

香港會計師公會的信頭
Letterhead of HONG KONG SOCIETY OF ACCOUNTANTS

BY FAX AND BY POST
(2869 6794)

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8 May 2000

Ms. Leung Siu-kum,
Clerk to Bills Committee on
Companies (Amendment) Bill 2000,
Legislative Council,
Legislative Council Building,
8 Jackson Road,
Central, Hong Kong.

Dear Ms. Leung.

Companies (Amendment) Bill 2000

Further to my letter to you of 24 March 2000 on the above Bill, I undertook to let you know if any additional points emerged when the Society's Council considered the Bill and the comments on it from our Insolvency Practitioners Committee.

I attach herewith a few supplementary points on the Bill. You will note that Part A contains proposals for minor changes to provisions that are not currently dealt with in the Bill. We believe that the opportunity should be taken to correct these errors in cross-references.

Yours sincerely.

PBTER TISMAN
DEPUTY DIRECTOR
(PROFESSIONAL PRACTICES)
HONG KONG SOCIETY OF ACCOUNTANTS

PMT/ay
Encl.

A. General Provisions of the Companies Ordinance

Section 140 (Resignation of auditor)

It appears that when subsection (2) was amended in 1995, corresponding amendments were not made to subsections (3)(b), 4 and 6(b) which still refer to the former subsection (2)(b) instead of subsection 2(a)(ii) (see attachment). This needs to be amended.

Eleventh Schedule (Accounts of Certain Private Companies under s1411)

Paragraph 5 of the Eleventh Schedule states: “There shall be shown under a separate heading the aggregate amount of any outstanding loans made under the authority of provisos (b) and (c) to section 48(1)”. However, the provisos to s48 were repealed in amendments made to the Ordinance in 1991. Similar provisions now appear as s47C(4)(a), (b) and (c). This reference in the Eleventh Schedule needs to be amended accordingly.

B. Corporate Rescue Provisions

New section 168ZD

Where the provisional supervision is ended and the appointment of a provisional liquidator previously terminated under s168ZD(11) is deemed not to have been terminated and the related winding up proceedings are deemed not to have been stayed, it is not clear now the provisional supervisor’s indemnity for contracts entered into by him during the provisional supervision will rank in the winding up of the company, or whether he is entitled to retain control over assets of the company in order to satisfy any such liabilities.

New section 168ZQ

Under s168ZQ a major secured creditor can signal his disagreement with the provisional supervisor preparing a proposal. This will effectively end the rescue attempt. However, the major creditor need give no justification for his decision. It is arguable that major a creditor should have to satisfy the court that opting out would increase the likelihood of his collecting a greater proportion of his secured debts.

It is noted that there is no general provision on unfair preferences. However, if the creditors decide that provision supervision should be ended in favour of a liquidation, consideration should be given to deeming the company to have been in liquidation from the date of the appointment of the provisional supervisor for the purpose of calculating the period relating to voidable dispositions. This should help to discourage provisional supervision from being used as a delaying tactic.

New section 168ZS

As regards classes of creditors whose rights are modified or otherwise affected, there should be a mechanism for ensuring that any objecting creditors in a class will not receive less than they would if the company were to be wound up. There could also be a mechanism to enable a plan to be approved over the objection of a class of creditors. In the United States, for example, a “cramdown” provision requires that a plan does not discriminate unfairly and is fair and equitable with respect to each class of claims or interests that is impaired under, and has not accepted, the plan. Court involvement and / or ratification would be necessary to ensure that objecting creditors are being treated fairly.

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Section of Enactment

Chapter: 32 Title: COMPANIES ORDINANCE Gazette Number:
Section: 140A Heading: Resignation of auditor Version Date: 30/06/1997

- (1) An auditor of a company may resign his office by depositing a notice in writing to that effect at the registered office of the company; and any such notice shall operate to bring his term of office to an end on the date on which the notice is deposited or on such later date as may be specified therein.
- (2) An auditor's notice of resignation shall not be effective unless- (Amended 84 of 1995 s. 4)
- (a) it contains either-
- (i) a statement to the effect that there are no circumstances connected with his resignation which he considers should be brought to the notice of the members or creditors of the company; or
- (ii) a statement of any such circumstances as aforesaid; and (Replaced 84 of 1995 s. 4)
- (b) it is signed-
- (i) in the case of an auditor which is a corporate practice, by a director of that practice;
- (ii) in the case of an auditor which is a partnership, by a partner of that partnership;
- (iii) in the case of an auditor who is an individual, by that individual. (Replaced 84 of 1995 s. 4)
- (3) Where a notice having effect under this section is deposited at a company's registered office the company shall within 14 days send a copy of the notice-
- (a) except in the case of a private company, to the Registrar; and
- (b) if the notice contained a statement under subsection (2)(b), to every person who under section 129G(1) is entitled to be sent copies of the documents there mentioned.
- (4) The company or any person who claims to be aggrieved may, within 14 days of the receipt by the company of a notice containing a statement under subsection (2)(b), apply to the court for an order under subsection (5).
- (5) If the court, on an application under subsection (4), is satisfied that the auditor is using the notice to secure needless publicity for defamatory matter, it may by order direct that copies of the notice need not be sent out; and the court may further order the company's costs on the application to be paid in whole or in part by the auditor, notwithstanding that he is not a party to the application.
- (6) The company shall, within 14 days of the court's decision, send to the persons mentioned in subsection (3)-
- (a) if the court makes an order under subsection (5), a statement setting out the effect of the order;
- (b) if the court does not make an order under that subsection, a copy of the notice containing the statement under subsection (2)(b).
- (7) If default is made in complying with subsection (3) or (6), the company and every officer of the company who is in default shall be guilty of an offence and liable to a fine and in the case of an individual, to imprisonment. (Amended 7 of 1990 s. 2)

(Added 6 of 1984 s.95)
[of. 1976 c. 69 s. 16U.K.]