

HONG KONG'S INSURANCE COMPANIES (AMENDMENT) BILL 2014 MAY SOON PASS



We have previously written about the most important future regulatory change in Hong Kong – namely the establishment of an Independent Insurance Authority (IIA) (<http://www.hfw.com/Insurance-regulation-in-HK-April-2014>).

Since its publication, the Hong Kong Federation of Insurers (**HKFI**) and other bodies have been lobbying for changes to be made to the Insurance Companies (Amendment) Bill 2014 (**IIA Bill**). They have had some success. On 15 May 2015, the administration published a “Response to Outstanding Issues Arising from the Discussions at Previous Meetings and Raised by the Industry” (<http://www.legco.gov.hk/yr13-14/english/bc/bc06/papers/bc060518cb1-858-3-e.pdf>). This document suggests that the changes to the IIA Bill requested by the HKFI and other bodies have been considered and to some extent adopted.

The government hopes that the IIA Bill, which amends the key insurance legislation and establishes the IIA, will pass before the Hong Kong Legislative Council’s summer recess (in July). While opinions are split on whether the IIA Bill will pass this quickly, or whether it will be delayed by filibustering or the recent failure to pass the electoral reform package, the official timetable is that the provisional IIA will be established in October 2015, with a Chairman and staff being recruited over the following 12 months. By the end of 2016 or beginning of 2017, the government aims that the IIA will be operative and the Office of the Commissioner of Insurance (**OCI**) will close. Thus the new IIA will replace the old IA (a public officer, currently Annie Choi, the Commissioner of Insurance) and her department the OCI.

In this briefing, we summarise some of the key amendments that are likely to be made to the IIA Bill before it passes.



Amendments likely to be made to the IIA Bill (and currently being proposed as Committee Stage Amendments)

1. Best interests obligation on intermediaries (new section 89)

The concerns are that:

- Insurance agents (who are agents of and thus owe duties to insurers) should not owe a best interest duty to policyholders.
- Making the obligation (of best interests) statutory without qualification could create a new statutory cause of action against intermediaries (by clients).

Proposed IIA Bill amendment:

- The best interests duty will be retained for all intermediaries (including agents). The IIA will give details in the Code of Conduct for Insurance Intermediaries of what constitutes “best interests”. In drawing up the code, the IIA will take into account the different roles of insurance agents and brokers. New section 93(7) stipulates that the code will be admissible in evidence in any proceedings under the ordinance before a court, and that *“if a provision in the code appears to the court to be relevant to a question arising in the proceedings, the court must, in determining the question, take into account any compliance or non-compliance of the provision”*.
- A new provision will likely be included under new section 89 to clarify that a breach of the conduct requirements would not on its own render any insurance intermediary or insurance company liable to judicial proceedings. This amendment will not disturb an aggrieved person’s right to take civil action against an insurance intermediary or an insurance

company on other grounds under common law.

2. Activities performed by employees of insurers (new section 121(2) and new schedule 1A)

New schedule 1A sets out the scope of the regulated activities. To ensure a level playing field and to prevent possible circumvention, the proposed IIA regime is activity-based, ie persons who engage in “regulated activities” (whether they are individual insurance agents, technical representatives of insurance agencies or insurance broker companies, or employees of insurers) should be subject to the same licensing and conduct requirements. New section 121(2) provides that a person acting on behalf of an insurer does not need to be licensed if he carries on a “regulated activity” that only involves the discharge of clerical or administrative duties for an insurer.

The concerns are that:

- Apart from clerical or administrative staff, some employees of insurers might give regulated advice when performing their jobs such as underwriting and claims handling.

Proposed IIA Bill amendment:

- A new provision is likely to be included to the effect that an employee of an authorised insurer does not need to be licensed if he carries on a “regulated activity” that only involves the discharge of underwriting or claims handling duties for an insurer.
- It is proposed that employees of authorised captive insurance companies and authorised reinsurance companies will be exempt from the licensing regime because they do not distribute insurance products to the general public.

3. Insurance agents’ relationship with insurers (revised section 68)

The government seeks to maintain the existing requirement under the Insurance Companies Ordinance (ICO) regarding the liability of an insurer for the acts of its appointed insurance agent under the ICO. Specifically, the existing section 68(2) provides that an insurer is not able to exclude or limit its liability for the actions of its appointed insurance agent in the dealings for the issue of a contract of insurance and insurance business relating to the contract.

The concerns are that:

- Revised section 68 would override the recently established common law position.
- An insurer should not be responsible for the acts of its appointed insurance agent if the relevant policy holder knows that the insurance agent’s acts are outside the latter’s authority.

Proposed IIA Bill Amendment:

- A new provision is likely to be included to make it clear that an insurer is not liable for the act of an insurance agent if (i) the act is not within the scope of the insurance agent’s authority; and (ii) that the insurance agent has disclosed that fact to the client before the client relied on the act.
- The onus of proving the above lies with the insurer.

4. Award of legal costs by the Insurance Appeals Tribunal (IAT) (new section 104)

The suggestion is that:

- The costs that can be awarded by the IAT can be capped at a certain level.



Proposed IIA Bill Amendment:

- Suggestion rejected.
- However, specific provisions are likely to be added to the IIA Bill providing that, with the consent of both parties to the review, the IAT may make a determination on the basis of written submissions only. This documents-only procedure is aimed at giving appellants a lower cost alternative.

5. Disciplinary proceedings

The concerns are:

- Will the IIA act impartially and separate its functions of carrying out investigation and making disciplinary decisions?
- That it was proposed that IIA should be mandated to consult the proposed expert panel before making major disciplinary decisions such as the revocation of licences.

Proposed IIA Bill amendment:

- Proposal rejected.
- The function of the proposed expert panel is to fill IIA's knowledge gap if necessary.
- The IIA will put in place a Chinese wall to ensure that its investigative staff will not be involved in the disciplinary process and the determination of disciplinary sanctions.

6. Reasonableness of pecuniary penalty on insurance intermediaries (new section 82)

The concern:

- Potential for unreasonable pecuniary penalties on insurance intermediaries.

Proposed IIA Bill Amendment:

- None.

■ The IIA is likely to make reference to fining guidelines similar to those currently adopted in other financial regulatory regimes which in general require the following factors to be taken into account when determining the quantum of a pecuniary penalty:

- The nature, seriousness and impact of a contravention.
- The conduct of the regulated person/entity concerned after the contravention (ie whether it has taken any remedial steps or attempted to conceal).
- Previous disciplinary record and compliance history of the regulated person/entity concerned.
- A pecuniary penalty should not have the likely effect of putting the regulated person/entity concerned in financial jeopardy.

7. Access to information, oral hearing and cross-examination (new section 81(1))

The concerns are:

- A defendant should be given an express right to an oral hearing and cross-examination.
- A defendant should have the right to access all of the information and evidence supporting charges.

Proposed IIA Bill Amendment:

- The IIA Bill is likely to be amended to confirm that an “an opportunity of being heard” is a reference to an opportunity to “make written or oral representations”. The IIA is likely to consider on a case by case basis whether it is appropriate to conduct an oral hearing and allow cross-examination. The IIA will set out procedural details of its disciplinary proceedings in the relevant

regulatory handbook, including the arrangements that the IIA will consider conducting an oral hearing and allowing cross-examination if such is justified.

- The government has no objection to the request that a defendant may request access to relevant information and evidence supporting the charges against him.

Conclusion

The above-listed proposed amendments to the IIA Bill follow relentless lobbying by the insurance industry. While some will say that the amendments do not go far enough (eg the best interests requirement has not been retained in the body of the legislation), the proposed amendments do clarify the IIA Bill and as such hopefully facilitate its implementation and forestall major difficulties.



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