THE LAW SOCIETY OF HONG KONG 香港律師會

Response to Consultation Paper on Rewrite of the Companies Ordinance

	Question	Response
1	(a) Do you agree that we need to amend the law to empower the Registrar, upon receipt of a court order requiring a company to change its name, to direct the company to change its name within a specified period?	Yes. The giving of such power to the Registrar should be adequate to address the issue created by the "shadow companies". The court order should be final with no right of appeal.
	(b) If your answer to (a) is in the affirmative, do you agree that the Registrar should be further empowered to change a company's name to its registration number if the company does not comply with his direction to change its name within the specified period?	Yes.

Paragraph 2.5

1. We agree that as a matter of policy and practicality, the option of prohibiting registration of a company name which is identical or similar to any trademark registered under the Trade Marks Ordinance is not viable.

Paragraph 2.6

2. We note the Government does not recommend adoption of a system of company name adjudication similar to that introduced in the UK.

2.1 We agree that the implementation of such system would require substantive consideration of the rules and procedures and cannot be introduced within a short time. In the UK, the system is not targeted to shadow companies but company name hijacking. Further, the system is yet to be tested in the UK and thus its effectiveness is yet uncertain.

2.2 However, we do not agree with the Government's reasoning as set out in paragraph 2.6 of the Paper.

(1) The burden lies on the officers of the "shadow companies" to attend the proceedings before an adjudicator if the company has any valid defence/response to the complaint. If they fail to do so, we see no reason why the adjudicator cannot make a decision based on the complainant's submissions alone.

(2) As in the cases of arbitration of domain name disputes, the administrative costs involved are generally lower than court actions.

(3) There will not necessarily be duplication of efforts as the trademark owner may elect to pursue either through the adjudication system or the court.

Paragraph 2.7

3. The proposal is to amend the CO to empower the Registrar, upon receipt of a court order requiring a company to change its name, to direct the company to

change its name within a specified period. If the company fails to comply with the direction, the Registrar may substitute its infringing name with its registration number.

3.1 We welcome this additional power which would provide relieve trademark owners of the need to sue the individual shareholders which often entails service of proceedings outside of Hong Kong.

Paragraph 2.9

4. The proposal is to grant the Registrar power to reject registration of *any* company name which is "*the same*" as an infringing name which the Registrar has previously directed a company to change and is the subject of a court order.

4.1 We welcome the grant of this additional power to the Registrar.

4.2 The effectiveness of this power however requires an appropriate interpretation of the meaning of "the same" being adopted by the Registrar.

4.3 According to the Company Names Guidelines issued by the Companies Registry in 2007, in determining whether a company name is "the same as" another, the following factors shall be disregarded:

4.3.1 the definite article, where it is the first word of the

same

4.3.2 the ending words or expressions “company”, “and company”, “company limited”, “and company limited”, “limited”, “unlimited”, “public limited company”, their abbreviations, and the ending Chinese characters of “company”, “company limited”, “unlimited company” and “public limited company”.

4.4 We propose that the current Guidelines be expanded as follows:

(a) where the director(s) and/or shareholder(s) of the company sought to be registered are the same as those of the company which has previously been subject of a court order, the meaning of “the same” should give effect to the terms of the injunction granted against the earlier company. For example, where the injunction restrains use of the trademark “Panasonic” or any name confusingly similar thereto as a company name without restriction on the scope of business, the Registrar should be empowered to refuse any such name, irrespective of any qualifiers/identifiers in the remaining part of the company name.

(b) where the director(s) and/or shareholder(s) of the company sought to be registered are any other third parties, the interpretation of “the same” should at least

follow the meaning of "too-like" as adopted by the Registrar under section 22(2) of the CO.

Paragraph 2.10

5. It is further proposed that the Registrar be empowered to change a company's name to its registration number if the company does not comply with his direction to change its name under section 22(2) of the CO.

5.1 We agree with the proposal.

5.2 As to the time frame within which the company must change its name in compliance with the direction before the Registrar will exercise the power to change its name to its registration number, we understand the Registrar's current practice is to specify 6 weeks. We consider this to be a reasonable period.

5.3 As to what constitutes non-compliance with the Registrar's direction to change the name, we propose that where the company simply changes to another name that still incorporates the same trademark under complaint though with added non-distinctive identifiers, such should not be taken as having complied with the direction and the Registrar is still empowered to change the company's name to its registration number.

5.4 In determining the meaning of "too like" under section 22(2) of the CO, we propose that the Registrar should give

consideration to evidence of actual or likelihood of confusion caused by the use of the company name in the light of all the relevant circumstances and the principle of "imperfect recollection" of an ordinary member of the public.

5.5 We propose that this same power should also be given where the company fails to comply with the Registrar's direction to change its company' name under section 22A of the CO.

Paragraph 2.11

6. The Paper has considered the alternative of empowering the Registrar to strike a company off the register if it fails to comply with a direction to change name but did not recommend it as it may adversely affect the interests of third parties such as creditors, and may result in uncertainties over liabilities and obligations of the company and its officers.

6.1 Following a decision to strike a company off the register, the Registrar will publish notices in the gazette allowing any interested third parties to object to the decision. Notwithstanding, in practice it is doubtful that such notices would be brought to the attention of interested third parties. As such, we agree that it may not be a good alternative.

Paragraph 2.12

7. The current processing of applications for incorporation of companies is 4 working days. We consider this a reasonable period.

7.1 We also agree to expedite the company name approval procedure.

7.2 The approval system contemplated under paragraph 2.12 of the Paper should examine not only certain preliminary requirements such as whether or not the name is not identical to another name already on the Registrar's register or contain certain words or expression on a specified list, but also incorporates a mechanism whereby the requirements under point 4.4 above will be taken into consideration, which should not be postponed to the further checking stage.

(c) If your answer to (a) or (b) is in the negative, what other option(s) do you suggest and why?

Not applicable.

2 (a) Do you agree with the proposal that the law should be amended to provide the Registrar with a discretionary power to approve a "hybrid name" where the applicant can show to the satisfaction of the Registrar that there is a genuine business need?

No. Company name is used to identify a unique legal entity which can take rights and obligations. Hybrid names can create confusion and give rise to difficulties in communicating with non-English speaking counterparties. Companies are allowed to use trade names in the conduct of their business and can use any fancy name they choose. It is difficult to see how a genuine business need for the use of hybrid name cannot be satisfied by the adoption of a hybrid trade name.

There is also concern that allowing hybrid names will inevitably make it more difficult for trademark owners to complain against shadow company names whether pursuant to section 22(2), 22A of the Companies Ordinance or passing-off or otherwise.

(b) If so, what should constitute a "genuine business need"?

Not applicable.

3 Do you have further views on how the current company name registration system could be improved, particularly for the purpose of tackling the problem of "shadow companies"?

Please see the commentary in Question 2 (b) above:

8. The current limitation period of 12 months within which the Registrar may direct a company to change its name is too short.

8.1. We propose the time period be extended to say, 18 months, without causing the company too much inconvenience due to extended period of use of more than 18 months and before the company holds its first annual general meeting.

9. Section 291 of the CO gives the Registrar power to strike off the register a company that he has reasonable cause to believe is not carrying on business or in operation.

9.1 Whilst the section does not specify whether such business or operation should take place within Hong Kong, we consider that the intention of the legislature is that *at least part* of the business or operation has to be in Hong Kong

because legislation is generally not intended to have extra-territorial effect unless expressly provided to be so. Further, it is obvious from section 291(1), (2) and (3) that the acts or steps expected to be taken by the Registrar to ascertain whether the company is carrying on business or in operation are to be carried out in Hong Kong and made known in Hong Kong.

9.2 It is almost impossible to make a worldwide investigation to find out whether a company carries on business or is in operation somewhere in the world. For this reason, we submit that if *prima facie* evidence that a company is not carrying on business or in operation in Hong Kong is submitted to the Registrar, this should be treated as "reasonable cause" for the Registrar to believe that the said company is not carrying on business or in operation and sufficient for the Registrar to invoke the procedure in section 291(1). We further submit that the mere statement of objection to the striking off action, i.e. without any ground of the objection, or mere affirmation of business activities/ operation without any supporting evidence of the alleged business activities or operation, should not be sufficient to extinguish the Registrar's "reasonable cause" to believe that the said company is not carrying on business or in operation. The Registrar should require the company to produce evidence if its carrying on business or

			in operation, and provide such evidence to the complainant (i.e. the party submitting the prima facie evidence of no business or operation in Hong Kong) for comment within a reasonable time, before the Registrar makes a decision not to invoke the procedure in section 291(3).
4	(a)	Do you agree that the general duties of directors should be codified in the Companies Bill?	No. Fiduciary duties which encompass all the common law developments cannot be codified unless written in great detail. This will result in a loss of flexibility as the expectations of directors' responsibilities are constantly evolving especially as corporate governance develops. A codification which summarises only the broad principles as in the UK is inadequate unless such codification co-exists with common law, and this will create new uncertainties.
	(b)	If your answer to Question (a) is in the affirmative, do you agree that the UK approach, including the duty to promote the success of the company for the benefit of its members as a whole having regard to such factors like the long-term consequences of a decision, the interests of employees, the impact of the company's operations on the community and the environment, etc., should be adopted? OR	Not applicable.
	(c)	If your answer to Question (a) is in the negative, do you have any views on how the directors' duties could be clarified or made more accessible?	The approach of publishing and revising non-statutory guidelines from time to time by the Companies Registry should be maintained. Directors to take initiatives in gaining an understanding of the common law duties.
5	(a)	Do you agree that corporate directorship should be	No. Corporate directors are now only allowed for private

		abolished altogether in Hong Kong, subject to a reasonable grace period?	companies. If corporate directorship is to be abolished, this will encourage an exodus of companies to other jurisdictions, such as BVI, that permits corporate directorship.
	(b)	If your answer to Question (a) is in the negative, do you agree that the UK approach (i.e. a company should be required to have at least one natural person as its director), subject to a reasonable grace period, should be adopted?	No.
	(c)	If your answers to both Questions (a) and (b) are in the negative, do you have any suggestion on how to improve the enforceability of directors' obligations and to solve the difficulty of pursuing corporate directors?	-
6	(a)	Do you agree that the changes listed in Appendix V should not be adopted in Hong Kong?	No, they should not be adopted. The existing framework is well understood and has worked well for many years.
	(b)	If not, please specify which of the changes you think should be introduced in Hong Kong and the reasons.	Not applicable.
7		Do you agree that charges on aircrafts and interests in them should be made registrable?	Yes. There should be no distinction between ships and aircrafts.
8		Should section 80(2)(a) of the CO requiring the registration of a charge for the purpose of securing any issue of debentures be deleted on the ground that it is redundant?	Yes it is redundant.
9		Would you prefer the reference to "bills of sale" in section 80(2)(c) of the CO to be:	

	(a)	retained as is;	Yes, even though a bill of sale is rarely used as a form of security over a company's assets, it may still be of relevance if these assets consist of artworks or other valuable jewellery which are not generally covered by a floating charge.
	(b)	retained but clarified along the lines of section 262(3) of the ACA; or	No.
	(c)	deleted?	No.
10	(a)	Would you prefer the term "book debts" to be statutorily defined or left to the courts to define?	The term "book debts" can and should be given a statutory definition.
	(b)	If your preference is for a statutory definition, would you agree to a definition along the lines of section 262(4) of the ACA, or some other (please specify)?	The ACA definition can be adopted.
	(c)	Do you agree that a lien on subfreights and cash deposits should be expressly excluded from the registration requirement?	Subfreight should be excluded as it lacks the proprietary characteristic of a charge. Cash deposits should not be excluded as it can be charged in favour of a party other than the depository bank.
11		Do you agree that the automatic statutory acceleration of repayment in section 80(1) of the CO should be replaced with a right for the lender to demand immediate repayment of the amount secured by the charge, should a company fail to register a charge within the prescribed time?	Yes. Automatic statutory acceleration is often not the intention of the lender.
12	(a)	Do you agree that both the instrument of charge and prescribed particulars should be registrable and open to public inspection?	Yes. The Registrar should not have to undertake the responsibility for checking the correctness of the particulars.

	(b)	Do you agree that the Registrar should no longer issue a certificate of due registration, but a receipt showing the particulars submitted for registration, as well as the date on which the instrument of charge (if required) and the particulars are submitted for registration?	The system of issuing certificate of registration should be retained. Non-registration will have legal consequences. There should be some official proof of due registration.
13		If the charge instrument is not registrable as an answer to Question 12(a), should the charge holder be precluded from relying on rights to the security in excess of those referred to in the particulars submitted for registration?	Agree.
14	(a)	Do you agree that the period to register a charge should be shortened?	Yes.
	(b)	If so, do you think that 21 days is an appropriate period?	Yes.
15	(a)	What are your views on the viability and desirability of introducing an administrative mechanism for late registration of charges?	No. Registration out of time should still require sanction from the court since it affects creditors' rights. Once the process of registration has been simplified, there should be no good reason for registration out of time. In case of registration out of time, the court should intervene to negate irregularities.
	(b)	If you think an administrative mechanism is desirable, what should be its essential features?	Not applicable.

The Law Society of Hong Kong
The Company and Financial Law Committee
Intellectual Property Committee
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