

立法會
Legislative Council

LC Paper No. CB(1)1138/03-04
(These minutes have been seen
by the Administration)

Ref: CB1/BC/18/02

Bills Committee on Companies (Amendment) Bill 2003

**Minutes of the fourteenth meeting
held on Friday, 20 February 2004, at 10:45 am
in Conference Room B of the Legislative Council Building**

Members present : Hon Audrey EU Yuet-mee, SC, JP (Chairman)
Hon Albert HO Chun-yan
Dr Hon Eric LI Ka-cheung, GBS, JP
Hon CHAN Kam-lam, JP
Hon Emily LAU Wai-hing, JP

Non-Bills Committee Member
Hon Miriam LAU Kin-yee, JP

Members absent : Hon Mrs Sophie LEUNG LAU Yau-fun, SBS, JP
Hon SIN Chung-kai
Dr Hon Philip WONG Yu-hong, GBS
Hon Henry WU King-cheong, BBS, JP

Public officers attending : Financial Services and the Treasury Bureau

Ms Shirley LAM
Principal Assistant Secretary for Financial Services and
the Treasury (Financial Services) 4

Mr Arthur AU
Assistant Secretary for Financial Services and
the Treasury (Financial Services) (4) 1

Companies Registry

Mr G W E JONES
Registrar of Companies

Mr Edward LAU
Secretary, Standing Committee on
Company Law Reform

Department of Justice

Mr Allen LAI
Senior Government Counsel

Clerk in attendance : Ms Anita SIT
Chief Council Secretary (1)6

Staff in attendance : Miss Monna LAI
Assistant Legal Adviser 7

Mr Matthew LOO
Senior Council Secretary (1)3

I Confirmation of minutes of meeting

LC Paper No. CB(1)1040/03-04 - Minutes of meeting on 5 February 2004

The minutes of the meeting held on 5 February 2004 were confirmed.

II Meeting with the Administration

LC Paper No. CB(1)1041/03-04 (01) - Administration's paper on follow-up actions arising from the discussion at the meeting on 5 February 2004 on Schedule 4

- LC Paper No. CB(1)1041/03-04 (02) - List of issues requiring follow-up actions by the Administration on Schedule 4 of the Bill (Position as at 19 February 2004)
- LC Paper No. CB(1)2504/02-03(01) - Submission dated 22 September 2003 from the Chinese General Chamber of Commerce
- LC Paper No. CB(1)2521/02-03 (03) - Administration's response to written submissions from the Association of International Accountants, the Chinese General Chamber of Commerce and the Stock Exchange of Hong Kong Limited
- LC Paper No. CB(1)2504/02-03(04) - Submission dated 5 September 2003 from Consumer Council
- LC Paper No. CB(1)2521/02-03(04) - Administration's response to written submission from Consumer Council
- LC Paper No. CB(1)2504/02-03 (05) - Submission dated 16 September 2003 from Office of the Privacy Commissioner for Personal Data, Hong Kong
- LC Paper No. CB(1)2521/02-03 (05) - Administration's response to written submission from Office of the Privacy Commissioner for Personal Data, Hong Kong
- LC Paper No. CB(1)2504/02-03 (11) - Submission dated 22 September 2003 from Linklaters
- LC Paper No. CB(1)798/03-04 (01) - Administration's response to written submission from Linklaters
- LC Paper No. CB(1)2504/02-03(12) - Submission dated 22 September 2003 from the Stock Exchange of Hong Kong Limited
- LC Paper No. CB(1)2504/02-03 (13) - Submission dated 22 September 2003 from the Hong Kong Institute of Company Secretaries

- LC Paper No. CB(1)798/03-04 (02) - Administration's response to written submission from the Hong Kong Institute of Company Secretaries
- LC Paper No. CB(1)2521/02-03 (01) - Submission dated 25 September 2003 from the Hong Kong Chinese Enterprises Association
- LC Paper No. CB(1)2521/02-03(02) - Submission dated 25 September 2003 from School of Business, Hong Kong Baptist University
- LC Paper No. CB(1)798/03-04 (03) - Administration's response to written submission from School of Business, Hong Kong Baptist University
- LC Paper No. CB(1)185/03-04 (01) - Submission dated 27 October 2003 from Hong Kong Society of Accountants
- LC Paper No. CB(1)798/03-04 (04) - Administration's response to written submission from Hong Kong Society of Accountants
- LC Paper No. CB(1)934/03-04 (03) - Submission dated 2 February 2004 from Hong Kong Society of Accountants
- LC Paper No. CB(1)217/03-04 (01) - Submission dated 21 October 2003 from Hong Kong Small and Medium Enterprises Association
- LC Paper No. CB(1)798/03-04 (05) - Administration's response to written submission from Hong Kong Small and Medium Enterprises Association
- LC Paper No. CB(1)786/03-04 (01) - Submission dated 12 January 2004 from Mr Winston POON, SC, Mr Godfrey LAM, Barrister, Ms Linda CHAN, Barrister
- LC Paper No. CB(1)971/03-04 (01) - Administration's response to written submission from Mr Winston POON, SC, Mr Godfrey LAM, Barrister, Ms Linda CHAN, Barrister

- LC Paper No. CB(1)946/03-04 (01) - Submission dated 5 February 2004 from Mr Winston POON, SC
- LC Paper No. CB(1)1041/03-04 (03) - Administration's response to written submission from Mr Winston POON, SC
- LC Paper No. CB(1)1041/03-04 (04) - Summary of written submissions and the Administration's response on Schedule 4 of the Bill (Position as at 19 February 2004)
- LC Paper No. CB(1)2425/02-03 (01) - Letter dated 29 August 2003 from Assistant Legal Adviser 7 (ALA7) to the Administration on Schedule 4 of the Bill
- LC Paper No. CB(1)849/03-04 (01) - Administration's response dated 17 January 2004
- LC Paper No. CB(1)934/03-04(01) - Administration's paper on follow-up actions arising from the discussion at the meeting on 29 January 2004 on Schedule 4
- LC Paper No. CB(1)798/03-04 (06) - Administration's paper on follow-up actions arising from the discussion at the meeting on 2 October 2003 on Schedule 4
- LC Paper No. CB(1)798/03-04 (07) - Administration's paper on international comparisons of shareholders' remedies

2. The Bills Committee continued the scrutiny of Schedule 4 of the Bill (Amendments relating to shareholders' remedies).

3. The Administration undertook to consider and provide information on the following matters -

Statutory derivative action

- (a) To consider introducing CSAs to the effect that a member of a specified corporation is required to apply to the court for leave for bringing proceedings on behalf of the specified corporation.

- (b) On the scope of application of the proposed provisions on statutory derivative action, to provide examples to illustrate the types of derivative claims that are not allowed by the court under the current common law arrangement but would be allowed if the proposed provisions are enacted.
- (c) As undertaken in the Administration's response to written submissions, to consider whether there is a need to -
 - (i) make it explicit in the proposed section 168BB(1) that the subject proceedings should be confined to those for the recovery of damages for fraud, negligence, default, breach of duty, or other misconduct, committed by a person who is or has been a director of the company (c.f. section 50 of the Australian Securities and Investments Commission Act 2001); and
 - (ii) add a new provision along the lines in section 237(3) of the Australian Corporation Act 2001 to "define" the scope of "best interests" in the proposed sections 168BD and 168BB(3) whereby proceedings between a company and a third party would normally be excluded from the statutory derivative action.
- (d) To provide information on the provision in Australia which provides a rebuttable presumption that granting leave is not in the best interests of the company if certain conditions are established.
- (e) On proposed section 168BB(2) empowering a member to bring proceedings "in the name of the specified corporation", to further consider the concerns of Mr Winston Poon, SC et al. over the possible problems relating to inspection and discovery of documents. In this connection, to also explain the merits of the proposed arrangement as compared to the common law arrangement and to provide information on how the issues are addressed in Australia and Singapore.
- (f) With regard to the timing for determination of the costs of the statutory derivative action, to provide information with court cases in Australia on the normal timing that the court makes an order as to the costs, whether at the stage of leave application or at the early stage of the proceedings on the derivative action or otherwise.

- (g) To clarify the policy intent as to whether multiple interventions in the same derivative action by different members of a specified corporation would be permissible, and how the court is expected to deal with such interventions given the leave requirement for such interventions.

Order for inspection

- (h) To further consider the need to provide saving for bankers with regard to documents relating to the affairs of the customers of bankers, bearing in mind that the existing part in the Companies Ordinance on "Inspection of Companies' Books and Papers", under which proposed sections 152FA to 152FE will subsume, already contains a saving provision, i.e. section 152F(2), for bankers.
- (i) To further clarify the intended scenarios as provided under subsection (a) to (c) under section 152FC(1) where information obtained by means of an inspection order may be disclosed by an inspector and to review whether the current drafting of the subsections is of adequate clarity, bearing in mind that the court is empowered to make an order to limit the use of the information under proposed section 152FA(3) and improper disclosure is an offence under proposed section 152FC(2).

III Any other business

Date of next meeting

- 4. Members noted that the next meeting would be held on Thursday, 26 February 2004 at 10:45 am. The Bills Committee would continue to scrutinize Schedule 4 of the Bill (Amendments relating to shareholders' remedies) at the next meeting.
- 5. There being no other business, the meeting ended at 12:50 pm.
- 6. The index of proceedings of the meeting is at **Appendix**.

**Proceedings of the meeting of the
Bills Committee on Companies (Amendment) Bill 2003**

**14th meeting on Friday, 20 February 2004, at 10:45 am
in Conference Room B of the Legislative Council Building**

Time marker	Speaker	Subject(s)	Action required
000000 - 000421	Chairman	Confirmation of minutes of meeting on 5 February 2004 Welcoming and introductory remarks	
000422 - 000806	Chairman Administration	Administration's response to written submissions <i>[CB(1)1041/03-04 (04)]</i> <u>Clause 5 - Part IVAA added (Bringing or intervening in proceeding on behalf of specified corporation)</u> Administration's response to the concern of the School of Business, Hong Kong Baptist University on allowing a member to bring a statutory derivative action without leave under proposed section 168BB(1)(a)	
000807 - 001309	Chairman Administration	Differences between the statutory derivative action provisions proposed in the Bill and the derivative actions brought under common law	
001310 - 001611	Chairman Administration Mr Albert HO	Differences in the scope of application between the proposed provisions on statutory derivative action and derivative actions brought under common law	
001612 - 001724	Chairman Mr Albert HO	Provisions on statutory derivative action in other jurisdictions <i>[CB(1)719/03-04 (07)]</i>	

Time marker	Speaker	Subject(s)	Action required
001725 - 002806	Chairman Ms Miriam LAU Administration Mr Albert HO	<p>Ms Miriam LAU queried the propriety of allowing a member to bring a statutory derivative action without leave under proposed section 168BB(1)(a), and placing the burden on the specified corporation concerned to persuade the court that the action should be halted. She also highlighted that there was a leave requirement for bringing a derivative action in the legislation of Australia and Singapore.</p> <p>The Bills Committee agreed that there should be a leave requirement for bringing a derivative action under proposed section 168BB.</p>	Administration to take the follow up action set out in paragraph 3(a) of the minutes
002807 - 003806	Chairman Administration Mr Albert HO	Scope of application of the proposed provisions on statutory derivative action, and examples to illustrate different types of derivative actions	Administration to take the follow up action set out in paragraphs 3(b) and 3(c)(i) of the minutes
003807 - 005049	Chairman Ms Miriam LAU ALA7	<p>Views of the UK Company Law Review that a decision by the non-involved members of the board not to sue the wrongful director should bar the derivative action considered. Section 237(3) of the Australia Corporation Act 2001 which provided a rebuttable presumption that granting leave would not be in the best interests of the company upon establishment that the company would not bring the proceedings itself and the decision was made by all non-interested directors considered.</p> <p>Definition of the scope of "best interests of the relevant specified corporation" in proposed sections 168BB(3) and 168BD(2)</p>	Administration to take the follow up action set out in paragraph 3(c)(ii) and (d) of the minutes

Time marker	Speaker	Subject(s)	Action required
005050 - 005250	Chairman Mr Albert HO	Mr Albert HO considered that there was no need to codify with reference to the Foss v. Harbottle rule the circumstances under which a derivative action may be brought. He in general found the existing drafting of the proposed provisions on statutory derivative action acceptable, and did not have a strong view on whether a leave requirement should be added.	
005251 - 005257	Chairman	Administration's response to the views of the Consumer Council on clause 5 of the Bill	
005258 - 005536	Chairman Administration ALA7	Administration's response to the concern of the Linklaters on the need of introducing proposed section 168BE(2)(c)	
005537 - 005547	Chairman	Administration's response to the view of the Hong Kong Society of Accountants (HKSA) on proposed section 168BG	
005548 - 005724	Chairman Administration	Administration's response to the concern of Mr Winston POON, Mr Godfrey LAM and Ms Linda CHAN that subsections (1)(a), (1)(b) and (2) of the proposed section 168BB appeared to have abolished entirely the Foss v Harbottle rule	
005725 - 011614	Chairman Administration Ms Miriam LAU Mr Albert HO ALA7	Administration's response to the concern of Mr Winston POON, Mr Godfrey LAM and Ms Linda CHAN on the proposed arrangement under section 168BB(2) to empower a member to bring proceedings "in the name of the specified corporation", and the problems relating to inspection and discovery of documents Existing common law arrangement with regard to status of the parties to a derivative action	Administration to take the follow up action set out in paragraph 3(e) of the minutes

Time marker	Speaker	Subject(s)	Action required
011615 - 011844	Chairman Administration ALA7	Administration's response to the concern of Mr Winston POON, Mr Godfrey LAM and Ms Linda CHAN about the determination of the costs of a derivative action if the action is to be brought in the name of a specified corporation	Administration to take the follow up action set out in paragraph 3(f) of the minutes
011845 - 012654	Chairman Administration Mr Albert HO Ms Emily LAU	Administration's response to the concern of Mr Winston POON, Mr Godfrey LAM and Ms Linda CHAN on the requirement of serving a written notice under proposed section 168BC Multiple interventions in the same statutory derivative action by different members of a specified corporation under proposed section 168BB	Administration to take the follow up action set out in paragraph 3(g) of the minutes
012655 - 012730	Chairman Administration	Administration's response to the concern of Mr Winston POON, Mr Godfrey LAM and Ms Linda CHAN about the mediation arrangement under proposed section 168BF(1)(b)	Administration to move CSA to delete the reference to "mediation" in proposed section 168BF
012731 - 012804	Chairman Administration ALA7	Administration's response to the concern of Mr Winston POON, Mr Godfrey LAM and Ms Linda CHAN about the use of word "settle" under proposed section 168H	
012805 - 012821	Chairman Administration	<u>Clause 6 - Injunctions</u> Administration's response to the suggestion made by Linklaters that the reference to "company" in proposed section 350B(1)(g) should be amended to "specified corporation"	Administration to move CSA to replace the term "company" with "specified corporation"
012822 - 012829	Chairman Administration	Administration's response to HKSA's view on injunctions	

Time marker	Speaker	Subject(s)	Action required
012830 - 013455	Chairman Administration Ms Emily LAU ALA7	<u>Administration's response to concerns raised by members at the meeting held on 5 February 2004 [CB(1)1041/03-04 (01)]</u> Former version of section 247A(1) of the Australian Corporations Act 2001 Policy intent of the proposed provisions on "order for inspection" under section 152FA	Administration to move CSA to delete the phrase "having regard to the interests of both the relevant specified corporation and the applicant" in proposed section 152FA(2)(b)
013456 - 013839	Chairman Administration Mr Albert HO	Minimum shareholding requirement etc for making an application for an inspection order under proposed section 152FA	Administration to move CSA to add a provision along the lines of existing section 115A of the Companies Ordinance relating to circulation of members' resolution
013840 - 014849	Chairman Administration ALA7 Mr Albert HO	Saving for bankers under proposed sections 152FA to 152FE	Administration to take the follow up action set out in paragraph 3(h) of the minutes
014850 - 020439	Chairman Administration ALA7 Mr Albert HO	Policy intent of proposed section 152FC Differences between the use word "required" in subsection (1)(a) and "permitted" in subsections (1)(b) and (1)(c) The three scenarios mentioned in subsection (1)(a) to (1)(c) of the proposed section 152FC	Administration to take the follow up action set out in paragraph 3(i) of the minutes

Time marker	Speaker	Subject(s)	Action required
020440 - 020549	Mr Albert HO Chairman	Usage of information obtained as result of inspection order	Administration to move CSA to proposed section 152FA to make it clear that the information obtained should be used only in relation to the purpose for it was sought, unless the court ordered otherwise
020550 - 020556	Chairman	Offence provision for misuse of information	Administration to move CSA to add an offence provision for improper use of information obtained under proposed section 152FA
020557 - 020730	Chairman Administration	The Bills Committee would discuss Administration's response to members' concerns relating to unfair prejudice raised at the meeting on 12 February 2004 at the next meeting scheduled for 26 February 2004.	