

PART 6

DISTRIBUTION OF PROFITS AND ASSETS

Division 1 – Preliminary

6.1 Interpretation

(1) In this Part –

“called up share capital” (已催繳股本), in relation to a company, means so much of its share capital as equals the aggregate amount of the calls made on its shares (whether or not those calls have been paid), together with –

- (a) any share capital paid up without being called; and
- (b) any share capital to be paid on a specified future date under the articles, the terms of allotment of the relevant shares, or any other arrangements for payment of those shares,

and “uncalled share capital” (未催繳股本) is to be read accordingly;

“capitalization” (資本化), in relation to a company’s profits, means any of the following operations (whenever carried out) –

- (a) applying the profits in wholly or partly paying up unissued shares in the company to be allotted to members of the company as fully or partly paid bonus shares; or
- (b) transferring the profits to share capital;

“distribution” (分派) means every description of distribution of a company’s assets to its members, whether in cash or otherwise, except distribution by way of –

- (a) an issue of shares as fully or partly paid bonus shares;
- (b) a redemption or buy-back of any shares in the company out of capital (including the proceeds of any fresh issue of

shares), or out of unrealized profits, in accordance with Division 4 of Part 5;

- (c) a reduction of share capital by extinguishing or reducing any member's liability on any of the company's shares in respect of share capital not paid up, or by repaying paid up share capital;
- (d) a distribution of assets to the members on the company's winding up; or
- (e) financial assistance given by the company to a member under section 5.79, 5.80 or 5.81;

“financial assistance” (資助) has the meaning given by section 5.70(1);

“financial items” (財務項目) means all of the following –

- (a) profits, losses, assets and liabilities;
- (b) provisions;
- (c) share capital and reserves (including undistributable reserves);

“net assets” (淨資產), in relation to a company, means the aggregate of the company's assets less the aggregate of its liabilities;

“undistributable reserves” (不可分派的儲備), in relation to a company, means –

- (a) subject to subsection (2), the amount by which the company's accumulated, unrealized profits, so far as not previously utilized by capitalization, exceeds its accumulated, unrealized losses, so far as not previously written off in a reduction or reorganization of capital; or
- (b) any other reserve that the company is prohibited from distributing by an Ordinance (other than this Part) or by its articles.

(2) In paragraph (a) of the definition of “undistributable reserves” in subsection (1), a reference to capitalization excludes a transfer of profits of the company to its capital redemption reserve on or after 1 September 1991.

(3) In this Part –

(a) a reference to profits of any particular description is a reference to profits of that description made at any time; and

(b) a reference to losses of any particular description is a reference to losses of that description made at any time.

(4) For the purposes of this Part, a financial statement is a referential financial statement if the distribution in question is made pursuant to determinations made by reference to financial items as stated in the financial statement under section 6.11.

6.2 Realized profits and losses

(1) In this Part, a reference to realized profits or realized losses of a company is a reference to those profits or losses of the company that are treated as realized profits or realized losses for the purpose of any financial statement of the company in accordance with principles generally accepted, at the time when the financial statement is prepared, with respect to the determination for accounting purposes of realized profits or realized losses.

(2) Subsection (1) does not affect any specific provision (whether in an Ordinance or otherwise) for the treatment of profits or losses of any description as realized.

(3) If, after making all reasonable enquiries, a company’s directors are unable to determine whether or not a particular profit or loss made before 1 September 1991 is realized, they may treat the profit as realized, and the loss as unrealized, for the purposes of this Part.

6.3 Certain amount treated as realized profit or loss

(1) For the purposes of this Part, a provision other than an amount specified in subsection (2) is treated as a realized loss.

(2) The amount is one written off or retained by way of providing for a diminution in value of a fixed asset appearing on a revaluation of –

(a) all of the company's fixed assets; or

(b) all of the company's fixed assets other than goodwill.

(3) For the purposes of subsection (2), any consideration by the directors of the value at a particular time of a fixed asset is regarded as a revaluation of the asset if –

(a) in the case of a listed company, the conditions specified in subsection (4)(a) and (b) are satisfied; or

(b) in the case of any other company –

(i) where the referential financial statement is the financial statement specified in section 6.13, the conditions specified in subsection (4)(a) and (b) are satisfied; or

(ii) where the referential financial statement is the financial statement specified in section 6.14 or 6.15, the condition specified in subsection (4)(a) is satisfied.

(4) The conditions are –

(a) the directors are satisfied that the aggregate value at that time of the company's fixed assets is not less than the aggregate amount at which they are for the time being stated in a financial statement of the company; and

(b) it is stated in a note to the referential financial statement that –

- (i) the directors have considered the value of the company's fixed assets without actually revaluing them;
- (ii) the directors are satisfied that the aggregate value at the time of consideration of those assets is or was not less than the aggregate amount at which they are or were for the time being stated in a financial statement of the company; and
- (iii) accordingly, by virtue of this subsection, amounts are stated in the referential financial statement on the basis that a revaluation of the company's fixed assets is regarded as having taken place at that time.

(5) For the purposes of this Part, if –

- (a) on the revaluation of a fixed asset, an unrealized profit is shown to have been made; and
- (b) on or after the revaluation, a sum is written off or retained for depreciation of the fixed asset over a period,

the amount by which the sum exceeds the projected sum in relation to the depreciation of that asset over the period is treated as a realized profit made over the period.

(6) In determining whether a company has made a profit or loss on an asset for the purposes of subsection (5), the value given to the asset in the earliest available record of its value made on or after its acquisition by the company is to be regarded as the cost of the asset if –

- (a) there is no record of the original cost of the asset; or
- (b) a record of the original cost of the asset cannot be obtained without unreasonable expense or delay.

(7) In subsection (5) –

“projected sum” (預計款項), in relation to a depreciation of a fixed asset, means a sum that would have been written off or retained for depreciation if the revaluation of the asset had not been made.

(8) For the purposes of this section, an asset of a company is regarded as a fixed asset if it is intended for use in the company’s activities, or otherwise to be held for the purpose of the company’s activities, on a continuing basis.

6.4 Certain amount relating to insurance company with long term business treated as realized profit or loss

(1) This section applies to a company that is an insurer and carries on long term business.

(2) For the purposes of this Part –

(a) an amount properly transferred to the statement of comprehensive income of the company from a surplus in the fund maintained by it in respect of the long term business is treated as a realized profit; and

(b) a deficit in that fund is treated as a realized loss.

(3) Subject to subsection (2), any profit or loss arising in the company’s long term business is to be disregarded for the purposes of this Part.

(4) In this section –

(a) a reference to a surplus in a fund maintained by a company is a reference to an excess of the assets representing the fund over the company’s liabilities attributable to its long term business, as shown by an actuarial investigation; and

(b) a reference to a deficit in such a fund is a reference to an excess of those liabilities over those assets, as shown by an actuarial investigation.

(5) In this section –

“actuarial investigation” (精算調查) means an investigation –

(a) made under section 18 of the Insurance Companies Ordinance (Cap. 41); or

(b) made pursuant to a requirement imposed under section 32 of that Ordinance;

“insurer” (保險人) has the meaning given by section 2(1) of the Insurance Companies Ordinance (Cap. 41);

“long term business” (長期業務) has the meaning given by section 2(1) of the Insurance Companies Ordinance (Cap. 41).

6.5 Distribution in kind: certain amount treated as realized profit

If a company makes a distribution consisting of or including a non-cash asset, and any part of the amount at which the asset is stated in the referential financial statement represents an unrealized profit, that part of that amount is treated as a realized profit for the purpose of determining, before or after the distribution, whether or not the distribution is made in contravention of section 6.6, 6.7 or 6.8.

Division 2 – Prohibitions and Restrictions

6.6 Prohibition on certain distributions

(1) A company may only make a distribution out of profits available for distribution.

(2) For the purposes of this section, a company’s profits available for distribution are its accumulated, realized profits, so far as not previously utilized by distribution or capitalization, less its accumulated, realized losses, so far as not previously written off in a reduction or reorganization of capital.

6.7 Listed company may only make certain distributions

(1) A listed company may only make a distribution –

- (a) if the amount of its net assets is not less than the aggregate of its called up share capital and undistributable reserves; and
- (b) if, and to the extent that, the distribution does not reduce the amount of those assets to an amount less than that aggregate.

(2) A listed company must not include any uncalled share capital as an asset for the purpose of determining the amount of its net assets under this section.

6.8 Restriction on application of unrealized profits

A company must not apply an unrealized profit in paying up debentures or in paying up any amount unpaid on its issued shares.

6.9 Financial Secretary may modify or exempt requirement in relation to investment company

(1) On application by an investment company, the Financial Secretary may –

- (a) modify, in relation to the company, the requirement of section 6.6, 6.7 or 6.8; or
- (b) exempt the company from any such requirement.

(2) The Financial Secretary may make a modification or exemption under subsection (1) subject to any terms and conditions that the Financial Secretary thinks fit.

(3) In this section –

“investment company” (投資公司) means a listed company whose principal business consists of investing its funds in securities, land or other assets with the aim of –

- (a) spreading investment risk; and

- (b) giving its members the benefit of the results of the management of the assets.

6.10 Consequences of unlawful distribution

(1) This section applies if –

(a) a company makes a distribution, or part of a distribution, to one of its members in contravention of –

(i) section 6.6, 6.7 or 6.8; or

(ii) a requirement of that section as modified under section 6.9; and

(b) at the time of the distribution, the member knows or has reasonable grounds for believing that the distribution, or that part of the distribution (as the case may be) is made in contravention of that section or modified requirement.

(2) If the distribution is made in cash, the member is liable to repay the distribution, or that part of the distribution (as the case may be) to the company.

(3) If the distribution is made otherwise than in cash, the member is liable to pay to the company a sum equal to the value of the distribution or that part of the distribution (as the case may be) at the time of the distribution.

(4) This section does not affect any obligation otherwise imposed on a member of a company to repay a distribution unlawfully made to the member.

(5) This section does not apply in relation to –

(a) any payment made by a company in respect of the redemption or buy-back by the company of shares in itself;
or

(b) any financial assistance given by a company in contravention of section 5.71.

Division 3 – Provisions Supplementary to Division 2

6.11 Justification of distribution by reference to financial statement

The amount of a distribution that may be made without contravening section 6.6, 6.7 or 6.8 is to be determined by reference to the financial items as stated in the financial statement specified in Division 4.

6.12 Successive distributions

- (1) This section applies if –
 - (a) a company proposes to make a distribution pursuant to determinations made by reference to financial items as stated in a financial statement; and
 - (b) the company –
 - (i) has made one or more prior distributions pursuant to determinations made by reference to financial items as stated in the financial statement; or
 - (ii) since the financial statement was prepared, has given financial assistance specified in subsection (3) or has made a payment specified in subsection (4).

(2) Section 6.11 applies for the purpose of determining the amount of the proposed distribution that may be made without contravening section 6.6, 6.7 or 6.8, or a requirement of that section as modified under section 6.9, as if the amount of the proposed distribution were increased by the amount of the prior distributions, financial assistance and other payments.

(3) The financial assistance is financial assistance given under Division 5 of Part 5 by the company out of its distributable profits.

- (4) The payment is –
 - (a) a payment made by the company in respect of the buy-back by the company of shares in itself (except a payment

lawfully made otherwise than out of distributable profits);
or

- (b) a payment made by the company of any description specified in section 5.52(5) (except a payment lawfully made otherwise than out of distributable profits).

Division 4 – Specified Financial Statement

6.13 Last annual financial statement specified for purposes of section 6.11

(1) Subject to sections 6.14 and 6.15, the financial statement specified for the purposes of section 6.11 is the company's financial statement for the previous financial year, in relation to which subsections (2), (3), (4), (5), (6) and (7) are complied with.

- (2) The financial statement must –
 - (a) have been laid before the company in general meeting under section 9.73(1); or
 - (b) have been sent to every member under section 9.74(3).
- (3) The financial statement must –
 - (a) have been properly prepared in accordance with this Ordinance; or
 - (b) have been properly prepared in accordance with this Ordinance, except only in relation to the matters that are not material for the purpose specified in subsection (9).
- (4) Without limiting subsection (3), the financial statement must –
 - (a) give a true and fair view of the financial position of the company as at the end of the financial year concerned; and
 - (b) give a true and fair view of the financial performance of the company for the financial year concerned.

(5) The company's auditor must have prepared a report on the financial statement under section 9.49.

(6) If, in the auditor's report, the auditor has not given an unqualified opinion to the effect that the financial statement has been properly prepared in accordance with this Ordinance, the auditor must have given a written statement as to whether, in the auditor's opinion, the matter in respect of which the report is qualified is material for the purpose specified in subsection (9).

(7) A written statement under subsection (6) –

(a) may be made at the time of the report or subsequently; and

(b) must be laid before the company in general meeting or sent to every member to whom the auditor's report is sent under section 9.74(3).

(8) A written statement under subsection (6) is sufficient for the purpose of a distribution to which it relates and that has been proposed. If such a written statement relates to distributions of any particular description, the statement is also sufficient for the purpose of a distribution included in those distributions, even though the distribution has not been proposed at the time of the statement.

(9) The purpose specified for subsections (3) and (6) is the purpose of determining, by reference to the financial items as stated in the financial statement, whether the distribution would be made in contravention of section 6.6, 6.7 or 6.8.

6.14 Interim financial statement specified for purposes of section 6.11

(1) This section applies where the distribution would be made in contravention of section 6.6, 6.7 or 6.8 if the amount of distribution that may be made were determined by reference to the financial items as stated in the financial statement specified in section 6.13.

(2) The financial statement specified for the purposes of section 6.11 is the company's financial statement –

(a) in the case of a listed company –

- (i) that is necessary to enable a reasonable judgement to be made as to the amounts of the financial items; and
 - (ii) in relation to which subsections (3), (5), (6), (9) and (10) are complied with; or
 - (b) in the case of any other company, that is necessary to enable a reasonable judgement to be made as to the amounts of the financial items.
- (3) Subject to subsection (4), the financial statement must –
- (a) have been properly prepared in accordance with this Ordinance; or
 - (b) have been properly prepared in accordance with this Ordinance, except only in relation to the matters that are not material for the purpose of determining, by reference to the financial items as stated in the financial statement, whether the distribution would be made in contravention of section 6.6, 6.7 or 6.8.
- (4) The requirement under subsection (3) for a financial statement to be properly prepared in accordance with this Ordinance has effect subject to any modification that is necessary for applying that requirement to a financial statement prepared otherwise than for a financial year.
- (5) Without limiting subsection (3), the financial statement must –
- (a) give a true and fair view of the financial position of the company as at the date of the financial statement; and
 - (b) give a true and fair view of the financial performance of the company for the period in respect of which the financial statement is prepared.
- (6) The financial statement must be accompanied by a directors' declaration that complies with subsections (7) and (8).

(7) The declaration must state whether, in the directors' opinion, the financial statement –

- (a) gives a true and fair view of the financial position of the company as at the date of the financial statement; and
- (b) gives a true and fair view of the financial performance of the company for the period in respect of which the financial statement is prepared.

(8) The declaration –

- (a) must be authorized by a resolution of the directors;
- (b) must specify the date on which it is made; and
- (c) must be signed on the directors' behalf by a director.

(9) If any director votes against the resolution authorizing the declaration, the financial statement must also be accompanied by –

- (a) a list of the directors who voted against that resolution; and
- (b) whichever of the following is applicable –
 - (i) where the directors decide that the reasons for voting against the resolution are material and should be disclosed to the members without being requested, the details of those reasons;
 - (ii) where the directors decide that the reasons for voting against the resolution are material but should not be disclosed to the members without being requested, or are immaterial, or need not be considered, a statement to that effect.

(10) A copy of the financial statement and of the accompanying directors' declaration must have been delivered to the Registrar. If the financial statement and declaration is not in English or Chinese, the copy must have been accompanied by a certified translation of the financial statement and declaration in either of those languages.

6.15 Initial financial statement specified for purposes of section 6.11

(1) If the distribution is proposed to be declared before any financial statement is laid before the company in general meeting under section 9.73(1) or sent to every member under section 9.74(3), the financial statement specified for the purposes of section 6.11 is the company's financial statement –

- (a) in the case of a listed company –
 - (i) that is necessary to enable a reasonable judgement to be made as to the amounts of the financial items; and
 - (ii) in relation to which subsections (2), (4), (7), (8), (9) and (10) are complied with; or
- (b) in the case of any other company, that is necessary to enable a reasonable judgement to be made as to the amounts of the financial items.

(2) The financial statement must –

- (a) have been properly prepared in accordance with this Ordinance; or
- (b) have been properly prepared in accordance with this Ordinance, except only in relation to the matters that are not material for the purpose specified in subsection (11).

(3) The requirement under subsection (2) for a financial statement to be properly prepared in accordance with this Ordinance has effect subject to any modification that is necessary for applying that requirement to a financial statement prepared otherwise than for a financial year.

(4) The financial statement must be accompanied by a directors' declaration that complies with subsections (5) and (6).

(5) The declaration must state whether, in the directors' opinion, the financial statement –

- (a) gives a true and fair view of the financial position of the company as at the date of the financial statement; and
 - (b) gives a true and fair view of the financial performance of the company for the period in respect of which the financial statement is prepared.
- (6) The declaration –
 - (a) must be authorized by a resolution of the directors;
 - (b) must specify the date on which it is made; and
 - (c) must be signed on the directors' behalf by a director.
- (7) If any director votes against the resolution authorizing the declaration, the financial statement must also be accompanied by –
 - (a) a list of the directors who voted against that resolution; and
 - (b) whichever of the following is applicable –
 - (i) where the directors decide that the reasons for voting against the resolution are material and should be disclosed to the members without being requested, the details of those reasons;
 - (ii) where the directors decide that the reasons for voting against the resolution are material but should not be disclosed to the members without being requested, or are immaterial, or need not be considered, a statement to that effect.
- (8) The company's auditor must have prepared a report on the financial statement stating whether, in the auditor's opinion –
 - (a) the financial statement has been properly prepared in accordance with this Ordinance; and
 - (b) the financial statement –

- (i) gives a true and fair view of the financial position of the company as at the date of the financial statement; and
- (ii) gives a true and fair view of the financial performance of the company for the period in respect of which the financial statement is prepared.

(9) If, in the auditor's report, the auditor has not given an unqualified opinion to the effect that the financial statement satisfies subsection (8)(a) and (b), the auditor must have given a written statement as to whether, in the auditor's opinion, the matter in respect of which the report is qualified is material for the purpose specified in subsection (11).

(10) A copy of the financial statement, of the accompanying directors' declaration, of the auditor's report of the financial statement, and of any written statement under subsection (9), must have been delivered to the Registrar. If the financial statement, declaration, report or written statement is not in English or Chinese, the copy must have been accompanied by a certified translation of the financial statement, declaration, report or written statement in either of those languages.

(11) The purpose specified for subsections (2) and (9) is the purpose of determining, by reference to the financial items as stated in the financial statement, whether the distribution would be made in contravention of section 6.6, 6.7 or 6.8.

Division 5 – Miscellaneous

6.16 Saving for certain older provisions in articles

If, immediately before 1 September 1991, a company was authorized by a provision of its articles to apply its unrealized profits in paying up, in full or in part, unissued shares to be allotted to the members as fully or partly paid bonus

shares, that provision continues (subject to any alteration of the articles) as authority for those profits to be so applied after that date.

6.17 Saving for other restrictions on distribution

This Part does not affect any Ordinance or rule of law, or any provision of a company's articles, restricting the sums out of which, or the cases in which, a distribution may be made.