

# Amendments to the Companies (Winding Up and Miscellaneous Provisions) Ordinance – A Missed Opportunity?

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On 3 June 2016, the Hong Kong Government gazetted the *Companies (Winding Up and Miscellaneous Provisions) (Amendment) Ordinance 2016* (“**Amendment Ordinance**”). The date of commencement of the Amendment Ordinance will be appointed by the Secretary for Financial Services and the Treasury by notice published in the Gazette.

## Background

The Amendment Ordinance seeks to improve and modernise Hong Kong’s corporate winding up regime. It amends the existing winding up provisions, which remained in the *Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap.32)* (“**CWUMPO**”) and its subsidiary legislation following the new *Companies Ordinance (Cap.622)* in 2014. The Amendment Ordinance was drafted with the aims to:

- Increase the protection of creditors;
- Streamline the winding up process; and
- Further enhance the integrity of the winding up process.

## Increase the protection of creditors

Under the Amendment Ordinance, the key amendments to the CWUMPO to increase creditors protection are:

Relevant Section(s)	Amendments
<ul style="list-style-type: none"> <li>• New Section 265A-265E, 266C and 266D</li> <li>• Amended Section 266B</li> </ul>	Providing for the court’s power to set aside transactions at an undervalue entered into by a company within five years before the commencement of its winding up
<ul style="list-style-type: none"> <li>• Amended Section 266, 266A and 266B</li> <li>• New Section 266C and 266D</li> </ul>	Introducing standalone provisions (as opposed to the current position of incorporating the provisions of the Bankruptcy Ordinance (Cap.6) by reference) to provide for the court’s power to set aside transactions entered into by a company prior to its winding up which are unfair preferences

<ul style="list-style-type: none"> <li>• New Section 170A</li> <li>• Amended Section 171 and 179</li> </ul>	Providing for the liabilities of directors and members concerned to contribute to the assets of the company in connection with a redemption or buy-back of the company's own shares out of capital, in cases where the company is wound up within one year of the relevant payment out of capital
<ul style="list-style-type: none"> <li>• Amended Section 228A</li> <li>• New Section 228B</li> </ul>	Introducing additional safeguards to reduce the risk of abuse in a director-initiated creditors' voluntary winding up
<ul style="list-style-type: none"> <li>• Amended Section 241</li> </ul>	Enhancing the requirements relating to the first creditors' meeting of a creditors' voluntary winding up to ensure that the creditors would have sufficient time and information to prepare for the meeting and make informed decisions
<ul style="list-style-type: none"> <li>• New Section 243A and 250A</li> </ul>	Restricting the powers of the members-appointed liquidator and the directors before the holding of the first creditors' meeting and the appointment of a liquidator respectively

### Streamline the winding up process

The Amendment Ordinance introduces provisions which improve the proceedings of the Committee of Inspection ("COI"), promote Court-free processes, and simplify other related procedures. The key amendments to the CWUMPO and the *Companies (Winding-Up) Rules (Cap.32H)* ("CWUR") are:

Relevant Section(s) or Rule(s)	Amendments
<ul style="list-style-type: none"> <li>• Amended Rule 176 and 179 of CWUR</li> </ul>	Allowing the bills of costs and charges of the liquidators' agents in a court winding up to be approved by the COI without taxation by the court
<ul style="list-style-type: none"> <li>• Amend Section 199 of CWUMPO</li> <li>• New Schedule 25 of CWUMPO</li> </ul>	Enabling the liquidator in a court winding up to appoint a solicitor for assistance by giving seven days' advance notice to the COI (or to the creditors in case there is no COI)
<ul style="list-style-type: none"> <li>• New Section 296A-296E of CWUMPO</li> </ul>	Allowing liquidator to communicate with members of the COI and other persons (such as creditors and contributories) by electronic means with their prior consent
<ul style="list-style-type: none"> <li>• New Section 207B-207C of CWUMPO</li> </ul>	Allowing remote attendance at meetings of the COI by the use of technology
<ul style="list-style-type: none"> <li>• New Section 207D-207K of CWUMPO</li> </ul>	Enabling the COI to perform its functions and make decisions through written resolutions sent by post or electronic means
<ul style="list-style-type: none"> <li>• Amended Section 206 and 243 of CWUMPO</li> </ul>	Prescribing the maximum and minimum numbers of members of the COI

### Further enhance the integrity of the winding up process

In relation to liquidators and provisional liquidators, the Amendment Ordinance also introduces certain regulatory measures to further enhance the integrity of the winding up process. The key amendments to the CWUMPO and the CWUP are:

Relevant Section(s) or Rule(s)	Amendments
<ul style="list-style-type: none"> <li>Amended Section 193, 194 and 196 of CWUMPO</li> <li>New Section 199A and 199B of CWUMPO</li> </ul>	Setting out more clearly the powers, duties, basis for determining remuneration, and tenure of office of a provisional liquidator in a court winding up
<ul style="list-style-type: none"> <li>Amended Section 205 and 276 of CWUMPO</li> </ul>	Providing that a liquidator would not be absolved from liabilities arising from the liquidator's misfeasance or breach of duty / trust, notwithstanding that he has obtained a court order releasing him as liquidator after the completion of the winding up
<ul style="list-style-type: none"> <li>Amended Section 278A of CWUMPO</li> </ul>	Expanding the existing prohibition on the offering of an inducement to secure or prevent appointment or nomination as a provisional liquidator or liquidator to cover the offering of such inducement to "any person" (as opposed to "a member / creditor of a company" only under the existing regime)
<ul style="list-style-type: none"> <li>New Section 262A-262G of CWUMPO</li> </ul>	Including persons with potential conflicts of interest in the list of persons disqualified for appointment as a provisional liquidator or liquidator, and requiring a prospective provisional liquidator and a prospective liquidator to disclose specified relationships between him or his immediate family members, etc. and the company being wound up
<ul style="list-style-type: none"> <li>New Section 244A of CWUMPO</li> <li>New Rule 154A and 154B of CWUP</li> </ul>	Stipulating procedures for resignation and removal of a liquidator in a voluntary winding up
<ul style="list-style-type: none"> <li>New Section 286A-286E of CWUMPO</li> <li>Amended Rule 5 of CWUP</li> <li>New Rule 51A-51B and 58A-58B of CWUP</li> </ul>	Improving the private and public examination procedures for investigation by the liquidator

## A Missed Opportunity?

The amendments to the CWUMPO by the Amendment Ordinance are welcome, in particular the amendments to the Unfair Preference provisions and introduction of Transactions at an Undervalue.

However, the Amendment Ordinance provides mainly 'band aid' solutions rather than the major surgery required to truly modernise the financial restructuring and insolvency regime in Hong Kong, as a key global financial centre, to ensure that it is better prepared to meet challenges in the region. In particular it fails to:

- Implement the UNCITRAL Model Law for cross-border insolvency;
- Implement a statutory regime to facilitate corporate rescue and restructuring; or
- Provide for insolvent trading (even without criminal sanction).

The amendments in the Amendment Ordinance are unlikely to deliver much material improvement to creditor recoveries. Considering that the Amendment Ordinance is the first significant update in this area of law in many years after several stalled attempts, and that it may be a long time until another chance comes by, the Amendment Ordinance seems to be a missed opportunity.

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