

立法會
Legislative Council

LC Paper No. CB(1)2474/11-12
(These minutes have been seen
by the Administration)

Ref : CB1/BC/3/10/2

Bills Committee on Companies Bill

**Minutes of the tenth meeting held on
Friday, 10 June 2011, at 9:30 am
in the Chamber of the Legislative Council Building**

Members present : Hon Starry LEE Wai-king, JP (Deputy Chairman)
Hon Albert HO Chun-yan
Ir Dr Hon Raymond HO Chung-tai, SBS, S.B.St.J., JP
Hon James TO Kun-sun
Dr Hon Philip WONG Yu-hong, GBS
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)
Hon Miriam LAU Kin-yee, GBS, 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)

Ms Ada CHUNG, JP
Registrar of Companies
Companies Registry

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

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

Mr Edward TYLER
Senior Assistant Law Officer (Civil Law)
Department of Justice

Miss Selina LAU
Senior Government Counsel
Department of Justice

Mr Ken FUNG
Government Counsel
Department of Justice

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

Staff in attendance : 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 10 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)

Discussion on 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)

Discussion on Part 13 and Part 14 of the Bill

(LC Paper No. CB(1)2389/10-11(01) -- Administration's paper on Part 13 and Part 14 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 10 -- Directors and Company Secretaries

- (a) whether the proposal to introduce a disinterested shareholders' approval requirement for ratification of directors' conduct would change the respective common law positions;
- (b) information on the provisions on directors' duties in the United Kingdom Companies Act 2006; and

Action

Part 11 -- Fair Dealings by Directors

- (c) a comparison table on the relevant requirements under the Companies Ordinance and the Companies Bill.

II Any other business

3. The Deputy Chairman reminded members that the next meeting of the Bills Committee would be held on Friday, 17 June 2011, at 9:00 am, to meet with Administration.
4. There being no other business, the meeting ended at 12:30 pm.

Council Business Division 1
Legislative Council Secretariat
17 August 2012

Bills Committee on Companies Bill

**Proceedings of the tenth meeting
on Friday, 10 June 2011, at 9:30 am
in the Chamber of the Legislative Council Building**

Time marker	Speaker	Subject(s)	Action required
000001-000537	Deputy Chairman	Opening remarks	
<u>Part 10 -- Directors and Company Secretaries</u>			
000538-001244	Administration	<p>The Administration's remarks that written response to members' concerns expressed at the meeting on 3 June 2011 on Part 10 of the Companies Bill ("CB") would be provided in due course</p> <p>Briefing on Part 10 (Directors and Company Secretaries) (Annex A to LC Paper No. CB(1)2280/10-11(01)) (paragraphs 24-41)</p>	
<i>Clause 464 -- Ratification of conduct of directors by disinterested members' approval</i>			
001245-002337	Ms Audrey EU Administration	<p>Discussion on whether the proposal to introduce a disinterested shareholders' approval requirement (clause 464) would change the respective common law positions</p> <p>The Administration's response that the proposed requirement was --</p> <p>(a) introduced to address potential conflict of interest in situations where the majority shareholders were directors or were connected with the directors; and</p>	

Time marker	Speaker	Subject(s)	Action required
		(b) in addition to the restrictions under the common law	
002338-003137	Mr Andrew LEUNG Administration Deputy Chairman	<p>Mr Andrew LEUNG's view that he had no concern about applying the requirement (to have disinterested shareholders' approval for ratification of directors' conduct) to large or listed companies, where there usually were both executive directors and independent non-executive directors, but there might be practical difficulty to apply the requirement to small and medium-sized enterprises ("SMEs"), in which there were no disinterested members since they were mostly family-owned businesses</p> <p>The Administration's response that --</p> <p>(a) clause 464(6) provided that nothing in clause 464 affected the validity of a decision taken by unanimous consent of a company's members, meaning that the restrictions imposed by clause 464 would not apply when every member approved the ratification; and</p> <p>(b) under Part 11 of CB, there were also requirements regarding disinterested members' approval for various prohibited transactions</p> <p>The Deputy Chairman's request for the Administration to provide further information regarding the background and justification for the new requirement (the approval of disinterested members)</p>	<p>The Administration to take action as in paragraph 2(a) of the</p>

Time marker	Speaker	Subject(s)	Action required
			minutes
003138-003619	Mr Jeffrey LAM Administration	<p>Mr Jeffrey LAM's views that --</p> <ul style="list-style-type: none"> (a) there were concerns among SMEs about difficulties in fully complying with the new requirements under CB; and the new requirements would increase their operational costs; (b) the Administration might not have fully consulted SMEs on the new requirements; and (c) it was not appropriate to apply the same regulatory framework to both SMEs and large companies <p>The Administration's response that --</p> <ul style="list-style-type: none"> (a) during past consultation on the draft CB, the Administration had adequately briefed all stakeholders, including SMEs, on the new requirements and sought their views; and (b) the Administration would arrange more briefings to members of the commercial sector to further explain the provisions in CB 	
003620-004423	Ms Audrey EU Administration	<p>Ms Audrey EU's enquiry on the de facto effect of ratification of a director's conduct, given that ratification would not prevent dissenting minorities from pursuing unfair prejudice claims or statutory derivative claims (paragraphs 24 and 28 of the Administration's paper)</p>	

Time marker	Speaker	Subject(s)	Action required
		<p>The Administration's response that --</p> <p>(a) clause 723 provided that if a company's members approved or ratified any conduct, the approval or ratification did not prevent a member of the company from bringing proceedings to the court; and</p> <p>(b) clause 464 did not alter the right at common law of the grievor to address any abuse of the majority voting rights by resorting to the courts</p>	
<p><i>Clauses 456 and 457 -- Directors' duty of care, skill and diligence</i></p>			
004424-005304	Mr Andrew LEUNG Administration	<p>Discussion on the standard of directors' duty of care, skill and diligence (clauses 456 and 457)</p> <p>The Administration's remarks that the formulation of clause 456(2)(a) made it clear that the court must take into account the functions carried out by the relevant director in relation to the company, meaning that what was required of the director would depend on the functions carried out by him/her, so that there would be variations between different types of directors and sizes of company</p>	
005305-010048	Mr Jeffrey LAM Administration	Mr Jeffrey LAM's remarks that SMEs were concerned about the impact of clause 456(2) (directors' duty to exercise reasonable care, skill and diligence) on their liabilities and business operation, as the requirements stated in the clause	

Time marker	Speaker	Subject(s)	Action required
		<p>were not specific and no practical guidance was available</p> <p>The Administration's response that --</p> <p>(a) clause 456(2) aimed to introduce an objective test, in addition to the traditional subjective test at the common law, to clarify the standard of directors' duty of care, skill and diligence;</p> <p>(b) the approach was in line with overseas developments in the common law; and</p> <p>(c) both the Companies Registry and the Hong Kong Institute of Directors had issued guidelines on directors' duties</p>	
010049-010355	Dr Philip WONG	Dr Philip WONG's view that the Administration should reconsider carefully the need to introduce a statutory statement in CB about directors' duty of care, skill and diligence, as it was not appropriate to apply one single standard to companies of different scales and nature, and the standard stated in clause 456 was not clear and would impose difficulties on compliance	
010356-011300	Mr WONG Ting-kwong Administration	<p>Mr WONG Ting-kwong's views that --</p> <p>(a) in the formulation of clause 456(2), there was a lack of</p>	

Time marker	Speaker	Subject(s)	Action required
		<p>objective requirements for a director's duty of care, hence, whether a director had exercised reasonable care, skill and diligence would be up to subjective consideration of individual judges; and</p> <p>(b) the formulation of clause 456(2) would raise concerns from companies of all scales</p> <p>The Administration's response that --</p> <p>(a) it was not intended that clause 456(2) would set rigid requirements, the clause only sought to set out a general standard of care, skill and diligence that was reasonably expected of directors;</p> <p>(b) the formulation of the clause aligned with the developments in other common law jurisdictions on the standard of a director's duty; and</p> <p>(c) civil proceedings against directors for breach of his/her duty of care, skill and diligence were rare in Hong Kong</p> <p>Mr WONG Ting-kwong's remarks that (a) and (c) of the Administration's response above did not address his concerns</p>	
011301-011730	Deputy Chairman Administration	The Deputy Chairman's enquiry on the reasons for not providing a "safe harbour" clause and not adopting a "business judgment rule" to protect directors from liability for bona fide	

Time marker	Speaker	Subject(s)	Action required
		<p>business decisions (paragraph 21 of the Administration's paper)</p> <p>The Administration's response that --</p> <p>(a) clauses 891 and 892 already provided that the court might relieve an officer of a company from liability for any misconduct if he/she had acted honestly and reasonably, so there was no need to introduce a "safe harbour" clause; and</p> <p>(b) as regards the "business judgment rule", there was already similar protection under the common law</p>	
011731-012654	Ms Audrey EU Administration	<p>Ms Audrey EU's enquiries on --</p> <p>(a) whether the company law in other common law jurisdictions had also adopted a mixed objective/subjective test in determining the standard of directors' duty of care; and</p> <p>(b) the consequence for a director who had failed the test</p> <p>The Administration's response that --</p> <p>(a) in the United Kingdom ("UK"), the general duties of directors had been comprehensively codified in the United Kingdom Companies Act 2006 ("UKCA 2006");</p> <p>(b) Australia and Singapore had adopted the objective test in their</p>	

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		<p>statutes which were judicially interpreted to incorporate subjective elements;</p> <p>(c) clause 456 aimed to clarify the standard of directors' duty of care, skill and diligence; the standard remained in line with that under the Listing Rules of the Hong Kong Exchanges and Clearing Limited and the Guide on Directors' Duties issued by the Companies Registry; and</p> <p>(d) clause 457 preserved the existing civil consequences of breach of directors' duty of care</p>	
012655-012742	Mr Andrew LEUNG	Mr Andrew LEUNG's view that it would be unfair to directors if with hindsight the performance of their duty of care was judged as not meeting the standard, and his request that the Administration should provide details of the relevant provisions in UKCA 2006 for members' reference	The Administration to take action as in paragraph 2(b) of the minutes
<u>Part 11 -- Fair Dealing by Directors</u>			
012743-014301	Administration	Briefing on Part 11 of CB -- Fair Dealing by Directors (Annex B to LC Paper No. CB(1)2280/10-11(01))	
014302-015004	Mr Andrew LEUNG Administration	Mr Andrew LEUNG's view that while the Listing Rules imposed restrictions on a wide range of transactions between a listed company and its directors/persons connected with the directors, CB should not extend such restrictions to SMEs, which were mostly	

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		<p>family-owned businesses</p> <p>The Administration's response that as far as fair dealing of directors was concerned, non-listed public companies and private companies which were subsidiaries of public companies should also be subject to reasonable restrictions in order to protect the interest of shareholders</p>	
015005-015559	Ms Audrey EU Administration	<p>Ms Audrey EU's enquiry on the impact of the new provisions in Part 11 on companies limited by guarantee, a large number of which were non-government organizations ("NGOs")</p> <p>The Administration's response that for companies limited by guarantee, the impact included --</p> <p>(a) these companies would be able to enter into loans with the approval of members;</p> <p>(b) the criminal sanctions for breach of the provisions on prohibition of loans in favour of directors were removed; and</p> <p>(c) the category of persons prohibited from entering into loans with the companies was widened</p>	
015600-020220	Mr Abraham SHEK Administration	<p>Mr Abraham SHEK's declaration that he was a non-executive director of a listed company and his views that --</p> <p>(a) non-listed and private companies</p>	

Time marker	Speaker	Subject(s)	Action required
		<p>should not be subjected to stringent restrictions on loans or similar transactions which were applicable to listed companies; and</p> <p>(b) if there were restrictions for non-listed and private companies, they should be made specific in CB to facilitate compliance</p> <p>The Administration's response that --</p> <p>(a) reasonable rules should be in place to restrict certain transactions in favour of the directors in non-listed and private companies in order to protect shareholders' interest;</p> <p>(b) in case of doubt, a company might convene a general meeting to seek members' approval on transactions, as appropriate; and</p> <p>(c) a lot of provisions in CB was intended to facilitate the operation of SMEs, for example, the criminal sanction for breach of the provisions on prohibition of loans in favour of directors had been removed</p>	
020221-020504	Mr Andrew LEUNG Administration	<p>Mr Andrew LEUNG's views that --</p> <p>(a) it would be difficult for small companies to obtain 100% approval of members on a controversial transaction if</p>	

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		<p>interested members' votes were to be disregarded; and</p> <p>(b) civil liabilities, albeit non-criminal, were still a burden to these companies</p> <p>The Administration's response that --</p> <p>(a) the requirement for disinterested members' approval for prohibited transactions only applied to public companies and private companies/companies limited by guarantee which were subsidiaries of public companies; and</p> <p>(b) for private companies within a group of companies having a listed company as a member, in fact there was relaxation in that these companies would be able to enter into loans with the approval of members, and for all companies the criminal sanctions for breach of the provisions on prohibition of loans in favour of directors would be removed</p>	
020505-020843	Mr Abraham SHEK Administration	<p>Mr Abraham SHEK's views that --</p> <p>(a) the so-called relaxation for private companies was in fact the Administration's selective description of the new requirements; and</p> <p>(b) the stringent restrictions on loans and similar transactions for private companies would adversely affect the business</p>	

Time marker	Speaker	Subject(s)	Action required
		<p>environment in Hong Kong</p> <p>The Administration's response that --</p> <ul style="list-style-type: none"> (a) the new requirements aimed to strike a balance between facilitating business operation and improving corporate governance; (b) the overall direction of the new requirements was relaxation of control, i.e. new exemptions from prohibitions on loans were introduced and criminal sanctions were removed; and (c) in general, SMEs would benefit from the relaxation 	
020844-021635	Prof Patrick LAU Administration	<p>Prof Patrick LAU's view that the Administration should consult NGOs, such as social service and education organizations most of which were companies limited by guarantee but did not have much expertise on company law, on the new requirements; otherwise, these organizations would unintentionally violate some of the regulations</p> <p>The Administration's response that --</p> <ul style="list-style-type: none"> (a) it had consulted NGOs on the draft CB; (b) for companies limited by guarantee which were not subsidiaries of public companies, restrictions on loans and similar transactions had been relaxed; and 	

Time marker	Speaker	Subject(s)	Action required
		(c) the Administration would be pleased to contact NGOs to further explain the new provisions under CB	
021636-021859	Ms Audrey EU	Ms Audrey EU's request that, to help clarify doubts and confusion, the Administration should provide a comparison table to show the different restrictions in respect of fair dealings by directors under CO and CB for different types of companies	The Administration to take action as in paragraph 2(c) of the minutes
<u>Part 13 -- Arrangement, Amalgamation, and Compulsory Share Acquisition in Takeover and Share Buy-Back</u>			
021900-023234	Administration	Briefing on Part 13 of CB -- Arrangements, Amalgamation, and Compulsory Share Acquisition in Takeover and Share Buy-Back (Annex A to LC Paper No. CB(1) 2389/10-11(01))	
<i>The proposal to retain the headcount test (clause 664)</i>			
023235-024254	Mr Abraham SHEK Administration	Mr Abraham SHEK's enquiry on the reasons that the Administration had not taken the majority view expressed during the first phase consultation on the draft CB to abolish the headcount test for approving a scheme of compromise or arrangement (clause 664) (Appendix to Annex A of the Administration's paper) The Administration's response that -- (a) the majority views received by the Administration expressing support for the abolishment of	

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		<p>the headcount test were from the listed companies;</p> <p>(b) at the same time, there were strong views from a number of organizations, including the Securities and Futures Commission ("SFC"), supporting the retention of the headcount test on the ground that the test served as an essential check on the share value test and the court had a discretion to dispense with the test;</p> <p>(c) the Administration had taken the views collected in an integrated approach with a view to striking a balance between protecting the right of the minority shareholders and avoiding giving too much veto power to the minority shareholders; and</p> <p>(d) the headcount test was retained in a number of common law jurisdictions, such as the UK, Singapore, Bermuda and Cayman Islands</p>	
024255-024918	Mr Andrew LEUNG Administration	<p>Mr Andrew LEUNG's views that --</p> <p>(a) it was natural for SFC, a regulator, to support the retention of the headcount test and the Administration should listen to the views of companies, which were the regulatees;</p> <p>(b) there were clear voices from the market and the legal sector in the first phase consultation of the</p>	

Time marker	Speaker	Subject(s)	Action required
		<p>draft CB supporting abolishment of the headcount test;</p> <p>(c) the Code on Takeovers and Mergers ("Takeovers Code") already provided protection for minority shareholders; and</p> <p>(d) the re-write of CO should aim to facilitate business operation</p> <p>The Administration's response that --</p> <p>(a) in retaining the headcount test, the Administration had not just taken SFC's views but also those from other concerned organizations, and the Administration had endeavoured to strike a balance between divergent views;</p> <p>(b) in addition to the headcount test, there was also the "share value test" in respect of a scheme of compromise or arrangement; the "share value test" provided that three-fourths of share value was required; and</p> <p>(c) the Takeovers Code did not have statutory backing, and could not be applied under certain circumstances, hence did not give sufficient protection to minority shareholders</p>	
024919-025229	Ir Dr Raymond HO	<p>Ir Dr Raymond HO's views that --</p> <p>(a) the Administration should not accept views selectively; and</p>	

Time marker	Speaker	Subject(s)	Action required
		(b) the views of listed companies were important because CB should aim to facilitate business operation in Hong Kong	
025230-025421	Mr Abraham SHEK	Mr Abraham SHEK's views that with reference to the Administration's paper about the comments collected on the headcount test (Appendix to Annex A to LC Paper No. CB(1) 2389/10-11(01)), it was unreasonable for the Administration to attach greater importance to expatriate professional/commerce associations than to local professional organizations	
025422-025536	Mr WONG Ting-kwong	Mr WONG Ting-kwong's view that the Administration must evaluate carefully the views of all sectors and should not listen to views selectively	
025537-025759	Administration	<p>The Administration's response that --</p> <p>(a) it had taken the views of all sectors into account;</p> <p>(b) on balance, there were merits in retaining the headcount test for approving a scheme of compromise or arrangement; and</p> <p>(c) the court would be given a new discretion to dispense with the test in special circumstances</p>	
025800-025937	Ir Dr Raymond HO	Ir Dr Raymond HO's view that it was undesirable to put the responsibility on the court in deciding whether the headcount test for a scheme of compromise or arrangement should be dispensed with	

Time marker	Speaker	Subject(s)	Action required
025938-030142	Mr Abraham SHEK	Mr Abraham SHEK's view that if the Administration considered that the proposal to retain the headcount test would be supported by the majority of the Legislative Council Members and hence it would not care about opposing views, it was politicizing Hong Kong's business environment and would do harm to Hong Kong's long-term development	
030143-030232	Deputy Chairman	The Deputy Chairman's advice that the Administration should consider members' views on the headcount test The Deputy Chairman's advice that the next meeting would be held on 17 June 2011	

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