

**Bills Committee on
Companies (Winding Up and Miscellaneous Provisions) (Amendment) Bill 2015**

**Clause-by-clause Examination
Draft Committee Stage Amendments – First Batch**

With the deliberation of the Companies (Winding Up and Miscellaneous Provisions) (Amendment) Bill 2015 (“the Bill”) at the Bills Committee meetings, the Government will propose some Committee Stage Amendments (“CSAs”) to amend the Bill. This paper sets out the first batch of the proposed draft CSAs at **Annex**.

2. Members are invited to examine the mark-up version of the relevant parts of the Bill with the proposed draft CSAs marked thereto. The reasons for these draft CSAs have been provided in the footnotes as appropriate. These draft CSAs are subject to revisions if necessary.

**Financial Services and the Treasury Bureau
Official Receiver’s Office
29 February 2016**

Companies (Winding Up and Miscellaneous Provisions) (Amendment) Bill 2015

Draft Committee Stage Amendments – First Batch

(1) Clause 20 / the new section 170A(5)**“170A. Liability of directors and shareholders involved in share redemption or buy-back out of capital**

- (1) This section applies where a company is being wound up and—
 - (a) it has under Division 4 of Part 5 of the Companies Ordinance (Cap. 622) made a payment out of capital in respect of the redemption or buy-back of any of its own shares (*payment out of capital*) from a person (*past shareholder*); and
 - (b) the aggregate amount of the company’s assets and the amounts paid by way of contribution to its assets (apart from this section) is insufficient for payment of its debts and liabilities, and the costs, charges and expenses of the winding up.
- (2) If the winding up commenced on, or within 1 year after, the date on which the payment out of capital was made, then the following persons are liable to contribute to the company’s assets in accordance with subsection (3) so as to enable the insufficiency mentioned in subsection (1)(b) to be met—
 - (a) the past shareholder; and
 - (b) the directors who signed the solvency statement required to be made under section 259(1) of the Companies Ordinance (Cap. 622) in relation to the payment out of capital (except a director who shows that the director had reasonable grounds for forming the opinion expressed in the statement).
- (3) For the purposes of subsection (2)—
 - (a) the past shareholder is liable to contribute an amount not exceeding the amount of the payment out of capital made by the company in respect of the shares redeemed or bought back from the past shareholder; and
 - (b) the directors are jointly and severally liable with the past shareholder to contribute the amount to which the past shareholder is liable to contribute.
- (4) A person who has contributed any amount to the assets of a company under this section may apply to the court for an order directing any other person who is jointly and severally liable in respect of that amount to pay the person an amount that the court thinks just and equitable.
- (5) ~~Section 170 does~~ The limitations under section 170 on any liability to contribute do not apply in relation to liability accruing under this section.¹

¹ This draft CSA seeks to express more clearly the intended effect of the new section 170A(5).

- (2) Clause 30(6) / the new section 190(2A) and (2B) and other Clauses² where the expression “affidavit of concurrence” is mentioned

“(2A) The provisional liquidator or liquidator may, subject to the direction of the court, require any of the persons mentioned in subsection (2)(a), (b), (c) and (d) who has not made, submitted and verified the statement of affairs to make and submit ~~an affidavit of concurrence~~ to the provisional liquidator or liquidator **a supplementary affidavit³**; stating that the person concurs in the statement.

(2B) **A supplementary affidavit** ~~An affidavit of concurrence~~ made under subsection (2A) may be qualified in respect of matters dealt with in the statement of affairs, where the maker of the affidavit—

- (a) is not in agreement with the maker of the statement;
- (b) considers the statement to be erroneous or misleading; or
- (c) is without the direct knowledge necessary for concurring in the statement.”

- (3) Clause 37 / the new section 199B(8)

“199B. Powers of provisional liquidator holding office by virtue of section 194(1)(aa) or (1A)

- (1) Except as provided in subsection (3), a provisional liquidator holding office by virtue of section 194(1)(aa) may exercise any of the powers specified in Part 1, 2 or 3 of Schedule 25 only with the sanction of the court.
- (2) Except as provided in subsection (4), a provisional liquidator holding office by virtue of section 194(1A) may exercise any of the powers specified in Part 1, 2 or 3 of Schedule 25 only with the sanction of the court or the Official Receiver.
- (3) A provisional liquidator holding office by virtue of section 194(1)(aa) may without the sanction of the court—

² There are 30 other places in the Bill where the expression “affidavit of concurrence” is mentioned and the relevant provisions will be similarly amended. They are (1) Clause 30(7) / the amended section 190(3); (2) Clause 30(11) / the new section 190(5B); (3) Clause 30(12) / the amended section 190(6); (4) Clause 31 / the new section 190A; (5) Clause 47(1) / the amended section 209A(2)(b); (6) Clause 47(2) / the amended section 209A(2)(g); (7) Clause 48 / the amended section 209B(e); (8) Clause 120(3) / the amended rule 2(1); (9) Clause 126 / the amended rule 28(4); (10) Clause 127 / the amended rule 35(2)(c); (11) Clause 128 / the amended cross-heading before rule 39; (12) Clause 129 / the amended rule 39; (13) Clause 130 / the amended rule 40; (14) Clause 131 / the amended rule 41; (15) Clause 134 / the amended rule 44; (16) Clause 152 / the amended rule 93; (17) Clause 153 / the amended rule 111; (18) Clause 154 / the amended rule 114; (19) Clause 158 / the amended rule 142; (20) Clause 165 / the amended rule 162; (21) Clause 169(1) / the amended rule 179(1); (22) Clause 173(2) / the amended Form 9 in the Appendix to the Companies (Winding-up) Rules (Chapter 32H) (“CWUR”); (23) Clause 173(3) / the amended Form 14; (24) Clause 173(4) / the amended Form 18; (25) Clause 173(5) / the amended Form 19; (26) Clause 173(23) / the amended Form 67; (27) Clause 173(24) / the amended Form 76; (28) Clause 173(25) / the amended Form 77; (29) Clause 173(27) / the amended Form 100; and (30) Clause 179 / section 8(2) of the new Schedule to CWUR.

³ This draft CSA seeks to better reflect the nature of the affidavit which may be qualified in respect of the matters mentioned in the new section 190(2B).

- (a) take into the provisional liquidator's custody, or under the provisional liquidator's control, all the property and things in action to which the company is or appears to be entitled; and
 - (b) dispose of the specified assets of the company to a person other than a relevant person.
- (4) A provisional liquidator holding office by virtue of section 194(1A) may without the sanction of the court or the Official Receiver—
- (a) take into the provisional liquidator's custody, or under the provisional liquidator's control, all the property and things in action to which the company is or appears to be entitled; and
 - (b) dispose of the specified assets of the company to a person other than a relevant person.
- (5) The Official Receiver is not personally liable for costs for any refusal to grant sanction under subsection (2) or (4).
- (6) The exercise by a provisional liquidator of the powers conferred by this section is subject to the control of the court.
- (7) A creditor or contributory may apply to the court on the exercise or proposed exercise of any of those powers.
- (8) In this section—

relevant person (有關人士), in relation to a company, means—

- (a) a director or shadow director of the company; or
- (b) an associate, within the meaning of sections 265A(2), 265B and 265C⁴, of the company or of any such director or shadow director;

specified assets (指明資產) means any perishable goods or other assets (excluding derivatives, warrants, options, shares and things in action) the estimated value of which—

- (a) is less than \$100,000; and
- (b) is likely to significantly diminish if they are not immediately disposed of.”

(4) Clause 43 / the new section 206A(3) – Chinese text

“(3) 在首次會議後，如清盤人收到有關委員會的委員或其代表的書面要求，要求召集該委員會的會議，則該清盤人須召集所要求的會議，而會議日期定於在由收到該要求當日起計收到該要求當日後⁵的 21 日內。”

⁴ This draft CSA seeks to express clearly that “an associate” referred to in the new section 199B(8)(b) has the same meaning as given by the new sections 265A(2), 265B and 265C.

⁵ This draft CSA seeks to improve consistency in the wording of the Chinese text of relevant provisions. There is already consistency in the wording in the English text of these provisions and hence no CSA to amend the English text is necessary.

(5) Clause 59 / the amended sections 228A(9), (10), (11) and (12)

- “(9) ~~Not later than 14 days after the appointment of a provisional liquidator under subsection (5)(b),~~ Within ~~14~~⁶ days after the commencement of the winding up of the company the directors shall give notice in the Gazette of-
- (a) the commencement of the winding up of the company by the delivery to the Registrar of the winding-up statement and the date of such delivery; and
 - (b) the appointment of the provisional liquidator and his name and address.
- (9A) A director who fails to comply with subsection (9) commits an offence and is liable on conviction to a fine and, for continued default, to a daily default fine.
- (10) A provisional liquidator appointed under ~~subsection (5)(b) shall, within 14 days after the date of his appointment~~ subsection (1)(c) must, within ~~14~~⁷ days after the commencement of the winding up of the company, deliver to the Registrar for registration a notice of his appointment in the specified form, which notice shall include the following particulars-
- (a) his name;
 - (b) his address; and
 - (c) the number of his identity card (if any) or, in the absence of such number, the number and issuing country of any passport held by him.
- (11) A person appointed as a provisional liquidator under ~~subsection (5)(b) who ceases to act as such shall, within 24~~ subsection (1)(c) who ceases to act as such must, within ~~24~~⁸ days after the date of his ceasing to act-
- (a) publish in the Gazette a notice of that fact; and
 - (b) deliver to the Registrar for registration a notice of that fact in the specified form.
- (12) If any change occurs in the particulars given in a notice delivered to the Registrar under subsection (10), the provisional liquidator shall, within ~~14~~⁹ days after the date of the change, deliver to the Registrar for registration a notice of that change in the specified form, unless he has previously given notice to the Registrar under subsection (11).”

⁶ This draft CSA seeks to align the time limit for giving notice with that in a similar provision under the amended section 229(1).

⁷ This draft CSA seeks to align the time limit for giving notice with that in a similar provision under the amended section 253(1).

⁸ This draft CSA seeks to align the time limit for giving notice with that in a similar provision under the amended section 253(2).

⁹ This draft CSA seeks to align the time limit for giving notice with that in a similar provision under the amended section 253(3).

(6) Clause 66(4) / the amended section 237A(2)

“(2) The creditors may, at a meeting ~~called by the liquidator under this section, appoint another liquidator in his place and fix the remuneration of the liquidator so appointed, and may, if they think fit, appoint a committee of inspection~~ summoned¹⁰ by the liquidator under this section, appoint another liquidator in place of the liquidator.”

(7) Clause 69 / the amended section 239(1) – English text

“(1) ~~Subject to section 239A¹¹, as~~As soon as the affairs of the company are fully wound up, the liquidator shall make up an account of the winding up, showing how the winding up has been conducted and the property of the company has been disposed of, and thereupon shall call a general meeting of the company for the purpose of laying before it the account, and giving any explanation thereof.”

(8) Clause 105 / the new section 296D(8)

“(8) The period specified for the purpose of ~~subsection (7)~~subsection (7)(b)¹² is—

- (a) the period specified for the purpose in any agreement between the liquidator or provisional liquidator and that other person; or
- (b) if no period has been specified, 48 hours.”

(9) Clause 173(16) / the new Form 44 in the Appendix to CWUR – Chinese text

“表格44 [第69(5)條]

關於送達分擔人臨時列表通知的誓章

(標題)

本人，
描述，宣誓聲言 —”

—[述明][述明]¹³ 宣誓人的姓名及

¹⁰ This draft CSA seeks to improve consistency in the wording used in different subsections of the amended section 237A.

¹¹ This draft CSA seeks to rectify a slip in the Bill.

¹² This draft CSA seeks to improve the drafting of the new section 296D(8) by making specific reference to subsection 7(b) of the new section 296D.

¹³ This draft CSA seeks to align the format in the Chinese text of the form with the English text of the form and hence no CSA to amend the English text of the form is necessary.

(10) Clause 173(26) / the amended Form 98 in the Appendix to CWUR

“FORM 98 [rule 189]
NOTICE TO CREDITORS AND CONTRIBUTORIES OF
INTENTION TO APPLY FOR RELEASE
(Title)

Take notice that I, the undersigned liquidator of the above-named company, intend to apply to the court for my release, and further take notice that any objection you may have to the granting of my release must be notified to the court within 21 days of the date hereof.

A summary of my receipts and payments as liquidator is hereto annexed.

Dated this day of , ~~19~~ 20¹⁴ .

Liquidator

To

Note-Section 205(3) of the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Chapter 32), enacts that “An order of the court releasing the liquidator shall discharge him from all liability in respect of any act done or default made by him in the administration of the affairs of the company, or otherwise in relation to his conduct as liquidator, but ~~any such order may be revoked on proof that it was obtained by fraud or by suppression or concealment of any material fact.~~” any such order—

- (a) does not prevent the exercise of the court’s powers under section 276; and*
- (b) may be revoked on proof that it was obtained by fraud or by suppression or concealment of any material fact.”¹⁵*

(28 of 2012 ss. 912 & 920)”

(11) Clause 177 / Section 8 of the new Schedule 26 (transitional and saving provisions)

“8. Release of liquidators under section 205

For a liquidator appointed before the commencement date, ~~section 205(3)~~ ~~section 205(3)(a)~~¹⁶ does not apply in relation to the release of the liquidator.”

¹⁴ This draft CSA updates the reference to “19 ” to “20 ” in the amended Form 98.

¹⁵ The draft CSA seeks to rectify a slip in the Bill in the English text. There is no such slip in the Chinese text and hence no CSA to amend the Chinese text is necessary.

¹⁶ This draft CSA seeks to improve the drafting of section 8 of the new Schedule 26 by making specific reference to section 205(3)(a).

- (12) Clause 177 / Section 31(2) of the new Schedule 26 (transitional and saving provisions)

“31. Liability for not keeping proper records under section 274

(1) In this section—

record keeping period (存檔期), in relation to a company being wound up, means the shorter of the following periods—

- (a) the period of 2 years immediately preceding the commencement of the winding up;
 - (b) the period between the incorporation of the company and the commencement of the winding up.
- (2) If the winding up of a company commences before the expiry of the period of 2 years beginning on the first day of ~~the first one of the company's financial years that begin~~ the company's first financial year that begins¹⁷ on or after the commencement date, section 274 is to have effect as provided in subsection (3).
- (3) For the purposes of subsection (2), section 274 is to be read as if, for a part of the record keeping period that coincides (whether in whole or in part) with a financial year of the company that begins before the commencement date—
- (a) “proper books of accounts” were substituted for “accounting records that comply with section 373(2) and (3) of the Companies Ordinance (Cap. 622)”; and
 - (b) the former section 274(2) had not been repealed.”

- (13) Clause 187 / heading of Division 6

To amend the heading of Division 6 of the Bill from “Division 6—Amendments to Clearing and Settlement Systems Ordinance (Cap. 584)” to “Division 6—Amendments to **Payment Systems and Stored Value Facilities** Ordinance (Cap. 584)”¹⁸.

¹⁷ This draft CSA seeks to improve the drafting of section 31(2) of new Schedule 26 by simplifying the provision.

¹⁸ This CSA seeks to amend the heading of Division 6 of the Bill because section 4 of the Clearing and Settlement Systems (Amendment) Ordinance 2015 (18 of 2015) has amended the short title of Chapter 584.