

立法會
Legislative Council

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LC Paper No. CB(2)2681/11-12
(These minutes have been seen
by the Administration)

Bills Committee on Legal Practitioners (Amendment) Bill 2010

Minutes of meeting
held on Tuesday, 27 March 2012, at 8:30 am
in Conference Room 3 of the Legislative Council Complex

Members present : Dr Hon Margaret NG (Chairman)
Hon LAU Kong-wah, JP
Hon Miriam LAU Kin-ye, GBS, JP
Hon Audrey EU Yuet-mee, SC, JP
Hon Paul TSE Wai-chun, JP

Members absent : Hon Albert HO Chun-yan
Hon Ronny TONG Ka-wah, SC

Public Officers attending : Mr Frank POON
Solicitor General
Department of Justice

Ms Adeline WAN
Senior Assistant Solicitor General
Department of Justice

Ms Betty CHEUNG
Senior Assistant Law Draftsman
Department of Justice

Mr Christopher NG
Senior Government Counsel
Department of Justice

Ms Ida CHAN
Senior Government Counsel
Department of Justice

Ms Karmen KWOK
Senior Government Counsel
Department of Justice

Mr Bernard YUE
Government Counsel
Department of Justice

Attendance by invitation : The Law Society of Hong Kong

Mr Joseph LI
Chairman of the Working Party on LLPs

Mr David HIRSCH
Member of the Working Party on LLPs

Ms Heidi CHU
Secretary General

Clerk in attendance : Miss Mary SO
Chief Council Secretary (3) 3

Staff in attendance : Miss Winnie LO
Assistant Legal Adviser 7

Ms Maisie LAM
Senior Council Secretary (2) 5

Ms Sandy HAU
Legislative Assistant (2) 5

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I. Meeting with the Law Society of Hong Kong and the Administration

[LC Paper Nos. CB(2)1520/11-12(01) and (02), CB(3)812/09-10, CB(2)1852/10-11(01), CB(2)1914/10-11(01), CB(2)1938/10-11(02),

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CB(2)2056/10-11(01), CB(2)1182/11-12(01), CB(2)1258/11-12(01), (02) and (03), CB(2)1311/11-12(01), CB(2)1333/11-12(01) and CB(2)1417/11-12(01)]

The Bills Committee deliberated (index of proceedings attached at **Annex**).

2. At the invitation of the Chairman, Senior Assistant Solicitor General ("SASG") briefed members on the overall description of the Administration's current proposal on clawback and comparisons of the defence provisions against clawback actions in the Administration's proposal with the corresponding provisions in the Manitoba Partnership Act and the proposal by The Law Society of Hong Kong ("LS"), details of which were set out in the Administration's paper (LC Paper No. CB(2)1520/11-12(01)). SASG said that the defence provisions proposed by LS, which were modelled on those of the Manitoba Partnership Act, stipulated that a person who received the partnership distribution was not liable to clawback if immediately before the distribution, the limited liability partnership ("LLP") made an assessment that the financial position of the partnership would not be described as failing the solvency tests under the proposed section 7AI(1) immediately after the distribution on the basis of one of the following acts -

- (a) financial statements prepared on the basis of accounting practices and principles that were reasonable in the circumstances;
- (b) a fair valuation; or
- (c) any other method that was reasonable in the circumstances.

3. SASG explained that the Administration had not accepted LS' proposed defence provisions for the following reasons -

- (a) accounting practices and principles were subject to review and changes by the relevant governing bod(ies) from time to time. Further, there was no requirement to have the LLP's financial statements audited by an independent auditor. In the Administration's view, the court should have the discretion to decide on the defence issue in any individual case based on all relevant factors and its circumstances. The courts' discretion should not be taken away simply because an LLP had made an

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assessment based on the financial statements prepared by the LLP itself;

- (b) there was no objective definition of "fair valuation". Who might be qualified to make a fair valuation of a particular asset was also open to argument. In the Administration's view, it was not appropriate to base the defence merely on fair valuation. Instead, the courts should be allowed to decide whether it was appropriate to take account of a particular valuation obtained by the LLP on its assets on a case by case basis;
- (c) allowing an LLP to rely on any other method that was reasonable in the circumstances to determine whether a distribution would not be liable to clawback lacked sufficient safeguards. For instance, it did not have the parallel safeguards as contained in the Administration's proposed section 7AI(1A)(b) and (c) (see Annex 1 to LC Paper No. CB(2)1520/11-12(01)) which required the LLP to have arrived at the assessment after exercising reasonable diligence and based on information available at the time of the assessment, and at the time of the distribution, the relevant partner/assignee did not have any reason to doubt the correctness of that assessment;
- (d) in addition, an LLP was not required to have made a "reasonable" assessment on its financial position before making a distribution; and
- (e) it was unclear whether the partner/assignee would have the burden to prove compliance of the requisite defence requirements.

4. At the invitation of the Chairman, Mr Joseph LI of LS briefed members on the claim statistics with respect to Hong Kong Solicitors Professional Indemnity Fund up to 2010-2011 indemnity year as set out in its submission to the Bills Committee (LC Paper No. CB(2)1520/11-12(02)). Specifically, Mr LI said that since the indemnity year 1988-1989 up to 2010-2011, the average claim size ranged from HK\$0.6 million to HK\$2.7 million, which was well below the statutory indemnity limit of HK\$10 million per claim.

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5. The Solicitor General ("SG") informed that the Administration had made considerable progress in its discussions with LS on the main issues of the Bill other than the clawback period. In its recent meetings with LS, the Administration proposed to shorten the clawback period from six years to four years while LS insisted that the clawback period should be shortened to two years.

6. Mr Joseph LI said that LS had consulted its members on the Bill on at least two occasions in 2009 and again in February 2012. The reason why the majority of members of LS insisted on a two years' clawback period in the Bill was that most of the overseas jurisdictions, such as the State of New York ("NY") of the United States ("US"), London, Singapore and many provinces in Canada, either used bankruptcy law to enforce liability against a partner(s) of an LLP or used a two years' clawback period in their LLP legislation. It was noted that only the State of California in US used a four years' clawback period in its LLP legislation.

7. Ms Miriam LAU said that instead of proposing a clawback period of four years which would not be acceptable to LS, the Administration should consider improving the defence provisions against clawback actions to better protect consumer interests by, say, requiring the LLPs to have their financial statements audited by an independent auditor and to have their valuation of a particular asset carried out by a designated body.

8. SG responded that in the Administration's recent discussions with LS, LS had agreed not to insist on introducing safe harbour provisions for distributions made by an LLP but to convert them (the provisions cited in (a), (b) and (c) in paragraph 2 above) as examples of factors that the courts might consider instead. The Administration welcomed LS' latest position and a new provision would be added to the Bill to reflect this latest development.

9. In response to Ms LAU's further enquiry on why the Administration would not accept a two years' clawback period, SG explained that unlike many overseas jurisdictions such as the province of Manitoba, the Bill did not prohibit an LLP from making a distribution to its partners. Further, the Administration did not insist on increasing the statutory professional indemnity limit per claim for an LLP, as was the case in Singapore and the United Kingdom. Under these circumstances and having regard to the fact that confining personal liability to a partner(s) at fault was a new partnership model for doing business in Hong Kong, it was necessary for the Administration to be prudent at the outset by laying down a longer clawback period to better protect consumer interests. The clawback

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provisions in the Bill would also have a precedent setting effect if LLPs were to be introduced for other professional practice. The Administration considered that shortening a clawback period from six years to four years could strike a proper and fair balance in protecting consumers of legal services on the one hand and innocent partners on the other. SG further said that the Administration would keep the Bill under review after implementation to see whether or not the clawback period achieved the desired effect.

10. Mr LAU Kong-wah said that he would be hesitant to support the Bill if a two years' clawback period was adopted.

11. Ms Audrey EU questioned the Administration's saying that Manitoba imposed prohibitions against LLPs from making a distribution to its partners. Section 85(2) of the Manitoba Partnership Act provided that "In circumstances other than in connection with the winding up of its affairs, a Manitoba LLP must not make a distribution of partnership property if there are reasonable grounds to believe that after the distribution (a) the partnership would be unable to pay its partnership obligations as they come due; or (b) the value of the partnership property would be less than the partnership obligations".

12. SASG explained that an LLP in Manitoba was prohibited from making a distribution if it failed the solvency tests set out in section 85(2) of the Manitoba Partnership Act. Further, under section 86(2) of the Manitoba Partnership Act, each partner of an LLP who authorized a distribution in contravention of the solvency tests was jointly and severally liable to the partnership for any amount for which a recipient was liable, to the extent that the amount was not recovered from the recipient. However, this was not the case proposed in the Bill. Under the Bill, an LLP would be free to decide for itself whether or not it should make a distribution to its partners, including even if the LLP would be unable to meet the solvency tests immediately after the distribution. In providing LLPs with the autonomy to distribute partnership property, it was necessary to provide appropriate checks and balances against irresponsible distributions for consumer protection purposes. Hence, the proposed section 7AI sought to make partners receiving the distribution liable to pay back the whole or part of the distribution to the LLP. It should however be noted that the proposed section 7AI did not affect a payment made as reasonable compensation for current services provided by a partner to the LLP, to the extent that the payment would be reasonable if paid to a person who was an employee, but not a partner, in the LLP as compensation for similar services.

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13. Mr Joseph LI shared Ms EU's views that similar to the Bill, the LLP legislation in Manitoba did not impose prohibitions against LLPs for making distributions to their partners. As such, a two-year clawback period used in the Manitoba LLP legislation should be used in Hong Kong. Mr LI further said that the statutory professional indemnity limit per claim in Manitoba was the same for an LLP and a general partnership at CAD 1 million (about HK\$7.76 million).

14. The Chairman opined that if LS insisted on a two-year clawback period, it might need to accept other provisions in the Manitoba Partnership Act, such as section 86(2).

15. Mr Paul TSE was of the view that section 85(2) of the Manitoba Partnership Act was not an outright restrictive provision. Mr TSE further said that unlike the Bill which was confined to law firms, the Manitoba Partnership Act applied to all firms operating in the form of an LLP. Hence, it might be necessary for Manitoba to use more restrictive provisions in its LLP legislation. Such an approach was not necessary for Hong Kong, as solicitors in Hong Kong were already subject to stringent regulation.

16. SG responded that the Manitoba LLP legislation was not a representative LLP model, albeit it was one of the many overseas LLP models to which the Administration had drawn reference in drafting the Bill which would enable Hong Kong to better compete with major financial centres such as Singapore and London in the provision of legal services.

17. Mr David HIRSCH of LS said that LLP legislations in major financial centres such as the NY State of US, London and Singapore, used bankruptcy law to enforce a liability against a partner(s) and did not have a clawback provision. As solicitors in Hong Kong were already subject to stringent regulation, it was unreasonable that law firms operating as LLPs should be subject to clawback in the event that the partnership property was unable to cover any claims made by clients, whereas other types of firms operating as limited liability companies were subject to bankruptcy law where the restoration period was two years.

Conclusion

18. The Chairman and Ms Miriam LAU urged the Administration and LS to continue to discuss ways on reconciling their differences on the clawback period, in order that the Bill could be passed before the expiry of the current legislative session.

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II. Date of next meeting

19. Subject to the progress of discussions between the Administration and LS on the clawback period, members agreed to hold the next meeting on 12 April 2012 at 4:30 pm.

(Post-meeting note: The next meeting was re-scheduled to 17 April 2012 at 2:30 pm.)

20. There being no other business, the meeting ended at 9:40 am.

Council Business Division 2
Legislative Council Secretariat
15 August 2012

**Proceedings of the meeting of the
Bills Committee on Legal Practitioners (Amendment) Bill 2010
on Tuesday, 27 March 2012, at 8:30 am
in Conference Room 3 of the Legislative Council Complex**

Time marker	Speaker	Subject	Action required
000000 - 000552	Chairman	Opening remarks	
000553 - 001157	Admin	Briefing by the Administration on the overall description of the Administration's current proposal on clawback and comparisons of the defence provisions against clawback actions in the Administration's proposal with the corresponding provisions in the Manitoba Partnership Act and the proposal by The Law Society of Hong Kong ("LS") [LC Paper No. CB(2)1520/11-12(01)]	
001158 - 001447	Chairman LS	Briefing by LS on the claim statistics with respect to Hong Kong Solicitors Professional Indemnity Fund up to 2010-2011 indemnity year [LC Paper No. CB(2)1520/11-12(02)]	
001448 - 001745	Chairman Admin	Briefing by the Administration on the progress of its discussions with LS on the duration of the clawback period as well as the main issues of the Bill other than the clawback period	
001746 - 002309	Chairman LS	LS's explanation why the majority of members of LS insisted on a two-year clawback period in the Bill	
002310 - 003227	Ms Miriam LAU Chairman Admin	Ms Miriam LAU's view that instead of proposing a clawback period of four years which would not be acceptable to LS, the Administration should consider improving the defence provisions against clawback actions to better protect consumer interests The Administration's explanation why it would not accept a two-year clawback period	
003228 - 003534	Mr LAU Kong-wah Chairman Admin	Mr LAU Kong-wah's view that he would be hesitant to support the Bill if a two-year clawback period was adopted	
003535 - 004616	Ms Audrey EU Chairman Admin	Ms Audrey EU's view that similar to the Bill, the limited liability partnership ("LLP") legislation in Manitoba did not impose prohibitions against LLPs for making distributions to their partners	
004617 - 004918	Ms Miriam LAU Chairman	Work plan of the Bills Committee	
004919 - 005609	Mr Paul TSE Admin Chairman	Mr Paul TSE's view that section 85(2) of the Manitoba Partnership Act was not an outright restrictive provision	

Time marker	Speaker	Subject	Action required
005610 - 005930	Chairman LS	LS's concurrence with the view that a two years' clawback period used in the Manitoba LLP legislation should be used in Hong Kong, as the LLP legislation in Manitoba did not impose prohibitions against LLPs for making distributions to their partners	
005931 - 010236	Chairman LS	The Chairman's remark that if LS insisted on a two years' clawback period, it might need to accept other provisions in the Manitoba Partnership Act, such as section 86(2)	
010237 - 010442	Chairman Ms Audrey EU Mr Paul TSE	Date of next meeting	
010443 - 010722	Mr Paul TSE Chairman Admin	Mr Paul TSE's view that the restrictive approach used by the Manitoba Partnership Act was not necessary for Hong Kong, as solicitors in Hong Kong were already subject to stringent regulation	
010723 - 011023	LS Chairman	LS's view that it was unreasonable that law firms operating as LLPs should be subject to clawback in the event that the partnership property was unable to cover any claims made by clients, whereas, in overseas jurisdictions such as the UK and Singapore, other types of firms operating as limited liability companies were subject to bankruptcy law where the restoration period was two years	
011024 - 011050	Chairman	Concluding remarks	

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