



鄭楊律師行

Solicitors & Notaries
Agents For Trademarks
& Patents

PARTNERS

Benny Y.B. Yeung LL.B. (Hons.)
楊元彬律師 2523 9386

Fiona C.K. Ng LL.B. (Hons.)
吳靜琴律師 2143 8950

Ellie O.L. Chiu LL.B. (Hons.)
丘愛莉律師 2143 8953

Eliza L.S. Chang LL.B. (Hons.)
鄭麗珊律師 2143 8960

Teresa C.Y. Leung LL.B. (Hons.)
梁植賢律師 2143 8962

Wesley K.L. Ip LL.B. (Hons.)
葉嘉麟律師 2143 8916

Chris Y. Chuang LL.B. (Hons.)
莊嚴律師 2143 8920

Millie Leung LL.B. (Hons.)
梁美妮律師 2143 8936

Lam Chi Hung LL.M.
林志鴻律師 2143 8983

CONSULTANTS

Clarence C.K. Cheng LL.B. (Hons.)
鄭志傑律師

Tom K.T. Tong Ph.D. P.D.LL.
唐基德律師

Li Bailiang LL.B. (P.R.C.)
黎柏亮律師

SOLICITORS

Dennis C.S. Leung LL.B. (Hons.)
梁創成律師

Sin Wing Sze LL.M.
冼穎思律師

Marina O.K. Fung LL.M.
封羈君律師

Jeffrey H.W. Chan LL.B. (Hons.)
陳漢榮律師

Tam Lee LL.B. (Hons.)
談理律師

Yvonne Y.W. Leung LL.B. (Hons.)
梁綺穎律師

Calvin H. Hui B.A. (Hons.)
許思行律師

+ Notary Public
國際公證人

* China-Appointed Attesting Officer
中國委託公證人

Our Ref: G/BY/0005-PIS

Your Ref:

6th July 2005

BY FAX (NO. 2801 7134) & BY HAND

The Hon. Margaret Ng
Chairman
Administration of Justice
and Legal Services Panel
Legislative Council
c/o 10th Floor, New Henry House
10 Ice House Street
Central, Hong Kong

Dear Madam

Re : Solicitors' Professional Indemnity Scheme AJLS Panel Meeting on 27th June 2005 : Some Follow Up Points

Thank you very much for giving us the opportunity to make representations to the panel. There were a few points which I would like to make in answer to the comments made by the Law Society but did not have the opportunity to do so because of the constraint of time. I shall be grateful if you will kindly allow me to make them here now.

The Claims Committee

Mr. Christopher Howse on behalf of the Law Society informed the meeting that negotiations with insurers on the minimum terms and conditions are expected to be lengthy. The example he gave was the Law Society's requirement for insurers not to decline liability for breach of policy conditions unless there is substantial prejudice resulting from such breach. According to him, this amounts to asking insurers to depart from their normal practice.

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The point is also used to demonstrate some of the benefits of retaining the Claims Committee. This was because in the present S.I.F. situation, the Claims Committee will only decline a claim when there is **substantial prejudice** to the Fund as a result of the breach.

We are, however, of the view that the insistence on the retention of a "Claims Committee" will be a great stumbling block in negotiations with insurers. Claims control is a very important right which no insurers will likely forego. After all, it is the pockets of the insurers which will be affected both in terms of paying claims and paying costs. Insurers should rightly be entitled to determine on things like which lawyers to retain, whether to defend or settle and at what amount of etc. It is unlikely for insurers to agree to leave these important decisions to the Claims Committee.

Turning back to the reject of claims point, I would like to point out that it is provided in paragraph 24 of "The Code of Conduct for Insurers" of the Hong Kong Federation of Insurers that :-

"An insurer should not refuse a claim by a policyholder :

.....

(c) in the absence of fraud by the policyholder, on the grounds of a breach of warranty or condition if the loss is unrelated to the breach."

Therefore, it is clear that insurers in Hong Kong have already departed from the common law position (where an insurers can refuse a claim even if it is not prejudiced by the breach – see for example Pioneer Concrete (U.K.) Ltd. v. National Employers Mutual General Insurance Association Ltd. [1985] 2 All ER 395).

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If insurers in Hong Kong have now departed from the common law position as discussed above, there is a good chance that insurers may go one step further to agree that they will only decline liability in cases of “substantial prejudice”.

If the Law Society wants to safeguard the interest of members in any disputes which they may have with their insurers and wish to have some say in these matters, it can either expand the function of the “Liaison Committee” to be created under the Q.I. Agreement (assuming for the time being that the U.K. Q.I. Agreement will be adopted) to include power to examine rejection of claims by insurers or to set up a body (involving both the Law Society and representatives from the insurers) to adjudicate on such disputes or to set up an alternative dispute resolution body to try and resolve such disputes by way of mediation or arbitration. Reference can also be had to the Insurance Claims Complaints Bureau of the Hong Kong Federation of Insurers.

Another benefit of the Claims Committee suggested by Mr. Howse is that with a Claims Committee, the Law Society can ensure that malpractices are reported to the Law Society. The U.K. Q.I. Agreement has reporting requirements (clause 6) and provides for a Reporting Protocol (again, I can only assume that the U.K. Q.I. Agreement will be adopted) if an insurer suspects dishonesty or fraud on the part of the insured firm. There should be no reason why an insurer will not comply with the Agreement and make a report to the Law Society. Why should an insurer risk breaching the agreement (and its consequence) to shelter the firm?

In any event, even if it is important for the Law Society to retain the Claims Committee to have control in these matters, it does not necessarily mean that the power of the Claims Committee should extend to the handling of claims. I hope that the suggestion to retain the Claim Committee is not motivated by the fact the Claims Committee used to channel valuable work to the panel solicitors.

Cheng, Yeung & Co.

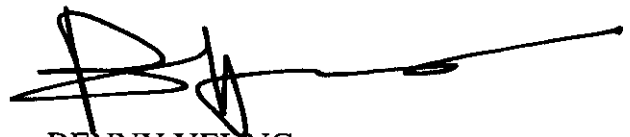
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The Q.I. Agreement

The Law Society have maintained their rejection of our request for the Q.I. Agreement to be drafted now. They said that they would only draft the Q.I. Agreement once the minimum terms and conditions are agreed and the insurers are identified. They seem to be of the view that the minimum terms and conditions are equivalent to the Q.I. Agreement. However, if one compares the draft rules to the U.K. Q.I. Agreement, one will readily see that the Q.I. Agreement deals with many other matters. For the time being, the Law Society has not said that they will adopt the U.K. Q.I. Agreement. They have only said that the U.K. Q.I. Agreement "will be taken as one of the basis for the Agreement in Hong Kong". I see no reason why the Law Society should not start examining the U.K. Q.I. Agreement to at least decide which clauses can be followed and which should be abandoned or modified and start the discussions. This will save us time. If the Law Society does not want to spend time immediately to draft or review the Q.I. Agreement, I would suggest them to inform insurers of the adoption of the U.K. Q.I. Agreement as a starting point to initiate the negotiations. Such Agreement has been in existence in the U.K. for a number of years and insurers are familiar with it so that it will be easy for them to start commenting on it. However, this does not mean that the Law Society can sit back and do nothing on the Q.I. Agreement.

Yours faithfully



BENNY YEUNG

For and on behalf of
the PIS Action Group

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c.c. The President, Vice-Presidents and Council Members of the Law Society