

LEGISLATIVE COUNCIL BRIEF

Companies Ordinance
(Ord. No. 28 of 2012)

Companies (Unfair Prejudice Petitions) Proceedings Rules

INTRODUCTION

The Chief Justice (“CJ”) has made the Companies (Unfair Prejudice Petitions) Proceedings Rules (“C(UPP)PR”) (Annex) pursuant to section 727 of the new Companies Ordinance (“CO”) (Ord. No. 28 of 2012) on 9 May 2013. The set of rules is subject to the approval of the Legislative Council (“LegCo”).

JUSTIFICATIONS

2. Section 727(1)(a) of the new CO provides that, subject to the approval of the LegCo, CJ may make rules for regulating the proceedings of the Court of First Instance (hereafter “the Court”) on unfair prejudice petitions concerning the affairs of a company. The C(UPP)PR is made to facilitate implementation of the new CO.

THE PROCEEDINGS RULES

3. Under the existing CO (Cap.32), the procedures on unfair prejudice petitions are regulated by the relevant provisions in the Companies (Winding-Up) Rules (Cap.32H). These provisions concern the form and the presentation of a petition, as well as the drawing up and the service of an order. The C(UPP)PR mainly re-enacts the procedural requirements on these aspects with appropriate modifications and elaborations.

4. In gist, under the C(UPP)PR, the proceedings on unfair prejudice petitions are to be regulated in the following manner –

- (a) *Presentation of the petition* : To present an unfair prejudice petition, the petitioner must deliver the petition to the Court for filing, and specify both the grounds for presentation and the terms of the order sought in the petition (Rule 4(1)). The petition must be in the form prescribed in the Schedule to the C(UPP)PR, which is modelled on Form 3A in the Appendix to Cap.32H (Rule 3(1)(b));
- (b) *Service of the petition* : The Court will return sealed copies of the petition endorsed with a return day, on which the petitioner, the company and all respondents must attend before the Registrar or a judge for directions in relation to the procedure on the petition (Rule 4(2) and (3)). The petitioner must serve the sealed copies on the company and all respondents at least 14 days before the return day (Rule 5);
- (c) *The return day* : The Court may give directions on procedural and other matters in respect of the petition as set out in Rule 6 on or after the return day, which may include advertising of the petition and any order for a stay with a view to mediation or other alternative dispute resolution; and
- (d) *The order* : On the pronouncing of the order in the Court, the draft order is to be drawn up in accordance with Rule 7. Unless otherwise directed by the Court, the petitioner must serve an office copy of the order on the company and on the Registrar of Companies (Rule 8). In addition, if the Court requires the order to be advertised, it must also give directions as to the manner and the time of advertisement (Rule 9).

5. The rules and practice of the High Court for regulating ordinary civil procedure also apply to an unfair prejudice petition so long as such rules and practice are not inconsistent with the C(UPP)PR, and that the petition does not include the seeking of an order to wind up the company (Rule 3(5)). On the other hand, where the petitioner also seeks an order to wind up the company concerned in an unfair prejudice petition, the rules for regulating winding-up proceedings by the Court under Cap.32H will become relevant. To deal with such petitions, it is provided in Rule

3(2) that both the C(UPP)PR and the relevant rules on winding-up proceedings in Cap.32H will apply, but the latter will take precedence where inconsistency arises.

6. The C(UPP)PR comprises nine rules and one schedule –
- (a) *Rules 1 and 2* provide for the commencement and the interpretation of the terms used respectively;
 - (b) *Rule 3* sets out the application of the set of rules to an unfair prejudice petition, in particular in the case where a petitioner also seeks an order to wind up of the company in the same petition. It also specifies the form of the petition;
 - (c) *Rule 4* specifies the content of the petition. It also sets out the arrangements for presentation of the petition and fixing of the return day;
 - (d) *Rule 5* sets out the requirements on the service of the petition by the petitioner;
 - (e) *Rule 6* provides for the matters on which the Court may give directions on or after the return day;
 - (f) *Rule 7* provides for the drawing up of an order;
 - (g) *Rule 8* provides for the service of the order;
 - (h) *Rule 9* provides that if the order is to be advertised, the Court must give directions as to the manner and time of advertisement; and
 - (i) *the Schedule* prescribes the form of the petition.

LEGISLATIVE TIMETABLE

7. The C(UPP)PR is subject to approval under the positive vetting procedures of LegCo. Subject to the views of LegCo, the Secretary for Financial Services and the Treasury will move a resolution for its approval at the LegCo sitting of 5 June 2013. The set of rules will come into operation together with the new CO.

IMPLICATIONS OF THE PROPOSAL

8. The C(UPP)PR forms part of the new company law regime, which will contribute to the achievement of the economic benefits as envisaged to be brought by the CO rewrite, namely to improve Hong Kong's business environment and strengthen our position as an international financial and business centre.

9. The C(UPP)PR does not have civil service, environmental, family, financial, productivity or sustainability implications. It is in conformity with the Basic Law, including the provisions concerning human rights. It will not affect the binding effect of the new CO.

PUBLIC CONSULTATION

10. We conducted a public consultation on the draft provisions of various pieces of subsidiary legislation under the new CO in two phases, with phase one launched on 28 September 2012 and phase two on 2 November 2012. The consultation period was six weeks in both phases. A total of 34 submissions were received by end 2012 and the respondents were generally supportive. Insofar as the C(UPP)PR is concerned, the respondents offered mostly general and technical comments on the draft provisions. We have taken into account these comments when finalising the set of rules. The Standing Committee on Company Law Reform was consulted in the process. We also briefed the LegCo Panel on Financial Affairs on 7 January 2013 on the subsidiary legislation.

PUBLICITY

11. A press release will be issued on 15 May 2013. A spokesman will be arranged to handle media enquiries.

BACKGROUND

Rewrite of the Companies Ordinance

12. The rewrite of the existing CO aims to provide a modernised legal regime for the formation and operation of companies in Hong Kong. The Companies Bill was passed by LegCo on 12 July 2012 and it was subsequently gazetted as the new CO on 10 August 2012. Our target is

to bring the new CO into operation in the first quarter of 2014.

Unfair Prejudice Petitions

13. Pursuant to section 724 of the new CO, an unfair prejudice petition may be presented to the Court if –

- (a) the company's affairs are being or have been conducted in a manner unfairly prejudicial to the interests of the members generally or of one or more members; or
- (b) an actual or proposed act or omission of the company is or would be so prejudicial.

Both current and past members of a company are entitled to present an unfair prejudice petition under section 724(1) and (3) of the new CO respectively. On an investigation of or an enquiry into the affairs of a company under Part 19 of the new CO, the Financial Secretary may also present an unfair prejudice petition pursuant to section 879(3) of the new CO. Section 725 provides for the scope of order which the Court may make for giving relief in respect of the unfairly prejudicial conduct. The above also applies to non-Hong Kong companies¹.

14. Under the existing CO, matters concerning unfair prejudice petitions are prescribed in section 168A whereas the conduct of such proceedings is regulated by Cap.32H. As Cap.32H is primarily concerned about the procedures on winding-up petitions, not all provisions in Cap.32H apply to unfair prejudice petitions. Specifically, the applicable provisions thereof include Rule 22 and Form 3A on the form of a petition, Rule 23 on the presentation of a petition, Rule 35(1) on the drawing up of an order and Rule 36(3) on the service of an order. On the commencement of the new CO, the aforesaid provisions in Cap.32H will be consequentially amended as appropriate by Part 7 of Schedule 9 to the new CO and they will no longer be applicable to unfair prejudice petitions; whereas the amended rules and the rest of the provisions in Cap.32H concerning winding-up petitions will remain in effect and continue to apply in relation to winding-up petitions.

¹ Non-Hong Kong companies refer to any companies incorporated in a place outside Hong Kong that have established a place of business in Hong Kong.

ENQUIRIES

15. Any enquiry on this LegCo Brief should be addressed to Mr Arsene Yiu, Principal Assistant Secretary for Financial Services and the Treasury (Financial Services) at 2528 6384.

Financial Services and the Treasury Bureau
15 May 2013

Companies (Unfair Prejudice Petitions) Proceedings Rules

(Made by the Chief Justice under section 727 of the Companies Ordinance (28 of 2012) subject to the approval of the Legislative Council)

1. Commencement

These Rules come into operation on the day on which section 727 of the Companies Ordinance (28 of 2012) comes into operation.

2. Interpretation

In these Rules—

company (公司) includes a non-Hong Kong company;

Registrar (司法常務官) has the meaning given by Order 1, rule 4(1) of the Rules of the High Court (Cap. 4 sub. leg. A);

return day (回報日), in relation to an unfair prejudice petition, means a day fixed under rule 4(2);

unfair prejudice petition (不公平損害呈請) means a petition presented to the Court by a member, or a past member, of a company under section 724(1) or (3) of the Ordinance, or by the Financial Secretary under section 879(3) of the Ordinance;

Winding-up Provisions (清盤條文) means the provisions of the Companies (Winding-up) Rules (Cap. 32 sub. leg. H) which apply to proceedings in a winding up by the Court.

3. Application

- (1) If an unfair prejudice petition does not include seeking an order to wind up the company under section 177(1) or 327(3) of the Companies (Winding Up and Miscellaneous

Provisions) Ordinance (Cap. 32) as an alternative remedy (*alternative application*)—

- (a) these Rules apply to the petition; and
 - (b) the petition must be in the form set out in the Schedule (with any necessary modifications that the circumstances may require).
- (2) If the petition includes an alternative application—
 - (a) the Winding-up Provisions (with any necessary modifications that the circumstances may require) apply to the petition;
 - (b) these Rules, so far as not inconsistent with the Winding-up Provisions, also apply to the petition; and
 - (c) the petition must be in the form set out in Form 2 in the Appendix to the Companies (Winding-up) Rules (Cap. 32 sub. leg. H).
 - (3) If the alternative application is not proceeded with under an order of the Court—
 - (a) the Winding-up Provisions cease to apply to the petition; and
 - (b) these Rules continue to apply to the petition.
 - (4) The cessation of the application of the Winding-up Provisions does not affect their previous application to the petition or anything duly done or suffered under the Winding-up Provisions in respect of the petition.
 - (5) The rules and practice of the High Court for regulating the ordinary civil procedure of the court, so far as may be applicable and not inconsistent with these Rules, also apply to the petition where—
 - (a) these Rules apply to the petition under subrule (1)(a); or

- (b) the Winding-up Provisions have ceased to apply to the petition under subrule (3)(a).

4. Presentation of petition

- (1) An unfair prejudice petition must specify the grounds on which it is presented and the terms of any order that is sought by the petitioner, and must be delivered to the Court for filing with sufficient copies for service under rule 5.
- (2) The Court is to fix a day on which, unless the Court otherwise directs, the petitioner and any respondent (including the company) must attend before the Registrar or a judge of the Court for directions to be given in relation to the procedure on the petition.
- (3) On fixing the return day, the Court is to return to the petitioner sealed copies of the petition for service, each endorsed with the return day and the time of hearing of the petition.

5. Service of petition

- (1) The petitioner must, at least 14 days before the return day, serve a sealed copy of the petition (*service copy*) on the company at the registered office of the company by leaving it with any member, officer or employee of the company found there.
- (2) If the company does not have a registered office, the service copy must be served at the principal or last known principal place of business of the company in Hong Kong (*alternative place for service*) by leaving it with any member, officer or employee of the company found there.
- (3) If no member, officer or employee of the company can be found at the registered office or alternative place for service, the service copy must be served—

- (a) by leaving it at the registered office or alternative place for service; or
 - (b) on a member, officer or employee of the company specified by the Court.
- (4) For a petition under section 724(1) or (3) of the Ordinance, the petitioner must also, at least 14 days before the return day, serve a sealed copy of the petition on every respondent named in the petition.

6. Return of petition

On the return day, or at any time after it, the Court may give any directions that it thinks appropriate with respect to the following matters—

- (a) service of the petition on any person, whether in connection with the time, date and place of a further hearing, or for any other purpose;
- (b) whether any statement of claim, defence and reply are to be delivered;
- (c) whether, and if so by what means, the petition is to be advertised;
- (d) the manner in which any evidence is to be adduced at any hearing before the judge, particularly—
 - (i) the taking of evidence wholly or in part by witness statement or orally;
 - (ii) the cross-examination of a person making a witness statement;
 - (iii) the matters to be dealt with in evidence;
- (e) any other matter affecting the procedure on the petition or in connection with the hearing and disposal of the petition; and

- (f) any orders, including an order for a stay for any period, that the Court thinks fit, with a view to mediation or other alternative dispute resolution.

7. Drawing up of order

- (1) The petitioner, or the petitioner's solicitor, and all other persons who have appeared at the hearing of the petition must, on the day on which an order under section 725 of the Ordinance is pronounced in the Court or the next day, leave with the Registrar a draft of the order and all other documents required for completing the order.
- (2) The Registrar may make an appointment to settle the order.

8. Service of order, etc.

- (1) Unless the Court otherwise directs, the petitioner must serve an office copy of the order on the company and on the Registrar of Companies.
- (2) Unless the Court otherwise directs, an office copy of the order must be served under subrule (1) by prepaid letter addressed to the company—
- (a) at the registered office of the company; or
- (b) (if the company does not have a registered office) at its principal or last known principal place of business in Hong Kong.
- (3) If the order involves a reduction of capital or an alteration of the company's articles, those provisions of the Ordinance and of the Rules of the High Court (Cap. 4 sub. leg. A) relative to these matters are to apply as the Court may direct.

9. Advertisement of order

If the Court requires the order to be advertised, it must give directions as to the manner and time of advertisement.

Schedule

[r. 3]

Petition on Ground that Members Unfairly Prejudiced

To the High Court of Hong Kong

(a) Insert full name(s) and address(es) of petitioner(s) The petition of (a)

(b) Insert full name of company subject to petition 1. (b) (the company) was incorporated on (c)

(c) Insert date of incorporation

(d) Insert address of registered office 2. The registered office of the company is at (d)

(e) Insert amount of share capital and how it is divided 3. The share capital of the company is divided into (e) shares. The amount of the capital paid up or credited as paid up is (e) \$

4. The principal business which is carried on by the company is:

.....

(f) Set out the grounds on which the petition is presented 5. (f)

In these circumstances the petitioner submits that#:

[] the company's affairs are being or have been conducted in a manner unfairly prejudicial to the interests of [the members generally]/[one or more members (including the petitioner)]*.

[] the company's affairs were conducted in a manner unfairly prejudicial to the interests of [the members generally at the time when the petitioner was a member of the company]/[one or more members (including the petitioner) at the time when the petitioner was a member of the company]*.

[] [the act or omission]/[the proposed act or omission] referred to in paragraph 5 above [is]/[would be] unfairly prejudicial to the interests of [the members generally]/[one or more members (including the petitioner)]*.

the act or omission referred to in paragraph 5 above was unfairly prejudicial to the interests of [the members generally at the time when the petitioner was a member of the company]/[one or more members (including the petitioner) at the time when the petitioner was a member of the company]*.

Please tick the box(es) as applicable.

* Delete as applicable.

(g) Set out the terms of the order(s) sought

The petitioner seeks the following order(s):

(g)
.....

or

any other order that the Court thinks fit.

(h) Insert the name(s) of the intended respondent(s)

It is intended to serve this petition on (h)
.....
.....
.....



Chief Justice

9 May 2013

Explanatory Note

These Rules provide for the form and procedure for a petition to the High Court under sections 724(1) and (3) and 879(3) of the Companies Ordinance (28 of 2012) as regards remedies for unfair prejudice to the interests of a company's members.