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Paper for the House Committee meeting on 31 May 2019

Report of Subcommittee on Solicitors (Professional Indemnity) (Amendment) Rules 2019 and Solicitors (Professional Indemnity) (Amendment) (No. 2) Rules 2019

Purpose

This paper reports on the deliberations of the Subcommittee on Solicitors (Professional Indemnity) (Amendment) Rules 2019 (L.N. 51) and Solicitors (Professional Indemnity) (Amendment) (No. 2) Rules 2019 (L.N. 52) ("the two Amendment Rules").

Background

2. The Professional Indemnity Scheme ("PIS") provides compulsory professional indemnity to Hong Kong law firms against losses arising from civil liability incurred in connection with their practices. It is governed by the Solicitors (Professional Indemnity) Rules (Cap. 159M) and is held, managed and administered by the Hong Kong Solicitors Indemnity Fund Limited ("the Fund") established by The Law Society of Hong Kong ("the Law Society").

The two Amendment Rules

3. L.N. 51 and L.N. 52 are made by the Council of the Law Society under section 73A of the Legal Practitioners Ordinance (Cap. 159) with the prior approval of the Chief Justice, and tabled at the meeting of the Legislative Council ("LegCo") of 3 April 2019. They amend Cap. 159M to implement certain changes to PIS.

4. At present, under Cap. 159M, foreign lawyers who are employed or who work in connection with a Hong Kong law firm are treated as unqualified

staff of a law firm for the purpose of calculating the annual contribution to be made by a law firm under PIS. L.N. 51 incorporates foreign lawyers who are employed or who work in connection with a Hong Kong law firm as an additional rating factor in calculating the firm's contributions under PIS. L.N. 51 also extends the entitlement to PIS to former foreign lawyers and former employees who were employed or who worked in connection with a Hong Kong law firm.

5. At present, under Cap. 159M, a claim for an indemnity by a person indemnified (i.e. a law firm, a principal in a law firm, any person employed in or in connection with a law firm (including any assistant solicitor, consultant, trainee solicitor etc.)) under PIS must not exceed \$10,000,000 per claim. L.N. 52 raises the existing indemnity limit to \$20,000,000 per claim.

6. L.N. 51 and L.N. 52 come into operation on 1 July and 1 October 2019 respectively.

The Subcommittee

7. At the House Committee meeting on 12 April 2019, Members agreed to form a subcommittee to study the two Amendment Rules. The membership of the Subcommittee is in the **Appendix**.

8. Under the chairmanship of Dr Hon Priscilla LEUNG, the Subcommittee held one meeting with the Law Society, the Fund and ESSAR Insurance Services Limited ("ESSAR"). The Subcommittee also posted a notice on LegCo's website to invite the public to make written submissions on the two Amendment Rules. No submission has been received.

9. To allow more time for scrutiny, the Chairman of the House Committee gave notice to move a motion to extend the scrutiny period of the two Amendment Rules to the Council meeting of 22 May 2019. However, the motion was not dealt with at the Council meeting of 17 April 2019 before the adjournment of the meeting. As such, the period for amending the two Amendment Rules expired at the Council meeting of 17 April 2019.

Deliberations of the Subcommittee

Operation of the Professional Indemnity Scheme

10. A member has asked about the number of claims received under PIS, the average amount paid for each claim, the procedures for settling a claim and

the assistance that the Fund will offer to claimants without legal representation to ensure that they would not be disadvantaged in their access to justice by their lack of procedural expertise.

11. ESSAR has explained that upon receipt of a claim against a solicitor, panel solicitor(s) of the Council of the Law Society will be appointed to represent the defendant (i.e. the indemnified law firm), give advice and carry out careful investigation into any alleged negligence. In cases where claimants are unrepresented, the Fund will make every effort to make sure that claims are processed in the most straight-forward and non-legalistic manner. Where there is evidence of professional negligence, the Fund will settle the claim as soon as possible. In fact, the number of unrepresented claimants is relatively small. ESSAR has taken note of members' concern and assured members that unrepresented claimants will be treated fairly and managed with due regard to their interests.

12. Questions have also been raised as to the basis for determining the quantum of a claim under PIS, the arrangements for claims exceeding PIS indemnity limit and the indemnity limit for a claim in respect of which the alleged negligence has occurred before the increased indemnity limit under L.N. 52 comes into operation (i.e. 1 October 2019). ESSAR has explained that the calculation of quantum will depend on the nature of claims. Panel solicitors will advise on the appropriate quantum of each claim according to the established legal principles. Should a claimant not agree to the proposed quantum, the claim will then be resolved either by negotiation or litigation. On indemnity limit, ESSAR has advised that the indemnity limit is \$20,000,000 per claim as long as the claim is first made on or after 1 October 2019, irrespective of when the alleged negligence occurred. PIS being a statutory scheme, it is authorized only to pay any single claim up to the indemnity limit. Hence, law firms are encouraged to take out top-up insurance in the market for additional protection.

13. There is a view that the Law Society should launch publicity to step up PIS promotion so that people know they can seek assistance from the Fund when they have not been properly served by solicitors. The Law Society has advised that it takes seriously any allegation of professional negligence. An aggrieved person can call up the Law Society at all times and make a complaint against a solicitor. On education and publicity efforts, the Law Society has been organizing the Law Week to promote available legal services, a free legal helpline which the general public can call to ask for information about specific areas of laws, a range of pro bono services for its members and so on. Members are welcome to make suggestions in this regard for the consideration of the Council of the Law Society. ESSAR has supplemented that the general

public can browse the website of the Law Society for relevant information.

Coverage of the Professional Indemnity Scheme

14. Clarification has been sought on whether employed lawyers of Hong Kong law firms who provide legal services in the Mainland and overseas jurisdictions will be covered by PIS. The Law Society has replied in the affirmative. ESSAR has added that there is no geographical exclusion under Cap. 159M. Hong Kong law firms which operate outside the jurisdiction of Hong Kong may do so by means of representative offices. As long as the fees generated from the services come back to the Hong Kong office, the lawyers will be covered under PIS subject to the provisions of Cap. 159M.

15. Some members have pointed out that not all law firms will arrange professional indemnity cover for the pro bono services provided by their solicitors outside the course of their employment. Also, some solicitors will not seek approval from their law firms for undertaking pro bono work due to various personal reasons. This means that some solicitors providing pro bono legal services are not covered by PIS or they have to purchase their own individual professional indemnity insurance. Members consider it necessary for the Law Society to encourage the legal profession to perform pro bono work by improving the coverage of PIS, identifying affordable insurance cover for individual solicitors wishing to perform pro bono work outside the scope of their practices, streamlining the process for obtaining an exemption under rule 7 of Cap. 159M ("Rule 7 Exemption"),¹ etc.

16. According to the Law Society, solicitors will be covered by PIS if they provide pro bono services within the ambit or under the name of their law firms, regardless of whether the legal advice is given inside or outside the firms. The Law Society notes solicitors' concerns about the lack of professional indemnity coverage for pro bono legal services. Hence, various risk management and pro bono courses have been organized to encourage solicitors to carry out pro bono work within the confines of their law firms, so as to ensure proper conflict checks, proper records and appropriate insurance cover in place to protect both the solicitors and the pro bono clients. Should solicitors choose to offer pro bono legal services in a personal capacity outside their law firm, they are encouraged to hold a practising certificate, obtain a Rule 7 Exemption from the Law Society and take out individual insurance cover. In fact, if solicitors want indemnification protection for pro bono services, all they need to do is to seek their employer's approval before offering such services. Nevertheless, members'

¹ Under rule 7 of Cap. 159M, the Council of the Law Society may exempt from compliance with Cap. 159, among others, any solicitor or any class of solicitors engaged only in a category or categories of professional business specified by the Council.

suggestions will be brought back to the Council of the Law Society for discussion.

17. ESSAR has further advised that the issue of pro bono services is high on the agenda of the Law Society which will continue to explore ways of encouraging solicitors' participation in pro bono work. Moreover, the Law Society is considering with the Government the feasibility of a master policy for all individuals performing pro bono work outside their law firms.

Professional Indemnity Scheme contributions

18. Concern has been raised as to whether the inclusion of foreign lawyers in the calculation of PIS contributions will affect PIS contributions payable by medium- or small-sized law firms which do not employ foreign lawyers. ESSAR has advised that there will be no change in the calculation of PIS contribution formula. The amendments will not result in an increase of PIS contributions of law firms which do not employ foreign lawyers.

Commencement of L.N. 51

19. The legal adviser to the Subcommittee has pointed out that according to the LegCo Brief, the amendments under L.N. 51 will enable the new calculations of PIS contributions (to take account of the number of foreign lawyers working in a firm) and deductibles to kick in from the indemnity year 2019-2020 commencing on 1 October 2019. Under paragraph 2(1)(a)(i) of Schedule 1 to Cap. 159M, the new formula for calculating contributions for an indemnity year refers to the number of, inter alios, foreign lawyers (as at 31 July immediately preceding such indemnity period commencing on or after 1 July 2019). The legal adviser to the Subcommittee has enquired why the commencement date of L.N. 51 is 1 July 2019 rather than 31 July 2019 if the relevant cut-off date for determining the contributions for each indemnity year is 31 July.

20. In this connection, ESSAR has explained that the commencement date of 1 July 2019 is to tie in with the calculation of contribution adjustments based on a different reporting cycle, that is, quarterly from 1 July to 30 June. Moreover, paragraph 2(1)(b)(i) of Schedule 1 to Cap. 159M, as amended, provides that the contribution for each indemnity period is regulated by the number of principals, assistant solicitors, consultants, and from 1 July 2019 onwards, foreign lawyers, engaged or employed in the practice and the gross fee income of the firm.

Drafting issues

21. With regard to Rule 3(2) of L.N. 51 which amends the definition of "indemnity" under Rule 2 of Cap. 159M to "the indemnity to which an indemnified, a former solicitor, or any person who was employed or who worked in connection with the Practice (whether as an assistant solicitor, a foreign lawyer, consultant, trainee solicitor or otherwise), or their estate and legal representatives is entitled under rule 10", the legal adviser of the Subcommittee considers that the singular verb "is" should be replaced with a plural verb "are" because the expression "their estate and legal representatives" is a plural noun. ESSAR agrees that the plural verb "are" should have been used. As the Law Society is continuing to make various other amendments to Cap. 159M, it will seek views of the Department of Justice ("DOJ") about this textual point and amend "is" to "are" in the next legislative exercise if DOJ agrees.

22. The legal adviser of the Subcommittee has pointed out that the term "他" in the Chinese text of paragraph 3(2)(c) of Schedule 3 to Cap. 159M is not entirely consistent with "he or she" in the English text. The legal adviser of the Subcommittee has suggested that the term "that person" (該人) may perhaps be used in lieu of the pronouns to ensure consistency between the two versions. The Law Society has taken note of the suggestion.

23. The Chairman has suggested that the term "該筆" in the Chinese version of paragraph 2(1)(a) and (b) of Schedule 3 to Cap. 159M should be replaced with "每一筆" in relation to "any one claim" in the English version. The Law Society has taken note of the suggestion.

Recommendation

24. The Subcommittee does not object to the two Amendment Rules.

Advice sought

25. The House Committee is invited to note the deliberations of the Subcommittee.

**Subcommittee on
Solicitors (Professional Indemnity) (Amendment) Rules 2019 and
Solicitors (Professional Indemnity) (Amendment) (No. 2) Rules 2019**

Membership list

Chairman Dr Hon Priscilla LEUNG Mei-fun, SBS, JP

Members Hon Tommy CHEUNG Yu-yan, GBS, JP
Hon Mrs Regina IP LAU Suk-ye, GBS, JP
Hon Paul TSE Wai-chun, JP
Hon WU Chi-wai, MH
Hon YIU Si-wing, BBS
Hon Dennis KWOK Wing-hang
Hon Alvin YEUNG
Hon Holden CHOW Ho-ding
Hon YUNG Hoi-yan
Hon LUK Chung-hung, JP

(Total : 11 Members)

Clerk Ms Angel WONG

Legal Adviser Mr Bonny LOO

Date 25 April 2019