

立法會
Legislative Council

LC Paper No. CB(1)1737/12-13
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by the Administration)

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**Subcommittee on Subsidiary Legislation Made under
the New Companies Ordinance**

**Minutes of the ninth meeting on
Thursday, 20 June 2013, at 2:30 pm
in Conference Room 2A of the Legislative Council Complex**

Members present : Hon WONG Ting-kwong, SBS, JP (Chairman)
Hon James TO Kun-sun
Hon Abraham SHEK Lai-him, SBS, JP
Hon Jeffrey LAM Kin-fung, GBS, JP
Hon Andrew LEUNG Kwan-yuen, GBS, JP
Hon Starry LEE Wai-king, JP
Hon SIN Chung-kai, SBS, JP
Hon Martin LIAO Cheung-kong, JP
Dr Hon CHIANG Lai-wan, JP
Hon CHUNG Kwok-pan

Members absent : Hon Kenneth LEUNG (Deputy Chairman)
Hon Albert HO Chun-yan
Hon Ronny TONG Ka-wah, SC
Hon Paul TSE Wai-chun, JP
Hon Steven HO Chun-yin
Hon Charles Peter MOK
Dr Hon Kenneth CHAN Ka-lok
Hon Dennis KWOK

**Public officers
Attending** : Financial Services and the Treasury Bureau

Mr Arsene YIU
Principal Assistant Secretary for Financial Services and
the Treasury (Financial Services) 6

Companies Registry

Mr Martin WONG
Registry Solicitor

Ms Phyllis MCKENNA
Deputy Principal Solicitor (Company Law Reform)

Mr Louie NG
Business Manager

Ms Marianna YU
Deputy Registry Manager (Registration)

Mrs Christine Frances SIT
Senior Solicitor (Company Law Reform)

Department of Justice

Mr CHENG Kim-fung
Senior Assistant Law Draftsman

Ms Carmen CHU
Senior Government Counsel

Mr Stefan LO
Senior Government Counsel

Ms Natalie WONG
Senior Government Counsel

Mr Manuel NG
Government Counsel

Clerk in attendance : Ms Connie SZETO
Chief Council Secretary (1)4

Staff in attendance : Mr Timothy TSO
Assistant Legal Adviser2

Miss Winnie LO
Assistant Legal Adviser 7

Ms Angel SHEK
Senior Council Secretary (1)4

Action

I Meeting with the Administration

Follow-up to issues arising from previous meeting

(LC Paper No. CB(1)1341/12-13(01) — List of follow-up actions arising from the discussion at the meeting on 11 June 2013

LC Paper No. CB(1)1341/12-13(02) — Administration's response to the issues arising from the discussion at the meeting held on 11 June 2013

L.N.77 of 2013 — Companies (Model Articles) Notice

L.N.80 of 2013 — Companies (Fees) Regulation

File Ref: CBT/7/6C — Legislative Council Brief on L.N.77 to L.N.80 of 2013

LC Paper No. LS56/12-13 — Legal Service Division Report on L.N.75 to L.N.80 of 2013

LC Paper No. CB(1)1182/12-13(01) — Updated background brief on the Subsidiary Legislation Made under the New Companies Ordinance prepared by the Legislative Council Secretariat)

Other relevant papers

(Proposed resolution under the Companies Ordinance (section 727 of Ordinance 28 of 2012) and the speech to be delivered by the Secretary for Financial Services and the Treasury when moving the proposed resolution	— Companies (Unfair Prejudice Petitions) Proceedings Rules
L.N.75 of 2013	— Companies (Revision of Financial Statements and Reports) (Amendment) Regulation 2013
L.N.76 of 2013	— Companies (Disclosure of Information about Benefits of Directors) (Amendment) Regulation 2013
L.N.78 of 2013	— Company Records (Inspection and Provision of Copies) Regulation
L.N.79 of 2013	— Companies (Non-Hong Kong Companies) Regulation
File Ref: CBT/7/6C	— Legislative Council Brief on Companies (Unfair Prejudice Petitions) Proceedings Rules
File Ref: CBT/7/6C	— Legislative Council Brief on L.N.75 and L.N.76 of 2013
LC Paper No. LS55/12-13	— Legal Service Division Report on Proposed Resolution under section 727 of the Companies Ordinance (28 of 2012))

Discussion

The Subcommittee deliberated (Index of proceedings attached at **Appendix**).

Follow-up actions to be taken by the Administration

Companies (Model Articles) Notice

2. The Administration was requested to –
 - (a) explain the policy intent of Part 2 Division 4 – Alternate Directors in Schedule 1 to the Notice (i.e. articles 30 to 32) in respect of the appointment, rights and responsibilities of an alternate director who was (i) a director of the company; and (ii) another person who was not a director of the company;
 - (b) clarify the difference between appointing an alternate director and giving a proxy for company business;
 - (c) clarify how an alternate director in paragraph (a)(i) and (ii) above would be counted for the purposes of determination of quorum at meeting and signing of written resolution; and
 - (d) review whether the relevant provisions of the Notice had clearly reflected the policy intent.

Letter from The Hong Kong Institute of Directors ("HKIoD")

3. The Administration was requested to provide a written response to the views raised by HKIoD in its letter dated 20 June 2013 on certain subsidiary legislation made under the new Companies Ordinance ("CO").

(Post-meeting note: HKIoD's letter dated 20 June 2013 (English version only), which was tabled at the meeting, was circulated to members vide LC Paper No. CB(1)1356/12-13 on 21 June 2013.)

Way forward

4. The Chairman concluded that the Subcommittee had completed scrutiny of the third batch of seven pieces of subsidiary legislation made under the new CO. Members agreed that the Administration should provide written response on follow-up actions which would be circulated to members. If members had no further views on the written response, the Chairman would make a verbal report on the deliberations of the Subcommittee at the House Committee meeting on 28 June 2013.

(Post-meeting note: The Administration's written response to the follow-up actions was issued to members vide LC Paper No. CB(1)1383/12-13 on 26 June 2013.)

5. Members noted that the deadline for giving notice of amendment to the six pieces of subsidiary legislation subject to the negative vetting procedure was 10 July 2013. As regards the Companies (Unfair Prejudice Petitions) Proceedings Rules which was subject to the positive vetting procedure, the Administration would a motion to seek the approval of the Legislative Council of the Rules at the Council meeting of 17 July 2013.

Notices for commencing the new CO

6. The Administration advised that, to complete the full process for making all relevant subsidiary legislation for the purpose of bringing the new CO into operation in the first quarter of 2014, it planned to table at the Legislative Council in October 2013 the following notices –

- (a) the Companies Ordinance (Commencement) Notice 2013;
- (b) the Companies Ordinance (Amendment of Schedule 7) Notice 2013; and
- (c) the Companies Ordinance (Amendment of Schedule 10) Notice 2013.

(Post-meeting note: The Administration's letter on the above notices for bringing the new CO into operation was issued to members vide LC Paper Nos. CB(1)1353/12-13 (English version) and CB(1)1372/12-13 (Chinese version) on 20 and 25 June 2013 respectively.)

7. In light of the smooth operation of the Subcommittee and to ensure continuity in the final stage of the relevant legislative work before commencement of the new CO, the Administration suggested that the above notices be scrutinized by the Subcommittee. No members raised objection to the Administration's suggestion. The Chairman said that he would include the Administration's suggestion in the verbal report to the House Committee for its consideration.

II Any other business

Cancellation of meetings on 24 and 25 June 2013

8. As the Subcommittee had completed scrutiny of the third batch of subsidiary legislation, members agreed that the meetings originally scheduled for 24 and 25 June 2013 would be cancelled.

9. There being no other business, the meeting ended at 3:40 pm.

Council Business Division 1
Legislative Council Secretariat
26 August 2013

**Proceedings of the Subcommittee on Subsidiary Legislation Made under
the New Companies Ordinance
Ninth meeting on Thursday, 20 June 2013, at 2:30 pm
in Conference Room 2A of the Legislative Council Complex**

Time Marker	Speaker	Subject(s)	Action Required
000949 – 001210	Chairman	Opening remarks	
001211 – 001411	Chairman Administration	Briefing by Administration on its written response to issues arising from the discussion at the meeting held on 11 June 2013 (LC Paper No. CB(1)1341/12-13(02))	
Clause-by-clause examination of the subsidiary legislation			
001412 – 002003	Chairman Administration Dr CHIANG Lai-wan	<p><u>Companies (Fees) Regulation (L.N. 80 of 2013)</u></p> <p><u>Section 1 – Commencement</u></p> <p><u>Section 2 – Fees payable in relation to registration of companies or for registration of documents</u></p> <p><u>Section 3 – Fees for inspecting or obtaining documents or information</u></p> <p><u>Section 4 – Fees for Registrar's approval or licence</u></p> <p><u>Section 5 – Miscellaneous fees payable under Ordinance</u></p> <p><i>Schedule 1 – Fees Payable in relation to Registration of Companies or for Registration of Documents</i></p> <p><i>Schedule 2 – Fees for Inspecting or Obtaining Documents or Information</i></p> <p><i>Schedule 3 – Fees Payable for Obtaining Registrar's Approval or Licence</i></p> <p><i>Schedule 4 – Miscellaneous Fees Payable under Ordinance</i></p> <p>Dr CHIANG enquired whether there would be any change in the level of fees payable to the Registrar under the Companies Ordinance ("CO").</p> <p>The Administration said that –</p>	

Time Marker	Speaker	Subject(s)	Action Required
		<p>(a) the fee items and levels under L.N. 80 were largely in line with those stipulated in the existing CO, with elaboration or clarification where appropriate;</p> <p>(b) under the existing CO, a company limited by shares was required to pay an annual registration fee upon the delivery of its annual return. To encourage compliance with the statutory filing requirement, the annual registration fee was subject to an escalating scale in the case of late filing. Currently, companies limited by guarantee were not subject to an escalating scale for late filing of annual returns. Provisions were therefore included in item 6 of Part 2 of Schedule 1 to subject companies limited by guarantee to an escalating scale for late filing requirements as in the case for companies limited by shares.</p> <p>Referring to the submission from The Hong Kong Institute of Directors ("HKIoD") tabled at the meeting, the Chairman said that HKIoD had indicated that it had no comments on L.N. 80. Apart from HKIoD's letter, the Subcommittee had not received submissions from other parties on the Regulation.</p>	
002004 – 002940	Chairman Mr Andrew LEUNG Mr Martin LIAO Administration	<p><u>Companies (Model Articles) Notice (L.N. 77 of 2013)</u></p> <p><u>Section 1 – Commencement</u></p> <p><u>Section 2 – Model articles for public companies limited by shares</u></p> <p><u>Section 3 – Model articles for private companies limited by shares</u></p> <p><u>Section 4 – Model articles for companies limited by guarantee</u></p> <p><u>Section 5 – Saving</u></p> <p><i>Schedule 1 – Model Articles for Public Companies Limited by Shares</i></p> <p><i>Schedule 2 – Model Articles for Private Companies Limited by Shares</i></p>	

Time Marker	Speaker	Subject(s)	Action Required
		<p><i>Schedule 3 – Model Articles for Companies Limited by Guarantee</i></p> <p>In reply to the Chairman and Mr LIAO, the Administration confirmed that a company to be incorporated under the new CO might adopt as its articles any or all of the provisions of the model articles prescribed. The model articles would have no impact on existing companies.</p> <p>Mr LEUNG enquired about the major differences between the model articles prescribed under the existing CO and L.N. 77.</p> <p>The Administration's response as follows –</p> <p>(a) Table A and Table C in Schedule 1 to the existing CO provided a set of standard articles for companies limited by shares and companies limited by guarantee respectively. Part I of Table A contained provisions applicable to a company limited by shares not being a private company while Part II of Table A was applicable to a private company limited by shares;</p> <p>(b) compared with the existing standard articles, the model articles in L.N. 77 had been substantially re-organized to enhance clarity, coherence and ease of reference. To facilitate users, L.N. 77 prescribed three distinctive sets of model articles for public companies limited by shares (Schedule 1 to the Notice), private companies limited by shares (Schedule 2 which was based on Schedule 1 with necessary changes) and companies limited by guarantee (Schedule 3) respectively. Topics relating to shares and distributions, which were applicable to companies limited by shares, were not contained in Schedule 3 which related to companies limited by guarantee;</p> <p>(c) in terms of contents, the major changes introduced in the model articles included, for example, new articles to provide for the detailed procedures for written resolutions for directors (i.e. articles 17 and 18 in Schedule 1) and the appointment and removal of alternate director (articles 30 to 32 in</p>	

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		<p>Schedule 1, articles 28 to 30 in Schedule 2, articles 26 to 28 of Schedule 3); and</p> <p>(d) some articles in Table A of Schedule 1 to the existing CO (e.g. articles 41 to 44 on "Conversion of Shares into Stock", article 81 on directors' "Borrowing Powers" and articles on accounts and audit) were not reproduced in the relevant schedules as they were considered (i) obsolete since the relevant concept was not restated in the new CO; or (ii) unnecessary having regard that the relevant provisions were already provided in the new CO. Some other existing articles were modified or updated to align with the requirements in the new CO but such modifications did not involve significant changes.</p>	
002941 – 003322	Chairman Mr SIN Chung-kai Administration	<p>Mr SIN enquired about the purpose of providing model articles for adoption by companies.</p> <p>The Administration advised that –</p> <p>(a) every company seeking incorporation in Hong Kong must submit its articles of association to the Companies Registry. Model articles were prescribed to facilitate a company in preparing its own articles;</p> <p>(b) the company would be required to fill in an incorporation form and file mandatory articles, as well as adopt either the model articles or attach its own customized articles. For incorporation by electronic means, the system would provide model articles for adoption at the company's volition; and</p> <p>(c) if a company did not register any articles prescribing any regulation for the company upon its incorporation, the relevant set of model articles shall form part of the company's articles.</p> <p>The Chairman observed that it was a common and convenient practice for shelf companies to be incorporated using model articles which could be modified when necessary.</p>	

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003323 – 004103	Chairman ALA7 Mr Martin LIAO Administration	<p><i>Schedule 1 – Model Articles for Public Companies Limited by Shares</i></p> <p><i>Part 2 Division 2—Decision-taking by Directors</i></p> <p>Article 7 – Calling directors' meetings</p> <p>ALA7 noted that article 7(6) provided that, if a notice of a directors' meeting had not been given to a director ("the failure") but the director waived his entitlement to the notice by giving notice to that effect to the company not more than seven days after the meeting, the failure would not affect the validity of the meeting, or of any business conducted at it. She drew members' attention to the fact that the model articles did not provide for the situation where a director did not give notice to waive his entitlement.</p> <p>The Administration advised that –</p> <p>(a) if a notice of a directors' meeting had not been given to a director, the director might waive his entitlement to the notice either at the meeting or by giving notice to that effect to the company not more than seven days after the meeting. This mechanism provided flexibility in the operation of a company as it could remedy the failure of giving a notice of a directors' meeting and prevent disputes arising from that failure which in turn might affect the validity of the meeting or of any business conducted at it; and</p> <p>(b) if a dispute over the failure of giving a notice of a directors' meeting was brought to the Court, it would be a matter for the Court to decide having regard to the circumstances of each case.</p>	
004104 – 010523	ALA7 Mr Martin LIAO Mr Andrew LEUNG Administration	<p><i>Schedule 1 – Model Articles for Public Companies Limited by Shares</i></p> <p><i>Part 2 Division 2—Decisions-taking by Directors</i> <i>Part 2 Division 4—Alternate Directors</i></p> <p>ALA7 drew members' attention to the provisions in articles 30 to 32 on "Alternate Directors" and article 18 on "Adoption of directors' written resolutions" which stipulated that –</p>	

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		<p>(a) a director ("appointor") might appoint any other director or any other person (if approved by resolution of the directors) as an alternate (article 30(1));</p> <p>(b) a person who was an alternate director but not a director might be counted as participating for determining whether a quorum was participating (but only if that person's appointor was not participating); and might sign a written resolution (but only if it was not signed or to be signed by that person's appointor) (article 31(3)(a) and (b));</p> <p>(c) no alternate director might be counted as more than one director for the purposes mentioned in (b) above (article 31(4)); and</p> <p>(d) a proposed directors' written resolution was deemed to be adopted when all the directors who would have been entitled to vote on the resolution at a directors' meeting had signed one or more copies of it (article 18).</p> <p>ALA7 pointed out that the above provisions were unclear as to how a director who also acted as an alternate director, or an alternate director who was not a director of the company, would be counted for the purposes of a quorum of a meeting or adoption of written resolutions.</p> <p>The Chairman queried how a person could serve as an alternate if he was also a director of the company in question.</p> <p>Mr LEUNG opined that there would be overlap in roles if a director could be appointed as the alternate of another director. He sought clarifications from the Administration as to—</p> <p>(a) whether the model articles should make reference to the relevant arrangements of listed companies in respect of appointment of alternate directors and proxies, and signing of written resolutions; and</p> <p>(b) whether a director should still be eligible to serve as alternate director for more than one director given that no alternate director could</p>	

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		<p>be counted as more than one director for determination of a quorum or signing of written resolutions.</p> <p>Mr LIAO expressed his views that if a director could not attend a meeting, he would need to appoint another person, who might be a director or otherwise, to act in his place as alternate director. The concept was different from the appointment of proxy. As an alternate director could not be counted as more than one director for determination of a quorum and signing of a written resolution, this would in effect discourage the appointment of the same person as alternate director by more than one director.</p> <p>The Administration said that –</p> <p>(a) as stipulated in article 30(1) in Schedule 1, a director might appoint as an alternate any other director, or any other person approved by resolution of the directors. This arrangement would provide the company with flexibility and its directors a choice of appointing another director as an alternate having regard that an existing director would be more familiar with the company's business than an outsider. A company might choose to adopt other arrangements for the appointment of alternate directors and modify the relevant model articles to suit its needs and operation, subject to other applicable statutory or regulatory requirements, such as the Listing Rules for Hong Kong-listed companies;</p> <p>(b) the requirement for counting alternate director as not more than one director in article 31(4) applied to all alternate directors for the purposes mentioned in article 31(3). The specific reference to "a person who is an alternate director but not a director" in article 31(3) was to make it clear that a person who was an alternate director but not a director could be counted towards a quorum for meeting and could sign a written resolution. While it would be clear that an alternate who was a director would be counted towards a quorum and could sign written resolutions, it might not be clear to an alternate who was not a director that he also had such rights;</p>	

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		<p>(c) the purpose of article 31(4) was to prevent a situation that a single alternate director, when he was the appointee of more than one director, could constitute a quorum for a directors' meeting alone and make decisions in the absence of other minds;</p> <p>(d) under article 18, adoption of a director's written resolution required the signature of all directors who would have been entitled to vote on the resolution at a directors' meeting. A written resolution shall be unanimous since there was no directors' meeting for the minority to persuade the majority to change their position in the course of decision-making. As such, an alternate director was to be counted once only for the signing of a written resolution. This would ensure that sufficient minds were being put to the issue to be resolved by written resolutions; and</p> <p>(e) alternate directors and proxies were two different concepts. In the model articles, the articles concerning proxies were only applicable to the procedures on general meetings.</p> <p>At the request of members, the Administration agreed to provide written response to explain the policy intent of articles 30 to 32 in respect of the appointment, rights and responsibilities of directors and alternate directors, and review whether the relevant provisions had clearly reflected the policy intent.</p>	<p>The Administration to take action as required in paragraphs 2(a) to (d) of the minutes.</p>
010524 – 010625	Chairman Administration	<p>At the request of the Chairman, the Administration undertook to provide a written response to the submission from HKIoD.</p>	<p>The Administration to take action as required in paragraph 3 of the minutes.</p>
010626 – 010705	Chairman	<p>Completion of scrutiny of the third batch of subsidiary legislation made under the new CO</p> <p>Cancellation of meetings scheduled for 24 and 25 June 2013</p>	

Time Marker	Speaker	Subject(s)	Action Required
010706 – 011014	Administration Chairman	Briefing by the Administration on matters relating to the commencement notice of the new CO and other notices for updating and/or making consequential amendments to other legislation for bringing the new CO into operation in the first quarter of 2014. (LC Paper No. CB(1)1353/12-13(01)) Members had no objection to the Administration's suggestion for the Subcommittee to continue its work to scrutinize the notices.	
011015 – 011056	Chairman	Arrangement for the follow-up actions arising from the meeting Legislative timetable	

Council Business Division 1
Legislative Council Secretariat
26 August 2013