



FINANCIAL SERVICES AND THE TREASURY BUREAU

Consultation Paper on Legislative Proposals to Improve Corporate Insolvency Law (“The Consultation Paper”)

The Law Society has reviewed the Consultation Paper. Using the abbreviations, the paragraph numbering and Annex appearing in the Consultation Paper, the Law Society sets out below the responses to those questions posed for consultation.

COMMENCEMENT OF WINDING-UP

Questions 1

Do you support the proposal to adopt a prescribed form of statutory demand, which would contain key information as described in paragraph 2.7 as well as a statement of the consequences of ignoring the demand?

Yes.

Question 2

Do you think that the section 228A procedure, whereby the directors of a company may commence a voluntary winding-up of the company without first having the members of the company resolve to do so, should be maintained or repealed?

The Section 228A procedure should be maintained as apparently there has not been any reported abuse of the procedure in the recent years.

Question 3

If the section 228A procedure is to be maintained, do you agree to the proposed improvement measures as set out in paragraph 2.14 to reduce the risk of abuse of the procedure?

Agree

Question 4

Do you agree to replacing the existing requirement of holding the first creditors' meeting on the same or the next following day of the members' meeting with the requirement of holding the first creditors' meeting on a day not later than the fourteenth day after the day on which the members' meeting is held in a creditors' voluntary winding-up case?

Agree.

Question 5

Do you support the proposal on prescribing a minimum notice period for calling the first creditors' meeting in a creditors' voluntary winding-up case? If so, do you consider a period of seven days appropriate?

We would agree to prescribe a minimum notice period for calling the first creditors' meeting. We suggest that the minimum period should be 14 days.

Question 6

Do you agree to the proposal on limiting the powers of the liquidator appointed by the company during the period before the holding of the first creditors' meeting in a creditors' voluntary winding-up case?

Agree.

Question 7

Do you agree to the proposed restrictions on the exercise of the directors' power before a liquidator is appointed in a creditors' voluntary winding-up case?

Agree.

Question 8

Do you agreed with the proposed technical amendments relating to the commencement of winding-up as set out in Annex C?

Agree.

PROVISIONAL LIQUIDATORS AND LIQUIDATORS

Question 9

(a) Do you agree to the expansion of the list of disqualified persons from being appointed as a provisional liquidator or a liquidator? If so, do you agree with disqualifying the types of persons as proposed in paragraphs 3.13, 3.15 and 3.16?

Agree to the expansion of the list. We further agree the types of persons proposed in paragraphs 3.13, 3.15 and 3.16 should also be disqualified from being appointed as a provisional liquidator or a liquidator.

(b) Do you agree to provide clearly that the appointment of a disqualified person as a provisional liquidator or liquidator shall be void and that he shall be liable to a fine if he acts as a provisional liquidator or liquidator?

Agree.

(c) Do you agree that the disqualification proposals should also apply to the appointment of a receiver or a receiver and manager of the property of a company with suitable modifications?

Agree.

Question 10

(a) Do you agree that a new statutory disclosure system should be introduced for the appointment of provisional liquidators and liquidators?

Agree.

(b) If yes, do you agree with the details of information required to be disclosed as set out in paragraph 3.21?

Agree to the details of information required to be disclosed as set out in paragraph 3.21.

(c) Do you agree that a statutory defence as proposed in paragraph 3.24 should be provided for a failure in disclosure?

Agree.

Question 11

(a) Do you agree that the existing prohibition on inducement being offered to members or creditors in relation to the appointment of liquidators should be extended to cover inducement being offered to any person?

Agree.

(b) Do you agree that the prohibition should also be extended to inducement offered in relation to the appointment of provisional liquidators, receivers, and receivers and managers?

Agree.

Question 12

Do you agree with the proposal to designate all provisional liquidators who take office upon and after the making of a winding-up order (i.e. section 194 PL) as “liquidators” such that they will be subject to the provisions in the CO which apply to liquidators?

Agree.

Question 13

Do you agree with the proposal to clearly stipulate that it is up to the court to determine the powers, duties, remuneration and termination of appointment of provisional liquidators who were appointed by the court before the making of a winding-up order (i.e. section 193 PL)?

Agree.

Question 14

Do you agree with the proposal of setting out the powers of liquidators now found in section 199(1) and (2) of the CO in a Schedule to improve the clarity of the provisions?

Yes.

Question 15

Do you agree that the requirement for the liquidator to apply to the court or the COI for exercising the power to appoint a solicitor in a court winding-up should be removed, provided that prior notification is given to the COI or, where there is no COI, the creditors when the liquidator exercises such power?

Yes.

Question 16

(a) Do you agree that, notwithstanding the release of a liquidator by the court, the liquidator should not be absolved from the provisions of section 276 of CO?

Yes but a time limit should be imposed within which the liquidator would remain liable or accountable for any money or property of the company after order releasing the liquidator is made.

(b) Do you agree that, where the court has granted a release to a liquidator, the power to make an application under section 276 should only be exercisable with the leave of the court?

Agree.

Question 17

Do you agree with the proposed technical amendments relating to the appointment, powers, vacation of office and release of provisional liquidators and liquidators as set out in Annex C?

Agree.

CONDUCT OF WINDING-UP

Question 18

Do you agree that a maximum and a minimum number of members should be set for the COI appointed in both a court winding-up and a creditors' voluntary winding-up?

Agree.

If so, are the proposed maximum number (seven) and minimum numbers (three) appropriate?

Maximum number – 7, minimum number – 3 would be appropriate.

Do you agree that the court should have the discretion to vary the maximum and minimum numbers on application by the liquidator?

Yes.

Question 19

Do you agree to allow the COI not to fill a vacancy if the liquidator and a majority of the remaining members of the COI so agree, provided that the total number of members does not fall below the proposed minimum number?

Agree.

Question 20

Do you agree to the proposals as set out in paragraphs 4.12 and 4.13 for streamlining and rationalising the proceedings of the COI?

Agree.

Question 21

Do you support the proposal to enable the COI to function through written resolutions sent by post or using other electronic means (such as using emails or through websites)?

Agree.

Question 22

(a) Do you agree with allowing the costs and charges of the agents employed by the liquidators to be determined by agreement between the liquidator and the COI?

Agree.

(b) Do you agree that if such agreement cannot be reached, the costs and charges of the agents shall be delivered up for taxation by the court?

Agree.

Question 23

Do you support the proposal to allow liquidators and provisional liquidators to communicate with creditors, contributories or other parties by electronic means, subject to the conditions as set out in paragraph 4.21?

Agree.

Question 24

Do you agree with the proposed technical amendments relating to the conduct of winding-up as set out in Annex C?

Agree.

VOIDABLE TRANSACTIONS

Question 25

(a) Do you agree that new provisions should be introduced to empower the court to make orders for restoring the position of a company to what it would have been if the company has not entered into a transaction at an undervalue?

Agree.

(b) Do you agree to the proposal regarding “relevant time” as proposed in paragraph 5.10?

Agree. A period of 5 years would be appropriate.

(c) Do you agree that transactions at an undervalue entered into by the company with a person who is connected with the company should be subject to a more stringent control as proposed in paragraph 5.11?

Agree.

(d) Do you agree that statutory protection should be provided for the party seeking to resist an application made by the liquidator of a company in respect of the undervalue transaction?

Yes.

If so, do you agree with the statutory protection as proposed in paragraph 5.12?

Yes.

Question 26

(a) Do you agree that the current provisions in the CO incorporating the provisions in the BO on unfair preference should be replaced by new standalone provisions which apply to winding-up cases as proposed in paragraph 5.17 to rectify the existing anomalies which limit the application and effectiveness of such provisions?

Agree.

(b) Do you agree with the definitions of “person who is connected with a company” and “associate” as proposed in paragraphs 5.19 and 5.20?

Agree.

(c) Do you agree that the existing protection for persons who have received benefits or acquired or derived interest in property in good faith and for value from unfair preference should be maintained, and that the same protection should also be applicable to the proposed new provisions on transactions at an undervalue?

Agree.

Question 27

Do you agree to the proposed special provisions in relation to floating charges created by a company in favour of a person who is connected with the company as detailed in paragraph 5.26?

Agree.

Question 28

Do you support the expansion of the scope of the exemption of a floating charge from invalidation catered for genuine credit transactions to cover “property and services supplied to the company” and “money paid at the direction of the company” as detailed in paragraph 5.28?

We support the expansion of the scope.

INVESTIGATION AND OFFENCES

Question 29

(a) Do you agree to expressly set out in the legislation the common law position that a person summoned for either a private or a public examination cannot invoke the privilege against self-incrimination during the examination?

Agree. The right against self-incrimination in the context of section 221 should be abrogated.

(b) If so, do you agree that we should introduce provisions to prohibit the subsequent use of answers given and statements made during the examination in subsequent criminal proceedings if certain conditions are satisfied, subject to certain exceptions such as offences relating to perjury and provision of false statement and offences under the future Companies (Winding Up and Miscellaneous Provisions) Ordinance?

Agree

Question 30

(a) Do you agree to the removal of the requirement that the OR or the liquidator must have alleged in his “further report” that fraud has been committed for initiating the public examination procedure, and to provide that a public examination may be ordered by the court upon the application by either the liquidator or the OR?

Agree.

(b) Do you agree with the proposed new categories of person that may be examined under the public examination procedure, namely (i) any person who has acted as liquidator of the company or receiver or receiver and manager of the property of the company; and (ii) any person who is or has been concerned, or has taken part, in the management of the company?

Agree.

Question 31

(a) Do you agree that if a company is wound up insolvent within one year of its shares being redeemed or bought back by payment out of capital, certain categories of persons should be required to contribute to the assets of the company for an amount not exceeding the payment made by the company in respect of the shares redeemed or bought back by the company so as to meet the deficiency in the company's assets?

Agree.

(b) If so, should the members from whom the shares were redeemed or bought back and the directors who made the solvency statement which supported the redemption or buy-back without having reasonable grounds for the opinion expressed in the statement be jointly and severally liable to contribute to such assets?

They should be jointly and severally liable to contribute to such assets.

(c) Should such persons be allowed to apply for winding-up of the company under the specific grounds as set out in paragraph 6.22?

Such person should be allowed to apply for the winding-up of the company under the specific grounds as set out in paragraph 6.22.

Question 32

Do you agree with the proposed technical amendments relating to the investigation during winding-up, offences antecedent to or in the course of winding-up and powers of the court as set out in Annex C?

Agree.

The Law Society of Hong Kong

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