

**Standing Committee on Company Law Reform**

**The Twenty-Eighth Annual Report**

**2011/2012**

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## **Standing Committee on Company Law Reform (SCCLR)**

### **Twenty-Eighth Report**

	<b><u>Table of Contents</u></b>	<b><u>Page No.</u></b>
PREFACE		
	(i) Terms of Reference of the Standing Committee on Company Law Reform.....	1
	(ii) Membership of the Standing Committee for 2011/2012.....	1
	(iii) Meetings held during 2011/2012.....	3
	(iv) Information Papers circulated during 2011/2012.....	3
REPORT.....		4

## **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 as and when experience shows them to be necessary.
- (2) To report annually to the Financial Secretary on those amendments to the Companies 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 2011/2012**

**Chairman** : Mr Godfrey LAM Wan-ho, S.C.

**Members** : Mr Stephen BIRKETT  
Mrs Anne CARVER  
Mr Rock CHEN Chung-nin, B.B.S., J.P.  
Mr CHEW Fook-aun  
Mr Vincent FAN Chor-wah  
Professor GOO Say-hak  
Mr Peter W GREENWOOD  
Ms Roxanne ISMAIL  
Mr Johnson KONG Chi-how  
Mr Rainier LAM Hok-chung  
Mrs Catherine MORLEY  
Mr Kenneth NG Sing-yip  
Ms Edith SHIH

Dr Kelvin WONG Tin-yau

Ms Benita YU Ka-po

**Ex-Officio**

**Members** :

Mr Andrew YOUNG

Chief Counsel, Legal Services Division

The Securities & Futures Commission

Mr Mark DICKENS, J.P.

Head of Listing Division

Hong Kong Exchanges and Clearing Limited

Professor Edward L G TYLER

Department of Justice

Mr E T O'CONNELL, J.P.

(up to 28.6.2011)

The Official Receiver

Ms Teresa WONG

(from 29.6.2011)

The Official Receiver

Ms Ada CHUNG, J.P.

The Registrar of Companies

Mr Stefan GANNON, J.P.

General Counsel/Executive Director

The Hong Kong Monetary Authority

Mr John LEUNG, J.P.

(up to 2.12.2011)

Deputy Secretary for Financial Services and the Treasury

Mr Darryl CHAN

(from 5.12.2011)

Deputy Secretary for Financial Services and the Treasury

**Secretary**

: Ms Phyllis MCKENNA

(iii)

**Meetings held during 2011/2012**

Two Hundred and Twentieth Meeting - 24.9.2011

(iv)

**Information Papers circulated during 2011/2012**

Companies Bill - Update on Progress of  
Work at the Bills Committee - 16.9.2011

Abolition of Capital Duty - 23.3.2012

## **REPORT**

The Standing Committee on Company Law Reform (“SCCLR”) was formed in 1984 to advise the Financial Secretary (“FS”) on amendments to the Companies Ordinance, Chapter 32 (“CO”) and other related ordinances. The SCCLR reports annually to the FS through the Secretary for Financial Services and the Treasury on amendments that are under consideration.

The main focus of the SCCLR in the past few years has been the CO rewrite exercise which commenced formally in mid-2006 following the setting up of the Companies Bill Team. A draft Companies Bill was put out for consultation in two phases. The resulting Companies Bill (“CB”), which rewrites the provisions of the CO relating to live companies, was gazetted on 14 January 2011 and was introduced into the Legislative Council on 26 January 2011. The Bill is now under scrutiny by a Bills Committee and it is anticipated that the CB will be enacted by July 2012 to become the new Companies Ordinance. After enacting the subsidiary legislation necessary to implement the CB in 2013, the new Companies Ordinance will become operative in 2014. The remaining provisions of the CO relating to insolvency, prospectuses and other miscellaneous matters will become the Companies (Winding Up and Miscellaneous Provisions) Ordinance (“C(WUMP)O”).

During the year, the SCCLR received updates from the Government about the progress of the Bill and the initiative to abolish capital duty under the CO. It also discussed the proposed modernization of corporate insolvency law in Hong Kong. Six members of the SCCLR (excluding the ex-officio members) now sit on the Advisory Group on Modernization of Corporate Insolvency Law to advise the Government on the modernization exercise.

### **Discussion Paper on Modernization of Corporate Insolvency Law**

#### **Background**

- (a) At the 220<sup>th</sup> meeting held on 24 September 2011, representatives from the Financial Services and the Treasury Bureau (“FSTB”) and the Official Receiver’s Office (“ORO”) presented a discussion paper on “Modernization of

Corporate Insolvency Law”<sup>1</sup>.

- (b) The Administration advised that after enactment of the CB as the new Companies Ordinance, the provisions remaining in the CO relating to insolvency, prospectuses and other miscellaneous matters would be renamed C(WUMP)O. An amendment bill would be introduced to reform C(WUMP)O and the target for completion of the reform was mid-2016<sup>2</sup>. The intention was to rationalize the law and target provisions of the insolvency regime that were out-dated. In the modernization process, reference would be made to the laws of Australia and the United Kingdom.
- (c) The Administration advised that they would also consider how best to take forward proposals on the statutory corporate rescue procedure previously considered by members<sup>3</sup>. The recommendations of the “Report on the Winding-up Provisions of the Companies Ordinance” (“the Report”) issued by the Law Reform Commission (“LRC”) in 1999 would also be considered<sup>4</sup>.
- (d) The Administration set out in an Annex to the paper an initial list of issues identified by the ORO which would be addressed in the modernization exercise and advised that the intention was to form an Advisory Group comprising SCCLR members and representatives from the relevant professions and stakeholders to advise on the technical issues and to consult the public on the major legislative proposals in late 2012.
- (e) The major issues identified by the ORO were as follows:-
- Updating the provisions on unfair preference<sup>5</sup>.

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<sup>1</sup> The Discussion Paper on “Modernization of Corporate Insolvency Law” dated 16 September 2011, Document No. 220-1.

<sup>2</sup> A tentative timetable setting out the key steps of the proposed modernization exercise is set out in Annex B to the Document No. 220-1.

<sup>3</sup> “Review of the Proposal to Introduce a Statutory Corporate Rescue Procedure in Hong Kong” (Document No. 213-1) was discussed at the 213<sup>rd</sup> meeting of the SCCLR on 11 July 2009 and “Review of Corporate Rescue Procedure Legislative Proposals - Consultation Feedback and Controversial Issues” (Document No. 217-2) was discussed at the 217<sup>th</sup> meeting on 12 June 2010. Consultation conclusions on the Review were issued in July 2010 and are available at [http://www.fstb.gov.hk/fsb/ppr/consult/doc/review\\_crplp\\_conclusions\\_e.pdf](http://www.fstb.gov.hk/fsb/ppr/consult/doc/review_crplp_conclusions_e.pdf).

<sup>4</sup> The Report is available at <http://www.hkreform.gov.hk/en/docs/rwind-e.doc>.

<sup>5</sup> Sections 266, 266A and 266B of the CO where the court may avoid payments made by an insolvent company preferring a particular creditor of the company to another.

- Introducing a new provision on transactions at an undervalue.
- Replacing the requirement for taxation of liquidator's agents costs by a procedure for agreement with the committee of inspection or the court.
- Embracing new technology by allowing for example, electronic communication by liquidators.
- Rewriting section 265 of the CO which deals with creditors afforded preferential status.
- Reviewing and rationalizing definitions in various provisions and clarifying the basis for remuneration of provisional liquidators.
- Providing for a new Statutory Corporate Rescue Procedure and introducing provisions dealing with insolvent trading.
- Reviewing the provisions on qualification and disqualification of liquidators and provisional liquidators<sup>6</sup>.
- Reviewing provisions and procedures on death, resignation, removal and release of liquidators and provisional liquidators.
- Improving the procedures for voluntary winding-up<sup>7</sup>.
- Providing that notwithstanding release, the court should still have the power to deal with delinquent liquidators<sup>8</sup>.
- Introducing some technical amendments<sup>9</sup>.

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<sup>6</sup> With a view to considering the possibility of introducing new comprehensive provisions to ensure quality and to avoid conflicts of interest arising.

<sup>7</sup> Section 228A of the CO.

<sup>8</sup> Section 276 of the CO gives the court the power to assess damages against a delinquent liquidator.

<sup>9</sup> Such as combining section 190(4) of the CO and rule 43 of the Companies (Winding-up) Rules as both deal with costs for preparation of a statement of affairs, and allowing members of committees of inspection to claim reasonable traveling expenses.



**Recommendations / Remarks**

- (f) Members generally supported the proposed approach of the Administration to the modernization of corporate insolvency law but some members were concerned with the pace of the law reform since the recommendations of the LRC in their Report in 1999.
  
- (g) Members generally agreed with the issues identified by the Administration requiring reform, but also considered that the issue of cross border insolvency was important to Hong Kong and that consideration should be given to adoption of The United Nations Commission on International Trade Law Model Law on Cross-Border Insolvency. Members generally agreed that legislation for a proper corporate rescue regime should be introduced in Hong Kong. The Administration undertook to take the above recommendations and views into account when conducting the modernization exercise.
  
- (h) Members commented that the Administration should also consider the future role and function of the ORO, the need for reconciliation of the compulsory and voluntary liquidation procedures and the recommendations of the LRC in their Report.