

LEGISLATIVE COUNCIL BRIEF

Companies Ordinance (Chapter 32)

COMPANIES (AMENDMENT) BILL 1999

INTRODUCTION

At the meeting of the Executive Council on 9 February 1999, the Council ADVISED and the Chief Executive ORDERED that the Companies (Amendment) Bill 1999 (“the Bill”), at Annex, should be introduced into the Legislative Council to update and streamline the operation of the Companies Ordinance.

BACKGROUND AND ARGUMENT

Merger relief

2. Section 48B(1) of the Ordinance provides that when a company issues shares at a premium, whether for cash or otherwise, a sum equal to the value of the premium on those shares shall be transferred to the share premium account and be treated as share capital. The share premium account cannot be drawn down save as provided for by those rules applicable to a reduction in share capital. The effect of this restriction is to exclude companies from the benefits of merger relief that could arise in cases of mergers and reconstructions of companies.

3. Modern company law, however, does not preclude the benefits of merger relief to companies upon their mergers and reconstructions. In the United Kingdom (“UK”), for example, this practice has been formalised by the enactment of sections 130 to 134 of the Companies Act 1985, which provided that if a company holds 90 per cent or more of the issued share capital of

another company as a result of an arrangement for the issue of shares by the first company in consideration of the issue or transfer to the first company of equity shares in the second company, then any share premium arising need not be credited to the share premium account and the first company's account may show the shares acquired at an acquisition cost equal to the nominal value of the shares issued by it in exchange. Merger relief is also available to a group reconstruction where there is no material change in the shareholder structure of the group or assets leaving the group¹.

4. We propose to update the law along the lines of the UK Companies Act 1985. The most important result of permitting merger relief is to enable the entities to be accounted for as though they had always been combined. The assets and liabilities of both companies are incorporated into the group account at book value and the shares issued by the acquiring company in the transaction are recorded at their nominal value rather than their fair value. Moreover, the pre-acquisition profits or reserves of the acquired company will not be capitalised (i.e. transferred to the share premium account) but will continue to be available to the group for distribution.

Nationality of company director and secretary

5. Sections 158 and 333 of the Ordinance require every locally incorporated company and every oversea company which establishes a place of business in Hong Kong to keep a register of its directors and secretary. The register should contain, among other things, the nationality of the directors and secretary. The company is also obliged to report these particulars and any changes to the Registrar of Companies (“the Registrar”).

6. The reason for requiring nationality to be specified was historical in nature. However, due to the globalisation of business, the disclosure of the nationality of company directors and secretaries may not be an additional benefit to searchers. The requirement to disclose nationality is also a potentially sensitive matter because it could indicate a director's racial or ethnic origin. We propose that the requirement to record and report the nationality of directors and secretaries should be deleted.

¹ Examples of group reconstructions where merger relief can apply are:- the addition of a new parent company to a group (as a vehicle for floatation), the transfer of a shareholding in a subsidiary from one group company to another, the transfer of shares in one or more subsidiary of a group to a new company whose shareholders are the same as those of the group's parent company, and two or more companies with the same shareholders combining into a group.

Director's index

7. Sections 158 and 333 of the Ordinance also require a listed company to report the other directorships held by each of its directors and any subsequent changes to such particulars to the Registrar. The purpose of these provisions is to ensure that the Registrar can maintain an up-to-date computerised index showing all the directorships held by the directors of listed companies. However, in the case of those directors who hold directorships in many listed as well as unlisted companies, the need to comply fully may be overlooked easily.

8. The Companies Registry is working on a project to expand its computer database. Upon completion of the project, a new comprehensive directors' index will be available for public search in late 1999. As the new index will allow cross-referencing with a director's other directorships, it will not be necessary for listed companies to report changes to the other directorships held by their directors. We propose to dispense with this reporting requirement upon the implementation of the new index.

Deregistration of solvent, defunct private companies

9. A company incorporated under the Ordinance may formally terminate its existence by dissolution. Prior to dissolution, Part V of the Ordinance requires an orderly winding-up of the company's affairs. The winding-up procedures for solvent companies are complex and time-consuming. As a result, such procedures are used only in a minority of cases. Instead, many defunct private companies have relied on the following two provisions of the Ordinance -

- (a) section 291 under which the Registrar may strike off a company from the register if he has reason to believe that it is not carrying on business or in operation; and
- (b) section 290A under which the Registrar may strike off a company from the register if it has failed to file annual returns for two consecutive years.

10. The purpose of section 291 is to empower the Registrar to strike off commercially inactive companies from the register. In practice, it would be difficult for the Registrar to have reason to believe that a company is not carrying on business or in operation unless this information came to him from the company or another source. For many years, the provisions of section 291 have been used to permit "applications" for companies to be struck-off. Section 290A was enacted in 1993 to provide a more objective and streamlined

means for striking-off companies, that is, failure to file annual returns for two consecutive years, than that available under section 291. However, in reality, both sections are being abused by the private sector as a way of getting rid of unwanted companies. Over the past five years, the Registrar has struck off 35 098 companies and 94 337 companies from the register under sections 291 and 290A respectively. Since no fee is payable for a company to be struck off under these two sections, Government is in effect providing a free corporate deregistration service to the private sector. This incurs an inordinate amount of resources on the Registrar.

11. Having regard to the situation in Hong Kong and the practices in overseas jurisdictions, we propose to introduce a formal but simplified procedure, which is largely modelled on section 601AA-AH of the Australian Corporations Law, for dissolving a solvent, defunct private company. Under the proposal, an application can be made to the Registrar for deregistration of a private company provided that all the members of the company agree to the deregistration; it has never commenced operation or has ceased to carry on business for more than three months and that it has no outstanding liabilities.

12. With the introduction of the new deregistration procedure, we propose that section 290A should be repealed. However, section 291 will be retained to enable the Registrar to remove, on his initiative, any defunct companies which has not been deregistered under the new provisions.

13. The other proposals incorporated in the Bill are primarily technical or minor in nature and are contained in the relevant clauses outlined in the following paragraphs.

THE BILL

14. **Clause 3** amends section 13 to require a company to deliver to the Registrar a complete set of amended articles of association within 15 days where the company has passed a resolution altering its articles. The proposal has the advantage of making it easier to review the latest version of the articles without the need for examining the special resolutions previously filed by the company.

15. **Clause 5** adds new sections 48C to 48F to give effect to the proposals on merger relief. The new sections are based on sections 131 to 134 of the UK Companies Act 1985 as amended by the UK Companies Act 1989.

16. Under section 126(2) of the Ordinance, where the financial year of a subsidiary does not coincide with that of its holding company, the group accounts shall deal with the subsidiary's state of affairs as at the end of its financial year ending with or last before that of the holding company, and with the subsidiary's profit or loss for that financial year. Exceptions can only be made if the Financial Secretary, on the application of or with the consent of the holding company's directors, directs otherwise. Since there is already an overriding duty on the part of directors to present the financial statements as showing a true and fair view of the company's affairs, and that personal sanctions can be levelled if they fail to do so, we consider that a better system would be to allow directors to depart from the provisions without seeking the approval of the Financial Secretary provided that they justify the deviation in the group accounts. **Clause 7** amends section 126(2) to remove the Financial Secretary's discretion, and also require the directors of the holding company to state in the group accounts the reasons why the financial year of the subsidiary does not coincide with that of the holding company.

17. **Clause 8** amends section 140A(3)(a) to require a private company, as in the case of a public company, to file a copy of its auditor's notice of resignation to the Registrar. The purpose is to make the notice available for public search in case the company's creditors require such information. **Clause 9** repeals sections 141A and 141B which specify the transitional arrangements when a large number of changes to the financial disclosure requirements were enacted in 1974. These transitional provisions are now spent and have no further effect.

18. **Clauses 11** and **28** amend sections 158 and 333 respectively to delete the requirement for locally incorporated companies and oversea companies to record and report the nationalities of their directors and secretaries. They also remove the requirement for listed companies to report the other directorships of its directors which will no longer be necessary when the Companies Registry's new directors' index comes into operation. **Clauses 12** and **29** make minor textual amendments to sections 158C(1)(b) and 333C(1)(b) respectively to reflect more accurately the structure and output of the new directors' index. **Clause 25** adds a new section 303B which is based on sections 16 and 16A of the Singapore Companies Act. The new section aims to provide protection for the Registrar from any possible legal action where the Registrar provides a service or information involving, inter alia, computerised information and a user of the information suffers loss or damage by reason of an error or omission therein.

19. Section 202 of the Ordinance provides that a liquidator of a company being wound up by the court must pay money received by him into the Company Liquidation Account controlled by the Official Receiver (“OR”) unless the committee of inspection applies to the OR for authorisation for the liquidator to open a special bank account. In practice, a committee of inspection is rarely appointed. In cases where there is no committee of inspection, the liquidator must apply to the court for directions as he cannot apply directly to the OR. **Clause 16** amends section 202 to provide that the liquidator, instead of the committee of inspection, can apply to the OR for authorisation to open a special bank account. This will save company assets being expended by the liquidator on making application to the court.

20. Section 233 provides that where a members’ voluntary winding-up is proposed, the directors, or in the case of a company having more than two directors, the majority of the directors, may at a meeting of the directors make a statutory declaration of solvency within the five weeks preceding the date of the passing of the special resolution for winding up the company or on that date but before the passing of the resolution. The required number of directors must all be present at the directors’ meeting to make the declaration. This requirement has created difficulties for companies when some of their directors are outside Hong Kong. **Clause 17** amends section 233 to allow a declaration of solvency to be made other than at a meeting of directors if the directors have passed a resolution authorizing the declaration to be made. This will give more flexibility to the directors in making the declaration.

21. **Clauses 18 to 21** repeal section 290A to remove the Registrar’s power to strike off a company for failure to file annual returns and make consequential amendments to related sections. **Clause 22** adds new sections 291AA to 291AB to provide for a new procedure for deregistration of solvent, defunct private companies. The new procedure will not be available to certain categories of companies set out in the Sixteenth Schedule. These include authorised institutions, authorised insurers, registered dealers and investment advisers, licensed leveraged foreign exchange traders and approved trustees.

22. Section 344A of the Ordinance provides that a private company may pass a resolution to declare itself a “dormant company”, which is defined as a company having “no significant accounting transaction”. A dormant company is exempted from certain requirements under the Ordinance. Similar to the new deregistration provisions, dormant company status is not available to certain categories of companies. **Clause 32** amends section 344A to add two more categories (i.e. licensed leveraged foreign exchange traders and approved

trustees) to the list of companies to which the provisions on dormant companies do not apply and move the list from the principal ordinance to the new Sixteenth Schedule to facilitate future updating.

LEGISLATIVE TIMETABLE

23. The legislative timetable is as follows -

Publication in the Gazette	19 February 1999
First Reading and commencement of Second Reading debate	10 March 1999
Resumption of Second Reading debate, committee stage and Third Reading	to be notified

HUMAN RIGHTS IMPLICATIONS

24. The Department of Justice advises that the proposed legislation has no human rights implications.

BINDING EFFECT OF THE LEGISLATION

25. The provisions in the Ordinance that are amended or added by the Bill do not bind the State by express provision.

FINANCIAL AND STAFFING IMPLICATIONS

26. The Companies Registry will set up a new unit through redeployment of staff to handle applications to deregister solvent, defunct private companies. Consequently, implementation of the proposal has no additional resource implications. The Registry, which operates as a trading fund department, will charge \$420 for each application which is calculated on a full cost-recovery basis. Other proposals have no financial or staffing implications.

ECONOMIC IMPLICATIONS

27. The proposed amendments ensure that the legal framework for companies is conducive to the running of business in Hong Kong.

PUBLIC CONSULTATION

28. The major proposals in the Bill have been discussed and supported by the Standing Committee on Company Law Reform. The Hong Kong Society of Accountants has been heavily involved in formulating the proposals to permit merger relief.

PUBLICITY

29. A press release will be issued on 19 February 1999 and a spokesman will be available to handle media enquiries.

ENQUIRIES

30. For enquiries, please call Miss Julina CHAN, Principal Assistant Secretary for Financial Services (Companies) at 2527 3909.

Financial Services Bureau
15 February 1999

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A BILL

To

Amend the Companies Ordinance.

Enacted by the Legislative Council.

1. Short title and commencement

(1) This Ordinance may be cited as the Companies (Amendment) Ordinance 1999.

(2) This Ordinance shall come into operation on a day to be appointed by the Secretary for Financial Services by notice in the Gazette.

2. Interpretation

Section 2(1) of the Companies Ordinance (Cap. 32) is amended by adding -

““Official Receiver” (破產管理署署長) means the Official Receiver appointed under the Bankruptcy Ordinance (Cap. 6);”.

3. Alteration of articles by special resolution

Section 13 is amended by adding -

“(3) Where the articles of a company are altered, the company shall within 15 days after the alteration deliver to the Registrar a printed copy of its articles as altered and certified as correct by an officer of the company.

(4) If a company makes default in delivering any document to the Registrar as required by subsection (3), the company and every officer of the company who is in default shall be liable to a fine and, for continued default, to a daily default fine.”.

4. Application of premiums received on issue of shares

Section 48B is amended -

(a) in subsection (3) -

(i) in paragraph (a), by adding “or” at the end;

(ii) in paragraph (b) (ii), by repealing “company; or” and substituting “company.”;

(iii) by repealing paragraph (c);

(b) by adding -

“(6) Sections 48C and 48D give relief from the requirements of this section, and in those sections references to the issuing company are to the company issuing shares as mentioned in this section.”.

5. Sections added

The following are added -

“Merger Relief

48C. Merger relief

(1) With the exception made by section 48D(6), this section applies where the issuing company has secured at least a 90 per

cent equity holding in another company in pursuance of an arrangement providing for the allotment of equity shares in the issuing company on terms that the consideration for the shares allotted is to be provided -

- (a) by the issue or transfer to the issuing company of equity shares in the other company; or
- (b) by the cancellation of any such shares not held by the issuing company.

(2) If the equity shares in the issuing company allotted in pursuance of the arrangement in consideration for the acquisition or cancellation of equity shares in the other company are issued at a premium, section 48B does not apply to the premiums on those shares.

(3) Where the arrangement also provides for the allotment of any shares in the issuing company on terms that the consideration for those shares is to be provided by the issue or transfer to the issuing company of non-equity shares in the other company or by the cancellation of any such shares in that company not held by the issuing company, relief under subsection (2) extends to any shares in the issuing company allotted on those terms in pursuance of the arrangement.

(4) Subject to subsection (5), the issuing company is to be regarded for the purposes of this section as having secured at least a 90 per cent equity holding in another company in pursuance of such an arrangement as is mentioned in subsection (1) if in consequence of an acquisition or cancellation of equity shares in that company (in pursuance of that arrangement) it holds

equity shares in that company (whether all or any of those shares were acquired in pursuance of that arrangement, or not) of an aggregate nominal value equal to 90 per cent or more of the nominal value of that company's equity share capital.

(5) Where the equity share capital of the other company is divided into different classes of shares, this section does not apply unless the requirements of subsection (1) are satisfied in relation to each of those classes of shares taken separately.

(6) Shares held by a company which is the issuing company's holding company or subsidiary, or a subsidiary of the issuing company's holding company, or by its or their nominees, are to be regarded for the purposes of this section as held by the issuing company.

(7) In relation to a company and its shares and capital, the following definitions apply for the purposes of this section -

“arrangement” (安排) means any agreement, scheme or arrangement, including an arrangement sanctioned under section 166 or 237;

“equity shares” (權益股份) means shares comprised in the company's issued share capital (excluding any part of such capital which carries no right to participate beyond a specified amount in a distribution of either profits or capital);

“non-equity shares” (非權益股份) means shares (of any class) not so comprised.

48D. Relief in respect of group reconstructions

- (1) This section applies where the issuing company -
 - (a) is a wholly-owned subsidiary of another company (“the holding company”); and
 - (b) allots shares to the holding company or to another wholly-owned subsidiary of the holding company in consideration for the transfer to the issuing company of assets other than cash, being assets of any company (“the transferor company”) which is a member of the group of companies which comprises the holding company and all its wholly-owned subsidiaries.

(2) Where the shares in the issuing company allotted in consideration for the transfer are issued at a premium, the issuing company is not required by section 48B to transfer any amount in excess of the minimum premium value to the share premium account.

(3) In subsection (2), “the minimum premium value” (最低溢價值) means the amount (if any) by which the base value of the consideration for the shares allotted exceeds the aggregate nominal value of those shares.

(4) For the purpose of subsection (3), the base value of the consideration for the shares allotted is the amount by which the base value of the assets transferred exceeds the base value of any liabilities of the transferor company assumed by the issuing company as part of the consideration for the assets transferred.

- (5) For the purpose of subsection (4) -
- (a) the base value of the assets transferred is to be taken as -
 - (i) the cost of those assets to the transferor company; or
 - (ii) the amount at which those assets are stated in the transferor company's accounting records immediately before the transfer,whichever is the less; and
 - (b) the base value of the liabilities assumed is to be taken as the amount at which they are stated in the transferor company's accounting records immediately before the transfer.
- (6) Section 48C does not apply in a case falling within this section.

[cf. 1985 c. 6 s. 132 U.K.]

48E. Provisions supplementary to sections 48C and 48D

(1) An amount corresponding to one representing the premiums or part of the premiums on shares issued by a company which by virtue of section 48C or 48D is not included in the company's share premium account may also be disregarded in determining the amount at which any shares or other consideration provided for the shares issued is to be included in the company's balance sheet.

(2) References in sections 48C, 48D and 48F and this section (however expressed) to -

- (a) the acquisition by a company of shares in another company; and
- (b) the issue or allotment of shares to, or the transfer of shares to or by, a company,

include (respectively) the acquisition of any of those shares by, and the issue or allotment or (as the case may be) the transfer of any of those shares to or by, nominees of that company; and the reference in section 48D to the company transferring the shares is to be construed accordingly.

(3) References in sections 48C, 48D and 48F and this section to the transfer of shares in a company include the transfer of a right to be included in the company's register of members in respect of those shares.

(4) In sections 48C and 48D and this section, "company" (公司), except in references to the issuing company, includes any body corporate.

[cf. 1985 c. 6 s. 133 U.K.]

48F. Provision for extending or restricting relief from section 48B

(1) The Financial Secretary may make regulations to make such provision as appears to him to be appropriate -

- (a) for relieving companies from the requirements of section 48B in relation to premiums other than cash premiums; or

(b) for restricting or otherwise modifying any relief from those requirements provided by sections 48C to 48E.

(2) Regulations made under this section may make different provision for different cases or classes of case and may contain such incidental and supplementary provisions as the Financial Secretary thinks fit.

(3) Where there is any conflict between any of the provisions of sections 48B to 48E and any of the provisions of regulations made under this section, the second-mentioned provisions shall prevail over the first-mentioned provisions.

[cf. 1985 c. 6 s. 134 U.K.]".

6. Length of notice for calling meetings

Section 114(1) (b) and (2) (b) is amended by repealing "other than an annual general meeting or" and substituting "which is neither an annual general meeting nor".

7. Contents of group accounts

Section 126(2) is amended by repealing everything after "group accounts" and substituting -

"shall -

- (a) deal with the subsidiary's state of affairs as at the end of its financial year ending with or last before that of the holding company, and with the subsidiary's profit or loss for that year; and

- (b) state the reasons why the financial year of the subsidiary does not coincide with that of the holding company.”.

8. Resignation of auditor

Section 140A(3)(a) is amended by repealing “except in the case of a private company,”.

9. Sections repealed

Sections 141A and 141B are repealed.

10. Provisions as to undischarged bankrupts acting as directors

Section 156(3) is amended by repealing “, and the expression “Official Receiver” (破產管理署署長) means the Official Receiver appointed under the Bankruptcy Ordinance (Cap. 6)”.

11. Register of directors and secretaries

Section 158 is amended -

- (a) in subsections (2) (a) and (3) (a), by repealing “, his nationality”;
- (b) in subsection (2A) -
 - (i) in paragraph (c), by adding “and” at the end;
 - (ii) by repealing paragraph (d);
 - (iii) in paragraph (e), by repealing “; and” and substituting a full stop;
 - (iv) by repealing paragraph (f);

- (c) by repealing subsection (4A);
- (d) in subsection (8), by repealing “, (4A)”.

12. Registrar to keep an index of directors

Section 158C(1) (b) is amended by repealing everything after “he” and substituting “can be identified as a director.”.

13. Further provisions relating to loans to officers, etc. of authorized financial institutions

Section 161BA(5) is amended by repealing “Secretary for Administrative Services and Information” and substituting “Chief Secretary for Administration”.

14. Interpretation

Section 168C(1) is amended by repealing the definition of “Official Receiver”.

15. Official Receiver appointed under Bankruptcy Ordinance to be official receiver for winding-up purposes

Section 188 is repealed.

16. Payments of liquidator into bank or Treasury

Section 202 is amended -

- (a) in subsection (1), in the proviso -
 - (i) by repealing “committee of inspection” and substituting “liquidator”;

(ii) by repealing “committee in” and substituting “liquidator in”;

(b) by repealing subsection (2) and substituting -

“(2) Subject to the proviso to subsection (1), where any such liquidator (other than the Official Receiver) receives any money in such capacity, he shall -

- (a) in the case of a sum not exceeding \$50,000, pay the money without any deductions therefrom to the Companies Liquidation Account not later than 14 days after its receipt;
- (b) in the case of any other sum, forthwith pay the money without any deductions therefrom to the Companies Liquidation Account.

(2A) Where a liquidator retains any sum (including part of any sum) in contravention of subsection (2) (a) or (b), then, unless he explains the retention to the satisfaction of the court, he shall pay interest on the amount so retained at the rate of 20 per cent per annum, and shall be liable to disallowance of all or such part of his remuneration as the court may think just, and to be removed from his office by the court, and

shall be liable to pay any expenses occasioned by reason of his default.”.

17. Statutory declaration of solvency in case of proposal to wind up voluntarily

Section 233 is amended -

- (a) in subsection (1), by repealing “Where” and substituting “Subject to subsection (1A), where”;
- (b) by adding -

“(1A) A declaration under this section may be made other than at a meeting of the directors of the company concerned if, but only if, a resolution has been passed -

- (a) authorizing such a declaration to be made;
- and
- (b) before the declaration is made.”.

18. Sections repealed

Sections 265(1) (da), 290A and 290B are repealed.

19. Government disclaimer of property other than immovable property vesting as bona vacantia

Section 290C(1) and (3) is amended by repealing “290B or”.

20. Effect of Government disclaimer under section 290C

Section 290D(1) is amended by repealing “290B or”.

21. Effect on section 290B of company's revival after dissolution

Section 290E is repealed.

22. Sections added

The following are added after section 291A -

“291AA. Application to Registrar for deregistration of defunct private company

- (1) Any of the following persons may apply to the Registrar for the deregistration of a private company -
 - (a) the company;
 - (b) a director or member of the company.
- (2) An application to deregister a private company can only be made if -
 - (a) all the members of the company agree to the deregistration;
 - (b) the company has never commenced business or operation, or has ceased to carry on business or ceased operation for more than 3 months immediately before the application; and
 - (c) the company has no outstanding liabilities.
- (3) An application made under this section -
 - (a) must be in the specified form; and
 - (b) must be accompanied by a written notice from the Commissioner of Inland Revenue stating that the Commissioner has no objection to the company being deregistered.

(4) If the applicant is a company, it must nominate a person to be given notice of the deregistration.

(5) The applicant must give the Registrar any further information that the Registrar may request in connection with the application.

(6) The Registrar may assume without inquiry that the information given in connection with the application is true unless the contrary is proved.

(7) If the Registrar is not aware of a failure to comply with any requirements under subsections (2) to (5), the Registrar must publish a notice of the proposed deregistration in the Gazette.

(8) The notice must state that unless an objection is received within 3 months after the date of publication of the notice, the Registrar may deregister the company and dissolve it.

(9) At the end of that 3 months, if the Registrar has not received any objection to the deregistration, the Registrar may deregister the company by publishing another notice in the Gazette declaring it to be deregistered upon the date of publication of the notice.

(10) On deregistering the company, the Registrar must also give notice of the deregistration to the applicant, or to the person nominated in the application to be given the notice.

(11) A company is dissolved on deregistration.

(12) Despite subsection (11), the liability (if any) of the officers and members of the company is to continue and may be enforced as if the company had not been dissolved.

(13) This section does not affect the power of the court to wind up a deregistered company.

(14) A person who, in connection with an application made under this section, knowingly or recklessly gives any information to the Registrar that is false or misleading in a material particular is liable to a fine and to imprisonment.

(15) In this section, “private company” (私人公司) includes a company deemed to be a dormant company under section 344A.

(16) This section does not apply to a company specified in the Sixteenth Schedule as a company to which this section does not apply.

291AB. Reinstatement of deregistered company

(1) If the Registrar is satisfied that a company was deregistered under section 291AA as a result of a mistake on the part of the Registrar, the Registrar may reinstate the registration of the company by publishing a notice in the Gazette declaring its registration to be reinstated upon the date of publication of the notice.

(2) The court may order that the Registrar reinstate the registration of a company that was deregistered under section 291AA if -

- (a) an application for reinstatement is made to the court within 20 years of the deregistration by a person who feels aggrieved by the deregistration; and

- (b) the court is satisfied that it is just that the registration of the company be reinstated.
- (3) If the court makes an order under subsection (2), it may -
 - (a) validate anything done between the deregistration of the company and its reinstatement; and
 - (b) make any other order it considers appropriate.
- (4) On the delivery of an office copy of an order under subsection (2) to the Registrar for registration, the Registrar must publish a notice in the Gazette to the effect that the registration of the company was reinstated on the date of the making of the order.
- (5) A company reinstated under subsection (1) or (2) is taken to have continued in existence as if it had not been deregistered.”.

23. Property and books etc. of dissolved company

Section 292 is amended -

- (a) by renumbering it as section 292(1);
- (b) in subsection (1) -
 - (i) by repealing “otherwise than under section 290A”;
 - (ii) by repealing “, subject and without prejudice to any order which may at any time be made by the court under sections 290 and 291,”;
- (c) by adding -

“(2) Subsection (1) is subject and without prejudice to the following -

- (a) any order that may at any time be made by the court under section 290 or 291;
- (b) a reinstatement that may be made under section 291AB.

(3) A person who was a director of a company immediately before its dissolution must ensure that all the books and papers of the company are kept for not less than 5 years after the dissolution.

(4) Subsection (3) does not apply in relation to the books and papers of the company that are required to be kept by another person under other requirements in this Ordinance or under any other Ordinance.

(5) A person who fails to comply with subsection (3) is liable to a fine.”.

24. Effect on section 292 of company’s revival after dissolution

Section 292A is amended -

- (a) in subsection (1), by adding”, or a reinstatement may be made under section 291AB” after “or 291(7)”;
- (b) in subsection (2) -
 - (i) by adding “or reinstatement” before “is made”;

- (ii) in paragraph (a), by adding “or reinstatement” before “so far as”.

25. Section added

The following is added -

“303B. Protection of Registrar etc. where computerized information etc. is used

(1) Where for the purposes of this Ordinance the Registrar provides a service or information involving computerized information or by means of magnetic tapes or any electronic modes, neither the Government nor a relevant person shall be liable for any loss or damage suffered by a user of the service or information by reason of an error or omission of whatever nature appearing therein or however caused if the error or omission, as the case may be, was made in good faith and in the ordinary course of the discharge of the duties of the relevant person.

(2) In this section, “relevant person” means -

- (a) the Registrar;
- (b) any other person appointed under section 303(2);
- (c) a person supplying information falling within subsection (1).”.

26. Effect of registration under Ordinance

Section 322(3)(g) is amended by repealing “or marriage of any female contributory,”.

27. Contributories in winding up of unregistered company

Section 328(2) is amended by repealing “or marriage of any female contributory,”.

28. Documents etc. to be delivered to Registrar by companies which establish a place of business in Hong Kong

Section 333 is amended -

- (a) in subsection (2) -
 - (i) in paragraphs (a)(i) and (b)(i), by repealing “, his nationality”;
 - (ii) in paragraph (aa) -
 - (A) in subparagraph (iii), by adding “and” at the end;
 - (B) by repealing subparagraph (iv);
 - (C) in subparagraph (v), by repealing “and” at the end;
 - (D) by repealing subparagraph (vi);
- (b) by repealing subsection (2A).

29. Registrar to keep an index of directors of oversea companies

Section 333C(1)(b) is amended by repealing everything after “he” and substituting “can be identified as a director.”.

30. Removal etc. of name of oversea company from register

Section 339A(2) is amended by repealing “倒閉” and substituting “不營運” .

31. Interpretation of provisions as to prospectuses

Section 343(2) is amended by repealing “it”.

32. Dormant companies

Section 344A is amended -

- (a) in subsection (4), by repealing “141B” and substituting “141C”;
- (b) by repealing subsection (8) and substituting -

“(8) This section does not apply to -

- (a) a company that is not a private company;
or
- (b) a company specified in the Sixteenth Schedule as a company to which this section does not apply.”.

33. Power to amend requirements as to accounts, Schedules, tables, forms and fees

Section 360 is amended by adding -

“(5) The Financial Secretary may, by order published in the Gazette, amend the Sixteenth Schedule.”.

34. Interpretation

Section 360A is repealed.

35. First Schedule amended

The First Schedule is amended, in Table A, in Part I, in regulation 89, by repealing “his widow” and substituting “the director’s spouse”.

36. Table of Fees to be paid to the Registrar of Companies

The Eighth Schedule is amended, in Part V -

(a) in paragraphs (ha) and (i), by repealing “倒閉” and substituting “不營運”;

(b) by adding -

“(p) application fee for deregistration of a private company
under section 291AA..... \$420”.

37. Provisions relating to acquisition of minority shares after successful take-over offer

The Ninth Schedule is amended, in Part 2, in paragraph 11, by repealing “屆滿前” and substituting “屆滿後”.

38. Punishment of offences under this Ordinance

The Twelfth Schedule is amended by adding -

“13(4)	Company failing to deliver to the Registrar document following alteration to its articles	Summary	level 3	\$300
291AA(14)	Person making false statement in connection with application for deregistration	Summary	level 6 and 6 months	-
292(5)	Former director failing to keep books and papers of dissolved company	Summary	level 3	”.

39. Provisions relating to acquisition of minority shares after successful buy out by share repurchase

The Thirteenth Schedule is amended, in paragraph 12, by repealing “屆滿前” and substituting “屆滿後” .

40. Matters for determining unfitness of directors

The Fifteenth Schedule is amended, in Part I, by repealing paragraph 3(e).

41. Schedule added

The following is added -

“SIXTEENTH SCHEDULE

[ss. 291AA,
344A & 360]

COMPANIES TO WHICH SECTION 291AA OR 344A
OF THIS ORDINANCE DOES NOT APPLY

PART I

COMPANIES TO WHICH SECTIONS 291AA AND 344A
OF THIS ORDINANCE DO NOT APPLY

1. An authorized institution as defined in the Banking Ordinance (Cap. 155).
2. An insurer as defined in the Insurance Companies Ordinance (Cap. 41).
3. A dealer registered under the Securities Ordinance (Cap. 333).
4. An investment adviser registered under the Securities Ordinance (Cap. 333).
5. A dealer registered under the Commodities Trading Ordinance (Cap. 250).
6. A commodity trading adviser registered under the Commodities Trading Ordinance (Cap. 250).
7. A licensed leveraged foreign exchange trader as defined in the Leveraged Foreign Exchange Trading Ordinance (Cap. 451).
8. An approved trustee as defined in the Mandatory Provident Fund Schemes Ordinance (Cap. 485).

9. A company having a subsidiary that falls within any of the categories specified in items 1 to 8.
10. A company that has fallen within any of the categories specified in items 1 to 9 at any time during the preceding 5 years.

PART II

COMPANIES TO WHICH SECTION 291AA OF THIS ORDINANCE DOES NOT APPLY

PART III

COMPANIES TO WHICH SECTION 344A OF THIS ORDINANCE DOES NOT APPLY”.

42. Validation of certain applications of share premium accounts

Where, at any time before the commencement of section 4(a), a share premium account has been applied by a company pursuant to section 48B (3)(c) of the principal Ordinance, then, notwithstanding section 49A (1)(b) of the principal Ordinance, that application of that account shall, by virtue of this section, be as valid and effectual as if that section had never been enacted.

43. Savings

Despite the repeal of sections 265(1)(da), 290A, 290B and 290E of the principal Ordinance, those sections are to continue to have effect in relation to a company that has been struck off under section 290A of the principal Ordinance as if those sections had not been repealed.

44. Consequential amendments

The enactments specified in the Schedule are amended as set out in the Schedule.

SCHEDULE

[s. 44]

CONSEQUENTIAL AMENDMENTS

Companies (Winding-up) Rules

1. Special bank account

Rule 157(1) of the Companies (Winding-up) Rules (Cap. 32 sub. leg.) is amended by repealing “at least one member of the committee of inspection, and by”.

2. Forms

The Appendix is amended by repealing Forms 82 and 83.

**Companies (Reports on Conduct of
Directors) Regulation**

3. Reports required under section 168I(3) of the Ordinance

Section 2(1)(a) of the Companies (Reports on Conduct of Directors) Regulation (Cap. 32 sub. leg.) is amended by repealing “registered in Hong Kong” and substituting “to which Part IVA of the Ordinance applies”.

Explanatory Memorandum

The principal purposes of this Bill are to amend the Companies Ordinance (Cap. 32) to

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- (a) give effect to various recommendations made by the Standing Committee on Company Law Reform (see clauses 3 and 4, new sections 48C to 48F at clause 5 and clauses 7, 8, 9, 11, 12, 17, 25 and 28 and new section 303B at clause 25);
- (b) revise the requirements applicable to liquidators in relation to the payment by them of company moneys to the Companies Liquidation Account (clause 16); and
- (c) introduce a new procedure for deregistering solvent, defunct private companies (new sections 291AA and 291AB at clause 22).

2. Clause 3 amends section 13 to require a company which has altered its articles to deliver to the Registrar of Companies (“the Registrar”) a printed copy of its articles as altered and certified as correct by an officer of the company.

3. Section 48B requires a company which issues shares at a premium (whether for cash or otherwise) to transfer to a share premium account a sum equal to the aggregate amount or value of the premiums on those shares. The section only provides a limited range of purposes for which the share premium account can be applied. The effect of this is to exclude companies in Hong Kong from the benefits of merger relief that arise in acquisitions, mergers and reconstructions. Accordingly, clause 4(b) amends section 48B to add a new subsection (6) to make the

requirements of that section subject to the relief provided at new sections 48C and 48D at clause 5.

4. Clause 5 adds new sections 48C to 48F. The new sections are based on sections 131 to 134 of the Companies Act 1985 of the United Kingdom (1985 c. 6 U.K.) as amended by the Companies Act 1989 of the United Kingdom (1989 c. 40 U.K.). New section 48C provides merger relief in that if a company holds 90 per cent or more of the issued share capital of another company as a result of an arrangement for the issue of shares by the first company in consideration of the issue or transfer to the first company of equity shares in the second company, then any share premiums arising need not be credited to the share premium account and the first company's accounts may show the shares acquired at an acquisition cost equal to the nominal value of the shares issued by it in exchange. New section 48D provides relief in respect of group reconstructions in that, *inter alia*, where a company which is a wholly-owned subsidiary of another company allots shares to the holding company in consideration for the transfer to it of assets other than cash, then if those shares are issued at a premium, the company is not required by section 48B to transfer any amount in excess of the minimum premium value to the share premium account. New section 48E provides interpretative provisions for new sections 48C, 48D and 48F. New section 48F empowers the Financial Secretary to make regulations to relieve companies from the requirements of section 48B in relation to premiums other than cash premiums, and to restrict or otherwise modify the relief from those requirements provided by new sections 48C to 48E.

5. Under section 126(2), where the financial year of a subsidiary does not coincide with that of its holding company, the group accounts

shall, unless the Financial Secretary on the application of or with the consent of the holding company's directors, otherwise directs, deal with the subsidiary's state of affairs as at the end of its financial year ending with or last before that of the holding company, and with the subsidiary's profit or loss for that financial year. Clause 7 amends that section to remove the Financial Secretary's discretion, and also to require the group accounts to state the reasons why the financial year of the subsidiary does not coincide with that of the holding company. Those reasons will be provided by the directors of the holding company.

6. Clause 8 amends section 140A(3)(a) to require a private company as well as a public company to send a copy of its auditor's notice of resignation to the Registrar.

7. Clause 9 repeals sections 141A and 141B as spent transitional provisions.

8. Clause 11 amends section 158 to delete the requirements that a company's register of its directors and secretaries shall contain particulars of a director's nationality and of directorships he holds in other companies. (Clause 28 similarly amends section 333).

9. Clause 12 amends section 158C(1)(b) to take account of the fact that the Registrar will use computerized information to keep the index of directors up to date. (Clause 29 similarly amends section 333C(1)(b)).

10. Clause 17 amends section 233 to enable a statutory declaration of solvency by the directors of a company to be made other than at a meeting of the directors of the company if a resolution has been passed authorizing the declaration to be made.

11. Clauses 18 to 21 repeal section 290A to remove the Registrar's power to strike off a company for failing to file annual returns, and make consequential amendments to related sections.

12. Clause 22 provides for the new deregistration procedure for solvent, defunct private companies. New section 291AA sets out, *inter alia*, the parties who may apply to the Registrar to deregister a private company, the circumstances in which the application can be made, the power and the procedure for the Registrar to deregister a company, and the effect of deregistration. Companies that cannot be deregistered under this new procedure are listed in the new Sixteenth Schedule, which may be amended by the Financial Secretary by order published in the Gazette (clauses 33 and 41). An offence is created for giving false or misleading information in connection with an application of deregistration (new section 291AA(14)). New section 291AB provides for the circumstances in which a deregistered company may be reinstated and the effect of reinstatement.

13. Clause 23 adds new provisions under section 292, requiring, *inter alia*, a former director to ensure that the books and papers of a dissolved company are kept for at least 5 years after the dissolution. Failure to comply with this requirement is made an offence (new section 292(5)).

14. Clause 25 adds a new section 303B to provide protection for, *inter alia*, the Registrar where the Registrar provides a service or information involving, *inter alia*, computerized information and a user of the information suffers loss or damage by reason of an error or omission therein.

15. Clause 32 amends section 344A to, *inter alia*, transfer to the new Sixteenth Schedule (clause 41) the list of companies to which the provisions on dormant companies do not apply. 2 more categories of companies are added to the list, which may be amended by the Financial Secretary by order published in the Gazette (clause 33).

16. Clause 42 validates prior actions taken under section 48B(3)(c) (now repealed by clause 4(a)) which may have conflicted with section 49A(1)(b).

17. Clause 43 saves, *inter alia*, the subsisting rights of a person aggrieved by a company having been struck off under section 290A.

18. Clause 44 and the Schedule consequentially amend various regulations and rules made under the Companies Ordinance (Cap. 32).