立法會
Legislative Council

LC Paper No. CB(1) 2035/99-00
(These minutes have been seen by the Administration and cleared by the Chairman)

Ref: CB1/BC/6/99/2

Bills Committee on
Companies (Amendment) Bill 2000

Minutes of meeting
held on Friday, 24 March 2000, at 4:30 pm
in Conference Room A of the Legislative Council Building

Members present	**:**	Hon Ronald ARCULLI, JP (Chairman) Hon HO Sai-chu, SBS, JP Hon Albert HO Chun-yan Hon Eric LI Ka-cheung, JP Hon HUI Cheung-ching Hon CHAN Kwok-keung Hon CHAN Yuen-han Hon Mrs Miriam LAU Kin-yee, JP
Members absent	**:**	Hon James TIEN Pei-chun, JP Hon LEE Cheuk-yan Hon Margaret NG Hon SIN Chung-kai
Public officers attending	**:**	**Financial Services Bureau** Miss Susie HO Deputy Secretary for Financial Services Mr L W TING Assistant Secretary for Financial Services

Official Receiver's Office

Mr E T O' CONNEL
Official Receiver (Atg)

Mr Edward LAU
Assistant Principal Solicitor

Mr Jeremy GLEN
Assistant Principal Solicitor

Companies Registry

Mr John BUSH
Secretary of the Standing Committee on Company Law Reform

Department of Justice

Mr Geoffrey FOX
Senior Assistant Law Draftsman

Miss Shandy LIU
Senior Government Counsel

Clerk in attendance : Ms LEUNG Siu-kum
Chief Assistant Secretary (1)4

Staff in attendance : Mr KAU Kin-wah
Assistant Legal Adviser 6

Miss Irene MAN
Senior Assistant Secretary (1)9

I Meeting with the Administration
(LC Paper No. CB(1) 1214/99-00(01))

The Administration briefed members on its response to members' concerns raised at the previous meeting.

Definition of "general meeting"

2. The Deputy Secretary for Financial Services (DS for FS) advised that the definition of "general meeting" was not provided in the Companies Ordinance (Cap. 32), but some sections of the Ordinance made reference to the holding of "general meetings" in the context of annual general meeting and extraordinary general meeting.

Compliance with the proposed section 116BA(1) by one or all directors or company secretaries

3. DS for FS advised that the director or secretary who moved the resolution was required to secure a copy of the proposed resolution to the auditor. The Administration would move an amendment to the new subsection 116BA(1) to clarify the liability of the director or secretary concerned. As regards paper meetings, the Senior Assistant Law Draftsmen (SALD) undertook to draft a Committee Stage amendment to clarify who should be the person responsible for complying with the provision.

Deletion of penalty provision from section 116BA(1) to bring it at par with that in section 141(7)

4. The Chairman noted that there was no penalty provision for non-compliance with section 141(7) for a physical meeting. He therefore raised concern about the rationale for imposing a penalty on the director or the secretary concerned for failing to serve a notice to the auditor for a paper meeting. He considered that the addition or deletion of the penalty provision should be applied equally to both sections 116BA(1) and 141(7) in relation to a paper meeting and a physical meeting respectively. The Secretary of the Standing Committee on Company Law Reform advised that when no notice was served on the auditor in the case of a physical meeting, the shareholders themselves could make objection and let the court determine the validity of the meeting. However, the resolution would remain valid until a complaint was lodged to the court. As for paper meetings, even if no notice was served on the auditor, the resolution passed would still be totally valid. Therefore, a penalty provision was necessary in order to ensure that the directors or the secretary would notify the auditor accordingly.

5. The Chairman, however, pointed out that under section 141(7), the resolution passed would remain valid until it was challenged and overturned. The same rationale should apply to a paper meeting where the burden should rest with the person challenging the resolution.

6. Mr Eric LI remarked that if an auditor did not get the notice for the general meeting of a company, he could lodge a complaint with the company and would seldom take it to the court. Since there were not many precedents,

it would be difficult to identify the position of the present legislation. He considered that the Administration might resolve the difference in the legislation for physical and paper meetings by either adding the penalty provision to the respective sections or invalidating the resolutions passed at both types of meetings.

7. DS for FS advised that in section 141(7), the resolution could be challenged while under section 116BA the resolution would still be valid even if the requirement on notifying the auditor had not been complied with and there was no avenue for challenging it. Thus, the Administration considered that the penalty clause in section 116BA would have a deterrent effect and would help to ensure that the director or secretary would comply with the notification requirement. The Chairman remarked that the subject should be discussed further.

Committee Stage amendments to section 116BA(4)

8. Members noted the amendments and had no comments.

Statistics on applications for voluntary winding up under section 228A

9. As the Administration maintained the position to repeal section 228A, Mr Albert HO enquired about the background for its enactment, whether it was modeled on foreign legislations and how it worked in other countries. The Official Receiver(Atg) (OR/Atg) advised that section 228A was unique to Hong Kong. It was first enacted in the 1980s and was amended in 1993 to the effect that only a solicitor or an accountant could become a provisional liquidator. Mr HO considered that since section 228A could provide expeditious proceedings for winding up of companies, the Administration could tighten up the provisions to guard against the possible abuse instead of repealing the section.

10. OR/Atg advised that both the SCCLR and the Insolvency Law Reform Commission recommended that section 228A be repealed because when a company became insolvent, the interests of creditors should be given priority. The process should be driven by the creditors, not by the directors since the creditors would have direct financial stake in the outcome of liquidation. If the directors appointed a provisional liquidator under section 228A, the creditors would have to face a “fait accompli” situation.

11. The Chairman enquired whether the creditors could replace the provisional liquidator when the creditors' meeting was called. OR/Atg advised that the creditors could do so. However, he pointed out that under section 228A, the directors were only required to deliver a statutory declaration to the Registrar of Companies recording the resolution that there were good and sufficient reasons for the winding up to be commenced under this section. As

the voluntary winding up process under section 228A was initiated by directors, and third parties were not involved in the initial process, it had not been possible to ascertain whether the reasons for choosing the section 228A route were in fact good and sufficient.

12. DS for FS supplemented that if the winding up procedure was initiated by creditors or the provisional liquidator was appointed by the court, there would be a degree of control or sanction over the provisional liquidator. However, under section 228A, the entire winding up process was initiated by the directors and there was no procedure for supervising the provisional liquidator. Mr Jeremy GLEN, the Assistant Principal Solicitor of the Official Receiver's Office advised further that if an application for the appointment of a provisional liquidator was made under section 193, the provisional liquidator would be under the control of the court.

13. On members' enquiry about the possibility of bringing the provisional liquidator appointed under section 228A subject to the control of the court to address the concerns over the possible abuse of the section, OR/Atg advised that sections 249 and 255 provided that creditors could apply to the court to determine any question arising from the winding up of a company.

14. Mr GLEN supplemented by saying that despite the provisions under sections 249 and 255, there was no supervisory control over the provisional liquidator's conduct and powers under section 228A. Mrs Miriam LAU pointed out that the provisional liquidator's powers had been circumscribed under section 228A(7). He would have similar powers and be subject to the like duties of a liquidator in a creditors' voluntary winding up. Thus, the powers of the provisional liquidator were not subject to no control as described by the Administration. In response, Mr GLEN explained that in making an application to the court for the appointment of a provisional liquidator under section 193, the provisional liquidator's power would be specifically limited if it were appointed by the court.

15. On limiting the powers of the provisional liquidators, Mrs Miriam LAU suggested amending section 228A to circumscribe the powers of the provisional liquidator under the court. Mr Albert HO suggested retaining the provision for the directors to wind up an insolvent company on a voluntary basis. If the vague definition of the "good and sufficient reasons" in section 228A(1)(b) was the main concern, it could be modified to enhance its clarity. He appreciated the establishment of a simple winding up mechanism for insolvent companies.

16. Mr Edward LAU, the Assistant Principal Solicitor of the Official Receiver's Office advised that the section 228A procedure was not a simple mechanism because a creditors' meeting was still necessary as in the case of the ordinary creditors' voluntary winding up. It was, therefore, by no means a

simpler procedure. DS for FS added that if more checks were to be established to determine whether there were good and sufficient reasons for the winding up under section 228A, the court would have to provide those checks. If the matter was to go to the court, it would fall back into the same old loop of the compulsory winding up procedure. She reiterated that in case of a real emergency, there were already provisions under section 193 that a petition could be presented to the court for the winding up of the company. At the request of members, she undertook to consult the Hong Kong Society of Accountants (HKSA) on the feasibility of certifying that there were good and sufficient reasons for winding up a company. Meanwhile, members suggested writing to the HKSA and the Law Society of Hong Kong (LSHK) again for their comments on section 228A.

(*Post-meeting note*: Submissions from HKSA and LSHK on section 228A were circulated to members vide LC Paper No. CB(1) 1355/99-00(01) and (02).)

17. The Chairman referred to Annex C to the information paper and noted that there was a marked increase of section 228A cases from 30 to 173 between 1997 and 1999. He enquired how winding ups were initiated in these cases with regard to the requirement of providing "good and sufficient reasons" as stipulated in section 228A(1)(b). OR/Atg advised that the petitions normally declared that the company could not continue its business by reasons of its liabilities and there were good and sufficient reasons for the winding up. The reasons were usually not specified. Addressing Mr Albert HO's concern on whether there were complaints lodged in respect of the interest of creditors being prejudiced by the use of this winding up procedure, OR/Atg advised that no complaint had been received as far as the Official Receiver's Office was aware. The Chairman remarked that the subject should be considered further.

Effectiveness of the corporate rescue model implemented in Canada

18. Mr GLEN advised that the corporate rescue model was based on provisions of various jurisdictions, including Canada, Australia and the United Kingdom. Addressing the Chairman's concern on whether there was an overseas provision similar to the clause in the Bill regarding the setting aside of a trust account for the arrears of payment to employees, DS for FS advised that the provision was unique to Hong Kong. In a number of overseas jurisdictions, the welfare systems were quite different from that of Hong Kong and that as far as the Administration was aware, there was no similar arrangement like the Protection of Wages on Insolvency Fund in other jurisdictions.

19. The Chairman expressed doubt about the practicality of the trust account arrangement. He sought clarification on whether the employees could choose to take less from the employers in respect of the outstanding wages in order to

support the company in the rescue procedure. DS for FS advised that the present proposal had been drafted having regard to the views expressed by the consultees during the consultation exercise conducted in 1998. Mrs Miriam LAU considered that the Administration would have to assess the practicality of the proposal for if a company had the money to set aside a trust account for the arrears of payment to employees, the company would not be in such a financial difficulty as to require corporate rescue. DS for FS clarified that under the trust account requirement a company, before undergoing corporate rescue, had to clear all arrears of payment including wages and other statutory entitlements under the Employment Ordinance (Cap. 57) owed to the employees who were to be laid off by the company. In respect of employees whose employment contracts would continue, the company only had to settle all arrears in wages.

20. The Chairman remained unconvinced that the present proposal did not provide an option for the employees to accept less from the employer in order to support their company to take chances in the rescue procedure. OR/Atg advised that the proposed procedure was only an addition to the existing provisions and not a substitute. If a company and its creditors had agreed to an arrangement between themselves, they could apply the mechanism provided in section 166 where there was no provision for the moratorium, nor the requirement of any trust account.

Corporate rescue

Power of the provisional supervisor

21. On the advice of the Chairman, the Bills Committee started to examine the part on corporate rescue. Mr Albert HO enquired about the extent of the power of the provisional supervisor during the moratorium. He raised concern about the rationale for giving the provisional supervisor the power to terminate the office of a director and asked whether the provisional supervision could embark on new ventures in order to save the company. OR/Atg advised that when the corporate rescue procedure was adopted, the provisional supervisor would have to make a proposal satisfying the company that he could achieve a more advantageous realization of the company's property for creditors than allowing it to go into liquidation in accordance with section 168Z(1)(a) to (c). After the initial 30-day moratorium, he would have to seek extension of the moratorium from the court if he had not yet been able to put forward his proposal for the consideration of the creditors. The court would judge the provisional supervisor's proposal serving as a check on the conduct of the provisional supervisor. Regarding the removal of directors, the provisional supervisor was only expected to take such drastic action when needs arose for safeguarding the assets of the company. As for the engagement into new business, he advised that paragraph 6 of Part 1 of the proposed 18th schedule had set out the duties of the provisional supervisor

during the moratorium. The Chairman remarked that the provisions in paragraph 6 of Part 1 of the 18th schedule and the proposed section 168Z(1)(a) to (c) would enable the provisional supervisor to manage the business of the company for the primary purpose of preserving the property of the company for the creditors, including the removal or the merging of some parts of the business for survival.

22. However, Mr GLEN advised that the main role of the provisional supervisor was to take over the executive control of the company. During the moratorium, the provisional supervisor could make a deal with the creditors on selling or taking over part of the business. Nevertheless, he did not consider that the power of the provisional supervisor would include the engagement of new ventures. In this connection, the Chairman enquired why the provisional supervisor should have the power to terminate the office of the directors during the moratorium as opposed to just freezing their power. Mr GLEN explained that the corporate rescue procedure was established for companies in very difficult situations; unlike in other jurisdictions where the rescue procedure could take about a year or two to reach an agreement, the provisional supervisor was severely limited in the length of time and would only have about six months to arrive at a solution for the company; therefore, the provisional supervisor should be given the right to decide which directors to retain or remove, that was to choose his own team for accomplishing his task within the six months. This power was set out in section 168ZG(2).

23. In view that under section 168ZI(1) and (2), any director obstructing the provisional supervisor could be liable to penalty, Mr Albert HO enquired about the possibility of subjecting the enormous power conferred upon the provisional supervisor to some form of scrutiny. SALD advised that the provisions concerned were not unique but were similar to those of the Banking Ordinance (Cap. 155) and the Insurance Companies Ordinance (Cap. 41). He undertook to provide members with the relevant provisions for information.

(*Post-meeting note*: The relevant provisions were circulated to members vide LC Paper No. CB(1) 1271/99-00(01).)

Arrangements for employees

24. As to whether the Administration should proceed the part on corporate rescue of the Bill at this stage, the Chairman reiterated his concern that a company in need of rescue might encounter difficulties in setting aside money for a trust account for its employees. Mr Eric LI, however, appreciated the introduction of the new framework into the legislation. He considered that further review on the legislation could be conducted after the model had been put into practice for some time. DS for FS advised that there was a need to strike a balance between the interests of employers and employees in the rescue procedure. Given that there was a strong demand from the employee

associations to set aside a trust account for the employees' benefits, the Administration had to address their concerns by putting forward a piece of workable legislation. She recognized that the proposed arrangement might not be perfect. However, she would suggest that the procedure be given the chance of putting in practice first, and if warranted, it could be modified in the light of experience later on.

25. Mr Eric LI remarked that as Hong Kong was suffering from economic recession, the proposed legislation would render assistance to companies in financial difficulty. He emphasized that since a large-scale consultation exercise had been conducted by the Administration and the Law Reform Commission, the concept of the proposed rescue procedure had actually been prevailing for four years and was not entirely new to the parties concerned. He showed appreciation for the Administration's commitment in giving a serious attempt in making the proposal and expressed support for it.

26. The Chairman considered that the employees should be given the right to vote on the requirement for a trust account, as some employees might find some other considerations granted by the company acceptable and were willing to give up their legal rights to save the company. He enquired whether the idea had been put through to the employee associations. DS for FS advised that the Administration had not consulted the employee associations on the above idea since it had just been raised by the Bills Committee. She said that if any compensation package was to put to a vote among the employees, the discussions would take time which might practically delay the implementation of rescue procedure since time was of the essence in corporate rescue.

27. Mr CHAN Kwok-keung said that some companies might be able to settle wages for employees yet not be able to settle all the debts owed to creditors, these companies might be worth saving and the proposed legislation would give them a chance to turn around. Mr HO Sai-chu said that the issue had been widely discussed in the Labour Advisory Board and some Board members expressed great concern on the protection for employees. They considered that employees should not continue working for a company without the guarantee of payments. Mr Eric LI held the view that without concrete examples, the Administration might have difficulty in convincing the employees on how a company might be saved by claiming less wages at the rescue stage.

28. Mr Albert HO shared the Chairman's view that the legislation should at least provide a means for those who opted to be paid less in order to save the company. DS for FS undertook to review the suggestion of providing flexibility in respect of the requirement for setting aside a trust account before the commencement of the rescue procedure as well as seeking the employees' view on the suggestion.

(*Post-meeting note*: Members agreed at the meeting on 10 April 2000 that the part on corporate rescue of the Bill was not to be considered in the current LegCo session.)

29. The Chairman invited members' views on how the corporate rescue part of the Bill could be tackled in the current session given that it was new and complicated in nature. Mr Eric LI said that despite the complexity of the Bill, the Administration had examined the concepts behind the proposed corporate rescue procedure for quite some time and had consulted experts in Hong Kong. He said that the accounting profession would support the proposal which would be beneficial to Hong Kong as a whole. The Chairman remarked that many organizations were not able to submit their views on the Bill before the proposed deadline of 21 March 2000. That being so, the deadline would have to be postponed to 15 April 2000 which would affect the progress of the Committee in examining the issues.

30. At the request of the Chairman, the Administration provided a flow chart to members indicating a typical workout of the restructuring procedure.

(*Post-meeting note*: The flow chart on corporate rescue was tabled at the meeting and circulated to members vide LC Paper No. CB(1) 1253/99-00.)

31. The next meeting was scheduled for 31 march 2000, at 8:30 a.m. There being no other business, the meeting ended at 6:35 p.m.

Legislative Council Secretariat
7 September 2000