

**Bills Committee on  
Companies (Amendment) Bill 2003**

**Follow-up actions arising from the discussion  
at the meeting on 26 April 2004**

**Introduction**

This paper sets out the outcome of the follow-up actions arising from the discussion at the meeting on 26 April 2004.

**Register of directors and secretaries - section 158**

*(a) to check apart from the provision of existing section 333A(2) regarding "authorized representative", whether there is any existing or proposed provision requiring an overseas company to notify the Companies Registrar of a change in directors or secretary if a director or the secretary of the overseas company ceases to be able to act in that capacity by reason of death or incapacity or other unforeseen reason; and if there is no such provision, to consider whether there is a need to provide for such a notification requirement*

2. Apart from the provision contained in the existing section 333A(2), there is no existing or proposed provision in the Companies Ordinance ("CO") requiring an overseas company to notify the Registrar of Companies of a change in directors or secretary if a director or the secretary of an overseas company ceases to be able to act in that capacity by reason of death or incapacity or other unforeseen reason. It is not considered that there is a need to provide for such notification requirement as the existing provision contained in section 335(1)(b) (which makes no reference to a change in a director or secretary occurring by reason of the death, incapacity or other unforeseen reason) has been in force for 20 years without problems. It is reasonable to assume that a proportion of the many notifications filed by overseas companies pursuant to section 335(1)(b) will have been triggered by one or other of these scenarios and that, since no representations have been made to the Companies Registry ("CR") to the contrary, this would seem to suggest that the filing obligation is operating effectively.

*(b) taking into account the notification requirement on oversea companies, to consider the need to revise proposed section 158(4) to make it clear that the situation where a director or the secretary of a Hong Kong company ceases to be able to act in that capacity, whether by reason of death or incapacity or other unforeseen reason, should trigger the requirement on the company to notify the change in the directors or secretary under proposed section 158(4)*

3. Similarly, it is not considered necessary to revise the proposed section 158(4) to include a requirement on the part of the company to notify any change in a director or secretary arising out of their death, incapacity or some other unforeseen reason as the existing provision, which was based on the similarly worded section 200 in the UK Companies Act 1948, has been in force since then, also without any problems. There is no substantive provision in any other part of the CO which concerns an obligation on the part of the company to remove a director in the event of his incapacity or some other unforeseen reason as the realities of normal commercial life would dictate that, whenever a director or secretary of a company ceases to be able to act in that capacity by reason of his death, incapacity or some other reason, a notice of change of director or secretary will be filed with the Registry pursuant to section 158(4).

4. Regulation 90 of the Articles of Association in Table A of the First Schedule of the CO sets out various circumstances in which the office of a director shall be vacated as follows –

"(a) (he) ceases to be a director by virtue of section 155 of the Ordinance.  
(See Note below) ; or

(b) becomes bankrupt or makes any arrangement or composition with his creditors generally; or

(c) becomes prohibited from being a director by reason of any disqualification order made under Part IVA of the Ordinance; or

(d) becomes of unsound mind; or

(e) resigns his office by notice in writing to the company given in accordance with section 157D(3)(a) of the Ordinance; or

(f) shall for more than 6 months have been absent without permission of the directors from meetings of the directors held during that period.

(Note - section 155 requires every director who is by the Articles of the company required to hold a specified share qualification to obtain his qualification within 2 months of his appointment or such shorter time as may be fixed by the Articles)

5. The corresponding regulation in relation to the appointment of a secretary (Regulation 112) provides as follows –

“The secretary shall be appointed by the directors for such term, at such remuneration and upon such conditions as they may think fit; and any secretary so appointed may be removed by them.”

6. Whilst Table A contains only a default set of model Articles, companies are, of course, free to prepare their Articles of Association in terms which differ from the Articles prescribed in Table A. The CR has not been made aware by members of the public of any deficiencies with the wording of the existing section 158(4) which appears to be working sufficiently well in practice and does not see a need to amend the registration requirement arising out of any change in the company's directors or secretary whether by reason of their death, incapacity arising out of any of the events listed in Regulation 90 of Table A or for any other unforeseen reason.

### **Notice of commencement of liquidation and of appointment of liquidator - section 337A**

*(c) to clarify the meaning of "commencement date of proceedings" under proposed section 337A(1)(a), particularly in the case of creditors' winding up*

7. There are 3 methods of commencing a winding up of a company as follows –

- compulsory winding up by the court
- voluntary winding up commenced by the directors of a company due to the insolvency of the company
- voluntary winding up commenced by the directors of a company where the company is solvent

### Compulsory Winding Up

Section 184(2) of the CO provides that the winding up of a company by the court shall be deemed to commence at the time of the presentation of the petition of the winding up by either the company, its creditors, contributories (or their trustee in bankruptcy or personal representative) or by the Registrar of Companies. By section 184(1), it is provided that, where a resolution has been passed by the company for voluntary winding up before the presentation of a petition, the winding up of a company shall be deemed to commence at the time of the passing of a resolution by the company for voluntary winding up.

### Voluntary Winding Up

Where proceedings are commenced pursuant to section 228A of the CO for the voluntary winding up of a company which by reason of its liabilities cannot continue its business, i.e. voluntary winding up due to the insolvency of the company, the “commencement date of proceedings” is the date of the delivery of the winding up statement signed by one of the directors following the passing of a resolution at a meeting of the directors (section 228A(5)(a)).

For voluntary winding up commenced by the directors of a company where the company is solvent, the “commencement date of proceedings” is deemed to be the date of the passing of the resolution for voluntary winding up pursuant to section 230 of the CO.

*(d) to advise whether proposed section 337A is sufficient to cover the situation where a non-Hong Kong company is wound up voluntarily and no proceedings in respect of the winding up have commenced*

8. It is considered that the proposed section 337A is sufficient to cover the situation where a non-Hong Kong company is wound up voluntarily as the term "proceedings" included in section 337A(1) is couched in sufficiently wide terms as to include all types of proceedings leading to the liquidation of a company. Whilst "proceedings" is defined neither in the CO nor in the Interpretation and General Clauses Ordinance (Cap 1), the ordinary dictionary meaning of "proceedings" is defined in the Collins Concise Dictionary, 21st Century edition as follows –

"1. an act or course of action. 2a. a legal action. 2b. any step taken in a legal action. 3(pl). the minutes of the meetings of a society, etc. 4. (pl) legal action; litigation. 5. (pl) the events of an occasion."

9. Accordingly, notwithstanding the fact that no court proceedings in respect of the winding up have been commenced by reason of the fact that the winding up of the company is being undertaken voluntarily, the term "proceedings" is intended to cover action also taken by a voluntary liquidator appointed by the company in general meeting which, in the case of winding up proceedings commenced in Hong Kong, would be pursuant to either section 228A(5)(b) or section 235(1). So far as winding up proceedings commenced in other jurisdictions are concerned, it would not be practical to include in the legislation a lengthy list of the effective dates and manner of commencement of such proceedings.

*(e) to consider whether the notification requirement on Hong Kong companies regarding the appointment of receivers or managers for the winding up of the companies should also apply to non-Hong Kong companies*

10. Currently, there are no provisions in which overseas companies are required to notify the appointment of receivers or managers for the winding up of the companies. Similarly, there is no such requirement in the legislation of United Kingdom, Singapore and Australia. As the present law has been in operation for many years without any problems, we do not see the need to introduce any change at this stage. Further, the Sub-Committee appointed by the SCCLR to review the registration of companies incorporated outside Hong Kong did not consider whether a notification requirement should be imposed in respect of the appointment of receivers or

managers.

*(f) to consider whether the 14-day notice requirement under proposed section 337A(1) will give rise to problems in those cases where the commencement of winding up is relayed back to a date earlier than the time of the presentation of the petition for the winding up*

11. In the case of the compulsory winding up of a company by the court, the commencement of winding up proceedings is tied to the date to the presentation of the petition. In the case of a voluntary winding up, the commencement of winding up proceedings is tied to the date of the passing of the special resolution by the company for solvent windings-up or, in the case of insolvent voluntary windings-up, the date of the delivery of the director's winding up statement to the Registrar pursuant to section 228A(5). It is therefore not considered that the 14-day notice requirement under the proposed section 337A(1) will give rise to any problems. In view of the fact that the commencement date of the liquidation proceedings may differ according to the law in force in the different jurisdictions where those proceedings are commenced, it is not possible to provide in this Bill the respective legislative requirements which would determine the commencement date of such proceedings. As the effect of both the existing provision and the proposed provision is intended to bring to the attention of the public the fact of the commencement of winding up proceedings wherever that might have occurred, it is not envisaged that the 14-day notice requirement would give rise to any problems [in cases] in the event that the commencement of winding up might in some other jurisdiction relate back to a date earlier than the time of the presentation of any petition for the winding up of the company.

### **Interpretation of Part XI - section 341**

*(g) to consider whether the same definitions of "director", "shadow director" and "secretary" should be adopted for Hong Kong and non-Hong Kong companies, and hence to review the need and the drafting of the proposed definitions of "director" and "secretary" under section 341*

12. The Companies (Amendment) Ordinance 2003, which was enacted on 11 July 2003, some four weeks after this bill was gazetted on 13 June 2003, amended the definition of "director" in section 341 to read "director" includes a shadow director'. We agree that the definition of "director" for non-Hong Kong companies should remain as in the existing section 341 so that the director disqualification provisions in Part IVA of the

Ordinance may also be applied to shadow directors of non-Hong Kong companies. We will move a CSA to reinstate the definition of “director” under the existing section 341.

13. For the definition of “director” for Hong Kong companies, the definition in section 2 does not include a “shadow director”. The reason is that it is not the intention that in all the provisions in which the word “director” appears, shadow directors should be included. An example is section 153 which provides that every company shall have at least two directors. It is obvious that the word “director” in this section does not include a “shadow director”. Thus, the approach for Hong Kong companies is to consider each provision separately and if there is a need to include shadow director in that section, an express provision will be added in that section.

14. As regards “secretary”, it is now defined in section 341 as “any person occupying the position of secretary by whatever name called”. There is no corresponding definition in section 2 for Hong Kong companies. The word “secretary” in the Ordinance is generally well-understood by the industry as the company secretary of the company. Thus, there is no need to define the word. It is worth noting that none of the other comparable Commonwealth jurisdictions has a definition of “secretary” in the corresponding provisions of their legislation. For non-Hong Kong companies, such companies may have a person who occupies the position of a secretary but, according to the law of its place of incorporation, different terminology may be used to describe the person who occupies such a position. Hence, there is a need for the definition.

**Financial Services Branch  
Financial Services and the Treasury Bureau  
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