



公 司 註 冊 處  
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30 April 2004

Secretary for Financial Services and the Treasury  
18/F Admiralty Centre, Tower 1  
18 Harcourt Road  
Hong Kong

(Attn: Ms Shirley Lam)

**BY FAX: 2528 3345**

Dear Ms Lam,

**Re : Consultation Paper on Statutory Derivative Action  
in the Companies (Amendment) Bill 2003**

Thank you for your letter of 22 April 2004 and the Consultation Paper thereto attached.

The Standing Committee has, on 27 April 2004, held a special meeting to discuss the statutory derivative action (SDA) as proposed in the Companies (Amendment) Ordinance 2003 and in particular, the various issues raised in paragraph 7 of the Consultation Paper, namely –

- (a) the co-existence of the common law derivative action (CDA) and the SDA;
- (b) the conduct of proceedings including the leave application, the discovery procedures and the costs order provision; and
- (c) the scope of proceedings.

Because of the very limited time that has been made available for the Committee to respond, no in depth study on the ramification of the various proposals can in reality be made. The following are the general comments and views of the majority of the members of the Committee :-

**(I) Leave Application Requirement**

- (i) The Committee reiterated its concern that the proposal to put in a leave requirement for the commencement of a SDA would in effect be a “trial within a trial”, which the Committee has all along been against.
- (ii) The Committee is of the unanimous view that if a leave requirement is considered necessary, the threshold must be set at a meaningfully low level. The Committee considered that the thresholds as presently being set out in section 168BB(3)(a) to (e) of the CSA should be reviewed, especially the following two requirements –
  - (a) that it is in the best interests of the specified corporation that the applicant be granted leave, and
  - (b) that the applicant is acting in good faith

which may force the court to enter into the merits of the claims, in cases where there are conflicting evidence and serious dispute of facts.

**(II) Co-existence of SDA and CDA**

- (i) The Committee is of the view that the problems and concerns raised by the Administration in paragraph 8 of the Consultation Paper can be addressed by conferring jurisdiction on the Hong Kong court to deal with SDAs by members of unregistered companies, if those companies have substantial connection with Hong Kong. Under Part X, section 327 of the Companies Ordinance, the court has the power to wind-up unregistered companies if the companies have sufficient nexus with Hong Kong. The same should be applied to SDA cases.
- (ii) On the basis of the Committee’s other recommendation as set out herein, the Committee does not see the need for a co-existing CDA.

**(III) Conduct of Proceedings**

**Discovery of documents**

- (i) The Committee agrees that the powers confer on the court as proposed section 168BG(1)(c) should be wide enough to enable it

to deal with any problem relating to discovery of documents. It may be even better, however, if there is a specific provision to that effect.

**(IV) Scope of Proceedings**

- (i) While there is a leave application requirement, it is also desirable to restrict the scope of SDA. The Committee is unanimously of the view that the scope of proceedings actionable under the proposed SDA procedure should be expressly limited to grounds like those expressed in paragraph 15.26 of the Standing Committee's Consultation Paper on Proposals in Phase I of the CGR, which include :-

- fraud
- negligence
- default in relation to any law or rules
- breach of any duty whether fiduciary or statutory

or as recommended by the UK Law Commission in its Report on Shareholder Remedies (No. 246, 1997) which states that the SDA should only be available if the cause of action arises as a result of an actual or threatened act or omission involving (a) negligence, default, breach of duty or breach of trust by a director of the company, or (b) a director putting himself in a position where his personal interests conflict with his duties to the company.

The Committee is also of the view that some research ought to be undertaken as to

- (a) how the SDA has fared in Singapore and in Australia and
- (b) whether information is available from the HK Judiciary as to the number of derivative actions in the past, and whether there is any basis for concern that the procedure would be abused.

Yours sincerely,



(Edward Lau)  
Secretary

Standing Committee on Company Law Reform

c.c. Mr Benjamin Yu, SC  
Chairman of the SCCLR

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