

立法會
Legislative Council

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LC Paper No. CB(2)2679/11-12
(These minutes have been seen
by the Administration)

Bills Committee on Legal Practitioners (Amendment) Bill 2010

Minutes of meeting
held on Friday, 9 March 2012, at 8:30 am
in Conference Room 3 of the Legislative Council Complex

- Members present** : Dr Hon Margaret NG (Chairman)
Hon Albert HO Chun-yan
Hon LAU Kong-wah, JP
Hon Audrey EU Yuet-mee, SC, JP
Hon Ronny TONG Ka-wah, SC
Hon Paul TSE Wai-chun, JP
- Member absent** : Hon Miriam LAU Kin-ye, GBS, JP
- 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

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 Allan LEUNG
Member of the Working Party on LLPs

Mr Michael LINTERN-SMITH
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)812/09-10, CB(2)1852/10-11(01), CB(2)1914/10-11(01), CB(2)1938/10-11(02), 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)]

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

Recent developments

2. The Chairman referred members to the past deliberations of the Bills Committee set out in the background brief prepared by the Secretariat (LC Paper No. CB(2) 1258/11-12(03)). The Chairman said that the Bills Committee had completed clause-by-clause examination of the Bill at its meeting on 10 June 2011. At the previous meeting of the Bills Committee held on 27 July 2011, representatives of The Law Society of Hong Kong ("LS") reiterated their objections in their earlier written submission to the Bills Committee that LS would not support the Bill if (a) the proposed designated partner(s) ("DP") provisions were not removed from the proposed Committee Stage amendments ("CSAs") and (b) the time limit for clawback under the proposed section 7AI was not changed from six years to two years from the date of distribution. The Administration met with LS on several occasions from August 2011 to February 2012 to iron out their differences. On 9 February 2012, the Administration met with LS again and informed LS that the Administration proposed to remove the DP provisions from the Bill and replace them by the Requirements on Supervising Partner(s) as set out in paragraph 8 of the Administration's paper (LC Paper No. CB(2) 1182/11-12(01)). The Administration, however, maintained its stance that the clawback period should be six years from the date of distribution.

3. The Chairman further said that on 13 February 2012, LS held a members' forum to discuss and seek its members' view on whether they would support the Bill. The discussions at the members' forum were focused on the following two issues -

- (a) the proposed replacement of the DP provisions by the Requirements on Supervising Partner(s); and
- (b) the proposed six years clawback period.

According to the letter from LS' President to its members dated 14 February 2012, the survey results showed that about 95% of the respondents did not support the limited liability partnership ("LLP") model proposed by the Administration. However, if the six years' clawback period was shortened, 71% of them were prepared to support the Bill. In response to a question on the appropriate clawback period, 62% of the respondents accepted a two years' clawback period.

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4. The Chairman pointed out that the Consumer Council had been invited to give views on the Administration's latest policy position to remove the DP provisions and replace them with the Requirements on Supervising Partner(s). The Consumer Council's response dated 8 March 2012 (LC Paper No. CB(2)1333/11-12(01)) was tabled at the meeting. Specifically, the Consumer Council indicated that it had no comment on the Administration's latest policy position. The Consumer Council's position on the Bill, as set out in its earlier submission to the Bills Committee (LC Paper CB(2)2260/09-10(01)), remained unchanged.

5. The Chairman added that LS had recently submitted another submission to the Bills Committee (LC Paper No. CB(2) 1311/11-12(01)) in which it reiterated its views to either delete the clawback provision from the proposed section 7AI of the Bill or to insert a clawback period of two years from the date of distribution into the proposed section 7AI.

6. The Chairman said that the Administration would provide the revised draft CSAs, after listening to members' view on the two issues referred to in paragraph 3 above.

Discussion

7. At the invitation of the Chairman, Senior Assistant Solicitor General ("SASG") said that LS agreed in principle to support the proposed replacement of the DP provisions by the Requirements on Supervising Partner(s). The Administration considered that the Requirements on Supervising Partner(s) could achieve its policy intent that at least one LLP partner would be held responsible for the LLP's default for the reasons set out in paragraph 14 of LC Paper No. CB(2) 1182/11-12(01).

8. As regards the proposed six years' clawback period, SASG said that the Administration had not reached a consensus with LS on the matter. The reasons for proposing a clawback period and a six years' limit of such under the proposed section 7AI were set out in two respective papers (LC Paper Nos. CB(2)344/10-11(01) and CB(2)888/10-11(01)) previously submitted to the Bills Committee, as well as in paragraph 16 of LC Paper No. CB(2)1182/11-12(01). Notwithstanding the aforesaid reasons, the Administration remained open to suggestions by members on this issue, but the Administration did not consider a two years' clawback period to be reasonable from the consumer protection angle for Hong Kong.

9. At the invitation of the Chairman, Mr Joseph LI of LS said that LS agreed in principle to support the proposed replacement of the DP provisions by the Requirements on Supervising Partner(s). However, LS

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had reservation on the proposed new section 7ACA(2)(b), referred to in paragraph 14(b)(ii) of LC Paper No. CB(2)1182/11-12(01), which stipulated that a supervising partner would not be protected by LLP if the default was a default of another partner under his supervision.

10. As regards the proposed six years' clawback period, Mr Joseph LI referred members to LS' President's letter to the Solicitor General dated 23 February 2012 (LC Paper No. CB(2) 1258/11-12(01)) which stated that LS would not support the Bill unless the clawback period was reduced to two years. In the comparison chart attached to the letter, it illustrated a list of overseas jurisdictions whose LLP legislation only relied on the general insolvency law to protect creditors. Among these jurisdictions, the LLP legislation of the provinces of British Columbia, Manitoba and Nova Scotia of Canada stipulated that proceedings to enforce a liability had to be commenced no later than two years after the date of the distribution to which the liability related. In the Malaysian LLP Act which had just been gazetted, the partner who received a distribution when the LLP was insolvent was liable to return the distribution if the distribution was received two years before the commencement of winding up of LLP. Mr LI further said that major financial centres, such as London, Singapore and the State of New York of the United States, also relied only on the general company law on insolvency to protect creditors. Hong Kong should be in line with most other jurisdictions in designing its LLP legislation in order to achieve the target of enhancing Hong Kong's competitiveness as a key centre of providing legal services.

11. Mr LI next referred members to LS' latest submission (LC Paper No. CB(2) 1311/11-12(01)) in which it set out the following reasons why consumers would not be disadvantaged without the clawback provision in the Bill -

- (a) the mandatory Professional Indemnity Scheme ("PIS") had proven to be sufficient protection based on past claims experience. From 1994-1995 indemnity year to 2 July 2009, only 1.6% of the total claims had sought HK\$10 million or more, and only one claim was brought by an individual and for which the Solicitors Indemnity Fund paid HK\$10 million;
- (b) in the event an LLP became insolvent and the partners were bankrupt, the Bankruptcy Ordinance (Cap. 6) would apply. Cap. 6 served the same purpose of clawback of restoring assets that should not have been distributed out from the LLP; and

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- (c) the general remedy of Mareva injunction would apply should there be any risk of dissipation of a firm's assets.

12. Mr LI pointed out that to introduce a six years' clawback period would be inconsistent with Cap. 6 and would cause prejudice to the interests of other creditors, as successful claimants could enforce a liability against a partner(s) in an LLP within six years after the date of the distribution to which the liability related under the proposed section 7AI, whereas the relevant period for restoration of assets was two years before presentation of the bankruptcy petition where unfair preferences were given to associates of the bankrupt debtors under section 51(b) of Cap. 6 and a person was an associate with whom he was in partnership under sections 50, 51 and 51B of Cap. 6. Mr LI further pointed out that as the Bill only proposed partial shield to LLPs, it was all the more important to ensure equality of treatment for all unsecured creditors on a pari-passu or "equal footing" basis in accordance with the existing bankruptcy framework.

13. Mr LI further said that if the Administration insisted on providing a clawback in the Bill, the period should be two years in order to align with the existing bankruptcy law and keep in step with the world trend on LLP legislation. Further, objective criteria should be provided under the proposed section 7AI to make it workable. Under the proposed CSAs to the proposed section 7AI, a partner who received a distribution from the partnership property was not liable to clawback if the partner proved that immediately before making the distribution, the LLP made a reasonable assessment that the financial position of the partnership would not be as described in subsection (1) of the section immediately after the distribution. LS proposed that the following criteria should be added to the proposed section 7AI to better enable LLPs to determine whether distribution of partnership property should be made -

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

14. SASG responded that the bankruptcy law in Cap. 6 could not operate to protect consumers in the way the clawback provision in the proposed section 7AI would, as the LLP model used in the Bill was a partnership model proposed by LS. The reason why bankruptcy or winding up law was used to enforce liability against a partner(s) of an LLP in places such as

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London and Singapore was because these places adopted a corporate model for their LLPs. The corporate model of LLPs meant that an LLP in London or Singapore had a separate legal personality from its partners and the LLP could be sued by creditors under the bankruptcy or winding up law. On the other hand, LLPs operating on a partnership model were governed by partnership legislation and their lack of a separate legal personality meant that successful judgment creditors against an LLP could not use Cap. 6 to petition for bankruptcy of the LLP. Moreover, under the partial shield of the LLP model proposed by the Bill, the personal assets of the innocent partners of LLPs were protected against claims incurred by the negligence of other partners. A client obtaining judgment against an LLP could not use the judgment debt as a basis for petitioning bankruptcy of the innocent partners. This was completely different from the case of general partnerships where all partners, including innocent partners, could be petitioned for bankruptcy by a consumer if the partnership properties were insufficient to satisfy the claim. Under such circumstances, it was necessary to provide a clawback mechanism in the Bill to enable consumers to enforce liability on an LLP when the partnership properties were insufficient. SASG further said that some Canadian provinces which adopted a partnership model also had clawback provisions in their LLP legislation.

15. SASG disagreed that clients of an LLP was granted an additional advantage under the proposed section 7AI over trade creditors in recovering money from the LLP. In fact, section 7AI would only allow the claimant to clawback partnership assets distributed when the LLP failed the solvency tests. On the other hand, all partners in an LLP were still jointly and severally liable to an unlimited extent for all debts and obligations owed to trade creditors, such as staff salaries and rent, which the law firm incurred.

Proposed replacement of the DP provisions by the Requirements on Supervising Partner(s)

16. Members agreed in principle to support the proposed replacement of the DP provisions by the Requirements on Supervising Partner(s).

Proposed six years' clawback period

17. Ms Audrey EU noted that in the LLP legislation of the province of Manitoba of Canada, the clawback period was two years and the LLP model was a partnership one. As the Bill also adopted the partnership LLP model, Ms EU asked the Administration about the rationale for setting the clawback period in the Bill at six years.

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18. SASG explained that although the clawback period in the LLP legislation of the province of Manitoba was two years from the date of distribution, it should be noted that under section 86(2) of the 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. In other words, all the partners who had authorized the distribution from the partnership property would also have to help pay the LLP if the recipient failed to discharge his liability on clawback. SASG further said that the LLP legislation of each jurisdiction was designed differently to suit its own circumstances. For example, the LLP legislation in Singapore provided that the statutory professional indemnity limit per claim was the equivalent of HK\$24 million for an LLP as opposed to the equivalent of only HK\$6 million per claim for a general partnership. Similarly, the statutory professional indemnity cover required for an LLP in the UK is 50% higher than that of a general partnership.

19. Mr Paul TSE declared interest that he was a partner of solicitor firms. Mr TSE further said that he preferred a two years' clawback period. Mr TSE also said that he could not see why clients of LLPs should get preferential treatment over other creditors in enforcing liability on an LLP and why clients of LLPs needed higher level of consumer protection than other professions such as accountants and building surveyors who conducted their business through limited liability entities. In his views, partners of an LLP would strive to ensure that they would not be at fault in dealing with their clients to avoid having unlimited personal liability for the occurrence of the fault, whereas this might not be the case for other professions which operated as a limited liability entity where the liability of their partners/owners was limited.

20. SASG disagreed that clients of LLPs would get preferential treatment over other creditors in enforcing liability on an LLP for the reasons given in paragraph 15 above. SASG further said that solicitors firms in Hong Kong would in future also have the option to conduct their business in the form of solicitor corporations which would allow solicitors to incorporate their practices with limited liability. To her understanding, LS was in the process of finalizing the drafting of the Solicitor Corporations Rules for the implementation of solicitor corporations. On the other hand, the LLP model to be introduced for solicitors firms by the Bill was the first of its kind in Hong Kong and other trades and professions could not use this mode of business yet.

21. Mr Albert HO asked the Administration whether consideration could be given to adopting section 86(2) of the Manitoba Partnership Act

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mentioned in paragraph 18 above, or setting the clawback period to three to four years, or increasing the statutory professional indemnity limit per claim.

22. SASG responded to Mr HO's suggestion by pointing out that the Bill might not be able to be passed by the Council within this legislative session, as more time would be needed to consider Mr HO's proposals set out in paragraph 21 above. SASG further said that although the Administration considered that a two years' clawback period was too short to provide adequate consumer protection, the Administration was open to any suggestion of setting the clawback period between two years and six years if this was the only outstanding issue.

23. Mr Joseph LI said that he could not provide a response to Mr HO's proposals at this stage, as members of LS needed to be consulted first. Mr LI further said that he did not see the need of increasing the statutory professional indemnity limit per claim, as only one claim resulted in a paid out of over \$10 million from 1994-1995 indemnity year to 2 July 2009. Further, any increase to the statutory indemnity limit per claim would inevitably lead to an increase in insurance premium contribution which would in turn be passed on to consumers.

LS

24. The Chairman requested LS to provide updated information on the claims made against PIS and whether the Hong Kong Solicitors Indemnity Fund Limited had any plan to review the claim limit. The Chairman also requested the Administration to provide information on which overseas LLP legislation had or did not have mandatory PIS for an LLP and, where available, information on the indemnity limit per claim for a general partnership and an LLP in those overseas jurisdictions which had mandatory PIS for an LLP.

Admin

25. Ms Audrey EU urged the Administration and LS to come to an agreement on the clawback period, say, three to four years.

Defence for distribution made under the proposed section 7AI

26. The Chairman, Ms Audrey EU and Mr Paul TSE urged the Administration to consider the proposal put forward by LS on defence for distribution made under the proposed section 7AI mentioned in paragraph 13 above.

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II. Dates of next meetings

27. Members agreed to next meet on the following dates -

(a) 19 March 2012 at 8:30 am; and

(b) 27 March 2012 at 8:30 am.

28. There being no other business, the meeting ended at 10:33 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 Friday, 9 March 2012, at 8:30 am
in Conference Room 3 of the Legislative Council Complex**

| Time marker | Speaker | Subject | Action required |
|-----------------|---|---|-----------------|
| 000000 - 000706 | Chairman | Opening remarks | |
| 000707 - 001807 | Chairman | Briefing by the Chairman on - (a) past deliberations of the Bills Committee set out in the background brief prepared by the Legislative Council Secretariat (LC Paper No. CB(2)1258/11-12(03)) and recent developments since the previous meeting of the Bills Committee held on 27 July 2011; (b) Consumer Council's views on the Administration's latest policy position to remove the proposed designated partner(s) ("DP") provisions and replace them with the Requirements on Supervising Partner(s) (LC Paper Nos. CB(2)1333/11-12(01) and CB(2)2260/09-10(01)); and (c) stances of the Administration and The Law Society of Hong Kong ("LS") set out in the Administration's paper (LC Paper No. CB(2)1182/11-12(01)) and LS' submission (LC Paper No. CB(2)1311/11-12(01)) | |
| 001808 - 002835 | Chairman Admin | Briefing by the Administration on its latest policy positions on the proposed replacement of the DP provisions by the Requirements on Supervising Partner(s) and the proposed six years' clawback period (LC Paper No. CB(2)1182/11-12(01)) | |
| 002836 - 003314 | Chairman LS | LS's expression of reservation on the proposed new section 7ACA(2)(b) referred to in paragraph 14(b)(ii) of LC Paper No. CB(2)1182/11-12(01) | |
| 003315 - 003722 | LS Chairman | Briefing by LS on the findings of its members' survey on the proposed clawback provisions and a comparison on the clawback provisions in the limited liability partnership ("LLP") legislation of overseas jurisdictions (LC Paper No. CB(2)1258/11-12(01)) | |
| 003723 - 005347 | LS Chairman | Briefing by LS on its submission dated 7 March 2012 concerning the proposed clawback provisions (LC Paper No. CB(2)1311/11-12(01)) | |
| 005348 - 005834 | Chairman Admin | The Administration's explanation on why the Bankruptcy Ordinance (Cap. 6) could not operate to protect consumers in the way the clawback provision in the proposed section 7AI would | |
| 005835 - 010048 | Chairman | Outstanding issues for discussion | |
| 010049 - 011204 | Chairman Ms Audrey EU LS Admin | Discussion between LS and various political parties on its position on the proposed clawback provisions Rationale of the Administration for setting the clawback period in the Bill at six years | |

| Time marker | Speaker | Subject | Action required |
|-----------------|---|--|---|
| 011205 - 011635 | Mr Paul TSE Chairman LS | Whether there was any case whereby a consumer was not sufficiently compensated in those claims seeking over the statutory indemnity limit of \$10 million | |
| 011636 - 011730 | Chairman Mr Paul TSE | Members agreed in principle to support the proposed replacement of the DP provisions by the Requirements on Supervising Partner(s) | |
| 001731 - 012407 | Mr Paul TSE Chairman Admin | Mr Paul TSE's view that he preferred a two years' clawback period from the date of distribution Whether clients of LLPs would get preferential treatment over other creditors in enforcing liability on an LLP and needed higher level of consumer protection than other professions who conducted their business through limited liability entities | |
| 012408 - 012819 | Chairman LS | The number of solicitor firms which would opt to practise in the form of LLPs after the introduction of LLP | |
| 012820 - 013817 | Mr Albert HO Chairman Admin LS | Discussions on Mr Albert HO's suggestions - (a) adopting the Manitoba LLP model of making partners, who authorized a distribution in contravention of the solvency tests, liable to pay the LLP an amount which the recipient of the distribution would be liable to pay the LLP, to the extent that the amount is not recovered from the recipient; or (b) setting the clawback period to three or four years from the date of distribution; or (c) increasing the statutory professional indemnity limit per claim if the clawback period was shortened to two years from the date of distribution | |
| 013818 - 014132 | Chairman LS | LS's proposal of adding specific criteria to the proposed section 7AI to provide clearer basis for LLPs to determine whether distribution of partnership property should be made | |
| 014133 - 015299 | Mr Paul TSE Chairman LS Admin | Mr Paul TSE's declaration of interest as a partner of solicitor firms and his reiteration that he preferred a two years' clawback period from the date of distribution The Administration was requested to provide information on which overseas jurisdictions had or did not have mandatory professional indemnity requirements for an LLP; and, where available, information on the indemnity limit per claim for a general partnership and an LLP in those overseas jurisdictions which had mandatory professional indemnity requirements for an LLP LS was requested to provide updated claims statistics of the Professional Indemnity Scheme and its views on whether consideration would be given to increasing the present statutory indemnity limit of \$10 million per claim | Admin (para. 24 of the minutes refers) LS (para. 24 of the minutes refers) |

| Time marker | Speaker | Subject | Action required |
|--------------------|--------------------------|---|------------------------|
| 015300 - 015559 | Ms Audrey EU Chairman | Ms Audrey EU's suggestion of setting the clawback period at three to four years from the date of distribution and her view that the Administration should consider the proposal put forward by LS on defence for distribution made under the proposed section 7AI | |
| 015600 - 015916 | Chairman | Concluding remarks | |
| 015917 - 020231 | Chairman Admin LS | Dates of next meetings | |

Council Business Division 2
Legislative Council Secretariat
15 August 2012