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# Improvement of Corporate Insolvency Law

## Legislative Proposals | *Consultation Document*

April 2013

Financial Services and the Treasury Bureau
www.fstb.gov.hk

## ABOUT THIS DOCUMENT

1. This paper is published by the Financial Services and Treasury Bureau ("FSTB") of the Government of Hong Kong Special Administrative Region to consult the public on the key issues of the corporate insolvency.

2. After considering the views and comments received, we aim to introduce an amendment bill into Legislative Council in 2014.

3. A List of questions for consultation is set out for ease of reference after Chapter 6. Please send your comments to us on or before **15 July 2013** by one of the following means:

   By mail to: Division 4
   Financial Services and the Treasury Bureau
   15/F, Queensway Government Offices
   66 Queensway
   Hong Kong

   By fax to: (852) 2869 4195

   By email to: corporate_insolvency_law@fstb.gov.hk

4. Any questions about this document may be addressed to Mr Denny HO, Assistant Secretary for Financial Services and Treasury (Financial Services), who can be reached at (852) 2527 3102 (phone), (852) 2869 4195 (fax) or dennyho@fstb.gov.hk (email).

5. This consultation paper is also available on the FSTB's website http://www.fstb.gov.hk/fsb and the website of the Official Receiver's Office http://www.oro.gov.hk.

6. Submissions will be received on the basis that we may freely reproduce and publish them, in whole or in part, in any form, and use, adapt or develop any proposal put forward without seeking permission or providing acknowledgment of the party making the proposal.

7. Please note that the names of respondents, their affiliation(s) and comments may be posted on FSTB's website or referred to in other documents we publish. If you do not wish your name or affiliation to be disclosed, please state so when you make your submission. Any personal data submitted will only be used for purposes which are directly related to consultation purposes under this consultation paper. Such data may be transferred to other Government departments/agencies for the same purposes. For access to or correction of personal data contained in your submission, please contact Mr Denny HO (see paragraph 4 above for contact details).

**CONTENTS**

# ABBREVIATIONS

| | |
|---|---|
| CO | Companies Ordinance (Cap. 32) |
| The new CO | Companies Ordinance (Ord. No. 28 of 2012) |
| UK | United Kingdom |
| ORO | Official Receiver's Office |
| LegCo | Legislative Council |
| Registrar | Registrar of Companies |
| CWUR | Companies (Winding Up) Rules (Cap. 32H) |
| OR | Official Receiver |
| COI | Committee of inspection |
| BO | Bankruptcy Ordinance (Cap. 6) |
| PIP | Private insolvency practitioner |

# EXECUTIVE SUMMARY

1. The nature of doing business generally requires that companies operate on credit, which enables them to trade, develop and expand. Corporate insolvency law is necessary to resolve all claims against insolvent companies, and to provide a fair and orderly process for realising and collecting the assets of insolvent companies and distributing them among creditors. There is a need to conduct a comprehensive exercise to improve the corporate insolvency and winding-up provisions in the Companies Ordinance to ensure that our legislation provides an effective process of liquidation in Hong Kong and does not lag behind other major jurisdictions. Besides, it is also imperative to ensure that our corporate winding-up regime can keep up with latest developments in Hong Kong.

2. The underlying objectives of the corporate insolvent law improvement exercise are to facilitate more efficient administration of the winding-up process and increase protection of creditors through streamlining and rationalising the company winding-up procedures and enhancing regulation of the winding-up process having regard to international experience. An effective company winding-up process with due regard to the protection of creditors will facilitate the development of Hong Kong as a global major business centre and reinforce our position as an international financial centre.

3. Having regard to the objectives of the exercise, the Government has drawn up 46 legislative proposals to improve the corporate insolvency and winding-up provisions of the Companies Ordinance. These proposals cover the following five aspects of the winding-up process, namely –

   (a) the commencement of winding-up *(Chapter 2)*;

   (b) the appointment, powers, vacation of office and release of provisional liquidators and liquidators *(Chapter 3)*;

   (c) the conduct of winding-up *(Chapter 4)*;

   (d) voidable transactions *(Chapter 5)*; and

   (e) the investigation during winding-up, offences antecedent to or in the course of winding-up, and powers of the court *(Chapter 6)*.

4. In drawing up the legislative proposals, we have taken into account expert

advice of an Advisory Group chaired by the Official Receiver and comprising representatives from the business and financial sectors, relevant professions, private insolvency practitioners, the academic sector as well as members of the Standing Committee on Company Law Reform. Reference has been made to the relevant recommendations of the "Report on the Winding-up Provisions of the Companies Ordinance" issued by the Law Reform Commission in 1999 where appropriate.

5. The Government would like to invite comments on the legislative proposals set out in this consultation document to improve our corporate insolvency and winding-up regime. We will study carefully the comments received in preparing the necessary legislation. Our plan is to introduce an amendment bill into Legislative Council in 2014/15.

# Chapter 1

# INTRODUCTION

## Background

1.1 The fundamental purpose of corporate insolvency law is to resolve all claims against insolvent companies, and provide a fair and orderly process for realising and collecting the assets of insolvent companies and distributing them among creditors in accordance with the statutory scheme of distribution.

1.2 Corporate insolvency law is necessary because the nature of doing business generally requires that companies operate on credit, which enables them to trade, develop and expand. While corporate insolvency law cannot prevent a company from falling into financial difficulties, it ensures that the value of the remaining assets of the insolvent company will be preserved as far as possible and that the assets will be distributed amongst the creditors of the company, including its employees, suppliers and contractors, in a fair and orderly manner.

1.3 At present, the statutory provisions relating to Hong Kong's corporate insolvency and winding-up regime are principally contained in the CO, alongside the provisions concerning the operation of live companies. The Companies Bill, which is the result of a comprehensive review of the provisions concerning the operation of live companies in the CO, was enacted on 12 July 2012 as the new CO. When the new CO comes into operation, currently planned for the first quarter of 2014, most of the provisions concerning the operation of live companies in the CO will be repealed and the remaining provisions, including the insolvency and winding-up provisions, will be retitled as the Companies (Winding Up and Miscellaneous Provisions) Ordinance.

## Need for Review

1.4 The corporate insolvency and winding-up provisions in Hong Kong were first introduced in 1865 and those in the CO now are broadly based on the Companies Act 1929 and the Companies Act 1948 of the UK. The last major review of these provisions was conducted back in 1984[1].

[1] Companies (Amendment) Ordinance 1984 (Ord. No. 6 of 1984).

While a number of amendments have been made to various insolvency and winding-up provisions in the CO since then with focus on specific issues, some common law jurisdictions have embarked upon more extensive exercises to reform their corporate insolvency and winding-up laws. For example, in the UK, the recommendations in the Report of the Review Committee on Insolvency Law and Practice (commonly referred to as the "Cork Report") resulted in the enactment of the Insolvency Act 1986[2]. In Australia, its Law Reform Commission published a Report on its General Insolvency Inquiry in 1988 (commonly referred to as the "Harmer Report") which had led to substantial amendments to the Australian corporations law in 1993. Hence, there is a need to conduct a comprehensive review of the corporate insolvency and winding-up provisions in the CO to ensure that our legislation provides an effective process of liquidation in Hong Kong and does not lag behind other major jurisdictions.

1.5 Besides, it is also imperative to ensure that our corporate winding-up regime can keep up with latest developments in Hong Kong. For example, with the outsourcing of court winding-up cases[3] in the last ten years, ORO has been enhancing its role in regulating the administration of the winding-up process. It is timely now to review the existing provisions concerning the regulation of the winding-up regime to, inter alia, improve transparency for the appointment of PIPs and ensure that ORO will be equipped with the necessary legislative tools to exercise proper control over the administration of the winding-up process.

1.6 In view of the above, to consolidate Hong Kong's position as a major international business and financial centre and to ensure that our corporate insolvency and winding-up regime can keep up with latest developments and meet social and economic needs, it is necessary to improve Hong Kong's corporate insolvency and winding-up law so as to bring it abreast with those of comparable jurisdictions in terms of its effectiveness, efficiency and user-friendliness.

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[2] In response to the recommendations in the Cork Report issued in 1982, the Insolvency Act 1985 made substantial changes to the insolvency provisions of the Companies Act 1985. The Insolvency Act 1985 was replaced by the Insolvency Act 1986, which was a consolidating enactment that repealed and re-enacted the Insolvency Act 1985 and the insolvency provisions of the Companies Act 1985.

[3] In 2000, ORO began outsourcing court winding-up cases to PIPs under section 194(1A) of the CO. Since then, the vast majority of cases have been outsourced to PIPs.

**The Improvement Exercise**

1.7 The underlying objectives of the exercise are to facilitate more efficient administration of the winding-up process and increase protection of creditors through streamlining and rationalising the company winding-up procedures and enhancing regulation of the winding-up process having regard to international experience. An effective company winding-up process with due regard to the protection of creditors will facilitate the development of Hong Kong as a global major business centre and reinforce our position as an international financial centre.

1.8 Having regard to the objectives of the exercise, the Government has initiated a comprehensive review of the corporate insolvency and winding-up provisions of the CO. The review covers the following five aspects of the winding-up process, namely –

(a) the commencement of winding-up;

(b) the appointment, powers, vacation of office and release of provisional liquidators and liquidators;

(c) the conduct of winding-up;

(d) voidable transactions; and

(e) the investigation during winding-up, offences antecedent to or in the course of winding-up and powers of the court.

The different aspects of the winding-up process can be broadly illustrated in the diagrams in **Annex A**.

1.9 The OR chaired an Advisory Group comprising representatives from the business and financial sectors, relevant professions, PIPs, the academic sector as well as members of the Standing Committee on Company Law Reform. In the eight meetings held from January to October 2012, the Advisory Group provided useful technical inputs and expert advice to the Government on the legislative proposals to be included in the improvement exercise. The membership of the Advisory Group is set out in **Annex B.**

1.10 With the benefit of expert advice by the Advisory Group, the Government has drawn up a number of legislative proposals in the above five aspects of the winding-up process. In formulating these legislative proposals, reference has been made to the relevant recommendations of the "Report on the Winding-up Provisions of the Companies Ordinance" issued by the Law Reform Commission in 1999 where appropriate.

These legislative proposals are described in detail in the following chapters of this consultation document.

**Parallel actions in respect of proposals for a new statutory corporate rescue procedure and insolvent trading provisions**

1.11 At present, companies which are facing financial difficulties and wish to move forward instead of going into liquidation may try to come to an arrangement with their creditors by means of non-statutory voluntary workouts or restructuring arrangements under section 166 of the CO. However, these methods lack certainty as they do not provide for a moratorium that can bind creditors while an arrangement proposal is being formulated.

1.12 The Government introduced the Companies (Corporate Rescue) Bill[4] into LegCo in 2001 with a view to introducing a statutory corporate rescue procedure into our corporate insolvency regime. The Bill provided that an independent third party, namely the provisional supervisor, may be appointed to take over the management of the company, consider options for rescuing the company and prepare a voluntary arrangement on the achievable option for creditors' approval while a moratorium on legal actions and proceedings against the company takes effect during the provisional supervision. In order to encourage the management of a company in financial difficulty to act on insolvency earlier rather than later, the Government also sought to introduce at the same time insolvent trading provisions. However, due to concerns of LegCo Members at that time on a number of issues including, for example, how to deal with employees' outstanding entitlements under the proposed corporate rescue procedure, the Bill was not enacted.

1.13 Having critically reviewed the previous proposals, the Government conducted a public consultation in late 2009 on the conceptual framework and a number of specific issues relating to the corporate rescue procedure and insolvent trading provisions. Since the

[4] Prior to the introduction of the Companies (Corporate Rescue) Bill, the Government had previously included the legislative proposals on corporate rescue and insolvent trading as part of the Companies (Amendment) Bill 2000. However, due to time constraint and complexity of the issues involved, the Bills Committee on the Companies (Amendment) Bill 2000 recommended the Government to move committee stage amendments to remove the relevant provisions on corporate rescue and insolvent trading from the Bill, and then resubmit these provisions to the LegCo for consideration at a later stage. The Companies (Amendment) Ordinance 2000 was eventually enacted without the corporate rescue and insolvent trading provisions.

publication of the consultation conclusions on the review in July 2010[5], the Government has been studying the various other key issues relating to the corporate rescue procedure and insolvent trading provisions and working further on the detailed proposals. We plan to take forward the proposals of a new corporate rescue procedure and insolvent trading provisions as part of the corporate insolvency law improvement exercise. We will further consult stakeholders on the detailed proposals in 2013/14.

**Seeking Comments**

1.14 The Government would like to invite comments on the legislative proposals set out in this consultation document to improve our corporate insolvency and winding-up regime. The Government will study carefully the comments received in preparing the necessary legislation.

1.15 Subject to the outcome of the consultation, the Government plans to introduce an amendment bill, together with the provisions on corporate rescue and insolvent trading, into LegCo in 2014/15.

[5] Available at http://www.fstb.gov.hk/fsb/ppr/consult/doc/review_crplp_conclusions_e.pdf

# Chapter 2

## COMMENCEMENT OF WINDING-UP

### Background

2.1 The CO sets out a number of grounds on which a company may be wound up by the court[6] upon petition by a relevant party (generally referred to as a "**court winding-up**"). The more frequently invoked ones are –

(a) the company is unable to pay its debts; and

(b) the court is of the opinion that it is just and equitable that the company should be wound up.

A creditor, a contributory (e.g. a member of the company) and the company itself are amongst those who may present a petition to the court for the winding-up of a company.

2.2 The CO also sets out the circumstances in which a company may be wound up voluntarily[7]. The members of a company may resolve that the company be wound up voluntarily[8], which is referred to as a "**members' voluntary winding-up**" in case where a certificate of solvency has been issued and delivered to the Registrar[9], or a "**creditors' voluntary winding-up**" if such a certificate of solvency has not been issued and delivered.

2.3 Besides a voluntary winding-up initiated by a resolution of the members of the company, the CO also provides for a special procedure whereby the directors of a company may commence a voluntary winding-up without

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6 Section 177(1) and (2) of the CO.

7 Section 228(1) of the CO.

8 Section 228(1)(a) of the CO provides for members' ordinary resolution for winding-up whereas section 228(1)(b) and (c) of the CO provide for members' special resolution for winding-up.

9 Section 233 of the CO provides that the directors of the company (or, in the case of a company having more than 2 directors, the majority of the directors) may at a meeting of the directors sign and issue a certificate to the effect that they have made a full inquiry into the affairs of the company, and that, having so done, they have formed the opinion that the company will be able to pay its debts in full within such period not exceeding 12 months from the commencement of the winding-up as may be specified in the certificate of solvency. The certificate of solvency is of no effect if the following two conditions are not met, viz. the certificate of solvency is issued within five weeks before passing of the resolution to wind up the company and it has been delivered to the Registrar not later than the date of delivery to the Registrar of a copy of the resolution.

first having the members of the company resolve to do so[10] ("the section 228A procedure").

## Proposals

### (A) Providing for a prescribed form for a statutory demand by a creditor

*Present Position*

2.4 One of the more frequently invoked grounds for winding up a company by the court is that the company is unable to pay its debts. The CO sets out three instances where a company will be deemed to be unable to pay its debts[11]. One of them is when a creditor to whom the company is indebted in a sum equal to or exceeding the specified amount[12] has served on the company a demand requiring the company to pay such sum ("statutory demand"), and the company has failed to comply with the statutory demand within three weeks.

2.5 At present, there is no prescribed form in the CO for a statutory demand. When faced with a petition for winding-up based on a purported statutory demand or the prospect of such a petition, a company may be tempted to challenge the validity and effect of the purported demand by arguing that the content of the purported statutory demand is not sufficient for the purpose.

2.6 Besides, the current law does not require creditors to warn the company that one possible consequence for failing to comply with the statutory demand within the specified time limit is a petition to wind up the company. It is possible for companies, especially those whose management possesses limited legal knowledge, to be inadvertently caught up in winding-up proceedings as they may not readily appreciate or be sufficiently alert to the fact that the document is a statutory demand and non-compliance of it can have serious consequences for the company.

*Proposal*

2.7 To strike a reasonable balance between facilitating a creditor in initiating the winding-up of a company by the court and the need for safeguarding the company against a prospective winding-up due to the management's

[10] Section 228A of the CO.
[11] Section 178 of the CO.
[12] Currently at $10,000.

limited legal knowledge, we **propose** to adopt a prescribed form of statutory demand, which should contain a statement of the consequences of ignoring the demand. The proposal would aid in alerting a debtor-company to the consequences of ignoring the demand. This will also enhance consistency of practice and avoid unnecessary and costly disputes over the validity and effect of any purported statutory demand. We **propose** that apart from the statement of the consequences of ignoring the demand, the statutory demand should contain key information such as the name and address of the debtor-company, contact information of the creditor, description and amount of the debt and the appropriate actions of the recipient.

2.8 Under the equivalent provisions in the relevant legislation of the UK and Australia relating to application for winding up a company by the court, there are also prescribed forms of statutory demands. For personal bankruptcy proceedings in Hong Kong, prescribed forms of statutory demand are also set out in the Bankruptcy (Forms) Rules (Cap. 6B)[13].

**Question 1**
Do you support the proposal to adopt a prescribed form of statutory demand, which would contain key information as described in paragraph 2.7 as well as a statement of the consequences of ignoring the demand?

## (B) Improving the section 228A procedure to reduce the risk of abuse

*Present Position*

2.9 The section 228A procedure is unique to Hong Kong amongst comparable jurisdictions. Under this procedure, if the directors, or a majority of the directors, have formed the opinion that the company cannot by reason of its liabilities continue its business, they may resolve at a meeting of the directors the matters stated in section 228A(1) of the CO[14] and deliver to the Registrar a winding-up statement certifying the

[13] Form 162, Form 163 and Form 164.

[14] The matters are –
(a) the company cannot by reason of its liabilities continue its business;
(b) the directors or a majority of them consider it necessary that the company be wound up and that the winding-up should be commenced under section 228A of the CO because it is not reasonably practicable for it to be commenced under another section of the CO; and
(c) meetings of the company and of its creditors will be summoned for a date not later than 28 days after the delivery of the winding-up statement to the Registrar.

passage of this resolution. As the section 228A procedure provides that the winding-up of the company commences at the time of the delivery of the aforesaid winding-up statement, the procedure has the effect of allowing the directors of a company, in the absence of a resolution of the members of the company to do so, to commence a winding-up of the company voluntarily.

2.10 While the section 228A procedure requires the directors to cause meetings of the members and of the creditors to be summoned for a date not later than 28 days after the delivery of the winding-up statement, the decision to wind up the company voluntarily has already been made by the directors when the members and the creditors attend the respective meetings. Therefore, the members and the creditors are faced with a *fait accompli* in terms of the winding-up of the company.

2.11 There were concerns that the procedure may give directors an opportunity to wind up a company without reference to either the creditors or the members and that the procedure may be used by these directors to their own advantage. The Law Reform Commission, in its Report on the Winding-up Provisions of The Companies Ordinance in 1999, recommended repealing section 228A of the CO because it considered that it was desirable to cut out any potential within the winding-up provisions for abuse.

2.12 In view of the Law Reform Commission's recommendation, the Government included a proposal to repeal section 228A of the CO in the Companies (Amendment) Bill 2000. However, members of the relevant LegCo Bills Committee were of the view that the procedure provided a cost-effective, immediate and quick means for directors to appoint a provisional liquidator in circumstances of insolvency so as to preserve and protect assets of the company, and would be particularly useful for companies which had ceased trading and whose directors had lost interest. In the absence of concrete evidence of abuse of the procedure, the Bills Committee was of the view that a repeal of the procedure was not sufficiently justified. In view of the Bills Committee's concerns, the Government eventually withdrew the proposal to repeal section 228A. Instead of repealing the section 228A procedure, the Government, on the recommendation of the Bills Committee, introduced amendments to narrow the scope for invoking the section 228A procedure so that the procedure can only be used where it is not reasonably practicable for the winding-up to be commenced under any other relevant section[15] of the

[15] See paragraphs 2.1 and 2.2.

CO.[16]

*Proposals*

2.13 As the voluntary winding-up of a company is an important decision which would fundamentally affect the company and the rights, interests and liabilities of its members, the decision to wind up a company voluntarily should under normal circumstances be reserved to its members instead of being delegated to its directors[17]. Therefore, the section 228A procedure should only be invoked as a "last resort" procedure by directors when all other modes of winding-up under the CO are impracticable, if not impossible, to be used. At the same time, adequate protection should be afforded to members and creditors by reducing the risk of abuse of the procedure.

2.14 On this basis, we **propose** to introduce the following changes to the section 228A procedure to further reduce the risk of abuse –

(a) to require that the winding-up statement to be delivered by the directors to the Registrar must state that the directors have already called the meeting of the company as currently required to be called under the section 228A procedure[18]. This proposal would bring forward the requirement for calling the meeting of the company such that it will have already been called by the time of the delivery of the winding-up statement to the Registrar. As a result, members of the company will be made aware of the directors' initiation of the section 228A procedure at the earliest possible instance;

(b) to require that the appointment of the provisional liquidator must be stated in the winding-up statement and to stipulate that the

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[16] By the Companies (Amendment) Ordinance 2000 (Ordinance No.46 of 2000).

[17] This position was highlighted by Deputy High Court Judge To in *SEG Investment Ltd v SEG International Securities (HK) Ltd* (14/10/2005, HCMP 4211 of 2003) in paragraph 19 of the Judgment: "*Wherever possible, the decision to wind up should be left to the company in general meeting convened specially for the purpose of deciding that important matter. Furthermore, it cannot be overlooked that directors are agents of the company only. It is not up to the agents to decide to put an end to the existence of the principal to whom the agents owe their authority. I am, therefore, of the opinion that the special procedure for winding-up under section 228A is not an alternative procedure to winding-up. It is not to be invoked at will or arbitrarily. It is not a choice of convenience. It is an escape when any other modes of winding-up under the Companies Ordinance is impracticable if not impossible*." Further, on appeal, Hon Lam J when giving the judgment of the Court of Appeal in *SEG Investment Ltd v SEG International Securities (HK) Ltd* (06/02/2008, CACV369, 382 & 383 of 2005), said at paragraph 35: "… *it is clear from sub-section (1)(b) that section 228A is a measure of last resort*."

[18] Section 228A(5)(c) of the CO provides that, where a winding-up statement is delivered to the Registrar, the directors are required to cause meetings of the company and of its creditors to be summoned for a date not later than 28 days after the delivery of that statement. In other words, the duty to call meetings is triggered after the delivery of the winding-up statement to the Registrar.

appointment is to take effect upon delivery of the winding-up statement to the Registrar. This proposal would eliminate the time gap between the delivery of the winding-up statement and the appointment of the provisional liquidator which is permissible under the current provisions[19]. As the directors' powers cease only upon the appointment of the provisional liquidator, the present arrangement is susceptible to abuse by directors who may delay the appointment of the provisional liquidator and retain their control of the company during the time gap; and

(c) to restrict the powers of the provisional liquidator in a section 228A procedure such that he may only exercise powers conferred on a liquidator in a voluntary winding-up under the CO if and only if he has obtained the sanction of the court, with the exceptions that the provisional liquidator may take into his custody the property of the company, dispose of only perishable goods and other goods the value of which is likely to diminish if not immediately disposed of, and do all things necessary for the protection of the company's assets. The rationale for the restrictions is that the provisional liquidator appointed under the section 228A procedure should not be given the wide powers of a liquidator as his appointment should solely be for the purpose of preserving the company's assets pending the appointment of the liquidator by the members and the creditors of the company.

2.15 These proposals would help enhance the protection of creditors and members when a company is wound up under the section 228A procedure while at the same time retaining the procedure as a last resort to wind up a company voluntarily when all other modes of winding-up under the CO are impracticable if not impossible.

**Question 2**
Do you think that the section 228A procedure, whereby the directors of a company may commence a voluntary winding-up of the company without first having the members of the company resolve to do so, should be maintained or repealed?

[19] Section 228A(5)(b) of the CO provides that, where a winding-up statement is delivered to the Registrar, the directors shall forthwith appoint a person to be a provisional liquidator in the winding-up. In other words, the duty to appoint a provisional liquidator is also triggered after the delivery of the winding-up statement to the Registrar, but no specific time limit is prescribed. Section 228A(15) of the CO provides that the powers of the directors shall cease during the period of the appointment of the provisional liquidator.

**Question 3**
If the section 228A procedure is to be maintained, do you agree to the proposed improvement measures as set out in paragraph 2.14 to reduce the risk of abuse of the procedure?

## (C) Improving efficiency and enhancing the protection of creditors in a creditors' voluntary winding-up

*Present Position*

2.16 At present, in case of a creditors' voluntary winding-up[20], the company is required to cause a meeting of creditors of the company ("the first creditors' meeting") to be summoned for the same or the next following day when the resolution for voluntary winding-up is proposed at a members' meeting ("the members' meeting")[21]. However, the CO does not provide for the minimum period of notice required for calling the first creditors' meeting. It only provides that the said notice is required to be sent by post to the creditors simultaneously with the sending of the notices of the members' meeting. Therefore, the length of notice for the first creditors' meeting depends on the length of notice required for calling the members' meeting.

2.17 The present position is unsatisfactory. The length of notice for the members' meeting may vary in different situations. If the company is able to secure the members' agreement to hold the members' meeting in short notice, it is possible to hold the members' meeting speedily or even immediately[22]. As the length of notice for the members' meeting will determine the length of notice to be given for the first creditors' meeting, if the meetings are held by such short notice, the creditors may not have sufficient time to consider the information about the company, take appropriate advice and assess their positions (e.g. to consider whether there is a need to nominate a person to be appointed as the liquidator)

[20] Unless the voluntary winding-up of a company is commenced under the section 228A procedure.

[21] Section 241(1) of the CO.

[22] By virtue of section 116 of the CO, at least 21 days' notice must be given for calling a general meeting at which a special resolution is to be considered, subject to the members agreeing to a shorter notice if certain requirements are satisfied, but at least seven days' notice must still be given for calling a general meeting at which a special resolution under section 228(1)(b) of the CO (other than a members' voluntary winding-up) is to be considered. In other words, the minimum notice for calling the members' meeting is seven days for a creditors' voluntary winding-up which is initiated by a special resolution under section 228(1)(b). However, the seven-day minimum notice requirement will be repealed when the new CO comes into operation and by then, a creditors' voluntary winding-up can theoretically be initiated by a special resolution at a members' meeting which is called by a shortest possible notice.

before the first creditors' meeting.

2.18 On the other hand, if the company prudently seeks to give reasonable notice to the creditors for the first creditors' meeting, the holding of the members' meeting, and thus the decision of whether to wind up the company voluntarily, would be withheld until the first creditors' meeting is ready to be held. This is also not satisfactory for a company which is in serious financial difficulty or insolvency and calls for an early decision as to whether to commence the winding-up process. In particular, a delay in the passage of the winding-up resolution may subject the company, its management and the creditors including employees to various risks[23].

*Proposals*

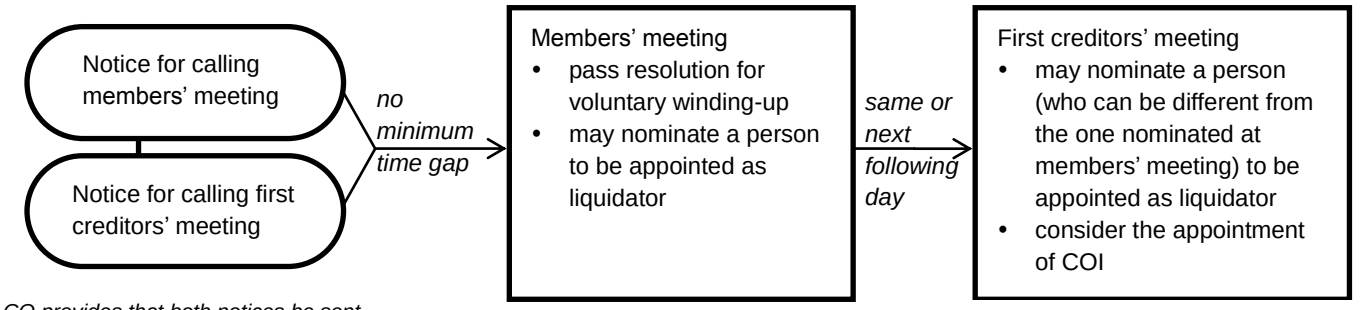
2.19 We **propose** to remove the requirement of holding the first creditors' meeting on the same or the next following day of the members' meeting, and to provide that the company shall summon the first creditors' meeting for a day not later than the fourteenth day after the day on which there is to be held the members' meeting.

2.20 We also **propose** to remove the requirement of sending the notice of the first creditors' meeting simultaneously with the sending of the notice of the members' meeting, and to prescribe a minimum notice period of seven days for calling the first creditors' meeting. There are similar requirements of minimum length of notice in the UK and Australia for the first creditors' meeting.

2.21 The above two proposals would ensure that reasonably sufficient notice is given to the creditors to prepare for the first creditors' meeting while reducing the time required for a company to commence a creditors' voluntary winding-up. This would improve the efficiency of a creditors' voluntary winding-up and at the same time enhance the protection of the creditors' interests, in terms of the protection of the company's assets and the creditors' rights to be given sufficient time and information for considering their position and making the appropriate decisions. The proposed changes are illustrated in the following diagrams –

[23] The risks include the opportunity for voidable antecedent transactions to occur, ongoing trading resulting in further losses to creditors, dissipation of company property, erosion of monies by actions by stakeholders such as the creditors, assets becoming uninsured due to a lack of funds and landlords taking action to evict the company for unpaid rents, etc.

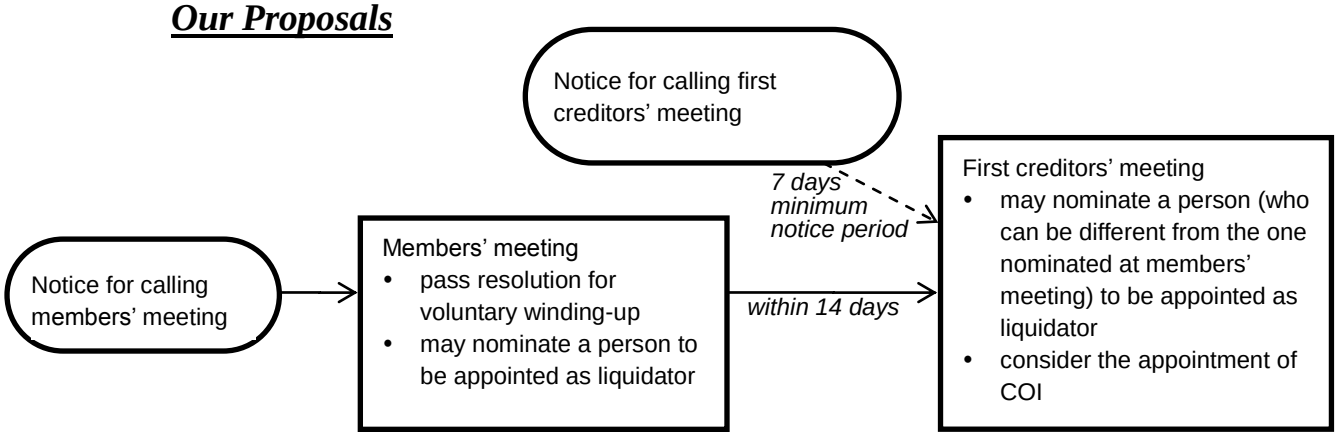
***Present Position***




*CO provides that both notices be sent simultaneously*

*CO does not provide the minimum period of notice for calling first creditors' meeting*

***Our Proposals***




2.22 With the proposed extension of time permissible between the holding of the members' meeting and the holding of the first creditors' meeting, there would be an increased risk of "centrebinding"[24], a practice whereby the company calls the members' meeting first to pass a winding-up resolution, deliberately puts off the holding of the first creditors' meeting and, with the aid of a liquidator appointed by the members at a members' meeting, does such things to the detriment of the creditors' interests, e.g. by selling the assets of the company at a knock-down price to a purchaser closely connected with the company or the directors.

2.23 In order to reduce the risk of "centrebinding", we **propose** to introduce a provision to the effect that during the period before the holding of the first creditors' meeting, the liquidator appointed by the members at a members' meeting cannot exercise the liquidator's powers conferred

[24] The practice of "centrebinding" derived its name from the case of *Re Centrebind Ltd* [1967] 1 W.L.R. 377, in which it was held by the UK court that prior to the holding of the first creditors' meeting, the members-appointed liquidator would have the powers to act as the liquidator of the company.

under the CO except with the sanction of the court. However, the liquidator may exercise his powers to take into his custody the property of the company, dispose of perishable goods and other goods the value of which is likely to diminish if not immediately disposed of or do all things necessary for the protection of the company's assets without the need to seek the court's sanction. A similar provision also exists in the relevant UK legislation[25].

2.24 Furthermore, we **propose** to provide that where the members have resolved to wind up the company voluntarily but no liquidator has been appointed by the company in a members' meeting, the powers of the directors shall not be exercised before the appointment of a liquidator of the company, except with the sanction of the court or so far as may be necessary to secure the compliance of the statutory requirements for the company to proceed with the creditors' voluntary winding-up. However, the directors may dispose of perishable goods and other goods the value of which is likely to diminish if not immediately disposed of or do all things necessary for the protection of the company's assets. This proposal would help ensure that, if the company is put into a creditors' voluntary winding-up, the existing directors of the company would cease to have full management powers and hand over the administration of the company's affairs to a duly appointed liquidator as soon as possible. As a result, the protection of the company's assets and the interests of the creditors would be enhanced. A similar provision also exists in the relevant UK legislation[26].

**Question 4**
Do you agree to replacing the existing requirement of holding the first creditors' meeting on the same or the next following day of the members' meeting with the requirement of holding the first creditors' meeting on a day not later than the fourteenth day after the day on which the members' meeting is held in a creditors' voluntary winding-up case?

**Question 5**
Do you support the proposal on prescribing a minimum notice period for calling the first creditors' meeting in a creditors' voluntary winding-up case? If so, do you consider a period of seven days appropriate?

[25] The proposal is similar to section 166 of the UK Insolvency Act 1986.
[26] Section 114 of the UK Insolvency Act 1986.

**Question 6**
Do you agree to the proposal on limiting the powers of the liquidator appointed by the company during the period before the holding of the first creditors' meeting in a creditors' voluntary winding-up case?

**Question 7**
Do you agree to the proposed restrictions on the exercise of the directors' power before a liquidator is appointed in a creditors' voluntary winding-up case?

2.25 Besides the above proposals, we **propose** to introduce a number of technical amendments relating to the commencement of winding-up. These proposals will help rationalise the winding-up process, enhance protection of creditors and modernise the present law. Details are set out in **Annex C**.

**Question 8**
Do you agree with the proposed technical amendments relating to the commencement of winding-up as set out in **Annex C**?

# Chapter 3

# APPOINTMENT, POWERS, VACATION OF OFFICE AND RELEASE OF PROVISIONAL LIQUIDATORS AND LIQUIDATORS

## Background

*Court Winding-up*

3.1 When a petition is presented for the winding-up of a company by the court, the court may at any time before the making of the winding-up order appoint a provisional liquidator for the company[27]. The main purpose of the appointment is to preserve the assets of the company pending the court's hearing of the petition. Either the OR or any other person deemed fit by the court may be appointed as a provisional liquidator. Further, the court may limit or restrict the powers of this provisional liquidator and determine his remuneration.

3.2 On the making of a winding-up order by the court, the OR, by virtue of his office, becomes the provisional liquidator[28]. In cases where a person other than the OR has been appointed as the provisional liquidator prior to the making of the winding-up order, that person will continue to act as the provisional liquidator[29]. Where the OR is the provisional liquidator upon the making of the winding-up order and he is of the opinion that the property of the company is not likely to exceed in value $200,000, the OR may appoint one or more other person(s) as the provisional liquidator in his place[30]. At present, the OR appoints a PIP from a list of PIPs established by the ORO, which is commonly known as "Panel T", as the provisional liquidator in his place. The list is established at regular intervals through a tender system by the ORO, and all PIPs on the list are required to satisfy certain criteria set by the ORO.

3.3 The provisional liquidator holding office after the making of a winding-up order is obliged to convene separate meetings of creditors and contributories of the company for the purpose of determining the

[27] Section 193 of the CO.
[28] Section 194(1)(a) of the CO.
[29] Section 194(1)(aa) of the CO.
[30] Section 194(1A) of the CO.

appointment of a liquidator and a COI[31]. In a case where the OR is the provisional liquidator, if the creditors and contributories do not nominate or express a preference as to the liquidator at their respective meetings convened by the OR, the OR will suggest for approval as the liquidator a PIP on a rotation basis from another list of PIPs that can satisfy the criteria set by the ORO (commonly known as "Panel A").

3.4 At any time after the presentation of the winding-up petition, where the property of the company is not likely to exceed in value $200,000, the court may order that the company be wound up in a summary manner, in which case it is not necessary to convene meetings of creditors and contributories for the purpose of determining the appointment of liquidator, and the OR or the provisional liquidator will be the liquidator. No COI will be appointed either[32].

3.5 To carry out his duties and functions, the liquidator in a court winding-up is given a range of powers under the CO[33]. Some of these powers (e.g. the power to make compromises or arrangements with creditors) are only exercisable by the liquidator with the sanction of either the court or the COI.

3.6 The remuneration of the liquidator (other than the OR) in a court winding-up is determined by agreement between the liquidator and the COI or, in case where they fail to agree or where there is no COI, by the court[34]. A provisional liquidator and a liquidator in a court winding-up may resign or be removed by the court, and the CO contains provisions which govern his resignation, removal and how a vacancy is to be filled[35]. When the liquidator has fulfilled his statutory duties, he may apply to the court for release[36]. An application for release may also be made where the liquidator has resigned or has been removed from his office.

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[31] Sections 194(1)(b) and 206 of the CO. A COI is a joint body of creditors and contributories of the company for supervising the liquidator, and may give directions to the liquidator in the course of winding up the company. For proposals relating to the COI, please refer to Chapter 4.

[32] Section 227F(1) of the CO.

[33] Sections 199(1) and (2) of the CO set out various powers of a liquidator in a court winding-up. A liquidator will also have the supplementary powers provided under sections 200(2) and (3) of the CO for summoning general meetings and applying to the court for directions. In addition, section 226 of the CO provides that various powers conferred on the court by the CO may be exercised by the liquidator. Other provisions of the CO also set out specific powers given to liquidators, e.g. powers to make various applications to the court for directions, examination orders, or avoiding antecedent transactions.

[34] Section 196(2) of the CO.

[35] Sections 196(1) and (3) of the CO and rules 45(7) and 154 of the CWUR.

[36] Under section 205(1) of the CO, a liquidator may apply to the court for his release if he has realised all the properties of the company (or so much thereof as can in his opinion be realised without needlessly protracting the liquidation), distributed a final dividend (if any) to the creditors, adjusted the rights of the contributories among themselves and made a final return (if any) to the contributories.

*Voluntary Winding-up*

3.7 In a members' voluntary winding-up, the liquidator is appointed by the company in general meeting (usually the meeting held for the purpose of passing the resolution to wind up the company voluntarily), and the company in general meeting also has the powers to fix the remuneration of the liquidators[37]. The liquidator in a members' voluntary winding-up is given a range of powers under the CO[38]. The liquidator may be removed by a special resolution of the company[39], and the company in general meeting may fill a vacancy occurring in the office of the liquidator[40]. The court also has the power to remove the liquidator and appoint another one, and the power to appoint a liquidator if there is no liquidator acting[41].

3.8 In a creditors' voluntary winding-up, the creditors and the company at their respective meetings may each nominate a person to be the liquidator[42]. If different persons are nominated, the person nominated by the creditors shall be the liquidator, subject to the directions or appointment otherwise by the court [43]. The liquidator in a creditors' voluntary winding-up is given a range of powers under the CO[44]. The remuneration of the liquidator is fixed by the COI, or if there is no COI, the creditors[45]. A vacancy in the office of the liquidator (other than a liquidator appointed by or by direction of the court) may be filled by another person appointed by the creditors[46]. The court also has the power to remove the liquidator and appoint another one, and the power to appoint a liquidator if there is no liquidator acting[47].

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37 Section 235(1) of the CO.

38 Sections 251(1) and (2) of the CO set out various powers of a liquidator in a members' voluntary winding-up. Other provisions of the CO also set out specific powers given to liquidators, e.g. powers to make various applications to the court for directions, examination orders, or avoiding antecedent transactions.

39 Section 235A(1) of the CO, subject to the court's power under section 235A(2) to order against the removal.

40 Section 236 of the CO.

41 Section 252 of the CO.

42 Section 242 of the CO.

43 Section 242 of the CO provides that in the case of different persons being nominated by the creditors and the company at their respective meetings, any director, member, or creditor of the company may, within seven days after the date on which the nomination was made by the creditors, apply to the court for an order either directing that the person nominated as liquidator by the company shall be liquidator instead of or jointly with the person nominated by the creditors, or appointing some other person to be liquidator instead of the person appointed by the creditors.

44 Sections 251(1) and (2) of the CO set out various powers of a liquidator in a creditors' voluntary winding-up. Other provisions of the CO also set out specific powers given to liquidators, e.g. powers to make various applications to the court for directions, examination orders, or avoiding antecedent transactions.

45 Section 244(1) of the CO.

46 Section 245 of the CO.

47 Section 252 of the CO.

3.9 There is no specific provision in the CO regarding the release of liquidator in a voluntary winding-up.

## Proposals

### (A) Expanding the list of persons disqualified for appointment as liquidator or provisional liquidator

*Present Position*

3.10 The CO provides that a person who is an undischarged bankrupt and a body corporate are not qualified for appointment as liquidator in a winding-up of a company[48]. However, there is currently no express provision in the CO disqualifying a person for appointment as a liquidator or a provisional liquidator in relation to a company where his relation with the company could constitute a conflict of interest or where his mental incapacity makes him unsuitable to act.

3.11 There is also no express provision in the CO stating that a person subject to a disqualification order under Part IVA of the CO[49] is not qualified to be appointed as a liquidator or a provisional liquidator in relation to a company, and the effect or consequence of an appointment of such person.

*Proposal*

3.12 We **propose** to expand the provisions on disqualification of persons for appointment as a provisional liquidator or a liquidator in relation to a company.

3.13 Firstly, to enhance the protection of creditors, we **propose** to provide that certain categories of persons who are considered as having a conflict of interest are not qualified for appointment as a provisional liquidator or a liquidator in a court winding-up and a creditors' voluntary winding-up. These persons include –

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[48] Section 278 of the CO.

[49] Section 168D of the CO provides for the court's power to make a disqualification order, i.e. an order disqualifying a person for a specified period from acting as a director or liquidator of a company, a receiver or manager of a company's property, or in any way, whether directly or indirectly, being concerned or taking part in the promotion, formation or management of a company. Sections 168E, 168F, 168G, 168H, 168J and 168L of the CO set out the grounds for a disqualification order.

(a) a person who is a creditor of the company;

(b) a person who is a debtor of the company;

(c) a person who is or has been a director or a secretary of the company;

(d) a person who is or has, at any time before the appointment and up to two years before the commencement of winding-up of the company, been an auditor of the company[50]; or

(e) a person who is a receiver or a receiver and manager of the property[51] of the company.

3.14 To cater for circumstances which may justify the above persons taking up the appointment as a provisional liquidator or a liquidator, we **propose** that these persons may accept such appointment with the leave of the court. The proposal in paragraph 3.13 will not apply to the appointment of a person as the liquidator in a members' voluntary winding-up because a company which is undergoing a members' voluntary winding-up is solvent and the conduct of the winding-up is primarily under the control of its members.

3.15 Secondly, to ensure that a provisional liquidator or a liquidator in all types of winding-up will be able to perform his duties in a competent manner, we **propose** that a person should not be qualified for such an appointment if he is found by the court under the Mental Health Ordinance (Cap. 136) to be incapable, by reason of mental incapacity[52], of managing and administering his property and affairs, or where he is for the time being subject to a guardianship order under Part IVB of the

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[50] For the purpose of this paragraph, where the auditor is or has been a corporate practice, each director would be regarded as "the auditor of the company"; and where the auditor is or has been a firm of partnership, each partner would be regarded as "the auditor of the company".

[51] The "manager" of the property of a company is the receiver or another person appointed under the powers contained in a debenture or charge or by the court to carry on the trade or business of a company which the receiver has taken over the control. He is contrasted with a "manager" of a company (i.e. a person who, under the immediate authority of the board of directors, exercises managerial functions) referred to in section 2(1) of the CO.

[52] "Mental incapacity" is defined in section 2(1) of the Mental Health Ordinance (Cap. 136) to mean mental disorder or mental handicap.

"Mental disorder" is defined to mean —

(a) mental illness;

(b) a state of arrested or incomplete development of mind which amounts to a significant impairment of intelligence and social functioning which is associated with abnormally aggressive or seriously irresponsible conduct on the part of the person concerned;

(c) psychopathic disorder; or

(d) any other disorder or disability of mind which does not amount to mental handicap.

"Mental handicap" is defined to mean sub-average general intellectual functioning with deficiencies in adaptive behaviour.

Mental Health Ordinance (Cap. 136).

3.16 Thirdly, to improve the clarity of the disqualification requirements in the CO, we **propose** providing expressly that a person who is subject to a disqualification order under Part IVA of the CO is not qualified to take up appointment as a provisional liquidator or a liquidator for all types of winding-up. However, in accordance with existing law, such a person may apply for leave of court to take up such an appointment.

3.17 We also **propose** to provide clearly that the appointment of any person not qualified for appointment as a provisional liquidator or liquidator under the above proposals shall be void and he shall be liable to a fine if he acts as a provisional liquidator or a liquidator.

3.18 The principle of disqualifying certain types of persons from being appointed as a provisional liquidator or a liquidator is equally relevant to the appointment of a receiver or a receiver and manager. In this connection, we **propose** that the proposals as set out in paragraphs 3.13 to 3.16 should also apply to the appointment of a receiver or a receiver and manager of the property of a company with suitable modifications[53].

**Question 9**

(a) Do you agree to the expansion of the list of disqualified persons from being appointed as a provisional liquidator or a liquidator? If so, do you agree with disqualifying the types of persons as proposed in paragraphs 3.13, 3.15 and 3.16?

(b) Do you agree to provide clearly that the appointment of a disqualified person as a provisional liquidator or liquidator shall be void and that he shall be liable to a fine if he acts as a provisional liquidator or liquidator?

(c) Do you agree that the disqualification proposals should also apply to the appointment of a receiver or a receiver and manager of the property of a company with suitable modifications?

[53] Firstly, paragraph 3.13(e) will not apply such that a receiver of a specified property of a company can be the receiver of the other property of the company. Secondly, in respect of the appointment of an auditor as a receiver or a receiver and manager of the property of the company, such auditor shall be disqualified for appointment if he is or has, at any time within the period of two years before the appointment, been the auditor of the company. Any appointment of an unqualified person shall be void and any such person acting as a receiver or a receiver and manager of the property of the company shall be guilty of an offence.

## (B) Disclosure of relevant relationships in relation to the appointment of provisional liquidators and liquidators

*Present Position*

3.19 The process of appointing a provisional liquidator or a liquidator often involves the nomination of prospective appointees by parties interested in the winding-up (e.g. particular creditors, directors or members of the company) for selection by parties responsible for making the appointment (e.g. the court, the directors, the creditors or the company)[54]. However, at present, there is no provision in the CO which requires a disclosure of information on potential conflicts of interest which the prospective provisional liquidators or liquidators may have to enable the appointing parties to make an informed decision on the appointment.

*Proposal*

3.20 The proposals as elaborated in paragraphs 3.13 to 3.14 would reduce the risk of persons having a conflict of interest in acting as a provisional liquidator or liquidator. Nevertheless, there are other situations that may give rise to real or perceived conflict of interest which will not be covered by those proposals, for example, where the prospective liquidator is a director of the holding or subsidiary company of the company in liquidation. However, given the limited number of PIPs in Hong Kong, further extending the scope of disqualification requirements to cover these situations may further limit the pool of eligible persons for appointment.

3.21 In order to strike a reasonable balance between minimising conflict of interest situations and maintaining a sufficient pool of PIPs for taking up such appointments, we **propose** to enhance transparency in the appointment of provisional liquidators and liquidators by introducing a new statutory disclosure system for the appointment of provisional liquidators and liquidators. Under the system, the prospective provisional liquidator or liquidator of a company in a court winding-up[55] and a creditors' voluntary winding-up (including one commenced by the

[54] The appointment by the OR of a provisional liquidator under section 194(1A) of the CO is an exception as it is made on a rotational basis. In addition, the list of PIPs under the Panel T scheme is established by a tender system, see paragraph 3.2 above.

[55] The proposals in paragraphs 3.21 to 3.24 do not apply to the OR, whether the OR is acting as a provisional liquidator or liquidator, or a person appointed by OR as provisional liquidator under section 194(1A) of the CO.

section 228A procedure)[56] will be required to make a statement of relevant relationships to state the following facts or relationships (if they or any of them exist) –

(a) the prospective provisional liquidator or liquidator[57] is or in the preceding two years has been –

(i) a member of the company or its holding company or subsidiary[58];

(ii) a creditor or debtor of the company or its holding company or subsidiary;

(iii) a director, secretary or employee of the company or its holding company or subsidiary;

(iv) an auditor of the company[59];

(v) a receiver or receiver and manager of the company's property;

(vi) a liquidator or provisional liquidator of the company;

(vii) a legal advisor of the company or its holding company or subsidiary; or

(viii) a financial advisor of the company or its holding company or subsidiary; or

[56] The proposals in paragraphs 3.21 to 3.24 will not apply to the appointment of a person as the liquidator in a members' voluntary winding-up, where the company is solvent and the conduct of the winding-up is primarily under the control of its members.

[57] A provisional liquidator or liquidator must be a natural person. However, the prospective provisional liquidator or liquidator is required to make disclosure of the requisite facts or relationships in relation to -
(i) himself;
(ii) if he is a partner of a firm of partnership, the firm and each partner of that partnership; and
(iii) if he is a director of a body corporate, that body corporate, each director of that body corporate and the secretary of that body corporate.

[58] "Holding company" or "subsidiary" have the meaning as given in the CO.

[59] For the purpose of this paragraph, where the auditor is or has been a corporate practice, each director would also be regarded as "the auditor of the company"; and where the auditor is or has been a firm of partnership, each partner would also be regarded as "the auditor of the company".

(b) the prospective provisional liquidator or liquidator[60] is an immediate family member[61] of –

(i) a director, secretary, or auditor of the company, or a person who has at any time within the immediately preceding period of two years been a director, secretary or auditor of the company;

(ii) a director or secretary of a holding company or subsidiary of the company, or a person who has at any time within the immediately preceding period of two years been a director or secretary of the holding company or subsidiary; or

(iii) a person who has, at any time within the immediately preceding period of two years, been a liquidator or provisional liquidator of the company.

If any of these facts or relationship exists, the prospective provisional liquidator or liquidator must also state in the statement of relevant relationships his reasons for believing that none of the facts or relationships results in the prospective provisional liquidator or liquidator having a conflict of interest or duty.

3.22 We **propose** that the statement of relevant relationships must be made by the prospective provisional liquidator or liquidator, and shall be provided to the relevant party empowered to make the appointment of provisional liquidator or liquidator such that the appointing party is in a position to take into account the statement and make an informed decision when considering the appointment. For example, if the appointment is made by the creditors at the first creditors' meeting, the statement shall be provided to the creditors before or at such meeting.

3.23 We **propose** that if there is any change or error in a particular matter in the statement of relevant relationships made by the provisional liquidator or the liquidator, he will be required to make a replacement statement within 14 days from the date of the change or from the date when the

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[60] The prospective provisional liquidator or liquidator is required to make disclosure of the requisite facts or relationships in relation to
(i) himself;
(ii) if he is a partner of a firm of partnership, each partner of that partnership; and
(iii) if he is a director of a body corporate, each director of that body corporate and the secretary of that body corporate.

[61] For the purpose of this disclosure, a person is an immediate family member of another person if he or she is a spouse, parent, child, sibling, grandparent or grandchild of that other person. The definition of "immediate family member" is based on the Residential Properties (First-hand Sales) Ordinance (No. 19 of 2012).

change or error comes to his knowledge.

3.24 A failure to include a particular matter in the statement or the replacement statement may result in the appointing parties making a misinformed decision on the appointment of a provisional liquidator or a liquidator, which will have the potential of affecting the rights of stakeholders (e.g. the creditors). Therefore, such a failure should constitute an offence. However, we **propose** that it will be a defence if the prospective provisional liquidator or liquidator proves that he has made reasonable enquiries and, after making the enquiries, he has no reasonable grounds for believing that the matter should have been included in the statement of relevant relationships.

**Question 10**

(a) Do you agree that a new statutory disclosure system should be introduced for the appointment of provisional liquidators and liquidators?

(b) If yes, do you agree with the details of information required to be disclosed as set out in paragraph 3.21?

(c) Do you agree that a statutory defence as proposed in paragraph 3.24 should be provided for a failure in disclosure?

## (C) Expanding the existing prohibition on inducement affecting appointment as liquidator

*Present Position*

3.25 Under the CO, any person who gives (or agrees or offers to give) to any member or creditor of a company an inducement (being any valuable consideration) with a view to securing his own appointment or nomination, or to securing or preventing the appointment or nomination of some person other than himself, as the company's liquidator shall be liable to a fine[62]. This is modelled on a relevant provision in the UK, and is intended to discourage touting for appointment as liquidator.

[62] Section 278A of the CO.

*Proposal*

3.26 Apart from the members or creditors of a company, other persons may have an influence on the choice of the liquidator[63]. We **propose** to amend the existing provision such that a person will be prohibited from offering an inducement to any person (instead of only the members and creditors) with a view to securing his own appointment or nomination as a liquidator, or to securing or preventing the appointment or nomination of some person other than himself as a liquidator.

3.27 The principle of prohibition of appointment by inducement is equally relevant to the appointment of provisional liquidators, receivers, and receivers and managers other than the liquidator of a company. Therefore, we **propose** that the prohibition should be extended to such appointments.

**Question 11**

(a) Do you agree that the existing prohibition on inducement being offered to members or creditors in relation to the appointment of liquidators should be extended to cover inducement being offered to any person?

(b) Do you agree that the prohibition should also be extended to inducement offered in relation to the appointment of provisional liquidators, receivers, and receivers and managers?

## (D) Clarifying the nature of "provisional liquidators" in a court winding-up

*Present Position*

3.28 Under the CO, the term "provisional liquidator" is used to describe the following persons in relation to a court winding-up[64] –

(a) provisional liquidators appointed by the court before the making of a winding-up order under section 193 of the CO (i.e. the

[63] For example, as the directors of a company are in charge of and well acquainted with the management and affairs of the company, members and creditors of the company may refer to or rely on any suggestion or recommendation made by the directors on the choice of the liquidator. It is possible for directors to make suggestions or recommendations under the influence of inducement. It is also possible for one PIP to give inducement to another PIP for referral of work.

[64] Under section 228A of the CO, the directors will appoint a "provisional liquidator", but Proposal (D) does not apply to this type of provisional liquidator.

provisional liquidators referred to in paragraph 3.1) ("section 193 PL"); and

(b) provisional liquidators who take office upon and after the making of a winding-up order under different sub-sections of section 194 of the CO[65] (i.e. the provisional liquidators referred to in paragraph 3.2) (collectively referred to herein as "section 194 PL").

3.29 The roles of a section 193 PL and that of a section 194 PL are different. The primary purpose for the appointment of a section 193 PL is to protect and preserve the assets of a company pending the hearing of the petition for winding-up. As the company has not yet been ordered to be wound up, normally a section 193 PL should not carry out the actual task of winding up the company.

3.30 Upon the making of the winding-up order by the court, the winding-up of the company should be carried out as soon as practicable, and the section 194 PL should be charged with the full duties and functions, and have the requisite powers, for conducting and administering the winding-up. He should also be subject to the supervision and control of the court and the OR. However, the difference between the roles of the section 193 PL and the section 194 PL is not expressly reflected in the present law.

3.31 Besides, it is not sufficiently clear in some of the existing provisions of the CO that make reference to "provisional liquidator" as to which type of "provisional liquidator" the term is intended to refer to, and whether the reference to "liquidator" in the provisions of the CO would apply to all or any one type of provisional liquidator. In addition, the provisions applicable to the different types of "provisional liquidators" are not made in a comprehensive manner in the CO[66]. These have given rise to

[65] Under section 194 of the CO, the following office-holders who take office upon and after the making of a winding-up order are also called the "provisional liquidator"–

(a) except where a person other than the OR acts as a provisional liquidator under section 194(1)(aa), the OR by virtue of his office becomes the provisional liquidator under section 194(1)(a) upon the making of the winding-up order;

(b) where a person other than the OR has been appointed as a section 193 PL, this person continues to act as the provisional liquidator by virtue of section 194(1)(aa); and

(c) the OR as the provisional liquidator under (a) may appoint one or more persons as provisional liquidator under section 194(1A) in place of himself.

[66] For example, section 196(1A) and 199(4) to (6) respectively provide for the remuneration and powers of the section 194 PL appointed by the OR under section 194(1A). However, the CO does not separately provide for the powers, functions and duties of the section 194 PL appointed under section 194(1)(a) or section 194(1)(aa).

uncertainties and legal challenges[67].

*Proposal*

3.32 To put beyond doubt that all section 194 PL should be charged with the full duties and functions, and have the requisite powers, for conducting and administering the winding-up, we **propose** to designate all section 194 PL as "liquidators". Consequently, all persons taking office on or after the winding-up order will be uniformly called the "liquidator". They will be subject to the provisions in the CO which apply to "liquidators", e.g. they will have the full powers of a "liquidator", and their remuneration will be determined in accordance with the provisions concerning "liquidators" (except where specifically provided otherwise in those provisions[68]). As a result, they will be able to carry out the winding-up of the company as soon as practicable for the benefit of the creditors involved.

3.33 With the proposed amendments, the term "provisional liquidator", when used in relation to a court winding-up, would only signify the provisional liquidator appointed prior to the winding-up order (i.e. section 193 PL). We also **propose** to provide more clearly that it is up to the court, taking into account case-specific circumstances, to determine the powers, duties and remuneration of a section 193 PL and to consider any application for the termination of his appointment by resignation or removal.

**Question 12**
Do you agree with the proposal to designate all provisional liquidators who take office upon and after the making of a winding-up order (i.e. section 194 PL) as "liquidators" such that they will be subject to the provisions in the CO which apply to liquidators?

[67] In *Re Lehman Brothers Securities Asia Ltd. (No.2)* [2010] 1 HKLRD 58, Barma J interpreted the definition of "liquidator" introduced by the Companies (Amendment) Ordinance (No.46 of 2000) as a purely consequential amendment for the introduction of the regime for appointing the section 194 PL by the OR under section 194(1A). In *Re MF Global Hong Kong Ltd (No.3)* [2012] 5 HKLRD 486, Harris J accepted that whether "liquidator" in a provision of the CO includes provisional liquidators depends on the particular provision concerned and its context.

[68] As the provisional liquidators now appointed under section 194(1A) of the CO are appointed by OR directly instead of by the court (paragraph 3.2 refers), it has been considered necessary and justified to restrict their powers (in sections 199(4) to (6) of the CO) and to make special provisions for the determination of their remuneration (in section 196(1A) of the CO). As the concern is still relevant notwithstanding the proposed change in the label to be given to these persons, no change will be made to the current arrangements on the restrictions of their powers and the determination of their remuneration.

**Question 13**
Do you agree with the proposal to clearly stipulate that it is up to the court to determine the powers, duties, remuneration and termination of appointment of provisional liquidators who were appointed by the court before the making of a winding-up order (i.e. section 193 PL)?

## (E) Modernising the provisions on the powers of liquidators

*Present Position*

3.34 At present, different sections of the CO provide for the powers of liquidators for different types of winding-up[69] and the powers set out in sections 199(1) and (2) of the CO are relevant to all types of winding-up.

3.35 Besides, a liquidator in a court winding-up must obtain the sanction of the court or the COI for the exercise of the power to appoint a solicitor to assist him in the performance of his duties[70]. There is no similar requirement for a voluntary winding-up.

*Proposal*

3.36 In order to improve the clarity of the provisions concerning the powers of liquidators, we **propose** to set out the powers now found in sections 199(1) and (2) of the CO in tabulated form in a Schedule. The respective sections providing for the powers of liquidators in different forms of winding-up can then make reference to the same Schedule.

3.37 Further consideration will be given to how to present the powers in the Schedule in a reader-friendly manner. For example, the powers may be grouped into three broad categories in the Schedule based on the need for obtaining the sanction, i.e. (a) powers exercisable with sanction in all forms of winding-up (now provided in sections 199(1)(d), (e) and (f)); (b) powers exercisable without sanction in voluntary winding-up but with sanction in a court winding-up (now provided in sections 199(1)(a) and

[69] Sections 199(1) and (2) of the CO set out various powers of a liquidator in a court winding-up.
For voluntary winding-up, section 251(1)(a) of the CO provides that the liquidator in a members' voluntary winding-up may, with the sanction of a special resolution of the company, exercise the powers given by sections 199(1)(d), (e) and (f) of the CO, whereas a liquidator in a creditors' voluntary winding-up may, with the sanction of the court or the COI, exercise these powers. Section 251(1)(b) of the CO provides that the liquidator in a voluntary winding-up may exercise any of the other powers given under CO to a liquidator in a court winding-up.

[70] Section 199(1)(c) of the CO.

(b)); and (c) powers exercisable without sanction in any winding-up (now provided in sections 199(1)(c) and 199(2)).

3.38 In addition, as it is very common for a liquidator to engage a solicitor to assist him in the performance of his duties, and sanction is usually given for the liquidator to exercise the power to appoint one in a normal court winding-up case, there is room for streamlining the process. Therefore, we **propose** to remove the requirement for the liquidator to apply to the court or the COI for exercising the power to appoint a solicitor in a court winding-up. However, the liquidator must give notice to the COI or, where there is no COI, to the creditors, of his exercise of this power. The proposal would streamline the winding-up process and also reduce cost. In the UK, liquidators are also empowered to appoint a solicitor in a court winding-up without the need to obtain the sanction of the court or the liquidation committee (i.e. the UK's equivalent of the COI)[71].

**Question 14**
Do you agree with the proposal of setting out the powers of liquidators now found in section 199(1) and (2) of the CO in a Schedule to improve the clarity of the provisions?

**Question 15**
Do you agree that the requirement for the liquidator to apply to the court or the COI for exercising the power to appoint a solicitor in a court winding-up should be removed, provided that prior notification is given to the COI or, where there is no COI, the creditors when the liquidator exercises such power?

## (F) Enhancing the regulation of liquidators by enforcing liabilities of liquidators notwithstanding their release by the court

*Present Position*

3.39 At present, section 276 of the CO provides that if, in the course of winding up a company, it appears that any past or present liquidator of the company[72] has misapplied or retained or become liable or accountable for any money or property of the company, or has been guilty of any misfeasance or breach of duty or breach of trust in relation to the

[71] The proposal is modelled on section 167(2) of the UK Insolvency Act 1986.
[72] Besides the past or present liquidator of the company, the provision also applies to any person who has taken part in the formation or promotion of the company, or any past or present officer or receiver of the company.

company, the court may examine into the conduct of such person and make orders against him. Orders which may be made by the court include compelling such person to repay or restore the money or property or any part thereof, or to contribute such sum to the assets of the company by way of compensation in respect of the above delinquent acts. The court will exercise such power on the application of the OR, the liquidator or any creditor or contributory.

3.40 On the other hand, it is provided under section 205(3) of the CO that an order of the court releasing the liquidator shall discharge him from all liability in respect of any act done or default made by him in the administration of the affairs of the company, or otherwise in relation to his conduct as liquidator. However, any such order may be revoked on proof that it was obtained by fraud or by suppression or concealment of any material fact.

*Proposal*

3.41 As the misfeasance of a liquidator may only be discovered after the grant of release by the court, the rights of the creditors, contributories or other interested parties who wish to call on the delinquent liquidator to account in such cases will be undermined by section 205(3). Therefore, we **propose** that the release of a liquidator by the court should not prevent the court from exercising its power under section 276, subject to the law on limitation period[73] for commencing legal proceedings.

3.42 The proposal would enhance the regulation of liquidators by suitably expanding the scope of their accountability beyond their release by the court. However, in order to strike a balance between minimising the risk of frivolous litigation and the need to protect the rights of creditors, contributories or other interested parties, we **propose** that, where the court has granted a release to a liquidator, the power to make an application under section 276 should only be exercisable with the leave of the court. The proposals as set out in paragraph 3.41 and this paragraph, which are modelled on the relevant provisions in the UK[74], seek to reduce the risk of abuse of the section 276 procedure and serve as a measure of protection to the liquidator who has been released by the court.

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[73] The limitation period would depend on the nature of the claim and is set out in the Limitation Ordinance (Cap. 347). For example, under section 31 of the Limitation Ordinance (Cap. 347), for an action for damages for negligence, the period is six years from the date on which the cause of action accrued, or three years from the date of knowledge (if that period expires later than six years from the date on which the cause of action accrued).

[74] The proposals are modelled on sections 174 and 212 of the UK Insolvency Act 1986.

**Question 16**

(a) Do you agree that, notwithstanding the release of a liquidator by the court, the liquidator should not be absolved from the provisions of section 276 of CO?

(b) Do you agree that, where the court has granted a release to a liquidator, the power to make an application under section 276 should only be exercisable with the leave of the court?

3.43 Besides the above proposals, we **propose** to introduce a number of technical amendments relating to the appointment, powers, vacation of office and release of provisional liquidators and liquidators. These proposals will help rationalise the winding-up process and enhance protection of creditors. Details are set out in **Annex C**.

**Question 17**

Do you agree with the proposed technical amendments relating to the appointment, powers, vacation of office and release of provisional liquidators and liquidators as set out in **Annex C**?

# Chapter 4

# CONDUCT OF WINDING-UP

## Background

4.1 The principal duties of a liquidator are to inquire into the affairs of the company being wound up, to collect and realise its assets and to settle the claims of the creditors according to their respective entitlements.

4.2 In a court winding-up, the creditors and contributories at the separate meetings convened by the provisional liquidator may decide that application be made to the court for appointing a COI to act with the liquidator[75]. The COI shall consist of creditors and contributories of the company or persons holding general powers of attorney from creditors and contributories. It supervises the liquidator, and may give directions to the liquidator in the course of winding up the company. In the administration of the assets of the company being wound up and in distributing them among the creditors, the liquidator is required to have regard to any directions that may be given by resolution of the creditors or contributories in general meeting, or by the COI[76]. He may also summon general meetings of the creditors or members for the purpose of ascertaining their wishes[77], or apply to the court for directions in relation to any particular matter arising under the winding-up[78].

4.3 A COI may also be appointed by the creditors in a creditors' voluntary winding-up[79]. There is no COI in a members' voluntary winding-up since the company in question is solvent and the members of the company have control of the winding-up proceedings.

4.4 After collecting and realising the assets of the company, the liquidator shall, after payment of the fees and expenses of the liquidation, distribute the balance to the general body of creditors based on the *pari passu* principle. However, the distribution is subject to the statutory order of priority provided for in the CO, which accords preferential status to

[75] Section 206(1) of the CO. Under section 206(2) of the CO, if there is a difference between the determinations of the creditors and the contributories, the court shall decide the difference.

[76] Section 200(1) of the CO. Any direction given by the creditors or contributories at any general meeting shall in case of conflict be deemed to override any direction given by the COI.

[77] Section 200(2) of the CO.

[78] Section 200(3) of the CO.

[79] Section 243(1) of the CO.

certain classes of debts (e.g. wages and salaries) so that such debts will be paid in priority to all other unsecured debts. If there are sufficient assets to discharge the liabilities of the company in full, the liquidator is required to divide the surplus assets amongst the contributories in accordance with their rights provided in the company's articles of association. Upon the completion of the liquidation process and subject to certain procedural requirements, the company will be dissolved.

## Proposals

### (A) Stipulating the maximum and minimum number of members of the COI

*Present Position*

4.5 There is no express provision in the CO or the CWUR which sets a minimum number of members of a COI in either a court winding-up or a creditors' voluntary winding-up. However, the CO[80] provides that notwithstanding any vacancy in the COI, the continuing members may act so long as the number of members does not fall below two. In other words, in order for the COI to act, there must be at least two members.

4.6 There is no provision which sets a maximum number of members of a COI in a court winding-up. In a creditors' voluntary winding-up, the first or subsequent meeting of creditors may appoint a COI consisting of not more than five persons[81].

4.7 In either a court winding-up or a creditors' voluntary winding-up, if there is a vacancy in the COI, the liquidator must summon a meeting of creditors or of contributories to fill the vacancy, unless the liquidator applies to the court for an order not to fill the vacancy[82].

*Proposal*

4.8 We **propose** that a maximum and a minimum number of members of COI should be set for both a court winding-up and a creditors' voluntary winding-up. We **propose** setting the maximum number of members as

[80] Sections 207(8) and 243(2) of the CO.

[81] Section 243(1) of the CO. Section 243(1) also provides that if a COI is appointed by the creditors' meeting, the company may appoint such number of persons as they think fit to act as members of the COI not exceeding five in number.

[82] Section 207(7) of the CO (for a court winding-up), which is applicable to a creditors' voluntary winding-up by section 243(2) of the CO.

seven to facilitate the operation of the COI, while the minimum should be set as three to minimise the chance of a deadlock of the COI. The relevant UK law also provides for a maximum and minimum number of members[83].

4.9 To allow flexibility, we **propose** that the maximum and minimum numbers may be varied if the liquidator makes an application to the court and the court thinks it fit to do so.

4.10 We also **propose** that it is not necessary to fill a vacancy in the COI if the liquidator and a majority of the remaining members of the COI so agree, provided that the total number of members does not fall below the proposed minimum number.

**Question 18**
Do you agree that a maximum and a minimum number of members should be set for the COI appointed in both a court winding-up and a creditors' voluntary winding-up? If so, are the proposed maximum number (seven) and minimum numbers (three) appropriate? Do you agree that the court should have the discretion to vary the maximum and minimum numbers on application by the liquidator?

**Question 19**
Do you agree to allow the COI not to fill a vacancy if the liquidator and a majority of the remaining members of the COI so agree, provided that the total number of members does not fall below the proposed minimum number?

## (B) Streamlining and rationalising the proceedings of the COI

*Present Position*

4.11 At present, in a court winding-up or a creditors' voluntary winding-up, the COI is required to meet at such times as they from time to time appoint, and failing such appointment, at least once a month. In addition, the liquidator or any member of the COI may also call a COI meeting as and when he thinks necessary[84]. There is no provision on the advance notice required for calling a COI meeting, nor is there any

[83] Rules 4.152(1) and (2) and 4.154(4) of the UK Insolvency Rules 1986.
[84] See sections 207(2) and 243(2) of the CO.

statutory requirement on the time limit within which the first meeting of the COI must be held. There is also no provision which allows the COI to function through resolution sent by post or electronic means.

*Proposal*

4.12 The current requirement that, failing the appointment by the COI to meet, the COI must meet at least once a month can be time and cost consuming, especially where such meetings serve no useful purpose. It may also discourage participation by creditors and contributories in the COI. Therefore, we **propose** to remove such requirement.

4.13 To rationalise the proceedings of the COI and enhance protection of the rights of COI members, we also **propose** introducing the following provisions –

(a) to require that the liquidator shall call a first meeting of the COI to be held within six weeks of his appointment or the COI's establishment (whichever is the later). This will ensure that the first meeting of the COI will be held in a timely manner;

(b) to require that the liquidator must give five business days' written notice of the date, time and venue of a meeting to every member of the COI (or his representative, if designated for that purpose). This will ensure that sufficient notice will be given to members of the COI for attending a meeting of the COI. To enable meetings to be called at short notice under special circumstances, the notice requirement can be waived by or on behalf of any member;

(c) to impose the duty on the liquidator, after the first meeting of the COI, to call a meeting of the COI if requested by a COI member, stipulate that such meeting will need to be held within 21 days of the request being received, and clarify that the request may be given by the representative of a member of the COI; and

(d) to impose the duty on the liquidator, after the first meeting of the COI, to call a meeting of the COI if the COI has previously resolved that a meeting be held on a specified date, and clarify that the COI may also appoint the time for meeting by way of resolution.

The above proposals will not affect the liquidator's power as currently provided in the CO to call a COI meeting when he thinks necessary. We **propose** that the liquidator should also be able to determine where the

meeting of the COI is held[85].

4.14 In order to encourage participation by creditors and contributories in the COI, we also **propose** that the COI should be able to function through written resolutions sent by post or using other electronic means (such as using emails or through websites). Under the proposal, the liquidator may seek to obtain the agreement of the members of the COI to a resolution by sending to every member (or his representative designated for that purpose) a copy of the proposed resolution[86]. Any member of the COI may, within seven business days from the date of the liquidator's sending out of a resolution, require him to summon a meeting of the COI to consider the matters raised by the resolution. In the absence of such a requirement, the resolution is deemed to have been passed by the COI if and when the liquidator is notified in writing by a majority of the members that they concur with it. Similar requirements are found in the UK[87].

4.15 It is envisaged that the said proposals would significantly streamline the proceedings of the COI by facilitating the participation by creditors and contributories in the COI. It will also reduce the cost of the liquidation, which ultimately benefits the creditors involved.

**Question 20**
Do you agree to the proposals as set out in paragraphs 4.12 and 4.13 for streamlining and rationalising the proceedings of the COI?

**Question 21**
Do you support the proposal to enable the COI to function through written resolutions sent by post or using other electronic means (such as using emails or through websites)?

[85] The proposals are modelled on rules 4.156(1) to (3) of the UK Insolvency Rules 1986.
[86] For the proposals concerning the delivery of documents by electronic means and the use of websites by the liquidator, see Proposal (D) below.
[87] Rules 4.167, 12A.3 and 12A.10 to 12A.13 of the UK Insolvency Rules 1986

## (C) Simplifying the process for the determination of costs or charges of liquidators' agents in a court winding-up

*Present Position*

4.16 At present, the bills of the costs or charges of every person employed by the OR or the liquidator in a court winding-up (e.g. solicitor, manager, accountant, auctioneer, broker, etc.) must, if requested by the OR or the liquidator, be delivered up for taxation[88] in order to facilitate the determination of the amount of such costs or charges that are payable out of the company's assets. Such procedure can be both costly and time consuming.

4.17 On the other hand, the liquidator (other than the OR) in a court winding-up is to receive remuneration by way of percentage or otherwise as is determined by an agreement with the COI where there is a COI, or by the court where there is no COI or there is no agreement between the liquidator and the COI[89].

*Proposal*

4.18 We **propose** to allow the bills of costs or charges of the agents employed by the liquidator to be determined by agreement with the COI. Similar to the present process for determining the remuneration of the liquidator, the liquidator will provide the COI with details regarding the work performed by the agents employed by him and the proposed costs and charges involved. If the COI agrees with the proposed costs and charges by way of resolution, the costs and charges are considered as approved without the need to deliver them up for taxation by the court. This would streamline the process for determining the bills of costs or charges of the agents employed by the liquidator if there is agreement between the liquidator and the COI, which would in turn reduce the cost of the

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[88] Taxation is a process of examination and determination of bills of costs by the court. According to the Procedural Guides issued by the High Court in 2004 relating to taxation/determination of bills in liquidation (Hong Kong Civil Procedure 2013 vol 1 62/App/94A and 94B), bills representing the liquidator's remuneration and bills of costs for agents of liquidators and provisional liquidators shall be lodged by the liquidator or provisional liquidator with the High Court Registry for appointment for taxation. Various documents are also required to be lodged in order to provide the background information about the liquidation administration. A hearing time will then be fixed for the taxation/determination of the bill lodged. The burden is on the liquidator to justify the amount of his remuneration and to demonstrate that he has scrutinised the agents' bills. The taxation/determination hearing may be adjourned for various reasons (e.g. cannot be finished within the allotted time) and the master's decision is subject to review, initially by the same master and then by a judge of the High Court. When taxation/determination is finished, the liquidator or provisional liquidator will have to pay the taxing fee.

[89] Section 196(2) of the CO.

liquidation and ultimately benefit the creditors involved. This would also ensure that a consistent approach is adopted in the determination of the remuneration of the liquidator and the costs and charges of his agents.

4.19 In the absence of a COI or if the liquidator fails to agree with the COI on the bills of costs or charges of the agents, the matter will continue to be determined by the court under the present procedure. This would also be consistent with the existing approach for determining the remuneration of the liquidator.

**Question 22**

(a) Do you agree with allowing the costs and charges of the agents employed by the liquidators to be determined by agreement between the liquidator and the COI?

(b) Do you agree that if such agreement cannot be reached, the costs and charges of the agents shall be delivered up for taxation by the court?

## (D) Allowing communication by liquidators with creditors, contributories, members of COI and other interested parties by electronic means

*Present Position*

4.20 At present, the CO does not provide for liquidators and provisional liquidators to communicate with creditors, contributories and other interested parties by way of electronic means. On the other hand, the CO contains provisions which provide that a company may send documents or information to any person in electronic form or by means of a website, but these provisions are not applicable to communications by a liquidator.

*Proposal*

4.21 With the growing acceptance of electronic means of communication, we **propose** to provide the liquidator and provisional liquidator with the flexibility to give, deliver or send any notice or document required to be given, delivered or sent by him to any person under the CO or the CWUR

by electronic means (such as using emails or through websites)[90], subject to the following conditions –

(a) if the liquidator or the provisional liquidator intends to deliver a notice or document to an intended recipient by electronic means, he has to secure the prior consent of such recipient; and

(b) if he intends to disseminate the notice or document through the use of websites, he has to send a notice to the intended recipient stating that the intended recipient may request a hard copy of the notice or document and specifying his contact details which may be used to request a hard copy.

**Question 23**
Do you support the proposal to allow liquidators and provisional liquidators to communicate with creditors, contributories or other parties by electronic means, subject to the conditions as set out in paragraph 4.21?

4.22 Besides the above proposals, we **propose** to introduce a number of technical amendments. These proposals will help rationalise the winding-up process, enhance protection of creditors and modernise the present law. Details are set out in **Annex C**.

**Question 24**
Do you agree with the proposed technical amendments relating to the conduct of winding-up as set out in **Annex C**?

[90] The proposal is without prejudice to the operation of the CO or the new CO regarding the delivery of notices and documents to the Registrar and the operation of the provisions of the Electronic Transactions Ordinance (Cap. 553) regarding the delivery of notices and documents to the Government and the court.

# Chapter 5

# VOIDABLE TRANSACTIONS

## Background

5.1 To protect the general body of unsecured creditors against a diminution of the assets of a company and achieve a "*pari passu*" distribution[91] of the assets amongst the unsecured creditors in the winding-up of the company, the CO empowers the liquidator to review the company's transactions and to apply to the court to avoid, vary or reverse the effects of certain transactions ("voidable transactions"). Generally, voidable transactions are those which would have remained binding on the company if the company is not wound up and would confer an unfair or improper advantage on a party at the expense of the unsecured creditors.

5.2 For example, the liquidator may ascertain whether a payment or transfer to a particular creditor has been made by the company to prefer one creditor to the disadvantage of the general body of unsecured creditors. Such a transaction would put the said creditor in a better position than other creditors in disregard of the priority position of preferential creditors and in breach of the *pari passu* principle of distribution amongst unsecured creditors, and is referred to as "unfair preference"[92]. If the court, on the application of the liquidator, is satisfied that an unfair preference has indeed been given, it has the power under the CO to make such order as it thinks fit for restoring the position to what it would have been as if the company had not given that unfair preference.

5.3 Besides unfair preferences, there are various other provisions in the CO for the adjustment of a company's transactions in the event of the winding-up of the company. These provisions in the CO take a variety of forms with widely differing range of effects and relief. For example, there is a provision in the CO on extortionate credit transactions in

[91] This term refers to a fundamental principle of insolvency law that creditors are treated equally and that distribution of the company's assets amongst them is in proportion to the size of their claims.

[92] Sections 266, 266A and 266B of the CO applying sections 50 to 51B of the BO.

relation to a company being wound up[93], under which the court may make various orders, such as varying the terms of that transaction, or setting aside the obligations created by that transaction. The CO also contains a provision which operates to invalidate floating charges created by the company over its assets within a specific period before the commencement of the winding-up[94].

## Proposals

### (A) Introducing new provisions on "transactions at an undervalue"

*Present Position*

5.4 At present, there is no provision in the CO which is specifically designed to enable the court, on application by the liquidator, to avoid "transactions at an undervalue". Transactions at an undervalue are transactions entered into by the company prior to its winding-up that involve an outright gift given by the company to a party, or entered into by the company with a party on terms that provide for the company to receive no consideration or for a consideration which is significantly less than the value of the subject of the transaction.

5.5 Transactions at an undervalue reduce the pool of property which would be available for distribution to creditors. At present, it is difficult for liquidators to challenge these transactions unless other provisions in the CO (such as the misfeasance provision[95] where the court may hold past or present officers liable for any misfeasance or breach of duty in relation to a company) can be relied upon.

5.6 Similar provisions to enable the court to set aside transactions at an undervalue can be found in the legislation in the UK and Australia. There are also similar provisions in the BO to enable the court in bankruptcy proceedings to set aside transactions at an undervalue entered

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[93] Section 264B applies in relation to a company being wound up where the company is, or has been, a party to a transaction for, or involving, the provision of credit to the company. A transaction is extortionate "if, having regard to the risk accepted by the person providing the credit –

(a) the terms of it are or were such as to require grossly exorbitant payments to be made (whether unconditionally or in certain contingencies) in respect of the provision of credit; or

(b) it otherwise grossly contravenes ordinary principles of fair dealing,

and it shall be presumed, unless the contrary is proved, that a transaction with respect to which an application is made under this section is or, as the case may be, was extortionate".

[94] Section 267 of the CO.

[95] Section 276 of the CO.

into by a bankrupt[96].

*Proposal*

5.7 For better protection of creditors against depletion of the assets of an insolvent company, we **propose** to introduce new provisions regarding transactions at an undervalue. This proposal will make up for the deficiency that currently exists in our corporate insolvency law.

5.8 We **propose** to specify that a transaction at an undervalue occurs when a company –

(a) makes a gift to or enters into a transaction with a person on terms that provide for the company to receive no consideration; or

(b) enters into a transaction with a person for a consideration[97] the value of which is significantly less than the value of the consideration provided by the company[98].

5.9 We **propose** to provide that where a company goes into liquidation[99] and the company has at a "relevant time" entered into a transaction at an undervalue with any person, the court shall, on the application of the liquidator, make such order as it thinks fit[100] for restoring the position to what it would have been if the company had not entered into the transaction at an undervalue.

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[96] Where the court finds that a bankrupt has entered into a transaction at an undervalue, section 49 of the BO (together with sections 51, 51A and 51B) enables the court, on application by the trustee in bankruptcy, to make such order as it thinks fit for restoring the position to what it would have been if the bankrupt had not entered into that transaction.

[97] The consideration received and provided by the company are to be assessed in terms of money or money's worth.

[98] Our proposal is based on the provisions in the Insolvency Act 1986 of the UK. Case law in the UK suggests that the UK provisions on transactions at an undervalue require a comparison to be made between the value obtained by the company for the transaction and the value of the consideration provided by the company (see *Re MC Bacon* [1990] BCC 78) and would include transactions at an overvalue, i.e. where the company was paying more for the goods or services than those goods or services were worth (see *Clements v Henry Hadaway Organisation Ltd* [2008] 1 B.C.L.C. 223).

[99] For the purpose of this proposal and the proposal for unfair preferences in Proposal (B) of Chapter 5, a company goes into liquidation if —
(a) it passes a resolution for voluntary winding-up;
(b) a winding-up statement made under section 228A of the CO has been delivered to the Registrar under that section; or
(c) an order for its winding-up is made by the court at a time when it has not already gone into liquidation by passing the aforementioned resolution.

[100] Similar to the provision on transactions at an undervalue provision in the BO, the court will also be given the power to make specific orders as set out in a non-exhaustive list in addition to the general power.

5.10 We **propose** that the "relevant time" should be any time within the period of five years ending with the commencement of the winding-up[101], but only if at that time the company is unable to pay its debts[102] or becomes unable to pay its debts as a result of the transaction. This five-year period is in line with that for bankruptcy cases under the BO.

5.11 Since persons connected with the company are in a position to possess or have access to information concerning the company that is not generally available, they will be able to take action to manipulate or exert influence on the affairs of the company in order to safeguard or gain some advantage for their own interests or the interests of persons or entities which they have a connection with. Therefore, for the purpose of considering whether a transaction at an undervalue is entered into at a "relevant time" (paragraph 5.10 refers), we **propose** to provide that the company is presumed (unless the contrary is shown) to be unable to pay its debts at that time or becomes unable to pay its debts as a result of the transaction where the transaction is entered into with a person "who is connected with the company"[103] (otherwise than by reason only of being its employee). The same presumption can also be found in the relevant provisions on transactions at an undervalue in the UK and in the BO[104].

5.12 We also **propose** providing statutory protection for the party seeking to resist an application made by the liquidator of the company in respect of the undervalue transaction such that the court will not make the order as described in paragraph 5.9 if it is satisfied that—

(a) the company which entered into the transaction did so in good faith and for the purpose of carrying on its business; and

(b) at the time it did so there were reasonable grounds for believing that the transaction would benefit the company.

This protection would enable a company to engage in genuine business transactions carried out in good faith in the reasonable belief that they will benefit the company, even where the transaction may technically be a transaction at an undervalue. Similar provisions can be found in the legislation in the UK[105].

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[101] The "commencement of winding-up" is to be construed in accordance with sections 184, 228A(5)(a) and 230 of the CO.

[102] "Unable to pay its debts" has the meaning as provided in section 178 of the CO.

[103] Please refer to paragraphs 5.19 to 5.20 in this Chapter regarding the definition of a "person connected with the company".

[104] Section 240(2) of the UK Insolvency Act 1986 and section 51(2) of the BO.

[105] Section 238(5) of the UK Insolvency Act 1986.

**Question 25**

(a) Do you agree that new provisions should be introduced to empower the court to make orders for restoring the position of a company to what it would have been if the company has not entered into a transaction at an undervalue?

(b) Do you agree to the proposal regarding "relevant time" as proposed in paragraph 5.10?

(c) Do you agree that transactions at an undervalue entered into by the company with a person who is connected with the company should be subject to a more stringent control as proposed in paragraph 5.11?

(d) Do you agree that statutory protection should be provided for the party seeking to resist an application made by the liquidator of a company in respect of the undervalue transaction? If so, do you agree with the statutory protection as proposed in paragraph 5.12?

## (B) Rectifying the anomalies in the application of existing provisions on "unfair preferences"

*Present Position*

5.13 At present, the CO does not have self-contained provisions on unfair preferences concerning companies being wound-up. Instead, the CO applies the provisions on unfair preferences in the BO with modifications to winding-up cases by relying on cross-references to relevant provisions of the BO[106].

5.14 The unfair preferences provisions in the BO are generally set out as follows –

(a) A debtor gives an unfair preference to a person if –

(i) that person is one of the debtor's creditors or a surety or guarantor for any of his debts or other liabilities; and

(ii) the debtor does anything or suffers anything to be done which (in either case) has the effect of putting that person into a position which, in the event of the debtor's bankruptcy, will be

[106] Sections 266, 266A and 266B of the CO applying sections 50 to 51B of the BO.

better than the position he would have been in if that thing had not been done.

(b) Where a debtor is adjudged bankrupt and he has at a "relevant time" given an unfair preference to any person, the court shall[107], on the application of the trustee-in-bankruptcy, make such order as it thinks fit for restoring the position to what it would have been if that debtor had not given that unfair preference.

(c) However, the court shall not make an order in (b) unless the debtor who gave the unfair preference was influenced in deciding to give it by a desire to produce in relation to that person the effect as set out in (a)(ii) (a "desire to prefer"), but the desire to prefer is presumed (unless the contrary is shown) if the unfair preference is given to an "associate"[108] of the debtor (otherwise than by reason only of being his employee).

(d) Where the unfair preference was not a transaction at an undervalue and was given to an "associate" of the debtor (otherwise than by reason only of being his employee), the "relevant time" would be any time within the period of two years ending with the day of the presentation of the relevant bankruptcy petition on which the debtor is adjudged bankrupt but only if the bankrupt is insolvent[109] at that time or becomes insolvent as a result of the unfair preference. In any other case of an unfair preference which was not a transaction at an undervalue, the two-year period mentioned above will be six months instead.

5.15 When these BO provisions are applied in the company winding-up context, a number of problems arise which have limited the application and effectiveness of the unfair preference provisions. For example, in the application of the term "associate" defined under the BO[110], while the

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[107] According to the English case *Re Paramount Airways Ltd (in liquidation)* [1993] Ch 223, despite the use of the word "shall" in provisions such as section 239(3) of the UK Insolvency Act 1986 (which is comparable to section 50(2) of the BO), the phrase "such order as it thinks fit" confers on the court an overall discretion which "is wide enough to enable the court, if justice so requires, to make no order against … the person to whom the preference was given". Legal commentary also put forward argument that the words "as it thinks fit" and the various examples of possible orders set out in section 241 of the UK Insolvency Act 1986 (which is comparable to section 51A of the BO) that may be made by the court lead to the conclusion that the court may in its discretion decline to make any order at all.

[108] "associate" is defined in section 51B of the BO.

[109] A debtor is insolvent if –
(a) he is unable to pay his debts as they fall due; or
(b) the value of his assets is less than the amount of his liabilities, taking into account his contingent and prospective liabilities.

[110] Section 51B of the BO.

expression "debtor" refers to the bankrupt in the bankruptcy context, the same expression can only mean the debtor company and not a director of the debtor company in the context of company winding-up. Therefore, the definition of "associate", which covers the spouse and relatives of the bankrupt, does not cover the spouse and relatives of a director of the debtor company when applied in the company winding-up context. This is clearly not desirable as the spouse and relatives of a director of the debtor company are likely recipients of unfair preferences. Furthermore, in the definition of "associate" under the BO, a company is an associate of a debtor if that debtor has control of the company or if the debtor and persons who are his associates together have control of the company. When applying the definition in the company winding-up context, a subsidiary of the debtor company is included as its associate, but the holding company of the debtor company or another subsidiary of the holding company of the debtor company are not covered.

*Proposal*

5.16 To address the anomalies relating to the application of the bankruptcy provisions in the winding-up context, we **propose** to introduce self-contained provisions on unfair preference in the CO instead of relying on cross-references to the provisions of the BO.

5.17 We **propose** that the new self-contained provisions should largely reinstate the position in the present law, with modifications to address the anomalies as identified in paragraph 5.15. The proposed provisions are set out as follows –

(a) A company gives an unfair preference to a person if –

(i) that person is one of the company's creditors or a surety or guarantor for any of the company's debts or other liabilities; and

(ii) the company does anything or suffers anything to be done which (in either case) has the effect of putting that person into a position which, in the event of the company going into insolvent liquidation[111], will be better than the position he would have been in if that thing had not been done.

[111] For the purpose of this proposal, a company goes into insolvent liquidation if it goes into liquidation at a time when its assets are insufficient for the payment of its debts and other liabilities and the expenses of the winding-up.

(b) Where a company has at a "relevant time" given an unfair preference to any person, the court, on the application of the liquidator, shall make such order as it thinks fit[112] for restoring the position to what it would have been if the company had not given that unfair preference.

(c) However, the court shall not make an order in (b) unless the company which gave the unfair preference was influenced in deciding to give it by a desire to produce the effect as set out in (a)(ii) (a "desire to prefer"), but the desire to prefer is presumed (unless the contrary is shown) if the unfair preference is given to a "person connected with the company" (otherwise than by reason only of being its employee).

(d) Where the unfair preference was not a transaction at an undervalue and was given to a "person connected with the company" (otherwise than by reason only of being its employee), the "relevant time" would be any time within the period of two years ending with the commencement of winding-up but only if the company is at that time unable to pay its debts[113] or becomes unable to pay its debts as a result of the transaction. In any other case of an unfair preference which was not a transaction at an undervalue, the two-year period mentioned above will be six months instead.

5.18 The only major change of the new standalone provisions from the position in the present law is that instead of making reference to an "associate of the debtor", the new provisions would make reference to a "person who is connected with the company". This is intended to rectify the existing anomalies in the application of the definition of "associate" in the unfair preference provisions of the BO to the winding-up context as highlighted in paragraph 5.15 above.

5.19 We **propose** that a "person who is connected with the company" will include –

(a) a director or shadow director of the company or an associate of such a director or shadow director; or

(b) an associate of the company[114].

[112] Similar to the case of transaction at an undervalue and in line with the present position, the court's general power to make any order as it thinks fit will be supplemented by a power to make specific orders, which will be set out in a non-exhaustive list. Similar provision is found in section 51A(1) of the BO.

[113] "Unable to pay its debts" has the meaning as provided in section 178 of the CO.

[114] This is modelled on section 249 of the UK Insolvency Act 1986.

5.20 We also **propose** a separate definition of "associate" for the purpose of defining a "person who is connected with the company" in the new provision on unfair preference. Similar to the existing definition of "associate" in the BO, the new definition of "associate" will cover the following persons –

(a) A person[115] is an associate of an individual if that person is –

(i) the individual's husband or wife[116] or a person who is in a cohabitation relationship[117] with the individual ("cohabitant"),

(ii) a relative[118] of –
(A) the individual, or
(B) the individual's husband or wife or cohabitant, or

(iii) the husband or wife or cohabitant of a relative of –
(A) the individual, or
(B) the individual's husband or wife or cohabitant.

(b) A person is an associate of any person with whom he is in partnership, and of the husband or wife or cohabitant or a relative of any individual with whom he is in partnership.

(c) A person is an associate of any person whom he employs or by whom he is employed[119].

(d) A person in his capacity as trustee of a trust is an associate of another person if the beneficiaries of the trust include, or the terms of the trust confer a power that may be exercised for the benefit of, that other person or an associate of that other person.

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[115] The reference to "person" shall have the meaning given by section 3 of the Interpretation and General Clauses Ordinance (Cap. 1), and would therefore include an individual and a company.

[116] In line with section 435(8) of the UK Insolvency Act 1986, reference to a husband or wife includes a former husband or wife and a reputed husband or wife.

[117] Cohabitant is proposed to be included in the definition of associate in line with the introduction of the concept of "cohabitation relationship" in the new CO (sections 484(1) and 666). It is proposed that the term "cohabitation relationship" be defined to mean a relationship between two persons (whether of the same sex or of the opposite sex) who live together as a couple in an intimate relationship. References to a cohabitant also include a former cohabitant.

[118] A person is a relative of an individual if he is that individual's brother, sister, uncle, aunt, nephew, niece, lineal ancestor or lineal descendant. Any relationship of the half blood is treated as a relationship of the whole blood. Stepchild or adopted child of any person is treated as his child. An illegitimate child is treated as the legitimate child of his mother and reputed father. This basically reflects the existing position in the law (section 51B(7) of the BO refers).

[119] Any director or other officer of a company is to be treated as employed by that company. This basically reflects the existing position in the law (section 51B(4) of the BO refers).

In addition, modelling on the relevant provision in the UK [120], the new definition of "associate" will also include the following to ensure that associated companies will also be covered –

(e) A company[121] is an associate of another company –

(i) if the same person has control[122] of both companies, or a person has control of one company and persons who are his associates, or he and persons who are his associates, have control of the other, or

(ii) if a group of two or more persons has control of each company, and the groups either consist of the same persons or could be regarded as consisting of the same persons by treating (in one or more cases) a member of either group as replaced by a person of whom he is an associate.

(f) A company is an associate of another person if that person has control of it or if that person and persons who are his associates together have control of it.

5.21 The proposed definition of "associate" will apply to the definition of a "person connected with the company" used in relation to both the proposed provisions on unfair preference and the proposed provisions on transactions at an undervalue (i.e. paragraphs 5.4 – 5.12 of this Chapter).

5.22 Under the existing law[123], appropriate protection is given to persons who have received benefits or acquired or derived interest in property in good faith and for value from an unfair preference (although a person who himself, as a creditor, received the benefit of an unfair preference will not be protected) in the winding-up context. We **propose** to maintain the said protection in the new standalone provisions on unfair preference, and

[120] Section 435 of the UK Insolvency Act 1986.

[121] A "company" includes any body corporate (whether incorporated in Hong Kong or elsewhere); and references to directors and other officers of a company and to voting power at any general meeting of a company have effect with any necessary modifications.

[122] For the purpose of the definition of "associate" under the proposed new provisions, a person is to be taken as having control of a company if –

(i) the directors of the company or of another company which has control of it (or any of them) are accustomed to act in accordance with his directions or instructions, or

(ii) he is entitled to exercise, or control the exercise of, one third or more of the voting power at any general meeting of the company or of another company which has control of it;

and where two or more persons together satisfy either of the above conditions, they are to be taken as having control of the company.

[123] Sections 266, 266A and 266B of the CO incorporating sections 51A(2), (3), (5) and (6) of the BO.

to provide that the same protection should also be applicable to the proposed new provisions on transactions at an undervalue as set out in paragraphs 5.4 - 5.12 of this Chapter with necessary modification.

**Question 26**

(a) Do you agree that the current provisions in the CO incorporating the provisions in the BO on unfair preference should be replaced by new standalone provisions which apply to winding-up cases as proposed in paragraph 5.17 to rectify the existing anomalies which limit the application and effectiveness of such provisions?

(b) Do you agree with the definitions of "person who is connected with a company" and "associate" as proposed in paragraphs 5.19 and 5.20?

(c) Do you agree that the existing protection for persons who have received benefits or acquired or derived interest in property in good faith and for value from unfair preference should be maintained, and that the same protection should also be applicable to the proposed new provisions on transactions at an undervalue?

## (C) Improving the effectiveness and flexibility of the provision for invalidating floating charges created before the winding-up of the company

*Present Position*

5.23 Amongst the provisions which aim at protecting the general body of creditors against a diminution of the company's assets, a provision is specifically designed to prevent companies from creating, at a time when liquidation was imminent, floating charges[124] which give no new value to the company and which result in converting unsecured creditors into secured creditors in preference to other unsecured creditors. This provision is necessary as the all-embracing nature of floating charges has a potentially adverse effect on other unsecured creditors in the process of liquidation by depleting the assets which could otherwise become available to them.

[124] A floating charge is a charge created over a class or classes of assets, present or future, and the subject matter of which could, in the ordinary course of the business of the company, be changing from time to time. It is contemplated that the company may carry on its ordinary course of business in respect of the class(es) of assets charged until crystalisation. For example, a charge over all the present and future book debts of a company where the company retains the ability to deal with the books debts and their proceeds freely in the ordinary course of its business.

5.24 Under the present provisions of the CO[125], a floating charge on a company's undertaking or property created by the company within 12 months prior to the commencement of the winding-up of the company shall be invalidated (unless it is proved that the company was solvent immediately after the creation of the charge). However, the present provisions do not distinguish between floating charges created in favour of persons connected with the insolvent company (e.g. a director) and floating charges created in favour of persons not so connected.

5.25 The above invalidation provisions are not intended to catch genuine credit transactions which create floating charges to secure new value to a company. Therefore, to ensure that such genuine credit transactions are not affected by the invalidation provisions, it is presently provided that a floating charge is not invalid to the extent of "the amount of any cash paid to the company"[126] at the time of or subsequently to the creation of the floating charge and in consideration of the floating charge. However, the existing provision for the exemption from invalidation is rather restrictive. In particular, it may not reflect the commercial reality as it may not cover the situations where the floating charge is created to secure other forms of valuable consideration which arise from day-to-day trading and finance. Further, the provision can be strictly interpreted to require the payment of money into the hands of the company itself[127].

*Proposal*

5.26 Due to the concern about floating charges created at a time when liquidation is imminent and which give no new value to the company, and in view of the greater likelihood for persons connected with the company to use this as a means to gain advantage over other unsecured creditors, we **propose** to introduce new provisions in relation to floating charges created by a company in favour of persons who are connected with the company. Under our proposal, which is modelled on the relevant provisions in the UK[128] –

(a) a floating charge created at any time within a period of two years (instead of 12 months) prior to the commencement of winding-up of the company in favour of a "person who is connected with the

[125] Section 267 of the CO.
[126] Including interest on that amount at the rate specified in the charge or at the rate of 12 per cent per annum whichever is the less.
[127] See *Re Dream Asia Ltd. (in liquidation)* [2003] 2 HKC 222.
[128] Section 245 of the Insolvency Act 1986.

company"[129] shall be invalidated; and

(b) in considering the validity of such a floating charge, it is not necessary to ascertain whether the company was solvent immediately after the creation of the charge.

5.27 The existing provision for exempting genuine credit transactions from invalidation (paragraph 5.25 refers) will continue to apply to floating charge created in favour of a "connected person" within the proposed extended period of two years, so that such a floating charge is not invalidated to the extent of the new value given to the company on or after, and in consideration for, the creation of the floating charge.

5.28 Further, to address the unnecessary restrictiveness of the existing provision for exempting genuine credit transactions from invalidation as mentioned in paragraph 5.25, we **propose** to expand the scope of the exemption as follows –

(a) amend the existing provision of "cash paid to the company" to "money paid to or at the direction of the company" to overcome the rigid interpretation of the existing provision which requires payment into the hands of the company, thus allowing for greater commercial flexibility between credit providers and consumer companies; and

(b) add "property or services supplied to the company" as new forms of consideration that may be exempted to cater for credit arrangements which involve supply of property or services on credit.

As a result, a floating charge will not be invalidated to the extent of the total value of the consideration for the creation of the charge as consisting of "money paid to or at the direction of the company" and "property or services supplied to the company" at the time of or subsequently to the creation of the floating charge.

[129] The expression "a person who is connected with the company" shall have the same meaning ascribed to it for the purposes of the provisions on transactions at an undervalue and unfair preferences, as elaborated in paragraphs 5.19 to 5.21 above.

**Question 27**
Do you agree to the proposed special provisions in relation to floating charges created by a company in favour of a person who is connected with the company as detailed in paragraph 5.26?

**Question 28**
Do you support the expansion of the scope of the exemption of a floating charge from invalidation catered for genuine credit transactions to cover "property and services supplied to the company" and "money paid at the direction of the company" as detailed in paragraph 5.28?

# Chapter 6

# INVESTIGATION DURING WINDING-UP, OFFENCES ANTECEDENT TO OR IN THE COURSE OF WINDING-UP AND POWERS OF THE COURT

## Background

6.1 One of the major tasks of a liquidator is to investigate into the affairs of the company. Such investigation enables the liquidator to determine the assets and liabilities of the company, and to find out if there was any misconduct on the part of the present or former officers of the company ("liquidation investigation").

6.2 In a court winding-up and a creditors' voluntary winding-up, the CO provides for the making out and submission of a statement of the affairs of the company[130]. The CO also provides for numerous powers for the court to facilitate the liquidation investigation, e.g. the powers to require various persons to pay, deliver or convey to the liquidator money, property or books and papers which apparently belong to the company[131], and to order private or public examinations of persons involved in the affairs of the company[132].

6.3 The liquidation investigation may reveal breach of specified provisions of the CO, breach of duty to the company, or commission of criminal offences by officers and directors of the company or other persons (whether or not related to the company). The CO contains provisions which enable action to be taken against these persons[133].

6.4 Besides the powers for facilitating the liquidation investigation, the CO also contains other provisions which enable the court to have closer control of a court winding-up. For example, as soon as it has made a winding-up order, the court must settle a list of contributories of the company (which include its present and past members)[134] unless it dispenses with the settlement of the list. The settlement of a list of contributories will help determine which of the company's members are

[130] Sections 190 and 241 of the CO.
[131] Section 211 of the CO.
[132] Sections 221 and 222 of the CO.
[133] For example sections 275 and 276 of the CO.
[134] Section 210 of the CO.

contributories, and are thus liable to contribute to the assets of the company on a winding-up. The court also has the powers to remove a liquidator from office on cause shown[135] and on application by the liquidator, give directions in relation to any particular matters arising from the winding-up[136].

## Proposals

### (A) Enhancing the effectiveness of the private and public examination procedures by providing for the express abrogation of the privilege against self-incrimination

*Present Position*

6.5 To facilitate the liquidation investigation, the CO provides that the court has the power to summon any officer of a company, any person known or suspected to be in possession of any property of the company or supposed to be indebted to the company, or any person having information relating to the affairs or property of the company to attend before it and to examine them on oath concerning the above matters[137] ("the private examination").

6.6 If the OR or the liquidator makes a further report[138] stating that in his opinion a fraud has been committed by any person in the promotion or formation of the company or by any officer of the company in relation to the company since its formation, the court may summon that person or officer to attend before it and be publicly examined[139] ("the public examination").

6.7 As the person summoned for private examination or public examination is compelled to attend before the court and to answer questions at the examination, and the information being asked for may contain potentially incriminating material against him, he would naturally wish to claim privilege against self-incrimination in order to avoid giving any

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[135] Section 196(1) of the CO.

[136] Section 200(3) of the CO.

[137] Section 221 of the CO. Section 221 provides for the court's powers in a court winding-up, but the powers may be invoked in a voluntary winding-up by virtue of section 255(1) of the CO. Please see the proposal in item 19 of Annex C regarding the application of section 221.

[138] Section 191(1) of the CO provides for the obligation of the liquidator in a court winding-up to submit to the court a preliminary report relating to the company, and section 191(2) provides for the submission of a further report by the OR or the liquidator.

[139] Section 222 of the CO.

answer at the examination.

6.8 Although it is not expressly provided in the CO whether the summoned person may claim the privilege against self-incrimination in either examination, there are judicial authorities[140] which have held that the privilege against self-incrimination cannot be invoked by a person undergoing the examinations.

*Proposal*

6.9 There is a public interest in ensuring that the liquidation investigation is conducted in an efficient and effective manner. Therefore, the summoned person should not be allowed to claim the privilege against self-incrimination as a reason for refusing to answer questions at either a private examination or a public examination in order not to frustrate the purpose of the liquidation investigation.

6.10 To remove any room for argument and achieve greater clarity and certainty, we **propose** to expressly set out in the legislation the common law position that a person being summoned to attend before the court for either a private or a public examination cannot invoke the privilege against self-incrimination during the examination. It follows that he must answer all questions that may be put to him, and that he is not excused from answering any question put to him at the examination on the ground that the answer might tend to incriminate him or make him liable to a penalty. The proposal is in line with similar investigation procedures in other pieces of legislation in Hong Kong[141].

6.11 To strike a reasonable balance between upholding public interest in having an efficient and effective corporate investigation and protecting the interest of the person being examined, we **propose** to expressly provide that if certain conditions are satisfied, the answers given or statements made by the person during either examination are not admissible as evidence against him in subsequent criminal proceedings that may be brought against him. The conditions are that the answer or statement might tend to incriminate him and that he so claims before giving the answer or making the statement at either examination.

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[140] See *Re Weihong Petroleum Co. Ltd.* [2002] 1 HKLRD 541 and *Re Asher & Co. (Hong Kong) Ltd.* [2004] 2 HKLRD 37 (private examinations), which relied on English cases like *Bishopsgate Investment Management Ltd. v Maxwell* [1993] Ch.1. The judgment in the English case also confirmed the same position in public examinations.

[141] For example, sections 145(3A) and 152A(5) of the CO, sections 863(7), 871(3) and 875(7) of Part 19 of the new CO, section 33 of the Theft Ordinance (Cap. 210), and sections 179(16) and 184(4) of the Securities and Futures Ordinance (Cap. 571).

However, the prohibition will be subject to certain exceptions, e.g. the answers given or statements made can be used in a proceeding in which the person is charged with offences relating to perjury or provision of false statements or offences under the future Companies (Winding Up and Miscellaneous Provisions) Ordinance. The prohibition of subsequent incriminating evidential use is in line with relevant provisions in the UK[142] and those concerning similar investigation procedures in Hong Kong[143].

**Question 29**

(a) Do you agree to expressly set out in the legislation the common law position that a person summoned for either a private or a public examination cannot invoke the privilege against self-incrimination during the examination?

(b) If so, do you agree that we should introduce provisions to prohibit the subsequent use of answers given and statements made during the examination in subsequent criminal proceedings if certain conditions are satisfied, subject to certain exceptions such as offences relating to perjury and provision of false statement and offences under the future Companies (Winding Up and Miscellaneous Provisions) Ordinance?

## (B) Widening the scope of application of the public examination procedure

*Present Position*

6.12 A public examination facilitates the investigation into the affairs of the company and the persons involved in the conduct of its affairs, and may enable the liquidator to obtain information for the administration of the estate which cannot as well be obtained privately. It also gives publicity for the information of creditors and the community at large of the salient facts and unusual features connected with the company's failure.

6.13 As mentioned in paragraph 6.6 above, the court may only exercise the power to order a public examination if the OR or the liquidator (as the

[142] Section 433 of the UK Insolvency Act 1986.

[143] For example the procedures concerning investigations into the affairs of companies by the Financial Secretary and inspectors appointed by the Financial Secretary (sections 142 to 152F of the CO, which will be re-enacted in Part 19 of the new CO).

case may be) has made for the court's consideration a "further report" in which he has stated that in his opinion a fraud has been committed by any person in the promotion or formation of the company or by any officer of the company in relation to the company since its formation. This has imposed an undue procedural burden for initiating the procedure. We also note that similar requirement is not found in the UK[144] or in the corresponding public examination procedure in the BO in respect of personal bankruptcy cases[145].

6.14 At present, only a person who is alleged to have committed fraud can be summoned for public examination. Besides, the categories of persons who may be examined are currently restricted to a person who is or has been an officer of the company or a person who has taken part in the promotion or formation of the company.

*Proposal*

6.15 We **propose** to remove the requirement that the OR or the liquidator must have alleged in his "further report" that fraud has been committed for initiating the public examination procedure, and to provide that a public examination may be ordered by the court upon the application by either the liquidator or the OR (whether or not the OR is the liquidator). This enhances the effectiveness of the public examination procedure by making it easier for the procedure to be triggered.

6.16 Besides, we **propose** to add further categories of person that may be summoned to attend before the court for a public examination. In addition to a person who is or has been an officer of the company or a person who has been concerned, or has taken part, in the promotion or formation of the company, the following persons can also be examined –

(a) any person who has acted as liquidator of the company or receiver or receiver and manager of the property of the company; and

(b) any person who is or has been concerned, or has taken part, in the management of the company.

Including (a) would enable the public examination procedure to be invoked to obtain information for the purpose of investigating the liquidation process itself. Including (b) would fill a gap in the existing

[144] Section 133 of the UK Insolvency Act 1986.
[145] Section 19 of the BO.

procedure which is not able to cover persons who are not officers of the company but who have taken part in its affairs or management, e.g. a Chief Financial Officer or a manager. These persons might be useful providers of relevant information for the investigation into the affairs of the company.

6.17 The scope of the matters that may be examined would also be amended to correspond with the types of persons to be examined. The proposal is modelled on the relevant provision in the UK[146].

**Question 30**

(a) Do you agree to the removal of the requirement that the OR or the liquidator must have alleged in his "further report" that fraud has been committed for initiating the public examination procedure, and to provide that a public examination may be ordered by the court upon the application by either the liquidator or the OR?

(b) Do you agree with the proposed new categories of person that may be examined under the public examination procedure, namely (i) any person who has acted as liquidator of the company or receiver or receiver and manager of the property of the company; and (ii) any person who is or has been concerned, or has taken part, in the management of the company?

## (C) Providing for liability of past directors and members in connection with a redemption or buy-back of shares out of capital

*Present Position*

6.18 At present, the CO[147] sets out the requirements for a private company to redeem or purchase its own shares out of capital. After the new CO comes into operation[148], all companies (i.e. including public companies) will be allowed to make a payment to redeem or buy-back their own shares out of capital, subject to compliance with the requirements under the relevant provisions.

[146] In line with the provision of section 133(1) of the UK Insolvency Act 1986.
[147] Sections 49I to 49O of the CO.
[148] Division 4 in Part 5 of the new CO.

6.19 One of the conditions for making payment out of capital is the making of a solvency statement[149] by the company's directors. The solvency statement is required to state that, having made full inquiry into the affairs and prospects of the company, the directors have formed the opinion that the company is able to pay its debts after the proposed date of payment and also has the ability to continue to carry on business as a going concern in the following year. Under both the CO and the new CO, a director who makes the solvency statement without having reasonable grounds for the opinion expressed in it commits an offence[150]. In the UK[151], there are provisions which also require the recipient of the payment to contribute to the assets of the company in the event of the insolvent winding-up of the company, and make the directors jointly and severally liable with the recipient.

*Proposal*

6.20 According to the capital maintenance doctrine, a company's share capital should generally be preserved and not be returned to the members during the lifetime of a company. The object of the doctrine is to provide protection to creditors since creditors give credit to a company on the faith of a representation by the company about its capital and they generally do not have recourse against the company's members in the event that the company could not pay its own debts, and are forced to rely exclusively on the assets – the capital – of the company for repayment. It was thus of fundamental importance to creditors that the capital of the company be preserved and kept intact.

6.21 To safeguard against abuse and ensure that the paid-up capital of a company is not returned to its members improperly prior to the insolvent

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[149] Pursuant to section 49K(3) of the CO. The requirement for a solvency statement in relation to a payment out of capital in respect of a share redemption or buy-back is retained in Part 5 of the new CO. In particular, section 206 of the new CO provides that a solvency statement in relation to a transaction is one that each of the directors making it has formed the opinion that the company satisfies the solvency test in relation to the transaction, and section 205 provides as follows: –

"A company satisfies the solvency test in relation to a transaction if –

(a) immediately after the transaction there will be no ground on which the company could be found to be unable to pay its debts; and

(b) either —

(i) if it is intended to commence the winding up of the company within 12 months after the date of the transaction, the company will be able to pay its debts in full within 12 months after the commencement of the winding up; or

(ii) in any other case, the company will be able to pay its debts as they become due during the period of 12 months immediately following the date of the transaction."

[150] Section 49K(6) of the CO and section 207 of the new CO.

[151] Section 76 of the UK Insolvency Act.

winding-up of a company, we **propose** that where a company has redeemed or bought back its own shares by payment out of its capital and the company is wound up insolvent[152] within one year of the redemption or buy-back, the following persons should be jointly and severally liable to contribute to the assets of the company an amount not exceeding the payment made by the company in respect of the shares redeemed or bought back by the company so as to meet the deficiency in the company's assets –

(a) recipient of the payment of the redeemed or bought-back shares; and

(b) the directors who made the solvency statement which supported the redemption or buy-back without having reasonable grounds for the opinion expressed in the statement.

The proposal, which is modelled on the relevant provision in the UK[153], ensures that the company is not divested of capital prior to its insolvent liquidation and that members do not get a preference over the creditors in relation to the capital in circumstances where they ought not do so.

6.22 As the persons liable under the proposed provisions could have personal liability, they have an interest in the early winding-up of the company in order to prevent the company's business or assets, which have become bad or depleted within the year following the redemption or buy-back, from becoming worse and making them potentially liable for a greater sum. Therefore, we **propose** to explicitly provide that such persons may petition for winding up the company on the grounds that the company is unable to pay debts or that the court is of opinion that it is just and equitable that the company should be wound up[154]. It follows that, in his character as contributory[155], such person may not apply for winding-up of the company on any other ground[156], unless he is a contributory otherwise than under the proposed provisions.

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[152] For the purpose of this proposal, a company is wound up insolvent if it is being wound up and the aggregate amount of the company's assets and the amounts paid by way of contribution to its assets (other than contribution required to be paid under this proposal) are not sufficient for payment of its debts and liabilities, and the expenses of the winding-up.

[153] Section 76 of the UK Insolvency Act 1986.

[154] The grounds for a winding-up petition as provided in sections 177(1)(d) and (f) of the CO.

[155] Under section 171 of the CO, the term "contributory" means "every person liable to contribute to the assets of a company in the event of its being wound up, and for the purposes of all proceedings for determining, and all proceedings prior to the final determination of, the persons who are to be deemed contributories, includes any person alleged to be a contributory.

[156] The other grounds as set out in sections 177(1)(a), (b), (c) and (e) of the CO.

**Question 31**

(a) Do you agree that if a company is wound up insolvent within one year of its shares being redeemed or bought back by payment out of capital, certain categories of persons should be required to contribute to the assets of the company for an amount not exceeding the payment made by the company in respect of the shares redeemed or bought back by the company so as to meet the deficiency in the company's assets?

(b) If so, should the members from whom the shares were redeemed or bought back and the directors who made the solvency statement which supported the redemption or buy-back without having reasonable grounds for the opinion expressed in the statement be jointly and severally liable to contribute to such assets?

(c) Should such persons be allowed to apply for winding-up of the company under the specific grounds as set out in paragraph 6.22?

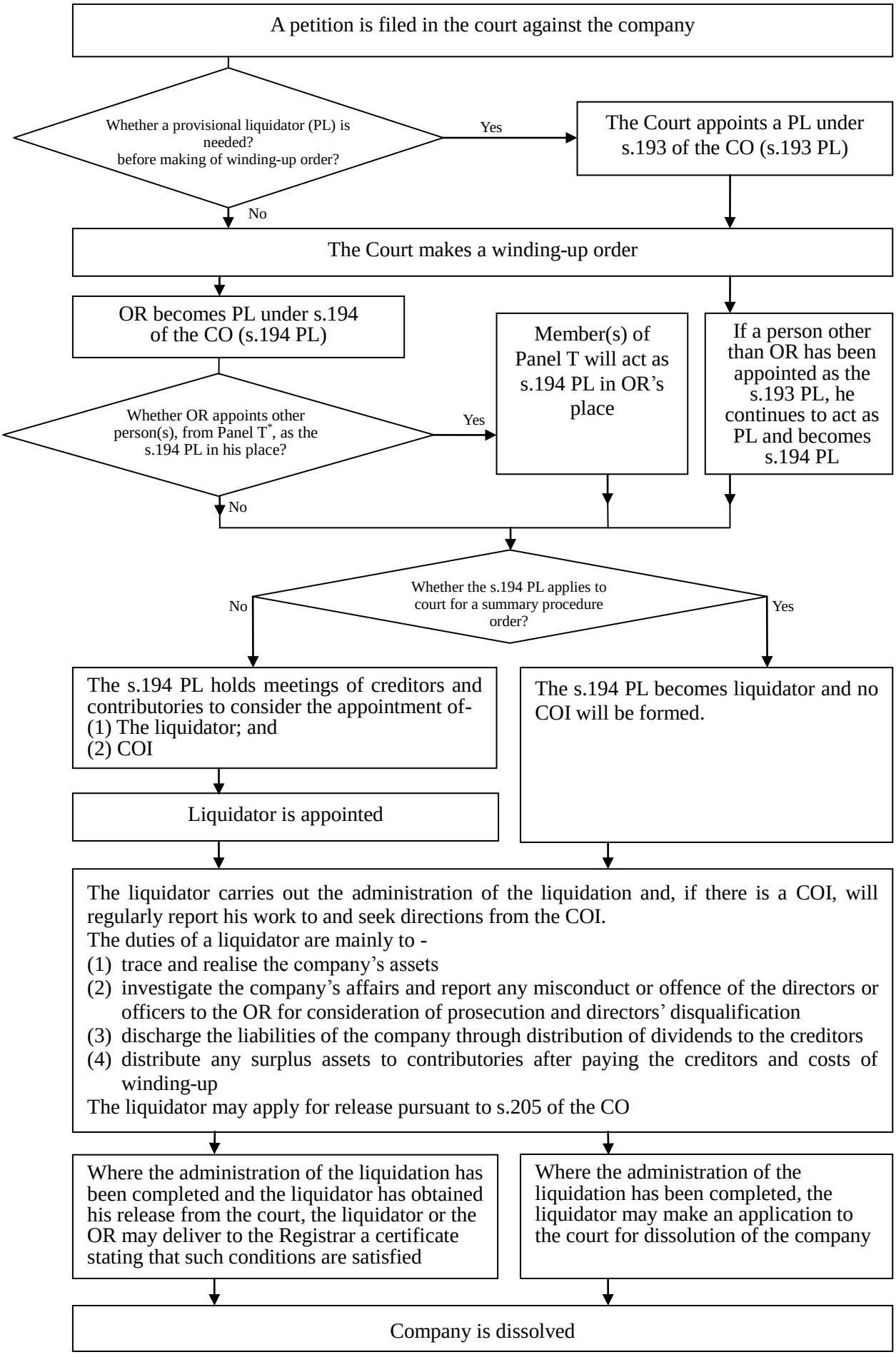
6.23 Besides the above proposals, we **propose** to introduce a number of technical amendments relating to the investigation during winding-up, offences antecedent to or in the course of winding-up and powers of the court. These proposals will help enhance protection of creditors and modernise the present law. Details are set out in **Annex C**.

**Question 32**

Do you agree with the proposed technical amendments relating to the investigation during winding-up, offences antecedent to or in the course of winding-up and powers of the court as set out in **Annex C**?

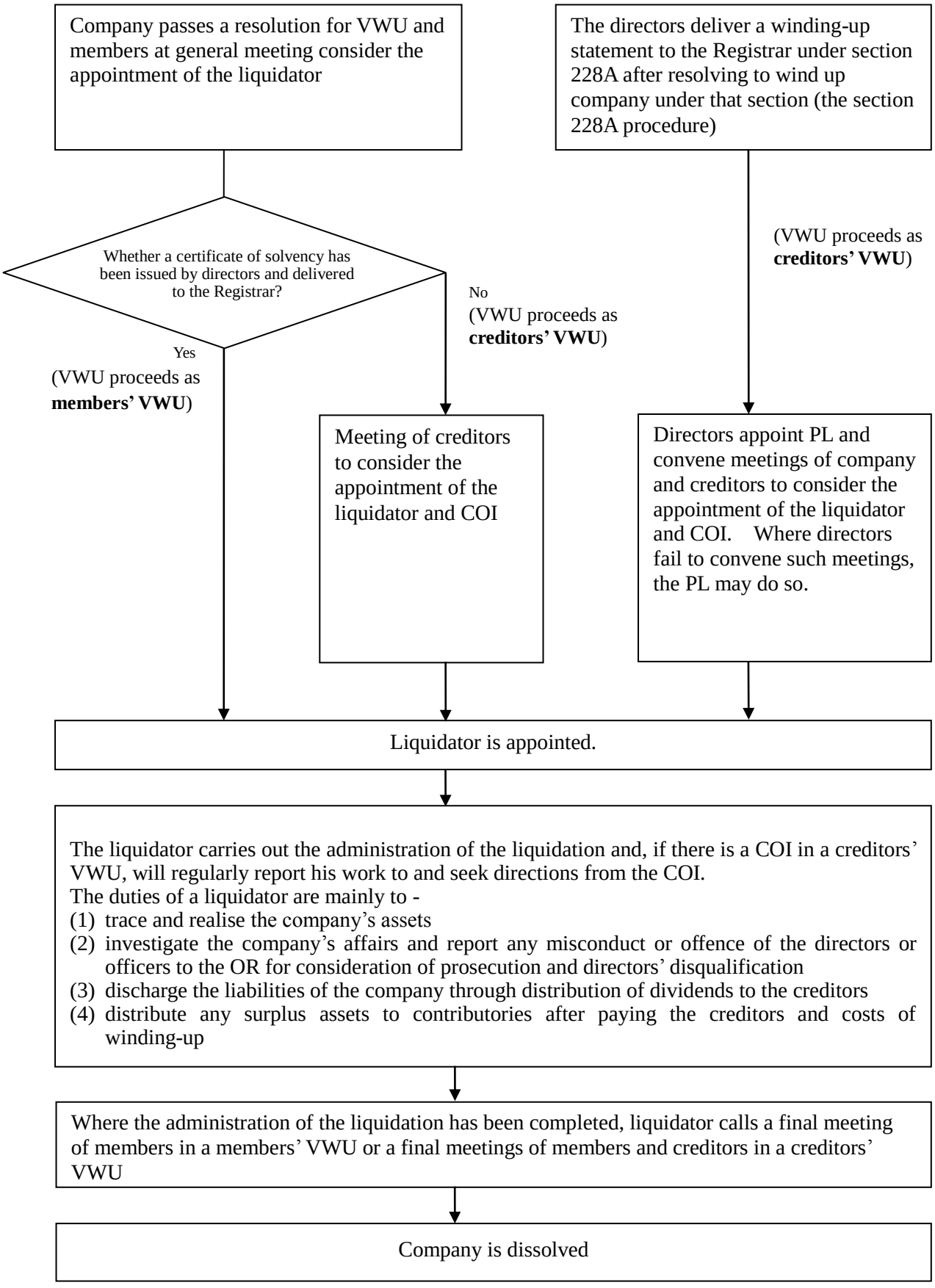
**Annex A**

# Court winding-up




* See paragraph 3.2

# Voluntary winding-up (VWU)



**Annex B**

## Membership List of the Advisory Group on Modernisation of Corporate Insolvency Law (January – October 2012)

**Chairperson –**

| | |
|---|---|
| Ms Teresa Wong | Official Receiver |

**Members –**

| | |
|---|---|
| Ms Linda Chan | Senior Counsel, Temple Chambers<br>*(representing The Hong Kong Bar Association)* |
| Ms Donna Duke | Deputy Head of Loan Management, Asia Pacific and Head of Loan Management, Hong Kong, The Hongkong and Shanghai Banking Corporation Limited<br>*(representing the Hong Kong Association of Banks)* |
| Mr Keith Ho | Partner & Notary Public, Wilkinson & Grist<br>*(representing The Law Society of Hong Kong)* |
| Mr Stephen Lau | Partner & Proprietor, Chui & Lau, Solicitors<br>*(representing The Chinese General Chamber of Commerce)* |
| Mr Li Ka-yin | Foreign Lawyer, C.C. Lee & Company<br>*(representing The Hong Kong Institute of Directors)* |
| Mr Stephen Liu | Managing Director, Ernst & Young Transactions Limited<br>*(representing The Hong Kong Institute of Chartered Secretaries)* |
| Mr Ian Robinson | Director, Robinson Management Ltd<br>*(representing The Hong Kong General Chamber of Commerce)* |
| Mr Jimmy Ng | Director, Wealth Fair Technologies (International) Limited<br>*(representing The Chinese Manufacturers' Association of Hong Kong)* |
| Mr Paul Chan | Principal, Paul K.C. Chan & Partners<br>*(representing the Federation of Hong Kong Industries)* |

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| Mr Johnson Kong | Managing Director, BDO Limited<br>*(representing the Hong Kong Institute of Certified Public Accountants)* |
| Dr Davy Wu | Senior Lecturer, Department of Accountancy and Law, Hong Kong Baptist University |
| Mrs Anne Carver | Professional Consultant, The Chinese University of Hong Kong<br>*(Member of Standing Committee on Company Law Reform (SCCLR))* |
| Mr Vincent Fan | Senior Advisor, Private Funds Group, Brookfield Asset Management Inc<br>*(SCCLR member)* |
| Prof Goo Say-hak | Professor of Law, the University of Hong Kong<br>*(SCCLR member)* |
| Ms Roxanne Ismail | Barrister at law, Temple Chambers<br>*(SCCLR member)* |
| Mr Rainier Lam | Partner, Recovery Services, PricewaterhouseCoopers<br>*(SCCLR Member)* |
| Mr Stefan Gannon | General Counsel/Executive Director, Hong Kong Monetary Authority<br>*(SCCLR Member)* |
| Prof Edward Tyler | Deputy Principal Government Counsel (Commercial) 3, Department of Justice<br>*(SCCLR Member)* |
| Mr Darryl Chan | Deputy Secretary (Financial Services) 3, Financial Services and The Treasury Bureau |

**Annex C**

## OTHER TECHNICAL AMENDMENTS

| | **Proposal** | **Justification** |
|---|---|---|
| ***Commencement Of Winding-Up*** | | |
| 1. | To provide that any notice to be issued under the insolvency provisions of the CO which requires any form of reply, e.g. the statutory demand under section 178(1)(a), shall contain details of the address of the person giving the notice, or the details of the address of his representative.<br><br>The guidance notes on all such notices shall reflect this proposal. | Currently, the CO does not require insolvency-related notices to contain the details of how to contact the person giving the notice. It may give rise to dispute between the person giving the notice and the recipient. |
| 2. | To extend the time limit in which a company is required to give notice of a resolution for voluntary winding-up by advertisement in the Gazette to 15 days, instead of 14 days, after the passing of the resolution. | At present, section 229 of the CO requires a company which has passed a resolution for voluntary winding-up to give notice of the resolution for voluntary winding by advertisement in the Gazette within 14 days after the passing of the resolution.<br><br>The Gazette is normally published only once a week, on a Friday, and advertisements for publication in the Gazette have to be sent to the Government Printer on the Monday morning before publication. If the resolution was passed on a Thursday and the notice was not sent to the Government Printer on or before the next Monday but later within next week, the notice will be published on a Friday after two weeks and it will become out of |

| | Proposal | Justification |
|---|---|---|
| | | time. The company may be liable for a fine. Balancing the need for the notice to be given promptly and the practical difficulty under the present requirement, it is proposed that the notice be given within 15 days of the making of the resolution. |
| 3. | To set out the obligations of the liquidator in a members' voluntary winding-up where he is of the opinion that the company will not be able to pay its debts in full within the period stated in the certificate of solvency issued under section 233 of the CO, as follows –<br><br>(a) the liquidator must summon a meeting of the creditors to be held within 28 days after the day on which he formed that opinion;<br>(b) notice of the creditors' meeting should be sent to the creditors not less than seven days before the meeting;<br>(c) notice of the creditors' meeting should be advertised and gazetted, and that the liquidator should provide creditors with all reasonable information concerning the affairs of the company free of charge; and<br>(d) the liquidator must prepare a statement of affairs, which should contain particulars of the company's assets and liabilities, the names and addresses of creditors and details of any securities held by creditors, and lay the statement | At present, section 237A of the CO provides that if a liquidator in a members' voluntary winding-up is of the opinion that the company will not be able to pay its debts in full within the period stated in the certificate of solvency under section 233, he must forthwith summon a meeting of the creditors, and must lay before the meeting a statement of the assets and liabilities of the company.<br><br>However, the section does not specify the time limit for the liquidator to summon the meeting of the creditors, the manner in which notice should be given to the creditors, or the details of the statement of assets and liabilities.<br><br>As the winding-up is to proceed as a creditors' voluntary winding-up, the creditors should be involved and duly informed at the earliest possible instance, and the obligations of the liquidator to engage the creditors should be clearly set out.<br><br>Similar requirements are also found in the relevant legislation in the UK. |

| | Proposal | Justification |
|---|---|---|
| | before the creditors' meeting at which the liquidator should preside. | |
| 4. | To repeal section 228(1)(c) of the CO. | At present, section 228(1)(b) of the CO provides that a company may be wound up voluntarily if the company resolves by special resolution that the company be wound up voluntarily. On the other hand, section 228(1)(c) of the CO provides that a company may be wound up voluntarily if the company resolves by special resolution to the effect that it cannot by reason of its liabilities continue its business, and that it is advisable to wind up.<br><br>As the circumstances under which a company may be wound up under section 228(1)(c) would have been covered by section 228(1)(b)[157], section 228(1)(c) is considered superfluous and can be repealed. |
| ***Appointment, Powers, Vacation of Office and Release of Provisional Liquidators and Liquidators*** | | |
| 5. | To make appropriate amendments to specific provisions in the CO and CWUR concerning the powers or duties of a liquidator in a creditors' voluntary winding-up to apply them to a provisional liquidator appointed | There are certain provisions of the CO and CWUR which are relevant to the provisional liquidator appointed under section 228A, e.g. – |

[157] Though both section 228(1)(b) and section 228(1)(c) require the passing of a special resolution, the special resolution required to be passed under section 228(1)(c) is not subject to the requirement of minimum notice of 7 days now imposed under section 116 of the CO on the special resolution under section 228(1)(b). However, by virtue of the changes to be introduced in the new CO to the notice requirements for holding members' meetings, the distinction between the minimum notice requirement applicable to section 228(1)(b) and that applicable to section 228(1)(c) will cease to exist.

| | Proposal | Justification |
|---|---|---|
| | under section 228A. | (a) the existing and proposed provisions relating to the resignation and removal of a liquidator;<br>(b) the powers of the court under section 276 to order a "liquidator" to repay or restore money or property or to contribute to company's assets;<br>(c) the powers of the court under sections 277(3) and (4) to direct a liquidator in a voluntary winding-up to make a report and give assistance to the Secretary for Justice;<br>(d) the powers of the court under section 279 to order a liquidator to make good the default in the filing or delivery of various returns, accounts and documents; and<br>(e) the liability under section 280 for the default of the company in providing notification of the company's winding-up.<br><br>Amendments shall be made to these provisions in the CO and CWUR to make it clear that these provisions apply to the provisional liquidator appointed under section 228A. |
| 6. | To rationalise the procedures with regard to the termination of a liquidator's appointment, as follows –<br><br><u>(a) Resignation of liquidators</u><br>To prescribe the resignation procedure for a liquidator appointed in a voluntary winding-up, as follows – | <u>(a) Resignation of liquidators</u><br>For resignation of a liquidator in a court winding-up, section 196(1) of the CO provides that a provisional liquidator or liquidator appointed |

| | Proposal | Justification |
|---|---|---|
| | (i) for a creditors' voluntary winding-up, to provide for a procedure similar to that provided in rule 154 of the CWUR in respect of a court winding-up, but only a meeting of creditors is required to be called for receiving the liquidator's resignation, and that where the meeting of creditors accepts the liquidator's resignation, he should file a notice of resignation with the Registrar. The liquidator may apply to court for permission to resign in any other cases, e.g. the meeting is called but not held, or the resignation is not accepted by the creditors; and<br><br>(ii) for a members' voluntary winding-up, to provide that the liquidator must call a meeting of the company for the purpose of receiving his resignation, and the liquidator should file a notice of resignation with the Registrar. | under section 193 or 194 of the CO may resign or, on cause shown, be removed by the court. Rule 154 of the CWUR sets out the relevant procedures. However, there are no provisions for the procedures for resignation of a liquidator in a voluntary winding-up.<br><br>There is a public interest in ensuring that the winding-up of companies is conducted properly, and that the interests of parties affected by the winding-up (e.g. creditors) are looked after. The resignation of a liquidator may affect or interrupt the administration of the winding-up. It is important that the liquidator should be accountable to the creditors and the contributories (as the case may be) by providing them with an explanation for the resignation and a clear account and report of the progress of the conduct of the winding-up so that they may review the conduct of the liquidator who proposed to resign and assess their corresponding rights. |
| | <u>(b) Removal of liquidators</u><br>To provide that a liquidator in a creditors' voluntary winding-up (except a liquidator appointed by the court or by direction of the court) may be removed by a creditors' meeting specially convened for the purpose, with detailed requirements, procedures and formalities to be stipulated in the CWUR. | <u>(b) Removal of liquidators</u><br>Section 196(1) and section 252(2) of the CO provide for the court's power to remove the liquidator in a court winding-up and a voluntary winding-up respectively. Besides removal by the court, section 235A of the CO also provides that in a members' voluntary winding-up, the company may by special resolution remove the liquidator |

| | Proposal | Justification |
|---|---|---|
| | To provide that liquidators in a creditors' voluntary winding-up who were appointed by the court or by direction of the court under sections 242 and 252 of the CO can only be removed by the court, and that any vacancy in that office can only be filled by sanction of the court. | from office at a general meeting. However, there is no express provision for the removal of liquidator by creditors under a creditors' voluntary winding-up.<br><br>In a creditors' voluntary winding-up, besides appointment by creditors and contributories at their respective meetings, the liquidator may also be appointed by the court or by direction of the court (sections 242 and 252 of the CO). Yet, the court's power to appoint or to give directions on the appointment of liquidators would be rendered meaningless if these court-appointed liquidators in a creditors' voluntary winding-up may be removed by a creditors' meeting. It is also not clear who can fill the vacancy in the office of a liquidator appointed by or by direction of the court. |
| | <u>(c) Other forms of vacation of office</u><br>To provide that an acting liquidator in all forms of winding-up and an acting provisional liquidator in a court winding-up or appointed under section 228A should cease to hold office immediately if -<br>(i) he becomes bankrupt;<br>(ii) he is found by the court under the Mental Health Ordinance (Cap. 136) to be incapable, by reason of mental incapacity, of managing and administering his property and affairs; or<br>(iii) he is for the time being subject to a guardianship | <u>(c) Other forms of vacation of office</u><br>At present, rule 155 of the CWUR provides that a liquidator shall vacate his office if a receiving order is made against him. With the proposal to expand the list of persons disqualified to act as provisional liquidator or liquidator (i.e. Proposal (A) of Chapter 3), there should be clear provisions to provide for vacation of office when the provisional liquidator or liquidator is disqualified to do so if he becomes bankrupt or is mentally incapacitated to act as such. |

| | Proposal | Justification |
|---|---|---|
| | order under Part IVB of the Mental Health Ordinance (Cap. 136). | |
| | (d) Release<br>While retaining the existing mechanism of application to the court in section 205 of the CO for releasing a liquidator in a court winding-up, to add that application to court for release may also be made in the case where the liquidator ceases to hold office due to his death or becoming disqualified to act. | (d) Release<br>For a court winding-up, section 205(1) of the CO does not cover all scenarios where a liquidator ceases to act, but only provides for the liquidator's application to the court for release in three scenarios –<br>(i) he has realised all property of company, distributed final dividend to creditors, adjusted rights of contributories and made final return;<br>(ii) he has resigned; and<br>(iii) he has been removed from office.<br><br>Provisions similar to (a), (b), (c) and (d) above are also found in the relevant legislation in UK. |
| 7. | To align the same 15-day notice requirement for the appointment of the liquidator with that for the passing of resolution in a voluntary winding-up, i.e. to provide that the liquidator shall publish a notice of his appointment in the Gazette and deliver to the Registrar for registration a notice of his appointment within 15 days after the date of his appointment under section 253. | As compared with a notice of the resolution for voluntary winding-up, a notice of the appointment of the liquidator is an equally important piece of information to the creditors of the company and those dealing with the company and should be subject to the similar requirement in terms of the time limit for publication in the Gazette and delivery to the Registrar for registration.<br><br>Section 229 of the CO requires a company which has passed a resolution for voluntary winding-up to give notice of the resolution for voluntary winding-up by |

| | Proposal | Justification |
|---|---|---|
| | | advertisement in the Gazette within 14 days after the passing of the resolution. The requirement is proposed to be slightly adjusted to 15 days (Proposal No. 2 in Annex C).<br><br>A printed copy of the resolution for voluntary winding-up is required to be forwarded to the Registrar for record within 15 days after the passing of the resolution under section 117 of the CO.<br><br>On the other hand, section 253 of the CO only requires the liquidator to publish a notice of his appointment in the Gazette and deliver to the Registrar for registration a notice of his appointment within 21 days after the date of his appointment. It is now proposed to shorten the notice period to 15 days to align with the requirement of section 117 and the proposed requirement for section 229. |
| ***Conduct of Winding-up*** | | |
| 8. | To provide that a body corporate may be a COI member. However, a body corporate may not act as a representative of a member. | At present, there is no provision in the CO that requires that a COI member must be a natural person. A creditor of a company under a court winding-up or a creditors' voluntary winding-up can be a body corporate. Having an express provision to allow a body corporate to be a member will remove any doubt. However, a body corporate cannot act as a representative of a member in order to ensure that the |

| | Proposal | Justification |
|---|---|---|
| | | representative must be a natural person. |
| 9. | To provide that a COI member would be capable of being represented by another person either on production of a letter of authority or by holding general powers of attorney. | At present, a COI member in a court winding-up is only capable of being represented by another person holding a general power of attorney from the member. The CO does not specify whether a COI member in a creditors' voluntary winding-up is capable of being represented by another person.<br><br>The requirement for a general power of attorney in the case of a court winding-up is unnecessarily stringent. A COI member should be permitted to authorise another person to represent him for the purpose of the business of the COI, and a letter of authority should suffice for the purpose. This would save time and costs on the part of the COI members.<br><br>The proposal will also clarify that a COI member in a creditors' voluntary winding-up is also capable of being represented by another person either on production of a letter of authority or by holding general powers of attorney. |
| 10. | To provide that COI members should be entitled to their reasonable travelling expenses to and from meetings of the COI within Hong Kong payable out of the company's assets. | The CWUR provides that, in a court winding-up, the actual out-of-pocket expenses necessarily incurred by the COI, subject to the approval of the OR, are payable out of the company's assets. It is not provided whether the actual out-of-pocket expenses include travelling expenses to and from |

| | Proposal | Justification |
|---|---|---|
| | | meetings incurred by COI members.<br><br>COI members, whether in a court winding-up or a creditors' voluntary winding-up, should be entitled to their reasonable travelling expenses to and from meetings of the COI. However, to avoid abuse, such expenses should be limited to expenses incurred for travelling within Hong Kong. |
| 11. | To clarify that in a winding-up of a bank by the court subject to a regulating order (i.e. the court orders that the winding-up of a company be regulated specially by the court), where the OR or the liquidator does not require formal proof of debts, the relevant date on which the deposit balances of depositors of the bank are deemed to have been proved is the date of the winding-up order. | Under the CO, a debt must be one to which the insolvent company is subject at the date of the winding-up order in order to be provable. However, the present provisions concerning the operation of a regulating order may lead to the situation where the depositors of a bank which is being wound up by the court subject to a regulating order are deemed to be admitted to proof for their deposit balances as at the date of the appointment of a provisional liquidator, while for other creditors of the bank (e.g. beneficiaries of letters of credit), a proof of debt must be submitted, and the date relevant is the date of the winding-up order.<br><br>The proposal will clarify that the expression "relevant date" in section 227E(3) should also be the date of the winding-up order, so that the deeming provision in section 227E will tally with the normal requirement on proof of debts in a court winding-up. |

| | Proposal | Justification |
|---|---|---|
| 12. | To specify the authority for deciding that an audit of the account of a liquidator for a voluntary winding-up shall not be required, as follows –<br><br>(a) in a creditors' voluntary winding-up, by the COI, or in the absence of a COI, the decision will be made by ordinary resolution at a creditors' meeting; and<br>(b) in a members' voluntary winding-up, the decision will be made by ordinary resolution at a meeting of the members of the company. | The present provision of section 255A(2) of the CO stipulates that an audit shall not be required if the COI or the company by ordinary resolution so determines. But it is unclear as to who is the deciding authority for dispensing with the auditing of the liquidator's accounts in either type of voluntary winding-up. |
| 13. | To modernise the drafting of section 265 of the CO concerning the preferential status being accorded to different classes of creditors in the distribution of realised assets of a company being wound up such that the provision could be presented in a more user-friendly manner and a more comprehensible style. This is a purely technical amendment and no change in the substance of the provision is proposed. | Section 265 has become cumbersome and difficult to understand due to numerous amendments made in piece-meal fashion over the years. |
| **Investigation during Winding-up, Offences Antecedent to or in the course of Winding-up and Powers of the Court** | | |
| 14. | To improve the clarity of law by combining section 190(4) of CO[158] | As the application of the two provisions overlaps, they should be |

[158] Section 190(4) of the CO provides that any person making or concurring in making the statement and affidavit required by section 190 shall be allowed, and shall be paid by the provisional liquidator or liquidator, out of the assets of the company, such costs and expenses incurred in and about the preparation and making of the statement and affidavit as the provisional liquidator or liquidator may consider reasonable, subject to an appeal to the court.

| | Proposal | Justification |
|---|---|---|
| | and rule 43 of the CWUR[159] which are both related to the costs and expenses incurred in and about the preparation and making of the statement of affairs of a company and the affidavit required by the provisions. | combined. |
| 15. | To provide that the provisional liquidator or the liquidator may require any person who is obliged to submit a statement of affairs to submit a statement of concurrence instead. Such statement of concurrence shall be verified by affidavit stating that the person concurs in a statement of affairs made by another person[160]. In making the statement of concurrence, a person may state he does not agree with matters dealt with in the statement of affairs, or he considers the statement of affairs to be erroneous or misleading, or he is without the direct knowledge necessary for concurring in the statement of affairs. | At present, where the court has made a winding-up order or appointed a provisional liquidator, a statement of affairs in the prescribed form, verified by affidavit, must be submitted by the directors and the secretary of the company (and other persons who are required to submit the statement) to the provisional liquidator or liquidator within the time limit specified, unless the court dispenses with the need for a statement of affairs. However, there is no specific provision providing a person with the right to make a statement of concurrence instead.<br><br>The proposal for requiring a statement of concurrence by the provisional liquidator or liquidator will avoid the need for a person to be required to complete a full statement of affairs where there is already one. It would allow him to concentrate on agreeing or disagreeing with the full statement |

[159] Rule 43 of CWUR provides that a person who is required to make or concur in making any statement of affairs of a company shall, before incurring any costs or expenses in and about the preparation and making of the statement, apply to the provisional liquidator or liquidator for his sanction, and submit a statement of the estimated costs and expenses which it is intended to incur; and, except by order of the court, no person shall be allowed out of the assets of the company any costs or expenses which have not before being incurred been sanctioned by the provisional liquidator or liquidator.

[160] Modelled on rule 4.33 of the UK Insolvency Rules 1986.

| | Proposal | Justification |
|---|---|---|
| | | or making qualifications to any matters dealt with therein.<br><br>Similar provision is also found in the relevant legislation in the UK. |
| 16. | To provide that the notice to be given to each person included in the list of contributories should state that in relation to any shares or interest not fully paid up, his inclusion in the list may result in the unpaid capital being called[161]. | The proposal will alert any person included in the list of contributories of the consequence of being so included. It will prompt the person to take appropriate action, such as notifying the liquidator of his objection to such inclusion.<br><br>Similar requirements are also found in the relevant legislation in the UK. |
| 17. | To revise the procedure for settlement of the list of contributories and require the liquidator as soon as reasonably practicable to –<br><br>(a) give notice to every person included in the list of contributories that the liquidator has settled the list of contributories; and<br>(b) inform any person to whom the notice is given that he should inform the liquidator in writing within 21 days from the date of the notice if he objects to an entry in, or omission from, the list.<br><br>On receipt of any such objection, the liquidator shall within 14 days give notice to the objector that he | At present, the liquidator is required to appoint a time and place for the settlement of a list of contributories and give notice of the time and place appointed to all persons he proposes to include in the list. A person who objects to an entry in, or omission from, the list may only do so on the day appointed for settlement of the list of contributories. Therefore, there may not be sufficient time for the person to gather information and raise objection on the day appointed for the settlement of the list.<br><br>The revised procedure would provide a reasonable time for a person to raise objection to an entry in, or omission from, the list of contributories. |

[161] Modelled on rule 4.198(2)(c) of the UK Insolvency Rules 1986.

| | Proposal | Justification |
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| | has either amended the list (specifying the amendment) or rejected the objection and declined to amend the list. In either case, the notice must inform the objector that if he maintains his objection, notwithstanding notice has been given by the liquidator declining his request to amend the list, he may apply to the court for an order removing the entry to which he objects or (as the case may be) otherwise amending the list within 21 days of the service on the objector the liquidator's notice[162]. | Similar requirements are also found in the relevant legislation in the UK. |
| 18. | To provide that an application under section 221 of the CO[163] may only be made by the liquidator, and in case of a court winding-up, also by the OR (irrespective of whether the OR is acting as the liquidator or not). | Section 221 does not specify who may apply to the court for an order under that section. As the powers of the court under section 221 to summon a person for examination and for production of books and papers relating to the company are relevant to the investigation work by the liquidator in a winding-up, but would affect the rights of the person summoned, it is more appropriate to restrict the eligible applicants under section 221 to the liquidators and not to widen the scope of the eligible applicants to include the creditors or contributories.<br><br>On the other hand, in case of a court winding-up, as the orders that can |

[162] Modelled on rules 4.198(3) and (4) and 4.199 of the UK Insolvency Rules 1986.

[163] Under section 221, an application can be made for the court to summon any officer of a company, any person known or suspected to be in possession of any property of the company, or any person having information relating to the affairs or property of the company to attend before it and to examine them on oath concerning the above matters (i.e. the private examination) and to require him to produce any books and papers in his custody or power relating to the company.

| | Proposal | Justification |
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| | | be made by the court under section 221 would facilitate the OR's work in supervising and regulating the administration of winding-up, and in carrying out any necessary investigation of the affairs of companies in liquidation and the relevant officers of such companies, the OR should be included as an eligible applicant.<br><br>Under similar provisions in the relevant UK legislation, liquidators and the official receiver of the UK are eligible applicants. |
| 19. | To expressly provide that the provisions of section 221 of the CO[163] apply in both a court winding-up and a voluntary winding-up. | At present, the wording of section 221 of the CO refers to court winding-up only.<br><br>On the other hand, the powers of the court under that section may also be invoked in a voluntary winding-up by virtue of section 255, provided that the court is satisfied that the required exercise of power will be just and beneficial.<br><br>The equivalent provision in the relevant UK legislation also applies to both court winding-up and voluntary winding-up. |
| 20. | To expressly provide that the person summoned for either a private examination or a public examination may at his own expense employ a solicitor with or without counsel, who (a) may at the examination put to him such questions as the court may allow for the purpose of enabling him to | In accordance with the general principle for the protection of a person's right to fair hearing, the person summoned for the examination should be entitled to legal representation at the examination. It is also considered appropriate for guaranteeing his rights that the person's legal |

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| | explain or qualify any answers given by him, and (b) may make representations on his behalf. | representatives should be able to put questions and to make representations on his behalf and for his case.<br><br>Similar provisions are found in the relevant legislation in the UK. |
| 21. | To provide that the documents and reasons submitted to the court by the applicant in support of his application under section 221[163] or section 222 of the CO should not be open for inspection by any person, except in so far as the court may order. | The documents and reasons in support of the application under section 221 or section 222 of the CO may contain information which, if disclosed to the person proposed to be made subject to the order, may adversely affect the effectiveness of the order being sought or even frustrate its purpose, e.g. the targeted person may be alerted to conceal, dissipate or destroy information or material which may tend to incriminate himself but relevant to the liquidator's investigation.<br><br>The proposal would strike a balance between maintaining the effectiveness of the procedures under section 221 and 222 and affording the person to be summoned a fair treatment.<br><br>Similar provisions are found in the relevant legislation in the UK. |
| 22. | To provide that the court has the power to require the person summoned under section 221 of the CO[163] to submit an affidavit to give information relating to the affairs or property of the company. | The proposed power will serve to facilitate the liquidator or the OR to obtain the requisite information about the company without incurring the costs of an examination, and to absolve the person being summoned the need to be examined in court (if the person |

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| | | is not subject to a separate examination order).<br><br>Similar provisions are found in the relevant legislation of the UK. |
| 23. | To provide that an application for an order under section 221 of the CO[163] must state whether the person to be summoned is to be ordered to appear before the court, to be ordered to answer interrogatories, to submit affidavits or to produce books, papers or other records, or any combination of the aforesaid. | The present wording of section 221 only refers to what the court may order (i.e. to summon a person to attend before the court, to examine him on oath and to require him to produce any books and papers in his custody or power). It is also not clear under the existing provisions whether the applicant for the court order may apply for a combination of the possible orders under section 221. The proposal will improve the clarity of the procedure by requiring the applicant to specify the order (or the combination of orders) which he applies for.<br><br>Similar provisions are found in the relevant legislation of the UK. |
| 24. | To require that a warning must be stated in the summons issued for a private examination under section 221 and a public examination under 222 of the CO that on conviction for perjury, a person is subject to imprisonment for seven years and a fine[164]. | It would help to ensure that the examinee is fully aware of the consequence of his making a false statement during the course of the examination. |
| 25. | To provide that where the court makes a regulating order, a liquidator (besides OR but including a provisional liquidator), may make | Where it appears to the court that by reason of the large number of creditors or contributories or for any other reason the interest of the |

[164] Section 31 of the Crimes Ordinance (Cap. 200).

| | Proposal | Justification |
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| | application to the court under section 227B for an order to dispense with the summoning of first meetings of creditors and contributories (for the purpose of considering the appointment of a liquidator and a COI), and to appoint a liquidator and a COI etc. | creditors so requires (e.g. the failure of banks and travel agencies in which there are many small creditors), a regulating order can be made by the court under section 227A of the CO. The OR, the liquidator or any creditor of a company may at any time after the presentation of a winding-up petition apply for a regulating order. When the regulating order is made, section 227B shall apply to the winding-up.<br><br>Section 227B is unnecessarily restrictive in that only the OR may make an application under this section. As section 227B is concerned with some consequential orders that the court may make in a case subject to a regulating order, it is reasonable that the liquidator and a provisional liquidator should also have the *locus standi* to make an application under section 227B. |
| 26. | To harmonise the definition of "proper books of account" under section 274(2) of the CO and that of "accounting records" under the new CO. | At present, the term "proper books of account" under sections 121(1) and 121(2) and the same term under section 274(2) of the CO have largely similar definitions but the wording of these provisions is not exactly the same. The two definitions should be identical.<br><br>The definition of "proper books of account" under sections 121(1) and 121(2) will be repealed and replaced by the new definition of "accounting records" contained in Subdivision 2, Division 4, Part 9 of the new CO when the new CO |

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| | | comes into operation. The definition of "proper books of account" under section 274(2) of the CO should therefore harmonise with the definition of "accounting records" under the new CO. |
| 27. | To amend section 276 by inserting the expression "breach of trust" before the expression "or breach of duty" and replacing the expression "or breach of trust" with "breach of trust or breach of duty". | Section 276 of the CO was amended in 1984 by the Companies (Amendment) Ordinance 1984, which included the substitution of the expression "breach of trust" where it first appeared in section 276(1) with "breach of duty". The second reference to "breach of trust" has not been amended. We take this opportunity to remove the inconsistency.<br><br>In addition, the reference to both "breach of trust" and "breach of duty" would remove any doubt as to whether the provision applies to one type of breach but not the other. |

# LIST OF QUESTIONS FOR CONSULTATION

Question 1 Do you support the proposal to adopt a prescribed form of statutory demand, which would contain key information as described in paragraph 2.7 as well as a statement of the consequences of ignoring the demand?

Question 2 Do you think that the section 228A procedure, whereby the directors of a company may commence a voluntary winding-up of the company without first having the members of the company resolve to do so, should be maintained or repealed?

Question 3 If the section 228A procedure is to be maintained, do you agree to the proposed improvement measures as set out in paragraph 2.14 to reduce the risk of abuse of the procedure?

Question 4 Do you agree to replacing the existing requirement of holding the first creditors' meeting on the same or the next following day of the members' meeting with the requirement of holding the first creditors' meeting on a day not later than the fourteenth day after the day on which the members' meeting is held in a creditors' voluntary winding-up case?

Question 5 Do you support the proposal on prescribing a minimum notice period for calling the first creditors' meeting in a creditors' voluntary winding-up case? If so, do you consider a period of seven days appropriate?

Question 6 Do you agree to the proposal on limiting the powers of the liquidator appointed by the company during the period before the holding of the first creditors' meeting in a creditors' voluntary winding-up case?

Question 7 Do you agree to the proposed restrictions on the exercise of the directors' power before a liquidator is appointed in a creditors' voluntary winding-up case?

Question 8 Do you agree with the proposed technical amendments relating to the commencement of winding-up as set out in Annex C?

Question 9

(a) Do you agree to the expansion of the list of disqualified persons from being appointed as a provisional liquidator or a liquidator? If so, do you agree with disqualifying the types of persons as proposed in paragraphs 3.13, 3.15 and 3.16?

(b) Do you agree to provide clearly that the appointment of a disqualified person as a provisional liquidator or liquidator shall be void and that he shall be liable to a fine if he acts as a provisional liquidator or liquidator?

(c) Do you agree that the disqualification proposals should also apply to the appointment of a receiver or a receiver and manager of the property of a company with suitable modifications?

Question 10

(a) Do you agree that a new statutory disclosure system should be introduced for the appointment of provisional liquidators and liquidators?

(b) If yes, do you agree with the details of information required to be disclosed as set out in paragraph 3.21?

(c) Do you agree that a statutory defence as proposed in paragraph 3.24 should be provided for a failure in disclosure?

Question 11

(a) Do you agree that the existing prohibition on inducement being offered to members or creditors in relation to the appointment of liquidators should be extended to cover inducement being offered to any person?

(b) Do you agree that the prohibition should also be extended to inducement offered in relation to the appointment of provisional liquidators, receivers, and receivers and managers?

Question 12

Do you agree with the proposal to designate all provisional liquidators who take office upon and after the making of a winding-up order (i.e. section 194 PL) as "liquidators" such that they will be subject to the provisions in the CO which apply to liquidators?

Question 13

Do you agree with the proposal to clearly stipulate that it is up to the court to determine the powers, duties, remuneration and termination of appointment of provisional liquidators who were appointed by the court before the making of a winding-up order (i.e. section 193 PL)?

Question 14 Do you agree with the proposal of setting out the powers of liquidators now found in section 199(1) and (2) of the CO in a Schedule to improve the clarity of the provisions?

Question 15 Do you agree that the requirement for the liquidator to apply to the court or the COI for exercising the power to appoint a solicitor in a court winding-up should be removed, provided that prior notification is given to the COI or, where there is no COI, the creditors when the liquidator exercises such power?

Question 16
(a) Do you agree that, notwithstanding the release of a liquidator by the court, the liquidator should not be absolved from the provisions of section 276 of CO?
(b) Do you agree that, where the court has granted a release to a liquidator, the power to make an application under section 276 should only be exercisable with the leave of the court?

Question 17 Do you agree with the proposed technical amendments relating to the appointment, powers, vacation of office and release of provisional liquidators and liquidators as set out in Annex C?

Question 18 Do you agree that a maximum and a minimum number of members should be set for the COI appointed in both a court winding-up and a creditors' voluntary winding-up? If so, are the proposed maximum number (seven) and minimum numbers (three) appropriate? Do you agree that the court should have the discretion to vary the maximum and minimum numbers on application by the liquidator?

Question 19 Do you agree to allow the COI not to fill a vacancy if the liquidator and a majority of the remaining members of the COI so agree, provided that the total number of members does not fall below the proposed minimum number?

Question 20 Do you agree to the proposals as set out in paragraphs 4.12 and 4.13 for streamlining and rationalising the proceedings of the COI?

Question 21 Do you support the proposal to enable the COI to function through written resolutions sent by post or using other electronic means (such as using emails or through websites)?

Question 22 (a) Do you agree with allowing the costs and charges of the agents employed by the liquidators to be determined by agreement between the liquidator and the COI?

(b) Do you agree that if such agreement cannot be reached, the costs and charges of the agents shall be delivered up for taxation by the court?

Question 23 Do you support the proposal to allow liquidators and provisional liquidators to communicate with creditors, contributories or other parties by electronic means, subject to the conditions as set out in paragraph 4.21?

Question 24 Do you agree with the proposed technical amendments relating to the conduct of winding-up as set out in Annex C?

Question 25 (a) Do you agree that new provisions should be introduced to empower the court to make orders for restoring the position of a company to what it would have been if the company has not entered into a transaction at an undervalue?

(b) Do you agree to the proposal regarding "relevant time" as proposed in paragraph 5.10?

(c) Do you agree that transactions at an undervalue entered into by the company with a person who is connected with the company should be subject to a more stringent control as proposed in paragraph 5.11?

(d) Do you agree that statutory protection should be provided for the party seeking to resist an application made by the liquidator of a company in respect of the undervalue transaction? If so, do you agree with the statutory protection as proposed in paragraph 5.12?

Question 26 (a) Do you agree that the current provisions in the CO incorporating the provisions in the BO on unfair preference should be replaced by new standalone provisions which apply to winding-up cases as proposed in paragraph 5.17 to rectify the existing anomalies which limit the application and effectiveness of such provisions?

(b) Do you agree with the definitions of "person who is connected with a company" and "associate" as proposed in paragraphs 5.19 and 5.20?

(c) Do you agree that the existing protection for persons who have received benefits or acquired or derived interest in

property in good faith and for value from unfair preference should be maintained, and that the same protection should also be applicable to the proposed new provisions on transactions at an undervalue?

Question 27 Do you agree to the proposed special provisions in relation to floating charges created by a company in favour of a person who is connected with the company as detailed in paragraph 5.26?

Question 28 Do you support the expansion of the scope of the exemption of a floating charge from invalidation catered for genuine credit transactions to cover "property and services supplied to the company" and "money paid at the direction of the company" as detailed in paragraph 5.28?

Question 29
(a) Do you agree to expressly set out in the legislation the common law position that a person summoned for either a private or a public examination cannot invoke the privilege against self-incrimination during the examination?
(b) If so, do you agree that we should introduce provisions to prohibit the subsequent use of answers given and statements made during the examination in subsequent criminal proceedings if certain conditions are satisfied, subject to certain exceptions such as offences relating to perjury and provision of false statement and offences under the future Companies (Winding Up and Miscellaneous Provisions) Ordinance?

Question 30
(a) Do you agree to the removal of the requirement that the OR or the liquidator must have alleged in his "further report" that fraud has been committed for initiating the public examination procedure, and to provide that a public examination may be ordered by the court upon the application by either the liquidator or the OR?
(b) Do you agree with the proposed new categories of person that may be examined under the public examination procedure, namely (i) any person who has acted as liquidator of the company or receiver or receiver and manager of the property of the company; and (ii) any person who is or has been concerned, or has taken part, in the management of the company?

Question 31

(a) Do you agree that if a company is wound up insolvent within one year of its shares being redeemed or bought back by payment out of capital, certain categories of persons should be required to contribute to the assets of the company for an amount not exceeding the payment made by the company in respect of the shares redeemed or bought back by the company so as to meet the deficiency in the company's assets?

(b) If so, should the members from whom the shares were redeemed or bought back and the directors who made the solvency statement which supported the redemption or buy-back without having reasonable grounds for the opinion expressed in the statement be jointly and severally liable to contribute to such assets?

(c) Should such persons be allowed to apply for winding-up of the company under the specific grounds as set out in paragraph 6.22?

Question 32

Do you agree with the proposed technical amendments relating to the investigation during winding-up, offences antecedent to or in the course of winding-up and powers of the court as set out in Annex C?