



CB(1)229/15-16(04)

Room 525, 5/F., Prince's Building, Central, Hong Kong  
Telephone: 2521 1160, 2521 1169 Facsimile: 2868 5035  
Email: info@hkab.org.hk Web: www.hkab.org.hk

香港中環太子大廈5樓525室  
電話：2521 1160, 2521 1169 圖文傳真：2868 5035  
電郵：info@hkab.org.hk 網址：www.hkab.org.hk

27 November 2015

By email to [slchan@legco.gov.hk](mailto:slchan@legco.gov.hk)  
Your ref: CB1/BC/1/15

Clerk to Bills Committee on  
Companies (Winding Up and Miscellaneous Provisions)  
(Amendment) Bill 2015  
The Legislative Council  
Legislative Council Complex  
1 Legislative Council Road, Central  
Hong Kong

Attn: Mr Hugo Chiu

Dear Mr Chiu

**Companies (Winding Up and Miscellaneous Provisions) (Amendment) Bill 2015 (“Bill”)**

We thank you for your letter of 10 November 2015 asking for the HKAB’s submission on the Bill.

We have been in correspondence with the Financial Services Branch of the Financial Services and The Treasury Bureau (“FSTB”) since 2013 in relation to this legislative exercise. Our submission to the FSTB dated 12 July 2013 (“2013 Submission”), then with regard to the legislative proposals, has already been uploaded onto its website<sup>1</sup>. Whilst the Administration has taken on board some but not all comments from us, our subsequent exchange with the FSTB has focussed on a number of key and new issues, of which we would like to draw the attention of the Bills Committee to the following.<sup>2</sup>

**A. Commencement of winding-up**

**Question 1 (prescribed form for statutory demand)**

1. We note the same Form 1A at clause 173(1) of the Bill is intended to be used against a company as defined in section 2 of the Companies (Winding Up and Miscellaneous Provisions) Ordinance (“CWUMPO”) or an unregistered company as defined in section 326.
2. Sections 178(1)(a) and 327(4)(a) CWUMPO are very specific in requiring a statutory demand to be served on the debtor at its “*registered office*” or “*principal place of business*”

<sup>1</sup> [http://www.fstb.gov.hk/fsb/ppr/consult/impbill\\_submissions.htm](http://www.fstb.gov.hk/fsb/ppr/consult/impbill_submissions.htm)

<sup>2</sup> Our comments below are structured around the numbered questions in the FSTB’s Consultation Document in 2013.

*Chairman* The Hongkong and Shanghai Banking Corporation Ltd  
*Vice Chairmen* Bank of China (Hong Kong) Ltd  
Standard Chartered Bank (Hong Kong) Ltd  
*Secretary* Henry Chan

主席 香港上海匯豐銀行有限公司  
副主席 中國銀行（香港）有限公司  
渣打銀行（香港）有限公司  
秘書 陳崇禧



(in Hong Kong), as the case may be. In contrast, the relevant blank in the proposed Form 1A is described simply as the debtor's "Address". This may be sufficient for demands against individuals but is, in our view, best amended to track the wording used in the CWUMPO.

Question 5 (minimum notice period for first creditors' meeting)

3. The FSTB's most recent letter to us gave a generic response saying "*the Consultation Conclusions issued in May 2014 have already explained [its] positions on those matters*".
4. The point made in our earlier letter to the FSTB is precisely that the analogy drawn in the Consultation Conclusions between a general meeting (of a going concern's members) and a first creditors' meeting (in the context of a voluntary liquidation) is, with due respect to the FSTB, unconvincing. In an insolvency, the circumstances can change by the day. We maintain the view that our suggestion<sup>3</sup> of three business days (as opposed to "*at least 7 days*" in the Bill) strikes a better balance between the need for creditors to have sufficient advance notice and to participate in the decision making process.

**B. Provisional liquidators ("PLs") and liquidators ("L")**

Question 9(a) (list of disqualified persons from being appointed as PL or L)

5. We suggested in the 2013 Submission that leave of the court should not be required before appointing a receiver / receiver and manager as PL or L. This is likewise met with the FSTB's generic response referring to the Consultation Conclusions. We cannot help but think the proposed requirement for leave defies the commercial reality that financial creditors having the right to appoint a receiver tend to be the major creditors by value.
6. As regards the timing of the application for leave contemplated under section 262B(3) of the Bill, the Administration appears to have missed our point made in relation to court winding-up. We did not suggest the PL or L should be, as described in the FSTB's letter to us, "*allowed to seek the court leave after he has already been appointed, or nominated for appointment*".
7. What we were at pains to point out to the Administration is that the two-stage process<sup>4</sup> required by the current drafting of the Bill is quite unnecessary. The more efficient and, we would say, logical approach is to empower the court to decide both applications at the same hearing. A standalone leave application is also inconsistent with, and cannot be accommodated by, the norm that an application for appointment of PL is the very first court application by creditors (often a bank group). The main issue must be whether a PL should be appointed at all. Who should be appointed is the next question to ask.

Question 9(b) (appointment of a disqualified person to be void)

8. We recommended in our 2013 Submission that the effect of a void appointment be clarified in the new legislation. We pointed out that section 196(5) CWUMPO is not sufficiently detailed and is expressly subject to section 278 of the same Ordinance.

---

<sup>3</sup> Initially made in the 2013 Submission.

<sup>4</sup> A leave application, then the appointment application.

9. The relevant provision in the Bill is section 262G in clause 85. Section 262G has inherited the drafting of section 196(5)<sup>5</sup> and hence its problem that whose discovery is determinative and what amounts to a discovery for this purpose are not spelt out. We take it that the Administration sees no need to improve the drafting. To us, this represents a missed opportunity.

Question 11 (prohibition on inducement in relation to appointment of L)

10. From our correspondence with the FSTB, we readily accept the Administration does not intend that the proposed new sections 278A and 297B in clauses 98 and 106 of the Bill will operate to prohibit normal competition on charge-out rates among insolvency practitioners.
11. Having said that, in case the proper construction of sections 278A and 297B is at issue in future, there can be different views even as regards the extent to which one may consult extrinsic materials (such as the FSTB's letter) for the purpose of ascertaining the legislative intent.<sup>6</sup> Given the Administration's clear stance, the simple solution is to expressly state that in the new sections.
12. With regard to in-house cross-referrals, we pointed out to the Administration that solicitors serving as liquidators will be unable to rely on the proposed carve-out because the term "*practice unit*"<sup>7</sup> is used. At least so far as insolvency practice is concerned, we do not consider "*the operation of the legal profession*" to be so "*different from that of the accounting profession*" that the limited applicability of the carve-out can be justified, as contended by the FSTB in its letter to us.
13. In essence, a "*practice unit*" simply means an accountancy business run as a firm, a sole proprietorship or a company. The first two forms of operation are captured by the definition of "*Hong Kong firm*"<sup>8</sup> in the case of solicitors. It is also common for law firms to provide certain kinds of services, such as company secretarial service, through a company owned by them. We repeat our suggestion to extend the carve-out to solicitors.

Question 12 (three types of PLs under section 194 CWUMPO)

14. We are grateful to the FSTB for confirming that the Administration has studied the Court of Appeal's Judgment in *Re MF Global Hong Kong Ltd (No 4)* [2015] 2 HKLRD 325.
15. The FSTB said in its letter to us that the previous concern regarding the word "*continues*" in section 194(1)(aa) CWUMPO has fallen away in light of *MF Global (No 4)* and section 199B in clause 37 of the Bill. We accept section 199B will help clarify the powers exercisable by a PL under section 194(1)(aa). However, it is also clear from *MF Global (No 4)* that the word "*continues*" in section 194(1)(aa) still has significance in matters such as the PL's remuneration.<sup>9</sup> We request the Administration and the Bills Committee to bear this in mind.

<sup>5</sup> "The acts... are valid even if it is afterwards discovered that..."

<sup>6</sup> In *HKSAR v Cheung Kwun Yin* (2009) 12 HKCFAR 568, the Court of Final Appeal expressly left open the question of the applicability in Hong Kong of the approach in *Pepper v Hart* [1993] AC 593.

<sup>7</sup> As defined in the Professional Accountants Ordinance (Cap 50).

<sup>8</sup> Section 2(1) of the Legal Practitioners Ordinance (Cap 159).

<sup>9</sup> Paragraph 27 of the Judgment in *MF Global (No 4)*, where the outcome in *Re Lehman Brothers Securities Asia Ltd (No 2)* [2010] 1 HKLRD 58 was affirmed (though not the reasoning).



Question 13 (court to determine powers, duties, remuneration and termination of PLs)

16. We welcome the Administration's amendment to the proposed section 193(4) CWUMPO in response to our comments, before the Bill's gazettal. Given it is recognised by the Administration that a PL may have both powers and duties, we are content with the drafting now in the Bill.
17. With regard to the remuneration of a section 193 PL, we propose that it be approved by either the court *or a subsequently appointed committee of inspection*. The FSTB has rejected this in its letter citing operational infeasibility and "*the nature of the office of such provisional liquidator*". To clarify, our proposal presupposes that, for whatever reason, the PL still has unpaid fees by the time a committee of inspection ("COI") is formed. His / her work should ultimately benefit the creditors both before and after the company is ordered to be wound up. We see no issue arising from the two points made by the FSTB. The Administration and the Bills Committee are invited to reconsider our proposal.

**C. Conduct of winding-up**

Question 15 (removal of sanction requirement for compulsory L to appoint a solicitor)

18. We note the sanction mechanism is preserved by section 199(4)(a) in clause 36 of the Bill, but we suppose the whole rationale of removing the sanction requirement is to streamline the process. In situations where giving 7 days' advance notice is impracticable, we consider it unlikely that seeking sanction from the court or the COI would be a better option for the L in terms of the time and costs involved.
19. Currently, the practice is that the L would either obtain sanction before appointing a solicitor, or if the circumstances do not allow, the L would apply for the court's retrospective sanction after the solicitor has been appointed. With the notice requirement, the current legislative proposal lies somewhere in between the two approaches. Co-existence of the three is undesirable.

Question 18 (number of members of a COI)

20. We have made our point to the Administration<sup>10</sup> and see that it is not persuaded. We take its point that the current proposal allows the appointment of a COI with five members. Given this, we are prepared to accept the proposal as is.

**D. Voidable transactions**

Question 25 (transaction at an undervalue)

21. As we pointed out in the 2013 Submission, the definition of transactions at an undervalue should ensure that only consideration moving from the counterparty *to the company itself* would count. The definition proposed at that time was unclear, and we do not see any improvement in section 265E(b) now at clause 88 of the Bill.
22. In correspondence, the FSTB suggested to us that "*the idea is to compare the value of the consideration given and that received by the company*" (our emphasis). This is not

---

<sup>10</sup> That the maximum number of COI members should be five instead of seven as proposed by the Administration.



explicitly borne out in section 265E(b). Our law does not require consideration to move to a promisor. Even if the consideration from a counterparty will mostly<sup>11</sup> move not to the company but a third party<sup>12</sup>, provided the value of the consideration in aggregate is not “*significantly less than the value... of the consideration provided by the company*”, it is doubtful whether section 265E(b) can be invoked, although the practical consequence of such a transaction may be that value (asset) is taken away from the company. This loophole should be filled.

23. As regards the look-back period, we still consider 5 years<sup>13</sup> to be unnecessarily long. That said, we appreciate the Administration has to take into account consistency between the legislative proposal and the equivalent provision in bankruptcy. With a view to ensuring the power to avoid transactions at an undervalue is enacted as soon as possible, we are prepared to take the look-back period as an issue of secondary importance.

**E. Investigation during winding-up**

Question 31 (redemption or buy-back of shares out of capital)

24. In the 2013 Submission, we suggested that a distinction be drawn between past shareholders who are connected with the company and those who are not – only the former should be required to contribute to the assets of the company in the circumstances discussed in the public consultation. Our proposal is commented as unreasonable and unjustifiable in the FSTB’s letter to us.
25. Whilst we do not share the FSTB’s view, we accept that its view<sup>14</sup> represents another plausible position to take. At the same time, we ask the Bills Committee to take note of the point we made so as to ensure the Committee members will give it adequate consideration.

We hope our submissions are of assistance. We would be most grateful if you would keep us apprised and involved in the legislative process.

Yours sincerely

Henry Chan  
Secretary

c.c. Mr Billy Au, Division 4, Financial Services Branch, FSTB  
Your ref: IB&W/2/1/5/3C (2014) Pt.4  
By fax to 2869 4195

<sup>11</sup> In this hypothetical example, it is assumed that a small part of the consideration from the counterparty will move to the company, otherwise section 265E(a) would apply.

<sup>12</sup> For example, its director.

<sup>13</sup> Section 266B(1)(a) in clause 89 of the Bill.

<sup>14</sup> That is to say, all types of persons who have received payment of the shares redeemed or bought back should be required to contribute to the assets of the company.