

New Companies Ordinance – Old Winding Up and Insolvency Regime

The existing provisions on the winding up of companies in Hong Kong will continue to operate after the new Companies Ordinance comes into effect, which is expected to be on 3 March 2014.

The new Companies Ordinance is an overhaul covering many aspects of the existing Companies Ordinance, including the following:

- Constitution and capacity of companies
- Directors and officers
- Share capital and financial assistance
- Shareholder meetings
- Company administration
- Registration of charges

Schemes of arrangement do form part of the re-write (refer to Part 13, Division 2 of the new Companies Ordinance). The amendments are primarily relevant in the context of takeover and privatisation members' schemes¹. The process for implementation of creditors' schemes will largely remain the same as provided for in the existing Companies Ordinance.

The new Companies Ordinance, however, does not cover the winding up and insolvency-related regime. Provisions on these aspects will remain in the existing Companies Ordinance, which will be re-titled the Companies (Winding up and Miscellaneous Provisions) Ordinance.

Insolvency practitioners will therefore continue to refer to the existing Companies Ordinance provisions on the following areas:

- Commencement of winding up
- Appointment, powers and duties of liquidators
- Conduct of winding up
- Ranking of creditors' claims
- Antecedent transactions

¹ For takeover and privatisation schemes, the "headcount test" (that is, approval by a majority in number of the relevant persons present and voting) is to be replaced by a requirement that votes cast against the scheme must not exceed 10% of the total voting rights attached to all disinterested shares. Other shareholder schemes not involving a takeover or general offer will still require satisfaction of the headcount test unless the court exercises its discretion to order otherwise (for example, perhaps in circumstances where there is evidence that the result of the vote has been unfairly influenced by share splitting).

Changes to the insolvency regime are on the horizon – the government kicked off a new consultation process with the issue of a consultation document² in April 2013. Some of the areas on which reform is being considered are summarised in the table below:

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| Commencement of winding-up, including: | <ul style="list-style-type: none"> • Introduction of a prescribed form of statutory demand • Protection of creditors and members of a company on voluntary winding up by its directors under section 228A (existing Companies Ordinance) |
| Appointment, powers, vacation of office and release of provisional liquidators and liquidators, including: | <ul style="list-style-type: none"> • Avoiding conflicts of interest upon appointment by means of statutory disclosure • Clarification of references to provisional liquidators in certain terms and where use of the term liquidator is to cover provisional liquidators |
| Conduct of winding-up, including: | <ul style="list-style-type: none"> • Formation of the committee of inspection, conduct of the committee's business and of winding up generally • Streamlining the process for determination of liquidators' agents' costs in a court winding-up |
| Voidable transactions, including: | <ul style="list-style-type: none"> • Introduction of a prohibition against transactions at an undervalue • Improvement of provisions on: <ul style="list-style-type: none"> ▪ unfair preferences; and ▪ invalidation of floating charges created before the winding up of a company |
| Investigation during winding-up, including with regard to: | <ul style="list-style-type: none"> • Enhancement of public and private examination procedures by statutory confirmation of the removal of the privilege against self-incrimination and widening the scope for using public examination • Redemptions and buy-backs of shares out of capital within one year before the company's insolvent winding up |

The government expects to introduce an amendment bill to the Legislative Council in 2014/2015.

The possibility of a statutory moratorium to bind creditors while struggling companies seek to implement rescue plans remains under review by the government and is likely to continue to be the subject of consultation in addition to the above key insolvency regime proposals.

² *Improvement of Corporate Insolvency Law Legislative Proposals*

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