



立法會秘書處 法律事務部  
LEGISLATIVE COUNCIL SECRETARIAT  
LEGAL SERVICE DIVISION

來函編號 COR REF  
來函編號 COR REF LS/B/40/02-03  
電話 TELEPHONE 2869 9370  
傳真號碼 FACSIMILE 2877 5029

Secretary for Financial Services  
and the Treasury  
Financial Services and the Treasury Bureau  
(Attn: Miss Shirley LAM, PAS(FS)4)  
18/F, Tower 1  
Admiralty Centre  
18 Harcourt Road  
Hong Kong

By Fax (2528 3345) and By Post

25 May 2004

Dear Miss LAM

**Companies (Amendment) Bill 2003 ("the Bill") - Schedule 4**

I refer to your Committee Stage amendments to the above Bill tabled on 20 May 2004 and enclose my comments in manuscript.

Yours sincerely

(Monna LAI)  
Assistant Legal Adviser

Encl

c.c. DoJ (Attn: Allen LAI, SGC)

**A marked-up version of the  
Committee Stage Amendments  
to the proposed sections 168BA to 168BI**

PART IVAA

BRINGING OR INTERVENING IN PROCEEDINGS ON  
BEHALF OF SPECIFIED CORPORATION

**168BA. Definition**

In this Part, unless the context otherwise requires,  
"proceedings" (法律程序) means any proceedings (other than criminal  
proceedings) within the jurisdiction of the court.

**168BAA. Application**

This Part applies to proceedings in relation to fraud,  
negligence, default in compliance with any law or rule or breach  
of duty committed against a specified corporation<sup>1</sup>.

**168BB. Members may bring or intervene  
in proceedings**

~~(1) A member of a specified corporation may~~

- ~~(a) without leave of the court, bring proceedings  
before the court on behalf of the specified  
corporation; or~~
- ~~(b) with the leave of the court granted under~~

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<sup>1</sup> Having regard to the views of various organizations on this issue, we propose, as agreed by the Bills Committee, to restrict the scope of the statutory derivative actions to those proceedings in respect of any fraud, negligence, default in relation to any law or rules, breach of duty in relation to the specified corporation.

The court may dismiss an application for leave under section 168BB(3) if the applicant has, in respect of the same subject matter, brought proceedings on behalf of the specified corporation, or intervened in any proceedings to which the specified corporation is a party under common law<sup>6</sup>.

168BCB. Court's power to strike out proceedings brought or intervention in proceedings by members under common law

(1) Where leave has been granted to a member of a specified corporation under section 168BB(3), if the member brings proceedings on behalf of the specified corporation, or intervenes in any proceedings to which the specified corporation is a party under common law in respect of the same subject matter, the court may -

(a) order to be struck out or amended any pleading or the indorsement of any writ in the proceedings or intervention under common law, or anything in such pleading or indorsement; and

(b) order the proceedings or intervention under common law to be stayed or dismissed or judgment to be entered

Should the Court consider SDA & CDA so that the applicants common law claim and statutory claim be heard in the same proceedings?

<sup>6</sup> Having regard to the views of various organizations on this issue, we propose to empower the court to deal with the co-existence or duplicity of a statutory derivative action and a common law derivative action: (a) Add a new section to empower the court to dismiss an application for leave to commence a statutory derivative action if a common law derivative action has been commenced by the same member in respect of the same subject matter; (b) Add a new section to empower the court to prevent a member from commencing a common law derivative action if leave has been granted to the same member to commence a statutory derivative action in respect of the same subject matter; and (c) Add a new section to empower the court to make any order and give any direction it considers appropriate in relation to items (a) and (b) above

(1) The court may, at any time,<sup>11</sup> make any order and give any direction it considers appropriate in respect of any proceedings brought or intervened in by a member of a specified corporation under section 168BB(1), or in respect of an application for leave made under section 168BB(3), including -

- (a) interim orders pending the determination of the proceedings or application;
- (b) directions concerning the conduct of the proceedings or application, ~~including requiring mediation~~<sup>12</sup>;
- (c) an order directing the specified corporation, or an officer of the specified corporation, to do, or not to do, any act (including the provision of such information or assistance as the court may think fit for the purpose of the proceedings or application)<sup>13</sup>; and
- (d) an order appointing an independent person to investigate and report to the court on -
  - (i) the financial position of the specified corporation;
  - (ii) the facts or circumstances that gave rise to the proceedings; or
  - (iii) the costs incurred by the parties to the

for whom?  
the court?

<sup>11</sup> These amendments aim to improve the clarity of the proposed section 168BF(1).

<sup>12</sup> In response to the suggestion made by Mr Winston Poon, SC, these amendments aim to delete the phrase "including requiring mediation".

<sup>13</sup> Having regard to the views of various organizations on this issue, we propose to amend the proposed section 168BF(1)(c) to make it clear that the court may make an order directing the specified corporation or its officers to provide information or assistance in relation to the statutory derivative action.