

**立法會**  
**Legislative Council**

LC Paper No. CB(1)1368/03-04  
(These minutes have been seen  
by the Administration)

Ref: CB1/BC/18/02

**Bills Committee on Companies (Amendment) Bill 2003**

**Minutes of the seventeenth meeting  
held on Thursday, 11 March 2004, at 8:30 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 Emily LAU Wai-hing, JP
- Non-Bills Committee Member  
Hon Miriam LAU Kin-ye, JP
- Members absent** : Hon CHAN Kam-lam, JP  
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

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**I Confirmation of minutes of previous meetings**

LC Paper No. CB(1)1138/03-04 - Minutes of meeting on 20 February  
2004

LC Paper No. CB(1)1249/03-04 - Minutes of meeting on 26 February  
2004

LC Paper No. CB(1)1250/03-04 - Minutes of meeting on 28 February  
2004

1. The minutes of the meetings held on 20, 26 and 28 February 2004 were confirmed.

## II Meeting with the Administration

LC Paper No. CB(1)1251/03-04 (01) - Administration's paper on follow-up actions arising from the discussion at the meetings on 20, 26 and 28 February 2004

LC Paper No. CB(1)1251/03-04 (03) - List of issues requiring follow-up actions by the Administration on Schedule 4 of the Bill (Position as at 9 March 2004)

LC Paper No. CB(1)1251/03-04 (04) - Submission dated 9 March 2004 from Mr Winston POON, SC, Mr Godfrey LAM, Barrister and Ms Linda CHAN, Barrister

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 provide information on the situation (e.g. whether there has been proliferation of cases and/or substantial lengthening of proceedings in individual cases etc.) of the litigation in the United Kingdom after the imposition of the leave requirement for derivative actions taken by a member or members of a company;
- (b) To provide information on the past situation (e.g. the number of derivative action cases over a certain number of years, the types of companies and conduct involved etc.) of the litigation in Hong Kong involving derivative actions taken by a member or members of a company; and
- (c) To advise, if the rebuttable presumption as provided under section 237(3) of the Australian Corporations Act 2001 is not adopted as a threshold condition for granting leave, there would still be sufficient safeguards under the other proposed provisions to protect lawful and reasonable commercial transactions of a company from being challenged through derivative actions.

### **III Any other business**

#### Date of next meeting

4. Members noted that the next meeting would be held on Friday, 19 March 2004 at 8:30 am. The Bills Committee would continue the clause-by-clause examination of Schedule 4 of the Bill (Amendments relating to shareholders' remedies) and deliberate other outstanding issues at the next meeting.
5. There being no other business, the meeting ended at 10:33 am.
6. The index of proceedings of the meeting is at **Appendix**.

Council Business Division 1  
Legislative Council Secretariat  
24 March 2004

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

**17th meeting on Thursday, 11 March 2004, at 8:30 am  
in Conference Room B of the Legislative Council Building**

<b>Time marker</b>	<b>Speaker</b>	<b>Subject(s)</b>	<b>Action required</b>
000000 - 000431	Chairman Ms Emily LAU	Confirmation of minutes of meetings on 20, 26 and 28 February 2004  The Chairman requested the Administration to give early notification to the Bills Committee, if the Administration intended to swap the order of the Bills Committee's scrutiny of Schedules 2 and 3 of the Bill already proposed by the Administration or to make other changes to the timetable for scrutiny of the Bill.	
000432 - 000922	Chairman Administration Ms Emily LAU	Briefing by the Administration on the outcome of its follow-up actions relating to the following matters arising from the discussion on 20 February 2004 - <ul style="list-style-type: none"> <li>• Leave for bringing a statutory derivative action</li> <li>• Scope of the proposed statutory derivative action</li> <li>• Safeguards in the statutory derivative action</li> </ul> <p><i>[CB(1)1251/03-04(01)]</i></p>	

Time marker	Speaker	Subject(s)	Action required
000923 - 002209	Chairman Administration ALA7 Ms Emily LAU Ms Miriam LAU	<p>The Chairman referred to the "rebuttable presumption" condition for granting leave (<i>paragraph 5(c) of CB(1)1251/03-04(01)</i>) and asked how far the condition would limit the scope of the proposed statutory derivative action.</p> <p>The Administration advised that the "rebuttable presumption" condition was proposed along the lines of the Australian Corporations Act 2001 and in response to the Bills Committee's request made at the meeting on 20 February 2004.</p> <p>ALA7 clarified that at the meeting on 20 February 2004, the "rebuttable presumption" provided in the Australian Corporation Act 2001 was raised for discussion only.</p>	
002210 - 002559	Chairman	<p>The Chairman drew members' attention to the latest written submission dated 9 March 2004 from Mr Winston POON, Mr Godfrey LAM and Ms Linda CHAN. They commented that the imposition of the leave requirement for bringing a statutory derivative action would defeat wholly the object of the recommendation of the Standing Committee on Company Law Reform (SCCLR), as it would result in "trial within a trial" and place additional obstacles before minority shareholders by requiring them to fight two battles rather than one all at their own risks. [<i>CB(1)1251/03-04(04)</i>]</p>	

Time marker	Speaker	Subject(s)	Action required
002600 - 003729	<p>Chairman Mr Albert HO Administration Ms Miriam LAU Ms Emily LAU</p>	<p>Members enquired about the situation of litigation in the United Kingdom (UK) regarding the preliminary hearings for derivative actions.</p> <p>The Administration advised that in UK, these preliminary hearings usually involved prolonged proceedings and high costs. It was understood that there had been a review of the preliminary hearing procedures with a view to streamlining the procedures.</p> <p>The Administration also advised that the leave requirement and the "rebuttable presumption" were two separate issues. The "rebuttable presumption" was mainly concerned with the scope of statutory derivative actions. Adding the presumption would have the effect of narrowing the scope of statutory derivative actions as the transactions or affairs of a specified corporation involving a third party, provided that certain conditions were established, would be presumed to be non-actionable through statutory derivative actions.</p> <p>Ms Emily LAU was concerned that imposing the leave requirement would create additional disincentives to minority shareholders in bringing derivative actions.</p>	<p>Administration to take follow-up action set out in paragraph 3(a) of the minutes</p>

Time marker	Speaker	Subject(s)	Action required
002600 - 003729 (Cont'd)		Ms Miriam LAU considered that in bringing a derivative action, the shareholder should bear the onus of providing evidence to support his claim. Without the leave requirement, the onus would be on the company concerned to convince the court to strike out the derivative action. She also commented that the shareholder might also seek the court's order to indemnify the costs of the action at the time he applied for leave for the derivative action.	
003730 - 003852	Chairman Administration	The Administration said that it was open-minded as to whether the bringing of a statutory derivative action should be subject to the leave requirement or the strike-out mechanism as proposed in the Bill, so long as a proper balance between the interests of shareholders and specified corporations could be achieved.	
003853 - 004355	Chairman	The Chairman said that practically, it was unavoidable to have some sort of "preliminary hearing" for the determination of whether the derivative action proceedings should continue and whether the shareholder bringing the action should be indemnified the costs of the action. She considered it preferable to have the two matters decided under the same proceedings and that the same test should apply for determination of the two matters.	



Time marker	Speaker	Subject(s)	Action required
004356 - 004443	Chairman Ms Miriam LAU	Ms Miriam LAU pointed out that it might be very difficult in practice for the companies concerned to strike out derivative action proceedings. She reiterated her view that the onus should be on the shareholder to prove that there was a serious question to be tried.	
004444 - 004649	Chairman Mr Albert HO	Mr Albert HO had no strong view on whether leave of the court for bringing statutory derivative action was required, as he considered that in practice shareholders would seek the court's order to indemnify the costs before continuing a derivative action. He also remarked that the court would tend to simplify pre-trial proceedings as advocated in the recent report of the Judiciary on Civil Justice Reform.	
004650 - 005959	Chairman Ms Emily LAU Ms Miriam LAU Mr Albert HO Administration	Ms Emily LAU said that she inclined to take heed of SCCLR's recommendation and thus considered that the proposed statutory derivative action mechanism should not create additional obstacles for minority shareholders to bring derivative actions. She was worried that if the leave requirement was imposed, it would add disincentives to minority shareholders in bringing derivative actions.	

<b>Time marker</b>	<b>Speaker</b>	<b>Subject(s)</b>	<b>Action required</b>
004650 - 005959 (Cont'd)		<p>Ms Miriam LAU said that members held the consensus view that the proposed statutory derivative action should not be more burdensome than the existing common law arrangement for minority shareholders. The leave requirement was however considered reasonable as the onus for proving that there was a serious question to be tried would be rightly placed on the shareholder bringing the action. Moreover, the leave proceedings would allow certain important matters, including the indemnification of costs, to be determined at an early stage.</p> <p>Ms Emily LAU said that she would accept the leave requirement if, and only if, the leave requirement could genuinely facilitate minority shareholders to bring derivative actions by providing a simple and one-off mechanism for the court to decide whether the derivative action should continue and at the same time make an order regarding the indemnification of costs.</p> <p>The Chairman suggested that the two matters of indemnification of costs and continuance of the derivative action be dealt with under one single leave application procedure and be subject to the same threshold/test. Whilst she fully appreciated the worry of SCCLR about having "a trial within a trial" with the leave requirement, she considered it sensible to provide for the leave application mechanism to deal with the two matters at the early stage. One single test should be applied for the two matters and the test should not be too difficult.</p>	

Time marker	Speaker	Subject(s)	Action required
010000 - 010144	Chairman Administration	<p>The Administration advised that if the leave requirement was imposed, it would propose amendments to proposed section 168BG to make it clear that the court could make an order as to the costs of a statutory derivation action <b>upon</b> (instead of <u>after</u>) granting the leave to commence the action.</p> <p>The Chairman suggested that the court be allowed to order indemnification of costs in stages. For example, at the time of granting leave, the court might order indemnification of the costs up to the discovery of documents.</p>	
010145 - 010232	Chairman Mr Albert HO Administration	<p>Mr Albert HO enquired about the past situation (e.g. the number of cases etc.) of litigation in Hong Kong involving derivative actions taken by a member or members of a company.</p> <p>The Bills Committee noted that the Law Society of Hong Kong had no comment on the proposed statutory derivative action.</p>	Administration to take follow-up action set out in paragraph 3(b) of the minutes
010233 - 010319	Chairman Administration Ms Miriam LAU	<p>The Administration informed members that SCCLR had discussed the issue of "leave requirement" at a special meeting held on 8 March 2004. SCCLR maintained that statutory derivative actions should be allowed to be brought without leave of the court, but if the Bills Committee decided that the leave requirement should be imposed, the striking out provisions should be deleted correspondingly. The threshold for granting leave should be low and that the leave application procedures should be kept to the minimum and as simple as possible.</p>	

Time marker	Speaker	Subject(s)	Action required
010320 - 010807	Chairman Ms Emily LAU Administration Mr Albert HO	<p>The Administration advised that the proposed statutory derivative action would have a wider application than the common law derivative action. As regards the threshold for granting leave, the Administration held an open attitude and considered that the proposed threshold conditions in paragraph 5 of the paper were reasonable.</p> <p>The Chairman pointed out that to make the procedure for the leave application simple, a document-based procedure as the procedure for an application for judicial review could be considered.</p>	
010808 - 011010	Chairman Ms Emily LAU Administration Ms Miriam LAU Mr Albert HO	<p>Taking note of the views of SCCLR members, Ms Emily LAU stated her support for SCCLR's recommendation of not imposing the leave requirement.</p> <p>Ms Miriam LAU maintained that the company concerned should not bear the onus to strike out proceedings of statutory derivative action, and hence she preferred adding the leave requirement for bringing a statutory derivative action.</p>	
011011 - 011123	Chairman Mr Albert HO	Leave requirement for intervening in a statutory derivative action under <b>proposed section 168BB(1)(b)</b>	
011124 - 011154	Chairman Mr Albert HO	Mr Albert HO said that he needed more time to consider whether bringing a statutory derivative action should be subject to the leave requirement. He would let the Bills Committee know his view by the next meeting.	

Time marker	Speaker	Subject(s)	Action required
011155 - 011159	Chairman Administration	The Administration would work out the Committee Stage amendments later when the Bills Committee or individual members of the Bills Committee had a confirmed view on whether the leave requirement should be included.	
011200 - 011512	Chairman Mr Albert HO	Mr Albert HO supported the Chairman's suggestion that a document-based procedure might be adopted for the leave application procedure for bringing a statutory derivative action.	
011513 - 011953	Chairman ALA7 Ms Emily LAU Administration	<p>ALA7 pointed out under <b>proposed section 168BD</b>, only the parties to the derivative action proceedings could apply for a court order to strike out the proceedings. Persons such as the creditors of the company were not entitled to apply for an order to strike out the proceedings even when all the directors and officers of the company had absconded and become untracable.</p> <p>The Administration confirmed that in Australia and Singapore, where statutory derivative action was provided, the bringing of a statutory derivative action was subject to the leave requirement.</p> <p>The Administration also pointed out that under the existing common law derivative action, there were disincentives to discourage minority shareholders from bringing derivative actions. These disincentives included the high costs involved, the possibility that full recovery of loss could not be obtained and that the recovery would be made available to the company rather than to the shareholder bringing the derivative action.</p>	

Time marker	Speaker	Subject(s)	Action required
011954 - 012059	Chairman Mr Albert HO Ms Emily LAU	Ms Emily LAU suggested and the Bills Committee agreed that those members who were absent from this meeting should be consulted on the leave requirement proposal. The Bills Committee would revisit this issue at the next meeting.	
012100 - 014019	Chairman Administration ALA7 Ms Miriam LAU Ms Emily LAU Mr Albert HO Dr Eric LI	<p>Briefing by the Administration on the rebuttable presumption as one of the safeguards in the statutory derivative action and the relevant provisions in the Australian Corporations Act 2001 <i>[CB(1)1251/03-04(01)]</i></p> <p>The Administration advised that the proposed rebuttable presumption would apply to leave applications for bringing a statutory derivative action as well as leave applications for intervening in proceedings to which the specified corporation was a party.</p> <p>Mr Albert HO said that the conditions under the rebuttable presumption were basic factors that the court would take into account in deciding whether leave should be granted for commencing a derivative action. He considered that there should be no need to stipulate the rebuttable presumption in the law.</p> <p>ALA7 pointed out that the purpose of the rebuttable presumption adopted in the Australian Corporations Act 2001 was to simplify the proceedings by allowing the court to presume that a derivative claim was not in the best interests of the company when the conditions as stipulated in section 237(3) of the Act were established.</p>	

Time marker	Speaker	Subject(s)	Action required
012100 - 014019 (Cont'd)		The Chairman said that it was unclear as to who was responsible for establishing the conditions to satisfy the rebuttable presumption. She also queried that the condition " <i>all of the directors...acted in good faith for a proper purpose</i> " under the rebuttable presumption was neither easy to establish nor easy to rebut as the meaning of the condition was not precise. Adding the rebuttable presumption might complicate the leave application proceedings.	
014020 - 014338	Chairman Dr Eric LI	Dr Eric LI considered that the bringing of a statutory derivative action should be subject to the leave requirement.	
014339 - 015839	Chairman Ms Miriam LAU Mr Albert HO ALA7 Dr Eric LI	Ms Miriam LAU considered that as the rebuttable presumption was intended to protect lawful and reasonable commercial transactions of a company from being challenged through derivative actions, the rebuttable presumption should be included unless the effect of its inclusion would defeat the said intended purpose.  ALA7 pointed out that the proposed rebuttable presumption was intended to help the court to leave arguments on matters which were essentially matters relating to the operations and management of the company to be decided by the non-involved directors.	Administration to take follow-up action set out in paragraph 3(c) of the minutes

<b>Time marker</b>	<b>Speaker</b>	<b>Subject(s)</b>	<b>Action required</b>
014339 - 015839 ( <i>Cont'd</i> )		The Chairman concluded that the Bills Committee supported the proposed safeguards under paragraphs 5(a) and 5(b) of the Administration's paper [CB(1)1251/03-04(01)] but had reservation about the proposed rebuttable presumption under paragraph 5(c).	

Council Business Division 1  
Legislative Council Secretariat  
24 March 2004