ICLG

The International Comparative Legal Guide to:

Insurance & Reinsurance 2013

2nd Edition

A practical cross-border insight into insurance and reinsurance law

Published by Global Legal Group, with contributions from:

Anderson Mōri & Tomotsune
Bedell Cristin
Blaney McMurtry LLP
Bulló - Tassi - Estebenet - Lipera - Torassa - Abogados
Cabemery and Partners (PTY) Ltd
Cabinet BOPS
Clyde & Co LLP
Clyde & Co (CIS) LLP
Creel, García-Cuéllar, Aiza y Enríquez, S.C.
Cruz Costa Advogados
DAC Beachcroft
De La Torre & Monroy
Erçin Bilgin Bektaşoğlu Law Firm
gbf Attorneys-at-law
Gross Orad Schlimoff & Co.
Harris Kyriakides LLC
Heenan Blaikie LLP
Johnson Šťastný Kramařík, advokátní kancelář, s.r.o.
Joseph Tan Jude Benny (Taipei)
Lenczner Slaght Royce Smith Griffin LLP
Lewis Baach PLLC
Marek Czernis & Co. Law Office
Noerr LLP
Osterling Abogados
Pachiu & Associates
Rose-Marie Lundström Advokat AB
Russell McVeagh
Studio Legale Turci
Tuli & Co
William Fry
Wotton + Kearney

GLG
Global Legal Group

The International Comparative Legal Guide to: Insurance & Reinsurance 2013

GLG
Global Legal Group

Contributing Editors
Jon Turnbull & Geraldine Quirk, Clyde & Co LLP

Account Managers
Brigitte Descacq, Henry Galezowski, Dror Levy, Maria Lopez, Florjan Osmani, Oliver Smith, Rory Smith, Toni Wyatt

Sub Editors
Beatriz Arroyo
Fiona Canning

Editor
Suzie Kidd

Senior Editor
Penny Smale

Group Consulting Editor
Alan Falach

Group Publisher
Richard Firth

Published by
Global Legal Group Ltd.
59 Tanner Street
London SE1 3PL, UK
Tel: +44 20 7367 0720
Fax: +44 20 7407 5255
Email: info@glgroup.co.uk
URL: www.glgroup.co.uk

GLG Cover Design
F&F Studio Design

GLG Cover Image Source
iStockphoto

Printed by
Ashford Colour Press Ltd
February 2013

ISBN 978-1-908070-50-0
ISSN 2048-6871

Strategic Partners

AEJE ECLA

FSC MIX Paper from responsible sources FSC® C011748

General Chapters:

Country Question and Answer Chapters:

Further copies of this book and others in the series can be ordered from the publisher. Please call +44 20 7367 0720

Guernsey

Bedell Cristin

Mark Helyar

1 Regulatory

1.1 Which government bodies/agencies regulate insurance (and reinsurance) companies?

The regulation of financial services business in the Bailiwick of Guernsey, including insurance and reinsurance activities and related insurance intermediary activities, is carried out by the Guernsey Financial Services Commission ("GFSC"). The primary legislation relating to the supervision and licensing of insurers and reinsurers by the GFSC is the Insurance Business (Bailiwick of Guernsey) Law, 2002, as amended ("IBL").

The Bailiwick of Guernsey includes the Islands of Sark, Alderney and Herm for the purposes of regulation of insurance and reinsurance activity.

The GFSC also has responsibility for the regulation of insurance managers, brokers and other insurance intermediaries under the provisions of the Insurance Managers and Insurance Intermediaries (Bailiwick of Guernsey) Law, 2002, as amended ("IMIL"). The provision of reinsurance brokerage services in Guernsey does not currently require any form insurance licence although it is likely to be subject to requirements to comply with anti money-laundering legislation.

Insurance business is generally separated into long term (i.e., in broad terms life or longevity-related insurance products) and general insurance business. These carry different regulatory requirements in terms of minimum capitalisation and solvency. There is also a regulatory distinction between international insurance activities and domestic insurance (i.e., the insurance of local risks).

Guernsey has a substantial captive insurance sector, the largest in Europe, where insurance companies are wholly owned by the parent company whose risk they insure (or indirectly reinsure through fronting arrangements). Captive insurers form the bulk of Guernsey-licensed insurers. In addition, Guernsey has protected cell and incorporated cell companies which are utilised as insurance structures for more than one cell owner at the same time, but where liability is ring-fenced by statutory provision from the potential insolvency of other cells. Such structures are typically referred to as "rent-a-captives". Captive insurers mainly outsource their management to licensed insurance managers who are themselves licensed and regulated by the GFSC. Every licensed insurer must have a Guernsey resident general representative responsible for the preparation and submission of returns and reports to the GFSC.

Insurance companies or reinsurers may also be subject to regulation by the GFSC under legislation such as the Protection of Investors (Bailiwick of Guernsey) Law, 1987, as amended, in circumstances where they issue securities to the public. For this purpose, the definition of securities is wide and includes shares, stock, loans debentures and various classes of derivatives of such securities including warrants and options.

All financial services businesses in the Bailiwick of Guernsey are required to comply with anti-money laundering and anti-terrorist financing legislation.

1.2 What are the requirements/procedures for setting up a new insurance (or reinsurance) company?

An applicant must submit an authorisation application which is compliant with the Insurance Business (Licensing) Regulations, 2010. These include a requirement to provide:

- a completed application form in the prescribed format (www.gfsc.gg);
- details of the proposed applicant;
- a detailed business plan;
- details of the proposed personnel and third-party service providers of the applicant, including the general representative; and
- details of the proposed bank mandate signing powers of the applicant.

A copy of the applicant's certificate of incorporation, memorandum and articles and physical confirmation that share capital has been received and/or that letters of credit or subordinated loans are in place is also required before a licence can be granted. Currently the minimum capital requirements are £100,000 for general business and £250,000 for life business. Additional information is likely to be required in circumstances where an applicant, controller, or ultimate beneficial owner of a company is resident in a sensitive jurisdiction, as published from time-to-time by the GFSC. There are specific disclosure requirements in place for producer-owned reinsurance companies ("PORCS") to ensure members of the public purchasing insurance are aware of any potential conflicts of interest.

When assessing applications for a licence to write insurance business, the GFSC is responsible for assessment against the minimum criteria for licensing in Schedule 7 of the IBL, as well as the means by which the applicant will comply with all other requirements of the IBL and its associated regulations, rules, codes, and guidance issued by the GFSC from time-to-time.

Key considerations for the GFSC in licensing include:

- whether the business of the applicant will be conducted with integrity and skill;

- whether fit and proper persons will be involved in the ownership, management and control of the applicant;
- whether the business of the applicant will be directed by at least two individuals of appropriate standing and experience;
- the composition of the Board of Directors (see below);
- whether the business of the applicant will be conducted in a prudent manner;
- whether the business of the applicant will be carried out in, or from within, the Bailiwick of Guernsey;
- the appointment of a suitable general representative, whose duties are as detailed in the Insurance Business (Duties of General Representative) Regulations 2008;
- whether the minimum levels of capital and solvency will be met and maintained by the applicant; and
- with regards to the composition of the Board of Directors, Schedule 7 of the Law requires the Board to include at least one director who is not an associate (other than a director) of, or associated party (other than a director) in relation to, the company and who is not responsible for the management of the company's business, unless the GFSC has agreed in writing to waive this requirement. In addition, the GFSC expects there to be at least an equitable balance between local and non-local directors and that control of the Board and the monies of the insurer will reside in Guernsey. It is GFSC policy that corporate directors of insurers are not permitted.

Where relevant, the GFSC will make enquiries of foreign supervisors in order to assist its consideration of the applicant's suitability in accordance with the minimum criteria for licensing.

In the case of PCC or ICC companies, the GFSC requires a new application in respect of each cell proposing to conduct insurance business. It is an offence under the IBL to change the approved business plan of a Guernsey insurance company (for example by writing new lines) without having notified the GFSC and provided an updated business plan for consideration.

1.3 Are foreign insurers able to write business directly or must they write reinsurance of a domestic insurer?

It is an offence for a foreign insurer to offer or hold themselves out as providing insurance or reinsurance without a licence under the IBL issued by the GFSC, however, insurers providing certain types of cover (for example motor), who are regulated in an equivalent jurisdiction acceptable to the GFSC, can register for a fee and provide insurance products to the domestic market.

1.4 Are there any legal rules that restrict the parties' freedom of contract by implying extraneous terms into (all or some) contracts of insurance?

No. Guernsey law is based on Norman French customary law and the principle is that "*entre les parties le contract fait loi*", in other words, parties are free to contract in any way they wish, subject to over-riding principles of public policy.

1.5 Are companies permitted to indemnify directors and officers under local company law?

Companies may not directly or indirectly indemnify or release a director from personal liability to the Guernsey company or associated company of which he is a director, that would otherwise attach to him arising from his own negligence, a breach of duty or breach of trust, nor may it indemnify against personal fines against a director by way of regulatory penalty or resulting from criminal proceedings. A company may purchase insurance against such liabilities. A company may also indemnify a director against liability incurred by a director to a person other than the company or an associated company.

1.6 Are there any forms of compulsory insurance?

Employers are required to carry compulsory employers' liability insurance and drivers of motor vehicles must carry third party insurance. Motor vessels, speedboats and the users of surfing longboards must also carry compulsory third party cover, as are persons using certain classes of firearms. Certain types of financial services and other businesses (such as law firms) may also be required by their own regulatory bodies to carry professional indemnity insurance but this is not a statutory requirement.

2 (Re)insurance Claims

2.1 In general terms, is the substantive law relating to insurance more favourable to insurers or insureds?

There is far less jurisprudence in Guernsey in relation to insurance matters than the English courts and in circumstances where no precedent exists, the case law of the higher English courts is often of persuasive authority in the Guernsey courts. This implies that the law of Guernsey is similar to English law and therefore generally more favourable towards insurers.

2.2 Can a third party bring a direct action against an insurer?

In the case of third parties suffering personal injury or death in circumstances where the insured has become insolvent or has been wound up, a statutory subrogated right exists for a third party to action the indemnity from the relevant insurance company "on cover" directly once liability has been established under the provisions of the "*Loi Rapport Aux Tierces Parties* (*Droits Contre Assureurs*) 1936". It is also possible for foreign laws to grant "look through" subrogated contractual rights to a third party claimant under an insurance policy issued by a Guernsey insurer to sue the Guernsey insurer in circumstances where the foreign insured has become insolvent, such as under the provisions of the Third Parties (Rights Against Insurers) Act 1930.

2.3 Can an insured bring a direct action against a reinsurer?

There is no statutory right to bring an action against a reinsurer.

2.4 What remedies does an insurer have in cases of either misrepresentation or non-disclosure by the insured?

In the event of misrepresentation or material non-disclosure the insurer will have the right to seek to avoid the relevant contract. In circumstances where a contract is avoided, the insurer would be under a corresponding duty to return the premium (as if the contract had never been made).

2.5 Is there a positive duty on an insured to disclose to insurers all matters material to a risk, irrespective of whether the insurer has specifically asked about them?

Guernsey law does not have the depth of developed case law on this subject and there is no statutory provision which would imply such a duty. English case law is not directly binding (except for relevant judgments of the Privy Council). However, the concept of good faith, or *bonne foi*, is originally a development of Roman law and as such the precedent which has developed around the subject both in England (and in France after the *Code Civile*) would be persuasive authority of the requirement to disclose all matters material to the underwriting of risk. The same qualifications would apply as to the state of a person's knowledge or what they could have been reasonably expected to know in the ordinary course of business and as to whether an insured has been put on notice to make further enquiry of a matter which is material to the underwriting of a risk. For the sake of completeness, however, these obligations and the consequences of failing to comply should be expressly stated in policy documentation. Typically, insurance and reinsurance contracts with or between Guernsey-based insurers and reinsurers are drafted as being subject to the proper law of England and Wales to take advantage of the long settled case law precedent applicable to such issues.

2.6 Is there an automatic right of subrogation upon payment of an indemnity by the insurer or does an insurer need a separate clause entitling subrogation?

A specific clause would generally be required in order to assert a right of subrogation, although it could be implied in certain circumstances (for example, by a previous course of dealing).

3 Litigation - Overview

3.1 Which courts are appropriate for commercial insurance disputes? Does this depend on the value of the dispute? Is there any right to a hearing before a jury?

The Magistrates Court of Guernsey handles disputes with a value limited to a maximum of £10,000. The Royal Court of Guernsey has unlimited jurisdiction in commercial matters. Guernsey has a system of permanent jurors called Jurats, appointed by the Island Parliament (the States of Guernsey). The Jurats are judges of fact and sit in all cases where there is a factual dispute. The judges of the Royal Court are primarily judges of law and procedure and sit alone for interlocutory and procedural hearings. There are a number of judges of law (known as Lieutenant Bailiffs) who are members of the bench in England & Wales.

3.2 How long does a commercial case commonly take to bring to court once it has been initiated?

This varies widely according to the nature of the dispute and the willingness of the parties to engage. A relatively simple matter which can be determined by interlocutory hearing may take a few weeks, a full trial may take a year or more. This depends largely on the case-load of the courts, the parties' intentions, and the complexity and size of the matter (for example, the extent of documentation to be disclosed).

4 Litigation - Procedure

4.1 What powers do the courts have to order the disclosure/discovery and inspection of documents in respect of (a) parties to the action and (b) non-parties to the action?

a) The court generally orders discovery between the parties after the conclusion of the initial interlocutory period and the finalisation of defences. However, the court also has a jurisdiction to make a disclosure (in the past known as a Norwich Pharmacal) order. The parties are under a duty to preserve evidence and to disclose documents in their possession, custody or control, which could, for example, include electronic evidence not within the jurisdiction but accessible or controlled by one of the parties. Adverse inferences and cost penalties may be awarded in circumstances where documents go missing or are deliberately destroyed and there is a risk of being found in contempt, or for a cause or defence to be struck out. Evidence can be taken from persons overseas or, for example, terminally ill before the commencement or proceedings or conclusion of the interlocutory phase of proceedings.

b) There are limited circumstances in which third parties can be ordered to disclose information. These circumstances are similar to the jurisdiction and grounds for obtaining a disclosure order. The Guernsey courts will not sanction the use of disclosure orders as "fishing expeditions" for evidence.

4.2 Can a party withhold from disclosure documents (a) relating to advice given by lawyers or (b) prepared in contemplation of litigation or (c) produced in the course of settlement negotiations/attempts?

The rules for disclosure of legally privileged documents is to all intents identical to that in place in England and Wales, in that such documents must be listed but not disclosed and remain privileged unless the party which holds the privilege agrees to it being waived.

4.3 Do the courts have powers to require witnesses to give evidence either before or at the final hearing?

Yes, this is usually carried out in circumstances where terminal illness means a witness is likely to be deceased before a trial date.

4.4 Is evidence from witnesses allowed even if they are not present?

Witnesses may submit evidence by video link to the court for certain types of proceedings and also by affidavit.

4.5 Are there any restrictions on calling expert witnesses? Is it common to have a court-appointed expert in addition or in place of party-appointed experts?

There are no restrictions on expert witnesses. It is within the gift of the parties to decide whether to agree a joint appointment. Generally, the courts do not appoint expert witnesses of their own volition.

4.6 What sort of interim remedies are available from the courts?

Guernsey law is based on Norman French customary law. It has always been possible in French law to form a binding obligation without valuable consideration and for this reason French, and therefore Guernsey, common law never developed the concept of equity or equitable remedies. There is also, for example, no concept of a deed, as it has never been necessary to assume some form of fictional consideration to fit within the strict rules for formation of a contract. This means that equitable remedies (such as specific performance) are generally unavailable. The Royal Court does have a statutory power of injunction or freezing order. This enables a party to prevent another person from doing something (such as moving money or other assets) or to require them to deliver something up, such as documents. It may also be used in limited circumstances to arrest assets or freeze bank accounts. The Royal Court retains an inherent jurisdiction to make such orders as it sees fit in order to see justice done to the relevant parties. Such orders may also be used to require the delivery of documents or other information or in extreme circumstances to permit searches of premises.

4.7 Is there any right of appeal from the decisions of the courts of first instance? If so, on what general grounds? How many stages of appeal are there?

The Royal Court of Guernsey has appellate civil jurisdiction in respect of decisions of the Magistrate's Court, the Court of Alderney and the Court of the Seneschal of Sark.

There is a right of appeal from the Royal Court of Guernsey to the Guernsey Court of Appeal (which normally sits four times per year) based on realistic prospects of success on the basis of the broad grounds set out below. From the Court of Appeal, there is a final right of appeal to the Judicial Committee of the Privy Council. Appeal grounds in civil claims are broadly categorised as follows:

- there was an error in law;
- there was a wrongful exercise of discretion;
- the decision was against the weight of evidence (i.e., challenging a finding of fact);
- there was no, or no sufficient, evidence upon which a finding was based; and
- the conclusion was inconsistent with finding of facts.

4.8 Is interest generally recoverable in respect of claims? If so, what is the current rate?

The judicial rate prior to judgment is at the discretion of the court or by agreement of the parties. Recent judgments indicate a rate on special damages of approximately 3 per cent from the time incurred and 2 per cent on general damages from the date of commencement of proceedings. After judgment, the prescribed rate of judicial interest is currently 8 per cent.

4.9 What are the standard rules regarding costs? Are there any potential costs advantages in making an offer to settle prior to trial?

Costs are at the general discretion of the court and are at a statutory recoverable rate (which often does not equate to the hourly fees of counsel). In exceptional circumstances (such as the deliberate misfeasance of one of the parties or vexatious proceedings) the court may order indemnity costs against a party or indeed against counsel. In general, recoverable costs follow the cause and are awarded against the losing party.

4.10 Can the courts compel the parties to mediate disputes? If so, do they exercise such powers?

The court can order a stay of proceedings to facilitate alternative dispute resolution, but cannot compel a party to take part. The court is free to draw conclusions from the willingness of the parties to undertake mediation and may take this into account in considering the award of costs.

4.11 If a party refuses to a request to mediate, what consequences may follow?

The court is arguably free, in the context of its general powers of inherent jurisdiction, to draw adverse inferences from a failure to mediate and could, for example, take this into account in terms of the award of costs.

5 Arbitration

5.1 What approach do the courts take in relation to arbitration and how far is the principle of party autonomy adopted by the courts? Are the courts able to intervene in the conduct of an arbitration? If so, on what grounds and does this happen in many cases?

The courts support the process of arbitration through the application of the Arbitration (Guernsey) Law, 1982. In general terms, arbitration takes place outside the court process and is determined by the provisions contained in the contractual agreement between the parties. The court may, however, intervene to appoint or remove an arbitrator or umpire, and at the request of the parties or the umpire to summon a witness to give evidence. The court has the same powers to make orders in relation to matters of procedure and other matters incidental to arbitration as its powers in relation to a civil action brought before the court. The court may judicially review an arbitral award and grant relief where an arbitrator is not impartial or the dispute involves a question of fraud.

5.2 Is it necessary for a form of words to be put into contract of (re)insurance to ensure that an arbitration clause will be enforceable? If so, what form of words is required?

No, there is no special form of words required. Whether an arbitration agreement exists will be a question of fact and construction in each case.

5.3 Notwithstanding the inclusion of an express arbitration clause, is there any possibility that the courts will refuse to enforce such a clause?

The appointment of an arbitrator is unlikely to be interfered with by the court, except in circumstances where the court is satisfied that the arbitration agreement is null and void, inoperative or incapable or being performed or that there is not in fact any dispute between the parties with regard to the matter agreed to be referred.

5.4 What interim forms of relief can be obtained in support of arbitration from the courts? Please give examples.

A party may apply to stay or strike out proceedings which ought to be the subject of arbitration if it is satisfied that there is no sufficient reason why the matter should not be referred in accordance with the relevant agreement and that the applicant was at the time when proceedings were commenced, and still remains, ready and willing to do all things necessary towards the proper conduct of the arbitration.

5.5 Is the arbitral tribunal legally bound to give detailed reasons for its award? If not, can the parties agree (in the arbitration clause or subsequently) that a reasoned award is required?

There is no requirement for a reasoned judgment but the court may order that an arbitrator or umpire must state reasons in sufficient detail in an award to enable the court to consider any question of law arising out of the award, should an appeal be brought. A party may give notice to an arbitrator that a reasoned award is required.

5.6 Is there any right of appeal to the courts from the decision of an arbitral tribunal? If so, in what circumstances does the right arise?

Right of appeal to the Royal Court arises on any question of law and the court may confirm or set aside an award or remit the award for reconsideration, together with the court's opinion on the question of law which was the subject of appeal. During the process the court may also be called upon to determine a point of law, and retains the power to make orders concerning the process itself and to remove an arbitrator.

Mark Helyar

Bedell Cristin
La Plaiderie House, La Plaiderie
St Peter Port, GY1 1WG
Guernsey

Tel: *+44 1481 812 855*
Fax: *+44 1534 754 280*
Email: *mark.helyar@bedellgroup.com*
URL: *www.bedellgroup.com*

Mark Helyar is the Managing Partner of Bedell Cristin's Guernsey office and Bâtonnier of the Guernsey Bar. He advises local and international regulatory authorities, government departments, listed companies, insurers and reinsurers, brokers, managers, and investment advisers on all matters relating to the insurance, captive and reinsurance sectors. Mark has advised clients worldwide on a variety of contentious and non-contentious insurance and reinsurance matters and is an acknowledged international expert in the formation and structuring of segregated cell companies for insurance and capital raising, having recently assisted in drafting ICC legislation for Malta and advised other foreign governments on implementation of similar legislation. He recently became responsible for the first ever public listing of a private CAT bond on the Channel Islands Stock Exchange.

Bedell

Bedell Cristin is part of Bedell Group, an award winning and leading offshore provider of legal and fiduciary services to world-class institutions, corporates, intermediaries and high net worth individuals. It operates in the following key locations: Jersey; Guernsey; London; Dublin; Geneva; Mauritius; BVI; and Singapore.

Other titles in the ICLG series include:

- Alternative Investment Funds
- Aviation Law
- Business Crime
- Cartels & Leniency
- Class & Group Actions
- Commodities and Trade Law
- Competition Litigation
- Corporate Governance
- Corporate Recovery & Insolvency
- Corporate Tax
- Dominance
- Employment & Labour Law
- Enforcement of Competition Law
- Environment & Climate Change Law
- International Arbitration
- Lending & Secured Finance
- Litigation & Dispute Resolution
- Merger Control
- Mergers & Acquisitions
- Mining
- Oil & Gas Regulation
- Patents
- PFI / PPP Projects
- Pharmaceutical Advertising
- Private Client
- Product Liability
- Project Finance
- Public Procurement
- Real Estate
- Securitisation
- Telecoms, Media & Internet
- Trade Marks

GLG
Global Legal Group

59 Tanner Street, London SE1 3PL, United Kingdom
Tel: +44 20 7367 0720 / Fax: +44 20 7407 5255
Email: sales@glgroup.co.uk

www.iclg.co.uk