COMPANIES (WINDING UP AND MISCELLANEOUS PROVISIONS) ORDINANCE (CAP 32)

Introduction

The Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap 32) consists of those provisions in the former Companies Ordinance (Cap 32) which were not repealed by the new Companies Ordinance (Cap 622). Cap 622 covers the incorporation and administration of companies etc — what has been called 'pure' Company Law. Its implementation (it came into operation on 3 March 2014) left behind in Cap 32 miscellaneous provisions, predominantly on winding up, but also included provisions on prospectuses, disqualification of directors, receivers and managers and provisions to prevent evasion of the Societies Ordinance.

Cap 622 Schedule 9, besides containing many repeals of the pure Company Law provisions in Cap 32, also contains consequential amendments to many of the provisions remaining in Cap 32. Few of the amendments are of any real significance. With many of the familiar definitions repealed, there are some additions to the interpretation section (s 2(1)) which are set out in s 3(17) of the Schedule. There are some consequential amendments to the prospectus and allotment provisions left in Part II. These provisions will in due course be repealed if and when the prospectus provisions are transferred to the securities legislation. A reader needs to be aware that a few provisions, which one might have assumed would have been repealed as part of the pure Company Law provisions, have been retained in Cap 32 (and replicated in Cap 622). Section 48A (Construction of references to offering shares or debentures to the public) is retained in Cap 32, because it is relevant to prospectuses, but it is also replicated in s 6 of Cap 622. Section 79 (Payment of certain debts out of assets subject to a floating charge in priority to claims under the charge) remains in Cap 32. Section 115 on corporate representatives has been repealed, but subss (1) and (3) substituted with a similar provision, but restricted to representation of companies at meetings of creditors.

Part IVA (Disqualification of Directors) remains in Cap 32. There are consequential amendments to many of the relevant provisions, but some of those are somewhat wider. For example in s 168F a new subsection (4A) has been added to define 'specified provision'. This avoids describing the topics of the relevant provisions in full (eg, return, accounts, notice etc) each time.

At Part V starting with section 169 one comes to the winding up provisions. The consequential amendments here are trivial up to s 219 (Inspection of books by creditors and contributors), where a new subs (1A) is added to deal with the situation where the books and papers of the company are digitalized or kept otherwise than in legible form. Section 290 (Power of court to declare dissolution void) remains, but the subsequent sections on striking off and deregistration

through to s 292 are repealed. Part VI (Receivers and Managers) remains. Part VII (General Provisions as to Registration) is repealed, save as to s 306 (Enforcement of duties under Ordinance by court order). Part VIII (Application of Ordinance to companies formed or registered under Companies Ordinances) remains. Most of Part IX (Companies not formed, but registered under Companies Ordinances) is repealed, save for ss 324 (Power of court to stay or restrain proceedings) and 325 (Action stayed on winding up order). Part X (Winding Up of Unregistered Companies) remains. Part XI (Companies Incorporated Outside Hong Kong) is repealed. Part XII (Restrictions on Sale of Shares and Offers of Shares for Sale) is related to prospectuses and retained. Part XIIA (Dormant Companies) is repealed. Part XIII remains for the provision under the cross heading Miscellaneous Offences, namely s 349 (Penalty for false statements), the provision under the cross heading Injunctions, namely s 350B (Injunctions), the provisions under the cross heading General Provisions as to Offences, s 351 (Provision for punishment and offence), s 351A (Limitation on commencement of proceedings), s 352 (Application of fines), s 354 (Saving as to private prosecution) and s 355 (Saving for privileged communications), the provision under the former cross heading Service of Documents and Legal Proceedings amended to Legal Proceedings, namely, s 359 (Power to enforce orders) and parts of the provisions under the cross heading General Provisions as to the Chief Executive in Council, namely subs (1) of s 359A (Power to make regulations) and subss (6) to (9) of s 360 (Power to amend Schedules).

Part XIIIA (Prevention of Evasion of the Societies Ordinance) remains in Cap 32. The Companies Ordinance Rewrite consulted on whether these provisions were still necessary in modern Hong Kong, but the police and the Government wished for the provisions to continue. Part XIV Savings was repealed by Cap 622.

As regards the Schedules to the former CO (Cap 32), the Third and Fourth, parts of the Twelfth, the Fifteenth and the Seventeenth to Twenty-third Schedules remain.

Most readers will know that some of the winding up provisions in Cap 32 have been reviewed under the Improvement of Corporate Insolvency Law exercise. An Amendment Bill for Cap 32 is likely to be introduced into LegCo in the middle of 2015. Some of the proposed changes are discussed below. Since they are not controversial there is a chance that that Bill will be passed before the end of 2015.

The former Companies Ordinance (Cap 32) came into operation on 1 July 1933. Most of its provisions were derived from the UK Companies Act 1929. Unlike some other jurisdictions, the UK and Hong Kong had a unitary system of Company Law legislation, namely the companies legislation covered both the law relating to the incorporation of companies, the administration of companies etc and liquidation or corporate insolvency in the one piece of legislation. That changed in the UK with the Insolvency Acts of 1985 and 1986.

The Companies Ordinance (Cap 32) was reviewed by an ad hoc committee set up in 1962 called the Companies Law Revision Committee (CLRC). Its terms of reference were to consider and make recommendations as to the revision of the company legislation of Hong Kong. In the late 1960s, the scandals in the mutual funds industry in Hong Kong diverted the Committee from its review of company

law in order to deal with the prevention of fraud and securities legislation (which appeared in 1974) and it was some years before they could recommence work on the general Company Law. It produced its first report on the Protection of Investors in 1971 and its second report on Company Law in 1973. The Committee took the view that the existing provisions on winding up had proved to be reasonably satisfactory in practice (para 8.1 of the Report) and made a number of technical recommendations for amendments, many of which duly appeared in the Companies (Amendment) Ordinance 1984.

In September 1990 the Law Reform Commission of Hong Kong (LRC) was given a reference to review the law and practice relating to the insolvency of both individuals and bodies corporate in Hong Kong. The LRC produced its Report on Bankruptcy in May 1995 and most of the recommendations were enacted by the Bankruptcy (Amendment) Ordinance 1996. The LRC produced its Report on the winding up Provisions of the Companies Ordinance in July 1999. It made some 160 recommendations, a few of which have found their way into later Companies (Amendment) Ordinances, but the bulk of which have not yet been enacted.

In March 1994 the then Financial Secretary announced in his Budget speech that there would be a review of the Companies Ordinance. In November 1994 Mr Ermanno Pascutto, a former deputy chairman of the Securities and Futures Commission of Hong Kong, was appointed as the consultant. The Pascutto Report was published in March 1997. In view of the ongoing LRC review of the winding up Provisions of the Companies Ordinance, it made no recommendations on corporate insolvency, save to suggest that Hong Kong should follow the English 1986 precedent and have an Insolvency Ordinance, comprising personal bankruptcy and corporate insolvency. The recommendations on general Company Law which tend to be based on the North American Business Corporations legislation were not favoured by the business community and were not followed up. However the Report had stirred up sufficient interest for the Government to encourage the Hong Kong Standing Committee on Company Law Reform to undertake a general review of the companies legislation. It did this with a number of reports over the next few years as part of its Corporate Governance Review, but recommended a full-time Government review of the Companies Ordinance.

In 2006 the Hong Kong Government committed itself to a major Companies Ordinance Rewrite. This was to be in two phases – the first to deal with what was called 'pure Company Law', and the second to deal with corporate insolvency. The Rewrite led to the new Companies Ordinance (Cap 622), which was passed by LegCo on 12 July 2012. Before that the Administration's enthusiasm for a rewrite for Phase Two had dimmed and in late 2011 it was decided to convert Phase Two of the Rewrite into a Modernisation of Corporate Insolvency Law Exercise, which subsequently became the Improvement of Corporate Insolvency Law Exercise. What became 46 legislative proposals recommendations were formulated by the Financial Services and the Treasury Bureau and the Official Receiver's Office. These were considered by an Advisory Group and the Standing Committee on Company Law Reform. The Advisory Group held 8 meetings between January and October 2012. In April 2013 the Financial Services and the Treasury Bureau published a Consultation Document Improvement of Corporate

Insolvency Law Legislative Proposals. The Consultation Conclusions were published on 28 May 2014. The 46 proposals were supported by the majority of the respondents. Some changes were made as a result of the consultation and subsequent discussions. The following covers the major topics considered during the exercise and indicates the likely changes in the Companies (Winding Up and Miscellaneous Provisions) (Amendment) Bill in 2015:

1. Commencement of winding up

1.1 Prescribed form for statutory demand

Unlike the statutory demand in the bankruptcy context (see Forms 162 to 164 of the Bankruptcy (Forms) Rules), there is no prescribed form for the statutory demand under s 178(1)(a) of Cap 32. Of course, a standard form has developed over the years, but is not wholly satisfactory. For example, it may not warn the recipient of the consequences of failure to pay. There is surprisingly little litigation in respect of statutory demands in Hong Kong, which may indicate a rather non-adversarial approach by local lawyers and does not compare well with the large amount of litigation on defects in demands in Australia prior to the introduction of a prescribed form in 2001 (though that does not seem to have reduced the amount of litigation much).

1.2 Improving the s 228A procedure

Section 228A permits the directors of the company, (if more than 2 directors, then the majority of them) to initiate a voluntary winding up (in a form similar to a creditors' voluntary winding up), where the company cannot by reason of its liabilities continue its business and the directors consider that it is not reasonably practicable for the winding up to be commenced under another section of the Ordinance. The section appears to be unique to Hong Kong. It was introduced in 1984, following a recommendation of the 1973 CLRC report (at para 8.22) itself based on a recommendation of the Jenkins Committee Report of 1962, though it was never followed in the UK. It seems that the wording of the provision is derived from a similar provision in a Malaysian Companies Bill drafted by Mr JC Finemore, the draftsman of the Australian uniform companies legislation of 1961. In any event, the provision did not appear in the Malaysian Companies Act 1965. There is a similar provision in the Singapore Companies Act (Chapter 50) s 291(1). The Jenkins Committee saw it as a means of speeding up the appointment of a provisional liquidator in emergency cases. But it has been criticized as permitting a 'statutory Centrebinding', named after *Re Centrebind Ltd* [1966] 3 All ER 889 , whereby the directors may appoint a 'tame' provisional liquidator (under s 228A (5)(b)) who will dispose of the company's assets to themselves, before the meetings of shareholders and creditors. An amendment in 1993 required that the provisional liquidator be a solicitor or a professional accountant. This is said to have cut down on any abuses and indeed that is still the only provision in the Ordinance

specifying a qualification for a liquidator. The proposed recommendations to tighten up the procedure under s 228A include:

(a) the winding up statement to be delivered by the directors to the Registrar of Companies must state that the meeting of the company has already been called;

(b) the appointment of the provisional liquidator must be stated in the winding up statement and the appointment takes effect from the commencement of the winding up, ie the delivery of the statement to the Registrar;

(c) the powers of a provisional liquidator under s 228A are to be restricted to those of a liquidator under a voluntary winding up who has obtained the sanction of the court, save for the power to dispose of perishable goods and other goods the value of which is likely to diminish if not immediately disposed of and to do all things necessary for the protection of the company's assets. It will be an offence for the provisional liquidator to exceed those powers without reasonable excuse.

1.3 Improving efficiency and enhancing the protection of creditors in a creditors' voluntary winding up

Under s 241 of Cap 32 the company is required to call the first meeting of creditors for the same or the next following day when the resolution to wind up is passed at a members' meeting and the notice of the creditors' meeting is to be sent by post simultaneously with the sending of the notices of the members' meeting. If the company can secure members' approval to hold the members' meeting at short notice, this will mean that the creditors will not have much time to prepare for their meeting. On the other hand if the company delays in holding the members' meeting, the winding up will be delayed and the danger of further losses or dissipation of the company's assets is increased. It is proposed to remove the requirement to hold the first creditors' meeting on the next following day of the members' meeting and to provide that the company shall summon the first creditors' meeting for a day not later than the 14th day after the day on which the members' meeting at which the resolution to wind up the company is proposed. It is also proposed that there will be a minimum notice period of 7 days for calling the creditors' meeting. To prevent the increased risk of 'Centrebinding' following these proposals, it is proposed that during the period before the first creditors' meeting the powers of a liquidator in a voluntary winding up conferred by s 251 of Cap 32 shall not be exercised, except with the sanction of the court, save that the liquidator may, without the sanction of the court dispose of perishable good, and other goods whose value is likely to diminish if not immediately disposed of and to do all things necessary for the protection of the assets. It will be an offence for the liquidator to exceed those powers without reasonable excuse. It is also recommended that until a liquidator is appointed in a voluntary winding up, the powers of directors shall not be exercised except with the sanction of the court, save in so far as

may be necessary to secure compliance with the statutory requirements for the company to proceed with a creditors' voluntary winding up and for the disposal of perishable goods and other goods the value of which is likely to diminish if not immediately disposed of and to do all things necessary for the protection of the company's assets. It will be an offence for a director without reasonable excuse to fail to comply with those requirements.

1.4 *Extending the time limit in which a company is required to give notice in the Gazette of a resolution to wind up voluntarily*

Section 229 of Cap 32 has a time limit of 14 days after the passing of the resolution. The Gazette is normally published on a Friday and material for publication has to be sent to the Government Printer on the Monday morning before the Friday publication. This can be too tight in some circumstances. It is proposed to extend the time limit to 15 days. This hardly seems much of an improvement!

1.5 *Setting out the obligations of the liquidator in a members' voluntary winding up where he is of the opinion that the company will be unable to pay its debts*

If a liquidator in a member's voluntary winding up is of the opinion that the company will not be able to pay its debts in full within the period not exceeding 12 months from the commencement of the winding up, he must summon a meeting of creditors: Cap 32 s 237A. No time limit is set for the meeting. As the winding up will be a creditors' winding up, the creditors should be involved as early as possible. It is proposed:

(a) that the liquidator must summon a creditors' meeting to be held within 28 days after the day on which the liquidator formed the opinion;
(b) notice of the meeting should be sent to creditors not less than 7 days before the meeting;
(c) notice of the meeting should be gazetted and advertised and the liquidator should provide creditors, free of charge, with all information as to the company's affairs as the creditors may reasonably require;
(d) the liquidator must prepare a statement of affairs to be laid at the meeting, which the liquidator should chair.

1.6 *Repeal of s 228(1)(c)*

This subsection provides that a voluntary winding up may be commenced by the company resolving by special resolution to the effect that it cannot by reason of its liabilities continue its business and that it is advisable to wind up. It is considered that this subsection is superfluous, as s 228(1)(b) provides for a winding up upon the company resolving by special resolution to wind up.

1.7 *Insolvency-related notices to contain contact details of the person giving the notice*

The prescribed bankruptcy statutory demand requires the maker to give the name and address and telephone number of any persons to whom any communication regarding the demand may be addressed. It is proposed that any notice issued under the insolvency provisions in Cap 32 shall provide the same information.

2. Appointment, Powers, Vacation of Office and Release of Provisional Liquidators and Liquidators

2.1 *Expanding the list of persons disqualified for appointment as liquidator or provisional liquidator*

Section 278 of Cap 32 provides that no person being an undischarged bankrupt and no body corporate shall be qualified for appointment as a liquidator and any appointment made in contravention of the section shall be void and any such person or body corporate acting as liquidator shall be liable to a fine. The Ordinance says nothing about mentally incapable persons acting as liquidators or persons subject to a disqualification order under Part IVA not being qualified (in fact under s 168D provision is made for a person subject to a disqualification order to apply for leave to be allowed to act as a director, liquidator etc). So there are a number of proposals with regard to such issues. First, it is proposed to extend disqualification for appointment as a provisional liquidator or liquidator to persons who are considered as having a conflict of interest for appointment, except with the leave of the court. Also a person who is mentally incapacitated and a person who is not permitted to act as a provisional liquidator or liquidator under a disqualification order made under Cap 32 or other specified Ordinances should (without having prior leave of the court to act as such) not be qualified to take up appointment or act as a provisional liquidator or liquidator. Any such appointment or acting shall be void and such person will commit an offence and be liable to a fine.

2.2 *Disclosure of relevant relationships in relation to the appointment of provisional liquidators and liquidators*

It is proposed to introduce a new statutory disclosure system for the appointment of provisional liquidators and liquidators in a court winding up and a creditors' voluntary winding up, including one commenced under s 228A. The proposed liquidator will be required to make a statement of relevant relationships to state:

(a) the prospective provisional liquidator or liquidator is or in the preceding two years has been –
   (i) a member of the company or its holding company or subsidiary;
   (ii) a creditor or debtor of the company or its holding company or subsidiary;
   (iii) a director, company secretary or employee of the company or its holding company or subsidiary;
   (iv) an auditor of the company;
   (v) a receiver or manager of the company's property;
   (vi) a liquidator or provisional liquidator of the company;
   (vii) a legal advisor of the company or its holding company or subsidiary; or

(viii) a financial advisor of the company or its holding company or subsidiary; or

(b) the prospective provisional liquidator or liquidator is an immediate family member of –

(i) a director, company secretary, or auditor of the company, or a person who has at any time within the immediately preceding period of two years been a director, company secretary or auditor of the company;

(ii) a director or company secretary of a holding company or subsidiary of the company, or a person who has at any time within the immediately preceding period of two years been a director or company secretary of the holding company or subsidiary; or

(iii) (iii) a person who has, at any time within the immediately preceding period of two years, been a liquidator or provisional liquidator of the company, or a receiver or manager of the company's property.

If any of the facts or relationships as stated above exists, the prospective provisional liquidator or liquidator must also state in the statement of relevant relationships his reasons for believing that none of the facts or relationships results in the prospective provisional liquidator or liquidator having a conflict of interest or duty. If there is any change or error in a particular matter in the statement of relevant relationships made by the provisional liquidator or liquidator, he will be required to make a replacement statement within 14 days from the date when the change or error comes to his knowledge. A failure to provide or update a statement of relevant relationships would constitute an offence, and a failure to include a particular matter in the statement or the replacement statement would also constitute an offence (with a defence provision proposed).

2.3 *Resignation of liquidators*

Currently, Cap 32 has no provisions for the procedures for resignation of a liquidator in a voluntary winding up (cf CWUR r 154 for resignation in compulsory winding up). It is proposed that for both creditors' and members' voluntary winding up a meeting of creditors or members should be called to receive the liquidator's resignation and, where the meeting accepts the resignation, the liquidator must send notice of resignation to the Registrar of Companies.

2.5 *Other forms of vacation of office*

Currently, only CWUR r 155 dealing with vacation of office by a liquidator if a bankruptcy order is made against him deals with this issue. With the proposed expansion (see 2.1, above) of persons disqualified from appointment or acting as provisional liquidator or liquidator, this topic will need to be expanded. It is proposed that a liquidator in all forms of winding up and a provisional liquidator in a court winding up or appointed under s 228A should vacate his office immediately in specified circumstances including when —

(a) he has a bankruptcy order made against him;

(b) he is found by the court under the Mental Health Ordinance (Cap 136) to be incapable, by reason of mental incapacity, of managing and administering his property and affairs;

(c) he is for the time being subject to a guardianship order under Part IVB of the Mental Health Ordinance (Cap 136).

2.6 *Release of liquidators*

It is proposed to extend release from a court winding up under s 205 of Cap 32 to cover the case of the death of the liquidator. The application for release would be made by the deceased liquidator's personal representative.

2.7 *Expanding the existing prohibition on inducement affecting appointment as liquidator*

Under s 278A of Cap 32 it is an offence to offer an inducement to any member or creditor of a company with a view to securing his own appointment or nomination as a liquidator or to secure or prevent the appointment or nomination of some other person as liquidator. It is proposed to extend this provision to any person (not just members or creditors of the company) and to apply it not just to the office of liquidator, but also to provisional liquidators, and receivers or managers.

2.8 *Clarifying the powers of provisional liquidators under s 194*

The commentary on s 194 refers to the cases of *Re Lehman Brothers Securities Asia Ltd (No 2)* [2010] 1 HKLRD 58 and *Re MF Global Hong Kong Ltd (No 3)* [2012] 5 HKLRD 486 , which illustrate the problems. The new definition of 'liquidator' in s 2(1), added by the Companies (Amendment) Ordinance 2000 ('liquidator' includes a provisional liquidator holding such office by virtue of s 194'), was supposed to clarify matters, but hardly did so. The roles and nature of a provisional liquidator under s 193 and of a provisional liquidator taking up office after the making of a winding up order under s 194 are different and their powers should accordingly be different. It is proposed to make amendments clarifying the powers, duties, remuneration etc of the different types of provisional liquidators.

2.9 *Modernising the provision on the powers of liquidators*

It is proposed to set out the powers now found in s 199(1) and (2) of Cap 32 for different types of winding up in tabulated form in a new Schedule. One particular power, to appoint a solicitor to assist the liquidator in the performance of his duties, is so common that it is proposed that this power should become exercisable on the liquidator giving not less than 7 days' notice to the committee of inspection or, where there is no such committee, to the creditors.

2.10 *Release of liquidator not to prevent application for misfeasance under s 276*

Currently, by virtue of s 205(3) of Cap 32 the order of the court releasing the liquidator discharges him from all liability in respect of any act done or default made by him in the administration of

the affairs of the company as liquidator. It is proposed that the release should not prevent the court exercising its power under s 276, but an application under that section will only be permitted with the leave of the court.

2.11 *Applying the same liabilities to a provisional liquidator appointed under s 228A as those that apply to a liquidator in a creditors' voluntary winding up*

It is proposed that amendments will be made such that relevant sections, ie Cap 32 ss 276, 277 and 279, and CWUR rr 58 and 220, would be applicable to provisional liquidators appointed under s 228A.

2.12 *Aligning the notice requirement for appointment of liquidator with that for the passing of a resolution in a voluntary winding up*

Section 253 of Cap 32 provides for a 21 days' notice of the appointment of a liquidator in a voluntary winding up. It is proposed to shorten this to 15 days to align with the proposed 15 days' notice of the resolution for voluntary winding up under s 229 (see 1.4, above).

3. Conduct of winding up

3.1 *Maximum and minimum numbers of committee of inspection (COI)*

There is no specific maximum or minimum of the number of members of the COI in a court winding up, though s 207(8) provides that the continuing members of a COI, if not less than two, may act notwithstanding any vacancy. In a creditors' voluntary winding up s 243 provides for a COI consisting of not more than 5 persons appointed by the first or subsequent meeting of creditors and, if such a COI is appointed, the company may in a general meeting appoint such number of persons as they think fit, not exceeding 5, as members of the COI. It is proposed to set the maximum number of members at 7, and the minimum at 3. The maximum and minimum may be varied on application by the liquidator to the court.

3.2 *Stipulating that a body corporate may be a member of the COI*

There is some uncertainty about this, but in *Re Asean Interests Ltd* [2004] HKCU 160 (unreported, HCCW 1233/2000, 19 December 2003) Kwan J (as she then was) held that a creditor under s 207 included a corporate creditor. She relied on s 115. It is proposed to add a new provision to expressly provide for this. A representative of a COI corporate member must be a natural person.

3.3 *Streamlining and rationalizing the proceedings of the COI*

Currently, the COI must meet at such times as it may from time to time appoint or, failing appointment, at least once a month (ss 207(2) and 243(2)). There is no provision as to the time limit within which the first meeting should be held or for notice for calling a meeting. It is proposed that:

(a) meetings of the COI shall be held when and where determined by the liquidator;

(b) the liquidator shall call the first meeting of the COI to be held within 6 weeks of his appointment or the COI's establishment (whichever is the later);

(c) the liquidator must give 5 business days' written notice of the date and time and, where applicable, the place of the meeting;

(d) the liquidator must, after the first meeting, call a meeting of the COI if so requested by a COI member or his representative, within 21 days of such request;

(e) the liquidator must, after the first meeting, call a meeting of the COI where it has previously resolved that a meeting be held;

(f) it will not be necessary to fill a vacancy in the COI, if the liquidator and a majority of the remaining members of the COI so agree, provided that the total number of members does not fall below the proposed minimum number.

3.4 *A member of the COI may be represented by another person either on production of a letter of authority or by holding a general power of attorney*

This may involve amendments to s 207 and the effect of s 243(2). The representation would be limited to the COI only. Section 115 (as amended by Cap 622 Sch 9 s 56) would continue to apply to representation at meetings of creditors.

3.5 *Introducing written resolutions of COI*

It is proposed that the COI should be able to make decisions through written resolutions sent by post or by using electronic means, such as emails. The provision should be based on the UK Insolvency Rules rather than the written resolutions procedure in the new CO (Cap 622) ss 548 et seq, which is more suited to larger meetings. Unlike the Cap 622 provisions which require unanimity, a majority is sufficient if the period for a member requesting a physical meeting has expired without a request having been made.

3.6 *Members of COI to be entitled to reasonable travelling expenses within Hong Kong*

The CWUR currently provide for out of pocket expenses in the case of a compulsory winding up. This proposal is intended to clarify the position of travelling expenses in all types of winding up.

3.7 *Clarifying 'relevant date' in a winding up under a regulating order*

Currently the date is defined in s 227E(3) by reference to s 265(6). It is proposed to substitute that with the date of the winding up order.

3.8 *Dispensing with audit of liquidator's account*

Currently s 255A(2) of Cap 32 provides that an audit shall not be required if the COI or the company by ordinary resolution so determines. It is proposed that an audit of the accounts of a liquidator in a voluntary winding up shall not be required —

(a) in a creditors' voluntary winding up, if the COI so

decides, or, in the absence of a COI, the creditors' meeting so decides by ordinary resolution; or

(b) in a members' voluntary winding up, the company in general meeting so decides by ordinary resolution.

3.9 Simplifying the process for the determination of costs or charges of liquidator's agent in a court winding up

Currently CWUR r 176 provides that such costs and charges be taxed by the Registrar (and see also r 179(2)). It is proposed that the costs etc of persons employed by the Official Receiver or by the liquidator shall be approved by the COI. If there is no approval or no COI to approve, the existing procedure applies.

3.10 Allowing electronic communications by liquidators to other persons

Currently there is no such provision in Cap 32. The new CO (Cap 622) contains provisions for the company to communicate with persons by electronic means or by website. It is proposed to allow provisional liquidators and liquidators to use such methods of communication subject to the prior consent of the recipient.

3.11 Modernising the drafting of s 265 of Cap 32

Currently s 265 is not user-friendly, because of numerous amendments over the years. It is proposed that it be redrafted in a more comprehensible style without any change in the law.

4. Voidable Transactions

4.1 Introducing new self-contained provisions on 'unfair preferences'

In [266B.05] the reader will find some comments regarding the problems caused when the concept of unfair preference was introduced into Cap 32 by the Bankruptcy (Amendment) Ordinance 1996. Rather than providing two completely independent sets of provisions for the Bankruptcy Ordinance and Cap 32, it was decided to simply apply the Bankruptcy Ordinance provisions to companies (see s 266B). It seems that this happened because the amendment to s 266 was intended to be a temporary measure pending the review of the winding up provisions of the Companies Ordinance: see The Law Reform Commission of Hong Kong Report on the Winding up Provisions of the Companies Ordinance, July 1999, para 21.17. Clearly provisions applicable as to an 'associate' in bankruptcy, where one is dealing with natural persons, should be different to those dealing with companies. The defects were obvious (see **[266B.05]**) and, despite noble efforts by judges to seek to give effectiveness to the provisions (see, eg, Kwan J in *Re Phantom Records Ltd* [2006] HKCU 2023 (unreported, HCMP 2770/2003, 7 December 2007), only self-contained provisions in Cap 32 could be effective. It is proposed to introduce self-contained provisions into Cap 32. The provisions will not be substantially different from those in the Bankruptcy Ordinance, eg the presumptions of insolvency and the desire to put the person in a better position, but, particularly with regard to 'associate', there will be suitable differences.

4.2 Introducing new provisions on 'transactions at an undervalue'

The Bankruptcy (Amendment) Ordinance 1996 introduced the concept of transactions at an undervalue into the Bankruptcy Ordinance. The Law Reform Commission Report recommended the introduction of such provisions into Cap 32. It is proposed to do so, based on the Bankruptcy Ordinance provision and the provision in the UK Insolvency Act 1986.

4.3 Introducing new provisions on 'relevant time'

The concept of relevant time means the claw-back period for unfair preferences and transactions at an undervalue. It is proposed that for unfair preferences (which are not transactions at an undervalue) the relevant time will be 2 years ending with the commencement of the winding up, where the transaction is with a person connected with the company, and 6 months in other cases. For transactions at an undervalue, the relevant time will be 5 years ending with the commencement of the winding up.

4.4 Introducing new provisions on orders in relation to unfair preferences and transactions at an undervalue

These will be based on s 51A of the Bankruptcy Ordinance and s 241 of the UK Insolvency Act 1986.

4.5 Improving the effectiveness and flexibility of s 267

Section 267 invalidates a floating charge made within 12 months of the commencement of the winding up, except to the amount of any cash paid to the company. It does not distinguish between charges made in favour of persons connected with the company and other persons. It is proposed to make that distinction with the relevant period being 2 years for persons connected with the company and 12 months for any other person. Also the scope of 'cash paid' is quite restrictive (see *Re Dream Asia Ltd* [2003] 2 HKLRD 287 at **[267.02]**) and will be extended to 'money paid to or at the direction of the company' and 'property or services supplied to the company' will also be added.

4.6 'Goes into liquidation'

It is proposed to provide a definition for 'goes into liquidation', which is relevant to the application of the new provisions as to voidable transactions.

4.7 Introducing new provisions on 'person connected with the company'

This will be the detailed definition of an 'associate'.

5. Investigation during winding up, offences antecedent to or in the course of winding up and Powers of the Court

5.1 Improving the private examination procedure

It is proposed to extend the procedure to a voluntary winding up. Applicants for an examination order will be the provisional liquidator or liquidator and, in the case of a compulsory winding up, the Official Receiver (whether or not he is also the liquidator). The court may order a private examination on its own motion. The examinee will be under the duty to answer all questions. This will provide expressly for what is already the case, since the Hong Kong courts have held that the privilege against self-

incrimination has been impliedly abolished (see [221.09]). A new provision will allow the court to order the examinee to submit an affidavit to the court containing an account of his dealings with the company or providing information concerning the promotion, formation, trade, dealings, affairs or property of the company. Another new provision will deal with the use of incriminating evidence in any answer to any question or in any affidavit. Such evidence will not be admissible in evidence against the person in criminal proceedings, subject to limited exceptions, where the person has so claimed before giving the answer or submitting the affidavit. A new provision will permit the person ordered to be examined to employ at his own cost a solicitor with or without counsel.

5.2 *Improving the public examination procedure*

Currently, the court may only order a public examination under s 222 if the Official Receiver or the liquidator has made a 'further report' to the court in which he states that in his opinion a fraud has been committed by any person in the promotion or formation of the company or by an officer of the company in relation to the company since its formation. It is proposed to remove this requirement. It is also proposed to extend the category of persons who may be summoned to attend for public examination to include a person who has acted as liquidator of the company or receiver or receiver and manager of the company and any person who is or has been concerned, or has taken part, in the management of the company. The requirement to answer all questions and the protection against the use of incriminating answers mentioned above in the context of a private examination which also apply to a public examination.

5.3 *Liability of past directors and members in connection with redemption or buy-back of shares out of capital*

On the redemption or buy-back of an unlisted company's own shares where the payment is out of capital it has been a condition since 1991 that the directors of the company must make a solvency statement, stating that they have formed the opinion that the company satisfies the solvency test in relation to the transaction. The solvency test is presently set out in Cap 622 s 205. A company satisfies the solvency test if —

(a) immediately after the transaction there will be no ground on which the company could be found unable to pay its debts; and

(b) either —

(i) if it is intended to commence the winding up of the company within 12 months after the date of the transaction, the company will be able to pay its debts in full within 12 months after the commencement of the winding up; or

(ii) in any other case, the company will be able to pay its debts as they become due during the period of 12 months immediately following the date of the transaction.

It is proposed that where a company has redeemed or bought back its own shares by payment out of its capital and the company is wound up insolvent within one year of the redemption or buy-back, the recipient of the payment and directors who made the solvency statement shall be jointly and severally liable to contribute to the assets of the company an amount not exceeding the payment made by the company in respect of the shares redeemed or bought back by the company, so as to meet the deficiency in the company's assets. Such persons will be added to the list of those entitled to petition to wind up the company.

5.4 *Combining s 190(4) and CWUR r 43*

These provisions both relate to the costs and expenses incurred in the preparation and making of the statement of affairs of a company and of the required affidavit. It is proposed to clarify the law by combining the two provisions.

5.5 *Providing for an affidavit of concurrence*

Currently, s 190 of Cap 32 requires the directors and the company secretary to submit a statement of affairs to the provisional liquidator or liquidator in a court winding up. It is proposed that the provisional liquidator or the liquidator may require a person who is obliged to submit a statement of affairs to submit an affidavit of concurrence instead. This would avoid the need for a person to be required to complete a full statement of affairs, when there is already one, with which he either agrees altogether or to which he only has a few qualifications.

5.6 *Revising the procedure for settlement of list of contributories*

Currently, under CWUR r 68 the liquidator must appoint a time and place for the purpose of settling a list of contributories. A creditor who objects to an entry in, or omission from, the list may only do so on the appointed day and that might not give him sufficient time to provide evidence of his objection. The proposed new procedure will be that the liquidator, having prepared the provisional list, will give notice to every person included in the list of the particulars relating to that person and informing him that, if the person objects as to any entry or omission, he should inform the liquidator within 21 days. On receipt of any objection, the liquidator must within 14 days give notice to the objector that he has decided or declined to amend the list. Subject to any application to the court under CWUR rr 71 and 72, the liquidator will then settle the final list. Some amendments will be required to Forms 43 to 45 of the CWUR.

5.7 *Empowering provisional liquidator and liquidator to apply under s 227B(1) of Cap 32 for order to dispense with the first meetings of creditors and contributories and to appoint a liquidator and COI*

Section 227A of Cap 32 provides for a special type of compulsory winding up with a regulating order. A regulating order may be made where there are a large number of small creditors, eg a bank or travel agency failure. Under s 227B(1)

if the plaintiff in such proceedings is within the jurisdiction, the court may, in the exercise of its inherent but discretionary power to restrain foreign proceedings, restrain the plaintiff from continuing the proceedings: *Re Vocalion (Foreign) Ltd* [1932] 2 Ch 196.

[181.05] The court's discretion

A stay, etc will not usually be granted where a secured creditor is seeking to realise his security.

The object of the section is to put all unsecured creditors on an equal footing: *Re Oak Pitts Colliery Co* (1882) 21 Ch D 322 at 329 (CA); and *Teng Fuh Co Ltd v Keen Lloyd (Holdings) Ltd* [1999] 4 HKC 682 (CA). The general principle is that where a petition has been presented which might result in a winding up or a scheme of arrangement (under s 166), no creditor should gain priority over others of his class and that even if the execution has already been commenced, a stay should be granted unless there are very special circumstances: *Attlee Investments Ltd v Lee Chuen* [1983] HKLR 420 at 422; and see *Chellic Industries Ltd v Datacom Wire and Cable Co Ltd*, above. This appears to put the onus on the party opposing the stay, etc. In *Re Memco Engineering Ltd* [1986] Ch 86, where admittedly the references are to execution and distress but the comments are made by reference to this section, the onus appears to be put the other way round, that is the court will only restrain the proceedings if there are special circumstances rendering it inequitable that they should be allowed to proceed. Perhaps execution and distress are to be treated differently from ordinary proceedings. The court in *Attlee Investments Ltd v Lee Chuen*, relied heavily on s 269, but the English provision referred to, which was then absent from s 269, was introduced into the Ordinance by the 1984 amendments: see now s 269(1) proviso (c). See also *Get Nice (Union) Finance Co Ltd v Luen Cheong Tai International Holdings Ltd & Anor* [2002] HKLRD (Yrbk) 149; *Johnson Stokes & Master v Jackin Total Fulfilment Services Ltd* [2007] 4 HKLRD 336.

For an example of circumstances in which an application for a stay should have been made to stop costs being run up against an insolvent company see *Re Parnip Investment Ltd* [1991] 2 HKC 272 (CA).

On the issue of appeal from the exercise of the discretion of a judge under this section, see *Attlee Investments Ltd v Lee Chuen*.

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182. Avoidance of dispositions of property, &c after commencement of winding up

In a winding up by the court, any disposition of the property of the company, including things in action, and any transfer of shares, or alterations in the status of the members of the company, made after the commencement of the winding up, shall, unless the court otherwise orders, be void.

[cf 1929 c 23 s 173 UK]

[182.01] History

The section is derived from s 173 of the Companies Act (1948 Act, s 227). A section 182 order is called a validation order.

At the time of the Jenkins Report (1962) there was some uncertainty as to whether the court could make a validating order before a winding up order was made. *Re Miles Aircraft Ltd* [1948] Ch 188 (a decision of s 173 of the Companies Act 1929 (UK) suggested it could not. The Jenkins Report recommended an amendment to the section to make it clear that the court could make a validating order between petition and winding up order. In *Re AI Levy (Holdings) Ltd* [1964] Ch 19 (a decision on s 227 of the Companies Act 1948 (UK) but in identical terms to its predecessor), Buckley J held that there was jurisdiction to make a validating order after presentation of a petition notwithstanding that a winding up order had not been made. The point is discussed in the Second Report of the Companies Law Revision Committee (1973) paras 8.9 and 8.10. The Committee took the view that *Levy* stated the law correctly and therefore did not think that any amendment was necessary.

It was not thought necessary to make any amendment when s 227 of the Companies Act 1948 (UK) was repeated as s 522 in the Companies Act 1985 (UK) and repeated again on s 127 of the Insolvency Act 1986 (UK). In Australia, any doubt has been specifically removed in the legislation since 1981; and see now Corporations Act 2001, s 468(3).

The *Levy* case was treated as correct in *Re Gray's Inn Construction Co Ltd* [1980] 1 All ER 814 (CA) and at 819-820 it was specifically stated that a validating order might be made before a winding up order has been made and the doubt has not been raised in recent years in the English courts. In *Re San Imperial Corpn Ltd (No 1)* [1980] HKC 428, a validating order was made before a winding up order had been made and *Re Five Lakes Investment Co Ltd and Multiford Co Ltd* [1985] HKLR 273 at 283 assumes that a validating order could be made before a winding up order. Nevertheless there is dicta in the Court of Appeal, presumably per incuriam, where judges with less experience in insolvency work have assumed the need for a winding up order: see Kempster J in *Perak Pioneer Ltd v Carrian Holdings Ltd* [1984] HKLR 349 at 352 and Clough JA in *Bank of East Asia Ltd v Rogerio Sou Fung Lam* [1988] 1 HKLR 181 (CA) at 191.

For equivalent sections see the Insolvency Act 1986 (UK), s 127, the Corporations Act 2001 (Aust), s 468 and the Companies Act (Cap 50) (Sing), s 259.

[182.02] Overview

The purpose of the section, as with others surrounding it, is to preserve the status quo and support the principle of *pari passu* distribution of assets. The rationale is well stated in *Re Gray's Inn Construction Co Ltd* [1980] 1 All ER 814 at 819-820 (CA); *Denny v John Hudson & Co Ltd* [1992] BCLC 901 (CA); and see *Re MKI Corp Ltd* [1996] 1 HKC 200; *Re Vesoco Co Ltd* [2000] 2 HKC 798; *Re Luen Cheong Tai Construction Co Ltd* [2003] HKCU 1186; [2004] 1 HKLRD 735; *Re Leric International Ltd* [2009] 2 HKLRD 238; *Re Jazz Photo (Hong Kong) Ltd* [2009] HKCU 939 (unreported, HCCW 1165/2003, 4 June 2009); *Siu Ping v Chan Wai Chi Louis* [2010] HKCU 666 (unreported, HCCW 82/2010, 1 March

2010); *Re Far East Structural Steelwork Engineering Ltd* [2010] 1 HKLRD 156, (CA); and see *Super Speed Ltd (in liq) v Bank of Baroda* [2015] 2 HKLRD 965, (CA), where it was stated (at para 20(1)) that the section's invalidation of dispositions does not 'bite' when the disposition can have no impact on the company's creditors. In that case post-petition loans made by the bank to the company did not lead to any reduction in the value of the equity, the relevant security properties being already charged to their full value.

A validating order may be made where it would be beneficial not only for the company but also for its secured creditors: *Re Surplus Trader Ltd* [2005] 4 HKLRD 437; *Re Nu-West Natural Products Corp Ltd (in liq)* [2007] HKCU 1331; (unreported, HCCW 293/2006, 28 June 2006). The benefit of a specific transaction may be easier to prove than the desirability of the company being able to carry on its business generally.

However, if a proposed sale of a company's assets in fact involves an arrangement between a number of classes of creditors and the company, it will be wrong for the court to grant the order: see *Re Sino-American Telecom Inc* [1998] 3 HKC 514.

Despite a s 182 order having been made a petitioner may challenge the transaction: see *Re Mi Fung Beads Co Ltd* (unreported, HCCW 224/2004, 19 April 2004) paras 27-28; *Re Asia Union Survey Services Ltd* [2005] HKCU 1462 (unreported, HCCW 1248/2004, 20 October 2005); *Re Labour Buildings Ltd* [2010] 2 HKLRD 280. For blanket validating orders, see *Re Pioneer Metals Co Ltd* [2008] HKCU 1844 (unreported, HCMP 2104/2007, 26 November 2008). For conditions (eg reporting conditions so that the petitioner can monitor performance), see *Re Wide Land Purchasing Centre Ltd* [2007] HKCU 752 (unreported, HCCW 868/2005, 4 May 2007); *Re Labour Buildings Ltd* [2010] 2 HKLRD 280.

For anticipatory validation orders see *Re Wah Lee Resources Co Ltd* HC (unreported, [2000] HKCU 4, (2000) CWU No 1047 of 1999). For retrospective orders see *Re Luen Cheong Tai Construction Co Ltd* [2004] 1 HKLRD 735.

If no winding up order is made or if some other order, such as the appointment of a provisional liquidator, covers the situation, the need for a s 182 order falls away: *Re Five Lakes Investment Co Ltd and Multiford Co Ltd* [1985] HKLR 273, 283.

In the case of a transfer of shares, the correct approach to determining whether to grant an application for a validation order is to ask whether the creditors might be better or worse off in the event of a winding up order being made, and the transfer not having been sanctioned: *Re Belgravia Properties Ltd* [2015] HKCU 116, [2015] 1 HKLRD 509. Generally an application for the validation of the transfer of fully paid up shares will be unobjectionable: ibid.

For the avoidance of transfer of shares etc after the commencement of a voluntary winding up see s 232.

When the application relates to a charitable company the Secretary for Justice should be joined as a party, see *Re Chungshan Commercial Association Hong Kong* [2008] 2HKLRD 511, [2009] HKCU 665 (unreported, HCCW 32/2009, 8 May 2009).

For other cases on s 182 see *Re Surplus Trader Ltd & Anor* [2005] 4 HKLRD

436; *Re Incorporated Owners of Albert House* [2004] HKLRD (Yrbk) 140; *Re APP (Hong Kong) Ltd* [2004] HKLRD (Yrbk) 141; *Re Jazz Photo (Hong Kong) Ltd* [2004] HKLRD (Yrbk) 143; *Re Thousand Bright Eyes Ltd* [2007] HKCU 1146 (unreported, HCCW 175-6 & 238/2006, 29 June 2007); *Re Legend International Resorts Ltd* [2007] HKCU 557; (unreported, HCCW 1139/2004, 28 March 2007); *Re Peace Mark Production Ltd* [2008] HKCU 2000 (unreported, HCCW 533/2008, 13 November 2008); *Re Luen Hing Fat Ltd* [2008] 4 HKLRD 961; *Re Jazz Photo Ltd* [2009] HKCU 939 (unreported, HCCW 1165/2003, 4 June 2009); *Siu Ping v Chan Wai Chi Louis* [2010] HKCU 666, 1 March 2010, HCCW 82/2010; *Re First Dragon Fashion (Hong Kong) Ltd* [2010] 4 HKLRD 592; *Re HKSC Foods Ltd* [2011] HKCU 267 (unreported, HCCW 456/2008, 10 February 2011); *Re Astrotec Co Ltd* [2012] HKCU 1237 (unreported, HCMP 923/2011, 3 May 2012); *Re Emagist Entertainment Ltd* [2012] 5 HKLRD 703; [2012] HKCU 2245 (where the company is insolvent, the court will only make a validation order where income is guaranteed); *Chen Lee Yuan Hua v Hsieh Yannik* [2013] HKCU 2042 (unreported, HCCW 436/2011, 2 September 2013); *Winbless Inc v Central Billion Inc* [2013] HKCU 2877 (unreported, HCCW 371/2011, 16 December 2013); *Super Speed Ltd (in liq) v Bank of Baroda* [2015] 2 HKLRD 965 (CA); *Re AGI Logistics (Hong Kong) Ltd (in liq)* [2015] 4 HKLRD 300, [2015] 6 HKC 250 (tax refund wrongly paid to company's subsidiary recoverable by company without having to exhaust remedies against the subsidiary).

[182.03] Disposition of property

Disposition covers a wide variety of transactions from the payment or repayment of money (see *Re Gray's Inn Construction Co Ltd* [1980] 1 All ER 814 (CA); *Re Arts Knitting Factory Ltd* [1974] HKLR 422; *Re Union (V-Tex) Shirts Factory Ltd* [1977] HKLR 237; *Bank of East Asia Ltd v Rogerio Sou Fung Lam* [1988] 1 HKLR 181; *Re CG & L Investment Ltd and Re Wyatt Estates Ltd* [1993] 1 HKLR 107; [1992] 1 HKC 78, (CA)); to a sale of the company's real estate, to a mortgage for loans made. It includes a direct payment from a construction employee to an insolvent contractor's sub-contractor: *Chevalier (HK) Ltd v Right Time Construction Co Ltd* [1990] 2 HKLR 223, [1990] 1 HKC 35 (CA) (a similar case to Jones J's first instance decision was Jones J in *Re Right Time Construction Co Ltd (in liquidation)* CWU No 97 of 1987 concerning payments to Wong Kwong Kee (Engineering), judgment handed down 26 July 1988). It also includes a transfer of all the issued shares of a company to an investor pursuant to an arrangement which would result in a back door listing: see *Re Rhine Holdings Ltd* [2000] 3 HKLRD 543.

A bank will usually freeze the company's account in the vulnerable period after the presentation of the winding up petition and before the making of the winding up order. If it does not do so, where the company's account is overdrawn, post-petition payments made by the bank, as the company's agent out of the account are void under s 182 and the amounts paid are recoverable by the liquidators only against a third party recipient: see *Coutts & Co v Stock* [2000] 1 WLR 906; *Hollicourt (Contracts) Ltd (in liq) v Bank of Ireland* [2001] 1 All ER 289 (CA Eng), overruling *Re Gray's Inn Construction Co Ltd* [1980] 1 All ER 814 (CA) and *Bank of East Asia Ltd v Rogerio Sou Fung Lam & Anor* [1988] 1 HKLR 181 (CA). In *Super Speed Ltd v Bank of Baroda*, above, the facts were unusual in that the payments out by the bank to third parties were not made from

the company's account but from the bank's own account with HSBC. Accordingly, there was no disposition by the company.

If the company's account is in credit and there is payment out of the account to a third party by a bank or agent on behalf of the company, then s 182 invalidates not only the disposition between the company and the payee but also the debiting of the company's account by the bank or agent as the reduction of the indebtedness constitutes a disposition: *Super Speed Ltd v Bank of Baroda*, above.

Payments out of the company's account by the bank before it was aware of the petition were not void against it: see *Hollicourt (Contracts) Ltd (above)*; *Coutts & Co v Stock*, above; *Re Vesoco Ltd* [2000] 2 HKC 798; and *Hong Kong Lawyer, January* 2001 p 55 (Ng).

A disposition does not include a sale by a mortgagee or receiver under a mortgage made prior to the commencement of the winding up: *Sowman v David Samuel Trust Ltd* [1978] 1 All ER 616; *Re Corona Corduroy Factory Ltd* [1987] 1 HKC 385; and see *Re Margart Pty Ltd* (1985) 9 ACLR 269 (NSW SC), *Wily v Commonwealth of Australia* (1996) 136 ALR 527; *Re Leric International Ltd* [2009] 2 HKLRD 238; *Re Labour Buildings Ltd* [2010] 2 HKLRD 280.

A proposed transfer of mortgage by the special manager does not require leave: *Re Tak Ming Co Ltd* [1960] HKLR 84. A demand by a mortgagee is not a matter in the winding up: ibid.

[182.04] Property of the company

In *Re French's (Wine Bar) Ltd* [1987] BCLC 499, the court was required to consider whether completion of an unconditional contract entered into before the presentation of the winding up petition was a disposition of the property of the company. Vinelott J concluded that the provision concerned only assets to which the company was beneficially entitled and which were capable of being realised for the benefit of creditors. Followed in *Re MW Lee & Sons Enterprises Ltd* [1999] 2 HKC 686, [1999] HKLRD 427 on appeal *Lee Tak, Samuel v Lee Tak Yan* [1999] 4 HKC 12, [1999] HKLRD 493 (CA) (property subject to a constructive trust held not to be the 'property of the company'); and see *Re Chan Woon Wing* [2000] HKLRD (Yrbk) 51; *Peregrine Investments Holdings Ltd & Anor v Asian Infrastructure Fund Management Co Ltd & Ors* [2003] 1 HKLRD 209; *Goldlion Properties Ltd v Regent National Enterprises Ltd* (unreported, HCMP 5273/2003, 23 January 2007, [2007] HKCU 150); appeal allowed [2008] 3 HKLRD 104, (CA); revsd (2009) 12 HKCFAR 512 (and see s 184); *J & J Chemtrading Co Ltd v Citichem International Ltd* (unreported, HCCW 356/2007, 23 August 2007), [2007] HKCU 1511; *Re Super Speed Ltd* [2015] 2 HKLRD 965, CA.

Leave

Where the company is solvent and active, leave will usually be given, otherwise the business of the company will be paralysed, and where the company is solvent the onus is on the person opposing the grant of leave: *Re Burton and Deakin Ltd* [1977] 1 All ER 631; *Re W Haking Enterprises Ltd* [2001] HKLRD (Yrbk) 150; *Re Wah Ying Cheong Co Ltd* (unreported, HCCW 225/1996, 14 March 2003, 1

March 2007, 5 October 2007), [2007] HKCU 358; *Re Honeycool Refrigeration & Engineering Co Ltd* [2009] 1 HKLRD 447; *Re Three Stars Knitting Factory Ltd* [2009] HKCU 887 (unreported, HCCW 234/2009, 17 June 2009); *Re Labour Buildings Ltd* [2010] 2 HKLRD 280; *Siu Ping v Chan Wai Chi Louis* [2010] HKCU 666, I March 2010, HCCW 82/2010; *Re Emagist Entertainment Ltd* [2012] 5 HKLRD 703; *Chan Mei Chun v K & A International Co Ltd* [2013] HKCU 2873, (unreported, HCCW 317/2013, 27 November 2013) If the company is not solvent, the court should only make a validation order if it is satisfied that the continuation of trading is likely to generate net income: *Re Century Group Ltd* [2004] HKCU 342 (Unreported, HCCW 59/2004, 18 March 2004); *Re First Dragon Fashion (Hong Kong) Ltd* [2010] 4 HKLRD 592; *Re Astrotec Co Ltd* [2012] HKCU 1237, HCMP 923/2011, 3 May 2012; *Re Super Speed*, above.

Leave should not be granted in respect of what are, in effect, disputes between shareholders: see *Re C G & L Investment Ltd and Re Wyatt Estates Ltd* [1993] 1 HKLR 107, [1992] 1 HKC 78, CA; *Re Parnip Investment Ltd* [1991] 2 HKC 272, CA.

It is the practice to obtain leave even where the company is legally bound to complete a transaction, eg an agreement for sale or lease of land: see *Re Tramway Building & Construction Co Ltd* [1988] Ch 293; *Re French's (Wine Bar) Ltd* (supra); *Re Chan Woon Wing* [2000] HKLRD (Yrbk) 51; *Re Three Stars Knitting Factory Ltd*, above; *Re Labour Buildings Ltd* [2010] 2 HKLRD 280.

Leave will not be given where to do so would result in a preference for a particular creditor: see *Re Rafidain Bank* [1992] BCLC 301; *Denny v John Hudson & Co Ltd* [1992] BCLC 901 (CA); *Advanced EPI Technology Corp v Vitelic (Hong Kong) Ltd* [2007] HKCU 1461, (unreported, HCCW 130/2000, 2 August 2007).

Where there has been a substitution of petitioner pursuant to Companies (Winding up) Rules, r 33 (see **[179.03]**), if the original petitioner is to have any part of his costs, the proper way to provide them is by means of an order for costs rather than the exercise of the power under s 182: see *Re Bostels Ltd* [1968] Ch 346 at 350–351. One of the dangers of a stay of a winding up order is the problem of validating dispositions in respect of a continuing business: *Re Cirtex Co Ltd* [1987] 3 HKC 21 (CA). Validating payments to keep the business going might have the effect that a pre-liquidation creditor might be paid in full at the expense of the other creditors.

One of the advantages of appointing a provisional liquidator is that he has all the necessary powers for management of the company's affairs and the need to consider s 182 falls away: *Re Five Lakes Investment Co Ltd and Multiford Co Ltd* [1985] HKLR 273 at 283, [1985] HKCU 2.

The section also applies in the winding up of a foreign company: *Re Sugar Properties (Derisley Wood) Ltd* [1988] BCLC 146.

[182.05] Application

If the application to the Court of First Instance is made before a winding up petition has been presented, probably the application should be made by originating summons: see RHC O 102 r 2. If made after the presentation of the petition, the

application should be made by general summons in the winding up (Companies (Winding–up) Rules rr 5(3) and 6) and heard, in the first instance, by a Master.

The application may be made by the company itself, or a contributory or any other person with an interest in the matter: *Argentum Reductions (UK) Ltd* [1975] 1 All ER 608. Often, after the winding up order is made, an application will be made by the liquidator for a declaration that certain payments made by the company were void under s 182: see eg *Chevalier (HK) Ltd v Right Time Construction Co Ltd* [1990] 2 HKLR 223, [1990] 1 HKC 35, CA; *Re Five Oceans Supply Services Ltd* [2002] HKLRD (Yrbk) 167. The liquidator cannot assign to a creditor in a winding up his right of applying to the court to assert the voidness under s 182 of impeached transactions: *Re Ayala Holdings Ltd (No 2)* [1996] 1 BCLC 467. For form of order, see *Practice Direction No 1 of 1990* [1990] 1 All ER 1056 (see *Re a Company (No 00687 of 1991)* [1992] BCLC 133 (referred to in *Re Parnip Investment Ltd* [1991] 2 HKC 272 at 276 (CA)). As to the application of the Limitation Ordinance (Cap 347) to s 182 applications, see the English cases cited and the arguments raised in *Joint and Several Liquidators of Faith Dee Ltd v Yip Shu Chee* [2013] HKCU 347 (unreported, HCCW 237/2005, 5 February 2013).

183. Avoidance of attachments, &c.

Where any company is being wound up by the court, any attachment, sequestration, distress, or execution put in force against the estate or effects of the company after the commencement of the winding up shall be void to all intents.

[cf 1929 c 23 s 174 UK]

[183.01] History

The section is derived from s 174 of the Companies Act 1929 (UK) (1948 Act, s 228).

For equivalent sections, see the Insolvency Act 1986 (UK), s 128; Corporations Act 2001 (Aust), s 468(4); Companies Act (Cap 50) (Sing), s 260.

[183.02] Overview

This section avoids any execution, etc put into force against the company's assets after the commencement of the winding up. The liquidator is then entitled to recover from a creditor or bailiff sums received by way of execution, unless the execution is completed before the commencement of the winding up by the court, ie the presentation of the petition (s 184(2)). In spite of the unqualified wording of the section it has long been held that the section has to be read with ss 181 and 186, so that a creditor who wishes to proceed with execution needs the leave of the court: see *Re Exhall Coal Mining Co* (1864) 4 De G J & Sm 377; *The Constellation* [1965] 3 All ER 873; *Re Chit Lee Holdings Ltd* [2000] 2 HKLRD 363, [2000] 2 HKC 481.

The section actually uses the phrase 'put in force'; compare the use of the word 'completed' in the associated s 269. 'Put in force' means levying execution, ie entry into possession by the bailiff, or in the case of attachment by garnishee proceedings, the service of the garnishee order: *Re London and Devon Biscuit Co* (1871) LR 12 Eq 190 at 193; *Re Great Ship Co, Parry's Case* (1863) 4 De G J & Sm 63; *Re National United Investment Corp* [1901] 1 Ch 950.

The test suggested in *McPherson, The Law of Company Liquidation (3rd Ed)* pp 187-198 is whether the execution proceedings have reached the stage when the creditor becomes a secured creditor within the meaning of s 2 of the Bankruptcy Ordinance (Cap 6), which is applied to liquidation by s 264 of the Companies Ordinance or, in the case of distress, when the goods are seized; and see *Re National United Investment Corp*, above.

If the execution has been completed before the presentation of the petition the creditor may retain the money: see *Re Bellaglade Ltd* [1977] 1 All ER 319.

For completion of execution, see s 269(2). Sections 183 and 269 need to be read together. Section 183 avoids the execution. Section 269 deals with the retention, or otherwise, of the proceeds or property of the uncompleted execution.

The object of the section, as for the immediately previous sections, is to give token recognition to the *pari passu* principle. Accordingly, the court will not restrain execution proceedings where the company is solvent: *Gerard v Worth of Paris Ltd* [1936] 2 All ER 905 (CA).

See ss 265(5) and (5A) for the preferential charge on goods distrained.

Even if the putting in force of execution etc is not avoided under the section, any necessary subsequent step, eg a bailiff's sale may be restrained under s 186 or if there are proceeds of such sale they may be caught by s 269. Similarly for a distress sale: *Re Roundwood Colliery Co Ltd* [1897] 1 Ch 373 (CA). Where payment or part payment has been made before the commencement of the winding up this might be a preference under s 266.

For forms of application to proceed, use 9(4) *Atkin's Court Forms (2nd Ed) (2006 issue)* Forms 378 to 387 *et seq*. The applications will be made under either s 181 (before winding up order is made) or s 186 (after winding up order is made) and reference should be made to the appropriate section.

[183.03] Attachment

For the property of a judgment debtor liable to attachment and sale see the High Court Ordinance (Cap 4) s 21D, and District Court Ordinance (Cap 336) s 48. Shares in a private company are expressly excluded from s 21D but this provision does not concern charging orders (which are subject to the provisions in s 20, s 20A and s 20B) and does not affect the Court's jurisdiction to order the sale of a private company's shares charged under a charging order: *Timmar Co Ltd v Erwin Hardy Corp Ltd* [2001] 3 HKLRD 561, [2001] 3 HKC 55; cf *Cheung Koon Ping v Muneyoshi Mickiyoshi* [1994] 3 HKC 563, not followed in *Ameritax Plus Ltd v Harris* [2012] 5 HKLRD 757.

For the purposes of the Companies Ordinance, an attachment of a debt is completed by the receipt of the debt: s 269(2)(b).

[183.04] Sequestration

For the writ of sequestration, see O 45 r 12 and O 46 r 5 of the Rules of the High Court. For the purposes of the Companies Ordinance execution against goods is completed by seizure and sale or by the making of a charging order under s 20 of the High Court Ordinance (Cap 4): s 269(2)(b).

[183.05] Distress

For distress generally, see Landlord and Tenant (Consolidation) Ordinance (Cap 7).

In the context of s 183 distraints are of three categories:

(1) where the goods were both seized and sold before the commencement of the winding up;

(2) where the goods were seized before the commencement of the winding up, but were not sold until after the commencement of the winding up; and

(3) where the goods were neither seized nor sold before the commencement of the winding up.

See *Re Union (V-Tex) Shirts Factory Ltd* [1977] HKLR 237 and *Re Carrian Holdings Ltd* [1983] 1 HKC 491; on appeal [1985] HKLR 21, sub nom *Halkirk Co Ltd v Carrian Holdings Ltd*. See also ss 181, 182, 186, 265(5) and (5A), 269 and 270.

Where the goods were both seized and sold before the commencement of the winding up, the distraint will be valid. In so far as the distraint is levied after the commencement of the winding up, s 183 renders the whole distraint void and the proceeds of the distraint are to be regarded as part of the assets of the company available for payment to creditors in the process of the liquidation generally. Where the distraint was levied prior to the commencement of the winding up, but sale of the goods occurred after such commencement without legal sanction, the court may under s 182 or s 186, or both, avoid or validate the sale. Where there are ample funds available to satisfy the claims of preferred creditors and no special reasons which would render the sale under the distraint inequitable, the landlord should be permitted to complete the proceedings in distress: see *Re Union (V-Tex) Shirts Factory Ltd*. This case involved a claim by a debenture holder and one of the issues was, if the distraints were valid, whether preferred creditors were to be paid out of the property available to the debenture holder or out of the proceeds of the distraints. The case contains a useful review of many of the earlier cases. In the event, for those cases of distress which were levied prior to the commencement of the winding up but where the sale of the distrained goods occurred after such commencement, the landlords should be permitted to complete the distress proceedings.

Where the company has paid money into court to obtain the release of goods

distrained upon, the landlord is entitled to the money to the extent that it is not needed to pay the preferential creditors: *Re Arts Knitting Factory Ltd* [1974] HKLR 422, [1974] HKCU 24. And see ss 265(5), (5A). In that case, Pickering J indicated that had he not found for the landlord on the above ground he would have made an order under s 183 that the disposition made by the company for the purpose of redeeming the property distrained upon should not be void as against the landlord.

[183.06] Execution

Execution in its widest sense means the enforcement of or giving effect to the judgments or order of the courts. In a narrower sense it means the enforcement of those judgments or orders by a public officer (the bailiff) under the writs of fi fa, possession, delivery, sequestration etc: see *Silktex Trading Co v Kong Sung Sin* [1986] HKLR 559; [1986] HKCU 256. Execution in the form of a possession order granted in respect of a company defaulting on mortgage repayments comes within the terms of s 183: see *Re Chit Lee Holdings Ltd* [2000] 2 HKLRD 363; [2000] 2 HKC 481. See generally Orders 45 and 46 of the Rules of the High Court.

Execution against land is completed by seizure, by the appointment of a receiver, or by the making of a charging order under s 20 of the High Court Ordinance (Cap 4): s 269(2)(c).

[183.07] Effect of the section

The effect of the section is not quite so drastic as it appears. It has been accepted for many years that s 183 is to be read with ss 181 and 186: *Re Exhall Coal Mining Co* (1864) 4 De G J & Sm 377; *The Constellation* [1965] 3 All ER 873 (arrest and sale of ship equivalent to sequestration and execution); *Daemar v Opeskin* (1985) 10 ACLR 67 (NSW CA). So a landlord will be permitted under these sections to levy distress for rent accrued after the commencement of the winding up where, for example, the liquidator retained possession of the premises to sell the business of the company as a going concern. Sequestration or distress commenced before the presentation of the petition, but not completed when the petition was presented will generally be allowed to proceed. Note that s 269 deals only with execution and attachment. On preferential payments and distress, see s 265(5).

Commencement of Winding Up

184. Commencement of winding up by the court

(1) Where before the presentation of a petition for the winding up of a company by the court, a resolution has been passed by the company for voluntary winding up, the winding up of the company shall be deemed to have commenced at the time of the passing of the resolution, and unless the court, on proof

of fraud or mistake, thinks fit otherwise to direct, all proceedings taken in the voluntary winding up shall be deemed to have been validly taken.

(2) In any other case, the winding up of a company by the court shall be deemed to commence at the time of the presentation of the petition for the winding up. [cf 1929 c 23 s 175 UK]

[184.01] History

The section is derived from s 175 of the Companies Act 1929 (UK) (1948 Act, s 229).

For equivalent sections see the Insolvency Act 1986 (UK), s 129, Corporations Act 2001 (Aust), ss 513A and 513D, Companies Act (Cap 50) (Sing), s 255.

[184.02] Overview

The commencement of a winding up by the court is backdated to the time of the presentation of the petition or in the case where the company was already in a voluntary winding up to the passing of the resolution to wind up.

The reference to 'the time of' the resolution etc excludes the general rule as to the computation of time in s 71 of the Interpretation and General Clauses Ordinance (Cap 1) where under the day on which an event happens from which a period of time is measured is excluded, so that the effect of s 184 is that if the resolution was passed or the petition presented on 1 January, then 1 January is the relevant date.

For the commencement of a voluntary winding up see s 230, ie the time of the passing of the resolution to wind up.

For the commencement of a voluntary winding up under a special procedure under s 228A see s 228A(3)(a), ie the time of delivery of the statutory declaration to the Registrar of Companies.

Time ceases to run for the purposes of the Limitation Ordinance (Cap 347) from the making of the winding up order, except as against the petitioning creditor, when time ceases to run from the presentation of the petition: *Re Cases of Taffs Well Ltd* [1992] Ch 179.

The commencement of the winding up is relevant, inter alia, to avoidance of disposition of property (s 182), avoidance of attachments (s 183), unfair preferences (s 266), avoidance of floating charges (s 267), preferential payments (s 265) and disclaimer of onerous property (s 268). The fact that s 184(2) has a relation back effect rendering a payment made after the commencement of the winding up void retrospectively under s 182, does not mean that at the time a bank honoured a cheque of the company it was not a valid and duly authorised payment at the time and therefore recoverable by the bank from the payee: see *Bank of East Asia Ltd v Rogerio Sou Fung Lam & Anor* [1988] 1 HKLR 181 (CA). For the effect of winding–up of the vendor on a sale and purchase see *Goldlion Properties Ltd v*

Regent National Enterprises Ltd [2008] 3 HKLRD 104, (CA); and (2009) 12 HKCFAR 512, CFA (the case involved a *force majeure* clause) and see **[182.03]**.

Consequences of Winding up Order

185. Copy of order to be delivered to Registrar

On the making of a winding up order, a copy of the order shall forthwith be delivered by the company, or otherwise as may be prescribed, to the Registrar for registration.

(Replaced 6 of 1984 s 133)

[cf 1948 c 38 s 230 UK]

[185.01] History

The section is derived from s 176 of the Companies Act 1929 (UK) (1948 Act, s 230). The terms of the section are a modernised version of the original section.

For the equivalent sections see the Insolvency Act 1986 (UK), s 130(1), Corporations Act 2001 (Aust), s 470, Companies Act (Cap 50) (Sing), s 262(1), (2).

[185.02] Overview

The notice to the Registrar of Companies is in fact given by the Official Receiver: see below.

For the giving of notice of the order to the Official Receiver see Companies (Winding up) Rules, r 34. The notice may be in Forms 12 and 13 of the Forms in the Appendix to the Rules. For the drawing up of the order see r 35(1). For form of order see Form 14 and 9(4) *Atkin's Court Forms* (2nd Ed) (2006 issue) Forms 131 to 135.

The order must contain at its foot a notice stating that it is the duty of the company secretary and any officer of the company who is liable to make out a statement of affairs to attend on the Official Receiver at such time and place as he may appoint and to give him all information he may require: r 35(2).

Three copies of the order sealed with the seal of the court must be sent forthwith by the Registrar of the High Court to the Official Receiver r 36(1)(a). The Official Receiver shall arrange for a sealed copy of the order to be served on the company and shall forward to the Registrar of Companies the copy of the order which by s 185 is directed to be so forwarded by the company: r 36(1)(b). The Official Receiver shall forthwith cause notice of the order to be gazetted: r 36(1)(c). On gazetting, see rr 202, r 203 and Forms 103 and Form 104.

For the form of the notice, see Form 103(1) in the Forms in the Appendix to the Companies (Winding up) Rules. The Official Receiver shall forthwith send notice

[268.05] Effect of disclaimer

Subsection (2) deals with the effect of disclaimer. Disclaimer determines the rights, interests and liabilities of the company but third parties are only to be effected so far as necessary to release the company and its property from liability (see subsections (6) and (7)). Disclaimer of a lease does not affect the landlord's right to sue the original tenant on his covenant to pay rent or the liability of a surety for the payment of rent: see *Hindcastle Ltd v Barbara Attenborough Associates Ltd* [1997] AC 70 (HL). See this case also for the background and history of the disclaimer provisions; and also *Re Park Air Services plc* [1997] 3 All ER 193 (CA).

For the validity of a provision in a guarantee that in the event of disclaimer the surety will take up a new lease in similar terms, see *Murphy v Sawyer-Hoare* [1994] 2 BCLC 59.

Where the insolvent company has granted an underlease the underlessee will generally be permitted to remain on terms of payment of rent and observance of the covenants in the head lease: *Re Levy, ex p Walton* (1881) 17 Ch D 746. For equitable mortgagees, see *Re Katherine et Cie Ltd* [1932] 1 Ch 70.

The disclaimer takes effect from its date or, in the case of leaseholds, filing of the disclaimer in the Land Registry: see Companies Winding Up Rules r 63(2) on the latter point and *MEPC plc v Scottish Amicable Life Assurance Society* (1993) 67 P & CR 314 (CA).

The company will remain liable for rates until the date of the disclaimer. The position is somewhat different in bankruptcy because the bankrupt's property, subject to the excepted items, vests in the trustee: Bankruptcy Ordinance (Cap 6) s 43; and *Re Lister, ex p Bradford Overseers and Bradford Corp* [1926] Ch 149.

The landlord or other person interested in the property will often be proving for arrears or money due and such person shall at the request of the liquidator furnish him with a statement of the interest claimed by him: Companies (Winding up) Rules r 63(3). As to what the landlord can prove for in the event of disclaimer, see *Re Park Air Services plc* [2000] 2 AC 172; [1999] 2 BCLC 155 (HL).

[268.06] Initiative of persons interested

Sometimes the liquidator (or in bankruptcy the trustee) fails to take action in respect of burdened property, in which case this subsection enables the persons interested to take the initiative by way of notice to the liquidator: subsection (4); and see Bankruptcy Ordinance (Cap 6) s 59(4).

If the liquidator fails to give notice of intention to apply to the court for leave to disclaim within 28 days after receipt of the notice to him, the liquidator will not be able to disclaim thereafter. The reference to the company being deemed to have adopted the contract in the latter part of the subsection (which reflects Bankruptcy Ordinance s 59(4)) is inappropriate since in winding up there is no vesting of the insolvent's property in the liquidator.

[268.07] Rescission of contracts

Subsection (5) provides for application to the court by any person entitled to the benefit or subject to the burden of a contract made with the company for rescission of the contract on such terms as the court thinks just. Any damages awarded under the order may be proved as a debt in the winding up.

In determining the quantum of any damages, a discount should be given for early repayment: *Re Park Air Services plc* [2000] 2 AC 172; [1999] 2 BCLC 155 (HL).

For forms of application and order, see **[268.04]**.

[268.08] Vesting of disclaimed property

Subsection (6) reflects the intention expressed in subsection (2) that third parties should be affected as little as possible by disclaimer. Subsection (6) allows an underlessee or mortgagee of leasehold to have the property vested in them or putting it the other way round, allows a landlord to put the other persons interested in the property to their election to either accept a vesting order or be excluded from all interest in the property: see eg *Re Baker, ex p Lupton* [1901] 2 KB 628 (CA); *Re Carter and Ellis, ex p Savill Bros Ltd* [1905] 1 KB 735 (CA); *Re Holmes ex p Ashworth* [1908] 1 KB 812; *Re AE Realisations (1985) Ltd* [1987] 3 All ER 83.

For forms of orders, see the precedent books referred to in **[268.04]**.

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269. Restriction of rights of creditor as to execution or attachment in case of company being wound up

(1) Where a creditor has issued execution against the goods or lands of a company or has attached any debt due to the company, and the company is subsequently wound up, he shall not be entitled to retain the benefit of the execution or attachment against the liquidator in the winding up of the company unless he has completed the execution or attachment before the commencement of the winding up:

Provided that-

(a) where any creditor has had notice of a meeting having been called at which a resolution for voluntary winding up is to be proposed, the date on which the creditor so had notice shall for the purposes of the foregoing provision be substituted for the date of the commencement of the winding up; and

(b) a person who purchases in good faith under a sale by the bailiff any goods of a company on which an

execution has been levied shall in all cases acquire a good title to them against the liquidator; and (Amended 6 of 1984 s 185)

(c) the rights conferred by this subsection on the liquidator may be set aside by the court in favour of the creditor to such extent and subject to such terms as the court may think fit. (Added 6 of 1984 s 185)

(2) For the purposes of this Ordinance-

(a) an execution against goods is completed by seizure and sale or by the making of a charging order under section 20 of the High Court Ordinance (Cap 4); (Amended 25 of 1998 s 2)

(b) an attachment of a debt is completed by the receipt of the debt; and

(c) an execution against land is completed by seizure, by the appointment of a receiver, or by the making of a charging order under the said section 20. (Replaced 52 of 1987 s 44)

(3) In this section, ***goods*** (貨品) includes all chattels personal, and ***bailiff*** (執達主任) includes any officer charged with the execution of a writ or other process.

[cf 1929 c 23 s 268 UK]

[269.01] History

The section is derived from s 268 of the Companies Act 1929 (1948 Act s 325), reproducing s 40 of the Bankruptcy Act 1914 (see Bankruptcy Ordinance (Cap 6) s 45).

Proviso (c) in subsection (1) was added in 1984 following a recommendation of the Companies Law Revision Committee in its Second Report, 1973, para 8.51, to adopt the similar provision in s 325 of the 1948 Act.

Subsection (2) was replaced in 1987 following the amendment to s 20 of the Supreme Court Ordinance (Cap 4) introducing new charging order provisions similar to those introduced in England and Wales by the Charging Orders Act 1979.

For equivalent provisions, see Insolvency Act 1986 (UK) s 183, Corporations Act (Aust) s 569, Companies Act (Cap 50) (Sing) s 334.

[269.02] Overview

Section 183 avoids execution or attachment put in force after the commencement of a compulsory winding up. There is no equivalent provision to s 183 in respect of voluntary windings up (cf Corporations Act (Aust) s 500, Companies Act (Cap

50) (Sing) s 299), though the liquidator in a voluntary winding up can apply pursuant to s 255(1) for a stay of the execution or attachment under ss 181 or 186. Section 269, which applies to all types of liquidation, provides, in effect, that an execution creditor cannot retain the fruits of execution against the liquidator unless the execution (or attachment) has been completed before the commencement of the winding up. The expression 'fruits of the execution' has been frowned upon but it is submitted that it gives the flavour: see *Re Andrew, ex p Official Receiver (Trustee)* [1937] Ch 122 (CA).

For the commencement of a compulsory winding up, see s 184. For the commencement of voluntary winding up, see s 230. For commencement where a compulsory winding up is converted into a voluntary winding up, see **[209A.01]–[209A.02]**.

Proviso (a) to subsection (1) creates a special rule in the case mentioned, so as to make the date on which the creditor had notice of the meeting at which it was intended to propose a resolution for voluntary winding up the relevant date.

Proviso (c) allows the court to set aside the rights of the liquidator and permits the creditor to receive the fruits of the execution or attachment or part thereof but this discretion will only be exercised in exceptional cases, eg where the creditor was misled by the company into delaying enforcing its rights. See *Re Lake & Hot Springs Country Club (HK) Ltd* [1986] HKLR 827, noted under **[270.02]**.

Proviso (b) to subsection (1) protects the title of the purchaser in good faith as against the liquidator.

Section 269 deals with the position of the execution creditor. The next section, s 270, deals with the position of the bailiff. Under subsection (1) thereof if the bailiff is given notice of the appointment of a provisional liquidator etc and the execution has not been completed as thereby defined (and note this seems to differ from completion of the execution under s 269(2)) the bailiff must pay the proceeds of the execution and deliver the goods taken, if not yet sold, to the liquidator.

Even if the goods have been sold, under subsection (2) of s 270 the bailiff must retain the balance proceeds of sale for 14 days and only if within that time no such notice as is specified is served on the bailiff can he pay the balance to the creditor.

It is submitted that s 269 must be read subject to s 270. That was clearly the intent under the Bankruptcy Act 1914 and ss 40 and 41 of the Bankruptcy Act 1914 (upon which ss 269 and 270 of Cap 32 are based). See the original version of s 45(2)(a) of the Bankruptcy Ordinance (execution shall be deemed to be completed, in the case of movable property in the possession of the debtor, by receipt by the judgment creditor of the full amount of the levy, after due compliance by the bailiff with the provisions of s 46). The wording 'completion of the execution by receipt ... of the full amount of the levy' still in s 270(1) is reflected in the original wording of s 45(2)(a) of the Bankruptcy Ordinance referred to above.

Section 269 creates a domestic code governing transactions taking place in Hong Kong. It afforded no protection to foreign banks which had made attachments overseas: *Re Axona International Credit and Commerce Ltd, American Express International Banking Corp & Ors v Johnson* [1984] HKLR 372; [1985] 2 HKC 675; and see Charles D Booth (1992) 66 American Bankruptcy Law Journal, 135,

220-229, 'Recognition of Foreign Bankruptcies: An Analysis and Critique of the Inconsistent Approaches of United States Courts'.

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270. Duties of bailiff as to goods taken in execution

(1) Subject to subsection (2A), where any goods of a company are taken in execution, and, before the sale thereof or the completion of the execution by the receipt or recovery of the full amount of the levy, notice is served on the bailiff that a provisional liquidator has been appointed or that a winding up order has been made or that a resolution for voluntary winding up has been passed, the bailiff shall, on being so required, deliver the goods and any money seized or received in part satisfaction of the execution to the liquidator, but the costs of execution shall be a first charge on the goods or money so delivered, and the liquidator may sell the goods, or a sufficient part thereof, for the purpose of satisfying that charge.

(2) Subject to subsection (2A), where under an execution the goods of a company are sold or money is paid in order to avoid sale, the bailiff shall deduct the costs of the execution from the proceeds of the sale or the money paid and retain the balance for 14 days, and if within that time notice is served on him of a petition for the winding up of the company having been presented or of a meeting having been called at which there is to be proposed a resolution for the voluntary winding up of the company and an order is made or a resolution is passed, as the case may be, for the winding up of the company, the bailiff shall pay the balance to the liquidator, who shall be entitled to retain it as against the execution creditor.

(2A) The rights conferred by this section on the liquidator may be set aside by the court in favour of the creditor to such extent and subject to such terms as the court thinks fit. (Added 6 of 1984 s 186)

(3) In this section, ***goods*** (貨品) includes all chattels personal, and ***bailiff*** (執達主任) includes any officer charged with the execute of a writ or other process.

(Amended 6 of 1984 s 186)

[cf 1929 c 23 s 269 UK]

[270.01] History

The section is derived from s 269 of the Companies Act 1929 (1948 Act s 326) reproducing s 41 of the Bankruptcy Act 1914 (see Bankruptcy Ordinance (Cap 6) s 46).

Subsection (1) was amended in 1984 by the addition of the introductory words. Subsection (2) was amended similarly and also the threshold judgment sum ($200) for the subsection to operate was removed following a recommendation of the Companies Law Revision Committee in its Second Report, 1973, para 8.51. Subsection (2A) was added in 1984 following the recommendation of the Companies Law Revision Committee referred to in **[269.01]**.

For equivalent sections, see Insolvency Act 1986 (UK) s 186, Corporations Act (Aust) s 570, Companies Act (Cap 50) (Sing) s 335.

[270.02] Overview

Subsection (1) enables the provisional liquidator or liquidator to recover goods of the company taken in execution and money received on the execution, so long as notice is given to the bailiff before the sale or completion of the execution. For completion of execution, see s 269(2). Accordingly, on appointment a liquidator or provisional liquidator must enquire into whether any execution has been levied on the company's goods.

The notice should demand delivery. If it does not, the liquidator should continue with the execution but hand over the proceeds thereof to the liquidator: see *Woolford's Estate Trustee v Levy* [1892] 1 QB 772, 779.

Care should be taken that the notice is valid, eg that any meeting called to pass a resolution to wind up was validly called: see *Re TD Walton Ltd* [1966] 2 All ER 157, *Engineering Industry Training Board v Samuel Talbot (Engineers) Ltd* [1969] 2 QB 270 (CA).

The costs of the execution are a first charge on the goods or money. The liquidator may sell the goods, or sufficient part thereof, to satisfy the charge. 'Costs of the execution' in this context mean the bailiff's costs and the creditor's costs: *Re Woods (Bristol) Ltd* [1931] 2 Ch 320.

The court has a discretion under subsection (2A) to set aside the rights conferred by the section. And see Companies (Winding up) Rules r 207 (disposal of monies received after execution), which refers also to the bailiff receiving notice of a declaration made under s 228A.

The effect of subsection (2) is to deprive the execution creditor of the fruits of the sale or money paid to avoid a sale and to transfer them to the liquidator after 14 days if the proper notice has been served (less the costs of the execution): see above for 'costs of the execution'.

Where notice has been given under subsection (2) of the presentation of a petition for the winding up of the company, the winding up order need not be made within the 14 days' period: see *Re Jones Photo Supplies Ltd* [1982] HKC 578.

The scope of subsection (2A) (rights of the liquidator may be set aside by the

court) was considered in *Re Lake & Hot Springs Country Club (HK) Ltd* [1986] HKLR 827, where the judgment creditor's application was rejected. The court reviewed various cases under the similar provision in s 269(1) proviso (c). Even though the applicant had obtained a judgment 2½ years before the presentation of the petition to wind up the company, there was no good reason for giving the applicant priority to preferential creditors and other unsecured creditors. In order to justify an alteration of the statutory order for the payment of debts, very strong grounds must be put forward. This will apply *a fortiori* where there are preferential creditors.

The application should be made by summons in the winding up proceedings: see Companies (Winding up) Rules rr 5(3), 7(2) and *Re Lake & Hot Springs Country Club (HK) Ltd,* above.

For successful applications under similar legislation, see eg *Re Suidair International Airways Ltd* [1951] Ch 165; *Re Grosvenor Metal Ltd* [1950] Ch 63; *Kumarasamy v Haji Daud* [1972] 2 MLJ 16.

Offences antecedent to or in course of Winding Up

271. Offences by officers of companies in liquidation

(1) If any person, being a past or present officer of a company which is at the time of the commission of the alleged offence being wound up, whether by the court or voluntarily, or which, subsequently to that time, is ordered to be wound up by the court or passes a resolution for voluntary winding up-

(a) does not to the best of his knowledge and belief fully and truly discover to the liquidator all the property, real and personal, of the company, and how and to whom and for what consideration and when the company disposed of any part thereof, except such part as has been disposed of in the ordinary way of the business of the company; or

(b) does not deliver up to the liquidator, or as he directs, all such part of the real and personal property of the company as is in his custody or under his control, and which he is required by law to deliver up; or

(c) does not deliver up to the liquidator, or as he directs, all books and papers in his custody or under his control belonging to the company and which he is required by law to deliver up; or

(d) within 12 months next before the commencement of the winding up or at any time thereafter conceals any part of the property of the company to the value of

$100 or upwards, or conceals any debt due to or from the company; or

(e) within 12 months next before the commencement of the winding up or at any time thereafter fraudulently removes any part of the property of the company to the value of $100 or upwards; or

(f) makes any material omission in any statement relating to the affairs of the company; or

(g) knowing or believing that a false debt has been proved by any person under the winding up, fails for the period of a month to inform the liquidator thereof; or

(h) after the commencement of the winding up prevents the production of any book or paper affecting or relating to the property or affairs of the company; or

(i) within 12 months next before the commencement of the winding up or at any time thereafter, conceals, destroys, mutilates, or falsifies, or is privy to the concealment, destruction, mutilation, or falsification of, any book or paper affecting or relating to the property or affairs of the company; or

(j) within 12 months next before the commencement of the winding up or at any time thereafter makes or is privy to the making of any false entry in any book or paper affecting or relating to the property or affairs of the company; or

(k) within 12 months next before the commencement of the winding up or at any time thereafter fraudulently parts with, alters, or makes any omission in, or is privy to the fraudulent parting with, altering, or making any omission in, any document affecting or relating to the property or affairs of the company; or

(l) after the commencement of the winding up or at any meeting of the creditors of the company within 12 months next before the commencement of the winding up attempts to account for any part of the property of the company by fictitious losses or expenses; or

(m) (Repealed 21 of 1970 s 35)

(n) (Repealed 21 of 1970 s 35)

(a) the proceeds, or any part of the proceeds, of the issue of the shares or debentures are or is to be applied directly or indirectly in any manner resulting in the acquisition by the company of shares in any other undertaking; and

(b) by reason of that acquisition or anything to be done in consequence thereof or in connexion therewith that undertaking will become a subsidiary of the company,

a report made by accountants (who shall be named in the prospectus) upon–

(i) the profits or losses of the other undertaking in respect of each of the 3 financial years immediately preceding the issue of the prospectus; and (Amended 86 of 1992 s 18)

(ii) the assets and liabilities of the other undertaking at the last date to which the financial statements of the undertaking were prepared. (Amended 28 of 2012 ss 912 & 920)

(2) The said report shall–

(a) indicate how the profits or losses of the other undertaking dealt with by the report would, in respect of the shares to be acquired, have concerned members of the company and what allowance would have fallen to be made, in relation to assets and liabilities so dealt with, for holders of other shares, if the company had at all material times held the shares to be acquired; and

(b) where the other undertaking has subsidiaries, deal with the profits or losses and the assets and liabilities of the undertaking and its subsidiaries in the manner provided by paragraph 31(3) in relation to the company and its subsidiaries.

(Amended 28 of 2012 ss 912 & 920)

34. (1) This paragraph shall apply in the case of every company whose financial statements at the last date to which the financial statements have been prepared disclose that either a value exceeding 10 per cent of the value of the assets of the company or a value of not less than $3000000 is placed on the company's interests in land or buildings. *(Amended 28 of 2012 ss 912 & 920)*

(2) A valuation report with respect to all the company's interests in land or buildings which shall include the following particulars of each property–

(a) the address;

(b) a brief description;

(c) the use at the date of the report;

(d) the nature of the tenure;

(e) a summary of the terms of any sub-leases or tenancies, including repair obligations, granted by the company;

(f) the approximate age of buildings;

(g) the present capital value;

(h) the estimated current net rental, being the estimated average net annual income from the property accruing to the company over a long period of years (not being less than 3 years) before taking into account tax and any interest or mortgage expenses but after taking into account management and maintenance expenses.

(3) A report for the purposes of sub-paragraph (2) shall state-

(a) whether the valuation–

(i) is the current value in the open market, stating whether-

(A) on an investment basis, or

(B) on a development basis, or

(C) on a future capital realization basis;

(ii) is the current value as an asset of a going concern;

(iii) is the value after development has been completed; or

(iv) has any other basis (which should be stated);

(b) where the valuation is based on value after development has been completed–

(i) the date when the development is expected to be completed;

(ii) the estimated cost of carrying out the development or (where part of the development has already been carried out) the estimated cost of completing the development; and

(iii) the estimated value of the property in the open market in its present condition.

(4) If the company has obtained more than one valuation report regarding any of the company's interests in land or buildings within 6 months before the issue of the prospectus then all other such reports shall be included.

Part III

Provisions Applying to Parts I and II of Schedule

35. Paragraphs 15 (so far as it relates to preliminary expenses) and 19 shall not apply in the case of a prospectus issued more than 2 years after the date at which the company began to carry on business.

36. Every person shall, for the purposes of this Schedule, be deemed to be a vendor who has entered into any contract, absolute or conditional, for the sale or purchase, or for any option of purchase, of any property to be acquired by the company, in any case where–

(a) the purchase money is not fully paid at the date of the issue of the prospectus;

(b) the purchase money is to be paid or satisfied wholly or in part out of the proceeds of the issue offered for subscription by the prospectus;

(c) the contract depends for its validity or fulfilment on the result of that issue.

37. Where any property to be acquired by the company is to be taken on lease, this Schedule shall have effect as if the expression 'vendor' included the lessor, and the expression 'purchase money' included the consideration for the lease, and the expression 'sub-purchaser' included a sub-lessee.

38. References in paragraph 10 to subscribing for shares or debentures shall include acquiring them from a person to whom they have been allotted or agreed to be allotted with a view to his offering them for sale.

39. For the purposes of paragraph 12 where the vendors or any of them are a firm, the members of the firm shall not be treated as separate vendors.

40. If in the case of a company which has been carrying on business, or of a business which has been carried on for less than 3 years, the financial statements of the company or business have only been prepared in respect of 2 years or 1 year, Part II shall have effect as if references to 2 years or 1 year, as the case may be, were substituted for references to 3 years.

(Amended 86 of 1992 s 18; 28 of 2012 ss 912 & 920)

41. The expression ***financial year*** (財政年度) in this Schedule means the year in respect of which the financial statements of the company or of the business, as the case may be, are prepared, and where by reason of any alteration of the date on which the financial year of the company or business terminates the financial statements of the company or business have been prepared for a period greater or less than a year, that period is for the purposes of this Schedule to be regarded as a financial year.

(Amended 28 of 2012 ss 912 & 920)

42. Any report required by Part II shall either indicate by way of note any adjustment as respects the figures of any profits or losses or assets and liabilities dealt with by the report which appear to the persons making the report necessary or shall make those adjustments and indicate that adjustments have been made.

43. Any report by accountants required by Part II shall be made by accountants qualified under the Professional Accountants Ordinance (Cap 50) for appointment as auditors of a company and shall not be made by any accountant who is an officer or servant, or a partner of or in the employment of an officer or servant, of the company or of the company's subsidiary or parent undertaking or of a subsidiary of the company's parent undertaking; and for the purposes of this paragraph the expression ***officer*** (高級人員) shall include a proposed director but not an auditor.

(Amended 6 of 1984 s 259, 12 of 2005 s 15)

44. For the purposes of paragraph 6, the description of a person, that is to say, his profession, trade or other occupation shall be stated with particularity and precision; and the description 'Company Director' shall be inadequate unless supplementary information is provided stating the nature of the relevant company's business.

45. For the purposes of this Schedule, ***address*** (地址) in the case of a natural person means the place of his usual residence.

46. Any valuation report required by Part II–
  (a) shall not state or imply that any land or building has been professionally valued unless the valuation is made by a professionally qualified valuation surveyor who is subject to the discipline of a professional body;
  (b) shall not be made by a person who is an officer or servant or proposed director of the company or the company's subsidiary or parent undertaking or of a subsidiary of the company's parent undertaking; and
  (c) shall not be made by a company which–
    (i) is the company's subsidiary or parent undertaking or a subsidiary of the company's parent undertaking; or
    (ii) has either a paid up capital of less than $1000000 or the assets of which do not exceed liabilities by $1000000 or more as shown in the company's last balance sheet.

(Amended 12 of 2005 s 15; 28 of 2012 ss 912 & 920)

47. *(Repealed 30 of 2004 s 2)*

(Third Schedule replaced 78 of 1972 s 21)

(Format changes—ER 1 of 2014)

FOURTH SCHEDULE

FORM OF STATEMENT IN LIEU OF PROSPECTUS TO BE DELIVERED TO REGISTRAR BY A COMPANY WHICH DOES NOT ISSUE A PROSPECTUS OR WHICH DOES NOT GO TO ALLOTMENT ON A PROSPECTUS ISSUED, AND REPORTS TO BE SET OUT THEREIN

[sections 2B & 43]

(Amended 12 of 2005 s 16; 28 of 2012 ss 912 & 920)

Part I

Form of Statement and Particulars to be contained therein

COMPANIES (WINDING UP AND MISCELLANEOUS PROVISIONS) ORDINANCE

Statement in lieu of Prospectus delivered for registration by [Insert the name of the company]

Pursuant to section 43 of the Companies (Winding Up and Miscellaneous Provisions) Ordinance

(Amended 28 of 2012 ss 912 & 920)

Delivery for registration duly authorised by (Insert the name of every director who has authorised and signed this Statement).	
The amount of the issued share capital of the company. (Amended 28 of 2012 ss 912 & 920)	$ ......
Divided into	Shares of $ ...... each Shares of $ ...... each Shares of $ ...... each
Amount (if any) of the above capital which consists of redeemable shares.	Shares of $ ...... each
The earliest date on which the company has power to redeem these shares.	
Names, descriptions and addresses of directors or proposed directors.	
If the share capital of the company is divided into different classes of shares, the right of voting at meetings of the company conferred by, and the rights in respect of capital and dividends attached to, the several classes of shares respectively.	1. ...... shares of $ .... fully paid. 2. ..... shares upon which $ ...... per share credited as paid.
Number and amount of shares and debentures agreed to be issued as fully or partly paid up otherwise than in cash.	3. debenture $ ......
The consideration for the intended issue of those shares and debentures.	4. Consideration

Number, description and amount of any shares or debentures which any person has or is entitled to be given an option to subscribe for, or to acquire from a person to whom they have been allotted or agreed to be allotted with a view to his offering them for sale.	1. ...... shares of $ .... and debentures of $ ....
Period during which option is exercisable.	2. Until ....
Price to be paid for shares or debentures subscribed for or acquired under option.	3. ....
Consideration for option or right to option.	4. Consideration ....
Persons to whom option or right to option was given or, if given to existing shareholders or debenture holders as such, the relevant shares or debentures.	5. Names and addresses ....
Names and addresses of vendors of property purchased or acquired, or proposed to be purchased or acquired by the company except where the contract for its purchase or acquisition was entered into in the ordinary course of the business intended to be carried on by the company or the amount of the purchase money is not material.	
Amount (in cash, shares or debentures) payable to each separate vendor.	
Amount (if any) paid or payable (in cash or shares or debentures) for any such property, specifying amount (if any) paid or payable for goodwill.	Total purchase price $ .... Cash......$ Shares......$ Debentures......$ Goodwill......$
Short particulars of any transaction relating to any such property which was completed within the 2 preceding years and in which any vendor to the company or any person who is, or was at the time thereof, a promoter, director or proposed director of the company had any interest direct or indirect.	
Amount (if any) paid or payable as commission for subscribing or agreeing to subscribe or procuring or agreeing to procure subscriptions for any shares or debentures in the company; or	Amount paid. Amount payable.
Rate of the commission	Rate per cent. $ ....
The number of shares, if any, which persons have agreed for a commission to subscribe absolutely.	
Estimated amount of preliminary expenses.	$
By whom those expenses have been paid or are payable.	
Amount paid or intended to be paid to any promoter.	Name of promoter- Amount $

Consideration for the payment	Consideration- ....
Any other benefit given or intended to be given to any promoter.	Nature and value of benefit- ....
Consideration for giving of benefit.	Consideration- ....
Dates of, parties to, and general nature of every material contract (other than contracts entered into in the ordinary course of the business intended to be carried on by the company or entered into more than 2 years before the delivery of this statement).	
Time and place at which the contracts or copies thereof may be inspected or (1) in the case of a contract not reduced into writing, a memorandum giving full particulars thereof, and (2) in the case of a contract wholly or partly in a language other than the official languages, a copy of a translation thereof in English or Chinese or embodying a translation in English or Chinese of the parts in a language other than the official languages, as the case may be, being a translation certified in the prescribed manner to be a correct translation. (Amended 23 of 1998 s 2)	
Names and addresses of the auditors of the company (if any).	
Full particulars of the nature and extent of the interest of every director in the promotion of or in the property proposed to be acquired by the company, or where the interest of such a director consists in being a partner in a firm, the nature and extent of the interest of the firm, with a statement of all sums paid or agreed to be paid to him or to the firm in cash or shares, or otherwise, by any person either to induce him to become or to qualify him as, a director, or otherwise for services rendered by him or by the firm in connexion with the promotion or formation of the company.	

(Signatures of the persons above-named as directors or proposed directors or of their agents authorised in writing.) ....
....
....

Date:

Part II

Reports to be set out

1. Where it is proposed to acquire a business, a report made by accountants (who shall be named in the statement) upon-

(a) the profits or losses of the business in respect of each of the 5 financial years immediately preceding the delivery of the statement to the Registrar; and

(b) the assets and liabilities of the business at the last date to which the financial statements of the business were prepared.

(Amended 28 of 2012 ss 912 & 920)

2. (1) Where it is proposed to acquire shares in an undertaking which by reason of the acquisition or anything to be done in consequence thereof or in connexion therewith will become a subsidiary of the company, a report made by accountants (who shall be named in the statement) with respect to the profits and losses and assets and liabilities of the other undertaking in accordance with sub-paragraph (2) or (3), as the case requires, indicating how the profits or losses of the other undertaking dealt with by the report would, in respect of the shares to be acquired, have concerned members of the company, and what allowance would have fallen to be made, in relation to assets and liabilities so dealt with, for holders of other shares, if the company had at all material times held the shares to be acquired.

(2) If the other undertaking has no subsidiaries, the report referred to in sub-paragraph (1) shall – (Amended 12 of 2005 s 16)

(a) so far as regards profits and losses, deal with the profits or losses of the undertaking in respect of each of the 5 financial years immediately preceding the delivery of the statement to the Registrar; and

(b) so far as regards assets and liabilities, deal with the assets and liabilities of the undertaking at the last date to which the financial statements of the undertaking were prepared. (Amended 28 of 2012 ss 912 & 920)

(3) If the other undertaking has subsidiaries, the report referred to in sub-paragraph (1) shall- (Amended 12 of 2005 s 16)

(a) so far as regards profits and losses, deal separately with the other undertaking's profits or losses as

provided by sub-paragraph (2), and in addition deal either- (Amended 12 of 2005 s 16)

(i) as a whole with the combined profits or losses of its subsidiaries, so far as they concern members of the other undertaking; or

(ii) individually with the profits or losses of each subsidiary, so far as they concern members of the other undertaking;

or, instead of dealing separately with the other undertaking's profits or losses, deal as a whole with the profits or losses of the other undertaking and, so far as they concern members of the other undertaking, with the combined profits or losses of its subsidiaries; and

(b) so far as regards assets and liabilities, deal separately with the other undertaking's assets and liabilities as provided by the last foregoing sub-paragraph and, in addition, deal either- (Amended 12 of 2005 s 16)

(i) as a whole with the combined assets and liabilities of its subsidiaries, with or without the other undertaking's assets and liabilities; or

(ii) individually with the assets and liabilities of each subsidiary;

and shall indicate as respects the assets and liabilities of the subsidiaries the allowance to be made for persons other than members of the company.

(Amended 12 of 2005 s 16)

Part III

Provisions Applying to Parts I and II of this Schedule

3. In this Schedule the expression ***vendor*** (賣主) includes a vendor as defined in Part III of the Third Schedule, and the expression ***financial year*** (財政年度) has the meaning assigned to it in that Part of that Schedule.

4. If in the case of a business which has been carried on, or of an undertaking which has been carrying on business, for less

(Amended 28 of 2012 ss 912 & 920)

9. Application of section 38C of this Ordinance

It is hereby declared that, where section 38C of this Ordinance has been complied with in respect of a programme prospectus which has been issued, the issue of any issue prospectus concerned does not of itself require that section to again be complied with in respect of the programme prospectus.

Part 2

Prospectus to which the Provisions of Part XII of this Ordinance Apply

1. Interpretation

In this division—

issue prospectus (發行章程) means that prospectus to which the provisions of Part XII of this Ordinance apply contained in the document, or series of documents, mentioned in section 2(1)(b);

programme prospectus (計劃章程) means that prospectus to which the provisions of Part XII of this Ordinance apply contained in the document mentioned in section 2(1)(a);

relevant information (有關資料), in relation to a prospectus, means such information as is required by the provisions of Part XII of, and the Third Schedule to, this Ordinance to be contained in the prospectus.

2. Prospectus consisting of more than one document

(1) A prospectus may consist of—

(a) a document containing such relevant information as the issuer of the document thinks fit (but excluding the price, or any formula for calculating the price, of the shares or debentures to which the prospectus relates); and

(b) a document, or series of documents, containing such relevant information as is not already contained in the document mentioned in paragraph (a).

(2) For the avoidance of doubt, it is hereby declared that an issue prospectus does not have to be issued at the same time as the programme prospectus concerned is issued.

3. Amendments

The information contained in—

(a) a programme prospectus may only be amended by—
  (i) an addendum to the programme prospectus;
  (ii) replacing the programme prospectus with a new programme prospectus; or
  (iii) the issue prospectus concerned or an addendum to the issue prospectus;

(b) an issue prospectus may only be amended by—
  (i) an addendum to the issue prospectus; or
  (ii) replacing the issue prospectus with a new issue prospectus;

(c) an addendum to a programme prospectus may only be amended by—
  (i) a further addendum to the programme prospectus;
  (ii) replacing the addendum with a new addendum;
  (iii) replacing the addendum and programme prospectus with a new programme prospectus; or
  (iv) the issue prospectus concerned or an addendum to the issue prospectus;

(d) an addendum to an issue prospectus may only be amended by—
  (i) replacing the addendum with a new addendum; or
  (ii) replacing the addendum and issue prospectus with a new issue prospectus.

4. Amendment made pursuant to section 3 is prospectus

It is hereby declared that any amendment made pursuant to section 3 is a prospectus and, subject to section 5, the provisions of this Ordinance shall apply to the amendment accordingly.

5. Certain amendments made pursuant to section 3 to be read with other related documents

Where it enables a provision of this Ordinance (including paragraph 3 of the Third Schedule to this Ordinance) to apply

to an amendment made pursuant to section 3, the amendment shall, for the purposes of that application, be read with all or any of the programme prospectus to which it relates and the addenda, if any, to the programme prospectus and the issue prospectus to which it relates and the addenda, if any, to the issue prospectus, as the case requires.

6. Warning

(1) Every issue prospectus (including a new issue prospectus mentioned in section 3(b)(ii) or (d)(ii)) and any form of application must contain a statement specified in Part 4 of the Eighteenth Schedule to this Ordinance.

(2) Any amendment made pursuant to section 3(b)(i) must contain a statement specified in Part 5 of the Eighteenth Schedule to this Ordinance.

7. Availability of programme prospectus, etc.

The issuer of a programme prospectus must make arrangements for—

(a) the programme prospectus and its addenda, if any; and

(b) the issue prospectus concerned and its addenda, if any,

to be readily available to investors and potential investors throughout the period during which the shares or debentures to which the issue prospectus relates are offered or sold to the public.

8. Cessation of offer to which programme prospectus, etc. relates

The shares or debentures the subject of a programme prospectus and its addenda, if any, and the issue prospectus concerned and its addenda, if any, shall cease to be offered or sold to the public on and after the date of—

(a) the publication of the next annual report and financial statements of the company to which the programme prospectus relates after the publication of the programme prospectus;

(b) the first anniversary of the date of publication of the programme prospectus; or

(c) if there is a guarantor corporation, within the meaning of section 342(8) of this Ordinance, in relation to the offer concerned, the publication of the next annual report and financial statements of the guarantor corporation after the publication of the programme prospectus,

whichever is the earlier.

(Amended 28 of 2012 ss 912 & 920)

9. Application of section 342B of this Ordinance

It is hereby declared that, where section 342B of this Ordinance has been complied with in respect of a programme prospectus which has been issued, the issue of any issue prospectus concerned does not of itself require that section to again be complied with in respect of the programme prospectus.

(Twenty-first Schedule added 30 of 2004 s 2)

(Format changes—E.R. 1 of 2014)

TWENTY-SECOND SCHEDULE

PERSONS SPECIFIED FOR THE PURPOSES OF SECTION 40 OF THIS ORDINANCE

[sections 38AA, 40, 342AA & 360]

(Amended 8 of 2011 s 26)

1. Persons who subscribe for or purchase shares or debentures pursuant to an offer in a prospectus.
2. Persons who by means of an agent acquire shares or debentures pursuant to an offer in a prospectus.
3. Persons who acquire shares or debentures pursuant to arrangements made between–
   (a) the issuer or vendor of the shares or debentures; and
   (b) intermediaries appointed for the purposes of the offer.

(Twenty-second Schedule added 30 of 2004 s 2)

(Format changes—E.R. 1 of 2014)

TWENTY-THIRD SCHEDULE

PARENT AND SUBSIDIARY UNDERTAKINGS

[sections 2B & 360]

Expanded Cross Reference: 3, 4, 5, 5A, 5B, 5C, 6, 7, 8, 9, 10

1. Interpretation

(1) For the purposes of the provisions specified under section 2B(3) of this Ordinance and this Schedule—

parent company(母公司) means a parent undertaking which is a company;

parent undertaking(母企業) shall be construed in accordance with section 2;

shares(股、股份) shall be construed as a reference to-

(a) in relation to an undertaking with a share capital, the allotted shares;

(b) in relation to an undertaking with capital in the form other than share capital, the rights to share in the capital of the undertaking; and

(c) in relation to an undertaking without any capital, the interest—

(i) conferring any right to share in the profits or liability to contribute to the losses of the undertaking; or

(ii) giving rise to an obligation to contribute to the debts or expenses of the undertaking in the event of a winding up;

undertaking(企業) means–

(a) a body corporate;

(b) a partnership; or

(c) an unincorporated association carrying on a trade or business, whether for profit or not.

(2) In construing any references to an undertaking which is not a company for the purposes of this Ordinance, other expressions appropriate to companies shall be construed, in relation to that undertaking, as references to the corresponding persons, officers, documents or organs, as the case may be, appropriate to undertakings of that description.

2. Parent undertaking and subsidiary undertaking

(1) An undertaking is a parent undertaking (***parent undertaking***) in relation to another undertaking (***subsidiary undertaking***) if—

(a)

(i) in the case where both the parent undertaking and the subsidiary undertaking are bodies corporate, the subsidiary undertaking is a subsidiary of the parent undertaking by virtue of section 2(4), (5), (6) and (7) of this Ordinance; or

(ii) in any other case, the parent undertaking—

(A) holds a majority of the voting rights in the subsidiary undertaking;

(B) is a member of the subsidiary undertaking and has the right to appoint or remove a majority of its board of directors; or

(C) is a member of the subsidiary undertaking and controls alone, pursuant to an agreement with other shareholders or members, a majority of the voting rights in the subsidiary undertaking; or

(b) the parent undertaking has the right to exercise a dominant influence over the subsidiary undertaking by virtue of—

(i) the provisions contained in any document constituting or regulating the subsidiary undertaking; or (Amended 28 of 2012 ss 912 & 920)

(ii) a control contract.

(2) For the purposes of subsection (1)(a)(ii), an undertaking shall be treated as a member of another undertaking (***the relevant undertaking***), if—

(a) any of its subsidiary undertakings is a member of the relevant undertaking; or

(b) any shares in the relevant undertaking are held by a person acting on behalf of the first-mentioned undertaking or any of its subsidiary undertakings.

(3) An undertaking shall be treated as the parent undertaking of another undertaking if a subsidiary undertaking of the first-mentioned undertaking is, or is to be treated as, the parent undertaking of that other undertaking; and references

to a subsidiary undertaking of the first-mentioned undertaking shall be construed accordingly.

(4) Sections 3 to 10 contain provisions explaining expressions used in this section and otherwise supplementing this section.

3. Voting rights in undertaking

(1) For the purposes of section 2(1)(a)(ii)(A) and (C), the references to the voting rights in an undertaking shall be construed as references to the rights conferred on shareholders in respect of their shares or, in the case of an undertaking not having a share capital, on members, to vote at general meetings of the undertaking on all, or substantially all, matters.

(2) For the purposes of subsection (1), where an undertaking which does not have general meetings at which matters are decided by the exercise of voting rights, the references to holding a majority of the voting rights in the undertaking shall be construed as references to having the right under the constitution of the undertaking to direct the overall policy of the undertaking or to alter the terms of its constitution.

4. Right to appoint or remove majority of directors

For the purposes of section 2(1)(a)(ii)(B)—

(a) the reference to the right to appoint or remove a majority of the board of directors shall be construed as a reference to the right to appoint or remove directors holding a majority of the voting rights at meetings of the board on all, or substantially all, matters;

(b) an undertaking shall be treated as having the right to appoint to a directorship if—

(i) a person's appointment to it follows necessarily from his appointment as a director of the undertaking; or

(ii) the directorship is held by the undertaking itself; and

(c) a right to appoint or remove a directorship which is exercisable only with the consent of another person shall be left out of account unless no other person has a right to appoint or, as the case may be, remove in relation to that directorship.

5. Right to exercise dominant influence

For the purposes of section 2(1)(b)—

(a) an undertaking shall not be regarded as having the right to exercise a dominant influence over another undertaking unless it has a right to give directions with respect to the operating and financial policies of that other undertaking which the directors are, or a majority of the directors is, obliged to comply with whether or not they are for the benefit of that other undertaking; and

(b) a ***control contract*** (控制合約) means a contract in writing conferring such a right which is—

(i) of a kind authorized by any document constituting or regulating the undertaking in relation to which the right is exercisable; and *(Amended 28 of 2012 ss 912 & 920)*

(ii) permitted by the law under which that undertaking is established.

6. Rights exercisable only in certain circumstances

(1) For the purposes of this Schedule but without prejudice to subsection (2), rights which are exercisable only in certain circumstances shall be taken into account only—

(a) when the circumstances have arisen, and for so long as they continue to obtain; or

(b) when the circumstances are within the control of the person having the rights.

(2) Rights which are normally exercisable but are temporarily incapable of exercise shall continue to be taken into account.

7. Rights held by one person on behalf of another

For the purposes of this Schedule—

(a) rights held by a person in a fiduciary capacity shall be treated as not held by him;

(b) rights held by a person as nominee for another shall be treated as held by the other; and

(c) rights shall be treated as held as nominee for another if they are exercisable only on his instructions or with his consent.

8. Rights attached to shares by way of security

Where any rights referred to in this Schedule are attached to shares held by way of security, the rights shall be treated as held by the person providing the security, if—

(a) apart from the right to exercise them for the purpose of preserving the value of the security, or of realizing it, the rights are exercisable only in accordance with his instructions; or

(b) the shares are held in connection with the granting of loans as division of normal business activities and apart from the right to exercise them for the purpose of preserving the value of the security, or of realizing it, the rights are exercisable only in his interests.

9. Rights attributed to parent undertaking

(1) For the purposes of section 2, rights shall be treated as held by a parent undertaking if they are held by any of its subsidiary undertakings.

(2) Nothing in section 7 or 8 shall be construed as requiring rights held by a parent undertaking to be treated as held by any of its subsidiary undertakings.

(3) For the purposes of section 8, rights shall be treated as being exercisable in accordance with the instructions of or in the interests of an undertaking if they are exercisable in accordance with the instructions of or, as the case may be, in the interests of any group undertaking.

(4) In this section, ***group undertaking*** (企業集團), in relation to an undertaking (***relevant undertaking***), means an undertaking which is—

(a) a parent undertaking or subsidiary undertaking of the relevant undertaking; or

(b) a subsidiary undertaking of any parent undertaking of the relevant undertaking.

10. Supplementary

References in any provision of sections 7, 8 and 9 to rights held by a person include rights falling to be treated as held by him by virtue of any other provision of those sections but not rights which by virtue of any such provision are to be treated as not held by him.

(Twenty-third Schedule added 12 of 2005 s 18)

(Format changes—E.R. 1 of 2014)