

**Bills Committee on
Companies (Amendment) Bill 2002**

**Follow-up Actions arising from the Discussion
at the Meeting on 20 May 2003**

Introduction

This paper sets out the outcome of the follow-up actions arising from the discussion at the meeting on 20 May 2003.

(a) Proposed Committee Stage Amendments to Section 161C

2. The proposed Committee Stage Amendments (CSAs) to new section 161C have been included in the fourth batch of draft CSAs. We are still discussing with the Hong Kong Society of Accountants on the CSAs.

(b) Registration of grant of administration of a deceased sole member and director of a one-member company

3. We are considering the Bills Committee's request for a simple mechanism for registration of the grant of administration of a deceased sole member and director of a one-member company in the absence of a reserve director.

(c) Malpractice in the property market

4. The proposed extension of the existing prohibition on financial assistance to directors to cover credit transactions (which in turn include conditional sales agreements) is not prompted by malpractice in the property market. The basis for the proposal is that as recommended by the Standing Committee on Company Law Reform, the existing prohibition, which is confined to loans only, is unduly restrictive and should be extended to cover modern forms of credit. In implementing this recommendation, we have decided to follow the UK approach by extending the prohibition to cover quasi-loans and credit transactions. We wish to clarify that there is nothing wrong about conditional sales agreements per se, but if such agreements are entered into between a

company and a director of its, etc, we consider that they could involve financial assistance to the director etc and hence should be prohibited.

(d) Responses to the further submission from Democratic Alliance for Betterment of Hong Kong (DABHK)

5. Our responses to DABHK's further submission are at Annex A.

(e) Responses to the further submission from Law Society of Hong Kong (LSHK)

6. Our responses to LSHK's further submission are at Annex B.

(f) Clauses 44 and 55

7. A company normally makes decisions in general meeting or through written resolutions. Where a company has one member and holds a meeting, the member may make a resolution in general meeting. The resolution will be recorded in the minutes of the meeting and, if the resolution is subject to filing requirement, a printed copy of the resolution will separately be prepared for filing purposes. Alternatively, if the member is not required to hold a meeting, he may instead sign a document that states the terms of a resolution which is usually referred to as a written resolution of the member. Section 116B provides that such document may be treated as if it were a resolution that has been made in general meeting. A sample of a written resolution is at Annex C.

8. The courts have in various cases¹ recognized decisions made by a company by informal unanimous consent without the need for a formal meeting or a written resolution of all members. Applying this principle to a one-member company, the effect is that solitary decisions of the sole member may take effect as if decisions of the company in general meeting. To ensure that a one-member company has a proper and complete record of decisions of this nature, clause 44 requires the sole member to file with the company a written record of such decisions. Such record shall be sufficient evidence of the decisions having been taken by the member. Without this provision, it will be very difficult, if not impossible, for the sole member to prove that such a solitary decision was in fact made. The clause does not go so far as to deem the record as a written resolution that has been made in general meeting.

¹ For example, *Re Duomatic, Ltd* [1969] 1 All ER.

9. Similarly, directors of a company normally make decisions in a meeting or through written resolutions. Where a company has one director and that director holds a meeting, the director may make a resolution in the meeting. The resolution will be recorded in the minutes of the meeting. Alternatively, if the director is not required to hold a meeting, he may instead sign a document that states the terms of a resolution which is usually referred to as a written resolution of the director. Regulation 108 of Table A provides that such document may be treated as if it were a resolution that has been made in a directors' meeting.

10. The courts have in various cases² recognized decisions made by the board of directors of a company by informal unanimous consent without the need for a formal meeting or a written resolution of all directors. Applying this principle to a one-director company, the effect is that solitary decisions of the sole director may take effect as if decisions made in a directors' meeting. To ensure that a one-director company has a proper and complete record of decisions of this nature, clause 55 requires the sole director to file with the company a written record of such decisions. Such record shall be sufficient evidence of the decisions having been taken by the director. Without this provision, it will be very difficult, if not impossible, for the sole director to prove that such a solitary decision was in fact made. The clause does not go so far as to deem the record as a written resolution that has been made in a directors' meeting.

Financial Services Branch
Financial Services and the Treasury Bureau
May 2003

² For example, *Runciman v Walter Runciman plc* [1992] BCLC 1084.

**Responses to Comments from
Democratic Alliance for Betterment of Hong Kong (DABHK)**

Clause 2

We do not consider it necessary to define the term “secretary” in section 2 as suggested. In any event, by defining the term to refer to the secretary under section 154 does not add anything of substance.

Clause 58

2. The transaction referred to in paragraph (a) of DABHK’s first submission would be prohibited under new section 157H(4). The transaction referred to in paragraph (b) of the same submission would also be prohibited under section 157H(1) if the assignment of liability under a loan from a director to his company is for consideration (i.e. the director is required to pay the company in return for its taking up the liability). If the assignment is not for consideration (i.e. the director is not required to pay the company in return for its taking up the liability), the director has clearly breached his fiduciary duties and could be subject to civil and/or criminal proceedings depending on the facts and circumstances of the case.

Clause 70

3. A creditor to whom a company is indebted may not apply to the court for winding up the company if the amount of debt involved is below \$5,000. We consider that the level of \$5,000 is on the low side, when compared with that of \$10,000 in the bankruptcy law, and the company is at a higher risk of being wound up. Clause 70 mainly aims to increase the level to \$10,000.

**Responses to Comments from
Law Society of Hong Kong**

Clause 33

If a company applies to enter on the register of charges a memorandum of satisfaction of a debt in respect of a registered charge under this clause, the original document evidencing payment will need to be produced to the Registrar of Companies as evidence of the satisfaction of the debt. Hence, it is highly unlikely that a memorandum of satisfaction will be wrongly entered on the register. If there is an omission or misstatement of any particular in a memorandum of satisfaction which is accidental, due to inadvertence etc, the court may, pursuant to existing section 80 of the Companies Ordinance, on the application of the company or any person interested rectify the omission or misstatement on such terms and conditions as seem to the court just and expedient.

Company No.:

THE COMPANIES ORDINANCE
(CHAPTER 32)
SPECIAL RESOLUTION
OF
(*Company Name*)
Passed on (*Date*)

By a written resolution signed by all the Members of the Company pursuant to Section 116B of the Companies Ordinance, the following Special Resolution was duly passed:-

The directors are hereby authorized:

- (a) to make a statutory declaration that—
- (i) the company will become dormant either as from the date of delivery of the statutory declaration to the Registrar or as from a later date as specified in the statutory declaration; and
 - (ii) prior to the company ceasing to be dormant, the directors of the company shall deliver to the Registrar a further statutory declaration that the company intends to enter into a relevant accounting transaction; and
- (b) to deliver a copy of the statutory declaration to the Registrar.

(Signature)
(Name)
Shareholder

(Signature)
(Name)
Shareholder