

Bills Committee on Companies Bill

Comparison Table for Part 7 – Debentures

PURPOSE

To facilitate clause-by-clause examination of Part 7 (Debentures) of the Companies Bill (CB), this paper provides a comparison table, at **Annex**, on the provisions in Part 5 and the relevant provisions in the Companies Ordinance (Cap 32) or the company laws of comparable jurisdictions, where applicable. Transitional and saving arrangements for Part 7 are set out in sections 51 to 62 of Schedule 10 to the CB.

PART 7 OF THE CB

2. The major proposals and policy issues concerning Part 7 are set out in Annex B to LegCo Paper CB(1)2175/10-11(01), which was considered by Members at the meeting on 3 June 2011. Members enquired about the details of regulation of convertible securities and share options/ subscription warrants in other jurisdictions and Hong Kong. We have subsequently provided supplementary information to Members via LegCo Paper CB(1)2439/10-11(05).

ADVICE SOUGHT

3. Members are invited to note the contents of this paper and provide their views.

**Financial Services and the Treasury Bureau
Companies Registry
11 October 2011**

Comparison Table for Part 7

This table includes provisions in the third (i.e. “Derivation”) column that indicate the corresponding or original section in the Companies Ordinance (CO) of the clause concerned in the Companies Bill (CB), where applicable. Where reference has been made to the relevant statutory provision(s) in other jurisdictions, such provision(s) is/ are also cited in that column. We use the term “Existing law” to mean that the clause is restating an existing section in the CO as set out in the “Derivation” column without change in substance, although the actual wording may be different from the existing section as improvements are made to the drafting language and style.

A list of abbreviations used is as follows:-

ACA: Australia Corporations Act 2001

CO: Companies Ordinance (Cap 32)

Clause	Contents	Derivation	Position in CO	Position in CB
Division 1: Preliminary				
303	Interpretation	CO s.2	“Debenture” includes debenture stock, bonds and any other debt securities of a company whether constituting a charge on the assets of the company or not.	Existing law with modifications:- (i) a new definition of “branch register” is added due to the introduction of new provisions (cl.310) on the keeping of a branch register; (ii) a new definition is given for “register of debenture holders” to improve drafting; and

Clause	Contents	Derivation	Position in CO	Position in CB
				(iii) to provide that a register of holders of debentures kept under CO s.74A is to be regarded as a register of debenture holders kept under this Part to ensure continuity of law.
Division 2: Register of Debenture Holders				
304	Register of debenture holders	CO s.74A(1) and (4)	<p>Any company which issues a series of debentures not transferable by delivery shall keep a register of debenture holders. The register of debenture holders shall include the following particulars of the debenture holders:-</p> <ul style="list-style-type: none"> (i) the name and address; (ii) the occupation or description, (iii) the amount of debentures held; and (iv) the date the person becomes or ceases to be a debenture holder. 	<p>Existing law, except that:-</p> <ul style="list-style-type: none"> (i) the obligation to enter the occupation or description of the debenture holders in the register has been removed to align with the provisions for register of members (cl.617); and (ii) the maximum fine level is lowered from Level 5 to Level 4.
305	Place where register must be kept available for inspection	CO s.74A(2), (3) and (4)	(i) The register of debenture holders shall be kept at the registered office of the company or a place where the register is made up. It shall not be kept at a place outside Hong Kong.	<p>Existing law, with the following changes to align with the provisions for register of members (cl.618):-</p> <ul style="list-style-type: none"> (i) there is a modification to allow the register to be kept at a place prescribed

Clause	Contents	Derivation	Position in CO	Position in CB
			(ii) A company must send notice to the Registrar of Companies (“the Registrar”) of the place where the register is kept, and of any change in that place.	by regulations; (ii) the company is no longer required to notify the Registrar if the register is kept at its registered office since the register came into existence; and (iii) the maximum fine level is lowered from Level 5 to Level 4.
306	Right to inspect and request copy	CO s.75	(i) Every register of debenture holders shall, except when duly closed, be open for inspection by the debenture holder or the company’s shareholders without fee, and by any other person on payment of \$1 or such less sum as may be prescribed by the company. (ii) Any person may require a copy of the register or any part of it on payment of \$2 or such less sum as may be prescribed by the company for every 100 words, and such copy shall be forwarded by the company to the person requesting it within 20 days after the request is received. (iii) A copy of the trust deed shall be forwarded to any person requesting it within 20 days	Existing law, with the following changes (except (iv)) to align with the provisions for register of members (cl.621):- (i) the relevant fees will be prescribed by regulations (c.f. currently specified in the CO); (ii) the time-limit for the company to provide a copy will be prescribed by regulations (c.f. 20 days in the CO); (iii) cl.306(5) (obligation to inform date of alteration) and (8) (no order of inspection in case of abuse) are added ; (iv) only the debenture holders and trustee (c.f. “any person” in the CO) may

Clause	Contents	Derivation	Position in CO	Position in CB
			<p>after the request is received, on payment of the sum of \$4 in the case of a printed trust deed, or payment of \$2 for every 100 words in the case of a trust deed not printed.</p> <p>(iv) If an inspection is refused, or a copy is refused or not forwarded within 20 days after the request is received, the court may by order compel an immediate inspection or direct that the copies be sent to the person requesting them.</p>	<p>request a copy of the trust deed; and</p> <p>(v) the maximum fine level for failing to provide copy is raised from Level 3 to Level 4.</p>
307	Consequences of contravening requirements as to register owing to other person's default		No corresponding provision in the CO.	New provision to align with the provisions for register of members (cl.622). It provides that if a company's register of debenture holders is kept by an agent, the power of the court to compel provision of copies extends to cover the agent.
308	Power to close register of debenture holders	CO s.99	A company may, on giving notice in accordance with the listing rules (if the debentures are listed) or by advertisement in newspapers (in other cases), close its register of debenture holders for any time(s) not exceeding in the	Existing law.

Clause	Contents	Derivation	Position in CO	Position in CB
			whole 30 days each year. The 30-day period may be extended but the period shall not exceed 60 days.	
309	Branch register of debenture holders		No corresponding provision in the CO.	New provision to align with the provisions for register of members (cl.627). It provides that if a company issues debentures in a place outside Hong Kong, it may keep a branch register of the holders of the debentures who are resident there. The company must notify the Registrar within 14 days of the place where the branch register is kept and any change of that place; failing to do so shall be an offence.
310	Keeping of branch register		No corresponding provision in the CO.	New provision to align with the provisions for register of members (cl.628). It provides that a company that keeps a branch register must transmit to its registered office every entry made in the branch register and keep at the place where the company's principal register is kept a duplicate of the branch register; failing to do so shall be an offence.
311	Transactions in debentures registered in		No corresponding provision in the CO.	New provision to align with the provisions for register of members (cl.629). It provides that the debentures registered in a branch

Clause	Contents	Derivation	Position in CO	Position in CB
	branch register			register must be distinguished from those registered in the principal register. No transaction in a branch register may be registered in any other register.
312	Discontinuance of branch register		No corresponding provision in the CO.	New provision to align with the provisions for register of members (cl.630). It provides that if a company discontinues a branch register, it must, within 14 days notify the Registrar of the discontinuance and the register to which the entries in the branch register have been transferred; failing to do so shall be an offence.
Division 3 : Allotment of Debentures or Debentures				
313	Return of allotment		No corresponding provision in the CO.	New provision to align with similar provisions for shares (cl.137). It provides that a company shall within 1 month after an allotment of debentures, deliver to the Registrar for registration a return of allotment.
314	Registration of allotment		No corresponding provision in the CO.	New provision to align with the new provisions for shares (cl.138). It requires a company to register the details of an allotment in its register of debenture holders

Clause	Contents	Derivation	Position in CO	Position in CB
				within 2 months.
315	Issue of debenture or certificate for debenture stock on allotment	CO s.70(1) and (2)	A company must issue the debentures within 2 months after their allotment.	Existing law except that the maximum fine level is raised from Level 3 to Level 4.
316	Court order for delivery of debenture or certificate for debenture stock	CO s.70(3)	If a company does not issue the debentures, a person entitled to the debentures may by notice require the company to do so within 10 days. If the company still fails to do so, the person may apply to the Court for an order to require the company to do so.	Existing law.

Division 4 : Transfer of Debentures or Debenture Stock

317	Requirement for instrument of transfer	CO s.66	A company must not register a transfer of debentures unless a proper instrument of transfer has been delivered to the company.	Existing law.
318	Registration of transfer or refusal of registration	CO s.69(1) and (2)	If a company refuses to register a transfer of debentures, the company shall, within 2 months after the transfer was lodged, send to the transferor and the transferee notice of the refusal.	Existing law, except that:- (i) new provision is added to expressly allow the transferee and the transferor to lodge a transfer with the company to

Clause	Contents	Derivation	Position in CO	Position in CB
				align with transfer of shares; and (ii) the maximum fine level is raised from Level 3 to Level 4.
319	Certification of transfer	CO s.69A	<p>(i) The certification by a company of any instrument of transfer shall be taken as a representation by the company that title documents have been produced to the company but not that the transferor has any title to the debentures.</p> <p>(ii) Where any person acts on the faith of a false certification by a company made negligently, the company shall be under the same liability as if the certification had been made fraudulently.</p> <p>(iii) The certification is deemed to be made by the company if it is signed or initialled by a person having actual or apparent authority to certify transfers on behalf of the company.</p>	Existing law.
320	Issue of debenture or certificate for debenture	CO s.70(1A), (1B), (2)	<p>A company must issue the debentures after any transfer:-</p> <p>(i) within 2 months in the case of a private</p>	Existing law, except that the maximum fine level is raised from Level 3 to Level 4.

Clause	Contents	Derivation	Position in CO	Position in CB
	stock on transfer	and (4)	company; or (ii) within 10 business days in the case of any other companies.	
321	Court order for delivery of debenture or certificate for debenture stock	CO s.70(3)	If a company does not issue the debentures, a person entitled to them may by notice require the company to do so. If within 10 days after the service of the notice the company still fails to do so, the person may apply to the court for an order to require the company to do so.	Existing law.
Division 5 : Miscellaneous Provisions				
322	Evidence of grant of probate etc.	CO s.72	The production to a company of any document which is by law sufficient evidence of probate of the will, or letters of administration of the estate of a deceased person having been granted to some person shall be accepted by the company as sufficient evidence of the grant.	Existing law.
323	Form of register of holders of debentures kept under instrument	CO s.74B	Any provision of an instrument made by a company which requires a register of debenture holders to be kept in a legible form shall be construed as requiring the register to be kept either in a legible form or in a non-legible form capable of being reproduced in a legible form.	Existing law.

Clause	Contents	Derivation	Position in CO	Position in CB
	made by company			
324	Perpetual debentures	CO s.76	Notwithstanding any rule of equity to the contrary, a condition contained in debentures or in a deed securing debentures shall not be invalid by reason only that the debentures are made irredeemable or redeemable only on a remote contingency, or on the expiration of a lengthy period.	Existing law.
325	Power to reissue redeemed debentures	CO s.77(1), (2), (5) and (6)	<p>(i) CO confers on a company the power to reissue redeemed debentures, unless there is any contrary provision in the company's articles or contract entered into by the company or the company has manifested an intention to cancel them.</p> <p>(ii) On a re-issue of redeemed debentures, the person entitled to the debentures shall be deemed always to have had the same priority as if the debentures had never been redeemed.</p>	Existing law, except that the reference to the 1911 Companies Ordinance (CO s.77(6)) is removed.
326	Deposit of debentures to secure	CO s.77(4)	Where a debenture is deposited by the company with a lender, to secure advances from time to time on a current account or otherwise, the	Existing law.

Clause	Contents	Derivation	Position in CO	Position in CB
	advances		debenture is not deemed to be redeemed by reason only that the account of the company is no longer in debit whilst the debenture remains deposited with the lender.	
327	Specific performance of contracts to subscribe for debentures	CO s.78	A contract with a company to take up and pay for any debentures of the company may be enforced by an order for specific performance.	Existing law.
328	Court may order meeting of debenture holders		<p>(i) CO s.75A provides that where the debentures or the trust deed or other documents securing the debentures provide for the holding of meetings of holders of debentures, then subject to such provisions, such meetings shall be convened subject to the relevant provisions in the CO¹.</p> <p>(ii) In practice, however, CO s.75A is unlikely to be invoked, because if the debenture documents do not provide for meetings, the CO provisions would be of no assistance. Where the debenture</p>	<p>(i) New provision to provide a right for debenture holders holding 10% of the value of the debentures in total (or higher percentage as provided for in the debentures, or the trust deeds or other documents securing the issue of the debentures) to apply to the court to order a meeting for giving directions to trustee.</p> <p>(ii) The right may be excluded by the debentures, or the trust deeds or other documents securing the issue of the</p>

¹ Sections 113 (“Convening of extraordinary general meeting on requisition”), 114B (“Order of court to order meeting”), 114C (“Proxies”), 114D (“Right to demand a poll”) (2) and 114E (“Voting on a poll”) of the CO.

Clause	Contents	Derivation	Position in CO	Position in CB
			documents do so provide, these documents (if professionally prepared) are likely to have their own provisions which will negate the application of the CO provisions.	debentures.
329	Liability of trustees for debenture holders	CO s.75B	<p>(i) Any provision in a trust deed securing debentures or in a contract with debenture holders is void if it exempts a trustee from, or indemnifies him against, liability for breach of trust, where he fails to show the degree of care and diligence required of him as trustee.</p> <p>(ii) However, s.75B does not invalidate releases given after the trustee's actions or omission. Furthermore, a provision is not invalidated if it prospectively allows for such releases to be given provided that the release is to be agreed by a majority of debenture holders of not less than 75 per cent in value.</p> <p>(iii) There are saving provisions for certain provisions in force before s.75B came into effect.</p>	Existing law.

Clause	Contents	Derivation	Position in CO	Position in CB
330	Immunity of trustees for debenture holders	c.f. ACA s.283DC	No corresponding provision in the CO.	New provision to provide that trustees will be statutorily excluded from liability for anything done (or not done) where they acted in accordance with the directions of a meeting of debenture holders.

**Financial Services and the Treasury Bureau
Companies Registry
11 October 2011**