立法會
Legislative Council

LC Paper No. CB(1) 2031/99-00
(These minutes have been seen by the Administration and cleared by the Chairman)

Ref: CB1/BC/6/99/2

Bills Committee on
Companies (Amendment) Bill 2000

Minutes of meeting
held on Tuesday, 7 March 2000, at 10:45 am
in Conference Room A of the Legislative Council Building

Members present	**:**	Hon Ronald ARCULLI, JP (Chairman) Hon Eric LI Ka-cheung, JP Hon Margaret NG Hon HUI Cheung-ching Hon SIN Chung-kai Hon Mrs Miriam LAU Kin-yee, JP
Members absent	**:**	Hon James TIEN Pei-chun, JP Hon HO Sai-chu, SBS, JP Hon Albert HO Chun-yan Hon LEE Cheuk-yan Hon CHAN Kwok-keung Hon CHAN Yuen-han
Public officers attending	**:**	**Financial Services Bureau** Miss Julina CHAN Principal Assistant Secretary for Financial Services Mr L W TING Assistant Secretary for Financial Services

Official Receiver's Office

Mr E T O' CONNEL
Official Receiver (Ag)

Mr Edward LAU
Assistant Principal Solicitor

Mr Jeremy GLEN
Assistant Principal Solicitor

Department of Justice

Mr Geoffrey FOX
Senior Assistant Law Draftsman

Miss Shandy LIU
Senior Government Counsel

Clerk in attendance : Ms LEUNG Siu-kum
Chief Assistant Secretary (1)4

Staff in attendance : Mr KAU Kin-wah
Assistant Legal Adviser 6

Miss Irene MAN
Senior Assistant Secretary (1)9

I Meeting with the Administration

(LC Paper No. CB(1)1115/99-00(01) was tabled at the meeting and circulated to members for retention.)

As the Administration had consulted a considerable number of organizations regarding the principles of corporate rescue in December 1998, the Chairman enquired whether they agreed to the clauses of the Bill. The Principal Assistant Secretary for Financial Services (PAS/FS) advised that the consultation exercise conducted in 1998 was mainly focused on the Law Reform Commission's (LRC's) proposal to widen the scope of the Protection of Wages on Insolvency Fund (PWIF) so that employees who were laid off by a company undergoing rescue and had wages/statutory entitlement outstanding could claim from the PWIF. Several options were put forward in the consultation paper on the treatment of outstanding entitlement of employees owed by a company in provisional supervision. In responding to the consultation paper, almost all respondents pledged their support in principle to

the introduction of a statutory corporate rescue in Hong Kong. The employer/employee groups, however, unanimously objected to the LRC's proposed change in use of the PWIF. In the consultation in 1998, the Administration was still drafting the Bill, hence it was not given to the respondents. At the close of the consultation, the Administration had reported to the Financial Affairs Panel of Legislative Council and the employer/employee groups on the Administration's proposal to require that the company had to clear all outstanding statutory entitlement of employees before initiating corporate rescue. The Administration had not received any objection from the employer/employee groups on this aspect since the gazettal of the Bill. Separately, it was understood that the Hong Kong Association of Banks and the Hong Kong Society of Accountants (HKSA) had notified the Administration that they would submit their views on the Bill shortly. As such, the Chairman suggested inviting views from all the organizations again for the Bills Committee's consideration. The deadline was scheduled for 21 March 2000. PAS/FS said that as per the Bills Committee's request, the Administration had also written to the Small and Medium Enterprises Committee seeking their views on the Bill.

(*Post-meeting note*: The deadline for receiving the submissions was postponed to 15 April 2000.)

2. At the request of the Chairman, PAS/FS briefed members on the Administration's response to the concerns raised at the previous meeting:

Consequences of non-compliance with sections 141(7) and 116BA

3. PAS/FS advised that a penalty clause on failure by directors and company secretaries to comply with section 116BA of delivering the resolution to the auditor would be necessary, for such resolution would only be passed through the unanimous written consent procedure without the need of convening a meeting. If the auditor was not notified in time, he would not have the opportunity to obtain the relevant document at a physical meeting. She also clarified that the existing section 141(7) of the Companies Ordinance (Cap.32) was different from the new section 116BA, in which the former conferred a general right on the auditor to have access to general meetings and notices, while the latter imposed an obligation on directors and company secretaries to notify the auditor of the proposed written resolution. Since the two sections were related to different subjects, it would not be appropriate to make direct comparison between the two on the necessity of a penalty clause. Although there was no penalty clause in section 141(7), if an auditor failed to obtain information necessary for the purpose of audit, he could state this fact in his audit report. At the request of the Chairman, the Senior Assistant Law Draftsman (SALD) undertook to provide the definition of general meetings.

4. Mr Eric LI pointed out that the accounting profession would welcome the new section 116BA for auditors should be informed of any major

changes in a company. Apart from being notified of the Annual General Meeting (AGM), auditors would also have to be informed of the cause for any Extraordinary General Meeting (EGM). Although auditors could request the company's meeting minutes, the minutes were not always fully documented, especially in non-listed companies. Mr Eric LI further pointed out that most of the small private companies or family businesses would seek lawyers or accountants to help fulfil the statutory requirements. He also clarified that once the company held its first general meeting and appointed an auditor, the auditor's term of office would last throughout the year until the following AGM. In other words, there would be an auditor in office at any point of time.

5. Although the company was required by law to appoint an auditor at its first AGM, the Chairman pointed out that the company was not required to hold its first AGM until 15 months after its incorporation. He enquired the arrangement before the first AGM, for instance, where an EGM was held before the appointment of an auditor. SALD advised that the provision was based on the UK legislation and when the company had no auditor, the new section would not apply and there was no one to notify. Upon the Chairman's enquiry about the circumstances under which it might be impracticable for notice to be given to auditors, SALD advised that if the company did have auditors, there was seldom an occasion where the notice could not be given to them unless it was to do with absolute urgency of time.

6. The Chairman enquired whether every director of a company would be required to give the notice to the auditors. The Secretary of the Standing Committee on Company Law Reform (S for SCCLR) advised that the board of directors should decide among themselves who to give the notice. However, the Chairman pointed out that the drafted clause would imply that all directors would be responsible for giving the notice and they would have committed an offence technically when failing to comply with the requirement. SALD undertook to redraft the clause.

7. Noting that there was no penalty provision in section 141(7) for directors and company secretaries failing to comply with the serving of notice to auditors, the Chairman expressed concern on whether there should be sanction in the new section 116BA. SALD reiterated that the penalty provision as proposed in section 116BA was based on the UK legislation. However, he undertook to consider the penalty provision again.

Validity of resolution agreed under section 116B upon failure of compliance with section 116BA(1)

8. PAS/FS advised that as provided in the new section 116BA(4), even if directors and company secretaries failed to notify the auditors of the resolutions at or before the time the resolutions were supplied to a member for signature, the resolutions would still be valid. The Chairman suggested the

Administration improve the drafting of section 116BA(4) by clarifying that non-compliance with the requirement of section 116BA should not affect the validity of the resolutions. SALD undertook to consider the changes accordingly.

Legality of internet meetings and requirement of physical signature of resolutions

9. PAS/FS advised that the Companies Ordinance (Cap.32) did not have any provisions expressly prohibiting the passing of resolutions via the internet. She was given to understand that under the Electronic Transactions Ordinance (Cap.553), which has been enacted, the passing of a resolution with the acceptable signature via the internet would be permitted provided that parties concerned consented to such an arrangement. The relevant sections of the Electronic Transactions Ordinance (Cap.553) would come into effect in April 2000.

10. Mr Eric LI suggested incorporating a section in the Bill making specific reference to the relevant provisions of the Electronic Transactions Ordinance (Cap.553). The Chairman expressed reservation about the member's proposal and considered that the Secretary for Financial Services, on resumption of the Second Reading debate of the Bill, should simply point out that with the introduction of internet meetings, there would be added convenience for persons of different occasions to use the relevant provisions of the Electronic Transactions Ordinance (Cap.553).

Opportunity for the director ordered to be examined to set aside the order

11. PAS/FS advised that since section 14 of the High Court Ordinance (Cap.4) and Order 59, r.4(1)(b) of the Rules of the High Court had provided generally for the setting aside of order in any civil matter, there was no need to add a specific clause to the proposed section 168IA to provide directors with an additional avenue to set aside the examination order.

Interests of minority creditors upon amendment to section 209A(6)

12. The Official Receiver (Atg) (OR/Atg) advised that since section 209A(2)(a) had provided that the court would have to consider the wishes and considerations of the creditors as a whole when dealing with an application for converting a compulsory winding up to creditors' voluntary winding up, the Administration regarded that there was sufficient protection for creditors within the present framework and it was not necessary to make it compulsory for the OR to submit a report pursuant to section 209A(6). According to his own experience of the conversion exercise from compulsory to creditors' voluntary winding up, once the exercise took place upon the court's approval, it would usually gain the full support from all creditors due to financial and flexibility reasons.

13. Upon Mr Eric LI's enquiry about the background of the legislation concerned, OR/Atg advised that section 209A was only active in 1984 and it was based on the recommendations of a report issued by the Companies Law Commission in UK in 1960. In Hong Kong, the Company Law Commission recommended in 1973 that creditors should be able to convert a compulsory winding up to a creditors' voluntary winding up. However, the UK report neither found its way into the UK legislation nor anywhere else in the common law world. The conversion was a unique statutory provision in Hong Kong. After an amendment in 1990, the section came into its present format and there were about 40 to 50 applications converting compulsory into voluntary winding ups.

Circumstances in which OR would appoint a special manager under section 216(1)

14. OR/Atg advised that the Administration could apply under section 216 to court for approval on the appointment of a special manager under restrictive circumstances. However, there were other circumstances where the OR might wish to apply to the court for approving the appointment of a special manager to handle certain aspects of work of a compulsory winding up, especially when there was dramatically increased workload.

Rationale of the Standing Committee on Company Law Reform (SCCLR) for the proposed repeal of section 228A

15. OR/Atg advised that the SCCLR had recommended that section 228A should be repealed because it would open to abuse and there was anecdotal evidence suggesting that directors would possibly appoint tame liquidators. As there would usually be a five-week gap between the appointment of the provisional liquidator and the holding of creditors meetings, the creditors could be left with a "fait accompli" if the directors had appointed provisional liquidators in circumstances other than an emergency. As there were provisions in the legislation both for creditors' voluntary winding up and compulsory winding up by the court, section 228A was regarded not necessary and should be repealed. PAS/FS supplemented that in case of a real emergency, a petition could always be presented to the court for the appointment of a provisional liquidator under section 193.

16. As the directors would be held liable for insolvent trading, the Chairman enquired what they should do if they believed the company could not continue its business. OR/Atg advised that the directors should first convene a meeting to inform the shareholders of the situation accordingly. Upon passing a resolution for creditors' voluntary winding up among the shareholders, the directors should convene another meeting with the creditors. In view of the company's insolvent situation, the creditors might appoint a liquidator to oversee the liquidation procedures. Alternatively, the company could file its own winding up petitions. Addressing the Chairman's enquiry on the period

required to convene a creditors' meeting, OR/Atg said that it would normally take about a few weeks to convene the meeting and in the meantime, the directors should cease trading in all manners. At Mr Eric LI's request for the statistics about the circumstances in which section 228A was invoked in the past, OR/Atg undertook to provide it for members' reference.

17. On Mr Eric LI's enquiry about making a declaration that the company would be able to pay its debts within a certain period, the Chairman remarked that in creditors' voluntary winding up, the directors need not make such declaration.

18. The Chairman took the view that a winding up procedure should not be entirely repealed just because of anecdotal evidence of abuse. He emphasized that section 228A should only be repealed when there was an alternative for the directors. It would not be fair to the directors if they were not allowed to carry on business and had to be held responsible for the liability of the company. He was still concerned about the consequences on the company and on the employees when the procedures in section 228A were no longer available. As such, he sought clarification on whether LRC had considered the issue upon recommending the repeal of the section.

19. Mr Jeremy GLEN, the Assistant Principal Solicitor (APS) advised that under section 193, petitions would be presented to the court for the appointment of the provisional liquidator, the conduct of the provisional liquidator would then be subject to the control of the court, and the petition in itself was to the benefit of the employees which in turn would trigger the functioning of the PWIF. However, under section 228A, in order to get the benefit of the PWIF, employees had to approach the Legal Aid Department on their own and sought to present a petition to trigger the protection from the PWIF according to the Protection of Wages on Insolvency Ordinance (Cap.380). Therefore, the protection for employees would be better under section 193 than the application under section 228A.

20. OR/Atg supplemented that under the Protection of Wages on Insolvency Ordinance (Cap.380), if there were less than 20 employees in a company, the Protection of Wages on Insolvency Fund Board would have a discretion on whether or not to file a winding up petition with the court and trigger the PWIF payment; for company which had more than 20 employees, the Board has no such discretion and a winding up petition would have to be filed with the court in order to trigger the PWIF payment. The Chairman was not convinced by the Administration's explanation. He remarked that there was basically no difference between the two ways from the employees' point of view.

Committee Stage amendments

21. PAS/FS advised that following the discussion at the previous meeting, the Administration would move two Committee Stage amendments to clauses 14 and 33.

Clause-by-clause examination of the Bill

Clauses 47 to 49

22. SALD advised that the clauses were technical amendments to reduce the documents required to be filed by overseas companies and directors. The draftsman was not prepared to replace "oversea company" with "overseas company" in clause 49. Members had no comment on these clauses.

Clause 50

23. PAS/FS advised that the clause was to rectify a technical omission when amending the Professional Accountants Ordinance (Cap.50) in 1994. Members made no comment on this clause.

Clause 51

24. SALD advised that sub-clause (a) was a technical amendment, (b) was the new offences to be examined in parallel with clause 41 and mostly to do with Part IVB on corporate rescue, and (c) was a consequential amendment to the repeal of section 228A. Members noted the clause with no comments.

Clause 52

25. Members made no comment on the clause.

Clause 53

26. SALD said that the 17th and 18th schedules would have to be discussed in context with Part IVB on corporate rescue while the 19th schedule should tie with the part on insolvent trading. Members noted with no comment.

Clause 54

27. SALD advised that the clause sought to make consequential amendments to both the corporate rescue part and other parts of the Bill.

28. There being no other business, the meeting ended at 12:25 p.m.

(*Post-meeting note*: the Administration's response to the members' concerns raised at the meeting was circulated to members vide LC Paper No. CB(1)1214(01)).

Legislative Council Secretariat
7 September 2000