

立法會
Legislative Council

Ref : CB2/BC/2/09

LC Paper No. CB(2)2700/10-11
(These minutes have been seen
by the Administration)

Bills Committee on Legal Practitioners (Amendment) Bill 2010

Minutes of meeting
held on Friday, 20 May 2011, at 8:30 am
in Conference Room B of the Legislative Council Building

Members present : Dr Hon Margaret NG (Chairman)
Hon LAU Kong-wah, JP
Hon Audrey EU Yuet-mee, SC, JP

Members absent : Hon Albert HO Chun-yan
Hon Miriam LAU Kin-ye, GBS, JP
Hon Ronny TONG Ka-wah, SC
Hon Paul TSE Wai-chun

Public Officers attending : 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

Mr Bernard YUE
Government Counsel
Department of Justice

Ms Karmen KWOK
Government Counsel
Department of Justice

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

Action

I. Meeting with the Administration

[LC Paper Nos. CB(2)888/10-11(01), CB(2)1186/10-11(01), CB(2)959/10-11(01), CB(2)1338/10-11(01), CB(2)1791/10-11(01) and (02)]

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

2. Senior Assistant Solicitor General ("SASG") advised that, at the request of the Chairman prior to the meeting, the Administration had prepared a brief note for distribution to members setting out its principal proposals for amending the Bill (LC Paper No. CB(2)1852/10-11(01)).

Proposed section 7AA

3. SASG said that the Administration would propose that the definition of "business" in the proposed section 7AA of the Bill be amended to be in general terms and wide enough to cover the business of Hong Kong law firms which were permitted to practise foreign law through the employment of registered foreign lawyers. This proposal was to address the comments given by the American Chamber of Commerce in Hong Kong in its submission dated 10 September 2010 (LC Paper No. CB(2)2260/09-10(02)).

Proposed section 7AC

Partial liability shield

4. SASG said that the Administration's position was that partners in a limited liability partnership ("LLP") should continue to be held liable for

Action

ordinary debts of their business (i.e. partial liability shield) such as rent and salaries as they were not unforeseeable debts over which LLP partners had no control as in the case of claims incurred by negligence of other partners. This might need to be brought out even more explicitly in the Bill, as the term "default" referred to in the proposed section 7AC(1) was defined as "any negligent or wrongful act or omission, or any misconduct" under the proposed section 7AA(1). The Administration would move a Committee Stage amendment ("CSA") to the Bill to the effect that non-defaulting partners of an LLP would only be exempted from joint and several liability under the Partnership Ordinance (Cap. 38) that arose from default committed by another person in the LLP in the course of the LLP's provision of professional services as a law firm.

5. The Chairman highlighted the view of the Law Society of Hong Kong ("LS") that the partial shield LLP model proposed under the Bill, as in the case of some overseas jurisdictions, ought to be changed to a full shield one, as in the case of many other overseas jurisdictions, although she noted that LS would not insist on maintaining their position in this matter. The Chairman noted LS' view that if the Administration maintained its position to propose a partial shield model under the Bill, LLPs could consider forming service companies to achieve the same liability protection as that offered under a full shield model.

Contents of the designation notice by LLP to clients

6. Ms Audrey EU noted that the Administration would move a CSA to substitute the constructive knowledge elements in the proposed section 7AC(3)(a) with a requirement for an LLP to serve a written notification on its clients to confirm the identity of the responsible partner or partners for each and every individual matter it handled throughout the course of the matter. Ms EU considered it necessary to require an LLP to include in the contents of the designation notice the effect of the proposed section 7AC on the liabilities in respect of the matter of the designated partner or partners as named in the notice and of other partners of the partnership so as to protect the consumer interest.

7. SASG advised that LS's view was that from the public relations angle, it would be odd for an LLP to include such a statement in the designation notice which would be given by the LLP to the client as soon as practicable, and in any event not later than 30 days, after it began to act for the client in respect of the matter. In addition, after the introduction of LLP for solicitors' practices in Hong Kong, the public would gradually become familiar with the business nature of LLPs and the differences between the extent of the liabilities in respect of each matter of the designated partners and the innocent partners of the partnership. SASG further advised that compliance with the

Action

notification requirement would not exonerate any members of the LLP, including members who were not named in the notice, from their common law liability.

Admin

8. Ms Audrey EU said that she could not subscribe to the explanation given by LS, as there were many ways to respectfully state the effect of the proposed section 7AC in the designation notice without causing adverse impact on the relationship between the LLPs and their clients. The inclusion of such a statement could also promote public understanding of the business nature of LLPs. After discussion, SASG agreed to include the requirement in the contents of the designation notice.

Proposed section 7AI

Limitation period for clawback actions

9. SASG said that the Administration originally proposed a limitation period of two years from the date the claimant discovered the distribution made or could with reasonable diligence had discovered it. Having taken into account LS's concern that the effective limitation period for clawback actions in these circumstances would be uncertain, the Administration had put forth a revised proposal that the limitation period on clawback actions under the proposed section 7AI would be six years from the date of the distribution to which the liabilities related, which would be in line with the stipulation in the Limitation Ordinance (Cap. 347). SASG stressed that the proposal had struck a proper balance between protecting the interest of consumers and that of LLP partners. LS however maintained the view that the limitation period should be two years from the date of the distribution.

10. Mr LAU Kong-wah and Ms Audrey EU indicated their agreement to the Administration's current proposal of setting the limitation period as six years from the date of the distribution.

New defence for distributions

11. SASG said that the Administration understood the LS's concern to be about the current proposed section 7AI, namely on what basis an LLP might determine whether a distribution of partnership property might be made without fear of being clawed back. Instead of adding provisions to the Bill to stipulate the specific bases for an LLP to make a distribution, such as financial statements prepared on the basis of accounting practices and principles as suggested by LS in paragraph 17 of its submission dated 21 March 2011 (LC Paper No. CB(2)1338/10-11(01)), the Administration proposed to provide a defence for a partner in an LLP (or an assignee of a partner's share in the partnership) in the proposed section 7AI to establish that,

Action

based on the information at the time of distribution, it was reasonable to conclude that the financial position of the partnership was able to meet the dual liquidity-asset test as described in the proposed sections 7AI(1)(a) and (b) after the distribution. For example, an LLP partner might put forward a defence that he/she had reasonable grounds to conclude that the partnership could meet the dual liquidity-asset test after the distribution as it had not received a letter before action before the distribution and thus a contingent partnership obligation could not have been foreseen by the LLP at the time of the assessment. It would be up to the court to decide whether a defence could be established. If a defence was established, the distribution concerned was not liable to be clawed back under the proposed section 7AI. If a defence was not established, the partner or assignee was liable to return an amount equivalent to the whole or part of the value of the property received in accordance with the rules set out in the proposed section 7AI(2).

12. SASG advised that the Administration did not consider it appropriate to state the specific bases suggested by LS in the Bill. While agreeing that these bases (based on the LLP provisions in some Canadian jurisdictions) might be relevant in justifying a distribution, SASG said that adopting an exhaustive list of bases in the Bill would imply that the LLP would not need to consider other relevant factors when making a distribution. SASG said that the court should be allowed to make a ruling on whether there would be a reasonable basis for distribution, taking into account all relevant considerations.

13. Mr LAU Kong-wah expressed concern that there might be cases that an LLP considered it more appropriate to make a provision far less than the amount of the claim as the value of the partnership obligation in relation to the claim when it carried out the liquidity-asset test assessment for the purposes of the proposed section 7AI. Mr LAU further asked whether the LLP partner and/or the assignee who had received the distribution could use the grounds that a judgement on the claim had not been given by the court at the time of the assessment as a defence for the distribution. SASG reiterated that whether a defence could be established was a matter to be decided by the court. In the first example cited by Mr LAU, a factor that the court might take into consideration was whether the LLP concerned had sought Counsel's advice on the appropriate value of the partnership obligation.

14. The Chairman said that from the perspective of clients, the introduction of a defence would make the clawback actions more comprehensive as it would be for the court to decide whether a defence could be established, hence the question of whether a distribution would be liable to be clawed back. Given the legal uncertainty surrounding the clawback actions, Mr LAU Kong-wah doubted whether the Administration's proposal was in the best interest of consumers.

Action

15. SASG advised that there had been lengthy discussions between the Administration and LS on the issue of distribution of partnership property under the proposed section 7AI. The Administration considered that the above proposed arrangement had struck a proper balance between protecting the interests of consumers and at the same time enabling an LLP to make distributions to its partners in proper circumstances. Whilst many overseas jurisdictions had adopted a more restrictive approach and prohibited an LLP from making any distribution under similar circumstances, the proposed arrangement provided flexibility and autonomy for an LLP to assess whether or not it should make a distribution to its partners. Senior Assistant Law Draftsman supplemented that, in some Canadian jurisdictions, the clawback provisions were more stringent than the proposed section 7AI in another respect, namely a partner authorizing a distribution in contravention of the liquidity-asset test would be liable to the amount that could not be recovered from the recipient of the distribution. SASG further said that under the proposed section 7AI(3), proceedings to enforce any of the liabilities arising under the proposed section 7AI as a result of the distribution might be brought by any person to whom the partnership owed any partnership obligation at the time of the distribution, among others. The burden of proof rested with the persons receiving the distribution who had to make out a defence of reasonable assessment. SASG further advised that the expression "as a consequence of which" in the proposed section 7AI(1) would be replaced by "and immediately after the distribution" to provide more clarity and certainty in the implementation of the liquidity-asset test.

16. SASG added that the proposal of providing in the Bill a defence for distributions might have the effect of providing incentive for LLPs to take out top-up insurance to cover claims for negligence against the firm. Ms Audrey EU considered the current proposal of the Administration acceptable.

17. Whilst agreeing on the need to provide in the Bill provisions regulating whether a distribution would be liable to be clawed back, Mr LAU Kong-wah maintained his concern that the introduction of a defence for distributions might affect consumer protection, as this was a further hurdle that had to be surmounted when a client enforced the judgement debt after obtaining the first instance judgement on his/her claim for negligence against an LLP. The Chairman suggested and members agreed to further discuss the subject at the next meeting.

II. Dates of subsequent meetings

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18. The Administration was requested to provide its proposed CSAs for members' consideration at the next meeting.

Action

19. Members agreed that further meetings would be scheduled on 2 June at 10:45 am and 7 June 2011 at 8:30 am to proceed with the clause-by-clause examination of the Bill.

(Post-meeting note: The meeting originally scheduled for 7 June 2011 at 8:30 am was rescheduled to 10 June 2011 at 8:30 am.)

20. There being no other business, the meeting ended at 9:57 am.

Council Business Division 2
Legislative Council Secretariat
6 October 2011

**Proceedings of the meeting of the
Bills Committee on Legal Practitioners (Amendment) Bill 2010
on Friday, 20 May 2011, at 8:30 am
in Conference Room B of the Legislative Council Building**

Time marker	Speaker	Subject	Action required
000000 - 000406	Chairman	Opening remarks Submissions dated 1 February and 21 March 2011 from The Law Society of Hong Kong ("the Law Society") (LC Paper Nos. CB(2)959/10-11(01) and CB(2)1338/10-11(01)) Letter dated 28 March 2011 from the Hong Kong Bar Association (LC Paper No. CB(2)1791/10-11(01)) Letter dated 30 March 2011 from the Consumer Council (LC Paper No. CB(2)1791/10-11(02))	
000407 - 001448	Admin Ms Audrey EU Chairman	Briefing by the Administration on its principal proposals for amending the Legal Practitioners (Amendment) Bill 2010 ("the Bill") (LC Paper No. CB(2)1852/10-11(01))	
001449 - 001905	Ms Audrey EU Admin Chairman	The Administration explained the policy intent concerning the partial liability shield under limited liability partnership ("LLP")	
001906 - 003245	Ms Audrey EU Admin Chairman	The notice given by LLP to existing clients under the proposed section 7AG and the newly proposed designation notice At the request of Ms EU, the Administration undertook to include in its draft Committee Stage amendments ("CSAs") a requirement that the designation notice had to state the effect of the proposed section 7AC on the designated partner or partners as named in the notice for a certain client matter and on other partners of the partnership	Admin (para. 8 of the minutes refers)
003246 - 003749	Chairman Mr LAU Kong-wah Ms Audrey EU	The Administration's position on the limitation period for clawback actions under the proposed section 7AI	
003750 - 004245	Chairman Admin	The Administration's proposal to introduce a new defence for distribution in the proposed section 7AI	
004246 - 005330	Mr LAU Kong-wah Admin Chairman	The dual liquidity-asset test as described in the proposed sections 7AI(1)(a) and (b) The Administration explained that whether a defence could be established should be a matter to be decided by the court	
005331 - 010444	Mr LAU Kong-wah Admin Chairman	Mr LAU questioned whether the introduction of a defence for distribution was in the best interest of consumers given the legal uncertainty surrounding the clawback actions	

Time marker	Speaker	Subject	Action required
010445 - 011033	Admin Chairman Ms Audrey EU Mr LAU Kong-wah	The Administration advised that the expression "as a consequence of which" in the proposed section 7AI(1) would be replaced by "and immediately after the distribution" to provide more clarity and certainty in the implementation of the liquidity-asset test	
011034 - 011720	Chairman Mr LAU Kong-wah Ms Audrey EU Admin	Ms EU's view that the Administration's proposal of introducing a defence for distribution was acceptable	
011721 - 011925	Mr LAU Kong-wah Chairman Admin	The Administration explained that, in the event that the LLP partners or assignees who received the distribution failed to return the value of the property received such that the LLP concerned was unable to pay the judgment debt to the claimant, those partners or assignees should be petitioned bankrupt	
011926 - 012114	Chairman Admin	The practice of Canada on clawback actions	
012115 - 012518	Chairman Mr LAU Kong-wah Admin Ms Audrey EU	Members agreed to further discuss the subject of introducing a defence for distribution in the proposed section 7AI and to proceed with clause-by-clause examination of the Bill at the next meeting The Administration was requested to provide its proposed CSAs for members' consideration at the next meeting	Admin (para. 18 of the minutes refers)
012519 - 012753	Chairman Admin Mr LAU Kong-wah Clerk	Dates of subsequent meetings	