

立法會
Legislative Council

LC Paper No. CB(1)1489/03-04
(These minutes have been seen
by the Administration)

Ref: CB1/BC/18/02

Bills Committee on Companies (Amendment) Bill 2003

**Minutes of the nineteenth meeting
held on Thursday, 25 March 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
Hon SIN Chung-kai
Hon Emily LAU Wai-hing, JP
Hon Henry WU King-cheong, BBS, JP
- Non-Bills Committee Member
Hon Miriam LAU Kin-ye, JP
- Members absent** : Dr Hon Eric LI Ka-cheung, GBS, JP
Hon CHAN Kam-lam, JP
Hon Mrs Sophie LEUNG LAU Yau-fun, SBS, JP
Dr Hon Philip WONG Yu-hong, GBS
- 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)1368/03-04 - Minutes of meeting on 11 March
2004

The minutes of the meeting held on 11 March 2004 were confirmed.

II Meeting with the Administration

LC Paper No. CB(1)1369/03-04 (01) - Administration's paper on follow-up
actions arising from the discussion at
the meetings on 20 and 28 February
2004 and 11 March 2004

- LC Paper No. CB(1)1369/03-04 (02) - Draft Committee Stage amendments (CSAs) on "statutory derivative actions" (**sections 168BA to 168BI**) provided by the Administration on 24 March 2004
- LC Paper No. CB(1)1369/03-04 (03) - Revised draft CSAs on "order for inspection" (**sections 152FA to 152FE**) and "unfair prejudice remedy" (**section 168A**) provided by the Administration on 24 March 2004
- LC Paper No. CB(1)1369/03-04 (04) - List of issues requiring follow-up actions by the Administration on Schedule 4 of the Bill (Position as at 24 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
- 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)1251/03-04 (05) - Letter dated 27 February 2004 from ALA7 to the Administration on the draft CSAs to proposed sections 152FA to 152FD
- LC Paper No. CB(1)1339/03-04 (01) - Letter dated 17 March 2004 from ALA7 to the Administration on the draft Committee Stage amendments to provisions on "Inspection of records" and "Unfair prejudice remedies"
- LC Paper No. CB(3)733/02-03 - Bill gazetted on 13 June 2003
- LC Paper No. CB(1)2228/02-03 (06) - Marked-up copy of Schedule 4
- LC Paper No. CB(1)798/03-04 (07) - Administration's paper on international comparisons of shareholders' remedies
- LC Paper No. CB(1)2282/02-03 - Corporate Governance Review by the Standing Committee on Company Law Reform - A Consultation Paper on proposals made in Phase I of the Review (July 2001)
- 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)1108/03-04 (01) - Administration's paper on follow-up actions arising from the discussion at the meeting on 12 February 2004 on Schedule 4
- 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)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

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

3. The Bills Committee noted that a letter dated 24 March 2004 from Assistant Legal Adviser 7 (ALA7) to the Administration providing comments on the draft Committee Stage Amendments (CSAs) set out in LC Paper Nos. CB(1)1369/03-04 (02) and (03) was tabled at the meeting.

(Post-meeting note: The letter was circulated to members vide LC Paper No. CB(1)1392/3-04 on 25 March 2004.)

4. The Bills Committee considered that as substantial changes had been made to the proposed provisions on statutory derivative action in the blue Bill, in particular the addition of the leave requirement, and concerns had been raised over some procedural issues of the proposed arrangement, further consultation with the Standing Committee on Company Law Reform (SCCLR) and other relevant parties was required. The Bills Committee requested and the Administration agreed to undertake the consultation. The consultation should be undertaken as soon as possible and the Bills Committee would be prepared to resume the discussion on statutory derivative action when the consultation outcome was available. The Administration confirmed that they would proceed with the consultation and the target was still to enact this part of the Bill, which was an important proposal to enhance the rights of minority shareholders, within the current legislative session. The Bills Committee also agreed that a clean version of the proposed Part IVAA incorporating all the draft CSAs proposed so far should be provided to the consultees. The Administration should draw the consultees' attention to the following points -

- (a) the proposal to add the leave requirement for bringing a statutory derivative action;
- (b) the proposal to retain the right to bring derivative action under common law after the statutory derivative action was brought in place and the fact that this might be a novel arrangement amongst common law jurisdictions; and
- (c) the procedural issues including the description of parties for the statutory derivative action proceedings, and the discovery of documents from the company concerned.

5. The Bills Committee considered that it might also be appropriate to consult the Judiciary, as the Judiciary would probably need to draw up specific procedures to effect the proposed statutory derivative action whilst certain pertinent issues, including the co-existence of statutory and common law rights to bring derivative actions and the description of parties to the proceedings, might give rise to procedural problems. Mr Albert HO however raised concern on whether the consultation with Judiciary would set a precedent. The Chairman instructed the Clerk and ALA7 to check whether there were relevant past cases for reference.

III Any other business

Date of next meeting

6. Members noted that the next meeting would be held on Thursday, 8 April 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.

7. There being no other business, the meeting ended at 12:55 pm.

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

Council Business Division 1
Legislative Council Secretariat
13 April 2004

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

**19th meeting on Thursday, 25 March 2004, at 10:45 am
in Conference Room B of the Legislative Council Building**

Time marker	Speaker	Subject(s)	Action required
000000 - 000139	Chairman	Confirmation of minutes of meeting on 11 March 2004	
000140 - 000524	Chairman Administration	<p>Briefing by the Administration on the outcome of its follow-up actions arising from the discussion at the meeting on 20 February 2004 on procedural issues relating to statutory derivative action <i>[CB(1)1369/03-04(01)]</i></p> <p>The Administration highlighted that there were a number of channels for facilitating discovery including Rules of High Court, proposed sections 168BF and 152FA. Lastly, the Rules Committee of the High Court might make rules of court under proposed section 168BI in order to give effect to the proposed provisions on statutory derivative action. <i>[CB(1)1318/03-04(02)]</i></p>	

Time marker	Speaker	Subject(s)	Action required
000140 - 000524 (Cont'd)		Regarding discovery under proposed section 152FA , the Administration drew the Bills Committee's attention that under the Australian Corporations Act 2001, a person who was granted, or applied for, or was eligible to apply for leave to bring or intervene in proceedings in the company's name might apply for a court order for inspection of the company's books. Such a link between the remedies of inspection of records and statutory derivative action was however not present between proposed section 152FA (as amended by the proposed CSAs) and proposed section 168BB , i.e. a member who was granted leave to bring a derivative action or intervene in proceedings in the name of a company was not eligible, by virtue of the court's permission to commence/intervene in proceedings in the name of the company, to apply to the court under proposed section 152FA to inspect records of the company if the member failed to pass any of the threshold conditions under the current proposed section 152FA(2) .	
000525 - 001459	Chairman ALA7 Administration Mr Albert HO	Taking note of the information in the Administration's paper [CB(1)1369/03-04(01)], members found that the exact method or procedures for discovery of documents from the company concerned in a derivative action in Australia was not precisely clear. It appeared that there was no special set of rules in Australia to specifically deal with discovery in a statutory derivative action, but the court having wide powers to make orders and directions would tailor an order for discovery as it thinks fit.	

Time marker	Speaker	Subject(s)	Action required
000525 - 001459 (Cont'd)		The Administration pointed out given the court's power to make an order directing the company to do any act including discovery under proposed section 168BF(1)(c) , and the express provision under proposed section 168BI for the Rules Committee to make rules of court to effect the provisions on statutory derivative action, there should not be problems with regard to discovery of documents. The Administration was however prepared to consider, subject to the Bills Committee's views, amending proposed section 152FA to also entitle a member who had obtained leave to bring/intervene in proceedings in the name of the company concerned to apply for a court order for inspection of the company's records.	
001500 - 001934	Chairman Administration Mr Albert HO	The Chairman pointed out that procedural problems might arise when a member brought a derivative action through the common law mechanism and the statutory mechanism at the same time, as so doing should be allowed under proposed section 168BB(4) .	
001935 - 002048	Chairman ALA7	ALA7 pointed out that section 236 of the Australian Corporation Act 2001 provided that "The right of a person at general law to bring, or intervene in, proceedings on behalf of a company is abolished".	

Time marker	Speaker	Subject(s)	Action required
002049 - 002201	Chairman Administration	<p>The Administration advised that it was considered desirable to make it explicit that the provisions for statutory derivative action should not affect any common law right of a member of a company to bring a derivative action. The arrangement was proposed in response to the concern raised by Mr Winston POON, SC that in Hong Kong, there were a large number of companies incorporated outside Hong Kong, and the right of a shareholder of these companies to bring a derivative action would be governed by the law of the place of incorporation. To abolish the common law right in respect of non-Hong Kong companies might deprive shareholders of these companies of rights otherwise available to them.</p>	
002202 - 002959	Chairman Ms Emily LAU Administration	<p>In response to Ms Emily LAU's enquiry, the Administration advised that many issues only came up at the stage of drafting the provisions and in the course of the Bills Committee's deliberation, such as the scope of statutory derivative action and the need or otherwise to codify the exceptions to the rule in <i>Foss v. Harbottle</i>. SCCLR agreed that the common law derivative action should be retained, though it did not specifically look into the issue of whether the derivative action should be brought in respect of a particular subject matter at the same time when statutory derivative action was brought in respect of the same matter.</p>	

Time marker	Speaker	Subject(s)	Action required
002202 - 002959 (Cont'd)		<p>Ms Emily LAU said that she did not support the imposition of the leave requirement for bringing a statutory derivative action, as this was against the recommendation of SCCLR of the need to avoid "having a trial within a trial" and would probably place additional obstacles before minority shareholders for bringing derivation actions.</p> <p>Ms Emily LAU expressed grave concern that some important issues such as the leave requirement arising in the course of the Bills Committee's deliberation had not been examined by SCCLR nor had undergone proper consultation.</p>	
003000 - 004019	<p>Chairman Mr Albert HO Administration ALA7 Ms Emily LAU</p>	<p>The Administration advised that the policy intent of introducing statutory derivative action was to provide an alternative to common law derivative action, and it was not intended that both means of actions would be brought at the same time. However, the Administration needed to seek further legal advice on this arrangement.</p> <p>The Chairman advised that proposed section 168BB(4) might need to be revised to reflect the policy intent.</p> <p>ALA7 pointed out that according to the information provided by the Administration so far, there was no jurisdiction under which a member was allowed to bring derivative action under both common law and statutory provisions.</p> <p>Taking note of ALA7's advice, Ms Emily LAU expressed reservation about the propriety of adopting the proposed arrangement, which might be novel.</p>	<p>Administration to incorporate amendment to proposed section 168BB(4), if needed, into the clean version of proposed Part IVAA to be sent to consultees</p>

Time marker	Speaker	Subject(s)	Action required
003000 - 004019 (Cont'd)		Mr Albert HO said that he had no strong view as to whether common law derivative action should be retained upon operation of the statutory derivative action provisions, so long as the concern of Mr Winston POON that the right of shareholders of non-Hong Kong companies to bring derivative action would be safeguarded.	
004020 - 010120	Chairman Administration Mr Albert HO Ms Emily LAU	<p>Members considered it not appropriate for the Bills Committee to propose abolishing the common law derivative action after statutory derivative action was brought in place.</p> <p>The Bills Committee requested and the Administration agreed to conduct a fresh round of consultation on proposed Part IVAA.</p> <p>The Chairman and Ms Emily LAU considered that the Judiciary should also be consulted as the court might need to make specific rules and draw up court procedures to effect the statutory derivative action.</p> <p>Mr Albert HO expressed concern on whether such consultation followed protocol and would cause additional workload on the Judiciary. If there were no precedent case of similar consultation, he was inclined not to support making the consultation.</p> <p>The Administration informed members that the Judiciary had been consulted on the Bill. The Judiciary did not raise any objection to the Bill.</p>	<p>Administration to consult SCCLR and other relevant parties on the proposed statutory derivative actions</p> <p>ALA7 and the Clerk to check if there were any relevant precedent cases of consultation with the Judiciary</p>

Time marker	Speaker	Subject(s)	Action required
010121 - 010702	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 undertaking as to damages <i>[CB(1)1369/03-04(01)]</i></p> <p>The Chairman considered it necessary to make it clear in proposed section 350B(5) that the court might require an undertaking as to damages by the affected persons on such terms as the court considered appropriate when it granted an interim injunction.</p> <p>ALA7 pointed out that according to section 1324 of the Australian Corporations Act 2001 upon the application of the Australian Securities and Investors Commission (ASIC) for the grant of an injunction, the Court must not require ASIC to give an undertaking as to damages as a condition of granting an interim injunction. No such exemption was provided to the Financial Secretary in the proposed provisions on Injunctions.</p>	Administration to move CSAs to proposed section 350B(5)
010703 - 010841	Chairman Administration	<p>Briefing by the Administration on the outcome of its follow-up actions relating to the situation of derivative action cases in the United Kingdom and Hong Kong <i>[CB(1)1369/03-04(01)]</i></p>	
010842 - 011111	Chairman Administration	<p>Briefing by the Administration on the outcome of its follow-up actions relating to "best interests of the company", in particular the concern that in the absence of a rebuttable presumption along the lines in section 237(3) of the Australian Corporations Act 2001, whether there would be sufficient safeguards for lawful and reasonable commercial transactions to be excluded from the scope of statutory derivative action. <i>[CB(1)1369/03-04(01)]</i></p>	

Time marker	Speaker	Subject(s)	Action required
011112 - 011244	Chairman ALA7 Ms Emily LAU	Draft CSAs relating to derivative action (section 5 of Schedule 4 of the Bill) [<i>CB(1)1369/03-04(02)</i>]	
011245 - 011249	Chairman Administration	Proposed section 168BA - Definition	
011250 - 012749	Chairman Administration ALA7 Ms Emily LAU Mr Albert HO	<p>Proposed section 168BB - Members may bring or intervene in proceedings The Administration advised that proposed sections 168BB(3)(c) and 168BB(3)(d) were mirrored from relevant provisions in Australia, including the term "take responsibility" in proposed section 168BB(3)(d).</p> <p>The Chairman considered that the drafting might not clearly reflect the intended interpretation of the Administration.</p> <p>The Bills Committee was concerned that the threshold in proposed section 168BB(3)(d) might be too high and/or very difficult to prove, and might result in unnecessary complications of the leave application proceedings. The Bills Committee requested the Administration to include the threshold in its consultation.</p> <p>The Administration considered that the proposed thresholds were still lower than the exceptions to the Foss v. Harbottle Rule.</p>	The Administration to include the concern over the threshold under proposed section 168BB(3)(d) in its consultation.
012750 - 012836	Chairman Administration ALA7	Proposed section 168BC - Service of written notice	
012837 - 012852	Chairman Administration	Proposed section 168BD - Court's power to strike out proceedings brought by members	
012853 - 013040	Chairman Administration ALA7	<p>Proposed section 168BE - Effect of approval or ratification The Administration advised that proposed section 168BE was mirrored from relevant provisions in Australia, except subsections (2)(a) and (2)(c) which were based on the recommendations of SCCLR.</p>	

Time marker	Speaker	Subject(s)	Action required
013041 - 013235	Chairman Administration ALA7	<u>Proposed section 168BF - General powers of court</u>	Administration to move CSA to add "or application" after "proceedings" in proposed section 168BF(3)(a)(ii)
013236 - 014343	Chairman Administration ALA7 Mr Albert HO	<p><u>Proposed section 168BG - Power of the court to make orders as to costs</u></p> <p>The Administration advised that the term "indemnification of costs" was mirrored from relevant provisions in Australia. This term was seldom used in the laws of Hong Kong.</p> <p>The Chairman noted that the thresholds in proposed section 168BG(3) were different from those for application of leave for bringing statutory derivative action. The Administration confirmed its policy intent to empower the court to make an order as to costs in favour of a member who was acting in good faith and had reasonable grounds for making the application, even in the case that the member failed to pass the threshold to obtain leave to commence a derivative action.</p>	<p>Administration to move CSA to add "or application" after "proceedings" in proposed section 168BG(1)(b)</p> <p>Administration to consider replacing the term "indemnification of costs" by another term commonly used in Hong Kong</p>
014344 - 014359	Chairman Administration	<p><u>Proposed section 168BH - Discontinuance or settlement</u></p> <p><u>Proposed section 168BI - Rules of court</u></p>	
014400 - 015210	Chairman Administration Mr Albert HO Ms Emily LAU ALA7	Referring to the wordings "it is probable that the specified corporation will not itself ..." in proposed subsections (c) and (d) of section 168BB(3) , Hon Albert HO expressed concern about the difficulty to provide evidence to pass the test.	
015211 - 020634	Chairman Administration ALA7 Mr Albert HO Ms Miriam LAU	Revised draft CSAs relating to inspection order and unfair prejudice remedy [CB(1)1369/03-04(03)]	Administration to discuss with ALA7 on technical amendments relating to drafting of the Bill

Time marker	Speaker	Subject(s)	Action required
015211 - 020634 (Cont'd)		<p>As regards saving provisions for solicitors and bankers under proposed section 152FD, the Administration advised that similar to the Banking Ordinance (Cap. 155), the Securities and Futures Ordinance (Cap. 571) did not contain any provision governing the disclosure of information by intermediaries relating to the affairs of their clients.</p> <p>On the concern that for the sake of consistency, saving for bankers and solicitors along the line of section 152F of the Companies Ordinance (Cap. 32) might need to be provided in respect of a court order made under proposed section 152FA, the Administration advised that the saving under existing 152F was in relation to an order made by the Financial Secretary whilst under proposed section 152FA the order was made by the court.</p> <p>Members agreed to revisit this issue at the next meeting.</p>	
020635 - 020752	Chairman	Date of next meeting	