Standing Committee on Company Law Reform

First Report to His Excellency the Governor in Council, January 1985

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REPORT

I - Registration of Charges

1.1 This subject is of the greatest practical importance to the business community. Briefly, a company creates a charge when it gives a creditor security over any of its property. Under Part III of the Companies Ordinance, Cap. 32, the basic details ("statutory particulars") of most types of charge have to be registered in the Companies Registry where they are available for inspection by members of the public on payment of a small fee. These statutory particulars of existing charges are of great interest to potential creditors of companies. If a charge requires to be registered but is not in fact registered then it is void against the liquidator if the company goes into liquidation and the creditor will then find himself in basically the same position as an ordinary unsecured creditor. It is therefore vital for any creditor who gets security from a company to ascertain whether the charge is registrable and, if it is, to ensure that it is duly presented to the Registrar of Companies for registration. During the financial year 1982/83, the total amount secured by charges registered in the Companies Registry was $47.1 billion and the total for the financial year 1983/84 was $42.8 billion.

1.2 The system of registration of charges in Hong Kong is almost entirely based on that in force in Britain. Unfortunately, the British system is far from perfect. More than twelve years ago, the Crowther Committee recommended a fundamental reform of the law on personal property security, including company charges, but the recommendation has not as yet been adopted. In these circumstances, the Standing Committee thought it desirable to deal with the pressing problems under the existing legislation, leaving possible consideration of basic reform to a later date.

1.3 The matters relating to charges which have been considered so far by the Standing Committee can be summarised as follows:

The Slavenburg decision

1.4 The decision in the Slavenburg case (N. V. Slavenburg's Bank v Intercontinental Natural Resources Ltd. and others [1980] 1 All E. R. 955) was concerned with the question of registration of charges created by an oversea (foreign) company which has established a place of business in Britain. Technically, the decision is not binding on the Hong Kong courts but informed opinion here, with which the Standing Committee agrees, is that it would be followed and most solicitors in the private sector are proceeding on that basis.

1.5 If an oversea company establishes a place of business in Hong Kong, it is required to comply with the registration requirements of Part XI of Cap. 32. These requirements are relatively simple, involving mainly the filing of certified copies of the company's constitution, its accounts where appropriate and the name and address of a person in Hong Kong who is authorised to accept on behalf of the company service of process and of any notices required to be served on the company. The registration fees payable are also very small, usually around $550. Nevertheless, for various reasons, including tax considerations, some oversea companies which admit that they are carrying on business in Hong Kong are reluctant to agree that they have established a place of business within the meaning of the Companies Ordinance here and therefore consider that they are not under an obligation to register under Part XI.

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1.6 Under Section 91 of Cap. 32, the registration of charges provisions set out in Part III of the Ordinance extend to charges on property in Hong Kong which are created, and to charges on property in Hong Kong which is acquired, by a company incorporated outside Hong Kong which has a place of business in Hong Kong.

1.7 Accordingly, when a Hong Kong creditor, usually a bank, takes a charge from an oversea company, it has to consider whether the company has established a place of business here. Until the Slavenburg decision, the bank would think it sufficient to search the Companies Registry to ascertain whether the oversea company had registered under Part XI of Cap. 32. If it had not registered, the bank would assume that the company had not established a place of business here and that the charge therefore did not require registration. Indeed, if the bank had then tried to register the charge, the Registrar of Companies would probably have replied saying that the oversea company did not appear to have a place of business in Hong Kong because it had not registered under Part XI of Cap. 32 and that the charge therefore did not appear to be registrable.

1.8 However, the Slavenburg case upset these views. It held that if a company had in fact established a place of business in Britain then any charge granted by it on property in Britain had to be registered even if the oversea company had not registered with the Registrar of Companies under the British equivalent of Part XI of Cap. 32. Accordingly, a creditor in Britain lending money to an oversea company and getting a charge over any property which it owns in Britain now has to satisfy himself as to whether or not the company has established a place of business there irrespective of whether or not it has registered with the Registrar of Companies. That is a question which at times cannot be answered with certainty, except by a court decision.

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1.9 In addition, the Slavenburg decision laid down that even if the company had no assets in Britain at the time the charge was created, the charge was registrable if any asset of the company subsequently came into Britain. This is a very difficult situation. When the charge is created, it cannot be registered because the company has no assets in Britain but if any asset comes into Britain during the lifetime of the charge, it becomes invalid for non-registration! The situation becomes almost impossible where the company owns ships or aircraft which may call at British ports. For example, if a British bank lends money to a Liberian shipping company on the security of its only asset, a cargo ship, and the ship is not in British waters at the time of creation of the charge, then the charge is not registrable. However, if the company goes into liquidation and at that time the ship happens to be in a British port, the bank will find that its charge is void against the liquidator because of non-registration.

1.10 There are other complications arising from the decision but the above are the main ones.

1.11 The Standing Committee has ascertained that, although the Law Society of England and Wales is very concerned about the difficulties caused by the Slavenburg decision and has submitted a paper to the Department of Trade and Industry asking for amending legislation, there is little possibility of legislation being forthcoming, at least in the near future.

1.12 In the circumstances, and after consideration of the views of various associations consulted, the Standing Committee recommends the following measures:

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(a) That Section 91 of Cap. 32 should only apply to an oversea company which is actually registered under Part XI of Cap. 32 at the time the charge is created.

(b) That Section 91 should be amended to provide that, for the purposes of Part III of Cap. 32, ships and aircraft owned by an oversea company shall always be deemed to be situated where they are registered, regardless of their actual physical position.

(c) That Section 91 should be amended to require the registration of any floating charge created by an oversea company registered under Part XI which could affect assets situated in Hong Kong i.e. a provision along the following lines:

"An oversea company will also require to register any floating charge over its undertaking or property which will have the effect of charging any undertaking or property situate in Hong Kong which the company may own at any time while the debt for which the charge was created remains unpaid or unsatisfied, notwithstanding that the company does not, as at the date of creation of the charge, own any undertaking or property situate in Hong Kong."

Note: The Standing Committee wishes to record its opinion that any charge which is registrable by an oversea company, but which is not in fact registered, should only be void as against any asset situated in Hong Kong. The Committee thinks that this is the effect of the proposed amendments but any doubt thought to exist should be resolved in the eventual legislation.

1.5 The Standing Committee anticipates that the above measures will be welcomed by, or at least be acceptable to, most of the parties affected. Although these measures do not remove all the difficulties arising from the Slavenburg decision, the Committee feels that they reduce the areas of uncertainty to an acceptable level. However, there was one measure recommended by various parties which the Committee was unable to agree to. This was that the sanction of invalidity should be removed in the case of charges created by an oversea company i.e. that Section 91 should be amended to provide that, if an oversea company fails to register a charge, then the validity of the charge should not be affected and instead the officers of the defaulting company should be subject to financial/custodial penalties. The Committee could not agree to this proposal for the following reasons. Firstly, it would distinguish unfairly between an oversea company which failed to register a charge and a Hong Kong company which failed to do so. Secondly, the Committee felt that the sanction of invalidity is the only really effective sanction in the case of failure to register charges. In most cases, a failure to register a charge only comes to the notice of the authorities where the defaulting company has gone into liquidation. In the case of an oversea company, there would be very little possibility, in practice, of fining or imprisoning the officers who would almost invariably be living outside the jurisdiction of the Hong Kong courts. Failing an effective sanction against the officers of the company, this means in practice that the authorities have to look to the creditors of oversea companies to ensure that charges are registered in Hong Kong, where necessary, and there is no doubt that the sanction of invalidity guarantees that creditors will take all possible steps to ensure such registration.

Mechanics of the Registration Procedure

1.14 Under the existing provisions of Part III of Cap. 32, where a charge requires to be registered either the company of the creditor has to present the original document of charge to the Registrar of Companies within 5 weeks after the date of creation of the charge, together with a statutory form setting out the particulars of the charge. The Registrar then registers the particulars and gives a certificate that this has been done. Under Section 83(2), this certificate "shall be conclusive evidence that the requirements of this Part as to registration have been complied with". The Registrar of Companies in London has been advised by Counsel that if he gives an incorrect certificate, because the particulars of the charge given to him are wrong and he has failed to notice the mistake, he might be liable to anyone who suffers a loss in consequence.

1.15 The Registrar of Companies therefore has to check each registration of charge very carefully which leads to substantial delay in the completion of registration.

1.16 The Jenkins Committee recommended in England in 1962 that the system be replaced by one under which both the chargor and the chargee would sign the form containing the statutory particulars and there would be no need to produce the original charge document, or a copy of it, to the Registrar. The chargor and the chargee would then be solely liable for the correctness of the statutory particulars and the Registrar would have no duty to check them. He would simply register the particulars. Such a system would, by removing the Registrar's duty to examine each registration of charge carefully, eliminate most of the delay in completion of registration.

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1.17 The recommendation was not accepted. The Law Society of England and Wales objected to its introduction on various grounds, which grounds have been considered by the Standing Committee.

1.18 The Committee are nevertheless in general agreement with the Jenkins Committee, although it is felt that it is highly desirable that copies of charges should be available in the Companies Registry for inspection by all interested parties because the statutory particulars do not contain all information of interest to a potential creditor e.g. they do not contain information as to restriction of creation of subsequent charges. This view is supported by all the professional bodies consulted by the Committee in the course of its consideration of this subject. The Committee appreciates that filing copies will be a cumbersome process unless the Registrar is provided with facilities for microfilming, but these will assuredly be more economic in the long run.

1.19 It is therefore recommended:

(a) that Section 80(1) of the Companies Ordinance be amended to provide that:

(i) the original instrument creating a charge need no longer be produced to the Registrar but that a copy of the instrument certified by the solicitor to the party seeking registration or by an officer of the company on oath shall be delivered to the Registrar for filing;

(ii) the prescribed particulars of the charge shall be certified as in the case of the copy instrument in (i); and

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(iii) the time limit for delivery of the prescribed particulars and of the copy charge (if applicable) to the Registrar be amended to 30 days (the time limit for registration in the Land Office).

(b) that Section 80(3) be similarly amended to provide that a certified copy charge shall be delivered to the Registrar for filing;

(c) that the introduction of microfilming in the Registry be expedited as a matter of urgency.

Registration of charges on shares in subsidiaries

1.20 Section 80(2) of Cap. 32 lists the types of charges in respect of which statutory particulars must be registered in the Companies Registry. These are the same as the British requirements except that we have no equivalent to the British requirement for registration of a charge on an aircraft.

1.21 The Jenkins Committee recommended that companies should also be required to register charges on shares in subsidiaries. This was because of the anomalous situation that if a company chooses to operate through branches and raises a loan on the assets used by one of those branches, it has to register the charge but if a company carries on business through subsidiaries and raises money by charging its shares in one of the subsidiaries, the charge does not require to be registered. The Jenkins Committee thought that charges on shares in subsidiaries should be registered and, in its Second Report (1973), our Company Law Revision Committee agreed with the Jenkins Committee.

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1.22 A clause amending Section 80(2) to include charges on shares in subsidiares was therefore included in the Companies (Amendment) Bill 1983. However, a serious practical fault in the provision was subsequently pointed out. If a creditor, usually a banker, is presented with shares in a batch of companies as security for a loan to a corporate client, how can he know whether any of these companies is in fact a subsidiary of the corporate client? There is no way that the banker can make an independent up-to-date check. The only reliable information available to him is in the last audited accounts of the corporate client which will normally contain a full list of subsidiaries but, of course, these accounts may be a year or even more old. The banker has to rely entirely on the corporate client which may have its own reasons for telling the banker that none of the companies whose shares are offered as security are subsidiaries when in fact some, possible even a majority of them, might have become subsidiaries within the previous two or three months. If the banker relied on the information supplied by the corporate client, he would not register the charge and if the client later went into liquidation, the charge would then be void in respect of the security on the shares in the subsidiaries. The only way the prudent creditor could protect himself would be by registering <u>all</u> charges on shares to cover the possibility of any of the shares being shares in a subsidiary of the corporate borrower. The Jenkins Committee, however, considered the question of requiring registration of all charges on shares and decided that such a requirement would be unreasonable.

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The Hong Kong Government decided that it would be wrong in principle to impose an obligation on a creditor in circumstances where he would not be able to check whether the obligation actually existed in any particular case and where, to protect himself, he would be obliged to do something, namely register all charges on shares, which it was generally agreed he should not be required to do. The clause was therefore deleted from the Bill and Government referred this matter to the Standing Committee for further consideration.

1.23 In the opinion of the Standing Committee, it is desirable that such charges should be registered. This would not only be of great help to potential creditors but, in the case of quoted companies, would also be a valualbe new source of disclosure of information to the investing public. The Committee agreed, however, that it would be inequitable to impose the usual sanction of invalidity under Section 80(1) in respect of non-registration, because a creditor has no reliable and up-to-date means of checking whether any shares offered to him as security by a corporate borrower are shares in a subsidiary of that borrower. It was also agreed that the usual sanction on the defaulting company under Section 80(1) for failure to register a charge (a fine of $1,000 for every day during which the default continues) would be insufficient to ensure that companies creating charges of this type would duly register them and that therefore a custodial penalty should also be provided.

1.24 The Committee therefore recommends that:

(a) Section 80(2) of the Companies Ordinance be amended to require a company to register any charge which it creates on the shares of a company (as defined in Section 2(8)

of the Ordinance)* which is, at the time the charge is created, a subsidiary of the company creating the charge or subsequently becomes such a subsidiary while the charge is still in force; and such registration shall be effected within 30 days of the creation of the charge or of the company becoming a subsidiary, as the case may be, with the sanction in wilful default of a fine of $10,000 and 6 months' imprisonment (i.e. the sanction of rendering the charge void will not apply to this category of charge);

(b) Section 85 of the Companies Ordinance be amended to allow the amendment or removal of the registration of a charge on shares in subsidiaries when one or all of the subsidiaries concerned cease to be a subsidiary of the chargor company.

Problems in interpretation of existing provisions

1.25 As previously indicated, Section 80 of Cap. 32 sets out the basic obligation for registration of charges and Sub-Section (2) specifies the types of charges to which the obligation applies. Paragraphs (c) and (e) of Sub-Section (2) apply to:

"(c) a charge created or evidenced by an instrument which, if executed by an individual, would require registration as a bill of sale;" and

"(e) a charge on book debts of the company;".

* Note: The purpose of the words in brackets is to make it clear that the provision applies to all subsidiaries of the company creating the charge, wherever they are registered and irrespective of whether they have registered in Hong Kong under Part XI of the Companies Ordinance.

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1.26 When the White Paper and the Bill for the Companies (Amendment) Ordinance 1984 were published in 1980 and 1983 respectively and members of the public were invited to comment, a number of professional organisations took the opportunity to ask for clarification of the scope of paragraphs (c) and (e). They referred in particular to the question of whether paragraph (e) extends to a charge on a deposit with a bank. This is clearly a point of great practical importance but there are known to be differing opinions on the subject. These requests from the professional organisations did not come as a great surprise to Government because the difficulties caused by the paragraphs are well known. Indeed, it is known that the Law Society of England and Wales feels that the two corresponding paragraphs in the British legislation do more harm than good and should be repealed. This view also has supporters in Hong Kong.

1.27 The Committee has appointed a Sub-Committee of two members and a co-opted member to consider the subject. The Sub-Committee presented a very detailed and informative first report to the November meeting of the Committee. Further reports will be forthcoming in the near future and the Committee will consider its recommendations after these are available.

Restrictions on creation of subsequent charges

1.28 One item of information which is not required to be included in the statutory particulars of a charge filed in the Companies Registry is particulars of any priority restriction affecting subsequent charges.

1.29 The position is the same in England but the point is covered in Scotland by Section 106A of the Companies Act 1948 which requires the registered particulars to include any restriction affecting priority.

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1.30 The point will also be covered here if our recommendation to file a copy of every charge in the Companies Registry (paragraph 1.19(a) above) is accepted, and no further amendment will be necessary.

Weaknesses in the registration system

1.31 Gower's "Modern Company Law" Fourth Edition, pages 460 and 481, refers to two weaknesses in the registration requirements for charges viz:

(1) A charge is effective even though the statutory particulars registered in the Companies Registry may be inaccurate; and

(2) If a charge is capable of covering further advances, it will cover them whether or not they are mentioned in the statutory particulars in the Registry.

1.32 The Committee considers that these two weaknesses can only be cured completely in the context of a basic reform of the system but is of the opinion that their effects will be substantially mitigated if our recommendations are accepted. No careful member of the public should then be misled by a mistake in the statutory particulars. He will also be appraised of the detailed provisions regarding security for additional amounts and will take steps to check on the up-to-date amount secured.

II- Date of Annual Accounts

2.1 Section 122(1) of Cap. 32 provides that "the directors of every company shall ..... once at least in every calendar year lay before the company in general meeting a profit and loss account ..... made up to a date not earlier than the date of the meeting by more than 9 months, or, in the case of a company carrying on business or having

interests abroad, by more than 12 months". Sub-Section (2) imposes the same condition in respect of the company's balance sheet. The court, if for any special reason it thinks fit to do so, may extend these periods of 9 and 12 months.

2.2 It will be noted that the accounts can be submitted to any general meeting during the calendar year, not necessarily to the annual general meeting which, under Section 111 of Cap. 32, must be held within 15 months of the previous A.G.M., unless the Registrar of Companies extends this time limit.

2.3 During 1984 there was press criticism to the effect that the provisions of Section 122 allow too long a period for submission of accounts.

2.4 The provisions of Section 122 are based on the former Section 148 of the British Companies Act 1948 which has been repealed and replaced by the much more complicated provisions of Sections 1 - 11 of the Companies Act 1976 which impose a duty to prepare, lay and deliver accounts by reference to "accounting reference periods" (ARPs). Under Section 6 of the Act, the period for laying accounts before a general meeting is:

(a) a private company - 10 months after the end of the ARP

(b) other company - 7 months after the end of the ARP

(c) if a company carries on oversea business, it can claim a further 3 months.

2.5 In Australia, a company has to submit its accounts to an annual general meeting within the period of 5 months after the end of its financial year, or 6 months in the case of an exempt proprietary company. However, the Corporate Affairs Commission may extend the said periods of 5 and 6 months and may also permit an A.G.M. to be held in a calendar year other than the one in which it should be held under the normal rules.

2.6 The Committee considers that a new system based on the "accounting reference system" now in use in Britain is not needed in Hong Kong at present. However, it is of the view that recent advances in accounting practices, especially in connection with computerisation, have made the existing time limits in Section 122 too generous and that a flat time limit of 6 months would be sufficient. It also considers that the accounts should be submitted to the company's annual general meeting rather than to any general meeting but with power to the court to approve submission to any general meeting if for any special reason the court thinks fit to do so. Some of the professional organisations consulted have reacted adversely to the Committee's proposals but the Committee feels that the objections raised lack substance.

2.7 The Committee therefore recommends that:

(a) Sub-Section 122(1) be amended by replacing the words "any general meeting" with "at the annual general meeting" and by replacing the words "9 months, or, in the case of a company carrying on business or having interests abroad, by more than 12 months" with "6 months".

(b) The proviso to Sub-Section 122(1) be amended -

(i) by replacing the words "periods of 9 and 12 months" with the words "6 months" and

(ii) by extending it to provide that the court may direct that the accounts may, instead of being laid before the annual general meeting as provided in the Sub-Section, be laid before a general meeting to be held on any date specified by the company and agreed by the court; the holding of such general meeting, however, to be without prejudice to the obligation under Section 111 to hold an annual general meeting.

(c) The Committee suggests that a reasonable period of time be allowed after enactment before the amendments are brought into operation.

2.8 The Committee has written to the Federation of Stock Exchanges informing them of the recommendations and suggesting that they amend their listing requirements to the same effect now, without waiting for the enactment of the legislation required to amend the Companies Ordinance.

III - Qualifications of Company Secretaries

3.1 Prior to the Companies (Amendment) Ordinance 1984, there was no requirement in Cap. 32 that a company must appoint a secretary. However, the new Section 154 of Cap. 32 introduced by the 1984 Ordinance states that every company shall have a secretary who may be one of the directors. It does not, however, require that the secretary must possess any qualifications.

3.2 The position was the same in Britain until 1980, when Section 79 of the Companies Act 1980 introduced certain requirements for the secretaries of public companies only.

3.3 Briefly, the Section requires the directors of a public company to secure that the secretary of the company is a person who, firstly, appears to them to have the requisite knowledge and experience to discharge the functions of secretary and, secondly, is either an existing company secretary, or possesses certain legal, accountancy or secretarial qualifications or "is a person who, by virtue of his holding or having held any other position or his being a member of any other body, appears to the directors to be capable of discharging those functions" (Section 79(1)(e)).

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3.4 The Committee has in this respect consulted the Association of the Institute of Chartered Secretaries and Administrators in Hong Kong. The Association was in favour of the introduction of a requirement for company secretaries to possess qualifications and, in a number of respects, their suggested requirements were more strict than those which apply in Britain.

3.5 The principal justification for the introduction of qualifications of this kind would seem to be the public interest in securing the due observance of the provisions of the Companies Ordinance, in particular those which require various returns to be filed in the Companies Registry, especially those relating to Annual General Meetings and, where appropriate, annual accounts. It appeared to the Committee that the present standard of compliance was not as high as it should be and that steps were necessary to bring about an improvement. At the same time it was thought that the present situation could not, generally speaking, be attributed to a lack of knowledge on the part of those responsible and that the desired result was far more likely to be achieved by firm enforcement of the law than by the imposition of qualifications.

3.6 Accordingly the Committee has suggested to the Hon. Attorney General that he consider a substantial increase in the penalties which may be imposed by the courts for non-compliance with the relevant provisions. It is also understood that the Registrar General has instituted a significant number of prosecutions in this respect and intends to continue a similar policy in the future. In the light of these considerations the Committee feels that it would not be appropriate at the present time to make any recommendation along the line taken in Britain, but will revert to the question in due course should its present view be shown to have been incorrect.

IV - Section 157E of Cap. 32

Proposed extension to cover Culpable Insider Dealers

4.1 Section 157E of Cap. 32 deals with the power to restrain fraudulent persons from managing companies. If a person falls within the categories specified in paragraphs (a) and (b) of Sub-Section 157E(1), the court can make an order that he shall not, without the leave of the court, act as a director, liquidator, receiver or manager of the property of a company or in any way take part in the management of a company. The order can be for a maximum of 5 years. Sub-Section (3) lists those persons who may make the application to the court.

4.2 The Committee considered the question of whether this provision should be extended to cover a person named as a culpable insider dealer by an Insider Dealing Tribunal, and if so, who ought to be authorised to make the application. It concluded that it would be appropriate to include persons so named, and that those persons already specified in Sub-Section (3) were appropriate to make the application. The Committee therefore recommends that Section 157E(1) be extended accordingly. It was thought also that the whole subject of insider dealing might usefully be reconsidered after the Inspector's reports on the investigations into the Carrian Group and the Eda Group and the Tribunal's report on the trading in International City Holdings Ltd. shares have been made available.

V - Matters under consideration

5.1 The Committee has considered two aspects of the Report on Insolvency Law and Practice (June 1982 - Cmnd. 8558), otherwise known as "The Cork Report". They are Wrongful Trading (Chapter 44) and Floating

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Charges: The Ten Per Cent Fund (Chapter 36). Provisionally, the Committee takes the view that there is a great deal to be said to the recommendations made in the Report with regard to the former, but not so with regard to the latter. The Committee understands that Mr. Gleeson in his capacity as Official Receiver is considering the proposals in the Report regarding Administration Orders. Further discussion has been deferred pending expected legislation in the near future in the United Kingdom.

5.2 The Committee is currently considering the two closely linked questions of the provision of financial assistance by a company for the purchase of its own shares and the purchase of such shares by the company itself.

Appendix 1

Terms of Reference of the Standing Committee on Company Law Reform

(1) To advise the Financial Secretary on amendments to the Companies Ordinance as and when experience shows them to be necessary.

(2) To report annually through the Secretary for Economic Services to the Governor in Council on those amendments to the Companies Ordinance that are under consideration from time to time by the Standing Committee.

(3) To advise the Financial Secretary on amendments required to the Securities Ordinance and the Protection of Investors Ordinance with the objective of providing support to the Securities Commission in its role of administering those Ordinances.

Appendix 2

Membership of the Standing Committee as at 31st December 1984

Chairman:

The Hon. Mr. Justice Cons

Members:

Dr. Andrew Chuang Siu-leung, JP,

Mr. D. E. Connolly, JP,

Mr. Robert Fell, CB, CBE,

Mr. Andrew Li,

Mr. Eric K. C. Lo,

Mr. Peter Pearson,

Professor P. G. Willoughby, JP,

Mr. C. H. Wong, JP,

Mr. Kenneth Fang Hung,

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Members (cont'd):

The Hon. Peter C. Wong, OBE, JP,

Mr. Charles H. Wilken, and

Mr. Charles Wrangham

Ex-officio Members:

Mr. P. Jacobs, OBE, JP, Secretary for Economic Services,

Mr. Noel M. Gleeson, JP, Registrar General, and

Mr. Ray Astin, JP, Commissioner for Securities

Co-opted Member of Sub-Committee:

Mr. Malcolm Barnett

Former Members who resigned during the year:

Mr. C. L. Warren-Smith, and

Mr. Michael W. Wells

Secretary:

Mr. P. Murphy, Registrar General's Department

Appendix 3

Meetings held during 1984

First Meeting - 31st May

Second Meeting - 7th July

Third Meeting - 8th September

Fourth Meeting - 6th October

Fifth Meeting - 3rd November

Sixth Meeting - 1st December

Standing Committee on Company Law Reform

First Report of the Standing Committee

Schedule of amendments made after consideration of comments received from members of the public

1. The Slavenburg decision

(1) Existing para. 1.12(c), page 5 of the First Report

Delete the existing paragraph (but not the Note at the foot of the page) and substitute:

"(c) That Section 91 should be amended to require the registration of any floating charge created by an oversea company registered under Part XI which could affect assets situated in Hong Kong i.e. a new subsection (5) along the following lines:

"(5) A floating charge on the undertaking or property of a company incorporated outside Hong Kong which is or becomes registered under Part XI of this Ordinance which could have the effect of charging any undertaking or property in Hong Kong which the company may own at any time while the debt or other obligation for which the charge is created remains unpaid or unsatisfied will be deemed to be a charge of a kind mentioned in subsection (1) or, as the case may be, subsection (3) notwithstanding that such company does not at the time of the creation of the charge or, as the case may be, at the time of its registration under Part XI of this Ordinance own any undertaking or property in Hong Kong which is subject to the charge." ."

(2) New paras. 1.12(d) and (e)

Add the following after the existing "Note" at the foot of the page:

"(d) (i) That Section 91 should be amended to make subsection (3) retrospective in effect i.e. to require that where -

an oversea company had registered under Part XI of the Companies Ordinance before 31.8.84 (when the present Section 91(3) came into operation) and

it had created the charge before it registered under Part XI,

the charge must be registered in Hong Kong within a period of 5 weeks from enactment of the recommended amendment.

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(ii) That the sanction for failure to comply should be a monetary penalty i.e. the sanction of invalidity for failure to register should not apply.

(e) That Section 91 should be amended to state that an oversea company will be deemed to be registered under Part XI of the Companies Ordinance from the date of the certificate of registration issued under Section 333(3) of the Ordinance. "

2. Mechanics of the registration procedure

Para. 1.19, page 8 of the First Report

In para. 1.19(a)(i) -

delete the words "on oath" after "officer of the company" and add after "for filing":- "and the manner of certification shall be prescribed by regulations".

3. Restrictions on creation of subsequent charges

(1) Page 14 of the First Report

Delete the existing para. 1.30 and substitute the following:

"1.30 The Committee recommends that Part III of the Companies Ordinance be amended:

(1) To require the inclusion in the registered particulars of any floating charge, of any restrictions on creation of subsequent charges, as in Sections 413(2)(e) and 417(3)(e) of the Companies Act 1985 relating to registration of charges in Scotland, and that the necessary changes be made in the prescribed forms, and

(2) By inserting a specific provision that no one will be deemed to have constructive notice of any of the contents of a copy of an instrument creating a charge filed in the Companies Registry other than those covered by the information contained in the registered particulars of that charge. "

4. Section 157E of the Companies Ordinance: Proposed extension to cover culpable insider dealers

(1) Para. 4.2, page 19 of the First Report

Delete the existing penultimate sentence and substitute the following:

/3 .....

"The Committee therefore recommends that:

(a) Section 157E be extended accordingly and

(b) that the powers of the court be extended to include:

(i) a prohibition of the culpable insider dealer from acting as director etc. of, or taking part in the management of, any corporate body (other than an oversea company) listed on a recognised stock exchange in Hong Kong, and

(ii) a prohibition of the dealer from being a liquidator or a receiver or manager of any property situated in Hong Kong of an oversea company which is listed on a recognised stock exchange in Hong Kong or from in any way, whether directly or indirectly, being concerned, or taking part, in the management in Hong Kong of such a company. "