

4th July 2002

The Clerk,
Bills Committee on the
Companies (Amendment) Bill 2002,
Legislative Council Secretariat,
Legislative Council Building,
8 Jackson Road,
Central,
HONG KONG

Dear Sirs,

COMPANIES (AMENDMENT) BILL 2002

The Legal Committee of the Hong Kong General Chamber of Commerce generally welcomes and supports the Companies (Amendment) Bill 2002 as carrying into effect mainly non-contentious proposals in the February 2000 Report of the Standing Committee on Company Law Reform. The proposals provide useful simplification and streamlining of administrative matters as well as some justifiable tightening of certain measures related to good governance.

We wish however to make the following observations.

Single Shareholder and Director Companies

The Committee particularly welcomes the proposal to allow single shareholder and single director companies. This change will reduce costs, and have other potential advantages, for SMEs. However, we venture to raise one technical issue on which the change could create a new problem. That is that in the event of the death of an individual who is the sole shareholder and director, the following situation would appear to arise:-

- i) there would be no director;
- ii) the personal representatives would have no legal ability to exercise any rights in respect of the issued share(s) until a grant of administration to the estate of the deceased was made;
- iii) even after the grant of administration it appears dubious whether any other officer of a company with no directors has the authority to register the grant;
- iv) even if the problem raised in (iii) is inapplicable or can be overcome, the company would be left without any directors for a considerable period;
- v) if the problem raised in (iii) is applicable, it seems that technically the personal representatives would have to apply to court for an order to amend the register before they could exercise the right attaching to the share to appoint one or more new directors.

We suggest that an answer might be found in

- a) permitting or possibly requiring the sole director of a company with only one shareholder to appoint one or more individuals to become directors in his place in the event of his death (“Successor directors”); the authority of such Successor directors might have to be appropriately restricted (e.g. in respect of the issue of new shares) in order to protect the interests of the estate of the deceased pending registration of the grant of administration;
- b) requiring any contingent appointment(s) as in (i) to be filed at the Companies Registry with the relevant consent(s), but subject to the right of the sole director to change the appointment(s);
- c) if no appointment is made under (a) or no appointment is taken up, permitting the personal representatives, even before the grant of administration but upon acceptance of their responsibilities, to appoint one or more Successor directors, who may but need not be themselves, as directors with the same restrictions on the normal authority of directors as in (a); and
- d) providing some protection to officers and employees of the Company, and any others dealing with the Successor director(s), in the event of an appointment under (c) which is subsequently challenged and set aside.

As a supplement to the above, the Company Secretary might be authorised to undertake certain specified corporate actions while there is no director, such as the institution of court proceedings in the name of the Company, to seek directions on the situation, the registration of appointment of a Successor director under (c) above, and the registration of the grant of administration as referred to in (v) above.

We further suggest that at a wider level than the technical issue outlined above, there is an issue relating to the present inability of the personal representatives of a deceased shareholder to exercise any rights in respect of shares in the deceased’s estate until a grant of administration has been obtained and registered with the company. That issue is of course not limited to the single shareholder and director company.

We therefore extend our suggestion(s) above to the concept that:-

- i) personal representatives should be entitled to vote the shares of the deceased before registration of the grant, but not to transfer the shares or receive distributions;
- ii) in order to protect all relevant interests, the law should provide that personal representatives should be able to make an expedited filing of their appointment or entitlement to a grant of administration, with an equally expedited issue of a provisional grant to allow for (i);
- iii) the restriction against transfers might be qualified to allow a sale with appropriate protection as to the proceeds;
- iv) we note that the relevant problems arise mainly because of the very long time normally taken in Hong Kong to obtain a grant of administration; we believe that in most major jurisdictions the period involved is much shorter, and we believe that in many jurisdictions there are procedures for expedited grants, to enable the personal representatives to take and exercise early control over the estate, with provision for corrective affidavits of assets and liabilities, and consequent calculation and payment

of further duty, after the grant is made. That would be welcome in Hong Kong in itself and would overcome all except the technical problem in connection with the registration of the grant – which could be dealt with by a simple clarification of the Companies Ordinance as suggested above.

Share Repurchases

The Committee is disappointed that while minor amendments are proposed in the provisions of the principal Ordinance relating to share repurchases, the opportunity has not been taken for a more comprehensive review with the objective of simplification. We believe that the existing law, which closely follows UK legislation, has been found by UK practitioners to be unduly cumbersome, as it has in Hong Kong. In particular:-

- i) the rationale of the prohibition against any contract for a repurchase being entered into without a special resolution made in advance is questioned: the provision can cause the loss of repurchases that would have been in the interests of the company, as well as a lack of clarity and certainty in presentations to shareholders. We do not consider that a contract which is conditional on the requisite resolution, with the requisite abstentions, and on compliance with other relevant provisions of the Ordinance, should be objectionable, and it would enable a simpler and clearer presentation to shareholders.
- ii) at least in private companies the publicity requirements of Section 49M are disproportionately expensive in many cases and also in many cases we question whether they serve a useful purpose. We suggest that the following might be considered:-
 - a) an exemption if the repurchase is of a limited percentage of the capital, say 25% from the filing of one annual return to the next, and if the directors' statement under Section 49K contains an additional paragraph, supplemental to Section 49K (3)(a), to the effect that at the relevant date the liabilities of the company will not exceed say two thirds of its assets;
 - b) an exemption if the directors' statement under Section 49K contains an additional paragraph to the effect that a notice containing the information set out in Section 49M has been sent, or will within the period referred to in Section 49M be sent, to all known creditors (including contingent creditors) of the company.

Authorisation of electronic forms of publicity

From the beginning of 2002, the Gazette has “gone electronic”, i.e. it is published on a web-site, and we imagine that the hard copy circulation is substantially reduced. Newspapers have progressively been doing the same, though we are not certain how far if at all that applies to classified advertising.

We also understand that the Hong Kong Stock Exchange will soon remove the requirement for listed companies to take out paid advertisements, and instead allow regulatory announcements to be placed on a company's and the Hong Kong Stock Exchange's web-sites.

We suspect that a web-site dedicated to statutory advertisements might in fact be both commercial and more practicable for consumers than present arrangements.

We suggest, in any case, that the opportunity might be taken to introduce an amendment in Section 74A, and elsewhere as relevant, to enable the Registrar to approve web-sites as an alternative to newspapers.

Our thanks again for the opportunity to put these points on this important piece of legislation. Should you require any further information, please do not hesitate to contact us.

Yours sincerely,

R T Gallie
Chairman
Legal Committee