

立法會
Legislative Council

LC Paper No. CB(1)598/15-16
(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 third meeting on
Monday, 14 December 2015, at 4:30 pm
in Conference Room 2 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 SIN Chung-kai, SBS, JP
Hon POON Siu-ping, BBS, MH
Hon CHUNG Kwok-pan
- Member absent** : 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)

Miss TONG Wing Sze, Anita
Assistant Official Receiver (Legal Services) (Acting)

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

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

I Meeting with the Administration

Matters arising from previous meetings

- (LC Paper No. CB(1)203/15-16(01) -- List of follow-up actions arising from the discussion at the meeting on 6 November 2015
- LC Paper No. CB(1)203/15-16(02) -- Administration's response to issues raised at the meeting on 6 November 2015
- LC Paper No. CB(1)283/15-16(01) -- List of follow-up actions arising from the discussion at the meeting on 30 November 2015
- LC Paper No. CB(1)283/15-16(02) -- Administration's response to issues raised at the meeting on 30 November 2015

LC Paper No. CB(1)283/15-16(03) -- Letter dated 10 December 2015 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

The Bills Committee deliberated (Index of proceedings attached at **Appendix**).

Admin Follow-up actions to be taken by the Administration

Interface between the winding-up process and application for the Protection of Wages on Insolvency Fund ("PWIF")

2. Further to members' concerns expressed at the meeting on 6 November 2015 on the need to address the issue of the long time gap between the commencement of the winding-up process of a company and the making of payments from PWIF, the Administration was requested to follow up with the Labour and Welfare Bureau and the Labour Department in exploring possible measures under the context of the corporate winding-up regime to help expedite the application process of PWIF, and report the results of discussion to the Bills Committee.

Appointment of liquidators/provisional liquidators by the Official Receiver's Office ("ORO")

3. The Administration was requested to respond to a member's views that there should be qualification requirements for liquidators/provisional liquidators and ORO should enhance the transparency in appointing liquidators/provisional liquidators, and provide the following information:

- (a) the composition of the Panels established by ORO for outsourcing winding-up cases (i.e. Panel A and Panel T), and their respective selection criteria; and
- (b) the mechanism for ORO to appoint a member of the Panels as the liquidator/provisional liquidator of a winding-up case.

The "relevant time" for the new provisions on "transaction at an undervalue"

4. Members were concerned that a well-conceived "transaction at an undervalue" might consist of a number of transactions starting more than five years before the commencement of the winding-up of a company and the proposed five-year claw-back period for the new provisions on "transaction at an undervalue" might not cover such related transactions. The Administration was requested to respond to members' views that the Bill should include provisions to allow the court with discretion to set aside transactions entered into by a company beyond the five-year period which were related to an undervalue transaction.

Changes to the existing insolvency regime

5. A member noted that notwithstanding that there were no explicit provisions in the existing Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap. 32) on new measures introduced by the Bill, e.g. the proposal relating to "transaction at an undervalue" (i.e. new measures set out in part (a) of the Annex to LC Paper No. CB(1)283/15-16(02)), the court might handle similar matters under case law. The Administration was requested to provide information on the relevant practices and case law (if any) applied by the court in handling such matters.

Issues raised by the Legal Adviser to the Bills Committee ("ALA7")

6. The Administration was requested to provide written responses to the issues raised by ALA7 in her letter dated 10 December 2015 (i.e. LC Paper No. CB(1)283/15-16(03))

(*Post-meeting note:* The Administration's written responses to issues raised at the meeting and to ALA7's letter were issued to members vide LC Paper Nos. CB(1)383/15-16(02) and CB(1)383/15-16(03) on 11 January 2016 and 8 January 2016 respectively.)

II Any other business

Date of next meeting

7. The Chairman reminded members that the next two meetings would be held on 11 January 2016, at 8:30 am and 25 January 2016, at 8:30 am.
8. There being no other business, the meeting ended at 6:32 pm.

Council Business Division 1
Legislative Council Secretariat
24 February 2015

**Proceedings of the Bills Committee on Companies
(Winding Up and Miscellaneous Provisions) (Amendment) Bill 2015
Third meeting on Monday, 14 December 2015, at 4:30 pm
in Conference Room 2 of the Legislative Council Complex**

Time Marker	Speaker	Subject(s)	Action Required
000152 – 000336	Chairman	<p data-bbox="600 483 874 517"><u>Introductory remarks</u></p> <p data-bbox="600 555 1251 920">The Chairman remarked that the Legal Adviser to the Bills Committee ("ALA7") sent a letter to the Administration on certain legal and drafting issues relating to the Bill on 10 December 2015 which was circulated to members vide LC Paper No. CB(1)283/15-16(03) on 11 December 2015. 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.</p>	
000337 – 000702	Chairman Administration	<p data-bbox="600 965 1251 1066">Briefing by the Administration on its response to issues raised at the meeting on 6 November 2015 [LC Paper No. CB(1)203/15-16(02)]</p>	
000703– 001108	Mr POON Siu-ping Administration	<p data-bbox="600 1115 1251 1216"><u>Caps under section 265 of the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap. 32) ("CWUMPO")</u></p> <p data-bbox="600 1254 1166 1288">Mr POON's views and enquiries as follows:</p> <p data-bbox="600 1326 1251 1538">(a) the labour sector considered that the caps stipulated under section 265 of CWUMPO on preferential payments to employees ("the caps under section 265") should be increased as the caps had not been reviewed for many years; and</p> <p data-bbox="600 1576 1251 1722">(b) whether the Administration would consider putting in place a mechanism for adjusting the caps under section 265, including factors such as inflation rate.</p> <p data-bbox="600 1760 1251 2089">The Administration responded that the Protection of Wages on Insolvency Ordinance (Cap. 380) ("PWIO") provided that the Protection of Wages on Insolvency Fund ("PWIF") had subrogation rights in winding-up cases where employees of those winding-up cases had been granted PWIF ex gratia payments. Increasing the caps under section 265 in such circumstances would result in the transfer to PWIF an even larger amount of</p>	

Time Marker	Speaker	Subject(s)	Action Required
		<p>money received from the realisation of a wound-up company's assets, and would adversely affect the interests of other creditors. The Administration did not have a policy of adjusting the caps under section 265 in line with inflation, nor did it consider necessary to increase the caps at the moment.</p>	
001109 – 001702	Chairman Administration	<p>Briefing by the Administration on its response to issues raised at the meeting on 30 November 2015 [LC Paper No. CB(1)283/15-16(02)]</p>	
001703 – 002804	Mr Kenneth LEUNG Administration Chairman	<p><u>Appointment of liquidators/provisional liquidators by the Official Receiver's Office ("ORO")</u></p> <p>Mr LEUNG's views as follows:</p> <p>(a) there should be qualification requirements for liquidators/provisional liquidators; and</p> <p>(b) ORO should enhance the transparency in appointing liquidators/provisional liquidators.</p> <p>The Administration was requested to respond to Mr LEUNG's views, and provided information on:</p> <p>(a) the composition of the Panels established by ORO for outsourcing winding-up cases (i.e. Panel A and Panel T), and their respective selection criteria; and</p> <p>(b) the mechanism for ORO to appoint a member of the Panels as the liquidator/provisional liquidator of a winding-up case.</p> <p>The Administration responded that:</p> <p>(a) some stakeholders' views on the need to impose qualification requirements for insolvency practitioners and establish a licensing/registration regime for liquidators/provisional liquidators were noted. The Administration would consider the feasibility of introducing such measures in the context of an overall review of the winding-up regime in future; and</p>	<p>The Administration to take action as per paragraph 3 of the minutes</p>

Time Marker	Speaker	Subject(s)	Action Required
		<p>(b) the existing mechanism for ORO to outsource winding-up cases to private insolvency practitioners ("PIPs") to act as provisional liquidators under section 194(1A) of CWUMPO (i.e. Panel T scheme) and to recommend PIPs to creditors and contributories in their respective first meetings for appointment as liquidators (i.e. Panel A Scheme) had been operating smoothly. ORO had set requirements (e.g. the relevant work experience) for such PIPs and would monitor their performance.</p>	
002805 – 004015	Miss CHAN Yuen-han Administration Chairman	<p><u>Safeguards for employees under the provisions on "transaction at an undervalue"</u></p> <p>In reply to Miss CHAN's enquiry, the Administration explained that the provisions on "transaction at an undervalue" did not provide that employees had to wait for five years before receiving the employees' commission associated with a transaction. The Administration added that employees' commission was generally calculated according to employment contracts or company policies, rather than as part of a transaction made between the company and a third party.</p> <p><u>Interface between the winding-up process and application for PWIF</u></p> <p>Miss CHAN urged the Administration to address the concern about the long time gap between the commencement of the winding-up process of a company and the making of payments from PWIF. She considered that the Administration should remove obstacles (especially where there was no dispute as to the company's liability) for employees to apply for PWIF, including the requirement to obtain the Labour Tribunal's determination for invoking PWIF applications under certain circumstances.</p> <p>The Administration was requested to follow up with the Labour and Welfare Bureau and the Labour Department in exploring possible measures under the context of the corporate winding-up regime to help expedite the application process of PWIF, and report the results of discussion to the Bills Committee.</p>	The Administration to take action as per paragraph 2 of the minutes

Time Marker	Speaker	Subject(s)	Action Required
004016 – 004306	Mr Kenneth LEUNG Administration	<p>Mr LEUNG referred to item 8 of the Annex to LC Paper No. CB(1)283/15-16(02) (on liabilities of liquidators arising from misfeasance, breach of duty or breach of trust), and enquired whether the proposed amended section 276 of CWUMPO would override the proposed amended section 205.</p> <p>The Administration responded that amendments were introduced to both sections 205 and 276. The position under the Bill was that despite the release of a liquidator under section 205, the court might examine into the liquidator's conduct pursuant to section 276.</p>	
004307 – 005804	<p>Mr Christopher CHEUNG Administration Chairman</p> <p>Mr Kenneth LEUNG Assistant Legal Adviser 7 ("ALA7")</p>	<p><u>"Transaction at an undervalue"</u></p> <p>Mr CHEUNG's enquiries about:</p> <p>(a) factors to be considered in determining whether a transaction was a "transaction at an undervalue";</p> <p>(b) how assets involved in such a transaction would be recovered; and</p> <p>(c) safeguard measures for employees under the provisions on "transaction at an undervalue".</p> <p>The Administration responded as follows:</p> <p>(a) the court would make the decision by considering the relevant case law and prevailing circumstances of the case instead of applying a simple formula; and</p> <p>(b) there were provisions in the Bill to protect genuine business transactions, including transactions carried out in good faith by a company.</p> <p>In response to Mr CHEUNG's further enquiry, the Administration clarified that the provisions on "transaction at an undervalue" would apply to a transaction made at the time when the company was unable to pay its debts.</p> <p>ALA7 added that the meaning of "transaction at an undervalue" was provided in the proposed section 265E of CWUMPO that "a company</p>	

Time Marker	Speaker	Subject(s)	Action Required
		<p>enters into a transaction with a person at an undervalue if:</p> <p>(a) the company makes a gift to that person, or otherwise enters into a transaction with that person on terms that provide for the company to receive no consideration; or</p> <p>(b) the company enters into a transaction with that person for a consideration the value of which, in money or money's worth, is significantly less than the value, in money or money's worth, of the consideration provided by the company."</p> <p>The Chairman remarked that the provisions on "transaction at an undervalue" could prevent a company from transferring its assets by selling them at a price significantly less than their value prior to the winding-up process.</p>	
005805 – 010210	Mr Kenneth LEUNG Chairman Administration	<p><u>The "relevant time" for the new provisions on "transaction at an undervalue"</u></p> <p>Mr LEUNG was concerned that a well-conceived "transaction at an undervalue" might consist of a number of transactions starting more than five years before the commencement of the winding-up of a company and the proposed five-year claw-back period for the new provisions on "transaction at an undervalue" might not cover such related transactions.</p> <p>The Administration was requested to respond to the views that the Bill should include provisions to allow the court with discretion to set aside transactions entered into by a company beyond the five-year period which were related to a transaction at an undervalue.</p>	The Administration to take action as per paragraph 4 of the minutes
Clause-by-clause examination of the Bill			
010211 – 011604	Chairman Administration ALA7	<p>Part 1</p> <p>Preliminary</p> <p><u>Clause 1 – Short title and commencement</u></p> <p><u>Clause 2 – Enactments amended</u></p>	

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		<p>Part 2</p> <p>Amendments to Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap. 32)</p> <p><u>Clause 3 – Long title amended</u></p> <p><u>Clause 4 – Part I heading and Part I, Division 1 heading added</u></p> <p><i>Part I – Preliminary</i></p> <p><i>Division 1 – Short Title</i></p> <p><u>Clause 5 – Heading before section 2 substituted</u></p> <p><i>Division 2 – Interpretation and Specification of Forms</i></p> <p><u>Clause 6 – Section 2 amended (interpretation)</u></p> <p>ALA7 highlighted the issues raised in her letter (CB(1)283/15-16(03)) on the definition of "liquidator" and Chinese rendition of the new definition of "transaction at an undervalue" in section 2(1) of CWUMPO. The Administration remarked that it had considered ALA7's views but considered it unnecessary to make amendments. The Administration would provide a written response to ALA7's letter.</p>	<p>The Administration to take action as per paragraph 6 of the minutes</p>
<p>011605 – 012626</p>	<p>Administration ALA7 Chairman</p>	<p><u>Clause 7 – Headings before section 37 substituted</u></p> <p><i>Part II – Share Capital and Debentures</i></p> <p><i>Division 1 – Prospectus</i></p> <p><u>Clause 8 – Heading before section 42 substituted</u></p> <p><i>Division 2 – Allotment</i></p> <p><u>Clause 9 – Heading before section 48A substituted</u></p> <p><i>Division 3 – Construction of References to Offering Shares or Debentures to the Public</i></p> <p><u>Clause 10 – Heading before section 79 substituted</u></p>	

Time Marker	Speaker	Subject(s)	Action Required
		<p><i>Division 4 — Special Provisions as to Debentures</i></p> <p><u>Clause 11 – Part IV repealed (management and administration)</u></p> <p><u>Clause 12 – Part IVA heading amended (disqualification of directors)</u></p> <p><u>Clause 13 – Section 168D amended (disqualification orders: general)</u></p> <p><u>Clause 14 – Section 168G amended (disqualification for fraud, etc., in winding up)</u></p> <p><u>Clause 15 – Section 168IA amended (power to order public examination)</u></p> <p>ALA7 highlighted the issues raised in her letter regarding the proposed amended section 168IA(7) of CWUMPO, and requested the Administration to explain the reason for removing the existing right of a person ordered to be publicly examined by the court to be furnished with a copy of the Official Receiver ("OR")'s report.</p> <p>The Administration responded that the OR's report would be confidential as it might contain information which, if disclosed to the person proposed to be made subject to the order, might adversely affect the effectiveness of the order being sought or even frustrate its purpose. Notwithstanding the proposed amendments to section 168IA(7) of CWUMPO, safeguard provisions were provided in the proposed new rule 51A of the Companies (Winding-up) Rules (Cap. 32 sub leg. H) to allow a person who was the subject of a public examination order to apply to the court to see all or part of the report. If the person satisfied the court that it would be unfair to him not to see the report, the court might allow him to see all or part of the report subject to any condition that it thought fit. The proposed amendments were also in line with the relevant provisions in the Bankruptcy Ordinance (Cap. 6) and the insolvency legislation of the United Kingdom. The Administration would provide a written response to ALA7's letter.</p>	<p>The Administration to take action as per paragraph 6 of the minutes</p>

Time Marker	Speaker	Subject(s)	Action Required
012627 – 013427	Administration ALA7 Chairman	<p><u>Clause 16 – Section 168IB added</u></p> <p><i>168IB. Self-incrimination in relation to requirement under section 168IA</i></p> <p><u>Clause 17 –Section 168R amended (register of disqualification orders)</u></p> <p><u>Clause 18 – Headings before section 169 substituted</u></p> <p><i>Part V – Winding Up</i></p> <p><i>Division 1 – Preliminary</i></p> <p><i>Subdivision 1 – Modes of Winding Up</i></p> <p><u>Clause 19 – Heading before section 170 substituted</u></p> <p><i>Subdivision 2 – Contributories</i></p> <p><u>Clause 20 – Section 170A added</u></p> <p><i>170A. Liability of directors and shareholders involved in share redemption or buy-back out of capital</i></p> <p>ALA7 highlighted the issues raised in her letter regarding the term "shareholders" in, and the purpose of subsection (5) of the proposed new section 170A of CWUMPO. The Administration remarked that it would provide a written response to ALA7's letter.</p>	The Administration to take action as per paragraph 6 of the minutes
013428 – 014034	Administration ALA7 Chairman	<p><u>Clause 21 – Section 171 amended (definition of contributory)</u></p> <p><u>Clause 22 – Headings before section 176 substituted</u></p> <p><i>Division 2 – Winding Up by the Court</i></p> <p><i>Subdivision 1 – Jurisdiction</i></p> <p><u>Clause 23 – Heading before section 177 substituted</u></p> <p><i>Subdivision 2 – Cases in which Company may be Wound Up by Court</i></p>	

Time Marker	Speaker	Subject(s)	Action Required
		<p><u>Clause 24 – Section 178 amended (definition of inability to pay debts)</u></p> <p><u>Clause 25 – Heading before section 179 substituted</u></p> <p><i>Subdivision 3 — Petition for Winding Up and its Effects</i></p> <p><u>Clause 26 – Section 179 amended (provisions as to applications for winding up)</u></p> <p><u>Clause 27 – Heading before section 184 substituted</u></p> <p><i>Subdivision 4 — Commencement of Winding Up</i></p> <p><u>Clause 28 – Heading before section 185 substituted</u></p> <p><i>Subdivision 5 — Consequences of Winding-up Order</i></p> <p><u>Clause 29 – Heading after section 187 substituted</u></p> <p><i>Subdivision 6 — Official Receiver and Liquidators</i></p> <p><u>Clause 30 – Section 190 amended (statement of company's affairs to be submitted to provisional liquidator or liquidator)</u></p> <p>ALA7 highlighted the issues raised in her letter on matters relating to "affidavit of concurrence" in the proposed new section 190(2B) of CWUMPO. The Administration remarked that it would provide a written response to ALA7's letter.</p>	<p>The Administration to take action as per paragraph 6 of the minutes</p>
<p>014035 – 014433</p>	<p>Administration Chairman ALA7</p>	<p><u>Clause 31 – Section 190A added</u></p> <p><i>190A. Costs and expenses of statement of affairs or affidavit of concurrence</i></p> <p><u>Clause 32 – Section 191 amended (report by Official Receiver or liquidator)</u></p> <p><u>Clause 33 – Section 193 amended (appointment and powers of provisional liquidator)</u></p>	

Time Marker	Speaker	Subject(s)	Action Required
		<p>ALA7 highlighted the issues raised in her letter on the vacancy in the office of the provisional liquidator in the proposed new section 193(6) and (7) of CWUMPO. The Administration remarked that it would provide a written response to ALA7's letter.</p>	<p>The Administration to take action as per paragraph 6 of the minutes</p>
<p>014434 – 014742</p>	<p>Administration Chairman</p>	<p><u>Clause 34 – Section 194 amended (appointment, style, etc. of liquidators)</u></p> <p>ALA7 referred to the issues raised in the letter regarding the proposed amended section 194 of CWUMPO, and requested the Administration to explain why there was no provision for a person acting as a liquidator under section 194(1)(aa) to apply to the court for the appointment of a person as a liquidator in his place similar to that found in section 194(2) for OR acting as a liquidator. The Administration remarked that it would provide a written response to ALA7's letter.</p>	<p>The Administration to take action as per paragraph 6 of the minutes</p>
<p>014743 – 015053</p>	<p>Administration ALA7 Chairman</p>	<p><u>Clause 35 – Section 196 amended (general provisions as to liquidators)</u></p> <p><u>Clause 36 – Section 199 substituted</u></p> <p><i>199. Powers of liquidator in winding up by court</i></p> <p><u>Clause 37 – Sections 199A and 199B added</u></p> <p><i>199A. Powers of Official Receiver holding office as provisional liquidator by virtue of section 194(1)(a)</i></p> <p><i>199B. Powers of provisional liquidator holding office by virtue of section 194(1)(aa) or (1A)</i></p> <p>ALA7 referred to the drafting issues raised in her letter regarding the proposed new section 199B of CWUMPO. The Administration remarked that it would provide a written response to ALA7's letter.</p>	<p>The Administration to take action as per paragraph 6 of the minutes</p>
<p>015054 – 015223</p>	<p>Administration Chairman</p>	<p><u>Clause 38 – Section 203 amended (audit of liquidator's accounts)</u></p> <p><u>Clause 39 – Section 205 amended (release of liquidators)</u></p>	

Time Marker	Speaker	Subject(s)	Action Required
		<u>Clause 40 – Heading before section 206 substituted</u>	
015224 – 020057	Chairman Mr Alan LEONG Administration	<u>Changes to the existing insolvency regime</u> Mr LEONG noted that notwithstanding that there were no explicit provisions in the existing CWUMPO on new measures introduced by the Bill, e.g. the proposal relating to "transaction at an undervalue" (i.e. new measures set out in part (a) of the Annex to CB(1)283/15-16(02)), the court might have handled similar matters before. The Administration was requested to provide information on the relevant practices and case law (if any) applied by the court in handling such matters.	The Administration to take action as per paragraph 5 of the minutes
020058 – 020257	Chairman Miss CHAN Yuen-han Clerk Mr POON Siu-ping	Date of next two meetings	