

GETTING THE
DEAL THROUGH 

Insurance & Reinsurance 2015

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Regulation

1 Regulatory agencies

Identify the regulatory agencies responsible for regulating insurance and reinsurance companies.

The Bermuda Monetary Authority (Authority) is an independent body and is solely responsible for the regulation of insurance and reinsurance companies in Bermuda. The Authority's regulatory powers are vested in the Insurance Act 1978 (Insurance Act) and its related regulations. The Authority is advised by the Insurance Advisory Committee (IAC), which is a statutory body that assists the Authority on matters relating to the insurance and reinsurance industries in Bermuda.

2 Formation and licensing

What are the requirements for formation and licensing of new insurance and reinsurance companies?

The formation of a new insurance or reinsurance company is essentially a two-part process, involving an application to incorporate a legal entity that is submitted to the Registrar of Companies and an application to the Authority in respect of the insurance licence. The latter consists of a preliminary application and a formal licence application.

Preliminary or pre-incorporation applications to the Authority are submitted to a sub-committee of the IAC, the Assessing and Licensing Committee, which meets once a week. The application must provide the Authority with sufficient information for the regulator to assess the fitness and propriety of the applicant, its management team and the feasibility of the proposed business plan. An application will typically include details of the ownership structure, company administration, business plan and five-year pro forma financial projections.

The multi-licence system of regulation in Bermuda categorises general business insurance companies into six classes (1-4), long-term business insurers into five classes (A-E), with a separate class for special purpose insurers (SPIs). The Insurance Act also provides for composite or dual licence companies.

When considering any application, the Authority is guided by the general application of its Statement of Principles and the Insurance Code of Conduct (Code). The Authority will only approve an application having first been satisfied that the minimum criteria are fulfilled; that the company has, or has available to it, adequate knowledge and expertise; and that the premises intended to be used in the business are adequate for the conduct of the business.

When considering the application, the Authority will also review the fitness and propriety of the controllers, and the company's board composition, business conduct and risk management. Every insurer must appoint an approved principal representative that is resident in Bermuda and maintain a principal office in Bermuda. Save as otherwise permitted by the Authority, every insurer must also appoint certain other positions such as an approved auditor, loss reserve specialist in respect of general business and an approved actuary in respect of long-term business.

Once the Authority has approved the pre-incorporation application and the company has been incorporated and organised, the company then formally applies to the Authority for registration under the Insurance Act, which does not distinguish between insurers and reinsurers for the purposes of registration.

3 Other licences, authorisations and qualifications

What licences, authorisations or qualifications are required for insurance and reinsurance companies to conduct business?

In addition to the licences noted in question 2 and the intermediaries noted in question 21, companies may also be required to hold specific licences, authorisations or consents dependent upon the nature of their structure or products. For example, it is possible for insurance companies that are incorporated outside of Bermuda to obtain a permit under section 134 of the Companies Act (branch operations) or a permit under the Non-Resident Insurance Undertakings Act (all members of the Society of Lloyd's of London and any insurance undertaking operating on the same basis are deemed to be a single non-resident insurance undertaking irrespective of the combination in which such members underwrite any particular insurance risk).

4 Officers and directors

What are the minimum qualification requirements for officers and directors of insurance and reinsurance companies?

It is a requirement that the business of the insurance or reinsurance company is managed by at least two individuals ('four eyes principle'). The Authority normally expects that these individuals will be either executive directors or persons to whom the board has delegated executive powers and who report directly to the board. In addition, insurance and reinsurance companies may also be required to appoint a number of directors without executive responsibility for the management of its business, as it considers appropriate, having regard to the circumstances and the nature and scale of operations.

Controllers and officers (terms defined as including a director, secretary or senior executive) must be 'fit and proper' to hold a particular position. When assessing fitness and probity, the Authority will consider the individual's relevant experience, skills, knowledge and soundness of judgment to properly undertake and fulfil the particular duties and responsibilities of his or her office. The standards vary considerably depending upon the particular role, and standards are understandably high in respect of managing directors, chief executive officers and other persons with similar roles.

5 Capital and surplus requirements

What are the capital and surplus requirements for insurance and reinsurance companies?

Each insurer must maintain a minimum level of paid-up share capital that varies depending upon its class and any other conditions imposed by the Authority. Broadly, a general business insurer with a Class 1, 2, 3, 3A or 3B licence must maintain fully paid-up share capital of at least \$120,000. The minimum fully paid-up share capital for a Class 4 insurer is at least \$1 million. With respect to long-term business carriers, Class A insurers must maintain minimum paid-up capital of at least \$120,000, while all other classes of long-term business insurer must maintain paid-up capital of at least \$250,000. Given the specific nature of SPIs, such insurers must maintain minimum paid-up share capital of at least \$1.

A minimum margin of solvency applies to all insurers and varies by class, and is the prescribed minimum amount by which the value of the statutory assets of insurers must exceed the value of their statutory liabilities. The minimum margin of solvency for a general business insurer is

based upon the insurer's statutory capital and surplus, net premiums written, and loss and loss expense provisions and other insurance reserves. For long-term insurers, the minimum margin of solvency is a function of assets rather than premiums written and loss and loss expense provisions and other reserves.

'Commercial carriers' (eg, Classes 3A, 3B, 4, C, D or E) must also ensure that the amount of their available statutory capital and surplus meet their minimum margin of solvency and enhanced capital requirement (ECR). The ECR is established with reference to either the applicable Bermuda Solvency Capital Requirement (BSCR) model or an internal capital model that has been approved by the Authority. For those classes of insurer that are subject to an ECR, the Authority also requires that they maintain a target capital level (TCR). The TCR is currently 120 per cent of a carrier's ECR. The Authority has also established rules that prescribe prudential standards with respect to Classes 3A, 3B, 4 and C-E in relation to enhanced capital requirements, capital and solvency returns, insurance reserves and eligible capital. The Insurance Act also provides that all general business insurers are required to maintain the value of their relevant assets at not less than 75 per cent of their relevant liabilities.

6 Reserves

What are the requirements with respect to reserves maintained by insurance and reinsurance companies?

The Authority has promulgated rules in connection with the prudential standards in relation to enhanced capital requirements, capital and solvency returns, insurance reserves and eligible capital that must be complied with by insurance and reinsurance companies. The prescribed standards reflect the different classes of insurers and their respective activities. (See also question 5.) The opinion of a loss reserve specialist or an actuarial opinion, or both, is required in respect of most classes of insurer depending upon whether the entity writes general or long-term business, or both.

7 Product regulation

What are the regulatory requirements with respect to insurance products offered for sale? Are some products regulated by multiple agencies?

The Insurance Act sets out the legal framework for insurance regulation and the Authority acts as the sole regulator in connection with all insurance products. The relevant licence (general or long term) will determine whether an insurance and reinsurance company can offer a particular type of product, which in large part is driven by the content of its approved business plan.

8 Regulatory examinations

What are the frequency, types and scope of financial, market conduct or other periodic examinations of insurance and reinsurance companies?

Every insurance and reinsurance company must continue to demonstrate that it satisfies the threshold conditions of its licence. To measure this, the Authority performs a base level of primarily off-site monitoring of all insurers known as fundamental monitoring. Fundamental monitoring also includes an annual review of the annual statutory returns, as well as the Authority's ongoing assessment of other information received. The Authority initiates prudential visits approximately every three years to establish or maintain relationships with key management. On-site work typically involves, but is not limited to, discussions with high level personnel, and may include additional work performed at the insurer's offices, such as interviews, tests and walk-throughs. Topics for discussion may include:

- corporate strategic initiatives and other significant company developments;
- current issues facing the industry;
- other factors of concern to management or the Authority; and
- follow-up on areas of concern previously identified.

9 Investments

What are the rules on the kinds and amounts of investments that insurance and reinsurance companies may make?

Except for restrictions on its ability to invest and deal with real property in Bermuda, an exempted company is free to acquire, hold and deal in all

types of investments provided that at least 75 per cent of a general business insurers' insurance liabilities must be relevant (liquid assets). The type and quality of assets do have an impact on the statutory solvency and liquidity requirements of an insurance group and the solo operating entities that comprise such group. Insurers and insurance groups must assess the quality of their capital resources that are eligible to satisfy their regulatory capital requirement levels.

The Code mandates that each insurer adopt an effective risk management and internal controls framework having regard for international best practice on risk management and internal controls. The risk management framework should address investment risk, concentration risk, liquidity risk, market risk and credit risk. Further, the framework should adopt the 'prudent person' principle in relation to the investment of its assets. In relation to the insurer, this principle requires that the insurer, in determining the appropriate investment strategy and policy, may only assume investment risks that it can properly identify, measure, respond to, monitor, control and report while taking into consideration its capital requirements and adequacy, short-term and long-term liquidity requirements, and policyholder obligations. Furthermore, the insurer must ensure that investment decisions have been executed in the best interest of its policyholders.

10 Change of control

What are the regulatory requirements on a change of control of insurance and reinsurance companies? Are officers and directors of the acquirer subject to background investigations?

The Authority maintains supervision over the shareholder controllers of all registered insurers in Bermuda. The definition of shareholder controller is set out in the Insurance Act, but generally refers to:

- a shareholder who holds 10 per cent or more of the shares carrying rights to vote at a shareholders' meeting of the registered insurer or its parent company;
- a shareholder who is entitled to exercise 10 per cent or more of the voting power at any shareholders' meeting of such registered insurer or its parent company; or
- a shareholder who is able to exercise significant influence over the management of the registered insurer or its parent company by virtue of its shareholding or its entitlement to exercise, or control the exercise of, the voting power at any shareholders' meeting.

Where a person becomes a 10, 20, 33 or 50 per cent shareholder controller of the insurer, that shareholder must notify the Authority in writing that it has become such a controller. The Authority has the power to conduct background investigations on any controller, including directors and officers, and, to the extent necessary, may object to a controller if it determines that that person is, or is no longer, a fit and proper controller of the insurer. To the extent that the insurer is a designated insurer of a Bermuda insurance group, the Authority will also have the power to object to controllers of the parent company of the group.

11 Financing of an acquisition

What are the requirements and restrictions regarding financing of the acquisition of an insurance or reinsurance company?

There are no specific requirements regarding the financing of an acquisition of an insurance or reinsurance company. However, entities should be cognisant of leveraging in acquisition vehicles and structures and the impact that will have on solo and group solvency requirements, rating agency capital and views.

12 Minority interest

What are the regulatory requirements and restrictions on investors acquiring a minority interest in an insurance or reinsurance company?

See question 10 in relation to 10, 20 and 33 per cent shareholder controllers. In addition, under the Exchange Control Regulations 1973, any ownership in 10 per cent or more of the equity securities of an exempt insurance company requires the prior approval of the Authority.

13 Foreign ownership**What are the regulatory requirements and restrictions concerning the investment in an insurance or reinsurance company by foreign citizens, companies or governments?**

In general, the majority of insurance and reinsurance companies are exempted companies and by their very nature open to 100 per cent ownership by foreign persons. Local companies are subject to 60 per cent ownership and control by Bermudians unless they otherwise obtain permission from the relevant minister.

14 Group supervision**What is the supervisory framework for groups of companies containing an insurer or reinsurer in a holding company system? What are the enterprise risk assessment and reporting requirements for an insurer or reinsurer and its holding company?**

The Insurance Act sets out provisions regarding group supervision, including the power of the Authority to include or exclude specified entities from group supervision, the power of the Authority to withdraw as group supervisor, the functions of the Authority as group supervisor and the power of the Authority to make rules regarding group supervision. This group supervision regime is in addition to the regulation of companies' various operating subsidiaries in their local jurisdictions. The Authority's group supervision rules are designed to assess the financial condition, including the enhanced capital requirements and solvency, of an insurance group, the system of governance and risk management, and supervisory reporting and disclosures of an insurance group. The Authority appoints a designated insurer for the purposes of group supervision. The designated insurer must notify the Authority upon reaching a view that there is a likelihood of the group or any member of the group becoming insolvent or that a reportable 'event' has, to the designated insurer's knowledge, occurred or is believed to have occurred. Holding companies, by their nature, are not insurers and, as such, not regulated in Bermuda. However, pursuant to its functions as group supervisor, the Authority may include any member of the group within its group supervision, including holding companies.

Significant aspects of the Bermuda insurance regulatory framework and requirements imposed on insurance groups include the solvency assessment. The group must perform an annual assessment of its own risk and solvency requirements, referred to as a group's solvency self assessment (GSSA). The GSSA allows the Authority to obtain an insurance group's view of the capital resources required to achieve its business objectives, and to assess a group's governance, risk management and controls surrounding this process.

The Authority has imposed the ECR on groups pursuant to its function as the group supervisor. The group's ECR may be calculated by either the standard model developed by the Authority (BSCR) or an internal capital model that the Authority has approved for this purpose. In addition, the group is required to prepare and submit annual audited group GAAP or IFRS financial statements, annual group statutory financial statements, an annual group statutory financial return, an annual group capital and solvency return, and quarterly group unaudited financial returns.

15 Reinsurance agreements**What are the regulatory requirements with respect to reinsurance agreements between insurance and reinsurance companies domiciled in your jurisdiction?**

Parties are generally free to contract on terms as they see fit, and the Insurance Act does not prescribe mandatory insurance or reinsurance contract wording. However, the Code does require that, as part of the legal and litigation risk component of their risk management framework, all insurers and reinsurers ensure their compliance with internationally recognised contract certainty standards. Members of the Association of Bermuda Insurers and Reinsurers and the Bermuda Insurance and Reinsurance Brokers Association are also subject to self-imposed contract certainty codes of practice in an effort to reduce operational and financial risk.

16 Ceded reinsurance and retention of risk**What requirements and restrictions govern the amount of ceded reinsurance and retention of risk by insurers?**

The level of ceded reinsurance and risk retention is primarily governed by the class of insurer and the prudential rules pertaining to solvency. (See question 5.) In general, insurers are permitted to retain or cede 100 per cent of liabilities.

17 Collateral**What are the collateral requirements for reinsurers in a reinsurance transaction?**

With the exception of SPIs, there are no specific collateral requirements for the assumption of reinsurance in Bermuda; however, this will ultimately depend upon the business plan of the insurer as approved by the Authority or conditions attached to its licence. SPIs, however, must be fully funded. To be fully funded, an SPI will generally be expected to confirm full disclosure to the cedent and insured of the fact that the maximum recovery under the insurance and reinsurance contract is limited to the lower of the stated contract limit and the available assets of the SPI; ensure that the rights of providers of debt or other financing are fully subordinated to the claims of creditors under its contracts of insurance and reinsurance; and ensure that each insurance and reinsurance contract is structured so that the SPI meets the fully funded requirements individually for each contract.

18 Credit for reinsurance**What are the regulatory requirements for cedents to obtain credit for reinsurance on their financial statements?**

Under the Insurance Account Regulations 1980 and the Insurance Return and Solvency Regulations 1980, reinsurance balances receivable are both an admitted asset and relevant asset for purposes of solvency calculations and liquidity ratios, respectively. However, the Authority has also established prudential standards when assessing an insurer's BSCR and ECR. See also question 5.

19 Insolvent and financially troubled companies**What laws govern insolvent or financially troubled insurance and reinsurance companies?**

The Companies Act 1981, Companies (Wind-up) Rules 1982, the Bankruptcy Act 1989, the Insurance Act 1978 and its related regulations, the Life Insurance Act 1978, the Segregated Accounts Companies Act 2002 and the Rules of the Supreme Court 1985 may all contain applicable law with respect to insolvent or financially troubled insurance and reinsurance companies. For example, part VII of the Companies Act 1981 addresses schemes of arrangement, reconstructions and amalgamations. Corporate insolvency is addressed in part XIII of the Companies Act 1981. Although the Companies Act 1981 applies to insurance and reinsurance companies, there are additional special provisions relating to insurance companies. For example, under the provisions of the Insurance Act 1978, a company that is licensed as a long-term insurer cannot be wound up voluntarily.

20 Claim priority in insolvency**What is the priority of claims (insurance and otherwise) against an insurance or reinsurance company in an insolvency proceeding?**

Not applicable.

21 Intermediaries**What are the licensing requirements for intermediaries representing insurance and reinsurance companies?**

The Authority may register a person as an insurance manager, broker, agent or salesperson, as the case may be, subject to that person complying with such conditions as the Authority may see fit to impose. In considering whether to register a person as an insurance manager, broker, agent or salesperson, the Authority must be satisfied that the minimum criteria are fulfilled with respect to the applicant, and that the person has knowledge of the insurance business adequate to enable him or her to act in the capacity in which he or she has applied for registration. Insurance managers and brokers are also required to maintain professional indemnity cover.

Insurance claims and coverage

22 Third-party actions

Can a third party bring a direct action against an insurer for coverage?

Under the Third Parties (Rights Against Insurers) Act 1963, a third party can bring a direct action against an insurer in the event of the bankruptcy or winding-up of the insured. It is not possible to contract out of this provision. The Motor Car Insurance (Third-Party Risks) Act 1943 and the Merchant Shipping Act 2002 also permit direct actions by third parties in certain circumstances.

23 Late notice of claim

Can an insurer deny coverage based on late notice of claim without demonstrating prejudice?

If the notice provision within the policy is expressed to be a condition precedent, then an insurer is not required to demonstrate prejudice in order to deny coverage.

24 Wrongful denial of claim

Is an insurer subject to extracontractual exposure for wrongful denial of a claim?

An insurer is not subject to extracontractual exposure for the 'wrongful denial of a claim'. The determination of liability and coverage disputes are a matter of contract, and there is no tortious or equitable duty upon which to base a claim for 'wrongful denial'. An insurer may rely on non-compliance of a term of the policy by the insured to exclude, limit or discharge its liability under the policy, and there is no statutory equivalent to section 11 Insurance Act 2015 (UK), which now limits the ability of the insurer to avoid circumstances where breach of the term by the insured has increased the risk of insured loss.

25 Defence of claim

What triggers a liability insurer's duty to defend a claim?

The terms of the policy will determine the liability insurer's duty to defend a claim and applicable triggers associated therewith.

26 Indemnity policies

For indemnity policies, what triggers the insurer's payment obligations?

The terms of the indemnity policy will determine the liability insurer's payment obligations and applicable triggers associated therewith.

27 Incontestability

Is there a period beyond which a life insurer cannot contest coverage based on misrepresentation in the application?

Where a contract has been in effect for two years during the lifetime of the person whose life is insured, a failure to disclose or a misrepresentation of a fact (other than a misstatement of age) required to be disclosed does not, in the absence of fraud, render the contract voidable.

28 Punitive damages

Are punitive damages insurable?

At common law there is no prohibition on the recovery of punitive damages. However, it should be noted that Bermuda Form policies exclude the recovery of such damages.

29 Excess insurer obligations

What is the obligation of an excess insurer to 'drop down and defend', and pay a claim, if the primary insurer is insolvent or its coverage is otherwise unavailable without full exhaustion of primary limits?

The express terms of the policy will determine an excess insurer's obligations with respect to 'drop down and defend' or paying a claim.

30 Self-insurance default

What is an insurer's obligation if the policy provides that the insured has a self-insured retention or deductible and is insolvent and unable to pay it?

Not applicable.

31 Claim priority

What is the order of priority for payment when there are multiple claims under the same policy?

Priority of payment in respect of multiple claims under the same policy is determined by the terms of the policy.

32 Allocation of payment

How are payments allocated among multiple policies triggered by the same claim?

Payment allocation should be expressed in the terms of the policies. The equitable principle of contribution may apply in circumstances where an insurer who has paid a claim can recover a proportionate payment from another insurer if both insurers are liable for the same claim.

33 Disgorgement or restitution

Are disgorgement or restitution claims insurable losses?

Bermuda follows the British line of authority on insurable losses rather than the American cases. For an interest to be insurable, there has to be a right recognised by law and this must be an existing right. The courts have frequently laid down that a mere hope or expectation of a future benefit is not sufficient to create an insurable interest. For this reason, disgorgement or restitutionary claims arising after the policy is entered into are not generally seen as an insurable loss as the assured did not have an insurable interest at the time the policy was entered into.

34 Definition of occurrence

How do courts determine whether a single event resulting in multiple injuries or claims constitutes more than one occurrence under an insurance policy?

The question of whether a single event caused multiple loss or whether a series of independent events lead to distinct separate losses arises in the context of aggregation where aggregated claims from one event may be capped in the policy while losses flowing from separate events would not be. Similarly, the issue is relevant where the deduction of an excess on a policy would negate a claim on a single loss basis, whereas the deduction of the excess where multiple losses are found to arise from a single event would not. The question is exemplified by the multiple claims that follow the loss of an aircraft. The court will look at the wording of the policy and try to achieve a sensible interpretation of the aggregation clause. 'Arising from [...] one event', for example, requires a looser causal link to the originating event than 'proximate cause', while 'result from' imparts a far stronger notion of causation. The Bermuda court takes into consideration decisions such as *Kuwait Airways Corp v Kuwait Insurance Co SAK* (UK), where Justice Ricks had to consider the operation of a ground limit of US\$300 million in 'any one occurrence'. In that case, he in fact concluded that the loss of a fleet of Kuwait Airways aircraft and spares arose out of a single occurrence, namely the capture of Kuwait airport. In contrast, in *Scott v Copenhagen Reinsurance Company (UK) Ltd*, the cover provided for aggregation of 'each and every loss or series of losses arising from one event', and it was held that the loss of a British Airways aircraft stranded at the airport as a result of the invasion and eventually damaged in February 1991 should not be aggregated with the loss of the Kuwait Airways fleet. The court considers the factual background to the losses and asks whether the primary cause of the loss and the loss itself are linked in terms of unity of time, intent and cause to the extent required by the policy wording. It should be noted that Bermuda Form Policies contain an integrated occurrence clause at article III(V)(2).

35 Rescission based on misstatements

Under what circumstances can misstatements in the application be the basis for rescission?

Misstatements by an assured in the policy application can form the basis of a misrepresentation claim for rescission by the insurer. In these circumstances the contract of insurance is voidable at the instance of the insurer. The insurer may elect to treat the contract of insurance as rescinded and return policy payments, or may affirm the contract. It is because the contract is voidable at the instance of the representee that an assured cannot avoid uncompetitive premium payments by alleging that the policy is void due to its own representations in the application form. In such circumstances, the insurer is entitled to affirm the contract and not treat the policy as rescinded.

Reinsurance

36 Reinsurance disputes

Are formal reinsurance disputes common, or do insurers and reinsurers tend to prefer business solutions for their disputes without formal proceedings?

Although cases can be heard in Commercial Court where a decision to litigate arises, arbitration is the most common mechanism for resolving reinsurance disputes in Bermuda, and is supported and facilitated by the Bermuda Supreme Court. Commercial arbitration is governed by two different statutes, depending upon whether the arbitration is domestic or international: the Arbitration Act 1986 applies to domestic arbitrations, and the Bermuda International Conciliation & Arbitration Act 1993 (1993 Act) applies to international arbitrations.

The 1993 Act incorporates into Bermuda law the UNCITRAL Model Law on International Commercial Arbitration (Model Law). The 1993 Act and the Model Law provide a facilitative context for the conduct of commercial international arbitrations. For example, the Court may order the appointment of arbitrators in the absence of party agreement, may assist in the taking of evidence by deposition, and may grant a variety of interim and procedural orders.

37 Common dispute issues

What are the most common issues that arise in reinsurance disputes?

Typically, the most common form of reinsurance dispute in Bermuda involves questions such as governing jurisdiction and enforcement together with the common raft of procedural issues such as the appointment of arbitrators, pleadings issues, discovery, requesting overseas depositions and securing the attendance of witnesses. The more interesting substantive questions of scope of the policy, effective notice of claim, following the settlement and non-disclosure tend to arise in off-island arbitrations. However, procedural issues involving the Court supporting off-island arbitration can assume a global significance, such as the Privy Council case of *Associated Electric & Gas Insurance Services v European Re of Zurich* (2003), which dealt with confidentiality of arbitral proceedings and the ability to rely on arbitral awards in separate arbitral proceedings. It remains to be seen whether the rise of insurance linked securities and the parametric insurance of natural disasters will lead to other cases of global significance in the future.

38 Arbitration awards

Do reinsurance arbitration awards typically include the reasoning for the decision?

The 1993 Act requires that the award be made in writing, be signed by the arbitrator or arbitrators, and must, unless otherwise agreed, state the reasons upon which it is based pursuant to Article 31 of the Model Law.

39 Power of arbitrators

What powers do reinsurance arbitrators have over non-parties to the arbitration agreement?

Non-parties to an arbitration agreement may be compelled to give evidence. However, arbitrators do not have the authority to join non-parties to an arbitration agreement without the express consent of such non-party and that of the parties to the agreement.

40 Appeal of arbitration awards

Can parties to reinsurance arbitrations seek to vacate, modify or confirm arbitration awards through the judicial system? What level of deference does the judiciary give to arbitral awards?

An arbitral award in Bermuda is final, and is not subject to any appeal on the merits. However, the Bermuda Supreme Court can refuse to enforce an arbitral award in certain circumstances, including (but not limited to) if based upon grounds set out in the New York Convention 1958, if the award is in respect of a matter that is not capable of settlement by arbitration, or if enforcement would be contrary to public policy in Bermuda.

Under article 34 of the 1993 Act, it is possible to make an application for setting aside as exclusive recourse against an arbitral award. An arbitral award may be set aside by the court if it is satisfied that the applicant can prove the following:

- incapacity of a party;
- invalidity of the arbitration agreement under its express governing law;
- lack of notice of appointment of an arbitrator or arbitral proceedings, or where a party is otherwise unable to present its case;
- the award deals with a dispute not contemplated by or falling within the terms of the submission to arbitration or contains decisions on matters beyond the scope of the submission;
- the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties;
- the subject matter of the dispute is not capable of settlement by arbitration under the law of Bermuda; or
- the award is in conflict with the public policy of Bermuda.

Reinsurance principles and practices

41 Obligation to follow cedent

Does a reinsurer have an obligation to follow its cedent's underwriting fortunes and claims payments or settlements in the absence of an express contractual provision? Where such an obligation exists, what is the scope of the obligation, and what defences are available to a reinsurer?

Under Bermuda law (and English law), a reinsurer is generally obligated to pay a claim where the reinsured has proven its liability under a reinsurance contract that contains a 'follow the settlements' clause and the reinsured acted honestly and took business-like steps in making the settlement (*Insurance Co of Africa v Scor (UK) Reinsurance Co Ltd* [1985] 1 Lloyd's Rep 312, 330). Having established that the original insured has been paid and there is a claim under the reinsurance contract, the burden of proof is on the reinsurer to establish that the reinsured did not take all proper and business-like steps when ascertaining the settlement. In the absence of express language in the reinsurance contract, the burden is with the reinsurer to establish both its liability under the insurance policy and entitlement to indemnity under the reinsurance contract. The reinsurer would be entitled to raise all defences that were available to the reinsured under the insurance policy against the original insured party. A 'follow the settlements' clause will not necessarily have the same effect as a more US-centric 'follow the fortunes' clause.

42 Good faith

Is a duty of utmost good faith implied in reinsurance agreements? If so, please describe that duty in comparison to the duty of good faith applicable to other commercial agreements.

Reinsurance contracts are contracts based upon the duty of utmost good faith between the parties. However, courts are reluctant to imply such a term in any commercial contract, as most recently decided in *Myers v Kestrel Acquisitions* [2015] EWHC 916 (Ch). Parties may of course agree to an express contract obligation to act in good faith.

43 Facultative reinsurance and treaty reinsurance

Is there a different set of laws for facultative reinsurance and treaty reinsurance?

Bermuda law does not draw a distinction between facultative and treaty reinsurance.

Update and trends

The European Commission recently announced that the Bermuda solvency regime (excluding captives) has been granted provisional equivalence to Solvency II (Directive 2009/138/EC) for a period of 10 years beginning on 1 January 2016.

44 Third-party action

Can a policyholder or non-signatory to a reinsurance agreement bring a direct action against a reinsurer for coverage?

Contract terms that attempt to provide a policyholder (or other non-signatory to a reinsurance contract) with a right to make a direct claim against the reinsurer (eg, 'cut-through' clauses) are generally ineffective under Bermuda law, especially as against the liquidator of a Bermudian insurer or cedent. The common law doctrine of privity applies in Bermuda.

45 Insolvent insurer

What is the obligation of a reinsurer to pay a policyholder's claim where the insurer is insolvent and cannot pay?

There is no obligation incumbent upon the reinsurer to pay a policyholder's claim where the insurer is insolvent. The reinsurer would only be obligated to make payments to the insurer pursuant to the terms of the reinsurance contract.

46 Notice and information

What type of notice and information must a cedent typically provide its reinsurer with respect to an underlying claim? If the cedent fails to provide timely or sufficient notice, what remedies are available to a reinsurer and how does the language of a reinsurance contract affect the availability of such remedies?

Notice requirements are determined by the terms and conditions of the reinsurance contract and will typically form part of claims cooperation or control clauses. Claims control or cooperation clauses provide varying levels of control over negotiations, settlement and defence of a claim. If the notice provision within the policy is expressed to be a condition precedent, then an insurer is not required to demonstrate prejudice in order to deny coverage.

47 Allocation of underlying claim payments or settlements

Where an underlying loss or claim provides for payment under multiple underlying reinsured policies, how does the reinsured allocate its claims or settlement payments among those policies? Do the reinsured's allocations to the underlying policies have to be mirrored in its allocations to the applicable reinsurance agreements?

As per question 41, provided the reinsured has acted in good faith and in a business-like manner when settling a claim, then the reinsurer will be bound by the terms of any 'follow the settlements' clauses expressed in the reinsurance contract. It is incumbent upon the reinsurer to establish both its liability under the insurance policy and entitlement to indemnity under the specific reinsurance contract to which the settlement has been allocated.

48 Review

What type of review does the governing law afford reinsurers with respect to a cedent's claims handling, and settlement and allocation decisions?

Bermuda law does not specifically provide rights of information or inspection. However, it is common for such access to be expressed in the reinsurance contract. See also questions 41, 46 and 47.

49 Reimbursement of commutation payments

What type of obligation does a reinsurer have to reimburse a cedent for commutation payments made to the cedent's policyholders? Must a reinsurer indemnify its cedent for 'incurred but not reported' claims?

The existence of a 'follow the settlements' clause may require the reinsurer to reimburse a cedent in respect of commutation payments. This obligation may give rise to a reinsurer challenging the specific apportionment of amounts payable. Further, as incurred but not reported claims are necessarily only estimates, it may be possible for a reinsurer to deny liability even on a 'follow the settlement' basis.

50 Extracontractual obligations (ECOs)

What is the obligation of a reinsurer to reimburse a cedent for ECOs?

Not applicable.



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