

立法會
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**Paper for the House Committee Meeting
on 5 February 2010**

**Legal Service Division Report on
Companies (Amendment) Bill 2010**

I. SUMMARY

- 1. Objects of the Bill** To amend the Companies Ordinance (Cap. 32) to streamline the company formation procedures; to extend the powers of the Registrar of Companies (the Registrar) to direct a change of company name; to enlarge the class of persons who may bring or intervene in statutory derivative actions; to provide for electronic communications with the Registrar; to provide for the modes of communications by a company to any person other than the Registrar; to remove obstacles to the introduction of paperless holding and transfer of shares and debentures; and to make related and miscellaneous amendments.
- 2. Comments** While the Administration is conducting a rewrite of Cap. 32, it considers it necessary to amend Cap. 32, ahead of the rewrite, to provide for electronic incorporation and filing of documents to tie in with the implementation of Phase II of the Integrated Companies Registry Information System. The Bill also introduces other technical amendments to Cap. 32 to streamline the existing requirements provided in Cap. 32.
- 3. Public Consultation** The Standing Committee on Company Law Reform, the Customer Liaison Groups and Users' Committee of the Companies Registry and the Inland Revenue Department respectively have been consulted and they supported the proposals. The proposal to empower the Registrar to direct a company to change its name was also broadly supported by the respondents in a public consultation conducted in 2008.
- 4. Consultation with LegCo Panel** The Administration briefed the Panel on Financial Affairs on 11 June 2009. Individual members expressed various concerns on the proposed amendments. The Panel was also briefed on the development of a scripless securities market on 1 February 2010.
- 5. Conclusion** The Legal Service Division is scrutinizing the legal and drafting aspects of the Bill. In the light of the concerns raised by some members of the Panel on Financial Affairs, members may wish to study the Bill in detail.

II. REPORT

Objects of the Bill

To amend the Companies Ordinance (Cap. 32) (the Ordinance) and its subsidiary legislation to streamline the company formation procedures; to extend the powers of the Registrar of Companies to direct a change of company name; to enlarge the class of persons who may bring or intervene in statutory derivative actions under Part IVAA of the Ordinance; to provide for electronic communications with the Registrar; to provide for the modes of communications by a company to any person other than the Registrar; to remove obstacles to the introduction of paperless holding and transfer of shares and debentures; and to make related and miscellaneous amendments to the Ordinance and its subsidiary legislation and the Securities and Futures Ordinance (Cap. 571).

LegCo Brief Reference

2. File ref.: C2/1/72(2009) issued by the Financial Services and the Treasury Bureau on 20 January 2010.

Date of First Reading

3. 3 February 2010.

Comments

Background

4. The Ordinance is one of the largest and most complex piece of legislation in Hong Kong with 367 sections and 24 schedules. The Standing Committee on Company Law Reform (SCCLR) was formed in January 1984 to advise the Financial Secretary on necessary amendments to the Ordinance as and when experience shows such amendments were required. In February 2000, SCCLR published "The Report of the Standing Committee on Company Law Reform on the Recommendations of a Consultancy Report of the Review of the Hong Kong Companies Ordinance" (the SCCLR Report). Although many recommendations of the SCCLR Report have been implemented through a number of amendment bills over the past few years, the Administration considers that piecemeal amendments to the Ordinance are no longer desirable. Instead, a complete rewrite and restructuring of the Ordinance is necessary to enhance the attractiveness and competitiveness of Hong Kong as a major international business and financial centre and to modernize Hong Kong's company law in the light of the experiences of comparable common law jurisdictions.

5. In mid-2006, a dedicated Companies Bill Team was set up to take forward the rewrite exercise. Given the extensive nature of the rewrite exercise, the

Administration has adopted a phased approach by tackling the core company provisions which affect the daily operation of live companies in Hong Kong in Phase I. The winding-up and insolvency-related provisions, which are mainly administered by the Official Receiver's Office, will be reviewed in Phase II of the rewrite. The Administration aims to introduce the Companies Bill into the Legislative Council by the end of 2010.

6. The Administration is separately working on legislative amendments to the Ordinance ahead of the introduction of the Companies Bill. These amendments, which are contained in the Companies (Amendment) Bill 2010 (the Bill), relate to electronic incorporation and filing of documents and other technical amendments. These amendments are summarized in the following paragraphs.

Electronic company registration and streamlined company name approval regime

7. According to the Administration, the Companies Registry (CR) is developing Phase II of the Integrated Companies Registry Information System (ICRIS II) which is expected to come on stream in late 2010 or early 2011. ICRIS II will enable on-line applications for company registration and filing of company documents. To tie in with the implementation of ICRIS II, the following amendments are proposed:

- (a) clauses 3 to 5 of the Bill seek to provide for a streamlined company formation procedure for the purpose of electronic registration, which will remove the attestation requirements for the signing of memorandum of association and articles of association by a founder member and to reduce the number of founder members required to sign an incorporation form from two to one;
- (b) clause 5 also seeks to require additional particulars to be given in an incorporation form under section 14A(2) of the Ordinance and to empower the Financial Secretary to amend that subsection by order published in the Gazette;
- (c) clauses 22 and 23 seek to provide for the signature requirement of certain documents if they are delivered to the Registrar in electronic form and to provide for the documents to be delivered to the Registrar by authorized representatives;
- (d) clauses 24 and 25 seek to provide for electronic communications with the Registrar, including the delivery of documents and forms to the Registrar in electronic form and the signing of the documents using digital signature or password; and
- (e) clause 27 seeks to empower the Registrar to issue certificates in any form including electronic form.

8. As a related matter, clauses 9 to 11 of the Bill seek to expedite the company name approval process. Under the proposed procedures, a company name will be accepted for registration instantaneously if it satisfies certain preliminary

requirements, namely, that it is not identical to another name on the register and does not contain certain specified words or expressions. Thereafter, if the company's name is found to be objectionable, the Registrar is empowered to direct the company in question to change its name within a specified period. The Registrar is also empowered to act pursuant to court orders to direct a shadow company to change its name. Clause 12 seeks to empower the Registrar to replace a company's name by its registration number if it fails to comply with the Registrar's direction to change its name. According to paragraph 3 of the LegCo Brief, the revised procedures will shorten the processing time for company incorporation from four working days to one day.

Electronic and website communications

9. Amendments have recently been made to Rule 2.07A of the Main Board Listing Rules (the Listing Rules) of the Hong Kong Exchanges and Clearing Limited (HKEx) to allow a listed issuer to send corporate communications to its shareholders by making them available on the listed issuer's website if the shareholders agree, or are deemed to have so agreed. Since there are currently no similar provisions in the Ordinance, Hong Kong-incorporated listed companies are not able to make use of such mode of communication.

10. Clause 31 of the Bill seeks to add new provisions to the Ordinance to enable communications by a company to any person other than the Registrar to be sent in electronic form or by means of website. It also provides rules that govern such communications (e.g. electronic communications can be made upon the recipient's agreement and to an address specified by the recipient, period of time specified for the information or document to be made available on the website, etc.) and retains the right of the recipient to request hard copies of the documents or information free of charge.

Exempting listed companies from giving notice of closure of register of members by advertisement in a newspaper

11. Section 99(1) of the Ordinance requires a company incorporated in Hong Kong to give notice of closure of its register of members or debenture holders by advertisement in a newspaper. However, Rules 2.07C and 13.66 of the Listing Rules require a listed company to publish its notice of closure of register of members on HKEx's website instead of in a newspaper. As a result, a listed company incorporated in Hong Kong has to publish its notice of closure of register of members both in a newspaper and on the HKEx's website.

12. Clause 53 of the Bill seeks to streamline the requirements by allowing Hong Kong-incorporated listed companies to give notice of closure of registers of members or debenture holders in accordance with the Listing Rules or by advertisement in a newspaper.

Multiple statutory derivative actions

13. The statutory derivative action (SDA) procedure under Part IVAA of the Ordinance allows a member of a company to bring an action or intervene in the

proceedings on behalf of the company in respect of misfeasance committed against the company. Unlike some overseas jurisdictions where members of a related company of the company in question have similar rights under their law, section 168BC(1) of the Ordinance only gives members of the company a right to seek leave to commence a SDA, i.e. only "simple" derivative actions as opposed to "multiple" derivative actions (i.e. allowing a member of a related company to commence or intervene in SDA on behalf of the company) can be taken. It is noted that in a recent court case¹, both the Court of Appeal and the Court of Final Appeal ruled that a "multiple" derivative action is maintainable in Hong Kong under the common law and considered it appropriate for section 168BC of the Ordinance to be extended to cover "multiple" SDA.

14. To further enhance the protection of the interests of minority shareholders, clauses 14 to 20 of the Bill seek to amend the Ordinance to expand the scope of SDA to enable a member of a related company of a specified corporation to bring or intervene in proceedings against a specified corporation.

Technical amendments paving the way for paperless holding and transfer of shares or debentures

15. Clauses 36 to 47 of the Bill seek to introduce technical amendments to the Ordinance to remove, or provide exceptions to, the limitations arising from provisions that compel the use of paper documents of title and paper instruments of transfer in relation to shares and debentures. Clause 48 is a related amendment to the Securities and Futures Ordinance (Cap. 571).

16. According to paragraph 10 of the LegCo Brief, the Securities and Futures Commission (SFC) is currently working with the HKEx and the Federation of Share Registrars (FSR) on a proposed operational model for implementing a paperless market and have issued a consultation paper on the proposed model on 30 December 2009. The Administration intends to bring the proposed amendments into operation only when the market is ready to implement a paperless model.

Other amendments

17. Other clauses of the Bill seek to make minor amendments and to rectify textual discrepancies.

Commencement

18. The Bill, if enacted, will come into operation on a day to be appointed by the Secretary for Financial Services and the Treasury by notice published in the Gazette.

Public Consultation

19. According to paragraph 23 of the LegCo Brief, SCCLR has been consulted and it supported the proposals. The CR and the Inland Revenue Department (IRD)

¹ *Waddington Ltd. v Chan Chun Hoo* [2006] 2 HKLRD 896; (2008) 11 HKCFAR 370

have consulted their Customer Liaison Groups and Users' Committee respectively where members were supportive of the proposals. The proposal to empower the Registrar to tackle the problem of "shadow companies" was also broadly supported by the respondents in a public consultation conducted in the second quarter of 2008 as part of the rewrite exercise. As regards the proposal to remove obstacles to the introduction of paperless holdings and transfers of shares and debentures, the SFC, HKEx and FSR launched a consultation exercise to consult the market on a proposed operational model for implementing a scripless market in Hong Kong on 30 December 2009.

Consultation with LegCo Panel

20. The Administration briefed the Panel on Financial Affairs (the FA Panel) on the proposed legislative amendments at its meeting on 11 June 2009. Individual members expressed concerns on various issues including the effectiveness of the proposed "multiple" derivative actions, the power of the Registrar to direct a company to change its name after approval and the approach adopted in the scrutiny of company names by the CR in company incorporation and the IRD in business registration. The FA Panel was also briefed on the development of a scripless securities market at its meeting on 1 February 2010. Members noted that legislative changes would be required to implement a scripless securities market in Hong Kong and the first step would be to amend provisions of the Ordinance which require the use of paper certificates and instruments of transfer.

Conclusion

21. The Legal Service Division is scrutinizing the legal and drafting aspects of the Bill. In the light of the above concerns raised by members of the FA Panel, members may wish to study the Bill in detail.

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