

# **Standing Committee on Company Law Reform**

## **The Thirty-Fourth Annual Report**

**2017 / 2018**

## **Standing Committee on Company Law Reform**

### **Thirty-Fourth Annual Report**

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## **PREFACE**

(i)

### **Terms of Reference of the Standing Committee on Company Law Reform**

- (1) To advise the Financial Secretary on amendments to the Companies Ordinance and the Companies (Winding Up and Miscellaneous Provisions) Ordinance as and when experience shows them to be necessary.
- (2) To report annually to the Financial Secretary on those amendments to the Companies Ordinance and the Companies (Winding Up and Miscellaneous Provisions) Ordinance that are under consideration from time to time by the Standing Committee.
- (3) To advise the Financial Secretary on amendments required to the Securities and Futures Ordinance on matters relating to corporate governance and shareholders' protection.

(ii)

### **Membership of the Standing Committee for 2017/2018**

**Chairman:** Mr John SCOTT, S.C., J.P.

**Members:** Mr Bruno ARBOIT  
Ms Linda CHAN Ching-fan, S.C.  
Mr Clement CHAN Kam-wing  
Ms Bonnie CHAN Yi-ting  
Professor David DONALD  
Mr David FU Yat-hung  
Mr David KIDD  
Mr Robert LEE Wai-wang  
Dr Lewis LUK Tei, J.P.  
Ms Gillian MELLER

Mr Albert NG (from 1.2.2018)  
Mr Keith POGSON  
Mrs Natalia SENG SZE Ka-mee  
Ms Cynthia TANG Yuen-shun  
Mr Bernie TING Wai-cheung  
Ms Wendy YUNG Wen-yee

**Ex-Officio  
Members :**

Mr Patrick HO, J.P. (up to 10.9.2017)  
Deputy Secretary for Financial Services and the  
Treasury (Financial Services)

Ms Winnie NG, J.P. (from 11.9.2017)  
  
Deputy Secretary for Financial Services and the  
Treasury (Financial Services)

Ms Ada CHUNG, J.P.  
Registrar of Companies

Ms Phyllis MCKENNA  
Official Receiver

Dr Stefan LO  
Senior Assistant Law Officer (Civil Law) (Ag.)  
Department of Justice

Mr Stefan GANNON, J.P.  
Commissioner, Resolution Office  
Hong Kong Monetary Authority

Mr Andrew YOUNG  
Chief Counsel, Legal Services Division  
Securities and Futures Commission

Mr David GRAHAM  
Chief Regulatory Officer and Head of Listing  
Hong Kong Exchanges and Clearing Limited

**Secretary:** Ms Ellen CHAN

(iii)

**Meeting held during 2017/2018**

Two Hundred and Twenty-eighth Meeting - 19.03.2018

(iv)

**Information Papers circulated during 2017/2018**

Companies (Amendment) Bill 2017 - 23.06.2017

Companies (Amendment) Ordinance 2018 - 25.01.2018

(v)

**Discussion Paper circulated during 2017/2018**

Introduction of a Statutory Corporate Rescue  
Procedure and Insolvent Trading Provisions –  
Latest Progress - 13.03.2018

## **REPORT**

The Standing Committee on Company Law Reform (“SCCLR”) was formed in 1984. It advises the Financial Secretary (“FS”) on amendments to the Companies Ordinance (Chapter 622) (“CO”) and the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Chapter 32) (“CWUMPO”), as well as on amendments to the Securities and Futures Ordinance (Chapter 571) on matters relating to corporate governance and shareholders’ protection. The SCCLR reports annually to the FS through the Secretary for Financial Services and the Treasury on amendments that are under consideration.

2. From 1 April 2017 to 31 March 2018, the SCCLR received two Information Papers from the Government on the Companies (Amendment) Bill 2017 and an update on the passage of the Companies (Amendment) Ordinance 2018.

3. The SCCLR met once during the year to discuss the legislative proposal to introduce a statutory corporate rescue procedure (“CRP”) and insolvent trading provisions in Hong Kong.

### **Discussion Paper on “Introduction of a Statutory Corporate Rescue Procedure and Insolvent Trading Provisions - Latest Progress”**

#### **Background**

4. At the 228<sup>th</sup> Meeting held on 19 March 2018, representatives from the Financial Services and the Treasury Bureau and the Official Receiver’s Office presented the discussion paper: “Introduction of a Statutory Corporate Rescue Procedure and Insolvent Trading Provisions – Latest Progress”. Members were briefed on the background of the introduction by the Government of a statutory CRP and insolvent trading provisions, which originated from the Law Reform Commission’s recommendations in 1996. Having regard to the outcome of the public consultation exercise in 2009/2010 on the conceptual framework and some specific issues for the introduction of a statutory CRP and insolvent trading provisions, the Government published a package of detailed proposals in May 2014 (“2014 Detailed Proposals”). The

Government consulted the SCCLR<sup>1</sup>, the Panel on Financial Affairs (“FA Panel”) of the Legislative Council<sup>2</sup> (“LegCo”) as well as relevant stakeholder groups on the proposals. Subsequently, in December 2015 and September 2016, as part of the further engagement exercise, the Government consulted the SCCLR again on a number of issues<sup>3</sup>.

5. Members were informed that based on the 2014 Detailed Proposals and the outcome of engagement with stakeholders and the SCCLR, drafting work for a bill for introducing a statutory CRP and insolvent trading provisions (“Bill”) had recently commenced.

### **Discussion Outcomes**

6. Members noted the latest proposals in ten key areas of the Bill:
- (a) prior written consent of the major secured creditor;
  - (b) notification requirements on commencement of provisional supervision;
  - (c) moratorium during provisional supervision;
  - (d) investigation of company’s affairs during provisional supervision;
  - (e) personal and statutory liabilities of provisional supervisors (“PS”);
  - (f) pre-commencement outstanding entitlements of employees;

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<sup>1</sup> Please see the SCCLR Annual Report for the year 2014/15 which is available at the Companies Registry’s website <https://www.cr.gov.hk/en/standing/docs/31anrep-e.pdf>.

<sup>2</sup> LC Paper No. CB(1)1536/13-14(01) of the FA Panel meeting held on 7 July 2014 can be retrieved at <https://www.legco.gov.hk/yr13-14/english/panels/fa/papers/fac1-1536-1-e.pdf>. The Detailed Proposals for CRP and insolvent trading provisions can be found at Annexes B and C therein.

<sup>3</sup> Please see the SCCLR Annual Report for the year 2015/16 for the meeting on 3 December 2015 and the SCCLR Annual Report for the year 2016/17 for the meeting on 7 September 2016, which reports are available at the Companies Registry’s website <https://www.cr.gov.hk/en/standing/docs/32anrep-e.pdf> and <https://www.cr.gov.hk/en/standing/docs/33anrep-e.pdf>.

- (g) effect of the approval of a voluntary arrangement on a company in winding-up proceedings taken before the commencement of provisional supervision;
- (h) safeguard measures for CRP; and
- (i) applicability of CRP to registered non-Hong Kong companies.

7. Members noted that after seeking members' views at the SCCLR meeting held in December 2015 and other stakeholders' comments in 2016, the Government had proposed a second statutory defence for insolvent trading provisions. While the first defence was that the director had taken all reasonable steps to prevent the company from incurring the debt while the company was insolvent or would so become insolvent, the second defence was that the director would have to show that firstly, he or she in good faith believed that the company incurred the debt for the purpose of returning the company to a state of solvency within a reasonable period of time; and secondly, there were reasonable grounds for believing that the incurrence of the debt would benefit the company and that the company was likely to return to a state of solvency within a reasonable period of time. Subjective and objective tests for establishing "reasonable grounds for believing" were added to the second defence. Members also noted that the tests would be similar to those for assessing the directors' duty to exercise care, skill and diligence under the CO. Whether there were reasonable grounds for such a belief would depend on whether a reasonably diligent person -

- (a) with the knowledge, skill and experience that might reasonably be expected of a person in the position of that director; and
- (b) with the knowledge, skill and experience of that director,

would also form such a belief.

8. Members discussed and supported the proposed moratorium provisions in relation to a winding-up, considering that in order to enable genuine restructuring proposals to be properly developed and put to creditors during the provisional supervision, it was crucial for the threat of winding-up proceedings to be removed during that period.

Members were satisfied that there were safeguard measures under the latest proposals, including that the court would be empowered to end the provisional supervision of a company for specific reasons upon application by a creditor or a member of the company. Members further noted that apart from the exceptions and exemptions from the moratorium provisions as set out in the 2014 Detailed Proposals, the Government had proposed some further exemptions which were mainly to preserve the rights of the Government and regulators for public interest purposes.

9. Members agreed with the Government that in order to enable and encourage other parties to continue to trade with the company during the provisional supervision while the PS attempted to work out a rescue proposal, the PS should be held personally liable for those pre-appointment contracts the PS adopted and for new contracts entered into by the PS during the provisional supervision (which the PS would be allowed to agree with the other contracting parties on the extent of such liabilities), noting that such personal liabilities were also imposed on the equivalent of PS in other jurisdictions.

10. Members noted that having regard to the responses obtained from the previous public consultation and stakeholder engagement exercise during which creditors' groups had expressed the view to have a more active role in the CRP, the requirement for the prior written consent of the major secured creditors ("MSC") was incorporated in the latest proposals as one of the requisites for commencing the provisional supervision. Some members were of the view that the requirement for MSC consent would be a factor rendering the proposed CRP legislation less useful and that it was sufficient to protect the interests of MSC by giving the MSC the rights to receive notice and to oppose. Members noted that the Government would continue to engage the SCCLR and other stakeholders on the latest proposals.

11. Members also discussed the possibility to have the Protection of Wages on Insolvency Fund ('PWIF') to pay the employees upon commencement of provisional supervision but recognised that it would be a matter for further discussion and subject to the agreement with the PWIF. Members noted that the Government would continue to engage labour unions, particularly in relation to pre-commencement outstanding entitlements of employees.

12. In relation to cross-border insolvency, members noted that the Government had engaged a consultant to conduct a detailed assessment on the advantages and disadvantages of introducing domestic legislation in Hong Kong in the form of either section 426 of the United Kingdom Insolvency Act or the UNCITRAL Model Law on Cross-Border Insolvency. Noting that the consultant's opinion was that the preferred option for Hong Kong was the UNCITRAL Model Law, the Government would further study the appropriate approach for domestic legislation on cross-border insolvency in Hong Kong. Members also noted the Government's plan to take forward the legislative exercise for cross-border insolvency after the enactment of the Bill on CRP.

13. Members were informed that concurrent with the drafting of the Bill, the Government would continue to engage the SCCLR and other stakeholders on the latest proposals. Members noted that the Government planned to introduce the Bill into the LegCo in the 2018-2019 legislative year.