

立法會
Legislative Council

LC Paper No. CB(1)2372/03-04
(These minutes have been seen
by the Administration)

Ref: CB1/BC/18/02

Bills Committee on Companies (Amendment) Bill 2003

**Minutes of the twenty-seventh meeting
held on Saturday, 29 May 2004, at 9:45 am
in Conference Room B of the Legislative Council Building**

- Members present** : Hon Audrey EU Yuet-mee, SC, JP (Chairman)
Hon SIN Chung-kai
Hon Miriam LAU Kin-yeet, JP
Hon Emily LAU Wai-hing, JP
- Members absent** : Hon Albert HO Chun-yan
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
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 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 Meeting with the Administration

Papers relating to Schedule 4 of the Bill

LC Paper No. CB(1)1613/03-04 (01) - Administration's consultation paper on Statutory Derivative Action (SDA)

LC Paper No. CB(1)1867/03-04 (06) - Summary of submissions in response to Administration's Consultation Paper on SDA and the Administration's response (Position as at 20 May 2004)

LC Paper No. CB(1)1962/03-04 (01) - Submission dated 24 May 2004 from Hong Kong Bar Association

LC Paper No. CB(1)1922/03-04 (01) - The Administration's revised draft Committee Stage Amendments (CSAs) on the proposed SDA as at 19 May 2004

LC Paper No. CB(1)1964/03-04 (02) - Letter dated 25 May 2004 from Assistant Legal Adviser 7 to the Administration on revised draft CSAs

LC Paper No. CB(1)1922/03-04 (02) - Submission dated 22 May 2004 from Mr David Webb

- LC Paper No. CB(1)1962/03-04 (02) - Letter dated 21 May 2004 from the Estate Agents Authority
- LC Paper No. CB(1)1962/03-04 (03) - Letter dated 25 May 2004 from the Hong Kong Association of Banks
- LC Paper No. CB(1)1962/03-04 (04) - Submission dated 25 May 2004 from the Securities and Futures Commission
- LC Paper No. CB(1)1964/03-04 (03) - Submission dated 27 May 2004 from Mr John Brewer
- LC Paper No. CB(1)1964/03-04 (04) - Letter dated 27 May 2004 the Mandatory Provident Fund Schemes Authority
- LC Paper No. CB(1)1964/03-04 (05) - Letter dated 27 May 2004 the The DTC Association (The Hong Kong Association of Restricted Licence Banks and Deposit-taking Companies)

The Bills Committee discussed the proposed Statutory Derivative Action (SDA) under Schedule 4 of the Bill and the related Committee Stage amendments (CSAs).

2. The following papers were tabled at the meeting -

- (a) Administration's revised draft CSAs on Schedule 4 of the Bill as at 27 May 2004 (*English version*);
- (b) Administration's response to submission from the Hong Kong Bar Association on 25 May 2004 (*English version only*);
- (c) Administration's response to submission from Mr David Webb on 22 May 2004 (*English version only*);
- (d) Administration's response to Securities and Futures Commission on 25 May 2004 (*English version only*);
- (e) Administration's response to Mr John Brewer on 27 May 2004 (*English version only*);
- (f) Submission dated 27 May 2004 from Mr Winston POON, QC (*English version only*); and

- (g) Summary of submissions in response to Administration's Consultation Paper on SDA and the Administration's response (as at 20 May 2004) (*Chinese version*).

(Post-meeting note: The papers were circulated to members vide LC Paper No. CB(1)1982/03-04 on 31 May 2004.)

II Any other business

Date of next meeting

- 3. Members noted that the next meeting would be held on Thursday, 3 June 2004 at 10:45 am. The Bills Committee would firstly follow up the outstanding matters of Schedules 1 and 3 of the Bill, and then continue to discuss the proposed SDA and other outstanding matters under Schedule 4 of the Bill.
- 4. Members agreed that one additional meeting of the Bills Committee will be held on Monday, 7 June 2004, at 2:30 pm.
- 5. There being no other business, the meeting ended at 12:55 pm.
- 6. The index of proceedings of the meeting is at **Appendix**.

Council Business Division 1
Legislative Council Secretariat
12 July 2004

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

**27th meeting on Saturday, 29 May 2004, at 9:45 am
in Conference Room B of the Legislative Council Building**

Time marker	Speaker	Subject(s)	Action required
000000 - 000123	Chairman Administration	Introductory remarks The Administration suggested and the Bills Committee agreed to consider the proposed Statutory Derivative Action (SDA) first.	
000124 - 003008	Chairman Administration Ms Emily LAU Mr SIN Chung-kai	The Bills Committee went through all the submissions in response to the Administration's Consultation Paper on SDA and the Administration's response to these submissions <i>[CB(1)1867/03-04(06)]</i> The Administration said that they had just received an internal memo from the Judiciary which did not raise any problem about the procedures to effect SDA but considered it preferable to introduce express provisions to deal with the co-existence of SDA and common law derivative action (CDA). Some Judges had also given their views on the leave requirement for SDA, and the scope of proceedings. The Bills Committee noted that in response to the Office of the Privacy Commissioner for Personal Data, the Administration would move CSAs to add a new provision to enhance the protection for the personal data obtained under proposed section 168BF.	Administration to revise the draft CSAs to proposed section 168BF

Time marker	Speaker	Subject(s)	Action required
000124 - 003008 (Cont'd)		On Mr David Webb's suggestion of entitling persons who was beneficially interested in the shares ("beneficial owners") instead of only "members" to bring an action under the proposed SDA, the Administration advised that the suggestion departed from the relevant common law principle. The Administration also advised that if a person was beneficially interested in the shares and would like to bring a SDA, that person might request that the shares be transferred into his own name before any action was to be taken. Ms Miriam LAU also considered that it was not clear how far the application of SDA would be extended if "members" was to be replaced by "beneficial owners".	
003009 - 003106	Chairman Administration	Briefing by the Administration on its response to the submission from the Hong Kong Bar Association (HKBA) [CB(1)1962/03-04(01)] [CB(1)1982/03-04(02)]	
003107 - 005522	Chairman Administration Ms Emily LAU Mr SIN Chung-kai Ms Miriam LAU	<u>Scope of SDA</u> On HKBA's suggestion to clarify the limited scope of proceedings under Part IVAA in line with relevant provisions in the United Kingdom (UK), the Administration considered that there was no need to define "proceedings" but proposed to add a doubt avoidance provision (proposed section 168BAB in CB(1)1982/03-04(01)).	

Time marker	Speaker	Subject(s)	Action required
003107 - 005522 (Cont'd)		<p><u>Scope of SDA (Cont'd)</u></p> <p>The Bills Committee considered the drafting of proposed section 168BAB not satisfactory and suggested that the proposed doubt avoidance provision be incorporated into the scope of SDA under proposed section 168BAA. The Administration undertook to revise the drafting with reference to similar wordings adopted in UK (RSC O.15 r.12A).</p>	Administration to revise the draft CSAs to proposed sections 168BAA and 168BAB
005523 - 010534	Chairman Administration Ms Emily LAU	<p><u>Leave requirement</u></p> <p>HKBA considered that no leave requirement for SDA should be imposed.</p> <p>In view of the divergent views on the proposed leave requirement for SDA, the Chairman requested the Administration to give an undertaking at the resumption of the Second Reading debate to review the arrangement around 2006/07 after the operation of the SDA. The review should take into account the relevant experiences in Singapore and Australia.</p>	Administration to give undertaking at the resumption of the Second Reading debate
010535 - 010629	Chairman Administration	<u>Difficulty for shareholders under proposed section 168BB(3) to show that the wrongdoers were in control</u>	
010630 - 010707	Chairman Administration	<u>Co-existence of CDA and SDA</u>	
010708 - 010721	Chairman Administration	The Bills Committee proceeded to scrutinize the revised draft CSAs on the proposed SDA.	
010722 - 010749	Chairman Administration	<p><u>Section 168BAA - Application</u></p> <p><u>Section 168BAB - Removal of doubt</u></p>	

Time marker	Speaker	Subject(s)	Action required
010750 - 015523	Chairman Administration Ms Emily LAU	<p><u>Section 168BB - Members may bring or intervene in proceedings</u></p> <p>The Bills Committee considered that proposed sections 168BB(1) and (2) were in order.</p> <p>As regards proposed section 168BB(3), the Chairman considered that the two thresholds in subsections (a) and (b) (<i>i.e. the application was "prima facie in the interest of the specified corporation" and the applicant was acting in "good faith"</i>) might be unnecessary as the Administration had already defined the scope for SDA, and the court would exercise discretion to decide whether and how these two factors would be taken into account in a leave application. The Chairman also pointed out that the phrase in subsection (c) "<i>and the specified corporation has not itself brought the proceedings</i>" might not be required.</p> <p>Mr SIN Chung-kai supported the Chairman's suggestion.</p> <p>Ms Miriam LAU supported the thresholds set out in proposed section 168BB(3) as the scope of SDA had been limited to cases in respect of fraud, negligence etc. as specified in proposed section 168BAA.</p> <p>The Chairman pointed out that it might be difficult to determine whether there a serious question to be tried in the absence of a scope for the SDA.</p>	

Time marker	Speaker	Subject(s)	Action required
010750 - 015523 (Cont'd)		<p><u>Section 168BB - Members may bring or intervene in proceedings (Cont'd)</u></p> <p>Ms Emily LAU considered that there were too many thresholds and the burden on a minority shareholder to fulfill all the thresholds to bring an SDA was too onerous. She preferred the arrangement proposed by the Standing Committee on Company Law Reform (SCCLR) to expressly limit the scope of SDA and set the thresholds at a meaningful low level.</p> <p>The Administration had reservation to remove the thresholds set out in proposed sections 168BB(a) and 168BB(b) and SDA should be initiated for the interest of a company. Similar provisions were adopted in other jurisdictions including Singapore and Australia.</p> <p>The Administration pointed out that the revised draft CSAs relating to SDA had been circulated to SCCLR and no further comments were received except the letter of 27 May 2004 from Mr Winston POON, QC.</p>	
015524 - 020649	Administration Chairman Mr SIN Chung-kai Ms Emily LAU	<p>The Administration advised that some SCCLR members had expressed concern that if the factor "interest of a company" was taken out, there might be a scenario that the costs of the proceedings borne by the company would be higher than the damages awarded, and hence it would defeat the very purpose of the SDA which should be brought in the interest of the company concerned.</p> <p>The Chairman pointed out that the company might not necessarily bear the costs of proceedings as the court would make orders about costs under proposed section 168BG.</p>	

Time marker	Speaker	Subject(s)	Action required
015524 - 020649 <i>(Cont'd)</i>		<p>Mr SIN Chung-kai said that he might need to reconsider the issues relating to the costs of proceedings if such costs were not automatically awarded once the leave of the court was granted.</p> <p>The Administration said that they would reconsider this issue in view of SCCLR members' concern and the members' comments.</p>	
020650 - 021159	Chairman Ms Emily LAU Administration Clerk	<p>The Bills Committee would firstly follow up the outstanding matters of Schedules 1 and 3 of the Bill at the next meeting, and then continue to discuss the proposed SDA and other outstanding matters under Schedule 4 of the Bill.</p> <p>The Bills Committee also agreed to schedule one additional meeting of the Bills Committee on 7 June 2004.</p>	