Company Law (Winding Up and Miscellaneous Provisions) Handbook

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(excluding any part of it which carries no right to participate beyond a specified amount in a distribution of either profits or capital); or

(b) the first-mentioned company is a subsidiary of any company which is that other company's subsidiary. *(Added 80 of 1974 s. 2)*

(5) For the purposes of subsection (4), the composition of a company's board of directors shall be deemed to be controlled by another company if that other company by the exercise of some power exercisable by it, without the consent of any other person, can appoint or remove all or a majority of the directors, and, for the purposes of this provision, that other company shall be deemed to have power to make such an appointment if— *(Amended 12 of 2005 s. 2)*

(a) a person cannot be appointed as a director without the exercise in his favour by that other company of such a power; or

(b) a person's appointment as a director follows necessarily from his being a director or other officer of that other company. *(Added 80 of 1974 s. 2)*

(6) In determining whether one company is a subsidiary of another company—

(a) any shares held or power exercisable by that other company in a fiduciary capacity shall be treated as not held or exercisable by it;

(b) subject to paragraphs (c) and (d), any shares held or power exercisable—

(i) by any person as a nominee for that other company (except where that other company is concerned only in a fiduciary capacity); or

(ii) by, or by a nominee for, a subsidiary of that other company, not being a subsidiary which is concerned only in a fiduciary capacity,

shall be treated as held or exercisable by that other company;

(c) any shares held or power exercisable by any person by virtue of the provisions of any debentures of the first-mentioned company or of a trust deed for securing any issue of such debentures shall be disregarded; and

(d) any shares held or power exercisable by, or by a

[2.03] The task of interpretation

The task of interpretation of the meaning of legal terms is one of the most basic of legal skills. This task is not facilitated by the manner in which the interpretation provisions of the Ordinance are organised, largely due to the manner in which the Ordinance has been amended over the years. Although s 2 provides a basic 'dictionary' for the interpretation of the Companies Ordinance, there are also many other definition provisions found elsewhere in the Ordinance. Some of these are referred to in the s 2 definition of particular terms: eg the definition of 'contributory' found in s 171.

However, many definitions are not found or even referred to in s 2, such as the definition of 'receiver and manager' found in s 302A; and the definitions of 'joint stock company' in s 311 and of 'unregistered company' found in s 326. Also see the definitions found in s 79A.

It should also be noted that some terms used in the Ordinance are not defined directly, so that reference must be made to the common law for an understanding of the meaning of the term used; a good example is the term 'creditor'. Because many Hong Kong Ordinance provisions and expressions have close parallels in other jurisdictions, this interpretative problem is much less significant than it might otherwise be.

However, some expressions are not defined at all in s 2; for example, the term 'creditor'. With regard to such expressions one will need to look to the common law for their meanings.

Finally, in approaching the task of interpreting of the Ordinance, the courts may resort to a number of different approaches, such as a literalist approach or a purposive approach. A more purposive approach will be adopted where the legislation is clearly seen to be remedial in character, such as the new disqualification of directors provisions introduced in 1994 as Pt IVA. It should also be noted that judges will be inclined to interpret the same words differently depending upon the consequences which flow from a breach or a contravention of a provision. Where a breach of a provision carries with it a criminal penalty, judges are likely to read the section more strictly than they would if it only involved a civil remedy: see further, *Briginshaw v Briginshaw* (1938) 60 CLR 336. Courts may also be influenced by the statements or interpretations made by regulatory bodies. Although such statements or interpretations are not legally binding, they do constitute an opinion of the law given by an agency which has considerable experience of the operation of the legislation: see for an example of this, the views expressed by Sheppard J in *Re Bond Corp Holdings Ltd v Grace Bros Holdings Ltd* (1983) 1 ACLC 1009, at 1030.

2A. Registrar to specify forms

(1) The Registrar may specify a form, for use in relation to any purpose of this Ordinance—

(a) unless it is provided otherwise in this Ordinance; or

to any purpose of this Ordinance.

(2) A form specified under subsection (1) for use in relation to a purpose may contain a requirement for the provision of any particulars ancillary or incidental to that purpose.

(3) Despite subsection (1), the Official Receiver may not specify a form for use in relation to a purpose if—

(a) this Ordinance provides otherwise;

(b) this Ordinance requires, or provides for, the use of a prescribed form (whether or not a form is prescribed) for that purpose; or

(c) a form is prescribed for that purpose.

(4) In exercising, as regards any purpose of this Ordinance, the power conferred under subsection (1), the Official Receiver may, if the Official Receiver thinks fit, specify more than one form to be used in relation to that purpose, whether as alternatives or to provide for different circumstances.

(5) In subsection (3)—

prescribed (訂明) means prescribed by—

(a) general rules;

(b) regulations made under section 168S(2); or

(c) regulations made under section 359A.

(Added 22 of 2023 s. 18)

[2AB.01] History

Section 2AB was added by the Bankruptcy and Companies Legislation (Miscellaneous Amendments) Ordinance (22 of 2023), effective 29 December 2023: see LN 146 of 2023.

[2AB.02] Overview

This section empowers the Official Receiver (OR) to specify forms for use for any purpose of this Ordinance. The power to specify forms was conferred on the OR in 2023 as part of the amendments made to Cap 32 (see ss 2AC and 2AD) to enable the introduction of the Official Receiver's Office (ORO)'s Electronic Submission System (ESS) for submission of forms to the ORO in company liquidations by electronic means.

The OR's power to specify forms does not extend to a purpose where a form is prescribed under the Ordinance for that purpose, or the Ordinance requires or provides for the use of a prescribed form for that purpose: sub-s (3). Note the definition of 'prescribed' in sub-s (5) which applies for the purpose of this section

[37.03] Prospectus defined

A prospectus is defined in s 2(1) to mean a prospectus, notice, circular, brochure or other document which: (1) offers shares or debentures in a company to the public; or (2) which is calculated to invite offers by the public to subscribe for or to purchase any shares or debentures of the company. However, it should be noted that the definition provides for consideration to be paid either by way of cash or in some other way. The definition of a prospectus set out in s 2(1)(a) is circular and open-ended as it states that a prospectus is 'any prospectus, notice, circular, brochure, advertisement, or other document ...'. This suggests that the definition may be somewhat broader in scope than the words of the definition would suggest by the use of the term 'means'. Also, it may be noted that s 41(1) deems as a prospectus certain documents relating to the allotment of shares in or debentures of the company. Section 2(1)(b) does, however, specifically excludes publications falling within s 38B(2) — advertisements concerning prospectus — and the 12 offers specified in Pt 1 of the Seventeenth Schedule, namely:

(1) offers to professional investors;

(2) offers to not more than 50 persons;

(3) offers in respect of which the total amount of consideration for the shares or debentures does not exceed $5 million; such offers are termed 'small scale offers';

(4) offers in respect of which the denomination of the shares, or consideration payable for the shares, or the principal amount of the debentures to be subscribed or purchased, is a minimum of HK$0.5 million (or equivalent in another currency); such offers are termed 'minimum consideration / denomination offers';

(5) offers in connection with an invitation made in good faith to enter into an underwriting agreement;

(6) offers in connection with takeovers or mergers or share repurchases made in compliance with the relevant codes;

(7) offers of shares made for no consideration to existing shareholders, or as an alternative to dividend to all or to a class of shareholders — such shares must be fully paid up and of the same class;

(8) offers of shares or debentures to 'qualifying persons' of the company concerned, or another company which is a member of the same group, by:

   (a) the company concerned;

   (b) another company within the group; or

   (c) trustees of a trust established for the benefit of any one or more companies within the same group which holds the shares or debentures being offered.

   A 'qualifying person' is defined as a present or former director, employee, or consultant, or former director, and includes their dependants. It also includes a trustee of a trust established by the company or another company within the same group which can

38. Specific requirements as to particulars in prospectus

(1) Subject to the provisions of section 38A, every prospectus issued by or on behalf of a company must either be in the English language and contain a Chinese translation or be in the Chinese language and contain an English translation, and must state the matters specified in Part I of the Third Schedule and set out the reports specified in Part II of that Schedule, and the said Parts I and II shall have effect subject to the provisions contained in Part III of the said Schedule. *(Replaced 78 of 1972 s. 5. Amended 83 of 1995 s. 5)*

(1A) Every prospectus to which subsection (1) applies must contain a statement specified in Part 1 of the Eighteenth Schedule. *(Added 78 of 1972 s. 5. Amended 83 of 1999 s. 5; 23 of 2004 s. 56; 30 of 2004 s. 2)*

(1B) If any prospectus is issued which does not comply with or contravenes the requirements of subsections (1) and (1A), the company and every person who is knowingly a party to the issue thereof shall be liable to a fine. *(Added 78 of 1972 s. 5. Amended 7 of 1990 s. 2)*

(2) A condition requiring or binding an applicant for shares in or debentures of a company to waive compliance with any requirement of this section, or purporting to affect him with notice of any contract, document, or matter not specifically referred to in the prospectus, shall be void.

(3) Subject to the provisions of section 38A, it shall not be lawful to issue any form of application for shares in or debentures of a company unless the form is issued with a prospectus which complies with the requirements of this section: *(Amended 78 of 1972 s. 5)*

Provided that this subsection shall not apply if it is shown that the form of application was issued– *(Amended 30 of 2004 s. 2)*

(a) in connexion with a bona fide invitation to a person to enter into an underwriting agreement with respect to the shares or debentures;

(b) in relation to shares or debentures which were not offered to the public; or

(c) in connexion with an offer specified in Part 1 of the Seventeenth Schedule as read with the other Parts of that Schedule. *(Added 30 of 2004 s. 2)*

If any person acts in contravention of the provisions of this subsection, he shall be liable to a fine. *(Amended 6 of 1984 s.*

[38C.03] Offence

Where a prospectus is issued in breach of the prohibition in s 38C, any person who is knowingly a party to the issue will be liable to a level 6 fine, punishable summarily.

[38C.04] Liability of expert for mis-statements

It should be noted that criminal liability under s 40A for untrue statements in a prospectus will not apply to an expert merely because the expert authorised the inclusion of an expert statement in a prospectus: s 40A(2). However, experts whose statements are incorporated in the prospectus will incur civil liability for any untrue statements made by them as an expert: s 40(1).

38D. Registration of prospectus

(1) No prospectus shall be issued by or on behalf of a company unless the prospectus complies with the requirements of this Ordinance and, on or before the date of its publication, its registration has been authorized under this section and a copy thereof has been registered by the Registrar.

(2) Every prospectus shall—

(a) on the face of it, state that a copy has been registered as required by this section and immediately after such statement—

(i) state that neither the Commission nor the Registrar takes any responsibility as to the contents of the prospectus;

(ii) where the prospectus is or is to be authorized for issue by a recognized exchange company pursuant to a transfer order made under section 25 of the Securities and Futures Ordinance (Cap 571), state that neither the Commission nor the recognized exchange company nor the Registrar takes any responsibility as to the contents of the prospectus; or

(iii) where the prospectus is or is to be authorized for issue by a recognized exchange controller pursuant to a transfer order made under section 68 of that Ordinance, state that neither the Commission nor the recognized exchange controller nor the Registrar takes any

a written statement signed by those persons setting out the adjustments and giving the reasons therefor.

(4) The references in subsection 3(b)(i) to the copy of a contract required thereby to be endorsed on or attached to a copy of the prospectus shall, in the case of a contract wholly or partly in a language other than English or Chinese, be taken as references to a copy of a translation of the contract in either language or a copy embodying a translation in English or Chinese of the parts not in either language, as the case may be, being a translation certified in the prescribed manner under subsection (10) to be a correct translation. *(Amended 83 of 1995 s. 7; 30 of 2004 s. 2)*

(5) The Commission may—

(a) authorize the registration by the Registrar, of a prospectus to which this section applies and where the Commission so authorizes, the Commission shall issue a certificate—

(i) certifying that the Commission has done so; and

(ii) specifying the documents which are required to be endorsed on or attached to the copy of the prospectus to be registered; or

(b) refuse to authorize such registration.

(6) The Commission shall not authorize the registration of a prospectus which relates to an intended company.

(7) The Registrar—

(a) shall not register a prospectus under this section unless—

(i) it is dated and the copy thereof to be registered has been signed in the manner required by this section;

(ii) it is accompanied by a certificate issued under subsection (5);

(iii) it has endorsed thereon or attached thereto all the documents specified in the certificate issued under subsection (5); *(Amended 28 of 2012 ss. 912 & 920)*

(iv) it conforms with such requirements as are prescribed by the Chief Executive in Council

Commission under this section.

(10) A translation mentioned in subsection (4) shall be—

(a) certified by the person making the translation as a correct translation; and

(b) deemed to be certified in the prescribed manner if the person making the translation has been certified, by the appropriate person mentioned in subparagraph (i) or (ii), as a person believed by that appropriate person to be competent to translate it into the English or Chinese language, as the case may be, that is to say—

(i) if the translation be made outside Hong Kong—

(A) a notary public in the place where the translation is made;

(B) such other person as may be specified by the Commission; or

(C) such other person belonging to a class of persons specified by the Commission, by notice published in the Gazette, for the purposes of this paragraph;

(ii) if the translation be made in Hong Kong—

(A) a notary public in the place where the translation is made;

(B) a solicitor of the High Court of Hong Kong;

(C) such other person as may be specified by the Commission; or

(D) such other person belonging to a class of persons specified by the Commission, by notice published in the Gazette, for the purposes of this paragraph. *(Added 30 of 2004 s. 2)*

(11) A notice published under subsection (10)(b)(i)(C) or (ii)(D) is not subsidiary legislation. *(Added 30 of 2004 s. 2)*

(Replaced 86 of 1992 s. 5)

[38D.01] History

Section 38D was replaced in 1992: see Eighth Report of the Standing Committee on Company Law Reform, 1991, at pp 26–28 and the Ninth Report of the Standing Committee on Company Law Reform, 1992, at pp 13–17. Subsections (2)(c) and

[38D.04] Application for authorisation

The application to the Commission for the issue of a certificate of authorisation of the registration of a prospectus must be made in writing and be delivered to the Commission together with a copy of the prospectus which is to be registered. The prospectus must be signed by the person who is named therein as a director or as a proposed director of the company; alternatively, it may be signed by his agent who is authorised in writing. The prospectus must also have attached to it any consent to the issue of the prospectus as required by s 38C.

Where the prospectus is to be issued generally, s 38D(3)(b)(i) requires that there be attached to the prospectus a copy of any contract (or, if it is an unwritten contract, a memorandum summarising its terms) as required by para 17 of the Third Schedule. If the prospectus is offering shares in the company for sale to the public, it will be necessary to provide a list of the names and addresses and a description of the vendor or vendors of these shares. Where the contract is in a language other than English or Chinese, a certified translation of the contract in either language must be attached: s 38D(4).

Where an accountant's report has been made under para 42 of the Third Schedule in which reference is made to various adjustments, it will also be necessary to provide a written statement setting out the adjustments and giving the reasons for these adjustments. See further the Ninth Report of the Standing Committee on Company Law Reform (1992, Hong Kong), at pp 5–17.

[38D.05] Refusal of registration

The Commission is empowered by s 38D(5)(b) to refuse to authorise the registration of a prospectus. The Registrar is also required not to register a prospectus under s 38D unless:

(1) it is dated and a copy has been signed as required by the section;
(2) the prospectus is accompanied by a certificate issued under s 38D(5);
(3) it has endorsed upon it, or has attached to it, all of the documents which are specified in the certificate issued under s 38D(5); and
(4) it conforms to the prospectus requirements which are prescribed by the Chief Executive in Council or which are specified by the Registrar under s 346.

If each of these matters are complied with, the Registrar is obliged to register the prospectus: s 38D(7)(b). It has been said that these provisions seem to have been enacted pursuant to the recommendations contained in the First Report of the Companies Law Revision Committee relating to para 252 of the report of the Jenkins Committee. As these Jenkins Committee recommendations were not implemented in the United Kingdom, there is no equivalent to ss 38D(5) and (7) in English companies legislation: Fourth Report, Standing Committee on Company Law Reform (1987, Hong Kong), at pp 22–23. The Commission is required not to authorise the registration of a prospectus which relates to an intended company: s 38D(6).

On intended company cf UK where until quite recently the companies legislation

prospectus, or class of prospectuses, which may be amended under subsection (1).

(3) If any company contravenes subsection (1), the company and every officer of the company who is in default shall be liable to a fine.

(4) For the avoidance of doubt, it is hereby declared that this section and Part 1 of the Twentieth Schedule do not apply to a prospectus to which section 39B applies. *(Added 30 of 2004 s. 2)*

[39A.01] History

This section was added in 2004.

[39A.02] Overview

Section 39A concerns amendment of a prospectus which consists of one document, as opposed to a prospectus comprising a programme prospectus and an issue prospectus (see s 39B) and permits amendments which are in accordance with Pt 1 of the Twentieth Schedule. This schedule permits amendment to a prospectus by an addendum or by a replacement prospectus, and amendment to an addendum to a prospectus by a further addendum, replacement of the addendum or replacement of the addendum and prospectus with a new prospectus. Any such amendment is a prospectus and the provisions of the Ordinance apply to the amendment. Any addendum must also be read with the prospectus to which it relates. Presently, the requirements applying to prospectuses issued by Hong Kong and non-Hong Kong companies are the same (see Pts 1 and 2 of the Twentieth Schedule).

[39A.03] Offence

If any company contravenes this provision, the company and every officer of the company who is in default is liable to summary prosecution and a level 6 fine: s 39A(3).

39B. Prospectus may consist of more than one document, etc.

(1) A prospectus to which the provisions of this Part are applicable may consist of more than one document in accordance with the provisions of Part 1 of the Twenty-first Schedule.

(2) A prospectus to which subsection (1) applies may only be amended in accordance with the provisions of Part 1 of the Twenty-first Schedule.

Subdivision 4—Commencement of Winding Up

(Replaced 14 of 2016 s. 27)

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 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: see: r 36(1)(c) (and the meaning of 'specified means' in s 2C and Sch 27). On gazetting (publication by the specified means), see rr 202, 203 and Forms 103 and 104.

For the form of the notice, see Form 103(1) in the Forms in the Appendix to the CWUR. The former requirement for advertisement of the notice in a local newspaper (former r 36(1)(d)) has been repealed: see the commentary to s 2C (at **[102]**).

Gazetting and registration in the Companies Registry of the winding-up order do not give deemed notice of the winding-up to a third party: see *Official Custodian for Charities v Parway Estates Developments Ltd (in liq)* [1985] Ch 151 (CA, Eng) (company's landlord held not to have waived right to forfeit lease, the terms of which included the usual right of re-entry on the tenant going into liquidation when the landlord accepted rent in ignorance of winding-up order being made).

For costs, see **[180.09]**. For appeals, see **[180.10]**.

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186. Actions stayed on winding-up order

(1) When a winding-up order has been made, or a provisional liquidator has been appointed, no action or proceeding shall be proceeded with or commenced against the company except by leave of the court, and subject to such terms as the court may impose. *(Amended 6 of 2024 s. 126)*

(2) If any action or proceeding relates to a case concerning national security (within the meaning of section 3(2) of the Safeguarding National Security Ordinance (6 of 2024)), subsection (1) does not prevent the action or proceeding from being proceeded with or commenced against the company. *(Added 6 of 2024 s. 126)*

[cf 1929 c 23 s 177 UK]

[186.01] History

The section is derived from s 177 of the Companies Act 1929 (UK) (1948 Act, s 231).

Re Keen Lloyd Resources Ltd [2004] HKCU 604 (unreported, HCCW 1134/2002, 20 June 2003) (CFI) and see *Re Forefront International Ltd* [2005] HKCU 139 (unreported, HCCW 622/2004, 27 January 2005) (CFI) and [2005] HKCU 194 (unreported, HCCW 622/2004, 4 February 2005) (CFI); *FCA v Carillian plc* [2021] EWHC 2571 (Ch).

No leave is required to raise a set-off: *Mersey Steel & Iron Co v Naylor Benzon & Co* (1882) 9 QBD 648 (CA, Eng). Leave is required to raise a counterclaim for a larger amount than that claimed: *Langley Constructions (Brixham) Ltd v Wells* [1969] 2 All ER 46 (CA, Eng).

On the *locus standi* of a person proceeding without leave, see *Daemar v Opeskin* (1985) 10 ACLR 67 (SC, NSW).

A summons for leave under s 186 was held not to be a 'proceeding' within the terms of a deed of compromise in *Trident Investment Co Ltd v Axona International Credit & Commerce Ltd* [1985] HKLR 94, [1985] HKCU 11 (CA), reversing Jones J in *Re Axona International Credit & Commerce Ltd* [1985] 2 HKC 675 (CFI). Leave is required to claim a payment in where the claim is admitted by the liquidators: *Re Precast Piling and Engineering Co Ltd* [2005] 2 HKC 10, [2005] HKLRD (Yrbk) 135 (CFI).

[186.04] Application for leave

Leave is sought by an application to a master in chambers (see Practice Direction 3.1 Part II para 1.1(a)) by summons in the winding-up proceedings: see CWUR, r 7(2) and Form 1 in the Forms in the Appendix to the Rules. For precedents, see 9(3) *Atkin's Court Forms* (2nd Edn, 2006) Forms 150–152.

A draft of the proposed statement of claim, etc should be exhibited to the affidavit or affirmation supporting the summons.

The nature of the applicant's claim must be stated with the same particularity as a statement of claim: *Trident Investment Co Ltd v Axona International Credit & Commerce Ltd* [1985] HKLR 94, [1985] HKCU 11 (CA). Copies of documents filed at court in winding-up proceedings should be served on the Official Receiver within 24 hours of filing: r 23A. The Official Receiver should be heard on the application before the court exercises its discretion.

Where a provisional liquidator has been appointed the company is entitled to be represented at the hearing of the application under s 186: *Re Perak Pioneer Ltd (No 3)* [1984] HKC 505 (CFI).

[186.05] Leave of the court

The test as to the exercise of the court's discretion whether or not to grant leave is what is fair and right in the circumstances: *Re Aro Co Ltd* [1980] 1 Ch 196 (CA, Eng); *New Cap Reinsurance Corp Ltd v HIH Casualty and General Insurance Ltd* [2002] 2 BCLC 228 (CA, Eng). If the issues can be conveniently dealt with within the winding-up proceedings leave will usually be refused. If there are substantial issues of fact in dispute which may be best dealt with in separate proceedings rather than in the liquidation leave will usually be granted: *Re*

on the joint petition of a creditor and of a contributory.

[cf 1929 c 23 s 178 UK]

[187.01] History

The section is derived from s 178 of the Companies Act 1929 (UK) (1948 Act, s 222).

For equivalent sections, see the Insolvency Act 1986 (UK), s 130(4); Corporations Act 2001 (Aust), s 471; Companies Act (Cap 50) (Sing), s 262(4).

[187.02] Overview

A winding-up order operates in favour of all the creditors and contributories of the company being wound up as if made on the joint petition of a creditor and a contributory. The provision is derived from the practice of the Court of Chancery under a decree of administration: *Harrison v Kirk* [1904] AC 1 (HL) at 5.

As a general rule, the Court has jurisdiction to rescind a winding-up only up until the time it is perfected (sealed). Therefore, neither the Companies Ordinance nor the CWUR make provision for rescission: *Re Asean Interests Ltd* [2001] 2 HKLRD 906, [2001] HKCU 412 (CFI). The Court will have regard to any new evidence which was not before the Court on the making of the winding-up order, on hearing such applications: *Re SY Engineering Co Ltd* [2000] 4 HKC 464 (CFI); on appeal [2002] HKCU 185 (unreported, CACV 1896/2001, 20 February 2002) (CA); *Re Grand Palace Ltd* [2008] HKCU 902 (unreported, CACV 356/2007, 30 May 2008) (CA).

This section confirms the class nature of winding-up proceedings: **[180.02]**.

For contributories, see ss 170–174. For creditors, see **[178.03], [178.04], [179.05]**.

Subdivision 6—Official Receiver and Liquidators

(Replaced 14 of 2016 s. 29)

188. *(Repealed 30 of 1999 s. 15)*

[188.01] General note

This former section provided a definition of the 'Official Receiver' by reference to the Official Receiver appointed under the Bankruptcy Ordinance. A definition is now included in s 2(1). 'Official Receiver' is defined in s 52 of the Bankruptcy Ordinance (Cap 6) as the Official Receiver appointed under s 75 of Cap 6. Section 75 deals with the appointment of the Official Receiver and any deputy official receiver. The appointment is by the Chief Executive of the Hong Kong Special

recognised cases should the offices of liquidator and receiver be combined in one person: and see **[3854]**; *Re A-One Investment Ltd* [2009] HKCU 1588 (unreported, HCCW 448/2008, 11 September 2009) (CFI); *Re Pan Sino International Holding Ltd* [2010] HKCU 1147 (unreported, HCCW 144/2009, 27 May 2010) (CFI). For the use of the same liquidator in a company group situation, see *Re Yiu Wing Construction Co Ltd* [2003] HKLRD (Yrbk) 193, [2002] HKCU 732 (CFI) (and see **[3853]**); *Re Keen Lloyd Resources Ltd* [2004] HKCU 731 (unreported, HCCW 434/2002, 15 June 2004) (CFI). And the court may override the nomination of the first meeting: see *Re Luen Cheong Tai Construction Co Ltd* (above); *Re Luen Wai Water & Drainage Works Ltd* [2003] HKLRD (Yrbk) 19, [2002] HKCU 732 (CFI). If a private liquidator has been appointed and a vacancy occurs, for example, if the appointed liquidator dies, the Official Receiver becomes the liquidator.

A private liquidator must be described, for example, for the purposes of any proceedings, by the style of the liquidator of the particular company in respect of which he is appointed and not by his individual name. Similarly, where the Official Receiver is the liquidator he must be described as Official Receiver and liquidator of the company in respect of which he is liquidator.

Where the Official Receiver is the liquidator of a company, he may apply to the court for the appointment of a person in his place: s 194(2); see *Re Founder Information (Hong Kong) Ltd* [2021] HKCU 540, [2021] HKCFI 311. Presumably the Official Receiver will nominate a replacement, having first obtained the views of the creditors or other interested persons: see *Re Five Oceans Supply Services Ltd* [2002] HKLRD (Yrbk) 167 (affirmed on appeal). For the power of the court to appoint a liquidator to fill a vacancy in the office of a liquidator appointed by the court see s 196(3).

[194.03] Appointment of private liquidator

A private liquidator may be appointed by the court after a determination has been made at separate meetings of creditors and contributories. If the meetings chose different persons, or if they fail to meet or fail to pass a resolution the matter will be resolved by the court: see *Re Akai Holdings Ltd* [2001] 2 HKLRD 411, [2002] HKCU 1323 (CFI). In an insolvent liquidation the court will have regard to the wishes of the major creditors as against those of the contributories: s 287.

If there has been no provisional liquidator appointed prior to the making of the winding-up order, the Official Receiver will become the provisional liquidator on the making of the order: ss 194(1)(a) and (aa). In appropriate circumstances it may be more convenient to leave the Official Receiver to become liquidator pursuant to s 194(1)(d), but have the creditors' nominee appointed as special manager under s 216: *Re WF Fearman Ltd (No 2)* (1988) 4 BCC 141. If the Official Receiver is, by virtue of sub-s (1)(a), the provisional liquidator and he is of the opinion that the property of the company is not likely to exceed $200,000 he may appoint one or more persons as provisional liquidator in his place: sub-s (1A). For the tender scheme for outsourcing small liquidations to the private sector, see *Re Good Success Catering Group Ltd* [2005] HKCU 21 (unreported, HCCW 542/2002, 24 September 2004) (CFI); *Re Bondfield International Ltd & Anor* [2005] HKCU 1457 (unreported, HCCW 99/2002 and HCCW 711/2002, 20–23 October, 15 November 2003 and 27 January 2005) (CFI) at [10] et seq. For the powers of a provisional liquidator appointed under sub-s (1A), see s 199(5). Provisional

The liquidator or provisional liquidator must, as soon as practicable, send to each creditor mentioned in the statement of affairs or a supplementary affidavit in relation to that statement and each person appearing from the company's books or otherwise to be a contributory, a summary of the statement of affairs and any supplementary affidavit, including the causes of the company's failure, and any observations thereon which the provisional liquidator may think fit to make: r 111(1). This assumes that the statement of affairs has been submitted. The proceedings of the first meeting are not invalidated by reason of any such summary or any notice required by the rules not having been sent or received before the meeting: r 111(1).

Where the company has been in voluntary winding-up prior to the winding-up order, the Official Receiver may in his discretion send to the creditors and contributories or any of them an account of such voluntary winding-up: r 111(2). The first meetings will determine whether or not the applications mentioned above or either of them shall be made to the court and such other matters as appropriate.

The first meetings will determine whether or not the applications mentioned above or either of them shall be made to the court and such other matters as appropriate. The court may override the decision of the meeting: *Re Luen Cheong Tai Construction Co Ltd* [2002] HKCU 1354 (unreported, HCCW 190/2002, 14 November 2002) (CFI).

In the case of a first meeting of creditors or of an adjournment thereof a person shall not be entitled to vote as a creditor unless he has duly lodged with the liquidator not later than the time mentioned for that purpose in the notice convening the meeting or adjourned meeting a proof of the debt which he claims to be due to him from the company: r 124(1).

Where there is no committee of inspection appointed, the functions of such committee which devolve on the court by virtue of s 208 may be exercised by the Official Receiver: r 198. As soon as possible after the first meetings have been held, the Official Receiver, or the chairman of the meeting, shall report the result of each meeting to the court: r 45(1). The form of the report of result of the meeting is set out in Form 24. The form reports on the number attending and the amount of the creditors' claims admitted for voting or the contributories' shareholdings, the matters put to the meeting and the majorities carrying the resolute, set out in tabular form.

If each of the meetings passes the same resolution or the resolutions passed are identical in effect, as regards the appointment of a liquidator and otherwise, the provisional liquidator will apply to the court by summons in Form 1 for an order appointing the named liquidator and where so determined at the meetings the appointment of a committee of inspection comprising the named persons. But the court is not bound by the determinations of the meetings and has a wide discretion in making the appointment: *Re GTI Holdings Ltd* [2023] HKCU 314, [2023] HKCFI 176 at [90]–[93]; *Re Proman International Ltd* [2023] HKCU 4248, [2023] HKCFI 2628. Where there are differences between the resolutions and determinations the court will, on the application of the provisional liquidator, consider them and make such order as shall be necessary: r 45(2), see *Re Akai Holdings Ltd* [2001] 2 HKLRD 411, [2002] HKCU 1323 (CFI); *Re Kong Wah Holdings Ltd & Anor* [2002] HKLRD (Yrbk) 166, [2003] HKCU 169; *Re Luen Yick Water & Drainage Works Ltd* [2003] HKLRD (Yrbk) 192. The provisional

[195.07] Reform

The remarks in the previous paragraph and similar remarks in relation to other provisions in the Ordinance or Rules which do not provide any specific penalty for default indicate the need for some such provision as is contained in the UK Insolvency Rules r 7.20 (orders enforcing compliance with Rules) which specifically refers to the Insolvency Act 1986 (UK), s 143(2), the equivalent of paragraph (b) of s 195.

196. General provisions as to liquidators

(1) A liquidator appointed under section 194 may resign or, on cause shown, be removed by the court. *(Replaced 46 of 2000 s. 26; Amended 14 of 2016 s. 35(1))*

(1A) A provisional liquidator appointed under s 194(1A) shall be remunerated—

(a) in accordance with a scale of fees approved from time to time by the Official Receiver; or

(b) on such other basis as the Official Receiver approves in writing. *(Added 46 of 2000 s. 26)*

(1B) Subsection (2) applies to a provisional liquidator holding office by virtue of section 194(1)(aa) as it applies to a liquidator (other than the Official Receiver) and to avoid doubt, subsection (2) does not apply to determine the remuneration of the provisional liquidator in respect of the period before the making of the winding-up order. *(Added 14 of 2016 s. 35(2))*

(2) Subject to subsection (1A) where a person other than the Official Receiver is appointed liquidator, he shall receive such remuneration by way of percentage or otherwise as is determined— *(Amended 46 of 2000 s. 26)*

(a) where there is a committee of inspection, by agreement between the liquidator and the committee of inspection; or

(b) where there is no committee of inspection or the liquidator and the committee of inspection fail to agree, by the court,

and if two or more persons are appointed liquidators, their remuneration shall be distributed among them in such proportions as may be determined by the committee of inspection or the court, as the case may be. *(Replaced 25 of 1985 s. 3)*

(2A) If the Official Receiver is of the opinion that the remuneration

and sub-s (3) substituting one week for three weeks and sub-s (6) was added. The penalties were taken out of sub-ss (3), (5) and (6) and put in the Twelfth Schedule by the 1990 amendment. The reference to s 239A was deleted by the 2016 amendment upon the repeal of s 239A. Subsection (2) was replaced by the Bankruptcy and Companies Legislation (Miscellaneous Amendments) Ordinance (22 of 2023), effective 29 December 2023 (see LN 146 of 2023).

For an equivalent section under UKIA, see s 94. There is no equivalent under Aus CA or Sing CA.

[239.02] Overview

This section provides for the final meeting of the company and for the dissolution of the company: see *Integrated Marketing Communications Ltd v Registrar of Companies* [2015] 5 HKLRD 362, [2015] HKCU 2190 (CFI). For the power of the court to declare the dissolution void and as to the consequences of dissolution, see s 290. For notice of final general meeting, see *Palmer's Company Precedents* (17th Edn, Stevens & Sons Publisher, 1956) Pt II Form 772. The notice of the final meeting must be published in the Gazette: see sub-s (2) and s 2C and Sch 27 ('specified means').

On dissolution the company ceases to exist: *Re Yopsau Ltd* [2017] HKCU 2093 (unreported, HCMP 1260/2017, 16 August 2017) (CFI).

[239.03] Deferral of dissolution

For 'interested person' see *Eidens v Glass* [1996] HKLY 174. For the relevant considerations for deferral see *Kelso Enterprises Ltd v Liu Yiu Keung* [2007] 3 HKLRD 266 (CA) (but in that case the company had already been dissolved); *Re Fullbright Co Ltd* [2009] 2 HKLRD 584, [2009] HKCU 439 (CFI) (at para 19, same discretion as under s 248(4)). Also see s 248 (the equivalent provision applicable to creditors' voluntary winding-up).

[239.04] Dissolution

Since 1999 the Annual Departmental Report of the Companies Registry no longer has a breakdown of the number of dissolutions by various sections. The total number of dissolutions following liquidations each year is about 1,750: see Companies Registry's website www.cr.gov.hk/en/statistics (accessed as at May 2024) under Statistics Dissolution.

239A. ***(Repealed 14 of 2016 s. 70)***

(Added 6 of 1984 s. 169)
[cf 1948 c 38 s 291 UK]

For a members' voluntary winding up which converted to a creditors' voluntary winding-up under ss 237A and 237B, it is unnecessary for the meeting referred to in s 241 to be held, nor is there a need for s 242 to apply for appointment of the liquidator. The creditors' meeting under s 237A takes the place of the meeting under s 241, and the creditors have the opportunity of appointing a new liquidator under s 237A to replace the existing liquidator. Section 243A (restrictions on powers of liquidator nominated by the company under s 242) is also inapplicable as the existing liquidator in the voluntary winding-up should have full powers unless he is replaced by a liquidator appointed by the creditors under s 237A. Subsection (2) makes it clear that ss 241, 242 and 243A do not apply where the winding-up was converted to a creditors' winding-up under ss 237A and 237B.

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241. Meeting of creditors

(1) The company shall —

(a) cause a meeting of the creditors of the company to be summoned for a date not later than 14 days after the day on which there is to be held the meeting of the company at which the resolution for voluntary winding up is to be proposed; and

(b) cause notices of the meeting of creditors to be sent by post to the creditors at least 7 days before the day on which the meeting is to be held. *(Amended 14 of 2016 s. 73(1))*

(2) The company shall cause notice of the meeting of the creditors to be published by the specified means in Chinese and English. *(Replaced 6 of 1984 s. 170; Amended 22 of 2023)*

(3) The directors of the company shall–

(a) cause a full statement of the position of the company's affairs that complies with subsection (3A) to be laid before the meeting of creditors to be held as provided in subsection (1); and

(b) appoint one of their number to preside at the said meeting. *(Amended 14 of 2016 s. 73(2))*

(3A) The full statement of the position of the company's affairs must show—

(a) the particulars of the company's assets, debts and liabilities;

(b) the names of the company's creditors and the estimated amount of the claim of each of the creditors;

(c) the securities held by each of the creditors;

period for holding of the creditors' meeting and to provide a minimum notice period for the meeting. Subsection (3) was amendend and sub-s (3A) was added by No 14 of 2016 to set out the specific matters to be contained in the full statement of the company's affairs. Subsection (5) was amended by No 14 of 2016 such that it only applies if the company's meeting is adjourned to a date later than the creditors' meeting. Subsection (6) was amended by No 14 of 2016 to provide that an offence is only committed if the default was without reasonable excuse.

Subsection (2) was amended by the Bankruptcy and Companies Legislation (Miscellaneous Amendments) Ordinance (22 of 2023), effective 29 December 2023 (see LN 146 of 2023), to remove the requirement for advertisement of the notice of meeting in newspapers (see further the commentary to s 2C (at **[102]**)).

For equivalent sections, see UKIA, ss 98, 99; Aus CA, s 497; Sing CA, s 296.

[241.02] Overview

Prior to amendments made by No 14 of 2016, this section required the meeting of creditors to be summoned for the day or the day next following the day on which the members' meeting at which the resolution for voluntary winding-up is to be proposed: see *Re YK Engineering & Piling Ltd* [2004] HKLRD (Yrbk) 184. There was a potential problem with this provision in that if the meeting of the company was held with short notice (see Companies Ordinance (Cap 622), s 571(3)), then the notice given to creditors for the creditors' meeting may also be short. Accordingly the creditors may not have sufficient time to consider the information about the company and to assess their position and the need to nominate a liquidator. On the other hand, holding the company meeting at short notice may sometimes be necessary to immediately put the company into liquidation. Subsection (1) was therefore amended by No 14 of 2016 to provide for a longer period for the creditors' meeting to be held (within 14 days of the company's meeting) and to specify a minimum notice period of 7 days. To deal with the problem of 'Centrebinding', see new s 243A which restricts the powers of the liquidator nominated at the meeting of the company. For the background to the amendments, see FSTB, *Improvement of Corporate Insolvency Law Legislative Proposals – Consultation Document* (April 2013), paras 2.16 to 2.21.

The company must cause notice of the meeting of creditors to be published in the Gazette: see sub-s (2), and s 2C and Sch 27 ('specified means').

For the appointment of a liquidator, see s 242.

For non-compliance with sub-s (1), (2), (3) or (4), an offence is committed under sub-s (6). See also s 243A(4) and (5) as to the liquidator's powers to apply to the court for directions where there is non-compliance.

[241.03] Reform

Substantial changes to the previous law were made by the UK's Insolvency Act 1986 (UKIA), s 98. Under that section, the creditors' meeting may be held not later than the fourteenth day after the date for which the company meeting was summoned. This time gap permits more information to be put before the creditors' meeting than if it were to be held immediately after the company meeting or the

presumably relying on s 7(2) of the Interpretation and General Clauses Ordinance (Cap 1): 'words and expressions in the singular include the plural'. This is subject to a contrary intention appearing in the Ordinance, the provisions of which are being interpreted: Cap 1, s 2(1). It is suggested that the situation be spelled out in any amending legislation.

There is no provision in the section to cover the situation where no liquidator is appointed but see s 252(1) and cf s 114 of the Insolvency Act (UK).

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243. Appointment of committee of inspection

(1) The creditors at the meeting to be held in pursuance of section 237A or 241 or at any subsequent meeting, may, if they think fit, appoint a committee of inspection consisting of not less than 3, and not more than 7 persons, and if such a committee is appointed the company may, either at the meeting at which the resolution for voluntary winding up is passed or at any time subsequently in general meeting, appoint one or more persons that they think fit to act as members of the committee, but the number of persons appointed by the creditors and the company must not in total exceed 7: Provided that the creditors may, if they think fit, resolve that all or any of the persons so appointed by the company ought not to be members of the committee of inspection, and, if the creditors so resolve, the persons mentioned in the resolution shall not, unless the court otherwise directs, be qualified to act as members of the committee, and, on any application to the court under this provision the court may, if it thinks fit, appoint other persons to act as such members in place of the persons mentioned in the resolution. *(Amended 14 of 2016 s. 74(1), (2) & (3))*

(1A) However, a liquidator may apply to the court for an order to vary the minimum or maximum number of members mentioned in subsection (1) and the court may make an order that it thinks fit. *(Added 14 of 2016 s. 74(4))*

(2) Subject to the provisions of this section and to general rules, sections 206A, 207, 207A, 207B, 207C, 207D, 207E, 207F, 207G, 207H, 207I, 207J, 207K and 207L apply with respect to a committee of inspection appointed under this section as they apply with respect to a committee of inspection appointed in a winding up by the court. *(Amended 14 of 2016 s. 74(5))*

(3) A body corporate may be a member of the committee but cannot act as a member otherwise than by a representative

(b) dispose of perishable goods and other goods that are likely to diminish in value if not immediately disposed of; and

(c) do anything that may be necessary to protect the company's assets.

(3) The liquidator must—

(a) attend the meeting of creditors held under section 241; and

(b) report to the meeting on any exercise of the liquidator's powers, whether or not those powers are exercised under this section.

(4) If section 241(1) is not complied with, the liquidator must apply to the court for directions as to the manner in which the default is to be remedied within 7 days of the later of the following—

(a) the day on which the liquidator was nominated by the company;

(b) the day on which the liquidator first became aware of the default.

(5) If section 241(2), (3) or (4) is not complied with, the liquidator may apply to the court for directions as to the manner in which the default is to be remedied.

(6) A liquidator who, without reasonable excuse, exercises a power conferred by section 251(1) in contravention of subsection (1) commits an offence and is liable on conviction to a fine.

(7) A liquidator who, without reasonable excuse, fails to comply with subsection (3) or (4) commits an offence and is liable on conviction to a fine.

(Added 14 of 2016 s. 75)

[243A.01] History

This section was added by the Companies (Winding Up and Miscellaneous Provisions) (Amendment) Ordinance 2016 (14 of 2016). The section is based on UKIA, s 166.

[243A.02] Overview

This section sets out the powers and duties of a liquidator nominated at a meeting of the company under s 242. The liquidator may act prior to the creditors' meeting under s 241 (where he may be nominated as liquidator by the creditors or replaced

281. Exemption of certain documents from stamp duty on winding up of companies

(1) In the case of a winding up by the court or a creditors' voluntary winding up of a company, stamp duty shall not be payable in respect of—

(Amended 6 of 1984 s. 197)

(a) any assurance relating solely to immovable property or personal property which forms part of the assets of the company and which, after the execution of the assurance, either at law or in equity, is or remains part of the assets of the company; or

(b) any other instrument relating solely to the property of any company which is being so wound up. (Replaced 31 of 1981 s. 65)

(2) In this section, ***assurance*** (轉易書) includes deed, conveyance, assignment and surrender.

[cf. 1929 c. 23 s. 281 U.K.]

[281.01] History

The section is derived from s 281 of the Companies Act 1929 (1948 Act s 339). The English s 281 was derived from s 16 of the Finance Act 1895, which was itself an extension of s 98 of the Bankrupts Act 1825 (and see Bankruptcy Ordinance s 125).

The Companies Law Revision Committee in its Second Report, 1973 at [8.62] recommended the repeal of the section, saying that, while the intention was no doubt to give some relief to creditors, it was of limited effect and in practice the amounts involved were almost always so trifling as not to warrant the expenditure of thought on whether or not the document was exempted.

The amendments made in 1984 disregarded the Committee's recommendation and were to make the section more appropriate to Hong Kong. The original para (a) referred to assurances of freehold or leasehold and interests in real or personal property. These references were not appropriate to Hong Kong where there is only one piece of freehold (ie St John's Anglican Cathedral). For 'immovable property', see Interpretation and General Clauses Ordinance (Cap 1), s 3.

Paragraph (b) listed a number of specific instruments which, while they may have been stampable in England, were certainly not stampable in Hong Kong.

The original section illustrates the inappropriateness of thoughtless copying of legislation from another jurisdiction.

The equivalent section under Insolvency Act 1986 (UK) is s 190. There are no equivalent provisions under Corporations Act (Aust) and Companies Act (Sing).

inspection or, if there is no such committee, as the creditors of the company, may direct. (Amended 6 of 1984 s. 198)

(2) After 5 years from the dissolution of the company no responsibility shall rest on the company, the liquidators, or any person to whom the custody of the books and papers has been committed, by reason of any book or paper not being forthcoming to any person claiming to be interested therein.

(3) Provision may be made by general rules for enabling the Official Receiver to prevent, for such period (not exceeding 5 years from the dissolution of the company) as he thinks proper, the destruction of the books and papers of a company which has been wound up, and for enabling any creditor or contributory of the company to make representations to him, and to appeal to the court from any direction which may be given by him in the matter.

(4) If any person acts in contravention of any general rules made for the purposes of this section or of any direction of the Official Receiver thereunder, he shall be liable to a fine.

(Amended 22 of 1950 Schedule 6 of 1984 s. 198; 7 of 1990 s. 2)

[cf. 1929 c. 23 s. 283 U.K.]

[283.01] History

The section is derived from s 283 of the Companies Act 1929 (1948 Act s 341). In 1984 sub-s (1)(*a*) was amended to delete the reference to winding up subject to the supervision of the court and sub-s (1)(*b*) to substitute special resolution for extraordinary resolution.

The 1950 and 1984 amendments to sub-s (4) increased the fine. The 1990 amendment took the quantum of the fine to the Twelfth Schedule.

For equivalent provisions, see Insolvency Regulations 1986 (UK)reg 16, Corporations Act (Aust)s 542, Companies Act (Cap 50)s 320.

[283.02] Overview

The section deals with the disposal of the books and papers of a company which has been wound up and is about to be dissolved. This is a real practical problem in Hong Kong with the pressure for space. For the definition of books and papers, see s 2(1). See also on disposal of books during the progress of the liquidation on a change of liquidator etc: Companies (Winding-up) Rules r 167. For the duty of former director to keep company's books and papers for 6 years see s 758 of the Companies Ordinance (Cap 622).

For dissolution in a members' voluntary winding up, see s 239(4) and in a creditors'

fine, and any person untruthfully stating himself as aforesaid to be a creditor or contributory shall be guilty of a contempt of court, and shall, on the application of the liquidator or of the Official Receiver, be punishable accordingly.

(Amended 7 of 1990 s. 2)

[cf. 1929 c. 23 s. 284 U.K.]

[284.01] History

The section is derived from s 284 of the Companies Act 1929 (1945 Act s 342). Subsection (3) was amended in 1984 to carry the quantum of the fine to the Twelfth Schedule. There is no equivalent under Insolvency Act 1986 (UK) (but see s 192 and Insolvency Rulesr 4.223) or Corporations Act (Aust) or Companies Act (Sing).

[284.02] Overview

The section applies to all types of liquidation. It provides for filing with the Registrar of Companies statements as to the position of the liquidation when the liquidation is not concluded within one year of its commencement. For commencement of winding-up by the court, see s 184 and for voluntary winding-up, see s 230. For conclusion of winding-up, see CWUR r 180. This deems the winding-up to be concluded in the case of a compulsory winding when the order dissolving the company has been reported by the liquidator to the Registrar (see s 227) or at the date of the liquidator's release under s 205 and in the case of a voluntary winding-up generally at the date of the dissolution of the company (see s 239(4) for members' voluntary winding-up and s 248(4) for creditors' voluntary winding-up). The purpose of this filing is to enable creditors and members to inspect the statement: sub-s (2).

For the intervals for submission of statements prescribed for voluntary winding-up: see CWUR r 181. For compulsory winding-up, see CWUR r 162. For forms, see CWUR Appendix Forms 92 et seq.

For filing of audited accounts with the court in a compulsory winding-up, see s 203(4) and Forms 87–89.

For fees for inspection of a liquidator's statement sent to the Registrar of Companies, see Companies (Fees and Percentages) Order para 6 and Sch 3, Table A, item 1.

For default fine, see s 2(1) and s 351(1A)(d).

[284.03] Reform

There is obviously some unnecessary duplication here with s 203 which requires the filing of accounts with the Official Receiver in the case of a compulsory winding-up.

the purpose of ascertaining and getting in any money payable to the bank under any section as are exercisable under s 128 of the Bankruptcy Ordinance (Cap 6). The reference to the 'bank' was taken from the 1929 Act meaning the Bank of England at which the Companies Liquidation Account in England was held and was clearly inappropriate for Hong Kong. References to the bank in sub-ss (3) and (5) were also removed in 1984.

The 1971 changes to sub-ss (3) and (5) limited the right to apply for payment in sub-s (3) to five years (there previously having been no time limit) and added the transfer of the balance to general revenue in sub-s (5).

The Companies Act (Sing) equivalent is s 322 and the Corporations Act (Aust) equivalent is s 544. But there is no Companies Liquidation Account in Australia. Section 543 permits the liquidator to invest surplus funds in authorised trustee and other specified investments. Similarly, in Singapore: see Companies Act s 321.

[285.02] Overview

In Hong Kong (as was the position in England prior to the Insolvency Act 1986 (UK) surplus funds have to be paid by the liquidator into in the Companies Liquidation Account. It is only recently that insolvency practice has become a recognised area of expertise and, save for the special procedure for voluntary winding-up under s 228A, there is still no requirement that a liquidator must be a professionally qualified person (though an unqualified person is unlikely to appointed liquidator in a compulsory winding-up). So the requirement that a private liquidator should pay surplus funds into an account like the Companies Liquidation Account (see in compulsory winding-up s 202) is explicable in historical terms though with the introduction of a regulated insolvency practitioner regime the requirement is less obvious (though all professions have their black sheep!). There is also some advantage in funds being pooled in so far as with larger sums better rates of interest can be obtained. There is a conflict here between the desire to make the funds of insolvent companies as secure as possible and the desire of government to reduce the costs of the insolvency service to general revenue (see notes to ss 294 and 295).

In a voluntary winding-up the liquidator must keep the Registrar of Companies informed as to the progress of the liquidation (see s 284) and he must pay unclaimed assets into the Companies Liquidation Account pursuant to s 285, subject to the retention of such funds as may be authorised by the Official Receiver for the immediate purposes of the liquidation.

See generally, CWUR rr 183 *et seq*; and ORO Circular No 2/2014 (3 March 2014) on deposits under s 295 and transfers of funds under ss 202 and 285.

Unclaimed trust property does not form part of the assets of the company: *Re Peregrine Brokerage Ltd* [2004] 1 HKLRD 856, [2003] HKCU 1217 (CFI) and see **[198.02]**.

There are some inconsistencies, for example, as regards timing, in the various provisions. Section 285 requires the liquidator to pay into the Companies Liquidation Account forthwith after the six months' period has expired and this requires the liquidator to keep track of his receipts on a daily basis. On the other

(Added 14 of 2016 s. 101)

[286B.01] History

This section was added by the Companies (Winding Up and Miscellaneous Provisions) (Amendment) Ordinance, No 14 of 2016, s 101.

[286B.02] Overview

At any time after the appointment of a provisional liquidator, the making of a winding up order or the commencement of a voluntary winding up, in respect of a company, the court may require by order any of the persons specified in sub-s (4) to do one or more of the following — (a) attend before the court; (b) be examined under s 286C; (c) submit to the court an affidavit containing either or both — (i) an account of the person's dealings with the company; (ii) information concerning the promotion, formation, trade, dealings, affairs or property of the company; (d) produce any books and papers in the person's custody or power relating to the company or the promotion, formation, trade, dealings, affairs or property of the company.

The court may make an order under this section on its own motion or on the application of the provisional liquidator or liquidator of the company, or, in the case of a winding up by the court where a winding up order has been made, the Official Receiver as well: sub-s (2).

If a person is required to attend before the court, after a reasonable sum has been tendered to the person for the person's expenses for attending before the court, fails to attend and no lawful impediment to the attendance is made known to the court and allowed by it, the court may, by warrant, cause the person to be apprehended and brought before the court.

If a person claims any lien on the books or papers produced by the person in accordance with an order to produce made under this section, the production is without prejudice to that lien; and the court has jurisdiction in the winding up to determine all questions relating to the lien.

An examination under ss 286B(1)(b) and 286C are presumably intended to replace the 'private examination' under the former s 221. The purpose of these provisions is to provide assistance to the liquidator to try to ascertain the truth about the affairs of the company as expeditiously and economically as possible: *Re King's Dyeing & Weaving Factory Ltd* [1987] HKLR 507, [1987] HKCU 136 (CFI). A liquidator comes to his task with no knowledge of the company's affairs and its books are often inadequate to tell the whole story, so the liquidator frequently needs the assistance of those involved in the conduct of the business. In many cases the examinee will be being interrogated in order to inculpate himself. That is why the examination provisions have sometimes been called 'the Star Chamber clause', because, in the past at least, the examinee would not know the case against him on the application for examination and often would not be present and might not know the contents of any report which led to the application and faced interrogation before a court official in camera. No wonder that Megarry J in *Re Rolls Razor Ltd*

the former liquidator). In *Re Matrix Industries Ltd* [2004] 1 HKC 194, [2004] 1 HKLRD 44 (CFI), it is suggested that notification of the proceedings to the Registrar of Companies may be enough; and see *Wong Pui Sau v Cheung Kwong Min* [2000] 2 HKC 810 (CFI). In the *Axa* case, above, where the applicant claimed a right by subrogation, the respondents were the company, the former liquidators and the Official Receiver (quaere whether the company in its own right can be a party, as it ceased to exist upon its dissolution; and it is not clear why the OR should have been joined).

If the company has any property, the earlier practice was that the Secretary for Justice should be served, as the order has the effect of making any property of the company which became *bona vacantia* on dissolution and has not been disposed of since, revert to the company: *Re Home and Colonial Insurance Co* (1928) 44 TLR 718. Also see *Wong Shuk-ying v A-G* [1987] 2 HKC 457, [1987] HKLR 985 (CFI); *Re Menes Trading Co Ltd* [2002] 1 HKC 108 (CFI); *Axa China Region Insurance Co Ltd v Maratz (HK) Ltd* [2001] HKCU 377 (unreported, HCMP 2166/2001, 4 May 2001) (CFI) (where the company, the former liquidators and the Official Receiver were made respondents). The Registrar of Companies now acts as agent for the Secretary for Justice in *bona vacantia* matters and notice of proceedings involving possible *bona vacantia* property should now be given to the Registrar of Companies: see Law Society Circular 01–335(PA) 10 December 2001 referred to in *Liu Yiu Keung v Registrar of Companies* [2004] HKCU 700 (unreported, HCMP 1098/2004, 11 June 2004) (CFI); *BCEG International Co Ltd v Liu Xiu & Anor* [2017] HKCU 652 (unreported, HCMP 3219/2016, 14 March 2017) (CFI); and in *Re Unieffort Co Ltd*, above; and see also *Chan Ping Sang Johnny & Anor v S-J* [2017] 2 HKLRD 1082, [2017] HKCU 891 (CFI); *Stephen Liu Yiu Keung (one of the former joint and several liquidators of Hanluck Investments Ltd) v Registrar of Companies & Anor (sub nom Re Hanluck Investments Ltd)* [2018] 6 HKC 374, [2018] HKCFI 1220 at [45].

For declaration that dissolution void and for change of liquidator upon restoration of company, see *BCEG International Co Ltd v Liu Xiu & Anor (sub nom CIF Investments Construction Ltd)* [2017] HKCU 652 (unreported, HCMP 3219/2016, 14 March 2017) (CFI).

[290.05] Court's discretion

There is nothing in this section which restricts the exercise of the court's discretion such that there must be the minimum number of members as at the date of revival: *Commissioner of Inland Revenue v Registrar of Companies* (unreported, HCMP 2268/1998, 12 January 1999) (CFI); *Re Mass Success Development Ltd* [1999] 3 HKC 136 (CFI); *Re Yiu Cheung Glass Mirror Co Ltd* [2007] 1 HKC 502 (CFI).

[290.06] Effect of order

The effect of the order is that the dissolution is void *ab initio*. All property of the company, which became *bona vacantia* and has not been disposed of since, is automatically revested in the company: *Re Dixon (CW) Ltd* [1947] Ch 251.

But no act in the intervening period is validated and made binding on the company. So litigation commenced between dissolution and avoidance of dissolution is not

the principal Ordinance, those secen struck off under section 290A of the principal Ordinance as if those sections had not been repealed.'

[290A.01] History

This section and the subsequent sections to s 290E were added in 1993 following a recommendation of the Standing Committee on Company Law Reform (see Fifth Report (for 1988) pages 28–33. The Registrar of Companies was concerned that companies were failing to file annual returns in time, if at all. Attempts to encourage filing of annual returns by means of a sliding scale of annual registration fee (see Eighth Schedule Pt I(e)), introduced in 1988, had not been very successful. Under s 291 the Registrar must have reasonable cause to believe that the company is not carrying on business or in operation. Mechanical procedures are easier for the Registrar to administer. However, with the introduction in 1999 of provisions allowing private companies to de-register (defunct companies: see s 291AA–AB) and the option of striking off under s 291, this section, together with ss 290B and 290E, was repealed. But if a company was struck off under this section, the group of sections continue to have effect in respect of applying for restoration and revival.

[290A.02] Overview

The section provided a detailed procedure where under the Registrar of Companies might strike off a company for failure to file annual returns and upon publication of such striking off in the Gazette the company was dissolved. The procedure followed, more or less, that set out under s 291, for the striking off of defunct companies.

For the filing of annual returns, see ss 107–109.

The section was exercised regularly. In calendar year 1996, 27,354 companies were struck off under this section, by far the largest number of dissolutions (the next largest group of dissolutions in 1996 was those under s 291(6) and the total number of dissolutions for 1996 was 38,446). No new strikings off were made under this section after its repeal and the section remains alive only to deal with the effects of pre-repeal strikings off.

Notwithstanding the striking off the liability of directors, managing officers and members continued: s 290A(4). The court could wind up a company which has been struck off: s 290A(5).

[290A.03] Restoration

The company itself or any member or creditor who feels aggrieved by the striking off may apply to the Registrar of Companies within 20 years of the publication of the striking off in the Gazette for the restoration of the company to the register: s 290A(6). Unlike s 291(7) the application is to the Registrar, not to the court. There is no right of appeal from an adverse decision of the Registrar under s 290A(6) but presumably judicial review proceedings would be available; *Chan Chi Ming v Brilliant Rise Container Depot Ltd* [2008] 1 HKC 487, [2008] 1 HKLRD 648

[293.01] History

The section is derived from s 300 of the Companies Act 1929 (1948 Act s 360).

The amendment in sub-s (1) in 1949 deleted the reference to a China company and the 1950 amendment deleted the reference to the Colonial Treasurer as a place where the Official Receiver could keep the Account.

'Governor' is to be construed as 'the Chief Executive of the Hong Kong Special Administrative Region': see Interpretation and General Clauses Ordinance (Cap 1) Sch 8 para 11, added by s 6 of the Hong Kong Reunification Ordinance (Cap 2001). The Adaptation of Laws (No 9) Ordinance 1999 reconfirms this substitution and is in effect from 1 July 1997.

There are not exact equivalents in the other relevant jurisdictions. Sections 403 to 408 of Insolvency Act 1986 (UK) are similar.

[293.02] Overview

Details of the Companies Liquidation Account can be found in the Annual Departmental Reports of the Official Receiver's Office under Financial Services Division and relevant appendices. The section operates a Pool Investment Scheme for estates valued from $100,000 to $20 million, in order to maximise investment yield 15 licensed banks are approved for the placement of estates' funds: see 1995-1996 Report para 5.3.3.

For payment of undistributed assets into the Account, see s 285. For separate accounts of particular estates, see s 295.

[293.03] Official Receiver's Office

Unlike the Land Registry and Companies Registry, the Official Receiver's Office is not a trading fund and as such expected to be self-sufficient: see Trading Funds Ordinance (Cap 430). If necessary, funds must be advanced by the Hong Kong Government to cover the cost of the operation of the Office. See Annual Departmental Reports for revenue and expenditure of the Office. And see s 188 and **[8653]** and **[9101]**.

294. Investment of surplus funds on general account

(1) Whenever the cash balance standing to the credit of the Companies Liquidation Account is in excess of the amount which in the opinion of the Official Receiver is required for the time being to answer demands in respect of companies' estates, he may invest in his name the whole or any part of such excess on fixed deposit or deposit at call with such bank as he thinks fit or in Government securities.

(a) that other person has agreed, generally or specifically, that the liquidator or provisional liquidator may send or supply the document or information to the person by electronic means;

(b) that other person has not revoked the agreement;

(c) that other person has specified, generally or specifically, an electronic address for receiving the document or information;

(d) the document or information is sent or supplied to that other person by electronic means to the electronic address mentioned in paragraph (c);

(e) the document or information is sent or supplied in a form, and by a means, that, in the reasonable opinion of the liquidator or provisional liquidator, will enable the recipient—

(i) to read the document or information, or, to the extent that it consists of images, to see the document or information, with the naked eye or with a suitable corrective lens; and

(ii) to retain a copy of the document or information;

(f) the document or information is authenticated in one of the following ways—

(i) the identity of the liquidator or provisional liquidator is confirmed in a manner specified by that other person;

(ii) if the manner has not been specified, the communication contains, or is accompanied by, a statement of the identity of the liquidator or provisional liquidator, the truth of which the other person has no reason to doubt; and

(g) the document or information contains, or is accompanied by, a statement that—

(i) the recipient may request the document or information in hard copy form; and

(ii) a postal address and an electronic address specified by the liquidator or provisional liquidator as provided in the statement may be used to request the document or information in hard copy form.

(4) For the purposes of subsection (3)(b), the person is only to be regarded as having revoked the agreement if the person

contract entered into by him in the performance of his functions, except in so far as the contract otherwise provides, and entitled in respect of that liability to indemnity out of the assets; but nothing in this subsection shall be taken as limiting any right to indemnity which he would have apart from this subsection, or as limiting his liability on contracts entered into without authority or as conferring any right to indemnity in respect of that liability.

(3) This section shall apply whether the receiver or manager was appointed before or after the commencement of the Companies (Amendment) Ordinance 1984 (6 of 1984) but subsection (2) shall not apply to contracts entered into before the commencement of that Ordinance.

(Added 6 of 1984 s. 210)
[cf. 1948 c. 38 s. 320 U.K.]

[298A.01] History

The section was added in 1984. It is derived from s 87 of the Companies Act 1947 (1948 Act s 369).

The addition was recommended by the Companies Law Revision Committee in its Second Report 1973, paras 9.3 to 9.5. As the Cohen Committee had noted, unlike receivers appointed by the court there was no right for a receiver appointed out of court to apply to the court for directions. Secondly, whereas a receiver appointed by the court to manage a business had a right to indemnity out of the assets in respect of contracts he made as receiver, but was personally responsible in respect of orders given by him unless the contract otherwise provided, a receiver appointed out of court was as a rule the agent of the company and not personally responsible unless he pledged his own credit. In some cases, they said, receivers appointed out of court had ordered goods and not paid for them, but the proceeds of realisation had been applied for the benefit of the debenture holders, the seller of the goods being left to sue the company, which had no assets. The Cohen Committee's recommendations to rectify these defects were incorporated in s 369 of the Companies Act, 1948. The extension of s 369(1) to debenture holders was recommended by the Jenkins Committee and this was made in the Insolvency Act 1986s 35(1) giving 'the persons by whom or on whose behalf a receiver or manager has been appointed' the right to apply for directions.

The Jenkins Committee further recommended that the court should be empowered to relieve a receiver appointed under an invalid charge or in circumstances that do not justify such appointment, wholly or in part, from any liability he may incur in respect of anything done or omitted to be done by him while purporting to act as receiver, so long as the act or omission would have been proper had his appointment been valid; the court should be empowered to hold the person making the appointment liable to the extent that the receiver is relieved from liability by the court. The Companies Law Revision Committee recommended this addition. This was not taken up in 1984 nor in the United Kingdom until Insolvency Act

Ch 82; *Li Lai-fun & Ors v Centro-Sound Ltd* [1986] HKC 541 (HC).

Many, but not all, receiverships end in the liquidation of the debtor company. The more profitable parts of a business might be 'hived off' into a new company which would be sold, leaving the shell of the old company to be wound up. Alternatively, time-making parts of a business might be sold off to pay the debts, leaving a viable core business. So receivership may in some cases be a 'rescue' procedure. It was the potential of receivership to save companies that led the Cork Committee to propose a somewhat similar procedure not dependent on being expressed or implied in security documentation, ie the administration order procedure. The receiver is sometimes called the company doctor as compared to the liquidator who is sometimes called the company undertaker.

For the impact of the Protection of Wages on Insolvency Ordinance on work outs, see **[178.01]**.

[298A.04] When appointment out of court made

The appointment must be made according to the terms of the document containing the power of appointment. First, it must be checked that the document containing the power of appointment is itself valid; if it is not, the power falls with it. For example, where the power is contained in a mortgage or charge which was given for an unauthorised purpose and the lack of authority was known to the lender: see *Rolled Steel Products (Holdings) Ltd v British Steel Corp* [1986] Ch 246 (CA).

A power is exercisable only in the events specified in the document containing the power or in the case of the statutory implied power under the Conveyancing and Property Ordinance in the events specified in s 50(1). A premature appointment will be invalid.

There is no implied power to appoint a receiver out of court of the ground that the security is in jeopardy: *Cryne v Barclays Bank plc* [1987] BCLC 548 (CA).

An injunction may be obtained restraining an intended appointment or restraining a receiver from acting under a purported appointment. The court may require payment into court of money due or an undertaking in damages as a condition of granting the injunction.

The power must be exercised in the manner specified in the document containing the power or in the case of the statutory implied power in the manner specified in s 50(1) of the Conveyancing and Property Ordinance.

An invalid appointment will make the receiver and the appointor liable in damages for any loss caused to the debtor: *Cryne v Barclays Bank plc*, above, and *Downsview Nominees Ltd v First City Corp Ltd* [1993] AC 295 (PC).

The power of appointment is exercisable under s 50(1) of the Conveyancing and Property Ordinance when the mortgage money has become due. Express or extended statutory powers will specify 'events of default' upon the happening of which the power is exercisable, ie they 'trigger' the exercise of power of appointment.

But sometimes, depending on the construction of the mortgage, some prior

[298A.06] When appointment made out of court takes effect

The appointment take effect when the document of appointment is received and accepted by the receiver: *Cripps (Pharmaceutical) Ltd v Wickenden* [1973] 2 All ER 606; *NZI Securities Australia Ltd v Poignand* (1994) 12 ACLC 550, 555.

In the United Kingdom, the time from which the appointment is effective is now provided for in the Insolvency Act 1986 (UK)s 33.

[298A.07] Effect of appointment out of court

A receiver appointed out of court is usually expressed to be the agent of the borrower by the security documentation and see Conveyancing and Property Ordinance s 50(2) for similar effect for appointments made under that Ordinance.

Otherwise the receiver will be the agent of the appointor: see *Gosling v Gaskell* [1897] AC 575 (HL)and see [1986] 1 QB 669 (CA); *Re B Johnson & Co (Builders) Ltd* [1955] Ch 634 (CA); *Downsview Nominees Ltd v First City Corp Ltd* [1993] AC 295 (CA),(1991) 9 C&SLJ 395; (Adenwala).

The receiver ceases to be the agent of a borrower company when the company is wound up but the receiver does not automatically become the agent of the appointor. The liquidation of the company does not affect the receiver's right to hold the mortgaged property and (where he has power) to dispose of it and s 182 of the Companies Ordinance (invalid disposition) does not apply: see *Sowman v David Samuel Trust Ltd* [1978] 1 All ER 616; *Re Corona Corduroy Factory Ltd* [1987] 1 HKC 385 (HC).

The security documentation usually provides that the receiver is to be the attorney of the borrower for the purpose of sale, etc but the absence of such power of attorney does not prevent the receiver assigning in the name of the debtor by affixing his own seal on behalf of the debtor: see *Man Kou-tan v Timewin Development Ltd* [1987] 3 HKC 504 (HC). On the interaction of winding-up and receivership, see (1979) 53 ALJ 264 (O'Donovan).

Where a receiver under the Conveyancing and Property Ordinance is selling s 53(1) (sale) and s 52 (protection of purchaser) of that Ordinance apply.

As a general rule, a receiver cannot sue in his own name, but there may be exceptional cases where he could do so where a cause of action is vested in him: *Liu Yiu Keung v Keen Lloyd Resources Ltd* [2006] 3 HKLRD 280.

One important effect of the appointment of a receiver, whether out of court or by the court is to crystallise a floating charge. Notice of the receiver's appointment is not necessary to crystallise the charge: *Alberta Paper Co Ltd v Metropolitan Graphics Ltd* (1983) 49 CBR (NS) 63. Even though the floating charge may have crystallised and become a fixed charge, nevertheless it may not be as effective as a charge originally created as a fixed charged. By virtue of s 79 of the Companies Ordinance (Insolvency Act 1986 (UK)ss 40 and 196), debts which would be preferential debts on winding-up (see s 265) are payable out of assets in the hands of the receiver in priority to principal and interest due under the charge. And under s 265(3B) (Insolvency Act 1986 (UK)s 175(2)), on winding-up, where the assets