

**Part 5**  
**Transactions in relation to Share Capital**  
**Division 1**  
**Preliminary**

**203. Interpretation**

**(1) In this Part—**

*Commission* (監察機關) means—

- (a) subject to paragraphs (b) and (c), the Securities and Futures Commission referred to in section 3(1) of the Securities and Futures Ordinance (Cap. 571);
- (b) if any relevant transfer order made under section 25 of that Ordinance is in force, the recognized exchange company concerned or both the Securities and Futures Commission and the recognized exchange company concerned, in accordance with the provisions of that order; or
- (c) if any relevant transfer order made under section 68 of that Ordinance is in force, the recognized exchange controller concerned or both the Securities and Futures Commission and the recognized exchange controller concerned, in accordance with the provisions of that order;

*contingent buy-back contract* (待確定回購合約) means a contract entered into by a company relating to any of its shares—

- (a) that is not a contract to buy back those shares; but
- (b) under which the company may (subject to any conditions) become entitled or obliged to buy back those shares;

*distributable profits* (可分派利潤), in relation to the making of a payment by a company, means those profits out of which the company could lawfully make a distribution equal in value to the payment;

*recognized exchange controller* (認可控制人) has the meaning given by section 1 of Part 1 of Schedule 1 to the Securities and Futures Ordinance (Cap. 571);

*specified Chinese language newspaper* (指明中文幸良章) means a Chinese language newspaper that is specified under subsection (2);

*specified English language newspaper* (指明英文幸幸章) means an English language newspaper that is specified under subsection (2).

- (2) The Chief Secretary for Administration may specify Chinese language newspapers and English language newspapers for the purposes of this Part and must publish a list of the specified newspapers in the Gazette.

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**History**

This section is derived from ss 2, 49E(1), 49S(1), 71A(3)(a) of the former Companies Ordinance (Cap 32).

**Overview**

Section 203 sets out a number of definitions which apply for the purposes of Pt 5. Part 5 of this Ordinance deals with various transactions affecting share capital, mainly in relation to the capital maintenance doctrine, which applies to companies limited by shares. Under this doctrine, share capital (amounts contributed by shareholders to the company in return for their shares) cannot be returned to shareholders except in a winding up.<sup>1</sup> This restriction is reflected in various provisions in Pt 5, but Pt 5 also sets out a number of exceptions to the basic rule in the context of reductions of capital (Div 3) and share redemptions and buy-backs (Div 4). Part 5 also contains provisions on financial assistance given by a company for an acquisition of shares in the company or its holding company (Div 5). The prohibitions in respect of the latter have traditionally been thought to be part of the capital maintenance doctrine.

While some jurisdictions have replaced the capital maintenance doctrine with a solvency test for determining distributions to shareholders (e.g. New Zealand Companies Act 1993, s 52), the doctrine is in general retained in Hong Kong under the new Companies Ordinance (Cap 622). However, greater use is made of the solvency test in the Ordinance in providing exceptions to the capital maintenance doctrine.<sup>2</sup> The basic solvency test for the purpose of Pt 5 is as set out in Div 2 of Pt 5.

### Division 2 Solvency Test

**204. Application of Division**

This Division has effect for the following transactions—

- (a) a reduction of share capital by special resolution supported by a solvency statement under Subdivision 2 of Division 3;
- (b) a payment out of capital in respect of a share redemption or buy-back under Division 4;
- (c) the giving of financial assistance by a company under Subdivision 4 of Division 5.

**History**

This section is new.

**Overview**

For the background to the introduction of the solvency test in Pt 5, see the notes to s 205. The solvency test in Pt 5 Div 2 is relevant for transactions

<sup>1</sup> *Trevor v Whitworth* (1887) LR 12 App Cas 409 (HL).

<sup>2</sup> See Financial Services and Treasury Bureau, *CO Rewrite Consultation Paper – Share Capital, Capital Maintenance Regime, Statutory Amalgamation Procedure* (26 June 2008) Ch 3 (available at [http://www.fstb.gov.hk/fsb/co\\_rewrite/eng/pub-press/consult.htm](http://www.fstb.gov.hk/fsb/co_rewrite/eng/pub-press/consult.htm))

as set out in s 204, namely reductions of capital, share redemptions and buy-backs, and financial assistance for an acquisition of the company's shares. The previous rules allowing such transactions under the former Companies Ordinance (Cap 32) as exceptions to the capital maintenance doctrine are in substance largely reproduced in Pt 5. However, in addition to the previous mechanisms for engaging in such transactions, Pt 5 introduces new exceptions to the capital maintenance doctrine, based on the solvency test, in the context of these transactions.

**205. Solvency test**

A company satisfies the solvency test in relation to a transaction if—

- (a) immediately after the transaction there will be no ground on which the company could be found to be 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.

**History**

This section is derived from s 47F(1)(d) of the former Companies Ordinance (Cap 32).

For the equivalent provision in the UK, see Companies Act 2006, s 643(1).

**Overview**

While the solvency test is applied in respect of a larger variety of transactions under the new Companies Ordinance (Cap 622)<sup>3</sup>, the use of a solvency test in the companies' legislation is not entirely new. Various solvency tests were used in the former Companies Ordinance (Cap 32) in some limited contexts – for example, the former s 47E provided for an exception to the prohibition on a company giving financial assistance for an acquisition of the company's shares in the case of unlisted companies where the members approve and the company satisfies the solvency test under s 47F. The test adopted in s 205 is based on that previous test in former s 47F. On the background to adoption of this test, see Financial Services and Treasury Bureau (FSTB), *CO Rewrite Consultation Paper – Share Capital, Capital Maintenance Regime, Statutory Amalgamation Procedure* (26 June 2008) at 18–21, and *Consultation Conclusions* (2 Feb

<sup>3</sup> See the notes to ss 203 and 204.

2009) at 9–10; FSTB, *CO Rewrite: Draft Companies Bill Second Phase Consultation Paper* (May 2010) at 72–73.

#### Unable to pay its debts

Under s 205, the basic test is that the company must be able to pay its debts immediately after the transaction and also must be able to pay its debts as they become due in the 12-month period following the date of the transaction: s 205(a) and (b)(ii). The alternative limb in para (b)(i) applies if, at the time of the transaction, it is intended that the company would commence winding up within 12 months of the transaction. In that case, the company must be able to pay its debts in full within 12 months after the commencement of winding up: s 205(b)(ii).

The test of solvency under s 205 is a cash flow test. The cash flow test was discussed in *Lau Siu Hung v Man Kwai Fong* [2013] 1 HKLRD 356, [2012] HKCU 2443 where the court stated that the essential question is whether the company's financial position is such that it can continue in business and still pay its way. The court cited with approval *Quick v Stoland Pty Ltd* (1998) 29 ACSR 130 (FCA) where it had been held that it is relevant to consider the following factors in determining whether the company is solvent at a given time:

- (1) all of the company's debts as at that time in order to determine when those debts were due and payable;
- (2) all of the assets of the company as at that time in order to determine the extent to which those assets were liquid or were realisable within a timeframe that would allow each of the debts to be paid as and when it became payable;
- (3) the company's business as at that time in order to determine its expected net cash flow from the business by deducting from projected future sales the cash expenses which would be necessary to generate those sales; and
- (4) arrangements between the company and prospective lenders, such as its bankers and shareholders, in order to determine whether any shortfall in liquid and realisable assets and cash flow could be made up by borrowings which would be repayable at a time later than the debts.

The court must also take into account an element of futurity in the determination of insolvency. In other words, not only the company's existing debts would be considered. Debts which will fall due in the near future and the likely availability of funds to meet those debts have to be taken into account as well.<sup>4</sup> Section 205(b) confirms that in the context of the Pt 5 solvency test, it is necessary to take into account debts that would fall due in the next 12 months (and in the case where it is intended that the company would be wound up within 12 months, it is necessary to consider all of the company's debts, as the company must be able to pay

<sup>4</sup> *Lau Siu Hung v Man Kwai Fong* (above) at paras 20–23.

all its debts in full within the time specified in para (b)(i)). Contingent and prospective liabilities need to be taken into account: see s 206(2)(b).

#### 206. Solvency statement

- (1) A solvency statement in relation to a transaction is a statement that each of the directors making it has formed the opinion that the company satisfies the solvency test in relation to the transaction.
- (2) In forming an opinion for the purpose of making a solvency statement, a director must—
  - (a) inquire into the company's state of affairs and prospects; and
  - (b) take into account all the liabilities of the company (including contingent and prospective liabilities).
- (3) A solvency statement—
  - (a) must be in the specified form;
  - (b) must state—
    - (i) the date on which it is made; and
    - (ii) the name of each director making it; and
  - (c) must be signed by each director making it.
- (4) Subsection (3)(a) does not apply to a solvency statement made for the purposes of the giving of financial assistance by a company under Subdivision 4 of Division 5.

#### History

This section is derived from s 47F(1), (2) of the former Companies Ordinance (Cap 32).

For the equivalent provisions in the UK, see Companies Act 2006 s 643.

#### Overview

The provisions in Pt 5 which utilise the solvency test require the directors to make a solvency statement where the directors are satisfied that the solvency test is satisfied: see s 216 (reduction of capital), s 259 (redemption or buy-back of shares out of capital) and ss 283 to 285 (financial assistance for acquisition of shares). Under ss 216 and 259, all the directors of the company must make the solvency statement, while under ss 283 to 285, it is sufficient that the solvency statement be made by the directors who voted in favour of the relevant board resolution approving of the giving of the financial assistance.

As to the solvency test, see s 205 and the notes thereto.

#### Contingent and prospective liabilities

A contingent liability is a liability which, pursuant to an existing obligation, would arise upon the happening of a certain event.<sup>5</sup> Prospective

<sup>5</sup> See *Re William Hockley Ltd* [1962] 2 All ER 111.

**Part 7**  
**Debentures**  
**Division 1**  
**Preliminary**

**307. Interpretation**

**In this Part—**

*branch register* (登記支冊) means a branch register kept under section 312;

*debenture* (債權證), in relation to a company—

(a) includes bonds and any other debt securities of the company, whether or not constituting a charge on the assets of the company; and

(b) except in sections 308, 311(2)(a), 312 and 331(1)(a) and Divisions 3 and 4, includes debenture stock;

*register of debenture holders* (債權證持有人登記冊) means a register kept under section 308.

**History**

This section is new. The definition of ‘debenture’ in para (a) is an amended restatement of the definition in s 2(1) of the former Companies Ordinance (Cap 32).

For equivalent provisions for definition of debenture:

1. UK: Companies Act 2006, s 738;
2. Australia: Corporations Act 2001, s 9;
3. Singapore: Companies Act (Chapter 50), s 4 (and for ‘branch register’).

**Overview**

Debentures were not given a separate Part under the former Companies Ordinance (Cap 32), but were generally treated together with shares, save for a specific Division under the heading Special Provisions as to Debentures for ss 74A to 78 dealing with a company’s register and meetings of debenture holders, etc. It was unsatisfactory that some provisions dealt with both shares and debentures (e.g. ss 66, 69, 70 and 99 of the former Companies Ordinance) and not user-friendly as a reader might be interested only in debentures. To improve clarity, all substantive requirements about debentures are now grouped under Part 7.<sup>1</sup>

This provision provides Interpretation for Part 7 on Debentures. Note that ‘debenture’ generally includes debenture stock, except in the provisions mentioned in para (b).

For transitional and saving provisions see Cap 622 Schedule 11 Part 7.

<sup>1</sup> See Draft Companies Bill Second Phase Consultation Paper, May 2010, Part 7 Para 11.

## Division 2

### Register of Debenture Holders

#### 308. Register of debenture holders

- (1) If a company issues a series of debentures, or any debenture stock, that are not transferable by delivery, the company must keep in the English or Chinese language a register of the holders of the debentures or debenture stock.
- (2) A company must enter in the register of debenture holders—
  - (a) the name and address of each holder of debentures or debenture stock;
  - (b) the amount of debentures or debenture stock held by each holder;
  - (c) the date on which each person is entered in the register as a holder of debentures or debenture stock; and
  - (d) the date on which any person ceases to be a holder of debentures or debenture stock.
- (3) If a company contravenes subsection (1) or (2), the company, and every responsible person of the company, commit an offence, and each is liable to a fine at level 4 and, in the case of a continuing offence, to a further fine of \$700 for each day during which the offence continues.

#### History

This section is derived from s 74A(1) and (4) of the former Companies Ordinance (Cap 32).

For equivalent provisions:

1. UK: Companies Act 2006, s 743;
2. Australia: Corporations Act 2001, ss 168(1), 171;
3. Singapore: Companies Act (Chapter 50), s 93.

#### Overview

The requirement to keep a register of debenture holders or the holders of debenture stock only applies when a company issues a series of debentures or debenture stock that are not transferable by delivery.

Section 74A of the former Companies Ordinance (Cap 32) was added in 1984, following a recommendation in the Second Report Company Law 1973 of the Companies Law Revision Committee at para 3.82. A register makes it possible for holders with identical rights to organize joint action in the same way that shareholders can be organized.

On contravention for 'responsible person', see s 3. A level 4 fine is HK\$0 to HK\$25,000: see Criminal Procedure Ordinance (Cap 221), s 113B and Schd 8.

The register of holders of debentures kept under s 74A of the former Companies Ordinance (Cap 32) is to be regarded as a register of debenture holders kept under this section: Cap 622 Schedule 11 Part 7 s 50.

#### 309. Place where register must be kept

- (1) A company must keep its register of debenture holders at—
  - (a) the company's registered office; or
  - (b) a place prescribed by regulations made under section 657.
- (2) A company must notify the Registrar of the place at which the register of debenture holders is kept. The notice must be in the specified form and delivered to the Registrar for registration within 15 days after the register is first kept at that place.
- (3) A company must notify the Registrar of any change (other than a change of the address of the company's registered office) in the place at which the register of debenture holders is kept. The notice must be in the specified form and delivered to the Registrar for registration within 15 days after the change.
- (4) Subsection (2) does not require a company to notify the Registrar of the place at which the register of debenture holders is kept—
  - (a) if, in the case of a register that came into existence on or after the commencement date of this Division, it has at all times been kept at the company's registered office; or
  - (b) if—
    - (i) immediately before that commencement date, the company kept a register for the purposes of section 74A of the predecessor Ordinance; and
    - (ii) on and after that commencement date, that register is kept as a register of debenture holders for the purposes of section 308(1) at the place at which it was kept immediately before that commencement date.
- (5) If a company contravenes subsection (1), (2) or (3), the company, and every responsible person of the company, commit an offence, and each is liable to a fine at level 4 and, in the case of a continuing offence, to a further fine of \$700 for each day during which the offence continues.

#### History

This section is derived from s 74A(2), (3) and (4) of the former Companies Ordinance (Cap 32).

For equivalent provisions:

1. UK: Companies Act 2006, s 743;
2. Australia: Corporations Act 2001, s 172;
3. Singapore: Companies Act (Chapter 50), s 93.

**Overview**

This section provides for the location of the register of debenture holders and notification to the Registrar of Companies of that location or any change of location. Notice of location or change of location must be in the specified form, which is NR 2.

As to 'a place prescribed by regulations made under s 657', see Company Records (Inspection and Provision of Copies) Regulation (Cap 622I), s 3 ('a place in Hong Kong').

As to contravention, for 'responsible person', see s 3. A level 4 fine is HK\$0 to HK\$25,000.

For transitional and saving provisions, see Cap 622 Schedule 11 Part 7 s 51.

**310. Right to inspect and request copy**

- (1) A member of a company is entitled, on request made in the prescribed manner and without charge, to inspect the register of debenture holders of the company in accordance with regulations made under section 657.
- (2) A person who is registered in the register as a debenture holder of the company is entitled, on request made in the prescribed manner and without charge, to inspect the register in accordance with regulations made under section 657.
- (3) Any other person is entitled, on request made in the prescribed manner and on payment of a prescribed fee, to inspect the register in accordance with regulations made under section 657.
- (4) A person is entitled, on request and on payment of a prescribed fee, to be provided with a copy of the register of debenture holders of a company, or any part of it, in accordance with regulations made under section 657.
- (5) A debenture holder of a company or the trustee for all debenture holders of a company is entitled, on request and on payment of a prescribed fee, to be provided with a copy of any trust deed or any other document securing the issue of the debentures in accordance with regulations made under section 657.
- (6) In this section—  
*prescribed* (訂明) means prescribed by regulations made under section 657.

**History**

This section is derived from s 75 of the former Companies Ordinance (Cap 32).

For equivalent provisions:

1. UK: Companies Act 2006, ss 744, 745;

2. Australia: Corporations Act 2001, s 173;
3. Singapore: Companies Act (Chapter 50), s 93(5) and (6).

**Overview**

Section 310 ensures the right to inspect and to obtain copies of the register of debenture holders. Registered debenture holders and shareholders are entitled to inspect without paying a fee, whereas other persons are required to pay a prescribed fee of \$50. There is a maximum fee for copies of the register and a company is required to respond to a request for copies within 10 days.<sup>2</sup> The section also entitles a debenture holder or the trustee for all debenture holders on request and on payment of the prescribed fee to a copy of the trust deed and any other document for securing the issue of the debenture. Under s 351(3), a company which has issued uniform debentures containing a charge required to be registered under Part 8 is required to keep a copy of one of the debentures.

For regulations made under s 657, see Company Records (Inspection and Provision of Copies) Regulation (Cap 622I) and, in particular, s 7 thereof, whereby a company must make its company records available for inspection, by any person entitled to inspect those records, during business hours for at least 2 hours per day.

For transitional and saving provisions see Cap 622 Schedule 11 Part 7 ss 52 to 54.

**311. Power to close register of debenture holders**

- (1) A company may, on giving notice in accordance with subsection (2), close its register of debenture holders, or any part of it, for any period or periods not exceeding in the whole 30 days in each year.
- (2) A notice for the purposes of subsection (1)—
  - (a) in the case of a company having any of the debentures or debenture stock mentioned in section 308(1) listed on a recognized stock market, must be given—
    - (i) in accordance with the listing rules applicable to the stock market; or
    - (ii) by advertisement in a newspaper circulating generally in Hong Kong; and
  - (b) in the case of any other company, must be given by advertisement in a newspaper circulating generally in Hong Kong.
- (3) The period of 30 days mentioned in subsection (1) may be extended in respect of any year by a resolution passed in that year by a majority in value of the debenture holders present in person or, if proxies are permitted, by proxy at a meeting summoned for

<sup>2</sup> For fees, see the Regulation referred to below, s 6.