

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

**Follow-up actions arising from the discussion at the Meeting on 14 March 2016**

This paper provides a written summary of our oral response to a question raised at the Bills Committee meeting on 14 March 2016 in relation to section 168IA (Clause 15 of the Bill) and section 286A (Clause 101 of the Bill) and sets out the revisions to a draft Committee Stage Amendment (“CSA”) we presented to Members at the same meeting.

Section 168IA (Clause 15 of the Bill) and section 286A (Clause 101 of the Bill)

2. A question was raised by the Assistant Legal Advisor (“ALA”) at the meeting on 14 March 2016 as to whether, with reference to the amended section 168IA (Clause 15 of the Bill) and the new section 286A (Clause 101 of the Bill) under which a person ordered to attend a public examination by the court (“the examinee”) would no longer be furnished with a copy of the report submitted by the Official Receiver or the liquidator of a company being wound up (as the case may be) to the court reflecting the reasons for requiring a public examination order, the person would be deprived of the opportunity of knowing the case against him so as to obtain legal advice before attending the public examination which may hence give rise to the question whether justice and fairness are preserved. The idea that it might be appropriate for the examinee to be provided with a summary/gist of the case before the public examination had also been raised.

3. We have explained at the said meeting that by operation of the various provisions in the Bill and the Companies (Winding-up) Rules (Chapter 32H) (“CWUR”), there would be adequate safeguards to ensure justice and fairness in the above-mentioned situation. The meeting noted our detailed explanation and did not raise any issue, but requested us to recapitulate our explanation in writing for Members’ reference. For this purpose, we would like to register the following points -

- (a) The purpose of a public examination is to gather more information on the affairs of the company being wound up and of the conduct or dealings of the examinee in relation to the company for facilitating the administration of the winding up case. It is not for seeking court sanction to impose any regulatory or enforcement action against the examinee.
- (b) At previous meetings of the Bills Committee (and also in our paper CB(1)383/15-16(03) dated 7 January 2016), we have explained (and the Bills Committee did not raise any negative comments) that a report by the Official Receiver or the liquidator of a company being wound up (as the case may be) to

the court reflecting the reasons for requiring a public examination order should be kept confidential as it may contain information which, if disclosed to the examinee, may adversely affect the effectiveness of the order being sought or even frustrate its purpose. In particular, the examinee may be alerted to conceal, dissipate or destroy information or materials which may tend to incriminate himself but are relevant to the case.

- (c) As part of the same legislative proposal, the Bill contains a specific provision in the new rules 51A(2) and 51B(2) (Clause 137 of the Bill) that the examinee may apply to the court to see the report and the court may allow him to see all or part of the report if he satisfies the court that it would be unfair to him not to be allowed to see it. Giving the court the power to make a determination under the new rules 51A(2) and 51B(2) on the examinee's access to the report by reference to the principle of fairness will ensure justice and fairness to the examinee.
- (d) Besides, under the existing Rule 54 of CWUR, the Official Receiver or the liquidator concerned (as the case may be) is required to give a "Notice to Attend Public Examination" to the examinee if the court grants a public examination order. The notice, which must be in the form of the new Form 31 of the Appendix to CWUR (Clause 173(8) of the Bill), will set out, inter alia, the matters to be examined during the public examination e.g. the conduct or dealings of the examinee in relation to the wound-up company; the promotion, formation or management of that company; and the conduct of the business and affairs of that company. Therefore, the notice already provides the scope of the matters to be examined in the public examination, and if the examinee so desires, he may seek legal advice on relevant matters before the public examination. With the information in the notice, and in light of the rationale of our proposal as explained above and the specific provision in the Bill on the examinee's access to the report subject to court's determination, we do not agree that the examinee should be provided with a summary/gist of the case before the public examination, unless the court determines otherwise under (c) above.
- (e) It should be noted that a public examination is distinct from proceedings for a disqualification order under Section 168I of the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Chapter 32) ("CWUMPO"). A public examination will not by itself lead to a determination by the court of issuing a disqualification order. If the proceedings for a disqualification order are initiated, the Companies (Disqualification of Directors Proceedings) Rules (Chapter 32K) require that there must be a due process to provide the respondent with sufficient safeguards e.g. he must be provided with the summons and informed of the evidence in support of the application for a disqualification order, and be given the opportunity to submit evidence in opposition to the application and defend his case.

- (f) On the other hand, the Bill also contains provisions (viz. the new section 168IB (Clause 16 of the Bill) and the new section 286D (Clause 101 of the Bill)) to safeguard the examinee's interest in that any answers or affidavits given by him during the public examination which might tend to incriminate him would not be admissible in evidence against him in criminal proceedings<sup>1</sup>.
- (g) The key elements of the subject proposal (as well as the other legislative proposals in the Bill) were included in our public consultation document for seeking public comments. We did not receive any negative comment from any member of the public, professional body or other stakeholder group in the public consultation exercise on the subject proposal.

Drafting issue on the New Rules 51A and 51B (Clause 137 of the Bill)

4. With reference to the advice by the ALA at the meeting on 14 March 2016, we will revise the draft CSA proposed in Item (10) in the Annex to our paper CB(1)674/15-16(01) dated 11 March 2016 in order to provide more specific references to the relevant paragraphs of section 268A(1) in the new rules 51A and 51B. Please find below the mark-up version of the relevant part of the Bill with the revised draft of the proposed CSA marked thereto.

Clause 137/ the new rule 51A

~~“51A. Evidence in support of application for public examination~~

- ~~(1) For the purposes of an application for an order of the court under section 286A(1) of the Ordinance (*public examination order*)—~~
- ~~(a) evidence in support of the application may be in the form of a report to the court setting out the reasons why a public examination order is needed; and~~
- ~~(b) a report under subparagraph (a) is confidential.~~
- ~~(2) Despite paragraph (1)(b)—~~
- ~~(a) a person who is the subject of a public examination order being applied for may apply to the court to see all or part of the report; and~~
- ~~(b) if the person satisfies the court that it would be unfair to the person not to see it, the court may allow the person to see all or part of the report subject to any condition that it thinks fit.~~

**51A. Further report confidential if public examination ordered**

- (1) If the court, after consideration of a further report made under section 191(2) of the Ordinance, makes an order under section 286A(1) of the

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<sup>1</sup> There are specified exceptions, viz. the criminal proceedings relating to the offence of (i) wilfully making a false statement under section 349 of CWUMPO and (ii) perjury under Part V of the Crimes Ordinance (Chapter 200).

Ordinance pursuant to paragraph (a) of that section, the further report is not open to inspection.

- (2) Despite paragraph (1)—
  - (a) a person in respect of whom the order is made may apply to the court to see all or part of the further report; and
  - (b) the court may allow the person, subject to any condition that it thinks fit, to see all or part of the further report if the person satisfies the court that it would be unfair to the person not to be allowed to see it.

**51B. Evidence in support of application for public examination**

- (1) If an application for an order of the court under section 286A(1) of the Ordinance (*public examination order*) is made pursuant to paragraph (b) of that section—
  - (a) evidence in support of the application may be in the form of a report to the court setting out the reasons why a public examination order is needed; and
  - (b) a report under subparagraph (a) is not open to inspection.
- (2) Despite paragraph (1)(b)—
  - (a) a person in respect of whom the application is made may (whether or not the application has been disposed of) apply to the court to see all or part of the report; and
  - (b) the court may allow the person, subject to any condition that it thinks fit, to see all or part of the report if the person satisfies the court that it would be unfair to the person not to be allowed to see it.”

**Financial Services and the Treasury Bureau  
Official Receiver’s Office  
18 March 2016**