

What goes where? An analysis of companies and securities legislation – the Hong Kong perspective

Wai Yee WAN

Professor, City University of Hong Kong



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History of companies legislation re-write in HK

- Companies Ordinance (Cap 32) first enacted in 1865 (based on UK Companies Act 1862)
- Substantially revised taking into account the developments in UK
- 1997 – recommendation to confine companies legislation to ‘core’ company law though the standing committee was not in favour
- Mid-2006 –re-write exercise to modernise HK’s company law and enhancing HK’s future as an international business and financial centre.
- Five rounds of public consultations and the Companies Bill was introduced to Legco in Feb 2011, and approved in July 2012
- Companies Ordinance Cap 622 came into force on 3 March 2014; provisions concerned with prospectuses, disqualification of directors and winding-up retained in Cap 32

The modern companies legislation

- The four objectives:
 - Enhance corporate governance
 - Enhancing shareholder engagement in decision-making process
 - Improve disclosure of company information
 - Regulate protection of shareholders through prescriptive dealing with directors' conflict of interests
 - Enhance minority shareholder protection to ensure independent voting in privatisations effected via schemes of arrangement

The modern companies legislation

- Ensure better regulation
 - Registrar of Companies has powers to rectify documents in public registry
 - Improve registration of charges regime
- Facilitate business
 - Doing away with unnecessary requirements e.g. AGM if all shareholders agree
 - Capital reduction can be effected without going to court
 - Simplify reporting for small private companies
- Modernise the law
 - Use of plain English
 - Abolish memorandum of association
 - Clarify when directors can be indemnified against liabilities to third parties

Hierarchy of laws

- Subsidiary legislation, known as *Regulations*, (12 pieces) to support the main legislation, including:
 - Accounting Standards
 - Directors' report
 - Disclosure of information about directors' benefits
- Subsidiary legislation is delegated to the Financial Secretary (s 909 of CO)
- Subsidiary legislation can be more easily amended and updated in the future to take into account advances in technology and new requirements. Eg, the subsidiary legislation on Companies (Directors' Report) Regulations contain detailed provisions on the format of the report, which are drawn up after consulting the SFC and the SEHK and which are expected to change over time (FSTB, 2009)
- Briefing notes – provides general information on subsidiary legislation to implement the main companies legislation, provided by Companies Registry
- Companies Registrar can issue guidelines indicating the manner in which the Registrar proposes to perform any function or exercise any power, or providing guidance on the operation of any provision of the CO. The guidelines are not subsidiary legislation, but may be admissible in evidence in any legal proceedings if they are relevant to determine a matter in issue (s 24 of CO, Cap 622).

Relevance of the re-write exercise

- The consultation papers remain available on the CR webpage
- CR webpage contains short papers (approx. five pages or less) as to the differences between the 'new' Companies Ordinance and the immediately preceding law, as well as the rationale for the changes
- Comprehensive FAQs on the key topics with changes (e.g. abolition of the article of association)

Offences and Penalties for Companies Legislation

- Offences and penalties are largely in the primary legislation (Cap 622 and 32)
- Non-compliance may lead to fines (within six levels) but fine levels are not in the CO; instead they are set out in the Criminal Procedure Ordinance (Cap 221), Schedule 8
- Where *Regulations* contains provisions on offences insofar as non-compliance is concerned, the primary legislation explicitly provides that the Financial Secretary has the power to issue Regulations dealing with the offences and punishment (together with the level of fine) e.g. Companies (Disclosure of Company Name and Liability Status) Regulation, the primary legislation (s 660 of Cap 622) specifies that the punishment cannot exceed “level 3” fine

Some remaining points for consideration

- Prospectus disclosure requirements remain in Cap 32 rather than in Securities and Futures Ordinance, Cap 571, though Lo and Qu (2018) anticipate that the provisions will be moved to Cap 571
- CR issues guidance on registration of prospectuses: [Companies Registry External Circular No. 3/2017 \(cr.gov.hk\)](#)
- Note: prospectuses are subject to dual filing under the Securities and Futures (Stock Market Listing) Rules (SMLR) where listing applicants and listed companies must file applications and disclosure materials with the SFC, via SEHK (reasons of exercising enforcement powers)
- Legislation does not merge corporate insolvency with personal bankruptcy

Securities regulation

- 1999 – consultation on the enactment of the omnibus securities legislation
- Securities and Futures Ordinance Cap 571 (enacted in 2002) to consolidate and modernise 10 pieces of legislation on financial services, securities and futures markets, investor protection ([Securities and Futures Ordinance expected to commence on April 1, 2003 \(info.gov.hk\)](#))
 - Introduces dual filing by listing applicants and listing companies to the SEHK and the SFC (SFC can investigate against misleading information filed)
 - Introduces offences relating to disclosure of false information inducing investors to enter into securities transactions
 - Introduces new private right of action to seek compensation for losses arising from reliance on false or misleading disclosures by listed companies
 - Auditors of listed companies have statutory immunity from civil liability for reporting suspected corporate misconduct to the SFC
- Initially, 37 sets of subsidiary legislation to operationalise the SFO
- NB: Prospectus disclosures in Cap 32

Securities regulation

- SFO Cap 571 is the overarching legislation on regulating the securities and futures industry in HK
- Power to issue subsidiary legislation (known as *rules*) relating to licensing etc. lies with SFC (s 397 of Cap 571); in specified cases (eg designation of collective investment schemes), the power lies with Financial Secretary (s 392 of Cap 571)
- Codes and guidelines are issued by SFC (and are not subsidiary legislation): e.g. s 112ZR Cap 571

Offences and Penalties for Securities Regulation

- As is the case of companies legislation, offences and penalties are largely in the primary legislation (Cap 571)
- Where *rules (subsidiary legislation)* contains provisions on offences insofar as non-compliance is concerned, the primary legislation explicitly provides that the SFC has the power to issue rules dealing with the offences and punishment (e.g. s 149 of Cap 471 on holding of client monies provides that the rules may specify that non-compliance leads to imprisonment up to a fixed number of years and/or specified levels of fines)

Reflection

- Enforcement of securities regulation primarily lies with public regulator, and not private enforcement (Wan et al 2019)
- Often breaches can lead to several potentially overlapping offences

Making false or misleading statements to the securities market

Table 8 (continued)

	Civil action	Civil remedies	Contravention section	Criminal sanction	Civil penalty orders	Disqualification of director	Statutory compensation (upon breach)
Hong Kong	Misrepresentation; tort of deceit; negligent misstatement	Remedies for deceit/misrepresentation	Section 108 of SFO (civil liability for inducing persons to invest in securities) Section 277 of SFO (disclosure of false or misleading statement likely to induce transaction) Section 391 (false or misleading public communication concerning securities) Section 298 of SFO (disclosure of false or misleading statement inducing transaction) Section 384 of SFO (provision of false or misleading statement under a requirement imposed in SFO to SFC and/or SEHK)	Section 107 of SFO (criminal liability for inducing persons to invest in securities) Section 303 of SFO: fine up to HK\$10 million and/or imprisonment up to 10 years Section 384 of SFO: fine up to HK \$500,000 and/or imprisonment up to 6 months	NA	Yes, orders under section 213 and/or 214 of SFO	Section 108 (civil liability) Section 281 (for breach of Section 277) Section 391 (civil liability) Section 305 of SFO (breach of Section 298)

Making false or misleading statements in prospectuses

Table 8 (continued)

Civil action	Civil remedies	Contravention section	Criminal sanction	Civil penalty orders	Disqualification of director	Statutory compensation (upon breach)
For prospectuses, in addition to common law and section 108, 277, 281 and 391 of SFO), specific statutory civil claims may be brought against the issuer and its directors	Remedies for false or misleading provisions in prospectus or non-compliance with prospectus requirements by persons who acquire shares in primary market	Sections 40(1) and 342E of Companies (Winding up and Miscellaneous Provisions) Ordinance (CWUMPO), Cap 32 (for false and misleading disclosure) Various provisions under the Theft Ordinance for deceit	Sections 40A and 342F of CWUMPO (for misleading disclosure): imprisonment and fine Sections 38 and 342 of CWUMPO (for non-compliance with prospectus requirements) Various sanctions prescribed under the Theft Ordinance	None NA	NA NA	Sections 40(1) and 342E of CWUMPO NA

References

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<https://www.cr.gov.hk/en/legislation/companies-ordinance/overview.htm>
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