A STURDY JURISDICTION

Richard Sharp, of Bedell Cristin, reflects on the potential advantages and position of Guernsey post-Brexit

Captive Review (CR): How will Brexit affect Guernsey's captive insurance industry?

Richard Sharp (RS): The outcome of the UK referendum on 23 June 2016 to leave the EU was both shocking and unprecedented. To understand what this means for Guernsey it is first necessary to remind ourselves of the nature of its long-standing constitutional relationship with the UK.

Guernsey is part of the British Isles but not part of the UK. It is in Europe but not in the EU or the EEA. Guernsey's constitutional relationship with the UK is over 750 years old and will not be affected by the end of a much younger relationship between the UK and the EU. Guernsey's status as a Crown Dependency gives it the right to make its own laws, including those concerning taxation, and Brexit does not put Guernsey's tax neutrality under threat. Guernsey's closest trading relationship is with the UK, but over the years, the island has successfully negotiated its own access to EU financial markets and there is no indication that Brexit will impact such access directly.

Richard Sharp

Richard Sharp heads up Bedell Cristin's insurance and reinsurance practice and, since joining the firm in 2012, has worked on a broad variety of transactions in the insurance and reinsurance sector. He is recognised amongst the Guernsey insurance and insurance management industries as a prominent adviser in the sector.

CR: What has been the impact so far for the European captive industry and what will a post-Brexit landscape be like?

RS: The UK government formally notified the European Council of its decision to leave the EU on 29 March 2017 by triggering Article 50 of the Lisbon Treaty. The exit period is expected to last at least two years while the UK negotiates the terms of its exit. The process for, and outcome of, Brexit still remain very uncertain but the following are among some of the expected effects:

• Uncertainty

Without doubt the first and most significant effect on captives will be the period of uncertainty while the UK negotiates the terms of its exit. Until the terms are settled, many businesses that operate captives will need to wait and monitor developments closely so that they are ready to adapt to the outcome. Any extension of the transition period will only be possible if all remaining EU member states agree to it. It is entirely possible, although not expected, that the negotiations might take less than two years, in which case businesses with captives may need to adapt that bit sooner.

• Currency

Following the Brexit decision, an initial consequence for insurers was an immediate fluctuation in exchange rates which affects companies operating in sterling or euros. It is expected that captives will continue to experience exchange rate volatility that may have knock-on effects on solvency – and credit ratings could also ultimately be affected.

• Passporting

The current EU passporting regime allows insurers that are authorised to provide financial services in one EU member state to also provide such services in other member states without having to be authorised to do so in the other jurisdictions. A passport allows an insurer to provide insurance services across borders or to establish a presence within other jurisdictions. Until negotiations have been concluded, it remains to be seen whether insurers will continue to benefit from a replacement system that will allow similar access. This is important, not just to UK insurers, but also to EU insurers, who might particularly miss access to the global insurance centre that is London.

It may be that a replacement system that provides exactly the same access can be agreed, or equally the ability to passport may be lost entirely. A third way might be some form of compromise that falls somewhere in the middle. Insurers would be prudent to expect any solution to be conditional on the UK having an equivalent regulatory regime, for example, in relation to solvency requirements.

• Regulation

In the absence of passporting many see an increase in regulation as inevitable, which will have a cost at a jurisdictional level and also a detrimental effect on the efficiency with which insurers can operate.

> "That Brexit itself will not have any impact on its regulatory landscape means that Guernsey continues to be seen as a stable jurisdiction offering certainty in uncertain times"

CR: What particular requests for advice from clients has Bedell Cristin seen uplift in since the Brexit result?

RS: At this stage, we are not yet seeing any noticeable trends, as the industry waits to see how the exit negotiations progress. Perhaps one immediate effect during this period may be the use of captives to insure against loss that might flow from the shock of Brexit and the difficulties of the negotiation process, such as more pronounced exchange fluctuations.

CR: How do you see Guernsey developing as a captive jurisdiction once the Brexit 'divorce' proceedings have been finalised?

RS: The use of Guernsey captives is an established model for companies with global operations, although, as with other offshore jurisdictions, there has been a recent trend of slowing growth. The consensus appears to be that Brexit is not expected to have a detrimental effect on offshore captive domiciles, and in fact it could prove to be an opportunity. Once Brexit is complete, companies could be making different choices about where they locate their captives. In a situation where there is no replacement for the current passporting system, captives that may have previously been established in the UK or EU may now consider Guernsey. In the interim, the fact that Brexit itself will not have any impact on its regulatory landscape means that Guernsey continues to be seen as a stable jurisdiction offering certainty in uncertain times.

Guernsey has an established regulatory and legislative framework along with experienced service providers, and is well placed to assist businesses looking to form new captives in the island. In particular, the protected and incorporated cell legislation, which has now been around for over 20 years, provides a number of tried and tested structuring options for captives. Guernsey will continue to regularly review its regulatory regime, particularly in areas such as solvency requirements, to ensure that it maintains a flexible and competitive captive offering.

One possibility is that the UK may, in effect, even become an offshore finance centre by encouraging the establishment of UK captives. It would, however, seem that there are a number of political, regulatory and fiscal hurdles that may first need to be addressed, and may prove to be difficult to overcome. Guernsey's long-standing position as a domicile of choice for captives will see it well-placed to overcome any such competition.

The outcome and knock on effects of Brexit for the European captive industry remain to be seen, and whether or not this represents an opportunity for Guernsey, the island will continue to look at other areas for future growth. One such area is China, and Guernsey has signed four Memoranda of Understanding in the region in the last 12 months to assist with the mutual exchange of information and co-operation in the insurance market. There has already been interest in Guernsey captives from two Chinese operations, a healthcare management firm, DINGTAI Health, and a film industry guarantee company, HLCG Film Guarantors, both of whom looked at various captive domiciles before settling on Guernsey. They provide just one example of the potential for Guernsey's captive business to continue to develop its worldwide footprint.