

Obligations under the Professional Indemnity Scheme

Introduction

1. The Hong Kong Solicitors Professional Indemnity Scheme ("**PIS**") is a statutory scheme which is managed and administered by the Hong Kong Solicitors Indemnity Fund Limited (the "**Company**"). Generally speaking, the PIS provides indemnity to solicitors, registered foreign lawyers and employees of Hong Kong law firms in respect of civil liability incurred in connection with their practice.
2. The terms and conditions of the PIS are set out in the Solicitors (Professional Indemnity Rules (Cap.159M) (the "**Rules**"). This article sets out the major obligations of an Indemnified (as defined in the Rules) ("**IF**") under the PIS.

Obligation to maintain indemnity

3. Unless exempted by the Council of the Law Society of Hong Kong (the "**Council**") pursuant to Rule 7 of the Rules, every solicitor who is, or is held out to the public as, a solicitor in Practice (as defined in Rule 2 of the Rules) in Hong Kong is required to maintain indemnity under the PIS. (Rule 6 of the Rules)
4. In order to maintain indemnity under the PIS, every principal of the existing Hong Kong law firms is required to:-
 - (a) submit the following documents to Managers of the PIS (currently Essar Insurance Services Limited) (the "**Managers**") on or before 15 August each year:-
 - (i) The Gross Fee Income Report, in the prescribed form and signed by a practising certified public accountant, reporting the firm's gross fee income for the immediately preceding accounting year of not less than 12 months (the "**GFI**").
 - (ii) The Application for Indemnity Form, containing the following information of the firm:-
 - (1) its name and address.
 - (2) the names of all the principals, assistant solicitors, consultants and registered foreign lawyers as at 31 July that year.
 - (3) particulars of the GFI attributable to the firm for the immediately preceding accounting year.
 - (b) make or cause to be made payment of the annual contribution for the next indemnity year in respect of himself/themselves, assistant solicitors, consultants and registered foreign lawyers of the firm, on or before 30 September each year. (Paragraphs 1 and 2(4) of Schedule 1 to the Rules)

For further information on calculation of basic contribution and claims loading under the PIS, please refer to Managers' Explanatory Note entitled "Annual Contributions under the Professional Indemnity Scheme".

5. Upon receipt of the documents or information per point 4(a) above from a Hong Kong law firm, Managers will not only calculate the annual contribution payable for the forthcoming indemnity year, but also adjust the annual contribution for the preceding indemnity year. The Hong Kong law firm is obliged to make further payment if the same is required after the above adjustment. (Paragraph 2(b)(iv) of Schedule 1 to the Rules)
6. All Hong Kong law firms are also required to submit any change in the particulars of the name and the position held in the Practice of every principal, assistant solicitor, consultant and registered foreign lawyer to the Managers on or before the last day of December, March, June and September in each year. (Paragraphs 2(b)(iii) &(iia) of Schedule 1 to the Rules)
7. If a principal of a Hong Kong law firm fails to show reasonable cause for not providing the documents or information as set out in point 4(a) above within 30 days of the receipt of notice from the Law Society of Hong Kong requesting him or her to show reasonable cause, such failure will constitute professional misconduct on the part of such principal and other principals of that Hong Kong law firm. The Council may also apply to the Court for an order compelling the principal(s) to disclose the requested particulars or information. (Rule 8(4) of the Rules)
8. If the principal(s) of a Hong Kong law firm fails to pay its annual contribution by 30 September, the current practising certificates issued to each and every solicitor of that Hong Kong law firm will automatically be suspended, and he/she will be disqualified to act as a solicitor under section 7 of the Legal Practitioners Ordinance (Cap.159) until the outstanding annual contribution is paid. (Rule 6(2) of the Rules)
9. In the event that the Council resolves to demand all Hong Kong law firms to make contributions to make up a deficit or anticipate deficit in the Fund, every principal of the Hong Kong law firms are obliged to make such payment within 30 days after the date of the written demand. (Paragraph 2(5) of Schedule 1 to the Rules)
10. Each principal of a Hong Kong law firm is also jointly and severally liable to pay interest on any outstanding contribution payable by the Hong Kong law firm. (Paragraph 5 of Schedule 1 to the Rules)

Obligation to notify

11. Paragraph 8(2) of Schedule 3 to the Rules says:-

"The indemnified must notify the Company in writing as soon as practicable of:-

- (a) *any claim made during the period of indemnity against the indemnified, which falls within rule 10;*
- (b) *the receipt by the indemnified of notice from any person of any intention to make any such claim; and*

- (c) *any circumstances of which the indemnified becomes aware during the period of indemnity and which may (whether during or after the period of indemnity) give rise to any such claim.”*

12. The duty to notify Managers does not only arise upon the receipt or existence of a civil claim made by a third party against an IF (e.g. commencement of legal proceedings) or an intended third party civil claim (e.g. receipt of an oral demand/ complaint or a pre-action letter), it also arises when the IF is aware of a circumstance which may give rise to any such claim (e.g. discovery of a deadline being missed before the relevant client was informed).

For further information on the notification obligations under the PIS, please refer to Managers’ Explanatory Note entitled “Notification obligation under the Professional Indemnity Scheme” dated 23 December 2020.

13. If an IF fails to comply with the above notification obligation and it results in prejudice or substantial prejudice to the handling or settlement of a claim, indemnity provided under the PIS in respect of that claim will be limited or refused. (Paragraphs 1(2)(vii) and 7(1) of Schedule 3 to the Rules)

Obligation not to admit liability for, settle any claim or incur any costs

14. An IF must not admit liability for, or settle any claim where indemnity is provided under the PIS, or incur any costs or expenses in connection therewith, without the prior consent of the Company. (Paragraph 8(1)(a) of Schedule 3 to the Rules)
15. Similar to the notification obligation, if any failure to comply with the above results in prejudice or substantial prejudice to the handling or settlement of a claim, indemnity provided under the PIS in respect of that claim will be limited or refused. (Paragraphs 1(2)(vii) and 7(1) of Schedule 3 to the Rules)

Obligation to pay the amounts not covered by PIS

16. Under the PIS, certain item or amount of a claim may be excluded from or not covered by indemnity as provided in the Rules (the “**Non-Covered Amount**”), which includes:-
- (a) the Deductible and Further Deductible payable by an IF.
 - (b) the direct or indirect loss of an IF’s fees or profit costs.
 - (c) the difference in the amount payable to the claimant resulting from the prejudice caused by an IF’s non-compliance with the Rules.
17. Where an IF is demanded to pay the Non-Covered Amount, every principal of the IF is obliged to pay the Non-Covered Amount. Failure to pay such sum without reasonable excuse is an event of professional misconduct. (Rule 15 of the Rules)

18. In the event that the IF fails to pay the Non-Covered Amount upon demand and the Company pays the same on behalf of the IF (the “**Outstanding Sum**”), each principal of the IF is severally liable to pay the Outstanding Sum and interest thereon to the Company. (Rule 16 and paragraphs 1(1) and 7 of Schedule 3 to the Rules)

Obligation to give information and assistance / duty to cooperate

19. When an IF makes a claim for indemnity under the PIS, the IF is required to give all information and assistance reasonably required by the Claims Committee and Panel Solicitors for indemnity investigation and handling of the claim. (Paragraph 8(10) of Schedule 3 to the Rules)
20. If the Company takes over conduct of the defence and settlement of a claim in the name of the IF, the IF must at their own costs give all reasonable assistance to the Company and Panel Solicitors and co-operate in the defence and settlement of the claim. (Paragraph 8(1)(d) of Schedule 3 to the Rules)
21. It is important to note that pursuant to Rule 18(1) of the Rules, Panel Solicitors may report to the Claims Committee (a) the failure or refusal of an IF to co-operate with Panel Solicitors concerning a claim or (b) if it appears to the Claims Committee that there may have been professional misconduct, the Claims Committee may inform the Council of full details. The Council may then take any action as it sees fit. (Rule 18 of the Rules)

Obligations vis-à-vis the “Counsel Clause”

22. If there is a difference or dispute between the Company and an IF as to the contest, defence, settlement or otherwise of a claim, it is mandatory for the Claims Committee to refer the difference or dispute to a Counsel (to be mutually agreed by the IF and the Company or failing agreement to be appointed by the President of the Law Society of Hong Kong) for a determination. (Paragraph 8(1)(c)(i) of Schedule 3 to the Rules)
23. When the above dispute resolution mechanism (i.e. the “Counsel Clause”) is triggered, it is a condition precedent for the IF to pay a deposit to the Company in an amount fixed by the Claims Committee as security for costs of the reference to the Counsel (the “**Deposit**”). The amount of the Deposit fixed by the Claims Committee is currently HK\$300,000. If the IF fails to pay the Deposit by the stipulated deadline, the IF will be bound by the decision of the Claims Committee in respect of the difference or dispute in question. (Paragraph 8(1)(c)(v) and (vi) of Schedule 3 to the Rules)
24. After the “Counsel Clause” is triggered and the appointed Counsel determines that a claim should be settled, an IF cannot unreasonably (a) refuses to consent to or to accept the settlement or (b) continues the relevant legal proceedings. (Paragraph 8(1)(b) of Schedule 3 to the Rules)

Conclusion

25. As non-compliance of any provision of the Rules may result in adverse consequences on an IF, it is important to be aware of these obligations and to ensure their compliance.

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