Standing Committee on Company Law Reform

The Thirty-Third Annual Report

2016 / 2017

Standing Committee on Company Law Reform (SCCLR)

Thirty-Third 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 2016/2017

Chairman:	Mr John SCOTT, S.C.	
Members:	Mr Bruno ARBOIT	
	Ms Linda CHAN Ching-fan, S.C.	(from 01.02.2017)
	Mr Clement CHAN Kam-wing	(from 01.02.2017)
	Ms Bonnie CHAN Yi-ting	
	Professor David DONALD	
	Mr David FU Yat-hung	(from 01.02.2017)
	Ms Roxanne ISMAIL, S.C.	(up to 31.01.2017)
	Mr David KIDD	
	Mr Rainier LAM Hok-chung	(up to 31.01.2017)

	Mr Robert LEE Wai-wang	
	Professor John LOWRY	(up to 31.01.2017)
	Dr Lewis LUK Tei, J.P.	
	Ms Gillian MELLER	(from 01.02.2017)
	Mr Kenneth NG Sing-yip	(up to 31.01.2017)
	Mr Keith POGSON	
	Mrs Natalia SENG SZE Ka-mee	
	Ms Cynthia TANG Yuen-shun	
	Mr Bernie TING Wai-cheung	(from 01.02.2017)
	Ms Benita YU Ka-po	(up to 31.01.2017)
	Ms Wendy YUNG Wen-yee	
Ex-Officio Members :	Mr Patrick HO, J.P. Deputy Secretary for Financial Services and the Treasury (Financial Services)	
	Ms Ada CHUNG, J.P. Registrar of Companies	
	Ms Teresa WONG, J.P. Official Receiver	(up to 09.02.2017)
	Ms Phyllis MCKENNA Official Receiver	(from 10.02.2017)
	Dr Stefan LO Senior Assistant Law Officer (Civil Law) (Ag.) Department of Justice	
	Mr Stefan GANNON, J.P. General Counsel Hong Kong Monetary Authority	
	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	
Secretary:	Ms Ellen CHAN	

(iii)

Meetings held during 2016/2017

Two Hundred and Twenty-sixth Meeting	-	07.09.2016
Two Hundred and Twenty-seventh Meeting	-	18.11.2016

(iv)

Discussion Papers circulated during 2016/2017

Legislative Proposal to Enhance Transparency of Beneficial Ownership of Companies in Hong Kong	-	07.09.2016
Introduction of a statutory corporate rescue procedure – Non-Hong Kong companies	-	07.09.2016
Proposed Amendments to improve the clarity and operation of the new Companies Ordinance (Cap. 622)	-	18.11.2016

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) ("CO") and the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Chapter 32) ("CWUMPO"), as well as on amendments to the Securities and Futures Ordinance (Chapter 571) ("SFO") 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.

2. From 1 April 2016 to 31 March 2017, the SCCLR held two meetings and considered three discussion papers.

Discussion Paper on "Legislative Proposal to Enhance Transparency of Beneficial Ownership of Companies in Hong Kong"

3. At the 226th meeting held on 7 September 2016, representatives from the Financial Services and the Treasury Bureau presented the discussion paper on "Legislative Proposal to Enhance Transparency of Beneficial Ownership of Companies in Hong Kong". The SCCLR noted that there was increasing international concern over the misuse of companies to facilitate money laundering or serve illicit purposes such as terrorist financing and the Financial Action Task Force required member jurisdictions to take measures to mitigate such risks by ensuring that adequate, accurate and timely information on the beneficial owners of companies was available and accessible by competent authorities. In order to enhance transparency of beneficial ownership of companies in Hong Kong to address the international concerns and meet Hong Kong's international obligations, the Government proposed to amend the CO to require each company incorporated in Hong Kong to take reasonable steps to identify the identity and certain particulars of the persons (and legal entities) that had significant control over the company and to keep a register of persons with significant control ("PSC register") in relation to the information obtained for public access.

4. Members were briefed on the broad parameters of the proposal as set out in the discussion paper, including: -

(a) The requirement to keep a PSC register applied to all companies incorporated under the CO except listed companies which were subject to a more stringent regime under the SFO.

(b) A person with significant control meant an individual, or a legal entity which was a member of the company, that was directly or indirectly holding more than 25 percent of the shares or voting rights of the company, or that had a direct or indirect right to appoint or remove the majority of directors, or that otherwise had some kind of significant influence or control over the company.

(c) Each company had the duty to investigate and obtain beneficial ownership information (such as issuing notices) and to maintain an up-to-date PSC register.

(d) The PSC register was to be kept at the company's registered office or a prescribed place and in the Chinese or English language.

(e) The PSC register was to be open for public inspection.

(f) A company and its responsible persons that fail to comply with the requirements in respect of the keeping of a PSC register would commit an offence.

(g) An aggrieved party could apply to the court for rectification of the PSC register.

(h) An entry in relation to a person with significant control could be removed from the PSC register after 10 years from the date the person ceased to be a person with significant control over the company.

Discussion Outcomes

5. Noting that Hong Kong had an obligation to follow international standards and that other jurisdictions either had in place a disclosure system or were planning to require companies to keep a PSC register, members generally agreed to the proposal and put forth the following observations: -

(a) As there were provisions in the CO and the model articles of association that required companies not to have regard to beneficial interests in the shares of companies, legislative amendments would be required to resolve any conflict.

(b) Some members noted that the proposal did not impose any obligation on the beneficial owners and a member considered that the company should be given power to compel disclosure by the beneficial owners. However, members generally shared the Government's view to adopt a balanced approach to legislation so as to minimise the regulatory burden on affected companies. Members suggested that reference could be drawn from actions taken by other member jurisdictions in determining what would be appropriate, in terms of robustness, in order to enable Hong Kong to meet its international obligations.

(c) A member suggested that the beneficial ownership information could be filed with the Companies Registry for public inspection while some members questioned if public inspection of the PSC register was appropriate, considering privacy concerns and the likely reaction of the business community.

6. Members were informed that the Government would consult the public and the business community on the proposal and would take into account the views of the SCCLR and the responses received from the proposed consultation in formulating a bill. Members noted that the Government planned to introduce the bill into the Legislative Council ("LegCo") by mid-2017.

Discussion Paper on "Introduction of a statutory corporate rescue procedure – Non-Hong Kong companies"

7. At the 226th meeting held on 7 September 2016, representatives from the Financial Services and the Treasury Bureau presented the discussion paper on "Introduction of a statutory corporate rescue procedure – Non-Hong Kong companies". When the corporate rescue procedure ("CRP") regime was discussed at the last meeting on 3 December 2015, some members had suggested that the regime should apply to non-Hong Kong companies. In response to the suggestion, the Government had reflected further on the matter and presented to members the various relevant factors in considering whether, and if so how, non-Hong Kong companies registered under Part 16

of the Companies Ordinance (Cap. 622) (or a former Companies Ordinance as defined in Cap. 622) ("non-Hong Kong companies") should be included in the scope of the proposed regime.

Discussion Outcomes

8. Having considered the factors and arguments presented and in view of the substantial number of active non-Hong Kong companies in Hong Kong, members generally preferred to include non-Hong Kong companies in the new CRP regime and to require a non-Hong Kong company to obtain the sanction of Hong Kong's court before commencing provisional supervision in Hong Kong, so as to minimise the risk of abuse and ensure adequate protection of the interests of affected parties. Members also expressed the following views: -

(a) The initiator of the CRP should be required to make a declaration that written consent of all major secured creditors of the company had been obtained and if the initiator was not an individual (for instance where the provisional supervision is initiated by the company by resolution of the directors or members), any one of its members or directors (as the case may be) being a Hong Kong resident could make the declaration. As there would be sanctions for false declarations under the Crimes Ordinance, there was no need for additional sanction in the CRP legislation.

(b) It was noted that, unlike Hong Kong companies, the option of proceeding to a creditors' voluntary winding-up of a non-Hong Kong company was not available to creditors due to restrictions in the CWUMPO. If the creditors were minded to terminate the CRP and wind up the non-Hong Kong company, a separate application for the winding-up would need to be made to the court in accordance with the CWUMPO. Where there was an application to wind up the non-Hong Kong company under the CWUMPO by the creditors in the case of a provisional supervision, it was for consideration whether its period should be deemed to have been extended automatically such that the provisional supervisor would continue to take charge of the company pending the hearing of the winding-up petition by the court; whereas in the case of a voluntary arrangement, the creditors could be required to agree on the interim operation of the voluntary arrangement.

(c) To address cross-border issues which would vary in different cases, the proposed legislation should provide the court with relevant powers and discretion to determine each application from non-Hong Kong companies to appoint a provisional supervisor based on its own facts and circumstances.

9. On the other issues of the CRP regime, members noted that the Government had further engaged stakeholders who generally supported the idea of having a safeguard provision to the effect that where a company had no major secured creditors, during the provisional supervision, on the application of a creditor the court might make an order to terminate the provisional supervision. Members further noted that there were different suggestions from stakeholders on who might be entitled to apply to the court for such purposes, whether there should be a time limit or qualification threshold for applying to the court and whether the court could determine when the provisional supervision should end. Members were of the view that in providing for safeguards, it was important to streamline the procedure and to avoid imposing too many technical pre-conditions.

10. Members were informed that the Government would take into account the views of the SCCLR in considering whether, and if so how, to refine the relevant provisions for incorporation into the draft bill.

Discussion Paper on "Proposed Amendments to improve the clarity and operation of the new Companies Ordinance (Cap. 622)"

11. At the 227th meeting held on 18 November 2016, representatives from the Companies Registry presented the discussion paper on "Proposed Amendments to improve the clarity and operation of the new Companies Ordinance (Cap. 622)". Members were informed that the implementation of the new CO since March 2014 had been smooth, with the business community widely adopting the new initiatives introduced to save compliance costs and facilitate business. Taking into account the operating experience as well as feedback from stakeholders, the Government had drawn up a list of proposed items for legislative amendments for improving the clarity and operation of the CO and further facilitating business.

12. Members noted that the proposed items in the list could be broadly categorised into three groups and that the majority fell within categories (b) and (c): -

(a) Items which addressed issues that arose after commencement of the CO.

(b) Items which aimed to clarify the policy intent or remove ambiguities.

(c) Items which were technical or minor in nature.

Discussion outcomes

13. Members were supportive of the proposed legislative amendments. In particular, members considered it sensible to allow groups of companies that satisfied the specified size criteria to benefit from the simplified reporting arrangement even though the group comprised non-Hong Kong subsidiaries. The same should also apply to groups which consisted of both private companies and guarantee companies. Moreover, members were of the view the proposed amendments to update the accounting-related provisions in Schedule 1 to the CO would help ensure that Schedule 1 would continue to reflect the latest accounting standards as promulgated by the Hong Kong Institute of Certified Public Accountants.

14. Members also agreed to the proposed amendments to clarify the policy intent and remove ambiguities, including the proposed requirements on the display of company names for non-Hong Kong companies to align the obligations of non-Hong Kong companies with those of local companies under the Companies (Disclosure of Company Name and Liability Status) Regulation (Cap. 622B). Members also agreed to the proposed amendments to section 450(4) and section 20 of the Companies (Revision of Financial Statements and Reports) Regulation (Cap. 622F) which would align the penalty level with that under section 413(4) of the CO. Members also agreed to the proposed amendment to section 681 of the CO in relation to horizontal amalgamation of companies as it would make clear that the court-free procedure was not restricted to subsidiaries of a holding company which was incorporated in Hong Kong.

15. Members further took note of the following amendments, and considered that such amendments would streamline the technical reporting requirements and facilitate the work of the accounting and company secretarial sectors, while not affecting the corporate governance requirements in the CO: -

(a) The provision of an option for a holding company which was also a wholly owned subsidiary to prepare consolidated financial statements instead of its own financial statements.

(b) As an alternative way of complying with the requirement for a holding company to list out the names of directors of its subsidiaries in the directors' report, allowing the holding company to provide such information on its website or to deposit a list containing the information at its registered office for inspection.

(c) Amending sections 360(2)(a) and (c) so that the adoption of simplified reporting would require a resolution by members of the holding company only.

16. Members noted that the Government had engaged relevant stakeholders including professional bodies, chambers of commerce and other relevant regulators on the more substantive items of the proposed amendments and that the stakeholders in general supported or had no objection to the proposed amendments. Members also noted that the Government would take into account the views of the SCCLR and relevant stakeholders in finalising the legislative proposals and aimed to introduce an amendment bill into LegCo in 2018.