

Legal Practitioners (Amendment) Bill 2010

This paper aims at highlighting the unintended result of the latest CSAs in relation to section 7AC(1) of the Legal Practitioners (Amendment) Bill 2010.

1. Section 7AC(1) has been revised as follows in the latest CSAs:

“A partner in a limited liability partnership is not, solely by reason of being a partner, jointly or severally liable for any partnership obligation (whether founded on tort, contract or otherwise) that arises ~~in the course of the business of the partnership~~ from the provision of professional services by the partnership as a limited liability partnership.....”

Consequentially, the definition of “business” in section 7AA is also deleted. The original definition of “business” is as follows:

““business”, in relation to limited liability partnership, means the business of the partnership in providing services as a Hong Kong firm or a foreign firm”

2. The discussion between the Law Society and the Administration on the reference to the word “business” in section 7AC took place over two years ago. The Law Society thought that the language had been settled. Reopening the discussion and changing the language substantively in as late as the last draft of CSAs provided to the Law Society shortly prior to the last Bills Committee meeting on 28 May 2012 allowed no time for the Law Society to comment fully on the effects of the substantive change.
3. The Law Society wrote to the Administration immediately after the Bills Committee meeting on 28 May 2012 setting out our objections to the revised section 7AC(1). A copy of the letter is attached. The letter has also been subsequently copied to the Bills Committee.
4. We were informed by the Administration that no change would be made to section 7AC(1).
5. We repeat the points raised in our letter dated 28 May 2012 and provide further information on the practical differences between the original wording of section 7AC(1) and the last minute change by the Administration to the section for consideration by members of the Bills Committee.
6. The change is not purely a drafting change. It has unintentionally blurred the scope of obligations protected by section 7AC and created difficulty in the application of the provision.

7. The phrase “professional services” used in the revised section 7AC(1) is not defined. A law firm carries on the practice as a solicitor or foreign lawyer, as the case may be. Nevertheless, in the course of the provision of such services, the firm will inevitably accept obligations connected with or incidental to such services which may not necessarily have to be carried out in the capacity as a solicitor or foreign lawyer. Examples include incidental services in connection with:
- (a) company secretarial services;
 - (b) company directorship services;
 - (c) estate administration services;
 - (d) mediation services;
 - (e) solemnizing of marriages as civil celebrants.
8. The original wording of section 7AC(1) clearly covers these services as long as they are provided in the course of the business of the LLP in providing services as a law firm. However, with the new amendments, these services may arguably be treated as excluded because they do not require solicitors or foreign lawyers to perform them and hence not “professional services”.
9. It is reiterated that the new amendments to section 7AC(1) has nothing to do with the issue of a “partial shield” versus a “full shield”. Regardless of the language used, section 7AC(1) only protects a partner from liability arising out of the negligence of another partner, not from other obligations of the LLP.

A good illustration of this point is the Ontario legislation:

Ontario Partnership Act

“10(2) Subject to subsections (3) and (3.1), a partner in a limited liability partnership is not liable, by means of indemnification, contribution or otherwise, for,

(a) the debts, liabilities or obligations of the partnership or any partner arising from the negligent or wrongful acts or omissions that another partner or an employee, agent or representative of the partnership commits in the course of the partnership business while the partnership is a limited liability partnership; or

(b) any other debts or obligations of the partnership that are incurred while the partnership is a limited liability partnership. 2006, c. 34, s. 19.”

Sub-clause (a) above covers liabilities arising from negligence in a partial shield situation. The phrase “in the course of partnership business” is used. Sub-clause (b) was added in 2006 covering other obligations of the partnership changing the LLP protection in Ontario from a partial shield to a full shield.

Accordingly, since section 7AC(1) of the Bill clearly provides that it only protects a partner from liability arising out of negligence of another partner or agent of the partnership, there is no doubt that it is partial shield, even though the language used relates to the obligations arising in the course of the partnership business, as in sub clause (a) of the Ontario legislation quoted above.

10. Further, LLP provisions in overseas jurisdictions that offer partial shield do not use “professional services”. To quote some examples:

(a) Manitoba

“75(1) Subject to subsections (2), (4) and (5), a partner in a Manitoba limited liability partnership is not individually liable, directly or indirectly by means of indemnification, contribution, assessment or otherwise, for debts, obligations or liabilities of the partnership or another partner that arise from the negligence, wrong act or omission, malpractice or misconduct of

(a) another partner; or

(b) an employee, agent or representative of the partnership

occurring in the ordinary course of carrying on practice in a profession referred to in subsection 69(1) while the partnership is a Manitoba limited liability partnership.”

(b) Alberta

“12(1) Subject to subsections (2) and (4), a partner in an Alberta LLP is not individually liable, directly or indirectly by means of indemnification, contribution, assessment or otherwise, for debts, obligations or liabilities of the partnership or another partner that arise from the negligence, wrongful acts or omissions, malpractice or misconduct of

(a) another partner, or

(b) an employee, agent or representative of the partnership

that occur in the ordinary course of carrying on practice in an eligible profession within the meaning of section 81 while the partnership is an Alberta LLP”.

11. The Law Society is hopeful that the Bill will be passed within the current LegCo term, but it invites members of the Bills Committee to take into account the

unintended consequence of the last minute amendment to section 7AC(1) and to move a motion to revert to the original version of section 7AC(1) as follows:

“A partner in a limited liability partnership is not, solely by reason of being a partner, jointly or severally liable for any partnership obligation (whether founded on tort, contract or otherwise) that arises in the course of the business of the partnership as a limited liability partnership... ..”

12. In relation to section 7ACE in the latest CSAs, we have raised strong objection in our letter dated 28 May 2012. The Administration responded by a letter dated 1 June 2012 which has been copied to members of the Bills Committee. The Law Society however disagrees with the Administration’s analysis of section 7ACE which is flawed. The protection given to an innocent partner should apply irrespective of whether the proceedings are brought by or against the partnerships. The original wording of “by or” in section 7ACE should be reinstated.

The Working Party on LLPs
The Law Society of Hong Kong
1 June 2012



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28 May 2012

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Attn : Ms. Adeline Wan/Mr. Chris Ng

Dear Adeline/Chris,

Legal Practitioners (Amendment) Bill 2010

We refer to the discussion at the Bills Committee meeting this morning.

We strongly object to the latest amendments made to section 7AC (including section 7AA) and section 7ACE of the Legal Practitioners (Amendment) Bill 2010.

Section 7AC

We note that in the latest CSAs, section 7AC(1) has been revised as follows:

"A partner in a limited liability partnership is not, solely by reason of being a partner, jointly or severally liable for any partnership obligation (whether founded on tort, contract or otherwise) that arises in the course of the business of the partnership from the provision of professional services by the partnership as a limited liability partnership....."

This is a substantive change that is being proposed at a very late stage. The DOJ and the Law Society discussed the reference to the word "business" in this clause more than two years ago while reviewing the draft Bill, and the Law Society thought this language was settled; the DOJ should not be re-opening the discussion at this late stage. The Law Society objects to this change for the following reasons:

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- (a) The introduction of the new term of “professional services” invites unnecessary questions on what type of services ought or ought not to be included;
- (b) The previous definition of “business” is much more clearly drafted and thus more preferable as it is clear that the obligations cover those that arise from the services provided as a law firm;
- (c) “Professional services” not only creates ambiguity as to its exact ambit, it also potentially narrows the scope of obligations from that intended in the previous version which was mutually agreed long ago.
- (d) The change has nothing to do with the issue of a “partial shield” versus a “full shield”. Regardless of the language used, Section 7AC(1) only protects a partner from liability arising out of the negligence of another partner, not from other obligations of the partnership.

Section 7ACE

The latest CSAs amended section 7ACE (formerly section 7ACD) as follows:

- “ *If a partner is protected from liability by section 7AC(1)*
- (a) *the partner is not a proper party, separately, to any proceedings brought ~~by or~~ against the partnership for the purpose of recovering damages or claiming other relief in respect of the liability; and*
 - (b) *the proceedings may, if they could apart from this section be brought ~~by or~~ against the partnership, continue to be so brought.”*

We do not consider that the addition of the word “separately” is meaningful because of the following reasons:

- (a) The provision aims at providing a legal basis to protect an innocent partner from being dragged by a claimant into litigation as a fishing expedition.
- (b) This protection is fair and has been mutually agreed. The original wording of the provision was in the Bill since it was gazetted two years

ago. We did not see any problem with it then, nor do we see any problem with it now.

- (c) Procedurally, a claimant can still take out proceedings against an LLP or against partners of the LLP. Nevertheless, this provision serves to enable any partner who enjoys LLP protection to rely on this specific provision as a legal basis to refute being made a party to the proceedings.
- (d) This is the policy intent and should be expressly provided for in the principal legislation. Where necessary, consequential amendments to the subsidiary practice or procedural rules under RHC Order 81 could be made to implement the policy and we have no objection to such consequential amendments.
- (e) As pointed out by some members of the Bills Committee at the meeting on 28 May 2012, the addition of the word “separately” only confuses the interpretation of the provision. The original wording of section 7ACE should be kept intact.
- (f) Further, subsection (b) provides that proceedings which could be brought in circumstances where the innocent partner does not enjoy LLP protection can continue to be brought. This subsection has therefore already addressed the concern that the proceedings could not be brought against the innocent partner with respect to his share of the partnership assets.

We object to the deletion of “by or” in the provision because of the following reasons:

- (a) The deletion of “by or” effectively means that the protection of the innocent partner not being dragged into litigation will be narrowed down to only proceedings against the partnership.
- (b) The inclusion of the words “by or” in subsection (b) is important to make it clear that the partnership retains the ability to make claims in litigation, despite the limitations in subsection (a). For example, in a negligence action against the partnership, the partnership may wish or need to bring counterclaims and/or proceedings against third parties.

To conclude, we strongly object to the amendments made to section 7AC(1) and section 7AA on the deletion of the definition of "business" and to section 7ACE (formerly 7ACD) in the latest CSAs. On the basis of the above reasons, the original wording of section 7AC(1) and section 7ACE (formerly section 7ACD) should be retained with no changes.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Heidi Chu', with a stylized flourish at the end.

Heidi Chu
Secretary General