香港董事學會
The Hong Kong Institute of Directors

Issued on: 26 March 2010

CO Rewrite
Consultation Paper on the Draft Companies Bill (First Phase Consultation)
(the "Consultation Paper")

In relation to the captioned paper, the Hong Kong Institute of Directors ("HKIoD") is pleased to present its preliminary views and comments.

In this set of comments, we have focused on the specific issues set out for consultation in the Consultation Paper.

The Consultation Draft of the CB published in conjunction with the Consultation Paper contains many provisions that, if passed into law, will affect the duty and responsibilities of company directors. The issues are complex and many of which are of a technical nature. We have concluded that more time is needed for the HKIoD to communicate with our members and canvass their views in order to present comments and findings that are more constructive to the Administration. We are now in that process, and we expect to complete that process in the near future.

Capitalized terms used herein but are not otherwise defined shall have the meanings ascribed to them in the Consultation Paper.

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Responses to specific questions
Our responses to specific questions as set out in the Consultation Paper are as follows:-

Question 1
In respect of members' schemes of listed companies, which of the following options do you prefer? Please explain the reasons.

Option 1: retain the headcount test;
Option 2: retain the headcount test but give the court a discretion to dispense with the test; or
Option 3: abolish the headcount test.

HKIoD response:

- We prefer the abolishment of the headcount test. A "majority in number" requirement embodied in the headcount test encourages manipulation by majority as well as minority shareholders. Many Hong Kong investors hold only beneficial interests in shares of listed companies within CCASS. With many shares in listed companies being held by nominees and custodians, a headcount test is not necessarily indicative of the decisions of the

香港董事學會有限公司 香港德輔道中19號環球大廈1008 1008 World-Wide House, 19 Des Voeux Road Central, Hong Kong
The Hong Kong Institute of Directors Ltd 電話 Tel: (852) 2889 9986 傳真 Fax: (852) 2889 9982 電郵 E-mail: executive@hkiod.com 網頁 Web-site: www.hkiod.com

beneficial owners of the shares. Minority shareholders of listed companies are already afforded substantial protection under the Takeovers Code. A court still has discretion not to sanction members' scheme even without a headcount test requirement. On this basis, we think the removal of the headcount test requirement is appropriate.

Question 2

(a) If your answer to Question 1 is Option 3, do you think that the headcount test should also be abolished in respect of members' schemes of non-listed companies?

(b) If your answer to (a) is yes, do you think that some form of additional protection should be provided for small shareholders? If so, what should such protection be?

HKIoD response:

- As to 2(a), we believe the headcount test can be abolished in respect of members' schemes of non-listed companies.
- As to 2(b), we express no views at this time. We note, however, that there should be further study on the necessity and if so, the form of additional protection for small shareholders in respect of members' scheme of non-listed companies.

Question 3

If your answer to Question 1 is Option 2 or Option 3, do you think that the same approach should apply to creditors' scheme?

HKIoD response:

- For creditors' scheme, we believe voting by value of debt and not by headcount will result in outcomes that are fairer.

Question 4

(a) Do you agree that directors' residential address should continue be made available for inspection on the public register?

(b) If your answer to (a) is in the negative, do you think that either:
  (i) the Australian approach (paragraphs 7.8 and 7.9); or
  (ii) the UKCA 2006 approach (paragraph 7.10(b)) should be adopted?

(c) If you consider that either the Australian or the UKCA 2006 approaches should be adopted, do you have any suggestions on how to tackle the practical problems highlighted in paragraph 7.13(c) to (e) above?

香港董事學會有限公司 香港德輔道中19號環球大廈1008 1008 World-Wide House, 19 Des Voeux Road Central, Hong Kong
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HKIoD response:

- As to 4(a), we do not agree that directors' residential address should continue be made available for inspection on the public register. For service of documents and legal proceedings, the company's registered address or another service address that the director provides should be sufficient. In addition, we note that there is no Hong Kong residency requirement for directors. For a foreign director to provide a foreign residential address may not have much actual value or utility from a service or enforcement point of view.
- As to 4(b), we suggest further study on the practicality of the UKCA 2006 approach as described in the Consultation Paper. We believe that disclosure of the residential address stored in the confidential record is appropriate in the event the company is being wound up or dissolved. There may be other situations that might warrant disclosure of the confidential record, but we think they should be few in numbers and narrowly defined.
- As to 4(c), we note that the issue of information (in confidential record) not being up to date can also occur in the public register under the current regime. It should be a director's responsibility to keep his public records and filings up to date and accurate. It might be appropriate to impose certain sanctions (on the director and as well as on the company) for failure to do so, though we note it may be difficult to police. On purging existing records, it is appropriate to purge existing records upon application and for a certain fee. We recommend further study on the financial and other resources needed.
- See our further comments below.

Question 5

(a) Do you think that there is a need to mask certain digits from the identification numbers of new records of directors and company secretaries on the public register?

(b) If your answer to (a) is yes, do you have any views on how to deal with personal identification numbers on existing records?

HKIoD response:

- As to 5(a), yes, we agree there is a need to mask certain digits from the identification numbers of directors and companies secretaries on the public register, especially for new records. ID numbers are the most commonly used method to verify personal identity of Hong Kong persons. Given the increasing use of electronic and telephone transactions, the risk of abuse will go up and not be less.
- As to 5(b), it is appropriate to purge existing records upon application and for a certain fee. We recommend further study on the financial and other resources needed.
- See our further comments below.

香港董事學會有限公司 香港德輔道中19號環球大廈1008 1008 World-Wide House, 19 Des Voeux Road Central, Hong Kong
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Further comments on Question 4 and Question 5

We note that the issues presented in Question 4 and Question 5, and their solution, should not just be viewed as simply a matter of making publicly available residential address and identification numbers of company directors. Many company directors by profession or other reasons are required to file personal data with authorities/agencies knowing that such data will be public records available for inspection. As more and more authorities/agencies post their records online, and as internet searches are becoming more common and easy, there is substantial risk that the full profile of a company director's personal data, even if those filed with the Companies Registry is masked or hidden, can still be revealed by cross-checks of just a few sources. We recommend a fuller examination of the issues relating to public availability of personal data of company directors.

Question 6

On the assumption that a new disinterested members' approval exception to prohibitions on loan and similar transactions in favour of directors and their connected persons will be introduced in respect of public companies, which of the following options do you prefer?

Option 1: "relevant private companies" as defined in section 157H(10) of the CO should continue to be subject to more stringent regulations similar to public companies (including restrictions relating to quasi-loans and credit transactions, restrictions relating to connected persons and disinterested members' approval requirement);

Option 2: extending the concept of "relevant private company" to cover companies associated with non-listed public companies;

Option 3: modifying the concept of "relevant private company" by disapplying it to private companies having a common holding company with a listed/public company;

Option 4: modifying the concept of "relevant private company" to cover only private companies which are subsidiaries of a listed/public company; or

Option 5: abolishing the concept of "relevant private companies", i.e. all private companies should be subject to the same treatment.

Any other option (please elaborate)?

HKIoD Response:

- For private companies associated with a listed company, we think the relevant prohibitions should appear in the Listing Rules rather than the CB.
- Although the number of non-listed public companies is currently small, the CB should provide a legal framework that is ready to address all forms of business associations permitted or contemplated thereunder. There may be a valid reason for the concept of "relevant private companies" to be extended to cover companies associated with non-listed public companies. In this regard, we may need to have some rules on how to define "disinterested members" as applicable to non-listed public companies.

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Question 7

Do you consider that the common law derivative action currently preserved in section 168BC(4) of the CO should be abolished in the CB?

HKIoD response:

- No, we think there is no need to outright abolish the common law derivative action, or CDA, currently preserved in section 168BC(4). Hong Kong is an international business and financial centre. As noted in the Consultation Paper, there are likely a large number of foreign companies with resident Hong Kong shareholders but which are not within the definition of "specified corporation" eligible to bring a statutory derivative action, or SDA. As also noted in the Consultation Paper, a CDA may also be necessary as a "fall back" for non-Hong Kong companies which for one reason or another cannot meet the requirements of section 168BB of the CO.
- Non-Hong Kong companies should be given the freedom to choose how to initiate or defend litigation in Hong Kong under all possible legal theories and utilizing all possible procedural mechanisms, whether these are based on statutory provisions, common law or court procedural rules. Hong Kong is and should strive to continue to be a major hub of cross-border legal services. Many law firms and practices with capability in the laws of foreign jurisdictions already have a presence in Hong Kong. These law firms and practices, together with Hong Kong's own law firms and practices, shall be able to advise their respective clients on the best way to proceed. Hong Kong courts shall have the readiness and sophistication to deal with derivative actions as they arise, and make appropriate rulings, whether substantive or procedural, that are appropriate for a particular case and yet consistent from case to case. We think this is more true to the function and spirit of a legal system that makes Hong Kong proud. And therefore, we do not believe it is necessary to abolish the CDA outright.

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