Bills Committee
on Companies (Amendment) Bill 2002

The Administration's Comments on
Two Submissions on the Companies (Amendment) Bill 2002

Submission from the Law Society of Hong Kong

Clause 2(1)(b) – definition of "manager"

The definition of the term "manager"[1] in Clause 2(1)(b) aims to implement the recommendation of the Standing Committee on Company Law Reform (SCCLR) that the term should mean the rank of executives immediately below and reporting to the board of directors of a company (and not executives at any rank in the company). The definition does not include a person who reports directly to the managing director.

Clauses 14 to 17, 19 to 23, 76, 79(1) to (5), and 86

2. These clauses aim to amend certain provisions in the Companies Ordinance to replace the filing requirement of a statutory declaration or affidavit by the filing of a written statement. Any person making a false statement in such a written statement may be prosecuted under section 349 of the Ordinance and, on conviction, subject to a maximum penalty of $100,000 and maximum imprisonment of 6 months.

Clauses 25(1) and (2)

3. To streamline the procedure and simplify the filing requirement, we consider it appropriate to dispense with the existing requirement for filing a resolution that authorizes an increase in the share capital of a company. Instead, the company would be required to file a notice with the Registrar of Companies (R of C) of the increase within 15 days after the increase takes effect. These legislative changes are in line with the existing filing arrangements for matters relating to share capital such as consolidation of shares, conversion of shares into stock.

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[1] The term "manager", in relation to a company, means a person occupying a position under the immediate authority of the board of directors but does not include –

(a) a receiver or manager of the property of the company; or
(b) a special manager of the estate or business of the company appointed under section 216.

4. It is also worth noting that if the resolution in question is passed by way of a special resolution[2], section 117 of the Ordinance still requires the special resolution to be filed.

Clause 32

5. We have proposed to dispense with the requirement for a certificate of registration of a charge to state the amount secured, having regard to the experience of the Companies Registry (CR). R of C has advised us that 95% of the current charges are "all monies" charges, where the amount cannot be accurately stated. He is often presented with such verbose and legalistic descriptions of the amounts secured that it is very difficult for him to interpret them and state the essence in the certificates of registration. We do not consider that the requirement to state the amount secured by the charge in the charge certificate serves any real purpose. Interested parties can obtain more comprehensive information by searching the related documents, which are available at the CR for public inspection.

Clause 33

6. The comments in paragraph 9 below are relevant.

Clause 38

7. If the number of members of a company falls to one or increases from one to two or more, the company has to enter a statement in respect of such event into the company's register of members, which is made available for public inspection. Hence, this arrangement can enhance the transparency of a single member company in the interest of the public and, in particular, those who have business transactions with the company. Any company making default in complying with the above requirement may be prosecuted and, on conviction, subject to a maximum penalty of $25,000 and maximum daily default fine of $700.

Submission from the Hong Kong Association of Banks

Clause 26

8. Under the Ordinance, the court's approval is required for a

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[2] Where a company's articles of association do not provide for the increase of capital by an ordinary resolution, a special resolution is required to be passed for the increase.

reduction in a company's share capital. The SCCLR considers that such approval is not necessary where there is no distribution out of the company and shareholders are treated equally and fairly. Accordingly, the SCCLR recommends that no court approval is required for a reduction in a company' share capital arising from a redesignation of par value to a lower amount provided that –

(a) the company has only one class of shares;
(b) all issued shares are fully paid-up;
(c) the reduction is distributed equally to all shares; and
(d) the reduction is credited to the share premium account.

Given that the reduction is credited to the share premium account, there would not be any distribution out of the company since the share premium account is deemed to be the share capital of a company under section 48B. It is worth noting that court approval (as in the case of a reduction in the share capital) is required in respect of any distribution from the share premium account. Hence, we do not consider it necessary to add the condition "no cash is paid out of the company" in the clause.

Clause 33

9. We do not see a need to require a certificate of mortgagee or chargee or to clarify the position of a chargee over his security (when the release of a registered charge is wrongly registered) in the Companies Ordinance, as the policy intent is that if a specified form in respect of the release of the registered charge is submitted to R of C by a person other than the mortgagee or chargee, it has to be accompanied by a document evidencing the release of the registered charge. Such document will either be sealed or signed by an authorized signatory on behalf of the chargee or mortgagee confirming his agreement to the release of the charge. We are reviewing the wording of clause 33 to see if this policy intent should be made more explicit.

Clauses 42, 44 and 55

10. Clause 42 provides that one member constitutes a quorum for a meeting of a company having only one member. Clauses 44 and 55 recognize respectively the decisions made at a meeting where a company has one member or director. It is also worth noting that clause 2(3) provides that any provision in the Ordinance should apply with necessary modifications to cater for the situation where a company has only one member or director. Hence, we do not see a need to further amend the Ordinance as suggested in the submission.

Clause 58

11. The SCCLR considers that the term "loan" in relation to provision of financial assistance by a company to its directors is inadequate to cover modern forms of credit. It notes that the UK has amended its laws and extended the prohibition to credit transactions and quasi-loans and recommends that the Ordinance should be extended to cover in generic terms the provision of financial assistance. Against the above background, this clause is drafted, on the basis on the relevant provisions in the UK legislation.

12. As regards the concern over the terms "credit transaction" and "take part in an arrangement", we intend to couch the clause in such terms to cover all possible scenarios where "financial assistance to directors" is involved. For example, leasing goods or land to a director with periodic payments could involve "financial assistance to directors" if the payments are set at a level not available in the commercial markets. On the term "conditional sales agreement", we are considering whether it should be defined in the Bill for the sake of clarity.

13. Both new sections 157H(2) and (4) prohibit a company from taking certain actions which would amount to a contravention of the new section 157H(1) in relation to the prohibition of financial assistance to directors. Such prohibition is however subject to certain exceptions in the new section 157HA. Reading sections 157H(2) and (4) together with section 157HA, it is clear that the exceptions in new section 157HA apply equally to new sections 157H(2) and (4).

Clause 63

14. The comments in paragraph 12 above are relevant.

Clause 65

15. It is worth noting that the Ordinance does not impose a general obligation on a company to keep records of the contracts between the company and its members. The purpose of this clause is to enhance the transparency of a company with one member who is also a director of the company by requiring that proper records be kept for contracts (excluding those entered into in the ordinary course of the company's business) between the member and company. We do not consider that the clause should go further than that; otherwise, an onerous burden will be unnecessarily imposed on such company, thereby discouraging the use of

this incorporation vehicle.

Clause 66

16. The clause is based on the recommendation of the SCCLR. It does not seek to impose an obligation on a company to purchase insurance for its auditor and simply gives the company an option to do so under certain circumstances. Hence, we do not see the need to exclude the "auditors" from the clause.

Financial Services Branch
Financial Services and the Treasury Bureau
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