

Views sought on changes to Winding-up Provisions of Companies Ordinance

The Insolvency Sub-committee of the Law Reform Commission today (Thursday) published a consultation paper containing proposals for amendments to the Winding-up Provisions of the Companies Ordinance.

The Chairman of the Sub-committee, Professor Edward Tyler, said that the proposals sought to update the existing provisions where necessary and to introduce ideas and procedures that would facilitate the operation of the increasingly complicated area of company liquidation.

The Consultation Paper is the third and final part of a series of Consultation Papers produced by the Sub-committee. The first part resulted in a Report of the Commission on Bankruptcy, which was published in 1995. This further resulted in the Bankruptcy (Amendment) Ordinance of 1996 which came into operation on 1 April 1998. The second Consultation Paper resulted in the Commission's Report on Corporate Rescue and Insolvent Trading published in October 1996.

The present Consultation Paper contains over 160 separate proposals relating to all aspects of the winding-up provisions of the Companies Ordinance and related issues, such as receivership. The proposals address both policy considerations and procedural aspects of the insolvency provisions.

Policy Considerations

On policy issues, the Consultation Paper proposes that a new Ordinance (the Insolvency Ordinance) should be created to bring together all insolvency and insolvency-related matters in a single ordinance.

The proposal contemplates that the Bankruptcy Ordinance, and the Companies Ordinance provisions on winding-up, receivership and the disqualification of directors, should be brought together in the new Ordinance, together with provisional supervision and insolvent trading (the Commission's recommendations for the introduction of a corporate rescue regime).

The consultation paper also proposes that a two-tier system for the licensing of insolvency practitioners should be established. The Official Receiver already operates a two tiered "Administrative Panel of Insolvency Practitioners for Court Winding-up" and the new system would develop this theme with the introduction of "Official Liquidators" and "Registered Liquidators".

"Official Liquidators" would act in all forms of liquidation, receivership, provisional supervision (when introduced), and bankruptcy; while "Registered Liquidators" could act in members' voluntary winding-up and individual voluntary arrangements in bankruptcy.

The proposals on insolvency practitioners are considered to be most important in the context of the proposals in the consultation paper as a whole because the proposal for a reliable and regulated pool of insolvency practitioners has allowed the Sub-committee to develop its proposals in a way that would impart a considerable degree of trust on insolvency practitioners, thus saving both time and costs.

Procedural Aspects

In terms of other proposals, directors could expect to see some changes in their responsibilities and obligations. For instance, it is proposed that the definitions of "shadow director" in sections 168C and 351(2) should be applied to all the winding-up provisions.

Another proposal is that the burden of proof in respect of certain offences or frauds by directors of companies in liquidation should be shifted onto the director; a director's level of proof to be on the balance of probabilities.

The duties of liquidators would specifically provide that they should be under a duty to act in a fiduciary capacity and to deal with the property under their control honestly, in good faith, with proper skill and competence and in a reasonable manner.

It is also proposed that the types of creditor who are currently entitled to preferential treatment under section 265 of the Companies Ordinance should be greatly reduced. Pari passu distribution of assets (that is, equal treatment of creditors) should be the norm and that exceptions to pari passu distribution should only be allowed where considerations involving the maintenance of public order or the prevention of systemic failure override the policy of equal treatment of creditors.

This would mean that under the current provisions the only preferences that would survive would be the preferences which relate to two specific businesses, banking and insurance, and that all other preferences (that is, those which currently favour employees, the Government and distraint by landlords and others) would be abolished.

One other proposal is for a simplified procedure for the dissolution of solvent companies which should have the effect of reducing the time and costs involved in dissolution at present. Dissolution is used in the vast majority of cases by small private companies and the high costs and the length of time currently involved in dissolving a company is seen as a disincentive to companies winding themselves up properly.

The consultation period for these proposals will end on July 31, 1998. Written submissions can be sent to the Law Reform Commission Secretariat before that date.

Copies of the consultation paper are available on request from the Law Reform Commission Secretariat, 20th Floor, Harcourt House, 39 Gloucester Road, Wanchai, Hong Kong.

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