Paper No. 103

National Security (Legislative Provisions) Bill : proscribed organizations - a response to points raised by Mr Winston Poon QC

In a letter addressed to the Secretary for Security dated 12 June 2003, Mr Winston Poon QC commented on certain proposals relating to organizations proscribed under the proposed section 8A of the Societies Ordinance. This paper is a response to those comments.

Amendments to Companies Ordinance?

2. In the final paragraph of his letter, Mr Poon states that "Neither the Schedule to the existing Bill nor the proposed Schedule 2 in the proposed amendments contains an amendment to the Companies Ordinance". That is not correct. Item 2 in the Schedule to the Bill proposes the addition of a new section 291AAA of the Companies Ordinance.

3. However, it is now proposed to delete that amendment, and to deal with the effects of proscription on an organization in a new Schedule 2 to the Societies Ordinance. As a result, it is no longer proposed to amend the Companies Ordinance. Instead certain existing provisions in the Companies Ordinance will be made to apply to certain types of proscribed organizations.

Registered companies

4. If a proscribed organization is a registered company, the Administration proposes that, on application by the Registrar of Companies to the Court of First Instance, the company shall be wound up, and sections 360D, 360E, 360F, 360G, 360H, 360I, 360J, 360K, 360L and 360M of the Companies Ordinance (Cap 32) shall apply to the company as if it were a company struck off the register and dissolved under section 360C of that Ordinance.

5. The effect of that approach is that provisions in Part XIIIA of the Companies Ordinance will govern the winding up. Part XIIIA was added to the Companies Ordinance in 1984 and, according to the Registrar of Companies, there are no reform proposals in respect of it.

6. Mr Poon states that Part XIIIA is defective in that a creditor who is entitled to make a claim against the organization will have no recourse. He

bases that statement on the fact that section 290 of the Ordinance does not apply to a winding up under Part XIIIA. Section 290 enables the Court to declare the dissolution of a company to have been void so as to enable the commencement of proceedings against it. He suggests that section 290 should apply.

7. In response, the Registrar of Companies has commented as follows.

"*Striking off and dissolution*

In a normal dissolution case (i.e. one which follows on completion of winding-up) or one which follows from a striking off under s.291, the dissolution may be void by an order of the court, or the company may be restored to the register by the Registrar so as to enable the winding-up to continue or people to complete their dealings with the company.

If, however, a company is struck off and dissolved under s.360C, no one has the power to void the dissolution or restore the company to the register (s. 360D). What will happen is that all the property and rights of the company shall, upon the striking off, vest in the Official Receiver who is obliged to wind-up the affairs of the dissolved company and distribute any dividend to proved creditors as if a winding-up order had been made against the company and he were the liquidator thereof.

Unliquidated claims against the company

S.360G provides that certain sections of the Companies Ordinance shall apply to the winding-up of a company struck off under s.360C as if on the day of dissolution of the company, an order had been made by the court for the winding-up of the company and as if the Official Receiver were the liquidator thereof. S.263 and s.264, which provide, inter alia, for debts provable in a winding-up, are amongst those sections.

Unliquidated claims, including tort claims, when converted into quantified claims by becoming liquidated by judgment or agreement, are now provable debts in any mode of insolvent winding-up. In the case of a solvent company, these claims are provable on a 'just estimate being made so far as possible'. As both s.263 and s.264 are applicable to a s.360C winding-up, the provability of unliquidated claims is in no way treated differently in such a winding-up."

Unregistered companies

8. With regard to any unregistered company that may be proscribed, the Administration proposes that winding up should be governed by Part X of the Companies Ordinance. That Part is specifically designed for the winding up of unregistered companies.

9. Mr Poon states that the statutory scheme in Part X is different in several respects from that in Part XIIIA. The Administration accepts that there are differences, but these differences are part of the current company law and are not created by its proposals. Moreover, Mr Poon's only example of unfairness in the differences relates to the exclusion of section 290 from Part XIIIA. That issue is dealt with in paragraph 7 above.

Dissolution before winding up

10. It is proposed that an unregistered company that is proscribed under section 8A of the Societies Ordinance should be regarded as having been dissolved, and may subsequently be wound up. Mr Poon regards this order of events to be unworkable.

11. The Registrar of Companies has commented as follows.

> "*<u>Dissolution and winding up</u>*
>
> In the sense in which the term is used in the UK as well as in HK, the dissolution of a company is effected by the Registrar of Companies removing the name of the company from the register. Dissolution of a company ends its legal personality and dissolves the relationship between the company and its members.
>
> Dissolution of a company usually comes after the completion of a liquidation procedure . The purpose of a liquidation procedure is to ensure that, before the company's existence ceases, all its affairs are dealt with (or 'wound-up') which means removing the company from all its legal relationships.
>
> There are, however, exceptions to this normal sequence of events, e.g. s.291 (Registrar may strike defunct company off register); s291AA (Registrar may deregister a defunct private company) and s.360C (CE in Council may order company engaging in undesirable activities to be struck off), whereby companies may become dissolved without going through a liquidation procedure."

Other organizations

12. If an organization is not registered under the Companies Ordinance, but is registered under any other Ordinance, it is proposed that the winding up of that organization would be conducted –

(1) under the relevant Ordinance, if it contains winding up provisions; or

(2) in other cases, under Part X of the Companies Ordinance.

13. Mr Poon does not have any comments on these arrangements that are additional to those referred to above.

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