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Our Ref: SN/6

15th July, 2013

Mr Denny Ho

Assistant Secretary for Financial Services and Treasury (Financial Services)

Financial Services and the Treasury Bureau

15/F, Queensway Government Offices

66 Queensway

Hong Kong

Dear Mr Ho,

Consultation on Legislative Proposals for the Improvement of Corporate Insolvency Law

The Hong Kong General Chamber of Commerce ("HKGCC") is pleased to submit our views on the issues raised in the consultation document on the captioned as follow.

Question 1

Do you support the proposal to adopt a prescribed form of statutory demand, which would contain key information as described in paragraph 2.7 as well as a statement of the consequences of ignoring the demand?

HKGCC's observations

In our view, the Administration and the legislature must ensure the adoption of a prescribed form will not allow or encourage debtor companies to take technical points against a statutory demand. The approach should never be one of form over substance.

Subject to the above, we agree that there should be a prescribed form of statutory demand so debtor companies are made expressly aware of the consequences and implications of ignoring a demand. We also support a requirement that the prescribed form of demand contain key information so as to enable a debtor company to understand, on the face of the demand, what action is required of it so as to comply with, or challenge, the demand.

Response to the question

The HKGCC supports the proposal at paragraph 2.7. We recommend that language similar to that found in the prescribed forms of statutory demand as set out in the Bankruptcy (Forms) Rules (Cap.6B) be adopted, particularly the section entitled "How to comply with a statutory demand or have it set aside".

Question 2

Do you think that the section 228A procedure, whereby the directors of a company may commence a voluntary winding-up of the company without first having the members of the company resolve to do so, should be maintained or repealed?

HKGCC's observations

If the concern is a risk of abuse, the procedure can and should be amended to minimise the risk; repealing the procedure altogether does not appear necessary. We recognise the possibility, although it may be rare, that the directors of an insolvent company are unable to have the support of the shareholders in passing a resolution for voluntary winding up under section 228 of the Companies Ordinance ("CO"), and the circumstances require a provisional liquidator to be appointed urgently so that the compulsory liquidation route is unfeasible due to the requirements in an application under section 193 in terms of time, costs and the factual basis to establish.

Response to the question

The HKGCC sees no need for the repeal of section 228A.

Question 3

If the section 228A procedure is to be maintained, do you agree to the proposed improvement measures as set out in paragraph 2.14 to reduce the risk of abuse of the procedure?

HKGCC's observations

We agree there is scope for amendment of the procedure to minimise the risk of abuse.

Response to the question

If section 228A is to be maintained, the HKGCC supports the proposals in paragraph 2.14.

Question 4

Do you agree to replacing the existing requirement of holding the first creditors' meeting on the same or the next following day of the members' meeting with the requirement of holding the first creditors' meeting on a day not later than the fourteenth day after the day on which the members' meeting is held in a creditors' voluntary winding-up case?

HKGCC's observations

We welcome the clarifications proposed in respect of the procedures for calling the first creditors' meeting in a creditors' voluntary winding-up. We support adopting a more generous notice period and timeframe in which the first creditors' meeting must be convened. On a related note, if section 241(1) is to be amended as proposed, thoughts should be given to whether section 241(5) in its current wording will still make sense, or if it should be amended consequently.

Response to the question

The HKGCC supports the proposal at paragraph 2.19.

Question 5

Do you support the proposal on prescribing a minimum notice period for calling the first creditors' meeting in a creditors' voluntary winding-up case? If so, do you consider a period of seven days appropriate?

HKGCC's observations

Financial creditors typically know more about a company's financial situation, and are commonly informed of or sense growing financial difficulties faced by the company earlier than trade creditors. In addition, whereas companies tend to borrow locally, their trade creditors may be located all over the world. If the minimum notice period is too short, trade creditors may be at a disadvantage compared with financial creditors in deciding how to respond to the commencement of voluntary winding-up.

Response to the question

The HKGCC supports the proposal to prescribe a minimum notice period but considers that a slightly longer period than seven days as proposed may work better in practice for some trade creditors. The new legislation should also require the company to give notice by instantaneous and publicly accessible means (e.g. email, facsimile and the company's website) to the extent it is practicable, in addition to "by post" currently required by section 241(1) CO.

Question 6

Do you agree to the proposal on limiting the powers of the liquidator appointed by the company during the period before the holding of the first creditors' meeting in a creditors' voluntary winding-up case?

HKGCC's observations

We agree that a liquidator's powers should be restricted, subject to Court sanction in appropriate circumstances, prior to the holding of the first creditors' meeting so as to enable the liquidator to preserve the company's property whilst at the same time ensuring that creditors' interests are adequately preserved until a decision is made as regards the liquidator's appointment at the first meeting of creditors. The restriction is appropriate especially because at present there is no requirement (save in a section 228A liquidation) that a liquidator is a licensed or regulated professional such as a solicitor or an accountant.

Response to the question

The HKGCC supports the proposal at paragraph 2.23.

Question 7

Do you agree to the proposed restrictions on the exercise of the directors' power before a liquidator is appointed in a creditors' voluntary winding-up case?

HKGCC's observations

We agree that where the winding-up has commenced, there is no justification for the directors to continue to exercise full management powers.

Response to the question

The HKGCC supports the proposal at paragraph 2.24.

Question 8

Do you agree with the proposed technical amendments relating to the commencement of winding-up as set out in Annex C?

HKGCC's observations

We support these technical amendments in principle; however, it is difficult to comment meaningfully on the amendments without actually having the benefit of reviewing the proposed language to be adopted.

Response to the question

The HKGCC supports proposals 1 to 4 inclusive of the technical revisions relating to the commencement of winding-up as set out in Annex C in principle.

Question 9

- (a) Do you agree to the expansion of the list of disqualified persons from being appointed as a provisional liquidator or a liquidator? If so, do you agree with disqualifying the types of persons as proposed in paragraphs 3.13, 3.15 and 3.16?
- (b) Do you agree to provide clearly that the appointment of a disqualified person as a provisional liquidator or liquidator shall be void and that he shall be liable to a fine if he acts as a provisional liquidator or liquidator?
- (c) Do you agree that the disqualification proposals should also apply to the appointment of a receiver or a receiver and manager of the property of a company with suitable modifications?

HKGCC's observations

In principle we support the proposals in paragraphs 3.12-3.16, but the drafting of the new legislation has to reflect market practice. For instance, it is widely recognised that a handful of firms provide auditing, tax, company secretarial, corporate finance and other services to many listed companies, and those firms also have insolvency practices. Creditors' choice of liquidators should not be unnecessarily restricted, or their costs unnecessarily increased, by new legislation under which leave of the court will be required in many cases for appointing insolvency practitioners from those firms.

With regard to paragraph 3.13(e), typically a receiver / receiver and manager is appointed by a financial creditor. It is understandable if financial creditors take the view that because a receivership is a private appointment, there is no compelling reason to disqualify a receiver / receiver and manager (without more) from being appointed as the provisional liquidator or liquidator.

Response to the question

As to question 9, the HKGCC:

- (a) Supports the proposals at paragraphs 3.12, 3.13 (except 3.13(e) as explained above), 3.15 and 3.16 but subject to the proposal at 3.14 (which the HKGCC also supports) that permits a prospective appointee in appropriate circumstances to apply to the Court for leave to act as provisional liquidator or liquidator.
- (b) Supports the proposal at paragraph 3.17. In order to avoid unnecessary dispute, the new legislation should clearly specify the effect of a court finding or declaration that an appointment is void. The office-holder might have done various kinds of practically irreversible things (e.g. dismissing employees) before his appointment is challenged. At present the closest to this (section 196(5) CO) is not sufficiently detailed and is expressly subject to section 278 CO.
- (c) Does not support the proposal at paragraph 3.18. Instead, the Administration and the legislature should consider whether and to what extent the list of disqualified persons should also apply to the appointment of provisional supervisors.

Question 10

- (a) Do you agree that a new statutory disclosure system should be introduced for the appointment of provisional liquidators and liquidators?
- (b) If yes, do you agree with the details of information required to be disclosed as set out in paragraph 3.21?
- (c) Do you agree that a statutory defence as proposed in paragraph 3.24 should be provided for a failure to disclosure?

HKGCC's observations

We encourage full and frank disclosure of relevant relationships in respect of prospective appointees to enable the appointing parties to make an informed decision on any given appointment.

Response to the question

As to question 10, the HKGCC:

- (a) Supports the implementation of a statutory disclosure system.
- (b) Supports the proposal at paragraph 3.21 as to the information to be disclosed (except for paragraph 3.21(a)(v) on the same basis as explained in our response to question 9 above). A prescribed form may assist in ensuring a minimum extent of disclosure and avoiding dispute. The new legislation should also state with whom the disclosure statement has to be filed in addition to the creditors, such as the court, the Official Receiver and the Registrar of Companies.
- (c) Is, in principle, not against the availability of a statutory defence, but suggests that instead of the formulation in paragraph 3.24, it should only be available where the prospective office-holder can prove he has made reasonable enquiries and, after making the enquiries, he *is not aware of the relevant relationship concerned*. If he is aware of it, under the proposal he should disclose and explain why he considers there to be no conflict. The defence as proposed in paragraph 3.24 apparently allows him to decide whether to disclose. This does not sit well with the disclosure system as proposed.

Question 11

- (a) **Do you agree that the existing prohibition on inducement being offered to members or creditors in relation to the appointment of liquidators should be extended to cover inducement being offered to any person?**
- (b) **Do you agree that the prohibition should also be extended to inducement offered in relation to the appointment of provisional liquidators, receivers, and receivers and managers?**

HKGCC's observations

The heading for section 278A of the CO uses the term “corrupt inducement” but the section itself refers to “any valuable consideration”.

Since the section was introduced here in 1984 (and its source introduced in England in 1948), there appears to be no case-law giving guidance on the meaning of “any valuable consideration” in this context, and the section heading cannot be used as an aid for interpretation (section 18(3), Interpretation and General Clauses Ordinance).

On a plain reading, if an insolvency practitioner offers lower charge-out rates to creditors in an attempt to win an appointment, arguably this can constitute “valuable consideration” and be caught by this section even where this was done as part of a normal competition for business.

Response to the question

As to question 11, the HKGCC is of the view that not only should there be no extension of the scope of section 278A, thought must be given to whether its continued existence is justified. The paucity of case-law in the 29 years since the section's enactment suggests that repealing it is unlikely to give rise to any problem in practice.

Question 12

Do you agree with the proposal to designate all provisional liquidators who take office upon and after the making of a winding-up order (i.e. section 194 PL) as “liquidators” such that they will be subject to the provisions in the CO which apply to liquidators?

HKGCC's observations

We welcome a formal distinction being made as between the roles of a section 193 PL and a section 194 PL and agree that a section 194 PL ought to be afforded the full duties and functions of a liquidator for the purposes of efficiently winding up a company.

Response to the question

The HKGCC supports the proposal at paragraphs 3.32 but suggests that the new legislation avoids the word “*continues*” now found in section 194(1)(aa) of the CO, which led the Honourable Mr Justice Barma (as the learned Justice of Appeal then was) in *Re Gold Pleasure Industrial Company Limited* (HCCW 49-52/2006, 7 January 2009) to conclude that a section 194 PL remains in office “*with all the powers under the original order by which he was appointed*” (paragraph 51) as a section 193 PL.

Question 13

Do you agree with the proposal to clearly stipulate that it is up to the court to determine the powers, duties, remuneration and termination of appointment of provisional liquidators who were appointed by the court before the making of a winding-up order (i.e. section 193 PL)?

HKGCC’s observations

It is already the current practice that the order appointing a section 193 PL would have detailed provisions on the matters stated in this question, but we see the benefit of the proposal in that it might encourage more thought in the drafting of the appointment order.

Specifically, on the remuneration of provisional liquidators, in our view a more flexible and hence favourable arrangement is that it can be approved by either the court or a subsequently appointed committee of inspection.

Response to the question

The HKGCC supports the proposal at 3.33 and puts forward the above proposal on the remuneration of provisional liquidators.

Question 14

Do you agree with the proposal of setting out the powers of liquidators now found in section 199(1) and (2) of the CO in a Schedule to improve the clarity of the provisions?

HKGCC’s observations

We take it that this proposal does not involve any substantive change to the law. We welcome initiatives to improve clarity of our legislation.

Response to the question

The HKGCC supports the proposal at paragraphs 3.36 and 3.37.

Question 15

Do you agree that the requirement for the liquidator to apply to the court or the COI for exercising the power to appoint a solicitor in a court winding-up should be removed, provided that prior notification is given to the COI or, where there is no COI, the creditors when the liquidator exercises such power?

HKGCC’s observations

We recognise it is more the norm than the exception that a liquidator requires assistance from solicitors. We agree that removing the requirement for sanction should help streamline the process.

On a related note, it is unclear why the opportunity is not taken to harmonise the position with regard to the commencement of proceedings (sanction is required under section 199(1)(a) in a compulsory liquidation but not in a voluntary liquidation).

Moreover, we suggest new legislation be enacted to reverse the common law position that a committee of inspection / creditors cannot give retrospective sanction to a liquidator. Under the current position, the liquidator can seek retrospective sanction from the court, but this adds to the cost of the liquidation and does not benefit the creditors.

Response to the question

The HKGCC supports the proposal at paragraph 3.38, and invites the Administration and the legislature to address the above observations.

Question 16

- (a) Do you agree that, notwithstanding the release of a liquidator by the court, the liquidator should not be absolved from the provisions of section 276 of CO?**
- (b) Do you agree that, where the court has granted a release to a liquidator, the power to make an application under section 276 should only be exercisable with the leave of the court?**

HKGCC's observations

We support increasing the accountability of those appointed to office as liquidator post their formal release in appropriate circumstances. If it is contemplated that a misfeasance claim can be brought against a former liquidator after his release, it is possible that this will take place after the company has been dissolved. In that scenario, the Honourable Mr Justice Barma observed in *Grand Gain Investment Ltd v Cosimo Borrelli & Another* (HCA 1463/2005, 1 June 2006) that “*there was... no longer any scope for misfeasance proceedings to be brought against the liquidator concerned*” (paragraph 49 citing *Kyrris v Oldham* [2004] 1 BCLC 306). One reason appears to be that the possible remedies set out in section 276 of the CO presuppose that dissolution of the company has not yet occurred.

Response to the question

As to question 16, the HKGCC:

- (a) Supports the proposal at paragraph 3.41. There should be consequential amendments to section 276 to ensure it can be invoked even after the company has been dissolved.
- (b) Supports the proposal at paragraph 3.42.

Question 17

Do you agree with the proposed technical amendments relating to the appointment, powers, vacation of office and release of provisional liquidators and liquidators as set out in Annex C?

HKGCC's observations

We support these technical amendments in principle; however, it is difficult to comment meaningfully on the amendments without actually having the benefit of reviewing the proposed language to be adopted.

Response to the question

The HKGCC supports proposals 5 to 7 inclusive of the technical revisions relating to the commencement of winding-up as set out in Annex C in principle.

Question 18

Do you agree that a maximum and a minimum number of members should be set for the COI appointed in both a court winding-up and a creditors' voluntary winding-up? If so, are the proposed maximum number (seven) and minimum numbers (three) appropriate? Do you agree that the court should have the discretion to vary the maximum and minimum numbers on application by the liquidator?

HKGCC's observations

There is a danger that in stipulating a maximum and minimum number of members, the COI provisions will become overly prescriptive as the present position does, on one view, provide the flexibility to appoint COIs of a size commensurate to the winding-up in question. On balance, however, we see benefit in setting a maximum and minimum number of members so as to (1) ensure COIs are adequately representative of creditor/contributory groups and (2) minimise the chance of voting deadlock by prescribing for odd numbers whilst at the same time (3) ensuring that COI decision-making is not slowed down by an overly large membership.

As to the maximum number proposed, it is not clear from the consultation paper why it is thought that seven will "facilitate the operation of the COI" and is therefore appropriate. Rules 4.152 and 4.154 of the UK Insolvency Rules 1986 prescribe for "not more than five". This maximum number is also adopted in the Australian Corporations Regulations 2001¹.

We agree that the Court should have the ability to vary the prescribed numbers in appropriate circumstances.

Response to the question

The HKGCC supports the proposal at paragraphs 4.8 and 4.9.

Question 19

Do you agree to allow the COI not to fill a vacancy if the liquidator and a majority of the remaining members of the COI so agree, provided that the total number of members does not fall below the proposed minimum number?

Response to the question

The HKGCC supports the proposal at paragraph 4.10.

Question 20

Do you agree to the proposals as set out in paragraphs 4.12 and 4.13 for streamlining and rationalising the proceedings of the COI?

HKGCC's observations

We encourage streamlining procedures for COI proceedings and agree that the timeframes proposed for the calling of the first meeting of the COI and the notice to be given by the liquidator of the same are sensible. In this regard, we note that Rule 4.156 of the UK Insolvency Rules 1986 prescribe a far more relaxed time frame in which a liquidator is required to call the first COI meeting². We are of the opinion that in a Hong Kong context, the six week timeframe proposed is sufficiently generous so as to balance encouraging the participation of COI members whilst also ensuring that delays are kept to a minimum in the administration of an insolvent estate.

Response to the question

The HKGCC supports the proposals at paragraphs 4.12 and 4.13.

Question 21

Do you support the proposal to enable the COI to function through written resolutions sent by posting or using other electronic means (such as using emails or through websites)?

¹ Schedule 8A, clause 11 which prescribes that a COI in the context of a deed of arrangement must consist of at least 3 and not more than 5 members.

² Within three months of a liquidator's appointment or the COI's establishment (whichever is the later).

HKGCC's observations

It is not clear from the proposal at paragraph 4.14 if by “other electronic means” the intention is to include or exclude the use of facsimiles in addition to emails and websites. If the intention is to streamline the operations of the COI by providing its members and the liquidator with as many viable alternatives to meetings in person as possible, we think it appropriate to either (1) specify an approved list of acceptable forms of electronic communication, alternatively (2) provide the liquidator and the COI members with the discretion to decide by what means resolutions ought to be passed. That is, the day-to-day administration of the COI would be bespoke to each winding-up by agreement between the liquidator and the COI members.

As to streamlining COI procedures generally, the proposals do not currently provide for an option to conduct COI meetings by electronic means. As electronic communications continue to improve, we think this ought to be considered. For example, video conferencing facilities are now more readily available as are telephone conference lines such that in our opinion, the COI should be entitled to take advantage of the flexibility such electronic means of communication provide.

Response to the question

The HKGCC supports the proposal at paragraph 4.14 but are of the opinion that the proposal ought to go further to address the points raised above.

Question 22

- (a) Do you agree with allowing the costs and charges of the agents employed by the liquidators to be determined by agreement between the liquidator and the COI?**
- (b) Do you agree that if such agreement cannot be reached, the costs and charges of the agents shall be delivered up for taxation by the court?**

HKGCC's observations

We welcome the proposal to empower the COI to approve agents' fees. If a COI is appointed, its members are, in our opinion, best placed to effectively critique and negotiate the costs and charges of agents employed by the liquidators. We also agree that the COI's consideration of both liquidators' remuneration and agents' fees together will ensure a consistent treatment of both.

Response to the question

As to question 22, the HKGCC:

- (a) Supports the proposal at paragraph 4.18.
- (b) Supports the proposal at paragraph 4.19.

Question 23

Do you support the proposal to allow liquidators and provisional liquidators to communicate with creditors, contributories or other parties by electronic means, subject to the conditions as set out in paragraph 4.21?

HKGCC's observations

We refer to and repeat our observations in response to consultation question 21 above in relation to the ambiguity regarding the scope of “other electronic means”.

As to notification generally, we are unclear as to why there are separate notification requirements for (1) the delivery of documentation by electronic means (paragraph 4.21(a)) and (2) the delivery of documentation through the use of websites (paragraph 4.21(b)). The means of giving notice pursuant to both of these subparagraphs is not specified and ought to be. We are also concerned that requiring the prior consent of a recipient to the liquidator's use of electronic means of communication may be impractical; it is also unclear what is intended by the phrase “secure the prior consent”.

Response to the question

Whilst the HKGCC supports the proposal at paragraph 4.21 in theory, we are of the opinion that the practical mechanics of the proposal require further consideration.

Question 24

Do you agree with the proposed technical amendments relating to the conduct of winding-up as set out in Annex C?

HKGCC's observations

We support these technical amendments in principle; however, it is difficult to comment meaningfully on the amendments without actually having the benefit of reviewing the proposed language to be adopted.

Response to the question

The HKGCC supports proposals 8 to 13 inclusive of the technical revisions relating to the commencement of winding-up as set out in Annex C in principle.

Question 25

- (a) Do you agree that new provisions should be introduced to empower the court to make orders for restoring the position of a company to what it would have been if the company has not entered into a transaction at an undervalue?**
- (b) Do you agree to the proposal regarding “relevant time” as proposed in paragraph 5.10?**
- (c) Do you agree that transactions at an undervalue entered into by the company with a person who is connected with the company should be subject to a more stringent control as proposed in paragraph 5.11?**
- (d) Do you agree that the statutory protection should be provided for the party seeking to resist an application made by the liquidator of a company in respect of the undervalue transaction? If so, do you agree with the statutory protection as proposed in paragraph 5.12?**

HKGCC's observations

Paragraph 5.8

The definition of “transactions at an undervalue” should ensure that only consideration moving from the counterparty *to the company itself* would count – the proposed definition in paragraph 5.8(b) is unclear. As a matter of contract law, it is permissible for consideration to move to a third party, but in the context of impeaching transactions at an undervalue, the key factor is the transaction’s effect on the company.

The manner in which consideration received and provided by the company is to be assessed (currently explained in footnote 97) should be made express in paragraph 5.8(b) as is the case in section 238(4)(b) of the UK Insolvency Act 1986. We would therefore propose paragraph 5.8(b) to read as follows:

Enters into a transaction with a person for a consideration the value of which, in money or money's worth, is significantly less than the value of the consideration, in money or money's worth, provided by the company.

Paragraph 5.10

We do not think it appropriate that the “relevant time” be 5 years. This look back period appears to have been suggested on the basis that it “is in line with that for bankruptcy cases under the BO”. With respect, this is a poor justification for adopting such a lengthy relevant time. We would support a relevant time of 2 years which is consistent with the approach adopted in the UK³ and in Australia⁴.

³ Section 240(1)(a) of the UK Insolvency Act 1986.

⁴ Sections 588FC and FE(3)(b) of the Australian Corporations Act 2001.

Paragraph 5.11

Whilst we agree the rationale for adopting a statutory presumption of insolvency for persons who are “connected with the company”, we are concerned that the definition proposed at paragraph 5.19 may, in theory, capture a company’s major supplier. In the matter of *Re a Company No.005009 of 1987*⁵, it was held that it was not obviously unsustainable (and therefore, in principle, possible) that a bank involved in a company’s affairs to a certain degree might constitute that bank as a shadow director of the company. If such an interpretation is possible in the case of a company’s bank, conceivably a liquidator may try and make similar arguments against the company’s major supplier in situations where, because of the company’s reliance, the liquidator may allege that the supplier was able to exert a high degree of influence on the company’s operations. This together with the very long relevant time proposed in the Consultation Document has the potential to bring significant uncertainty to ordinary business dealings.

Response to the question

As to question 25, the HKGCC:

- (a) Supports, in principle, the proposals at paragraphs 5.7 and 5.8 but considers that the two observations stated above with regard to paragraph 5.8 must be addressed.
- (b) Does not agree the 5 year “relevant time” proposed at paragraph 5.10 and suggests that a 2 year relevant time be adopted.
- (c) Supports the proposal at paragraph 5.11 in principle but has concerns as to the breadth of the definition of “connected with the company” proposed at paragraph 5.19.
- (d) Supports the proposal at paragraph 5.12.

Question 26

- (a) Do you agree that the current provisions in the CO incorporating the provisions in the BO on unfair preference should be replaced by new standalone provisions which apply to winding-up cases as proposed in paragraph 5.17 to rectify the existing anomalies which limit the application and effectiveness of such provisions?
- (b) Do you agree with the definitions of “person who is connected with a company” and “associate” as proposed in paragraphs 5.19 and 5.20?
- (c) Do you agree that the existing protection for persons who have received benefits or acquired or derived interest in property in good faith and for value from unfair preference should be maintained, and that the same protection should also be applicable to the proposed new provisions on transactions at an undervalue?

HKGCC’s observations

Paragraphs 5.16 & 5.17

We agree that stand-alone provisions ought to be incorporated into the CO with the anomalies identified in paragraph 5.15 rectified. However, as to the drafting of the proposed stand-alone provisions, we are of the opinion that paragraphs 5.17(c) and (d) ought to be redrafted so as to make more explicit the difference in treatment of those persons connected with the company (where the desire to prefer is presumed and a 2 year look back period applies) and those persons who are not connected with the company (where the desire to prefer must be proven and a 6 month look back period applies). In this regard, we would suggest adopting the format of sections 239⁶ and 240⁷ of the UK Insolvency Act 1986.

⁵ (1988) 4 BCC 424.

⁶ Subsections (5) and (6) deal with persons who are not connected with the company and those who are connected with the company respectively.

⁷ Subsections (1)(a) and (b) deal with persons who are connected with the company and those who are not connected with the company respectively.

Paragraph 5.19

We refer to and repeat our comments to paragraph 5.11 above in respect of the possibility that the definition of “person who is connected with the company” may, without further consideration of the drafting of the definition, include a company’s major supplier. We would not support such a definition.

Response to the question

As to question 26, the HKGCC:

- (a) Supports the proposals at paragraph 5.16 and 5.17 subject to the drafting suggestions identified above.
- (b) Does not support the proposal at paragraph 5.19 insofar as it might possibly capture a company’s major supplier. As to paragraph 5.20, we support having a separate definition of “associate” but would suggest that each category of associate should be sign-posted in the manner adopted in section 435 of the UK Insolvency Act 1986. By way of example, “5.20(a) [Associate of individual] A person is an associate...”
- (c) Supports the proposal at paragraph 5.22.

Question 27

Do you agree to the proposed special provisions in relation to floating charges created by a company in favour of a person who is connected with the company as detailed in paragraph 5.26?

Response to the question

The HKGCC supports the proposal at paragraph 5.26 provided that the definition of “person who is connected with the company” is revised so that it will not inadvertently and inappropriately capture a company’s major supplier.

Question 28

Do you support the expansion of the scope of the exemption of a floating charge from invalidation catered for genuine credit transactions to cover “property and services supplied to the company” and “money paid at the direction of the company” as detailed in paragraph 5.28?

HKGCC’s observations

We welcome the expansion of the categories of genuine credit transactions that are to be expressly exempt from invalidation. However, one practical matter that ought to be addressed is the issue of valuation in the case of property and services supplied to the company. It is not clear from the proposal at paragraph 5.28 what value date should be used – “at the time of or subsequently to the creation of a floating charge”. By way of example, should it be the date when the charge is created, or when the property is supplied? In the case of services, how can a fair valuation be arrived at? One option may be to adopt a variation of section 245(6) of the UK Insolvency Act 1986 which attempts to provide a definition of the value of goods and services:

For the purposes of subsection (2)(a) the value of any goods or services supplied by way of consideration for a floating charge is the amount in money which at the time they were supplied could reasonably have been expected to be obtained for supplying the goods and services in the ordinary course of business and on the same terms (apart from the consideration) as those on which they were supplied to the company.

Although the language “property or services supplied to the company” at paragraph 5.28(b) goes some way to capturing other forms of valuable consideration which arise from day-to-day trading and finance, we suggest that other typical forms of valuable consideration (the transfer of land or shares) ought to be included. Perhaps “property or services supplied to the company including but not limited to [insert other agreed forms of consideration]”?

Response to the question

The HKGCC supports the proposal at paragraph 5.28 in principle but is of the view that the matters above must be adequately addressed.

Question 29

- (a) Do you agree to expressly set out in the legislation the common law position that a person summoned for either a private or public examination cannot invoke the privilege against self-incrimination during the examination?
- (b) If so, do you agree that we should introduce provisions to prohibit the subsequent use of answers given and statements made during the examination in subsequent criminal proceedings if certain conditions are satisfied, subject to certain exceptions such as offences relating to perjury and provision of false statement and offences under the future Companies (Winding Up and Miscellaneous Provisions) Ordinance?

HKGCC's observations

Paragraph 6.10

We agree that the common law position should be expressly stated in the CO. This brings the CO into line with the position taken in Australia⁸.

As to enhancing the effectiveness of the examination procedures generally, on our understanding, it is also common (possibly more common) that section 221 is invoked to require provision of documents. Consequently, in our opinion, it would be good if the legislation expressly provides whether / to what extent the respondent can claim legal professional privilege. In this regard, in the leading authority *Akai v Ernst & Young* (2009) 12 HKCFAR 642, the Court of Final Appeal held that transcripts and notes relating to section 221 oral examinations should be afforded legal professional privilege and not disclosed as part of the discovery to be given in subsisting audit negligence proceedings. As the CO does not expressly address the question of legal professional privilege, it may be prudent in this round of reforms to consider doing so. This would, in our opinion, provide greater clarity and certainty as to the potential use of the section 221 examination procedures.

Paragraph 6.11

It is not clear from the proposal at paragraph 6.11 if the “certain conditions” referred to are limited to “that the answer or statement might tend to incriminate him and that he so claims before giving the answer or making the statement...” or if the draftspersons had any other substantive conditions in mind. This ought to be made clear. As to the proposal that the prohibition will be subject to “certain exceptions”, again it is not clear if the exceptions are to be limited to the examples given, that is where the person in question is charged with offences relating to (1) perjury, (2) provision of false statements or (3) other offences under the future Companies (Winding Up and Miscellaneous Provisions) Ordinance. We agree the proposal in principle but cannot meaningfully comment as to its adequacy for the purpose of protecting a respondent examinee’s rights without having the opportunity to consider the precise language proposed.

Response to the question

As to paragraph 29, the HKGCC:

- (a) Supports the proposal at paragraph 6.10. We would also encourage consideration of legislating in respect of legal professional privilege.
- (b) Supports the proposal at paragraph 6.11 in principle and subject to our comments above.

⁸ Section 597(12) of the Australian Corporations Act 2001 *cf* Sections 133 and 236 of the UK Insolvency Act 1986 where the issue of privilege against self-incrimination is still a matter for common law.

Question 30

- (a) Do you agree to the removal of the requirement that the OR or the liquidator must have alleged in his “further report” that fraud has been committed for initiating the public examination procedure, and to provide that a public examination may be ordered by the court upon the application by either the liquidator of the OR?**
- (b) Do you agree with the proposed new categories of person that may be examined under the public examination procedure, namely (i) any person who has acted as liquidator of the company or receiver or receiver and manager of the property of the company; and (ii) any person who is or has been concerned, or has taken part, in the management of the company?**

HKGCC’s observations***Paragraphs 6.15 & 6.16***

It is not evident from the consultation paper what justification is given for the proposed removal of the section 222(1) requirement to make a further report alleging fraud so as to invoke the public examination process. Nor is there any justification given for adding further categories of persons that might be summoned to attend before the court for a public examination. Without an explanation as to the reasoning behind these proposals, we cannot see how they might “enhance the effectiveness of the public examination procedure by making it easier for the procedure to be triggered”. Both proposals appear, at first blush, to have the potential for encouraging liquidators to “fish” for information without requiring them to properly turn their minds to why they might have grounds to proceed with a public examination of promoters and directors rather than to invoke the private examination procedure prescribed in section 221.

Moreover, if the fraud requirement is to be removed, it appears to us that the substantive question to be answered is whether it is actually necessary to retain two separate examination procedures⁹. What would be the justification and distinction between the two procedures?

Response to the question

As to question 30, the HKGCC:

- (a) Does not support the proposal at paragraph 6.15.
- (b) Does not support the proposal at paragraph 6.16.

Question 31

- (a) Do you agree that if a company is wound up insolvent within one year of its shares being redeemed or bought back by payment out of capital, certain categories of persons should be required to contribute to the assets of the respect of the shares redeemed or bought back by the company so as to meet the deficiency in the company’s assets?**
- (b) If so, should the members from whom the shares were redeemed or bought back and the directors who made the solvency statement which supported the redemption or buy-back without having reasonable grounds for the opinion expressed in the statement be jointly and severally liable to contribute to such assets?**
- (c) Should such persons be allowed to apply for winding-up of the company under company for an amount not exceeding the payment made by the company in the specific grounds as set out in paragraph 6.22?**

⁹ In Australia all examinations proceed as public examinations unless the Court orders otherwise (section 597(4) of the Australian Corporations Act 2001).

HKGCC's observations

Paragraph 6.21

We understand the rationale for ensuring that a company's capital is not inappropriately divested and agree that the capital maintenance doctrine should be respected. However, we are of the opinion that the category of persons who ought to make a contribution to the assets of the company in the manner provided for in the proposal should be limited to those persons who are connected with the company within the meaning of paragraph 5.19 of the consultation paper and subject to our comments to paragraph 5.11 above. As currently drafted, the proposal does not distinguish between persons who are connected with the company and those who are not so connected (paragraph 6.21(a) simply refers to "recipient of the payment"). If the intention is to "safeguard against abuse and ensure that the paid-up capital of a company is not returned to its members improperly" we are of the opinion that it should only be those closest to the company who ought to be held accountable.

Paragraph 6.22

On the issue of standing to petition for the winding-up of the company, in the BVI, there is Court of Appeal authority (*Westford Special Situations Fund*, 2011) stating that (by reference to the BVI equivalent of section 170(1)(g) CO) a holder of preference shares who has issued a redemption notice may not petition based on the redemption proceeds. In our view, this position is sensible and should be adopted in Hong Kong.

Response to the question

As to question 31, the HKGCC:

- (a) Supports the proposal at paragraph 6.21 that certain categories of persons should be required to contribute, but is of the view that a distinction should be drawn between persons who are connected with the company and those who are not so connected.
- (b) Supports liability being shared but only as between directors and those members who are persons connected with the company.
- (c) Supports the proposal at paragraph 6.22, and suggests that the observation stated above (with regard to redeeming shareholders) be taken into account in the drafting of the new legislation.

Question 32

Do you agree with the proposed technical amendments relating to the investigation during winding-up, offences antecedent to or in the course of winding-up and powers of the court as set out in Annex C?

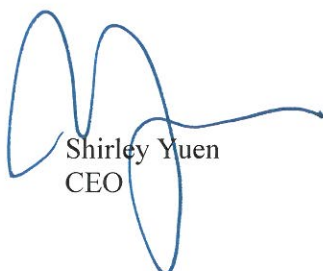
HKGCC's observations

We support these technical amendments in principle, however, it is difficult to comment meaningfully on the amendments without actually having the benefit of reviewing the proposed language to be adopted.

Response to the question

The HKGCC supports proposals 14 to 27 inclusive of the technical revisions relating to the commencement of winding-up as set out in Annex C in principle.

Yours sincerely,



Shirley Yuen
CEO