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By Fax (2527 0292)

22 May 2015

Ms HUNG Sze-man, Joan
Prin AS for Financial Services &
the Treasury (Financial Services)SD
Financial Services and the Treasury Bureau
24/F, Central Government Offices
2 Tim Mei Avenue
Tamar
Hong Kong

Dear Ms HUNG,

Insurance Companies (Amendment) Bill 2014

I refer to the paper issued by the Financial Services and the Treasury Bureau in May 2015 (LC Paper No. CB(1)858/14-15(03)) (the Paper) which was discussed at the Bills Committee meeting on 18 May 2015.

Under the heading of "Insurance agent's relationship with insurers" of the Paper, in paragraph 8, the Administration explains that "The industry considers that the revised section 68 would override the recently established common law position (*Thanakharn Kasikorn Thai Chamkat (Mahachon) also known as Kasikornbank Public Co Ltd. v Akai Holdings Ltd. (in liquidation)* (2010) 13 HKCFAR 479 (the Case) was cited) and that an insurer would not have to 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." In this respect, I have the following observations -

1. The brief facts of the Case were that where a company purported to enter into a loan and security transaction with a bank where the transaction displayed clear issues of conflict of interest in relation to the company's Chief Executive Officer (the CEO), the bank could not assert that the CEO had apparent authority to enter into

the transaction. As pointed out by the Administration, the Case was not concerned with insurance issue in particular.

2. In discussing the law relating to apparent authority, the Court referred to, among others, *Freeman & Lockyer v. Buckhurst Park Properties (Mangal) Ltd* [1964] 2 QB 480 which identified four conditions which have to be satisfied before a third party can enforce a contract against a company entered into by a purported agent with no actual authority (paragraph 43 of the judgment). The Court further referred to *Freeman & Lockyer v. Buckhurst Park Properties (Mangal) Ltd*, when it discussed the notion that an agent who has no apparent authority cannot clothe himself with such authority by his own unauthorized words (paragraph 65 of the judgment). It appears that the Court's decision on the law relating to apparent authority is not recently established common law position.
3. The Court held that it was open to the bank to rely on the CEO's apparent authority (if he had such authority) unless the bank's belief in that connection was dishonest or irrational (which included turning a blind eye and being reckless) (paragraph 62 of the judgment). However, the Court held that, given the relevant circumstances, the bank was irrational in its belief that the CEO had authority to commit the company to the transaction (paragraph 121 of the judgment). Therefore, the Case is not concerned about the actual knowledge of the third party. Unlike the question at issue in the Case, the proposed Committee Stage Amendments (CSAs) as indicated in paragraph 8 of the Paper relate to the actual knowledge on the part of a policy holder of the lack of authority of an insurance agent. Under common law, a company is liable in respect of contracts made by its agents when acting within the scope of their authority, provided that the contract is within the company's powers, but not for acts or representations not within that scope¹.
4. It is noted that the proposed CSAs are modeled on section 917D of the Corporations Act 2001 of Australia. Under section 917A of the Act, certain circumstances are specified as to what conduct of a representative (i.e. the agent) of a financial services licensee may be regarded as being within the scope of authority given by the

¹ See paragraph 95.163, volume 14, Halsbury's Laws of Hong Kong 2012 (Second Edition). *Kleinwort, Sons & Co v Associated Automatic Machine Corpn Ltd* [1934] WN 65, HL; *George Whitechurch Ltd v Cavanagh* [1902] AC 117, HL.

licensee. The amended section 68 as proposed in the Bill is silent as to what conduct of an agent of an authorized insurer may be regarded as being within the scope of authority given by the insurer. In such circumstances, would the Administration consider specifying what conduct of an agent of an authorized insurer may be regarded as being within or outside the scope of authority of the agent, by reference to section 917A of the Act?

Yours sincerely,

A handwritten signature in black ink, appearing to be 'Winnie LO', written in a cursive style.

(Winnie LO)
Assistant Legal Adviser

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