



New updates to Practice Direction 3.1

On 30 June 2023, the Chief Justice has issued new sets of practice directions applicable to bankruptcy and winding-up proceedings in Hong Kong which comes into effect on 17 July 2023. The new practice direction brought fundamental changes and streamlined the current insolvency regime to this electronic day and age. Our Mr Conti Wong and Mr Victor Lam have authored this article to present a comprehensive overview of the key changes that hold particular significance for insolvency practitioners and creditors seeking to initiate enforcement measures against debtors..

Practice Direction 3.1 Bankruptcy and Winding-up Proceedings

The New Practice Direction 3.1 ("**New PD 3.1**") has brought fundamental changes compared with the Old Practice Direction 3.1 ("**Old PD 3.1**") which was issued on 24 January 2017. Bankruptcy proceedings and winding-up proceedings are discussed separately to enhance clarity.

Bankruptcy Proceedings

Serving a Statutory Demand

One of the hurdles most commonly faced by creditors is serving a statutory demand. The Court has emphasised the importance of strict compliance with the mandatory statutory requirements for service of a statutory demand as it is the pre-requisite for commencement of bankruptcy proceedings (see *Re Li Shu Chung* [2019] HKCFI 2500). Rule 46(2) of the Bankruptcy Rules (the "**BR**") provides that "*the creditor shall do all that is reasonable for the purpose for bringing the statutory demand to the debtor's attention and, if practicable in the particular circumstances, to cause personal service of the demand to be effected*".

Under the Old PD 3.1, to justify for an order for substituted services, there must be at least two personal calls to all of the debtors' addresses together with appointment by letter, followed by a warning that the creditor proposes to serve the statutory demand by post and by advertisement.

One of the most usual grounds for debtor to oppose bankruptcy petition is that the creditor has failed to do all that is reasonable to bring the statutory demand to the debtor's attention. There have been numerous precedents exploring what the phrase "*all that is reasonable*" means and failure to discharge this duty will inevitably result in the bankruptcy petition being set aside.

That has led to judicial sentiment being expressed by Mr Recorder William Wong SC in *Re Cao Zhong* [2021] HKCFI 3143 at paragraph 78 that the Court would generally expect creditors to properly utilise technological solutions such as SMS, WeChat, WhatsApp and/or other instant communication applications (to the extent such means are available and viable) to bring a statutory demand to the debtor's attention where possible.

Such judicial sentiment has now codified in paragraph 2 of the New PD 3.1 where it has been stated that:-

1. Where a debtor has agreed with the creditor to use any electronic means such as emails, WhatsApp, WeChat or other similar means of communications to receive any documents relating to the debt; or
2. Where the debtor has during the period of 12 months immediately preceding the date of the statutory demand used any of the said electronic means with the creditor,

the creditor could send the statutory demand through the said electronic means.

Thus, the new additional mode of service reflects this electronic day and age where communication through instant messaging is prevalent.



Filing a Complete Checklist

The New PD 3.1 also requires a creditor to file (a) a complete checklist in the form of Appendix A of the New PD 3.1 together with (b) the affidavit proving service of the statutory demand. The checklist requires the applicant to furnish details and confirmations concerning matters such as the advertisement of the statutory demand, the draft petition to be lodged, and the attempts made to serve the statutory demand on the debtor, along with comprehensive information about such visits to the debtor's last known address.

Expected Timeline for Solicitors

Paragraph 1.3 of the New PD 3.1 has provided a welcoming change to set an expected timeline for solicitors for any requisition(s) raised by the Court or the leave to file the petition within 28 days of lodging their application. If there is no update within 28 days, the solicitors can now either return or write to the court to enquire the status.

Applications to Masters in bankruptcy proceedings

The New PD 3.1 has revised and included new applications that may be heard and determined by a Master under rule 6(a) of the BR and they include the following:-

1. to bring, institute or defend any action or other legal proceeding relating to the property of the bankrupt under Section 61(b) or Section 61A of the Bankruptcy Ordinance (the "**BO**");
2. to appoint a trustee or to fill a vacancy in the office of the trustee under Sections 81(3) and 82(2) of the BO;
3. to appeal against any act or decision of a trustee under Section 83 of the BO; and
4. for abridgement or enlargement of time appointed pursuant to the BO, the BR or fixed by any order of the Court for doing any act or taking any proceeding.

From our experience, application for extension of time to file affidavits in an application to set aside statutory demand could only heard by Judge in chambers instead of Master in Chambers. The paragraph 3.1(kk) of the New PD 3.1 provides clarity that any abridgement or enlargement of time under the BO, the BR (not just rule 204 of the BR) or any Court order could now be heard by Master.

Paragraph 4.2 of the New PD 3.1 also provides for the manner to make an application to bring, institute or defend any action or other legal proceeding relating to the property of the bankrupt, the application must be supported by an affidavit that includes:-

- (a) the specific proceeding(s) or intended proceeding(s) concerned;
- (b) the amount at stake or the amount which may be recovered for the benefit of the estate;
- (c) the estimated legal costs and the estimated disbursements (including counsel's fees and experts' fees) for defending or pursuing the proceeding(s) and the proposed cap for such costs;
- (d) the estimated time costs of the trustee (including his staff) in defending or pursuing the proceeding(s); and
- (e) a comparison of the costs and benefits of the proposed proceeding(s) to be commenced, continued or defended.



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For an application to appoint solicitor, counsel or agent whether under sections 61(c) and 61A of the BO or otherwise, Paragraph 4.3 of the New PD 4.3 also provides that such an application must be supported by an affidavit including the following:-

- (a) the matter(s) in relation to which the assistance of a solicitor, counsel or agent is sought;
- (b) whether any person (excluding the solicitor's staff) may be engaged and instructed by the solicitor or agent; and
- (c) in the case of appointment of solicitors or agents, the quoted fees of 3 firms of solicitors or agents in respect of the matter(s) and whether such fees included any discount(s) given, together with a brief justification for recommending the firm of solicitors or agent to be engaged.

The New PD 3.1 sets out clearly the Court's expectation when bankruptcy trustees appoint any solicitor, counsel, or agent and/or bring or defend any action relating to the property of the bankrupt. It is also expected that insolvency practitioners should have detailed plan, cost estimate and a cost-and-benefit analysis prepared before making such applications to the Court.

Application to set aside the Statutory Demand

Under paragraph 8.2 of the New PD 3.1, in an application to set aside a statutory demand that is not dismissed by the Court, the Court could now give directions on paper on filing of evidence and leave for the parties to fix a date for hearing (if appropriate), instead of having an *inter partes* directions hearing.

From our experience, depending on the judges hearing the applications, the Court will usually fix an *inter partes* directions hearing unless the parties could agree on the directions and vacate the hearing. The New PD 3.1 now provides for the practice for the Court to give appropriate directions on paper, saving time and costs for the Court and the parties.



Winding-up Proceedings

Paragraph 12.1 of the New PD 3.1 provides for further clarity on service of winding-up petitions on companies pursuant to rule 25 of the Companies (Winding-up) Rules (Cap 32H) (the “**Winding-up Rules**”).

Types of companies	Manner of service
Company incorporated in Hong Kong	The petition shall be served at its registered office in Hong Kong.
Registered non-Hong Kong companies	The petition shall be served in Hong Kong:- • at the principal place of business; or • on the authorised representatives of the company, in accordance with sections 803(1)-(4) of the Companies Ordinance (Cap 622) (the “CO”).
Non-Hong Kong company that has established a place of business in Hong Kong	The petition shall be served at the place of business.
Non-Hong Kong company that no longer has a place of business in Hong Kong	The petition shall be served in accordance with section 803(5)(b) of the CO:- • By way of registered post to the company’s registered office (or the equivalent) in its place of incorporation; and • By way of registered post to the company’s principal place of business (if any) in its place of incorporation; OR • where the address of such registered office or principal place of business cannot be ascertained, but the company has had a place of business in Hong Kong within the previous 12 months, by way of leaving or by post to the place of business in Hong Kong.
Unregistered company which has no place of business in Hong Kong and is not registered under section 777 of the CO	Leave to serve the petition out of jurisdiction must be obtained from the Court under Order 11, rule 1(1) of the Rules of High Court (Cap 6A). The applicant has to demonstrate a good argument case that the 3 core requirements for the Court to exercise the jurisdiction under section 327 of the CO are met and that there is a serious issue to be tried on merits.

Monday hearings before the Companies Court

Paragraph 14.2 of the New PD 3.1 has now included the directions concerning Monday hearings before the Companies Court circulated by the Honourable Madam Justice Linda Chan on 13 September 2021. It clarifies the filing of bundles and submissions that is expected by the Companies Court (whether it be substantive or direction hearing).

All of the relevant bundles, submissions and draft directions must now be served not only on the respondent companies, but also all persons who have filed notice of intention to appear in the petition and the Official Receiver.



Dismissing or striking out winding-up petition by consent

Paragraph 14.3 of the New PD 3.1 makes it clear after a winding-up petition has been advertised and/or gazetted by consent, the Court may only dismiss or strike out the petition without the attendance of the parties when a consent summons is signed by all parties (not only the petitioner and the respondent company, but also all supporting and opposing creditors who have filed a notice of intention to appear in the petition) is lodged 2 clear days prior to the hearing.

This change represents that all creditors who have filed notices of intention to appear must be served of all hearing bundles and submissions and that the support of all creditors (including those creditors who filed a notice of intention to appear in the petition) is needed to dismiss a petition by consent, representing the Court giving weight to the views of all creditors.

Adjournment of winding-up petition hearing

Paragraph 14.5 of the New PD 3.1 provides that if the parties wish to make a joint application to adjourn the winding-up petition and vacate the hearing, the application must be made in the following manner:-

1. the petitioner shall lodge a consent summons together with a letter explaining the brief reason or justification for seeking the adjournment;
2. the consent summons must be signed by the petitioner, respondent company and all persons who have filed notices of intention to appear in the petition (or letters signed by such persons indicating their agreement to the proposed adjournment); and
3. the consent summons must be lodged with the clerk to the Companies Judge within the time limit for lodging e-bundles and skeleton submissions.¹

Case management of a bankruptcy or winding-up petition

Paragraph 16 of the New PD 3.1 lays down clearer and much welcomed guidelines for effective case management. The respondents who intend to oppose the petition are expected to adhere closely with the deadline imposed under rule 68 of the BR and rule 32(1) of the Winding-up Rules to file their notice to show cause or affidavit in opposition respectively.

Bankruptcy petitions

A debtor intends to show cause against a bankruptcy petition shall file a notice to show cause with the Official Receiver and to the petitioner 3 days before the day on which the petition is to be heard (Rule 68 of the BR).

Winding-up petitions

The affidavit in opposition shall be filed within 7 days or such longer time as the Court may direct, of the date of the filing of the verifying affidavit (Rule 32(1) of the Winding-up Rules).

The affidavit in reply to an affidavit in opposition shall be filed within 3 days of the date of the filing of an affidavit in opposition (Rule 32(2) of the Winding-up Rules).

Any application for an extension of time to file such notice or affidavit will be heard by Master under paragraph 9.1(qa) of the New PD 3.1. An application for an extension of time to file such notice or affidavit must be supported with good reasons and the Court would normally grant leave to the respondent to file an affidavit out of time conditional upon payment into court of the petitioning debt or a part of the debt.

This change has been in line with the judicial sentiment that the filing of affidavit in opposition and any extension of time to file such affidavit shall be made with good reasons and shall be conditional upon the respondent paying the debt into court.²



Paragraph 16.2 of the New PD 3.1 has made it clear that the affidavit in opposition shall comply with the requirements stipulated in Order 41 of the Rules of the High Court (Cap 6A) by including:-

1. the brief grounds of his opposition to the petition;

¹ This provides much clarity and expresses the judicial sentiment expressed by the Honourable Madam Justice Linda Chan in *Re GTI Holdings Limited* [2021] HKCFI 3647 and paragraph 7 of *Re Jiayuan International Group Ltd* [2023] HKCFI 1245 that adjournments should be sought with the consent of the creditors who had given notice to appear in the petition who, in her Ladyship's view, have the right to be heard and seek an order to be substituted as petitioner if the petitioner does not seek a winding up order against a company.

² Per the Honourable Madam Justice Linda Chan in paragraph 7 of *Re Tian Shan Development (Holdings) Ltd* [2022] HKCFI 3084, paragraphs 13-20 of *Re Simplicity & Vogue Retailing (HK) Co Ltd* [2023] HKCFI 1443, paragraph 7 of *Re Guoan International Ltd (in liquidation)* [2023] HKCFI 666

2. the facts relied upon in opposition to the petition;

It is inappropriate to set out any legal arguments, opinions or submissions in such an affidavit. Any non-compliance with the requirements may result in the affidavit or some parts of the affidavit being struck out by the Court with costs against the party.

No discovery of documents or cross-examination of deponents will be required and no expert evidence (including expert evidence contained in or exhibited to an affidavit) should be filed without leave of the Court. If a party wishes to adduce expert evidence, he must apply for leave and identify:

1. the specific issues or question which the expert is required to address;
2. the proposed expert by name and field; and
3. the proposed directions on filing such evidence.

Filing expert evidence without leave may result in the Court expunging such evidence with costs against the party. This is consistent with the Court's duty to actively manage cases.³

Paragraph 16.5 provides that English translation of documents in Chinese exhibited in an affidavit should be obtained, and the English translation must either be agreed by the other party or submit the translation to the Court Language Section for certification within 28 days of the filing of the affidavit. Directions from the Court is necessary if the parties consider dispensation of the English translation.

Interlocutory applications in the petition should be rare and the parties should consider whether any interlocutory application is necessary.



Registrar's Certificate

Paragraph 11.3 of the New PD 3.1 now provides that practitioners should obtain the registrar's certificate without undue delay, and failure to obtain the registrar's certificate within 3 months from the date of the petition, in the absence of any good reasons, may result in the dismissal of the winding-up petition.

Applications to Master in winding-up proceedings

Paragraph 9.1(qa) of the New PD 3.1 provides that Master could now hear applications to waive the requirements or extend the time limits for filing affidavits in opposition and affidavits in reply.

Paragraph 9.2 of the New PD 3.1 also provides for an application to bring or defend an action or legal proceedings under Item 1 of Part 2 of Schedule 25 of the Companies (Winding up and

³ This reflects the judicial sentiment expressed by the Honourable Madam Justice Linda Chan in paragraphs 5-8 of *Re Everwin Enterprise (Hong Kong) Ltd* [2022] HKCFI 1653 that expert evidence could only be filed with leave of the Court, and if a party files any expert evidence without leave, all of the costs occasioned by such evidence to be borne by the party and/or the directors responsible for causing the company to file the expert evidence.

Miscellaneous) Ordinance (Cap 32) (the "**CWUMPO**"), the application must be supported by an affidavit that includes:-

- (a) the specific proceeding(s) or intended proceeding(s) concerned;
- (b) the amount at stake or the amount which may be recovered for the benefit of the estate;
- (c) the estimated legal costs and the estimated disbursements (including counsel's fees and experts' fees) for defending or pursuing the proceeding(s) and the proposed cap for such costs;
- (d) the estimated time costs of the trustee (including his staff) in defending or pursuing the proceeding(s); and
- (e) a comparison of the costs and benefits of the proposed proceeding(s) to be commenced, continued or defended.

For an application to employ a solicitor to assist the liquidator under Item 8 of Part 3 of Schedule 25 of the CWUMPO, Paragraph 9.3 of the New PD 4.3 also provides that such an application must be supported by an affidavit including the following:-

- (a) the matter(s) in relation to which the assistance of a solicitor, counsel or agent is sought;
- (b) whether any person (excluding the solicitor's staff) may be engaged and instructed by the solicitor or agent; and
- (c) in the case of appointment of solicitors or agents, the quoted fees of 3 firms of solicitors or agents in respect of the matter(s) and whether such fees included any discount(s) given, together with a brief justification for recommending the firm of solicitors or agent to be engaged.

The New PD 3.1 sets out clearly the Court's expectation when liquidators appoint any solicitor, counsel or agent and/or bring or defend any action relating to the property of the bankrupt. It is also expected for insolvency practitioners to have a detailed plan, cost estimate and a cost-and-benefit analysis prepared before making such applications to the Court.



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Takeaway

This article only attempts to summarise some of the fundamental changes that we consider appropriate. Through the New PD 3.1, the Court makes it clear that winding-up and bankruptcy proceedings are of summary nature. Practitioners should be reminded that such proceedings should not be turned into full-blown civil proceedings.

It is also of paramount importance that practitioners should adhere closely to the New PD 3.1 as failure to follow the New PD 3.1 may result in adverse cost consequences or in some extreme cases, dismissal of the applications in question.

It is also welcoming to see that the New PD 3.1 reflects the current electronic day and age and provides a streamlined process for creditors to take action against delinquent debtors.

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