

The Anti Bribery Laws of Hong Kong

Presented by: Christine Koo



Christine M. Koo & Ip, Solicitors & Notaries

Tel. No. : (852) 2524 8996

E-mail : christinekoo@cmkoo.com.hk

Date : 27 November 2012



Disclaimer

(Copy Right Reserved)



Minimum Requirements of a Broker

(Copy Right Reserved)

What Does the Law Say?

Comparison between Broker and Agent

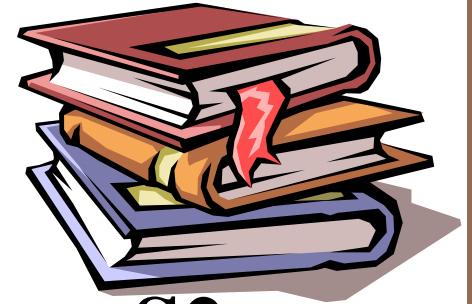
Insurance Brokers

- agent of the insured
- should not tied to any insurer
- paid by the insurer
- carries out preparatory work
- assists in event of a claim

Insurance Agents

- agent of an insurer(s)
- contracted to sell their policies
- paid by the insurer
- carries out preparatory work
- assists in event of a claim

What Does the Law Say?



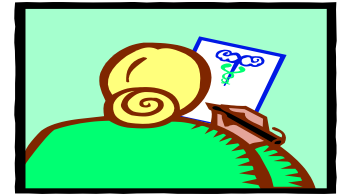
Insurance Companies Ordinance S2

1. Insurance Broker: Definition

“Insurance Broker” means a person who carries on the business of negotiating or arranging contracts of insurance in or from Hong Kong as the agent of the policy holder or potential policy holder or advising on matters related to insurance.

What Does the Law Say?

2. Policy Holder: Definition



“Policy Holder” means the person who for the time being is the legal holder of a policy for securing a contract with an insurer, and-

- (a) in relation to such long term business as consists in the granting of annuities upon human life, includes an annuitant; and
- (b) in relation to insurance business of any other kind, includes a person to whom, under a policy, a benefit is due or a periodic payment is payable.



Fit & Proper Criteria

Minimum Requirement

- (a) Good character and reputation;
- (b) Utmost good faith and integrity;
- (c) Independent and impartial;
- (d) Shall not give misleading information or make false statements;
- (e) Avoid conflict of interest;
- (f) Due care and diligence; etc.,

Fit & Proper Criteria

Minimum Requirement

(g) Priority of Clients Interest

- (i) shall not prejudice his client's selection of insurer by unreasonably limiting the choice of insurers.
- (ii) shall not be unreasonably dependent on any particular insurer in transacting insurance brokers business.

Fit & Proper Criteria

Minimum Requirement

(h) Information for Client

He shall disclose his association, if any, he may have with any insurer to whom he is recommending his client and which may result in a potential conflict of interests.

(Copy Right Reserved)





What Does the Common Law Say?

The general principles of professional conduct to insurance brokers are that a broker shall at all times:

- Conduct his business with the utmost good faith and integrity.
- Do everything to satisfy the insurance requirements of his clients.



What Does the Common Law Say?

- Place these requirements above all other considerations.
- A broker must ensure that he uses a sufficient number of insurers to satisfy clients' needs.
(Exclusive agreement with insurer?)

(Copy Right Reserved)

What does New York State attorney general Eliot Spitzer say? (2005)

Legal action against leading US insurance brokers with the following allegations:

- The insurance brokers steered unsuspecting clients to insurers with whom they had lucrative payoff agreements.
- They received special payments from insurance companies that were above and beyond normal sales commissions.

What does New York State attorney general Eliot Spitzer say? (2005)

- Contingent commissions/Compensation for market services
- Solicit fake bids for insurance contracts, which deceived customers into thinking that true competition had taken place. (Rigged bids)

(Copy Right Reserved)



What does New York State attorney general Eliot Spitzer say? (2005)

- Stifled competition/Cheated customers
- Convinced other insurers to go along with a system of creating fictitious and noncompetitive bids in order to give the customers the appearance of a competitive marketplace for insurance coverage where it didn't exist.

What does New York State attorney general Eliot Spitzer say? (2005)

- Breach of fiduciary duty to their clients by putting their own financial interests ahead of its customers' in securing insurance coverage for them.
- By accepting and even demanding the contingency fee, they breached their fiduciary duty to their clients.

What does New York State attorney general Eliot Spitzer say? (2005)

- They committed fraud and breached antitrust violations through a price-fixing scheme.
- Their illegal acts resulted in a distorted market and higher insurance costs.
- The civil complaint seeks restitution and punitive damages.

What Does ICAC Say?

Prevention of Bribery Ordinance (Cap 201)

Section 9(1) says:

Any agent who, without lawful authority or reasonable excuse, solicits or accepts any advantage as an inducement to or reward for or otherwise on account of his-

- (a) doing or forbearing to do, or having done or forborne to do, any act in relation to his principal's affairs or business; or
 - (b) showing or forbearing to show, or having shown or forborne to show, favour or disfavour to any person in relation to his principal's affairs or business,
- shall be guilty of any offence.



What Does ICAC Say?

Prevention of Bribery Ordinance (Cap 201)

Section 9(2) says:

Any person who, without lawful authority or reasonable excuse, offers any advantage to any agent as an inducement to or reward for or otherwise on account of the agent's-

- (a) doing or forbearing to do, or having done or forborne to do, any act in relation to his principal's affairs or business; or
 - (b) showing or forbearing to show, or having shown or forborne to show, favour or disfavour to any person in relation to his principal's affairs or business,
- shall be guilty of any offence.

What Does ICAC Say?

Prevention of Bribery Ordinance (Cap 201)

Section 9(3) says:

Any agent who, with intent to deceive his principal, uses any receipt, account or other document-

- (a) in respect of which the principal is interested; and
- (b) which contains any statement which is false or erroneous or defective in any material particular; and
- (c) which to his knowledge is intended to mislead the principal, shall be guilty of any offence.

What Does ICAC Say?

Prevention of Bribery Ordinance (Cap 201)

Section 9(4) says:

If an agent solicits or accepts an advantage with the permission of his principal, being permission which complies with subsection (5), neither he nor the person who offered the advantage shall be guilty of an offence under subsection (1) or (2).



What Does ICAC Say?

Prevention of Bribery Ordinance (Cap 201)

Section 9(5) says:

For the purposes of subsection (4) permission shall-

- (a) be given before the advantage is offered, solicited or accepted;
or
- (b) in any case where an advantage has been offered or accepted without prior permission, be applied for and given as soon as reasonably possible after such offer or acceptance,

and for such permission to be effective for the purposes of subsection (4), the principal shall, before giving such permission, have regard to the circumstances in which it is sought.

What Does ICAC Say?

Prevention of Bribery Ordinance (Cap 201)

Section 12(1) says:

Any person guilty of an offence under this Part, other than an offence under section 3, shall be liable-

- (a) on conviction on indictment-
 - (i) for an offence under section 10, to a fine of \$1000000 and to imprisonment for 10 years;
 - (ii) for an offence under section 5 or 6, to a fine of \$500000 and to imprisonment for 10 years; and
 - (iii) for any other offence under this Part, to a fine of \$500000 and to imprisonment for 7 years; and

What Does ICAC Say?

Prevention of Bribery Ordinance (Cap 201)

Section 12(1) says:

- (b) on summary conviction-
 - (i) for an offence under section 10, to a fine of \$500000 and to imprisonment for 3 years; and
 - (ii) for any other offence under this Part, to a fine of \$100000 and to imprisonment for 3 years,

and shall be ordered to pay to such person or public body and in such manner as the court directs, the amount or value of any advantage received by him, or such part thereof as the court may specify.

What Does ICAC Say?

Prevention of Bribery Ordinance (Cap 201)

Section 19 says:

In any proceedings for an offence under this Ordinance, it shall not be a defence to show that any such advantage as is mentioned in this Ordinance is customary in any profession, trade, vocation or calling.

Judge: Lawful Authority for the commercial practice.



R v Kelly- Facts:

(Supreme Court of Canada, criminal case)

- Kelly offered financial planning services. He charged his client a fee for his service.
- Kelly recommended a Product (Qualico) to his client.
- Qualico rewarded Kelly with commission.

Customers of Kelly testified that they were unaware that Qualico paid Kelly a sales commission for each Product sold to Kelly's customers.

In the Offering Memorandum of the Product, it contained 2 one-line references to Issuing and Sales Costs. Kelly argued that his client should be able to infer from those 2 one-line references that Kelly would be receiving commission as "Sales Costs".



HCCA NO. 15 OF 2010

BETWEEN

JEREMY PAUL EGERTON HOBBS

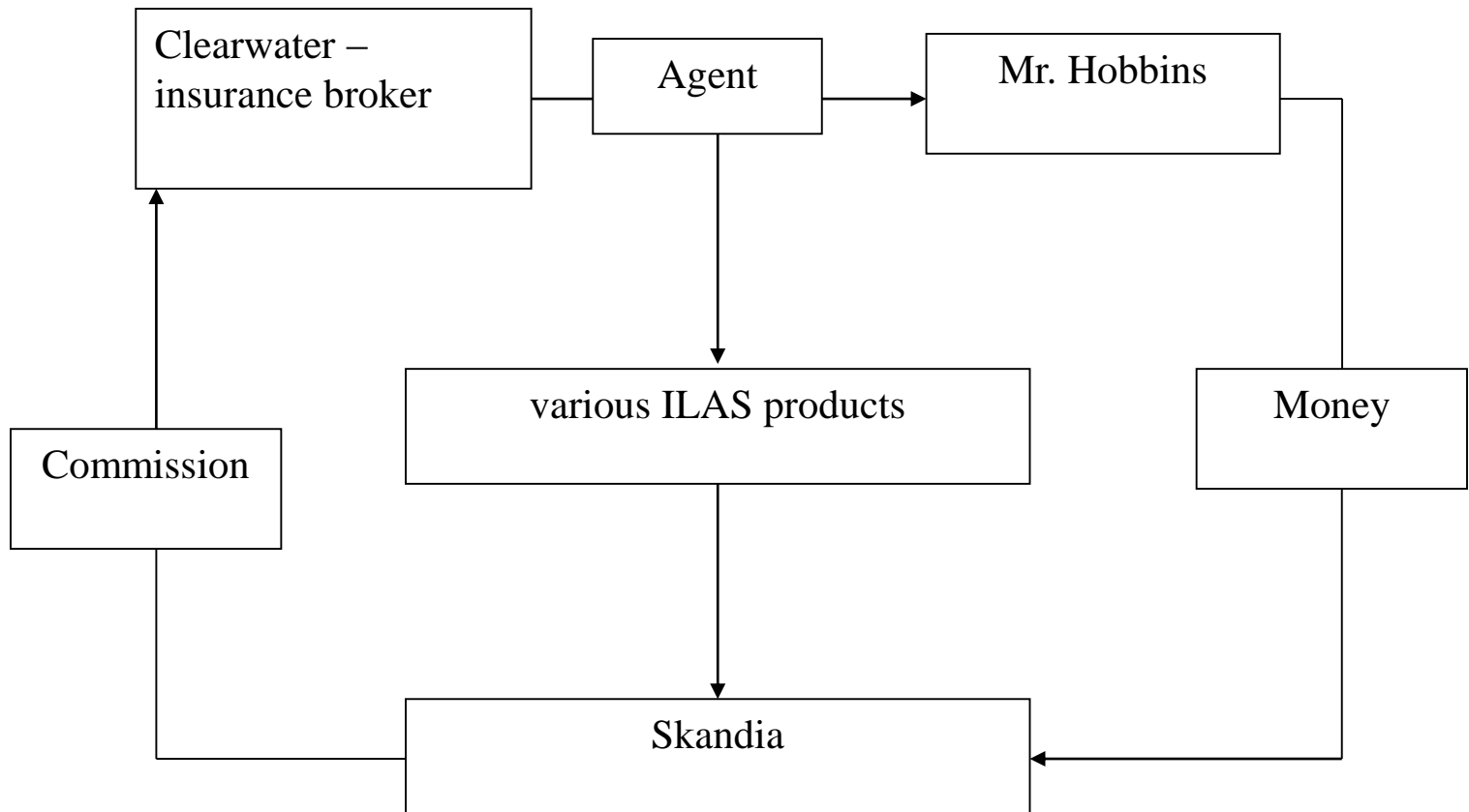
Plaintiff

and

ROYAL SKANDIA LIFE ASSURANCE LIMITED 1st Defendant

CLEARWATER INTERNATIONAL LIMITED 2nd Defendant

Summary of facts



Pl sought:

- restitution (restore his former position to Dec 05) from D1.
- commission earned so far from D2.
- contract void –
illegality/misrepresentation.



Nub of the case (Judge's words)

Whether, as a matter of law, an insurance broker is obliged to disclose HOW MUCH one earns on any particular transaction.

Elements (1)

- Pl – successful businessman,
high-ranking executive.
- experienced in investment products (CIB, MCA, EIB, WPB, IDS, BOSI).
 - Recollection of events hazy. Mr. Keating's evidence more reliable.

Elements (2)

- D2 – Good documentations
- Broker agreements
 - Investment Risk Profiler Questionnaire
 - Questionnaire 05, 06 (update)
 - Report to Pl re commission
 - Client Needs Analysis Questionnaire
 - Client Agreement re product (commission)
 - KYC
 - Contemporaneous note
- Application form concealed information – nothing duplicitous.
- No misrepresentation (meet 67 times over 40 months).

Points to Note

Proper documentations.

Each ILAS product, one client agreement mentioning commission.

Commission not in excess, “not exceed the usual market rate”.

What If

1. PI old and illiterate in-experience investor.
2. Incentive Bonus.
3. Sell only one Insurer's Product.
(Zurich, Generali, Aviva)
4. CFA decision.

Q & A Session

Presented by: Christine Koo



Christine M. Koo & Ip, Solicitors & Notaries

Tel. No. : (852) 2526 7666

E-mail : christinekoo@cmkoo.com.hk

PLEASE NOTE

The law and procedure on this subject are very specialised. This article is a general explanation for your reference only and should not be relied on as legal advice for any specific case. If legal advice is needed, please contact our solicitors.

請注意

本題目之法律及程序十分專門。此文章只屬一般性之解釋，供你參考，而不應被依賴為關於任何特定事件之法律意見。如需法律意見，請與我所律師聯絡。

Christine M. Koo & Ip, Solicitors & Notaries LLP
顧張文菊、葉成慶律師事務所 有限法律責任合夥