Comment

NATURE AND LIABILITY SHIELD OF LIMITED LIABILITY PARTNERSHIPS IN SINGAPORE

In 2005, the Singapore Parliament passed the Limited Liability Partnerships Act after having studied the approaches adopted by other jurisdictions (especially UK and US). With an eclectic mixture of provisions, this Act has arguably given rise to a business structure that can be considered a novel corporate business vehicle somewhat different from its US predecessor and bearing a stronger resemblance to its UK counterpart. The article will examine the conceptual nature of the limited liability partnership spawned by this statute and the extent of liability shield afforded to such partners.

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I. Introduction

1 The developments that led to the enactment of the Limited Liability Partnerships Act[1] ("LLPA") may be traced to the 1997-1998 Asian financial crisis which prompted the Singapore Government to embark on a systematic overhaul of the nation's economic infrastructure. In December 1999, the Company Legislation and Regulatory Framework Committee ("CLRFC") was appointed by the Ministry of Finance, Attorney-General's Chambers and Monetary Authority of Singapore to "undertake a comprehensive and coherent review of company law and regulatory framework and recommend a modern company law and regulatory framework for Singapore which accords with global standards and which will promote a competitive economy".[2] One of the major proposals put forward by the CLRFC in October 2002 was to introduce

1 Enacted in April 2005 by Singapore Parliament which took into consideration public feedback received after the introduction of Limited Liability Partnerships Bill in October 2004.

2 Consultation Paper prepared by CLRFC (chaired by Dr P Pillai), October 2001, p 1 <http://www.saicsa.org.sg/documents/clrfc_consultation_paper231001.PDF> (accessed 10 September 2007).

new business structures[3] in order to offer "market players more options in deciding how they want to structure their businesses."[4]

2 With the benefit of hindsight gleaned from the experience of other pioneering jurisdictions which had already introduced LLPs, the CLRFC took the view that the Delaware Code "appears to be the more preferred model … [with] an orderly and seamless transition for an existing partnership to convert to an LLP".[5] The Study Team which the Ministry of Finance convened in November 2002 (to formulate the legal framework for the new business structures) thus asserted at the outset that their deliberations were "guided by the CLRFC's recommendation to model the Singapore LLP Bill after the Delaware Revised Uniform Partnership Act."[6]

3 However, the Study Team's final report (which was released in February 2004) additionally incorporated "other suitable discrete elements from the UK and Jersey legislation".[7] In fact, the LLPA has arguably given rise to a business structure that is conceptually different from that outlined in the Delaware blueprint. One may even view this new business entity as bearing a much closer resemblance to the UK counterpart; if this perception is indeed valid, it may be necessary to re-visit the central premise concerning the conceptual nature and extent of liability shield afforded to the individual members of such an entity (especially with regard to shielding errant partners accused of personal malpractices).

II. Nature of proposed LLP

4 To understand the operating parameters of the new business entity, one first needs to examine the wording of the LLPA which appears

3 See Recommendation 1.1, CLRFC Report, October 2002, summary and para 2.8 <http://www.agc.gov.sg/publications/docs/CLRFC_Oct_2002.pdf> (accessed 10 September 2007).

4 See Ministry of Finance's press statement on 22 October 2002, "Singapore Reforms Company Law" <http://app.mof.gov.sg/news_press/pressdetails.asp?pressID=75> (accessed 10 September 2007).

5 CLRFC Report, *supra* n 3, ch 1, paras 2.7-2.8.

6 See co-chairmen's cover letter addressed to Deputy Prime Minister and Minister of Finance (attached to Study Team's Final Report), 27 February 2004, para 3 <http://app.mof.gov.sg/data/050404_02.pdf> (accessed 10 September 2007).

7 *Ibid*.

to be an eclectic mixture of provisions borrowed from different jurisdictions (as indicated in brackets in the following extracts):

> S 4 – Separate Legal Personality
>
> (1) A limited liability partnership is a body corporate which is formed by being registered under this Act and which has legal personality separate from that of its partners.
>
> [UK LLPA 2000 s 1(2)]
>
> (2) A limited liability partnership shall have perpetual succession.
>
> (3) Any change in the partners of a limited liability partnership shall not affect the existence, rights or liabilities of the limited liability partnership.
>
> [UK LLPA 2000 s 1(2); Jersey LLP Law 1997 art 2(4)]
>
> s 5 – Capacity
>
> A limited liability partnership shall, by its name, be capable of —
>
> (a) suing and being sued;
>
> (b) acquiring, owning, holding and developing or disposing of property, both movable and immovable;
>
> (c) having a common seal; and
>
> (d) doing and suffering such other acts and things as bodies corporate may lawfully do and suffer.
>
> [Singapore Companies Act (Cap 50, 1994 Ed) s 19(5)]
>
> S 6 – Non-applicability of Partnership Law
>
> Except as otherwise provided by this Act, the law relating to partnerships shall not apply to a limited liability partnership.
>
> [UK LLPA 2000 s 1(5)]

5 It is evident from s 4 of Singapore LLPA that the new business entity is a body corporate formed by being registered under the Act and is a separate legal entity from its partners. This provision has clearly been extracted from s 1(2) of UK LLPA where their LLP entity is unambiguously portrayed as a corporate vehicle.

6 In addition, it may be inferred from the items listed in s 5 of Singapore LLPA that this new business entity has been imbued with attributes that are characteristic of a company incorporated under the Singapore Companies Act. Accordingly, a local LLP is allowed to, *inter alia*, own property, enter into contracts, sue and be sued in its own name,

and perform "such other acts and things as bodies corporate may lawfully do."

7 Furthermore, many of the provisions incorporated into Singapore LLPA (including the Schedules) have been derived from the Singapore Companies Act; examples include the provisions relating to accounts and audit,[8] restriction of undischarged bankrupts acting as managers[9] and disqualification of managers.[10] There is even a provision that regards the new business entity as a body corporate for the purposes of offences committed.[11] Much like a company, the local LLP also possesses perpetual succession.[12] Additionally, the Fourth and Fifth Schedules have made extensive references to the Singapore Companies Act on issues concerning receivership and winding up. In contrast, little has been drawn from the Singapore Partnership Act which has been specifically excluded[13] from application to the new business entity (with the exception of certain internal management provisions serving as a default constitution for the Singapore LLP in a manner not dissimilar to its UK counterpart).[14] Hence, the LLP conceived by statute is apparently more akin to a corporation and seems rather unconnected to a partnership.[15]

8 In contrast, the US Delaware position is governed largely by partnership principles. It is important to note that there was actually no intention in the US to create a new or separate corporate vehicle for the LLP[16] which was spawned via amendments to their ordinary partnership statute, *viz* Revised Uniform Partnership Act ("RUPA"), instead of via the

8 Section 25 of Singapore LLPA *cf* s 199 of Singapore Companies Act.
9 *Id*, at s 33. The LLP manager (see s 23 of Singapore LLPA) performs a role similar to the company director; hence, these LLP provisions are borrowed from Singapore Companies Act and applied *mutatis mutandis*.
10 *Id*, at ss 34-36, *cf* s 149 and s 154 of Singapore Companies Act.
11 *Id*, at s 50.
12 *Id*, at s 4(2)
13 *Id*, at s 6.
14 The only reference to partnership law in Singapore LLPA is in the First Schedule which provides default provisions for the LLP's constitution and was derived from UK LLP Regulations (which in turn were derived from UK Partnership Act).
15 M Twomey, "Protection For Partners From Unlimited Liability In Certain Circumstances" [2003] Co Lawyer 86 at 87. See also M Blackett-Ord, "Limited Liability Partnerships And Problems With Legal Uncertainty" [2002] NLJ 152.
16 See M Twomey, *ibid*; J Naylor, "Is The Limited Liability Partnership Now The Entity Of Choice For Delaware Law Firms?" [1999] Delaware J Corp Law 145; and CJ Miller, "LLPs: How Limited Is Limited Liability?" [1997] J Missouri Bar 129 <http://www.mobar.org/journal/1997/mayjun/index.htm> (accessed 9 September 2007).

enactment of new legislation as in the UK and Singapore. In fact, § 15-202(a) of RUPA states that "a limited liability partnership is for all purposes a partnership." As can be seen from the following RUPA provisions, the Delaware LLP is a business vehicle that retains the fundamental aspects of the partnership with the added significant feature of, *inter alia*, limited liability for its members:[17]

> § 15-201 – Partnership as Entity
>
> (a) A partnership is a separate legal entity which is an entity distinct from its partners unless otherwise provided in a statement of partnership existence and in a partnership agreement.
>
> (b) A limited liability partnership continues to be the same entity that existed before the filing of a statement of qualification under Section 15-1001.
>
> (72 Del Laws, c 151, § 1; 72 Del Laws, c 390, § 11)
>
> § 15-306 – Partner's Liability
>
> (c) An obligation of a partnership incurred while the partnership is a limited liability partnership, whether arising in contract, tort or otherwise, is solely the obligation of the partnership. A partner is not personally liable, directly or indirectly, by way of indemnification, contribution, assessment or otherwise, for such an obligation solely by reason of being or so acting as a partner.

9 Another point to note for US partnerships is that RUPA has already adopted the entity theory and partners are thus accorded a separate legal entity status under the Delaware Code. Extrapolating from the entity theory, RUPA makes a partner an agent of the partnership[18] with no mention of mutual agency.[19] In terms of liability, however, all of the partners are jointly and severally[20] liable unless the partnership is an LLP[21] (with its limited-liability shield excepting it from this joint and several liability obligation). Such a position is structurally different from that of the general partnership in Singapore (as well as the UK) where no separate entity status has been accorded to general partnerships; hence, a seamless transition to the Delaware LLP structure may not be readily

17 Delaware LLP members are shielded from both contractual obligations and tortious liabilities of the LLP (§15-306 of Delaware RUPA). See also CLRFC Report, *supra* n 3, para 2.8.

18 § 15-301 of Delaware RUPA.

19 It would have made them mutually responsible for partnerships obligations.

20 § 15-306 of Delaware RUPA.

21 *Id*, at § 15-306(C).

arranged for an ordinary Singapore partnership unless the basic partnership model[22] is imbued with an entity status as per the Delaware model. In contrast, the Singapore LLP comes into being by registration of a 'body entity' or a partnership converting into a LLP.[23]

10 The Delaware LLP is bound by "the large body of already existent general partnership law, in so far as the partnership law is not in conflict with the provisions of the state LLP statute";[24] in other words, partnership ethos applies. On the other hand, the corporate model (which Singapore has borrowed from the UK LLP) impels the application of corporate ethos and principles;[25] such a model is inconsistent with the preference implicit in the Study Team's acknowledgement that "the popularity of the Delaware model stems from its approach which regards LLPs primarily as partnerships instead of treating them as companies as in the UK."[26]

11 Although bearing a fraternal relationship with the UK model, the structure adopted for Singapore LLPs is not a facsimile of that for UK LLPs. Neither does it conform to the Delaware partnership-variant model as advocated by the CLRFC. The Singapore model has drawn on an eclectic mixture of provisions comprising discrete portions from various jurisdictions[27] (including the Singapore Companies Act), the upshot being that the LLP introduced here is more of a novel corporate business vehicle.

III. Liability of LLP and its partners

12 One of the principal issues for any LLP model concerns the extent of liability protection accorded to the members of the business

22 Under Singapore Partnership Act (Cap 391, 1994 Rev Ed). It ought to be noted that the UK Law Commission recently recommended (after a review of UK Partnership Act) that the entity theory should be adopted in which partnerships would have been considered as legal entities: Law Comm No 283 and Scottish Law Comm No 192, November 2003, Report on Partnership Law, part V – Separate Legal Personality <http://www.lawcom.gov.uk/docs/lc283.pdf> (accessed 9 September 2007).

23 See s 14, s 16, s 20 and s 21 of Singapore LLPA.

24 J Naylor, *supra* n 16 at 155.

25 As noted in para 14 of Stationery Office's Explanatory Notes attached to UK LLP Act, "the LLP's existence as a corporate entity means that the effect of the general law is different in comparison with a partnership."

26 Final Report compiled by Study Team on LLPs, February 2004, para 4.3 <http://www.agc.gov.sg/publications/docs/Limited_Liability_Partnership_Final_Mar_2002.pdf> (accessed 9 September 2007).

27 Primarily from UK, Delaware and Jersey jurisdictions (with company law provisions from Singapore Companies Act also included).

entity for liabilities incurred in the course of business. The following partner-liability provision[28] in the Singapore LLPA has been adapted from, *inter alia*, the Delaware model[29] (in accordance with the Study Team's recommendation):[30]

> S 8 – Limited Liability of Partners
>
> (1) An obligation of the limited liability partnership whether arising in contract, tort or otherwise, is solely the obligation of the limited liability partnership.
>
> (2) A partner is not personally liable, directly or indirectly, by way of indemnification, contribution, assessment or otherwise, for an obligation referred to in subsection (1) solely by reason of being a partner of the limited liability partnership.

13 It is evident from this provision that Singapore legislature has opted for complete shield protection and innocent partners or members of the LLP are accordingly protected for tortious as well as commercial contractual obligations in the course of business.

14 This limitation of liability does not pose any conceptual obstacle as it blends with the corporate entity theory providing for the LLP's separate legal personality.[31] However, the limited-liability shield offered to Singapore LLPs is, in principle, an extrapolation of the LLP's corporate entity whereas the corresponding shield for Delaware LLPs is added as an exception to the general partner's liability. In jurisdictions such as the UK, this different theoretical underpinning of liability limitation has thrown up some nettlesome controversy in the area of tortious liability.

A. Malpractice of LLP partners

15 In the US, general legal principles dictate that the tortfeasor bears responsibility for his professional misconduct. Membership of an LLP does not absolve such a partner from his own personal misdeed. In fact, various US jurisdictions even have statutory provisions maintaining that the errant partner remains liable for the loss caused by his own negligence, misfeasance or omission.[32]

28 One of the few replications from Delaware RUPA.
29 § 15-306(C) of Delaware RUPA.
30 See Report of Study Team on LLPs, *supra* n 26, para 10.1.3.
31 Section 4(1) of Singapore LLPA.
32 The Texas legislation, for example, spells this out; see Texas Business Organisation Code 2004, Sub-chapter J (Limited Liability Partnership), s 152.801. See also

16 This US position seems to be favoured too by the Study Team and CLRFC, both of them agreeing that:

> the LLP structure should not insulate a partner from the liability which he would otherwise incur to any person (which may include the LLP and/or a person dealing with the LLP) under law by his own wrongful acts or omissions even though such acts or omissions of his are carried out or occur in his role as a partner of the LLP.[33]

17 Their preference that a LLP partner should still be personally liable for his own wrongful acts or omissions (even though such acts are carried out in his role as a partner of the LLP)[34] has clearly been accepted by the government.

18 In stark contrast, the legal position of the individual partner is rather ambiguous in the UK as their LLP statute (enacted in 2000) has included the following governing provision which had attracted controversy because of its particularly chequered history:

> s 6(4) Where a member of a limited liability partnership is liable to any person (other than another member of the limited liability partnership) as a result of a wrongful act or omission of his in the course of the business of the limited liability partnership or with its authority, the limited liability partnership is liable to the same extent as the member.

19 Tracing the background of this UK provision helps to shed some light on the inherent problems. Actually, the drafters of the original provision in the UK LLPA had initially thought[35] that the position would not be different from the US counterpart as the individual member of the LLP ought to be liable for his own negligent advice. At the time, these drafters relied on *Williams v Natural Life Foods*[36] where the Court of Appeal found the company director to have personally assumed responsibility and should thus be liable for his own negligent advice.[37]

s 16306(e) of California Corp Code UPA 1994 and art 5 of LLP (Jersey) Law 1997. In addition, § 15-306(D) of Delaware Code had previously contained a similar provision that the liability protection shield "shall not affect the liability of a partner … for such a partner's own negligence or wilful misconduct" but this provision was subsequently deleted because it was deemed superfluous.

33 Report of Study Team on LLPs, *supra* n 26, para 10.1.3.

34 See Report of Study Team on LLPs, *supra* n 26, para 4.1.

35 J Freedman, "Limited Liability Partnerships In United Kingdom: Do They Have A Role For Small Firms?" [2001] J Corp Law 898 at 910.

36 [1996] 1 BCLC 288.

37 As evident in para 10 of House of Lords' explanatory notes to the Bill; see J Freedman, *supra* n 35 at 911.

During the passage of legislation, however, the appellate *Williams* decision had been reversed by the House of Lords[38] which found no assumption of liability on the part of the errant director. The decision has generally been thought to have been justified on the basis of protecting the sacrosanct principles of corporate law – the company's separate legal personality and the protection afforded by limited liability.[39] Interestingly enough, the *Williams* case is not without its detractors.[40] Controversy erupted yet again after the Court of Appeal found the professional surveyor of a sole principal liable for negligence in *Merrett v Babb*[41] (where the assumption of responsibility was attributed to the fact that Merrett had signed the valuation report in his personal capacity as a professional).[42] The difficulty in this particular area revolves round the attribution of responsibility to the individual professional for his negligence in the course of carrying out work for which the LLP has been retained.[43]

20 In the wake of the House of Lords' reversal of the Court of Appeal's decision in the *Williams* dispute, the UK legislators attempted to submit a clarifying amendment[44] that the interposition of the LLP should not have any impact on the individual responsibility of the member for

38 [1998] 1 WLR 830. See *Customs & Excise Commissioners v Barclays Bank* [2007] 1 AC 181 and *Noel v Poland* [2001] 2 BCLC 645; *cf Standard Chartered Bank v Pakistan National Shipping Corp (No 2)* [2003] 1 AC 959 where fraud was involved. See also *TS&B Retail Systems v 3Fold Resources* (No 3) [2007] WL 1303036 (Federal Court of Australia); *contra Interchase v Grosvenor Hill* (No 3) [2003] 1 Qd R 26 (Supreme Court of Queensland). For comments, see F Reynolds, "Personal Liability Of Company Directors In Tort" (2003) 33 HKLJ 51; and G Shapira, "Liability Of Corporate Agents" [1999] Co Lawyer 130.

39 However, the case attracted its fair share of detractors who argued that the decision was not justifiable on corporate principles; see Z Cohen, "Directors' Negligence Liability To Creditors – A Comparative And Critical View" [2001] J Corp Law 351.

40 See, *eg*, Z Cohen, *ibid*; J Armour, "Corporate Personality And Assumption Of Responsibility" [1998] LMCLQ 246; and S Watson and A Willekes, "Economic Loss And Directors' Negligence" [2001] JBL 217; *cf* R Grantham and C Rickett, "Directors' Tortious Liability: Contract, Tort Or Company Law?" (1999) 62 MLR 133.

41 [2001] QB 1174. See also *Customs & Excise Commissioners v Barclays Bank*, *supra* n 38; *Bluett v Suffolk County Council* [2004] EWCA Civ 1707; and *Yazhou Travel Investment v Bateson* [2004] 1 HKLRD 969.

42 See J Whittaker, "Professional LLPs: Liability In Negligence After *Merrett v Babb*" [2002] JBL 601.

43 *Id*, at 605.

44 See 608 Parl Deb HL (5th ser) col 1381 for their suggested amendment:

> Any member of a limited liability partnership shall be personally liable in tort … to any person for his own acts of omission … to the same extent as he would have been liable if the limited liability partnership had been a partnership subject to the provision of the Partnership Act 1890 and of which that member was a partner.

his misfeasance. It is regrettable that the UK government did not support the submission, preferring instead to leave the clarification to the general development of law which will naturally take some time before the matter can be unambiguously resolved.

21 As for Singapore, it was surprising that the draft LLP Bill originally imported this controversial UK provision without any clarifying clause despite the expressed preference of both the Study Team and CLRFC that "the LLP structure should not insulate a partner from the liability which he would otherwise incur to any person under law by his own wrongful acts or omissions even though such acts or omissions of his are carried out or occur in his role as a partner of the LLP."[45] Any wholesale adoption of this particular provision from the UK LLPA (without any additional clarifying clause) might have led to the inference that its interpretation would impel the application of corporate principles to the Singapore LLPs. Apart from granting LLP partners greater protection than would have been warranted,[46] such a lateral transposition could even hamstring the development of LLPs in Singapore since the open-ended UK position had already been (and might continue to be) plagued by vexatious cases such as *Williams* and *Merrett* which at times proved rather difficult to reconcile. Indeed, it would not have been progressive for the courts in Singapore to be persuaded by the views of UK judges concerning what should probably be a policy approach[47] in giving pre-eminence to corporate doctrines (as opposed to that of ensuring the individual responsibility for his tortious acts). The criticism levied by commentators against this UK provision ought to be heeded:

(a) "The effect … of giving precedence to company law is that all professional advisors could give advice carelessly."[48]

(b) "Commentators are divided on the question as to whether or not even wrongdoing members are personally

45 Report of Study Team on LLPs, *supra* n 26.
46 V Finch and J Freedman, "The Limited Liability Partnership: Pick And Mix Or Mix-Up" [2002] JBL 475 at 484. See also G Morse, "Partnerships For The 21st Century? – Limited Liability Partnerships And Partnership Law Reform In The UK" [2002] SJLS 455.
47 See J Whittaker, *supra* n 42 at 606.
48 S Watson and A Willekes, *supra* n 40 at 220.

liable. It is regrettable that there should be any lack of clarity on so fundamental an issue …"[49]

(c) "Where LLPs lie [on this issue of guilty partner's liability] has been left to courts and to further litigation. This seems a strange decision given that LLPs were designed to clarify partner's liability."[50]

22 Taking into account the feedback[51] received during the public consultation period, Singapore Parliament fortunately included an additional clarifying clause in the LLPA which expressly provides for the personal liability of an 'errant' partner in Singapore:

> s 8(3) Where Subsections (1) and (2) shall not affect the personal liability of a partner in tort for his own wrongful act or omission, but a partner shall not be personally liable for the wrongful act or omission of any other partner of the limited liability partnership.[52]

23 The addition of this clarifying clause will disallow errant and irresponsible partners from hiding behind the LLP shield to avoid liability for personal negligence – a vast improvement from the previous position in the draft LLP Bill. Singapore has thus sought to avert the UK controversy, and the oft-criticized case of *Williams* either has no direct application or may be viewed with circumspection in the local context.

B. Direct supervisory responsibility

24 Will a LLP partner who has been supervising another partner (or one of the firm's employees) be liable for the latter's wrongful acts? At present, the Singapore LLPA is silent on this issue which may be of some concern for professional LLPs where supervisory monitoring ought to be encouraged.

49 M Lower, "What's On Offer? A Consideration Of The Legal Forms Available For Use By Small And Medium-Sized Enterprises In The United Kingdom" [2003] Co Lawyer 165 at 168.

50 J Freedman, *supra* n 35 at 911.

51 See, *eg*, HY Yeo, "Liability Of Partners In A Limited Liability Regime" (2003) 15 SAcLJ 392 at 397 where it was argued that there should be statutory clarification to avoid the *Williams* controversy.

52 This provision is adapted from s 16306(e) of California Corp Code UPA 1994 which is not dissimilar to the spirit of the attempted clarifying amendment that was scuttled during its passage through UK legislature; see text to n 44. The Texas LLP legislation also spells this out along similar lines; see Texas Business Organisation Code 2004, Sub-chapter J (Limited Liability Partnership), s 152.801.

25 In the US, the LLP statutes of many states do impose supervisory liability. There is actually no common approach that is uniformly accepted across the US for imposing such supervisory liability upon LLP partners;[53] the basis adopted in most of these states is that the LLP partner must have exercised both 'supervision and control'[54] in a "direct" manner[55]. Of particular interest is the LLP statute in Texas[56] where a partner may be insulated from vicarious responsibility for the negligence of other partners and employees under his direct supervision or control provided that he neither knew of such negligence when it occurred nor failed to take appropriate action at the time.

26 If Singapore legislature should decide in the future on the need to impose supervisory liability upon LLP partners, it is suggested that the basis employed by the Texan statute[57] may be suitably adapted: there must be both 'supervision and control' exercised by the supervising partner in a 'direct' manner (rather than a casual level of supervision or control). In addition, there must be close involvement in supervision and control *in connection with the actual work for a matter or client* (rather than general responsibility for a matter or client).[58]

27 On the other hand, imposing personal liability on the LLP partner for the wrongful acts of another partner or employee under his direct supervision and control may prove to be double-edged. Partners will naturally be less willing to participate in the LLP's management and

53 SS Fortney, "Professional Responsibility And Liability Issues Related To Limited Liability Law Partnerships" 39 S Texas LR 399 at 439. See also CR Goforth, "Limiting The Liability Of General Partners In LLPs: An Analysis Of Statutory Alternatives", 75 OrLR 1139 at 1154-1156.

54 Under the original Delaware statute, the partner (even if he is regarded as a supervisor) must also have control in order to be affixed with liability.

55 SS Fortney, *supra* n 53.

56 Tex Rev Civ Stat Ann art 6132b-§3.08. The original version of the Delaware statute explicitly stipulates that the privilege of limited liability "shall not affect the liability of a partner in a registered limited liability partnership for his own negligence, wrongful acts, or misconduct or that of any person under his direct supervision and control" Del Code Ann tit 6 Del C s 1515(c). This was replaced by a provision based on RUPA but adding that the liability limitation "shall not affect the liability of a partner in a limited liability partnership for such partner's own negligence or willful misconduct" Del Code Ann Tit 6 Del C s 15-306(d). That sub-section was deleted in a subsequent revision as the rationale was that the position was clearly being governed by general law principles for personal misconduct; see A R Bromberg and L E Ribstein, Bromberg and Ribstein on *Limited Liability Partnerships, Revised Uniform Partnership Act and Uniform Limited Partnership Act 2001* (Aspen Publishers, 2003) at p 123.

57 See Tex Rev Civ Stat Ann art 6132b-§3.08.

58 *Ibid.* See also Bromberg and Ribstein, *supra* n 56 at 164.

supervisory functions[59] due to the so-called 'pervasive incentive effects'[60] when faced with the risk of losing personal assets as a result of negligent monitoring (or the lack thereof) of one's supervisee. The matter is compounded by the lack of clear definition in the LLP statutes regarding the nature and degree of control that will subject the supervising partner to personal liability; in the US, for example, the statutes of those states which impose such supervisory liability do not offer LLP partners much guidance on the precise circumstances under which they would be considered as performing supervisory functions.[61] Will membership of an opinion committee or service as a team leader be enough to expose a partner to personal liability if he has no direct involvement in the alleged malpractice?[62] Is a supervisor strictly liable for the acts and omissions of subordinates or must a plaintiff first establish negligence in supervision? The lack of authority on this issue generates uncertainty which is very likely to affect the actions of LLP partners.[63] Since anecdotal evidence already suggests that young professionals may not always find it easy to seek mentorship under seasoned practitioners, one questions whether the insistence on imposing supervisory liability is irrefutably beneficial for society if senior members of the LLP are disinclined to draw upon the wealth of their experience to provide guidance for their younger colleagues.

28 The brute-force approach is for the LLP statute to mandate that professional practices must carry adequate malpractice coverage to address the liability exposure of supervisors. Alternatively, LLP partners may be required to indemnify a fellow partner for any losses incurred as a result of serving in such a supervisory capacity.[64] Even so, insurance protection or indemnification will only offer supervisors some measure of comfort to allay their fears when they take on supervisory duties but it still cannot help to eliminate all disincentives.

59 See Bromberg and Ribstein, *supra* n 56 at 127.

60 *Ibid*. See also L E Ribstein, "Limited Liability Of Professional Firms After Enron" [2004] J Corp Law 427 at 447; and SS Fortney, "Am I My Partner's Keeper? Peer Review In Law Firms" 66 U Colorado LR 329 at 334.

61 See Bromberg and Ribstein, *supra* n 56 at 123.

62 See SS Fortney "High Drama And Hindsight: The LLP Shield Post-Andersen" Business Law Today, January-February 2003, 43.

63 SS Fortney, *supra* n 53.

64 Texas initiated the requirement of insurance as a substitute for the partners' joint and several liability. It laid down an arbitrary figure of US$100,000. Later, it quantified the requirement as carrying at least US$100,000 of liability insurance of a form that is designed to cover the kinds of errors, omissions, negligence, incompetence or malfeasance if limited. See Tex Rev Civ Stat Ann Art 6132b3.08 Rev Civ Stat (d)(1).

29 At present, any recourse to common law will not be of much avail since there has not been much judicial guidance thus far on the direct supervisory liability of LLP partners. In the past, one could resort to partnership law to hold the entire partnership vicariously liable for the torts of partners if committed within the ordinary course of partnership business.[65] Given the current lack of track record for LLPs, however, perhaps the issue ought to be phrased as whether there is a duty on the LLP partner to supervise or monitor the work done by another partner or employee. One may proceed to argue that this is a matter to be determined by general tort law of negligence where the issue at hand then becomes whether the failure to monitor is tantamount to negligence or breach of duty. In the UK, there is a need to consider whether there has been an assumption of responsibility on the part of the supervisor to the injured third party as well as whether there has been reasonable reliance (or lack thereof) by the third party that the junior's work will be monitored. This may, in turn, be tied with the issue of imputing responsibility upon others with the possible need to additionally consider other ancillary questions such as:

> 30 (a) whether it is reasonable to delegate (and, if so, the exercise or lack of reasonable care with which the superintending professional has selected the person to whom performance was delegated); and
>
> 31 (b) whether reasonable care, where a duty is found to be owing, dictates that the work be vetted.[66]

32 Indeed, the question of supervisory responsibility should perhaps not be confined to the narrow context of LLP legislation. The crux of the issue actually lies in the broader concern of professional responsibility and good governance – a theme pertaining to the practice of law in general. As such, it might arguably be optimal to approach the question

65 JS Dzienkowski, "Legal Malpractice And The Multi-State Law Firm: Supervision Of Multi-State Officers; Firms As Limited Liability Partnerships" 36 S Texas LR 967 at 972.

66 AM Dugdale and KM Stanton, *Professional Negligence*, (Butterworths, 3rd Ed, 1998) pp 340-341. This becomes a direct liability claim rather than one of vicarious liability as in the partnership realm. In the US, the question of whether there is a duty to monitor remains open. See SS Fortney, *supra* n 60 at 344 regarding the possibility of breach of duty of care based on failure to comply with bar committee by-laws for supervising the junior members of the law firm.

from the broader vantage point of legal ethics and discipline.[67] Extrapolating further, one could even propose that this issue ought to be regulated by state legislature under the legal profession statutes instead of the LLPA. Would it not be in the public interest to mandate proper internal peer-review structure for risks and implement quality-control measures in each firm to monitor the acts of subordinates? The emergence of mega-size practices among professionals[68] such as accountants and lawyers is a modern phenomenon; for example, it is only recently that lawyers have been allowed to practise law in corporate form[69] with young lawyers who join such firms having to receive work from senior lawyers and partners.[70] Hence, this latest phase in the evolution of law firms behoves the legal profession to re-visit the question of professional responsibility. The benefit of such an internal peer review or supervisory set-up is that the reputation of the firm will be enhanced in the long run.

IV. Conclusion

33 The initiative to "create in the LLP a business structure which confers limited liability on its investors or partners while allowing them to retain the flexibility of operating the LLP as a partnership firm which has perpetual succession"[71] should prove to be beneficial for the Singapore economy where businessmen are actively encouraged to be creative when seeking new opportunities.

34 Teething problems may be expected during the initial phase of implementation. Whether the eclectic mixture of provisions incorporated into the LLPA will blend well with each other in practice must naturally be monitored closely. Of great relief is the final decision of legislature (after taking cognizance of public feedback) to insert the clarifying provision that the errant partner remains liable for the loss caused by his own negligence, misfeasance or omission. As for the responsibilities of

67 See JS Dzienkowski, *supra* n 65. However, see also SS Fortney, *supra* n 60 at 354 where she argues that the breach of disciplinary rule set up by bar committees (although not defining civil liability) may suggest breach of applicable standard of care and may influence the extent on duty to monitor peers.

68 See E Burger, "The Use Of Limited Liability Entities For The Practice Of Law: Have Lawyers Been Lulled Into A False Sense Of Security?" 40 Texas J Bus Law 175 at 192.

69 See JS Dzienkowski, *supra* n 65.

70 *Ibid*. For a historical and sociological take on this modern phenomenon, see SS Fortney, *supra* n 60.

71 Report of Study Team on LLPs, *supra* n 26, para 4.1.

supervisory partners, however, there ought to be clarification by statute when a supervisor could be found liable for his supervisee's misdeeds or negligence; alternatively, if *status quo* is preferred, the common law position on assumption of responsibility in the negligent spheres of economic loss should govern where liability can be imposed on the errant supervising partner.