

Bills Committee on Companies Bill

**Comparison Table for Part 10 –
Directors and Companies Secretaries**

PURPOSE

To facilitate clause-by-clause examination of Part 10 (Directors and Companies Secretaries) of the Companies Bill (“CB”), this paper provides a comparison table, at Annex, on the provisions in Part 10 and relevant provisions in the Companies Ordinance (Cap. 32) or the company laws of comparable jurisdictions, where applicable. Transitional and saving arrangements for Part 10 are set out in sections 82 to 88 of Schedule 10.

PART 10 OF THE CB

2. The major proposals and policy issues concerning Part 10 are set out in Annex A to LegCo Paper No. CB(1)2280/10-11(01), which was considered by Members at the meetings of 3 and 10 June 2011. Members expressed concerns about 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 the CB. On the proposal to require ratification of conduct of directors by disinterested members’ approval, some Members sought our confirmation that the proposal would change the respective common law position. We have subsequently provided supplementary information on both issues to Members via LegCo Paper No. CB(1)2577/10-11(01).

ADVICE SOUGHT

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

**Financial Services and the Treasury Bureau
Companies Registry
18 November 2011**

Comparison Table for Part 10

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 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 –

CO: Companies Ordinance (Cap. 32)

UKCA 2006: United Kingdom Companies Act 2006

Clause	Contents	Derivation	Position in CO	Position in CB
Division 1: Appointment, Removal and Resignation of Directors				
Subdivision 1 : Requirement to have Directors				
444	Public company and company limited by guarantee required to have at least 2 directors	CO s.153(1), (2), (5) to (7)	It provides that every non-private company must have at least 2 directors. The persons named as directors in the incorporation form of a company are the first directors of the company. Where the number of directors falls below 2, any power of a director under the articles to increase the number of directors or to	Existing law. Provisions relating to offence under CO s.153(3) & (4) are not retained in view of the offence under the new provisions in cl. 449.

Clause	Contents	Derivation	Position in CO	Position in CB
			summon a general meeting may be exercised by the remaining director.	
445	Private company required to have at least one director	CO s.153A(1), (2), (10) & (11)	It provides that every private company must have at least one director. The persons named as directors in the incorporation form of a company are the first directors of the company.	Existing law. Provisions relating to offence under CO s.153A(3), (4) & (5) are not retained in view of the offence under the new provisions in cl. 449.
446	Nomination of reserve director of private company	CO s.153A(6) to (9)	It provides that that where a private company has only one member who is also the sole director, the company may nominate a reserve director to act in place of the sole director in the event of his death.	Existing law with new provision under cl. 446(3) requiring delivery of notice to the Registrar if the nomination ceases to have effect.
447	Restriction on body corporate being director	CO s.154A(1) to (3) c.f. UKCA 2006 s.157(4) & (5)	It imposes a prohibition on a body corporate being appointed as director. The prohibition does not apply to a private company unless it is a member of a group of companies with a listed company as a member.	Existing law with new provisions under cl. 447(3) & (4) to provide for the consequence of contravention and clarify the liability of a director appointed in contravention of this clause.

Clause	Contents	Derivation	Position in CO	Position in CB
448	Requirement to have at least one director who is natural person	c.f. UKCA 2006 s.155(1)		New provision introducing a requirement that every private company, other than one that is a member of a group of companies of which a listed company is a member (as to which, see cl. 447 above), must have at least one director who is a natural person.
449	Direction requiring company to appoint director	c.f. UKCA 2006 s.156		<p>New provision empowering the Registrar to give directions requiring a company to appoint a director in compliance with the statutory requirement.</p> <p>The offence of contravening the Registrar's direction requiring appointment of director is subject to a fine at level 6 and daily fine of \$2,000 (cl. 449(4)). This is an increase in the level of penalty when compared to those under CO s.153(3) & s.153A(3) for contravention of the requirements to appoint directors (being fine at level 3 and daily fine of \$300).</p>

Clause	Contents	Derivation	Position in CO	Position in CB
Subdivision 2 : Appointment of Directors				
450	Minimum age for appointment as director	CO s.157C c.f. UKCA 2006 s.157(1), (4) & (5)	It provides that the minimum age for appointment as director is 18.	Existing law with new provision under cl. 450(2) & (3) to provide for the consequence of contravention and clarify the liability of a director appointed in contravention of the clause.
451	Appointment of directors to be voted on individually	CO s.157A(1), (2)(b) & (3)	It provides that the appointment of each director of a company other than a private company or a company without a share capital must be voted on individually unless there is unanimous agreement for a block resolution.	Existing law.
452	Validity of acts of director	CO s.157 & s.157A(2)(a) c.f. UKCA 2006 s.161	It validates the act of a director or manager, even though defects are later discovered in his appointment or qualification.	Existing law with the following modifications – (a) the provisions no longer apply to a manager as there is no provision to govern the appointment and qualifications of a manager in the first place; and (b) the application of the provisions is extended, for example, to situations

Clause	Contents	Derivation	Position in CO	Position in CB
				where a director had vacated office but continued to act.
Subdivision 3 : Removal and Resignation of Directors				
453	Resolution to remove director	CO s.157B(1), (1A), (5) to (8)	It provides that a company may, by ordinary resolution, remove a director. This does not affect the right of the removed director to claim compensation. Special notice is required and weighted voting rights are not enforceable for such resolution.	Existing law.
454	Director's right to protest against removal	CO s.157B(2) to (4) c.f. UKCA 2006 s.169	It provides that a director proposed to be removed is entitled to be heard on the resolution and may make written representations which the company is required to send to members or read out at general meeting. If the court is satisfied that such right is being abused to secure needless publicity for defamatory matter, it may order that such representations need not be sent or read out.	Existing law with the modification that the test for the Court to order non-publicity of the director's representations is changed to "the rights given are being abused" in cl. 454(5) by removing the criteria of "to secure needless publicity for defamatory matter" as stated in CO s.157B(4).

Clause	Contents	Derivation	Position in CO	Position in CB
455	Resignation of director	CO s.157D	It permits a director or secretary to resign by written notice unless otherwise provided in the articles or by agreement. Notification of resignation must be given to the Registrar.	Existing law except that notification may be given in electronic form.
Division 2 : Directors' Duty of Care, Skill and Diligence				
456	Duty to exercise reasonable care, skill and diligence	c.f. UKCA 2006 s.170(1), (3) & (5), s.174 & s.251(3)		New provision on the duty of a director to exercise reasonable care, skill and diligence. A mixed subjective/objective test in the determination of the standard of care, skill and diligence is set out.
457	Civil consequences of breach of duty to exercise reasonable care, skill and diligence	c.f. UKCA 2006 s.178(1)		New provision preserving the existing civil consequences of breach (or threatened breach) of directors' duty of care, skill and diligence under the common law.

Clause	Contents	Derivation	Position in CO	Position in CB
Division 3 : Directors' Liabilities				
458	Interpretation and application	c.f. UKCA 2006 s.234(2)		New provision on the meaning of “permitted indemnity provision” and “third party” and on the application of the new law on commencement of the CB.
459	Avoidance of provisions protecting director from liability	CO s.165 (1) & (3) c.f. UKCA 2006 s.232(1) to (3)	It provides for the avoidance of any provision exempting or indemnifying any officer or auditor from liability to the company or a related company in respect of negligence, default, breach of duty or breach of trust in relation to the company or related company. A company may purchase and maintain insurance for an officer or auditor against such liability to the company, related company or third party (save for fraud) and any liability incurred in defending any proceedings against him for negligence, default, breach of duty or breach of trust (including fraud).	Existing law with the following modifications – (a) the prohibitions against exemption and indemnification no long apply to non-director officers (i.e. manager and company secretary); (b) extending the prohibition to exemption and indemnification of a director’s liability to third parties; (c) extending the prohibition to indemnification of the liability of a director of an associated company; (d) extending the permission to insure to cover the liability of a director of an associated company. The prohibition relating to an auditor is separately provided in cl. 406.

Clause	Contents	Derivation	Position in CO	Position in CB
460	Permitted indemnity provision	c.f. UKCA 2006 s.234(1) to (5)		New provision permitting a company to indemnify a director against liability to a third party if specified conditions are met.
461	Permitted indemnity provision to be disclosed in directors' report	c.f. UKCA 2006 s.236(2) to (5)		New provision requiring the disclosure of a permitted indemnity provision in the directors' report.
462	Place where copy of permitted indemnity provision must be kept available for inspection	c.f. UKCA 2006 s.237(1) to (8)		New provision to impose obligations on a company to keep a copy of a permitted indemnity provision or a memorandum of its terms reduced to writing available for inspection, to retain and keep such provision or memorandum available for inspection for at least one year after the termination or expiry of the provision and to notify the Registrar of the place of keeping the provision or memorandum. New offences are created for non-compliance with the

Clause	Contents	Derivation	Position in CO	Position in CB
				obligations, with a fine at level 3 and daily default fine of \$300.
463	Right of member to inspect and request copy	c.f. UKCA 2006 s.237(8) & s.238		New provision giving members a right to inspect without charge a copy of a permitted indemnity provision or a memorandum of its term reduced to writing and a right to be supplied with a copy of such provision or memorandum on payment of a fee. New offence is created for failing to provide a copy of such provision upon request, with a fine at level 3 and daily default fine of \$300.
464	Ratification of conduct by director involving negligence, etc.	c.f. UKCA 2006 s.239		New provision setting out the requirements for ratification of conduct by a director involving negligence, default, breach of duty or breach of trust. The provision does not affect (a) any additional requirement imposed by any other Ordinance or rule of law; or (b) any rule of law as to acts incapable of being ratified.

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Division 4 : Appointment and Resignation of Company Secretaries				
465	Company required to have company secretary	CO s.154(1), (1AA), (1AB), (2) & (3)	It provides that a company must have a secretary who resides in Hong Kong or has its registered office or place of business in Hong Kong if it is a body corporate.	Existing law with the change of the term from “secretary” to “company secretary”.
466	Circumstances under which director may not be company secretary	CO s.154 (1A), (1B), & (4)	It specifies the circumstances under which a director may not be a secretary.	Existing law.
467	Direction requiring company to appoint company secretary	c.f. UKCA 2006 s.272		<p>New provision empowering the Registrar to give directions requiring a company to appoint a company secretary in compliance with the statutory requirements.</p> <p>There is no offence provision in the CO in respect of a breach of the provisions of s.154 on the appointment of company secretary. Cl. 467(4) creates</p>

Clause	Contents	Derivation	Position in CO	Position in CB
				a new offence relating to appointment of company secretary, with fine at level 6 and daily fine of \$2,000.
468	Resignation of company secretary	CO s.157D(1) to (3)	It permits a director or secretary to resign by written notice unless otherwise provided in the articles or by agreement. Notification of resignation must be given to the Registrar.	Existing law except that notification may be given in electronic form.
Division 5 : Miscellaneous Provisions Relating to Directors and Company Secretaries				
469	Director vicariously liable for acts of alternate etc.	CO s.153B	It provides that an alternate director is an agent of the director who appoints him and that a director is vicariously liable for torts committed by his alternate.	Existing law.
470	Avoidance of acts done by person in dual capacity as director and company secretary	CO s.154B	It provides that where a provision requires or authorizes a thing to be done by or to a director and the secretary, it will not be satisfied if done by the same person acting both as director and as, or in place of, the secretary.	Existing law with the new provision in cl. 470(2) to clarify that this clause applies to any provision of the CB or the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap 32) and any provision in a company's articles.

Clause	Contents	Derivation	Position in CO	Position in CB
471	Provisions as to undischarged bankrupt acting as director	CO s.156	It prohibits an undischarged bankrupt from acting as a director or being concerned in the management of a company except with the leave of court.	Existing law.
472	Minutes of directors' meetings	CO s.119(1) & (4) c.f. UKCA 2006 s.248	It requires a company to record minutes of general meetings and directors' meetings. The company and every officer in default commit an offence for a failure to do so.	Existing law with modifications as follows – (a) there is now a time limit of 20 years from date of meeting set out in cl. 472(2) in respect of the keeping by the company of minutes records so as to avoid perpetuity of the obligation; and (b) for contravention of the requirement to record minutes of directors' meetings, the fine is increased from level 3 to level 5 and the daily fine is increased from \$300 to \$1,000 (cl. 472(3)).
473	Minutes as evidence	CO s.119(2) & (3)	It provides that minutes of a meeting, if signed by the chairman, are prima facie evidence that the meeting has been duly held and of the transaction	Existing law plus a new provision in cl. 473(3) stating that the deemed validity of appointments at a meeting is subject to the provisions voiding the

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			of the business which they record.	appointment of body corporate director and underage director.
474	Written record of decision of sole director of private company	CO s.153C	It provides that a sole director of a private company who makes a decision that has effect as if agreed in a directors' meeting must provide the company with a written record of that decision. Such a record is sufficient evidence of the decision having been taken. Record of such decisions must be kept in the same way as minutes of directors' meetings.	Existing law with modifications as follows – (a) there is now a time limit of 20 years from date of decision set out in cl. 474(3) in respect of the keeping by the company of written records of sole director's decisions so as to avoid perpetuity of the obligation; and (b) for the contravention of the requirement to keep the records, the fine is increased from level 3 to level 5 and the daily fine is increased from \$300 to \$1,000 (cl. 474(7)).
Schedule 10 : Transitional and Saving Provisions				
82 - 88	Transitional and saving arrangements for Part 10			New provisions to provide transitional and saving arrangements in the following areas :- (a) first directors; (b) requirement to have at least one

Clause	Contents	Derivation	Position in CO	Position in CB
				director who is natural person; (c) validity of acts of director; (d) removal of director; (e) directors' liabilities; (f) first company secretaries; and (g) records of meetings of directors.