

立法會
Legislative Council

LC Paper No. CB(1)2374/03-04
(These minutes have been seen
by the Administration)

Ref: CB1/BC/18/02

Bills Committee on Companies (Amendment) Bill 2003

**Minutes of the twenty-ninth meeting
held on Monday, 7 June 2004, at 2:30 pm
in Conference Room B of the Legislative Council Building**

- Members present** : Hon Audrey EU Yuet-mee, SC, JP (Chairman)
Hon CHAN Kam-lam, JP
Hon SIN Chung-kai
Hon Miriam LAU Kin-yee, JP
Hon Emily LAU Wai-hing, JP
Hon Henry WU King-cheong, BBS, JP
- Members absent** : Hon Albert HO Chun-yan
Dr Hon Eric LI Ka-cheung, GBS, 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

Miss Annie KONG
Assistant Secretary for Financial Services and
the Treasury (Financial Services) (4) 2

Companies Registry

Ms Dorothy SILKSTONE
Registry Solicitor

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

LC Paper No. CB(3)733/02-03 - Bill gazetted on 13 June 2003

Outstanding matters on Schedule 3 of the Bill

LC Paper No. CB(1)2043/03-04 (01) - Administration's paper on follow-up actions arising from the discussion at the meeting on 3 June 2004

LC Paper No. CB(1)2013/03-04 (01) - The Administration's revised draft Committee Stage Amendments (CSAs) on Schedule 3 of the Bill as at 28 May 2004

Papers relating to the Schedule 4 of the Bill

- LC Paper No. CB(1)2043/03-04 (02) - The Administration's revised draft CSAs on Schedule 4 of the Bill as at 3 June 2004
- LC Paper No. CB(1)2036/03-04 (01) - The Administration's revised draft CSAs on Schedule 4 of the Bill as at 1 June 2004
- LC Paper No. CB(1)2013/03-04 (04) - Letter dated 31 May 2004 from the Law Society of Hong Kong
- LC Paper No. CB(1)1922/03-04 (02) - Submission dated 22 May 2004 from Mr David Webb
- LC Paper No. CB(1)1982/03-04 (03) - Administration's response to submission from Mr David Webb on 22 May 2004
- 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)1982/03-04 (04) - Administration's response to Securities and Futures Commission on 25 May 2004
- LC Paper No. CB(1)1964/03-04 (03) - Submission dated 27 May 2004 from Mr John Brewer
- LC Paper No. CB(1)1982/03-04 (05) - Administration's response to Mr John Brewer on 27 May 2004
- 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)1982/03-04 (02) - Administration's response to submission from the Hong Kong Bar Association on 25 May 2004

LC Paper No. CB(1)1982/03-04 (06) - Submission dated 27 May 2004 from Mr Winston POON, QC

The Bills Committee discussed the outstanding matters of Schedule 3 of the Bill, and then continued to discuss the proposed Statutory Derivative Action (SDA) and other outstanding matters under Schedule 4 of the Bill.

2. The following papers were tabled at the meeting -

- (a) Administration's paper on follow-up actions arising from the discussion at the meeting on 3 June 2004 (*English version*);
- (b) Administration's paper on "Illustration of the operation of Section 333B" (*English version only*); and
- (c) Letter dated 7 June 2004 from Assistant Legal Adviser 7 to the Administration on Schedule 3 of the Bill (*English version*).

(Post-meeting note: The papers were circulated to members vide LC Paper No. CB(1)2070/03-04 on 9 June 2004.)

II Any other business

Date of next meeting

3. Members noted that the next meeting would be held on Thursday, 10 June 2004 at 8:30 am. The Bills Committee would continue to discuss the proposed SDA and other outstanding matters under Schedules 3 and 4 of the Bill.
4. There being no other business, the meeting ended at 4:40 pm.
5. The index of proceedings of the meeting is at **Appendix**.

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

**29th meeting on Monday, 7 June 2004, at 2:30 pm
in Conference Room B of the Legislative Council Building**

Time marker	Speaker	Subject(s)	Action required
000000 - 000035	Chairman	Welcoming and introductory remarks	
000036 - 010236	Chairman Administration Ms Emily LAU ALA7 Ms Miriam LAU	<p><u>Outstanding matters on Schedule 3 of the Bill</u> [CB(1)2013/03-04(01)] [CB(1)2043/03-04 (01)]</p> <p>Briefing by the Administration on its response to members' concern raised at the meeting on 3 June 2004 and the paper on "Illustration of the operation of section 333B" tabled at the meeting.</p> <p>ALA7 pointed out and the Bills Committee agreed that the definition of "alternation" under proposed section 335(1) was unclear, and there was no provision to specify the obligation of a company to appoint a replacement of an authorized representative (AR) within a certain timeframe when the company had terminated the appointment of its existing AR and registered the cessation under section 335(1).</p> <p>The Bills Committee also considered that the relationship among the registration requirements under proposed sections 333A(2), 333B(1) and 335(1) was unclear.</p>	

Time marker	Speaker	Subject(s)	Action required
000036 - 010236 <i>(Cont'd)</i>		<p>The Administration noted members' views and agreed to standardize the notice period under proposed sections 333A(2), 333B(1) and 335(1) to one month, and made proper cross-reference between sections 333A(2) and 335(1).</p> <p>Ms Miriam LAU noted that if a company terminated the appointment of its AR, the company concerned was required to register the termination notice and then register the appointment of a replacement AR using two different forms, i.e. Forms N2 and N8, under the proposed arrangement. She suggested that the registration requirements should be streamlined. The Administration shared Ms LAU's views and agreed to consider combining the two forms.</p>	<p>Administration to revise the draft Committee Stage amendments (CSAs) to sections 333A and 335</p> <p>Administration to consider streamlining the registration requirements in respect of termination of appointment of an existing AR and the appointment of a replacement AR</p>
010237 - 010502	Chairman Administration	Briefing by the Administration on further CSAs to Schedule 3 of the Bill <i>[Annex D to CB(1)2043/03-04(01)]</i>	
010503 - 010649	Chairman Administration	<p>The Bills Committee proceeded to the discussion on the English version of the revised draft CSAs to Schedule 4 of the Bill (as at 3 June 2004) <i>[CB(1)2043/03-04(02)]</i></p> <p>The Bills Committee agreed to scrutinize the English version of the revised draft CSAs relating to the proposed Statutory Derivative action (SDA) first.</p>	
010650 - 010721	Chairman Administration	<p><u>Heading of Part IVA</u></p> <p><u>Section 168BA - Definition</u></p>	

Time marker	Speaker	Subject(s)	Action required
010722 - 013233	Chairman Administration ALA7 Ms Miriam LAU	<p><u>Section 168BAA - Application</u></p> <p>Members noticed that the proposed scope of SDA was not limited to misfeasance committed only by directors and controlling shareholders of a company against the company, and sought clarification on whether the proposed scope was in line with that recommended by the Standing Committee on Company Law Reform (SCCLR).</p> <p>The Administration referred to paragraph 15.26 of the SCCLR's Consultation Paper on proposals made in Phase I of the Review on the recommended grounds for SDA, and confirmed that SCCLR had not specifically suggested that the scope of SDA should be confined to misfeasance committed by directors and controlling shareholders against the company.</p> <p>On the drafting of sections 168BAA(1)(b) and (c), the Administration noted members' suggestion to delete the phrases "<i>the proceedings are brought as a result of</i>" from subsection (1)(b) and "<i>the intervention is brought as a result of</i>" from subsection (1)(c), and agreed to revise the drafting of these two subsections.</p>	Administration to revise the draft CSAs to sections 168BAA(1)(b) and (c)

Time marker	Speaker	Subject(s)	Action required
013234 - 015109	Chairman Administration ALA7 Ms Miriam LAU Ms Emily LAU	<p><u>Section 168BB - Members may bring or intervene in proceedings</u></p> <p>ALA7 pointed out that when a shareholder obtained leave of the court under section 168BB to intervene in proceedings, the company concerned might no longer be a party of the proceedings and hence might have no locus standi in the proceedings.</p> <p>In response, the Administration advised that in practice, the company might submit information to the court through the shareholder bringing the SDA. The shareholder might also apply under section 168BF for the court to make an order for the company to submit information if required.</p> <p>Ms Emily LAU reiterated that she did not support the leave requirement for SDA under section 168BB(3). She would not move CSAs to the Bill but she was considering whether separate voting on related provisions was required.</p> <p>The Bills Committee noted that the Administration would revise the drafting of the section 168BB(3)(c) by moving the phrase "<i>or discontinued</i>" immediately after "<i>continued</i>".</p>	<p>Administration to revise the draft CSAs to section 168BB(3)(c)</p>

Time marker	Speaker	Subject(s)	Action required
013234 - 015109 <i>(Cont'd)</i>		ALA7 pointed out that it was not clearly stipulated in section 168BB(4A) "if the applicant has, in the exercise of any common law right brought proceedings..." as to whether a shareholder might apply leave for a SDA if the shareholder had exercised the common law derivative action (CDA) for the same subject matter but failed in the action. The Administration advised that section 168BB(4A) only stipulated that the court might dismiss a member's application for leave to commence a SDA if a CDA had been brought by the same member in respect of the same subject matter. For other scenarios, the court would exercise discretion to decide whether the leave application for SDA should be granted/dismissed based on the merits of each case.	
015110 - 015250	Chairman Administration	<u>Section 168BC - Service of written notice</u>	

Time marker	Speaker	Subject(s)	Action required
015251 - 020348	Chairman Administration Ms Miriam LAU ALA7 Mr CHAN Kam-lam	<p><u>Section 168BCA - Court's power to strike out proceedings brought or intervention in proceedings by members under common law</u></p> <p>The Bills Committee noted that where a CDA and a SDA were taken by different members of a company in respect of the same subject matter at the same time, it would be up to the court to exercise its discretion to decide whether and how the parties should or should not proceed with their actions.</p> <p>Ms Miriam LAU considered that the present proposal of expressly retaining the common law right to derivative action should be subject to review in future, given that this arrangement was not found in the overseas jurisdictions studied by the Bills Committee. She also cautioned that unless the Administration made it clear that the proposed arrangement was subject to review, any proposal to abolish CDA in future might be regarded as a vitiation of shareholders' rights. She therefore strongly demanded that the Administration, at the resumption of the Second Reading debate, made it clear that the proposed arrangement of not abolishing the common law right of a shareholder to derivative actions upon the enactment of the SDA provisions was subject to review in the light of actual experience in the operation of the SDA provisions.</p> <p>The Administration agreed to review this aspect of the SDA when an overall review of the SDA provisions was undertaken and would make clear this position at the resumption of the Second Reading debate.</p>	

Time marker	Speaker	Subject(s)	Action required
020349 - 020419	Chairman Administration	The Administration undertook to provide both Chinese and English version of CSAs to the Bill on or before 9 June 2004.	

Council Business Division 1
Legislative Council Secretariat
12 July 2004