

《2015年公司(清盤及雜項條文) (修訂)條例草案》
Companies (Winding Up and Miscellaneous
Provisions) (Amendment) Bill 2015

立法會 法案委員會
LegCo Bills Committee

6-11-2015

財經事務及庫務局 (財經事務科) 及 破產管理署

Financial Services and the Treasury Bureau (Financial Services Branch) & Official Receiver's Office

公司破產法例的重要性 (一)

Importance of Corporate Insolvency Law (1)

- ◆ 公司常以信貸方式營運以進行交易及拓展業務
Companies often operate on credit, which enables them to trade, develop and expand
- ◆ 須訂立公平有序的程序以處理公司倒閉的情況-
There is a need to provide a fair and orderly process to deal with the situations when companies fail -
 - 收集無力償債公司的資產和將之變現
Collecting and realising the assets of the insolvent companies
 - 把資產分發予債權人(如僱員、供應商及承辦商)
Distributing them among creditors (e.g. employees, suppliers and contractors)

公司破產法例的重要性 (二)

Importance of Corporate Insolvency Law (2)

- ◆ 公司清盤程序若具見成效，將可提升營商環境，有助香港維持全球主要商業中心的角色，鞏固本港的國際金融中心地位，亦能有效保障債權人及相關持份者的合法權益

An effective company winding-up process will promote the business environment, maintain Hong Kong's status as a global major business centre, reinforce our position as an international financial centre and protect the legitimate interests of creditors and other relevant stakeholders

公司清盤的類型

Types of winding-up of companies

一般而言，公司清盤可分為三類：

In general, there are three types of winding-up of companies:

- ◆ 由法院作出的清盤 - 合資格人士向法院提出呈請後，法院可把公司清盤
Court winding-up - The company may be wound up by the court upon petition by an eligible party
- ◆ 成員自動清盤 - 公司也可自動清盤。如公司成員(即股東)議決把公司自動清盤，並已發出有償債能力證明書，清盤便會以“成員自動清盤”方式進行。
Members' voluntary winding-up - A company may wind up voluntarily. If the members (i.e. shareholders) of a company resolve that the company be wound up voluntarily, and where a certificate of solvency has been issued, then the winding-up would proceed as a “members' voluntary winding-up”.
- ◆ 債權人自動清盤 - 如公司成員議決把公司自動清盤，但沒有發出有償債能力證明書，清盤便會以“債權人自動清盤”方式進行。
Creditors' voluntary winding-up - If the members of a company resolve that the company be wound up voluntarily, but a certificate of solvency has not been issued, then the winding-up would proceed as a “creditors' voluntary winding-up”.

修例的需要 (一)

Need for Change (1)

- ◆ 香港在1865年首次推行有關公司破產及清盤的條文
The corporate insolvency and winding-up provisions in Hong Kong were first introduced in 1865
- ◆ 上一次在1984年對公司清盤制度作出重大修改
Last major amendments made to the corporate winding-up regime was in 1984
- ◆ 一些其他主要海外司法管轄區已就其公司破產及清盤法例完成較全面的改革
Some other major overseas jurisdictions have completed more extensive reforms on their corporate insolvency and winding-up laws

修例的需要 (二)

Need for Change (2)

- ◆ 需要檢討香港的公司清盤制度。現時，香港的公司破產及清盤制度的法例條文載於公司(清盤及雜項條文)條例(第32章)(“《條例》”)
It is necessary to review Hong Kong’s overall corporate winding-up regime. At present, the provisions relating to Hong Kong’s corporate insolvency and winding-up regime are contained in Companies (Winding Up and Miscellaneous Provisions) Ordinance (Chapter 32) (“CWUMPO”)
- ◆ 我們已借鑑相關的海外經驗，以進行檢討，並制訂《2015年公司(清盤及雜項條文)(修訂)條例草案》(“《條例草案》”)
We have made reference to the relevant overseas experience in our review and prepared the Companies (Winding Up and Miscellaneous Provisions) Bill 2015 (“the Bill”)

公眾諮詢

Public Consultation

- ◆ 2013年4月至7月進行為期三個月的公眾諮詢
Three-month public consultation from April to July 2013
- ◆ 在2014年年中分別向立法會財經事務委員會及公司法改革常務委員會匯報諮詢總結
Briefing on Consultation Conclusions for the LegCo Panel on Financial Affairs and the Standing Committee on Company Law Reform respectively in mid 2014
- ◆ 於2015年年中就《條例草案》的條文擬稿分別進一步徵詢公司破產法例現代化諮詢小組及相關持份者團體的意見
Further engagement with the Advisory Group on Modernization of Corporate Insolvency Law and relevant stakeholder groups respectively in mid 2015 to seek their comments on the draft provisions of the Bill

《條例草案》 The Bill

- ◆ 《條例草案》中有189條條文以修訂《條例》及相關條文
189 clauses in the Bill to amend the CWUMPO and related provisions
 - 三個主要政策目標
3 main policy objectives
 - ✓ 加強對債權人的保障
Increasing protection of creditors
 - ✓ 精簡清盤程序
Streamlining the winding-up process
 - ✓ 使清盤程序更完備健全
Further enhancing the integrity of the winding-up process

加強對債權人的保障 (一)

Increasing Protection of Creditors (1)

- ◆ 引進“遜值交易”的新條文(參考資料摘要第6(a)段)
Introducing new provisions for “transaction at an undervalue”
(paragraph 6(a) of the Brief)
 - 確保公司資產不會在清盤前被不當「賤賣」，以保存公司可分發予債權人的資產。
Ensuring assets of the company will not be inappropriately dumped prior to its winding-up and preserving assets of the company which can be distributed to the creditors
 - 法院將可作廢相關交易
Court may set aside the relevant transaction in future
 - 涵蓋在開始清盤前5年內進行的交易
Covering transactions within 5 years before commencement of winding-up
 - 5年追溯期是經參考有關個人破產的法例的現有條文而訂定
5-year claw-back period was set with reference to the existing provisions of the bankruptcy law applicable to individuals
 - 較長的追溯期更能保障債權人的利益
A longer claw-back period better protects creditors' interests

加強對債權人的保障 (二)

Increasing Protection of Creditors (2)

- ◆ 引進“遜值交易”的新條文(參考資料摘要第6(a)段)(續)
Introducing new provisions for “transaction at an undervalue”
(paragraph 6(a) of the Brief) (cont’d)
 - 《條例草案》有條文保障正常的商業交易，例如指明以下交易不會受影響 -
There are provisions in the Bill to protect genuine business transactions, for example the following transactions will not be affected -
 - (1) 以交易當時計算，如公司所收取的交易項目的價值，並非“顯著”低於交易項目當時的價值。
if at the time of transaction the value of the consideration received by the company is not “significantly” less than the value of the consideration provided by the company.
 - (2) 如公司當時真誠地進行該交易及有合理理由相信該交易會令該公司得益。
if the transaction is carried out in good faith by the company and at the time of transaction there were reasonable grounds for believing that the transaction will benefit the company

加強對債權人的保障 (三)

Increasing Protection of Creditors (3)

- ◆ 訂立 “不公平優惠” 的獨立條文(參考資料摘要第6(b)段)
Introducing standalone provisions for transactions which are “unfair preferences” (paragraph 6(b) of the Brief)
 - 與現時一樣，法院可作廢相關交易
Same as at present, court may set aside the relevant transaction
 - 修正《條例》 因把《破產條例》(第6章)相關條文應用於公司清盤所引致的欠妥之處
Rectifying the anomalies in CWUMPO arising from applying the relevant Bankruptcy Ordinance (Chapter 6) provisions in the corporate winding-up context

加強對債權人的保障 (四)

Increasing Protection of Creditors (4)

- 有關從資本中贖回或回購公司股份，如公司在其後一年內違反事前償付能力陳述並清盤，則公司有關人士須承擔責任，向公司資產提供不多於就有關贖回或回購一事所收的款項 (參考資料摘要第6(c)段)

With respect to a redemption or buy-back of the company's own shares out of capital, in cases where the company breaches the prior solvency statement and is wound up within one year of the relevant transaction, providing for the liabilities of the parties concerned to contribute to the assets of the company up to the amount of the payment regarding the redemption or buy-back (paragraph 6(c) of the Brief)

- 這與《公司條例》(第622章)的相關條文互相呼應。該條文規定在作出有關贖回或回購之前，公司董事須作出償付能力陳述，證明在交易後一年內公司必須有能力悉數償付其債項
This corresponds to the relevant provisions of the Companies Ordinance (Cap. 622) which provides that prior to a relevant redemption or buy-back, the directors of the company have to make a solvency statement satisfying that the company is able to pay its debts in full within 12 months after the transaction
- 收取款項的成員及作出償付能力陳述的董事須共同及各別負上責任
Members (who received the payment) and the director (who made the solvency statement) should be jointly and severally liable
- 《條例草案》為作出償付能力陳述的董事提供免責條款
The Bill provides clauses on exclusion of liability for the director who made the solvency statement

加強對債權人的保障 (五)

Increasing Protection of Creditors (5)

- ◆ 優化有關債權人自動清盤開始後舉行第一次債權人會議的規定(參考資料摘要第6(e)段)

Enhancing the requirements relating to the first creditors' meeting upon the commencement of a creditors' voluntary winding-up (paragraph 6(e) of the Brief)

- 訂明召開第一次債權人會議的最短通知期為 7 天
to prescribe a minimum notice period of 7 days for calling the first creditors' meeting
- 取消第一次債權人會議須在公司會議舉行當日或翌日舉行的現行規定，改為須於公司會議舉行後的14天內舉行
to remove the existing requirement of holding the first creditors' meeting on the same day as, or the next following day after, the day of the company's meeting, and prescribe that the first creditors' meeting is to be held within 14 days after the holding of the company's meeting
- 確保債權人有足夠的時間及資料籌備第一次債權人會議，並在掌握相關資料的情況下作出決定
to ensure that the creditors would have sufficient time and information to prepare for the first creditor's meeting and make informed decisions

加強對債權人的保障 (六)

Increasing Protection of Creditors (6)

- ◆ 就債權人自動清盤案在特定情況下適當限制由成員委任的清盤人及清盤公司的董事的權力(參考資料摘要第6(e)段)
Appropriate restrictions on the powers of members' appointed liquidators and directors of the company concerned under specified circumstances in a creditors' voluntary winding-up (paragraph 6(e) of the Brief)
- 有關清盤個案由成員委任的清盤人的權力，在舉行第一次債權人會議前應受適當限制
Appropriate restrictions on the powers of the relevant members' appointed liquidator before the holding of the first creditors' meeting
- 清盤公司的董事的權力，在委任清盤人之前同樣受適當限制
Appropriate restrictions on the powers of directors of the company being wound up before the appointment of liquidator
- 以防清盤程序為人所濫用
Minimizing potential abuse in the winding-up process
- 如有需要，有關人士仍可在取得法院認許的情況下，行使清盤人或公司董事的其他權力。
If necessary, the relevant persons may apply for court sanction to exercise other powers of a liquidator or director.

精簡清盤程序 (一)

Streamlining Winding-up Process (1)

- ◆ 在由法院作出的清盤中，清盤人所聘用代理人的訟費單和收費單，可經審查委員會核准 (參考資料摘要第8(a)段)
Allowing the bills of costs or charges of the liquidators' agents in a court winding-up to be approved by the committee of inspection (COI).
(paragraph 8(a) of the Brief)
 - 如獲批准，無須如現時般交由法院評定
If approved, no need to be put to the court for examination and determination as currently required

精簡清盤程序 (二)

Streamlining Winding-up Process (2)

- 在由法院作出的清盤中，清盤人可給予審查委員會(如無審查委員會，則給予債權人)7天的事先通知，以行使委任律師協助履行清盤人職責的權力 (參考資料摘要第8(b)段)

Enabling the liquidator in a court winding-up to exercise the power to appoint a solicitor to assist in performing the liquidator's duties by giving 7 days' advance notice to the COI (or to the creditors in case there is no COI) (paragraph 8(b) of the Brief)

- 無須如現時般須事先取得法院或審查委員會的認許
No need to obtain the sanction of the court or the COI as currently required
- 有為審查委員會或債權人而設的保障條文
Safeguard provisions for COI or creditors

精簡清盤程序 (三)

Streamlining Winding-up Process (3)

- ◆ 清盤人如事先取得審查委員會委員及其他人士(例如債權人和分擔人)的同意，便可以電子方式與各人通訊。此外，清盤人可選擇以遙距方式舉行審查委員會的會議(參考資料摘要第8(c)及8(d)(i)段)
Allowing communications by a liquidator with members of the COI and other persons (such as creditors and contributories) by electronic means with their prior consent or allowing remote attendance at meetings of COI (paragraphs 8(c) and 8(d)(i) of the Brief)
 - 如有關人士不同意以電子方式與清盤人通訊，清盤人必須繼續向該等人士提供印本
If any relevant person does not agree to communicate with liquidator by electronic means, the liquidator must continue to supply the hard copy form to the relevant person

使清盤程序更完備健全 (一)

Further Enhancing the Integrity of the Winding-up Process (1)

- ◆ 適當地把無資格獲委任為臨時清盤人或清盤人的人士的類別擴大，以涵蓋有潛在利益衝突的人士等 (例如公司的債權人) (參考資料摘要第10(d)段)

Suitably expanding the list of persons disqualified for appointment as a provisional liquidator or liquidator to also cover persons with potential conflicts of interest (e.g. a creditor of the company) (paragraph 10(d) of the Brief)

- 彈性安排 - 有潛在利益衝突的人士如獲法院許可，仍可獲委任為臨時清盤人或清盤人

Flexibility - Persons with potential conflicts of interest may be appointed as a provisional liquidator or liquidator with the leave of the court

使清盤程序更完備健全 (二)

Further Enhancing the Integrity of the Winding-up Process (2)

- ◆ 引入新規定，訂明準臨時清盤人或準清盤人，如其本人或家人等與清盤公司有指明的關係，便須披露該等關係 (例如準清盤人的配偶是清盤公司的董事) (參考資料摘要第10(e)段)

Introducing a new requirement for disclosure by a prospective provisional liquidator and prospective liquidator of specified relationships between him or his immediate family members, etc. and the company being wound up (e.g. the spouse of a prospective liquidator is a director of the company) (paragraph 10(e) of the Brief)

- 提高委任過程的透明度
Increasing transparency in the appointment process
- 例如：在作出披露前兩年內他本人或家人是有關公司的董事、公司秘書或臨時清盤人等
Example: within 2 years before making the statement he or his family is a director, company secretary or provisional liquidator of a relevant company etc.

使清盤程序更完備健全 (三)

Further Enhancing the Integrity of the Winding-up Process (3)

- ◆ 訂明清盤人在清盤工作完成後，即使已獲法院頒令解除其作為清盤人的職務，也不會獲豁免承擔因失當行為或失職行為 / 違反信託行為而引致的法律責任 (參考資料摘要第10(b)段)

Providing that a liquidator would not be absolved from liabilities arising from the liquidator's misfeasance or breach of duty / trust notwithstanding that he has obtained a court order releasing him as liquidator after the completion of the winding-up (paragraph 10(b) of the Brief)

- 增強對債權人的保障
Enhancing the protection of creditors
- 避免向法院作出瑣屑的申請的保障條文
Safeguard against frivolous applications to the court
- 債權人的法律責任設有限期
Liquidators' liabilities are time-limited
- 海外主要司法管轄區的清盤人、以及香港其他專業人士也有相類安排
Similar arrangement for liquidators in major overseas jurisdictions and other professionals in Hong Kong

使清盤程序更完備健全 (四)

Further Enhancing the Integrity of the Winding-up Process (4)

- ◆ 更清楚述明在由法院作出的清盤中，根據《條例》不同條文委任的臨時清盤人的權力、職責、酬金的訂定及任期(參考資料摘要第10(a)段)

Setting out more clearly the powers, duties, the basis for determining remuneration, and tenure of office of a provisional liquidator appointed under different sections of CWUMPO in a court winding-up (paragraph 10(a) of the Brief)

- 消除現有相關條文不明確的地方
Removing uncertainties in the relevant existing provisions
- 例如：《條例草案》訂明了第194(1)(aa)條臨時清盤人的權力、職責、酬金的訂定等。

Example: The Bill prescribes the power, duties, the basis for determining remuneration of the section 194(1)(aa) provisional liquidators

其他事項 (一)

Other matters (1)

◆ 維持《條例》下現行的優先償付次序

No change to the order of priority of preferential payments in CWUMPO

- 在所有無抵押債權人之中，僱員的欠薪、所有強積金供款等已獲賦予最高優先權
Outstanding entitlements and MPF contributions of employees are already accorded the highest priority amongst all unsecured creditors
- 亦較其他優先債項包括公司拖欠政府的法定債項優先
Ahead of other preferential debts such as Government's statutory debts

其他事項 (二)

Other matters (2)

- 維持《條例》第265條現行設定的優先償付給僱員的付款額上限
No change to the existing caps set out in section 265 in CWUMPO on preferential payments to employees
 - 由於僱員的欠薪等會繼續先由破欠基金直接支付，維持現有上限不會對他們有實際影響
As Protection of Wages on Insolvency Fund will continue to pay the employees' outstanding entitlements upfront, employees' interests will not be affected by maintaining the existing caps
 - 但調高上限會減少可分發予其他債權人的已變現資產，影響他們的權益
But upward adjustment of the caps will affect the interests of other creditors by reducing the amount of realised assets available for distribution to them

Thank you

多謝