Bermuda Insurance Litigation Guide 2024 (Chambers)

Service Area: Insurance Law, Dispute Resolution and Litigation

Sector: Insurance

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1 Rules governing insurer disputes

1.1 Statutory and procedural regime

Bermuda is a British Overseas Territory. The modern legal system of Bermuda is established by the Bermuda Constitution Order 1968, an Order in Council of the United Kingdom that established the Supreme Court as the primary court of first instance and the Court of Appeal as the court with jurisdiction to hear appeals from judgments of the Supreme Court. The Appeals Act 1911 further establishes a right of appeal from any judgment of the Court of Appeal to the Judicial Committee of the Privy Council in London. This ultimate right of appeal to the Privy Council, along with the common law, is one factor that has made Bermuda an attractive jurisdiction for insurers.

Bermuda's legal system is largely based on English common law. The Supreme Court Act 1905 further establishes that (subject to the provisions of any acts of the Bermuda legislature) the common law, the doctrines of equity and the Acts of the Parliament of England of general application that were in force in England at the date when Bermuda was settled on 11 July 1612 have force within Bermuda.

Insurance disputes that are litigated in the Bermuda courts are generally heard by the Commercial Court, which is one of the five divisions of the Supreme Court. The same procedural regime that governs all commercial litigation governs insurance disputes in the courts, which is contained in the Rules of the Supreme Court 1985 (1985 Rules).

The primary statute governing insurance-related activities in Bermuda is the Insurance Act 1978 (Insurance Act); insurance and reinsurance companies are also subject to the provisions of the Companies Act 1981.

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1.2 Litigation process and rules on limitation

Litigation process

The Supreme Court possesses and exercises the jurisdictions of the court of general assize, the court of chancery, the court of exchequer, the court of probate, the court of ordinary and the court of bankruptcy. There is also a Commercial Court, which deals exclusively with commercial (including insurance) and arbitration-related matters.

Appeals are common in Bermuda. The Court of Appeal has five Justices of Appeal, with the current President being Sir Christopher Clarke. Appeals are typically heard by three Justices. The Court of Appeal sits for three sessions of around a month per year.

Trials are conducted using the adversarial model between plaintiffs and defendants, with barristers making both oral and written submissions on their behalf. Bermuda has a fused legal profession and Bermuda litigators are both barristers and attorneys, although in special circumstances English King's Counsel are admitted to the Bermuda Bar.

Civil proceedings in the Supreme Court may be begun by writ, originating summons, originating motion or petition. The 1985 Rules prescribe which originating process to use on the basis of the facts and circumstances of the case.

A typical civil action is commenced by filing a generally endorsed writ of summons, naming the parties to the action and providing very brief details of the relief sought. If the defendant defends the claim, then a generally endorsed writ must be supplemented by a statement of claim with the facts upon which the action is founded.

The party bringing the action is responsible for service. When a company is the defendant, a copy of the proceedings will be properly served if it is left at the registered office of the company in Bermuda. With respect to parties outside of the jurisdiction, the Supreme Court can be asked to make an order for service outside of the jurisdiction if the criteria in Order 11, Rules 1 and 2 of the 1985 Rules are met. A defendant who fails to respond as required under the 1985 Rules can have a default judgment entered against them.

Following the originating process to commence proceedings, the litigation process will move through the steps of interim applications, discovery and trial, closing with judgment.

Rules on limitation

The Limitation Act 1984 sets out the applicable limitation periods. The majority of claims are subject to a limitation period of six years, which applies to claims for breach of a contract and in tort. A 20-year limitation period applies where the claim is based on a contract under seal or concerns the recovery of land and the proceeds of the sale of land or monies secured by a mortgage or a charge.

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In contract law, the limitation period typically runs from the date on which the contract was breached. For a tort, the limitation period commences on the date the damage occurred. The Limitation Act 1984 makes provision for latent defects, as well as for cases where the cause of action could not, with reasonable investigation, have been discovered sooner.

Limitation is not an automatic bar to an action or recovery under it. A defendant must raise the Limitation Act 1984 as a defence and specifically plead the same.

1.3 Alternative dispute resolution (ADR)

Arbitration and mediation are the most common forms of ADR in Bermuda, which is a sophisticated hub for international arbitration of complex insurance and reinsurance disputes and has incorporated the UNCITRAL Model law into its domestic legislation via the Bermuda International Conciliation and Arbitration Act 1993. A branch of the Chartered Institute of Arbitrators was established in Bermuda in 1996, the primary function of which is to run arbitration training courses and to act as an appointing authority when asked to do so.

The court has repeatedly confirmed in judgments relating to the enforcement of arbitration agreements and awards that it will adopt a pro-enforcement stance on such matters, in keeping with Bermuda's obligations under the New York Convention (which has had the force of law in Bermuda since 1979).

The use of ADR is not mandated under the 1985 Rules, but that fact has not prevented the growth of its popularity and use, particularly mediation. The Supreme Court can impose costs consequences on a party where it has refused to engage in ADR and such refusal proves to be unreasonable. The Bermuda branch of the Chartered Institute of Arbitrators has localised procedural rules for mediation and arbitration, which are based on the UNCITRAL Rules.

Insurance and reinsurance contracts very often incorporate arbitration agreements, and confidential arbitration is the most common means of resolving insurance disputes in Bermuda.

2. Jurisdiction and choice of law

2.1 Rules governing insurance disputes

Choice of law

Bermuda's conflict of laws rules regarding determining the choice of law in contract are the same as the "old" English common law rules. They were unaffected by the legislation binding the United Kingdom during its membership of the European Union, which was not applicable in Bermuda (for example, the Rome I Regulation).

If the parties to a contract choose a particular law to govern the contract, effect will generally be given to that choice. In the absence of an express choice of law, the court will seek to identify either:

- an implied or inferred choice discerned from the surrounding circumstances; or
- the system of law with which the alleged contract has its closest connection.

It is common for parties to Bermuda insurance and reinsurance contracts to select Bermuda law to govern the contract.

The only statutory provision that limits the parties' freedom to select the governing law of a contract is Section 11(2) of the Segregated Accounts Companies Act 2000, which provides that the governing instruments in relation to segregated accounts are deemed to be governed by Bermuda law.

For tort claims, the Bermuda court first considers where the tort was committed in substance. For torts committed outside of Bermuda, the court applies the double-actionability rule: the tort must be actionable under both the lex fori and lex loci delicti.

Jurisdiction

In general, when determining whether or not a proposed defendant is subject to its jurisdiction, the Bermuda court will consider whether the proposed defendant can be validly served within the Islands of Bermuda or whether a defendant has submitted, or has agreed to submit, to the jurisdiction of the Bermuda courts (for example, by contract or by taking steps in the litigation proceedings in Bermuda). If the proposed defendant has a foreign address, the plaintiff must obtain leave to serve the proposed defendant out of the jurisdiction, pursuant to Order 11 of the 1985 Rules.

However, the External Companies (Jurisdiction in Actions) Act 1885 permits a foreign company doing insurance business in Bermuda by an agent or branch to be sued in the name under which they carry on business in Bermuda. It further provides that service of process on the agent or manager of the company in Bermuda is good service, without the need for leave.

2.2 Enforcement of foreign judgments

Foreign money judgments can be enforced by or against insurers in Bermuda, either under the Judgments (Reciprocal Enforcement) Act 1958 (1958 Act) or under common law principles, provided that certain conditions are met. The method of enforcement is therefore dependent on the jurisdiction in which the judgment was given.

The 1958 Act allows money judgments (including arbitration awards that would be enforceable as judgments in the United Kingdom) from the superior courts of the United Kingdom (along with certain Commonwealth countries and overseas territories to which the Governor has declared the 1958 Act applies) to be enforced by registration of the judgment in the Supreme Court at any time within six years after the date of the judgment. The judgment must be final and conclusive, and the sum must not be in respect of taxes, fines or penalties.

A foreign judgment from a country not catered for by the 1958 Act can be enforced in Bermuda under common law principles. Fresh proceedings must be issued in Bermuda, with the debt obligation created by the foreign judgment as the cause of action in the Bermuda proceeding. The foreign court must have had jurisdiction over the judgment debtor in accordance with Bermuda's conflict of laws rules.

Non-money judgments are not enforceable under the 1958 Act or common law. For example, a judgment ordering specific performance of a contract will likely not be enforceable, although it may be capable of recognition. Injunctions will also not be enforced – they may be recognised by the Bermuda courts as a defence to a claim or as conclusive of an issue in a claim but would not be sufficient to found a cause of action.

Arbitration awards are enforceable through the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards and Part IV of the Bermuda International Conciliation and Arbitration Act 1993.

Judgments that consist of an award of multiple damages will not be enforced in Bermuda.

2.3 Unique features of litigation procedure

The 1985 Rules are similar to the English civil procedure rules that applied in 1999; as a result, practitioners and the courts utilise the 1999 edition of the English "White Book" and its commentary to assist in the interpretation and application of the 1985 Rules.

Unlike the modern English rules, the 1985 Rules do not impose any specific pre-action protocols. However, parties will still typically engage in pre-action correspondence pursuant to the overriding objective set out in Order 1A of the 1985 Rules, which obliges parties to assist the court in order to identify issues at an early stage and save costs.

Whilst English case law is persuasive in Bermuda, judges and lawyers in Bermuda will also look to the case law of other common law and offshore jurisdictions, such as Australia, Canada, New Zealand, the Cayman Islands, the BVI, Hong Kong and Singapore, particularly when issues arise for which there is no precedent in the Bermuda courts.

3 Arbitration and insurance disputes

3.1 Enforcement of arbitration provisions in commercial contracts

Arbitration clauses are common in commercial contracts of insurance and reinsurance concluded in Bermuda or by Bermuda-based insurers and reinsurers.

The Bermuda courts will generally enforce arbitration agreements, and have confirmed that that should be the ordinary approach in a number of judgments. The court's pro-enforcement powers extend to issuing anti-suit injunctions to restrain parties from acting in violation of an arbitration agreement. The presumption is that an anti-suit injunction will be granted where the arbitration agreement in question is valid and binding, and the respondent party has not shown strong reasons that the injunction ought not to be granted. The Bermuda court can grant such injunctive relief notwithstanding the jurisdiction in which proceedings are commenced and regardless of whether the seat of the arbitration is Bermuda. A party in breach of an anti-suit order can be held in contempt of court, and any resulting foreign judgment could be held to be unenforceable in Bermuda.

3.2 The New York convention

Bermuda is subject to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, which has had force of law in Bermuda since the United Kingdom extended it to Bermuda in 1979. Part IV of the Bermuda International Conciliation and Arbitration Act 1993 provides a statutory enforcement regime for New York Convention awards.

The award creditor must file an application seeking leave to enforce the award. An originating summons must be issued on an ex parte basis, along with a supporting affidavit setting out the basic facts of the arbitration, the fact of the agreement to arbitrate, the hearing and the award. The affidavit should exhibit the arbitration agreement and the original award. Once the award creditor obtains an order granting leave to enforce, it will be served on the award debtor. An application to set aside the order can be made – in lieu of any such application, the award can be enforced as if it were a judgment of the court.

As noted in **2.2 Enforcement of foreign judgments**, the 1958 Act also provides for the enforcement of awards from the United Kingdom (and other select countries) for the payment of money, so long as the award would be enforceable as a judgment in the United Kingdom.

3.3 The use of arbitration for insurance dispute resolution

Arbitration is the prevalent form of insurance dispute resolution in Bermuda, making Bermuda a sophisticated hub for the arbitration of complex insurance and reinsurance disputes. The vast majority of business lines, with the property and casualty at the centre of the Bermuda market, as well as the captive industry, utilise arbitration agreements as the primary form of dispute resolution clause.

In Bermuda, there are two arbitration statutes: the Arbitration Act 1986 (the 1986 Act) governing arbitrations between purely domestic parties, and the Bermuda International Conciliation and Arbitration Act 1993 (the 1993 Act) governing international arbitrations seated in Bermuda. The Acts themselves determine what arbitrations they apply to, and whether an arbitration is "domestic" or "international". The 1993 Act incorporates the UNCITRAL Model Law into Bermuda law.

If Bermuda law applies to the interpretation of the arbitration agreement, a Bermuda arbitration will generally be confidential.

The 1986 Act provides for a right of appeal of an arbitration award to the Court of Appeal on any question of law arising out of the award. In the absence of consent of all parties, leave must first be obtained from the Supreme Court. There is no right of appeal under the 1993 Act, although a party could seek to challenge an award in the Court of Appeal on the very limited grounds that are taken from the New York Convention – eg, public policy or the dispute being incapable of resolution by arbitration.

4 Coverage disputes

4.1 Implied terms

Insurance and reinsurance contracts are subject to the same rules of contractual construction as any other commercial contract, and terms can be implied as a matter of judicial construction.

There are two statutes that imply terms into insurance and reinsurance contracts.

First, for a contract written by a segregated accounts company, the Segregated Accounts Companies Act 2000 provides that the following are implied terms:

- that the parties select the law of Bermuda as the governing law and submit to the jurisdiction of the courts of Bermuda;
- that no party shall seek, whether in any proceedings or by any other means whatsoever or wheresoever, to establish any interest in or recourse against any asset linked to any segregated account to satisfy a claim or liability not linked to that segregated account;
- that if any party succeeds by any means whatsoever or wheresoever in establishing any interest in or recourse against any asset linked to that segregated account, that party shall be liable to the company to pay a sum equal to the value of the benefit thereby obtained by them; and
- that if any party succeeds in seizing or attaching by any means or otherwise levying execution against any assets linked to any segregated account of the company in respect of a liability not linked to that segregated account, that party shall hold those assets or their proceeds on trust for the company and shall keep those assets or proceeds separate and identifiable as such trust property.

Second, the Supply of Services (Implied Terms) Act 2003 implies terms regarding the period of time for completion under a contract and the consideration to be paid are reasonable, if not otherwise set. There is also an implied term that that the supplier will carry out the service with reasonable care and skill. This is generally understood to be directed to consumer contracts.

4.2 Rights of insurers

Insurance and reinsurance law in Bermuda is based on the English common law. However, unlike in England, the issues of non-disclosure and misrepresentation are not governed by statute (except in the case of life insurance). A recent divergence in the laws of Bermuda and England on these issues has arisen from the introduction of the Insurance Act 2015 in England. This modified the previously applicable common law remedies for non-disclosure and misrepresentation (collectively considered to be breaches of the duty of utmost good faith), which were also codified in the Marine Insurance Act 1906 (whilst this statute does not apply in Bermuda, some of its provisions are declaratory of the common law and as such are likely to be considered in determining the Bermuda common law). There have been no such revisions to the remedies in Bermuda. The duty of utmost good faith as it was characterised by the common law before the Insurance Act 2015 came into force in England (on 12 August 2016) continues to apply to all insurance contracts in Bermuda.

As a matter of principle, insurance contracts governed by Bermuda law are contracts of "utmost good faith" (also known as the principle of uberrima fides). This common law duty applies to insurance contracts in Bermuda and is imposed on both the insured and the insurer, as the parties to the contract. In placing and effecting the insurance contract, the intended insured party (and its broker) owe the following pre-contractual duties that comprise the duty of utmost good faith:

- a duty of disclosure, requiring the insured to disclose all material facts to the insurer; and
- a duty not to make misrepresentations.

Failure on the part of the insured to discharge these duties will give the insurer the remedy of avoidance ab initio. This has the same effects as rescission of a contract – it means that the parties are placed retroactively into the position they would have been in had the contract never existed. The insurer must be careful not to waive its right to avoid the contract or affirm the contract. The remedy of avoidance must be elected by the insurer. The parties can agree to limit the scope of pre-contractual duties and the requirement to make an accurate representation through their insurance contract(s).

A breach of a continuing warranty discharges the insurer from any further liability under the contract from the date of breach (but still allowing claims by the insured in respect of any loss occurring before the breach). This discharge is automatic, and the insurer need not make any election. In the case of a breach of an existing fact warranty, the fulfilment of the warranty is a condition precedent to the attachment of the risk and thus a breach would effectively void the contract ab initio.

4.3 Significant trends in policy coverage disputes

Given that the vast majority of coverage disputes in Bermuda are arbitrated confidentially, trends are difficult to identify.

Noteworthy coverage disputes in Bermuda often arise from areas of Bermuda-specific insurance innovation, such as the statutory segregated account regimes. Insurance companies utilise segregated accounts for rent-a-captive solutions, ILS transactions and the separation of reserves amongst business lines, and unique coverage issues and disputes rise from these structures, which cannot always be determined by reference to the usual common law principles of coverage.

The Supreme Court delivered a seminal judgment in August 2023 that reinforced the integrity of the segregated accounts company structure and the separation of assets and liabilities as between segregated accounts. The judgment will likely be cited in all future insurance disputes that involve a segregated accounts company.

4.4 Resolution of insurance coverage disputes

The majority of coverage disputes subject to Bermuda law are resolved by way of confidential arbitration. Mediation is also common.

Many insurance contracts for excess liability insurance and reinsurance written in Bermuda are written on the Bermuda Form. Disputes arising therefrom are resolved in Bermuda Form arbitration – that is, an English procedural law-governed arbitration of a contract governed by New York law. Bermuda Form arbitration agreements invariably provide for a seat in London or Bermuda.

4.5 Position if insured party is viewed as a consumer

Most insurance business written in Bermuda is international insurance and reinsurance; on that basis, there is little consideration of consumer protections in Bermuda insurance law and procedure. It is worth noting, however, that the Consumer Protection Act 1999 protects consumers from unfair business practices, and that the insurers carrying on "domestic business" in Bermuda are obliged by the Insurance Code of Conduct of the Bermuda Monetary Authority (BMA) to conduct their business with customers fairly and with integrity.

4.6 Third-party enforcement of insurance contracts

The Contracts (Rights of Third Parties) Act 2016 permits a third party to enforce a term of a contract where:

- the third party is identified in the contract by name, as a member of a class, or as answering a particular description; and
- the contract expressly provides in writing that the third party can enforce such term. This allows properly drafted cut-through provisions to provide a valid means of third-party enforcement rights in Bermuda.

The Third Parties (Rights Against Insurers) Act 1963 allows a third party to take direct action against an insurer in circumstances where its insured owes a liability but is insolvent. The Motor Car Insurance (Third-Party Risks) Act 1943 has similar provisions.

Finally, the Merchant Shipping Act 2002 also provides a statutory right to lodge proceedings to enforce a claim for oil discharge liability against a ship's insurer.

4.7 The concept of bad faith

Bermuda law does not recognise any concept of "bad faith" as a basis for awarding damages against an insurer, for example due to its conduct during the administration or handling of a claim. There are no "damages on damages".

4.8 Penalties for late payment of claims

There are no statutory remedies for the late payment of claims in Bermuda.

However, insurers and reinsurers are regulated by the BMA, which has wide-ranging enforcement powers, including the giving of directions (pursuant to the Insurance Act) to an insurer restricting the business it can write in circumstances where the BMA considers there to be a significant risk that the insurer will be unable to meet its obligations to policyholders.

Insurers are also bound by the BMA's Insurance Code of Conduct, which provides that insurers should implement policies that require them to address claims in a timely, fair and transparent manner and avoid any aggressive and coercive claims handling tactics and discrimination during the claims handling process. This is consistent with the principle, also contained within the Insurance Code of Conduct, that directors of a Bermuda insurer must act in the best interest of the company and its policyholders. In any event, insurers must conduct their business in a prudent manner in accordance with the Insurance Act, and compliance with the Insurance Code of Conduct is a determinative factor in the BMA's assessment of such prudent conduct of business.

4.9 Representations made by brokers

As a general principle, a broker acts as an agent of the insured or the reinsured, particularly when it is placing cover. However, brokers can have many roles and will often find themselves as dual agents, particularly in circumstances where they are placing both reinsurance and a retrocession. Section 29 of the Insurance Act, for example, makes a broker with authority to accept premium the agent of the insurer.

Therefore, whilst the insured certainly can (and often will) be bound by its broker's representations, this is unlikely ever to be straightforward. This is particularly the case in Bermuda, where brokers are involved in more than one capacity – eg, with respect to captives.

It is worth noting that the BMA's Insurance Brokers and Insurance Agents Code of Conduct provides that an insurance broker must not recommend a transaction to a client unless it has taken reasonable steps to make the client aware of the risks involved, including any conflicts of interest and that, when providing advice to or arranging contracts of insurance for the client, a broker shall make full and adequate disclosure of all facts necessary for its clients to make an informed decision. The BMA has specific powers to grant and revoke a broker's registration in Bermuda under the Insurance Act.

4.10 Delegated underwriting or claims handling authority arrangements

Delegated underwriting and claims handling authority arrangements are often used by Bermuda insurers and reinsurers. Such arrangements are necessarily subject to appropriate oversight by the insurers as part of their overall risk management and material outsourcing requirements, and as such do not generally result in particular litigated issues in Bermuda.

5 Claims against insureds

5.1 Main areas of claims where insurers fund the defence of insureds

Coverage for defence costs is provided in many types of liability policy, including professional indemnity and director's and officer's insurance policies. Different policies can provide for defence costs, in addition to the policy limit or within it.

In the context of Bermuda Form policies, defence cost coverage is often provided by way of endorsement.

5.2 Likely changes in the future

There is no indication that there will be any change in defence costs coverage in the coming years.

5.3 Trends in the cost or complexity of litigation

The COVID-19 pandemic made it necessary for court proceedings to take place remotely, and the courts have maintained the ability to hear matters in this way. This has permitted judges to sit remotely, which has allowed for more efficient use of the court's resources. It has also allowed for clients, overseas counsel and even witnesses to attend hearings remotely when they would ordinarily have flown to Bermuda to attend.

Earlier in 2024, both the Supreme Court and the Court of Appeal introduced significantly higher court fees for court filings.

5.4 Protection against costs risks

Bermuda has no third-party funding legislation but these arrangements are permitted in Bermuda, having been blessed by the courts, which have rejected arguments that such arrangements are unlawful.

Third-party funding can be used by any party and in any amount.

Contingency fees are prohibited in Bermuda by the Barristers' Code of Professional Conduct 1981, Rule 96.

6 Insurers' recovery rights

6.1 Right of action to recover sums from third parties

Insurance contracts are contracts of indemnity and, as a matter of Bermuda law, an insurer has equitable rights of subrogation – ie, an insurer can receive recoveries from third parties that would serve to reduce the insured loss and bring proceedings in the name of the insured against liable third parties, having provided contractual indemnification to the insured.

6.2 Legal provisions setting out insurers' rights to pursue third parties

There is no legislative codification of subrogation rights in Bermuda – a court will consider the terms of the contract and apply common law principles. Subrogation claims are made in the name of the insured.

7 Impact of macroeconomic factors

7.1 Type and amount of litigation

Insurers and reinsurers in Bermuda continue to monitor and navigate the effects of the COVID-19 pandemic, and the extent of reinsurance disputes that may reach Bermuda for resolution remains to be seen.

With respect to the war in the Ukraine, issues arise in Bermuda from the registration of Russian aircraft in the jurisdiction. The sanctions levied against Russian and Belarusian entities have caused issues for Bermuda insurers and other financial institutions to address, including with the regulatory authorities.

Bermuda's reinsurance sector is also uniquely exposed to the rise in natural catastrophes, particularly hurricanes in North America.

Each of these unprecedented factors creates an environment for insurance-related disputes. However, it is difficult to measure the impact in light of the preponderance of arbitrations for the resolution of insurance and reinsurance disputes.

7.2 Forecast for the next 12 months

It is conceivable that the Bermuda insurance market could be exposed to unique and novel claims and disputes in the coming year, in response to the evolving risks from industries such as digital assets and licensed cannabis cultivation, each of which can be insured in Bermuda. Cyber perils also continue to present new and developing challenges to insurers globally, particularly with the growth of AI technologies, and Bermuda is no different.

Bermuda's segregated accounts regime is another area that could create additional disputes. The BMA has recently issued a Guidance Note outlining its expectations for companies using segregated accounts to conduct regulated insurance business. This is due to become effective on 1 January 2025. Along with the Incorporated Segregated Accounts Companies Act, which was enacted in 2019, these innovative ways of conducting insurance business in Bermuda have the potential to create novel disputed issues amongst counterparties and with regulatory authorities.

7.3 Coverage issues and test cases

The Bermuda court gave important judgments in 2022 and 2023 regarding the integrity of the segregation of accounts regime, in Ivanishvili v Credit Suisse Life (Bermuda) Ltd [2022] SC Bda 56 Civ and in Re Northstar Financial Servies (Bermuda) Ltd and Omnia Ltd [2023] SC Bda 57 Civ.

7.4 Scope of insurance cover and appetite for risk

Individual insurers will have varying lines of coverage and portfolios of risk, and the management of these will inevitably be impacted by specific and general market developments from time to time, including litigation developments.

The Bermuda reinsurance market has generally reported that the impact of the COVID-19 pandemic on the (re)insurance industry in particular remains uncertain. The potential scale of the losses is such that substantial capital retention is generally required until there is greater certainty, locking up capital that could otherwise be used to back new underwriting and thus exacerbating the demands on capital.

8 Emerging risks

8.1 Impact of ESG on underwriting and litigating insurance risks

Bermuda reinsurers are required specifically to consider and address ESG risk as part of their overall risk management framework. Climate change risk in particular has been identified by the BMA as a significant financial risk to insurers and, as a result, the underlying stability of the financial sector. As such, in addition to the general assessment of ESG risks in the context of each insurer's business and operations, Bermuda insurers are expected specifically to take a proactive (and proportionate) approach to manage and, where possible, mitigate risks associated with climate change. This expectation applies to insurers in respect of both their underwriting activities and their operations and investments, and therefore can have a material impact on underwriting and risk management.

8.2 Data protection laws

While certainly important in its own right, Bermuda's data privacy laws (in particular, the Personal Information Protection Act 2016) are not generally expected to have a material impact on the underwriting and litigation of insurance risks by Bermuda insurers.

9 Significant legislative and regulatory developments

9.1 Developments affecting insurance coverage and insurance litigation

There have been a number of detailed changes to both the general business and long-term business insurance regulations that have an impact on the calculation of the relevant capital and solvency ratios. These changes to the capital model will likely have a general effect on the nature and extent of risks to be underwritten as capital needs adjust, but no overall impact on insurance coverage, insurance litigation or claims that insurers will fund the defence is expected.