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Insurance & Reinsurance 2022

Bermuda: Law & Practice
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Law and Practice

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CONTENTS

1. Basis of Insurance and Reinsurance Law	p.3	8. Interpreting an Insurance Contract	p.16
1.1 Sources of Insurance and Reinsurance Law	p.3	8.1 Interpretation of Insurance Contracts and Use of Extraneous Evidence	p.16
2. Regulation of Insurance and Reinsurance	p.3	8.2 Warranties	p.16
2.1 Insurance and Reinsurance Regulatory Bodies and Legislative Guidance	p.3	8.3 Conditions Precedent	p.16
2.2 The Writing of Insurance and Reinsurance	p.10	9. Insurance Disputes	p.16
2.3 The Taxation of Premium	p.10	9.1 Insurance Disputes over Coverage	p.16
3. Overseas Firms Doing Business in the Jurisdiction	p.10	9.2 Insurance Disputes over Jurisdiction and Choice of Law	p.16
3.1 Overseas-Based Insurers or Reinsurers	p.10	9.3 Litigation Process	p.16
3.2 Fronting	p.12	9.4 The Enforcement of Judgments	p.16
4. Transaction Activity	p.12	9.5 The Enforcement of Arbitration Clauses	p.16
4.1 M&A Activities Relating to Insurance Companies	p.12	9.6 The Enforcement of Awards	p.17
5. Distribution	p.14	9.7 Alternative Dispute Resolution	p.17
5.1 Distribution of Insurance and Reinsurance Products	p.14	9.8 Penalties for Late Payment of Claims	p.17
6. Making an Insurance Contract	p.15	9.9 Insurers' Rights of Subrogation	p.17
6.1 Obligations of the Insured and Insurer	p.15	10. Insurtech	p.17
6.2 Failure to Comply with Obligations of an Insurance Contract	p.15	10.1 Insurtech Developments	p.17
6.3 Intermediary Involvement in an Insurance Contract	p.15	10.2 Regulatory Response	p.17
6.4 Legal Requirements and Distinguishing Features of an Insurance Contract	p.15	11. Emerging Risks and New Products	p.18
6.5 Multiple Insured or Potential Beneficiaries	p.15	11.1 Emerging Risks Affecting the Insurance Market	p.18
6.6 Consumer Contracts or Reinsurance Contracts	p.15	11.2 New Products or Alternative Solutions	p.18
7. Alternative Risk Transfer (ART)	p.15	12. Recent and Forthcoming Legal Developments	p.18
7.1 ART Transactions	p.15	12.1 Developments Impacting on Insurers or Insurance Products	p.18
7.2 Foreign ART Transactions	p.16	13. Other Developments in Insurance Law	p.18
		13.1 Additional Market Developments	p.18

1. BASIS OF INSURANCE AND REINSURANCE LAW

1.1 Sources of Insurance and Reinsurance Law

The principal legislation governing companies in Bermuda is the Companies Act 1981, as amended (the “Companies Act”), under which the majority of companies in Bermuda are incorporated by registration.

In addition to the Companies Act, (re)insurance companies and (re)insurance intermediaries in Bermuda are also governed by the provisions of the Insurance Act 1978 and related regulations, rules and guidance notes, each as amended from time to time (the “Insurance Act”), which applies to any person carrying on insurance business in or from within Bermuda. “Insurance business”, which includes that of reinsurance, is the business of effecting and carrying out contracts to:

- protect persons against loss or liability to loss in respect of risks to which they may be exposed; or
- pay a sum of money or render money’s worth on the occurrence of a loss event.

Insurers in Bermuda should also be aware of the provisions of the Life Insurance Act 1978 (the “Life Act”), the Segregated Accounts Companies Act 2000 (the “SAC Act”), the Incorporated Segregated Accounts Companies Act 2019 (the “ISAC Act”) and the Non-Resident Insurance Undertakings Act 1967 (each as amended), as applicable.

2. REGULATION OF INSURANCE AND REINSURANCE

2.1 Insurance and Reinsurance Regulatory Bodies and Legislative Guidance

Bermuda’s Regulator

The Bermuda Monetary Authority (BMA) has a legal authorisation and compliance division, which vets the ownership of all entities incorporating or forming in Bermuda and liaises with the various divisions within the BMA to ensure compliance. The BMA carefully scrutinises the ownership of these entities, requiring information on the direct, intermediate and ultimate owners. The BMA must be satisfied that the persons who wish to own/control such entities are persons of integrity and good standing.

In applying a risk-based regulatory approach, the BMA first employs a framework that assesses the nature, scale and complexity of entities seeking to conduct business in Bermuda, their related risk and the level of sophistication of the clients involved. It then supervises them accordingly.

For commercial (re)insurers, the BMA established a risk-based capital model as a tool to assist the BMA both in measuring risk and in determining appropriate levels of capitalisation. This is termed the Bermuda Solvency Capital Requirement (BSCR) or an in-house (re)insurer solvency capital model approved by the BMA. The BSCR model is a risk-based capital model that provides a method for determining an insurer’s capital requirements (statutory capital and surplus) by taking into account the risk characteristics of different aspects of the insurer’s business.

The BMA introduced prudential standards in relation to all commercial (re)insurers’ enhanced

capital requirement (ECR). The ECR is equal to the higher capital and surplus requirement of the BSCR or that company's approved internal model. To enable the BMA to better assess the quality of the commercial (re)insurer's capital resources, applicable (re)insurers are required to disclose the makeup of their capital in accordance with the "three-tiered capital system". In order to minimise the risk of a shortfall in capital arising from an unexpected adverse deviation, the BMA expects that such insurers operate at or above a threshold capital level, which exceeds an insurer's ECR.

Under this system, all of the (re)insurer's capital instruments will be classified as either basic or ancillary capital, which in turn will be classified into one of three tiers based on their "loss absorber" characteristics.

Highest quality capital will be classified as Tier 1 Capital and lesser quality capital will be classified as either Tier 2 Capital or Tier 3 Capital. Under this regime, up to certain specified percentages of Tier 1, Tier 2 and Tier 3 Capital may be used to support the insurer's solvency margins and ECR.

While not specifically referred to in the Insurance Act, the BMA has also established a target capital level (TCL) equal to 120% of its ECR. While an insurer is not currently required to maintain its statutory capital and surplus at this level, the TCL serves as an early warning tool for the BMA. Failure to maintain statutory capital at least equal to the TCL will likely result in increased regulatory oversight.

Any (re)insurer that fails to comply with its ECR must, at the point that the directors become aware of such failure or have reason to believe that such failure has occurred, immediately notify the BMA and within 14 days after file a written report containing the particular circumstances

that lead to the failure and outlining their plan (including actions to be taken and indicative timeline) on how they intend to rectify the failure.

Additionally, and subject to any legislation to the contrary, any insurer that fails to comply with their ECR is prohibited from declaring and paying dividends until the failure has been rectified with the BMA.

Categories and Classes of Insurers

The Insurance Act distinguishes between insurers carrying on the following activities.

- Long-term business, which consists of insurance contracts covering life, annuity, accident and disability risks and certain other types of contracts. This does not include "excepted long-term business" (as defined in the Insurance Act).
- Insurers carrying on general business, ie, any insurance business that is not long-term or special purpose. General business includes accident and disability policies and has been in effect for less than five years.
- Insurers carrying on special purpose business, including that under which an insurer fully funds its liabilities to its insureds through the proceeds of a debt issuance, cash, time deposits or other financing mechanism. Long-term business consists of insurance contracts covering life, annuity, accident and disability risks and certain other types of contracts.

There are eight general business classifications (Classes 1, 2, 3, 3A, 3B, 4, IGB and IIGB), six long-term business classifications (Classes A, B, C, D, E and ILT) and three classifications of restricted special purpose insurer, unrestricted special purpose insurer and the collateralised insurer (SPIs), which can be classified as either general business or long-term business.

Insurers are sub-divided into three categories:

- captive insurers (Classes 1, 2, 3, A and B) (Captive Insurers);
- commercial insurers (Classes 3A, 3B, 4, C, D and E) (Commercial Insurers); and
- special purpose and collateralised insurers.

The IGB, IIGB and ILT categories can be either captive or commercial insurers.

In general, insurers proposing to carry on general business will be registered as follows.

Class requirements

A Class 1 insurer is:

- wholly owned by one person and intends to carry on insurance business consisting only of insuring the risks of that person; or
- an affiliate of a group and intends to carry on insurance business consisting only of insuring the risks of any other affiliates of that group or of its own shareholders.

A Class 2 insurer is:

- wholly owned by two or more unrelated persons and intends to carry on insurance business not less than 80% of the net premiums written in respect of which will be written for the purpose of:
 - (a) insuring the risks of any of those persons or of any affiliates of any of those persons; or
 - (b) insuring the risks which, in the BMA's opinion, arise out of the business or operations of those persons or any affiliates of any of those persons; or registrable as a Class 1 insurer, but for the fact that:
 - (i) not all of the business which it intends to carry on, but at least 80% of the net premiums written, will consist of the business described under the requirements for a Class

- (i) 1 insurer; or
- (ii) it intends to carry on insurance business not less than 80% of the net premiums written in respect of which will, in the BMA's opinion, arise out of the business or operations of the person by whom it is owned or any of the affiliates of that person.

(c) A Class 3 insurer is not registrable as a Class 1, Class 2, Class 3A, Class 3B, Class 4 insurer or special purpose insurer.

A Class 3A insurer intends to carry on insurance business in circumstances where:

- 50% or more of the net premiums written, or 50% or more of the loss and loss expense provisions, represent unrelated business; and
- total net premiums written from unrelated business are less than BMD50 million.

A Class 3B insurer intends to carry on insurance business in circumstances where:

- 50% or more of the net premiums written, or 50% or more of the loss and loss expense provisions, represent unrelated business; and
- total net premiums written from unrelated business are BMD50 million or more.

A Class 4 insurer:

- has total statutory capital and surplus of not less than BMD100 million; and
- intends to carry on insurance business including excess liability business or property catastrophe reinsurance business.

A Class IGB insurer intends, at the time of its registration, to carry on general business in an innovative and experimental manner whereas a Class IIGB insurer intends to carry on business in an innovative manner.

Long-Term Business

In general, insurers proposing to carry on long-term business will be registered as follows.

Class requirements

A Class A insurer is:

- wholly-owned by one person and intends to carry on long-term business consisting only of insuring the risks of that person; or
- an affiliate of a group and intends to carry on long-term business consisting only of insuring the risks of any other affiliates of that group or of its own shareholders.

A Class B insurer is:

- wholly-owned by two or more unrelated persons and intends to carry on long-term business, not less than 80% of the premiums and other consideration written in respect of which will be written for the purpose of:
 - (a) insuring the risks of any of those persons or of any affiliates of any of those persons;
 - (b) insuring risks which, in the BMA's opinion, arise out of the business or operations of those persons or any affiliates of any of those persons; or
 - (c) registrable as a Class A insurer, but for the fact that:
 - (i) not all of the business which it intends to carry on, but at least 80% of the premiums and other considerations written, will consist of the long-term business described under the requirements for a Class A insurer; or
 - (ii) it intends to carry on long-term business, not less than 80% of the premiums and other considerations written in respect of which will, in the BMA's opinion, arise out of the business or operations of the person by whom it is owned or any of

the affiliates of that person.

- (d) A Class C insurer has total assets of less than BMD250 million and is not registrable as a Class A or Class B insurer.

A Class D insurer has total assets of BMD250 million or more, but less than BMD500 million, and is not registrable as a Class A or Class B or Class C insurer.

A Class E insurer has total assets of more than BMD500 million and is not registrable as a Class A or Class B insurer.

A Class ILT insurer intends at the time of its application for registration to carry on long-term business in an innovative and experimental manner.

Special Purpose Insurers

A special purpose insurer is an insurer that carries on special purpose business. "Special purpose business" means insurance business under which an insurer fully collateralises its liabilities to the persons insured through the proceeds of any one or more of the following:

- a debt issuance where the repayment rights of the providers of such debt are subordinated to the rights of the person insured;
- some other financing mechanism approved by the BMA;
- cash; and
- time deposits.

Restricted special purpose business means special purpose business conducted between a special purpose insurer and specific insureds approved by the BMA.

A collateralised insurer is an insurer that carries on special purpose business but is not a special purpose insurer.

Registration Process

There are two key steps involved in registering an insurance company in Bermuda.

Step 1 – Application approval

An application is made to the BMA's Insurance Licensing Advisory Committee (ILAC) for approval of the insurance programme. This application must be submitted to the BMA by close of business on the Monday of the week of the ILAC's meeting on the ensuing Friday. The application will include (but is not limited to) the following:

- business plan;
- Form 1B;
- pro forma financial projections;
- actuarial/loss reserve specialist analysis, if required;
- BSCR calculation, if required;
- resumés and personal declaration forms for directors and officers; and
- acceptance letters and CVs of the service providers (ie, principal representative, insurance managers, auditors and loss reserve specialists, as applicable).

Step 2 – Registration

Once the BMA has approved the application, an application is then made to the BMA for the company to be registered as an insurance company. This application will include the following:

- business plan (as revised and if applicable);
- Form 1B, signed by two directors and the principal representative;
- acceptance letters and CVs of service providers (if not already provided);
- proof of capital being paid into the company; and
- registration fee.

Generally, the insurance company can be approved for registration and registered within 14 days of submission of the application. It is

worth noting, however, that the application process may take longer if the BMA requires additional information or defers or declines the application. As the ILAC meets once a week (every Friday), each deferral by the BMA for further information will postpone registration by at least a week.

Insurers must also meet the “minimum criteria” for registration as follows:

- officers and controllers meet a fitness and propriety test;
- suitable corporate governance policies and processes established according to the nature, risk profile, size and complexity of the insurer;
- a minimum of two individuals effectively direct the business of the insurer;
- a suitable number of non-executive directors on the board of directors of the insurer;
- business is conducted in a prudent manner;
- the position of the insurer within the structure of any group to which it belongs must not obstruct effective consolidated supervision; and
- the business of the insurer is carried on with integrity and the professional skills appropriate to the nature and scale of the insurer's activities.

The minimum margin of solvency for general insurers is calculated by reference to the greater of net premiums and discounted loss reserves and other insurance reserves. A minimum floor of BMD120,000 applies for single-parent captives and BMD100 million for Class 4 reinsurers. The minimum margin of solvency for long-term insurers is a proportion of assets reported on the insurer's statutory balance sheet, subject to a minimum floor of BMD120,000 for single-parent captives and BMD8 million for Class E insurers (or 2% of first BMD500 million of assets plus

1.5% of assets above USD500 million whichever is greater).

An approved loss reserve specialist is to be appointed by all multi-parent captives and commercial insurers carrying on general business and a qualified actuary approved by the BMA must be appointed by all insurers carrying on long-term business.

Captive insurers' reporting requirements include annual financial statements, and an annual statutory financial return comprised of:

- auditor's report;
- solvency certificate;
- loss reserve opinion (general business multi-parent captives);
- actuary's opinion (long-term business multi-parent captives);
- declaration of compliance;
- underwriting analysis; and
- own risk assessment.

Commercial insurers' reporting requirements include:

- annual financial statements (GAAP);
- annual capital and solvency return (comprising a version of the insurer's BSCR model); and
- quarterly financial returns.

In addition to this, commercial insurers must offer proof that they:

- maintain assets sufficient to capitalise an "enhanced capital requirement" (based on the insurer's BSCR model);
- satisfy a minimum portion of their enhanced capital requirement with qualifying tiers of eligible capital;
- maintain a head office in Bermuda;

- have conducted the commercial insurer's solvency self-assessment;
- have prepared and published a financial condition report and declaration executed by the CEO of the insurer and any senior executive responsible for actuarial risk or risk management or internal audit or compliance function (to be made available on the insurer's website, if applicable, or in hard copy to members of the public on request); and
- maintain a target capital level of 120% of enhanced capital requirement.

Registration of Special Purpose Insurers (SPI)

The BMA has put in place a new expedited one step process for registration of SPIs which are permitted to carry on restricted special purpose business.

Under the new process the BMA offers a turnaround time of three business days. Other benefits of the procedure are that the process may be initiated on any business day by submitting an application prior to 5 pm (Bermuda time) and the required information is provided through a new SPI checklist with no need to submit a business plan.

The Insurance Code of Conduct

All insurers must comply with the BMA's Insurance Code of Conduct (the "Code"), setting out the duties, requirements and standards with which insurers are to comply when conducting business.

The Code requires insurers to establish and maintain a sound corporate governance framework, providing for appropriate oversight of the insurer's business and adequately protecting policyholder interests. The Code further requires the board of directors of an insurer that employs an insurance manager to ensure that such insurance manager meets the fitness and propriety tests. Moreover, the board of directors and chief

and senior executives are required to adopt an effective risk management strategy and an internal controls framework that has regard for international best practice on risk management and internal controls. As there are varying risk profiles of insurers, the BMA interprets the Code based on the nature, scale and complexity of the business of each insurer.

Cyber-Risk Code of Conduct

In response to a consultation paper published in December of 2019, the BMA published Insurance Sector Operational Cyber-Risk Management Code of Conduct (the “Cyber Code”). The Cyber Code applies to all insurers, insurance managers and insurance intermediaries (agents, brokers and insurance marketplace providers) are required to comply with the Insurance Sector Operational Cyber-Risk Management Code of Conduct (Registrants). The Cyber Code establishes duties, requirements, standards, procedures, and principles to be complied with in relation to operational cyber-risk management. The BMA will expect that cyber-risk controls will be proportional to the nature, scale and complexity of the organisation.

Insurance Intermediaries

Insurance intermediaries, including insurance managers, brokers, agents or insurance marketplace providers, or their innovative counterparts – IA, IB, IM, or IMPs (collectively, “insurance intermediaries”) – must comply with the respective BMA code of conduct. Insurance intermediaries can be either a natural person or a body corporate. The insurance intermediary must also meet minimum criteria for registration. This includes the fitness and propriety of controllers, which is assessed by reference to the competence, capability, honesty, integrity and reputation of the officer controllers.

Insurance intermediaries must maintain adequate professional indemnity insurance but are

not otherwise subject to any prudential requirements.

Principal Representative

Every insurance company registered in Bermuda, even those with no physical presence on the island, must appoint a principal representative. A principal representative can take the form of a natural person or body corporate, but is more often than not a body corporate. The insurance manager of an insurer commonly also acts as the insurer’s principal representative, but it is possible for both roles to be fulfilled by two separate entities. The BMA must approve the appointment of a principal representative by an insurer.

The principal representative exists so that the BMA can have some identified individual or company present in Bermuda to whom it can look in respect of an insurer’s affairs. The principal representative has specific statutory obligations including the requirement to report certain events to the BMA, breach of which constitutes an offence under the Insurance Act. In particular, the principal representative must report the insolvency or likely insolvency of the insurer, the breach by the insurer of any law or the insurer’s licence, the breach of any condition or solvency margin of the insurer or the failure by the insurer to adhere to certain other directions of the BMA.

Auditor

Subject to any directions given by the BMA to the contrary, every insurer must appoint and maintain an auditor approved by the BMA. Insurers must have their statutory financial returns audited annually by an approved auditor. Under prevailing policy, the BMA will only appoint individuals or firms resident in Bermuda as approved auditors.

Loss Reserve Specialist

The Insurance Act stipulates that in certain instances a loss reserve specialist (LRS), approved by the BMA, must opine on the insurer's loss reserves. The LRS is usually an actuary but must be independent from the actuary who sets the reserve levels. This opinion gives the BMA additional assurance concerning the level of reserves carried by the insurer.

Actuary

Insurers registered as long-term insurers must appoint an actuary in accordance with the Act, and have this appointment approved by the BMA. The primary role of the approved actuary is to opine on the adequacy of the total long-term business insurance reserves, reflected in insurers' statutory financial statements and statutory financial returns, and any other matters specified by the BMA.

2.2 The Writing of Insurance and Reinsurance

See **2.1 Insurance and Reinsurance Regulatory Bodies and Legislative Guidance**.

2.3 The Taxation of Premium

This does not apply in this jurisdiction.

3. OVERSEAS FIRMS DOING BUSINESS IN THE JURISDICTION

3.1 Overseas-Based Insurers or Reinsurers

Establishing a Physical Presence in Bermuda

In Bermuda, it is possible to establish a fully operational office in a few weeks.

Head Office Requirements

The Insurance Act was amended in 2016 to require commercial insurers to establish and maintain their head office in Bermuda. In deter-

mining whether commercial insurers have complied with the head office requirements, the BMA considers the following six factors:

- where the underwriting, risk management and operational decision making of the insurer occurs;
- whether the presence of senior executives responsible for and involved in the decision making related to the insurer's insurance business are located in Bermuda;
- where meetings of the board of directors of the insurer occur;
- the location where management of the insurer meets to effect policy decisions of the insurer;
- the residence of the officers, insurance managers or employees of the insurer; and
- the residence of one or more directors of the insurer in Bermuda.

The BMA will apply the proportionality principle when it considers the above factors in determining whether the insurer, based on the nature, scale and complexity of its business, has met the head office requirements.

The head office requirement does not apply to a commercial insurer that has a permit under the Non-Resident Insurance Undertakings Act 1967 or a permit under Section 134 of the Companies Act. These provisions cover branch operations in Bermuda for foreign insurers.

Non-resident Insurance Undertakings

There are a few representatives of overseas carriers in Bermuda, commonly referred to as non-resident insurance undertakings (NRIUs). Most NRIUs have engaged agents in Bermuda who receive commissions on premiums written. Most of these premiums arise out of the sale of life insurance policies.

Economic Substance Requirements

The Council of the EU adopted a resolution on a Code of Conduct for business taxation, the aim of which is to counteract the effects of zero tax and preferential tax regimes around the world. In 2017 the Code of Conduct Group (the “Code Group”) investigated the tax policies of both EU member states and third countries, assessing tax transparency, fair taxation and implementation of anti-BEPS measures. Following assessment by the Code Group, Bermuda was included in a list of jurisdictions required to address the Code Group’s concerns about “economic substance”. Like their counterparts in the British Virgin Islands, the Cayman Islands, Guernsey, Jersey and Isle of Man, the government of Bermuda has been working closely with the Code Group to ensure that those concerns are adequately addressed. As a result of this engagement, the Economic Substance Act 2018, as amended (the “Substance Act”), and the Economic Substance Regulations 2018 (the “Substance Regulations”) became operative on 31 December 2018.

Which Entities Are Subject to the Substance Act?

The Substance Act applies to “registered entities”, which means:

- companies incorporated under the Companies Act;
- companies formed under the Limited Liability Company Act 2016; and
- partnerships (exempted, exempted limited or overseas).

A registered entity will be in scope of the Substance Act if it conducts a relevant activity. The relevant activities are:

- banking;
- insurance;
- fund management;
- financing and leasing;

- headquarters;
- shipping;
- distribution and service centres;
- holding entity; and
- intellectual property.

Economic Substance Requirements

A registered entity conducting a relevant activity will satisfy the economic substance requirements if:

- it is managed and directed in Bermuda;
- core income generating activities (CIGA) are undertaken in Bermuda in relation to the relevant activity;
- it maintains adequate physical premises in Bermuda;
- there are adequate full-time employees in Bermuda with suitable qualifications; and
- there is adequate operating expenditure incurred in Bermuda in relation to the relevant activity.

How Will a Company Be Assessed on Compliance?

The Registrar of Companies (“Registrar”) will determine whether a company is compliant with the economic substance requirements based on the information provided in the annual filing. Registered entities in scope of the Substance Act will be required to file, on an annual basis, an economic substance e-declaration (“Declaration”) with the Registrar through the online economic substance Declaration portal. The Declaration will include the following information:

- the nature and extent of the relevant activity including the CIGA undertaken by the relevant entity;
- the nature and extent of the entity’s presence in Bermuda;
- whether the entity is managed and directed in or from Bermuda; and

- the nature and extent of outsourcing arrangements to affiliates or service providers.

How Is “Adequate” to Be Assessed?

The Substance Act does not impose a minimum annual expenditure nor a minimum number of employees in order to satisfy the economic substance requirements. Rather, “adequacy” will be assessed based on the particular circumstances of the entity.

Compliance and Enforcement

The Registrar will have monitoring and enforcement powers under the Registrar of Companies (Compliance Measures) Act 2017 and will have the power to fine an entity for non-compliance.

Implementation Period

The commencement date for the Substance Act was 1 January 2019 and the new regime became immediately applicable to new registered entities incorporated or registered after this date. The transitional period for existing entities has ended. The first reporting commenced in 2020.

Relevant Activity of Insurance

The Substance Regulations sets out the CIGA applicable to insurance as including the following:

- predicting and calculating risk;
- insuring or re-insuring against risk;
- providing client services; and
- preparing regulatory reports.

Brexit

The responses above are unaffected by Brexit.

3.2 Fronting

This does not apply in this jurisdiction.

4. TRANSACTION ACTIVITY

4.1 M&A Activities Relating to Insurance Companies

Some of the M&A Insurance deals Appleby worked on in 2021 include:

- counsel to Etelequote Limited in connection with the sale of its operating subsidiaries to Primerica, Inc. (NYSE:PRI), a well established provider of financial services to middle-income families throughout the United States and Canada;
- counsel to Global Atlantic Financial Group Limited (Global Atlantic) in connection with the sale of Global Atlantic to a subsidiary of KKR & Co. Inc. (KKR); and
- advised Argo Group International Holdings, Ltd., an underwriter of specialty insurance and reinsurance products in the property and casualty market, in an agreement to sell its reinsurance business, Ariel Re.

Other notable insurance deals Appleby worked on in 2021 include:

- counsel to the Vantage Group in connection with its formation of Vantage Risk Ltd. as a Bermuda exempted company and registration as a Class 4 insurer under the Insurance Act 1978 (Insurance Act). One of the largest new insurance platforms in Bermuda;
- acted for the UK’s largest special motor insurer and Lloyd’s underwriter ERS Insurance (now rebranded IQUW) in developing a significant presence in Bermuda including the establishment of a Class 3B reinsurer; and
- acted as Bermuda counsel for Chaucer, the international specialty (re)insurance group, in the formation and licensing of its Bermuda Class 4 insurer and insurance agent.

Two companies registered in Bermuda may amalgamate and continue as one company or

merge and continue as one of the merging companies (hereinafter referred to as a “business combination”). A business combination requires each company to enter into an amalgamation or merger agreement as the case may be, which sets out the terms and means of effecting the business combination.

The directors of each company involved in a business combination must submit the amalgamation or merger agreement, as the case may be, before the shareholders of their respective companies. They must then gain shareholder approval before the amalgamation or merger agreement can be effected and the amalgamated or surviving company can be registered by the Registrar. Special attention should be paid to the provisions of the by-laws of the respective companies that apply to meetings. Appropriate notice must therefore be given to the shareholders, and they should also be sent a summary of the amalgamation or merger agreement and a statement of the fair value of their shares.

At the meeting, each share of an amalgamating or merging company is entitled to the right to vote, irrespective of whether it carries that right and, if the amalgamation or merger agreement contains a provision that would constitute a variation of the rights attaching to any class of shares, then the holders of such shares are entitled to vote separately as a class. Unless the provisions of the by-laws provide otherwise, the resolution of the shareholders or class must be approved by a majority of 75% of those voting at the meeting, where the quorum is two people holding (or representing by proxy) more than one third of the issued shares of the company (or the class).

Should the amalgamation or merger agreement receive approval then the dissenting shareholders are entitled to receive the merger consideration and, if they are not satisfied that they

have been offered fair value, they may apply to the court within one month of the notice of the meeting to assess the fair value of their shares.

BMA Approval

The regulatory authority responsible for registering mergers and amalgamations pursuant to the Companies Act is the Registrar. For insurance companies, a BMA “no objection” or some form of notification will also be required as the BMA must remain informed of all the controllers of all registered insurers in Bermuda and any material changes to them. A “controller” for this purpose means:

- the managing director of the registered insurer or its parent company;
- the chief executive of the registered insurer or of its parent company;
- a 10%, 20%, 33% or 50% “shareholder controller”; or
- any person in accordance with whose directions or instructions the directors of the registered insurer or of its parent company are accustomed to act.

The definition of shareholder controller is set out in the Insurance Act but generally refers to:

- a person who holds 10% or more of the shares carrying rights to vote at a shareholders’ meeting of the registered insurer or its parent company;
- a person who is entitled to exercise 10% or more of the voting power at any shareholders’ meeting of such registered insurer or its parent company; or
- a person 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.

The BMA will also want to assess the financial strength of the amalgamated company and will expect the management accounts for each of the amalgamating companies and pro-forma financials for the amalgamated company to be provided as part of their assessment.

Notification of Material Change

Pursuant to various sections of the Insurance Act (re)insurers are required to notify the BMA before effecting a material change to the business of the respective insurer or that of an insurance group of which it is a member.

For the purposes of this section, a material change includes:

- acquisition or transfer of insurance business being part of a scheme falling within, or any transaction relating to a scheme of arrangement under, Section 25 of the Insurance Act or Section 99 of the Companies Act;
- an amalgamation with or acquisition of another firm;
- engaging in unrelated business that is retail business;
- the acquisition of a controlling interest in an undertaking that is engaged in non-insurance business which offers services and products to persons who are not affiliates of the insurer;
- outsourcing all or substantially all of an insurer's actuarial, risk management, compliance or internal audit functions;
- outsourcing all or a material part of an insurer's underwriting activity;
- the transfer other than by way of reinsurance of all or substantially all of a line of business;
- the expansion into a material new line of business;
- the sale of an insurer; and
- outsourcing of an officer role.

In order to effect a material change, the (re) insurer must have served on the BMA, in writing, a notice stating that the (re)insurer intends to effect such change. Once the notice is served, the BMA has 30 days beginning with the date on which the notice was served to notify the (re) insurer, in writing, that there is no objection to the (re)insurer effecting the material change. If, after the 30 day period has elapsed, the (re)insurer has not received a response from the BMA, it is free to effect the desirous material change.

The BMA is required by the Insurance Act to serve a notice of objection unless it is satisfied: (i) that the interests of the policyholders of the (re) insurer would not in any manner be threatened by the material change; and (ii) without prejudice to the preceding paragraph, that, having regard to the material change the requirements of the Insurance Act would continue to be complied with or, if any of those requirements are not complied with, that the (re)insurer concerned is likely to undertake adequate remedial action.

Before issuing a notice of objection, the BMA is required to serve upon the (re)insurer concerned a preliminary written notice stating the BMA's intention to issue a formal notice of objection. Upon receipt of the preliminary written notice, the (re)insurer served may, within 28 days, file written representations with the BMA which shall be taken into account by the BMA in making its final determination.

5. DISTRIBUTION

5.1 Distribution of Insurance and Reinsurance Products

This does not apply in this jurisdiction.

6. MAKING AN INSURANCE CONTRACT

6.1 Obligations of the Insured and Insurer

This does not apply in this jurisdiction.

6.2 Failure to Comply with Obligations of an Insurance Contract

This does not apply in this jurisdiction.

6.3 Intermediary Involvement in an Insurance Contract

This does not apply in this jurisdiction.

6.4 Legal Requirements and Distinguishing Features of an Insurance Contract

This does not apply in this jurisdiction.

6.5 Multiple Insured or Potential Beneficiaries

This does not apply in this jurisdiction.

6.6 Consumer Contracts or Reinsurance Contracts

This does not apply in this jurisdiction.

7. ALTERNATIVE RISK TRANSFER (ART)

7.1 ART Transactions

Bermuda is the world's leading domicile for insurance-linked securities (ILS) transactions. With a highly regarded regulatory framework, sophisticated legal system, developed infrastructure and global companies with a physical presence, Bermuda maintains a reputation as a quality jurisdiction that has demonstrated its ability to respond to changes in market conditions while meeting its clients' commercial needs.

The BMD100 billion ILS market has proven to be both relevant and reliable after the heavy catastrophe losses around the world in 2017 and 2018. As expected, in 2021 there was continued registration with 52 new insurer registrations completed by October of 2021. Bermuda's (re)insurance market is comprised of over 1,200 (re)insurers holding total assets in excess of USD980 billion writing gross premium of approximately USD240 billion.

As of 31 December 2020, Bermuda maintained its position as the premier jurisdiction for captives, with a total of 680 captives writing gross premiums of approximately BMD25 billion. According to the Bermuda Stock Exchange, Bermuda has listed more than 100 more ILS and catastrophe bonds in 2020 than it did in the previous year. At the end of 2020, the total number of ILS-listed securities stood at 590, with a combined nominal value of USD43.01 billion.

Bermuda has been in the ILS market for more than 20 years and was involved in some of the first deals in the mid-1990s. The influx of capital has been the main catalyst for the growth of the ILS market. Many investors are now developing their own modelling and due diligence capabilities and cedants are now sponsoring deals as a way of securing more competitive prices.

Some of the more common ILS structures in today's market are as follows.

- Catastrophe bonds – the capital market alternative to traditional catastrophe reinsurance that uses fully collateralised SPI to transfer a defined set of risks from an insurer to capital market investors. Initially, catastrophe bonds were structured to offer high yields for investors with high-risk appetites and only covered a single peril. Nowadays, catastrophe bonds tend to cover a multitude of perils and are structured as low risk/investment grade by

offering over-collateralisation or guarantees from third-party insurers.

- Reinsurance sidecars – fully collateralised special purpose insurers created to purchase some, or all, of an insurance policy in order to share in the profits and risks. The ceding insurer or reinsurer, who cedes risk to the reinsurance sidecar, normally pays its premiums for the coverage upfront, allowing investors to profit from the premium return with their collateral exposed for the duration of the underlying reinsurance contracts. Reinsurance sidecars used to be formed as joint ventures between existing insurance or reinsurance companies, but increasingly have been used as a convenient deployment vehicle for third-party capital in the reinsurance underwriting business.
- Contingent capital structures – these offer insurers the option to raise capital during a defined commitment period based upon the occurrence of a qualifying event. Should the qualifying event occur, investors provide the insurer with capital determined by the amount of catastrophic loss and if no catastrophic event occurs, there is no exchange of funds. Because low-probability, high-severity event insurance tends to be scarce or uneconomic, contingent capital can be a cost-effective solution for a company needing liquidity relief.
- Extreme mortality bonds – these enable the issuer to protect itself from large deviations in longevity or mortality due to deaths from disease, pandemics, war, terrorism or natural catastrophes. These bonds are structured similarly to other asset-backed securities, with deviations in mortality serving as the trigger.
- Longevity swaps – these transfer the risk of pension scheme members living longer than expected from pension schemes to an insurer or bank provider.
- Industry loss warranties – these are reinsurance contracts whose payouts are linked to a

predetermined trigger of estimated insurance industry losses rather than their own losses from a specified event. They are essentially swap contracts.

7.2 Foreign ART Transactions

This does not apply in this jurisdiction.

8. INTERPRETING AN INSURANCE CONTRACT

8.1 Interpretation of Insurance Contracts and Use of Extraneous Evidence

This does not apply in this jurisdiction.

8.2 Warranties

This does not apply in this jurisdiction.

8.3 Conditions Precedent

This does not apply in this jurisdiction.

9. INSURANCE DISPUTES

9.1 Insurance Disputes over Coverage

This does not apply in this jurisdiction.

9.2 Insurance Disputes over Jurisdiction and Choice of Law

This does not apply in this jurisdiction.

9.3 Litigation Process

This does not apply in this jurisdiction.

9.4 The Enforcement of Judgments

This does not apply in this jurisdiction.

9.5 The Enforcement of Arbitration Clauses

This does not apply in this jurisdiction.

9.6 The Enforcement of Awards

This does not apply in this jurisdiction.

9.7 Alternative Dispute Resolution

This does not apply in this jurisdiction.

9.8 Penalties for Late Payment of Claims

This does not apply in this jurisdiction.

9.9 Insurers' Rights of Subrogation

This does not apply in this jurisdiction.

10. INSURTECH

10.1 Insurtech Developments

Insurtech is the insurance industry's next evolution and, given that Bermuda has been at the forefront of providing innovative solutions in the insurance industry for decades, it is a natural progression for the jurisdiction.

The BMA has taken a proactive response to the growing insurtech market, anticipating the needs of current and future players. Leveraging Bermuda's reputation as a centre of excellence for innovation in a sound regulatory environment, the BMA has launched two parallel innovation tracks initially targeted at the insurtech market: (i) the insurance regulatory sandbox ("Sandbox"), and (ii) an innovation hub ("Innovation Hub"). The BMA has endeavoured to provide innovative solutions in the insurance industry to maintain Bermuda's dominance in the global ILS and captive sectors.

The Insurance Regulatory Sandbox

The Sandbox is a space where companies can test new technologies and offer innovative products and services to a limited number of customers in a controlled environment and for a limited period of time.

The Sandbox is available for entities registered, or proposing to become registered, under Section 4 (insurer) or Section 10 (insurance intermediaries) of the Insurance Act. The BMA encourages the use of a separately incorporated company (subsidiary or joint venture) to carry out activities within the Sandbox.

The licences available are ILT, IGB, IM, IA and IB for long-term insurers, general business insurers, insurance managers, agents and brokers, respectively. On successful graduation from the Sandbox, the company will be relicensed under an existing class of insurer or insurance intermediary (Class 1, 2, 3, 3A, 3B or 4 (if a general business insurer), Class A, B, C, D or E (if a long-term insurer), special purpose insurer, collateralised insurers, insurance manager, broker, agent or salesman).

Innovation Hub

The Innovation Hub is a platform for exchanging ideas and information and for facilitating dialogue between the BMA and market participants. The space designed for activities not directly regulated by the BMA and is ideal for a company still developing its thoughts and ideas, not yet prepared for proof of concept, and therefore not ready to apply for entry into the Sandbox. There is a dedicated working group for the insurance sector called the BMA Insurance Innovation Working Group.

The Innovation Hub is initially aimed at companies seeking to create innovative insurance solutions. However, it will be expanded to include other financial technology start-ups more broadly in the future.

10.2 Regulatory Response

This does not apply in this jurisdiction.

11. EMERGING RISKS AND NEW PRODUCTS

11.1 Emerging Risks Affecting the Insurance Market

This does not apply in this jurisdiction.

11.2 New Products or Alternative Solutions

This does not apply in this jurisdiction.

12. RECENT AND FORTHCOMING LEGAL DEVELOPMENTS

12.1 Developments Impacting on Insurers or Insurance Products

This does not apply in this jurisdiction.

13. OTHER DEVELOPMENTS IN INSURANCE LAW

13.1 Additional Market Developments

This does not apply in this jurisdiction.

Appleby is one of the world's leading offshore law firms. Its global teams of legal specialists advise public and private companies, financial institutions and private individuals. The firm's international presence, across ten global locations, offers comprehensive multi-jurisdictional legal advice. Its offices are based in the key offshore jurisdictions of Bermuda, the British Virgin Islands, the Cayman Islands, Guernsey, Isle

of Man, Jersey, Mauritius, the Seychelles and in the international financial centres of Hong Kong and Shanghai. The firm offers advice and services across corporate, dispute resolution, property, regulatory and private client and trusts practice areas, and works to achieve practical solutions whether from a single location or across multiple jurisdictions.

AUTHORS



Brad Adderley is the managing partner of Appleby's Bermuda office and has overall responsibility for managing its operations. In January 2022, he was appointed head of the

corporate department and the insurance and reinsurance global sector leader for the Bermuda group. Brad is also a partner in the corporate department in Bermuda and has been a member of the insurance team for over 25 years. He has extensive experience in the insurance and reinsurance market and specialises in ILS and alternative collateralised reinsurance investment transactions. He has advised clients on a wide range of transactions, including catastrophe bonds, special purpose insurers, sidecars, life insurance securitisations, and other fully collateralised structures.



Alan Bossin is COO at Appleby and a partner in the Bermuda corporate department. Alan specialises in insurance and reinsurance with a focus on mergers and acquisitions,

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Matthew Carr is a partner within the corporate department of Appleby's Bermuda office. He joined the firm in September 2010 as a trainee with the funds and investment services team

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Matthew has experience in a wide array of insurance and reinsurance matters involving captives, catastrophe bonds, special purpose insurers, and long-term and general business commercial re/insurers. His practice includes the provision of structural and regulatory advice for new and existing re/insurers, and he is frequently involved in the licensing process for new re/insurance structures.



Tim Faries is a partner in the corporate department in Bermuda and a member of the insurance team. Tim is also CEO of AGS Global. Tim was the Bermuda office managing

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