

The image shows a close-up of a building's exterior. On the left, there are two large, blue-painted columns. To the right, a series of smaller, red-painted columns are visible. A planter box with green plants is situated between the blue and red columns. The background shows a building with a grid-like pattern of windows.

# Bermuda captive insurers

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## 1 Introduction

Bermuda is the premier domicile for captive insurers. As at 31 December 2019, there were 715 companies licensed as captive insurers in Bermuda, representing an annual gross premium income of approximately \$40 billion.<sup>1</sup> Bermuda licenses more captive insurers than any other domicile other than the United States of America and more than any single state of the United States of America.<sup>2</sup>

Bermuda pioneered the captive insurer industry in the 1960s and now boasts an unrivalled concentration of local professional knowledge with decades of experience. Bermuda is also home to the underwriting operations for more than 30 major commercial international insurance and reinsurance firms and is the largest supplier of catastrophe reinsurance to US insurers.<sup>3</sup> At the end of 2019, there were 1,200 insurers and reinsurers registered in Bermuda holding total assets in excess of \$800 billion and writing gross premium of approximately \$150 billion.

Bermuda is the world's third largest insurance and reinsurance market<sup>4</sup> and is one of only two non-European Union (EU) domiciles whose regulatory regime for commercial insurers has been recognised as fully equivalent with EU Solvency II by reference to reinsurance, group supervision and solvency capital. Known as the “world's risk capital”, it has been a beacon of innovation, entrepreneurialism and leadership in the insurance market globally for over 50 years, with the genesis of insurance-linked securities (among other developments) to its credit.

Bermuda has been granted “Reciprocal Jurisdiction” status (effective 1 January 2020) by the United States National Association of Insurance Commissioners, making reinsurance provided by Bermuda commercial insurers eligible for regulatory recognition without the need to provide collateral.

Its insurance market is licensed and supervised by a highly-experienced regulator, the Bermuda Monetary Authority (BMA), with 50 years' experience of the supervision of financial institutions. The BMA's approach to supervision is risk-based and includes a “proportionality” principle that allows it to calibrate its regulation of captive insurers in a manner that reflects the lower regulatory risks that they pose.

As a British Overseas Territory, Bermuda is a self-governing but dependent territory of the United Kingdom and is subject to the external relations of the United Kingdom. It has a stable political system and a robust, independent and efficient court system that upholds the rule of law, including a specialist Commercial Court that determines insurance and company matters. Its highest court of appeal is the Judicial Committee of the Privy Council of the United Kingdom. The Bermuda Government continues to have a pro-business agenda making Bermuda a favourable environment in which to establish an insurance entity.

For anyone considering registering a captive insurer in Bermuda, this paper provides an overview of the licensing requirements and process, the prudential and conduct standards that a captive insurer will need to meet and the on-going filing and other requirements that it will need to comply with. It is not, however, a substitute for legal advice.

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<sup>1</sup> Based on a press release published by the Bermuda Monetary Authority on 22 January 2020 (<https://www.bma.bm/news-and-press-releases/bma-releases-2019-captive-number-registration-statistics>).

<sup>2</sup> Based on figures reported in <https://www.captive.com/news/2019/02/25/srs-charts-the-total-number-of-active-captives-for-2018>.

<sup>3</sup> Association of Bermuda Insurers and Reinsurers (<https://www.abir.bm/why-bermuda/>).

<sup>4</sup> <https://www.insuranceerm.com/content/events/insurance-risk-and-capital-bermuda-2018.html>.

## 2 What is a Bermuda captive insurer and why establish one?

A captive insurer is an insurance company that is wholly-owned by the policyholders whose risks (or whose affiliates' risks) the insurer insures. It may be owned by a single parent company and insure only risks of that company and its group entities (single-parent). Alternatively, it may be owned by a number of unrelated parent companies and insure only risks of those companies and their respective affiliates (multi-parent).

Owners of the captive insurer must capitalise it to a level compliant with Bermuda company and insurance law (details are set out, below, in section 7). The capital is at risk when the captive insurer starts underwriting and it supports the reserves (funded by premiums) maintained by the captive insurer in respect of expected loss and unearned premium obligations.

Despite the regulatory equivalence of its commercial insurance regime with European Solvency II, Bermuda operates a bifurcated regulatory model, which means that the capital requirements for captive insurers are usually considerably less onerous than those applicable to commercial insurers in Bermuda.

Owning a Bermuda captive insurer may offer a number of advantages to a corporate group:

- It allows the owners to draft bespoke insurance cover for their corporate groups. This may represent a valuable benefit where risks of the owners and their affiliates are difficult to insure in the commercial insurance markets. In that event, with the assistance of legal advisers and insurance managers, the owners may be able to use the captive insurer obtain more attractive terms through the use of tailored policies and structured solutions.
- It allows the owners to benefit from any pricing differential between the direct commercial insurance markets and the reinsurance markets. In these days of an apparently indefinite soft market, that consideration may be of less relevance. But there may still be costs to be saved for some classes of business and for some geographical areas. A captive insurer may also allow the owners to reduce or avoid some of the acquisition costs that are often priced into commercial insurance rates.
- Any profits of the captive insurer are, subject to the observance of Bermuda company and insurance law, available for dividend to its shareholders, thereby permitting shareholders to participate in any positive underwriting results of the underlying insurance programmes. The applicable rules relating to the declaration of dividends by a captive insurer are discussed in section 7.12 below. Alternatively, in many mutual insurance company structures, profits are reinvested in the company year on year.
- Subject to the observance of Bermuda company and insurance law regarding the maintenance of reserves for future liabilities and with any contractual claims cooperation obligations in the captive insurer's outward reinsurance programmes, shareholders of a captive insurer may have a certain amount of influence over the handling of claims. Depending on the circumstances, this could permit a slightly more benevolent approach to settlements than might be expected from an independent commercial insurer (although, of course, a worsening claims experience will impair the potential advantage mentioned directly above, namely the ability to participate in positive underwriting results).

### 3 Preliminary considerations

Anyone considering establishing a captive insurer in Bermuda should begin by choosing suitable professional service providers to advise it on the types of insurer license class available along with the criteria the proposed entity will need to meet in order to comply with them. As will become apparent later in this memorandum, there are many legal and strategic matters to take into consideration before making a licensing application. Among other things, the proposed owners will need advice on what domestic or worldwide risks will be desirable for the captive to underwrite, whether the captive will write on a direct basis or whether, perhaps where local regulatory issues apply or a strong balance sheet is needed, risks will be fronted by local commercial carriers. Finally, it will also be necessary to consider what outwards reinsurance programme is desirable. The proposed owners will want to take advice on these matters from their internal chief risk officer, their broker, accountants and legal advisers.

The proposed owners will need to choose a law firm, a corporate service provider (who will provide the registered office address of the insurer and maintain its minute book and statutory registers), an auditor, insurance manager, bank and either a loss reserve specialist or an actuary.

### 4 Overview of Bermuda company and insurance regulation

Bermuda captive insurers are registered under the Insurance Act 1978 (Insurance Act). The Insurance Act prohibits persons from carrying on insurance business in or from within Bermuda without being registered under the Insurance Act or unless they benefit from a statutory exemption. The supervision and inspection of entities registered under the Insurance Act is the responsibility of the BMA.

Most captive insurers are managed by highly experienced insurance managers based in Bermuda. Insurance managers are able to discharge, under the supervision of the Board of Directors of a captive insurer, most executive functions of the captive insurer, underwriting, claims, finance, investment and compliance functions and to assist with the purchase of outward reinsurance.

Captive insurers must be bodies corporate and are invariably registered under the Bermuda Companies Act 1981 (Companies Act). Bermuda law permits the registration of companies that are exempt from local requirements for ownership and control by Bermudians. “Exempted companies” may be wholly-owned and controlled by international subscribers.

Bermuda has robust laws to combat risks of money-laundering and terrorist financing, having attained the highest level of technical compliance of any of the 75 or so jurisdictions reviewed in mutual evaluation reports published by 2020 by the Financial Action Task Force (FATF). Accordingly, Bermuda service providers conduct due diligence on the proposed ultimate beneficial owners of Bermuda captive insurers. Strict rules apply in relation to persons connected with countries designated by FATF as high-risk or as having inadequate systems and controls to combat money laundering and terrorist financing.

## 5 Captive insurer license classes

With the help of their professional advisers, the proposed owners will need to determine what license class to apply for, having regard to the number of unrelated owners that the proposed captive insurer will have and its business plan.

Bermuda has a highly-calibrated, flexible captive insurer licensing system that is responsive to the individual risk profiles of different types of captive insurer. There are five license classes of Bermuda captive insurers, three for captive insurers carrying on general business (property and casualty), and two for those carrying on long-term business (life).

Which captive insurer license class applies depends (other than whether the captive insurer is to carry on general business or long-term business) on whether the captive insurer will be a single-parent or multi-parent captive insurer and on how much "unrelated" (third party) business it will write (if any).

Captive insurers carrying on general business are classified as Class 1, Class 2 or Class 3 based on the following criteria:

<b>Class 1</b>	Single-parent captive insurers that write no unrelated business (in other words, that only write risks of their parent or affiliates).
<b>Class 2</b>	Single-parent captive insurers that write unrelated business that does not exceed 20% of their net written premium and multi-parent captive insurers that write no or no more than 20% unrelated business.
<b>Class 3</b>	Companies that write more than 20% unrelated business up to a limit of 50%.

Captive insurers carrying on long-term business are classified as Class A or Class B based on the following criteria:

<b>Class A</b>	Single-parent captive insurers that write no unrelated business.
<b>Class B</b>	Single-parent captive insurers that write unrelated business that does not exceed 20% of premium and other considerations written and multi-parent captive insurers that write no or no more than 20% unrelated business.

Bermuda also has a discrete licensing system for captive insurers who wish to experiment in new technologies and/or provide innovative products, services and delivery mechanisms to a limited number of policyholders. Details of the system are beyond the scope of this paper.

## 6 Licensing process

### 6.1 Overview

Having determined what license to seek, the proposed owners must apply to the BMA's Assessment and Licensing Committee (ALC) for preliminary approval. The ALC sits at weekly meetings every Friday. An application submitted on Monday should be reviewed by the ALC during its meeting on Friday of the same week.

Unless the proposed owners already have a Bermuda company, they will also need to apply to the Registrar of Companies to register a company under the Companies Act. Company registration applications can be approved within two to three business days.

Unless it has voting shares listed on an appointed exchange, a Bermuda company cannot issue voting shares to a non-resident person without obtaining the prior permission of the Controller of Exchange or unless a *de minimis* amount applies. The functions of the Controller of Exchange are exercised by the corporate authorisations team of the BMA. Details of the beneficial owners of the proposed company, including personal declarations and statements of net wealth from individuals and constitutional documents and financial statements of intermediate holding companies, will need to be submitted as part of the application for permission. Shares in the new company cannot be subscribed by the proposed shareholders until receipt of notice of non-objection.

At the same time as applying to the ALC for preliminary approval of their license application, many applicants make a concurrent application in the same week to the Registrar of Companies, reserving the proposed company name and applying to register the new company under the Companies Act.

If the company is incorporated in the same week, the proposed owners can ensure that it will be duly organised and capitalised in time for a formal application to the ALC on the Monday of the following week, with a view to a decision on registration under the Insurance Act on the Friday.

### 6.2 Documents required for licensing application

With assistance from their professional advisers, the proposed owners will need to prepare the following documents which will form the licensing application:

- Business plan attaching pro forma financial projections (balance sheets and revenue accounts) covering first five years, potentially with an actuarial evaluation of reserves as necessary.
- Completed statutory license application form, including (among other things):
  - Basic corporate details.
  - Identity of principal representative, insurance manager, auditor and loss reserve specialist or approved actuary (as applicable) and attaching proof of acceptance of appointment.
  - Details of the extent of unrelated insurance/reinsurance business proposed.
  - Estimated premiums written on a gross and net basis.
  - Outwards reinsurance arrangements.
- CVs and personal declarations for directors and officers.
- Details of ownership structure.

## 6.3 Licensing requirements

Before registering a company as a captive insurer, the BMA must be satisfied that the company:

- Meets its prescribed minimum margin of solvency (see 7.1 below).
- (If it is a body corporate with share capital) has paid up share capital equal to or exceeding the statutory minimum amount applicable to it (see 7.2 below).
- Has or has available adequate knowledge and expertise.
- Meets the following "minimum criteria" (among others) of registration:
  - Officers and controllers (including shareholder controllers) are fit and proper persons to perform their functions.
  - Appropriate corporate governance policies and processes are established given the nature, size, complexity and risk profile of the insurer.
  - The business of the insurer is conducted in a prudent manner.
  - The position of the insurer within the structure of any group to which it belongs does not obstruct effective consolidated supervision.
  - The business of the insurer is carried on with integrity and the professional skills appropriate to the nature and scale of the insurer's activities.

## 7 Ongoing requirements

Once licensed, a captive insurer is subject to a number of ongoing requirements.

### 7.1 Minimum margin of solvency

All captive insurers must ensure that their business assets exceed their business liabilities by at least a minimum amount called the minimum margin of solvency.

For captive insurers carrying on general business, the minimum margin of solvency is calculated by reference to the greater of net written premiums and discounted loss reserves and other insurance reserves. It is subject to a minimum floor of \$120,000 for Class 1 insurers, \$250,000 for Class 2 insurers and \$1 million for Class 3 insurers.

For captive insurers carrying on long-term business, the minimum margin of solvency is based on a proportion of assets reported on the insurer's statutory balance sheet and is subject to a minimum floor of \$120,000 for Class A insurers and \$250,000 for Class B insurers.

### 7.2 Minimum amount of paid up share capital

All insurers with share capital must have a minimum amount of paid up share capital. The minimum amount applicable to Class 1, Class 2, Class 3 and Class A insurers is \$120,000. The minimum amount applicable to Class B insurers is \$250,000.



### **7.3 Liquidity ratio**

Companies carrying on general business must maintain a liquidity ratio of liquid assets to liabilities, more specifically calculated in the Insurance Returns and Solvency Regulations 1980, of 75%.

### **7.4 Principal office and principal representative**

Captive insurers must maintain a principal office and have a principal representative in Bermuda.

The principal representative is a person approved by the BMA whose role it is to report concerns regarding solvency or knowledge or reason to believe that a captive insurer is in breach of conditions relating to its margins, is involved in criminal proceedings or has ceased carrying on insurance business in or from within Bermuda.

The principal representative will also need to sign certain annual statutory filings of the insurer, including its business solvency certificate and statutory compliance declaration (see 7.8 below).

Normally, the principal representative will be an insurance manager, whose premises will form the principal office. As noted above, Bermuda has a number of highly-experienced insurance managers.

### **7.5 Loss reserve specialist or approved actuary**

All multi-parent captive insurers carrying on general business must appoint a suitably qualified approved loss reserve specialist to confirm the insurer's reserves. Captive insurers carrying on long-term business must appoint a suitably qualified actuary approved by the BMA.

### **7.6 Auditor**

Captive insurers must appoint an independent auditor, approved by the BMA, to audit their statutory financial statements.

### **7.7 Insurance Code of Conduct**

The BMA publishes an Insurance Code of Conduct (Insurance Code) setting out duties, requirements and standards with which insurers must comply in the conduct of their business. Specifically, the Insurance Code:

- Requires insurers to establish and maintain a sound corporate governance framework, providing for appropriate oversight of the insurer's business, and adequately protecting the interests of policyholders.
- Requires (in the case of an insurer that employs an insurance manager) the board of directors of the insurer to ensure that the insurance manager passes the fitness and propriety tests.
- Obliges the board of directors and the chief and senior executives to adopt an effective risk management strategy and an internal controls framework that has regard for international best practice on risk management and internal controls.
- Specifies particular governance mechanisms to be embedded in the corporate governance framework as part of the insurer's obligation to conduct business in a prudent manner.

Its provisions apply to all insurers, but the BMA assesses compliance using a "proportionality" principle, meaning that it will take into account the nature, scale and complexity of an insurer's business in determining what compliance involves on a case by case basis.

Failure to comply may provide grounds for the BMA to determine that the insurer is not complying with the minimum criterion of conducting business in a sound and prudent manner.

## 7.8 Insurance Act Annual Statutory Filing Requirements

Captive insurers must file, within six months of the end of their financial year:

- An annual statutory financial return containing the following:
  - Auditor's report
  - Business solvency certificate
  - Loss reserve opinion (for general business multi-parent captive insurers)
  - Actuary's opinion (for long-term business multi-parent captive insurers)
  - Declaration of compliance
  - Own risk assessment
  - AML return (for long-term direct insurers)
  - Statement of control, and
  - Underwriting analyses.
- Audited annual financial statements (including statutory balance sheet, statutory income statement, statement of capital and surplus and notes).

The statutory financial statements need not comply with GAAP or IFRS and in fact the preparation and presentation of items in statutory financial statements differs from GAAP and IFRS in that goodwill, deferred acquisition costs, intangibles are not admitted in statutory financial statements.

## 7.9 BMA supervision of controllers

The BMA requires shareholder controllers of captive insurers to comply with its fitness and propriety regime.

A shareholder controller means a person who, alone or with any associate or associates:

- Holds 10% or more of the shares carrying rights to vote at a general meeting of the insurer or its parent company
- Is entitled to exercise or control of 10% or more of the voting power at a general meeting of the insurer or its parent company, or
- Is able to exercise a significant influence over the management of the insurer or its parent company by virtue of holding shares or an entitlement to exercise or control the exercise of voting power at any general meeting.

There are four sub-divisions of shareholder controller, 10%, 20%, 33% and 50% shareholder controller, reflecting whether the shares held by the shareholder controller respectively represent 10% or more but less than 20%, 20% or more but less than 33%, 33% or more but less than 50% or 50% or more of the voting rights referred to above.

The applicable procedure in the event of a proposed change of control varies depending on whether or not the captive insurer has shares listed on a stock exchange recognized by the BMA.

Persons proposing to become a 10%, 20%, 33% or 50% shareholder controller of an insurer whose shares are listed on a stock exchange recognized by the BMA (public company) need only notify the BMA within 45 days of the fact.

Persons proposing to become a 10%, 20%, 33% or 50% shareholder controller of an insurer which is not a public company (private company) must follow a non-objection procedure, involving notice to the BMA and either receipt of notice of non-objection within a period of 45 days or the elapse of that period without notice of objection. Generally, a proposed shareholder controller of a private company insurer will want to obtain notice of non-objection rather than rely on the absence of timely notice of objection.

In assessing the fitness and propriety of a proposed shareholder controller, the BMA must have regard to the influence that the proposed shareholder controller has or is likely to have on the conduct of the affairs of the insurer. If the proposed shareholder controller does, or is likely to, exercise close control over the business, the BMA will look for evidence that it has the probity and soundness of judgment and relevant knowledge and skills to manage the affairs of the insurer. If the proposed shareholder controller is not likely to be closely involved, these factors will be of less relevance. The BMA will also have regard to whether the financial position, reputation or conduct of the proposed shareholder controller has damaged or is likely to damage the insurer through an association which undermines confidence. Proposed shareholder controllers must disclose detailed due diligence material, including a personal declaration for individuals.

The BMA may also give notice of objection to an existing shareholder controller if it determines that the person is no longer a fit and proper person to be a shareholder controller. The process begins with a pre-notification of intent to object, and allows for a right to make representations in reply.

A captive insurer must file with the BMA updated details of its controllers at the time of filing its statutory financial statements.

## **7.10 Material change**

A captive insurer must observe a statutory notification and non-objection procedure before effecting a “material change”. A “material change” includes:

- Certain portfolio transfers
- Corporate reorganisations
- Material outsourcings
- Acquisition of interest in non-insurance businesses
- The development of a new line of business
- Sale of an insurer subsidiary.

The captive insurer must serve notice of intention to effect the material change on the BMA. It may not affect the material change unless it receives notice of the BMA’s non-objection within 30 days of service or the period of 30 days elapses without notice of objection.

The BMA must object to the proposed change unless it is satisfied that it would not threaten the interests of policyholders and that the requirements of the Insurance Act will continue to be complied with by the insurer.

## **7.11 Registration and licensing fees**

Annual government fees are payable by Bermuda companies based on their assessable capital (authorised share capital plus share premium account). Annual licensing fees are also payable to the BMA.

## 7.12 Dividends and capital reduction

A captive insurer must obtain the approval of the BMA before:

- Declaring a dividend if it failed to comply with its margins on the last day of the last financial year, or
- Reducing its total statutory capital as set out in its previous year's financial statements by 15% or more.

A captive insurer may not declare dividends in any financial year if this would cause it to be in breach of its margins. The declaration of dividends and reduction in capital must also be in compliance with the provisions of the Companies Act.

## 7.13 Separate business funds

Exceptionally, captive insurers may be registered with long-term and general business licenses. Insurers carrying on both long-term and general business must maintain separate accounts relating to their general and long-term businesses.

## 7.14 Compliance with Companies Act

Bermuda companies must maintain a registered office address in Bermuda at which are maintained statutory registers of members and directors and officers and company books and papers and records of account. They must have at least one director or a secretary that is ordinarily resident in Bermuda or have "resident representative". The Companies Act also includes provisions relating to annual financial statements, annual filings, management and administration and the winding up of companies.

## 7.15 Economic substance

The Economic Substance Act 2018 (ESA) requires Bermuda captive insurers to maintain a substantial economic presence in Bermuda by:

- Being managed and directed in Bermuda
- Undertaking "core income generating activities" in Bermuda
- Maintaining adequate physical presence in Bermuda
- Employing adequate suitably qualified full time employees in Bermuda
- Incurring adequate operating expenditure in Bermuda

(ES requirements).

In recognition of the fact that the Insurance Act and the Insurance Code of Conduct contain provisions requiring a substantial presence on the island, insurers benefit from a deeming provision according to which they may meet the ES requirements by demonstrating compliance with applicable provisions of the Insurance Act and provisions of the Companies Act.

Bermuda captive insurers, in common with all Bermuda companies that are within scope of the ESA, must file an annual economic substance declaration with the Registrar of Companies providing data on their presence in Bermuda or be recognised by the Registrar of Companies as tax resident in jurisdiction that is not on the EU list of non-cooperative jurisdictions for tax purposes.

## **8 Other matters**

### **8.1 Taxation and stamp duty**

There is currently no Bermuda income, corporation or profits tax, withholding tax, capital gains tax or transfer tax payable by exempted companies. An exempted company captive insurer may apply to the Minister of Finance for an undertaking that, in the event of Bermuda legislation imposing tax computed on profits or income or on any capital assets, gain or appreciation or tax in the nature of estate duty or inheritance tax, such tax shall not be applicable to the company, its operations, shares, debentures or other obligations, until 31 March 2035, except insofar as such tax applies to persons ordinarily resident in Bermuda or in respect of land in Bermuda held or leased by the company.

Stamp duty is generally not payable in respect of the affairs of an exempted company captive insurer, except in respect of transactions relating to Bermuda land.

### **8.2 Foreign exchange control**

Exempted companies may operate in Bermuda free of exchange control regulations and may pay dividends and distributions, open and maintain foreign bank accounts, acquire assets, meet all liabilities and purchase securities without the approval of the Bermuda Controller of Exchange.

However, as noted in 6.1 above, unless voting shares of the captive insurer company are listed on an appointed exchange, exchange control permission is required before shares in the company may be transferred or issued to a non-resident person who holds or who will as a result hold more than 10% of the voting shares. New subscriptions by existing shareholders which do not involve the shareholder exceeding a prescribed percentage holding only need to be notified and, even where the percentage is exceeded, permission is assured where there is no change in overall beneficial ownership of the captive insurer.

### **8.3 Corporate reorganisation and redomestication**

Bermuda law offers a range of convenient processes for reorganising a company and changing its corporate domicile.

Bermuda captive insurer companies may amalgamate or merge under Bermuda law with the prior approval of the BMA.

Subject to the existence of complementary legislation in the proposed new jurisdiction of domicile, Bermuda companies can discontinue in Bermuda and continue in another jurisdiction without dissolution. The process can be used by a captive insurer company should its members determine that it is no longer in the company's best interests to remain in Bermuda, provided that they obtain prior approval of the BMA. Redomestication of exempted companies can also be achieved, again with the prior approval of the BMA, by cross-border amalgamation or merger with a corporation in another jurisdiction.

## Further information

To find out more about our services and expertise, and key contacts, go to: [kennedyslaw.com/bermuda](https://www.kennedyslaw.com/bermuda)

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