to the performance of both parties' obligations following making the contract, the courts are unwilling to imply this term into the contract. There is no basis under Bermudian law for awarding damages against an insurer or reinsurer for "bad faith" handling of claims.

Commercial court and appeal judges have been reluctant to imply terms favourable to one party into reinsurance contracts post placement. One successful instance was for the reinsured to owe a duty to exercise skill when underwriting business before cession to a facultative obligatory treaty (*Phoenix General Insurance Co of Greece SA v Halvanon*). However, the Court of Appeal (*Bonner v Cox*) cast doubt on whether *Phoenix v Halvanon* was correctly decided.

Other terms have been considered for implication (mainly London market related terms/practices, under various common law rules for implication), but have met with judicial resistance, for example:

- Terms implied for the provision of documents and information in connection with claims presented under follow settlements language (*Charman v Guardian Royal Exchange Assurance Plc*).
- An implied term that a reinsurer will, subject to certain provisos, follow the judgments of foreign courts in the absence of contrary terms (*Commercial Union Assurance Co Plc v NRG Victory Reinsurance Ltd*).
- An implied term through market custom and practice entitling underwriters to inspect original placing records post placement (*Goshawk Dedicated Ltd & Ors v Tyser & Co Ltd*).
- An implied term permitting recovery of underlying incurred legal/defence costs (*Insurance Company of Africa v Scor (UK) Ltd*).
- An obligation on the reinsured to consult with his reinsurer before settling a claim (*The National Fire and Marine Insurance Company of New Zealand v The Australian Mercantile Union Insurance Company*).
- An implied term that the reinsurer will not withhold approval under a claims co-operation clause to settle a claim, save on "reasonable grounds" (*Gan Insurance v Tai Ping Insurance*).
- Refund of premium following a termination of cover, as opposed to a total failure of consideration (*Swiss Reinsurance Co v United India Insurance Co Ltd*).





These English legal authorities are not binding on the Bermuda courts, but their determination of principles of London market and practice could be informative to Bermuda proceedings.

**19. Please identify customer protections which are generally included in insurance policies to supplement relief available under general law.**

There are no substantive consumer protection bodies which provide consumers with increased remedies beyond general insurance contract law.

**20. Please identify examples of standard policies or terms produced by trade associations or relevant authorities, if any, and explain how these can be obtained.**

There are no general regulatory requirements or standardised policies produced by trade associations or relevant authorities. The local policy must be written in English.

The Bermuda market sells insurance policies with a standardised excess liability wording known as the Bermuda Form policy. The policy is made subject to an amended form of New York law but its arbitration provisions usually name either London or Bermuda as the seat of arbitration and consequential curial law. A similar standardised wording for the excess market is available called the Bermuda Shorts Form (see *Question 21*).

**21. Please identify common clauses in reinsurance policies, including follow the form and follow the fortune reinsurance, and standard provisions concerning choice of law, arbitration, and right to take part in the underlying adjustment. Is facultative or treaty reinsurance more common in your jurisdiction?**

Many of Bermuda's major players provide both insurance and reinsurance, albeit through separate subsidiaries. The market sells both facultative and treaty reinsurance which contain many of the usual clauses found in reinsurance markets elsewhere. Clauses which may be considered more peculiar to Bermuda include:

- Arbitration clauses often invoke the UNCITRAL Model Law on International Commercial Arbitration 1985 (as amended) (UNCITRAL Model Arbitration Law), nominating Bermuda as the seat of arbitration and New York law as the substantive law of the contract.
- The market for primary and excess layers is considerable in Bermuda. Bermuda's brokers have directed efforts on producing a single policy excess follow form contract (see *below*). This is to avoid a confusing situation which could encourage coverage gaps between primary and excess layers, where different general liability excess insurance carriers insist and incorporate their own terms and conditions for each excess layer. In October 2008, one international broker created the "Bermuda Shorts Form". This aims to provide greater contract certainty, clarity and consistency

among carriers. It incorporates provisions for Bermuda-specific issues, such as the market's preference for:

- London or Bermuda arbitration;
- New York governing law; and
- specific punitive damages endorsements.

## INSURANCE AND REINSURANCE POLICY CLAIMS

**22. What must be established to trigger a claim under an insurance policy?**

Contracts of insurance in the Bermuda market typically respond on one of the following bases, in relation to losses or notified circumstances which are likely give rise to a claim or loss:

- **Losses occurring during (LOD) basis.** An insurer must pay its share of the loss suffered by the policyholder, if it occurred during the period when the reinsurance contract was in force.
- **Claims made basis.** This is typically used in professional indemnity insurance policies which require notice of the claim (or, subject to drafting, a circumstance likely to give rise to a claim) within the policy period, subject to any policy extensions that might be purchased.
- **Losses occurring on risks attaching (RAD) basis.** Reinsurance treaties often respond to losses occurring on risks written by the ceding company during the currency of the reinsurance, which are said to attach to the overlying reinsurance. Therefore, losses occurring after the reinsurance period has expired can be ceded, subject to the proviso that the risks incepted and therefore attached during the reinsurance period.

A standard form policy wording providing excess liability coverage known as the Bermuda Form policy responds according to a coverage trigger, which is a hybrid of losses occurring during and the claims made basis (see *Question 20*).

In relation to insurers, the duty to defend a claim and the trigger for that duty is determined by the contractual terms set out in the policy.

There are no reported cases in Bermuda dealing with the recovery of punitive damages. In England, the Court of Appeal has held that exemplary damages (punitive damages) were payable under the indemnity provided by a policy of insurance (*Lancashire County Council v Municipal Mutual Insurance Ltd [1997] QB 897*). The court commented that contracts should only be unenforceable on public policy grounds in very plain cases and that the courts "should be wary of minting new rules of public policy when the legislature has not done so". This authority is not binding, but would be persuasive in Bermuda.

The use of cut-through clauses (see *Question 23*) has been popular, to encourage the use of local broker owned carriers to cede business through (and collect a corresponding commission). The clause often allows access to highly rated reinsurance by the underlying original insured. Issues of contractual privity and possibly Bermudian insolvency law mean that even creative drafting of the clause will not trigger coverage in favour of the underlying policyholder (see *Question 23*).



## MAIN INSURANCE/REINSURANCE TRADE ORGANISATIONS

### Bermuda Monetary Authority (BMA)

**Main activities.** Since 2002, BMA has had responsibility over the insurance industry. The BMA is the sole regulator for all Bermudian financial services industries, and is responsible for approving the authorisation of any new insurance or reinsurance company.

W [www.bma.bm](http://www.bma.bm)

### Association of Bermuda Insurers and Reinsurers (ABIR)

**Main activities.** ABIR's mission is to:

- Represent the public policy interests of Bermuda's Class 4 insurers and reinsurers around the world, giving special priority to regulatory action in Bermuda, Europe, the US, and international regulatory forums.
- Promote Bermuda's Class 4 reinsurers as the best in the business in ceding insurer forums.

W [www.abir.bm](http://www.abir.bm)

### Bermuda Insurance Management Association (BIMA)

**Main activities.** BIMA is an association of professional insurance managers in Bermuda. It protects the interests of its members and their clients. The clients under management (more than

1,200 insurance and reinsurance companies) consist mainly of captives, but also include large mutuals, rent-a-captives and commercial insurers and reinsurers. The BIMA's principal role is to liaise with the government and other bodies, on matters affecting the insurance industry.

### Insurance Advisory Committee (IAC)

**Main activities.** The BMA is assisted by the IAC, which advises the BMA on any matter relating to the development of the insurance industry. It can also recommend legislative changes as it considers appropriate. The IAC is a statutory body functioning under the Insurance Act. It advises the government on matters relating to the insurance and reinsurance industries. As a primary industry organisation, it is a significant forum for industry, regulatory and government representatives to consider all matters relating to the industry, in a non-partisan and productive manner.

### Bermuda Captives Owners Association (BCOA)

**Main activities.** The BCOA was created in 2005, with the general intention to establish a forum to exchange ideas and promote the interest of its captives.

W [www.bcoa.bm](http://www.bcoa.bm)

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### 23. Please provide brief circumstances in which third parties can claim under an insurance policy.

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Generally, there is no provision for a third party to bring direct action against an insurer. However, if the insured is bankrupt or insolvent then an action can be brought (see Question 25).

There is no privity of contract between an insured and a reinsurer and Bermudian law retains the strict common law doctrine of privity. An express provision in a reinsurance contract purporting to confer on the insured a right to claim directly from the reinsurer (cut-through clause) is generally ineffective under Bermuda contract law. There are also Bermuda insolvency law considerations relating to the efficacy of cut-through clauses.

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### 24. Is there a time limit outside of which the insured/reinsured is barred from making a claim?

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There are a number of issues which are relevant to determining when a claim is time barred. A key question is when the (re)insured's cause of action against the (re)insurer for an indemnity accrues. The secondary question, when that cause of action expires, is more straightforward to calculate.

The date when a cause of action accrues may depend on the facts of the insured event and also the terms of the policy itself (which may postpone the accrual date, in other words, the underwriter's obligation to indemnify). The default position, unless

altered by contract is, in outline, that a (re)insurance cause of action against the (re)insurer is a claim for breach of contract (see Question 26). The limitation period is governed by section 7 of the Limitation Act 1984. This provides that an action founded on breach of contract expires six years from the date on which the cause of action accrued.

#### Insurance

For liability insurance, the accrual of the insured's cause of action against a liability insurer starts once the insured's liability to the third party is ascertained by agreement, compromise settlement, court judgment or arbitration award (that is, an "adjudication" of liability), including as to quantum of liability.

The date of accrual is different for property or hull insurance losses, where the policyholder's cause of action accrues at the date of the property's loss (or how the insured event is defined under the policy). The limitation period in this case starts on the date of the insured event, even though the quantum of loss may not yet be known/adjusted, or the loss notified to underwriters, until some time later. Relevant authority from a Bermuda perspective for this is in the 1983 Privy Council decision of *Castle Insurance v Hong Kong Islands Shipping Co. Ltd.*

#### Reinsurance

The courts have adopted a similar approach to identifying the accrual of reinsurance causes of action to that of direct liability policies, in that time runs from the date that the reinsured's liability and quantum have been established. The English Court of Appeal decision in *Daugava v Henderson [1934]* is the main authority for this orthodox view.



However, judicial opinion remains divided as to whether reinsurance is best characterised as a form of liability insurance, that is, a liability insurance covering the insurer's own potential liability to its policyholder, or if reinsurances cover the primary/original insured risk. Authority for the latter was recently considered in the 2009 House of Lords' decision of *Wasa v Lexington*.

If reinsurance is not liability insurance and instead actually protects the original risk, the accrual of the reinsurance cause of action is apparently akin to how property insurance operates, so that the reinsurer is liable to its ceding company at the date of the original loss event (the cause of action only exists for six years under the Limitation Act). This analysis would probably cause reinsurers to be liable at an earlier date than the orthodox *Daugava* position (*see above*).

The date that the reinsurance cause of action may start to run may also be affected by:

- The (re)insurer/(re)insured commencing legal proceedings.
- The use of a standstill/tolling agreement to stand time still.
- Accounts provisions found in treaty reinsurances.
- Application of a follow the settlements clause, which can act as a condition precedent to liability.
- The presence of a variable excess point in certain aggregate non-proportional reinsurances.

#### **Claims notification causes**

(Re)insurance contracts typically require the cedant to give prompt notice of claims to its reinsurer:

- A (re)insurer is not required to demonstrate prejudice when denying coverage on the grounds of late notice, if the notice clause in the policy is clearly expressed to be a condition precedent to liability. In the absence of clear wording, the reinsurer's only remedy for breach of notification is damages. Quantification of the reinsurer's loss is difficult (and would probably be nominal, unless late notification precluded a reinsurer from taking crucial steps which would have reduced its exposure).
- The claim is not covered if the reinsurance contract is not triggered in time, for example in claims made policies (*see Question 22*).

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#### **25. Can the original policyholder or other third party enforce the reinsurance contract against a reinsurer?**

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Generally, there is no provision for a third party to bring a direct action against an insurer. However, if the insured is bankrupt or insolvent then such an action can be brought under the Third Parties (Rights against Insurers) Act 1963.

The reinsurer has no obligation to pay a policyholder's claim if the insurer is insolvent. The only obligation on the reinsurer is to pay the insurer (or its liquidator), on the reinsurance contract's terms and conditions.



The business solvency certificate and the declaration of statutory ratios must be signed by:

- At least two directors of the insurer (of whom one must be a director resident in Bermuda if the insurer has a resident director).
- The insurer's principal representative in Bermuda.

In signing the business solvency certificate, the directors and the principal representative must confirm that the business solvency margin and the minimum liquidity ratio have been satisfied. Any statement to the effect that the insurer has not satisfied the various statutory criteria is likely to result in an enquiry by the BMA.

Every insurer must appoint and maintain a principal representative in Bermuda (*section 8A(1), Insurance Act*). The principal representative must report to the BMA immediately on reaching the view that there is likelihood of the relevant insurer becoming insolvent, or his knowing or believing that any certain specific events have occurred in relation to the particular insurer.

In addition, part XIII of the Companies Act deals with the winding-up of all companies, including the liquidation of insolvent insurance and reinsurance companies.

The competing priorities between creditors of a company which is in liquidation in Bermuda are generally determined in the following order:

- Claims of secured creditors under fixed charges rank ahead of all claims made in the liquidation proceedings. Secured creditors cannot make claims in the liquidation proceedings (to extent that they are secured), and must enforce their security outside the liquidation proceedings.
- In the liquidation proceedings, after payment of the costs and expenses of the liquidation, the assets of the company are distributed in the following order of priority:
  - if section 33(3) of the Employment Act 2000 applies, on the winding-up of a company or the appointment of a receiver, claims of an employee employed in Bermuda to payment for leave accrued but not taken, wages earned but not paid, severance allowance under the Employment Act 2000 up to a maximum of 26 weeks and wages;
  - claims relating to taxes owing to the government and rates owing to any municipality (*section 236, Companies Act*) and, to the extent not covered in the above point, specified wages accrued and unpaid, holiday remuneration and amounts due under the Contributory Pensions Act 1970 and the Workmen's Compensation Act 1965;
  - claims of secured creditors under floating charges; and
  - claims by unsecured creditors.
- Claims in the nature of capital claims (generally the claims of shareholders) or subordinated claims rank last and, among themselves, under the company bye-laws or any shareholders' agreement or subordination agreement in the liquidation.

There is no Bermuda regulatory prohibition on its market participants selling excess coverage on which the primary

insurer's insolvency triggers a drop down of coverage, or where the underlying cover is otherwise exhausted through claims erosion. An excess insurer's obligations, relating to indemnification, are limited to those obligations set out in the terms of the excess policy. The 2009 English case *Flexsys America LP v. XL Insurance Co. Ltd [1009] EWHC 1115* provided some guidance on the meaning of "exhaustion" of underlying local policies, before the drop-down would be triggered and provide excess layer coverage for a claim on the same terms as the local policy (excluding the indemnity provisions). This authority is not binding, but would be persuasive in Bermuda.

## TAXATION OF INSURANCE AND REINSURANCE PROVIDERS

- 28. Briefly describe the tax treatment for insurers, reinsurers, and other persons or entities providing insurance and reinsurance-related services in your jurisdiction.**

There is no Bermuda income, corporation or profits tax, withholding tax, capital gains tax, capital transfer tax, estate duty or inheritance tax payable by any company.

At incorporation, lawyers apply for a Certificate of Tax Exemption from the Minister of Finance, under the Exempted Undertakings Tax Protection Act 1966. This exemption guarantees freedom from any Bermuda tax on profits or income (except for annual government fees, local land taxes and employment taxes, if the captive has a workforce present in Bermuda) until 28 March 2016, a date which is regularly rolled forward.

## INSURANCE AND REINSURANCE DISPUTE RESOLUTION

- 29. Are there special procedures or venues for dealing with insurance or reinsurance complaints or disputes in your jurisdiction?**

Arbitration is the most common mechanism for resolving reinsurance disputes, since most reinsurance contracts contain agreements to arbitrate. More recently there has been a re-domestication of arbitration agreements in reinsurance contracts, providing for arbitration in Bermuda.

- 30. Please give a brief overview of the main dispute resolution methods used to settle reinsurance claims.**

Reinsurance arbitrations in Bermuda are generally subject to the Bermuda International Conciliation and Arbitration Act 1993 (Arbitration Act 1993), which gives effect to the UNCITRAL Model Law on International Commercial Arbitration. This gives the parties broad freedom to agree rules and, in the absence of agreement, confers broad powers on the arbitral tribunal. A court has very limited powers to interfere with these arbitrations.

To the extent that disputes are litigated rather than arbitrated, these cases are heard in the Commercial Court which was established in January 2006. The Commercial Court judges are familiar with, and well qualified to address, the issues that typically arise in the insurance and reinsurance arenas.





## REFORM

**31. Please summarise any proposals for reform of the law, regulation or rules in your jurisdiction relating to the provision of insurance or reinsurance services.**

In November 2009, the Committee of European Insurance and Occupational Pensions Supervisors (CEIOPS) released its consultation paper on the technical criteria for assessing non-EU countries' equivalence under Solvency II. This now provides a roadmap for the areas Bermuda needs to consider. Bermuda is under consideration for being part of the first wave of countries to be assessed. The BMA has clearly identified in its 2009 and 2010 business plans that achieving equivalence with the EU regulators under Solvency II is one of its key strategic objectives.

The BMA will introduce regulation that is consistent with EU requirements. The BMA has consistently stated that "equivalent" does not mean "equal", and that the regulation will be proportionate to the risk of regulatory failure posed by entities operating

in the Bermuda market. The wholesale nature of the Bermuda market should mean that regulation here can and should be different to regulation required to protect retail consumers in EU markets, but still meet the equivalence test. However, the path to equivalence will still result in a significant increase in regulatory requirements for many Bermuda companies.

Recent regulation has introduced the Bermuda Solvency Capital Requirement (BSCR) for the Class 4 sector (and now extended to Class 3Bs), and proposed significant amendments to the Solvency Framework for Long-Term Insurers. For the latter, the BMA proposes to leverage the Class concepts used in Bermuda's captive insurance market, by extending the current general business captive insurance classifications to long-term business. A consultation paper was released by the BMA in August 2010 (available at: [www.bma.bm/document-centre/consultation-papers/insurance.asp](http://www.bma.bm/document-centre/consultation-papers/insurance.asp)).

Bermuda is not part of, nor directly subject to, any changes in the law which may arise from the UK Law Commission review of insurance law, which remains ongoing.

## CONTRIBUTOR DETAILS



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**Areas of practice.** Corporate; insurance and reinsurance; private equity; M&A and funds work.

#### Recent transactions

- Advising a number of investors participating in the Class of 2005 start-ups.
- Acting in relation to the initial public offering by Flagstone Reinsurance Holdings Limited on the New York Stock Exchange.
- Acting on the acquisition by Koch Industries Inc of Georgia-Pacific.

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**Qualified.** England and Wales, 1983; Bermuda, 1991

**Areas of practice.** Civil litigation and international commercial arbitration; private international law; insurance; reinsurance and insolvency; banking law; telecoms law; arbitrator in international and domestic arbitrations.

#### Recent transactions

- Multi-million US dollar confidential insurance/reinsurance coverage arbitrations.
- Advising a Bermudian captive insurer owned by a US pharmaceutical company in a multi-million US dollar claim against reinsurers.
- Appearing as counsel before the Bermuda courts in over 40 cases.
- The IPOC litigation, a complex multi-jurisdictional dispute about the ownership of shares in a Russian telecoms company, worth over US\$1.25 billion.

*Our research identifies two dominant firms from the leading offshore market of Bermuda. Flying colours for Attride-Stirling & Woloniecki...Rod Attride-Stirling and Jan Woloniecki won approval of clients and competitors across the globe.*

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