CHAPTER 4

BUSINESS FACILITATION

4.1 One of the guiding principles of the rewrite exercise is to cater for the needs of SMEs. The Government believes that SMEs should generally be allowed to take advantage of simplified accounting and reporting requirements, thereby saving their compliance and business costs. Another means to save costs is to facilitate companies to dispense with AGMs by unanimous members' consent. We have also looked into ways to simplify some of the complex rules prescribed in the CO, such as the capital maintenance rules. In some cases, the solution involves introducing cheaper and less time-consuming alternatives to court procedures to deal with more straight-forward cases. The new measures include a court-free procedure for reduction of capital based on the solvency test and a court-free statutory amalgamation procedure for wholly-owned intra-group companies. Such alternative procedures should save costs and time.

Saving Costs

Allowing more private companies and small guarantee companies to take advantage of simplified reporting requirements[53]

4.2 At present, section 141D of the CO provides that a private company (other than a company which is a member of a corporate group, a banking company, a deposit-taking company, an insurance company, a stock-broking company, a shipping company or an airline company) may, with the written agreement of all the shareholders, prepare simplified accounts in respect of one financial year at a time.[54] These companies may also prepare simplified directors' reports.

4.3 We will relax the restrictive qualifying criteria to enable more private companies (including those which are members of a group of companies) to prepare simplified financial and directors' reports to save business and compliance costs. The relaxation will be along the following lines:

(a) a private company (other than a banking company, a deposit-taking company, an insurance company, or a stock-broking company) that

[53] Provisions will be included in Part 9 of the CB to be covered in the second phase consultation paper.

[54] The simplified accounts are prepared in accordance with the SME Financial Reporting Standard issued by the HKIPCA.

qualifies as a "small company" [55] will be allowed to prepare simplified financial and directors' reports automatically without any requirement for shareholders' consent;

(b) other private companies may also prepare simplified financial and directors' reports, if shareholders holding at least 75 % of the total voting rights agree in writing and no other shareholder object. The agreement will remain in force until the agreement is revoked by a shareholder;

(c) the current prohibition for a private company which has any subsidiary or is a subsidiary of another company formed and registered under the CO to prepare simplified accounts and reports will be removed. In addition, a private company which is the holding company of a group of private companies may prepare simplified group accounts provided that the criteria of a "small group" [56] or the shareholders' consent requirement are met; and

(d) the current prohibition which prevents a company that owns and operates ships or aircraft engaged in the carriage of cargo between Hong Kong and a place outside Hong Kong from relying on section 141D will be removed. It is considered to be an anachronism which is no longer appropriate.

4.4 We believe that small guarantee companies should be allowed to take advantage of the simplified reporting and disclosure requirements applicable to private companies. Nevertheless, the total assets and number of employees may not be suitable criteria to distinguish large guarantee companies from small ones. We suggest using a total annual revenue of not more than HK$25 million as a bright line rule for guarantee companies. Those guarantee companies with a total annual revenue of HK$25 million or less can take advantage of the simplified accounting and reporting requirements.

---

[55] A company is considered to be a 'small company' if it satisfies at least two of the following conditions:
- Total annual revenue of not more than HK$ 50 million.
- Total assets of not more than HK$ 50 million at the balance sheet date.
- No more than 50 employees.

The details will be set out in subsidiary legislation.

[56] A group of companies will qualify as a "small group" in a year if it satisfies at least two of the following conditions:
- Aggregate total annual revenue of not more than HK$50 million net for that year.
- Aggregate total assets of not more than HK$50 million net at the balance sheet date.
- No more than 50 employees.

The detailed criteria will be formulated in consultation with the HKICPA and prescribed in subsidiary legislation.

Allowing companies to dispense with AGMs by unanimous members' consent.

4.5 For many private companies, the obligation to hold AGMs could be redundant and potentially burdensome. In order to simplify the decision-making process, all companies will be allowed to dispense with AGMs if unanimous members' consent is obtained, and that dispensation should be in force unless a member, by notice, requires an AGM to be held in a particular year, or until the dispensation is revoked by passing an ordinary resolution to that effect.[57] A company is also not required to hold an AGM if the company has only one member.

4.6 At present, there is an exception under section 111(6) of the CO for a company to dispense with AGMs if everything that is required to be done at the meeting is done by way of a written resolution or resolutions in accordance with section 116B. The written resolution procedure will be retained in case a company might wish to dispense with an AGM on a specific occasion by a written resolution.

Facilitating Business Operation

Introducing an alternative court-free procedure for reduction of capital based on solvency test[58]

4.7 At present, the CO only allows reduction of share capital by a court sanction procedure, save for the re-designation of the nominal value of shares to a lower amount. Shareholders must agree by special resolution, and the court, after settling the list of creditors and considering creditor objections (if any), has to be satisfied that alternative protections are in place.

4.8 We will introduce a court-free procedure based on a cash flow solvency test[59], as an alternative process in addition to the current rules. The new procedure should be faster and cheaper and will be applicable to all companies.

Allowing all companies to purchase their own shares regardless of the source of funds, subject to a solvency test[60]

4.9 The current rules on buy-backs in the CO, which distinguish between financing a purchase out of distributable profits or the proceeds of a new issue of shares and that out of capital, are fairly complex and restrictive. Also, financing by payment out of capital based on a solvency test is

---

57 See paragraphs 25 to 27 of Explanatory Notes on Part 12.

58 Provisions will be included in Part 5 of the CB to be covered in the second phase consultation paper.

59 Generally following the approach in section 47F(1)(d) already provided in the CO in relation to the case of financial assistance.

60 Provisions will be included in Part 5 of the CB to be covered in the second phase consultation paper.

currently provided as an exception available to private companies only. We will streamline the rules and allow all companies to fund buy-backs regardless of the source of funds, subject to a solvency requirement.

Streamlining financial assistance provisions

4.10 Section 47A of the CO imposes broad prohibitions (subject to certain exceptions) on a company and its subsidiaries giving financial assistance to a third party for the purpose of acquiring shares in the company. The rules on financial assistance and the exemptions that are available are overly complex. Also the prohibitions are so wide that it is generally accepted that they are capable of capturing potentially beneficial, or at least innocuous transactions. As a result, companies may spend a disproportionate amount of time and money structuring transactions in such a way that they do not contravene the prohibition. We will attempt to streamline the financial assistance provisions in a manner similar to the NZCA.[61] Nevertheless, as the reformed rules may still be considered to be difficult for companies to comprehend and apply, and the mischief arising from financial assistance can arguably be tackled effectively by rules other than those for financial assistance, we will also consult on the alternative of abolishing the rules in the second phase consultation paper to be issued in early 2010.

Introducing a court-free statutory amalgamation procedure for wholly-owned intra-group companies[62]

4.11 The current procedure for amalgamation by means of a court-sanctioned scheme of compromise or arrangement under sections 166 to 167 of the CO is both complex and costly. We will introduce a voluntary, court-free option to simplify the amalgamation process for intra-group companies, thereby reducing business costs. To minimise the risk of the new statutory procedure being abused, we propose to confine it only to an amalgamation either between a holding company with one or more of its wholly-owned subsidiaries or between two or more wholly-owned subsidiaries of the same holding company, where minority shareholders' interests would normally not be an issue. For amalgamations involving insolvent companies or companies not within the group, the existing requirement for court sanction should be retained so as to ensure that their terms are just and fair to all shareholders and creditors.

---

[61] See sections 76 to 80 of the NZCA. Provisions will be included in Part 5 of the CB to be covered in the second phase consultation paper.

[62] Provisions will be included in Part 13 of the CB to be covered in the second phase consultation paper.

4.12 As a safeguard for creditors, the board of directors of each amalgamating company must make statements to verify the solvency of the amalgamating company as well as the amalgamated company.

Introducing a new procedure of "administrative restoration" of dissolved companies by the Registrar

4.13 Presently under section 291 of the CO, a company can be struck off the register by the Registrar if the company is not in operation or carrying on business. There have been some cases where a company struck off seeks to be restored on the ground that, contrary to the Registrar's belief, it was actually in operation or carrying on business at the time of its striking off. This may occur because a company fails to file its annual returns, moves without notifying the CR of a change of registered office and is unaware of the proposed strike-off. While restoration is often straightforward in such circumstances as it is unlikely to be contested, it still requires an application to the court. We will introduce a simplified administrative restoration procedure to allow companies to be restored to the register in straightforward cases without the need for recourse to the court.[63]

Making the keeping and use of a common seal optional

4.14 Section 93(1)(b) the CO stipulates that every company "shall have as its common seal a metallic seal on which it shall have its name engraven in legible characters". The use of the common seal by companies is required generally for executing deeds (particularly in conveyancing transactions), and, for the purposes of sections 71, 73 and 73A of the CO, in issuing a certificate as evidence of title to shares, a share warrant and sealing securities.[64]

4.15 We consider that where the seal is not used, the CB should provide for the requirements governing the mode of due execution of documents to facilitate companies entering into and executing business transactions and contracts which are increasing rapidly in volume and value. In this respect, we will allow a company to execute a document as a deed without using a common seal.[65] Companies can still use a common seal if they wish. This gives flexibility to companies which would have the option of either retaining or dispensing with the common seal.

---

[63] See paragraphs 14 to 17 of Explanatory Notes on Part 15.

[64] Please note that the CB will remove the power of a company to issue share warrants, see paragraph 5.7 below. An "official seal" which is a facsimile of the common seal with the addition of the word "securities" or "證券" may be used for sealing securities.

[65] We are considering the mode of due execution of documents without using a common seal. Provisions will be included in Part 3 of the CB to be covered in the second phase consultation paper.