



CHANGES TO THE HONG KONG'S WINDING-UP AND INSOLVENCY LAW

On 3 June 2016, the Hong Kong Government gazetted the Companies (Winding-up and Miscellaneous Provision) (Amendment) Ordinance 2016, (the “Amended Ordinance”).

Whilst the enforcement date is yet to be set, the Amended Ordinance is intended to improve and modernise Hong Kong’s corporate winding-up regime by providing measures to increase protection of creditors as well as streamlining and enhancing the integrity of the winding-up process. This is also intended to further align the winding-up regime with the latest international developments and thus providing confidence to both investors and creditors of its position as an international business hub.

We are pleased to set forth herein the key amendments as follows:

Creditor Protection

The Ordinance aims to enhance the protection of creditors by introducing inter alia the following changes:

1. *Unfair preferences*

The amendment addresses a long standing anomaly in the corporate unfair preference regime by introducing a standalone power for the Court to set aside transactions entered into by a company prior to its winding-up where it unfairly puts one creditor in a better position than others.

Previously, the unfair preference concept in the corporate arena was inelegantly linked to that of the individuals under the Bankruptcy Ordinance.

2. *Transactions at an undervalue*

Historically, Hong Kong’s corporate insolvency law has no separate concept of transactions at an undervalue, although there is such concept provided under the Bankruptcy Ordinance.

Under the new amendment, the Court will have the power to set aside transactions at an undervalue entered into by a company within 5 years before the commencement of its winding-up, but only where one of the two conditions are met:

- a. Either the company is unable to pay its debts at the time or it becomes unable to pay its debts as a result of the transaction; or
- b. Unfair preference

As a safeguard and reassurance to concerned directors, the Court will not make remedial order in restoring the company to the position it would have been before the transaction is entered, if the Court is satisfied that the company had entered into the transaction in good faith for the purposes of business and there are reasonable grounds to believe that the transaction would benefit the company.

3. ***Floating charges***

The Amendment Ordinance changes the law in respect of floating charges and when they can be set aside. It aims to prevent mischief of last minute floating charges being created by directors or connected persons in favour of themselves.

Under the Amendment Ordinance the “relevant time” for floating charges created in favour of connected persons two years prior to the commencement of the company’s winding will be caught.

4. ***Liabilities of directors and members***

The Amendment Ordinance contain new provisions for civil liability on directors and members in connection with a redemption or buy-back of shares out of capital.

Where a company is being wound up and it has made a payment out of capital relating to the redemption or buy back of any of its shares from a person and winding-up commences within one year, both the past shareholder and the director who signed the solvency statement are jointly and severally liable to contribute an amount not exceeding the amount of the payment out of capital made by the company in respect of the shares redeemed or brought back from the past shareholder.

The change is intended to protect the interest of creditors by ensuring that the company’s paid-up capital is preserved and not returned to its members immediately before the insolvent winding-up of the company at the expense of the company’s creditors.

The Winding-Up Process

The Amendment Ordinance also aims to improve and streamline the winding-up process by introducing, inter alia, the following:

1. ***Appointment of solicitor***

Simplifying the procedure for a liquidator to appoint a solicitor to assist in a Court winding-up by giving advance notice to the Committee of Inspection.

2. ***Safeguards in voluntary winding-up***

The directors must deliver to the Registrar a winding-up statement. Thereafter, the directors need to “cause a meeting of the company to be summoned for a date not later than 28 days after the delivery of” the said winding-up statement. The directors are to appoint a provisional liquidator from the commencement of the winding-up of the company.

3. ***Powers of provisional liquidators***

For court winding-up, the powers and duties of provisional liquidators are set out more clearly with provisions on the basis of remuneration and tenure of office.

4. ***Liquidator’s Appointment***

The Amendment Ordinance aims to prevent any conflict of interest by expanding the list of persons disqualified for appointments as provisional liquidators or liquidators and requiring all prospective provisional liquidators or prospective liquidators to disclose specific relationships between him or his immediate family members etc and the company being wound up.

If you wish to understand more on the changes, please feel free to approach:

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