

**Bills Committee on
Legal Practitioners (Amendment) Bill 2010 (“the Bill”)**

**Administration’s Response to Issues Raised by Members
at the Bills Committee Meeting held on 14 July 2010**

Purpose

At the meeting on 14 July 2010, the Bills Committee asked the Administration to provide a paper to address the following –

- (a) whether the drafting of the definition of “partnership obligation” under the proposed section 7AA could achieve the legislative intent of protecting an innocent partner from personal liability that he or she has as a partner under section 11 of the Partnership Ordinance; and
- (b) setting out the use and application of the terms “obligation”, “liability” and “duty” in local legislation.

This paper provides the Administration’s response.

Part 1 - English definition of “partnership obligation”

Relevant provisions in Partnership Ordinance

2. The discussion at the 14 July meeting focused on the word “obligation” which is contained in section 11 of the Partnership Ordinance¹. However, to explain the drafting of the definition of “partnership obligation” in the proposed section 7AA, including the expression “debts, obligations or liabilities”, it is necessary for this paper to also cover other relevant provisions of the Partnership Ordinance to provide a holistic view on the subject.

3. The object of the Bill is to modify the law regarding a partner’s personal liability for the default of another partner, or of an employee, agent or representative of the firm insofar as a limited liability partnership within the

¹ Cap. 38

meaning of the proposed s.7AB in the Bill (“LLP”) is concerned. A partner of a firm may be liable for debts, obligations and liabilities arising from default in which he plays no part under sections 11 and 14 of the Partnership Ordinance as set out below.

“11. Liability of partners

Every partner in a firm is liable jointly with the other partners for all debts and obligations of the firm incurred while he is a partner; and after his death his estate is also severally liable in a due course of administration for such debts and obligations, so far as they remain unsatisfied but subject to the prior payment of his separate debts.”
[*emphasis added*]

“14. Liability for wrongs joint and several

Every partner is liable jointly with his co-partners and also severally for everything for which the firm while he is a partner therein becomes liable under section 12 or 13.” [i>emphasis added]

And sections 12 and 13 read –

“12. Liability of firm for wrongs

Where, by any wrongful act or omission of any partner acting in the ordinary course of the business of the firm or with the authority of his co-partners, loss or injury is caused to any person not being a partner in the firm, or any penalty is incurred, the firm is liable therefor to the same extent as the partner so acting or omitting to act.” [i>emphasis added]

“13. Misapplication of money or property received for or in custody of firm

In the following cases, namely –

- (a) where one partner, acting within the scope of his apparent authority, receives the money or property of a third person and misapplies it; and
- (b) where a firm in the course of its business receives the money or property of a third person, and the money or property so received is misapplied by one or more of the partners while it is in the custody of the firm,

the firm is liable to make good the loss.” [i>emphasis added]

4. As can be seen from the provisions reproduced above, the reference to debts, obligations and liabilities in the definition of “partnership obligations” in the proposed section 7AA is consistent with the expressions used in sections 11 to 14 of the Partnership Ordinance.

Overseas precedents on LLP

5. In other common law jurisdictions which have statutes on partnership similar to our Partnership Ordinance² and which afford to an innocent partner protection from personal liability similar to that proposed in the Bill, the provisions on liability of a partner of an LLP also refer to debts, liabilities and obligations. Examples include –

- s.10(2)(a) of Partnership Act, Ontario³; and
- s.12(1) of Partnership Act, Alberta⁴.

“obligation” and “liability”

6. While there may be some overlap between the concepts “debt”, “obligation” and “liability”, each concept is indispensable from the definition of “partnership obligation” in the proposed s.7AA in the Bill.

7. Certain “obligations” are not covered by the concepts of “debt” and “liability”, such as –

- (a) a contractual obligation to do something;
- (b) a firm’s obligation under an undertaking, given by it as solicitors acting for a vendor in a sale of property transaction to the solicitors firm acting for the purchaser, that it will not release the purchase money received to its vendor client until its client has properly signed all sale documents.

8. The word “liabilities” would be more appropriate for liability arising under s.12 or 13 of the Partnership Ordinance.

9. Section 12 of the Partnership Ordinance is equivalent to s. 10 of the

² Provisions corresponding to ss.11, 12, 13 and 14 of the Partnership Ordinance are set out in the table below

Partnership Ordinance (Cap. 38)	Partnership Act 1890 (UK)	Partnership Act, Ontario	Partnership Act, Alberta
s.11	s.9	s.10(1)	s.11
s.12	s.10	s.11	s.13
s.13	s.11	s.12	s.14
s.14	s.12	s.13	s.15

³ <http://www.e-laws.gov.on.ca/>

⁴ <http://www.qp.alberta.ca/>

Partnership Act 1890 in the UK and examples of liabilities under the latter for loss or injury caused to a non-partner by a wrongful act or omission of a partner include –

- liability for negligent advice⁵;
- liability for the negligent conduct of a claim by a partner in a firm of solicitors.⁶

10. An example of liability under s.13 of the Partnership Ordinance⁷ to make good the loss arising from misappropriation of money or property received by a partner is a solicitors' firm's liability that arose when money received by the firm in a conveyancing transaction subject to an undertaking by the firm is misappropriated by a partner in breach of the undertaking.⁸

Use of “duty” in Partnership Ordinance

11. As to the use of the terms “obligation”, “liability” and “duty”, this paper will focus on the Partnership Ordinance, as the Bill seeks to modify the general principles on a partner's personal liability as set out in that Ordinance.

12. The use of “obligation” and “liability” is dealt with in paragraphs 6 to 10 above.

13. The term “duty” (責任) is used in ss.21, 26, 29, 30 and 32 of the Partnership Ordinance, all being provisions under the heading “RELATIONS OF PARTNERS TO ONE ANOTHER”, concerning the partners' duties between themselves or the partners' duties in relation to the partnership. The relevant passages are set out in the table below –

s.21	The mutual rights and <u>duties</u> of partners, whether ascertained by agreement or defined by this Ordinance, may be varied ...
s.26	The interests of partners in the partnership property, and their rights and <u>duties</u> in relation to the partnership, shall be determined, subject to any agreement, express or implied, between the partners ...
s.29(1)	Where a partnership entered into for a fixed term is continued after the term has expired, and without any express new agreement, the

⁵ Blyth v Fladgate [1891]1 Ch. 337

⁶ Welsh v Kanrston, 1972 S.L.T. 96

⁷ equivalent to s 11 of the Partnership Act 1890 in the UK

⁸ Hebei Enterprises Ltd v Livarsiri & Co., FACV No. 23 of 2007

	rights and <u>duties</u> of the partners remain the same as they were at the expiration of the term
s.30 – heading	<u>Duty</u> of partners to render accounts, etc. Partners are bound to render true accounts and full information of all things affecting the partnership to any partner or his legal representatives.
s.32 – heading	<u>Duty</u> of partner not to compete with firm

14. The Bill seeks to modify the law on a partner’s personal liability to a non-partner for the default of a co-partner. The term “duty” is used exclusively in the context of a partner’s liability to a co-partner in the Partnership Ordinance. Using “duty” instead of “obligation” in the Bill will be inconsistent with the usage in the Partnership Ordinance and, thus, inappropriate.

Conclusion

15. The definition of “partnership obligation” under the proposed section 7AA, which refers to “debt”, “obligation” and “liability”, is consistent with the expressions used in the Partnership Ordinance, is similar, in approach, to overseas precedents and is thus appropriate for protecting an innocent partner from personal liability that he or she has as a partner under sections 11 and 14 of the Partnership Ordinance in the circumstances envisaged by the Bill.

Part 2 - Chinese rendition for “partnership obligation”

16. We have adopted “義務” as the Chinese rendition for “obligation” under the Bill for the following reasons.

17. Firstly, “義務” is used in the Partnership Ordinance as the Chinese rendition for “obligation”. Relevant provisions in Chinese are extracted below for easy reference.

《合夥條例》(第38章)

11. 合夥人的法律責任

商號的每一合夥人，對商號在他作為合夥人期間所招致的一切債項及義務(debts and obligations)，須與其他合夥人共同負上法律責

任，該合夥人死亡後，如該等債項及**義務(obligations)**仍未清償，則在遺產管理的適當階段，其遺產亦須對該等債項及**義務(obligations)**各別負上法律責任，但須先償付該合夥人的獨有的債項。

19. 加入和退出的合夥人的法律責任

(2) 合夥人退出商號，並不因此而終止他退出前所招致的**合夥債項或義務(partnership debts or obligations)**須負上的法律責任。

The Bill is intended to operate against the background of the Partnership Ordinance; and all “relevant laws” are to continue to apply to an LLP, except so far as they are inconsistent with the proposed new Part IIAAA (proposed new section 7AM in the Bill). To avoid confusion and for consistency sake, we consider it appropriate to adopt in the Bill the same Chinese rendition for “obligation” as that in the Partnership Ordinance. “Obligation” is also rendered as “義務” in sections 3 and 5 of the Limited Partnership Ordinance (Cap. 37) and in numerous other Ordinances and their subsidiary legislation.⁹

18. Secondly, the Chinese text of the Partnership Ordinance, since its being declared authentic in 1995, has been relied on by the courts in deciding cases. Specifically, section 11 of the Partnership Ordinance, containing “義務” as the rendition of “obligation”, was quoted in judgments of the Court of Appeal, High Court and the District Court and is familiar to the courts.¹⁰

19. Thirdly, in the dictionary 《現代漢語詞典》(修訂本), the first meaning of “義務” is “公民或法人按法律規定應盡的責任”。

20. Furthermore, “義務” is also used to refer to “obligation” in the legal sense in legislation on partnership in the PRC¹¹. National laws that apply to Hong Kong also adopt this usage.¹²

21. Therefore, “義務” is the appropriate Chinese rendition for “obligation”

⁹ For example, “obligation” is rendered as “義務” in defined terms such as “權利或義務” (right or obligation) in s.2 of the Shenzhen Bay Port Hong Kong Port Area Ordinance (Cap. 591) and “參照義務” (reference obligation), “不合資格參照義務” (non-qualifying reference obligation) and “合資格參照義務” (qualifying reference obligation) in ss.2 and 51 of the Banking (Capital) Rules (Cap. 155 sub. leg. L).

¹⁰ 有關以 International Can (國際印鐵製罐廠)名義經營的黃伍祺的事宜 (CACV 636/2000); 恆利金屬鈕扣廠有限公司 訴 陳鍾城經營恆利金屬製品廠 (澳門) (HCA 7331/2000); Lee Kit Fong 訴 Lam Wai Keung & Ors (DCCJ 5411/2005).

¹¹ ss. 17, 19, 24, 45, 49 & 65 of 《中華人民共和國合伙企業法》 (http://www.gov.cn/flfg/2006-08/28/content_371399.htm).

¹² e.g. sections 15, 18 and 22 of 《中華人民共和國領事特權與豁免條例》 (Schedule 3 to the Instrument A403)

while “債項” and “法律責任” have been adopted as the Chinese renditions for “debt” and “liability” respectively in the Bill.

Department of Justice
September 2010

LDD DM#172178 v7E