立法會
Legislative Council

LC Paper No. CB(1)2329/09-10

Ref: CB1/BC/3/09

Paper for the House Committee meeting on 25 June 2010

Report of the Bills Committee on Companies (Amendment) Bill 2010 and Business Registration (Amendment) Bill 2010

Purpose

This paper reports on the deliberation of the Bills Committee on Companies (Amendment) Bill 2010 and Business Registration (Amendment) Bill 2010.

Background

2. According to the Administration, the Companies Registry (CR) is developing Phase II of the Integrated Companies Registry Information System (ICRIS) which is expected to come on stream in early 2011. Phase II of ICRIS will introduce on-line applications for company registration and filing of company documents. To tie in with the implementation of Phase II of ICRIS, the Administration considers that there is the need to amend the Companies Ordinance (Cap. 32) (CO), ahead of the CO rewrite[1], to provide for electronic incorporation and filing of documents. In this connection, the Administration also proposes to improve the company name registration system with a view to expediting the company incorporation process and empowering the Registrar of Companies (the Registrar) to tackle problems related to "shadow companies"[2]. As a result of the collaboration between CR and Inland Revenue Department (IRD) and in order to provide more efficient and integrated customer-friendly services to the business sector, the Administration also proposes to amend the Business Registration Ordinance (Cap. 310) (BRO) to facilitate the provision of a one-stop service for company registration and business registration.

---

[1] In mid-2006, the Administration launched a major and comprehensive exercise to rewrite the CO. The Administration conducted three public consultations in 2007 and 2008 to gauge views on a number of complex issues. Taking into account the views received, the Administration has prepared draft clauses of the Companies Bill for further consultation in two phases. The first phase consultation on the draft Companies Bill was launched in December 2009, and the second phase consultation was launched in May 2010.

[2] "Shadow companies" refer to those companies incorporated in Hong Kong with names which contain parts which are very similar to existing and established trademarks or trade names of other companies and which pose themselves as representatives of the owners of such trademarks or trade names in order to produce counterfeit products in Mainland China bearing such trademarks or trade names.

3. The Administration introduced the Bills into the Legislative Council (LegCo) on 3 February 2010.

The Bills

Companies (Amendment) Bill 2010

4. The Companies (Amendment) Bill 2010 (CAB) seeks to -

(a) provide the legal basis for on-line applications for company registration and filing of company documents;

(b) streamline and expedite the company name approval process;

(c) enhance the powers of the Registrar to direct a change of company name for the purpose of tackling problems relating to "shadow companies";

(d) enlarge the class of persons who may bring or intervene in statutory derivative actions (SDA);

(e) provide for electronic and website communications by a company to any person other than the Registrar;

(f) remove obstacles to the introduction of paperless holding and transfer of shares and debentures; and

(g) make related and miscellaneous amendments.

Business Registration (Amendment) Bill 2010

5. The Business Registration (Amendment) Bill 2010 (BRAB) seeks to-

(a) provide for simultaneous application for company registration and business registration;

(b) treat company's notification of changes in certain business particulars to the Registrar as a notification to the Commissioner of Inland Revenue;

(c) provide for the submission of business registration and branch registration applications as well as the issuance of business registration certificates and branch registration certificates by electronic means; and

(d) make related and consequential amendments to other legislation.

The Bills Committee

6. At the House Committee meeting on 5 February 2010, Members agreed to form a Bills Committee to study the two Bills. Under the chairmanship of Hon Paul CHAN Mo-po, the Bills Committee has held eight meetings. The membership list of the Bills Committee is at **Appendix I**. The public including chambers of commerce, business and industry associations, relevant professional bodies and company secretarial service providers have been invited to give views on the two Bills. The Bills Committee received oral representations from deputations at a meeting on 30 March 2010, and further invited the various parties mentioned above to give views specifically on the proposal to enlarge the class of persons who may bring or intervene in SDA (i.e. the proposal on multiple SDA). A list of the organizations and individuals which/who have submitted views to the Bills Committee is at **Appendix II**.

Deliberations of the Bills Committee

Companies (Amendment) Bill 2010

Electronic company registration and document delivery (Clauses 3 to 8 and Clauses 21 to 27)

7. On electronic company registration, the main provisions in the CAB seek to -

(a) provide for a streamlined company formation procedure for the purpose of electronic registration, which will remove the attestation requirements for the signing of memorandum of association and articles of association by a founder member and reduce the number of founder members required to sign an incorporation form from two to one (clauses 3 to 5);

(b) provide for the signature requirement of certain documents if they are delivered to the Registrar in electronic form and provide for the documents to be delivered to the Registrar by authorized representatives (clauses 22 and 23);

(c) provide for electronic communications with the Registrar, including the delivery of documents and forms to the Registrar in electronic form and the signing of the documents using digital signature or password (clauses 24 and 25); and

(d) empower the Registrar to issue certificates in any form including electronic form (clause 27).

Verification procedures

8. According to the Administration, at present, the CR will not verify the identities of those who submit applications for company incorporation or deliver company documents for registration. An applicant is liable to criminal prosecution if he submits false information for company registration. Under the proposed electronic regime for registration and documents delivery, CR will put in place a registration system to require any person who wishes to use ICRIS to register on the computerized system as registered users. As part of the registration, the user has to submit to the CR a copy of his/her Hong Kong Identity Card or passport (for individuals), the company registration number (for body corporates registered in Hong Kong) or a copy of the certificate of incorporation issued by the authorities in the place of incorporation (for body corporates incorporated outside Hong Kong). The registered users will log on ICRIS using passwords.

9. Members including Ms Miriam LAU, Dr Philip WONG, Mr WONG Ting-kwong and Mr CHAN Kin-por have expressed concern that the proposed electronic regime for company registration would be susceptible to exploitation by persons with ulterior motives due to the lack of appropriate measures to verify the identities of those submitting applications for registration. For example, an applicant may use a forged identity/company registration document for registration as a user of the on-line application system, and any subsequent enforcement action against the user would be futile given the forged information provided, especially in the case where the registered user is located outside Hong Kong. These members consider that proper safeguards should be put in place in implementing the electronic registration regime. A number of deputations including those from the accountancy and company secretarial service sectors have also highlighted the need to verify the authenticity of the applicants' identities and their supporting documents.

10. The Bills Committee has sought information on the practices and procedures for electronic company registration in other comparable jurisdictions. According to the Administration, the electronic company registration systems in the United Kingdom (UK), New Zealand, Singapore and Australia do not include formal procedures for verification of user identities. In Australia and UK, users of the system have to use a specified software in order to incorporate companies on-line, but usually only professionals or company secretarial firms would purchase/develop the software while the vast majority of company registrations are done through these intermediaries. In the case of Singapore, Singapore citizens and permanent residents can register companies on-line by themselves, while foreign residents must engage professional firms or service bureaus registered with the authority to register a company on their behalf. Qualified professional firms (e.g. company secretarial firms, law firms and accounting firms) are each assigned a unique professional

number for handling companies' registration. The Companies Act in Singapore is being amended to regulate the parties assigned with the professional numbers. The Administration has explained that it has not proposed a similar system to the Singapore model on consideration that the compulsory employment of a professional company service provider will increase the cost for company registration and may not be in the best interest of the business sector. Moreover, a separate licensing system may have to be established for regulating the professional company service providers.

11. To address members' concern about the lack of verification of the identities of ICRIS users submitting applications for registration, the Administration has agreed to put in place the following procedures for registration of ICRIS users -

(a) Individual users

(i) Registration can be done in person at CR's office and CR's staff will check and verify the identities of the users face-to-face; or

(ii) registration can be done on-line using digital certificates issued by the HongKong Post or any recognized Certification Authorities; or

(iii) registration can be done on-line provided that a copy of the identity document of the applicant duly certified by a local professional or an authorized person[3] is submitted. CR's staff will check the copy manually before the registration is approved. If in doubt, CR will verify the applicant's identity further through other means, such as requesting an interview with the applicant.

(b) Companies or firms/partnerships registered in Hong Kong

The applicant has to provide its company registration number which will be checked against the company information kept at CR or a copy of the business registration certificate.

---

[3] The document is deemed to be certified as a true copy if it is duly certified -
(i) by a notary public practising in Hong Kong;
(ii) by a solicitor practising in Hong Kong;
(iii) by a certified public accountant (practising) within the meaning of section 2 of the Professional Accountants Ordinance (Cap 50);
(iv) by an officer of the court in Hong Kong who is authorized by law to certify documents for any judicial or other legal purpose;
(v) by a professional company secretary practising in Hong Kong; or
(vi) (in the case of a non-Hong Kong resident), by a consular officer of his/her home country.
This is similar to the provision regarding certified copies of documents under Regulation 3(2)(b) of the Companies (Forms) Regulation (Cap.32B).

(c) Companies registered outside Hong Kong

These companies can only use ICRIS to incorporate companies and submit company documents through local registered agents.

12. Noting that the above measures will be implemented as administrative arrangements and would not be spelt out in the legislation, the Bills Committee has requested that the relevant Government official should give assurance, in his speech at the resumption of the Second Reading debate on the Bills about the implementation of the measures, and that the Administration would revert to the Panel on Financial Services if substantial changes are made to those measures in future. The Administration has agreed to these requests.

13. Dr Philip WONG has expressed concern about the accuracy of the information on company address provided by an applicant for registration or by a company in notifying subsequent changes. He has requested the Administration to consider putting in place a mechanism to verify the information, such as checking whether the address as stated did exist. The Administration has advised that in developing Phase II of ICRIS, it will build into the system functions for checking the information on company address provided by applicants/companies.

Electronic communications with the Registrar

14. The proposed section 346(2A) provides for the serving of a notice by electronic means by the Registrar in respect of any non-compliance with the specified requirements in the delivery of documents to the Registrar. Under the proposed section 348BA, the Registrar is empowered to issue certificates in any form including electronic form. The Bills Committee has noted that under these proposed provisions, CR may notify a person through e-mail to check a notice or download a certificate stored in the CR's computer system, instead of directly sending the notice or certificate to the e-mail address of the person concerned. Ms Miriam LAU and Mr WONG Ting-kwong have enquired about the rationale for this arrangement. The Administration has explained that the arrangement was proposed for security reasons and to ensure safe delivery of the notice or certificate concerned. In actual operation, the persons concerned will be advised of a specified period for retrieving or downloading a notice/certificate stored in CR's computer system. However, the Administration has subsequently advised that based on the Electronic Transactions Ordinance (Cap. 553), the detailed electronic document delivery/storage arrangements would not need to be specified in other applicable ordinances. As such, the Administration will move CSAs to the proposed sections 346(2A) and 348BA(2) to simply empower the Registrar to serve a notice and deliver a certificate respectively through electronic means.

15. On the arrangement for companies to opt for electronic communications with the Registrar, the Administration has advised that applicants for company registration

will be requested to indicate at the outset whether he agrees to receive information/documents from CR through electronic means. CR will also put in place arrangements for existing companies to opt for communications with the Registrar by electronic means. The Chairman and Ms Miriam LAU have expressed the view that applicants using the electronic registration system should be allowed to opt for receipt of hard copies of the certificates of incorporation and business registration certificates. The Administration has responded that those certificates will be issued to successful applicants in the same manner as they submit the applications. In other words, only electronic certificates will be issued to applicants using the electronic registration system. However, arrangements will be put in place for applicants to obtain hard copies of the certificates at a fee.

Certified true copies of memorandum and articles

16. Currently, persons who wish to form a company are required under section 15 of the CO to deliver certified true copies of the companies' memorandum of association and articles of association (M&A), together with the incorporation form, to CR for registration. Since sections 6 and 12 of the CO require the original copies of the M&A to be signed by all the founder members, it follows that the copies of the M&A to be delivered to CR for registration will need to show the signatures of all founder members. To facilitate the delivery of such documents under electronic incorporation, the Administration proposes to move CSAs to introduce new clauses 3A, 5A, 5B and amend 5(3) of CAB so that there is no need to deliver the certified true copies of the M&A to the CR for registration. Instead, the founder member would need to include a statement in the incorporation form certifying that the M&A have been signed in accordance with sections 6 and 12 of the CO and the contents of the copies of the M&A delivered for registration are the same as the original M&A. The Bills Committee agrees to the proposal.

Certificates to be sent by private companies with annual returns

17. Private companies are required under section 110 of the CO to send together with their annual returns to the CR certificates signed by a director or the secretary of the company confirming that their companies comply with the conditions of private companies. In order to allow the certificates to be delivered together with the annual returns to the CR through electronic means, the Administration proposes to move a CSA to introduce a new clause 22A to amend section 110 of the CO to that effect. The Bills Committee agrees to the proposal.

<u>Streamlined company name approval regime (Clauses 9 to 13)</u>

18. The Bills Committee notes that clauses 9 to 11 of the Bill seek to expedite the company name approval process. Under the proposed procedures, a company name will be accepted for registration instantaneously if it satisfies certain preliminary requirements, namely, that it is not identical to another name on the register or is not the same as a body corporate incorporated/established under an Ordinance, and does

not contain certain specified words or expressions in the Companies (Specification of Names) Order. Thereafter, if the company's name is found to be objectionable, the Registrar is empowered to direct the company in question to change its name within a specified period. The Registrar is also empowered to act pursuant to a court order to direct a company with an infringing name to change its name. Clause 12 seeks to empower the Registrar to replace a company's name by its registration number if it fails to comply with the Registrar's direction to change its name. According to the Administration, the revised procedures will shorten the normal processing time for company incorporation from four working days to one day.

Dissemination of names of newly registered companies

19. According to the Administration, CR has published guidelines to explain the requirements for the registration of a company name. The guidelines were last updated in 2007 so that the names of newly registered companies which resemble closely the names of existing companies will be considered as "too like". For example, registration of companies which added the word "Holding" or "International" in the name of an existing company may be considered as "too like". Companies may lodge a complaint to CR, if they consider that the name of a new company is "too like" the names of their companies, within 12 months of the registration of the new company. At present, some companies obtain lists of newly registered companies at a search fee so that they can check against similar company names.

20. Dr Philip WONG and Mr WONG Ting-kwong have pointed out that in the past, CR did inform the relevant party if the name of a new company resembled closely the name of an existing company. They have suggested that with the implementation of the on-line company registration system, a notification system should be put in place whereby existing companies will be informed of the names of newly registered companies on a regular basis, and the business sector may be prepared to pay for such notification service. Ms Miriam LAU has suggested that some basic information such as the names of newly registered companies should be provided free of charge to the public regularly so that companies may check whether the names of any new companies resemble closely theirs.

21. The Administration has explained that the company registration system had been revised years ago and for the sake of efficiency, CR no longer consults existing companies regarding the registration of new companies. The current legislative proposals do not propose changes to the existing procedure for companies to raise objection to the registration of proposed names of new companies. However, having regard to members' views, CR has arranged since mid-May 2010 to post on its website the names of companies newly registered in the previous week, and will continue to do so on a weekly basis to facilitate existing companies to check if any names of the newly registered companies closely resembled theirs. Regarding the suggestion of providing a notification service to existing companies for checking against similar company names, the Administration has advised that such a notification service would

involve practical difficulties such as the need to define the criteria for selecting "similar names". The Administration considers that the implemented arrangement of disseminating the names of newly registered companies on CR's website on a weekly basis would enable existing companies to check if any names of newly registered companies closely resembled theirs.

Enforcement against shadow companies

22. Dr Margaret NG has expressed concern about the effectiveness of the proposed amendments in enhancing enforcement against "shadow companies". She has sought information about the feedback from the relevant parties on the proposed amendments. The Administration has advised that during its consultation with the intellectual property practitioners, there were various suggestions on how the company registration regime could be strengthened to tackle the "shadow company" problem, including the suggestion of striking a company off the register if the company fails to comply with the Registrar's direction to change name. Having regard to the need to protect the interests of third parties, such as creditors, the Administration considers it more appropriate to empower the Registrar to substitute the name of a company which had failed to comply with the Registrar's direction to change name with its registration number than striking the companyoff the register. The intellectual property practitioners sectors in general are satisfied with the current proposed arrangement.

23. Dr Margaret NG has queried why the Registrar does not strike off a company which has failed to comply with the Registrar's direction to change name pursuant to a court order. The Administration has explained that in a legal action for trademark infringement or passing off against a "shadow company", the court usually only orders the company to change its name.

Sanctions for failing to change company name as directed by the Registrar

24. Ms Miriam LAU has noted that while the proposed section 22AA empowers the Registrar to replace a company's name by its registration number if it fails to comply with the Registrar's direction to change name, there is no provision in the Bill stipulating the liabilities of a company which continues to use the replaced company name. Ms LAU has asked the Administration to consider adding a provision in the proposed section 22AA to stipulate the prohibition of the continued use of a replaced company name, and the liabilities for non-compliance. The Administration has advised that section 93(4) of the CO specifies the criminal liabilities for companies which have their names substituted but continue to use their old names in business, and the criminal liabilities are applicable to various other sections of the CO. As such, the Administration considers it inappropriate to add a separate provision in the proposed section 22AA to specify the application of section 93(4). In this connection, the Administration has confirmed that in notifying a company of the Registrar's direction to change its name, the Registrar will advise the company not to continue to use its old name in business.

Mechanism for review of Registrar's direction to change name

25. Mr Albert HO has expressed concern about the channels available for companies to seek review of the Registrar's change-of-name directions. The Administration has advised that under the existing section 22A of the CO, a company may apply to the court to set aside the Registrar's direction to change its name if the direction is made on the ground that the company's name gives so misleading an indication of the nature of its activities as to be likely to cause harm to the public. With the addition of new section 22A(1A) as proposed in the Bill, a company may also apply to the court to set aside the Registrar's direction to change its name in circumstances where, in the opinion of the Chief Executive, the use of the name by the company would constitute a criminal offence, or the name is offensive or otherwise contrary to the public interest. As for other cases, the Administration has not proposed to allow companies to apply to the court to set aside the Registrar's change-of-name direction in such cases. These cases include those where the name of a new company is the same as a company on the register of company names, or the company name is likely to give the impression that the company is connected with the Central People's Government or the HKSAR Government, or where special approval by the Registrar is required under section 20(2)(b) of the CO to use particular words, e.g. "trust", in the company names.

26. Mr Albert HO has expressed the view that given the cost and time involved in court proceedings, the Administration should examine the feasibility of having appeals against the Registrar's directions to change names heard by the Administrative Appeals Board instead of by the court. The Administration has advised that as such an arrangement would involve amendments to the Administrative Appeals Board Ordinance (Cap. 442), the Director of Administration's advice will be sought. As it will take time to work out the relevant arrangements, the Administration has proposed that the matter be considered in the CO rewrite exercise, instead of the current legislative exercise. The Bills Committee agrees to the Administration's proposed arrangement.

Authority for approving/rejecting registration of company names

27. Regarding the authority for approving/rejecting the registration of company names, Ms Audrey EU has expressed concern about the inconsistency between existing section 20(1) and 20(2) where the wording "in the opinion of the Chief Executive" is used, and the proposed sections 22(3A) and 22A(1A) where the wording "in the opinion of the Registrar" is used. The Administration has advised that under an administrative arrangement, the Chief Executive has delegated the authority for approval/rejection of the registration of a company name under section 20 to the Registrar, although such delegation is not reflected in the provisions of the CO. To address Ms EU's concern, the Administration will move CSAs to delete the words "in the opinion of the Registrar" in the proposed sections 22(3A) and 22A(1A).

28. Ms Miriam LAU has noted that in the proposed sections 22(3A) and 22A(1A), the word "may" is used for the Registrar to direct a company to change its name. Ms LAU enquired why discretion is to be given to the Registrar when companies must not be registered by certain names as specified in the relevant sections. The Administration has explained that it is stated in the proposed section 20(2) that the Chief Executive (i.e. the Registrar under delegated authority) may give consent to registration of certain company names. The use of the word "may" in the proposed section 22(3A) is to allow flexibility for the Registrar to exercise his discretion.

29. As regards the proposed section 22A(1A), the Administration initially proposed a CSA to replace the word "may" with "must" in the proposed section pursuant to the discussion at the Bills Committee meeting on 31 May 2010. In view of members' query at the meeting on 10 June 2010, the Administration has obtained legal advice from the Department of Justice (DoJ). According to DoJ's advice, despite the use of the word "may", if the Registrar is aware that a name should not have been registered under section 20(1)(c) or (d) of the CO, the Registrar would generally be under an obligation to issue a direction for change of name. It has been accepted by the courts that the word "may" can be used to confer a power upon a specified authority to act in certain circumstances, and when the relevant circumstances arise, the authority has a duty to act. On the basis of DoJ's advice, the Administration considers that there is no need to replace the word "may" with "must" in the proposed section 22A(1A).

Multiple statutory derivative actions (Clauses 14 to 20)

30. The statutory derivative action (SDA) procedure under Part IVAA of the CO allows a member of a company to bring an action or intervene in the proceedings on behalf of the company in respect of misfeasance committed against the company. Unlike some overseas jurisdictions where members of a related company of the company in question have similar rights under their law, section 168BC(1) of the CO only gives members of the company a right to seek leave to commence a SDA, i.e. only "simple" derivative actions as opposed to "multiple" derivative actions (i.e. allowing a member of a related company to commence or intervene in SDA on behalf of the company) can be taken. It is noted that in a recent court case[4], both the Court of Appeal and the Court of Final Appeal ruled that a "multiple" derivative action was maintainable in Hong Kong under the common law and considered it appropriate for section 168BC of the CO to be extended to cover "multiple" SDA. Clauses 14 to 20 of CAB seek to amend the CO to expand the scope of SDA to enable a member of a related company[5] of a specified corporation to bring or intervene in proceedings on behalf of a specified corporation.

---

4 *Waddington Ltd. v Chan Chun Hoo* [2006] 2 HKLRD 896; (2008) 11 HKCFAR 370

5 Under Clause 14(3), "related company" (有關連公司), in relation to a specified corporation, means—
(*a*) a subsidiary of the corporation;
(*b*) a holding company of the corporation; or
(*c*) a subsidiary of a holding company of the corporation."

31. As the scope of multiple SDA proposed by the Administration is wider than that specified in the Court of Final Appeal's ruling in relation to the *Waddington* case, the Bills Committee has requested the Administration to explain the rationale for its proposal. The Administration has confirmed its policy intention that the proposed extension of SDA to a member of a related company goes further than the decision in the *Waddington* case. The proposal seeks to enhance the protection of the interests of minority shareholders, in particular those in a group of companies. In making the proposal, the Administration has taken into account the relevant provisions in other jurisdictions. At the Bills Committee's request, the Administration has provided information on the relevant provisions on SDA in the legislation of Australia, Canada, New Zealand and Singapore, and a court case in Australia where multiple SDA was discussed in the judgment.[6] The Bills Committee has also noted that while Hong Kong's SDA procedure under the CO came into operation in 2005, the SDA legislation in UK was enacted in 2006, and only the simple SDA procedure is provided for in the UK legislation.

32. The Bills Committee has noted that while the majority of the organizations/individuals submitting views to the Bills Committee on the multiple SDA proposal are supportive of the proposal, the Hong Kong Bar Association (BAR) and Ms Linda CHAN, who is a barrister, hold different views. The BAR fully supports the proposal of extending standing to bring SDA to members of the holding company of the wronged company, but does not support extending the standing to -

(a) members of a subsidiary of the wronged company; and

(b) members of another subsidiary of the holding company of the wronged company,

because this is inconsistent with the rationale for derivative actions, which is elaborated in the BAR's submission to the Bills Committee. The BAR opines that extension of standing to bring SDA to the above two categories of persons in Hong Kong should only be done after proper empirical study on whether there is a sufficient case to justify it, and if so what the proper threshold(s) applicable should be. Ms Linda CHAN has also expressed reservation on allowing the above two categories of persons to bring SDA.

33. Mr Ronny TONG has raised concerns about the proposed scope of multiple SDA. He considers it questionable to give standing to a shareholder of a subsidiary company to commence or intervene in proceedings on behalf of its holding company and/or another subsidiary company of the same holding company, as the principle of SDA is that a shareholder commencing or intervening in SDA proceedings is to seek remedy in the name of and for the benefit of the company, and not for a party who is not a member of the company. Referring to the example given by the Administration to justify the extension of standing to bring SDA to members of a subsidiary company,

---

[6] Annexes D and E to LC Paper No. CB(1)1638/09-10(01)

i.e. a subsidiary company of a holding company may be prejudiced by the depletion of the holding company's assets when the subsidiary company has provided guarantee for the holding company's liabilities, Mr TONG has pointed out that there are already avenues under the law for the subsidiary company, when it has paid the guaranteed amount, to seek remedies. He has also expressed concern that the Administration's proposal may open the floodgate of frivolous or vexatious derivative actions.

34. The Administration has provided the following explanation -

(a) The current provisions on SDA in the CO, which were introduced in 2004, provides for the retention of common law derivative actions;

(b) The implementation of a statutory remedy is based on the provisions in the relevant legislation, and common law principles would no longer be applicable unless such principles are specified in the legislation for the statutory remedy;

(c) In a statutory multiple derivative action, membership of a company is no longer relevant. Instead, the party commencing or intervening in such proceedings should have a legitimate interest in seeking the relief;

(d) The proposed extension of SDA to cover members of a "related company" is rational and logical. A subsidiary company is under the control of the holding company, and it may be forced to provide guarantee for the holding company's liabilities. It is therefore necessary to extend standing to bring SDA to individual companies belonging to the same holding company in order to protect the interests of the minority shareholders;

(e) The proposed scope of multiple SDA is similar to the arrangement in Australia, and is more limited in scope compared to the arrangement in Singapore which includes "any other person" who the court considers a proper person to commence or intervene in proceedings on behalf of a corporation; and

(f) The proposed scope of multiple SDA will not result in frivolous or vexatious derivative actions being taken, as the leave requirement in section 168BC(3) of the CO operates as a filter on applications, and the experience in other jurisdictions where the scope of SDA has been extended does not indicate that the floodgate of frivolous or vexatious derivative actions would be opened.

35. The Bills Committee has noted that in its judgment, the Court of Final Appeal suggested that once the legislation had been extended to cover multiple SDA, the Administration and the Legislature should consider removing the duplication of

common law rights and statutory rights regarding derivative actions. In this regard, the Administration has advised that the issue as to whether the existing right to take a common law derivative action should be preserved or abolished has been included in the first phase public consultation on the draft Companies Bill commenced in December 2009. The issue will be further studied during the CO re-write exercise.

Electronic and website communications (Clauses 28 to 35)

36. Amendments have recently been made to Rule 2.07A of the Main Board Listing Rules (the Listing Rules) of the Hong Kong Exchanges and Clearing Limited to allow a listed issuer to send corporate communications to its shareholders by making them available on the listed issuer's website if the shareholders agree, or are deemed to have so agreed. Since there are currently no similar provisions in the CO, Hong Kong-incorporated listed companies are not able to make use of such mode of communication. Clause 31 seeks to add new provisions to the CO to enable communications by a company to any person other than the Registrar to be sent in electronic form or by means of website. It also provides rules that govern such communications (e.g. electronic communications can be made upon the recipient's agreement and to an address specified by the recipient, period of time specified for the information or document to be made available on the website, etc.) and retain the right of the recipient to request hard copies of the documents or information free of charge.

Requirements under new Part IVAAA

37. Members have expressed concern that given their current drafting, proposed new Part IVAAA under clause 31 and the associated amendments in clauses 28, 33 and 34 are not easily comprehensible. The Administration has explained that the objective of the new Part is to provide for the various modes of communication by a company to another person (other than the Registrar) under the CO. The new Part contains specific provisions in respect of each type of communication and each kind of intended recipient of the relevant communication. The Administration considers that the structure of the new Part as drafted is appropriate.

38. To facilitate companies to comply with the requirements specified in the various provisions under the proposed new Part IVAAA, the Bills Committee has requested the Administration to issue, after enactment of the CAB, guidelines setting out the statutory requirements in an easily comprehensible manner. The Administration has undertaken to issue such guidelines and has provided a draft of such guidelines for the Bills Committee's reference.[7]

---

[7] Annex to LC Paper No. CB(1)2193/09-10(02)

Provision of hard copy of documents or information by company to its members or debenture holders

39. Under the proposed section 168BAI, a member or debenture holder of a company may, within 28 days after the date of receiving from the company a document or information in electronic form, request the company to provide him free of charge a hard copy of the document or information. The company must provide the hard copy (a) within 21 days after receiving the request; or (b) if the document or information requires an action to be taken by the member or holder on or before a date, to provide the hard copy at least 7 days before the date. However, the requirement in (b) does not apply unless the member or holder makes the request at least 14 days before the date.

40. Members have expressed concern that if a member or debenture holder wishes to obtain a hard copy of the document or information, he is required to make a request for the hard copy 14 days in advance and otherwise the company may provide the hard copy within 21 days after receipt of the request. As such, the member or debenture holder may only receive the hard copy after the deadline for the member or debenture holder to take an action. To address members' concern, the Administration has agreed to move a CSA to amend the proposed section 168BAI such that a company is required, if the document or information requires an action to be taken by the member or holder, to send or supply to the member or debenture holder of the company a hard copy of the document or information within 7 days after the date of receiving the request from the member/debenture holder.

Paving way for scripless holding and transfer of shares or debentures (Clauses 36 to 48)

41. Clauses 36 to 47 of the Bill seek to introduce technical amendments to the CO to remove, or provide exceptions to, the limitations arising from provisions that compel the use of paper documents of title and paper instruments of transfer in relation to shares and debentures. Clause 48 is a related amendment to the Securities and Futures Ordinance (Cap. 571). According to the Administration, the Securities and Futures Commission is currently working with the Hong Kong Exchanges and Clearing Limited and the Federation of Share Registrars on a proposed operational model for implementing a paperless market and issued a consultation paper on "A Proposed Operation Model for Implementing a Scripless Securities Market in Hong Kong" on 30 December 2009 for a three-month public consultation exercise.

42. As a deputation holds the view that the proposed amendments in relation to scripless holding and transfer of shares and debentures should be deferred until the outcome of the relevant public consultation is available, the Bills Committee has sought explanation on the rationale for pursuing the proposed amendments in the current legislative exercise. The Administration has advised that the current proposed amendments are technical changes intended to remove or provide exceptions to the existing limitations in the CO that compel the issue or use of paper documents

of title and transfer. This is an important first step in the entire legislative process for implementing the scripless initiative. The proposed amendments will be brought into operation only when there is general market consensus on, and readiness to implement, the proposed scripless operational model. They will not pre-empt the scripless operation model.

Business Registration (Amendment) Bill 2010

Official secrecy (Clauses 4 and 25(9))

43. Section 4 of the BRO provides for the preservation of secrecy with regard to matters that come to the notice of officers of IRD in the performance of their duties under the BRO. To cater for the proposed simultaneous business registration application scheme under which officers of CR will perform functions in relation to simultaneous business registration applications, clause 4 of the BRAB amends section 4 of the BRO to extend the obligation of secrecy applicable to officers of the CR. To address members' concern that the inclusion of the word "solely" in the proposed sections 4(1)(a) and 4(3)(a) may have the unintended effect of narrowing the scope of information for preservation of secrecy, the Administration has agreed to move CSAs to remove the word "solely" from the provisions. The Administration will also move a CSA to add new section 4(3B) to specify that the requirements on officers of the CR to preserve secrecy of information do not apply to any particulars that are provided in an incorporation application or company registration application, because such particulars are information that should be made available to the public as stipulated in the CO. In view of the above proposed amendments, the Administration will also move a CSA to make consequential amendments to the proposed Form 4 (Oath or Affirmation of Secrecy) under clause 25(9) of BRAB.

Simultaneous business registration applications (Clause 6)

44. The Bills Committee has sought explanation on the arrangement that under the proposed simultaneous business registration application scheme would not cover the registration of a branch of a business. The Administration has advised that the simultaneous registration service will not cover the business registration of a company's branch office, as inclusion of such applications would significantly increase the capital and maintenance costs of ICRIS, and based on past experience, there should be extremely few companies that would wish to set up a branch at the time of company incorporation/registration.

Drafting issues

Gender-neutral drafting

45. The Legal Adviser to the Bills Committee for the CAB has pointed out that in a Legal Notice gazetted on 28 May 2010 (namely L.N. No.69 of 2010) relating to the amendment of certain forms in a subsidiary legislation, the words "他/她" were used as the Chinese rendition of "he/ she", whereas in the CAB, the word "他" (but not "他或她") is used as the Chinese rendition of "he or she" in the new section 14A(2)(k) and (l) as amended by clause 5(3). Ms Miriam LAU has expressed the view that it is not necessary to use "he or she" because section 7(1) of the Interpretation and General Clauses Ordinance (Cap. 1) already states that words and expressions importing the masculine gender include the feminine and masculine genders. However, Ms LAU considers that if the Administration insists using "he or she" in the English version, "他或她" should be used as the Chinese rendition.

46. The Administration has responded that the drafting practice now requires that opportunity is to be taken to use gender-neutral terms or avoid using merely a specific gender pronoun. The drafting practice is only a matter of change of style, having regard to the practice in other jurisdictions like Australia, Canada, New Zealand and Ireland. The legal meaning of the relevant provisions is not affected. Gender-neutrality has no significant implications for Chinese drafting. If the English text uses a noun to achieve gender neutrality (e.g. "Director" instead of "he"), the Chinese text can follow suit. However, the character "他" is more gender-neutral compared to "he". For example, "他們" is used for a group of people of both sexes. Therefore, if no interpretation problem is likely to arise in the particular context, "他們" and "他" may continue to be used as they are suitable and concise.

Plain language drafting

47. The Legal Advisers to the Bills Committee have pointed that as a consequence of the amendments proposed in the two Bills, there would be intermixing of the use of "must" and "shall" in the same sections of the CO and BRO. The Bills Committee has requested the Administration to consider amending "shall" to "must" in the other provisions of the sections concerned so as to achieve consistency within the same sections of the ordinances. The Bills Committee has noted that similar amendments were made to the Occupational Deafness (Compensation) Amendment Bill 2009 to change the word "shall" to "must" if the two words were used in the same section.

48. The Administration has responded that the drafting practice now requires that opportunity is to be taken to use "must" instead of "shall" to impose an obligation in line with ordinary speech in provisions being inserted. The use of "must" to impose an obligation in the CO and BRO in which "shall" has been used for the same purpose will not lead to an interpretation that "shall" has a different legal effect from "must" or

vice versa. The proposed new sections/subsections are drafted in accordance with the latest drafting practice. As to the suggestion of amending the other provisions of the sections concerned in the current legislative exercise so as to achieve consistency in the use of words within the same sections of the CO and BRO, the Administration has advised that the suggestion will not be pursued in the current legislative exercise in view of the magnitude of the changes involved. However, opportunities will be taken to achieve consistency in the use of the words in the CO rewrite exercise.

49. The Bills Committee has noted that a paper[8] on "Drafting of Legislation" provided by the Administration, which covers the above drafting issues, was discussed by the LegCo Panel on Administration of Justice and Legal Services at its meeting on 15 December 2009.

Committee Stage amendments

50. Apart from the proposed CSAs mentioned in paragraphs 14, 16, 17, 27, 40 and 43 above, the Administration also proposes the following CSAs –

(a) introducing a new clause under the BRAB to amend the Revenue (Reduction of Business Registration Fee) Order 2010, so that certain simultaneous business registration applications made under the new section 5A of the BRO would also be entitled to a reduction in business registration fee;

(b) textual amendments to clause 31 (pertaining to sections 168BAH(4)(c)(ii) and 168BAH(5)(c)(ii) of the CO) of the CAB; and

(c) textual amendments to clause 9 (pertaining to section 7A(4) of the BRO) and to clause 14(3) (pertaining to section 16(2)(b) of the BRO) of BRAB.

The Bills Committee agrees to the Administration's proposed CSAs, which are set out in **Appendix III**. The Bills Committee has not proposed any CSA to the Bills.

Follow-up actions to be taken by the Administration

51. During the deliberations of the Bills Committee, the Administration has made the following undertakings -

(a) the relevant Government official will give assurance, in his speech at the resumption of the Second Reading debate on the Bills, about the implementation of administrative measures for the verification of

[8] LC Paper No. CB(2)512/09-10(04)

identities of ICRIS users when they submit applications for registration (paragraph 12 above);

(b) the Administration would revert to the Panel on Financial Services if substantial changes are made to the administrative measures mentioned in (a) in future (paragraph 12 above);

(c) the suggestion of having appeals against the Registrar's directions to change company names to be heard by the Administrative Appeals Board instead of by the court will be considered in the CO rewrite exercise (paragraph 26 above); and

(d) opportunities will be taken to achieve consistency in the use of the words "shall" and "must" in the CO rewrite exercise (paragraph 48 above).

Recommendation

52. The Bills Committee supports the resumption of the Second Reading debate on the CAB and BRAB on 7 July 2010.

Advice sought

53. Members are invited to note the Bills Committee's recommendation in paragraph 52.

Council Business Division 1
Legislative Council Secretariat
24 June 2010

Appendix I

Bills Committee on Companies (Amendment) Bill 2010 and Business Registration (Amendment) Bill 2010

Membership list

Chairman	Hon Paul CHAN Mo-po, MH, JP
Members	Hon Albert HO Chun-yan Dr Hon Margaret NG Hon CHAN Kam-lam, SBS, JP Dr Hon Philip WONG Yu-hong, GBS Hon Miriam LAU Kin-yee, GBS, JP Hon Audrey EU Yuet-mee, SC, JP Hon WONG Ting-kwong, BBS, JP Hon Ronny TONG Ka-wah, SC Hon CHIM Pui-chung Hon Starry LEE Wai-king Hon CHAN Kin-por, JP Hon Alan LEONG Kah-kit, SC (since 19 May 2010) (Total: 13 Members)
Clerk	Ms Anita SIT
Legal Adviser	Mr Timothy TSO (Companies (Amendment) Bill 2010) Mr YICK Wing-kin (Business Registration (Amendment) Bill 2010)

Appendix II

Bills Committee on Companies (Amendment) Bill 2010 and Business Registration (Amendment) Bill 2010

List of organizations/individuals which/who have submitted views to the Bills Committee

1. Hong Kong Institute of Chartered Secretaries
2. Mr David M. WEBB
3. Ms Eirene YEUNG, Member of the Hong Kong Institute of Chartered Secretaries
4. Ms Linda CHAN, Barrister
5. The British Chamber of Commerce in Hong Kong
6. The Chinese General Chamber of Commerce
7. The Chinese Manufacturers' Association of Hong Kong
8. The Hong Kong Bar Association
9. The Hong Kong General Chamber of Commerce
10. The Law Society of Hong Kong
11. The Real Estate Developers Association of Hong Kong
12. The Taxation Institute of Hong Kong
13. Tricor Services Limited

COMPANIES (AMENDMENT) BILL 2010

COMMITTEE STAGE

Amendments to be moved by the Secretary for Financial Services and the Treasury

Clause	Amendment Proposed
New	By adding – "**3A. Articles prescribing regulations for companies** Section 9 is amended by repealing "signed by the founder members and".".
5(3)	In the proposed section 14A(2)(*k*)(ii), by deleting "and".
5(3)	In the proposed section 14A(2)(*l*)(ii), by deleting the full stop and substituting a semicolon.
5(3)	By adding – "(*m*) a statement that the company's memorandum and articles (if any) have been signed in accordance with sections 6 and 12; and (*n*) a statement that the contents of the copies of the company's memorandum and articles (if any) delivered under section 15, with or without the part showing the signature and the date of signing as they appear on the original documents, are the same as those of the

memorandum and articles.".

New — By adding –

"**5A. Delivery and registration of incorporation form, memorandum and articles**

Section 15(1) is amended by repealing ", certified to be a true copy of the original by a founder member".

5B. Effect of registration

Section 16(1) is amended by repealing "certified under section 15,".".

10(1) — In the proposed section 22(3A), by deleting "in the opinion of the Registrar".

11(2) — In the proposed section 22A(1A), by deleting "in the opinion of the Registrar".

New — By adding –

"**22A. Certificates to be sent by private company with annual return**

(1) Section 110 is amended by renumbering it as section 110(1).

(2) Section 110(1) is amended by repealing "signed by a director or the secretary of the company".

(3) Section 110(1) is amended by repealing "so signed".

(4) Section 110 is amended by adding –

"(2) A certificate sent for the purposes of subsection (1) in relation to a private company must –

(*a*) if sent in the form of an electronic record –

(i) be signed by a director or the secretary of the company; or

(ii) contain an acknowledgment, by a person who is authorized by the company to deliver any document under this Ordinance on the company's behalf and whose authorization has been notified to the Registrar, to the effect that the person is authorized by a director or the secretary of the company to send the certificate; or

(*b*) if sent in paper form, be signed by a director or the secretary of the company.".".

24(2) In the proposed section 346(2A)(*b*), by deleting everything after "if the person" and substituting "so consents, in the form of an electronic record.".

27 By deleting the proposed section 348BA(2) and substituting –

"(2) Without limiting the powers of the Registrar under subsection (1), the Registrar may issue a certificate in the form of an electronic record.".

31 In the proposed section 168BAH(4)(*c*)(ii), by deleting "a prior" and substituting "any prior".

31 In the proposed section 168BAH(5)(*c*)(ii), by deleting "a prior" and substituting "any prior".

31 In the proposed section 168BAI(2)(*b*), by deleting everything after "holder" and substituting ", within 7 days after the date of receiving the request.".

31 By deleting the proposed section 168BAI(3).

BUSINESS REGISTRATION (AMENDMENT) BILL 2010

COMMITTEE STAGE

Amendments to be moved by the Secretary for Financial Services and the Treasury

Clause	Amendment Proposed
4(1)	In the proposed section 4(1)(*a*), by deleting "solely".
4(3)	(a) In the proposed section 4(3)(*a*), by deleting "solely". (b) By adding – "(3B) In relation to an officer of the Companies Registry, subsections (1) and (3) do not apply to any particulars that are provided in an incorporation application or company registration application.".
9	In the proposed section 7A(4), by adding "as soon as practicable" before "refund".
14(3)	In the proposed section 16(2)(*b*), by adding "as soon as practicable" after "refunded".
25(9)	In the proposed Form 4 – (a) in paragraph (*a*), by deleting "solely in the performance of any function under the principal Ordinance" and substituting "in the performance of any function under the principal Ordinance (other

than particulars that are provided in an incorporation application or company registration application as respectively defined under the principal Ordinance [(3)]";

(b) in the notes, by adding –

"[(3)] Delete this phrase in brackets in the case of an officer of the Inland Revenue Department.".

New By adding –

"Revenue (Reduction of Business Registration Fees) Order 2010

31. Amendments to Revenue (Reduction of Business Registration Fees) Order 2010

Section 32 has effect only if the date of coming into operation of sections 6, 17 and 18 ("specified date") is before 1 August 2011, and if so, section 32 comes into operation on the specified date.

32. Reduction of business registration fees

(1) Section 2(1) of the Revenue (Reduction of Business Registration Fees) Order 2010 (L.N. 20 of 2010) is amended by repealing "This" and substituting "Subject to subsection (1A), this".

(2) Section 2 is amended by adding –

"(1A) In respect of a business registration certificate issued in relation to a simultaneous business registration application deemed to have been made under

section 5A(2)(*a*) of the Ordinance, this section applies to the prescribed business registration fee payable under section 5A(1)(*a*) of the Ordinance if the related incorporation application is made before 1 August 2011.".

(3) Section 2(2) is amended by repealing "payable under item 1(*l*)(i) or (ii) of Schedule 1" and substituting "under item 1(*l*)(i) or (ii) of the Table in Schedule 1".

(4) Section 2(3) is amended by repealing "payable under item 2(*a*) or (*b*) of Schedule 2" and substituting "under item 2(*a*)(i) or (ii) of the Table in Schedule 2".

(5) Section 2(4) is amended by adding –

""incorporation application" (成立法團申請) has the meaning given by section 2 of the Ordinance;".".