

立法會
Legislative Council

LC Paper No. CB(1)2473/11-12
(These minutes have been seen
by the Administration)

Ref : CB1/BC/3/10/2

Bills Committee on Companies Bill

**Minutes of the ninth meeting held on
Friday, 3 June 2011, at 9:30 am
in Conference Room A of the Legislative Council Building**

Members present : Hon Starry LEE Wai-king, JP (Deputy Chairman)
Hon Albert HO Chun-yan
Hon James TO Kun-sun
Dr Hon Philip WONG Yu-hong, GBS
Hon Miriam LAU Kin-yee, GBS, JP
Hon Abraham SHEK Lai-him, SBS, JP
Hon Audrey EU Yuet-mee, SC, JP
Hon Jeffrey LAM Kin-fung, SBS, JP
Hon Andrew LEUNG Kwan-yuen, GBS, JP
Hon WONG Ting-kwong, BBS, JP
Prof Hon Patrick LAU Sau-shing, SBS, JP

Members absent : Hon Paul CHAN Mo-po, MH, JP (Chairman)
Ir Dr Hon Raymond HO Chung-tai, SBS, S.B.St.J., JP
Hon Ronny TONG Ka-wah, SC

Public officers attending : **Agenda item I**
Mr John LEUNG, JP
Deputy Secretary for Financial Services and the
Treasury (Financial Services)

Mr Nick AU YEUNG
Principal Assistant Secretary for Financial Services
and the Treasury (Financial Services)

Mrs Karen HO
Deputy Principal Solicitor (Company Law Reform)
Companies Registry

Ms Kitty TSUI
Senior Solicitor (Company Law Reform)
Companies Registry

Mr Tim CHUNG
Solicitor (Company Law Reform)
Companies Registry

Ms Marianna YU
Deputy Registry Manager (Registration)
Companies Registry

Miss Selina LAU
Senior Government Counsel
Department of Justice

Mr Ken FUNG
Government Counsel
Department of Justice

Mr Stefan LO
Government Counsel
Department of Justice

Clerk in attendance : Ms Connie SZETO
Chief Council Secretary (1)4

Staff in attendance : Mr KAU Kin-wah
Senior Assistant Legal Adviser 3

Mr Timothy TSO
Assistant Legal Adviser 2

Ms Sharon CHUNG
Senior Council Secretary (1)4

Action

I Meeting with the Administration

Continuation of discussion on Part 5 of the Bill

(LC Paper No. CB(1)2066/10-11(01) -- Administration's paper on Part 4 and Part 5 of the Companies Bill)

Discussion on Parts 6 to 8 of the Bill

(LC Paper No. CB(1)2175/10-11(01) -- Administration's paper on Parts 6 to 8 of the Companies Bill)

Discussion on Part 10 and Part 11 of the Bill

(LC Paper No. CB(1)2280/10-11(01) -- Administration's paper on Part 10 and Part 11 of the Companies Bill)

Other relevant papers

(LC Paper No. CB(3)412/10-11 -- The Bill
File Ref: CBT/17/2C -- Legislative Council Brief
LC Paper No. LS26/10-11 -- Legal Service Division Report
LC Paper No. CB(1)1406/10-11(01) -- Paper on Companies Bill prepared by the Legislative Council Secretariat (Background brief))

The Bills Committee deliberated (Index of proceedings attached at the **Appendix**).

Admin 2. The Bills Committee requested the Administration to provide written information on/responses to the following concerns/suggestions --

Part 5 -- Transactions in relation to Share Capital

- (a) the practices in other common law jurisdictions regarding the requirement for a solvency statement to be accompanied by an auditor's report under the uniform solvency test for the types of transactions under Part 5, together with samples of the relevant specified forms currently used under the Companies Ordinance (Cap. 32) ("CO") that have a proforma solvency statement, and a sample of auditors' report;

Part 6 -- Distribution of Profits and Assets

- (b) information on directors' obligations where they became aware of matters affecting the propriety of the payment of a dividend before the dividend was paid, the relevant court cases and similar requirements in New Zealand;
- (c) reasons for not adopting the approach in the Companies Act 2006 of the United Kingdom ("UKCA 2006") to provide for distribution in-specie in the Companies Bill ("CB"), and information about the relevant case in the United Kingdom which had led to the enactment of such provisions;

Part 7 -- Debentures

- (d) the details of regulation of convertible securities and share options/subscription warrants in other common law jurisdictions and in Hong Kong;

Part 8 -- Registration of Charges

- (e) the suggestion that the charges on cash deposits should be registrable;
- (f) the suggestion that an early alert system for registration of charges should be put in place;
- (g) the view that chargees should be responsible for delivering the charge for registration;
- (h) the suggestion that criminal sanctions for late registration of charges should be removed altogether when the court had granted relief for an extension of time;

Action

- (i) the view that the Notification to the Registrar of Companies of debt satisfaction or release of a charge, etc. under CB should not be more cumbersome than that under CO;

Part 10 -- Directors and Company Secretaries

- (j) information on the provisions on directors' duties in UKCA 2006; and
- (k) whether the court would take into account the size of the company as well as the function of the relevant director in relation to the company in considering the standard of the duty of care, skill and diligence to be expected of the director under the formulation in clause 456 of CB.

II Any other business

- 3. The Chairman reminded members that the next meeting of the Bills Committee would be held on Friday, 10 June 2011, at 9:30 am to meet with Administration.
- 4. There being no other business, the meeting ended at 12:12 pm.

Council Business Division 1
Legislative Council Secretariat
17 August 2012

Bills Committee on Companies Bill

**Proceedings of the ninth meeting
on Friday, 3 June 2011, at 9:30 am
in Conference Room A of the Legislative Council Building**

Time marker	Speaker	Subject(s)	Action required
000001-000341	Deputy Chairman	Opening remarks	
<u>Part 5 -- Requirement to attach an auditors' report to a solvency statement</u>			
000342-001706	Administration Ms Audrey EU Deputy Chairman	<p>The Administration's responses to members' enquiries and views made at the previous meeting on Part 5 --</p> <p>(a) reasons for not including a balance sheet test in the uniform solvency test under Part 5;</p> <p>(b) reasons for requiring a 12-month period of solvency for the uniform solvency test (clause 200); and</p> <p>(c) reasons for not requiring a solvency statement to be accompanied by an auditors' report under the uniform solvency test for the types of transactions under Part 5</p> <p>The Administration's advice that it would provide the written response in due course</p> <p>Ms Audrey EU's suggestion that the Administration might consider an alternative option other than requiring a solvency statement to be accompanied by an auditors' report under the uniform solvency test</p> <p>The Deputy Chairman's support for</p>	

Time marker	Speaker	Subject(s)	Action required
		attaching an auditor's report to a solvency statement and her request for the Administration to provide the practices in other common law jurisdictions in this regard together with samples of the relevant specified forms currently used under the Company Ordinance (Cap. 32) ("CO") that had a proforma solvency statement, and a sample of auditors' report	The Administration to take action as in paragraph 2(a) of the minutes
<u>Part 6 -- Distribution of Profits and Assets</u>			
001707-002419	Administration	Briefing on Part 6 of CB -- Distribution of Profits and Assets (Annex A to LC Paper No. CB(1)2175/10-11(01))	
002420-003222	Ms Audrey EU Administration Deputy Chairman Mr Andrew LEUNG	Discussion on whether there should be provisions in CB regarding how to value a distribution in-specie along the lines of the Companies Act 2006 of the United Kingdom ("UKCA 2006") Ms EU's request for the Administration to consider incorporating similar provisions in UKCA 2006 to CB Request by Mr Andrew LEUNG and the Deputy Chairman for the Administration to provide information about the relevant case in the United Kingdom which had led to the enactment of provisions in UKCA 2006 giving guidance on how to value a distribution in-specie	The Administration to take action as in paragraph 2(c) of the minutes
003223-004854	Mr Albert HO Deputy Chairman Ms Audrey EU Administration	Discussion on whether provisions should be put in place to address the situation where a distribution had been proposed or approved, but before it had actually been made, a certain event occurred that might change the opinion regarding the financial ability of the company	

Time marker	Speaker	Subject(s)	Action required
		<p>The Administration's advice that among the major common law jurisdictions, only the company law in New Zealand had provisions to address the above situation</p> <p>Requests by Ms Audrey EU and the Deputy Chairman for the Administration to provide --</p> <p>(a) reasons for not making provisions in CB regarding directors' obligations where they became aware of matters affecting the propriety of the payment of a dividend before the dividend was paid; and</p> <p>(b) the relevant requirements in the company law in New Zealand</p>	<p>The Administration to take action as in paragraph 2(b) of the minutes</p>
<p><u>Part 7 -- Debentures</u></p>			
<p>004855-005355</p>	<p>Administration</p>	<p>Briefing on Part 7 of CB -- Debentures (Annex B to LC Paper No. CB(1)2175/10-11(01))</p>	
<p>005356-005932</p>	<p>Deputy Chairman Administration</p>	<p>The Deputy Chairman's enquiry on whether CB covered the regulation of registration of major forms of financing tools, including shares, debentures, share options, convertible bonds, etc.</p> <p>The Administration's response that CB mainly covered the regulation of share capital and debentures, and the scope of the coverage was sufficient</p> <p>The Deputy Chairman's request that the Administration should provide details of regulation of convertible securities and share options/subscription warrants in other common law jurisdictions and in Hong Kong</p>	<p>The Administration to take action as in paragraph 2(d) of the minutes</p>

Time marker	Speaker	Subject(s)	Action required
<u>Part 8 -- Registration of Charges</u>			
005933-010618	Administration	Briefing on Part 8 of CB -- Registration of Charges (Annex C to LC Paper No. CB(1)2175/10-11(01)) (paragraphs 1-8))	
010619-011302	Mr James TO Administration	<p>Mr James TO's suggestion that the Administration should consider requiring that a charge over cash deposits in favour of a party other than a deposit-taking bank be registrable</p> <p>The Administration's response that --</p> <p>(a) in general, charges over cash deposits created by companies did not require registration as charges over book debts; and</p> <p>(b) it would provide a written response to Mr TO's suggestion</p>	The Administration to take action as in paragraph 2(e) of the minutes
011303-012112	Administration	Briefing on Part 8 (Annex C to LC Paper No. CB(1)2175/10-11(01) (paragraphs 9-29))	
012113-012718	Mr James TO Administration	<p>Mr James TO's suggestion that --</p> <p>(a) there should be an early alert system to inform the public or a company's stakeholders in a timely manner that there was a charge in respect of the company pending registration; and</p> <p>(b) chargees should be responsible for delivering the charge for registration</p> <p>The Administration's response that the</p>	

Time marker	Speaker	Subject(s)	Action required
		<p>requirement for early alerts of charges might complicate the registration system, and it would provide a written response to Mr TO's suggestions</p>	<p>The Administration to take action as in paragraphs 2(f) and 2(g) of the minutes</p>
<p>012719-014002</p>	<p>Mr Albert HO Senior Assistant Legal Adviser 3 ("SALA3") Administration</p>	<p>Mr Albert HO's enquiry about the number of prosecutions against companies for late registration of charges in the past few years and his view that --</p> <p>(a) criminal sanctions for late registration of charges should be removed altogether when the court had granted relief for an extension of time; and</p> <p>(b) there being no policy on criminal sanctions for late registration of charges, the Administration might consider penalizing late registration by administrative fines only</p> <p>The Administration's response that --</p> <p>(a) prosecutions against companies for late registration of charges were rare though there were about 10 cases of late registration made to the court each month; and</p> <p>(b) the criminal liability for a company due to late registration of charges should be retained to achieve a deterrent effect</p> <p>SALA3's remarks that the penalties under CO mostly involved fines but not imprisonment</p>	
<p>014003-</p>	<p>Mr Andrew LEUNG</p>	<p>Mr Andrew LEUNG's views that --</p>	

Time marker	Speaker	Subject(s)	Action required
014700	Administration	<p>(a) it was onerous to impose criminal sanctions on the responsible person of a company for late registration of charges and the Administration should consider administrative fines only; and</p> <p>(b) it might not be practicable for a company, especially the small and medium-sized enterprises, to comply with the requirement for giving early alerts of charges, if any, since it would be premature to disclose an application for registration of a charge before it was accepted</p> <p>The Administration's response that it would study members' suggestions about the early alert system and removal of criminal sanctions for late registration of charges and give a written response</p>	<p>The Administration to take action as in paragraph 2(h) of the minutes</p>
014701-015243	Ms Miriam LAU Administration	<p>Ms Miriam LAU's view that the Administration should re-consider whether criminal sanctions for late registration of charges were necessary and her enquiry about the difference in the requirements under CO and CB for notification to the Registrar of Companies ("the Registrar") of release of charges</p> <p>The Administration's response that --</p> <p>(a) the process of application or notification under CO and CB was the same but the types of documents that would be registered and made available for public inspection were different; and</p>	

Time marker	Speaker	Subject(s)	Action required
		(b) under clause 344 of CB, the certified copy of the instrument evidencing the release of a charge or satisfaction of debt would be made available for public inspection	
015244-015733	Mr James TO Administration	Mr James TO's clarification that his suggestion about an early alert system for charges applied to confirmed charges The Administration's response that it would consider Mr TO's view and give a written response	
015734-020124	Mr Andrew LEUNG Administration Ms Miriam LAU Deputy Chairman	Mr Andrew LEUNG's view that the requirements for notification to the Registrar of debt satisfaction or release of a charge under CB should not be more cumbersome than those under CO The Administration's elaboration on the registration procedures for debt satisfaction and release of charges under CO and CB Ms Miriam LAU's view that the registration procedures should remain unchanged The Deputy Chairman's request for the Administration to provide information on the existing registration procedures for release of charges and the proposed new procedures under CB, as well as written response to members' views	The Administration to take action as in paragraph 2(i) of the minutes
020125-020318	Mr James TO Administration	Mr James TO's enquiry about "any commercial sensitive information" in the charge instrument to be registrable (paragraph 14 of the paper)	

Time marker	Speaker	Subject(s)	Action required
		The Administration's response that any commercial sensitive information, as mutually agreed between the charger and the chargee, might be contained in a document separate from the charge deed	
020319-020720	Mr James TO Administration	Mr James TO's enquiry about whether a voluminous charge instrument of thousands of pages would need to be registered The Administration's response that in general the full charge document should be registered	
<u>Part 10 -- Directors and Company Secretaries</u>			
020721-022412	Administration	Briefing on Part 10 of CB -- Directors and Company Secretaries (Annex A to LC Paper No. CB(1)2280/10-11(01)) (paragraphs 1-23))	
022413-022930	Mr Andrew LEUNG Administration SALA3	Mr Andrew Leung's request for the Administration to provide a copy of the provisions on directors' duties in UKCA 2006 and his view that the provisions in clauses 891 and 892 (that the court may grant company officer etc. relief in proceedings for misconduct if such acts were done in good faith) be extended to cover acts under clauses 456 and 457 (about directors' duty of care, skill and diligence) The Administration's response that clauses 891 and 892 were general provisions about the court's power to relieve a company officer's liability for misconduct in various aspects, not limited to directors' duty of care, skill and diligence	The Administration to take action as in paragraph 2(j) of the minutes

Time marker	Speaker	Subject(s)	Action required
		SALA3's remarks that clauses 891 and 892 empowered the court to grant relief, and it would be the court's discretion as whether to grant relief in a particular case	
022931-023616	Mr Albert HO Administration	<p>Mr Albert HO's enquiry on whether the court would take into account the function of the relevant director in relation to the company, e.g. as an executive director or a non-executive director, in considering the standard of the duty of care, skill and diligence to be expected of him/her under the formulation in clause 456</p> <p>The Administration's response that --</p> <p>(a) clause 456(2)(a) referred to the "general knowledge, skill and experience that may reasonably be expected of a person carrying out the functions carried out by the director in relation to the company", which meant that the court would consider a director's function in relation to the company;</p> <p>(b) under the Listing Rules issued by the Hong Kong Exchanges and Clearings Ltd. ("HKEx"), the duties of care of an executive director and a non-executive director are not differentiated; the court would consider all relevant rules and factors; and</p> <p>(c) after enactment of CB, HKEx would consider aligning the provisions for directors' duty of care under the Listing Rules with those under CB</p>	

Time marker	Speaker	Subject(s)	Action required
023617-024203	Mr James TO Administration	<p>Mr James TO's enquiry on whether the actual duties or duties expected of the post of the director were to be considered under clause 456</p> <p>The Administration's response that the actual duties carried out by the director would be considered</p> <p>Mr TO's requests for the Administration to provide written information on the above interpretation on clause 456, and for SALA3 to examine whether the present drafting had reflected the policy intention</p>	The Administration to take action as in paragraph 2(k) of the minutes
024204-024250	Deputy Chairman	The Deputy Chairman's advice that the next meeting would be held on 10 June 2011, at 9:30 am	