

HONG KONG BAR ASSOCIATION
COMPANIES (AMENDMENT) BILL 2002

COMMENTS

1. Subject to the specific comments below, we are in general support of the proposed amendments.

2. We note the proposed s. 23(1A) aims to expressly spell out the right of every shareholder to enforce the terms of the memorandum and articles of association. However, it seems to us that the existing s. 23 already clearly states that the memorandum and articles bind the company and the members as if signed and sealed by each member and contain covenants on the part of each member to observe all its provisions. In other words, s. 23 clearly provides that there is a contract between the members and the company. We would accordingly query the need to spell out the members' and company's right to enforce the terms of such a contract.

3. We note that the reason for the proposed repeal of s. 8, which currently allows shareholders holding not less than 5% in the nominal value of the company's issued share capital or any class thereof to apply to the court to annul a special resolution to amend a company's objects clause, is the concern it may impede fundamental business decisions. In particular, it is said that dissenting members of a public company, if dissatisfied, can always sell their stake in the company. We have reservations about this rationale because this could in principle be said for many other provisions of the Ordinance with regard to public companies.

4. Further, we doubt whether the power conferred by s.8 on dissenting shareholders will impede business decisions because although dissenting shareholders can apply to court, it does not necessarily mean the court will grant an order of annulment. The court can properly come to a view whether the application is made in good faith and make such order as it thinks fit.

5. We note that the proposed s.153B makes a director vicariously liable for the acts of an alternate director appointed to act in his place. However the proposed s.153B does not bear out paragraph 8 of the Brief that the director should be vicariously responsible for the acts and omissions of his alternate except in relation to an offence. The proposed s.153B(1)(a) makes a director who appoints an alternate director vicariously liable for any tort committed by the alternate director while acting in the capacity of alternate director.

6. Further, we note that the proposed s.153B as drafted does not confine itself to torts committed by the alternate director against the company and hence might be said to cover for example an assault by the alternate director against another director during a board meeting. If the object of the amendment is to improve corporate governance then it may be considered that s.153B should be limited to torts against the company. On the other hand, we note that s.153B as drafted does not apply to other wrong-doing such as misfeasance and breach of fiduciary duties. We assume that a deliberate decision has been made to specify “tort” as the only kind of wrong-doing of the alternate for which the principal director may be responsible.

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