

# **Standing Committee on Company Law Reform**

## **The Thirty-Sixth Annual Report**

**2020 / 2021**

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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 2020/2021**

<b><u>Chairman:</u></b>	Mr John SCOTT, SC, JP	(up to 31.1.2021)
	Mr Johnny Mok, SC, BBS, JP	(from 1.2.2021)
<b><u>Members:</u></b>	Mr Bruno ARBOIT	(up to 31.1.2021)
	Mr Clement CHAN Kam-wing, MH, JP	
	Mr Paul CHOW Koon-ying	
	Ms Christine CHUNG Wai-yin	
	Ms Julianne Pearl DOE	
	Mr Dennis HO Chiu-ping	(from 1.2.2021)
	Mr Jason KARAS	
	Ms Rachel LAM Yan-kay, SC	
	Mr Robert LEE Wai-wang	
	Professor LOW Chee-keong	
	Ms Gillian MELLER	

Mr Albert NG  
Mr Keith POGSON (up to 31.1.2021)  
Mrs Natalia SENG SZE Ka-mee  
Ms Cynthia TANG Yuen-shun  
Mr Bernie TING Wai-cheung  
Ms Jacqueline WALSH (from 1.2.2021)  
Ms Tiffany WONG

**Ex-Officio  
Members :**

Mr Sam HUI Chark-shum  
Deputy Secretary for Financial Services and the  
Treasury (Financial Services)

Ms Ada CHUNG, JP (up to 3.9.2020)  
Registrar of Companies

Ms Kitty TSUI Lai-ching (from 4.9.2020)  
Registrar of Companies (Ag)

Ms Phyllis MCKENNA, JP  
Official Receiver

Dr Stefan LO Huoy-cheng  
Senior Assistant Law Officer (Civil Law)  
Department of Justice

Mr Stefan GANNON, JP  
Commissioner, Resolution Office  
Hong Kong Monetary Authority

Ms Annabel LEE Tung-mei  
Deputy Chief Counsel, Legal Services Division  
Securities and Futures Commission

Ms Bonnie CHAN Yi-ting  
Head of Listing  
Hong Kong Exchanges and Clearing Limited

**Secretary:** Ms Ellen CHAN

(iii)

**Meetings held during 2020/2021**

Two Hundred and Twenty-ninth Meeting	-	20.7.2020
Two Hundred and Thirtieth Meeting	-	2.12.2020

(iv)

**Information Paper circulated during 2020/2021**

Companies (Fees) (Amendment) Regulation 2020	-	7.7.2020
Legislative Council Panel on Financial Affairs Paper – Protection of Personal Information on the Companies Register	-	26.3.2021

(v)

**Discussion Papers circulated during 2020/2021**

Companies (Corporate Rescue) Bill – Legislative Proposals	-	7.7.2020
Implementation of Uncertificated Securities Market Regime in Hong Kong under a Revised Operational Model	-	16.11.2020

## **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 2020 to 31 March 2021, the SCCLR received one Information Paper from the Government on the Companies (Fees) (Amendment) Regulation 2020, and was kept informed of the Government’s plan to commence the relevant provisions in the CO to protect personal information on the Companies Register.

3. The SCCLR held two meetings during the year and considered two discussion papers.

### **Discussion Paper on “Companies (Corporate Rescue) Bill – Legislative Proposals”**

#### **Background**

4. At the 229<sup>th</sup> meeting held on 20 July 2020, representatives from the Financial Services and the Treasury Bureau (“FSTB”) as well as the Official Receiver’s Office presented the discussion paper: “Companies (Corporate Rescue) Bill – Legislative Proposals”. Members were briefed on the history of the legislative exercise by the Government for introducing a statutory corporate rescue procedure (“CRP”), which originated from the Law Reform Commission’s recommendations in 1996. Members noted the efforts made by the Government throughout the years including two failed attempts in 2000 and 2001 to put through bills on the matter in the Legislative Council (“LegCo”), a public consultation exercise in 2009, publication of a package of detailed proposals in 2014 as well as numerous engagement exercises with

relevant stakeholders and that the meeting was the fifth time<sup>1</sup> the Government went to the SCCLR for advice on CRP.

5. Members were informed that the Companies (Corporate Rescue) Bill (“Bill”) was being drafted and were briefed on the latest major legislative proposals on CRP.

### **Discussion Outcomes**

6. Members noted that a major proposal was that the prior written consent of a major secured creditor (“MSC”) of a company was required before the company could initiate provisional supervision and had a lengthy discussion on such requirement. While members noted that the requirement was proposed as a result of the Government’s previous engagement exercises with stakeholders and taking into account a balance of interests concerned, most members had concerns that the requirement could pose potential practical difficulties as it was generally difficult to obtain active consent from major secured creditors such as banks. Some members considered that the requirement could be an impediment to the practical value of the proposed CRP legislation.

7. Members had considered the position of other comparable jurisdictions and noted that for example in Australia, there would in reality be considerable discussion between the administrator and the secured creditors of the company to ensure that the secured creditors would agree to the voluntary administration. Members generally took the view that as between giving the MSC a right to give consent and giving the MSC a right of objection, the latter would be much easier and more practical than the former from the perspective of facilitating provisional supervision.

8. On the qualifications of the provisional supervisor (“PS”), members agreed with the Government’s proposal that the PS should be a certified public accountant or a person qualified to act as a solicitor in Hong Kong.

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<sup>1</sup> Please see the SCCLR Annual Reports which are available at the Companies Registry’s website -  
2014/15: <https://www.cr.gov.hk/en/standing/docs/31anrep-e.pdf>  
2015/16: <https://www.cr.gov.hk/en/standing/docs/32anrep-e.pdf>  
2016/17: <https://www.cr.gov.hk/en/standing/docs/33anrep-e.pdf>  
2017/18: <https://www.cr.gov.hk/en/standing/docs/34anrep-e.pdf>

9. Members discussed the proposal on liabilities of the PS and noted that the PS had 16 business days from the date of appointment as PS to consider whether to adopt a contract that was entered into by the company with a third party before the PS was appointed. Members further noted that at any time before adoption, the PS might negotiate with that third party to limit the extent of his or her liabilities under the contract.

10. Members also discussed the proposals on the statutory moratorium during provisional supervision and the exemptions. Members noted that one of the exempted matters was proceedings in relation to unfair prejudice petitions under the CO and the policy intent was to enable minority shareholders to resolve disputes concerning their own interests. Members however had doubts on the necessity for such an exemption as it could allow a minority shareholder to bring down the entire corporate rescue process.

11. In relation to protection of employees' interests, members discussed the proposal on phased payments and were satisfied that the protection under the proposal should be comparable to that provided in the winding up proceedings. Members also discussed the proposed power of the PS to borrow money, for the purposes of carrying on business of the company and protecting employees' entitlements. Members noted that the PS would be the agent of the company and therefore would have the power to borrow money. Members also noted that the Government had not proposed to include provisions on super priority rescue financing in the draft Bill after considering that comparable jurisdictions also did not have similar provisions in their CRP regimes, which provisions would pose significant changes to the established law and practice on priority and security lending.

12. Members also discussed the insolvent trading provisions proposed to be added to CWUMPO, in particular the statutory defences to be introduced for directors. Members noted that the reasonable grounds/reasonable steps test proposed for the defences was similar to the test for the directors' duty of care with which directors should be familiar and agreed with the Government that with such a reasonable grounds test, directors would be more likely to obtain professional and financial advice before acting.

13. Members were generally supportive of the legislative proposals set out in the discussion paper.



## **Discussion Paper on “Implementation of Uncertificated Securities Market Regime in Hong Kong under a Revised Operational Model”**

### **Background**

14. At the 230<sup>th</sup> meeting held on 2 December 2020, representatives from FSTB and the Securities and Futures Commission (“SFC”) presented the discussion paper: “Implementation of Uncertificated Securities Market Regime in Hong Kong under a Revised Operational Model”. Members were given an overview of the policy objectives of the Government’s proposal to introduce an uncertificated securities market (“USM”) regime in Hong Kong that would modernize Hong Kong’s securities market infrastructure, increase market efficiencies, and provide investors with better choice and protection, thus enhancing the competitiveness of Hong Kong as an international financial centre.

15. Members were informed that in proposing a USM regime, the Government had consulted the market as well as the SCCLR<sup>2</sup> in around 2009/2010 based on a model (“2010 Model”) and secured the passage of the Securities and Futures and Companies Legislation (Uncertificated Securities Market Amendment) Ordinance 2015 by the LegCo to implement the USM regime based on the 2010 Model. Due to subsequent market views that the 2010 Model would compromise certain market efficiencies, a revised operational model (“Revised Model”) was developed.

16. Members were briefed on the key features of the Revised Model, including the following: the nominee structure under the existing market infrastructure would be preserved; there would be an option for investors for holding shares in their own name in certificated or uncertificated form; a single register of members (“ROM”) would be maintained solely by the relevant share registrar; and there would be an electronic interface between the Central Clearing and Settlement System (“CCASS”) and the share registrars’ systems. Members were also briefed on the legislative amendments necessary for the implementation of the Revised Model which mainly concerned the SFO and the CO.

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<sup>2</sup> Please see the SCCLR Annual Report for the year 2009/2010 which is available at the Companies Registry’s website : <https://www.cr.gov.hk/en/standing/docs/26anrep-e.pdf>

## **Discussion Outcomes**

17. Members noted that under the Revised Model, the two new USI and USS features<sup>3</sup> would both enable investors to hold shares in their own names and in electronic form, and welcomed the two new features as USI or USS holders would be registered shareholders and they would be able to directly vote at meetings.

18. Members discussed the implications on those investors who refused to go paperless. Members noted that as the implementation would adopt a phased approach, investors who were not ready or who were unwilling to go paperless would not be able to participate in initial public offerings, but their rights in respect of securities already held would not be compromised at the initial stage. Upon full dematerialization, such investors might not be able to exercise certain rights or entitlements, for example, they would have to convert the paper securities into uncertificated form before transferring. Although ownership of the securities would not be affected, members suggested to conduct investor education to promote public awareness in moving towards an uncertificated regime.

19. Members also discussed other implications of implementation of the USM regime, such as costs on brokers who would have to develop or enhance their information technology systems. On the understanding that Hong Kong Exchanges and Clearing Limited was preparing to launch a new settlement system, members noted that it might be a good opportunity for the requirements of the USM regime to be incorporated at the same time which might help to save or reduce the development costs of brokers.

20. In respect of the proposal to limit the number of proxies that might be appointed by an individual shareholder of listed companies to two, members noted that how the two proxies should be counted in practice in light of the different options for holding securities was under consideration by SFC and if necessary would be specified in the subsidiary legislation to be made.

21. Members observed that pursuant to the planned timetable for implementing the USM regime, companies might have limited time of about six

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<sup>3</sup> The acronym "USI" denotes that the holdings in question belong to an uncertificated securities holder, and that the feature is provided by the issuer's share registrar. The acronym "USS" denotes that the holdings in question belong to an uncertificated securities holder, and that the feature is provided by a sponsoring clearing / custodian participant.

months to make the necessary amendments to their Articles of Association in order to be ready for the implementation. Members were informed that the proposed SFO amendments included a provision to the effect that the legislative amendments for the USM regime would prevail over a company's Articles of Association, and the provision would apply to all listed companies including those incorporated outside Hong Kong. In addition, SFC was looking into the laws of three main jurisdictions (i.e. the Mainland, Bermuda and Cayman Islands, which together made up about 90 per cent of the companies incorporated elsewhere but listed on Hong Kong's stock exchange) to ensure that those laws would not present any hurdles for the listed companies concerned. Members were assured that SFC would work with the listed companies to prepare ahead for the implementation.

22. As regards the implications on investor financing such as share mortgages, members were informed that SFC was working with share registrars to explore whether it would be necessary to replace the existing practice of pledging share certificates by, for example, a locking mechanism whereby securities subject to pledging could not be sold.

23. Members also discussed the proposal to disallow book closures (closing the ROM) for listed companies. Most members considered that listed companies might want to close their ROMs in advance of an annual general meeting or other general meetings in order to determine who the companies' shareholders were and who to give notice for attending such meetings. It would be crucial for listed companies to suspend registrations of transfer of shares for a certain period of time, given there were statutory requirements on the notice period for such meetings.

24. Members appreciated that under the USM regime, some processes such as registration of transfer of shares could be completed much more quickly and an extended book closure period could put registered shareholders in a more disadvantageous position than those who were holding shares in CCASS as beneficial owners, and therefore discouraging investors to be registered shareholders. Members noted that the proposal was only to revoke the application of the provision on book closures under the CO to listed companies so as to avoid possible conflict with subsidiary legislation to be made under the SFO in the future. They suggested that the actual arrangement on book closures for listed companies should be further deliberated when drafting the subsidiary legislation, in particular, to take into account the statutory notice requirements under the CO.

25. Members also discussed how the proposed enhanced authorization and regulation scheme for share registrars could be rolled out under a tight timetable for implementing the proposed USM regime and considered that, as the enhancement would focus more on share registrars' internal systems and facility development and that a code of conduct would be put in place, there should not be insurmountable difficulty during the process.

26. Upon conclusion of discussion, members were all in support of the proposed implementation of a USM regime in Hong Kong. Despite issues to be resolved along the way, members opined that the new initiative was an encouraging move in the right direction.