立法會 Legislative Council

LC Paper No. CB(1)883/15-16 (These minutes have been seen by the Administration)

Ref : CB1/BC/1/15/2

Bills Committee on Companies (Winding Up and Miscellaneous Provisions) (Amendment) Bill 2015

Minutes of the fifth meeting on Monday, 25 January 2016, at 8:30 am in Conference Room 3 of the Legislative Council Complex

Members present: Hon WONG Ting-kwong, SBS, JP (Chairman)

Hon Andrew LEUNG Kwan-yuen, GBS, JP

Hon Alan LEONG Kah-kit, SC Hon NG Leung-sing, SBS, JP Hon CHAN Yuen-han, SBS, JP

Hon Kenneth LEUNG

Hon Alice MAK Mei-kuen, BBS, JP

Hon Dennis KWOK

Hon Christopher CHEUNG Wah-fung, SBS, JP

Hon POON Siu-ping, BBS, MH

Hon CHUNG Kwok-pan

Members absent: Hon SIN Chung-kai, SBS, JP

Hon TANG Ka-piu, JP

Public officers attending

: Mr Patrick HO

Deputy Secretary for Financial Services and the

Treasury (Financial Services)

Mr Billy AU

Principal Assistant Secretary for Financial Services and

the Treasury (Financial Services)

Action - 2 -

Miss Anita TONG Assistant Official Receiver (Legal Services) (Acting) Official Receiver's Office

Mr Alvin SIN Senior Solicitor (Project Work) Official Receiver's Office

Mr Coleman WONG Senior Solicitor (Project Work) Official Receiver's Office

Mr Manuel NG Senior Government Counsel Department of Justice

Miss Cindy Cheuk Senior Government Counsel (Acting) Department of Justice

Clerk in attendance: Ms Connie SZETO

Chief Council Secretary (1)4

Staff in attendance: Miss Winnie LO

Assistant Legal Adviser 7

Mr Hugo CHIU

Senior Council Secretary (1)4

Ms Sharon CHAN

Legislative Assistant (1)4

Action

I Meeting with the Administration

Matters arising from previous meetings

(LC Paper No. CB(1)481/15-16(01) — List of follow-up actions arising from the discussion at the meeting on 11 January 2016

LC Paper No. CB(1)481/15-16(02) — Administration's response to issues raised at the meeting on 11 January 2016

LC Paper No. CB(1)383/15-16(04) — Letter dated 4 January 2016 from Legal Service Division to the Administration

LC Paper No. CB(1)481/15-16(03) — Administration's response to Legal Service Division's letter dated 4 January 2016

LC Paper No. CB(1)481/15-16(04) — Summary of views of written submissions and Government's

submissions and Government's responses

LC Paper No. CB(1)481/15-16(05) — Letter dated 21 January 2016 from Legal Service Division to the Administration)

Clause-by-clause examination of the Bill

(LC Paper No. CB(3)7/15-16 — The Bill

LC Paper No. CB(1)197/15-16(01) — Marked-up copy of the Bill prepared by the Legal Service Division (Restricted to members only)

File Ref: IB&W/2/1/5/4C — Legislative Council Brief

LC Paper No. LS1/15-16 — Legal Service Division Report

LC Paper No. CB(1)115/15-16(01) — Background brief on Companies
(Winding Up and Miscellaneous
Provisions) (Amendment) Bill
2015 prepared by the Legislative
Council Secretariat)

Discussion

<u>The Bills Committee</u> deliberated (Index of proceedings attached at **Appendix**).

Admin Follow-up actions to be taken by the Administration

Clause 45 – section 207B on the meeting place of a committee of inspection ("COI") using remote attendance

2. Under the proposed new section 206A(6) of the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap. 32) ("CWUMPO"), the liquidator might summon a COI meeting with remote attendance of members by giving notice of the date, time and place of the meeting to every member of the The proposed new section 207B(6) further provided that the liquidator might satisfy the requirement of specifying a place of the meeting under the proposed section 206A(6) by specifying the arrangements the liquidator proposed to enable the COI members to exercise their rights to speak and vote while they were not present together at the same place for the meeting. Nevertheless, the proposed new section 207B(8) provided circumstances in which the liquidator must specify a place for meeting of COI (e.g. when a COI member requested the liquidator to specify a place for the meeting in accordance with the proposed new section 207C). Administration was requested to explain the purpose of the proposed section 207B(8), and its operation with the proposed sections 206A(6) and 207C, and re-consider the suggestion made by the Legal Adviser to the Bills Committee ("ALA7") that the Administration should consider subjecting section 207B(6) to section 207B(8).

Clause 98 – section 278A on exemption from liability in offering inducement to affect appointment as a provisional liquidator or liquidator

3. The proposed amended section 278A of CWUMPO expanded the existing scope on the prohibition of offering inducements to affect the appointment as a provisional liquidator or liquidator. The carve-out provisions in subsection (2) of section 278A only applied to the accounting profession. The Administration was requested to explain the considerations for not applying the carve-out provisions to other relevant professions including the legal profession.

Clause 105 – section 296D on communication by liquidators by means of website

4. The proposed new section 296D of CWUMPO provided for the circumstances in which a liquidator might communicate with another person via a website. Subsections (2)(f) and (3) of section 296D specified a period throughout which the document or information must be made available on the website by the liquidator. Subsection (6) provided an exemption if: (a) the document or information was made available on the website for part of that period; and (b) the failure was wholly attributable to circumstances that it would

Action - 5 -

not be reasonable to have expected the liquidator or provisional liquidator to prevent or avoid. The Administration was requested to consider members' suggestion that a minimum period should be specified for the document or information be made available on the website to provide clarity and ensure that the relevant parties would not overlook the document or information.

Issues raised by ALA7

5. The Administration was requested to provide written responses to the issues raised by ALA7 in her letter dated 21 January 2016 (LC Paper No. CB(1)481/15-16(05)).

(*Post-meeting note*: The Administration's written response was issued to members vide LC Paper Nos. CB(1)552/15-16(02) and (03) on 15 February 2016.)

II Any other business

Date of next meetings

- 6. <u>The Chairman</u> reminded members that the next two meetings would be held on 16 February 2016, at 8:30 am and 1 March 2016, at 10:45 am.
- 7. There being no other business, the meeting ended at 10:31 am.

Council Business Division 1 <u>Legislative Council Secretariat</u> 6 May 2016

Proceedings of the Bills Committee on Companies (Winding Up and Miscellaneous Provisions) (Amendment) Bill 2015 Fifth meeting on Monday, 25 January 2016, at 8:30 am in Conference Room 3 of the Legislative Council Complex

Time Marker	Speaker	Subject(s)	Action Required
000123 - 000316	Chairman	Introductory remarks	
000317 – 001454	Administration Chairman	Briefing by the Administration on: (a) its response to issues raised at the meeting on 11 January 2016 [LC Paper No. CB(1)481/15-16(02)]; (b) its response to Legal Service Division's letter dated 4 January 2016 [LC Paper No. CB(1)481/15-16(03)]; and (c) the paper entitled "Summary of views of written submissions and Government's responses" ("the Summary of views") [LC Paper No. CB(1)481/15-16(04)].	
001455 - 002853	Chairman Assistant Legal Adviser 7 ("ALA7") Administration	The place of meeting for the committee of inspection ("COI") using remote attendance Under the proposed new section 206A(6) of the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap. 32) ("CWUMPO"), the liquidator might summon a COI meeting with remote attendance of members by giving notice of the date, time and place of the meeting to every member of the COI. The proposed new section 207B(6) further provided that the liquidator might satisfy the requirement of specifying a place of the meeting under the proposed section 206A(6) by specifying the arrangements the liquidator proposed to enable the COI members to exercise their rights to speak and vote while they were not present together at the same place for the meeting. Nevertheless, the proposed new section 207B(8) specified the circumstances in which the liquidator must specify a place for meeting of COI (e.g. when a COI member requested the liquidator to specify a place for the meeting in accordance with the proposed new section 207C).	

Time Marker	Speaker	Subject(s)	Action Required
		The Administration was requested to explain the purpose of the proposed section 207B(8), and its operation with the proposed sections 206A(6) and 207C, and re-consider the suggestion made by ALA7 that the Administration should consider subjecting section 207B(6) to section 207B(8).	The Administration to take action as per paragraph 2 of the minutes
		The Administration advised that:	
		(a) it had made reference to the relevant legislation of the United Kingdom ("UK") in formulating the proposed new section 207B(6) and (8); and	
		(b) under the proposed new section 207B(6), a liquidator might hold a COI meeting with remote attendance without specifying a place for the meeting (i.e. a virtual meeting) by specifying the arrangements to enable persons attending the meeting to exercise their rights to speak and vote. However, the proposed new section 207B(8) provided that a member of COI might reverse the liquidator's decision and request the liquidator to specify a place for the meeting in accordance with the proposed new section 207C. In such a case, the liquidator must comply with the request by specifying a place for the meeting. Members of COI could choose to attend the meeting at the specified place or participate by remote attendance.	
		(<i>Post-meeting note</i> : The Administration's position was further clarified in paragraph 2 of CB(1)552/15-16(02) in that under the new section 207B(8), the meeting arranged by the liquidator could still be a meeting held with remote attendance arrangements.)	
002854 – 004843	Mr Kenneth LEUNG Mr CHUNG	The first creditors' meeting	
	Kwok-pan Administration Chairman	Mr LEUNG's views and enquiries as follows: (a) he shared the concern raised in some written submissions to the Bills Committee (i.e. item 21 of the Summary of views) that the	
		proposed amended section 241 and new section 243A of CWUMPO would introduce a 14-day time gap between the members'	

Time Marker	Speaker	Subject(s)	Action Required
		meeting at which the resolution for voluntary winding up was proposed and the first creditors' meeting was held ("the time gap"). The time gap might be abused by directors to commit illegal acts;	•
		(b) there should be further safeguards apart from restricting the directors' powers during the time gap as proposed in the Bill; and	
		(c) whether the interests of a third party to the winding-up process of a company would be protected during the time gap, including whether the third party would be notified about the commencement of the winding-up process.	
		The Administration responded as follows:	
		(a) the proposed amended section 241 and new section 243A of CWUMPO were to introduce a notice period for the first creditors' meeting and allow time for creditors to better prepare for the meeting and facilitate them to make informed decisions at the said meeting. The time gap would be between 7 and 14 days as the requirement for sending the notice of the first creditors' meeting was 7 days. The provisions were drafted with reference to similar provisions in the UK and Australian regimes in order to better protect the interests of creditors and taking into account the feedback from previous public consultation;	
		(b) the term "days" in the proposed amended section 241(1)(a) meant calendar days;	
		(c) the proposed new section 250A restricted the powers of the directors of a wound-up company (including the power to carry out transactions with a third party) during the period between the members' meeting and the first creditors' meeting. Contravention of section 250A would be an offence. Besides, the proposed amended section 276 further empowered the court to assess damages against directors who had been negligent or caused losses to a third party; and	

Time Marker	Speaker	Subject(s)	Action Required
Market		(d) the existing section 280 provided for the notification requirements for a company in liquidation. For example, all invoices and other documents issued by the company must contain a statement that the company was being wound up.	Кецинец
		Redemption or buy-back of the company's own shares out of capital and appointment of a provisional liquidator	
		In response to Mr CHUNG's enquiries about (a) the proposed measure relating to the redemption or buy-back of the company's own shares out of capital (i.e. item 5 of the Summary of views); and (b) the financial implications of the compulsory requirement to appoint a provisional liquidator in a voluntary winding-up (i.e. item 9 of the Summary of views), the Administration advised that:	
		(a) the relevant provisions of the Companies Ordinance (Cap. 622) provided that prior to the redemption or buy-back of a company's own shares out of capital, the directors of the company must make a solvency statement to the effect that the company was able to pay its debts in full within 12 months after the transaction. A director would only be held liable if he had no reasonable grounds for forming the opinion expressed in the statement and yet he still signed the solvency statement; and	
		(b) CWUMPO did not provide that a provisional liquidator must be appointed in a voluntary winding-up of a company.	
004844 – 005721	Mr Kenneth LEUNG Administration	Removal of liquidator	
000121	Chairman	Mr LEUNG's views and enquiries as follows:	
		(a) liquidators or former liquidators should be allowed to apply to the court to object to their removal because (i) they might be removed when they had discovered adverse evidence on illegal transactions against the contributories or the directors and; (ii) parties who could apply to the court to object to the removal of liquidators (e.g. creditors) might	

Time Marker	Speaker	Subject(s)	Action Required
		not have the financial resources to do so; (b) whether liquidators could request creditors/contributors to apply to the court to object to the removal and join as a party in the application; and (c) whether a liquidator could apply to the court for directions after the removal.	
		The Administration responded as follows: (a) in handling an application for the removal of a liquidator, the court would examine the evidence submitted by relevant parties	
		including the liquidator's view on the removal (e.g. whether he agreed or did not agree to be removed) and make the decision having regard to the circumstances of the case; and (b) under the existing section 200(3) of	
		CWUMPO, a liquidator could apply to the court for directions in relation to any particular matter arising under the winding-up. As a company would need to give notice before holding the meeting which was to decide on the removal of its liquidator, the liquidator would have reasonable time to apply to the court for directions upon the receipt of the notice.	
005722 – 010523	Mr Andrew LEUNG Administration Chairman	Bills of costs or charge of the liquidator's agents Mr LEUNG enquired whether there would be safeguards for creditors of small and medium enterprises if liquidators charged unreasonable fees as there was a proposal to allow the bills of costs or charge of the liquidator's agents in a court winding up to be approved by the COI without having the need to go through the court's taxation process.	
		The Administration responded that: (a) the policy objective of the proposal to allow the bills of costs or charge of the liquidator's agents in a court winding up to be approved by the COI was to streamline the winding-up process by promoting court-free procedures. Most feedback received on the proposal	

Time Marker	Speaker	Subject(s)	Action Required
		during the public consultation was positive; (b) the proposal aimed to provide an alternative procedure for an agreement to be reached on the costs or charges of the liquidators' agents with a view to saving time and costs required for taxation. If the COI members and the liquidator were unable to reach an agreement, the costs or charges were still required to be	
		taxed by the court under the existing mechanism; and (c) under the existing section 196(2) of CWUMPO, the remuneration of a liquidator was determined (i) where there was a COI, by agreement between the liquidator and the COI; or (ii) where there was no COI or where the liquidator and the COI failed to agree, by the court. The Bill did not propose any change to this provision.	
Clause-by-	clause examination of th	e Bill	
010524 – 013000	Chairman Administration Mr CHUNG Kwok-pan Mr Kenneth LEUNG Chairman	The Chairman remarked that ALA7 sent a letter to the Administration on certain legal and drafting issues relating to the Bill on 21 January 2016 [LC Paper No. CB(1)481/15-16(05) issued on 22 January 2016]. The Administration was requested to provide a written response to the letter, and ALA7 could raise her concerns when the Bills Committee discussed the relevant clauses.	The Administration to take action as per paragraph 5 of the minutes
		Clause 74 – Section 243 amended (appointment of committee of inspection)	
		Clause 75 – Section 243A added	
		243A. Powers and duties of liquidator nominated by company	
		Clause 76 – Section 244A added	
		244A. Removal of liquidator Clause 77 – Section 245 amended (power to fill vacancy in office of liquidator)	

Time Marker	Speaker	Subject(s)	Action Required
		<u>Clause 78 – Section 247 amended (duty of liquidator to call meetings of company and of </u>	•
		creditors at end of each year)	
		<u>Clause 79 – Heading before section 249</u> <u>substituted</u>	
		Subdivision 6 — Provisions Applicable to Voluntary Winding Up	
		Clause 80 – Section 249 substituted	
		249. Provisions applicable to voluntary winding up	
		Clause 81 – Section 250A added	
		250A. Directors' powers before nomination or appointment of liquidator	
		<u>Clause 82 – Section 251 amended (powers and duties of liquidator in voluntary winding up)</u>	
		<u>Clause 83 – Section 253 amended (notice by liquidator of his appointment or ceasing to act)</u>	
		<u>Clause 84 – Section 255A amended (audit of liquidator's accounts in voluntary winding up)</u>	
		Clause 85 – Part V, Division 4A added	
		Division 4A — Provisional Liquidator and Liquidator — Restrictions on Appointment, Disqualification, Disclosure and Validity of Acts	
		262A. Restrictions on appointment of provisional liquidator or liquidator, etc.	
		262B. Persons disqualified from being appointed etc. as provisional liquidator or liquidator	
		262C. Disclosure statement	
		262D. Matters to be disclosed in disclosure statement	
		262E. Convenor's duty concerning disclosure statement	

Time Marker	Speaker	Subject(s)	Action Required
		262F. Updating disclosure statement	•
		262G. Validity of acts of provisional liquidator and liquidator	
		<u>Clause 86 – Headings before section 263</u> <u>substituted</u>	
		Division 5 — Provisions Applicable to Every Mode of Winding Up	
		Subdivision 1 — Proof and Ranking of Claims	
		<u>Clause 87 – Heading before section 266</u> <u>substituted</u>	
		Subdivision 2 — Effect of Winding Up on Antecedent and Other Transactions	
		Clause 88 – Sections 265A to 265E added	
		265A. Interpretation of Subdivision 2	
		265B. Meaning of associate	
		265C. Meaning of associate: further provisions	
		265D. Transactions at an undervalue voidable in certain circumstances	
		265E. Meaning of transaction at an undervalue	
		Clause 89 – Sections 266, 266A and 266B substituted	
		266. Unfair preferences voidable in certain circumstances	
		266A. Meaning of unfair preference	
		266B. Relevant time under sections 265D and 266	
		Clause 90 – Sections 266C and 266D added	
		266C. Orders under sections 265D and 266	
		266D. Application of sections 265D to 266C	

Time Marker	Speaker	Subject(s)	Action Required
		Clause 91 – Section 267 substituted	•
		267. Effect of floating charge	
		Clause 92 – Section 267A added	
		267A. Relevant time under section 267	
		Definition of "floating charge"	
		Mr CHUNG and Mr LEUNG commented that the definition of "floating charge" in the proposed amended section 267 of CWUMPO (i.e. a charge which, when created, was a floating charge) was circular.	
		The Administration advised that the definition was adopted from existing provisions, and was so drafted to cover a floating charge that would become a fixed charge upon the commencement of the winding up of a company by virtue of the terms and conditions of the charge document.	
013001 – 013457	Administration Mr Kenneth LEUNG	<u>Clause 93 – Heading before section 271</u> substituted	
		Subdivision 3 — Offences Antecedent to or in Course of Winding Up	
		Clause 94 – Section 274 amended (liability where proper accounts not kept)	
		Clause 95 – Section 276 amended (power of court to assess damages against delinquent officer, etc.)	
		Clause 96 – Heading before section 278 substituted	
		Subdivision 4 — Supplement Provisions as to Winding Up	
		<u>Clause 97 – Section 278 repealed</u> (<u>disqualification for appointment as liquidator</u>)	
		Clause 98 – Section 278A substituted	
		278A. Inducement affecting appointment etc. as provisional liquidator or liquidator	

Time Marker	Speaker	Subject(s)	Action Required
WILLIAM		Exemption from liability in offering inducement to affect appointment as provisional liquidator or liquidator	Required
		The proposed amended section 278A of CWUMPO expanded the existing scope on the prohibition of offering inducements to affect the appointment as a provisional liquidator or liquidator. Mr LEUNG asked why the carve-out provisions in subsection (2) of section 278A only applied to the accounting profession.	
		The Administration was requested to explain the considerations for not applying the carve-out provisions to other relevant professions including the legal profession.	The Administration to take action as per paragraph 3 of the minutes
013458 -	Administration	Clause 99 – Section 285A added	
020126	Mr NG Leung-sing Chairman ALA7	285A. Representation of corporation at meetings of creditors	
		<u>Clause 100 – Heading before section 287</u> <u>substituted</u>	
		Subdivision 5 — Supplementary Powers of Court	
		Clause 101 – Sections 286A to 286E added	
		286A. Power to order public examination of promoters, directors, etc.	
		286B. Powers to order examination of persons concerned with company's property, etc. and provision of information, etc.	
		286C. Examination of persons concerned with company's property, etc.	
		286D. Self-incrimination in relation to direction or requirement under section 286A, 286B or 286C	
		286E. Jurisdiction of Registrar	
		<u>Clause 102 – Heading before section 290</u> <u>substituted</u>	

Time Marker	Speaker	Subject(s)	Action Required
TYZWZ ZIOZ		Subdivision 6 — Provisions as to Dissolution	required
		<u>Clause 103 – Heading before section 293</u> <u>substituted</u>	
		Subdivision 7 — Central Accounts	
		<u>Clause 104 – Heading before section 296</u> <u>substituted</u>	
		Subdivision 8 — Rules and Fees	
		Clause 105 – Part V, Division 6 added	
		Division 6 — Electronic Communications by Liquidators	
		296A. Interpretation of Division 6	
		296B. Application of Division 6	
		296C. Communication by liquidator by electronic means	
		296D. Communication by liquidator by means of website	
		296E. Certain persons may require hard copy	
		Communication by liquidators by electronic means	
		The proposed new section 296C(3)(a) of CWUMPO provided that "that other person has agreed, generally or specifically, that the liquidator or provisional liquidator may send or supply the document or information to the person by electronic means". Mr NG enquired about the use of the phrase "generally or specifically".	
		The Administration advised that:	
		(a) before the liquidators or provisional liquidators could send or supply a document or information to a recipient by electronic means, they had to obtain the prior consent of the recipient; and	
		(b) the recipient could give a general consent to agree to receive all documents and information from the liquidators or	

Time Marker	Speaker	Subject(s)	Action Required
		provisional liquidators by electronic means (i.e. "generally"), or could give a specific consent to agree only to receive specific documents or information by electronic means in a specific occasion (i.e. "specifically").	
		Communication by liquidators by means of website	
		The proposed new section 296D of CWUMPO provided for the circumstances in which a liquidator might communicate with another person via a website. Subsections (2)(f) and (3) of section 296D specified a period throughout which the document or information must be made available on the website by the liquidator. Subsection (6) provided an exemption if: (a) the document or information was made available on the website for part of that period; and (b) the failure was wholly attributable to circumstances that it would not be reasonable to have expected the liquidator or provisional liquidator to prevent or avoid.	
		The Administration was requested to consider the Chairman's suggestion that a minimum period should be specified for the document or information be made available on the website to provide clarity and ensure that the relevant parties would not overlook the document or information.	The Administration to take action as per paragraph 4 of the minutes
		On the issues raised in ALA7's letter dated 21 January 2016 regarding the proposed new section 296D of CWUMPO, the Administration advised that:	
		(a) the purpose of the proposed new section 296D(6) was to provide an exemption to cover a failure to make a document or information available on a website continuously throughout the period mentioned in the new section 296D(2)(f) or 296D(3) which was wholly attributable to circumstances that it would not be reasonable to have expected the provisional liquidator or liquidator to prevent or avoid, and examples of incidents that might fall under the proposed new section 296D(6) included failure which was wholly	

Time Marker	Speaker	Subject(s)	Action Required
		attributable to earthquakes, fires or terrorist attacks; and (b) it would consider ALA7's suggestion regarding the proposed new section 296D(8).	
020127 – 020152	Chairman	Date of next two meetings	

Council Business Division 1
<u>Legislative Council Secretariat</u>
6 May 2016