

立法會
Legislative Council

LC Paper No. CB(1)2535/11-12
(These minutes have been seen
by the Administration)

Ref : CB1/BC/3/10/2

Bills Committee on Companies Bill

**Minutes of the eleventh meeting held on
Friday, 17 June 2011, at 9:00 am
in Conference Room A of the Legislative Council Building**

- Members present** : Hon Paul CHAN Mo-po, MH, JP (Chairman)
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
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
Hon Ronny TONG Ka-wah, SC
- Members absent** : Hon James TO Kun-sun
Hon Miriam LAU Kin-ye, GBS, JP
Prof Hon Patrick LAU Sau-shing, SBS, JP
- 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 Rita HO
Registry Solicitor
Companies Registry

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

Ms Phyllis MCKENNA
Deputy Principal Solicitor (Company Law Reform)
Companies Registry

Mrs Christine Frances SIT
Senior Solicitor (Company Law Reform)
Companies Registry

Mr Tim CHUNG
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

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 13 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)

Discussion on 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)

Matters arising from the meetings on 6, 13 and 19 May 2011

(LC Paper No. CB(1)2439/10-11(01) -- Follow-up actions to be taken by the Administration for the meeting on 6 May 2011

LC Paper No. CB(1)2439/10-11(02) -- Follow-up actions to be taken by the Administration for the meeting on 13 May 2011

LC Paper No. CB(1)2439/10-11(03) -- Administration's response to issues raised by members at the meetings on 6 and 13 May 2011

LC Paper No. CB(1)2132/10-11(03) -- Administration's response to issues raised by members at the meeting on 6 May 2011

LC Paper No. CB(1)2439/10-11(04) -- Administration's response to issues raised by members at the meeting on 19 May 2011

LC Paper No. CB(1)2439/10-11(05) -- Administration's response to issues raised by members at the meeting on 3 June 2011)

Action

Discussion on Part 15 and Part 19 of the Bill

(LC Paper No. CB(1)2439/10-11(06) -- Administration's paper on Part 15 and Part 19 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 the following issues/concerns/suggestions --

Part 13 -- Arrangements, Amalgamation, and Compulsory Share Acquisition in Takeover and Share Buy-Back

- (a) public views on court-free amalgamation procedure;
- (b) whether the solvency requirement should be relaxed to allow for meeting the balance sheet test as an alternative;

Part 9 -- Accounts and Audit

- (c) the suggestion to review the qualifying criteria for simplified reporting;

Part 5 -- Transactions in relation to Share Capital

- (d) reasons why an auditor's report was required for buy-backs out of capital but not reduction of capital by a private company under the court-free procedure in the United Kingdom; and

Action

Part 6 -- Distribution of Profits and Assets

(e) practice for distribution in-specie in Hong Kong.

II Any other business

3. The Chairman reminded members that the next meeting of the Bills Committee would be held on Friday, 28 June 2011, at 9:00 am, to meet with the Administration.

4. There being no other business, the meeting ended at 12:03 pm.

Council Business Division 1
Legislative Council Secretariat
5 September 2012

Bills Committee on Companies Bill

**Proceedings of the eleventh meeting
on Friday, 17 June 2011, at 9:00 am
in Conference Room A of the Legislative Council Building**

Time marker	Speaker	Subject(s)	Action required
000001-000808	Chairman	Opening remarks	
000809-001109	Mr Andrew LEUNG Chairman	<p>Mr Andrew LEUNG's views that --</p> <p>(a) the Administration should provide written responses to members' concerns expressed at previous meetings as soon as possible; and</p> <p>(b) the Bills Committee should first discuss the Administration's responses to outstanding issues at this meeting before continuing the discussion on Part 13</p> <p>The Chairman's advice that as the Bills Committee had commenced discussion on Part 13 at the last meeting, it would be advisable to complete the relevant discussion first</p>	
001110-001156	Administration	<p>The Administration's response that --</p> <p>(a) the Administration was preparing the written response to members' concerns about the formulation of "responsible person" in consultation with the Department of Justice, and would be able to provide the paper for members' discussion in July 2011; and</p> <p>(b) written responses to matters arising from the meetings on 6, 13 and 19 May and 3 June 2011 had been provided and were ready for discussion</p>	
<u>Discussion on Part 13</u>			
001157-001421	Administration	Briefing on Part 13 of the Bill (Arrangements, Amalgamation, and Compulsory Share Acquisition in Takeover and Share Buy-Back)	

Time marker	Speaker	Subject(s)	Action required
		(Annex A to LC Paper No. CB(1)2389/10-11(01))	
001422-002335	Mr Andrew LEUNG Administration	<p>Mr Andrew LEUNG's enquiries on the introduction of a new court-free statutory amalgamation procedure (clauses 667 to 675), including --</p> <ul style="list-style-type: none"> (a) details about public views received from past consultations on the application of the new court-free procedure; and (b) other than in Singapore and New Zealand, whether there were similar court-free procedures for amalgamations in common law jurisdictions <p>The Administration's response that --</p> <ul style="list-style-type: none"> (a) during a consultation with stakeholders in 2008, the majority of the respondents supported the introduction of a court-free statutory amalgamation procedure, with some of them holding the view that the procedure should only apply to intra-group amalgamations, some highlighting the importance of adequate protection for shareholders and creditors in the new procedure to prevent possible abuses by the management of companies; (b) to minimize possibility of abuse of the new procedure, the Administration proposed to confine it only to intra-group amalgamations where minority shareholders' interests would normally not be an issue; (c) no substantive comments on the proposal had been received during the consultation in 2010 on the draft CB; (d) the proposed court-free statutory amalgamation procedure for intra-group amalgamations had the support of the Standing Committee on Company Law Reform; (e) the Administration would provide more 	The

Time marker	Speaker	Subject(s)	Action required
		<p>information about the views received during past consultations on the proposed procedure;</p> <p>(f) the court-free procedure was proposed based on similar procedures in Singapore and New Zealand; and</p> <p>(g) in the United Kingdom ("UK"), there were no court-free procedures for amalgamations</p> <p>Mr Andrew LEUNG's views that --</p> <p>(a) the Administration was inconsistent in that it had accepted the majority view on the court-free statutory amalgamation procedure but rejected the majority view about abolishing the "headcount test" for approving scheme of compromise or arrangement ("the headcount test"); and</p> <p>(b) it was unacceptable that the Administration had taken the views received during consultations selectively</p>	<p>Administration to take action as in paragraph 2(a) of the minutes</p>
002336-002434	Chairman	<p>The Chairman's advice that --</p> <p>(a) there had been sufficient discussions on the headcount test in the previous meeting; and</p> <p>(b) the Administration had undertaken to consider members' views and would revert at future meetings</p>	
002435-002620	Dr Philip WONG	<p>Dr Philip WONG's views that --</p> <p>(a) while appreciating the need to protect the interest of minority shareholders on a scheme of compromise or arrangement, the headcount test was not the only way for offering such protection; and</p> <p>(b) the best way to protect small investors' interest was through public education, e.g. educate investors the importance of gathering sufficient information about a company before making investment</p>	

Time marker	Speaker	Subject(s)	Action required
		decisions	
002621-002711	Chairman	The Chairman's request for the Administration to consider Dr Philip WONG's views	
<u>Discussion on the Administration's response to issues raised by members on 6 May 2011 on Part 9 (LC Paper No. CB(1)2132/10-11(03))</u>			
002712-003904	Administration	Briefing on the written response to issues raised by members on 6 May 2011 on Part 9 (LC Paper No. CB(1)2132/10-11(03))	
003905-004826	Mr Andrew LEUNG Administration	<p>Mr Andrew LEUNG's views that --</p> <p>(a) the estimated percentage (98%) of small-to-medium-sized enterprises ("SMEs") among companies registered in Hong Kong given in the Administration's paper was misleading because those SMEs only referred to manufacturing enterprises with fewer than 100 employees and non-manufacturing enterprises with fewer than 50 employees; these companies were not the same type of companies which would be eligible to prepare simplified accounts and directors' reports ("simplified reporting") under the Companies Bill ("CB"); and</p> <p>(b) the Administration should provide the estimated number of SMEs that would be qualified for simplified reporting with reference to the information kept by the Inland Revenue Department</p> <p>Mr Andrew LEUNG's enquiries on --</p> <p>(a) the proposed criteria for companies qualified to make simplified reporting under CB; and</p> <p>(b) the criteria for making simplified reporting adopted by other countries</p> <p>The Administration's response that --</p> <p>(a) the proposed eligibility criteria were any two of the three below --</p> <p>(i) total annual revenue of not more than HK\$50 million;</p>	

Time marker	Speaker	Subject(s)	Action required
		<p>(ii) total assets of not more than HK\$50 million;</p> <p>(iii) no more than 50 employees;</p> <p>(b) criterion (i) above (total annual revenue of not more than HK\$50 million) was proposed with reference to that adopted by the Hong Kong Institute of Certified Public Accountants ("HKICPA") for companies not incorporated in Hong Kong ("non-Hong Kong companies") to prepare financial reports under the SME Financial Reporting Standard ("SME-FRS");</p> <p>(c) even the Inland Revenue Department did not have the estimated number of companies which would fall within the eligibility criteria for making simplified reporting under CB; and</p> <p>(d) in the UK, "small enterprises" referred to those meeting any two of the three criteria below --</p> <p>(i) total annual revenue of not more than sterling Pound ("GBP") 5.6 million;</p> <p>(ii) total assets of not more than GBP 2.8 million;</p> <p>(iii) no more than 50 employees</p> <p>Mr Andrew LEUNG's view that according to HKICPA's criteria, the annual revenue limit (HK\$50 million) only applied to non-Hong Kong companies, the Administration should not apply this to Hong Kong companies without thorough deliberation and consultation</p>	
004827-005620	Chairman Mr Andrew LEUNG	<p>The Chairman's views that --</p> <p>(a) the Administration should seek information from the Inland Revenue Department on the estimated number of companies that would qualify to make simplified reporting under CB;</p>	

Time marker	Speaker	Subject(s)	Action required
		<p>(b) HKICPA's criteria for companies qualified to adopt the SME-FRS were set years ago, having considered the criteria in UK; at that time, it was estimated that about 80% of Hong Kong companies making tax returns could make use of the SME-FRS;</p> <p>(c) HKICPA had plans to review the eligibility criteria for companies to adopt SME-FRS when the Companies Ordinance ("CO") rewrite exercise was completed; and</p> <p>(d) the Administration should consider members' views, study the practices in other places such as Singapore and countries of the European Union for both small and medium enterprises, and review the proposed criteria</p> <p>Mr Andrew LEUNG's views that --</p> <p>(a) the criteria adopted by HKICPA only served as a professional guideline for accountants, they should not be the only criteria that the Administration should consider adopting; and</p> <p>(b) for SMEs possessing a real estate property in Hong Kong, it was not unusual that their total assets exceeded HK\$50 million; in such circumstances, many SMEs would not be qualified for making simplified reporting; and they needed to pay a large amount of fees for preparing full financial reports; such reports would not be meaningful for the enhancement of corporate governance</p>	<p>The Administration to take action as in paragraph 2(c) of the minutes</p>
005621-010412	Mr Jeffrey LAM Chairman Administration	<p>Mr Jeffrey LAM's views that --</p> <p>(a) the Administration should provide more background information on the proposed criteria for SMEs to make simplified reporting, and review the criteria with concerned bureaux/departments; and</p> <p>(b) on the headcount test, the Administration should respond to members' views, consider the "one share one vote"</p>	

Time marker	Speaker	Subject(s)	Action required
		<p>principle, and should not simply follow overseas practices</p> <p>The Chairman's advice that the criteria adopted by HKICPA were set out long time ago (in 2006), the Administration should consider members' views and review the definition of SMEs to ensure that it reflected the latest economic development</p> <p>The Administration's response that --</p> <p>(a) it had consulted the public and relevant organizations on the proposed criteria in the first phase consultation in 2007 and during consultation of the draft CB in 2008-2009, there was general support for the proposed criteria; and</p> <p>(b) the Administration would discuss with HKICPA a further review of the criteria</p>	
010413-010704	Dr Philip WONG Administration	<p>Dr Philip WONG's enquiry on whether representatives of outsourced service companies stationed at the client company would be counted in the client company's payroll as its employees</p> <p>The Administration's response that such representatives were not considered the client company's employees</p>	
<p><u>Discussion on the Administration's response to issues raised by members on 6 May 2011 on Part 12 (LC Paper Nos. CB(1)2132/10-11(03) and CB(1)2439/10-11(03))</u></p>			
010705-011549	Administration	<p>Briefing on the written response to issues raised by members on 6 May 2011 on Part 12 about --</p> <p>(a) proxy as the chairperson of a general meeting (LC Paper No. CB(1)2132/10-11(03)); and</p> <p>(b) duty to notify auditors of proposed written resolution (LC Paper No. CB(1)2439/10-11(03))</p>	
011550-011710	Mr Albert HO Administration	Mr Albert HO's enquiry on whether there were ways of passing a proposed written resolution	

Time marker	Speaker	Subject(s)	Action required
		<p>without a meeting other than requiring the unanimous consent of shareholders with voting rights</p> <p>The Administration's response that a proposed written resolution needed the unanimous agreement of shareholders with voting rights, but the company's articles of association might provide for the passing of a resolution without a meeting provided that it was agreed to by all the members entitled to vote</p>	
011711-012338	Dr Philip WONG Mr Albert HO Administration	<p>Dr Philip WONG's enquiry on whether a shareholder had the right under the law to request that a meeting be held to discuss a proposed written resolution</p> <p>Mr Albert HO's enquiry on whether a shareholder had the right to request that a meeting be held to overturn a written resolution passed by shareholders with less than 100% voting rights</p> <p>The Administration's response that according to clause 551(3), only with the unanimous consent of all the shareholders with voting rights that a resolution could be passed without a meeting under the conditions set out in the company's articles of association</p>	
012339-012612	Chairman Administration Mr Andrew LEUNG	<p>The Chairman's enquiry on when the Administration's response to members' concerns about the formulation of "responsible person" in CB would be ready for further discussion</p> <p>The Administration's response that --</p> <p>(a) it was considering members' views and suggestions on the formulation of "responsible person" and a response would be ready around July 2011; and</p> <p>(b) to encourage due compliance with the filing obligations under CB, the Registrar of Companies would have new power to compound specified offences in lieu of prosecutions, this would be discussed under Part 20 of CB</p>	

Time marker	Speaker	Subject(s)	Action required
		<p>Mr Andrew LEUNG's views that --</p> <p>(a) it was harsh to impose criminal liabilities on companies' non-compliance with filing obligations; and</p> <p>(b) it was not satisfactory that compounding, in lieu of prosecution, would only be imposed at the discretion of the Registrar of Companies</p>	
<p>Discussion on the Administration's response to issues raised by members on 19 May 2011 on Part 4 (LC Paper No. CB(1)2439/10-11(04))</p>			
<p>012613-013046</p>	<p>Administration</p>	<p>Briefing on the written response to issues raised by members on 19 May 2011 in relation to Part 4 (Share Capital) (LC Paper No. CB(1)2439/10-11(04)) -- rationale behind the proposal for a mandatory no-par system</p>	
<p>013047-013412</p>	<p>Dr Philip WONG Administration</p>	<p>Dr Philip WONG's enquiries on --</p> <p>(a) the time allowed for companies to make administrative arrangements for migrating to the mandatory no-par system after enactment of CB; and</p> <p>(b) the legal consequences for companies if they failed to complete the administrative changes before the deadline</p> <p>The Administration's response that --</p> <p>(a) to allow sufficient time for publicity on the new requirements and for companies to make necessary arrangements, it was envisaged that the new CO would commence at least 18 months after enactment, which would be around 2014; and</p> <p>(b) given that there would be deeming provisions for the migration to the no-par system, there would be no legal liabilities for a company if it failed to make the necessary changes after the new CO took effect</p>	

Time marker	Speaker	Subject(s)	Action required
013413-013826	Administration	Briefing on the written response to issues raised by members on 19 May 2011 in relation to Part 4 (Share Capital) (LC Paper No. CB(1)2439/10-11(04)) - details of the proposal that allows a company to apply its share capital in writing off preliminary expenses and expenses of any issue of shares of the company (clause 144)	
<i>Break (013827- 014951)</i>			
<u>Discussion on the Administration's response to issues raised by members on 19 May 2011 on Part 5 (LC Paper No. CB(1)2439/10-11(04))</u>			
014952-020226	Administration	Briefing on the written response to issues raised by members on 19 May 2011 in relation to Part 5 (Transactions in relation to Share Capital) (LC Paper No. CB(1)2439/10-11(04))	
020227-023317	Mr Andrew LEUNG Administration Chairman	<p>Mr Andrew LEUNG's views that it was unnecessary for a solvency statement for the transactions under Part 5 of CB to include an auditors' report; but the inclusion of a balance sheet test might be necessary, since the net value of assets of a company in these transactions was more important than a satisfactory cash flow</p> <p>Mr Andrew LEUNG's enquiry on the circumstances under which the uniform solvency test was applicable</p> <p>The Administration's response that a cash-flow based uniform solvency test was applicable to --</p> <ul style="list-style-type: none"> (a) court-free reduction of capital, (b) buy-backs of company's shares out of capital, (c) financial assistance for acquisitions of a company's shares; and (d) court-free intra-group amalgamation procedures <p>Mr Andrew LEUNG's views that --</p> <ul style="list-style-type: none"> (a) the requirement of a cash-flow based 	

Time marker	Speaker	Subject(s)	Action required
		<p>solvent statement for court-free intra-group amalgamation procedures imposed undue hardship on normal commercial activities of unlisted companies; and</p> <p>(b) the requirements under CB should take into account the practical situations of business operation in Hong Kong</p> <p>The Administration's response that --</p> <p>(a) the requirement of the solvency statement aimed to protect the interest of creditors in the course of the amalgamating process; and</p> <p>(b) in Singapore and New Zealand, it was required that the amalgamating company should pass both the cash-flow test and the balance sheet test; the requirements under CB for Hong Kong companies were more relaxed</p> <p>The Chairman's view that the cash-flow based solvency test required under CB could give stakeholders some confidence that the amalgamating company would be able to pay its debts in full in the 12 months following the date of the transaction</p> <p>The Chairman's suggestion that the Administration should consider whether the solvency requirement should be relaxed to allow for meeting the balance sheet test as an alternative</p>	<p>The Administration to take action as in paragraph 2(b) of the minutes</p>
023318-023934	Chairman Administration	<p>The Chairman's enquiries on --</p> <p>(a) whether an auditors' report was required for buy-backs out of capital and reduction of capital by a private company under the court-free procedure in UK; and</p> <p>(b) views of financial institutions and market regulators collected during past consultations on the above requirement</p>	

Time marker	Speaker	Subject(s)	Action required
		<p>The Administration's response that --</p> <p>(a) in the UK, an auditor's report was required for buy-backs out of capital but not for reduction of capital;</p> <p>(b) it would conduct a research to find out the reasons for the above; and</p> <p>(c) financial institutions and regulatory authorities had not expressed any concerns during past consultations on the Administration's proposal of not requiring an auditor's report for buy-backs or reduction of capital</p>	<p>The Administration to take action as in paragraph 2(d) of the minutes</p>
<p><u>Discussion on the Administration's response to issues raised by members on 19 May 2011 on Part 9 (LC Paper No. CB(1)2439/10-11(04))</u></p>			
023935-024345	Administration	Briefing on the written response to issues raised by members on 19 May 2011 in relation to Part 9 (Accounts and Audit) (LC Paper No. CB(1)2439/10-11(04))	
024346-024618	Chairman Mr Andrew LEUNG	<p>The Chairman's views that --</p> <p>(a) he supported not to extend the requirement of preparing directors' remuneration reports to non-listed companies; and</p> <p>(b) any improvements to the disclosure of the remuneration of directors of listed companies should be considered by the Securities and Futures Commission and the Hong Kong Exchanges and Clearing Limited</p> <p>Mr Andrew LEUNG's remarks that he agreed to the Chairman's views</p>	
<p><u>Discussion on the Administration's response to issues raised by members on 3 June 2011 on Part 6 (LC Paper No. CB(1)2439/10-11(05))</u></p>			
024619-025534	Administration	Briefing on the written response to issues raised by members on 3 June 2011 in relation to Part 6 (Distribution of Profits and Assets) (LC Paper No. CB(1)2439/10-11(05))	
025535-025827	Mr Andrew LEUNG Administration	Mr Andrew LEUNG's view that CB should not include provisions on distribution in-specie similar to those in the UK Companies Act	

Time marker	Speaker	Subject(s)	Action required
		<p>2006, as the book value of a property held by a company in Hong Kong could be very much lower than its market value</p> <p>The Administration's response that --</p> <p>(a) there were no plans to introduce such provisions in CB as there were no strong views received during past consultations about distribution in-specie; and</p> <p>(b) no similar concerns to those raised in the UK following the <i>Aveling Barford</i> case were raised in Hong Kong</p>	
025828-030302	Deputy Chairman Administration Chairman	<p>The Deputy Chairman's enquiry on restrictions on distribution in-specie in Hong Kong</p> <p>The Administration's response that under section 79A of CO, "distribution" meant every description of distribution of a company's assets to its members, whether in cash or otherwise, with a few exceptions; consequently, a distribution could be made in the form of non-cash assets</p> <p>The Chairman's remarks that distribution in-specie was more common in private companies than in public companies and it was accounted for at the fair value of the assets concerned</p> <p>The Chairman's advice that the Administration should provide written information on the practice for distribution in-specie in Hong Kong for members' reference</p>	The Administration to take action as in paragraph 2(e) of the minutes
030303-030330	Chairman	Date of next meeting	