

Part 6

Distribution of Profits and Assets

Division 1

Preliminary

286. Interpretation

(1) In this Part—

called up share capital (已催繳股本), in relation to a company, means so much of its share capital as equals the aggregate amount of the calls made on its shares (whether or not those calls have been paid), together with—

- (a) any share capital paid up without being called; and
- (b) any share capital to be paid on a specified future date under the articles, the terms of allotment of the relevant shares, or any other arrangements for payment of those shares,

and *uncalled share capital* (未催繳股本) is to be read accordingly;

capitalization (資本化), in relation to a company's profits, means any of the following operations (whenever carried out)—

- (a) applying the profits in wholly or partly paying up unissued shares in the company to be allotted to members of the company as fully or partly paid bonus shares;
- (b) transferring the profits to share capital;

distribution (分派) means every description of distribution of a company's assets to its members, whether in cash or otherwise, except distribution by way of—

- (a) an issue of shares as fully or partly paid bonus shares;
- (b) a redemption or buy-back of any shares in the company out of capital (including the proceeds of any fresh issue of shares), or out of unrealized profits, in accordance with Division 4 of Part 5;
- (c) a reduction of share capital by extinguishing or reducing any member's liability on any of the company's shares in respect of share capital not paid up, or by repaying paid up share capital;
- (d) a distribution of assets to the members on the company's winding up; or
- (e) financial assistance given by the company to a member under section 279, 280 or 281;

financial assistance (資助) has the meaning given by section 270(1);

financial items (財務項目) means all of the following—

- (a) profits, losses, assets and liabilities;
- (b) provisions;
- (c) share capital and reserves (including undistributable reserves);

net assets (淨資產), in relation to a company, means the aggregate of the company's assets less the aggregate of its liabilities;

undistributable reserves (不可分派的儲備), in relation to a company, means—

- (a) subject to subsection (2), the amount by which the company's accumulated, unrealized profits, so far as not previously utilized by capitalization, exceeds its accumulated, unrealized losses, so far as not previously written off in a reduction or reorganization of capital; or

- (b) any other reserve that the company is prohibited from distributing by an Ordinance (other than this Part) or by its articles.
- (2) In paragraph (a) of the definition of *undistributable reserves* in subsection (1), a reference to capitalization excludes a transfer of profits of the company to its capital redemption reserve on or after 1 September 1991.
- (3) In this Part—
 - (a) a reference to profits of any particular description is a reference to profits of that description made at any time; and
 - (b) a reference to losses of any particular description is a reference to losses of that description made at any time.
- (4) For the purposes of this Part, any financial statements are referential financial statements if the distribution in question is made pursuant to determinations made by reference to financial items as stated in the financial statements under section 298.

287. Realized profits and losses

- (1) In this Part, a reference to realized profits or realized losses of a company is a reference to those profits or losses of the company that are regarded as realized profits or realized losses for the purpose of any financial statements prepared by the directors in accordance with principles generally accepted, at the time when the financial statements are prepared, with respect to the determination for accounting purposes of realized profits or realized losses.
- (2) Subsection (1) does not affect any specific provision (whether in an Ordinance or otherwise) under which profits or losses of any description are regarded as realized.

- (3) If, after making all reasonable enquiries, a company's directors are unable to determine whether or not a particular profit or loss made before 1 September 1991 is realized, they may treat the profit as realized, and the loss as unrealized, for the purposes of this Part.

288. Certain amount to be regarded as realized profit or loss

- (1) For the purposes of this Part, a provision other than an amount specified in subsection (2) is to be regarded as a realized loss.
- (2) The amount is one written off or retained by way of providing for a diminution in value of a fixed asset appearing on a revaluation of—
- (a) all of the company's fixed assets; or
 - (b) all of the company's fixed assets other than goodwill.
- (3) For the purposes of subsection (2), any consideration by the directors of the value at a particular time of a fixed asset is to be regarded as a revaluation of the asset if—
- (a) in the case of a listed company, the conditions specified in subsection (4)(a) and (b) are satisfied; or
 - (b) in the case of any other company—
 - (i) where the referential financial statements are the financial statements specified in section 300, the conditions specified in subsection (4)(a) and (b) are satisfied; or
 - (ii) where the referential financial statements are the financial statements specified in section 301 or 302, the condition specified in subsection (4)(a) is satisfied.

- (4) The conditions are—
- (a) that the directors are satisfied that the aggregate value at that time of the company's fixed assets is not less than the aggregate amount at which they are for the time being stated in the financial statements; and
 - (b) that it is stated in a note to the referential financial statements that—
 - (i) the directors have considered the value of the company's fixed assets without actually revaluing them;
 - (ii) the directors are satisfied that the aggregate value at the time of consideration of those assets is or was not less than the aggregate amount at which they are or were for the time being stated in the financial statements; and
 - (iii) accordingly, by virtue of this subsection, amounts are stated in the referential financial statements on the basis that a revaluation of the company's fixed assets is to be regarded as having taken place at that time.
- (5) For the purposes of this Part, if—
- (a) on the revaluation of a fixed asset, an unrealized profit is shown to have been made; and
 - (b) on or after the revaluation, a sum is written off or retained for depreciation of the fixed asset over a period,
- the amount by which the sum exceeds the projected sum in relation to the depreciation of that asset over the period is to be regarded as a realized profit made over the period.

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(6) In determining whether a company has made a profit or loss on an asset for the purposes of subsection (5), the value given to the asset in the earliest available record of its value made on or after its acquisition by the company is to be regarded as the cost of the asset if—

- (a) there is no record of the original cost of the asset; or
- (b) a record of the original cost of the asset cannot be obtained without unreasonable expense or delay.

(7) In subsection (5)—

projected sum (預計款項), in relation to a depreciation of a fixed asset, means a sum that would have been written off or retained for depreciation if the revaluation of the asset had not been made.

(8) For the purposes of this section, an asset of a company is to be regarded as a fixed asset if it is intended for use in the company's activities, or otherwise to be held for the purpose of the company's activities, on a continuing basis.

289. Certain amount relating to insurance company with long term business to be regarded as realized profit or loss

(1) This section applies to a company that is an insurer and carries on long term business.

(2) For the purposes of this Part—

(a) an amount properly transferred to the statement of comprehensive income of the company from a surplus in the fund maintained by it in respect of the long term business is to be regarded as a realized profit; and

(b) a deficit in that fund is to be regarded as a realized loss.

- (3) Subject to subsection (2), any profit or loss arising in the company's long term business is to be disregarded for the purposes of this Part.
- (4) In this section—
- (a) a reference to a surplus in a fund maintained by a company is a reference to an excess of the assets representing the fund over the company's liabilities attributable to its long term business, as shown by an actuarial investigation; and
- (b) a reference to a deficit in such a fund is a reference to an excess of those liabilities over those assets, as shown by an actuarial investigation.

- (5) In this section—

actuarial investigation (精算調查) means an investigation—

- (a) made under section 18 of the Insurance Companies Ordinance (Cap. 41); or
- (b) made pursuant to a requirement imposed under section 32 of that Ordinance;

insurer (保險人) has the meaning given by section 2(1) and (2) of the Insurance Companies Ordinance (Cap. 41);

long term business (長期業務) has the meaning given by section 2(1) of the Insurance Companies Ordinance (Cap. 41).

290. Distribution in kind: certain amount to be regarded as realized profit

If a company makes a distribution consisting of or including a non-cash asset, and any part of the amount at which the asset is stated in the referential financial statements represents an unrealized profit, that part of that amount is to be regarded as a realized profit for the purpose of determining, before or after the distribution, the lawfulness of the distribution in accordance with this Part.

291. Application of Part

- (1) This Part applies in relation to a distribution made on or after the commencement date of this Part, except a distribution specified in subsection (2).
- (2) The excepted distribution is a distribution the amount of which would, had this Part applied in relation to the distribution, be determined under section 298 by reference to the financial items as stated in any financial statements for a financial year or period beginning before the commencement date of this Part.

292. Saving for other restraints on distribution

This Part does not affect any Ordinance or rule of law, or any provision of a company's articles, restricting the sums out of which, or the cases in which, a distribution may be made.

Division 2**Prohibitions and Restrictions****293. Prohibition on certain distributions**

- (1) A company may only make a distribution out of profits available for distribution.
- (2) For the purposes of this section, a company's profits available for distribution are its accumulated, realized profits, so far as not previously utilized by distribution or capitalization, less its accumulated, realized losses, so far as not previously written off in a reduction or reorganization of capital.

294. Listed company may only make certain distributions

- (1) A listed company may only make a distribution—

- (a) if the amount of its net assets is not less than the aggregate of its called up share capital and undistributable reserves; and
 - (b) if, and to the extent that, the distribution does not reduce the amount of those assets to an amount less than that aggregate.
- (2) A listed company must not include any uncalled share capital as an asset for the purpose of determining the amount of its net assets under this section.

295. Restriction on application of unrealized profits

A company must not apply an unrealized profit in paying up debentures or in paying up any amount unpaid on its issued shares.

296. Financial Secretary may modify or exempt provisions in relation to investment company

- (1) On application by an investment company, the Financial Secretary may—
- (a) modify, in relation to the company, any of the prohibitions or restrictions in section 293, 294 or 295; or
 - (b) exempt the company from any of such prohibitions or restrictions.
- (2) The Financial Secretary may make a modification or exemption under subsection (1) subject to any terms and conditions that the Financial Secretary thinks fit.

- (3) In this section—

investment company (投資公司) means a listed company whose principal business consists of investing its funds in securities, land or other assets with the aim of—

- (a) spreading investment risk; and

- (b) giving its members the benefit of the results of the management of the assets.

297. Consequences of unlawful distribution

- (1) This section applies if—
 - (a) a company makes a distribution, or part of a distribution, to one of its members in contravention of—
 - (i) section 293, 294 or 295; or
 - (ii) a prohibition or restriction in that section as modified under section 296; and
 - (b) at the time of the distribution, the member knows or has reasonable grounds for believing that the distribution, or that part of the distribution (as the case may be) is made in contravention of that section or modified prohibition or restriction.
- (2) If the distribution is made in cash, the member is liable to repay the distribution, or that part of the distribution (as the case may be) to the company.
- (3) If the distribution is made otherwise than in cash, the member is liable to pay to the company a sum equal to the value of the distribution or that part of the distribution (as the case may be) at the time of the distribution.
- (4) This section does not affect any obligation otherwise imposed on a member of a company to repay a distribution unlawfully made to the member.
- (5) This section does not apply in relation to—
 - (a) any payment made by a company in respect of the redemption or buy-back by the company of shares in itself; or
 - (b) any financial assistance given by a company in contravention of section 271.

Division 3

Provisions Supplementary to Division 2

298. Justification of distribution by reference to financial statements

The amount of a distribution that may be made without contravening section 293, 294 or 295, or a prohibition or restriction in that section as modified under section 296, is to be determined by reference to the financial items as stated in the financial statements specified in Division 4.

299. Successive distributions

(1) This section applies if—

(a) a company proposes to make a distribution pursuant to determinations made by reference to financial items as stated in any financial statements; and

(b) the company—

(i) has made one or more prior distributions pursuant to determinations made by reference to financial items as stated in the financial statements; or

(ii) since the financial statements were prepared, has given financial assistance specified in subsection (3) or has made a payment specified in subsection (4).

(2) Section 298 applies for the purpose of determining the amount of the proposed distribution that may be made without contravening section 293, 294 or 295, or a prohibition or restriction in that section as modified under section 296, as if the amount of the proposed distribution were increased by the amount of the prior distributions, financial assistance and other payments.

- (3) The financial assistance is—
 - (a) financial assistance that is given by the company out of its distributable profits; or
 - (b) financial assistance—
 - (i) that is given by the company in contravention of Division 5 of Part 5; and
 - (ii) the giving of which reduces the company's net assets or increases its net liabilities.
- (4) The payment is—
 - (a) a payment made by the company in respect of the buy-back by the company of shares in itself (except a payment lawfully made otherwise than out of distributable profits); or
 - (b) a payment made by the company of any description specified in section 252(5) (except a payment lawfully made otherwise than out of distributable profits).

Division 4

Specified Financial Statements

300. Last annual financial statements specified for purposes of section 298

- (1) Subject to sections 301 and 302, the financial statements specified for the purposes of section 298 are the financial statements prepared by the directors for the previous financial year, in relation to which subsections (2), (3), (4), (5) and (6) are complied with.
- (2) The financial statements must—
 - (a) have been laid before the company in general meeting under section 420(1); or

- (b) have been sent to every member under section 421(3).
- (3) The financial statements must—
 - (a) have been properly prepared in accordance with Subdivision 3 of Division 4 of Part 9; or
 - (b) have been properly prepared in accordance with Subdivision 3 of Division 4 of Part 9, except only in relation to the matters that are not material for the purpose specified in subsection (8).
- (4) The company's auditor must have prepared a report on the financial statements under section 396.
- (5) If, in the auditor's report, the auditor has not given an unqualified opinion to the effect that the financial statements have been properly prepared in compliance with this Ordinance, the auditor must have given a written statement as to whether, in the auditor's opinion, the matter in respect of which the report is qualified is material for the purpose specified in subsection (8).
- (6) A written statement under subsection (5)—
 - (a) may be made at the time of the report or subsequently; and
 - (b) must be laid before the company in general meeting or sent to every member to whom the auditor's report is sent under section 421(3).
- (7) A written statement under subsection (5) is sufficient for the purpose of a distribution to which it relates and that has been proposed. If such a written statement relates to distributions of any particular description, the statement is also sufficient for the purpose of a distribution included in those distributions, even though the distribution has not been proposed at the time of the statement.

- (8) The purpose specified for subsections (3) and (5) is the purpose of determining, by reference to the financial items as stated in the financial statements, whether the distribution would be made in contravention of section 293, 294 or 295, or a prohibition or restriction in that section as modified under section 296.

301. Interim financial statements specified for purposes of section 298

- (1) This section applies where the distribution would be made in contravention of section 293, 294 or 295, or a prohibition or restriction in that section as modified under section 296, if the amount of distribution that may be made were determined by reference to the financial items as stated in the financial statements specified in section 300.
- (2) The financial statements specified for the purposes of section 298 are the company's financial statements—
- (a) in the case of a listed company—
 - (i) that is necessary to enable a reasonable judgement to be made as to the amounts of the financial items; and
 - (ii) in relation to which subsections (3), (5) and (6) are complied with; or
 - (b) in the case of any other company, that is necessary to enable a reasonable judgement to be made as to the amounts of the financial items.
- (3) Subject to subsection (4), the financial statements must—
- (a) have been properly prepared in accordance with Subdivision 3 of Division 4 of Part 9; or
 - (b) have been properly prepared in accordance with Subdivision 3 of Division 4 of Part 9, except only in relation to the matters that are not material for the purpose of determining, by reference to the financial items as stated in the financial statements, whether the

distribution would be made in contravention of section 293, 294 or 295, or a prohibition or restriction in that section as modified under section 296.

- (4) The requirement under subsection (3) for any financial statements to be properly prepared in accordance with Subdivision 3 of Division 4 of Part 9 has effect subject to any modification that is necessary for applying that requirement to the financial statements prepared otherwise than for a financial year.
- (5) A statement of financial position that forms part of the financial statements—
 - (a) must be approved by the directors; and
 - (b) must be signed by 2 directors on the directors' behalf.
- (6) A copy of the financial statements must have been delivered to the Registrar. If the financial statements are not in English or Chinese, the copy must have been accompanied by a certified translation of the financial statements in either of those languages.

302. Initial financial statements specified for purposes of section 298

- (1) If the distribution is proposed to be declared before any financial statements are laid before the company in general meeting under section 420(1) or sent to every member under section 421(3), the financial statements specified for the purposes of section 298 are the company's financial statements—
 - (a) in the case of a listed company—
 - (i) that are necessary to enable a reasonable judgement to be made as to the amounts of the financial items; and
 - (ii) in relation to which subsections (2), (4), (5), (6) and (7) are complied with; or

- (b) in the case of any other company, that are necessary to enable a reasonable judgement to be made as to the amounts of the financial items.
- (2) Subject to subsection (3), the financial statements must—
 - (a) have been properly prepared in accordance with Subdivision 3 of Division 4 of Part 9; or
 - (b) have been properly prepared in accordance with Subdivision 3 of Division 4 of Part 9, except only in relation to the matters that are not material for the purpose specified in subsection (8).
- (3) The requirement under subsection (2) for any financial statements to be properly prepared in accordance with Subdivision 3 of Division 4 of Part 9 has effect subject to any modification that is necessary for applying that requirement to any financial statements prepared otherwise than for a financial year.
- (4) A statement of financial position that forms part of the financial statements—
 - (a) must be approved by the directors; and
 - (b) must be signed by 2 directors on the directors' behalf.
- (5) The company's auditor must have prepared a report on the financial statements stating whether, in the auditor's opinion, the financial statements satisfy subsection (2)(a).
- (6) If, in the auditor's report, the auditor has not given an unqualified opinion to the effect that the financial statements satisfy subsection (2)(a), the auditor must have given a written statement as to whether, in the auditor's opinion, the matter in respect of which the report is qualified is material for the purpose specified in subsection (8).
- (7) A copy of the financial statements, of the auditor's report of the financial statements, and of any written statement

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under subsection (6), must have been delivered to the Registrar. If the financial statements, report or written statement is not in English or Chinese, the copy must have been accompanied by a certified translation of the financial statements, report or written statement in either of those languages.

- (8) The purpose specified for subsections (2) and (6) is the purpose of determining, by reference to the financial items as stated in the financial statements, whether the distribution would be made in contravention of section 293, 294 or 295, or a prohibition or restriction in that section as modified under section 296.
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