



HKI Arb Webinar: “Disputes Under Insurance Contracts”

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Disputes under Insurance Contracts

1. Overview of insurance contracts in Hong Kong and highlight some issues that insurers may encounter;
2. Impact of COVID-19 pandemic and new ways of working within the insurance industry, such as the use of technology, to allow customers to easily purchase insurance; and
3. Challenges and potential issues with cross-border matters (i.e., Mainland China).

Insurance Contracts in Hong Kong

- Insurance contracts issued in Hong Kong are highly likely to be governed by the laws of the Hong Kong Special Administrative Region.
- Generally, any disputes arising from insurance contracts issued in Hong Kong should be brought to the courts of Hong Kong.
- Since the introduction of the Civil Justice Reform in April 2009, there has been greater focus on early settlement of disputes. Alternative dispute resolution is encouraged, and arbitration has been a popular form of ADR for insurance disputes.
- Insurance contracts may contain arbitration clauses, which are generally enforceable. However, if there is an obligation to arbitrate, this should be expressed in an unqualified and mandatory terms.
- Some policy provisions may include arbitration clauses.
 - These may be required for certain insurance products, such as Voluntary Health Insurance Scheme (VHIS) introduced by the Food and Health Bureau (FHB).

Insurance Contracts in Hong Kong

- Insurer Disputes
 - One of the options for policyholders is to refer their dispute or complaint to the Insurance Complaints Bureau (ICB).
 - ICB can handle complaints from policyholders in connection with or arising from personal insurance contracts to facilitate the satisfaction, settlement or withdrawal of such complaints by making of awards.
 - Alternatively, policyholders can choose to litigation or arbitration to resolve insurance disputes.
 - ADR is encouraged and arbitration has been a popular form of ADR to settle insurance disputes, particularly when the amount in dispute is significant. Arbitration proceedings in Hong Kong being private and confidential, unless parties agree otherwise, is also an advantage. Also, the arbitral award being final and binding on the parties, may also be an advantage for the parties to consider and elect such means of settling disputes.

Insurance Contracts in Hong Kong

- Third Party Enforcement of Insurance Contracts
 - The Contracts (Rights of Third Parties) Ordinance (Cap.623 of the Laws of Hong Kong) (CRTPO) provides that if a term of a contract expressly provides or purportedly grants benefits to a third party expressly identified in the contract, the third party can enforce the terms of the contract against the parties to the contract, provided the parties have not expressly excluded the application of this Ordinance.
 - The CRTPO will also apply to insurance contracts but an insurers can expressly exclude the application for the CRTPO .
 - If the application of the CRTPO is not expressly exclude, a third party that is granted benefit under the policy may directly enforce the term of the policy granting such benefit against the insurer, even though they are not a party to the insurance policy.
 - Hence, insurance policy provisions are often seen to exclude the CRTPO.

Insurance Contracts in Hong Kong

- Enforcement of Foreign Judgment
 - In the event where a judgment is obtained outside of Hong Kong, whether in a foreign country or Mainland China, these may be enforced in Hong Kong.
 - Under
 - Foreign Judgments (Reciprocal Enforcement) Ordinance (Cap.319 of Laws of Hong Kong) (“FJREO”) and
 - Mainland Judgments (Reciprocal Enforcement) Ordinance (Cap.597 of Laws of Hong Kong) (“MJREO”),these provide statutory means to facilitate reciprocal recognition and enforcement of such foreign and Mainland China judgments.
 - These statutory means may allow Hong Kong to recognize final money judgments from foreign countries and Mainland China.
 - If the judgment is outside the scope of the FJREO and MJREO, such foreign judgments may be enforced at common law by way of bringing a fresh action based on such foreign judgment.

Impact of COVID-19 on insurance contracts

- Due to the COVID-19 pandemic, there may be difficulties having the potential policyholder sign application forms in person.
- To work around the difficulties faced with the COVID-19 pandemic, new ways of working were implemented to overcome this, such as, the use of virtual non-face-to-face selling and use of e-signatures.
- Based on the Electronic Transactions Ordinance (Cap. 553 of the Laws of Hong Kong), e-signatures are now more commonly used by potential customers who need to sign application forms and other relevant documents.
- Apart from the use of e-signatures by potential customers, some contracting parties, e.g., third-party service providers, are also adopting e-signatures for executing agreements.
- During the pandemic, the use of e-signatures may have increased, especially due to the measures in minimizing risk of infection and travelling restrictions.
- In any event, insurers will still need to ensure that any use of e-signature platforms or applications comply with applicable legal and regulatory requirements.

Impact of COVID-19 on insurance contracts

- With the development of technology, the insurance industry is also actively developing insurance technology and the use of technology for customers to purchase insurance policies virtually.
- To cater for the COVID-19 pandemic and measures to minimize the risk of infection during the selling process, many insurers took advantage of the Virtual Onboarding Sandbox offered by the Insurance Authority of Hong Kong (“IA”) for selling long term insurance products in 2020.
- Earlier this year, the IA introduced further measures to facilitate the purchase of all life insurance products online. To satisfy the growing needs of the general public and to enhance financial inclusiveness, the IA allowed the distribution of Investment-Linked Assurance Scheme (“ILAS”) products as well via the Virtual Onboarding Sandbox approved by the IA.
- The IA maintains that all existing regulatory requirements must still be satisfied. Such requirements include all requirements applicable for the distribution of long-term insurance products, including ILAS products. As we can see, the insurance industry is actively developing to adapt with the advancement of technology but at the same time, not compromising any necessary regulatory requirements, including requirements in terms of security, user access rights, auditing, etc. to ensure that customer protection is maintained.

Impact of COVID-19 on insurance contracts

- With the Virtual Onboarding mechanism, customers and individual insurance agents will not be required to attend physical meetings or wet-ink signature. The customers and individual insurance agents can meet virtually via a highly secure video chat and purchase a wide range of individual insurance products.
- Authorized insurers using such mechanism are required to ensure that stringent measures, in particular, security measures and data protection are maintained.
- With the use of digital/e-signature platforms or applications for potential policyholders to sign application form and other applicable documents, we need to ensure that all applicable information risk security measures are in place and compliant with applicable legal and regulatory requirements.
- This includes any privacy obligations (i.e., complying with Personal Data (Privacy) Ordinance, Cap. 486 of the Laws of Hong Kong) as such application form and other applicable documents will contain personal data.
- If digital/e-signature platforms or applications are used, documents (in particular, those containing personal data) may be uploaded onto such platforms may be stored for a certain period of time.

Challenges and potential issues with cross-border matters

- Some of the challenges that we may face with the increase in policyholders located in Mainland China include disputes with the policy provision interpretation, including those relating to claims coverage and claims decision of the insurer.
- Generally, policy provisions issued in Hong Kong will be governed by Hong Kong law and subject to Hong Kong courts.
- However, a recent appeal case in Mainland China with the appellant (also the plaintiff in this case) being the insured person who is a PRC citizen, commenced proceedings in Mainland China.
- The appellant appealed the decision held by the Intermediate People's Court of Wuhan City, Hubei Province, People's Republic of China whereby the Intermediate Court indicated that they did not have jurisdiction to hear the proceedings.

Challenges and potential issues with cross-border matters

- The appellant in this case is the insured person, who is a PRC citizen. The insurer is a Hong Kong authorized insurer.
- The Hubei Higher People's Court allowed the appeal and indicated that only when a foreign-related civil case satisfied the six conditions stipulated in the provisions of Article 532 of The Interpretations of the Supreme People's Court on Applicability of the Civil Procedure Law of the People's Republic of China, the People's Court will dismiss the filing of a lawsuit and inform the plaintiff (appellant, in this case) to bring the lawsuit with a more convenient foreign court.
- Since the appellant is a PRC citizen, this case does not satisfy item (4) of the said Article 532.
- The Hubei Higher People's Court indicated that the Intermediate People's Court decision to dismiss the lawsuit by the appellant was an error in the application of law and should be corrected.

Challenges and potential issues with cross-border matters

- With such decision made by the Hubei Higher People's Court, this will create potential uncertainty as to how the Courts may interpret and decide on disputes between policyholders and insurers, particularly with claims decision made by Hong Kong authorized insurers.
- Such uncertainty may be points to consider when dealing with cross-border matters.
- Additionally, other potential issues to be mindful of include the means of selling of insurance products.

Challenges and potential issues with cross-border matters

- Insurance agents in Hong Kong must be licensed insurance intermediaries to conduct regulated activity.
- Regulatory regime for licensed insurance intermediaries under the Insurance Ordinance (Cap.41 of the Laws of Hong Kong) makes it a criminal offence for a person, without reasonable excuse to carry on “regulated activity”, or hold themselves as carrying on “regulated activity”, in the course of his/her business or employment or for reward, unless licensed or otherwise exempted.
- Under the Insurance Ordinance (Cap.41), “*regulated activity*” includes:
 - a) The act of negotiating or arranging a contract of insurance;
 - b) The act of inviting or inducing, or attempting to invite or induce, a person to enter into a contract of insurance;
 - c) The act of inviting or inducing, or attempting to invite or induce, a person to make a material decision;
 - d) The act of giving regulated advice.

Challenges and potential issues with cross-border matters

- Although under section 64H of the Insurance Ordinance (Cap.41), it provides that if a person actively markets to the public, from a place outside Hong Kong (for example, Mainland China), insurance services that the person provides, the person is regarded as holding out that they are carrying on regulated activity.
 - “Insurance services” in this section means services that would constitute a regulated activity if the services were provided in Hong Kong.
- If a licensed individual insurance agent were to actively market Hong Kong insurance products in Mainland China, they would be considered as conducting regulated activity.
- Depending on the facts of each case, such individual insurance agent may potentially contravene PRC laws and regulations. To negotiate, arrange or advise on insurance policies issued by authorized insurers in Hong Kong but not licensed to do so in Mainland China may expose such individual insurance agent to legal consequences.

Challenges and potential issues with cross-border matters

- Licensed insurance intermediaries (including insurance agents) in Hong Kong does not mean that they are licensed to sell insurance products in Mainland China.
- Hong Kong insurance agents must be mindful and observe all applicable laws and regulations when selling insurance products outside of Hong Kong, particularly if the foreign jurisdiction has restrictions on conducting regulated activities, including negotiating or arranging insurance contracts, inviting or inducing a person to enter into an insurance contract or to make a material decision, or giving regulated advice, etc.
- Hong Kong authorized insurers need to ensure that any negotiating, arranging or advising on insurance policies issued by such insurers who are not licensed to do so in Mainland China refrain from doing so.

Cross-border matters

- Cross-border insolvency proceedings
 - Currently, Hong Kong and Mainland China are piloting a new arrangement to mutually recognize and assist each other in insolvency matters. This increased judicial cooperation will likely be helpful with the increase of cross-border economic activities between Hong Kong and the Greater Bay Area.
 - The cooperation mechanism was established between Hong Kong and Mainland China in the form of the *Record of Meeting of the Supreme People's Court and the Government of the Hong Kong Special Administrative Region and Mutual Recognition of and Assistance to Bankruptcy (Insolvency) Proceedings between the Court of the Mainland and the Hong Kong Special Administrative Region and the Supreme People's Court's Opinion on taking forward a pilot measure in relation to Recognition and Assistance to Bankruptcy (Insolvency) Proceedings in the Hong Kong Special Administrative Region.*

Cross-border matters

- Cross-border insolvency proceedings
 - The Mainland and Hong Kong jurisdictions agree to terms where pilot cities (i.e., Shanghai, Shenzhen and Xiamen) in the Mainland and Hong Kong will mutually recognize and assist each other in insolvency matters.
 - Under this arrangement, liquidators and bankruptcy trustee from Hong Kong may apply to Mainland Courts for the recognition of Hong Kong insolvency proceedings, and vice versa.
 - The aim for this is to bring about efficiency and alignment of insolvency process in both jurisdictions, in hopes to promote better protection of the assets and interests of the creditors as a whole.

Q&A



Thank You!



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