

Bills Committee on Companies (Amendment) 2003

The Administration's response to the submission from Hong Kong Institute of Directors (HKIoD)

HKIoD's views	Relevant deliberations of the Bills Committee (prepared by the Clerk to the Bills Committee)	Administration's response
HKIoD is supportive of the Bill and believes that it will raise the standard of Corporate Governance in Hong Kong while at the same time, cater for the interests of the business community.	-	Noted.
Whilst it appears unreasonable that any member (including a one-share shareholder) will qualify under proposed section 152FA(1) to inspect records of the specified corporation if the court so orders, this arrangement is in line with the existing law where even one-share member can bring proceedings under section 168A in the case of unfair prejudice.	In response to members' concern about possible abuse of the remedy for ulterior personal purposes, the Administration has agreed to specify certain requirements in terms of minimum shareholding and minimum number of shareholders for an application made under proposed section 152FA(1) . Revised draft Committee Stage amendments (CSAs) will be discussed on 19 March 2004.	Noted.
HKIoD does not agree that the scope of records to be inspected is "not clear", as safeguard has been put in place under proposed section 152FB that the court in making the inspection order under proposed section 152FA may limit the scope of the records to be inspected.	Bills Committee has taken note of the comments of Linklaters and Hong Kong Small and Medium Enterprises Association that proposed section 152FA may have gone too far in terms of the "records" which a shareholder may seek to inspect. Taking note of the Administration's response, the Bills Committee did not seek to add an express provision to limit the scope of records to be inspected.	Noted.

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<p>In addition to saving for solicitors under proposed section 152FD and protection of personal data under proposed section 152FE, it may be desirable to build in protection against self-incrimination.</p>	<p>The Administration will add a saving provision for bankers, and is revising the draft CSAs discussed on 28.2.04.</p> <p>In response to ALA7's query, the Administration has advised that a specified corporation may claim privilege against self-incrimination under common law and seek to refuse production of documents which are the subject of an inspection order under proposed section 152FA. The Administration does not intend to abrogate the privilege against self-incrimination.</p>	<p>A specified corporation may claim privilege against self-incrimination under common law and seek to refuse production of documents which are the subject of an application for an inspection order under the proposed section 152FA. The Bill does not contain any provision which would abrogate the privilege against self-incrimination which may be available to a specified corporation.</p>
<p>HKIoD seeks clarification as to why there is no limitation period for a past member to seek relief under proposed section 168A(2B).</p>	<p>Similar concern is expressed by Mr Winston POON, SC et al.</p> <p>The Administration has advised that there is no prescribed limitation period for proposed section 168A(2B) or the existing section 168A as specified in the Limitation Ordinance. Nor is there any separate provision for limitation period for section 168A relief in the Companies Ordinance.</p> <p>The Bills Committee has not taken a position on whether there should be a statutory limitation period, pending further information from the Administration on the relevant laws of overseas jurisdictions.</p>	<p>There is no limitation period applicable to the section 168A application. The parties are however subject to the equitable principles of laches and acquiescence. We do not see why there should be a statutory limitation period for a former member but not a present member. As long as one accepts that damages can be granted as a remedy for a past prejudicial conduct, it is difficult to argue that the action of a former member should be time-barred but not that of a present member when both actions are in relation to the same type of past conduct.</p>

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<p>The drafting of proposed section 168A(2D) may mislead a member of general public to believe 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 principle in awarding costs.</p>	<p>Similar concern is expressed by Mr Winston POON, SC et al. In the draft CSAs provided on 10 March 2004, proposed section 168A(2D) is deleted.</p>	<p>We agree that the proposed section 168A(2D) should be deleted.</p>
<p>Allowing any member of a specified corporation to bring proceedings on its behalf without any qualification or condition under proposed section 168BB(1)(a) is in contradiction to common law of derivative action.</p>	<p>Similar concern is expressed by Mr Winston POON, SC et al. and School of Business, Hong Kong Baptist University</p> <p>The Bills Committee discussed on 11 March 2004 whether under the proposed statutory derivative action, the leave of court was required for bringing a derivative action. The Bills Committee will revisit this issue at the coming meeting.</p>	<p>We are looking into the matters and will let you have our substantive response later on.</p>
<p>As an additional safeguard, the intervention by a member under proposed section 168BB(1)(b) should be subject to the usual criteria governing intervention of proceeding by third parties under Order 15 rule 6 (Misjoinder and nonjoinder of parties) of the Rules of High Court.</p>	<p>Mr Winston POON, SC et al. have raised concern that proposed section 168BB(1)(b) not only offends against the <u>Foss v Harbottle</u> rule, it also undermines the common law rule that a third party has no right to intervene any proceedings to which he is not a party.</p>	<p>Under the proposed section 168BB(1)(b), a member of a specified corporation may, with the leave of the court, intervene in any proceedings before the court to which the specified corporation is a party for the purpose of continuing, discontinuing or defending the proceedings on behalf of the specified corporation. The court may only grant such leave if it is satisfied that the intended intervention is in the best interests of the specified corporation, the member is acting in good faith in the application for leave and that a pre-action notice has been served. It is worth noting that nothing in the proposed section 168BB(1)(b) modifies or affect the operation of the Order 15 Rule 16 under the Rules of the High Court.</p>

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A direction under proposed section 168BF(1)(b) to mediate should only be made when the parties agree to mediate.	Same view is expressed by Mr Winston POON, SC et al. The Administration will move CSAs to delete the reference to "mediation" in the proposed section 168BF .	We agree that "requiring mediation" in the proposed section 168BF(1)(b) should be deleted.
On proposed section 168BH , 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.	-	Under the proposed section 168BH, the proceedings commenced under the proposed statutory derivative action cannot be discontinued or settled without leave of the court. This is to avoid problems like "gold-digging" actions which may be settled on terms which are disadvantageous to the specified corporation. For example, the member (who commences the proceedings) may be bought off by the directors (who are the wrongdoers) in disregard of the rights of the specified corporation.