

WEBINAR

THE INNER WORKINGS OF THE INSURANCE APPEALS TRIBUNAL AND DISPUTES BETWEEN INSURANCE COMPANIES AND THEIR AGENTS

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AGENDA

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- What are the common Court disputes between insurance companies and their former agents?
- Should the insurance companies pursue against their former agents by way of bankruptcy proceedings or writ action?
- What are the legal issues arising from “claw-back” clauses in agent’s contracts?

AGENDA

- Douglas Lam SC, Chairman of the Insurance Appeals Tribunal
- What are the role and powers of the Insurance Appeals Tribunal?

PART 1: COMMON COURT DISPUTES

Common Court Disputes

2 routes which insurance companies may pursue against its insurance agents

- **Statutory Demand** → Not set aside, not paid → Bankruptcy Petition
(ss. 6 and 6A of the Bankruptcy Ordinance, Cap 6)
- **Writ Action** → Judgment → Statutory Demand of Judgment Debt → not paid, Bankruptcy Petition

Common Court Disputes

- Pros and Cons of the Statutory Demand Route and the Writ Action Route
- Which is the safer course to take?

Common Court Disputes

The Writ Action route is preferred unless the Petitioning Debt is Crystal Clear

Example:

So Sheung Hin Ben v. Chubb Life Insurance Company Ltd [2018] HKCA 209 (Possible Good Faith and Rationality Implied Term → no bankruptcy)

FWD Life Insurance Company v. Poon Cindy [2019] HKCA 697

Common Court Disputes

Example:

Possible Oral Representation relating to agent's liability to repay → no bankruptcy

Li Man Hoo, Ex Parte FTLife Insurance Company Limited [2020] HKCFI 1354 (Disputes on calculation of performance etc → no bankruptcy)

Common Court Disputes

Effect and legal issues arising from “Claw Back Clauses”

Example:

Shek Kin Pong & Ors v. FTLife Insurance Company Limited [2019] HKCFI 1781

PART 2: THE ROLE AND POWERS OF THE INSURANCE APPEALS TRIBUNAL

Insurance Ordinance

(Cap./Instrument No.: 41)

100. Applications for review of specified decisions

- (1) An affected person may, by notice in writing to the Tribunal, apply to the Tribunal for a review of a specified decision within the period ending 21 days after the notice informing the person of the decision has been served.
- (2) An application for review—
 - (a) must be in writing; and
 - (b) must state the grounds for the application.
- (3) The Tribunal must, as soon as practicable after receiving an application for review, send a copy of the application to the Authority.
- (4) On an application by an affected person, the Tribunal may by order extend the time within which the application for review may be made under subsection (1).
- (5) The Tribunal may only grant an extension—
 - (a) if it is satisfied that there is a good cause for granting the extension; and
 - (b) after the affected person and the Authority have been given a reasonable opportunity to be heard.
- (6) On making the order, the time within which the application for review may be made is extended accordingly.

101. Determination of review by Tribunal

- (1) The Tribunal may determine a review of a specified decision by—
 - (a) confirming, varying or setting aside the decision; or
 - (b) remitting the matter to the Authority with directions it considers appropriate.
- (2) If a specified decision is set aside, the Tribunal may substitute for the decision another decision it considers appropriate.
- (3) If the Tribunal varies, or substitutes another decision for, a specified decision, the decision as varied or the other decision substituting for the specified decision—
 - (a) must be a decision that the Authority had power to make in respect of the review in question;
 - (b) may be more or less onerous than the specified decision; and
 - (c) may be made under the same provision as that under which the specified decision has been made or any other provision of this Ordinance.
- (4) In reviewing a specified decision, the Tribunal must give the parties to the review a reasonable opportunity to be heard.
- (5) Subject to section 104(3), the standard of proof required to determine any question or issue before the Tribunal is to be the standard of proof applicable to civil proceedings in a court of law.

102. Powers of Tribunal

- (1) Subject to Schedule 10, the Tribunal may, for the purpose of a review, on its own initiative or on the application of a party to the review—
- (a) receive and consider any material by way of oral evidence, written statements or documents, whether or not the material would be admissible in a court of law;
 - (b) determine the manner in which any material mentioned in paragraph (a) is received;
 - (c) by notice in writing signed by the chairperson of the Tribunal, require a person—
 - (i) to attend before it at any sitting and to give evidence; and
 - (ii) to produce any article, record or document in the person’s possession or control relating to the subject matter of the review;
 - (d) administer oaths;
 - (e) examine or cause to be examined on oath or otherwise a person attending before it and require the person to answer truthfully any question which the Tribunal considers appropriate for the purpose of the review;
 - (f) order a witness to provide evidence for the purpose of the review by affidavit;
 - (g) order a person not to publish or otherwise disclose any material the Tribunal receives;
 - (h) prohibit the publication or disclosure of any material the Tribunal receives at any sitting, or any part of a sitting, that is held in private;

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- (i) stay any of the proceedings in the review on any grounds and on any terms and conditions that it considers appropriate having regard to the interests of justice;
 - (j) determine the procedure to be followed in the review; and
 - (k) exercise other powers or make other orders that may be necessary for or ancillary to the conduct of the review or the carrying out of its functions.
- (2) The Tribunal may, with the consent of the parties to a review, determine the review on the basis of written submissions only.
- (3) A person commits an offence if the person, without reasonable excuse—
- (a) fails to comply with an order, notice, prohibition or requirement of the Tribunal made, given or imposed under subsection (1);
 - (b) disrupts any sitting of the Tribunal or otherwise misbehaves during any sitting of the Tribunal;
 - (c) having been required by the Tribunal under subsection (1) to attend before the Tribunal, leaves the place where the person’s attendance is so required without the permission of the Tribunal;
 - (d) hinders or deters any person from attending before the Tribunal, giving evidence or producing any article, record or document, for the purpose of a review;
 - (e) threatens, insults or causes any loss to be suffered by any person who has attended before the Tribunal, on account of that attendance; or
 - (f) threatens, insults or causes any loss to be suffered by the chairperson, or any other member, of the Tribunal at any time on account of the performance of the chairperson’s or member’s functions.

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- (4) A person who commits an offence under subsection (3) is liable—
 - (a) on conviction on indictment to a fine of \$1,000,000 and to imprisonment for 2 years; or
 - (b) on summary conviction to a fine at level 6 and to imprisonment for 6 months.
 - (5) A person is not excused from complying with an order, notice, prohibition or requirement of the Tribunal made, given or imposed under subsection (1) only on the ground that to do so might tend to incriminate the person.

103. Use of incriminating evidence given for the purpose of review

- (1) This section applies to any evidence, answer or information given or provided by a person in accordance with a requirement or order of the Tribunal under section 102(1)(c), (e), (f) or (k).
- (2) Despite anything in this Ordinance and subject to subsection (3), neither the evidence, answer or information given or provided by the person nor the requirement or order of the Tribunal is admissible in evidence against the person in criminal proceedings in a court of law.
- (3) Subsection (2) does not apply to criminal proceedings in which the person is charged with an offence under section 102(3)(a), or under Part V of the Crimes Ordinance (Cap. 200), or with perjury, in respect of the evidence, answer or information.

104. Contempt dealt with by Tribunal

- (1) The Tribunal has the same powers as the Court of First Instance to punish for contempt.
- (2) Without limiting subsection (1), the Tribunal has the same powers as the Court of First Instance to punish for contempt, as if it were contempt of court, a person who, without reasonable excuse, engages in a conduct falling within section 102(3)(a), (b), (c), (d), (e) or (f).
- (3) The Tribunal must, in exercising its powers to punish for contempt, adopt the same standard of proof as the Court of First Instance in the exercise of the same powers to punish for contempt.
- (4) Despite anything in this Ordinance—
 - (a) no power may be exercised under this section to determine whether to punish a person for contempt in respect of any conduct if—
 - (i) criminal proceedings have previously been instituted against the person under section 102(3) in respect of the same conduct; and
 - (ii) those criminal proceedings remain pending or because of the previous institution of those criminal proceedings, no criminal proceedings may again be lawfully instituted against the person under that section in respect of the same conduct; and

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- (b) no criminal proceedings may be instituted against a person under section 102(3) in respect of any conduct if—
- (i) any power has previously been exercised under this section to determine whether to punish the person for contempt in respect of the same conduct; and
 - (ii) proceedings arising from the exercise of that power remain pending or because of the previous exercise of that power, no power may again be lawfully exercised under this section to determine whether to punish the person for contempt in respect of the same conduct.

Schedule 9

[ss. 96 & 138]

Specified Decisions

(Schedule 9 added 12 of 2015 s. 98)

Part 1

Specified Decisions Made in relation to Insurers

<u>Column 1</u>	<u>Column 2</u>	<u>Column 3</u>
<u>Item</u>	<u>Description of decision</u>	<u>Provision</u>
1.	Refusal to grant an authorization to carry on insurance business on the grounds that section 8(2) or (3) applies	Section 8(1)(b)(i)
2.	Refusal to grant an authorization to carry on insurance business	Section 8(1)(b)(ii)
3.	Imposition, amendment or revocation of a condition in relation to an authorization to carry on insurance business	Section 8(1)(a) or 12(1)

4.	Refusal to approve the appointment of an individual as a controller of an authorized insurer	Section 13A(5)
5.	Revocation of approval of appointment of an individual as a controller of an authorized insurer	Section 13A(7)
6.	Refusal to approve the appointment of a person as a director of an authorized insurer	Section 13AC(5)
7.	Revocation of approval of appointment of a person as a director of an authorized insurer	Section 13AC(7)
8.	Refusal to approve the appointment of an individual as a key person in control functions of an authorized insurer	Section 13AE(5)
9.	Revocation of approval of appointment of an individual as a key person in control functions of an authorized insurer	Section 13AE(7)

10.	Imposition, amendment or revocation of a condition in relation to the approval of appointment of a controller, director or key person in control functions of an authorized insurer	Section 13AF
11.	Objection to a person being proposed to become a controller of an authorized insurer	Section 13B(4)
12.	Objection to the appointment of a controller or director of an authorized insurer	Section 14(4)
13.	Refusal to approve the appointment of a person as an actuary of an authorized insurer	Section 15(3D)
14.	Revocation of approval of the appointment of a person as an actuary of an authorized insurer	Section 15(3F)
15.	Imposition, amendment or revocation of a condition in relation to the approval of appointment of an actuary of an authorized insurer	Section 15AA

16.	Objection to the appointment of an actuary of an authorized insurer	Section 15B(2A)
17.	Imposition of a restriction on effecting or varying contracts of insurance by an authorized insurer	Section 27
18.	Imposition of a requirement on an authorized insurer about investments	Section 28
19.	Imposition of a requirement on an authorized insurer about maintenance of assets in Hong Kong	Section 29
20.	Imposition of an additional requirement on an authorized insurer about custody of assets	Section 30
21.	Imposition of a limitation of the premium income to be received by an authorized insurer	Section 31
22.	Imposition of a requirement on an authorized insurer	Section 35(1)

23.	Direction in respect of the affairs, business and property of an authorized insurer	Section 35(2)
24.	Rescission or variation of a requirement imposed under sections 27 to 35(1)	Section 38(1)
25.	Determination of remuneration and expenses to be paid by an authorized insurer to an Advisor or Manager	Section 38E(5)
26.	Exercise of power to take disciplinary action against an authorized insurer	Section 41P(1)
27.	Refusal to approve the appointment of a person as the authorized representative of Lloyd's	Section 50B
28.	Revocation of approval of the appointment of a person as the authorized representative of Lloyd's	Section 50B
29.	Exercise of power to take disciplinary action against Lloyd's, etc.	Section 50G

Part 2

Specified Decisions Made in respect of Insurance Intermediaries

<u>Column 1</u>	<u>Column 2</u>	<u>Column 3</u>
<u>Item</u>	<u>Description of decision</u>	<u>Provision</u>
1.	Refusal to grant an insurance agency licence	Section 64U(4)
2.	Refusal to grant an individual insurance agent licence	Section 64W(2)
3.	Refusal to grant a technical representative (agent) licence	Section 64Y(2)
4.	Refusal to grant an insurance broker company licence	Section 64ZA(3)
5.	Refusal to grant a technical representative (broker) licence	Section 64ZC(2)
6.	Refusal to approve an individual as a responsible officer of a licensed insurance agency	Section 64ZE(3)

7.	Refusal to approve an individual as a responsible officer of a licensed insurance broker company	Section 64ZF(3)
8.	Imposition, amendment or revocation of a condition in relation to a licence granted under section 64U, 64W, 64Y, 64ZA or 64ZC or approval granted under section 64ZE or 64ZF	Section 64ZG
9.	Revocation of the approval granted under section 64ZE	Section 64ZL(2)
10.	Revocation of the approval granted under section 64ZF	Section 64ZM(2)
11.	Refusal to renew a licence granted under section 64U, 64W, 64Y, 64ZA or 64ZC	Section 64ZV(4)
12.	Imposition, amendment or revocation of a condition in relation to a renewal of a licence granted under section 64U, 64W, 64Y, 64ZA or 64ZC	Section 64ZW

13.	Exercise of power to take disciplinary action	Section 81(1), (2) and (3)
14.	Revocation or suspension of a licence or approval that is regarded as having been granted under Part 5 of Schedule 11	Section 110 of Schedule 11
15.	Imposition, amendment or revocation of a condition in relation to a licence or approval that is regarded as having been granted under Part 5 of Schedule 11	Section 111 of Schedule 11
16.	Imposition of a disciplinary sanction on a specified person as defined by section 112 of Schedule 11	Section 113(4) of Schedule 11

Schedule 10

[ss. 97, 98, 99, 102, 105 & 117]

Appointment of Members and Proceedings of Tribunal, etc.

(Schedule 10 added 12 of 2015 s. 98)

1. Interpretation

(1) In this Schedule—

application for review (覆核申請) means an application made under section 100;

chairperson (主席) means the chairperson of the Tribunal;

ordinary member (普通成員) means a member of the Tribunal other than the chairperson;

panel member (上訴委員) means a member of the panel appointed under section 2 of this Schedule;

Secretary (局長) means the Secretary for Financial Services and the Treasury.

(2) In this Schedule—

parties (各方), **review** (覆核), and **specified decision** (指明決定) have the same meaning as in Part XII.

2. Appointment of panel

- (1) Subject to section 98, the Chief Executive must appoint persons to a panel comprising the number of members that the Chief Executive considers appropriate.
- (2) A panel member—
 - (a) must not be a public officer (except a public officer by virtue only of being the chairperson of a board or tribunal established under an Ordinance); and
 - (b) must not be a member of the Authority.
- (3) Subject to subsections (4) and (5), a panel member is appointed for a period that the Chief Executive considers appropriate, and may, subject to the other provisions of this Ordinance, from time to time be reappointed.
- (4) A panel member may at any time resign from office by notice in writing to the Chief Executive.
- (5) The Chief Executive may by notice in writing remove a panel member from office on the grounds of incapacity, bankruptcy, neglect of duty, conflict of interest or misconduct.
- (6) To avoid doubt, section 97(3) does not require the appointment of persons to more than one panel under this section.

3. Appointment of chairperson

- (1) The chairperson must be appointed by the Chief Executive.
- (2) The chairperson—
 - (a) must be a former Justice of Appeal of the Court of Appeal;
 - (b) must be a former judge or a former deputy judge of the Court of First Instance; or
 - (c) must be eligible for appointment as a judge of the High Court under section 9 of the High Court Ordinance (Cap. 4).
- (3) The chairperson—
 - (a) must not be a public officer (except a public officer by virtue only of being the chairperson of a board or tribunal established under an Ordinance); and
 - (b) must not be a member of the Authority.
- (4) Subject to subsections (5) and (7), the chairperson is appointed for a term of 3 years or appointed to act in relation to any specified review, and may, subject to the other provisions of this Ordinance, from time to time be reappointed.
- (5) The chairperson may at any time resign from office by notice in writing to the Chief Executive.

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- (6) A notice of resignation takes effect—
 - (a) on the date the Chief Executive receives the notice; or
 - (b) if a later date is specified in the notice, on that later date.
 - (7) The Chief Executive may by notice in writing remove the chairperson from office—
 - (a) if the chairperson is no longer qualified for appointment as chairperson under subsection (2); or
 - (b) on the grounds of incapacity, bankruptcy, neglect of duty, conflict of interest or misconduct.
 - (8) If a review has been commenced by the Tribunal but not completed before the expiry of the chairperson’s term of office, the Chief Executive may authorize the chairperson to continue to act as the chairperson for the purpose of completing the review.

4. Appointment of ordinary members

- (1) For determining a review, the Secretary on the recommendation of the chairperson must appoint 2 panel members as ordinary members in relation to the review.

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- (2) Subject to subsections (3) and (5), an ordinary member is appointed to act in relation to any specified review, and may, subject to the other provisions of this Ordinance, from time to time be reappointed.
 - (3) An ordinary member may at any time resign from office by notice in writing to the Secretary.
 - (4) A notice of resignation takes effect—
 - (a) on the date the Secretary receives the notice; or
 - (b) if a later date is specified in the notice, on that later date.
 - (5) If an ordinary member ceases to be a panel member, he or she ceases to be an ordinary member.

5. Further provisions relating to chairperson and ordinary members

- (1) If, during the sittings of a review, there is a change in any of the persons specified in subsection (2), then—
 - (a) if the parties to the review so consent, the sittings may continue despite the change; or
 - (b) in the absence of the consent of the parties to the review, the sittings must not continue but may begin anew.

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- (2) The following persons are specified—
 - (a) the chairperson or a person acting as the chairperson in relation to the review;
 - (b) a panel member acting as an ordinary member in relation to the review.

6. **Sittings**

- (1) The chairperson must convene the sittings of the Tribunal that are necessary to determine a review.
- (2) Before convening a sitting in respect of a review, the Tribunal may give directions to the parties to the review concerning—
 - (a) procedural matters to be complied with by the parties; and
 - (b) the time within which the parties are required to comply with those matters.
- (3) Subject to subsection (4), at any sitting of the Tribunal—
 - (a) the chairperson and 2 ordinary members must be present;
 - (b) the chairperson must preside; and
 - (c) every question before the Tribunal must be determined by the majority of votes cast by the chairperson and the ordinary members, except that a question of law is to be determined by the chairperson alone.

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- (4) At any sitting of the Tribunal held in respect of any matter which is determined by the chairperson alone as the sole member of the Tribunal under section 9(1) of this Schedule—
- (a) the chairperson only must be present; and
 - (b) every question before the Tribunal must be determined by the chairperson.
- (5) Every sitting of the Tribunal must be held in public.
- (6) However, subsection (5) does not apply if the Tribunal, on its own initiative or on the application of any of the parties to the review, determines that in the interests of justice a sitting, or a part of the sitting, must be held in private.
- (7) If an application is made under subsection (6) for a determination that a sitting or any part of the sitting must be held in private, a hearing of the application must be held in private.
- (8) The parties to a review must, at any sitting of the Tribunal relating to the review, be entitled to be heard—
- (a) in person, or—
 - (i) for the Authority or a company—through an officer or employee of the Authority or the company (as the case may be);
 - (ii) for a partnership—through a partner; or
 - (iii) for a sole proprietorship—through the sole proprietor; or

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- (b) through a counsel or solicitor or, with the leave of the Tribunal, through any other person.
 - (9) The chairperson must prepare or cause to be prepared a record of the proceedings at any sitting of the Tribunal, which must contain the particulars relating to the proceedings that the chairperson considers appropriate.
 - (10) The order of proceedings at any sitting of the Tribunal must be determined by the Tribunal in the manner most appropriate to the circumstances of the case.

7. Preliminary conferences

- (1) If the conditions set out in subsection (2) are satisfied, the chairperson may, on his or her own initiative or on the application of any of the parties to the review, direct that a conference be held for any one or more of the purposes set out in subsection (3).
- (2) The conditions are—
 - (a) the chairperson, after considering any material that has been submitted to the Tribunal in relation to the application for review by the parties to the review, considers it appropriate to hold the conference; and
 - (b) the parties agree or, for an application made by a party under subsection (1), the other party agrees.

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- (3) The purposes are—
- (a) to enable the parties to prepare for the conduct of the review;
 - (b) to assist the Tribunal to determine issues for the purposes of the review;
 - (c) to generally secure the just, expeditious and economical conduct of the review.
- (4) A conference is to be attended by the parties or their representatives and presided over by the chairperson.
- (5) At a conference held in accordance with a direction of the chairperson under subsection (1), the chairperson may—
- (a) give any direction the chairperson considers necessary or desirable for securing the just, expeditious and economical conduct of the review; and
 - (b) endeavour to secure that the parties to the review make all agreements as they ought reasonably to have made in relation to the review.
- (6) After a conference has been held in accordance with a direction of the chairperson under subsection (1), the chairperson must report to the Tribunal on the matters relating to the conference that the chairperson considers appropriate.

8. Consent orders

- (1) At any time after an application for review has been made, the Tribunal or chairperson may make any order which it or the chairperson is entitled to make under any provision of this Ordinance, whether or not the requirements otherwise applicable to the making of the order have been complied with, if the conditions set out in subsection (2) are met.
- (2) The conditions are—
 - (a) the parties to the review request, and agree to, the making of the order by the Tribunal or the chairperson (as the case may be); and
 - (b) the parties consent to all of the terms of the order.
- (3) Despite Part XII or any other provisions of this Schedule, an order made under subsection (1) by the Tribunal or chairperson must, for all purposes, be regarded as an order made under the provision in question in compliance with the requirements otherwise applicable to the making of the order.
- (4) In this section—
order (命令) includes any finding, determination and any other decision.

9. Chairperson as sole member of Tribunal

- (1) The chairperson may determine a review or an application as the sole member of the Tribunal if—
 - (a) at any time after an application for the review has been made but before any sitting of the Tribunal is held to determine the review, the parties to the review have, by notice in writing given to the Tribunal, informed the Tribunal that they have agreed that the review may be determined by the chairperson as the sole member;
 - (b) the application is an application to the Tribunal under section 100 for an extension of the time within which an application for review may be made; or
 - (c) the application is an application to the Tribunal under section 110 for a stay of execution of a specified decision.
- (2) If subsection (1) applies, the Tribunal constituted by the chairperson as the sole member of the Tribunal is to be regarded for all purposes as the Tribunal constituted also by 2 ordinary members.
- (3) After making a determination under subsection (1)(c), the chairperson must report to the Tribunal the determination and the reasons for the determination, and other matters relating to the determination that the chairperson considers appropriate.

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- (4) In the circumstances specified in subsection (5), a person who is eligible to be appointed as a chairperson under section 3 of this Schedule must, on appointment by the Chief Executive for the purpose, determine the application in question as if he or she were the chairperson duly appointed under this Ordinance, and the provisions of this Ordinance are to apply to him or her accordingly.
- (5) The circumstances are—
- (a) there is an application described in subsection (1)(c); and
 - (b) the chairperson—
 - (i) cannot perform his or her functions because of illness, absence from Hong Kong or any other reason; or
 - (ii) considers it improper or undesirable that he or she should perform his or her functions in relation to the application.

10. Privileges and immunities

Except as otherwise provided in this Ordinance, the Tribunal, the chairperson and ordinary members, and any party, witness, counsel, solicitor, or any other person involved, in a review, have the same privileges and immunities in respect of the review as they would have if the review were civil proceedings before the Court of First Instance.

Q&A

THANKS!

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