

CHAPTER 3

THE CAPITAL MAINTENANCE REGIME

Background

- 3.1 Part II¹⁶ and Part IIA¹⁷ of the CO contain the provisions commonly referred to as the capital maintenance and distribution rules respectively. The latter are not in fact distinct rules but the key statutory provisions embodying the capital maintenance doctrine.
- 3.2 The capital maintenance doctrine was first developed in the mid-19th century in the UK. The premise of the doctrine is that creditors provide credit on the basis of an express or implied representation that consideration received for shares (the share capital) shall be applied only for the purposes of the business and that it shall not be returned to the shareholders except in a winding up after all creditors have been paid.
- 3.3 For the purpose of *creditor protection*, the CO restricts payment out of capital to shareholders in the following ways:
 - 3.3.1 dividends can only be paid out of distributable profits;
 - 3.3.2 court sanction is generally required for the reduction of capital, except for redesignation of the nominal value of shares;
 - 3.3.3 the purchase by a company of its own shares (“buy-back”) may generally only be made out of distributable profits or the proceeds of a new issue, save for certain exceptions; and
 - 3.3.4 financial assistance by a company of the acquisition of its own shares (“financial assistance”)¹⁸ is generally prohibited, save for certain exceptions.
- 3.4 Whilst the principle of capital maintenance has developed principally for

¹⁶ Sections 47A to 48, 48B to 50 and 58 to 62.

¹⁷ Sections 79A to 79P.

¹⁸ The rules on financial assistance are often regarded as part of the capital maintenance regime although technically they are not necessarily related to the preservation of share capital. If negotiated on proper terms, a financial assistance transaction should not affect the assets of the company and, on whatever terms, is no more likely in itself than any other transaction to infringe the company’s capital.

the protection of creditors, the rules also seek to protect shareholders, particularly the minority, from unequal treatment in selective distributions where only some shareholders receive benefits and from dilution of existing shareholders' rights.

The Capital Maintenance Doctrine

- 3.5 Some have questioned the premise of the doctrine, doubting whether creditors rely on the share capital significantly in practice, as most creditors negotiate and contractually provide for the level of protection that their circumstances require. By definition, non-consensual creditors do not rely on the levels of capital maintained by the companies concerned.
- 3.6 The capital maintenance principle has become less relevant nowadays. Most companies only have a small issued share capital¹⁹. Out of a total of over 662,000 live companies incorporated in Hong Kong which have issued capital in Hong Kong Dollars ("HKD") as at end of April 2008, around 80% have no more than HKD10,000 issued share capital and around 36% actually have issued capital of HKD100 or less.
- 3.7 Some have also considered the capital maintenance rules as unduly complex, often ill-targeted for their intended purpose and somewhat overtaken by their exceptions.

Reform in Other Jurisdictions – the Solvency Test Approach

- 3.8 Some jurisdictions such as the UK, Australia and Singapore have reformed their capital maintenance rules in recent years, each with some variations to suit their particular circumstances. Some other jurisdictions like the US and New Zealand have moved away from the capital maintenance regime to a general solvency test approach. These changes are summarised in **Appendix II**.
- 3.9 The theory underpinning the solvency test approach is that the law should focus on the core risk at stake – insolvency of the company – since this is the only condition in which creditors will be left unpaid. All forms of distribution to shareholders including payment of dividends, capital returns and buy-backs are allowed provided that relevant solvency tests are met,

¹⁹ The CO, like other common law jurisdictions, does not prescribe a minimum capital, therefore allowing companies operational flexibility. This is readily explicable – it would be quite difficult to determine an appropriate level of capital for all companies.

without distinguishing between payment from capital or profits. The argument for this method is that creditors are more concerned with a company's solvency than the preservation of its share capital.

Cash Flow and Balance Sheet Tests

- 3.10 There are traditionally two types of solvency tests: the cash flow (or liquidity) test and the balance sheet (or net assets) test. The cash flow test basically requires the company to be able to meet all debts as they fall due, whilst the balance sheet solvency test requires that liabilities must not exceed assets. A majority of the directors are typically required to confirm that the tests are met and to sign a solvency certificate as to their opinion. Civil liability is usually provided to give the right of recoupment by the company of the unauthorised distribution from directors or shareholders. In addition, criminal liability is imposed on a director who signs a certificate knowing that it is false or misleading in a material particular²⁰.
- 3.11 In Hong Kong, the solvency test is basically a cash flow test, and has been part of the capital maintenance rules (being an exception to financial assistance for unlisted companies and a condition to buy-backs out of capital by private companies) for some time. The details are set out in the relevant sections below.

SCCLR's Recommendations

- 3.12 The SCCLR has considered whether the general solvency test approach should be adopted in Hong Kong. It has recommended against across the board application of the solvency test to all forms of distribution, mainly for the following reasons:
- (a) While the solvency test approach would in theory offer better protection to creditors than the capital maintenance regime, it may give rise to considerable concerns on the part of directors, especially those of SMEs, due to the increase in their potential liabilities;
 - (b) Directors may have to rely on professional advice more frequently to avoid being held liable for improper distribution and this would increase the cost of running business;

²⁰ See, for example, sections 377(1) and 373(4) of the NZCA.

- (c) The business sector is likely to find the application of the solvency test to the distribution of dividends objectionable, in particular. The current rules that dividend should be declared out of distributable profit have worked well and provided certainty. Moreover, the civil remedies under the NZCA where payment of a distribution that did not satisfy the solvency test is recoverable in the first instance from the shareholders who have received the payment would also be objectionable to the general investors. It would create great uncertainty to the shareholders in their receipts of dividends²¹;
- (d) Some features of the present capital maintenance regime may provide better safeguard against improper distribution (e.g. court sanction is required in case of reduction of capital other than re-designation of the nominal value of shares to a lower amount), as compared with relying on a solvency test based on the judgement of directors; and
- (e) While using solvency as the principal rule for protection of creditors is appealing in theory, the concerns and potential drawbacks, especially those noted in (a) to (c) above, would outweigh any benefits arising from the adoption of such an approach.

Question 12

Do you agree that Hong Kong should NOT adopt the solvency test approach to creditor protection which applies to all forms of distribution? Please provide reasons.

Options for Reform

- 3.13 While advising against the adoption of an across-the-board solvency test approach, the SCCLR does not dismiss the possibility of streamlining and rationalising some of the complex capital maintenance rules.
- 3.14 As noted in paragraph 3.12(c) above, the current rules on distribution of dividends have worked well and no major change is proposed. We would therefore like to invite public views on possible options to streamline or rationalise the rules on reduction of share capital, buy-backs and financial assistance before deciding whether to incorporate them into

²¹ See section 56(1) of the NZCA. There are however safeguards that shareholders who received the dividends in good faith and who have altered their position can keep their dividends. By comparison, under the US's Revised Model Business Corporations Act, directors are primarily liable for the amount in excess of a lawful distribution.

the draft Bill for further public consultation.

Existing Solvency Test Requirements

- 3.15 Regardless of whether the reform options (discussed below) are adopted, we would like to have your views as to whether the existing solvency requirement, which is basically a cash flow test, should be replaced with one which combines both cash flow and balance sheet bases of solvency.
- 3.16 A company that is in a highly liquid state (as where it has cash or assets easily convertible to cash) at a time when its liabilities exceed its assets may satisfy the cash flow solvency test, but not the balance sheet solvency, and consequently the combined tests.
- 3.17 The NZCA and the US Revised Model Business Corporations Act combine both solvency tests, so that a company must have a positive cash flow and a positive net worth. Jurisdictions that have more recently enacted the solvency test appear to have preferred the combined cash flow and balance sheet approach to solvency. The SCA (has since 30 January 2006) adopted this approach in amending its capital maintenance rules. South Africa chose this approach to solvency when enacting solvency as the measure for distributions in 1999²². In Malaysia the Corporate Law Reform Committee has recommended that the New Zealand form of solvency test (the twofold cash flow and balance sheet test) be applied to its proposed reform of its capital reduction, buy-back and financial assistance rules²³.
- 3.18 The UK applies only the cash flow test of solvency in the non-court sanctioned reduction of capital process and the exception to the prohibition on buy-backs. The Rickford Report²⁴ concluded that the balance sheet test added little to the cash flow test, and suggested that should the UK move to the solvency approach to distribution, the solvency test should broadly follow that currently applied to capital reductions with supplementary disclosure addressing the accounting net assets balance²⁵. The Report considered that the balance sheet test

²² Section 90 of the South African Companies Act.

²³ *A Consultative Document on Capital Maintenance Rules and Share Capital: Simplifying and Streamlining Provisions Applicable to Shares* (June 2005) by the Corporate Law Reform Committee for the Companies Commission of Malaysia, available at www.ssm.com.my.

²⁴ The Rickford Report is a report by an interdisciplinary group established in the UK in May 2003 to review company law on capital maintenance and developing accounting standards. See J Rickford Ed., *Reforming Capital: Report of the Interdisciplinary Committee on Capital Maintenance*, (2004) *European Business Law Review* 919-1027, p.977 in particular.

²⁵ [2004] *European Business Law Review* 977

tended to be treated as a mere mechanical application of a calculation of balance sheet net asset value. Such mechanical application of a crude balance sheet test fails to make proper allowance for the quality of a company's assets and liabilities, their volatility and linkage over time and the quality of the company's performance. A surplus on a company balance sheet does not necessarily indicate that a company may prudently distribute that amount, any more than that is the maximum which it would be prudent to distribute.

- 3.19 The Rickford view has been disputed. Clearly a crude use of the balance sheet test might prevent legitimate distributions but the converse risk that it might allow excessive and imprudent distributions should be met by the cumulative requirement of cash flow solvency. It has also been argued that there is no reliable yardstick which directors could use in order to ascertain to a reasonable degree whether long term liabilities will find their match in future profits under the cash flow solvency test, and that a balance sheet test is also required in order to ensure a 'minimum protection' for long term obligations. This is because balance sheet tests require all liabilities which have accrued to be covered by existing assets on the distribution date, irrespective of the date when payment has to be performed²⁶.
- 3.20 We would like to hear public views on whether the combined solvency approach gives a significantly better balance of protection for creditors without undue hardship to companies.

Question 13

Should the solvency test currently used in Hong Kong (which is basically a cash flow test) be modified by including a balance sheet test?

Reduction of Share Capital

- 3.21 The CO only allows for reductions of share capital by court sanction, save for the re-designation of the nominal value of shares to a lower amount²⁷. Shareholders must agree by special resolution, and the court, after settling the list of creditors and considering creditor objections, has to be satisfied

²⁶ W Schon, 'Balance Sheet Tests or Solvency Tests – or Both?' (2006) European Business Organization Law Review 181, 190-193.

²⁷ See Sections 58 to 63 of the CO. Section 58(3) and the ancillary provisions introduced by the Companies (Amendment) Ordinance 2003 to allow for re-designation of the nominal value without court sanction will no longer be relevant if Hong Kong moves to a no-par system (see Chapter 2 above).

that alternative protections are in place. In the period of 2005-06 to 2007-08, the number of cases of capital reduction that were subject to confirmation by the court and registered with the CR under section 61 of the CO was on average about 20 each year.

- 3.22 Some jurisdictions such as Singapore²⁸ and the UK²⁹, which also require reduction to be sanctioned by the court, recently introduced a court-free process based on solvency for capital reduction as an alternative procedure which is thought to be faster and cheaper. The UK CLRSG initial proposal was to replace the court-sanctioned procedure with the new process, but it decided in favour of retaining the former in the Final Report. One of the arguments which influenced the decision was that the court's confirmation provides certainty as to the legality of the transaction and therefore still had its value.
- 3.23 The alternative procedure is restricted to private companies in the UK, as the Second European Community ("EC") Directive was thought to stand in the way of its extension to public companies. In Singapore, it is available to both public and private companies with some differences in the conditions of application. In both the UK and Singapore, the solvency declaration is required to be made by *all* directors. Both have criminal sanctions relating to the solvency declaration.
- 3.24 The SCCLR does not see a strong need for the introduction of a court-free procedure based on solvency test as an alternative to the current court sanctioned procedure in Hong Kong. Some companies may still prefer the court's confirmation as it provides certainty as to the legality of the transaction. Some creditors may also perceive a solvency declaration by the directors as offering lesser protection for them than the court's oversight. Nevertheless, we would like to hear public views on the need for introducing a court-free procedure for capital reduction as an alternative procedure before taking a final view on the matter.

²⁸ See Division 3A of Part IV of the SCA, available at http://statutes.agc.gov.sg/non_version/html/homepage.html

²⁹ See Chapter 10 of Part 17 of the UK CA 2006, available at <http://www.berr.gov.uk/bbf/co-act-2006/>

Question 14

Do you agree that reduction of capital should continue to be subject to judicial control and there is no need to introduce a court-free procedure as an alternative process in addition to the current rules?

Question 15

If your answer to Question 14 is negative (i.e. you think that an alternative court-free process for reduction of capital should be introduced:

- (a) Should it be available to all companies (whether listed or unlisted) or just private companies or private and unlisted public companies; and**
- (b) Should all directors make the solvency declaration, or is it sufficient for the majority to do so?**

Purchase of Own Shares (Buy-backs)

3.25 Under the CO, a company may, subject to meeting certain requirements, purchase its own shares out of distributable profits or the proceeds of a new issue of shares³⁰. Buy-backs out of capital are only allowed by (1) private companies to the extent that there are insufficient distributable profits or proceeds of a fresh issue, and subject to meeting certain solvency requirements³¹, and (2) by all companies in the four circumstances stipulated in section 49B(4)³², if authorised by its articles.

³⁰ Section 49B of the CO. Where shares are cancelled, the amount by which the company's issued share capital is diminished is transferred to the capital redemption reserve (section 49H). This reserve is to be treated as if it were share capital with the exception that it may be used to pay up fully-paid bonus shares (section 49H(4)). Subject to the move to no-par, there will no longer be a capital redemption reserve and hence no such transfer.

³¹ The directors shall make a statement that, having made full inquiry into the affairs and prospects of the company, they have formed the opinion –

- (a) As regards its initial situation immediately following the date on which the payment out of capital is proposed to be made, that there will be no grounds on which the company could then be found unable to pay its debts; and
- (b) As regards its prospects for the year immediately following that date, that, having regard to their intentions with respect to the management of the company's business during that year and to the amount and character of the financial resources which will in their view be available to the company during that year, the company will be able to continue to carry on business as a going concern (and will accordingly be able to pay its debts as they fall due) throughout the year.

³² The four circumstances stipulated in section 49B are to (1) settle or compromise a debt or claim; (2) eliminate a fractional share or fractional entitlement; (3) fulfil an agreement in relation to an employee share option scheme; and (4) comply with a court order ordering a purchase in respect of either an application to the court by minority shareholders upon an alteration in the company's objects, or an unlisted company providing financial assistance for the acquisition of its shares, or unfairly prejudicial conduct.

The CO requires the cancellation of shares that are bought back³³.

- 3.26 For private companies to buy-back shares out of its capital, they have to undergo several steps, including (a) obtaining members' approval by a special resolution; (b) the directors filing a statutory form, together with an auditor's report, with the CR that the company will be able to meet the solvency requirement; and (c) publishing notices with relevant information in the Gazette, one English newspaper and one Chinese newspaper. Any creditor or non-approving member of the company may, within 5 weeks of the date on which the resolution is passed, apply to the court for cancellation of the resolution³⁴.
- 3.27 Buy-backs by listed companies are subject to additional requirements under section 49BA of the CO and the Code on Share Repurchases³⁵ issued by the SFC and also have to comply with the Listing Rules. Nevertheless, the SFC may exempt any listed company from any of the buy-back requirements in section 49BA³⁶.
- 3.28 Any purchase of its own shares by a company is subject to disclosure requirements. A return has to be delivered to the CR within 14 days from the date on which the purchased shares are delivered to the company. In the period of 2005-06 to 2007-08, the CR registered a total of some 560 returns, out of which around 40 were buy-backs out of capital.
- 3.29 Some jurisdictions have relaxed their rules on buy-backs in recent years. Singapore has since early 2006 allowed buy-backs for all companies (i.e. both private and public companies) from whatever source of funds subject to the solvency requirement³⁷ and approval by shareholders³⁸. Australia similarly allows buy-backs for all companies irrespective of the source of funds provided creditors are not prejudiced. The UK, however, has not made any significant changes to its rules, mainly because the Second EC Directive prevents the extension of the solvency approach to public companies.

³³ Section 49A(4) as extended to buy-backs by section 49B(3).

³⁴ Sections 49K to 49O of the CO.

³⁵ The Code is intended to ensure that persons engaged in buy-back offers act fairly. We will not review the Code as it is beyond the scope of the CO rewrite exercise.

³⁶ See section 49BA(11) of the CO and the Guidelines for the Exemption of Listed Companies from the Share Repurchases Requirements of Section 49BA of the CO issued by the SFC. There are other considerations in the case of listed companies, such as prevention of market manipulation and shareholder protection issues that are mainly tackled by the SFC's Code on Share Repurchases. The Code is beyond the scope of the current rewrite exercise.

³⁷ See section 76F of the SCA.

³⁸ See sections 76C, 76D, 76DA and 76E of the SCA.

3.30 The current rules on buy-backs in the CO, which distinguish between purchase out of distributable profits or the proceeds of a new issue of shares and purchase out of capital, are fairly complex. Also, the solvency exception is currently restricted to private companies only. One option for reform is to extend the current solvency exception to public companies so that public companies can fund buy-backs from capital to the extent that there are insufficient distributable profits or proceeds of a fresh issue, subject to meeting the solvency requirements. Another option is to allow all companies to fund buy-backs regardless of the source of funds, subject to a solvency requirement in a manner similar to that of the SCA. This would streamline the rules, but the proposed solvency requirement may add a burden to companies purchasing their own shares out of distributable profits or the proceeds of a new issue of shares.

Question 16

Should the current provisions on buy-backs in relation to protection of creditors be:

- (a) retained;**
- (b) amended to allow public companies (whether listed or unlisted) to fund buy-backs from capital subject to the solvency and other procedural requirements currently applicable to a buy-back out of capital by private companies; or**
- (c) amended to allow all companies (whether listed or unlisted) to fund buy-backs (regardless of the source of funds) subject to a solvency requirement (in a manner similar to that of the SCA)?**

Treatment of Repurchased Shares

3.31 Currently the CO requires all repurchased shares to be cancelled. The UK, Singapore, New Zealand, and a number of states in the US give their companies (in the UK only those listed on a recognised exchange) the option to hold the shares bought back in treasury, so that the shares bought back are not inevitably cancelled. A number of ways to counter the dangers of abuse have been adopted, e.g. prohibiting the sale of treasury shares at 'price sensitive times' and limiting the number of shares that could be held in treasury.

- 3.32 The question whether Hong Kong should allow the shares of listed companies to be held in treasury has been considered in some detail by the SFC with the issuance of a public consultation paper on the subject in 1998³⁹.
- 3.33 In its Consultation Conclusions in July 1999, the SFC decided not to introduce treasury shares and suggested instead to proceed with amending the Listing Rules to enable all listed companies in Hong Kong to expedite the listing of new shares that are reissued following a repurchase and cancellation (described in the document as a ‘block listing regime’)⁴⁰. This conclusion was reached taking account of the views expressed in the responses to the consultation, which favoured adoption of the block listing regime over treasury shares.
- 3.34 Nevertheless, we would welcome consultees’ views on the need to introduce treasury shares for all companies (including private companies) before taking a final view.

Question 17

Is there a case for legislating for treasury shares for all companies (as in Singapore)?

Financial Assistance

- 3.35 Section 47A of the CO imposes very broad prohibitions on a company (and its subsidiaries) giving financial assistance to a third party for the purpose of acquiring shares in the company. Certain exceptions are set out in section 47C and special restrictions apply to listed companies (section 47D). Unlisted companies are provided with an additional exception premised upon solvency and subject to a special resolution of the shareholders (section 47E). The solvency test itself is based on cash flow alone⁴¹, but there is also a requirement that the assistance must be

³⁹ The SFC Consultation Paper on Treasury Shares can be found at <http://www.sfc.hk/sfc/html/EN/speeches/public/consult/consultation/treasury%20shares.html>

⁴⁰ A Consultation Paper on Treasury Shares Consultation Conclusions - Hong Kong July 1999 can be found at http://www.sfc.hk/sfc/html/EN/speeches/public/consult/consultation/conclusion_treasury.html
The proposed block listing regime has not been implemented yet as there has not been strong demand for it in the market and is therefore a low priority item to the Hong Kong Stock Exchange.

⁴¹ A majority of the directors must provide a statement that –

(1) Immediately following the date on which the assistance is proposed to be given, that there will be no ground on which the company could be found to be unable to pay its debts; and either:

provided out of distributable profits to the extent that the net assets are reduced by the assistance⁴².

- 3.36 Although it is clearly important to protect the interest of creditors and minority shareholders against such risks like the company's assets being lost because of the lack of credit-worthiness of the assisted parties, the rules on financial assistance, and the exemptions that are available are so complex that it is generally accepted that they are capable of capturing potentially beneficial, or at least innocuous transactions. As a result, companies may spend a disproportionate amount of time and money structuring transactions in such a way that they do not contravene the prohibition. Although the scope of the prohibition has been whittled away with the addition of exceptions, companies have first to understand all the rules and then identify that an exception applies to them, and determine how it works. Moreover the exceptions, while useful, do not simplify the law as much as is useful.
- 3.37 The UK CA 2006 has dispensed with the restriction against private companies providing financial assistance. The UK CLRS took the view that the financial assistance provisions impose unjustified costs on private companies, and proposed that they be repealed. It was also of the view that other protections found in the sphere of directors' duties of fidelity and fairness and the use of powers for proper purposes with a duty of care, as well as minority protection of the shareholders, were adequate to protect creditors and members⁴³.
- 3.38 Other jurisdictions have also reformed their financial assistance rules although not going as far as abolishing the prohibition altogether for private companies. The NZCA allows financial assistance with a solvency certification by the directors, and provided that the board has resolved that the company should give the assistance, that it is in the best interest of the company, and that the terms are fair and reasonable to the company⁴⁴, and either that:

(2) If it is intended to commence the winding up of the company within 12 months of that date, that the company will be able to pay its debts in full within 12 months of the commencement of the winding up, or

(3) In any other case, that the company will be able to pay its debts as they fall due during the year immediately following that date.

⁴² Section 47E(2) of the CO.

⁴³ *Modern Company Law for a Competitive Economy: Developing the Framework* (London: DTI, 2000) 232-234.

⁴⁴ Section 76 read with section 77 of the NZCA.

- (a) There is unanimous shareholder approval⁴⁵; or
- (b) The procedures for special financial assistance (where not all shareholders are extended the assistance) are followed⁴⁶; or
- (c) The financial assistance does not exceed 5% of shareholders funds⁴⁷.

3.39 Singapore has also retained the prohibition, but introduced two additional exceptions premised upon (cash flow and balance sheet) solvency for all companies⁴⁸. Both exceptions require that all directors make a solvency statement in relation to the giving of the financial assistance, and that they resolve (giving full grounds for their conclusions) that:

- (a) the company should give the assistance;
- (b) it is in the best interest of the company; and
- (c) the terms and conditions are fair and reasonable to the company.

The financial assistance may not exceed 10% of the total paid-up capital and reserves of the company (the first new exception)⁴⁹ unless there is also unanimous shareholders resolution for the giving of the financial assistance (the second new exception)⁵⁰.

3.40 Both jurisdictions have criminal sanctions relating to the solvency requirement.

3.41 There appears to be a case for reforming the financial assistance rules. The question is the direction that such reform should take. For the protection of creditors and minority shareholders, it seems doubtful whether we should go so far as abolishing the prohibition altogether, like the UK has done for private companies. There is probably no compelling reason to follow Singapore in making solvency an additional exception to the prohibition for all companies⁵¹ as this will just add to the length and complexity of the provisions and further confuse the

⁴⁵ Section 76 of the NZCA.

⁴⁶ Section 78 of the NZCA, which requires the Board to disclose information with regards to the assistance to each shareholder and certify that the giving of the assistance is of benefit to those shareholders not receiving the benefit.

⁴⁷ Section 80 of the NZCA.

⁴⁸ Singapore's Companies (Amendment) Act 2005 which came into effect on 30 January 2006.

⁴⁹ Section 76(9A) of the SCA.

⁵⁰ Section 76(9B) of the SCA.

⁵¹ It is already an exception under the CO for unlisted companies.

underlying policy of the prohibition. The more streamlined approach adopted in the NZCA seems to be a possible way forward. If there is broad support for reform in a manner similar to the NZCA in this aspect, we will develop the proposal in the draft Bill for further public consultation.

Question 18

Should the current financial assistance provisions be streamlined in a manner similar to the NZCA?

Question 19

If your answer to Question 18 is in the negative, would you prefer instead:

- (a) the current provisions be retained;**
- (b) the prohibition of financial assistance be abolished in respect of private companies (as the UK has done); or**
- (c) making solvency an additional exception to the prohibition for all companies (whether listed and unlisted) in a manner similar to the SCA?**