

Standing Committee on Company Law Reform

The Twenty-Ninth Annual Report

2012 / 2013

Standing Committee on Company Law Reform (SCCLR)

Twenty-Ninth Annual Report

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PREFACE

(i)

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 to the Financial Secretary 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 and Futures Ordinance on matters relating to corporate governance and shareholders' protection.

(ii)

Membership of the Standing Committee for 2012/2013

<u>Chairman</u>	:	Mr Godfrey LAM Wan-ho, S.C., J.P.	(up to 10.01.2013)
		Mr Anderson CHOW Ka-ming, S.C.	(from 11.01.2013)
<u>Members</u>	:	Mr Stephen BIRKETT	
		Mrs Anne CARVER	(up to 31.01.2013)
		Mr Rock CHEN Chung-nin, B.B.S., J.P.	
		Mr CHEW Fook-aun	
		Mr Vincent FAN Chor-wah	
		Professor David DONALD	(from 01.02.2013)
		Professor GOO Say-hak	
		Mr Peter W GREENWOOD	
		Ms Roxanne ISMAIL, S.C.	
		Mr Johnson KONG Chi-how	
		Mr Rainier LAM Hok-chung	
		Mrs Catherine MORLEY	
		Mr Kenneth NG Sing-yip	

Ms Edith SHIH (up to 31.01.2013)
Dr Kelvin WONG Tin-yau
Ms Benita YU Ka-po
Ms Wendy YUNG Wen-yee (from 01.02.2013)

Ex-Officio

Members :

Mr Andrew YOUNG
Chief Counsel, Legal Services Division
Securities and Futures Commission

Mr Mark DICKENS, J.P. (up to 28.02.2013)
Head of Listing Division
Hong Kong Exchanges and Clearing Limited

Mr David GRAHAM (from 01.03.2013)
Chief Regulatory Officer and Head of Listing
Hong Kong Exchanges and Clearing Limited

Professor Edward L G TYLER
Senior Assistant Law Officer (Civil Law)
Department of Justice

Ms Teresa WONG, J.P.
Official Receiver

Ms Ada CHUNG, J.P.
Registrar of Companies

Mr Stefan GANNON, J.P.
General Counsel/Executive Director
Hong Kong Monetary Authority

Mr Darryl CHAN (up to 23.11.2012)
Deputy Secretary for Financial Services and the Treasury (Financial Services)

Mr Patrick HO (from 26.11.2012)
Deputy Secretary for Financial Services and the Treasury (Financial Services)

Secretary : Ms Phyllis MCKENNA

(iii)

Meetings held during 2012/2013

Two Hundred and Twenty-First Meeting - 03.11.2012

(iv)

Information Paper circulated during 2012/2013

The New Companies Ordinance - An Update - 18.07.2012

(v)

Consultation Documents circulated during 2012/2013

Subsidiary Legislation for Implementation of
the new Companies Ordinance - Phase One
Consultation - 28.09.2012

Subsidiary Legislation for Implementation of
the new Companies Ordinance - Phase Two
Consultation - 02.11.2012

REPORT

The Standing Committee on Company Law Reform (“SCCLR”) was formed in 1984 to advise the Financial Secretary (“FS”) on amendments to the Companies Ordinance, Chapter 32 (“CO”) and other related ordinances. The SCCLR reports annually to the FS through the Secretary for Financial Services and the Treasury on amendments that are under consideration.

The main focus of the SCCLR in the past few years has been the CO rewrite exercise which commenced formally in mid-2006. With six years’ consolidated efforts by relevant parties, the new Companies Ordinance (Chapter 622) was passed by the Legislative Council on 12 July 2012. More than ten pieces of subsidiary legislation are required to provide for various administrative, technical and procedural matters for the implementation of the new Companies Ordinance. The target is to bring the new Companies Ordinance into operation in the first quarter of 2014 after enactment of the subsidiary legislation. The remaining provisions of the CO relating to insolvency, prospectuses and other miscellaneous matters will become the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Chapter 32).

During the year, the SCCLR received an information paper from the Administration that provided an update on the passage of the new Companies Ordinance.

The SCCLR met once during the year to discuss provisions of the draft subsidiary legislation necessary for implementation of the new Companies Ordinance. At the meeting, the Administration took the opportunity to brief members on issues raised during passage of the new Companies Ordinance, and the proposed improvement of corporate insolvency law in Hong Kong. Six members of the SCCLR (excluding the ex-officio members) sat on the Advisory Group on Modernization of Corporate Insolvency Law to advise the Administration on the exercise.

Consultation Documents on Subsidiary Legislation for Implementation of the new Companies Ordinance

Background

- (a) At the 221st meeting held on 3 November 2012, representatives from the Financial Services and the Treasury Bureau and the Companies Registry respectively presented the consultation documents on “Subsidiary Legislation for Implementation of the new Companies Ordinance”¹.
- (b) The Administration advised that the consultation, covering 12 pieces of subsidiary legislation, was being conducted in two phases, and that there would be a period of 6 weeks for responses to each phase of the consultation. It was further advised that the subsidiary legislation on fees would mainly restate existing fees and charges where relevant stakeholders would be consulted separately. The following items of subsidiary legislation were presented by the Administration :-

(i) Companies (Summary Financial Reports) Regulation

The Administration took members through the regulation and advised that it would basically be a restatement of existing law, Chapter 32M, modified to take account of the provisions of the new Companies Ordinance which allowed companies not preparing simplified reports, in addition to listed companies, the option of preparing summary financial reports. It was further explained that the regulation would set out the requirements as to the form and content of summary financial reports.

(ii) Companies (Directors’ Report) Regulation

The Administration explained that this regulation, which set out requirements concerning the contents of a directors’ report, would largely be a restatement of section 129D(3) of the CO, with modifications necessary as a result of the new Companies Ordinance and with an expanded scope of disclosure to enhance corporate governance and transparency.

¹ “Subsidiary Legislation for Implementation of the new Companies Ordinance” (Phase One and Phase Two Consultations) was circulated on 28 September 2012 (Document No. 221-2) and 2 November 2012 (Document No. 221-3) respectively.

(iii) Companies (Specification of Names) Order

(Note : This legislative item was subsequently retitled as “Companies (Words and Expressions in Company Names) Order”)

The Administration explained that this Order would be a restatement of the Companies (Specification of Names) Order (Chapter 32E) of the CO which set out a list of words and expressions requiring approval from the Registrar of Companies if they were to be included in a company name. The list of words and expressions specified by the Order would be updated and that obsolete terms would be removed.

(iv) Companies (Non-Hong Kong Companies) Regulation

The Administration explained that the regulation would contain procedural and technical requirements in relation to the registration and other requirements for non-Hong Kong companies that had established a place of business in Hong Kong. It was explained that there would be no substantive change in the law or the requirements except that the requirements would be set out in the regulation rather than the primary legislation or external circular of the Companies Registry.

(v) Company Records (Inspection and Provision of Copies) Regulation

The Administration explained that the regulation would prescribe where company records were to be kept as well as the procedures for inspection and provision of copies of company records. It was explained that the Bills Committee on the Companies Bill of the Legislative Council had once requested that company records should be allowed to be kept at any place in Hong Kong. This regulation would seek to give effect to such an arrangement.

(vi) Companies (Model Articles) Notice

The Administration explained that the schedules to the notice would set out three sets of model articles of association (“MA”) for public companies limited by shares, private companies limited by shares and companies limited by guarantee respectively. It was explained that these MA would be optional and would replace Tables A and C of the First Schedule to the CO

for companies to be incorporated under the new Companies Ordinance. They would apply by default in so far as they were not modified or excluded by articles registered by the companies. It was explained that the proposed MA, whilst similar in scope to Tables A and C, would be re-organized for clarity, coherence and ease of reference, with articles concerning similar matters grouped under distinct divisions. It was pointed out that the MA for private companies limited by shares and companies limited by guarantee would be shorter and more concise than the MA for public companies limited by shares.

(vii) Companies (Accounting Standards (Prescribed Body)) Regulation

The Administration explained that the purpose of the regulation was to prescribe the body for issuing or specifying accounting standards (which financial statements must comply with) in Hong Kong and advised that this Regulation would prescribe the Hong Kong Institute of Certified Public Accountants as such a body.

(viii) Companies (Trading Disclosure) Regulation

(Note : This legislative item was subsequently retitled as “Companies (Disclosure of Company Name and Liability Status) Regulation”)

The Administration explained that the regulation would restate sections 93 and 94 of the CO in relation to the obligation of companies to display their name at their registered office and disclose their name and liability status in their communication documents and transaction instruments. It was pointed out that the law would be updated to allow for, inter alia, electronic display of company name and to extend the obligations to company websites.

(ix) Companies (Revision of Financial Statements and Reports) Regulation

The Administration explained that the regulation would basically restate existing law; Chapter 32N, which set out the detailed requirements for revision of financial statements after they had been provided to members, with modifications to take into account the changes that had been made under the new Companies Ordinance. It was brought to the attention of members that the new offence set out in section 408 of the new Companies

Ordinance in relation to auditors would be restated in the regulation on the basis that non-compliance with requirements in relation to original financial statements and non-compliance with relevant requirements in relation to revised financial statements should be subject to the same statutory penalties.

(x) Companies (Unfair Prejudice Proceedings) Rules

(Note : This legislative item was subsequently retitled as “Companies (Unfair Prejudice Petitions) Proceedings Rules”)

The Administration explained that the purpose of these rules, to be made by the Chief Justice, would be to regulate the proceedings on unfair prejudice petitions commenced under the new Companies Ordinance. It was explained that the Companies (Winding-up) Rules (Cap.32H) applied to such petitions under the current law, but the new rules would apply once the new Companies Ordinance commences operation. It was made clear that under the new rules, if a petition also included a prayer for winding up, the Companies (Winding-up) Rules would still apply together with these rules, insofar as these rules were not inconsistent with the said Companies (Winding-up) Rules.

(xi) Companies (Disclosure of Information about Benefits of Directors) Regulation

The Administration explained that this regulation would re-enact the existing law on the disclosure of directors’ benefits in the notes to financial statements in sections 161, 161B and 129D(3)(j) of the CO, with modifications to take account of changes made in the new Companies Ordinance.

(xii) Companies (Residential Addresses and Identification Numbers) Regulation

The Administration advised that the regulation would prescribe the procedures for applications to the Registrar of Companies after the implementation of the new Companies Ordinance in respect of withholding of personal information of directors and company secretaries (which may include the applicant’s usual residential address and/or full identification

number) from public inspection and the disclosure of withheld or protected information. It would also specify the types of persons who may make an application for access to such information and the applicable conditions.

(Note : The Administration notes the diverse views expressed by stakeholders in the first quarter of 2013 on the new arrangement for the inspection of personal information of company directors on the Companies Register (“the new arrangement”) under the new Companies Ordinance, some of which had not been put forward in previous rounds of public consultation on the new inspection arrangement. In view of the complex legal, privacy and operational issues involved, and taking into account the views of Legislative Council Members expressed at the meeting of the Panel on Financial Affairs on 8 April 2013, the Administration is according priority to the tasks necessary for commencing the new Companies Ordinance as scheduled in the first quarter of 2014, and will consider matters relating to the new arrangement thereafter. It follows that the Administration will not make the Companies (Residential Addresses and Identification Numbers) Regulation at this stage, and the provisions in the new Companies Ordinance concerning the new arrangement will not be included in the commencement notice to be made in the fourth quarter of 2013. A copy of the information paper for the Legislative Council Panel on Financial Affairs was set out in Annex C of the information paper “Update on the making of Subsidiary Legislation under the new Companies Ordinance” circulated to all SCCLR members on 10 May 2013.)

Recommendations / Remarks

Members generally expressed support for the subsidiary legislation and expressed views on certain provisions of the regulations which the Administration agreed to take into account in finalizing them. In particular, the following observations were made:

- For item (v), concern was expressed that the new requirements in the regulation to give prior notice for inspection of company records would result in a lot of paper work and would eliminate the possibility of surprise or immediate inspection, such as that allowed under the CO.

- For item (vi), it was suggested it be made clear that the MA were in addition to the mandatory articles that companies were required to have pursuant to the provisions set out in sections 81 to 85 of the new Companies Ordinance.
- For item (viii), it was suggested that the name of the regulation be changed, as the current name did not appear to reflect the content of the regulation.
- For item (ix), it was agreed that it was appropriate for the regulation which dealt with revised financial statements, to impose the same statutory penalties for non-compliance as imposed in section 408 of the new Companies Ordinance for original financial statements.