



"Mr. Herbert Hui"
<herberthui@ogholdin
gs.com>

To: <mloo@legco.gov.hk>
cc:
Subject: Comments from HKIoD on Companies (Amendment) Bill 2003

05/03/04 16:44

Clerk to the Bills Committee
Legislative Council Secretariat
Attention : Mr. Mathew Loo

Dear Mr. Loo,

I am writing on behalf of the Hong Kong Institute of Directors in response to the Market Consultation on proposals concerning the Companies (Amendment) Bill 2003. I set out below my comments following the sub-headings in the Consultation document.

1. Proposed sections 152FA to 152FE of Schedule 4

I agree that the proposed section 152FA(1) appears to provide that any member (i.e. including a one-share shareholder) will qualify to inspect records of the specified corporation, if the court so orders. Whilst this may appear unreasonable, this is in line with the existing law where even a one-share member can bring proceedings under section 168A in the case of unfair prejudice.

In relation to whether there is any limitation on the scope of the records to be inspected, I believe safeguard have been put in place under section 152FB - the court in making the order can limit the scope of the records to be inspected. I therefore disagree that it is "not clear".

As the proposed section is drafted, only legal professional privilege (i.e. communication to and from a solicitor) and personal data are protected. It may be a good idea to build in protection against self-incrimination.

2. Proposed subsection (2B) of section 168A in paragraph 4(3) of Schedule 4

We would like to seek clarification as to why there is no limitation period for past member to seek relief under section 168A.

3. Proposed subsection (2D) of section 168A in paragraph 4(3) of Schedule 4

This new subsection enabling the Court to award costs in favour of a petitioner. However, the criteria laid down in paragraphs (a) and (b) of the proposed subsection are lower than the existing threshold for awarding costs in favour of an unsuccessful litigant. The creation of this subsection may well result in a proliferation of section 168A petitions as a member of the general public reading the subsection may be misled into believing that once the statutory criteria have been satisfied, he will automatically be entitled to the costs of the proceedings irrespective of the outcome. The proposed section is against the usual principle in awarding costs (i.e. costs follow the event and that the losing party should pay the costs of the winning party). The way the proposed section is drafted may encourage a petitioner to adopt a "nothing to lose" attitude which is unsatisfactory.

4. Proposed subsection (1)(a) of section 168BB in paragraph 5 of Schedule 4

It is in contradiction to common law of derivative action by allowing any member of a company to bring proceedings on its behalf without any qualification or condition whatsoever.

5. Proposed subsection (1)(b) of section 168BB in paragraph 5 of Schedule 4

The intervention by the member as drafted under the proposed section is subject to obtaining the permission from the court to do so. As an additional safeguard, the government should consider whether the intervention should also be subject to the usual criteria governing

intervention of proceedings by third parties under order 15 rule 6 of the Rules of the High Court.

6. Proposed subsection (1)(b) of section 168BF in paragraph 5 of Schedule 4

The court should not have a mandatory power to force parties to go into mediation. Perhaps a direction to mediate should only be made when the parties agree to mediate.

7. Proposed section 168BH in paragraph 5 of Schedule 4

We would like to know why any member of the company, without leave of the Court, may bring proceedings on behalf of the company, but cannot discontinue or settle the proceedings without leave of the court. Perhaps the leave of the Court should be made a requirement only when the member is acting in person and not represented by lawyers. It would be in line with the existing rules of the court that whenever a litigant in person settles with his opponent, the leave of the court is required.

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The above represents some of our thoughts on the proposed Companies (Amendment) Bill 2003. On the whole, we are supportive of the proposed Bill and believe that it will go some way towards raising the standard of Corporate Governance in Hong Kong while at the same time, catering for the interests of the business community.

If there are any queries, please do not hesitate to contact me at 25207238.

Yours sincerely,

Herbert Hui

Chairman

Hong Kong Institute of Directors