



Insurance & Reinsurance

in 23 jurisdictions worldwide

2014

Contributing editor: E Paul Kanefsky



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Getting the Deal Through is delighted to publish the fully revised and updated seventh edition of *Insurance & Reinsurance*, a volume in our series of annual reports, which provide international analysis in key areas of law and policy for corporate counsel, cross-border legal practitioners and business people.

Following the format adopted throughout the series, the same key questions are answered by leading practitioners in each of the 23 jurisdictions featured. New jurisdictions this year include Indonesia, Korea, Mexico and Turkey.

Every effort has been made to ensure that matters of concern to readers are covered. However, specific legal advice should always be sought from experienced local advisers. *Getting the Deal Through* publications are updated annually in print. Please ensure you are referring to the latest print edition or to the online version at www.gettingthedealthrough.com.

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. *Getting the Deal Through* would also like to extend special thanks to contributing editor E Paul Kanefsky of Edwards Wildman Palmer LLP for his invaluable assistance with this volume.

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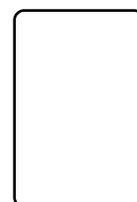
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Regulation

1 Regulatory agencies

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

There are two principal statutes that form the basis of the regulatory framework for the insurance and reinsurance business in the Bahamas. The Insurance Act, 2005 (the Domestic Act) and its associated regulations (domestic regulations) deal with domestic insurers, local branches of foreign insurers and the domestic market. The External Insurance Act, 2009 (the External Act) and its associated regulations (external regulations) regulate external (captive) insurers.

The government agency responsible for regulating insurance companies in the Bahamas is the Insurance Commission of the Bahamas. The Commission is an operationally independent body corporate that derives its authority from the Domestic Act. Its functions include maintaining surveillance over the insurance market, promoting and encouraging sound and prudent insurance management and business practices and ensuring that the provisions of the anti-money laundering legislation of the Bahamas are complied with. For these purposes, the Commission has powers of regulation, inspection and supervision over insurance companies.

The Commission, which has five to seven members appointed by the Governor-General, is answerable to the Minister of Labour and National Insurance, to whom it has to report annually on its operation and conduct. Members are selected for their wide experience and capacity in insurance, financial or commercial matters, industry, law and administration. An insurance advisory committee composed of at least 12 members appointed by the Commission will advise the superintendent in respect of general matters relating to the insurance industry within or outside the Bahamas.

The Commission is also the supervisory authority for regulating external insurance companies carrying on external insurance business from within the Bahamas under the External Act.

If the insurer is a public company as defined in the Securities Industry Act, 2011, its activities will also be overseen by the Securities Commission of the Bahamas.

2 Formation and licensing

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

The requirements for formation and licensing of new domestic insurance companies are set out in the Domestic Act and domestic regulations, and only corporate bodies that are registered as insurers may carry on insurance business in the Bahamas.

The name of the company must be approved by the Commission. It should reflect the type of insurance business to be undertaken, and may not confuse or deceive.

A domestic insurance or reinsurance company must be constituted in a manner that is acceptable to the Commission. It cannot be registered for both long-term and general insurance business and its

constitutive documents must restrict its activities solely to the carrying on of insurance business. Upon application to and approval by the Commission, a domestic insurance company may be constituted as a segregated account company under the Segregated Account Companies Act, 2004.

In the case of a foreign company seeking to conduct business as an insurer in the Bahamas, it must be lawfully constituted in accordance with the laws of the country in which it is incorporated and must have undertaken insurance business in that country for at least five years before the date of application for registration and the company must appoint a person resident in the Bahamas to be its principal representative in the Bahamas and inform the Commission in writing of the name and address of that person.

The Commission may request the applicant to furnish such additional information it may consider relevant.

The application package submitted to the Commission will include:

- details of the ownership structure;
- a detailed business plan reviewed by both an independent accountant and an independent actuary;
- evidence of compliance with all capital requirements and arrangements for reinsurance as necessary;
- sufficient information to permit the Commission to determine that the beneficial owners and the persons holding executive positions of the company are fit and proper persons to hold an insurance licence in the Bahamas; and
- certified copies of all constitutive documents, including licences issued by any external regulatory entity if licensed or regulated elsewhere.

The Commission can issue a restricted or unrestricted licence, and it may attach conditions as it deems necessary to the issue and continuance of a licence.

Companies seeking registration under the External Act are subject to largely equivalent requirements. However, there is no per se restriction on such companies engaging in business other than external insurance business proposed to be carried on from the Bahamas, although full disclosure of the nature and extent of such business must be made in the application. The Commission must also be satisfied as to the external applicant's compliance with other legislative and regulatory requirements (immigration, exchange control) as applicable.

Upon approval, the Commission will issue a designation, being either:

- a restricted external insurer, which may only underwrite risks of its members, subsidiaries and affiliates; reinsureds who acknowledge in writing that the external insurer is a restricted external insurer and such other persons as the Commission may approve; or
- an unrestricted external insurer.

The Commission may also specify the class or classes of business in which such restricted or unrestricted external insurers may engage.

3 Other licences, authorisations and qualifications

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

An insurer licensed under the Domestic Act must obtain a business licence under the Business Licence Act in order to conduct business in the Bahamas, which will further necessitate registration with the National Insurance Board in respect of its employees.

It should also be noted that under the Domestic Act, the Commission's prior approval is required in various post-licensing situations, including, *inter alia*, any change to the company's constitutive documents, changes in its beneficial ownership and the issue or use of a new form of policy or application for policy.

An insurer licensed under the External Act must appoint a person resident in the Bahamas as its local insurance manager, namely its principal representative in the jurisdiction. The obtaining of a business licence, work permits and the like will be required solely to the extent that the external insurer operates from within the Bahamas.

4 Officers and directors

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

A domestic insurance company in the Bahamas must have at least five directors. A director must be at least 18 years of age and must be a natural person of sound mind. He or she may not:

- be bankrupt;
- be prohibited from exercising the voting rights attached to shares of the company;
- be an officer, director or full-time employee of an entity that is prohibited from exercising the voting rights attached to shares of the company;
- be an agent or employee or minister of the government of the Bahamas; or
- be an insurance agent or broker of the company.

Residency requirements are imposed so that at least one half of the directors of a company that is a subsidiary of a foreign institution must be resident in the Bahamas and at least three-quarters of the directors of any other company must be resident in the Bahamas.

There are no special qualification requirements for officers and directors of external insurance companies under the External Act. However, complete and detailed background information on each such person (including *curricula vitae* and references) must accompany the application for registration under the External Act, with annual certifications as to the continuing accuracy of the same to be made thereafter.

5 Capital and surplus requirement

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

Domestic companies

Paid-up share capital

The minimum paid-up share capital requirements for insurance companies are the following:

- for long-term insurance business: minimum paid-up and unencumbered share capital of not less than B\$3 million;
- for general insurance business: minimum paid-up and unencumbered share capital of not less than B\$2 million; and
- for any other insurance business: minimum paid-up share capital of such amount as the Commission determines.

The actual required capital levels can vary depending on the business plan submitted with the application for registration. The requirements will be determined on the following criteria (projected or actual):

- the size of the company as measured by its assets, capital and surplus, reserves, premium writings and insurance in force;
- the kinds of business written, the company's net exposure and the degree of diversification of lines of insurance; and
- the past and anticipated trend in the size of the company's capital and consideration of premium growth, operating history, and loss and expense ratios.

Statutory fund

The Domestic Act requires every insurance company registered in the Bahamas to establish and maintain a statutory fund with a Bahamian financial institution approved by the Commission, provide both initial and annual statements to the Commission evidencing particulars of the liabilities of the company in respect of which the fund is established and particulars of the assets comprising the fund.

Where the Commission finds that statement unsatisfactory, incomplete, inaccurate, misleading or the value of the assets is insufficient or excessive, the Commission may give directions to the company for an increase or decrease of the value of the assets.

Deposits

Every insurance company is also required to establish and maintain specific deposits, which are to be placed in a trust; the trust is to be created by trust deed approved by the Commission.

The assets to be held in trust must be held by a trustee approved by the Commission. The minimum assets required to be deposited by a registered insurer from commencement of operations are as follows:

- for long-term insurance business – B\$2 million;
- for general insurance business – B\$1 million; and
- for entities that propose not to write any new business – B\$500,000.

The assets are to be valued at an amount that does not exceed the total of their book values less an investment valuation reserve within such an amount. Admissible assets for deposits include cash, unencumbered securities issued or guaranteed by the Bahamas government, other securities (as approved by the Commission) and irrevocable letters of credit (maximum 15 per cent of total) provided by an approved financial institution.

The Commission may require a company to increase or decrease the above amounts if it considers it necessary. Moreover, the Commission may require a reinsurer that reinsures all or part of an insurer's business to deposit balances owing to the insurer with the Commission.

Note that reinsurance companies are not required to make the aforementioned deposits.

Foreign companies registered under the Domestic Act

Foreign companies carrying on long-term insurance business in the Bahamas are required to vest in trust in the Bahamas assets equal to their liability and contingency reserves in respect of their policyholders in the Bahamas as established by the balance sheet of the company at the end of its last financial year.

Foreign companies carrying on general insurance business in the Bahamas must place in trust in the Bahamas assets equal to their liability and reserves less the amount deposited on account of the business in respect of their policyholders in the Bahamas as established by the revenue account of the company at the end of its last financial year.

Foreign companies must also deposit with the Commission the same amounts as local companies.

Solvency requirements

Additionally, an insurer must meet a minimum solvency margin. The margin of solvency is defined as the excess of the value of the company's admissible assets over the amount of its liabilities. In each year after registration a company must have the following assets:

- for a long-term insurance business: an amount equal to the total liabilities plus the minimum amount of capital required to satisfy the solvency requirement (namely, 20 per cent of the gross premium income including annuity premiums in its last financial year or B\$500,000, whichever is the greater amount); and
- for general insurance business: an amount equal to total liabilities plus the minimum amount of capital required to satisfy the solvency requirement (namely, 20 per cent of the company's first B\$10 million of premium income in respect of general business and 18 per cent of the amount by which the company's premium income in respect of general insurance business exceeds B\$10 million).

The solvency ratio is established on the basis of risk assessment in each particular case. As a general rule, the minimum solvency margin ratio for domestic long-term and general insurers is five to one net premium to capital or surplus, but a three to one margin is preferred.

Of the assets required for the minimum margin of solvency, at least 25 per cent (for an insurer carrying on long-term business) and at least 75 per cent (for an insurer carrying on general business) of such assets must be in approved form, which, in addition to admissible assets as previously defined, include loans by way of mortgages on real estate; net investment income due and accrued; premiums receivable; reinsurance balances receivable; accounts receivable net of provisions for bad and doubtful debts; land and buildings; and irrevocable letters of credit approved by a recognised bank, for such an amount and on such conditions approved by the Commission.

For purposes of solvency premiums may be reduced by up to 75 per cent of reinsurance where the reinsurer is approved by the Commission.

Surplus

Further, a company may be required to have additional funding as determined by the Commission in the form of contributed surplus so that the start-up expenses will not impair the initial capital.

External insurance companies

Paid-up capital

A company intending to engage in external long term business must have fully paid-up capital, capital surplus and subordinated capital or contributed reserve fund at a minimum aggregate sum of B\$200,000, whereas the requirement for a company intending to engage in external general insurance business is B\$100,000. A company may be licensed to engage in both external long term and general insurance business if its fully paid-up capital, capital surplus and subordinated capital or contributed reserve fund is at a minimum aggregate sum of B\$300,000. No specific parameters are set for an external insurer wishing to engage in variable insurance business; the Commission will review such applications and impose requirements on an ad hoc basis.

Registration under the External Act may be cancelled for failure to fulfil the requisite paid-up capital requirements.

It must be noted that registered insurance managers and external insurance brokers are also subject to capital and net asset requirements, along with an obligation to maintain a requisite level of professional indemnity insurance.

Solvency requirements

Specific solvency tests are mandated for restricted and unrestricted external insurers carrying on general business as well as every licensee carrying on long-term insurance business.

6 Reserves

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

The domestic regulations require domestic insurers to set aside certain reserve amounts to meet all claims on the insurance issued.

The reserve requirements for companies doing general insurance business are as follows:

- 80 per cent of the unearned net premiums computed pro rata per mensem, as at the date of the statement;
- 40 per cent of the annual net premium for the year of accounting, as at the date of the statement; or
- such amount as is calculated actuarially if the actuarial basis is approved by the Commission, whichever is higher.

In addition, every company carrying on general insurance business must provide reserves for meeting claims outstanding at the date of its annual statement of account and for meeting catastrophes as prescribed by the Commission. The Commission can exempt a company from providing such additional reserves or prescribe that the reserves are to be held in trust as a statutory fund.

There are no specific provisions in the Act in respect of reserves for long-term insurance business.

An insurer registered under the External Act may be required to maintain funds (in the form of cash, short-term securities or other easily realisable assets) equal to 40 per cent of the last annual total net premiums payable to such insurer. Failure to maintain reserves as mandated may lead to cancellation of the external insurance licence.

7 Product regulation

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

All licensed domestic insurance companies must sell or distribute their products through registered intermediaries (namely, salespersons, sub-agents, agents and brokers).

The Domestic Act details information and terms, which must be set out in policies for long-term insurance business, as well as mandating the particulars to be included in group life insurance policies. Other requirements are imposed in respect of beneficiaries, paid-up policies, surrender values, the non-forfeiture of policies and industrial life insurance business.

There are no specific provisions in respect of insurance products in the External Act.

There are presently no products offered for sale in the Bahamas that are regulated by multiple agencies.

8 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 Domestic Act sets out the rules for transfer and sale or merger of an insurance company: a company that desires to have the whole or any part of its insurance business transferred to or acquired by another company must obtain the approval of the Commission in writing.

The acquirer (namely, any person that proposes to take control or increase his or her interest in a registered insurance company) must obtain the prior approval of the Commission in writing. The Commission may approve the acquisition of control with or without conditions. It may refuse approval on the grounds that the acquirer is not a fit and proper person to have control over the company and the interests of consumers would be threatened by the acquirer's control.

If a person acquires control of a registered insurance company without any conscious action on his or her part, he or she must

notify the Commission before the end of the period of 14 days beginning with the day on which he or she first becomes aware that he has acquired control.

The circumstances in which a change of control is deemed to occur is set out in the Domestic Act. A detailed procedure as laid out in the Domestic Act (including provision for a public hearing) must be followed before the Commission will determine whether or not to approve the transaction.

The Commission must also be notified if 10 per cent or more of a company's ownership changes.

The Commission may reject the change of control in designated circumstances, including, *inter alia*, where the Commission believes that the proposed acquisition, amalgamation or transfer is detrimental to the policyholders, or the proposed acquisition, amalgamation or transfer is not in the public interest. Provision is made for appeal of the Commission's decision, within a designated period.

The Commission may undertake external background investigations on each of the present directors of a company, any directors it is proposed to appoint, any other persons in accordance with whose directions the directors of the company or any of them act or will act and each person who either has an interest or it is proposed will have an interest in shares of the company having a nominal value of 10 per cent or more of the company's total share capital and that carry voting rights.

It is a condition of any licence issued under the External Act that the licensee must obtain the prior written approval of the Commission in respect of any issue or transfer of shares to any person not named as a shareholder in its original application, unless upon such issue or transfer the new shareholder's interest is equal to 10 per cent or less of the aggregate book value of the total outstanding shares of the licensee. It should be further noted that both the auditor and the insurance manager engaged by an external insurer are required to submit annual confirmations to the Commission in which they attest, *inter alia*, that the information regarding ownership and control submitted to the Commission in the external insurer's application or any updates thereto is accurate.

9 Financing of an acquisition

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

Neither the Domestic nor the External Act contain any requirements or restrictions on the financing of the acquisition of an insurance or reinsurance company, although the Commission's prior written approval must be obtained.

10 Foreign investment

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

In order to make an investment in a company incorporated under the Companies Act or any other entity deemed 'resident' for exchange-control purposes by the Central Bank of the Bahamas, a prospective foreign investor, whether a person or an entity, must obtain the prior written approval of the Bahamas Investment Authority and the Central Bank of the Bahamas. This will largely apply solely in respect of a prospective foreign investment in a domestic insurance or reinsurance company.

External (captive) insurance is an area that the Bahamian government has especially targeted as being of particular interest to foreign investors. As a general rule, the insurance or reinsurance companies regulated under the External Act are not deemed 'resident' for exchange control purposes and, as such, a foreign investment in a non-resident company may take place without the approvals described in the preceding paragraph.

Obviously, the Commission's approval of the change in beneficial ownership of a domestic company will be required, as set forth in the response to question 8.

11 Reinsurance agreements

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

The Domestic Act expressly requires that in order to be registered in the Bahamas, an insurance company must make adequate arrangements for reinsurance, unless there is no justification for making such arrangements. These arrangements must be contained in the detailed business plan submitted to the Commission at the time the company applies to be licensed in the Bahamas.

The business plan must contain an overall assessment of the risk factors and an analysis of the proposed reinsurances. Details of reinsurance and net risk must be provided. The reinsurers must be identified by name and address and evidence provided of their financial solvency and consistent financial reliability, in order to ensure that where reinsurance is used to substantially reduce the potential liabilities outstanding, the policies are to be taken out with only reputable, well reserved and financially sound reinsurers.

Generally speaking, reinsurance through affiliated or related entities is permitted only with the Commission's prior approval where the affiliate or related party is not itself a registered insurer or is registered in another jurisdiction.

The Commission has the power to cancel an existing company's registration if it believes that the company's reinsurance arrangements are not satisfactory.

Similarly, a would-be external insurer must submit complete details of existing or proposed reinsurance arrangements in respect of each class of business in which it proposes to engage, along with the amount of retention in each case as part of its application to the Commission. The Commission may condition an external insurer's licence on maintaining certain arrangements for reinsurance, and may revoke its licence for any failure to comply.

12 Ceded reinsurance and retention of risk

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

The Commission has the power to restrict, via regulation or directive, the extent to which a registered Bahamian or foreign insurer may cause itself to be reinsured against risks. At present, neither the domestic nor the external regulations provide any specific requirements and restrictions in respect of the amount of ceded reinsurance and retention of risk by insurers. However, the nature and extent of existing or proposed reinsurance arrangements must be included in the application for registration of every company and these are therefore subject to the Commission's approval. A company in the application must clearly indicate the amount of the applicant company's retention in each case and the names of the insurance companies or associations of underwriters who will reinsure each class of the company's business, and the amount that will be reinsured by each.

13 Collateral

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

Neither the Domestic Act nor the External Act expressly prescribe collateral requirements for reinsurers in a reinsurance transaction. However, as previously mentioned, details of reinsurance arrangements must be contained in the business plan submitted to the Commission for approval. Reinsurers must be identified by name and address and evidence must be provided of their financial solvency and consistent financial reliability.

14 Insolvent and financially troubled companies

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

The Domestic Act deals with the voluntary winding-up of insurance companies and liquidation of insolvent insurance companies.

The External Act provides for compulsory winding-up of licensees and winding up on petition of the Commission in designated circumstances, as well as the establishment and maintenance of solvency margins.

15 Intermediaries

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

Domestic insurers may sell or distribute their products only through properly licensed and registered insurance intermediaries.

Insurance intermediaries (being brokers, agents, sub-agents, adjusters, risk managers, consultants, salespersons or any other persons promoting or facilitating insurance products or agreements) must be licensed. To obtain a licence, the applicant must be 'sufficiently competent and knowledgeable to carry on business as an insurance intermediary'. Except as otherwise expressly prescribed in the Domestic Act, insurance intermediaries other than salespersons and designated sub-agents must be corporate entities.

Where the applicant is an individual, he or she must be a person of good character and a fit and proper person to be an insurance intermediary and each of the persons, if any, with whom he or she is associated, whether as a partner or otherwise in his or her business as an insurance intermediary, must be a fit and proper person. He or she must have passed any required exams, and be a member in good standing of a professional association approved by the Commission.

If the applicant is a body of persons, each of the persons managing or controlling the body or, each of the partners or owners, as the case may be, must be a fit and proper person. The underlying persons must also have professional qualifications and affiliations as prescribed by the Commission.

In either case, having regard to the knowledge and competence of the individual or the persons managing the body or of the partners and such other staff as the body may employ, they must be capable of carrying on business efficiently as an insurance intermediary.

Limitations

An insurer cannot be registered as a broker, agent or other insurance intermediary. Similarly, adjusters, consultants or surveyors cannot be registered as salespersons, agents, sub-agents or brokers.

It should be noted that an agent cannot be registered in respect of general insurance business for more than five insurance companies at a time, or for long-term insurance business for more than three insurance companies at a time. A sub-agent cannot be registered in respect of more than one general and one long-term insurance agent at any given time. A salesperson cannot be registered for more than one agent or broker at any given time.

Underwriters

No association of underwriters can carry on insurance business in the Bahamas unless it is registered with the Commission. A member of an association can, after the date of registration, carry on its Bahamian insurance business other than long-term insurance business.

The persons who manage the applicant must be of good character and otherwise fit and proper persons to manage the applicant and the staff the applicant employs must be sufficiently competent and knowledgeable to carry on that business in an efficient manner.

If the applicant is constituted outside the Bahamas, additional obligations are imposed including the designation of one or more persons resident in the Bahamas who are authorised to accept service of process on the applicant in any legal proceedings.

The External Act mandates that persons providing insurance management services or acting as external insurance brokers must be licensed to engage in such activities. Notably, only companies incorporated in and under the laws of the Bahamas (a local company) may be so licensed; no individuals (wherever resident) or non-Bahamian companies may engage in such activities.

To obtain a licence to act as an insurance manager or external insurance broker, the local company must consider whether its owners, directors and senior managers are fit and proper persons and specifically whether they have or have access to sufficient knowledge and experience of insurance business adequate for the proposed activities and whether the net asset value of the local company is appropriate and sufficient for such activities. In this regard, the Commission may prescribe such minimum capital and insurance coverage requirements as it sees fit.

Insurance claims and coverage**16 Third-party actions**

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

Generally not. However, provision is made in the Road Traffic Act for insurers to make payment directly to a third party in respect of a liability that is covered by the terms of insured's motor vehicle policy in the event a judgment in respect of the same has been obtained.

17 Late notice of claim

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

There is presently no statutory guidance on this point. It will be governed by the contractual terms set out in the insurance policy.

18 Wrongful denial of claim

Is an insurer subject to extra-contractual exposure for wrongful denial of a claim?

No.

19 Defence of claim

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

There is presently no statutory guidance on this point. It will be governed by the contractual terms set out in the insurance policy.

20 Indemnity policies

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

There is presently no statutory guidance on this point. It will be governed by the contractual terms set out in the insurance policy.

21 Incontestability period

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

There is presently no statutory guidance on this point. It will be governed by the contractual terms set out in the insurance policy.

22 Punitive damages

Are punitive damages insurable?

There is presently no statutory guidance on this point, nor are there any reported cases in the Bahamas regarding the recovery of punitive damages. It should be noted that a court would award punitive damages only in the most exceptional circumstances.

23 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?

There is presently no statutory guidance on this point. It will be governed by the contractual terms set out in the insurance policy.

24 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?

There is presently no statutory guidance on this point nor are there any reported cases in the Bahamas that address it. As such, it will be governed by the contractual terms set out in the insurance policy.

25 Claim priority

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

There is presently no statutory guidance on this point. It will be governed by the contractual terms set out in the insurance policy. However, guidance should be sought in respect of implications arising in the event that payments are made shortly before insolvency.

26 Allocation of payment

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

There is presently no statutory guidance on this point. It will be governed by the terms set out in the insurance policy. It should be noted that an insured can only seek to be made whole and may not obtain payments in excess of the full amount of the loss. In the event payment under one policy satisfies the claim, an insurer may be entitled by the policy terms to bring an action for contribution from the insurers that issued the other policies.

Reinsurance**27 Reinsurance disputes**

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

There is presently no statutory guidance directly related to the settlement of reinsurance disputes. Formal disputes resulting in local litigation are uncommon, and there is consequently little if any case law on this point. At the present time, most of such contracts provide for resolution outside the jurisdiction.

28 Common dispute issues

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

The bringing into force of an updated and modernised Arbitration Act in 2010 is expected to facilitate the use of arbitration as a dispute resolution mechanism in insurance and reinsurance matters.

29 Arbitration awards

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

The Arbitration Act dictates that the reasons for an award must be stated therein, unless it is an agreed award or the parties have agreed to dispense with reasons.

30 Power of arbitrators

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

The arbitrators themselves do not have any power over non-parties to the arbitration agreement. However, with the permission of the arbitrators or the agreement of the other party (or parties), a party to the arbitral proceedings may request that a court compel the attendance of a witness to give oral testimony, produce documents or other material evidence if such witness is in the Bahamas and the proceedings are being conducted in the Bahamas.

31 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?

Yes, the parties may seek to vacate, modify or confirm arbitration awards through the judicial system, but there is little practical experience of this up to the time of writing. Under the Arbitration Act, an arbitral award may be set aside by the court in whole or in part on the following grounds: the arbitral tribunal lacked substantive jurisdiction; or there were serious irregularities (as detailed in the Arbitration Act) affecting the tribunal, the proceedings or the award. Parties are also permitted to appeal to the court on a question of law arising out of an award made by an arbitral tribunal.

Reinsurance principles and practices**32 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?

There is presently no statutory guidance nor are there any reported cases on this point. It will be governed by the terms set out in the reinsurance contract.

33 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.

It is likely that a Bahamian court would follow the English common law principle pursuant to which a duty of utmost good faith would be so implied, although we are not aware that there are any reported cases on this point.

34 Facultative reinsurance and treaty reinsurance

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

No such separate laws exist, nor are we aware of reported cases developing different principles in respect of facultative versus treaty reinsurance.

35 Third-party action

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

There is presently no statutory guidance on this point. Although questions as to coverage and rights of action are generally governed by the terms set forth in the reinsurance contract, there is likely to be a question as to whether in the absence of privity of contract any terms purporting to permit such an action would be given effect by the court.

Update and trends

Recently, the Commission issued a significant number of guidance notes and draft consultation documents, mainly addressing corporate governance matters including, among others, guidance on and for independent directors.

36 Insolvent insurer

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

The obligation will be governed by the terms set forth in the reinsurance contract.

37 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?

There is presently no statutory guidance nor are there any reported cases on these points. Consequently, the terms set out in the reinsurance contract will govern and mandate the availability of remedies.

38 Allocation of underlying claim payments or settlements

Where an underlying loss or claim triggers multiple 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?

There is presently no statutory guidance nor are there any reported cases on these points, which will be governed by the terms set out in the reinsurance contract.

39 Review

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

There is presently no statutory guidance on this point. It will be governed by the terms set out in the reinsurance contract.

40 Reimbursing of commutation payments

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

There is presently no statutory guidance on this point. It will be governed by the terms set out in the reinsurance contract.

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