Disclosure of Company Name – What Else and What Next?

Introduction

On 3 March 2014, the Companies Ordinance (Cap.622) ("CO") together with 12 items of subsidiary legislation commenced operation. One item of the subsidiary legislation – Companies (Disclosure of Company Name and Liability Status) Regulation (Cap.622B) ("Regulation") – has rather unexpectedly led to some serious concerns from the market. Practitioners and compliance professionals, in particular, have been concerned about early indications from the authorities that for a Hong Kong company registered by both an English name and a Chinese name, full compliance requires it to state both names in all circumstances where its registered name is required to be displayed or disclosed under the Regulation.

In response to these concerns, the Registrar of Companies has considered the matter further and sought legal advice. On 24 July 2014, the Companies Registry ("CR") published External Circular No. 13/2014 (the "External Circular"), stating that for the purpose of compliance in ensuring that a company is properly identified, the CR considers that it is sufficient for a company with bilingual names to display or state either its English name or Chinese name. Of course, such a company may still choose to display or state both its English name and Chinese name. The External Circular further states that the CR will enforce the provisions accordingly.

This has gone a long way in addressing the concerns of compliance professionals, and the responsiveness of the CR should be applauded. However, while dealing with the issues identified by the market by way of the External Circular may be a very good interim measure, longer term we believe that the Regulation should be amended after consultation.

In this article we discuss why we consider, despite issue of the External Circular, an amendment of the Regulation is still necessary. In addition, we study a few other areas of the Regulation in respect of which refinements should preferably be made.

What led to the concern about disclosure of bilingual names?

As pointed out by the CR on several occasions, the requirement for disclosure of a company's registered name in its communication documents and transaction instruments is not a new requirement because there were similar disclosure requirements under section 93 of the old Companies Ordinance ("old CO"). Yet, people have been quick to note the difference in the wording, i.e., section 93 of the old CO only stated "its name" while the Regulation now uses "registered name", and the rationale for and implications of such difference have never been highlighted during the consultation and legislative process. One possible reason for such difference in wording is that in making reference to the UK Companies Act 2006 and the Companies (Trading Disclosures) Regulations 2008 (which uses "registered name") during the old CO rewrite exercise ("Rewrite Exercise"), the special circumstances of Hong Kong, being a place which adopts the policy of bilingualism in law, have not been fully considered. The issue of bilingual names which is unique to Hong Kong has no relevance for the UK. The replacement of "the name" by "registered name" in the Regulation has therefore resulted in confusion which is most probably an unintended result of the Rewrite Exercise.

In response to initial enquiries from practitioners on the scope of "registered name", the CR indicated that for a company with bilingual names, its full registered name consists of both its English and Chinese names and therefore they both need to be disclosed in accordance with the Regulation together. This view is apparently based on a literal

interpretation of the Regulation. The Regulation defines "registered name" as "the name by which the company is registered under the Ordinance", and one reasonable interpretation is that this means both the English and Chinese names. Of course, a more purposive interpretation may well lead to the conclusion that this means no more than where the company is registered by both an English name and a Chinese name, each of these names on its own constitutes the registered name of the company.

The early indications that the CR would require both the English and the Chinese names to be stated have prompted strong reaction from companies with bilingual names since most of them had only used either the company's English name or Chinese name before the commencement of the Regulation, in the belief that this practice was in full compliance with section 93 of the old CO. And the lack of any enforcement by the CR in respect of this practice under the old regime has in a way reinforced this belief. If it is the intention of the legislature to bring about a change in the practice which is likely to affect the daily operation of companies with bilingual names, it is generally felt that this should have been highlighted during the consultation stage of the Rewrite Exercise.

While disclosing and displaying both names all the time is surely not impossible, this could be extremely burdensome for companies, taking into account that the broad definitions of "communication documents" and "transaction instruments" would capture intra-group agreements and those to be circulated by electronic means. It will also give rise to certain unforeseen practical difficulties when it comes to documents to be published and circulated outside of Hong Kong. For example, it may not be practical for a company with bilingual names to use its English name in mainland China. Similarly, it is also odd if not impractical for a company with bilingual names to use its Chinese name in countries where Chinese is not a language in general use.

Putting aside the above practical inconvenience and difficulties that may arguably be overcome, the approach to enforcing the Regulation in a way that requires both the English and the Chinese names to be stated seems to be inconsistent with the general policy of bilingualism in law in Hong Kong. This policy means that legal obligations imposed by statutes can generally be satisfied by using the English language or the Chinese language. For example, statutory filings under the CO and other statutes can be satisfied by either using English or Chinese. There are of course exceptions in specific circumstances, e.g., a prospectus in English must be accompanied by a Chinese translation and vice versa, but these are exceptions rather than the rule.

Does the External Circular suffice?

Amid the confusion in the market over the Regulation, the External Circular is a welcome move which shows the CR's responsiveness and receptiveness to market concerns. The External Circular states that the CR has sought legal advice, presumably from the Department of Justice on the question. Apparently, a more purposive interpretation of "registered name" has been found acceptable in the context of enforcing the Regulation. Hence, for compliance purposes, it seems to be safe for companies with bilingual names to rely on the External Circular as a policy statement of the regulator. These companies can now be freed from any worry that a failure to disclose both names may lead to criminal prosecution under the Regulation.

The next question is whether it is sufficient or satisfactory from the perspective of civil liabilities.

We consider that there still remain justifiable concerns about the adequacy of the External Circular as a solution in so far as civil consequences for the companies and their officers are concerned. A claim under common law that a contract is void because the other side has not stated say its Chinese name which in turn is a breach of the Regulation (but which is not considered a breach by the enforcement authority) would probably be so disreputable that the possibility of such claim being upheld in court should be minimal. We will come back to this later in the article. On the other hand, a claim for statutory remedy under section 661 is a different matter.

Section 661 of the CO (previously section 93(5) of the old CO) provides that if an officer of a company or a person acting on the company's behalf signs or authorises to be signed on behalf of the company, any bill of exchange, promissory note, endorsement, cheque or order for money or goods in which the company's name is not mentioned in the manner as required by the Regulation, that officer or person is personally liable to the holder of the bill of exchange, promissory note, cheque or order for money or goods for the amount (unless it is duly paid by the company).

Therefore, if a company with bilingual names fails to honour a cheque for whatever reasons, e.g., it is on the brink of insolvency, it would be possible for the payee to make a claim against the director who signed the cheque pursuant to section 661 on the basis that only the English name (or only the Chinese name) of the company has been stated in the cheque. Further, commentators have raised the possibility that if an officer is held liable under section 661, he may have a cause of action against the bank which supplied the pre-printed cheque forms in negligence. In these situations, the court has to determine whether the Regulation has been breached. Given that one reasonable interpretation of the requirement of the Regulation is that both names need to be stated, the director would be exposed to such a claim if such an interpretation is adopted by the court. After all, while the External Circular can serve as a statement of policy when it comes to enforcing the Regulation by the CR, it does not have the effect of changing the Regulation. Therefore, in bills of exchange, promissory notes, cheques or orders for money or goods, it is advisable for companies with bilingual names to state both their English and Chinese names.

Now let's turn to other possible civil consequences of a breach of the Regulation. The primary purpose of the Regulation is to ensure that a company will be properly identified. In the External Circular, the CR has stated that it considers that disclosing either name is sufficient for the purpose of properly identifying a company. Apart from the imposition of a fine and the civil consequence provided for in section 661, neither the Regulation nor the CO has provided for any other consequences for contravention. It is therefore unlikely to be the intended consequence that a breach of the Regulation, on its own, has the effect of rendering a transaction void or voidable. In any event, there are always express provisions to that effect in the CO when this is indeed the legislative intent[1].

Despite the absence of any such provision in the CO, a mistake as to identity can be a ground for arguing that a contract is void under common law. It is possible that a company's failure to disclose both of its names in a contract (despite the External Circular) will still be raised by a contracting party who desperately wants to get away from the transaction. Although the risk is minimal, this cannot be removed entirely.

The way forward - public consultation?

As with all new legislation, no matter how thoroughly the market was consulted when the statute was formulated, there are bound to be issues which would only surface after implementation. The difficulties encountered by compliance professionals on commencement of the Regulation are a case in point. In addition to the problems discussed above which are specific to companies with bilingual names, a number of other issues regarding the Regulation have been identified. We cover some of these issues here.

It is a new requirement that a company must state its registered name on any website of the company. It is common practice for a corporate website to include profiles and information about various companies within the group. Does this mean that all companies within the group have to disclose their registered names on the website? Also, would it be acceptable if the registered name is only found after clicking several links? The Regulation is not particularly helpful on these points.

The Regulation has broadened the scope of "communication document" and "transaction instrument" by providing that a reference to a communication document or transaction instrument is a reference to it in hard copy form, electronic form or any other form. With electronic circulation becoming increasingly prevalent, the requirement to disclose the company's registered name in these electronic messages and documents (even if it has only an English or Chinese name) could be rather challenging for companies which frequently send out marketing materials to clients by way of SMS messages, emails, etc.

Last but not least, the exact meaning of "communication document" is a bit unclear as part of its definition – "official publication of the company" – has not in turn been clearly defined. To what extent would internal communication documents such as staff newsletters, notices to staff, etc., fall within the term "official publication of the company"? This is a common query raised by many companies. It would

[1] A buyback by a company will be void if following such buyback there would no longer be any member holding shares other than redeemable shares (s236) and transactions with directors e.g., loans, quasi loans without prescribed shareholders' approval are voidable at the instance of the company (s513).

be desirable for the CR to provide some guidance on the criteria, whether by way of refining the Regulation or by issuing a FAQ.

The scale of the Rewrite Exercise was massive, taking more than seven years to complete. The public were engaged all along and were given plenty of opportunities to express their views on the draft legislation. The CR had also done a very good job in briefing the public and practitioners on the changes and initiatives introduced by the CO with a view to getting them fully prepared for the implementation. And as evidenced by the issue of the External Circular, the CR has been very quick in addressing the concerns of the market after the implementation, and their efforts are to be commended. However, given the important implications of all these changes for local companies – e.g., the Regulation does have a lot of impact on the daily operation of Hong Kong companies – it is important to collect feedback from the market on a regular basis after implementation, and conducting a public consultation in due course and suitably amending the Regulation as well as other parts of the CO (about which the market may also have some concerns) would be highly desirable.

Contact Us

For inquiries related to this Legal Update, please contact the following persons or your usual contacts at our firm.

Patrick Wong
Partner
T: +852 2843 4528
E: patrick.wong@mayerbrownjsm.com

Loretta Chan
Consultant
T: +852 2843 5158
E: loretta.chan@mayerbrownjsm.com