

## MEMORANDUM

**DATE : 01 March 2021**  
**SUBJECT : OVERVIEW OF THE SINGAPORE INSURANCE ACT, THE SINGAPORE INSURANCE (LLOYD'S ASIA SCHEME) REGULATIONS AND OTHER LEGISLATION AND ISSUES RELEVANT TO THE LLOYD'S ASIA TERMS OF BUSINESS AGREEMENT**

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This memorandum and the attached Lloyd's Asia Terms of Business Agreement ("**Lloyd's Asia TOBA**") are an update by Premier Law LLC as Singapore counsel to the previous versions of the memorandum dated 19 October 2009 and the Lloyd's Asia TOBA issued in October 2009 respectively. This memorandum seeks to provide an overview of the Singapore Insurance Act (the "**Act**") and the Singapore Insurance (Lloyd's Asia Scheme) Regulations (the "**Lloyd's Asia Scheme Regulations**"), and to highlight and explain the relevant key features and rules under Singapore law as well as the general principles underlying the Lloyd's Asia TOBA.

### **A. OVERVIEW OF THE ACT AND THE LLOYD'S ASIA SCHEME REGULATIONS**

1. The Monetary Authority of Singapore ("**MAS**") is the regulatory authority which oversees the insurance industry in Singapore.

#### **I. The Act**

2. The Act is the primary legislation which governs the conduct of insurance companies and insurance business in Singapore.
3. Any person or company must be licensed or authorised by the MAS in respect of a particular class of insurance business as an insurer before he can carry on that business in Singapore.<sup>1</sup> The MAS may at any time add to, vary or revoke any existing conditions of the license of an insurer or impose any conditions thereto.<sup>2</sup>
4. "*Insurance business in Singapore*" is defined in the Act to mean "*the business of assuming risk or undertaking liability in Singapore under policies, and of –*

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<sup>1</sup> Section 3 of the Act.

<sup>2</sup> Section 8(8) of the Act.

- (a) receiving proposals for policies in Singapore;*
- (b) issuing policies in Singapore; or*
- (c) collecting or receiving premiums on policies in Singapore".<sup>3</sup>*

5. The Act also governs the conduct of insurance broking business and states that "*no person shall carry on business as any type of insurance broker in Singapore unless (a) the person is registered by the [MAS] as that type of insurance broker; or (b) the person is exempted from registration under Section 35ZN [of the Act]*".<sup>4</sup>
6. An "*insurance broker*" is defined in the Act as "*a person who is or has been carrying on the business of receiving proposals for, or issuing, policies in Singapore; collecting or receiving premiums on policies in Singapore; or arranging contracts of insurance in Singapore as an agent for the insureds or intending insureds in respect of (a) policies relating to general business and long-term accident and health policies, other than policies relating to reinsurance business; or (b) reinsurance of liabilities under policies relating to life business or general business*".<sup>5</sup>

## **II. Foreign Insurer Schemes**

7. Part IIA of the Act sets out the provisions concerning foreign insurer schemes. A "*foreign insurer*" is defined in the Act as "*an insurer which is: (a) authorised under the laws of another country to carry on insurance business in that foreign country; but (b) is not licensed as an insurer under section 8 [of the Act] or authorised as a reinsurer under Section 34 [of the Act]*".<sup>6</sup>
8. The MAS has the power to "*establish any foreign insurer scheme for the purpose of permitting any member of any class, society or association of foreign insurers specified in the scheme to carry on insurance business in Singapore*".<sup>7</sup>
9. In respect of each foreign insurer scheme, the MAS will "*appoint an administrator who shall be resident in Singapore*".<sup>8</sup> This administrator shall have "*responsibility for the operation of the scheme*" and shall "*carry out such tasks in relation to the carrying on of insurance business in*

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<sup>3</sup> Section 1A of the Act.

<sup>4</sup> Section 35W(1) of the Act.

<sup>5</sup> Section 1A of the Act.

<sup>6</sup> Section 1A of the Act. Section 8 of the Act relates to the licensing of insurers under the regime of the Act and does not include foreign insurers who are registered under the law of another country.

<sup>7</sup> Section 35B of the Act.

<sup>8</sup> Section 35C(1) of the Act.

*Singapore by the foreign insurers under the scheme as may be directed by the [MAS] or as may be prescribed".<sup>9</sup> "Where the appointment of the administrator of any foreign insurer scheme is revoked, all foreign insurers carrying on business in Singapore under that scheme shall cease to carry on in Singapore insurance business under the scheme".<sup>10</sup>*

10. Where the MAS has established a foreign insurer scheme, "*each member of the class, society or association of foreign insurers specified in the scheme may, in accordance with the terms of the scheme, carry on such insurance business in Singapore as may be prescribed*".<sup>11</sup> However, the MAS "*may by notice in writing prohibit any foreign insurer from carrying on all or any kind of insurance business in Singapore under any foreign insurer scheme if (a) the foreign insurer breaches or contravenes any of the terms of the scheme under which the foreign insurer carries on insurance business in Singapore; or (b) the [MAS] considers it necessary in the public interest*".<sup>12</sup>
11. The MAS has the power to "*make such regulations as are necessary or expedient for the purpose of carrying out the provisions of [Part IIA of the Act relating to foreign insurer schemes]*".<sup>13</sup>

### **III. The Insurance (Lloyd's Asia Scheme) Regulations**

12. The MAS has established the Lloyd's Asia Scheme and, in doing so, has come up with the Lloyd's Asia Scheme Regulations.
13. The administrator of the Lloyd's Asia Scheme is Lloyd's of London (Asia) Pte Ltd.<sup>14</sup>
14. Under the Lloyd's Asia Scheme, a member of the society of underwriters known in the United Kingdom as Lloyd's and incorporated by the Lloyd's Act 1871 of the United Kingdom ("**Lloyd's**") "*may carry on insurance business specified in the First Schedule [of the Lloyd's Asia Scheme Regulations] in Singapore if*<sup>15</sup>:

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<sup>9</sup> Section 35C(4) of the Act. Further details of the requirements and duties of the administrator under the Lloyd's Asia Scheme are set out at Part IV of the Lloyd's Asia Scheme Regulations.

<sup>10</sup> Section 35J(1) of the Act.

<sup>11</sup> Section 35D(1) of the Act.

<sup>12</sup> Section 35F of the Act.

<sup>13</sup> Section 35L(1) of the Act sets out the examples of what such regulations may include.

<sup>14</sup> Regulation 2.

<sup>15</sup> Regulation 3.

- (a) *The member registers with the administrator in accordance with Regulation 4 [of the Lloyd's Asia Scheme Regulations];*
- (b) *The member carries on insurance business, and enters into contracts of insurance, in Singapore through (i) [a company registered with the administrator under Regulation 6 of the Lloyd's Asia Scheme Regulations in order to act as an agent in Singapore for any member of Lloyd's under the Lloyd's Asia Scheme Regulations (defined in the Lloyd's Asia Scheme Regulations as a "Service Company")]; or (ii) a Service Company and a coverholder;*
- (c) *The member authorises the Service Company... to: (i) establish and maintain the insurance funds in respect of Singapore policies and offshore policies [in separate funds]<sup>16</sup> and [specific deposits]<sup>17</sup>; and (ii) to accept service of notices and legal processes in respect of or connected to the carrying on of insurance business in Singapore, including any notice or direction of the [MAS] to the member; and*
- (d) *Lloyd's has given an undertaking to the [MAS] that the holder of any insurance policy issued by the member under [the Lloyd's Asia Scheme Regulations] shall have recourse to [the member's premium trust fund, funds at Lloyd's as defined in paragraph 17 of the Lloyd's Membership Byelaw (No. 5 of 2005), other personal wealth of the member and the [fund established under the Lloyd's New Central Fund Byelaw (no. 23 of 1996) (defined in the Lloyd's Asia Scheme Regulations as the "New Central Fund")] (collectively, defined in the Lloyd's Asia Scheme Regulations as the "Chain of Security")], in accordance with and subject to the terms of the relevant Lloyd's trust deeds and Lloyd's byelaws, conditions and requirements governing the trust deeds, to the same extent as the holder of a general business policy issued by the same member of Lloyd's in London."*

15. In respect of a Service Company, it can only act as an agent in Singapore for any member of Lloyd's under the Lloyd's Asia Scheme Regulations if "it is a company registered under the Singapore Companies Act (Cap. 50) and meets the following requirements:

- (a) *The company must be registered with the administrator under Regulation 6 [of the Lloyd's Asia Scheme Regulations]; and*

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<sup>16</sup> As further detailed at Regulation 11.

<sup>17</sup> As further detailed at Regulation 16.

(b) *The company must, unless the [MAS] otherwise permits, be (i) a subsidiary of a managing agent at Lloyd's; or (ii) a subsidiary of the holding company of a managing agent at Lloyd's*".<sup>18</sup>

16. The key duties and obligations of a Service Company are set out below:

(a) *"A Service Company must not, without the approval of the [MAS] enter into any contract of insurance on behalf of the members of a syndicate"*<sup>19</sup>;

(b) A Service Company (which for the purposes of this paragraph shall be referred to as "**Lead Service Company**") may however *"enter into a contract of insurance on behalf of the members of a syndicate without the approval of the [MAS] if (i) the [MAS] has approved another Service Company to enter into the contract of insurance on behalf of the members of that syndicate, and that approval has not been revoked; (ii) the members of the syndicate have authorised the other Service Company to authorise the Lead Service Company to enter into the contract of insurance on behalf of the members of that syndicate; and (iii) the other Service Company has authorised the Lead Service Company to enter into the contract of insurance on behalf of the members of the syndicate"*.<sup>20</sup>

(c) *"No Service Company shall write any insurance business, unless it has reason to believe that suitable arrangements for the reinsurance of the business written in Singapore are in place at all times and that the reinsurers are of good security"*<sup>21</sup>;

(d) *"Every Service Company shall immediately inform the [MAS] if: (i) it becomes aware that any arrangement referred to in [paragraph (c) above] has been, is being or is likely to be rendered inadequate or ineffective; (ii) for any accounting period, the permitted trust outgoings of any insurance fund established by it under Regulation 11 exceed the premium receipts of that insurance fund; (iii) any development has occurred or is likely to occur which the Service Company has reasonable grounds to believe is likely to have a material*

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<sup>18</sup> Regulation 5.

<sup>19</sup> Regulation 6A(1).

<sup>20</sup> Regulation 6A(1A).

<sup>21</sup> Regulation 6A(2).

*adverse effect on the financial position of the Service Company; or (iv) it amends or alters its memorandum and articles of association"*<sup>22</sup>;

(e) *"Every Service Company must, within one month after any amendment or alteration to its memorandum and articles of association, furnish to the [MAS] written particulars of the amendment or alteration, verified by a statutory declaration made by a senior officer of the Service Company"*<sup>23</sup>;

(f) *"A Service Company must, not less than 14 days before authorising a person as its coverholder, notify the [MAS] in writing of the particulars set out in sub-paragraph (g) of the Fourth Schedule [of the Lloyd's Asia Scheme Regulations] of the person"*<sup>24</sup>; and

(g) *"A Service Company must obtain the approval of the [MAS] before the Service Company, or any coverholder authorised by the Service Company, begins to introduce into Singapore any policy [for general business which insures any risk of a nature which has not been previously underwritten in the Singapore insurance market] on behalf of any member of Lloyd's for whom the Service Company is approved to enter into any contract of insurance"*.<sup>25</sup>

## **B. EXPLANATION NOTES ON KEY TERMS IN THE LLOYD'S ASIA TOBA**

### **I. Scope And Applicability Of The Lloyd's Asia TOBA**

17. The Lloyd's Asia TOBA is intended to contractually govern the conduct of insurance business and reinsurance business in Singapore between a Service Company acting as an agent in Singapore for a member of Lloyd's under the Lloyd's Asia Scheme and an insurance broker.
18. The Lloyd's Asia TOBA has been prepared specifically for use in the Lloyd's Asia market which is based in Singapore. As such, the Lloyd's Asia TOBA is governed by Singapore law. Generally, in drafting the Lloyd's Asia TOBA, the terms in the model Terms of Business Agreement used in the London market ("**UK TOBA**") have been adopted to the extent practicable, with the necessary modifications to reflect the relevant rules and regulatory

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<sup>22</sup> Regulation 6A(3).

<sup>23</sup> Regulation 6A(4).

<sup>24</sup> Regulation 6A(5).

<sup>25</sup> Regulation 9.

requirements under Singapore law. Should Service Companies wish to amend the Lloyd's Asia TOBA further to reflect particular commercial arrangements, it is open for them to do so, although it is recommended that they seek appropriate legal advice with regard to any changes made.

## II. Key Terms In The Lloyd's Asia TOBA

19. Where terms in the UK TOBA have been departed from, we explain below the reason for such modification in the Lloyd's Asia TOBA with reference to Singapore law.

(a) Clause 1 (Definitions)

The definition of "*Insurance Business*" in the Lloyd's Asia TOBA is premised on that as set out in the Act, which is the "*business of assuming risk or undertaking liability under policies, and of (a) receiving proposals for policies; (b) issuing policies; or (c) collecting or receiving premiums on policies*".<sup>26</sup>

(b) Clause 3.2 (Regulatory Status)

The MAS may, by order, on any of the prescribed grounds in the Act, cancel the registration of any insurance broker.<sup>27</sup> The prescribed grounds for cancellation are exhaustively set out in section 35ZB(2) of the Act and include where the insurance broker has gone into liquidation or has been wound up or dissolved. Clause 3.2 of the TOBA requires the broker to inform the Service Company immediately in writing in the event that (a) the MAS cancels the broker's registration or if the broker is an exempt insurance broker, the MAS withdraws such exemption; (b) the broker otherwise ceases to be authorised or registered by the MAS to undertake activities in relation to insurance business or reinsurance business; or (c) if one of the prescribed grounds for cancellation of the broker's registration has been fulfilled.

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<sup>26</sup> Section 1A of the Act.

<sup>27</sup> Section 35ZB(1) of the Act.

(c) Clause 4.3 (Signing Down)

At present, we understand that signing down is not common within the Lloyd's Asia market as that practice is presently understood in the London market. However, as the market develops, it is anticipated that signing down may become more common. To reflect the possible differences in practice in the Lloyd's Asia market and recognising that market practice may develop further, Clause 4.3 has been amended to recognise that brokers may be authorised to sign down the Service Company's participation in any insurance or reinsurance slip or contract. It should be noted that the Lloyd's Asia TOBA itself does not authorise the broker to sign down. If the broker is authorised to sign down and proceeds to sign down the Service Company's line, then the broker is obliged by Clause 4.3 to notify the Service Company promptly of its signed line.

(d) Clauses 6.1 and 6.2 (Transfer Of Risk)

**Direct Insurance Business**

In respect of insurance business (which is covered in Clause 6.1 of the Lloyd's Asia TOBA), the Act prescribes the following effects of payments made to insurance intermediaries, such as brokers:-

- A. *"Where a contract of insurance is arranged or effected by an insurance intermediary, payment to the insurance intermediary of moneys payable by the insured to the insurer under or in relation to the contract (whether in respect of a premium or otherwise) shall be a discharge, as between the insured and the insurer, of any liability of the insured under or in respect of the contract, to the extent of the amount of the payment".<sup>28</sup>* In other words, payment by the insured of a premium to the broker is effective as payment to the insurer. In practice, this means that the insurer bears the credit risk in the event the broker fails to pass on the premium to the insurer.
- B. *"Payment by an insurer to an insurance intermediary of moneys payable to an insured (whether in respect of a claim, return of premiums or otherwise) under or in relation to a contract of insurance, shall not discharge any liability of the*

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<sup>28</sup> Section 35O(1) of the Act.

*insurer to the insured in respect of those moneys.*"<sup>29</sup> In other words, payment by the insurer to the broker of moneys payable to the insured (such as claims money or return of premiums) is only treated as paid once such moneys is actually received by the insured and the insurer bears the credit risk in the event the broker does not pass the money to the insured.

Under the Act, this “*risk transfer*” to the insurer is mandatory and it is not possible for the parties to contract out of the statutory requirements.<sup>30</sup>

### **Reinsurance Business**

In contrast, in respect of reinsurance business (which is covered in Clause 6.2 of the Lloyd's Asia TOBA), the Act provides that the relevant provisions which prescribe the various effects of payments made to insurance intermediaries in the case of direct insurance business as highlighted directly above do not apply.<sup>31</sup> As such, Clause 6.2 of the Lloyd's Asia TOBA is drafted on a non-“*risk transfer*” basis. The reinsurer is only deemed to have received the premium once it is received by the reinsurer or its agent. Similarly, the reinsurer is deemed to have paid a claim or returned any premium once the claims money or premium is paid to the reinsurance broker.

(e) Clause 6.4 (Terms Of Trade)

The Lloyd's Asia TOBA is a draft agreement produced for consideration by the Service Company when recording its contractual arrangement with a broker. Clause 6.4 of the Lloyd's Asia TOBA allows the Service Companies to set out in the Lloyd's Asia TOBA the Terms of Trade to apply between the broker and the Service Company. It is, however, for the Service Company to negotiate and agree with the broker the Terms of Trade which the Service Company wants to adopt when dealing with that broker. Where appropriate, Service Companies may wish to delete this provision and agree to the relevant Terms of Trade separately.

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<sup>29</sup> Section 35O(3) of the Act.

<sup>30</sup> Section 35O(4) of the Act.

<sup>31</sup> Section 35N(1) of the Act provides that "*Section 35O [of the Act]... shall not apply to a general reinsurance broker or life reinsurance broker in respect of contracts for the reinsurance of liabilities under insurance policies.*".

(f) Clause 6.5 (Marine Insurance Act)

Section 53(1) of the Marine Insurance Act (Cap 387) provides that the broker is liable to the insurer for the premium payable in respect of a marine policy which is secured with that insurer whether or not the broker has received the premium from the assured. In the same way the insurer is liable for any amount payable in respect of any losses whether or not the broker has paid the premium. Section 53(2) provides that the broker shall have a lien against the assured for the payment of the premium and brokerage and against the insurer for payment of brokerage if acting on behalf of the insurer in broking the policy. Clause 6.5 of the Lloyd's Asia TOBA preserves the statutory obligation of the broker to pay the premium of any marine insurance secured and of the insurer to make payment in respect of any losses impacting on that insurance. The broker's obligations to pay the premium in respect of any marine insurance secured on behalf of the assured whether or not the assured makes payment to the broker, are distinct from the broker's obligation to receive and hold monies in accordance with its statutory obligations which are addressed in Clause 6.6 of the Lloyd's Asia TOBA.

(g) Clause 6.6 (Broker's Holding Of Funds)

- A. Clause 6.6 of the Lloyd's Asia TOBA obliges the broker to hold monies in accordance with its statutory obligations. If the broker is based in Singapore, then those statutory obligations are set out within Section 35ZD of the Act. It should be noted that it is the responsibility of the broker, not the Service Company, to ensure that the broker holds monies in accordance with its statutory obligations.
  
- B. Please note that under Regulation 7 of the Insurance (Intermediaries) Regulations which applies to brokers based in Singapore, it is provided that interest arising from any payment which is due to the insurer that is received by an insurance broker from any bank account, shall belong to the insurer, unless the insurer and the broker have agreed otherwise. However, any interest arising from any payment which is due to the insurer that is received by a reinsurance broker from any bank account, shall belong to the reinsurance broker, unless the insurer and reinsurance broker have agreed otherwise. This is consistent with the position concerning the transfer of risk and has been reflected in the Clause 6.6.

- C. If the insurer and the broker agree that any interest arising from any payment which is due to the insurer shall be retained by the broker, then the following Clause 6.6 may be adopted:

*"At all times the Broker shall receive and hold monies in accordance with its statutory, legal and regulatory obligations and any interest accrued on these monies which otherwise would be payable to the SC shall be retained by the Broker."*

- (h) Clause 9 (Data Protection)

In Singapore, the Personal Data Protection Act 2012 ("**PDPA**") fully came into force on 2 July 2014. The PDPA establishes a data protection law that comprises various rules governing the collection, use and disclosure of personal data by organisations (which includes any individual or company in Singapore). Personal data refers to "*data, whether true or not, about an individual who can be identified from that data, or from that data and other information to which the organization has or is likely to have access*".<sup>32</sup> Under the PDPA, organisations may transfer any personal data to a country or territory outside Singapore if it is done in accordance with requirements under the PDPA to ensure that the organisations provide a standard of protection to personal data so transferred that is comparable to the protection under the PDPA.<sup>33</sup>

- (i) Clause 11.1 (Access To Records)

There is no particular requirement under Singapore law in relation to the period of retention of records relating to insurance or reinsurance business. However, for certain purposes tax records are required to be kept for seven years and therefore this has been adopted for the purposes of this agreement. It is, of course, open for the parties to agree a longer period.

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<sup>32</sup> Section 2(1) of the PDPA.

<sup>33</sup> Section 26(1) of the PDPA.

(j) Clause 20 (Choice Of Law And Jurisdiction)

- A. The Lloyd's Asia TOBA is governed by Singapore law. This means that if there is any dispute arising out of the Lloyd's Asia TOBA, including any dispute as to its existence, validity, termination or meaning, then that dispute shall be determined in accordance with Singapore law.
- B. The Lloyd's Asia TOBA is subject to arbitration in Singapore as the forum with jurisdiction to determine any dispute arising out of the TOBA. As such, the Singapore Courts do not have jurisdiction to determine such disputes but may still be called upon to support the arbitration proceeding. Arbitration in Singapore has been selected as the dispute resolution mechanism because whilst the TOBA is intended to contractually govern the conduct of insurance business and reinsurance business in Singapore (as set out in paragraph 17 above), in the event that the TOBA is amended to contractually govern the conduct of insurance business or reinsurance business in jurisdictions other than Singapore, an arbitral award may be enforced in more than 150 countries in accordance with the New York Convention of 1958. A Singapore Court judgement, however, may only be enforced in a limited number of overseas countries. In the event that the TOBA is amended to contractually govern the conduct of insurance business or reinsurance business in jurisdictions other than Singapore, where the parties wish to, it is open for them to select a different choice of law and jurisdiction clause. Appropriate legal advice from a firm qualified to advise on the local law of the relevant jurisdiction should be obtained if any changes are made to the choice of law or jurisdiction clause. Where the broker is Singapore-domiciled and Singapore-regulated, the parties may prefer to adopt a clause agreeing to the jurisdiction of the Singapore Courts.
- C. It should be noted that notwithstanding the selection of mediation and arbitration to resolve any disputes arising from the Lloyd's Asia TOBA, the parties may still apply to the Singapore Court, or any other Court of competent jurisdiction, for any interim measures of protection or assistance as provided by the UNCITRAL Model Law on International Commercial Arbitration Article 9 which is incorporated into Singapore law by Section 3 of the International Arbitration Act (Cap. 143A) of Singapore as reflected at Clause 19.2 of the TOBA.