立法會
Legislative Council

LC Paper No. CB(1)2132/99-00
(These minutes have been seen by the Administration and cleared with the Chairman)

Ref: CB1/BC/6/99/2

Bills Committee on
Companies (Amendment) Bill 2000

Minutes of meeting
held on Tuesday, 23 May 2000, at 10:45 am
in Conference Room A of the Legislative Council Building

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

Mr G W E JONES
Registrar of Companies

Mr John BUSH
Secretary of the Standing Committee on Company Law Reform

Official Receiver's Office

Mr E T O'CONNEL
Official Receiver (Ag)

Mr Edward LAU
Assistant Principal Solicitor

Department of Justice

Mr Geoffrey FOX
Senior Assistant Law Draftsman

Miss Shandy LIU
Senior Government Counsel

Clerk in attendance : Mr Andy LAU
Chief Assistant Secretary (1)2

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

Miss Irene MAN
Senior Assistant Secretary (1)9

I Confirmation of minutes of meeting
(LC Paper No.CB(1)1637/99-00)

The minutes of the meeting held on 22 February 2000 were confirmed.

II Meeting with the Administration
(LC Paper Nos. CB(1)1447, 1508 and 1538/99-00 and 1607/99-00(01))

2. Members noted the Administration's response towards the technical amendments other than corporate rescue and insolvent trading in the Bill made by the Hong Kong Society of Accountants (HKSA) and the Law Society of Hong Kong (LS). Addressing Mr James TIEN's enquiry on whether HKSA and LS were aware of the Administration's response to their submissions, the Deputy Secretary for Financial Services (DS for FS) replied in the negative.

3. Members went through the latest set of the Committee Stage amendments (CSAs) tabled at the meeting.

(*Post-meeting note*: The set of CSAs tabled at the meeting was circulated to members vide LC Paper No.CB(1)1673/99-00 for retention.)

Clauses 1(2), 2(b), 9

4. Members noted the clauses and made no comments.

Clause 14

Section 116B(6A)

5. As the term "book" had been understood as a record for resolutions, Mr Albert HO enquired whether the term "book" would include other forms of storage such as computer disk, and whether it was in line with the practice in other jurisdictions. The Registrar of Companies (R of C) advised that the term "book" would only appear in the form of a hard copy and the practice concerned was based on section 382A of the UK Companies Act 1985 where the records of the unanimous written resolutions were kept in a book.

Section 116BA

6. The Chairman said that he had asked the Legal Adviser to draft CSAs to section 116BA and other related clauses which sought to address the confusion possibly arising from section 116BA(2) regarding the party to be charged with the responsibility of giving the notice to the auditor when there were many directors in a company. However, R of C advised that members' concern could be better met by the proposed amendment in section 116BA(3)(c) giving directors or secretaries the grounds for defence.

7. The Chairman enquired why the burden was not fixed on the secretary alone but on a number of directors which created the confusion. Though the Secretary of the Standing Committee on Company Law Reform (S of the SCCLR) pointed out that the director himself might also be the secretary in small companies, the Chairman

considered that in that case, the person should be found responsible under the law as a secretary but not as a director. If the responsibility was clearly defined to be on the secretary, even if there were only two directors in a small company and one of which was also the secretary, the charge would then be clearly on the one with secretarial duties. However, S of the SCCLR pointed out that directors might sometimes have to hold a meeting very quickly, and if the secretary was not around, the secretary would then be found liable in his total ignorance of the matter. At present, there were plenty of defences in the provisions for directors who were required to give the notice. DS for FS shared the concern of the S of the SCCLR that if the secretary was held responsible but was not around when the directors wanted to call upon a paper meeting, there was no sufficient defence for him. However, the Chairman considered that sufficient defence was already found in the existing section 116BA(3).

8. Addressing the Chairman's query on the person to be responsible for giving the auditor notice of the company's Annual General Meeting or Extraordinary General Meeting, S of the SCCLR advised that there was no one specifically designated for the responsibility and both the directors and the secretary would be liable to do that. Mr Eric LI pointed out that it would be unusual to shift the burden of notifying the auditor to the secretary alone for it would become inconsistent with the principle behind the entirety of the Companies Ordinance (Cap.32). He preferred resting the responsibility upon the directors for they were well aware of the resolutions and it was their duty to notify the auditor. However, the Chairman maintained the view that keeping the responsibility on the secretary alone was clear and simple.

9. R of C advised that the Companies Ordinance had been referring to the collective responsibilities of directors. Since the secretary was not burdened with any specific responsibility regarding circulation of information to auditors in connection with general meetings of a company in section 141, a parallel arrangement should be adopted in section 116BA. In that case, the Chairman considered that the new section 116BA should have been drafted according to section 141 by only saying that the auditor should be notified in order to maintain the consistency of legislation, leaving the company itself to fix that responsibility and thus avoided the doubt in the new provision. Moreover, there was no consequence of not obliging section 141 but the new provision would make breaching section 116BA a criminal offence.

10. As a matter of basic principles, R of C explained that section 141 dealt with the general right of an auditor to attend the general meeting but the new provision would do away with actual meetings if there was a unanimously signed resolution, and in those circumstances, it would be possible for an auditor not being given a notice. However, the Chairman said that it was not the need to notify the auditor that was in doubt but the party who had the responsibility to give notice should be clearly defined. R of C reiterated that the directors should bear a collective responsibility for the matter as it had been the case throughout the Companies Ordinance. For instance, in section 109(4), the company and every officer would be liable to a fine regarding the fundamental disclosure instrument of the annual return.

11. The Chairman sought clarification on whether both the directors and the secretary would be held responsible in section 116BA if the auditor did not receive any notice. S of the SCCLR advised that there were defences for the director who was not aware of the need of the notice, and only the director being given the specific responsibility by other fellow directors to give the notice would be prosecuted should he fail to discharge the duty. Therefore, the matter would be narrowed down in practice to a particular director instead of the whole board. The Chairman enquired how the nomination of a particular director would take place to fix the responsibility on him. S of the SCCLR advised that there might be internal procedures in the company to assign specific duties to a person. This would come under the defence in section 116BA(3)(c). DS for FS supplemented that the secretary should be responsible for setting up a system for notifying the auditor and the directors should have their defence under section 116BA(3)(c) so that they would not be liable. Nevertheless, it would be up to individual companies to set up their own internal systems to ensure compliance with the provisions.

12. Mr James TIEN enquired whether there should be a difference in liability between executive and non executive directors under the Companies Ordinance for the latter might not be aware of the calling of meetings but the executive directors and the company secretary would certainly know about the matter. In response, R of C said that both executive and non executive directors should have exactly the same statutory duties and responsibilities.

13. Instead of making the failure to serve the notice on the auditor a criminal offence, Mr Albert HO suggested either making it a civil offence by imposing a fine on the party concerned or making the resolution effective only after it was endorsed by the auditor. However, the Chairman considered that Mr HO's suggestion would still involve the step of the verification of the auditor's receipt of the notice.

14. Mr Eric LI considered that inconsistency among different sections of the Companies Ordinance would confuse practitioners. On the one hand, the law should provide sufficient defence for directors; on the other hand, it should provide for appropriate penalties for directors deliberately concealing facts from the auditor.

15. The Chairman still found the draft legislation unacceptable for it created uncertainties. It might be better to put the burden on the company making it an internal matter for the company to sort out. He also held the view that the proposed section 116BA(2A) had not solved the problem for it only said if someone in the company had given the notice to the auditor, then no one else would be liable. Therefore, no person would commit an offence if the secretary had given the notice without making reference to the board. The same confusion among the directors of not knowing who had given the notice would still exist. Moreover, since the section did not require every single director and secretary to send the notice, if for some reasons it was not sent and there was no internal arrangement defining who would be charged with the duty, then everyone would be held responsible according to the legislation.

16. Mr James TIEN sought the Administration's comments on placing the burden of the serving of notice on the auditor on the company instead of on the directors and secretary. In response, SALD suggested that section 116BA(3) be redrafted along the line so that the director who proposed the resolution or the secretary of the company who was tied directly to the director putting forward that resolution would bear the onus to serve the notice on the auditor. In other words, not all directors but just the one putting up the resolution would be liable. Nevertheless, R of C pointed out that though it might be able to address members' concern, it would also mark an immediate departure from the Companies Ordinance which had been referring to the collective responsibilities on all directors and would possibly have other impacts on the whole of the Ordinance which could not be determined at this stage. SALD undertook to examine the issue further.

17. Moreover, the Chairman suggested amending section 116BA(3)(c) to "that he had reasonable grounds to believe that a copy of the notice was sent to the company's auditors" where the "reasonable grounds" might refer to some internal arrangements. R of C advised that the section had been copied to a large extent from section 123(6) of the Companies Ordinance where defence was provided for directors. However, the Chairman considered it not appropriate to compare the two provisions for section 123(6) was concerned about the company accounts while section 116BA about posting a notice literally. It would be simpler to say that the defendant had reasonable grounds to believe that a copy of the resolution was sent to the company's auditor. R of C agreed to consider the amendment.

(*Post-meeting note*: The revised set of CSAs was circulated to members vide LC Paper Nos. CB(1)1698 and 1771/99-00.)

18. The Chairman enquired whether the provisions in section 116BA were identical to the relevant UK provisions and how the resolution could be sent to the auditor at the time it was supplied to a member for signature in section 116BA(1), given there might be more than one member. R of C advised that in general terms, the provisions were just based on section 381(a) to (c) of the UK Companies Act 1985. SALD advised that the purpose of the notice was to ensure that the auditor would be aware of what was going on before anything happened within a reasonable time.

Clauses 16, 17, 18, 19(b)(i) and (ii), (c)(i) and (d), 21, 22 and 24

19. Members noted the deletion of the clauses.

Clause 30(a)(iii) and 33(b), 38

20. Members noted the clauses and made no comments.

Clause 39

21. The Chairman advised that the Administration had proposed an amendment to the existing section 228A of the Companies Ordinance to remove the uncertainty or the possibility of abuse arising from the "good and sufficient reasons" as phrased in the existing section 228A(1)(b), for at present, a person could swear an affidavit claiming there were good and sufficient reasons for winding up without any further elaboration.

22. The Chairman enquired how the criteria of "not reasonably practicable" could be satisfied under section 228A(1)(b). DS for FS advised that the expression had been quoted from a case heard in 1997 in which Mr Justice Rogers ruled that winding up under section 228A should be used only in circumstances of extreme urgency, where provisions elsewhere in the Companies Ordinance on the winding up of companies could not be resorted to because it was not reasonably practicable to do so.

23. OR/Atg further advised that there were different circumstances when it was not reasonably practicable to use other provisions to wind up the company. For example, the shareholders of a joint venture company might have a covenant not to wind up the company, but when the company had to be put into liquidation for its own interest, the covenant might preclude them from winding up the company; another scenario was that where the shareholders for some reasons failed to contact the directors, but the company had to be wound up quickly, then it was again not reasonably practicable to wind it up by using other provisions in the Companies Ordinance. Taking into account the different scenarios and Mr Justice Rogers' comments, as well as members' concern about the repeal of section 228A, the Administration had come up with the proposed amendments. Members raised no objection to the proposed amendments.

24. Mr Albert HO enquired about the terms of imprisonment as mentioned in section 228A(2)(b). OR/Atg advised that as section 228A currently stood, there were four provisions in the Twelfth Schedule which provided for fine and imprisonment. As far as section 228A(2)(b) was concerned, it was six months' imprisonment at maximum and a Level 5 fine. Mr HO expressed concern about the penalty for there might be circumstances when the director might honestly believe that he was reasonable but only that the prosecutor was of an opposite view. However, OR/Atg advised that the OR Office had not been aware of any prosecution undertaken under the section.

25. The Chairman held the view that if a company was on its way to winding up, it would usually seek advice from professionals such as accountants or lawyers. Mr Eric LI said that since it would be a declaration, assistance would have to be sought from lawyers while the accountant would only submit the relevant information for the

lawyers' consideration. It would be the court's duty to sanction the declaration made by the directors. Mr Albert HO enquired whether it would constitute reasonable grounds for defence when a director held certain belief honestly but was later found to be unreasonable. DS for FS advised that it could be a defence in court and it would be a matter for the court to decide.

Clauses 40, 41, 42(b)(iii), 43, 44 and 45

26. Members noted the deletion of the clauses.

Clauses 51, 52, 53 and Schedule

27. Members noted the clauses and the deletion of certain sections of the Schedule.

Concluding remarks

28. Mr Eric LI urged the Administration to make good use of the coming few months to consult the relevant parties on the part of corporate rescue for further discussion in future. Mr Albert HO expressed that although the Committee could not finish the parts on corporate rescue and insolvent trading in the current LegCo term due to time constraint, he would appreciate it if the Administration would bring them back in the next term for scrutiny. Meanwhile, he urged the Administration to bring the proposal on the flexibility in the trust account requirement to the Labour Advisory Board (LAB) for consultation immediately.

29. The Chairman advised that in taking the matter to LAB, the Administration might also gather cases of similar nature from the Judiciary in order to explain to LAB that under certain circumstances, if employees volunteered to opt out, the consequence could be advantageous. In any case, the employees could also choose not to opt out and would have nothing to lose. DS for FS undertook to take the matter to LAB for consultation. Members agreed that the Second Reading debate on the Bill be resumed on 21 June 2000.

30. As members had no other comments, the Chairman advised that he would make a report to the House Committee on 9 June 2000 and thanked all parties for their contribution concerned.

31. There being no other business, the meeting ended at 12:05 p.m..

Legislative Council Secretariat
16 August 2000