

**Circular No 007/2016
Dated 7 Jan 2016**

To Members of the Malaysian Bar

Conveyancing Practice: Matters Relating to Professional Indemnity Insurance

A. Letter of Acknowledgment in Conveyancing Matters

In view of the possibility of a conflict of interest arising whenever a firm/solicitor acts for a Purchaser/Borrower as well as the Purchaser's financier in a conveyancing transaction, the Bar Council and the insurers for the Malaysian Bar have agreed that if the insured firm/solicitor obtains a Letter of Acknowledgment from the Purchaser/Borrower, the Base Excess stipulated in the Certificate of Insurance 2016 will apply in the event of a claim.

Clause 10(a) of the Certificate of Insurance 2016 states, in summary, as follows:

- (1) In a claim against a firm/solicitor where the firm/solicitor has acted for more than one party in a conveyancing of land/building transaction and/or in contravention of the applicable Bar Council rules on conflict of interest, the Base Excess stipulated in Item 9 of the Schedule of Insurance 2016 will **not** apply to that claim.
- (2) In such cases, the excess applicable to the claim will be a minimum of RM100,000 or **double** the Base Excess (Item 9 of the Schedule of Insurance 2016), subject to a maximum of RM300,000.

The insurers have agreed that if the insured firm/solicitor obtains, before conducting the transaction, a written confirmation from the Purchaser/Borrower stating that the latter acknowledges not to be represented in the transaction, then the Base Excess stipulated in Item 9 of the Schedule of Insurance 2016 **shall** apply if a claim arises as a result of that transaction.

Samples of the Schedule of Insurance 2016 (Attachment A) and Letter of Acknowledgment (Attachment B) are attached for your reference.

Attachment A: Sample Schedule of Insurance 2016

Each firm's Base Excess, referred to above, is stipulated in Item 9 of the Schedule of Insurance 2016, a sample of which is attached.

This amount varies from firm to firm, so please refer to your firm's Schedule to find out the applicable Base Excess. In addition, please refer to Clause 10 of the Certificate of Insurance 2016 to determine the exceptions to this Base Excess.

Attachment B: Sample Letter of Acknowledgment

Attached is a sample of the Letter of Acknowledgment that is to be executed by the Purchaser/Borrower in situations where the firm/solicitor acts for the Purchaser/Borrower in a Sale and Purchase transaction, and for the Financial Institution in the financing transaction. Please amend the waiver accordingly, to suit any other transaction where a situation of conflict may arise.

Failure to have this waiver executed **may** result in the increase in excess outlined in Clause 10(a) of the Certificate of Insurance 2016.

We urge Members involved in conveyancing matters to take note of the above and ensure that a written acknowledgment is obtained, to avoid an increase in excess in the event a claim is made against the firm/solicitor.

B. Blanket Letter of Undertaking and/or Indemnity by a Solicitor in Conveyancing Matters

Members are reminded of the following examples of what is generally accepted as a reasonable undertaking on the part of solicitors acting for banks:

- (a) *“The legal documentation is in order and is complete and should the Bank suffer any loss or damage by reason of the security documents not being registered for reasons attributable to or acts of negligence, error, mistake or omission and/or by reason of the aforesaid security documentation not being in order, we as the solicitors responsible for the preparation of the said legal documentation shall be responsible to make good to the Bank in full all such loss and damage.”*
- (b) *“In the event the charge is not registered for reasons attributable to our acts or negligence, error, mistake and/or by reason that the aforesaid security documentation not being in order resulting in the Bank sustaining or suffering any loss or damage arising therefrom, we as the solicitors responsible for the preparation and the presentation for registration of the charge shall be responsible to make good to the Bank in full all such loss and damage.”*
- (c) *“We confirm that the interest of the Bank is fully protected and that in the event the Bank’s position is compromised howsoever as a result of our acts or omission, we shall be responsible to the Bank.”*

Further to that, Members are reminded that the giving of “blanket” undertakings to banks is not advisable. The following is an example of such a blanket undertaking:

“We undertake to refund to you the Facilities in the event the charge is not or cannot be registered or if any of the security documents is not perfected or not enforceable for any reasons whatsoever and we shall make good to the Bank in full such loss and damages.”

Jardine Lloyd Thompson Sdn Bhd is of the view that, subject to the terms and conditions of the Malaysian Bar Professional Indemnity Insurance Mandatory Policy (“Mandatory Policy”):

- (a) the Mandatory Policy may not respond to claims arising from the giving of a blanket undertaking due to its scope; and
- (b) the Mandatory Policy is an indemnity policy, with its primary goal being to ensure compensation to those who suffer loss through the negligence of a solicitor. A blanket undertaking may involve issues extending beyond negligence, including misconduct or dishonesty that is not covered or has limited cover under the Mandatory Policy.

Members of the Bar are advised to take note of the important issues referred to above, and be guided accordingly.

Should you have any enquiries, please contact:

- Chuah Ying Ying, Executive Officer, by telephone at 03-2050 2106, or by email at yingying@malaysianbar.org.my; or
- the Bar Council Professional Indemnity Insurance and Risk Management Department, by telephone at 03-2032 4511, or by email at pirm@malaysianbar.org.my.

Thank you.

Low Beng Choo
Chairperson
Conveyancing Practice Committee

Ragunath Kesavan
Chairperson
Professional Indemnity Insurance Committee



APPENDIX 1

MALAYSIAN BAR

SCHEDULE ATTACHING TO AND FORMING PART OF THE MALAYSIAN BAR PROFESSIONAL INDEMNITY INSURANCE CERTIFICATE AS PART OF MASTER POLICY NO. 129715U7000009					
1.	CERTIFICATE NO.	:	2016/M/ ____ / ____		
2.	INSURER	:	Pacific & Orient Insurance Co. Berhad (12557-W) 11 th Floor, Wisma Bumi Raya No. 10, Jalan Raja Laut, P.O. Box 10953 50730 Kuala Lumpur (and its successors or assigns)		
3.	NAMED INSURED	:	(As per Attachment 1 to this Schedule)		
4.	THE FIRM	:			
5.	ADDRESS	:	(and all branches within West Malaysia)		
6.	PERIOD OF INSURANCE	:	From 1 st January 2016 to 31 st December 2016 at midnight Malaysian Time		
7.	MANDATORY LIMIT OF INDEMNITY	:	RM		each and every claim (subject to sub-limit in respect of Misconduct)
8.	SUB-LIMIT IN RESPECT OF MISCONDUCT	:	RM	350,000.00	in the aggregate (subject to Firm's Mandatory Limit, whichever is lower)
9.	BASE EXCESS	:	RM		each and every claim (subject to Clause 11 of the Certificate of Insurance)
10.	PREMIUM INCLUSIVE OF 6% GOODS & SERVICES TAX	:	RM		
11.	STAMP DUTY	:	Paid on the Master Policy		
		SIGNED FOR : Pacific & Orient Insurance Co. Berhad S. KRISHNA MURTHIE General Manager Business Development, Underwriting			
The insurance is subject to the terms of the <u>Master Policy No. 129715U7000009</u> and the 2016 Certificate of Insurance.					



Attachment B: Sample Letter of Acknowledgment

ACKNOWLEDGMENT OF LEGAL REPRESENTATION

To: *[firm of solicitors concerned]*

Re: Loan/facility amount : RM _____
 Financier :
 Borrower(s) :
 Chargor(s) :
 Security :

I/we, the undersigned, expressly acknowledge the following:

1. I am/We are the abovenamed Borrower(s)/Chargor(s).
2. I am/We are fully aware, and hereby acknowledge, that *[name of firm of solicitors and address]* ("the said Solicitors") are solicitors acting only for the abovenamed Financier in the above loan documentation, and that the said Solicitors are **not** representing me/us in the matter; notwithstanding that they witness or attest my/our execution of the relevant documents, or that I/we have agreed to bear their fees on behalf of the Financier, or that they may be acting (or have acted) for me/us in any other related or unrelated matter.
3. I/We have been advised, and am/are fully aware, that I am/we are at liberty to engage separate and independent legal representation in the matter. However, I/we have chosen not to do so, while being fully aware that, should situations arise where the Financier's interest is in conflict with my/our interest, the said Solicitors' duty would be owed to the Financier and not to me/us.
4. The contents of this acknowledgment have been explained to me/us and I/we fully understand the same.

Dated _____

Name:

NRIC no: