

Hong Kong regime on liquidators

Grow | Protect | Operate | Finance

A liquidator is usually involved at the end of a company's life cycle. The role of a liquidator includes investigating the reasons why a company has failed; collecting, protecting and realising the company's assets; and distributing the proceeds of realisation in accordance with the statutory rules of distribution. The liquidator regime in Hong Kong thus places an emphasis on ensuring that the winding-up of financially distressed businesses is conducted in a fair and orderly manner and under the control and oversight of professionals conversant with the winding-up process and rules.

Appointment

Pre-requisites of appointment

Any person may be appointed, or nominated for appointment, as liquidator as long as he is not disqualified from appointment under the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap. 32) (CWUMPO)¹. There are certain exceptions – the following persons are not allowed to be appointed as a liquidator²:

- a. bodies corporate;
- b. undischarged bankrupts;
- c. persons subject to a disqualification order under Part IVA of CWUMPO (save with leave of the court);
- d. persons found under the Mental Health Ordinance (Cap. 136) (MHO) to be incapable, by reason of mental incapacity, of managing and administering the person's property and affairs;
- e. persons subject to a guardianship order under MHO;

¹ Section 262B of CWUMPO.

² The prohibition does not apply to the Official Receiver and items (f) to (i) do not apply in relation to a members' voluntary winding-up (i.e. one that is initiated by shareholders of a solvent company): Section 262B(2) and (3) of CWUMPO.

- f. creditors or debtors of the company;
- g. directors (or former directors) of the company;
- h. company secretary (or former company secretary) of the company;
- i. auditors of the company or a person who was auditor of the company within the two-year period before commencement of winding-up; and
- j. any receiver or manager of property of the company.

Further, a liquidator candidate has to make and deliver a disclosure statement³ confirming that he is not disqualified and disclose his relevant relationships or connections with the company⁴, such as where he was a member, creditor, debtor, director or employee of the company within the two years before the making of the statement. Where there is any such relationship, the relevant details together with the reasons for belief of no conflict of interests should be clearly stated in the disclosure statement. These requirements ensure that a liquidator is not only independent but also seen to be so.



Procedures of appointment

Three types of liquidator may be appointed in the case of a winding-up of a company:

- a. a provisional liquidator who is appointed to preserve the status quo and protect the assets of a company in the interval between the presentation of a winding-up petition and the grant of a winding-up order by the court⁵. This type of liquidator is usually involved in cases where the property of the company is at risk, or it is alleged that those in control are misappropriating or wasting its assets, or any other good cause exists⁶. His appointment may be made by the court on application by the petitioner at any time after the presentation of a winding-up petition;
- b. a provisional liquidator who provides interim insolvency management services from the time the court makes a winding-up order and until he or another person becomes liquidator and is capable of acting as such. This role is usually assumed by the Official Receiver, Hong Kong's official insolvency administrator, automatically after the making of a winding-up order by the court⁷, unless, prior to the winding-up order, a different person has been appointed as the provisional liquidator, in which case that person shall remain as provisional liquidator; and
- c. a liquidator who is appointed by the creditors/ shareholders of the company being wound up or by the court following the grant of a winding-up order.

³ Section 262D of CWUMPO.

⁴ This requirement does not apply in relation to a members' voluntary winding-up, the Official Receiver or a person who is appointed as provisional liquidator by the Official Receiver: section 262C(1) of CWUMPO.

⁵ Section 193 of CWUMPO; *Re Legend International Resorts Ltd* (01/03/2006, CACV210/2005) [2006] 2 HKLRD 192 at §27.

⁶ *Re Five Lakes Investment Co Ltd* (26/10/1983, HCCW79/1983) at §48; *Re Maintain Profits Ltd.* (31/10/2002, HCCW345/2002) [2003] 2 HKLRD 237 at §29.

⁷ Section 194(1) of CWUMPO.

Panel scheme for appointment of provisional liquidators/liquidators

For summary cases where the property of the company is not likely to exceed HK\$200,000 in value, the Official Receiver as provisional liquidator may appoint private insolvency practitioners under the “Panel T” scheme as joint and several liquidators in place of the Official Receiver. Firms of certified public accountants, solicitors and company secretaries with at least two appointment takers who have sufficient insolvency work experience may apply to be included on a Panel T roster list through a tender exercise conducted by the Official Receiver’s Office (ORO) every two years. Firms admitted to the “Panel T” list will be appointed as liquidators in summary cases on a rotation basis.

As for larger “non-summary” liquidations, where the property of the wound-up company is likely to exceed in value HK\$200,000, the ORO is required to convene separate meetings of creditors and contributories (i.e. shareholders) within three months of the date of making of the winding-up order⁸ for the purposes of determining whether or not an application is to be made to the court for appointing a liquidator⁹. At the first meetings of creditors and contributories, resolutions on the choice of liquidator to be appointed in place of the Official Receiver would be passed. Where no nomination of liquidators has been put forth by the creditors and contributories, the ORO would explain its “Panel A” scheme and recommend the candidates of the next eligible firm on the “Panel A” roster list to the creditors and contributories for appointment as liquidators. In contrast with the “Panel T” scheme, only accounting firms with sufficient insolvency work experience and resources may be admitted by the ORO to the “Panel A” roster list. After the first meetings of creditors and contributories have been held, the Official Receiver will report the result of each meeting to the court¹⁰.

If the choice of liquidator by the creditors and contributories is identical, the court may then, upon the application of the Official Receiver, appoint the chosen liquidator. In any other case, the court will fix a time and place for deciding the differences (if any) and making such order as shall be necessary¹¹.

Appointment of liquidators in cases of a members’ voluntary winding-up (i.e. one that is initiated by shareholders of a solvent company) is more straightforward; the shareholders of the company may simply pass an ordinary resolution in a general meeting for the appointment of the liquidators, without any involvement of the court or the ORO.

Removal

At times, the interest of those who are interested in the assets of the company being wound up may demand the removal of liquidators. In this regard, on application to the court, the court retains a wide discretion to remove a liquidator if the circumstances indicate that the removal is proper and appropriate. The court’s power is exercisable “on cause shown”¹². General grounds for removal include bias, misconduct, dereliction of duty, unfitness, inability or failure to carry out his duty, or loss of confidence in his professional judgment to such a degree as will forfeit the confidence of the court¹³. Liquidators may also be removed even where no personal misconduct or unfitness is established against them¹⁴, such as where the winding-up can be conducted more cheaply or more effectively by some other person.

In a members’ voluntary winding-up, shareholders may simply pass a special resolution in the general meeting to remove a liquidator from office, after giving notice to the creditors and the liquidator specifying the intention to propose such a resolution. There is no need to show “cause” for the removal.

8 Rule 106 of the Companies (Winding-Up) Rules (Cap. 32H) (CWUR).

9 Section 194(1)(b) of CWUMPO.

10 Rule 45(1) of CWUR.

11 Rule 45(2) of CWUR.

12 Section 196 of CWUMPO.

13 *Allied Ever Holdings Ltd v. Li Shu Chung and Others* (27/11/2017, HCCW497/2009) at §§5-6.

14 *Allied Ever Holdings Ltd v. Li Shu Chung and Others* (27/11/2017, HCCW497/2009) at §3.

Responsibilities, powers and duties

Roles

In the course of a winding-up, a liquidator enjoys a special status and assumes composite roles.

First, he acts as an agent of the company. Once appointed, the liquidator steps into the shoes of the directors of the company and assumes overall control over the company. He acts on behalf of the company and will bind the company on principles of agency.

Second, a liquidator is deemed to be a trustee of the company assets under his control and owes fiduciary duties towards the company and the creditors. In other words, the liquidator is expected to act honestly, with due care and diligence, and in good faith, in dealing with the company's assets. Analogous to the duty of care owed by directors, the standard of care expected of a liquidator is that of a reasonably skilled liquidator in the circumstances. For example, a liquidator is expected to pay real attention to the details of the company's documentation and take control and get in the company's property in the proper discharge of his duties to wind up affairs of the company. A liquidator will be negligent if he fails to exercise professional judgment and ascertain the true value of the company's assets such that the proceeds realised are less than those which should be realised had reasonable skill, care and diligence been exercised in the asset sale. The fiduciary duties also prohibit a liquidator from making a secret profit out of his office.

Third, if the liquidator is appointed in a case of compulsory winding-up, he is considered an officer of the court and is entrusted with the reputation of the court for impartial and proper dispatch of his duties. In that regard, no lesser standard is to be expected of him than of a court or judge¹⁵. As such, he is duty bound not to conceal anything that is material to ascertain the exact truth before the court, and shall steer clear of any possible conflict of interest which may impede the discharge of his legal and fiduciary duties. In the event of conflict of interest, he should apply to the court for leave to resign.

Responsibilities

The primary responsibility of a liquidator is to properly administer the estate of the company subject to a winding-up order and distribute the available assets to creditors and shareholders in accordance with the statutory rules on priority of distribution. The liquidator must probe into the company affairs, with a view to identifying and obtaining the company's assets for paying creditors and shareholders. Some responsibilities of the liquidator are administrative in nature. For example, the liquidator is also required to make all statutory returns required by law, to maintain a record and keep accounts, books and papers. In appropriate cases, the liquidator may commence legal action in the name of the company against those who committed wrongs against the company and examine the conduct of officers and make a report to the ORO for disqualification purposes.

Powers

To enable a liquidator to properly discharge his duties, the statute confers on the liquidator the following general powers, which are exercisable without sanction of the court:

- a. *sell the real and personal property of the company by public auction or private contract;*
- b. *do all acts and to execute, in the name and on behalf of the company, all deeds, receipts and other documents and, for that purpose, to use, when necessary, the company's seal;*
- c. *prove, rank and claim in the bankruptcy of any contributory, for any balance against his estate, and to receive dividends in the bankruptcy in respect of that balance as a separate debt due from the bankrupt or insolvent, and rateably with the other separate creditors;*
- d. *appoint an agent to do any business that the liquidator is unable to do in person; and*
- e. *employ a solicitor to assist the liquidator in performing the liquidator's duties.*

¹⁵ Re Legend International Resorts Ltd (in Compulsory Liquidation) (07/03/2011, HCCW1139/2004) at §30.

With the sanction of the court or a committee of inspection¹⁶, a liquidator may further exercise the following powers:

- i. commence or defend any action or proceeding for and on behalf of the company;
- ii. carry on the business of the company, so far as may be necessary for its beneficial winding-up;
- iii. pay any classes of creditors in full; and
- iv. make any compromise or arrangement with creditors.

Irrespective of whether the powers exercised by the liquidator are exercisable with or without sanction of the court or the committee of inspection, they are subject to the overarching control of the court. Any shareholder or creditor may apply to the court in respect of any exercise or proposed exercise of these powers.

Remuneration and costs

A liquidator is entitled to reasonable remuneration for the services rendered in the course of winding up the company. In general, he should be paid by a percentage of the assets realised or otherwise as determined by agreement with the committee of inspection or by the court, as the case may be. In practice, the remuneration is usually determined on a time-spent basis, in accordance with the standard rates approved by the ORO¹⁷. Since a liquidator claims remuneration and expenses against the company's assets realised, in cases where the company has insufficient assets for paying the liquidator's fees, it is common for him to enter into a funding arrangement with one or more creditors of the company. If there are two or more liquidators, their remuneration ought to be distributed in such proportions as determined by the committee of inspection or by the court, as the case may be. If the Official Receiver considers that the remuneration determined by agreement with the committee of inspection should be reviewed, it may apply to the court for an order of reduction of the remuneration.

As aforesaid, a liquidator is under fiduciary duties to act in good faith and with impartiality in the proper discharge of his/her roles. Except as provided by CWUMPO or CWUR, he must not accept from any solicitor, auctioneer, or any person connected with the company of which he is liquidator or who is employed in or in connection with the insolvent company, any gift or benefit beyond the remuneration he may receive under statute. The rule against accepting gifts ensures that an insolvency practitioner will not have his decision-making or professional judgment unduly influenced by other parties.



¹⁶ A committee of inspection is appointed following the first meetings of creditors and contributories and consists of creditors and persons who need to contribute to the assets of the company. Its function is to help supervise the exercise of power by the liquidator.

¹⁷ See: https://www.oro.gov.hk/pdf/eng/publications/panel_a_scheme_rules_annexC.pdf

CONTACTS



Keith Brandt
Managing Partner, Hong Kong
D +852 2533 3622
keith.brandt@dentons.com



Jenny Zhuang
Of Counsel, Hong Kong
D +852 2533 3660
jenny.zhuang@dentons.com



Henry Li
Associate, Hong Kong
D +852 2533 3678
henry.li@dentons.com