

THE FIRST FUND AGREEMENT

dated 1st February 1981

between

MOTOR INSURERS' BUREAU OF HONG KONG

and

THE GOVERNMENT OF HONG KONG

MEMORANDUM OF AGREEMENT

MEMORANDUM OF AGREEMENT made the 1st day of February One thousand nine hundred and eighty-one.

BETWEEN:-

- (1) THE GOVERNMENT OF HONG KONG ("Government"); and
- (2) MOTOR INSURERS' BUREAU OF HONG KONG, a company duly formed and registered under the Companies Ordinance having its registered office at 22nd Floor, Prince's Building, Hong Kong ("M.I.B."), supplemental to an Agreement (hereinafter called "the Principal Agreement") made on 27th June 1980 between Government and the insurers then authorised to carry on motor vehicle insurance business in Hong Kong by or on behalf of whom the Principal Agreement was signed and in pursuance of paragraph 1 of which M.I.B. was incorporated.

WHEREBY IT IS AGREED as follows:-

1. Definitions

In this Agreement:-

"the Authority" means the public officer for the time being responsible for authorising insurers pursuant to the provisions of the Ordinance or such other person as may be nominated by Government for the purposes of this Agreement.

"judgment" means a judgment in favour of the person who suffered death or bodily injury, his dependants or personal representatives.

"policy" means a policy of insurance in respect of third party risks which complies with the requirements of the Ordinance.

"Ordinance" means the Motor Vehicles Insurance (Third Party Risks) Ordinance, Chapter 272, or any enactment amending or replacing the same.

"relevant liability" means a liability arising out of the death of or bodily injury to any third party in respect of which a policy must insure the use of a motor vehicle by a person in order to comply with the Ordinance.

2. Satisfaction of Claims by M.I.B.

If judgment is obtained against any person or persons at first instance in a court of competent jurisdiction in Hong Kong (or on appeal therefrom either to superior court in Hong Kong or to the Privy Council) and either at the time of the accident giving rise to liability there is not in force a policy or such policy is ineffective for any reason other than the inability of the insurer to pay its debts by reason of its insolvency and any such judgment is not satisfied in full within 28 days from the date upon which the person or persons in whose favour such judgment was given became entitled to enforce it, then M.I.B. will, subject to the provisions of this Agreement, pay or cause to be paid to the person or persons in whose favour such judgment was given any sum payable or remaining payable thereunder in respect of the relevant liability including any sum awarded by the court in respect of interest on

that sum and any taxed costs (or such portion thereof as relates to the relevant liability) or satisfy or cause to be satisfied such judgment.

3. TAVAS

In making any payment pursuant to this Agreement M.I.B. shall not take into account any money which has been or may be paid from the fund maintained under the Traffic Accident Victims (Assistance Fund) Ordinance 1978 in respect of the accident giving rise to the relevant liability.

4. Finance

In order to provide the necessary finance for M.I.B. to meet its obligations in respect of those claims and expenses falling directly upon M.I.B. provision will be made for a separate percentage charge to be applied to the gross premium written in respect of any motor insurance, such charge to be subject to future review and adjustment upwards or downwards as may be necessary to provide any monies required by M.I.B. to meet its obligations.

5. Termination

This Agreement may be terminated by Government at any time by notice in writing or by M.I.B. on two years' notice in writing without prejudice to the continued operation of the Agreement in respect of accidents occurring before the date of termination.

6. Pre-Agreement Accidents

This Agreement shall not apply if the death or injury giving rise to the claim resulted from an accident which occurred before the date hereof.

7. Recovery

Nothing in this Agreement shall prevent an insurer from providing by conditions in its contracts of insurance or by collateral agreement that all sums paid by it on behalf of M.I.B. or by M.I.B. by virtue of this Agreement in or towards the discharge of the liability of the insured shall be recoverable by the insurer or by M.I.B. from the insured or any other person.

8. Conditions Precedent

M.I.B. shall not incur any liability under Clause 2 of this Agreement unless or until the following conditions are met:-

- (a) written notice of proceedings is given by registered post by or on behalf of the person bringing the proceedings (hereinafter called "the plaintiff", which expression shall where the context so admits include a person bringing proceedings against M.I.B.) before or within seven days after the commencement of such proceedings
- (i) to the insurer in any case in which there was in force at the time the accident occurred a policy purporting to cover the use of the motor vehicle and the existence of which is known before the commencement of proceedings to the plaintiff;

- (ii) to M.I.B. in any other case;
- (b) a copy of any writ of summons which may be issued has been supplied to the insurer or M.I.B. as the case may be, provided that the plaintiff shall not seek to obtain judgment before the expiry of thirty days from the date the copy of such writ of summons shall have been supplied to the insurer or M.I.B. unless within the said period of thirty days the person against whom the plaintiff has taken proceedings issues any process which would lead to the dismissal of such proceedings for want of prosecution;
- (c) if so required by M.I.B. and subject to full indemnity from M.I.B. as to reasonable costs, the plaintiff shall take all reasonable steps to obtain judgment against any person against whom he might have a remedy in respect of or arising out of the death or injury giving rise to the aforesaid proceedings;
- (d) the plaintiff shall comply with all requirements of M.I.B. in relation to any matter which might give rise to a claim against M.I.B. in terms of this Agreement, provided that the plaintiff shall not be bound by the terms of this paragraph unless the requirements of M.I.B. are in all the circumstances reasonable. In the event of any dispute as to the reasonableness of a requirement by M.I.B. for the supply of information or that any particular step should be taken to obtain judgment against other persons the matter shall be referred to the Authority, whose decision shall be final and binding on all parties concerned;
- (e) the judgment or judgments (including such judgments as may be obtained under paragraph (c) of this Clause) shall be assigned to M.I.B. or its nominee, and the plaintiff as judgment creditor will lend his name and do everything necessary or conducive to the recovery of the judgment debt from the debtor;
- (f) the plaintiff shall give credit to M.I.B. for any amount paid to him by or on behalf of the defendant in respect of liability for death of or injury to any person arising out of the event which occasioned the claim against M.I.B. In the event of such amount including a sum in respect of loss of or damage to property the amount of which is not separately specified, then the amount of the credit to M.I.B. shall be in the same proportion as the amount of the claim for death of or injury to any person bears to the total claim where such claim included an amount in respect of loss of or damage to property.

9. Offers in Satisfaction

When notice of proceedings has been given under Clause 8, it shall be competent for M.I.B. at any time before the date set down for the hearing of the action to offer to the plaintiff in full satisfaction of the obligation of M.I.B. such sum as it considers sufficient in respect of any claim made together with the equivalent of the taxed costs and interest to the date of such offer. If such offer is not accepted and in any ensuing action the plaintiff is awarded in respect of his claim for death of or injury to any person not more than the sum offered under this Clause (exclusive of the sum for such costs and interest), then in satisfaction of its undertaking under this Agreement M.I.B. shall not be required to pay more than the total amount awarded together with the sum offered in respect of costs and interest and shall be entitled to set off any costs incurred by it after the date of the offer against any amount awarded to the plaintiff.

10. Exemptions

- (1) M.I.B. shall not incur any liability under Clause 2 in a case where:-
 - (a) the claim arises out of the use of a motor vehicle owned by or in the possession of Her Majesty or Government, except where any other person has undertaken responsibility for the existence of a contract of insurance under the Ordinance (whether or not the person or persons liable be in fact covered by a contract of insurance) or where the liability is in fact covered by a contract of insurance;
 - (b) the claim arises out of the use of a motor vehicle the use of which is not required to be covered by a contract of insurance by virtue of the Ordinance, unless the use is in fact covered by such a contract;
 - (c) at the time of the accident the person suffering death or bodily injury in respect of which the claim is made was allowing himself to be carried in a motor vehicle and
 - (i) knew or had reason to believe that the motor vehicle had been taken without the consent of the owner or other lawful authority except in a case where
 - (A) he believed or had reason to believe that he would have had the owner's consent if the owner had known of his being carried and the circumstances of his carriage; or
 - (B) he had learned of the circumstances of the taking of the motor vehicle since the commencement of the journey and it would be unreasonable to expect him to have alighted from the motor vehicle; or
 - (ii) being the owner of or being a person using the motor vehicle, he was using or causing or permitting the motor vehicle to be used without there being in force in relation to such use a contract of insurance such as would comply with the Ordinance, knowing or having reason to believe that no such contract was in force.
- (2) The exemption specified in sub-paragraph (1) (c) of this Clause shall apply only in a case where the judgment in respect of which the claim against M.I.B. is made was obtained in respect of a liability incurred by the owner or a person using the motor vehicle in which the person who suffered death or bodily injury was being carried.
- (3) For the purposes of these exemptions:-
 - (a) a motor vehicle which has been unlawfully removed from the possession of Her Majesty or Government shall be taken to continue in that possession whilst it is kept so removed;
 - (b) references to a person being carried in a motor vehicle include references to his being carried in or upon or entering or getting on to or alighting from the motor vehicle;

- (c) "owner", in relation to a motor vehicle which is the subject of a hiring agreement or a hire-purchase agreement, means the person in possession of the motor vehicle under that agreement.

11. Non-Application

This Agreement shall not apply to the use of a motor vehicle owned by a person who has made a deposit with the Director of Accounting Services pursuant to Section 4(4) (c) of the Ordinance.

12. Compulsory Membership

The Authority undertakes to ensure that every person authorised to carry on motor vehicle insurance business in Hong Kong will undertake to become a member of M.I.B. as a condition for such authorisation.

13. Agents

Nothing in this Agreement shall prevent M.I.B. from performing its obligations under this Agreement by agents.

AS WITNESS the hands of the duly authorised representatives of the parties hereto the day and year first above written.

Signed by the Registrar General Of Hong Kong for and on behalf of the Government of Hong Kong, and by Motor Insurers' Bureau of Hong Kong, in the presence of Stewart Smith, Solicitor, Hong Kong.