

Lorenz & Partners

Legal, Tax and Business Consultants

Information No.: 60 (EN)

Dissolution of a Hong Kong Company

June 2017

Table of Contents

I. INTRODUCTION	4
II. COMPULSORY WINDING UP BY THE COURT	6
1. Persons, who can apply for a compulsory winding up	6
a) A company's petition	6
b) A creditor's petition	6
c) A contributory's petition	6
d) Other parties that can file the petition	7
2. Grounds for winding up	7
3. Commencement of a mandatory winding up	8
a) Disposition of property	9
b) Judgments against the company	9
c) Provisional Liquidator	9
d) Preliminary Report	10
e) Meetings of Creditors and Contributories	11
4. The powers and duties of the liquidator	11
5. Summary procedure for a compulsory winding-up by the court	12
III. VOLUNTARY WINDING-UP	13
1. Commencing a voluntary winding-up	13
a) Members' voluntary winding-up	14
b) Creditor's winding-up	14
2. The powers and duties of the liquidator in a voluntary winding-up	15
3. Voluntary winding-up according to Section 228A CWUO	15
IV. THE ASSETS OF A COMPANY AVAILABLE FOR DISTRIBUTION	16
1. The members of the company	16
2. The directors of the company	17
3. Other Debtors	17
4. Onerous property	17
V. COMPLETION OF WINDING-UP AND TERMINATION	18
1. Proof and ranking of claims	18
2. Preferential payments	18
a) Category A: Relating to employees	18
b) Category B: Relating to the Government	19
c) Category C: Relating to companies being a bank	19
d) Category D: Relating to companies being an insurance company	19
3. Distribution of the surplus assets	20
VI. DISSOLUTION OF THE COMPANY	20
1. Dissolution in case of a mandatory winding-up	20
2. Dissolution in the case of voluntary winding-up	21
VII. DEREGISTRATION OF DEFUNCT SOLVENT COMPANIES	21

I. Introduction

Hong Kong is known as a place where it is easy, quick and simple to establish private limited companies. The time required for online registration of a new local company is less than 24 hours. It takes four working days for paper submission.

However, in certain cases, a company needs to be closed down. This can be the case if the shareholders decide that they do not need the company anymore, or if the business model has not proven to be successful. In order to avoid further losses, it can be advisable to close down the company. Assuming that the business is making losses, the first idea should be to try to change the business model, and/or finding new ways of raising funds and new money. This can be done by increasing the registered capital, by shareholder loans, or by obtaining new funds from third parties, such as banks or private investors. However, it can also be advisable to think about restructuring the company, merging it with another business, or thinking of another way to rescue the company. However, if all these measures cannot rescue the company, it must be decided how to terminate the company.

This Brochure gives a comprehensive overview of different ways a Hong Kong company can (or must) be closed down. This includes voluntary winding-up or liquidation (the terms have the same meaning), and in case the company is insolvent and cannot pay off its debts, it includes a mandatory winding-up by the court.

Hong Kong's insolvency regime is based mainly on that of the United Kingdom and the emphasis is on the realization of assets for the benefit of creditors rather than the rescue of the company. The legislation concerning corporate insolvency is contained largely in the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap 32) as well as in the Companies Ordinance (Cap 622). Certain provisions on the Bankruptcy Ordinance (and the related Bankruptcy Rules) are also applicable for the liquidation of insolvent companies. At present, Hong Kong does not have a formal statutory rescue procedure for companies in financial difficulty (like Chapter 11 in the US). The absence of a stay of moratorium on creditor enforcement action while a restructuring is being worked out can be a significant problem for a company.

On 3 June 2016, the Companies (Winding Up and Miscellaneous Provisions) (Amendment) Ordinance ("Amendment Ordinance") was gazetted. The Amendment Ordinance follows the "hiving off" of the insolvency provisions from the Companies Ordinance into the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap 32) (hereinafter "**CWUO**") in March 2014. This Amendment Ordinance intended to modernise and consolidate the corporate insolvency regime in

Hong Kong as well as improve creditor protection and streamline the winding up process.

Some provisions include:

- The court will have the power to set aside a transaction at an undervalue which is entered into by a company within five years before the commencement of its winding up.
- Extension of the meaning of “associate” for the purposes of voidable transactions, i.e. to include the spouse of a director.
- Extending the “claw-back” period for floating charges to two years prior to the commencement of a winding-up for such persons
- The improvement of the liquidator’s powers to investigate and challenge antecedent transactions
- Promoting additional court-free procedures by allowing committees of inspection (“COIs”) to approve costs of liquidators’ agents and permit liquidators to appoint a solicitor to assist in the liquidator’s duties on notice to creditors
- Streamlining the administration of liquidation

However, the attempts to have a proposed corporate rescue bill in place and as draft legislation on insolvent trading is still pending, so far further consultation is being put before the Legislative Counsel with hope that a bill will be passed into the Legislative Counsel by 2018.

The process of winding up brings the life of a company to an end: its assets are sold off, its debts are paid; and, if the company is insolvent, its debts are paid to the extent existing funds allow and any surplus funds are distributed amongst the shareholders or otherwise, in accordance with the memorandum and articles of the company. The company continues to exist throughout the process of the winding-up, and all acts are done in the name of the company. The conduct of the winding-up is in the hands of a liquidator. On his appointment, the directors cease to have power to manage the company; the liquidator assumes their functions and becomes subject to the duties laid down in Part V of the Companies Ordinance and to the winding-up rules. The company ceases to exist only by formal act of dissolution after the whole winding-up process has been completed.

The winding-up of a company may be ordered by the court, or it may be done voluntarily. When the court orders a winding-up, it is said to be compulsory: the liquidator, who is appointed by the court, can only act under its direction and control.

In a voluntary winding-up, the liquidator is appointed by the shareholders, and will exercise general control over the liquidation.

II. Compulsory winding up by the court

The provisions dealing with a compulsory winding up ordered by the court can be found in Sections 176- 227F of the **CWUO**. According to Section 257 CWUO, a petition for compulsory winding up can be filed even if an application for voluntary winding up has already been submitted to the court.

1. Persons, who can apply for a compulsory winding up

The Companies Ordinance provides that a petition to the Court of First Instance¹ can be filed by the company itself (very unlikely), its creditors, its contributors, the Financial Secretary, the Registrar, or by the Official Receiver.² Petitions may also be presented by the Securities and Futures Commission (SFC), the Office of the Commissioner of Insurance, and the Hong Kong Monetary Authority.

a) A company's petition

The company itself can apply to the court to be wound up.³

b) A creditor's petition

The usual method by which a petition is presented to the court is by one or more creditors of the company⁴ based on the fact that the company cannot pay its debts.⁵

c) A contributory's petition

A contributory means every person liable to contribute to the assets of the company in the event of its being wound up, and includes any person alleged to be a contributory (means: all shareholders and former shareholders of partly paid shares who have transferred their shares in the last year).⁶ However, the right for contributories are limited, so that they can only file the petition in case the company

¹ Section 176 CWUO.

² Section 177 CWUO.

³ Section 169 (1) (b) CWUO.

⁴ Section 179 CWUO.

⁵ Section 177 (1) (d) CWUO.

⁶ Section 171 CWUO.

does not have any other shareholders, and the shares were originally allotted to him or have been held by him and registered in his name for at least 6 to 18 months before the commencement of winding up.⁷

d) Other parties that can file the petition

Other parties that can file to the court a petition for mandatory winding up include:

- The Financial Secretary of Hong Kong, who might file such petition when he has reasonable grounds to believe that the winding-up of the company is in the public interest.⁸ The court may grant the petition if the court thinks that it is just and equitable for the company to be wound up.⁹
- The Registrar of the Hong Kong Companies Registry can file a when certain preconditions are met.¹⁰
- The Official Receiver: When a company is being wound up voluntarily, the Official Receiver may present a petition for the company to be wound up by the court.¹¹
- The Securities and Futures Commission (SFC) can present the petition under the Securities and Futures Ordinance (Chap 571).

2. Grounds for winding up

A company may be wound up by the court on the following grounds:¹²

- The members (shareholders) of the company can by special resolution decide to wind the company up by the court.¹³
- The company does not commence business within a year from its incorporation, or it suspends business for a whole year.¹⁴
- The company has no members (shareholders).¹⁵
- The company is unable to pay its debts.¹⁶ A company is considered being unable to pay its debts when the company owes HKD 10,000 (approx. EUR 1,000) or

⁷ Section 179 (1) (a) CWUO.

⁸ Section 179 (1) (d) CWUO.

⁹ Section 879 (2) of the Companies Ordinance.

¹⁰ Section 177 (2) CWUO.

¹¹ Section 179 (2) CWUO.

¹² Section 177 (1) CWUO.

¹³ Section 177 (1) (a) CWUO.

¹⁴ Section 177 (1) (b) CWUO.

¹⁵ Section 177 (1) (c) CWUO.

more to a creditor who has served the company, at its registered office, with a demand requiring it to pay the sum due and the company does not pay or provide security or compromise for payment on terms which are acceptable to the creditor, within three weeks.¹⁷ In case the company is owing unpaid salaries, wages in lieu of notice, or severance payments to several employees, they are considered to be one creditor.¹⁸ A company is also considered to be unable to pay its debts when a judgement creditor (means somebody who obtained already a judgement against the company) has tried to enforce this judgement by execution on the company's property and the execution has failed to satisfy the debt in whole or in part.

- The court is satisfied that the company is unable to pay its debts and is therefore insolvent, including contingent and prospective liabilities.
- However, it is to bear in mind that despite one of the mentioned reasons has been brought to the court, it is still the court's decision to decide whether the company should be wound up. For instance, the company might have a counter-claim against the creditor, so the court could decide that the counter-claim exceeds the creditor's claim, and the company therefore can still be considered to be solvent.
- The articles of the company can specify certain grounds on which the company shall be wound up by the court. However, this happens quite rarely, more popular are reasons in the articles according to which the company can be voluntarily wound up by their members.
- The court is of the opinion that it is just and equitable that the company should be wound up. There are certain court decisions dealing with this issue, however, since these are all based in a case-by-case basis, this cannot be elaborated in detail in this Brochure.

3. Commencement of a mandatory winding up

A winding up commences when the petition is filed to the court.¹⁹ Assuming the company has decided by shareholder's resolution to voluntarily wind up the company, then the date of passing this resolution is considered to be the date of commencement of winding-up.²⁰ The date of commencement of winding-up is important because of a number of reasons:

¹⁶ Section 177 (1) (d) CWUO.

¹⁷ Section 178 (1) CWUO.

¹⁸ Section 178 (2) CWUO.

¹⁹ Section 184 (2) CWUO.

²⁰ Section 184 (1) CWUO.

a) Disposition of property

Any disposition of the company's property, any transfer of shares, or alteration in the status of the members made after the commencement is void, unless the court orders otherwise.²¹

b) Judgments against the company

Any order of the court granted to a judgment creditor for execution against the property of the company which is enforced after the commencement of the winding-up is also void.²² Furthermore, if there is any action or proceeding against the company pending, from the commencement of the winding-up until a winding-up order is made, the company or any creditor or contributory may apply to the court to stay or restrain the action on such terms as it thinks fit.²³

c) Provisional Liquidator

A provisional liquidator may be appointed by the court at any time from the commencement of the winding up.²⁴ Basically, every natural person can be appointed by the court as a liquidator, as long as he or she is not bankrupt,²⁵ and it is noteworthy that no company can be appointed as liquidator. For becoming a liquidator, it is not required that the person to be appointed does have any previous relation to the company, its directors or the shareholders, but the companies registry must be informed about the appointment, and it might be ordered that the to be appointed liquidator shall pay security.²⁶ If, and to which extent, the provisional liquidator shall receive remuneration for his job and his work, will be determined by the court.

When a provisional liquidator has been appointed, a statement of affairs of the company must be made and submitted by the company to the provisional liquidator. The Statement must be in the form as described by the law²⁷, verified by an affidavit, and must include particulars of the company's assets, debts, liabilities, the names, addresses, and occupations of its creditors and any security which they hold.²⁸

²¹ Section 182 CWUO.

²² Section 183 CO.

²³ Section 181 CWUO.

²⁴ Section 193 CWUO.

²⁵ Section 278 CWUO.

²⁶ Section 195 (a) CWUO.

²⁷ Winding up Rules, r 39, and Form 23.

²⁸ Section 190 (1) CWUO.

The statement must be submitted and verified by one or more of the company's creditors and by the company secretary.²⁹ The statement of affairs must be submitted within 28 days after the provisional liquidator has been appointed or the winding-up order has been made,³⁰ but a time extension can be claimed for good cause.

d) Preliminary Report

The liquidator shall submit a preliminary report to the court.³¹ This must be done as soon as it is practicable after the receipt of the statement of affairs.

The report must include:

- The amount of capital issued, subscribed for, and paid-up, and the estimated amount of assets and liabilities;
- If the company has failed, the causes of the failure; and
- Whether in the opinion of the liquidator further inquiry is desirable as to any matter relating to the promotion, formation, or failure of the company, or the conduct of the business of the company.³²

The liquidator has to ascertain the company's assets and liabilities so that preferential and unsecured creditors can be established. The liquidator may also make further reports stating the manner in which the company was formed and whether in his opinion any fraud has been committed by any person in its promotion or formation or by any other officer in relation to the company since formation, and any other matters which in his opinion are desirable to bring to the notice of the court.³³ If the liquidator's report alleges fraud or, in the case of an insolvent company, grounds which would disqualify an officer of the company, the court has the power to order a public examination of any of the company's promoters, directors, or officers.³⁴ In certain cases, this might trigger personal liability for a director of the company.

²⁹ Section 190 (2) CWUO.

³⁰ Section 190 (3) CWUO.

³¹ Section 191 CWUO.

³² Section 191 (1) CWUO.

³³ Section 191 (2) CWUO.

³⁴ Section 222 (1) CWUO.

e) Meetings of Creditors and Contributories

The next step is that the creditors and the contributories of the company will meet in separate meetings to determine whether the provisional liquidator shall be replaced by a permanent liquidator, or whether the provisional liquidator shall continue to serve.³⁵ Furthermore, it must be decided by these meetings whether a “Committee of Inspection” should be established to support the liquidator, and how such committee should be created. A committee of inspection³⁶ shall consist of members from the creditors’ and the contributories’ side and shall meet at least once a month. The duty of the committee is to act in the best interests of the general body of creditors that it represents. In case that no committee is established, the court shall have the same duties, rights and responsibilities as the committee would have.³⁷ Therefore, in case of small companies, it is normally not required to establish a committee of inspection.

4. The powers and duties of the liquidator

In a compulsory winding up, ordered by the court, the liquidator has the following rights:³⁸

- Bring or defend any action or other legal proceedings for or against the company
- Carry on the business of the company
- Appoint a solicitor for assistance in the winding up
- Pay any classes of creditors in full
- Compromise all debts, calls and claims between the company and third parties who may be liable to the company.

Section 199 (2) CWUO assigns further rights to the liquidator, and it can be said that the liquidator has almost the same rights as a sole director of a company, except that a director shall act in the best interest of the company, whereas the liquidator shall act in the best interest of the company’s creditors. As long as the liquidator is appointed as provisional liquidator, these rights can be restricted.³⁹ The liquidator is responsible towards the creditors and the contributories and may summon a meeting of them to ascertain their wishes. If more than 10% in value of the creditors or contributories vote, the liquidator is required to summon a meeting,⁴⁰ and the liquidator needs to

³⁵ Section 206 CWUO.

³⁶ Section 207 CO.

³⁷ Section 208 CO.

³⁸ Section 199 (1) CWUO.

³⁹ Section 193 CWUO.

⁴⁰ Section 200 CWUO.

keep proper books and record the minutes of proceedings at meetings.⁴¹ In case the liquidator receives any money for the company, he needs to pay this amount into the company's account.⁴² Whilst in office, every liquidator must send the Official Receiver an account of his receipts and payments at least twice a year,⁴³ which must be accompanied by a statutory declaration.⁴⁴

If a liquidator does not faithfully perform his duties and duly observes all the requirements imposed on him, or if any complaint is made to the Official Receiver by a creditor or a contributory, the Official Receiver must inquire into the matter and require the liquidator to answer any inquiry, and take such action as he thinks expedient.⁴⁵

5. Summary procedure for a compulsory winding-up by the court

In case that a petition for compulsory winding-up is made to the court and the property of the company does not exceed HKD 200,000, then the company can be wound up by summary procedure.⁴⁶ The appointed provisional liquidator will be the liquidator of the company; there will be no meetings of creditors and contributories, and no committee of inspection will be appointed, and other modifications may be made to save expenses and to speed up the process.⁴⁷ Once having checked the financial status of the company, the liquidator will decide whether to apply to the court for summary procedure. From a practical point of view, many insolvency cases in Hong Kong are wound-up by such summary procedure.

⁴¹ Section 201 CWUO.

⁴² Section 202 (1), (2) CWUO.

⁴³ Section 203 (1) CWUO.

⁴⁴ Section 203 (2) CWUO.

⁴⁵ Section 204 CWUO.

⁴⁶ Section 227F CWUO.

⁴⁷ Section 227F CWUO.

III. Voluntary winding-up

A voluntary winding-up⁴⁸ has many advantages over a compulsory winding-up and therefore should be considered when planning to liquidate a company.

1. Commencing a voluntary winding-up

A company can be wound up voluntarily under the following reasons:⁴⁹

- Upon the occurrence of an event or expiry of a period as described in the articles of the company
- When decided by the shareholders by special resolution
- When decided by the shareholders that by reasons of its liabilities, the company should be wound up
- Under special circumstances by decision of the directors⁵⁰

A printed copy of the resolution to wind up the company must be delivered to the Companies Registry within 15 days after passing the resolution,⁵¹ and the winding up is deemed to commence on the passing date of the resolution. The decision of the winding-up must also be published within 14 days after the passing of the resolution.

Upon passing the resolution, the company shall cease to carry out its business,⁵² except in so far as it is required for the beneficial winding-up. This is contrary to a mandatory winding-up, where all business stops with the winding-up order, and all acts done after the order are deemed to be invalid. But, as with a mandatory winding-up, every company document, invoice, order, business letter, etc. must state that the company is being wound-up. Every transfer of share, or any alteration in the status of the members of the company made after the resolution of winding up is void.⁵³ But even when the company is wound-up voluntarily, a compulsory winding-up can be ordered, in case the financial circumstances of the company deteriorate.

⁴⁸ Sections 228 CWUO.

⁴⁹ Section 228 (1) CWUO.

⁵⁰ Section 228A CWUO.

⁵¹ Section 622 (1) (h) CO.

⁵² Section 231 CWUO.

⁵³ Section 232 CWUO.

a) Members' voluntary winding-up

When a voluntary winding-up by the members (shareholders) is proposed, the directors may issue a certificate of solvency⁵⁴, signed by the directors. This certificate states that:

- They have made a full inquiry into the affairs of the company, and
- They are of the opinion that the company will be able to pay its debts in full within a maximum of 12 months from the passing of the resolution.

This certificate of solvency must be issued within five weeks preceding the resolution of the members to wind up the company, or on the meeting when such resolution shall be passed, but it must be presented to the members before passing the winding-up resolution. Furthermore, the certificate must be, together with the winding-up resolution, delivered to the Companies Registry, together with a statement of the company's assets and liabilities.⁵⁵

In case the directors issue such certificate, but they have reasonable grounds to believe that the company cannot fully pay its debts, they commit an offence.⁵⁶

At the date of the meeting, or afterwards, the company must appoint a liquidator. Contrary to a mandatory winding-up, where the liquidator is an officer of the court, in a voluntary winding-up he is an agent of the company. He must give notice to the Companies Registry of his appointment and he must publish this in the Gazette within 21 days following his appointment.⁵⁷ From the date of the appointment, all powers of the directors cease.⁵⁸ Removing the liquidator is possible by shareholder's resolution with special majority.

b) Creditor's winding-up

A creditors' voluntary liquidation will occur where the company decides to put itself into voluntary liquidation but is not solvent. Therefore, any voluntary liquidation in which there is no certificate of solvency will be a creditors' voluntary liquidation.

⁵⁴ Section 233 (1) CWUO.

⁵⁵ Section 233 (2) CWUO.

⁵⁶ Section 233 (3) CWUO.

⁵⁷ Section 253 CWUO.

⁵⁸ Section 235 (2) CWUO.

For a creditors' winding-up, the company must arrange a meeting of the shareholders in which a creditors' winding-up shall be proposed, and it must also arrange a meeting of the creditors for the same day or the following day. The invitation to this creditors' meeting must be published in the gazette and in at least one English- and one Chinese-language newspaper.⁵⁹ The directors of the company must compile a statement of the company's affairs for that meeting and include a list of creditors and the estimated amount of their claims.⁶⁰ The shareholders and the creditors need to appoint a liquidator.⁶¹

2. The powers and duties of the liquidator in a voluntary winding-up

The liquidator in a voluntary winding-up has basically the same rights and duties as in a mandatory winding-up.⁶² He must collect the debts of the company and adjust the rights of the contributories among themselves.⁶³ Furthermore, he needs to keep account of his receipts and his payments, and this account basically needs to be audited.⁶⁴

There are certain powers which the liquidator can only exercise with the approval of the persons who appointed him (shareholders or creditors). Such powers can be:

- Pay any class of creditors in full
- Make any compromise or arrangement with creditors or other persons
- Compromise debts, claims, etc., take security to discharge such liabilities.⁶⁵

The liquidator can also apply to the court to:

- Determine any question arising out of the liquidation;
- Enforce its powers.

3. Voluntary winding-up according to Section 228A CWUO

If the directors of a company have the opinion that the company cannot continue its business by reason of its liabilities, they may convene a meeting of the directors and

⁵⁹ Section 241 (2) CWUO.

⁶⁰ Section 241 (3) CWUO.

⁶¹ Section 242 CWUO.

⁶² Section 251 (1) (b) CWUO.

⁶³ Section 251 (2) CWUO.

⁶⁴ Section 255A CWUO.

⁶⁵ Section 251 (1) CWUO.

deliver to the Companies Registry a statement that a directors' resolution has been passed and that:

- The company cannot by reason of its liabilities continue its business;
- The directors consider it as necessary that the company be wound-up and it is not reasonably practicable for the winding-up to be commenced in another way; and
- Meetings of the shareholders and the creditors will be held not later than 28 days from filing the winding-up statement.⁶⁶

The directors need also appoint a liquidator, after which the winding-up continues as a normal voluntary winding-up. The possibility that the winding-up is initiated by the directors speeds up the process and makes it easier to protect the assets of the company, because normally the directors of the company have a better understanding of the financial situation of the company, and this makes it faster than an investigation by shareholders or creditors.

IV. The assets of a company available for distribution

It is the liquidator's duty to collect any possible outstanding money for the company, so that the company will be able to pay all, or at least as much as possible, of its liabilities. Therefore, the liquidator can collect and is able to claim from the following persons:

1. The members of the company

The present and the past members (shareholders) of the company are liable to contribute to the assets of the company. However, this is limited to the following:

- In a company limited by shares, no contribution is required from any present or past member which exceeds the amount that is unpaid on his shares.⁶⁷ This means, as long as a member paid all his shares, he does not need to contribute further.
- In a company limited by guarantee, no contribution is required which exceeds the amount which was undertaken to be contributed in the event of the company being wound-up.⁶⁸

⁶⁶ Section 228A(1) CWUO.

⁶⁷ Section 170 (1) (d) CWUO.

⁶⁸ Section 170 (1) (e) CWUO.

- A past member will not be liable if he ceased to be a member one year or more before the commencement of the winding-up.⁶⁹
- A past member will not be liable for debts of the company contracted after he ceased to be a member.⁷⁰
- Furthermore, a past member will only be liable as far as the present members are not able to make their required contribution.⁷¹

2. The directors of the company

In case a director of the company has undertaken to be personally liable for the debts of a company, he might be liable to make further contributions according to his declaration. However, a court order against the director is required before he needs to make any contribution.⁷²

3. Other Debtors

Any other person that owes an amount of money to the company can be ordered by the court to pay the outstanding money to the company.⁷³ The court can delegate this power to liquidator.⁷⁴

4. Onerous property

It might be the case that the liquidator discovers during the winding-up process that some of the company's property consists of:

- Land burdened with onerous restrictions;
- Shares or stocks in companies;
- Unprofitable contracts;
- Any other property which is unsaleable or not readily saleable by reason of some onerous burdens or payments be required.

Then the liquidator may, with permission from the court, disclaim the interest of the company in such property.⁷⁵ The purpose is to end unprofitable contracts and the

⁶⁹ Section 170 (1) (a) CWUO.

⁷⁰ Section 170 (1) (b) CWUO.

⁷¹ Section 170 (1) (c) CWUO.

⁷² Section 170 (2) (c) CWUO.

⁷³ Section 214 CWUO.

⁷⁴ Section 226 CWUO.

⁷⁵ Section 268 CWUO.

company can be freed from all liabilities in respect of such property, and finally the company might be released from all liability.

The power to disclaim must usually be exercised within 12 months from the commencement of the winding-up, and it must be made in writing by the liquidator. If there is any person interested in such property, he can apply to the liquidator and require the liquidator to decide whether to disclaim or not. The liquidator must then give notice within 28 days and inform that he wants to disclaim. If the liquidator does not give notice, it is deemed that the company is continuing to fulfill the contract.⁷⁶

If any person suffers damages from any disclaimer by the liquidator, such person is deemed to be a creditor of the company and he may prove the amount lost as a debt in the winding-up.⁷⁷

V. Completion of winding-up and termination

1. Proof and ranking of claims

In case of a winding-up, the company ideally should be able to pay all its debts in full to all its creditors. However, in case of a mandatory winding-up (when the company is out of money), it will most likely be the case that the company does not have enough money to pay all its debts. Therefore, the law determines which claims against the company shall be settled first, and in which order the claims should be settled by the company.⁷⁸

2. Preferential payments

In a winding-up, certain debts are to be treated preferentially and paid in priority to other debts.⁷⁹ Such preferential debts can be divided as follows:

a) Category A: Relating to employees

This category refers to payments due to employees of the company, and consists of the following:

⁷⁶ Section 268 (4) CWUO.

⁷⁷ Section 268 (7) CWUO.

⁷⁸ Section 265 CWUO.

⁷⁹ Section 265 (1) CWUO.

- All wages and salaries not exceeding HKD 8,000
- Any severance or long service payment not exceeding HKD 8,000
- Any amount due in respect of compensation according to the Employee's Compensation Ordinance
- Any payment in lieu of notice not exceeding HKD 2,000
- All accrued holiday remuneration
- Any contributions to the MPF which have not yet been paid to the MPF account of the employee, capped at HKD 50,000. The amount exceeding HKD 50,000 will be paid by 50%, the remaining 50% are treated as non-preferential debt.

b) Category B: Relating to the Government

All statutory debts due and payable to the government within 12 months before the appointment of the winding up order.⁸⁰

c) Category C: Relating to companies being a bank

Section 265 (1) (d) (b) CWUO relates to companies being wound up and being banks. This section was introduced to protect the interests of small depositors, however, many restrictions appear.

d) Category D: Relating to companies being an insurance company

This category is protecting claims against insurance companies which are due under a contract with an insurer. For instance, in case of a health insurance, the payments required from the insurer to the insured person under the health insurance plan are covered. However, it should be noted that there are other government plans and laws that are protecting such payments, so that this provision can only be seen as supplementary.

The debts in category A take precedence over the debts in the subsequent categories. Within one category, the claims rank equally, and must be paid in full unless the assets are insufficient to meet them, in which case they will abate in equal proportions.⁸¹

⁸⁰ Section 265 (1) (d) CWUO.

⁸¹ Section 265 (3) CWUO.

3. Distribution of the surplus assets

After paying all the debts of the company back to the preferential creditors, the liquidator can distribute the remaining assets of the company, if any, to the unsecured creditors. The remaining assets must be distributed on a *pari passus* basis to the remaining creditors.⁸² This means that if the money is not sufficient to pay all the debts in full, the unsecured creditors will each receive the same proportion of what is owing in percent (e.g. each creditor receives 30% of its outstanding debts).

After all debts have been paid in full, and after all costs of the liquidation (fees, liquidator remuneration) have been settled, any surplus can be distributed amongst the shareholders in relation to the amount of shares of the company they hold.

VI. Dissolution of the company

When a company has been wound-up and is about to be dissolved, the books and papers of both the company and the liquidator may be disposed of as directed by the court in a compulsory winding-up or by the members by a special resolution in a member's voluntary winding-up.⁸³ There is no special provision that states that the books and records need to be kept for a certain period of time. This is to be decided by the court or the members.

1. Dissolution in case of a mandatory winding-up

After distributing all of the assets, the liquidator can resign, or can be removed from office. He can also apply to the court and claim for his release.⁸⁴ Such a court order releases the liquidator from all liability in respect of any act done or default made by him, but the order can be revoked on proof that it was obtained by fraud, suppression, or concealment.⁸⁵

The company can then be dissolved:

- The company can be dissolved without court order, when its business has been completely wound-up and the liquidator was granted release by order of the court.⁸⁶ The liquidator can then sign a certificate of compliance⁸⁷ and deliver it to

⁸² Section 250 CWUO.

⁸³ Section 283 (1) CWUO.

⁸⁴ Section 205 (1) CWUO.

⁸⁵ Section 205 (3) CWUO.

⁸⁶ Section 226A CWUO.

the Companies Registry for registration. Two years from the date of registration of this certificate, the company will be dissolved, but the court may, on the application of the liquidator, defer the dissolution.

- When the affairs of the company have been completely wound-up, the liquidator may apply to the court for an order that the company be dissolved from the date of such order.⁸⁸ The liquidator must provide the Companies Registry with a copy within 14 days.

2. Dissolution in the case of voluntary winding-up

As soon as all the business of the company has been settled, the liquidator can make up an account of the winding-up showing how the winding-up has been conducted, and how the property of the company has been disposed of.

A General Meeting of the Shareholders needs to be called by the liquidator for the purpose of laying the account before it. The meeting will be called by an advertisement in the Gazette, and this must be published at least one month before the meeting.⁸⁹

Within one week after the meeting, the liquidator must send a copy of the account of the Companies Registry and must make a return including details of the holding of the meeting and other details. The Companies Registry must register the account and the return; three months later the company will be dissolved.⁹⁰

VII. Deregistration of defunct solvent companies

Deregistration is a straight-forward method for dissolving a Hong Kong private company.⁹¹ It can be applied when the following requirements are fulfilled:

- All members (shareholders) of a company agree to the deregistration;
- The company did not do any business or ceased business for more than 3 months immediately before the commencement of the deregistration;
- The company has no outstanding liabilities; and
- The company's or its subsidiaries' assets do not consist of any immovable property situated in Hong Kong.

⁸⁷ Section 226A CWUO.

⁸⁸ Section 227 CWUO.

⁸⁹ Section 239 (2) CWUO.

⁹⁰ Section 239 (4) CWUO.

⁹¹ Section 750 CO.

In the majority of cases, deregistration is the preferable method for dissolution since the procedure is more simple compared to a liquidation as aforementioned. Therefore, the deregistration is much more controllable since it can be proceeded upon the approval of shareholders, and does not require any involvement of the court and/or a liquidator. It can be completed within six months under normal circumstances (i.e. if no objections to the deregistration are raised, and all liabilities can be paid, if any). The costs for deregistration are therefore much lower.

However, one should consider that any of the liabilities of the officers (such as directors, company secretary, etc.) and members of the company are not influenced by the deregistration. The Companies Registry has the power to reinstate the company on the register even though the company is dissolved by way of deregistration within 20 years from the dissolution date. In that case the company is regarded to be as having continued in existence and as if it had not been dissolved.

*We hope that the information provided in this brochure was helpful for you.
If you have any further questions please do not hesitate to contact us.*

Lorenz & Partners (Hong Kong) Ltd.

Unit 1003, Unit 2906, 29/F, Wing On Centre
111 Connaught Road, Central, Hong Kong, SAR
Tel: +852 252 814 33

E-mail: hongkong@lorenz-partners.com