

立法會
Legislative Council

LC Paper No. LS26/10-11

Paper for the House Committee Meeting on 11 February 2011

Legal Service Division Report on Companies Bill

I. SUMMARY

1. **Objects of the Bill** To reform and modernize Hong Kong company law, to restate part of the enactments relating to companies, to make other provision relating to companies, and to provide for incidental and connected matters.
2. **Comments**
 - (a) The Bill is Phase I of the rewrite of the Companies Ordinance (Cap. 32). It is divided into 21 parts and 10 schedules. Provisions relating to winding-up and insolvency will be dealt with in Phase II of the rewrite exercise.
 - (b) According to the Administration, the Bill aims at enhancing corporate governance, ensuring better regulation, facilitating business operation, and modernizing the law.
 - (c) A separate Bill will be introduced to deal with the bulk of consequential amendments to Cap. 32 and other enactments which is a new arrangement in Hong Kong.
3. **Public Consultation** Three topical public consultations were conducted in 2007 and 2008. A draft Bill was then prepared for further public consultation in two phases in 2009 and 2010.
4. **Consultation with LegCo Panel** The Panel on Financial Affairs was briefed on the proposals to rewrite Cap. 32 at a number of meetings in recent years and the more recent discussions were held on 4 January 2010, 7 June 2010 and 1 November 2010. During the Panel discussions, various concerns were raised by members of the Panel.
5. **Conclusion** The Legal Service Division is scrutinizing the legal and drafting aspects of the Bill. In the light of the importance of the Bill and the concerns raised by members of the Panel on Financial Affairs, members may wish to study the Bill in detail.

II. REPORT

Objects of the Bill

To reform and modernize Hong Kong company law, to restate part of the enactments relating to companies, to make other provision relating to companies, and to provide for incidental and connected matters.

LegCo Brief Reference

2. File Ref.: CBT/17/2C issued by the Financial Services Branch of the Financial Services and the Treasury Bureau on 12 January 2011.

Date of First Reading

3. 26 January 2011.

Comments

Background

4. The Companies Ordinance (Cap. 32) (the Ordinance) is one of the most voluminous and complex pieces of legislation in Hong Kong with over 360 sections and 24 schedules. The Standing Committee on Company Law Reform (SCCLR) was formed in January 1984 to advise the Financial Secretary on necessary amendments to the Ordinance as and when experience showed such amendments were required. In February 2000, SCCLR published "The Report of the Standing Committee on Company Law Reform on the Recommendations of a Consultancy Report of the Review of the Hong Kong Companies Ordinance" (the SCCLR Report). Although many recommendations of the SCCLR Report have been implemented through a number of amendment bills over the past few years, the Administration considers that piecemeal amendments to the Ordinance cannot meet the needs of the business community. Instead, a complete rewrite and restructuring of the Ordinance is necessary to enhance the attractiveness and competitiveness of Hong Kong as a major international business and financial centre and to modernize Hong Kong's company law in the light of the experiences of comparable common law jurisdictions.

5. In mid-2006, a dedicated Companies Bill Team was set up to take forward the rewrite exercise. Given the extensive nature of the rewrite exercise, the Administration has adopted a phased approach by tackling the core company

provisions which affect the daily operation of live companies in Hong Kong in Phase I. The winding-up and insolvency-related provisions, which are mainly administered by the Official Receiver's Office, will be reviewed in Phase II of the rewrite.

6. The Administration has separately worked on legislative amendments to the Ordinance ahead of the introduction of the Companies Bill (the Bill). These amendments, which are contained in the Companies (Amendment) Ordinance 2010 passed by the Legislative Council on 7 July 2010, mainly relate to electronic incorporation and filing of documents, multiple statutory derivative actions, removal of obstacles to the introduction of paperless holding and transfer of shares and debentures, and other technical amendments.

The Bill

7. The Bill is divided into 21 parts and 10 schedules. The major provisions are summarized in the following paragraphs: -

- (a) Part 1 contains preliminary provisions, including the short title, the commencement date, definitions of terms and the application of the Bill.
- (b) Part 2 contains provisions relating to the functions and powers of the Registrar of Companies (Registrar), the Companies Register and the registration of documents by the Registrar.
- (c) Part 3 contains provisions relating to company formation and registration, re-registration of unlimited companies as companies limited by shares and related matters. It also provides for new requirements for the articles of association of a company following the abolition of the memorandum of association.
- (d) Part 4 contains provisions relating to the share capital of companies.
- (e) Part 5 contains provisions dealing with certain transactions in relation to a company's share capital, including capital maintenance (the reduction of share capital and redemption or buy-back of a company's own shares) and related rules (financial assistance by a company for the acquisition of its own shares). Members may wish to note that the requirements under Division 5 of Part 5 of the Bill (in relation to financial assistance by a company for the acquisition of its own shares) are similar to those under sections 76-81 of the New Zealand's Companies Act 1993.

- (f) Part 6 contains provisions relating to the distribution of profits and assets to members.
- (g) Part 7 contains provisions relating to debentures, including new requirements for registration of the allotment of debentures and filing of a return of allotment.
- (h) Part 8 contains provisions relating to the registration of charges by a company or registered non-Hong Kong company.
- (i) Part 9 contains provisions relating to the keeping of accounting records, the preparation and the publication of annual financial statements, directors' reports and auditor's reports, and the appointment and rights of auditors.
- (j) Part 10 contains provisions relating to directors and company secretaries.
- (k) Part 11 contains provisions relating to fair dealing by directors. It also deals with a director's disclosure of material interests in transactions, arrangements or contracts.
- (l) Part 12 contains provisions on company administration and procedure, including resolutions, meetings, keeping of registers and company records, and annual returns.
- (m) Part 13 contains provisions relating to schemes of arrangement or compromise with creditors or members, amalgamation of a company with other companies, and compulsory acquisition of shares following a takeover offer or following a general offer for share buy-back.
- (n) Part 14 contains provisions relating to the remedies available for protection of companies' or members' interests, including unfair prejudice remedies, an injunction order, the statutory derivative action, and a court order for inspection of company records. Members may note that Part 4 of the Companies (Amendment) Ordinance 2010 (12 of 2010) has expanded the statutory derivative action procedure under Part IVAA of the Ordinance to "multiple" statutory action, i.e. allowing a member of a related company of a specified corporation to bring or intervene in proceedings against a specified corporation (section 168BC as amended). The common law right to bring or intervene in proceedings is expressly preserved.

- (o) Part 15 contains provisions relating to the dissolution of companies after being struck off the Companies Register by the Registrar or the court or after being deregistered by the Registrar.
- (p) Part 16 contains provisions relating to non-Hong Kong companies, i.e. companies incorporated outside Hong Kong that have established a place of business in Hong Kong.
- (q) Part 17 contains provisions relating to companies not formed under the Bill or a former Companies Ordinance but eligible to be registered under the Bill.
- (r) Part 18 contains provisions relating to communications in electronic or hard copy form between a company and its members, debenture holders and other persons. It also deals with communications by means of website. Members may wish to note that this Part is largely based on Part 6 of the Companies (Amendment) Ordinance 2010 (12 of 2010).
- (s) Part 19 contains provisions relating to investigations and enquiries into companies' affairs.
- (t) Part 20 contains miscellaneous provisions.
- (u) Part 21 provides for the inclusion in Schedule 9 of consequential amendments and for the inclusion in Schedule 10 of transitional and saving provisions.

Four aims of the Bill

8. According to the Administration, the Bill aims at achieving 4 main purposes, namely (a) enhancing corporate governance, (b) ensuring better regulation, (c) facilitating business operation, and (d) modernizing the law. The more notable of the proposed measures for achieving these aims are summarized in the ensuing paragraphs.

Enhancing corporate governance

9. Some notable measures for enhancing corporate governance are (a) setting out the standard of directors' duty of care, skill and diligence in Division 2 of Part 10; (b) requiring every private company (other than a private company that is a member of a group of companies of which a listed company is a member) to have at least one natural person as director under clause 448; (c) requiring the inclusion of a business review (including an indication of likely future

development in the company's business) as part of the directors' report under Schedule 5; and (d) introducing rules to deal with directors' conflicts of interests under Part 11.

10. Members may also wish to note that the "headcount test" is retained under Part 13 for approving a scheme of compromise or arrangements. Section 166(2) of the Ordinance provides for the "headcount test" for approval of a members' or a creditors' scheme in requiring the approval of such a scheme at a meeting summoned by the court by a majority in number representing three-fourths in value of the members or class of members, or the creditors or class of creditors, as the case may be, present and voting either in person or by proxy. Clause 664 repeats the same requirements except in the case of a members' scheme, the court has the discretion to dispense with the requirement of majority in number. According to the conclusions of the 2009 First Phase consultation on the draft Companies Bill, the respondents' views on the issue whether to abolish the "headcount test" were diverse. The Administration is inclined to believe that there are merits in retaining the "headcount test" for both members' and creditors' scheme to protect the interests of minority shareholders and small creditors. The provisions are comparable to those of section 411(4) of the Australian Corporations Act 2001 as amended.

Ensuring better regulation

11. Some notable measures for better regulation are improvements to the registration of charges scheme under Part 8 and other improvements to clarify and enhance the Registrar's powers to help ensure the accuracy and timeliness of information on the public register under Part 2. The enforcement regime is also proposed to be strengthened by giving the Registrar the power under clause 861 in Part 19 to obtain documents, records and information if the Registrar has reason to believe that a specified act constituting an offence under clause 738(7)¹ or 883(1)² has been done.

Facilitating business operation

12. Some notable measures for facilitating business operation are (a) allowing small private companies³ to take advantage of simplified accounting and

¹ Clause 738(7) of the Bill provides that a person who, in connection with an application for deregistration of a company, knowingly or recklessly gives any information to the Registrar that is false or misleading in a material particular commits an offence.

² Clause 883(1) of the Bill provides that a person commits an offence if, in any return, report, financial statements, certificate or other document, required by or for the purposes of any provision of the Bill, the person knowingly or recklessly makes a statement that is misleading, false or deceptive in any material particular.

³ A company is qualified as a small private company if any 2 of the following conditions specified in section 1(1) of Schedule 3 are satisfied:

- (a) the amount of the company's total revenue for the financial year does not exceed 50 million;
- (b) the amount of the company's total assets at the date of the statement of financial position for the financial year does not exceed 50 million;
- (c) the average number of the company's employees during the financial year does not exceed 50.

reporting requirements under Part 9 and Schedule 3; (b) dispensing with the requirement to hold annual general meetings subject to unanimous members' consent under clause 603 in Part 12; and (c) simplifying some of the procedural requirements, such as introducing a court-free procedure for reduction of capital based on the solvency test under clause 206 in Part 5.

Modernizing the law

13. One of the notable measures for modernizing the company law is the retiring of concepts that no longer serve any useful purposes, such as par value of shares. According to the Administration, the language of the Bill is also modernized and the sequence of some of the provisions is re-arranged in a more logical and user-friendly order so as to make the Bill more readable and comprehensible. Members may also wish to note that new provisions are introduced under Division 7 of Part 2 for withholding from public inspection of directors' residential addresses and full identity card/passport numbers in the Companies Registry's public register. However, under clause 54 of the Bill, the Court of First Instance may make an order for the disclosure by the Registrar of the protected information under appropriate circumstances. Moreover, the Financial Secretary may make regulations under clause 53(4) prescribing an entity to whom protected information may be disclosed. The provisions of Division 7 are similar to sections 240-246 of the United Kingdom Companies Act 2006.

Consequential amendments

14. Members may wish to note that the Administration intends to submit a separate Bill later in 2011 to deal with the bulk of consequential amendments to the current Ordinance and other enactments. According to the Administration, while this arrangement is new to Hong Kong, it is a common practice in other common law jurisdictions, such as Australia and the United Kingdom.

15. When the Bill is enacted, all the provisions in the existing Ordinance, except those provisions to be tackled in Phase II of the rewrite and provisions on prospectuses, will be repealed under Schedule 9 to the Bill, and the existing Ordinance containing the remaining provisions will be renamed as the Companies (Winding Up and Miscellaneous Provisions) Ordinance. According to paragraph 16 of the LegCo Brief, upon completion of Phase II of the rewrite, all the remaining provisions (excluding provisions on prospectuses which will be reviewed by the Securities and Futures Commission) will be merged with the Bill (to be enacted as the Companies Ordinance) to become one piece of legislation again.

Use of notes

16. It is noted that a number of notes⁴ are used in the Bill. For instance, notes are used to make cross reference to other sections of the Bill (e.g. clauses 2(1), 162(3), 253(2), and 420(1)), to state the commencement date of other ordinances (e.g. sections 15, 39(1), 45, and 46 of Schedule 10), and to give examples (e.g. clauses 155(1), 175(2), 183(2), 205(1), 207(3), and section 27(2) of Schedule 10). Members may wish to note that according to section 18(3) of the Interpretation and General Clauses Ordinance (Cap. 1), a marginal note or section heading to any provision of any Ordinance shall not have any legislative effect and shall not in any way vary, limit or extend the interpretation of any Ordinance. Due to the new format of the Bill, it is not clear whether the notes are marginal notes within the meaning of section 18(3) of Cap. 1.

Commencement

17. The Bill, if enacted, will come into operation on a day to be appointed by the Secretary for Financial Services and the Treasury by notice published in the Gazette. According to paragraph 17 of the LegCo Brief, the Administration estimated that the Bill, if enacted, may commence operation in around 2014.

Public Consultation

18. According to paragraph 14 of the LegCo Brief, in the course of the rewrite, the Administration has worked closely with SCCLR and four Advisory Groups (comprising members nominated by the relevant professional bodies and business organizations, academics, SCCLR members and representatives from relevant Government departments) set up to advise on specific areas of the rewrite. Three topical public consultations were conducted in 2007 and 2008 to gauge views on a number of complex subjects. According to the Administration, the proposals put forward in the consultations were generally supported by the respondents. The Administration then incorporated the proposals together with SCCLR's other recommendations into a draft Bill for further public consultation held in two phases in 2009 and 2010, and 164 and 57 submissions were received respectively. The Bill reflects the conclusions that the Administration has drawn from the views of the respondents.

⁴ In paragraph 20 of a paper for the meeting of the Panel on Administration of Justice and Legal Services (AJLS Panel) on 15 December 2009 (LC Paper No. CB(2)512/09-10(04)), the Department of Justice stated that the use, where appropriate, of reader aids such as notes and examples would be encouraged. It is noted that the item of "Drafting of legislation in Chinese and the use of examples in legislation" has been put on the list of outstanding items for discussion of the AJLS Panel (LC Paper No. CB(2)836/10-11(02)) and this item has been tentatively scheduled to be discussed in March/April 2011.

Consultation with LegCo Panel

19. The Administration briefed the Panel on Financial Affairs on the proposals to rewrite the Ordinance at a number of meetings in recent years and the more recent discussions were held on 4 January 2010, 7 June 2010 and 1 November 2010. During the Panel discussions, members raised concerns and gave views on a number of issues, including (a) timeframe and objectives of the rewrite exercise, (b) codification of the standard of directors' duty of care, skill and diligence, (c) headcount test for approving a members' scheme of arrangement or compromise for listed companies, non-listed companies and creditors' schemes, (d) disclosure of residential addresses of directors and identification numbers of directors and company secretaries on the public register, (e) restrictions on private companies' giving of financial assistance to a party for the purpose of acquiring its own shares, and (f) requirement for listed or unlisted companies to prepare separate directors' remuneration reports.

Conclusion

20. The Legal Service Division is scrutinizing the legal and drafting aspects of the Bill. In the light of the importance of the Bill and the concerns raised by members of the Panel on Financial Affairs, members may wish to study the Bill in detail.

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24 January 2011