

**立法會**  
***Legislative Council***

LC Paper No. CB(1)1441/03-04  
(These minutes have been seen  
by the Administration)

Ref: CB1/BC/18/02

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

**Minutes of the eighteenth meeting  
held on Friday, 19 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  
Hon CHAN Kam-lam, JP  
Hon SIN Chung-kai  
Hon Henry WU King-cheong, BBS, JP

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

**Members absent** : Dr Hon Eric LI Ka-cheung, GBS, JP  
Hon Mrs Sophie LEUNG LAU Yau-fun, SBS, JP  
Dr Hon Philip WONG Yu-hong, GBS  
Hon Emily LAU Wai-hing, 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 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)1318/03-04 (01) - List of issues requiring follow-up actions by the Administration on Schedule 4 of the Bill (Position as at 18 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

LC Paper No. CB(1)1318/03-04 (02) - Administration's response to written submission dated 9 March 2004 from Mr Winston POON, SC, Mr Godfrey LAM, Barrister, Ms Linda CHAN, Barrister

LC Paper No. CB(1)1239/03-04 (01) - Submission dated 5 March 2004 from Hong Kong Institute of Directors

LC Paper No. CB(1)1318/03-04 (03) - Administration's response to written submission from Hong Kong Institute of Directors

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

2. The Bills Committee noted that a letter dated 17 March 2004 from Assistant Legal Adviser 7 to the Administration on the draft Committee Stage amendments to provisions on "Inspection of records" and "Unfair prejudice remedies" was tabled at the meeting.

*(Post-meeting note: The paper was circulated to members vide LC Paper No. CB(1)1339/3-04 on 22 March 2004.)*

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

Order for inspection

- (a) To revise the drafting of **proposed section 152FC(1)** as the term "any other applicants" in this section is not consistent with the term "any one or more of such members applying as applicant" in **proposed section 152FA(1)(a)**.
- (b) To add a provision under **proposed section 152FB** to make it clear that the court may make an order regarding the disclosure of information or documents obtained as a result of the inspection.
- (c) To check whether there are provisions in the Securities and Futures Ordinance (Cap. 571) (SFO) governing the disclosure of information relating to the affairs of the clients of "intermediaries" ("intermediaries" as defined in SFO), and in the light of any such provisions, to consider the propriety of providing saving for the intermediaries apart from solicitors and bankers, or confining the saving provision for solicitors only.

### Unfair prejudice remedies

- (d) To add a doubt-avoidance provision to make it clear that the proposed provisions would not have the effect of entitling any member to recover loss by way of damages which should properly belong to the company under common law.

## **II Any other business**

### Timetable for scrutiny of the Bill

4. The Administration suggested that after the scrutiny of Schedule 4 of the Bill, the Bills Committee proceed to discuss Schedule 3 of the Bill relating to overseas companies. The proposed arrangement was to allow time for the interested parties which had commented on Schedule 2 of the Bill relating to group accounts to provide further information. The Bills Committee agreed to the proposed arrangement.

### Date of next meeting

5. Members noted that the next meeting would be held on Thursday, 25 March 2004 at 10:45 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.

6. There being no other business, the meeting ended at 10:35 am.

7. The index of proceedings of the meeting is at **Appendix**.

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

**18th meeting on Friday, 19 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 - 000024	Chairman	Welcoming and introductory remarks	
000025 - 000144	Chairman Mr Albert HO Mr SIN Chung-kai	<p>The Bills Committee continued the deliberation on whether leave of the court should be required for bringing a statutory derivative action.</p> <p>Mr Albert HO agreed that leave of the court should be obtained for bringing a statutory derivative action, but the threshold for granting leave should be low.</p>	
000145 - 000604	Chairman Mr Albert HO Administration	<p>The Chairman considered the proposed safeguards in the statutory derivative action under paragraphs 5(a) and 5(b) of the Administration's paper <i>[CB(1)1251/03-04(01)]</i> acceptable. She however considered that adding the rebuttable presumption as proposed in paragraph 5(c) of the <i>CB(1)1251/03-04(01)</i> might complicate the leave application proceedings. The leave application procedures should be as simple as possible.</p>	

<b>Time marker</b>	<b>Speaker</b>	<b>Subject(s)</b>	<b>Action required</b>
000605 - 000920	Chairman Mr Albert HO ALA7 Administration	<p>The Bills Committee noted that the degree of proof required by the court for establishing that "there is a serious question to be tried" was generally lower than that for establishing a prima facie case.</p> <p>The Chairman considered that to obviate the pressure of litigation costs on the member bringing a derivative action, it would be desirable for the court to give directions on costs during the leave application proceedings.</p>	
000921 - 001255	Chairman Administration Mr Albert HO	<p>The Administration advised members that the Standing Committee on Company Law Reform (SCCLR) had formally informed the Administration of its views on the proposed leave requirement for bringing a statutory derivative action. In gist, SCCLR reiterated that there should be no "trial within a trial" for the purpose of determining the standing of an applicant to commence a statutory derivative action. If the Bills Committee decided that the leave requirement should be imposed, the striking-out provisions should be deleted correspondingly and the threshold for granting leave should be low. SCCLR also suggested that the leave application proceedings should be conducted ex parte and should be document-based.</p>	

Time marker	Speaker	Subject(s)	Action required
000921 - 001255 (Cont'd)		<p>The Administration expressed reservation about SCCLR's suggestion that the leave application proceedings should be conducted ex parte, as upon the granting of leave, the company concerned might make application to set aside the leave granted and this would complicate the leave application proceedings.</p> <p>Furthermore, it would not be possible for the court to decide whether the member should be indemnified the costs in the leave application proceedings if the proceedings were conducted ex parte.</p> <p>The Chairman and Mr Albert HO shared the Administration's views. Mr Albert HO commented that in the absence of the striking-out mechanism, conducting the leave application proceedings ex parte was unfair to the company concerned.</p>	
001256 - 001329	Chairman Administration	<p>The Chairman concluded that the Bills Committee agreed to impose leave requirement for bringing statutory derivative action and supported the proposed safeguards under paragraphs 5(a) and 5(b) of the CB(1)1251/03-04(01).</p> <p>Furthermore, the court should be empowered, at the time of granting leave, to order the indemnification of the costs of the leave application and the costs of the subsequent derivative action (up to a certain stage of the action as considered appropriate by the court) in favour of the member bringing the statutory derivative action.</p>	Administration to provide draft Committee Stage amendments (CSAs) on the proposed leave requirement for statutory derivative action

Time marker	Speaker	Subject(s)	Action required
001330 - 001634	Chairman Administration	The Bills Committee agreed to the Administration's proposal to proceed to scrutinize Schedule 3 of the Bill after the scrutiny of Schedule 4.	
001635 - 001903	Chairman Ms Miriam LAU	Leave requirement for statutory derivative action and SCCLR's suggestions	
001904 - 002044	Chairman ALA7 Mr Albert HO Administration	The Administration would make it clear in the proposed CSAs that the court might, upon the granting of leave to commence a statutory derivative action, make any orders as to the costs of an application for leave to commence a statutory derivative action as well as the costs of the statutory derivative action.	
002045 - 003539	Chairman Administration ALA7 Ms Miriam LAU Mr Albert HO Mr Henry WU	<p>Briefing by the Administration on the outcome of its follow-up actions arising from the discussion at the meetings on 20 February 2004 [CB(1)1251/03-04 (01)]</p> <p>As regards the scope of statutory derivative action, ALA7 drew members' attention to the written submissions from Mr Winston POON et al. and SCCLR's recommendations to codify the derivative action under common law, the scope of which was limited to the established exceptions to the Foss v. Harbottle rule. She pointed out that according to the Administration's current proposal, the scope of statutory derivative action would be wider than the common law derivative action.</p>	



Time marker	Speaker	Subject(s)	Action required
002045 - 003539 (Cont'd)		<p>The Administration confirmed that according to the minutes of meetings of the SCCLR, SCCLR had not specifically discussed whether there was a need to confine the scope of the statutory derivative action to the established exceptions to the Foss v. Harbottle rule or that the sole purpose of the statutory derivative action should be to codify the common law derivative action. The purpose of the proposed statutory action was to address the practical difficulties for minority shareholders to take derivative action under common law, and the court would consider, among other things, whether the action was brought in good faith and was in the best interest of the company concerned. The scope of the proposed statutory derivative action might be wider than common law derivative action as set out in paragraph 4 of the <i>CB(1)1251/03-04(01)</i>.</p> <p>The Administration also pointed out that express provisions to limit the scope of proceedings were not found in the statutory derivative action in other jurisdictions, nor was such limitation found in the common law derivative action.</p> <p>Ms Miriam LAU said that she needed more time to consider whether the proposed statutory derivative action allowing a wider scope of actions than the common law derivative action was acceptable.</p>	

Time marker	Speaker	Subject(s)	Action required
002045 - 003539 (Cont'd)		Considering that leave requirement would be imposed for bringing a statutory derivative action, the Chairman and Mr Albert HO supported the proposal under paragraph 6 of CB(1)1251/03-04(01).	
003540 - 003606	Chairman Administration	The Administration was still awaiting the response from its counterpart in Australia on how the procedural issues relating to discovery of documents and award of costs were dealt with under their statutory derivative action proceedings.	Administration to revert to the Bills Committee on this matter once the information was available
003607 - 003634	Chairman Administration	Timing for determination of the costs of statutory derivative action. ( <i>paragraph 8 of the CB(1)1251/03-04(01)</i> )	Administration to provide draft CSAs to make it clear that the court could make any orders as to the costs of a statutory derivative action upon granting leave to commence the action.
003635 - 003715	Chairman Administration	Multiple interventions in the same statutory derivative action. ( <i>paragraph 9 of the CB(1)1251/03-04(01)</i> )	
003716 - 003741	Chairman Administration ALA7	Disclosure of information ( <i>paragraph 10 of the CB(1)1251/03-04(01)</i> )	Administration to move CSAs to delete ", or any investigation carried out in Hong Kong in accordance with law" in <b>proposed section 152FC(1)(a)</b>

Time marker	Speaker	Subject(s)	Action required
003742 - 003751	Chairman Administration ALA7	Briefing by the Administration on the outcome of its follow-up actions arising from the discussion at the meetings on 26 February 2004 [CB(1)1251/03-04 (01)]	
003752 - 003853	Chairman Administration	Scope of <b>proposed section 168A(2A) to (2C)</b> The Administration agreed to add a new provision to make it clear that <b>proposed section 168A(2A) and (2C)</b> would not have the effect of entitling any member to recover loss by way of damages which should properly belong to the company under common law. The Administration was consulting Mr Winston POON and Mr Godfrey LAM on the drafting of the new provision.	Administration to provide draft CSAs on add the doubt-avoidance provision
003854 - 004016	Chairman Administration	Deletion of the phrase "whether or not with a view to bringing to an end the matters complained of" ( <i>paragraph 12 of the CB(1)1251/03-04(01)</i> )	Administration to move CSAs to delete the phrase in <b>proposed sections 168A(2A) and 168A(2C)</b>
004017 - 004409	Chairman Administration	The Administration said that its counterpart in New Zealand had not provided any specific information about court cases relating to application for unfair prejudice remedy by a former shareholder under the New Zealand Companies Act 1993.	

Time marker	Speaker	Subject(s)	Action required
004410 - 004431	Chairman Administration	<p>The Administration said that its counterpart in New Zealand had advised that there was no statutory limitation period for action to seek unfair prejudice remedy by a former shareholder under the New Zealand Companies Act 1993.</p> <p>The Administration was awaiting response from its counterpart in Australia as to whether there was any statutory limitation period for action to seek unfair prejudice remedy.</p> <p>[Post-meeting note: The Administration's counterpart in Australia advised that there was no statutory limitation period for action to seek unfair prejudice remedy by a former shareholder under the Australian Corporations Act 2001.]</p>	
004432 - 004452	Chairman Administration	<p>The Bills Committee would discuss the Administration's response to the follow-up actions arising from the discussion at the meetings on 28 February 2004 relating to order for inspection together with related CSAs [CB(1)1251/03-04 (01) &amp; CB(1)1331/03-04(01)]</p>	
004453 -004617	Chairman Administration ALA7	<p>Briefing by the Administration on the outcome of its follow-up actions arising from the discussion at the meetings on 28 February 2004 relating to injunctions [CB(1)1251/03-04 (01)]</p> <p>The Bills Committee noted that the scope of injunctions in <b>proposed section 350B</b> and that in the Australian Corporations Act 2001 was wider than that in the Singapore Companies Act.</p>	

Time marker	Speaker	Subject(s)	Action required
004618 - 004954	Chairman Administration Clerk ALA7	Revised draft CSAs relating to order for inspection provided by the Administration on 18 March 2004 [CB(1)1331/03-04(01)]	
004955 - 010447	Chairman Administration ALA7	Briefing by the Administration on revised draft CSAs to section 3 of Schedule 4 of the Bill - <i>Sections added</i> [CB(1)1331/03-04(01)]  <b><u>Proposed section 152FA</u></b> In response to ALA7, the Administration confirmed that the policy intent of <b>proposed section 152FA(1)</b> was for the court to make an order authorizing some or all the members applying as applicant in a joint application or a person other than the applicant to inspect records of the specified corporation concerned.  Inconsistency in the drafting of <b>proposed sections 152FA(1) and 152FA(3)</b>	Administration to take follow up action set out in paragraph 3(a) of the minutes
010448 - 011611	Chairman Administration Mr Albert HO Mr Henry WU	<b><u>Proposed section 152FB</u></b> The Administration advised that the court would base on the merits of each application and make order specifying the level of expenses incurred, including charges for making copies of records, by the company in the inspection.	

Time marker	Speaker	Subject(s)	Action required
011612 - 013359	Chairman Administration ALA7 Mr Albert HO	<b><u>Proposed section 152FC</u></b> As regards disclosure of information under <b>proposed section 152FC(1)(b)</b> , the Bills Committee considered that it was not clearly set out in the current drafting that the court might make an ancillary order under <b>proposed section 152FB</b> authorizing the disclosure of information obtained as a result of the inspection authorized under <b>section 152FA</b> .	Administration to take follow up action set out in paragraph 3(b) of the minutes
013400 - 014150	Chairman Administration Mr Henry WU Mr Albert HO	<b><u>Proposed section 152FD</u></b> In response to the Chairman's concern that the scope of the phrase "relate to the affairs of its customers" might be too wide, the Administration advised that the drafting of <b>proposed section 152FD(2)</b> mirrored that of section 152F(2).  Mr Henry WU was concerned that if saving was provided for bankers, equal treatment should be given to securities dealing companies.  Mr Albert HO pointed out that if saving was provided for bankers, it would be difficult to argue against providing saving for other industries/trades which were also subject to a comprehensive regulatory regime. He considered that saving should be provided for solicitors only as originally proposed by the Administration.  The Chairman suggested revisiting this issue at the next meeting.	Administration to take follow up action set out in paragraph 3(c) of the minutes
014151 - 014209	Chairman Administration ALA7	<b>Proposed section 152FE</b>	

Time marker	Speaker	Subject(s)	Action required
014210 - 014309	Chairman Administration	Briefing by the Administration on revised draft CSAs to section 7 of Schedule 4 of the Bill - <i>Punishment of offences under this Ordinance</i> [CB(1)1331/03-04(01)]	
014310 - 014909	Chairman ALA7 Administration	Briefing by the Administration on its response to written submission from the Hong Kong Institute of Directors [CB(1)1239/03-04(01) & CB(1)1251/03-04(02)]	
014910 - 015653	Chairman Administration	Briefing by the Administration on draft CSAs to section 4 of Schedule 4 of the Bill - <i>Alternative remedy to winding up in cases of unfair prejudice</i> [CB(1)1251/03-04(02)]  In response to Mr Albert HO's enquiry, the Administration advised that all proceedings under <b>new section 168A(2)</b> should be made by petition instead of other forms such as originating summon.	
015654 - 020204	Chairman Administration ALA7	As regards <b>proposed section 168A(2C)</b> , the Administration confirmed that the court might only make order of payment such as damages to past members.	Administration to move CSAs to replace "this section" by "subsection (2C)" in <b>proposed section 168A(2B)</b>
020205 - 020257	Chairman Administration	In response to the Chairman's enquiry about the use of the phrase "may make an application to the court by petition" in <b>proposed section 168A(2B)</b> , the Administration advised that the drafting mirrored that of existing section 168A(1).	
020258 - 020304	Chairman Administration	Doubt-avoidance provision to prevent entitling any member to recover loss by way of damages which should properly belong to the company under common law.	Administration to take follow up action set out in paragraph 3(d) of the minutes

<b>Time marker</b>	<b>Speaker</b>	<b>Subject(s)</b>	<b>Action required</b>
020305 - 020331	Chairman Administration	Proposed amendments to delete <b>proposed section 168A(5C)</b> .	
020332 - 020359	Chairman	The Administration to provide Chinese version of draft CSAs to <b>proposed section 168A</b> for discussion at the next meeting.	
020400 - 020410	Chairman	Date of next meeting	

Council Business Division 1  
Legislative Council Secretariat  
2 April 2004