

Standing Committee on Company Law Reform

The Thirtieth Annual Report

2013 / 2014

Standing Committee on Company Law Reform (SCCLR)

Thirtieth 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 and the Companies (Winding Up and Miscellaneous Provisions) 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 and the Companies (Winding Up and Miscellaneous Provisions) 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 2013/2014

<u>Chairman</u>	:	Mr Anderson CHOW Ka-ming, S.C.	
<u>Members</u>	:	Mr Stephen BIRKETT	
		Mr Rock CHEN Chung-nin, B.B.S., J.P.	
		Mr CHEW Fook-aun	
		Mr Vincent FAN Chor-wah	(up to 31.01.2014)
		Professor David DONALD	
		Professor GOO Say-hak	
		Mr Peter W GREENWOOD	(up to 18.05.2013)
		Ms Roxanne ISMAIL, S.C.	
		Mr David KIDD	(from 01.02.2014)
		Mr Johnson KONG Chi-how	
		Mr Rainier LAM Hok-chung	
		Dr Lewis LUK Tei, J.P.	(from 01.02.2014)
		Mrs Catherine MORLEY	

Mr Kenneth NG Sing-yip
Dr Kelvin WONG Tin-yau, J.P.
Ms Benita YU Ka-po
Ms Wendy YUNG Wen-yee

Ex-Officio

Members :

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

Mr David GRAHAM
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 Patrick HO, J.P.
Deputy Secretary for Financial Services and the Treasury (Financial Services)

Secretary : Ms Phyllis MCKENNA (up to 17.11.2013)
Mrs Karen HO (from 18.11.2013)

(iii)

Meeting held during 2013/2014

Two Hundred and Twenty-Second Meeting - 25.05.2013

(iv)

Information Papers circulated during 2013/2014

Update on the Making of Subsidiary - 10.05.2013
Legislation under the New Companies
Ordinance

Commencement of the New Companies - 17.02.2014
Ordinance

(v)

Discussion Papers circulated during 2013/2014

Improvement of Corporate Insolvency Law - 10.05.2013

Sponsor Regulation - 14.05.2013

(vi)

Consultation Document circulated during 2013/2014

Improvement of Corporate Insolvency Law - 16.04.2013 and
Legislative Proposals (April 2013) 23.04.2013

REPORT

The Standing Committee on Company Law Reform (“SCCLR”) was formed in 1984. It advises the Financial Secretary (“FS”) on amendments to the Companies Ordinance (Chapter 622) (“New CO”) and the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Chapter 32)¹, and to the Securities and Futures Ordinance (Chapter 571) on matters relating to corporate governance and shareholders’ protection. The SCCLR reports annually to the FS through the Secretary for Financial Services and the Treasury on amendments that are under consideration. Following passage of the New CO in mid-2012, the Administration completed the legislative exercise for the subsidiary legislation made under the New CO in 2013. The New CO subsequently came into operation on 3 March 2014².

2. The SCCLR received two information papers from the Administration during the year on the progress on the making of the subsidiary legislation under the New CO and the commencement of the New CO.

3. The SCCLR met once during the year to discuss the legislative proposals to improve the regulation of sponsors and the consultation document “Improvement of Corporate Insolvency Law Legislative Proposals” dated April 2013.

Discussion Paper on “Sponsor Regulation”

4. At the 222nd meeting held on 25 May 2013 representatives from the Financial Services and the Treasury Bureau and the Securities and Futures Commission (“SFC”) presented proposals to strengthen and clarify the legal liability

¹ Upon commencement of the New CO on 3 March 2014, those provisions in the former Companies Ordinance (Cap. 32) governing the formation and operation of companies as in force immediately before the commencement date were repealed and replaced by provisions in the New CO. Cap. 32 (which was retitled as the Companies (Winding Up and Miscellaneous Provisions) Ordinance) continues to contain provisions relating mainly to prospectuses and corporate insolvency matters. In this report, “Cap. 32” is used to refer to the former Companies Ordinance before commencement of the New CO and, as the case may be, the Companies (Winding Up and Miscellaneous Provisions) Ordinance after commencement of the New CO.

² With the exception of some provisions as set out in the Companies Ordinance (Commencement) Notice 2013.

of sponsors by introducing legislative amendments to Cap. 32. As background, it was explained to the SCCLR that Cap. 32 contained provisions dealing with civil and criminal liability for any untrue statement in a prospectus. There was however no Hong Kong case law on whether sponsors were subject to these provisions. During a consultation conducted by the SFC in May 2012 seeking comments on a number of proposals to enhance the regulatory regime of sponsors, diverse views were received on a proposal to amend Cap. 32 to clarify that sponsors were subject to civil and criminal liability for untrue statements in prospectuses. Given that sponsors had clear responsibilities for the contents of a prospectus, and since the position as to whether sponsors were subject to statutory liability was unclear, there could be merit in amending Cap. 32 to clarify that sponsors are subject to civil and criminal liability for untrue statements in prospectuses.

5. Member's views were sought on the proposal to introduce legislative amendments to Cap. 32 for such purpose.

Recommendations / Remarks

6. Members noted the proposal to amend Cap. 32 to clarify that sponsors were subject to civil and criminal liability for untrue statements in prospectuses. Members also noted that statutory liability underpinned prospectus accuracy, and that sponsors, who had clear responsibilities for the contents of a prospectus, should be subject to both civil and criminal liability for untrue statements in prospectuses under Cap. 32. Members generally supported the proposed legislative amendment to Cap. 32³.

Consultation Document on “Improvement of Corporate Insolvency Law Legislative Proposals” (April 2013)

Background

7. At the 222nd meeting held on 25 May 2013, representatives from the Financial Services and the Treasury Bureau and the Official Receiver's Office

³ The SFC has subsequently issued “Supplemental Consultation Conclusions on the Regulation of IPO Sponsors – Prospectus Liability” on 22 August 2014. An information paper on “Sponsor Regulation” was also circulated to members on the same day. The SFC concludes that no legislative amendments are required because sponsors are already covered under the existing prospectus liability provisions in Cap. 32.

presented the consultation document on “Improvement of Corporate Insolvency Law Legislative Proposals” (April 2013)⁴ (“the consultation document”).

8. The Administration explained that an Advisory Group (“AG”)⁵ was set up in January 2012 to consider and advise on legislative proposals to improve the insolvency regime, adding that the AG had held eight meetings. Taking into account the comments from the AG, the Administration had drawn up 46 legislative proposals to improve the corporate insolvency and winding up provisions of Cap. 32.

9. The Administration then briefed Members on the legislative proposals set out in the consultation document which was issued in April 2013.

Recommendations / Remarks

10. Members were generally supportive of the legislative proposals set out in the consultation document.

11. In relation to the proposal set out in paragraph 3.16 of the consultation document to expressly provide that a person subject to a disqualification order under Part IVA of Cap. 32 would not be qualified to take up the position of provisional liquidator or liquidator for all types of winding-up, members considered that the proposal should be extended to also cover disqualification orders made under all other Hong Kong ordinances.

12. Members held divergent views on the length of the “claw-back” period for the purpose of avoidance of transactions at an undervalue. Some Members considered that the five-year period proposed in paragraph 5.10 of the consultation document was too long and was unfair to recipients due to the uncertainty associated with the possibility of the transaction being set aside, while other Members were of the view that the five-year period was appropriate as this proposal was to target suspicious transactions instead of genuine business activities.

⁴ **“Improvement of Corporate Insolvency Law Legislative Proposals” (April 2013)**
http://www.fstb.gov.hk/fsb/ppr/consult/doc/impbill_consult_e.pdf.

⁵ The AG was chaired by the Official Receiver and comprised representatives from the business sectors, professionals, insolvency practitioners and academics as well as seven members of the SCCLR.

13. Members noted that there was a definition of “control” in relation to the definitions of “person who is connected with the company” and “associate” for the proposals on voidable transactions in Chapter 5 of the consultation document, and that with that definition, a person would be taken as having “control” of a company if he was entitled to exercise, or control the exercise of, “one third or more” of the voting power at any general meeting of the company or of another company which had control of it. On the other hand, Members also noted that in determining whether a director was associated with a body corporate under the New CO, the threshold was set at “thirty per cent” voting power. Members considered it desirable to apply the same formulation in different branches of the company law.