

# PANORAMIC INSURANCE & REINSURANCE

Gibraltar



 LEXOLOGY

# Insurance & Reinsurance

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## REGULATION

### Regulatory agencies

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

The regulatory authority for Gibraltar that is responsible for licensing and regulating insurance, reinsurance and insurance distribution companies is the Gibraltar Financial Services Commission (GFSC). There are no Lloyd's syndicates in Gibraltar.

Law stated - 13 March 2024

### Formation and licensing

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

Under Gibraltar law, incorporation of companies is governed by the Companies Act 2014. Some companies that undertake the business of insurance and reinsurance are structured as protected cell companies and therefore will need to comply with the requirements of the Protected Cell Companies Act 2001.

As for the licensing and regulation of entities that conduct the activities of insurance, reinsurance and insurance distribution by way of business, the statutory framework that governs these activities is the Financial Services Act 2019 (FSA 2019), which is supported by the sector-specific Financial Services (Insurance Companies) Regulations 2020 (Insurance Companies Regs 2020).

Applicants that wish to conduct the activities of insurance, reinsurance and insurance distribution in Gibraltar would be required to apply for a licence under Part 7 of the FSA 2019.

The licensing process under Part 7 of the FSA 2019 would be required to comply with the threshold conditions as specified under Schedule 12 of the FSA 2019 (Threshold Conditions) and they are principally as follows:

- the location of the applicant's offices must be in Gibraltar;
- the entity must have appropriate resources, in particular, financial and non-financial resources, that are appropriate in relation to the business of insurance, reinsurance or insurance distribution that the entity is seeking to carry on or seeks to carry on in Gibraltar;
- the entity must be capable of being effectively supervised having regard to all the circumstances;
- the entity must be fit and proper, in other words, those who manage the firm's affairs must have adequate skills and experience and must have acted and may be expected to act with probity;
- the business model of the firm concerned (that is, the firm's strategy for doing business) must be suitable for a person carrying on the regulated activities it seeks to carry on; and

- The entity must pay such periodical and other fees as the regulations prescribe.

The Threshold Conditions are expected to always be complied with.

**Law stated - 13 March 2024**

### **Other licences, authorisations and qualifications**

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

Gibraltar withdrew from the European Union as a result of the United Kingdom's withdrawal and as such, European insurance firms that were passporting into Gibraltar prior to 31 December 2020 (IP Completion Day) were allowed to continue to do so under a temporary permissions regime (TPR) under the Financial Services (Passport Rights and Transitional Provisions) (EU Exit) Regulations 2020 (Transitional Provisions Regs 2020). The TPR ceased to have effect on 31 December 2021 but an EEA firm that is a party to an existing contract that was entered into before IP Completion Day, or on and after IP Completion day, which rendered it necessary to carry on the regulated activity in Gibraltar in order to perform its obligations under the pre-existing contract, would be allowed a restricted temporary approval by the GFSC in line with the requirements of the Transitional Provisions Regs 2020.

In addition, post-IP Completion Date, the Financial Services (Specified Insurers) (Temporary Exemption) Regulation 2020 (Specified Insurers Regs) made provision for temporary exemption for specified insurers who are established in an EEA State or Switzerland and authorised by their supervisory authority to carry on regulated insurance activity in their home state to undertake insurance business in Gibraltar. This means that these specified insurers are exempted from the general prohibition rule under section 8 of the FSA 2019, which states that no person may carry on a regulated activity in or from Gibraltar or purport to do so unless the person is (1) an authorised person; or (2) an exempt person (General Prohibition Rule). Specified insurers will need to comply with the requirements of the Specified Insurers Regs.

Gibraltar has also domesticated the EU Insurance Distribution Directive through the Financial Services (Insurance Distribution) Regulations 2020 (Insurance Distribution Regs). Any insurance intermediaries that wish to undertake insurance distribution activities in Gibraltar will be required to apply for a Part 7 FSA 2019 licence and comply with the requirements of the Insurance Distribution Regs.

**Law stated - 13 March 2024**

### **Officers and directors**

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

Certain regulated function holders and directors of insurance and reinsurance companies will be required to comply with the regulated individuals regime under Part 8 of the FSA 2019.

A person is only permitted to perform a regulated function if the person is an individual who has been approved by the GFSC (section 88 of the FSA 2019).

Regulated functions are set out in Part 2 of Schedule 14 of the FSA 2019. For insurance, insurance distribution or reinsurance, the following compulsory function holders will require prior approval from the GFSC;

- head of compliance;
- head of actuarial function;
- head of internal audit;
- head of risk management;
- head of finance;
- head of underwriting;
- head of claims; and
- chair.

Any person who exercises significant influence over an insurance, insurance distribution or reinsurance business carries out a regulated function that will require prior approval from the GFSC.

**Law stated - 13 March 2024**

## **Capital and surplus requirements**

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

The EU Solvency II Directive (Solvency II Directive) has been domesticated into Gibraltar law under the Insurance Regs 2020. Any insurance or reinsurance undertaking must therefore comply with the solvency capital requirement as prescribed under Part 6, Chapter 3 of the Insurance Regs 2020. An undertaking must, when calculating its solvency capital, take the following into account:

- all quantifiable risks to which the undertaking is exposed to must be calibrated;
- solvency capital must cover existing business and new business expected to be written over the following 12 months; and
- existing business must cover only unexpected losses.

The solvency capital requirement must also correspond to the 'value at risk' of the undertaking's basic own funds subject to a confidence level of 99.5 per cent over a one-year period, and must cover at least the following risks:

- non-life underwriting risk;
- life underwriting risk;
- health underwriting risk;
- market risk;

- credit risk; and
- operational risk.

In essence, insurance and reinsurance undertakings must have the following:

- a minimum capital requirement representing the minimum amount of capital that the company needs to cover its risks; and
- a solvency capital requirement, which is an amount that is required by the undertaking to operate as a going concern, assessed on a value at risk measure over a period of one year.

**Law stated - 13 March 2024**

## **Reserves**

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

Due to the implementation of the Solvency II Directive, insurance and reinsurance undertakings will need to comply with the calculation of reserves or technical provisions as prescribed under Part 6, Chapter 1 of the Insurance Regs 2020. Regulation 66 of the Insurance Regs 2020 states that an insurance or reinsurance undertaking must establish adequate technical provisions with respect to all of its insurance and reinsurance obligations towards policyholders and beneficiaries of insurance or reinsurance contracts.

The value of reserves (technical provisions)

In calculating its technical provisions, the undertaking must:

- use information provided by the financial markets and generally available data on underwriting risks (market consistency);
- be prudent, reliable and objective;
- correspond to the current amount that the undertaking would have to pay if it were to transfer its insurance or reinsurance obligations immediately to another insurance or reinsurance undertaking; and
- ensure that the value of technical provisions is equal to the sum of a best estimate and a risk margin, calculated in accordance with the Insurance Regs 2020.

The best estimate must correspond to the probability-weighted average of future cashflows, taking account of the time value of money (expected present value of future cash flows) using the relevant risk-free interest rate term structure, and must be calculated (1) based on up-to-date and credible information and realistic assumptions; (2) using adequate, applicable and relevant actuarial and statistical methods; and (3) gross, without deduction of the amounts recoverable from reinsurance contracts and special purpose vehicles, which must be calculated separately in accordance with the requirements of regulation 76 of the Insurance Regs 2020.

## Product regulation

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

There is no prior regulatory approval required under Gibraltar law with respect to insurance products for sale, but all insurance companies must comply with general good requirements. Regulation 165 states that nothing in any enactment (whenever passed) requires the prior approval or systematic notification of general and special policy conditions, scales of premiums, or forms and other printed documents that an insurance undertaking intends to use in its dealings with policyholders. However, in so far as insurance of any description is compulsory, any undertaking providing insurance may be required by the GFSC to communicate those conditions to it.

Due to the United Kingdom's withdrawal from European Union, which resulted in Gibraltar's exit from the European Union, Gibraltar managed to secure continuous access to the UK market for financial services and financial products. This was confirmed by the Financial Services (Gibraltar) (EU Exit) Regulations 2020 (UK Gibraltar EU Exit Regs), which have now been extended to the end of December 2023 or until the Gibraltar Authorisation Regime (GAR) replaces the UK Gibraltar EU Exit Regs either in the first quarter of 2024 or later. Gibraltar reciprocal legislative framework in that respect is the Transitional Provisions Regs 2020.

As such, any insurance company that sells its products to the UK market on a passport basis will have to comply with the conduct of business rules in the United Kingdom. Recent changes to consumer protection laws in the United Kingdom resulted in the Financial Conduct Authority issuing a consumer principle (Principle 12) requiring regulated firms to deliver good outcomes for retail customers (Consumer Duty) which came into effect on 31st July 2023. Insurers including Gibraltar firms that sell their products in the United Kingdom must demonstrate their product suite, communications, and end-to-end customer journey and consider changes in areas including governance and accountability that could affect best outcome for customers.

Due to the GAR, there is a need for alignment between the United Kingdom's and Gibraltar's regulatory and legislative approach to financial services, and consequently, the GFSC in their recently hosted event for the insurance sector announced that Gibraltar will also be implementing the equivalent consumer duty, which will be applicable to all regulated entities under their supervision.

Law stated - 13 March 2024

## Regulatory examinations

What are the frequency, types and scope of financial, market conduct or other periodic examinations of insurance and reinsurance companies?

Gibraltar's regulatory approach to insurers and reinsurers that are authorised in Gibraltar is a combination of regulatory self-reporting, regulatory visits and, if necessary, regulatory intervention. By way of example, the Insurance Companies Regs 2020 require insurance companies to submit their solvency capital return every quarter, and their own risk self-assessments, solvency and financial condition report and regular supervisory report annually. Submission of audited accounts every year is also compulsory. The GFSC is the supervisory and prudential authority for insurance companies in Gibraltar and will conduct regulatory inspections and grant approvals for companies' regulated individuals or function holders, as required under Schedule 14 of the FSA 2019.

**Law stated - 13 March 2024**

## **Investments**

### **What are the rules on the kinds and amounts of investments that insurance and reinsurance companies may make?**

Gibraltar imposes the 'prudent person' principle in respect of investments by insurance companies. Insurers are required to hold assets to cover their technical provisions and to maintain an adequate solvency margin above their technical provisions. The prudent person principle requires the insurers to only invest in assets and instruments whose risks it can properly identify, measure, monitor, manage, control, report, and appropriately take into account in the assessment of its overall solvency needs as prescribed under the Insurance Companies Regs 2020. For example, assets covering the minimum capital requirement and the solvency capital requirement must be invested in a manner that ensures security, quality, liquidity, and profitability of the portfolio as a whole. In addition, the localisation of those assets must be such as to ensure their availability, and assets held that cover the technical provisions must be invested in a manner appropriate to the nature and duration of insurance companies' liabilities and in the best interest of all policyholders and beneficiaries taking into account any disclosed policy objective. Investments and assets that are not admitted to trading on a regulated financial market must be kept to prudent levels. Assets must also be properly diversified to avoid excessive reliance on any particular class or exposure to excessive risk concentration.

**Law stated - 13 March 2024**

## **Change of control**

### **What are the regulatory requirements on a change of control of insurance and reinsurance companies? Are officers, directors and controlling persons of the acquirer subject to background investigations?**

Section 111 of the FSA 2019 imposes an obligation to notify the GFSC if a person decides to acquire or increase control over a Gibraltar-regulated firm, which includes insurance companies. The notification will have to be made prior to the acquisition or increase of control. 'Acquisition of control' under the FSA 2019 means the acquisition of 10 per cent or more of the shares or voting rights of the insurance company or its parent entity, or shares or voting power either in the insurance company or its parent entity resulting in the acquirer having the ability to exercise significant influence in the management of the

insurance company. 'Significant influence' is defined under section 89 of the FSA 2019 as a person (P) (despite not formally having that role), who performs a regulated function (as specified in Schedule 14 of the FSA 2019) and instructs or purports to instruct a person that formally has that role as to how that person should perform a regulated function, or when the person that formally has that role habitually or to a material extent performs the regulated function in accordance with the wishes or instructions of P. P is therefore deemed to have significant influence and so would be caught under the requirement of section 111 of the FSA 2019. Section 111 notices must be submitted by the potential acquirer using the prescribed form given by the GFSC. The assessment criteria as set out in section 119 includes, among other things, the reputation of the section 111 notice giver, the knowledge, skills and experience of any person who will direct the business of the insurance company post-acquisition, and the financial soundness of the notice giver.

Officers who are function holders as set out in Schedule 14 of the FSA 2019, including board members and independent non-executive directors, will also require prior approval from the GFSC. They are regulated individuals and will need to comply with the requirements under Part 8 of the FSA 2019. As such, background investigations will be required, as the criteria for approval are that the individual must be fit and proper to perform the regulated function and that he or she is able to perform the regulated function in the insurance entity.

**Law stated - 13 March 2024**

### **Financing of an acquisition**

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

Gibraltar law does not impose any specific requirement or restriction in respect of the financing of the acquisition of an insurance company. However, any debt or equity raised to fund the acquisition would require prior disclosure and consent from the GFSC. Considerations on matters such as financial assistance or group solvency position post-acquisition will need to be applied, and although Gibraltar law does not prohibit or mandate any particular acquisition financing method, the GFSC will look at the financing method when the section 111 notice is submitted.

**Law stated - 13 March 2024**

### **Minority interest**

**What are the regulatory requirements and restrictions on investors acquiring a minority interest in an insurance or reinsurance company?**

There should not be any restriction if the acquirer holds less than 10 per cent of the voting rights or share ownership, unless the acquirer of the minority interest can exercise significant influence over the management of the insurance company, which could trigger a requirement for change in control approval under section 111 of the FSA 2019. If a minority interest were to increase its shareholding to 10 per cent, this will also trigger the section 111 notice.

**Law stated - 13 March 2024**

## Foreign ownership

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

There is no regulatory prohibition on foreign ownership, provided that effective supervision of the insurance entity can be carried out and that the foreign owner is not from a sanctioned country.

Law stated - 13 March 2024

## Group supervision and capital requirements

What is the supervisory framework for groups of companies containing an insurer or reinsurer in a holding company system? What are the enterprise risk assessment and reporting requirements for an insurer or reinsurer and its holding company? What holding company or group capital requirements exist in addition to individual legal entity capital requirements for insurers and reinsurers?

The Insurance Companies Regs 2020 require supervision at group level if the insurance or reinsurance undertaking is a participating undertaking in at least one insurance undertaking, reinsurance undertaking, third country insurance undertaking or third country reinsurance undertaking, or when the parent undertaking of the insurance company is a UK insurer or reinsurer or the parent undertaking of the insurance undertaking undertakes mixed activity financial holding in a third country other than the United Kingdom. The Solvency II Directive imposes new provisions concerning group supervision, which brings the entire group within the Solvency II framework, meaning the group is subject to Solvency II requirements under the three pillars, which consist of quantitative requirements, supervisory review and market disclosure.

Group solvency capital requirement will be required, and it would normally be calculated on a consolidated basis. The group supervisor under Solvency II will usually be the supervisor in the country where the ultimate parent of the group has its headquarters, but groups may be supervised at more than one level and may have more than one group or individual supervisor, working as a college of supervisors. Additionally, any reporting and disclosure will be required both at group level and solo entity level.

The GFSC may decide on a case-to-case basis not to include an undertaking in group supervision where (1) the undertaking is situated in a third country where there are legal impediments to the transfer of necessary information; (2) the undertaking is of negligible interest with respect to the objectives of group supervision (except where several undertakings of the same group that are negligible individually are not negligible when taken collectively); or (3) the inclusion of the undertaking would be inappropriate or misleading with respect to the objectives of the group supervision.

The GFSC, however, would still retain the right to request from the undertaking that is at the head of the group any information that may facilitate supervision of the insurance or reinsurance undertaking.

## **Reinsurance agreements**

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

There are currently no reinsurance companies that are licensed or domiciled in Gibraltar. Nevertheless, they would be regulated in the same way as insurance companies as provided by the Insurance Regs 2020. For reinsurance agreements, Gibraltar's position would be the same as that of the United Kingdom, and reinsurance contracts would generally apply the same contractual rules under common law as there is no specific regulatory regime that governs the content, scope or application of reinsurance contracts in Gibraltar. However, note that a reinsurance contract concluded with an undertaking that has its office in a third country must be treated in the same manner as a reinsurance contract concluded with the undertaking authorised under Part 7 of the FSA 2019, where, in accordance with regulation 238 of the Insurance Companies Regs 2020, it is determined that the solvency regime of the third country is equivalent to that required under the law of Gibraltar.

Law stated - 13 March 2024

## **Ceded reinsurance and retention of risk**

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

There are no clear guidance notes from the GFSC in this respect. However, while there is no specific rule limiting reinsurance to a certain percentage of the risk, it is likely that the GFSC will take the same approach as the UK regulators in that they would prefer some risk retention to align interests, control and overexposure of risk to one counterparty. Generally, 10 per cent is the acceptable minimum retention, although there have been recent discussions in the insurance sector for a higher percentage to be retained by the cedents.

Law stated - 13 March 2024

## **Collateral**

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

We are not aware of any prescribed requirements for collateral for reinsurers in a reinsurance transaction under Gibraltar. Common law contractual principles should apply and the ceding insurer and the reinsurer would have the freedom to agree on the form of collateral (if needed) that will be applied to the contract. If collateral is given, it must be disclosed to the GFSC and will need to satisfy the requirements for collateral as set out in the Solvency II Directive to receive regulatory credit. Gibraltar has implemented the EU Financial Collateral Directive and therefore, in so far as reinsurance arrangements are collateralised to protect against

counterparty risk, they can be structured to qualify as 'financial collateral arrangements', the meaning of which is provided under the Financial Collateral Arrangements Act 2004 of Gibraltar.

The GFSC is prohibited from requiring that the assets held to cover the technical provisions related to insurance risks situated in Gibraltar are localised within Gibraltar, or requiring localisation within Gibraltar of the assets representing the recoverables from reinsurance contracts. The GFSC is also prohibited from retaining or introducing the establishment of technical provisions, a system with gross reserving requiring the pledging of assets to cover unearned premiums and outstanding claims provisions where the reinsurer is a third country insurance or reinsurance undertaking situated in a country or territory whose solvency regime is regarded as equivalent to that laid down in the law of Gibraltar (see Regulation 119(1) of the Insurance Companies Regs 2020).

Further, the GFSC is not required to apply any provision or exercise any function in a manner that is inconsistent with any condition or obligation of the Covered Agreement (ie, the agreement between the United Kingdom and the United States of America on Prudential Measures regarding Insurance and Reinsurance, which by virtue of article 2(r) of the agreement, extends to Gibraltar) and the GFSC must use all reasonable endeavours to enter into an arrangement with the supervisory authority of the relevant US state for cooperation in the exchange of information about the insurer or reinsurer, substantially in the form of the memorandum of understanding as set out in the Annex to the Covered Agreement (see regulation 119A of the Insurance Companies Regs 2020).

**Law stated - 13 March 2024**

### **Credit for reinsurance**

**What are the regulatory requirements for cedents to obtain credit for reinsurance on their financial statements?**

Gibraltar has domesticated the Solvency II Directive and as such, the regulatory requirements for cedents to obtain credit for reinsurance on their financial statements are set out under Part 6 of the Insurance Companies Regs 2020, and the methods of calculations provided under the Financial Services (Insurance Companies) (Accounts) Regulations 2021.

**Law stated - 13 March 2024**

### **Insolvent and financially troubled companies**

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

Part 7 of the Insurance Companies Regs requires that insurance and reinsurance undertakings have procedures in place to identify deteriorating financial conditions, and requires that such undertakings notify the GFSC immediately if such deterioration occurs. The GFSC will have the power to suspend permission or cancel permission altogether under the regulations. Insolvency proceedings against insurers, such as liquidation, administration, voluntary arrangements and the appointment of a provisional liquidator, are also available in Gibraltar. Companies can also use a scheme of arrangement under Part VIII of the

Companies Act 2014 of Gibraltar. The following legislation in Gibraltar applies in respect of insurance companies:

- the Insolvency Act 2011;
- Part 12 of the Insurance Companies Regs 2020 in respect of the reorganisation and winding-up of insurance undertakings; and
- the Protected Cell Companies Act 2001 in respect of insolvency for insurance companies that are structured as a protected cell company.

The Insolvency Act 2011 provides the law and framework for insolvency in Gibraltar and applies to all corporate entities that are incorporated under the laws of Gibraltar. Insurance companies, however, will need to also satisfy the requirements of Part 12 of the Insurance Companies Regs. For example, only the Supreme Court is entitled to decide on reorganisation measures in respect of a Gibraltar insurer. The adoption of reorganisation measures does not preclude the opening of winding-up proceedings in respect of an insurance undertaking. The GFSC will need to be informed as a matter of urgency in the event that an insurer goes into administration.

As with administration, only the Supreme Court is entitled to decide on the winding-up proceedings of a Gibraltar insurance company, and the GFSC will need to be informed.

Law stated - 13 March 2024

### **Claim priority in insolvency**

#### **What is the priority of claims (insurance and otherwise) against an insurance or reinsurance company in an insolvency proceeding?**

Regulation 250(1) of the Insurance Companies Regs states that insurance claims take precedence over other claims against an insurance undertaking. Therefore, the order of priority of claims against an insurance company in an insolvency proceedings is as follows;

- with regard to assets representing the technical provisions, insurance claims must take absolute precedence over any other claim on the undertaking;
- with regard to the whole of the assets of the undertaking, insurance claims must take precedence over any claim on the undertaking other than:
  - claims by employees arising from employment contracts and employment relations;
  - claims by public bodies on taxes;
  - claims by social security systems; and
  - claims on assets subject to rights in rem.

Notwithstanding the above, the expenses arising from the winding-up proceedings as determined in accordance with the general law of Gibraltar must take precedence over insurance claims.

Law stated - 13 March 2024

## Intermediaries

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

Under Gibraltar law, insurance intermediaries such as managing general agents, managing general underwriters and brokers must be licensed under Part 7 of the FSA 2019 before they can operate in Gibraltar. Gibraltar has domesticated and retained the EU Insurance Distribution Directive under its local laws and as such, in addition to obtaining the licence to operate under Part 7 of the FSA 2019 from the GFSC, insurance intermediaries will have to comply with the requirements of the Insurance Distribution Regs in Gibraltar. As Gibraltar has retained passporting rights into the United Kingdom, any insurance intermediary that is licensed in Gibraltar will be able to passport their services into the UK under the current passporting regime, which continues to be operable until the GAR is in place in the United Kingdom.

Law stated - 13 March 2024

## INSURANCE CLAIMS AND COVERAGE

### Third-party actions

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

Unlike the United Kingdom, Gibraltar does not have any statutory framework to support a third party's claim against an insurer. Nevertheless, English jurisprudence is used as persuasive authority in Gibraltar. Gibraltar's English Law (Application Act) 1962 provides, *inter alia*, that common law and the rules of equity as enforced in England shall apply to Gibraltar, in so far as they may be applicable to the circumstances of Gibraltar and subject to such modifications thereto as such circumstances may require, save to the extent to which common law or any rule of equity may from time to time be modified or excluded by (1) any order of His Majesty in Council that applies in Gibraltar; or (2) any act of Parliament at Westminster that applies to Gibraltar, whether by express provision or by necessary implication; or any act of Parliament and in all causes or matters in which there is any conflict or variance between the common law and the rules of equity with reference to the same subject, in which case, the rules of equity shall prevail (see section 2(1) and (2) of the English Law (Application) Act 1962. In view thereof, Gibraltar courts could well be persuaded to apply any English common law rules notwithstanding that there are no codified laws in respect of third-party claims.

Law stated - 13 March 2024

### Late notice of claim

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

Gibraltar will follow English common law principles in this respect as there is currently no Gibraltar-specific case law in relation to late notice of a claim.

As such, the common law principles laid down in the English case of *Taylors v Builders Accident Assurance Ltd* [1997] PIQR would be of highly persuasive authority should there be a late notice claim filed in the Courts of Gibraltar. It was held that the delay in notifying the claim to the insurer deprived the insurer of its right to investigate and defend the claim. This was held to be a repudiatory breach, even though the condition breached was not expressly stated as a condition precedent.

Further, in a more recent English law case, *Arch Insurance v Philip McCullough* [2021], the Commercial Court considered the application of a notification condition in a public liability policy that was allegedly notified late, and found in favour of Arch Insurance. This decision serves to counter the perception in the market that it is difficult to prove late notification on the facts. Additionally, it reinforces that breach of a notification clause, if it is a condition precedent, can provide a complete policy defence, and insurers do not have to additionally prove prejudice. The decision provides clarity, especially in light of the surge of late notification issues due to the disruption to businesses caused by the covid-19 pandemic.

Law stated - 13 March 2024

### Wrongful denial of claim

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

This will be a matter for the courts to decide and there are currently no decided cases in Gibraltar in this respect. Claimants can also file their complaints to the Financial Services Ombudsman (the Ombudsman), which is a statutory body created under Part 14 of the Financial Services Act 2019. The Ombudsman has a wide range of powers to investigate, facilitate, mediate, propose or determine solutions to disputes. A dispute may only be considered by the Ombudsman where the act or omission that is the subject of the dispute:

- occurred not more than six years before the date when the dispute is received;
- occurred at an earlier date but with reasonable diligence the consumer could not have known of it until after that date and it is received by the Ombudsman not more than three years after the date when, in the opinion of the Ombudsman, the consumer first knew of or ought to have known of the act or omission; and
- is received by the Ombudsman within one year of the date on which the consumer first complained to the insurer about that act or omission.

Law stated - 13 March 2024

### Defence of claim

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

The trigger would be the notification by the insured of an event or circumstance within the terms prescribed by the policy between the parties, for which the insurer may be liable to act within their duty to defend a claim.

Law stated - 13 March 2024

## **Indemnity policies**

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

English law common law principles will apply and in the case of *Peninsular & Oriental Steam Navigation Co v Youell* [1997] 2 Lloyd's Rep 136, CA, the insured needed to demonstrate to the insurer that the insured is under a legal liability to one or more of those claiming against the insured and the loss in question is covered by the policy.

Law stated - 13 March 2024

## **Incontestability**

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

An incontestability clause prevents the provider from contesting coverage due to a misstatement by the insured after a specific amount of time has passed. Gibraltar has no statute that codifies this principle, however, the period may be mentioned within the specific terms of each policy. If the terms of the policy do not provide a prescribed period, then the Limitation Act 1960 (Limitation Act) could apply, under which an action cannot be brought after the expiration of six years from the date on which the cause of action accrued (see section 4). However, the limitation period will be postponed where the action is based on misrepresentation by the insured, where the right of action is concealed by the misrepresentation, or where the action is for relief of the consequences of the mistake. The limitation period will begin to run once the insurer has discovered the misrepresentation (see section 32 of the Limitation Act).

Law stated - 13 March 2024

## **Punitive damages**

### Are punitive damages insurable?

Punitive damages awarded by the court are insurable. This, however, is subject to the terms of the insurance policy.

Law stated - 13 March 2024

## **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?

An excess insurer covers a claim after the primary insurance limit has been exhausted or used up. Unfortunately, Gibraltar does not have any decided cases or legislative framework that states the obligation of the insurer to drop down and defend. Gibraltar will follow

the English law position on this and decisions will be binding if they are in the same circumstances as UK common law.

Law stated - 13 March 2024

### **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?

We are not aware of any decided cases in Gibraltar in this respect. As such, it is likely that should such a matter be adjudicated in Gibraltar, the courts would be persuaded by established English case law.

Law stated - 13 March 2024

### **Claim priority**

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

We are not aware of any Gibraltar decided cases on the matter and therefore, we are not able to comment on the order of priority of payment should there be multiple claims under the same policy.

Law stated - 13 March 2024

### **Allocation of payment**

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

Allocation issues arise when the loss is ongoing and implicates multiple policies and multiple policy periods. There are no set rules or provisions in relation to allocation of payments under Gibraltar Law. Gibraltar courts would follow English common law if such circumstances should arise.

The English courts have provided guidance for payment allocation, and for insureds who have multi-policies, and have usefully laid out common law principles which provide the following:

- Insurers may insure an insurable interest as many times and under as many policies as they wish (*Godin v London Assurance* (1758) 1 Burr 489; *Albion Insurance Co Ltd v Government Insurance Office of New South Wales* (1969) 121 CLR 342).
- The insured has the discretion to choose, subject to the terms of the policy, which policy it wishes to claim under. The chosen insurer, who is then to cover the loss, will be able to seek a contribution from the other insurer(s) under the equitable doctrine of contribution (*Boag v Economic Insurance Company Ltd* [1954] 2 Lloyd's Rep 581).

## Disgorgement or restitution

### Are disgorgement or restitution claims insurable losses?

There is currently no definition of 'insurable losses' under Gibraltar Law. Under UK statute there also is no definition of insurable losses. Therefore, Gibraltar will follow UK common law principles.

The case of *Prudential Insurance Co v Commissioners of Inland Revenue* [1904] 2 HB 658 provides clarity when defining an insurable loss, in which it was held that an insurable loss must have the following characteristics:

- there must be an element of uncertainty about whether, when and how the loss will occur;
- if it were to happen, the loss must have an adverse effect on the insured; and
- the insured must have an insurable interest in the subject matter of the loss.

Additionally, Mr Justice Channell characterised that a contract of insurance requires that for monetary consideration (the premium), a person (the insurer) agrees to pay to the other (the insured) a sum of money or some benefit upon the occurrence of one or more specified events.

Disgorgement is available only when the insured has breached an obligation of good faith or loyalty. Consequently, a party cannot insure disgorgement as this would essentially involve the recovery of disgorged funds through insurance enabling that party to retain the proceeds of its wrongful acts and shift the burden of the loss to its insurer.

Restitution claims, however, are capable of being an insurable loss.

## Definition of occurrence

### How do courts determine whether a single event resulting in multiple injuries or claims constitutes more than one occurrence under an insurance policy?

Gibraltar will follow English common law principles in this respect.

## Rescission based on misstatements

### Under what circumstances can misstatements in the application be the basis for rescission?

Gibraltar will use common law principles to determine the basis for rescission of contracts of insurance due to misstatements, although Gibraltar's Insurance (Motor Vehicles) (Third Party Risk) Act 1986 (the Act) does state that an insured must not make a false statement or withhold any material information for the purpose of obtaining the issue of a certificate of insurance as it is considered an offence to do so and therefore the contract could be rescinded (see section 14 of the Act).

Law stated - 13 March 2024

## REINSURANCE DISPUTES AND ARBITRATION

### Reinsurance disputes

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

No, formal reinsurance disputes are not common in Gibraltar. Even though Gibraltar insurance companies write about one-third of the United Kingdom's motor market, these companies would only reinsurance with reinsurers based outside of Gibraltar as there is currently no authorised reinsurer in Gibraltar. Further, most reinsurance contracts are governed by English law and as to whether arbitration or court proceedings are preferred, it would be a matter for the insurer and its reinsurer to decide.

Law stated - 13 March 2024

### Common dispute issues

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

We are not aware of such issues as Gibraltar is not a jurisdiction of choice for reinsurance disputes.

Law stated - 13 March 2024

### Arbitration awards

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

Reinsurance arbitration does not take place in Gibraltar.

Law stated - 13 March 2024

### Power of arbitrators

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

This is not applicable in Gibraltar as there is no arbitration tribunal for reinsurance in Gibraltar.

Law stated - 13 March 2024

### **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?

Reinsurance arbitration does not take place in Gibraltar, therefore it is highly unlikely that appeals will take place through the Gibraltar judicial system.

Law stated - 13 March 2024

## REINSURANCE PRINCIPLES AND PRACTICES

### **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?

Reinsurance principles and practices will follow the law governing the contract of reinsurance. Gibraltar does not have any authorised reinsurers at present, therefore it is highly unlikely that reinsurance contracts and practices will be governed by Gibraltar law.

Law stated - 13 March 2024

### **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.

We are not able to comment as Gibraltar does not have any authorised reinsurers at present, therefore it is highly unlikely that reinsurance contracts and practices will be governed by Gibraltar law.

Law stated - 13 March 2024

### **Facultative reinsurance and treaty reinsurance**

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

We are not aware of different sets of laws for either facultative or treaty reinsurance.

**Third-party action**

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

We do not currently have any authorised reinsurers in Gibraltar. Therefore, such contracts would not be governed by Gibraltar law.

Law stated - 13 March 2024

**Insolvent insurer**

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

Gibraltar's position is the same as English law: there is no obligation on the part of the reinsurer to pay a policyholder's claim where the insurer is insolvent and cannot pay.

Law stated - 13 March 2024

**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?

We do not have any reinsurers authorised in Gibraltar, therefore we are not able to advise on notice requirements and available remedies.

Law stated - 13 March 2024

**Allocation of underlying claim payments or settlements**

Where an underlying loss or claim provides for payment under multiple underlying 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?

Reinsurance principles and practices will follow the law governing the contract of reinsurance. Gibraltar does not have any authorised reinsurers at present.

Law stated - 13 March 2024

## Review

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

The governing law will be based on the jurisdiction of the reinsurer, and therefore this would vary and each case will depend upon its own specific facts. There are currently no reinsurers authorised in Gibraltar.

Law stated - 13 March 2024

## Reimbursement of commutation payments

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

Gibraltar to date has no authorised reinsurers. The reinsurer's obligations would depend on the terms of the reinsurance contract. Since reinsurance contracts are not written in Gibraltar, we are unable to comment.

Law stated - 13 March 2024

## Extracontractual obligations (ECOs)

**What is the obligation of a reinsurer to reimburse a cedent for ECOs?**

Gibraltar currently has no authorised reinsurers. The reinsurer's obligations would depend on the terms of the reinsurance contract. Since reinsurance contracts are not written in Gibraltar, we are unable to advise any further.

Law stated - 13 March 2024

## UPDATES & TRENDS

### Key developments

**Are there any emerging trends or hot topics in insurance and reinsurance regulation in your jurisdiction?**

Gibraltar insurers currently underwrite around one-third of all motor policies issued to UK policyholders. Gibraltar insurers are consequently readying themselves for the application of the Gibraltar Authorisation Regime when the UK Financial Services Act 2021 fully comes into effect, hopefully by early 2025. Gibraltar will be required to have laws and regulations that fully align with those of the United Kingdom.

The ongoing hot topic in the United Kingdom in respect of the insurance sector is consumer duty. Although it is still not implemented in the Gibraltar regulatory framework, Gibraltar authorised firms, whether insurance companies or insurance intermediaries who distribute

or sell their products in the United Kingdom, are required to conform and to have policies in place in their business to ensure good customer outcomes.

Another development in the past year is on operational resilience of regulated firms. The Financial Services (Operational Resilience) Regulations 2023 was implemented on 13 July 2023 and these regulations apply to, amongst others, insurance and reinsurance undertakings and insurance and reinsurance intermediaries with annual revenue from regulated intermediary business of £35 million or more, calculated on a three year rolling average.

These firms must:

- identify its important business services; and
- set an impact tolerance for each of those important business services.

The impact set for each important business service must specify the first point at which a disruption to the service would (a) cause an intolerable level of harm to any one or more of the firm's clients or (b) pose a risk to (1) the firm's safety and soundness; (2) the orderly operation of the financial markets; (3) the soundness, stability or resilience of the Gibraltar financial system; or (4) an appropriate degree of protection for those who are or may become the firm's policyholders (where the firm is an insurance or reinsurance undertaking).

**Law stated - 13 March 2024**