

Bills Committee on Shenzhen Bay Port Hong Kong Port Area Bill

Insurance Arrangement After the Opening of the Shenzhen Bay Port Hong Kong Port Area (“HKPA”)

Purpose

This paper reports on the proposed solution to extending the geographical limit of pre-existing mandatory insurance policies to cover the HKPA.

Background

2. Documents of a private nature involve various bargains made between contracting parties in different circumstances. Statutory extension of the territorial limits of pre-existing rights and obligations that are confined to Hong Kong to include the HKPA could amount to an interference with the rights or obligations of the parties concerned. The risks that the provision may re-write the bargain made between contracting parties and cause significant hardship to some of them are real. It would be difficult to ensure that the application of a general provision to all of them will satisfy the requirement of proportionality or fair balance implicit under Articles 6¹ and 105² of the Basic Law in every case that it falls to be applied. Therefore, the Bill will not extend pre-existing rights or obligations arising from documents of a private nature. This gives rise to the question as to the coverage of pre-existing insurance policies, especially those which are mandatory under the law.

¹ Article 6 provides:

“The Hong Kong Special Administrative Region shall protect the right of private ownership of property in accordance with law.”

² Article 105 provides:

“The Hong Kong Special Administrative Regional shall, in accordance with law, protect the right of individuals and legal persons to the acquisition, use, disposal and inheritance of property and their right to compensation for lawful deprivation of their property.

Such compensation shall correspond to the real value of the property concerned at the time and shall be freely convertible and paid without undue delay.

The ownership of enterprises and the investments from outside the Region shall be protected by law.”

3. There are at present four such major classes of mandatory insurance. These are vessel third party, aviation, motor vehicle third party risks and employees' compensation. As the HKPA will not cover any waters or upper strata of the airspace, motor vehicle third party risks and employees' compensation insurance will be the two major classes of mandatory insurance policies that may be affected by the establishment of the HKPA.

4. In future insurance policies, i.e. those issued on or after the HKPA comes into operation, a reference to Hong Kong to describe the territorial limit of a right or obligation will be construed as including the HKPA unless the contrary intention appears (Clause 12 of the Bill). However, a similar reference in pre-existing policies will not automatically be construed to include the HKPA. Given that the two classes of insurance policies in question are usually renewed on an annual basis, the problem relating to the extension of their territorial coverage is hence only transitional.

Motor Vehicle Third Party Risks Insurance

5. Motor Vehicles Insurance (Third Party Risks) Ordinance (Cap. 272) stipulates that all persons who use (or cause or permit any other person to use) motor vehicles on roads are required to take out insurance in respect of any liability which may be incurred by them in respect of the death or bodily injury to any persons caused by or arising out of the use of the motor vehicles. Consideration has to be given to extending the territorial coverage of the policies to include the HKPA.

Employees' Compensation Insurance

6. According to section 40 of the Employees' Compensation Ordinance ("ECO") (Cap. 282), all employers are required to take out insurance policies to cover their liabilities under the ECO and at common law for injuries at work in respect of all their employees. The ECO will be applicable to the HKPA under the Bill.

7. Some of the current employees' compensation insurance policies do not have a territorial limit, and will therefore already cover the HKPA. For those pre-existing policies which are subject to the territorial limit of Hong Kong, consideration has to be given to extending their coverage to include the HKPA.

Consultation with the Hong Kong Federation of Insurers

8. We have been consulting the Hong Kong Federation of Insurers (“the Federation”) on the best way forward. We have kept the Federation posted of the milestone developments of the Bill. We consulted the Federation before submitting a paper to the LegCo Panel on Security in March 2006 and kept the Federation posted of the gazettal of the Bill in February 2007. We have arranged briefings and a site-visit for the Federation and its member companies in February and March 2007 to allow them to make an informed judgement on the risks involved.

9. The Federation has advised Government that possible options to cope with this transitional problem include issuing an individual endorsement to each affected policy or putting in place a market agreement. It assured us of its readiness to work with all parties to find a practical and effective way forward.

Market Agreement

10. At the meeting held on 29 March 2007, Members noted that the Federation is prepared to recommend to its members to enter into a market agreement with the Government, extending policy coverage to the HKPA without charging extra premium. This market agreement serves as a platform of best industry practices and will be signed by the Insurance Authority (“IA”) as representative of the Government.

Successful Examples

11. In advocating a solution through market agreement, the Federation has cited several successful examples such as the Motor Insurers’ Bureau set up in 1980 that provides compensation to traffic accident victims if the driver is uninsured or untraceable and the Employees Compensation Insurer Insolvency Scheme established in 2003 that provides payment in the event of an employer’s insurer becoming insolvent. The Employees’ Compensation Insurance Residual Scheme scheduled to be launched in May 2007 is also predicated on market agreement to offer a venue of last resort for employers engaged in certain high-risk trades. So far market agreements have been operating satisfactorily and the IA is not aware of any problems.

Effectiveness

12. By entering into the market agreement voluntarily, the insurance companies are undertaking to the Government to extend the coverage of existing policies to include the HKPA. The insurance companies have the legal responsibility to the Government to comply with their promise in case of incidents at the HKPA.

IA's Regulatory Powers

13. A key statutory duty discharged by the IA is to protect the interest of policyholders. In this light, any failure on the part of an insurance company to abide by the market agreement will reflect adversely on its probity and integrity, hence hampering its ability to meet the "fit and proper" requirement of the Insurance Companies Ordinance. Regulatory powers vested with the IA could therefore be relied upon to ensure compliance with the market agreement.

Market Competition

14. Besides, competition in the insurance industry is very keen. As public trust and confidence are the cornerstones of insurance industry, possible adverse reputation and competition tension will create strong disincentives for insurance companies to renege on the market agreement. Policyholders will have the freedom to switch to other companies that they consider more prudent and with better track records.

Binding Effect

15. The market agreement is a legally binding agreement executed by the Government acting through the IA and the insurers. The Federation considers that the market agreement, promulgated by way of a joint declaration announced in the press, is not only binding on the signatories, but also places their reputation and goodwill at stake.

16. Even though individual policyholders are not parties to the market agreement, disputing parties can draw reference to the market agreement in court proceedings and the insurers will be estopped from breaching their

undertaking. The IA as signatory party to the market agreement stands ready to render assistance to policyholders in this regard.

Public Notification

17. To notify the public, particularly the policyholders, of the details of the market agreement and the list of subscribing companies, the Federation is considering making a prominent announcement upon the launching of the market agreement. Relevant Government departments will also help disseminate such information. Companies which choose not to participate in the market agreement will be requested to inform their policyholders either by issuing an endorsement to each of them or advising them to seek extra coverage for the HKPA.

Making Reference to Market Agreement in the Bill

18. At the Bills Committee meeting on 29 March 2007, some Members suggested making reference to the market agreement in the Bill and providing a statutory basis to the insured for some legal actions against non-compliance with the market agreement. The Government considers that such sanctions will run against the fundamental spirit of a market agreement and frustrate goodwill extended by the industry. Furthermore, this course of action may have read-across implications on other market agreements. Lack of clarity on the suggested reference would render insurance companies reluctant to enter into the market agreement, thereby hampering its efficiency as a voluntary undertaking.

Unilateral Deed

19. At the meeting on 29 March 2007, Members also suggested the option of a unilateral deed. As we understand it, this refers to an undertaking executed under seal by the insurers undertaking to confer certain benefits to the policy holders over and above the benefits they are entitled to receive under the terms of the existing policies. Some insurance companies will be wary of the resulting legal implications and thus unlikely to pursue the deed with full vigor.

Individual Endorsement

20. Issuing an individual endorsement to every policyholder is another option being considered by the industry. This option imposes a considerable amount of administrative work in view of the large number of policies involved, and hence subsequent enquiries and follow up work. This alternative does not avail itself as an efficient and cost-effective solution to a transitional problem.

Way Forward

21. Despite being a voluntary undertaking between insurance companies and the Government, market agreement is a pragmatic way forward, minimizing administrative costs incurred by the industry and avoiding confusion to the insuring public.

22. The Federation has been very cooperative in mapping out practical solutions with the Government to extend the territorial coverage of existing insurance policies to the HKPA during the transitional period and at no extra cost to the policyholders. This is over and above the commercial obligations of the insurance companies. The Federation aims to firm up the market agreement within April 2007 and apply it before the establishment of the HKPA. Having regard to the successful implementation of previous market agreements and the various safeguards available, the Government is content that the market agreement would provide a satisfactory solution to extending policy coverage to the HKPA.

Security Bureau
10 April 2007