

Companies (Amendment) Bill 2000

The Hong Kong Institute of Company Secretaries supports legislative changes which are consistent with international standards and appropriate for Hong Kong, and therefore supports the *Companies (Amendment) Bill 2000* in general.

We were particularly pleased to see the clarification of the resolutions in writing provisions (s116B), amendment of annual return provisions (s107), and the inclusion of provisions which would allow a company to dispense with physical annual general meetings (s111(6)).

As company secretaries often find themselves in key administrative positions regarding schemes of arrangement and compromise, the introduction of corporate rescue provisions is also welcome.

Concerns

Concerns and recommendations are limited to the provisions regarding the recognition of Provisional Supervisors (s168W) and the definition of the Responsible Person (s295A).

We were puzzled by the omission of Chartered Secretaries from the constitution of the designated ORO Provisional Supervisor Panel, given the:

- stated criteria of independence, integrity and expertise as expressed in *LRC Report On Rescue and Insolvent Trading* (October 1996, para 7.1)
- qualifying scheme for professional recognition as Chartered/Company Secretary
- recognition of professional qualified company secretaries by the LRC and its Sub-Committee on Insolvency as expressed in *LRC Report on the Winding-Up Provisions of the Companies Ordinance* (July 1999, para 3.14 - 3.18)

Criteria

Companies legislation since the turn of the century have required that companies must appoint the following corporate officers: directors and company secretaries.

As far as the relationship is concerned, company secretaries have been described as a 'third organ' of a company, as their position and power do not depend on the board of directors or the shareholders, ie. the other two organs, but from legislation and common law.

Evidence of the independence and importance of the company secretary was emphasized by the House of Lords in *Panorama Developments Ltd v Fidelis Furnishing Fabrics Ltd* (1971), where the court asserted that “there can be no doubt that the company secretary is the chief administrative officer of the company”.

Lord Denning went on to describe the company secretary as: “an officer...with extensive duties and responsibilities... which include the authority to bind company regarding contracts connected with the administrative side of a company’s affairs”.

Panorama was far more significant than it might appear, as the court clarified that, due to the nature of the position of the secretary, the power to contract for the company may be implied, that is, it need not be specifically [expressly] given to the secretary by the company articles of association or the board of directors.

The following comments regarding the qualification and recognition are indicative of the level of expertise one might expect from qualified company secretaries.

Qualification

Admission to Associate Membership of the HKICS and the Institute of Chartered Secretaries and Administrators (ICSA) requires that candidates:

- complete 17-paper examination scheme;¹
- obtain 6-years relevant work experience; and
- satisfy Institute that they are fit and proper.

The ICSA has operated an external examination programme as an integral part of its professional qualifying scheme for 100 years. The content of the qualifying scheme has progressed over time in order to remain relevant and applicable to dynamic economic and business environments, and to continue to meet the Charter obligations and Mission of the ICSA in contributing to good business practice.

The professional knowledge of candidates is assessed through external examinations throughout the world. In order to maintain the high standards of the external examination system, stringent administrative arrangements have been established.

¹ Information Systems; Organisation and the Human Resource; Introduction to Hong Kong Law; Business Economics; Quantitative Techniques; Managing Information Systems; Management Principles; Hong Kong Business Law; Introduction to Accounting; Professional Administration; Management Practice; Hong Kong Corporate Law; Hong Kong Financial Accounting; Corporate Finance; Hong Kong Company Secretarial Practice; Hong Kong Taxation; Management Accounting

Recognition

1. Insolvency Practice

The LRC *Report on the Winding-Up Provisions of the Companies Ordinance* (July 1999) recommended that a licensing system for IPs be established² and that company secretaries qualified as professionals by the HKICS and ICSA should have a place on the ‘Administrative Panels of Insolvency Practitioners for the Court winding-Up of Companies’, as either Licensed Insolvency Practitioners (LIPs) or Registered Insolvency Practitioners (RIPs) - depending on experience:

‘We have included company secretaries following a submission by the Hong Kong Institute of Company Secretaries, which is the representative body for company secretaries in Hong Kong.

The Institute submitted that its members were adequately qualified to carry out windings-up and we accept the Institute’s contention that company secretaries already carry out a large number of liquidations.

Members of the Institute are trained in a broad range of legal and accountancy management subjects and are also required to address insolvency issues in the Institute’s corporate law and company secretarial practice examinations.’ (para 3.18; emphasis added)

As recognition of company secretaries as IPs for liquidation purposes is recommended in the 1999 LRC report, it is submitted that they should be recognised as IPs for corporate rescue purposes. It would appear that the issue was not fully considered when the 1996 LRC report on corporate rescue was completed.

The administration of a liquidation scheme is certainly as onerous and complicated - if not more so - than the administration of a corporate rescue scheme. Furthermore, one may lead to the other. The LRC considered this eventuality in the 1996 Report, ie. it was suggested that where a provisional supervision is proposed by a liquidator or provisional liquidator, he should be able to nominate himself as PS if on the panel (para 7.14).

² See 1999 Report, para 3.13: “we recommend the introduction of a new two tier system of licensing of insolvency practitioners to be established and operated by the Official Receiver:

- *Licensed Insolvency Practitioners* [LIPs] who would act in all forms of liquidation, receivership, provisional supervision and bankruptcy; and
- *Registered Insolvency Practitioners* [RIPs] who would act in members’ (solvent) voluntary winding-up, creditors’ (insolvent) voluntary winding-up and individual voluntary arrangements in bankruptcy.

In the real life, Company Secretary is better qualified by their knowledge, experience and duties “as a provisional supervisor” to take over the running of the Company as a going concern and in the end to be able to make a voluntary rescue arrangement proposal, which is more sensible commercially and should therefore be more acceptable to the creditors. It will be illogical to follow the spirit of the enactment if it allows qualified Secretary to be left out the panel for provisional supervision.

On the other hand, Company Secretary, being always regarded as a member of the senior management, may be easily, if not likely, called into liability during the execution of their duties for the Company facing insolvency under the proposed amendment relating to insolvency trading. Should there be any liability to be assumed, there should be different in the degree of gravity towards different members of the management according to different responsibilities. The directors and certain operational management, who bind the Company by making their decisions, which usually to greater extent have more effect on the company’s liquidity rather than that of most administrative decisions done by Company Secretary. Since there seem numerous discussions on the division of the responsibilities and liabilities of the directors and Company Secretary in the contemporary legal framework, the provisions relating to Insolvency Trading should be more elaborated in defining who are the senior management to be caught by the provisions to avoid too wide in its application that Company Secretary may take up unnecessary liabilities.

2. Direct Access to Bar

Like members of the HKSA, members of the HKICS are recognised by the Bar Association for Direct Professional Access (DPA) to Barristers in Hong Kong.

Recommendations

- 1. That proposed section 168W(1)(a) be amended to include qualified company secretaries.**
- 2. That proposed section 295A to be amended to incorporate some exceptions to exclude a manager who is involved in directing, the company’s business or affair in the ordinary course of business or execute inherent duties of administrative nature from the definition of “responsible person”.**

Concluding Remarks

Given the stated criteria upon which the proposed recognition for provisional supervisors is based, ie. professionals with sufficient independence, integrity and expertise, there would appear to be no reason to justify the limitation to accountants and solicitors.

It must also be remembered that notwithstanding the legislative intent or the best efforts of scheme administrators, corporate rescue schemes are often the penultimate step to liquidation. As company secretaries have been recognised as RIPs for liquidation purposes, it follows that they should be recognised for rescue purposes.

Thank you again for the opportunity to comment on the Bill.

Should the Bills Committee like to discuss any of the points in this submission, please do not hesitate to call me or Institute Secretary Agnes Lam directly on 2881-6177.

Kind regards.

John Wong
Chairman
HKICS Technical Committee