

COUNTRY UPDATE-Hong Kong: Insurance

Dec 03 2019 Charlotte Robins and Matt Bower

The Hong Kong insurance industry is undergoing an exciting period of growth and regulatory transition. The insurance market continues to grow rapidly, with statistics from the Insurance Authority (IA) indicating that total gross premiums for the Hong Kong insurance industry in 2018 had increased by 8.6% in comparison to 2017.

The IA replaced the Office of the Commissioner of Insurance (OCI) on June 26, 2017, with enhanced power over the regulation of insurers and enhanced enforcement powers; and on September 23, 2019, the IA replaced the industry's three self-regulatory organizations and took over the regulation of insurance intermediaries, which was previously subject to a self-regulatory regime. The introduction of a new statutory licensing regime places greater regulatory control over insurance intermediaries (i.e. insurance brokers and agents).

Regulatory framework

Introduction of the IA

As the primary insurance regulator in Hong Kong, the IA's principal function is "to regulate and supervise the insurance industry for the promotion of the general stability of the insurance industry and for the protection of existing and potential policyholders" (Insurance Ordinance (IO), section 4A). Provisions under the Insurance Companies (Amendment) Ordinance 2015 came into operation in phases starting from 26 June 2017 with the establishment of the IA. The IA has been tasked with functions including:

- supervising compliance with the IO;

- promoting and encouraging proper standards of conduct among insurers and insurance intermediaries; and

- promoting the competitiveness of the Hong Kong insurance industry globally.

Governance structure of the IA

The following members of the IA are appointed by the chief executive of Hong Kong:

- a chairperson;

- a chief executive officer; and

- eight non-executive and five executive directors.

The IA has established four functional committees:

- the Corporate Services Committee, tasked with matters relating to the IA's internal administration;
- the External Relations Committee, which is responsible for the IA's external communications and promotion of public understanding of insurance products;
- the Audit Committee, which oversees the effectiveness of the IA's internal control and risk management systems, as well as the appointment of its external auditor; and
- the Regulatory Instruments Committee, which is responsible for reviewing draft legislation, code guidelines (each a GL) and circulars and overseeing the consultation of new and updated regulatory instruments.

Industry funding

In line with the International Association of Insurance Supervisors' (IAIS) requirement that insurance regulators should be financially independent, it is envisaged that the IA will eventually be fully funded by the industry and policyholders through a combination of:

- authorisation and annual fees;
- insurers register's prescribed fee, for instance application fee for approval of the appointment of a controller; and
- a levy on insurance premiums, payable by policyholders.

While licence fees for insurance intermediaries will be waived for the first five years of the new licensing regime, levies on policyholders commenced on 1 January 2018. Under the IO, levies for insurance premiums are payable by policyholders to the IA through their insurance companies. Levies for the first phase (i.e. 1 January 2018 to 31 March 2019) was set at 0.04% of the annual premium and capped at HK\$40 per life insurance policy and HK\$2,000 per non-life insurance policy. This is set to increase incrementally (in four phases) until the rate reaches 0.1% of annual premium by 1 April 2021, with a cap of HK\$100 per life insurance policy and HK\$5,000 per non-life policy per year.

Authorisation and supervision of insurers

The IO prohibits any person from carrying on insurance business in or from Hong Kong except by (a) companies authorised

under section 8 of the IO (authorised insurers), (b) Lloyd's, or (c) an approved association of underwriters approved by the IA.

Authorised insurers in Hong Kong are currently subject to a range of regulatory requirements, both at the time of initial authorisation and on an on-going basis. Many of these requirements, including in relation to key matters such as capital adequacy and solvency (as discussed below) have remained largely unchanged during the shift in responsibility from the OCI to the IA. However, one of the most significant changes associated with the IA's introduction has been increased scrutiny in relation to key persons appointed by authorised insurers.

Fit and proper

Under the new enhanced approval process for the appointment of key persons by authorised insurers, the IA will apply a "fit and proper" test to the appointment of:

- "controllers" of the insurer, including shareholders controlling 15% or more of the voting power at any general meeting of the insurer, as well as managing directors and chief executives of Hong Kong incorporated authorised insurers, or, for overseas incorporated authorised insurers, managing directors or chief executives responsible for their insurance business in Hong Kong;

- directors of Hong Kong incorporated authorised insurers;

- actuaries of Hong Kong incorporated authorised insurers which carry on long term business; and

- "key persons in control functions" of authorised insurers, being those persons responsible for the performance of functions which are likely to enable the responsible individuals to exercise a significant influence on the insurer's business. These functions currently include intermediary management, risk management, financial control, compliance, internal audit, actuarial matters and any other functions specified by the IA.

In determining whether a person or body corporate is "fit and proper" for the purposes of above roles, the IA will have regard to the factors specified in section 14A of the IO, as well as those set out in its Guidelines on "Fit and Proper" Criteria under the IO (GL4) which was effective on 26 June 2017, including:

- a person's education, other qualifications or experience;

- the person's ability to act competently, honestly and fairly;

- a person or body corporate's financial status and solvency; and

- whether any disciplinary action has been taken against the person or body corporate by the Securities and Futures Commission (SFC), or other Hong Kong or overseas regulators performing a similar function to the IA.

These factors resemble those that the SFC is required to consider when assessing whether a person is fit and proper to be licensed under the SFO.

Capital and solvency requirements

Authorised insurers must maintain a minimum paid-up capital of:

- HK\$10 million for insurers carrying on either general or long term insurance business;
- HK\$20 million for insurers carrying on both general and long term insurance business, or insurers carrying on statutory insurance business; and
- HK\$2 million for captive insurers.

In relation to solvency, insurers are currently required to maintain an excess of assets over liabilities of not less than a specified margin, which is determined by the size and type of the insurer's business:

- general business insurers must maintain a solvency margin of the greater of:
 - 20% of relevant premium income (up to a cap of HK\$200 million) plus 10% of the relevant premium income over HK\$200 million, or
 - 20% of relevant claims outstanding (up to a cap of HK\$200 million) plus 10% of the relevant claims outstanding over HK\$200 million.

However, this is subject to a minimum of HK\$10 million for insurers with non-statutory business and HK\$20 million for insurers with statutory business;

- long term business insurers must maintain a solvency margin of at least HK\$2 million, with the total figure based on the aggregation of percentages of capital at risk and mathematical reserves; and
- captive insurers must maintain a margin of the greater of 5% of net premium income, 5% of net claims outstanding, or HK\$2 million.

However, the IA is in the process of consulting on the implementation of a risk-based capital framework. Once implemented, this framework will bring Hong Kong in line with global standards, including the EU's Solvency II Directive (Solvency II), and ensure

consistency with the Insurance Core Principles issued by the IAIS in 2011. The details of this risk-based framework are not yet known, but it is likely to have three pillars, mirroring those of Solvency II:

- Pillar 1, comprised of quantitative aspects, including the adoption of a total balance-sheet approach to determine the appropriate capital adequacy level for each insurer with reference to the risks inherent in their assets and liabilities. Pillar 1 will also include the introduction of two explicit solvency control levels, the breach of which will trigger intervention by the IA;
- Pillar 2, which will include increased corporate governance and enterprise risk management standards, as well as the requirement to submit an "own risk and solvency assessment" to the IA each year for review; and
- Pillar 3, which will include periodic public reporting of capital resources and capital requirements.

While this consultation process has been underway since 2014, with the consultation conclusion published in 2015, the IA's current goal is to implement a risk-based capital framework by 2022. The IA is in the process of undertaking quantitative impact studies as part of the development of detailed rules, and has stated that it anticipates that following the conclusion of these studies, at least two to three years will be needed to amend legislation before a lengthy implementation phase can commence.

Reinsurance

Section 8(3)(c) of the IO requires authorised insurers to ensure that adequate arrangements are made for the reinsurance of risks of those classes of insurance which are to be carried on by the insurer.

In assessing the adequacy of an insurer's reinsurance arrangements, the IA will have regard to a range of factors as set out in its Guideline on Reinsurance (GL17), including:

- whether the insurer's reinsurance management framework is sound;
- the type of reinsurance arrangements it has adopted, and in particular whether the insurer has ensured that the terms and conditions of the reinsurance contracts it has entered into are compatible with the risks of the relevant underlying business;
- its maximum retention levels and any possible gaps in its reinsurance program which might cause undue exposure;
- the spread of risks among reinsurers; and
- the security of the reinsurers, including whether the reinsurer is under the supervision of a robust insurance supervisory authority.

Asset maintenance requirements

Under section 25A of the IO, insurers carrying on general business (other than professional reinsurers and captive insurers) must maintain assets in Hong Kong of not less than the aggregate of:

- 80% of its net liabilities; and

- the solvency margin applicable to its Hong Kong general business.

Schedule 8 to the IO specifies the types of assets which will qualify as "assets in Hong Kong", including real property, computers and motor vehicles located in Hong Kong, as well as money deposited and kept in an authorised institution in Hong Kong. In the event of insolvency of an insurer, the claims of Hong Kong policyholders to these assets in Hong Kong will be accorded a preferential status under Hong Kong's insolvency law to those of ordinary creditors.

Reporting requirements

Authorised insurers in Hong Kong are subject to a range of reporting obligations, including:

- the obligation to submit financial statements (as prepared in accordance with Schedule 3 to the IO) to the IA annually;

- the obligation that insurers carrying on general business submit audited General Business Returns and audited Statements of Assets and Liabilities in relation to their Hong Kong general business to the IA annually. The latter requirement does not apply to a professional reinsurer or a captive insurer; and

- the obligation that insurers carrying on long term business submit an actuarial investigation report and the Hong Kong Long Term Business Return to the IA annually.

Product governance requirements

Authorised insurers in Hong Kong are also subject to a range of product governance requirements under GL 15 (Guideline on Underwriting Class C Business) and GL 16 (Guideline on Underwriting Long Term Insurance Business - other than Class C Business) in relation to the underwriting of long term insurance business, which were originally promulgated by the OCI and remain in force following the IA's assumption of responsibility. At a high level, these guidelines require insurers to develop and market products with due regard to the interests of customers, including by:

- undertaking a suitability assessment both at the point of sale and when clients' circumstances change;

- avoiding the creation of misaligned incentives in the selling of products by their intermediaries, such as high commissions in the early years of a policy term;

- providing adequate and clear information to customers before, during and after sales are made, including in relation to risks associated with the products; and
- implementing proper control systems to achieve fair treatment of customers, including in relation to post-sale contact between the insurer and the customer.

The IA's inspection, investigation and disciplinary powers

The IA possesses powers to inspect, investigate and discipline insurers, as well as the power to prosecute in its own name offences which are triable summarily under the IO. These powers are similar to those of other financial services regulators in Hong Kong, but particularly resemble those of the SFC.

Inspection powers

The IA may conduct compliance inspections on authorised insurers to ascertain whether they have complied with (or are likely to be able to comply with):

- the IO, a notice or requirement under the IO or a condition imposed under the IO; and
- a term or condition of an authorisation.

An inspector appointed by the IA may enter any business premises of the authorised insurer, inspect, make copies or otherwise record the details of a business record, and make inquiries.

In relation to insurance intermediaries, the IA has indicated that it will undertake on-site inspections to gauge the level of their compliance with the relevant laws and regulatory requirements.

Investigation powers

In relation to authorised insurers, the IA may conduct investigations where:

- it has reasonable cause to believe that the IO may have been contravened, a person may have been involved in misconduct in relation to the carrying on of insurance business, or a person has carried on insurance business in a manner that is not in the interests of policyholders or potential policyholders or the public interest; or
- it has reason to enquire if a person is/was guilty of misconduct or is/was not a fit and proper person for the purpose of considering whether to exercise disciplinary powers.

IA-appointed investigators have a range of powers to compel assistance with their investigations of authorised insurers, including requiring the production of documents, attendance at interviews, and the provision of answers to written questions. Importantly, a person will not be excused from complying with the above requirements only on the ground that to do so might tend to incriminate the person. However, if the person claims privilege against self-incrimination, information provided in compliance with the above requirements shall not be admissible in evidence against the person in subsequent criminal proceedings (except in relation to offences relating to, among others, non-compliance with investigation provisions or to perjury).

In investigating possible misconduct by authorised insurers, the IA may also:

- apply to a Magistrate for a search warrant to enter premises and to search for, seize and remove a record or document where there are reasonable grounds to suspect that the record or document is on the premises;
- require a person to verify (by way of statutory declaration) explanations, particulars or answers obtained from inspections or investigations; and
- apply to the court for an inquiry into the failure of a person to comply with a requirement in an inspection or investigation or a requirement to provide a statutory declaration, and the court may order compliance and find persons involved guilty of contempt of court.

In relation to insurance intermediaries, the IA presently has the power to require production of specified books and papers by an insurance agent, insurance broker or approved body of insurance brokers under section 74 of the IO. See the discussion below.

Disciplinary powers

Disciplinary sanctions

The IA may impose a range of disciplinary sanctions on those authorised insurers found guilty of misconduct, as well as those it considers not to be "fit and proper" to hold a position as a director or controller of an authorised insurer. These sanctions include:

- revoking or temporarily suspending authorisation;
- issuing a public or private reprimand; and
- imposing a pecuniary penalty of up to the greater of HK\$10million or three times the profit gained or loss avoided as a result of the misconduct.

The IA has issued guidelines regarding the factors it will consider in exercising its power to impose a pecuniary penalty (see GL 18, Exercising Power to Impose Pecuniary Penalty in Respect of Authorised Insurers under the IO). These factors include:

- the nature, seriousness and impact of the offending conduct, including whether it was reckless, any costs imposed on policyholders, the amount of profits gained as a result of the conduct, the impact of the conduct on the interests of

policyholders or the public interest generally and whether it involved the breach of a fiduciary duty;

- the behaviour of the insurer since the identification of the offending conduct, including whether the insurer self-reported the offending conduct and the degree of cooperation with the IA and other authorities; and

- the insurer's disciplinary and compliance history.

Similarly, the IA is empowered under the IO to take certain disciplinary actions against licensed insurance intermediaries and certain persons (such as a responsible officer of a licensed insurance intermediary or a person concerned in the management of the regulated activities a licensed insurance intermediary). These sanctions include:

- revoking or temporarily suspending authorisation;

- issuing a public or private reprimand; and

- imposing a pecuniary penalty of up to the greater of HK\$10million or three times the profit gained or loss avoided as a result of the misconduct.

The IA has set out the factors to be considered when imposing pecuniary penalty in its Guideline on Exercising Power to Impose Pecuniary Penalty in respect of Regulated Persons under the IO (GL22).

Power to prosecute offences summarily

The IA can also prosecute offences which are triable summarily under the IO in its own name, including:

- knowingly or recklessly making materially false or misleading statements or omitting material particulars from statements in connection with applications by authorised insurers for approval to appoint various key persons; and

- failure by authorised insurers to obtain the IA's approval to appoint various key persons.

Appeals of IA decisions

Certain "specified decisions" made by the IA may be appealed to the Insurance Appeals Tribunal (Tribunal), a quasi-judicial body independent of both government and the IA established under Part XII of the Insurance Companies (Amendment) Ordinance 2015.

The Tribunal has jurisdiction to review a range of decisions of the IA, including:

- the exercise of power to take disciplinary action,

- refusal to grant an authorisation;

- revocation of approval of appointment of a key person to an authorised insurer; and

- the exercise of powers of intervention such as imposing restrictions on an authorised insurer's business.

These decisions may be appealed further to the Court of Appeal, subject to leave being granted by the Court of Appeal.

Domestic and international cooperation

Memoranda of understanding

The IA has entered into a range of memoranda of understanding with other insurance regulators, including those situated in Australia, the United Kingdom, Ireland, Germany, Singapore and the People's Republic of China (PRC). These agreements are intended to enhance cross-border supervisory co-operation, including through the exchange of information and investigative assistance. The IA is also a party to the IAIS's Multilateral Memorandum of Understanding agreed with more than 50 insurance supervisors internationally. This is in addition to the cross-sectoral agreements between the IA and other domestic regulators, most notably the SFC and HKMA, as well as the Commissioner of Customs and Excise in relation to the implementation of the Anti-Money Laundering and Counter-Terrorism Financing Ordinance.

Mainland China and Hong Kong Closer Economic Partnership Agreement (CEPA)

The CEPA establishes a form of free trade area in relation to the mainland of the PRC and the Hong Kong Special Administrative Region. The CEPA covers three broad areas, namely trade in goods, trade in services, and trade and investment facilitation. As part of this arrangement, Hong Kong insurers are given preferential treatment in relation to accessing the mainland PRC market, including allowing:

- Hong Kong insurance agency and brokerage companies to set up wholly-owned subsidiaries in the mainland to provide insurance agency and brokerage services; and

- Hong Kong insurance companies and their groups (as formed through re-grouping or strategic mergers) to enter the mainland insurance market, subject to access criteria including in relation to corporate governance and risk management standards.

Key recent regulatory developments and reforms

New statutory licensing regime for insurance intermediaries

As noted above, the new regulatory regime for insurance intermediaries came into operation on 23 September 2019.

History of the regime

Insurance intermediaries, insurance agencies, brokerage companies and their representatives were each regulated by one of three self-regulatory organisations (SROs), being the Insurance Agents Registration Board established under the Hong Kong Federation of Insurers, the Hong Kong Confederation of Insurance Brokers and the Professional Insurance Brokers Association. The IA has now assumed responsibility for regulating these intermediaries with the intention of addressing:

- perceived and real conflicts of interests that arise from self-regulation;

- inconsistencies in the investigation procedures and disciplinary regimes between the SROs; and

- the limited investigatory and sanctioning powers of the SROs.

All insurance intermediaries who are validly registered with the SROs immediately before 23 September 2019 will be deemed as licensees under the new regime for a three year transitional period. Individuals who are validly registered as responsible officers of insurance agencies or chief executives of broker companies will also be deemed as responsible officers under the new regime over the transitional period.

Licensing of regulated activities

Under this regime, the carrying out of "regulated activities" will require a licence from the IA. A broad range of acts fall under the definition "regulated activities":

- the act of negotiating or arranging a contract of insurance;

- the act of inviting or inducing, or attempting to invite or induce, a person to enter into a contract of insurance;

- the act of inviting or inducing, or attempting to invite or induce, a person to make a "material decision"; and

- the act of giving "regulated advice".

The matters relevant to making a "material decision" and giving "regulated advice" include (among others) applying for, renewing, cancelling and assigning an insurance contract, exercising a right under the contract, changing the terms of the contract, and making or settling an insurance claim. However, exemptions from the licensing requirements exist, for example for professional advisers (lawyers, accountants and actuaries), or persons carrying out clerical duties.

Importantly, a person who actively markets insurance services to the Hong Kong public from a place outside of Hong Kong, where such services would constitute a regulated activity if provided in Hong Kong, will be regarded as carrying on a regulated

activity. The person will be prohibited from conducting such active marketing without obtaining a licence from the IA. While no guidance as of yet has been provided as to what the IA will consider "active marketing", the concept of active marketing is well established in the Hong Kong securities regulatory framework, and guidance can be gained from the SFC and the expertise in the securities regulatory regime.

In the case of a bank that is a licensed insurance intermediary, any of the bank's staff intending to carry on regulated activities as representatives of the bank must be licensed technical representatives (agent) or licensed technical representatives (broker) appointed by the bank unless carrying on of the activity concerned only involves the discharge of clerical or administrative duties for the bank (section 123(2) of the IO). Please refer to the guidance in the circular and explanatory note on licensing requirements for banking sector published by the IA on 22 October 2019.

Licensing framework

The IA will offer five types of licences, which mirror the existing criteria for registration within the three SROs:

- licensed insurance agency;

- licensed Individual insurance agent;

- licensed technical representative (agent);

- licensed insurance broker company; and

- licensed technical representative (broker).

Business entities (i.e., agencies or broker companies) must also appoint at least one responsible officer who must himself/herself be licensed as a technical representative. The appointment must be approved by the IA.

"Fit and proper"

As part of obtaining a licence, the IA must be satisfied (among other things) that the applicant (and, where applicable, its directors, partners and controllers) are fit and proper. The Guideline on "Fit and Proper" Criteria for Licensed Insurance Intermediaries under IO (GL23) took effect since 23 September 2019. GL23 reflects the statutory requirements under section 64ZZA of the IO.

The matters which the IA will consider in determining the fitness and properness of insurance intermediaries closely resemble those which it must consider in relation to key persons in an authorised insurer, as discussed above. However, some additional factors will be taken into account in the context of insurance intermediaries such as the information possessed by IA in relation to the group of companies if the intermediaries belong to a group.

Conduct requirements

Pursuant to the introduction of the new regime, licensed insurance intermediaries are required to comply with the statutory conduct requirements set out in section 90 (conduct requirements for licensed insurance intermediaries), 91 (conduct requirements for licensed insurance agencies and their responsible officers) and 92 (conduct requirements for licensed insurance broker companies and their responsible officers) of the IO, as well as the codes of conducts issued by the IA.

The Code of Conduct for Licensed Insurance Agents and the Code of Conduct for Licensed Insurance Brokers came into effect on 23 September 2019. It contains eight general principles of conduct reflecting the conduct requirements under section 90 (a) – (i) of the IO, as well as the requirements on corporate governance, internal controls and procedures for insurance agencies and broker companies.

Breach of the conduct requirements may result in the imposition of disciplinary sanctions on the intermediary by the IA, but such breach will not in of itself render the intermediary liable to judicial proceedings.

Fintech

Despite its relatively recent creation, the IA has already made a number of significant announcements in relation to fostering fintech, and specifically "InsurTech" in the Hong Kong insurance industry, including:

- the IA authorised its first ever life virtual insurer under Fast Track in December 2018, and its first non-life virtual insurer in October 2019. The IA's authorisation of an insurer operating solely through digital distribution channels under Fast Track encourages and facilitates wider application of InsurTech in Hong Kong;
- the launch of an "Insurtech Sandbox" to enable authorised insurers in Hong Kong to carry out "pilot runs" of innovative technology initiatives and gain real market data and information of user experience in a controlled environment before launching them into the market. Sandbox testing is also intended to allow insurers to demonstrate to the IA that their products can meet the relevant supervisory requirements which would apply if their product was launched on the market. However, participation in the IA's sandbox is subject to a range of supervisory requirements, including customer protection safeguards and risk management controls;
- the launch of a "Fast Track" to expedite the authorisation process for new applicants seeking to carry on insurance business in or from Hong Kong, and who own and operate solely digital distribution channels, without the use of any conventional channels involving agents, banks or brokers. However, Fast Track applicants will still be subject to the existing solvency, capital and local asset requirements and policy protection measures (aside from those measures not applicable to direct digital sales);
- the creation of an Insurtech Facilitation Team to promote Hong Kong as an Asian insurtech hub and provide advice on insurtech-related topics as appropriate;

- the creation of a fintech-focused working group as part of the Future Task Force, which has been set up by the local insurance industry to consider and make recommendations regarding the Hong Kong insurance industry's future;
- the IA has entered into a cooperation agreement with the UK Financial Conduct Authority (FCA) in September 2017 specifically in relation to increasing collaboration to support fintech innovation. Under this agreement, the IA and FCA will cooperate on information sharing, as well as referrals of innovative firms seeking to enter the other regulator's market; and
- the IA enter into an MOU with the Office of Insurance Commission of Thailand on 12 December 2018, with the goal to pursue a wide range of activities on technical assistance, capacity building, exchange of information and development of InsurTech.

The Greater Bay Area (GBA)

The GBA connects 11 cities, including Shenzhen and Hong Kong, with the goal to create an integrated economic and business hub. The initiative allows Hong Kong to utilise its strengths in business, professional services and finance, as well as its global role as a gateway to China.

The Chairman of IA revealed in June 2018 that there is a possibility for a new insurance connect scheme to be created to established a special channel for the marketing, sale and processing of insurance product using the same model that links the stock markets of Shanghai and Shenzhen with Hong Kong. Under the proposal, Hong Kong Insurers would be allowed to set up service centres in the Greater Bay Area, and might even be allowed to sell insurance products to people not located in Hong Kong.

As GBA is an on-going project, it is expected that more regulatory development will take place in the near future. The size, economic potential and interconnectivity of the GBA will most definitely create significant opportunities for banks and corporations.

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