立法會
Legislative Council

LC Paper No. CB(1) 1689/99-00
(These minutes have been
seen by the Administration)

Ref: CB1/BC/6/99/2

Bills Committee on
Companies (Amendment) Bill 2000

Minutes of meeting
held on Tuesday, 29 February 2000, at 2:30 pm
in Conference Room A of the Legislative Council Building

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

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)1074/99-00(01))

Members agreed to go through the technical and miscellaneous amendments of the Bill first which basically covered clauses 1 to 23, 25 to 43 and 46 to 52, before continuing with the parts on corporate rescue and insolvent trading under clauses 24, 44, 45, 53, 54 and the Schedule.

Clause-by-clause examination of the Bill

Clauses 1 and 2

2. Members noted the two clauses and clause 2(b) was to do with corporate rescue and insolvent trading.

Clause 3

3. Members had no comment on the clause.

Clause 4

4. Members noted that clause 4 was a consequential amendment to the proposed section 116B and agreed to examine the proposed sections 116B, 116BA and 116BB under clause 14 first.

Clause 14

5. The Registrar of Companies (R of C) briefed members about the rationale behind the amendments in clause 14. Currently, there were doubts whether the existing section 116B enabled a company to use a unanimous written resolution to transact company business instead of passing a resolution at a general meeting of the company. R of C explained that a number of sections like Sections 53 and 57B appeared to require a company to exercise certain powers at a general meeting. For example, section 57B(1) stated that "the director shall not without the prior approval of the company in general meeting, exercise any power of the company to allot shares". Thus, even all the shareholders were prepared to sign a written resolution approving the allotment of shares by the directors, they still had to go through the formality of holding a meeting and passing such a resolution. To remove this doubt, the Administration proposed to repeal the existing section 116B and add the new section 116B which specifically state that anything which might be done by a company by resolution in general meeting might be done, without a meeting and without any previous notice being required, by a written resolution signed by or on behalf of all the members who at the date of the resolution would be entitled to attend and vote at the meeting. The provisions of this new section are based on long standing provisions in the UK Companies Act 1985.

6. R of C advised that the statutory provisions in clause 14 would apply to all companies in general. However, in practice, large public listed companies would not be able to make use of this provision because they would have difficulties in getting all shareholders to sign a resolution.

7. Mr Albert HO enquired about the applicability of clause 14 to the removal of auditor and director of a company. The Secretary of the Standing Committee on Company Law Reform (S of SCCLR) advised that the auditor and director concerned should be given the opportunity to put their case before a full meeting to decide whether they should be removed or not, so the clause would not apply in those circumstances. The Chairman remarked that since both the auditor and the director were in fact voted into office by shareholders, it would be reasonable to hold a general meeting if removal was to be considered.

8. Upon the Chairman's enquiry on how the date of the resolution would be ascertained for it could be critical in some circumstances, S of SCCLR advised that it would be the date on which the resolution was last signed. S of SCCLR confirmed that there had been no operational difficulties in the UK in respect of ascertaining the date of the resolution. R of C added that the Administration should have included into the clause provisions on recording written resolutions.

He said that the Administration would move Committee Stage amendments accordingly to the new Section 116B.

9. R of C further advised that the proposed Section 116BA basically adopted Section 381B of the UK Companies Act 1985. It required a director or a secretary of the company to send to the auditors a copy, or inform them of the contents, of any written resolution proposed under Section 116B at or before the time the resolution was supplied to a member for signature. Like the existing provision under Section 141 which provided auditors' right to receive notices of meetings, this requirement applied to all companies.

10. The Chairman referred to subsection (2) of Section 116BA and enquired about the level of the fine if the director or secretary failed to comply with the requirement of notifying the auditors. R of C advised that clause 51 provided the schedule of offences. Referring to subsection (4) of 116BA, the Chairman expressed concern about why the auditors had to be notified if it would have no effect on the validity of the resolution. S of SCCLR advised that auditors had to be notified to enable them to make representations. Even if there was a physical meeting, the notice would still have to go to the auditors. R of C added that the provision was taken straight from the UK Companies Act and the auditors should be entitled to attend any general meeting of the company. The Chairman was not convinced that there should be a disparity of treatment regarding the imposition of penalties between failure of notifying the auditors of a physical meeting and of a paper meeting. He requested the Administration to provide further information on the consequences if Section 141(7) was not complied with.

11. Mr Albert HO enquired about the feasibility of holding meetings via the internet. R of C replied that this possibility was being currently discused in the context of the overall review of company law in the UK and could be examined further in Hong Kong.

Clauses 4 to 11

12. Members had no comment on these clauses.

Clause 12

13. R of C advised that a company could dispense with the need to hold annual general meetings so long as a unanimous written declaration was passed by members under Section 116B. A copy of each document required to be laid before the company’s annual general meeting (AGM) should also be provided for all members so that they could decide whether a meeting was necessary.

14. Mr SIN Chung-kai enquired whether the clause would apply to all companies including the listed ones so that they would be able to waive their AGM. R of C clarified that it would apply to all companies but it would be practicably impossible for a listed company to get a unanimously written resolution signed by all members. Mr SIN further enquired about the advantages of removing the AGM. R of C explained that it might not be necessary to have a meeting to discuss mere formalities. Meetings should be held only if there was a genuine need, not just for the sake of complying with the legislation.

15. On Mr SIN's concern that the listed companies would bypass the AGM, the Chairman remarked that if a company was incorporated overseas, it could obviate the need to hold a meeting by just declaring a meeting had been held there. He considered that it was a matter of corporate accountability for a company to hold an AGM.

16. The Chairman asked whether electronic means in this regard would be accepted. R of C advised that the major review of the company law in UK had suggested that instead of sending the accounts to members, companies should just post them on their websites which would be more efficient and economical. However, there was no provision in the current legislation yet.

Clauses 13 and 15

17. Members had no comment on the clauses.

Clauses 16 to 19

18. Members noted that clauses 16 to 19 were related to part IVB on provisional supervision and voluntary arrangements while clause 19(b)(i) was a consequential amendment to the repeal of section 228A under clause 39.

Clause 20

19. The Official Receiver (Atg) (OR/Atg) advised that the clause introduced a new section 168IA to empower the OR to conduct a public examination in court of the directors of a company which had been wound up by the court. Subsection (7) of the new 168IA provided the examinee the right to seek assistance from a counsel or solicitor. Similar provisions were given in Section 222.

20. The Chairman considered that Section 168IA should be read together with Section 168D. Referring to subsection (6) of 168IA, the Chairman was concerned whether the person called for examination would be given the chance to exculpate himself, since there was a proviso under Section 222 that the examinee

could apply to the court to be exculpated. In response, OR/Atg said that under subsection (9), if the OR, after the examination, considered that there was insufficient evidence to warrant further disqualification proceedings, it would be the end of the matter. However, if he regarded the disqualification proceedings necessary, the answers given by the examinee would have to be in the form of a transcript in order to be admissible in evidence against the examinee.

21. On the Chairman's concern whether opportunity would be given to the examinee to set aside the court order for examination, OR/Atg undertook to provide further information to members after the meeting.

Clauses 21 and 22

22. Members noted that the clauses were consequential to the insolvent trading provisions.

Clause 23

23. Members had no comment on the clause.

Clauses 25 to 29

24. Members noted that clauses 25 to 28 were consequential amendments to the amendments made to section 194 under clause 30 while clause 29 was related to the new part on provisional supervision.

Clause 30

25. OR/Atg advised that the clause empowered the OR, where he was the provisional liquidator of a company, to appoint a person as a provisional liquidator in his place. Addressing Mr SIN Chung-kai's concern about whether creditors could oppose to the appointment of the provisional liquidator, OR/Atg advised that there was no place where the creditors could object.

Clauses 31 to 33

26. Members noted the clauses. SALD pointed out a wrong cross reference in clause 33(b)(4)(b) where it should be subject to subsection (6) instead of (5). The Administration would amend it by a Committee Stage amendment.

Clause 34

27. OR/Atg advised that the clause would relieve the OR from the mandatory obligation to submit a report under section 209A(1) which enabled creditors to apply to the court to convert the compulsory winding up into a creditors voluntary winding up. Such a conversion would save money for the winding up. Upon the Chairman's enquiry on the reasons for not having the OR

to file the report, the Assistant Principal Solicitor of the Official Receiver's Office (APS/ORO) advised that in most circumstances, since the OR did not act as the liquidator, he did not possess the necessary information to file any report but relied on the information supplied by the liquidator.

28. The Chairman further enquired about the right of minority creditors if they were aggrieved of the conversion to a creditors voluntary winding up. OR/Atg advised that the liquidator would have a duty of care in conducting the liquidation and should treat all creditors fairly. If any creditors were aggrieved of the conduct of the liquidator in the course of compulsory winding up, they could apply to the court for resolution of the dispute. APS/ORO supplemented that if minority creditors opposed to the conversion proposed by the majority creditors, the minutes of the meeting would be filed with the court so that the court would note their opposition to the conversion. One of the reasons for reserving the discretion for the OR to file the report was to prevent the interest of the minority shareholders being prejudiced. The decision on whether a conversion should be granted would rest with the court after submitting the report. OR/Atg further informed members that all the conversions according to past experience had been unanimously supported by all creditors. On the Chairman's enquiry on the UK experience, OR/Atg said that in UK, once it was a compulsory winding up, there was no provision converting it to creditors voluntary winding up. This provision was unique in Hong Kong. Nevertheless, SALD undertook to review the provision and provide further information for members' consideration.

Clause 35

29. Mr SIN Chung-kai enquired about the reference of "other grounds" added to Section 216(1). In response, OR/Atg advised that the rationale behind the amendment was to widen the grounds on which the court might appoint a special manager of a company. Upon Mr SIN's enquiry on precedents in bringing in special managers, OR/Atg referred to the example in 1991 when the Bank of Credit and Commerce was about to close, the OR was appointed the provisional liquidator, but the court in turn appointed two partners from KPMG Peat Marwick to be the special managers under Section 216 due to the scale of the liquidation.

30. Both Mr SIN and the Chairman were unconvinced of the reasons for the amendment since they considered the original provision had already provided sufficient grounds for the appointment of special managers. Mr SIN also pointed out that the Administration should be able to provide some examples illustrating the deficiency of the original provision to justify the introduction of this amendment. OR/Atg undertook to clarify the matter.

Clauses 36 to 38

31. Members noted that clauses 36 and 37 were consequential to clause 30 while clause 38 to clause 39.

Clause 39

32. OR/Atg advised that the repeal of section 228A was recommended by the SCCLR in 1999. The Committee was of the view that one of the major weaknesses of section 228A was that it was the directors, rather than the shareholders of the insolvent company, who could initiate the voluntary winding up process. The Chairman enquired about the directors' right after the repeal of section 228A since the directors would bear the liability if they carried on the insolvent business. OR/Atg advised that in case of a real emergency, a petition could be presented to the court and an application made for the appointment of a provisional liquidator under section 193. He further advised that section 228A could be abused by unscrupulous directors who could have given away all of the assets of the company before the creditors' meeting to be held within five weeks after the passing of the directors' resolution. In view of the possible abuse, the SCCLR made the recommendation to repeal section 228A. OR/Atg advised that this provision was unique in Hong Kong.

33. Members expressed reservations at the need for repealing section 228A. DS for FS undertook to provide the information regarding the rationale of the SCCLR in this respect for members' reference.

Clauses 40 to 42

34. Members had no comment on these clauses.

Clauses 43 to 45

35. Members noted that clause 43 was consequential to clause 39, clause 44 was about insolvent trading and clause 45 was consequential to the new Part IV B on provisional supervision and voluntary arrangement.

Clause 46

36. R of C explained that amendments to section 333(1)(f) were suggested by the Hong Kong Society of Accountants (HKSA). Clause 46 amended section 333 so that, apart from individuals or partnerships of accountants or solicitors, incorporated firms of accountants or solicitors could also accept process on behalf of oversea companies. This was to rectify a technical omission in relation to the amendments made to the Companies Ordinance and the Professional Accountants Ordinance in 1995 to provide for incorporation of professional accountant firms.

37. The Chairman sought clarification on the "solicitor corporation" added to section 333(1)(f) and enquired whether there was corporate practice for solicitors in Hong Kong. Assistant Secretary for Financial Services (AS/FS) clarified that the proposed amendment had been made after consultation with the Law Society of Hong Kong. While there was at present no solicitor corporation, the amendment had been put in to cater for the formation of such corporations in future. The Chairman held the view that the solicitor corporation should only be introduced when there was one in future; otherwise, it would bring about confusion. The Deputy Secretary for Financial Services (DS for FS) noted the Chairman's comments and undertook to review the matter. SALD proposed an alternative to adding the solicitor corporation that the Financial Secretary could be empowered by notice in the gazette to amend the legislation should a solicitor corporation come into existence in future.

38. On the progress of the consultation process, Mr James TIEN suggested that the Administration consult the Small and Medium Enterprises Committee. DS for FS accepted member's suggestion.

39. There being no other business, the meeting ended at 4:35pm.

(*Post-meeting note*: the Administration's response to members' concerns raised at the meeting was circulated to members vide LC Paper No. CB(1)1115/99-00(01).)

Legislative Council Secretariat
25 May 2000