

香港特別行政區政府
財經事務及庫務局
財經事務科
公司條例草案專責小組
香港金鐘道六十六號
金鐘道政府合署十五樓



CB(1)1277/12-13(02)
COMPANIES BILL TEAM
FINANCIAL SERVICES BRANCH
FINANCIAL SERVICES AND
THE TREASURY BUREAU
GOVERNMENT OF THE HONG KONG
SPECIAL ADMINISTRATIVE REGION
15TH FLOOR
QUEENSWAY GOVERNMENT OFFICES
66 QUEENSWAY
HONG KONG

電話 TEL.: 2528 6384
圖文傳真 FAX.: 2869 4195
本函檔號 OUR REF.: CBT/7/6C
來函檔號 YOUR REF.: LS/S/12/12-13 & LS/S/25/12-13

By Fax

10 June 2013

Mr Timothy Tso
Assistant Legal Adviser
Legal Service Division
Legislative Council Secretariat
Legislative Council Complex
1 Legislative Council Road
Central
Hong Kong
(Fax No.: 2877 5029)

Dear Mr Tso,

**Companies (Unfair Prejudice Petitions) Proceedings Rules
Company Records (Inspection and Provision of Copies) Regulation
Companies (Non-Hong Kong Companies) Regulation**

We refer to your letters of 31 May, 3 June, 7 June and 10 June 2013. Our reply to the points raised in your letter in relation to the three pieces of subsidiary legislation made under the new Companies Ordinance (“CO”) is given below for your reference.

Companies (Unfair Prejudice Petitions) Proceedings Rules

Rule 3(2)(c)

This subrule provides that the form set out in Form 2 in the Appendix to the Companies (Winding-Up) Rules (Cap.32H) must be used in the case

where a petition involves an alternative application. By virtue of rule 3(2)(a), rule 22 of Cap.32H also applies to such a petition, i.e. that the petition shall be in Form 2 with such variations as circumstances may require. The petitioner may therefore state the grounds on which the petition is presented and the terms of the order sought in an adapted format of Form 2 as necessary. As a matter of litigation practice, a petitioner invariably would state in the petition the grounds of presentation and the terms of the order sought in the originating process.

Rule 3(4)

“容受” is used in the Chinese text of existing legislation and is not a new expression. Examples of using “容受” to bring out the meaning of “suffer” in similar contexts can be found in section 40BX(3)(b) of the Education Ordinance (Cap.279) and section 3(1) of The Hong Kong Institute of Housing Ordinance (Cap.507). We consider the expression appropriate in the present context.

Rule 3(5)

This subrule provides that for a petition which does not include an alternative application (or if such an application is not proceeded with), the rules and practice of the High Court for regulating the ordinary civil procedures of the court, so far as may be applicable and not inconsistent with the set of rules, also apply to the proceedings on the petition. On the other hand, if a petition includes an alternative application, subrule 3(2) provides that the Winding-up Provisions are to apply. In such case, rule 210 of Cap.32H (which provides for the application of rules and practice of the High Court in circumstances where no other provision is made by the existing CO (Cap.32) or Cap.32H) is applicable to the proceedings on such a petition.

Rule 4(2)

This subrule does not specify whether the hearing on the return day is to be held in chambers or in open court. It will be a matter to be decided by the Judiciary, and may be specified in Practice Direction if it is considered appropriate by the Judiciary as in current practice (see paragraph 5.6.3 of Part II of Practice Direction 3.1 of the Judiciary, which states that the hearing on the return day is to be held in chambers).

Rule 5(1), 5(2) and 7(1)

“留交” is used generally as the Chinese equivalent of “leave” or “leaving” in the Rules of the High Court (Cap.4A). In particular, it is used in Order 65, rule 2 and Order 69, rule 3(2) in the context of service of documents, as well as in Order 59, rule 16(3) in the context of leaving a document with the Registrar. “留交” is also used in rules 25 and 35 of Cap.32H. We consider the expression appropriate in the present context.

Rule 8(1)

This subrule provides that unless the Court otherwise directs, the petitioner must serve an office copy of the order on the company and on the Registrar of Company. Pursuant to section 70 of the Interpretation and General Clauses Ordinance (Cap.1), where no time is prescribed or allowed within which anything shall be done, such thing shall be done without unreasonable delay. Upon service of the order on the Registrar, the order will be duly filed for public inspection on the Companies Register. This set of Rules does not prescribe any criminal consequences for non-compliance with the aforesaid requirement. This reflects the existing position in Rule 36(3) of Cap.32H (i.e. the provision which this subrule re-enacts).

By virtue of Order 45, rule 7 of Cap.4A (which applies to an unfair prejudice petition by virtue of rule 3(5) of this set of Rules), an order shall not be enforced unless a copy of the order has been duly served on the person or body corporate required to do or abstain from doing the act in question, unless service is dispensed with. Accordingly, if the company concerned is ordered to do or abstain from doing an act, the petitioner must duly serve the order on the company before the order is enforced.

Company Records (Inspection and Provision of Copies) Regulation

General and Section 7(1)

One major difference between this Regulation and the consultation draft published in September 2012 is the regime for inspection of company records. In the consultation draft, we have proposed an appointment-based inspection regime, i.e. the requestor must make an appointment with the company typically seven days prior to the date of inspection, which will take place at a location to be specified by the company concerned. Having considered the feedback from public

consultation and further reviewed the proposed regime, we consider that the proposed regime would be overly prescriptive. The current Regulation adopts a more general approach by stipulating a company's obligation to make its records available for inspection by any persons entitled to do so during business hours. This is also the approach adopted in relevant provisions of the existing CO. Section 7 does not impose any specific requirements concerning the location for inspection and would allow for flexibility.

Section 7(3)

This subsection provides that if section 7(1) (i.e. a company must make available its company records for inspection during business hours) is contravened, criminal liability may be imposed on the company and every responsible person of the company. Since the obligation under section 7(1) is imposed on the company, criminal liability should only be imposed on such persons.

Sections 7(3) and 11(4)

Section 7(3) provides for the penalty for contravention of section 7(1) concerning the inspection of records, while section 11(4) provides for the penalty for contravention of section 11(1) concerning the provision of copies. The maximum penalty is a level 4 fine in both cases. It is considered that a daily default fine would not be necessary for such offences as prosecution action is likely to be targeted at a specific breach on a specific date rather than over a continuous period.

Sections 9 and 13

The application for an order of the Court should be made by originating summons. Order 102, rule 2(1) of Cap.4A, upon consequential amendment by section 5(3) of Schedule 10 to the new CO, will provide that except for certain types of applications specified in that Order (such as an application to sanction a compromise or arrangement between a company and its creditors), every application for an order of the Court under the new CO may be made by originating summons. This preserves the current arrangements.

The magistrate does not have the power to make the relevant orders under sections 9(1) & (2) and 13 of this Regulation, which are to be handled by the Court. This is in line with the empowering section of the Regulation (see section 657(4)(c)).

Section 11(5)

“Business day” is defined to include Saturday with reference to the definition of the same term in the interpretation provision for Part 18, i.e. section 821(1) of the new CO, which represents the typical arrangement in the communications with the company. As to sections 218(7) and 261(7) in the new CO which do not count Saturday as a business day, these provisions are concerned with the publication of notices in the Gazette which is not applicable to the context of this Regulation.

Section 657(2)(c) of the new CO

Section 657(2)(c) of the new CO provides that this Regulation may contain provisions requiring a company to inform a person of the most recent date on which alterations were made to a register or an index (“the requirement”). We note that the requirement, which is not present in the existing CO, would lead to additional compliance costs for the companies concerned, and we are not aware of any strong demand for its introduction. Therefore the requirement was not included as we finalised this Regulation.

Companies (Non-Hong Kong Companies) Regulation

Section 2

In Part 16 of the new CO, the English expression “place of incorporation” (of a non-Hong Kong company) is rendered as (某非香港公司) “成立為法團所在地方” (see sections 774, 775(2)(a), 776(2)(b), 787 and 789 for example). In this Regulation, “place of incorporation” is used in a number of provisions (such as sections 3, 4 and 9). Thus, in the Chinese text of this Regulation, a definition “成立所在地” is included in section 2 to simplify the aforesaid Chinese expression for making the Chinese drafting more concise. As the English expression “place of incorporation” is used in its ordinary sense and is clear in meaning, it does not need to be defined here. Under section 10B of the Interpretation and General Clauses Ordinance, the English language text and the Chinese language text of an Ordinance shall be equally authentic, and the Ordinance shall be construed accordingly. As such, each text is independent and can be read on its own. There is no discrepancy in meaning in this case.

It is not uncommon for the Chinese text of a piece of legislation to feature a term in its interpretation provision without providing an equivalent definition in the English text, and vice versa. For example, in the new CO, section 2 provides for the word “Court” as an abbreviation of the Court of First Instance; while no equivalent definition is given in the Chinese text, which instead uses “原訟法庭” directly in various provisions.

Section 3(1)(e)(ii)(B) and (4)

The correspondence address required under section 3(1)(e)(ii)(B) can be a place within or outside Hong Kong. Section 3(4) provides that such a correspondence address must not be a post office box number without affecting the aforesaid.

Sections 4(4)(a) and 9(1)(k)

The Chinese rendition concerned reflects the position in the English text. Section 4(4)(a) refers to section 776(4) of the new CO, in which subsections (a) and (e) requires that an application for the registration of a non-Hong Kong company must be made in specified form and delivered to the Registrar, and the relevant Chinese rendition is “申請須符合指明表格...交付處長”. It follows that the Chinese expression “在本條例第776(4)條規定須交付申請” can only be interpreted as the delivery of application to the Registrar as provided for in that subsection; and accordingly “日期” means the date of making such a delivery. The same applies to the Chinese rendition of section 9(1)(k) of this Regulation. We will consider whether amendments to these sections are necessary.

Section 9(1)(h)(i)

We note your comment on the Chinese rendition of “name” and will consider whether amendment to the rendition is necessary.

There is no specific requirement for the address of the authorised representative in this Regulation. Section 9 is concerned about the particulars to be contained in an annual return of a registered non-Hong Kong company, which, in respect of the address of an authorised representative, follows the requirement at the time of applying for registration as the registered non-Hong Kong companies as stipulated in section 776(4)(c).

Section 11(2)(a) and (3)(a)

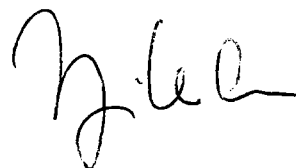
For a local company which revises its financial statements, the revision would be subject to the relevant provisions in Part 9 of the new CO as well as the Companies (Revision of Financial Statements and Reports) Regulation. The latter provides that the revised financial statements are to be taken as having been revised on the date of the original financial statements, so it is appropriate for that Regulation to impose the requirements in question. However, in respect of registered non-Hong Kong companies, Part 16 of the new CO and this Regulation only deal with the delivery of revised accounts for registration. The revision of the accounts would be made pursuant to the applicable regulatory requirement (as defined in section 10(1) of this Regulation). Accordingly, the requirements in question are not applicable to revised accounts of a registered non-Hong Kong company. This is also the current position under section 20 of the Companies (Revision of Accounts and Reports) Regulation (Cap.32N) which this section re-enacts.

Section 14(2)(a)

The expression "after the change" in the English text qualifies any instruments to which change has been made. The intention is if a piece of instrument (such as the company's charter) has been amended, the registered non-Hong Kong company shall submit that piece of instrument in its entire form, with the amendment duly incorporated, together with the return to the Registrar. We will consider whether amendment to this section is necessary.

You are welcome to contact the undersigned at 2528 6384 should you have any further questions.

Yours sincerely,



(Arsene Yiu)

for Secretary for Financial Services
and the Treasury

c.c. D of J

(Attn : Mr Sunny Chan, Mr Henry Chan, Ms Amy Chan,
Ms Mandy Ng, Ms Phyllis Poon and Miss Cindy Cheuk)

R of C

(Attn : Mrs Karen Ho and Ms Phyllis McKenna)

Clerk to Subcommittee on Subsidiary Legislation Made under the
New Companies Ordinance

(Attn : Ms Connie Szeto)