Bills Committee on Companies Bill

Follow-up actions for the meeting held on 10 February 2012 in relation to Part 16 of the Companies Bill

Purpose

This paper sets out the Administration's response to the issues raised by Members at the Bills Committee meetings on 10 February 2012 relating to Part 16 (Non-Hong Kong Companies) of the Companies Bill ("CB").

Administration's response

Clause 762 (Interpretation)

2. Members asked the Administration to review the interpretation of "place of business" and the criteria for requiring a non-Hong Kong company to register, taking into account the practice in other jurisdictions.

Position in other jurisdictions

3. We have studied the position in the United Kingdom ("UK") and Singapore. In the UK, the threshold for registration is the opening of a UK establishment, which means a place of business or branch of an overseas company. It is considered desirable to use the concept of establishment of a place of business rather than adopting a new test (e.g. of carrying on business) as there is already a body of case law on what constitutes an established place of business. In particular, it has been held that a company has an established place of business if –

(a) it has a specified or identifiable place at which it carries on business which has more than a fleeting character; and

(b) there is some visible sign or physical indication that the company has a connection with particular premises.

It is considered sufficient to meet the established place of business test if only activities incidental to the main business of the company are carried on in the UK. So, for example, a company which sets up only warehouse or administrative facilities will still have established a place of business and will therefore be required to register in the UK[1]. However, there is no definition of "place of business" in the UK Companies Act 2006.

4. In Singapore, a combination of thresholds is adopted, namely, the carrying on of business and establishment of place of business (section 365 of the Singapore Companies Act ("SCA")). While there is a definition on "carrying on business" (section 366 of the SCA), there is no definition of "place of business". Sections 365 and 366 of the SCA are at **Annex A** (English only).

Position in the Companies Ordinance ("CO")

5. In line with the position in the UK, the threshold of registration under the CO for companies incorporated outside Hong Kong has all along been the establishment of a place of business. The definition of "place of business" has evolved over the years[2], and is currently defined in section 341 of the CO as including "a share transfer or share registration office but does not include an office specified in the twenty-fourth schedule". The 24th Schedule contains an exclusion from the definition of "place of business", namely, a local representative office established or maintained with the approval of the Monetary Authority under section 46 of the Banking Ordinance (Cap.155) by a bank.

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1 Paragraph 23 of the Consultation Document "Reforming The Law Concerning Oversea Companies" (October 1999).

2 Before the Companies (Amendment) Ordinance 2004, "place of business" was defined as including "a share transfer or share registration office and any place used for the manufacture or warehousing of any goods, but does not include a place not used by the company to transact any business which creates legal obligations". It was amended to the current definition pursuant to the Companies (Amendment) Ordinance 2004 to avoid the double negative in the proviso in the original formulation for excluding a place not used by the company to transact any business. The amendments also removed "a place used for the manufacture or warehousing of goods" from the definition as being outdated. In addition, the amendments took into account comments received from deputations concerning representative offices of oversea banks which were subject to the supervision of the Hong Kong Monetary Authority and the obligation to register under the Banking Ordinance.

6. The threshold of registration has been reviewed over the years. In 2000, the Standing Committee on Company Law Reform recommended no change to the threshold of registration. It was considered difficult to formulate a definition of "carrying on business". Also, it was noted that in Singapore, there were views that there was no certainty in the "carrying on business" test as compared with the "place of business" test, resulting in companies registering just to be on the safe side.

7. In the light of the above, we do not propose any change in the threshold of registration in the CB, i.e. to retain the test of "establishing a place of business". As regards the definition of "place of business", given that there is already a body of well-settled case law on what constitutes an established "place of business" (see **Annex B)**, we propose no change to the definition in the CB, which is in line with that in the CO.

Clause 765 (Registration of non-Hong Kong company)

8. There was a suggestion to restate section 333AA(1) of the CO, which states explicitly the Registrar's obligation to keep a register of non-Hong Kong companies. In this regard, we have made a specific division under the CB, Division 3 in Part 2, to provide for matters concerning the Companies Register. It is provided in clause 26 of the CB that the Registrar must keep records of companies. The term "company' in Part 2 is defined in clause 19 to cover non-Hong Kong company registered under the CB as well as a company registered in the register kept under section 333AA of the CO. Pursuant to clause 26(1) and (2), the records include those which are registered under the CB and those kept for the purpose of a register of companies under the CO.

9. In the light of the above, we are of the view that the obligation under section 333AA(1) of the CO has been expressly provided in clause 26 of the CB.

Clause 778 (Directors may revise accounts not complying with certain requirement)

10. Members suggested that a period longer than seven days should be allowed for non-Hong Kong companies to deliver the warning statement to the Registrar under clause 778(4), given that it might take non-Hong Kong companies more time to file the statement than local companies. In view of Members' suggestion, we will introduce a CSA to replace the time limit of "7 days" with "15 days".

Clause 783 (Authorized representative of registered non-Hong Kong company must notify Registrar of dissolution)

11. Members suggested introducing a defence for the authorized representative in case he genuinely was not aware of the dissolution of the non-Hong Kong companies. In view of Members' suggestion, we will introduce a CSA to the effect that it is a defence to establish that the person did not know, and had no reason to believe, that the company is dissolved.

Clause 788 (Conditions for granting application)

12. There was a concern that, if a non-Hong Kong company temporarily did not have a place of business in Hong Kong, and at that point in time its name was struck off the Companies Register, it would not be able to be restored under clause 788 (as it could not fulfill clause 788(2)(a)). In view of the concern, we will introduce a CSA to amend clause 788(2)(a) to the effect that it is a condition for restoration that the non-Hong Kong company has, at the time of making the application under section 787, a place of business in Hong Kong and had, at any time within the period of six months before the name was struck off the Companies Register, a place of business in Hong Kong.

Financial Services and the Treasury Bureau
Companies Registry
9 March 2012

Annex A

Singapore Companies Act

Foreign companies to which this Division applies

365. This Division applies to a foreign company which, before it establishes a place of business or commences to carry on business in Singapore, complies with section 368 and is registered under this Division.

[13/87]

Interpretation of this Division

366. —

(1) In this Division, unless the contrary intention appears —

"agent" means the person named in a memorandum of appointment or power of attorney lodged under section 368(1)(*e*) or 370(6) or under any corresponding previous written law;

"carrying on business" includes administering, managing or otherwise dealing with property situated in Singapore as an agent, legal personal representative, or trustee, whether by employees or agents or otherwise, and "to carry on business" has a corresponding meaning.

[8/2003]

(2) Notwithstanding subsection (1), a foreign company shall not be regarded as carrying on business in Singapore for the reason only that in Singapore it —

(*a*) is or becomes a party to any action or suit or any administrative or arbitration proceeding or effects settlement of an action, suit or proceeding or of any claim or dispute;

(*b*) holds meetings of its directors or shareholders or carries on other activities concerning its internal affairs;

(*c*) maintains any bank account;

(*d*) effects any sale through an independent contractor;

(*e*) solicits or procures any order which becomes a binding contract only if such order is accepted outside Singapore;

(*f*) creates evidence of any debt or creates a charge on movable or immovable property;

(*g*) secures or collects any of its debts or enforces its rights in regard to any securities relating to such debts;

(*h*) conducts an isolated transaction that is completed within a period of 31 days, but not being one of a number of similar transactions repeated from time to time;

(*i*) invests any of its funds or holds any property;

(*j*) establishes a share transfer or share registration office in Singapore; or

(*k*) effects any transaction through its related corporation licensed or approved under any written law by the Monetary Authority of Singapore, established under the Monetary Authority of Singapore Act (Cap. 186), under an arrangement approved by the Authority.

[38/98; 8/2003]

Annex B

Case law on the definition of "place of business"

- In the UK, there is a body of case law on what constitutes an established place of business.

  - In *Lord Advocate v Huron and Erie Loan and Savings Co* [1911] SC 61, it was held on the facts that the companies did carry on business in the UK but did not establish a place of business in the UK. In considering the meaning of "having a place of business", the Lord President said at p.616:

    " … "carrying on business" is one thing and "establishing a place of business" another. If what the legislature meant was that these requirements were to be imposed upon all foreign companies who carried on business with the United Kingdom, it would have been perfectly easy to say so. Therefore I am driven to the conclusion that when the legislature selected the phrase "establishes a place of business" it meant something other than "carrying on business" … I therefore, in my judgment, merely look at the expression as it is used. That expression seems to me clearly to point to this, that the Company must have what I call a local habitation of its own."

  - In the case of *South India Shipping Corp. v. Export-Import Bank of Korea* [1985] All E.R. 219, a Korean incorporated bank operated a branch office in London on leased premises. The branch did not conduct any banking transactions but carried out incidental activities such as collating and disseminating information, encouraging trade between the UK and Korea, and liaising with other banks and financial institutions in London. It was held that the Korean bank had established a place of business in England. Ackner L.J. held that there was no need for the bank's activities in England to form a substantial or paramount part of its business, and that activities incidental to its main objects sufficed to found

jurisdiction over the company.

- As to the meaning of establishing a place of business, Oliver L.J. stated in *Re Oriel Ltd.* [1986] 1 W.L.R. 180 at 184 that :

  "it connotes not only the setting up of a place of business at a specific location, but a degree of permanence or recognisability as being a location of the company's business. The concept, as it seems to me, is of some more or less permanent location, not necessarily owned or even leased by the company, but at least associated with the company and from which habitually or with some degree of regularity its business is conducted."

- The question of what constitutes a place of business has been settled in Hong Kong along broadly similar lines to the position in the UK.

  - In *MCY Finance Ltd SA v Hong Kong Shanghai (Shipping) Ltd* [1986] HKC 323, the court followed *Lord Advocate* and applied the test "an identifiable or recognizable place of habitation in the Colony". It was held that appointing of an agent in Hong Kong will not constitute the establishment of a place of business in Hong Kong.

  - It was held in *Elsinct (Asia-Pacific) Ltd v Commercial Bank of Korea Ltd* [1994] 3HKC 365 that a broad common sense approach should be applied to the interpretation of "place of business". Such an approach was followed in *Ho Tai Kwan v Global Innovative Systems Inc* [2008] 1 HKLRD 399, *Huang Ping Owen v Burswood Ltd* (unrep., DCCJ 5239/2008, [2009] HKEC 1581) and *Singamas Management Services Ltd v Axis Intermodal (UK) Ltd* [2011] 5 HKLRD 145 and each case is decided on its own facts.

  - In *Elsinct (Asia-Pacific) Ltd v Commercial Bank of Korea Ltd,* it was held that a representative office was not required to register under Part XI of the CO so long as the activities undertaken in Hong Kong were limited to promotion, public

relations, collection of financial data etc.

- In *Ho Tai Kwan v Global Innovative Systems Inc* [2008] 1 HKLRD 399, the Court of Appeal adopted a broad common sense approach and having considered the facts of the case decided that the overwhelming evidence showed that D had a "place of business" in Hong Kong. D was using the relevant premises as its corporate headquarters and principal executive offices, where executive decisions were made.

- In the recent case of *Singamas Management Services Ltd v Axis Intermodal (UK) Ltd*, the court followed the test in *Lord Advocate.* In that case, there was a website bearing the name of the defendant D. C being the holding company of D acted as D's agent in business dealing in the office of C. The fact that there were meetings and discussions at the Hong Kong address by C as the agent does not mean that the Hong Kong address was a place of business established by D. The Court is not satisfied on the facts that D had established a place of business in Hong Kong.