

LEGISLATIVE COUNCIL BRIEF

HIGH COURT ORDINANCE (Chapter 4) RULES OF THE HIGH COURT (AMENDMENT) RULES 2005

COMPANIES (AMENDMENT) ORDINANCE 2004 (AMENDMENT OF SCHEDULE 3) NOTICE 2005

INTRODUCTION

In exercise of the power under section 54 of the High Court Ordinance, the High Court Rules Committee has made the Rules of the High Court (Amendment) Rules 2005 (Annex A) (“Amendment Rules”). The object of the Amendment Rules is to put beyond doubt that an application under new section 168BD of the Companies Ordinance (“CO”) for leave to dispense with the service of a written notice required by that section may be made by ex parte originating summons.

2. In exercise of the power under section 4 of the Companies (Amendment) Ordinance 2004 (“Amendment Ordinance”), the Secretary for Financial Services and the Treasury will publish in the Gazette the Companies (Amendment) Ordinance 2004 (Amendment of Schedule 3) Notice 2005 (Annex B) (“Amendment Notice”). The object of the Amendment Notice is to modify the new definition of “specified corporation” (added by section 1(1) of Schedule 3 to the Amendment Ordinance) for the purpose of ensuring that the amendments made by section 1(1) can be given effect in view of the order in which the Schedules to the Amendment Ordinance will respectively commence.

BACKGROUND AND ARGUMENT

3. The Amendment Ordinance was enacted in July 2004 to improve the prospectus regime to facilitate market development (Schedule 1), modernise the registration regime for oversea companies (Schedule 2) and enhance corporate governance regime by strengthening the remedies for shareholders (Schedule 3).

(a) Amendment Rules

4. New Part IVAA of the CO (added by section 5 of Schedule 3 to the Amendment Ordinance) provides for a statutory derivative action (SDA) whereby a member of a specified corporation may commence an action on behalf of the corporation in respect of a wrong done to the corporation. New section 168BD of the CO requires such a member to serve a pre-action notice on the specified corporation except with the leave of the court granted under new section 168BD(4) of the CO.

5. An application for leave under new section 168BD(4) is originating in nature. Order 102, Rule 2(1) of the Rules of the High Court (RHC) provides that every application made under the CO must be made in accordance with Order 5, Rule 3 of the RHC by originating summons save for those applications prescribed in Order 102, Rules 3, 4 and 5 of the RHC and those made in proceedings relating to winding up of companies. Order 102, Rule 2(2) of the RHC further provides that such summons shall be made in Form 10 which is the prescribed form for inter partes originating summons unless the application made by the summons is an application under sections 167, 302 or 306 of the CO. Orders 7 and 28 of the RHC respectively set out the general matters and procedures relating to originating summons.

6. Given that Order 102, Rule 2(2) of the RHC is cast in mandatory language, this raises the question of whether an ex parte application can be brought under new section 168BD(4) of the CO.

7. Against the above background, there is a need to amend the RHC to make it clear that an application made under new section 168BD(4) may be made by ex-parte originating summons. Such amendment may be made by the High Court Rules Committee under section 54 of the High Court Ordinance¹.

(b) Amendment Notice

8. Section 2(1) of the CO (as amended by section 1(1) of Schedule 3 to the Amendment Ordinance) provides that a specified corporation means a company or a non-Hong Kong company. The term

¹ As the subject of the proposed amendments in the Amendment Rules is an existing provision in the RHC, we consider it more appropriate for the Amendment Rules to be made by the High Court Rules Committee under section 54 of the High Court Ordinance instead of new section 168BK of CO (added by section 5 of Schedule 3 to the Amendment Ordinance).

“non-Hong Kong company” is a new term introduced by virtue of section 27 of Schedule 2 to the Amendment Ordinance to replace the existing term “oversea company” in the CO.

9. As Schedule 2 to the Amendment Ordinance would be brought into operation in around late 2005 (i.e. later than Schedule 3 which will be brought into operation on 15 July 2005²) when the relevant preparatory work, including the modification of the Companies Registry’s computer system, is completed, the term “non-Hong Kong company” as provided in Schedule 2 will have not come into operation at the time when Schedule 3 commences.

10. Against the above background and having taken into account of the order in which the Schedules to the Amendment Ordinance will respectively commence, there is a need to amend the term “specified corporation” to include an “oversea company”. Such amendment may be made by the Secretary for Financial Services and the Treasury under section 4 of the Amendment Ordinance.

AMENDMENT RULES/AMENDMENT NOTICE

(a) Amendment Rules

11. Section 2 of the Amendment Rules amends Order 102, Rule 2 of the RHC to make it clear that an application under new section 168BD of the CO for leave to dispense with the service of a written notice required by that section may be made by ex parte originating summons.

(b) Amendment Notice

12. Section 1 of the Amendment Notice modifies the new definition of “specified corporation” (added by section 1(1) of Schedule 3 to the Amendment Ordinance) to include “oversea company” for the purpose of ensuring that the amendment made by section 1(1) can be given effect in view of the order in which the Schedules to the Amendment Ordinance will respectively commence.

² Schedule 3 to the Amendment Ordinance will be brought into operation on 15 July 2005 by means of the Companies (Amendment) Ordinance 2004 (Commencement) Notice 2005 made by the Secretary for Financial Services and the Treasury under section 1 of the Amendment Ordinance. The Commencement Notice will be tabled into the Legislative Council for negative vetting on 18 May 2005.

LEGISLATIVE TIMETABLE

13. The Amendment Rules and the Amendment Notice will be tabled at the Legislative Council for negative vetting on 18 May 2005.

IMPLICATIONS OF THE AMENDMENT RULES AND THE AMENDMENT NOTICE

14. The proposals in the Amendment Rules and those in the Amendment Notice have no financial, staffing, economic, productivity, environmental or sustainability implications, and are in conformity with the Basic Law, including the provisions concerning human rights. The proposals in the Amendment Rules do not affect the current binding effect of the High Court Ordinance while those in the Amendment Notice do not affect the current binding effect of the CO.

PUBLIC CONSULTATION

15. As the Amendment Rules and Amendment Notice are technical in nature, no public consultation is considered necessary. Representatives of the legal profession are included in the High Court Rules Committee.

PUBLICITY

16. A press release will be issued on 13 May 2005. A spokesman will be available to handle enquiries.

ENQUIRIES

17. Enquiries on this brief should be addressed to Mr Arthur Au, Assistant Secretary for Financial Services and the Treasury (4)1 (telephone number: 2527 5543).

**Financial Services Branch
Financial Services and the Treasury Bureau
May 2005**

RULES OF THE HIGH COURT (AMENDMENT) RULES 2005

(Made by the Rules Committee of the High Court under section 54 of the High Court Ordinance (Cap. 4))

1. Commencement

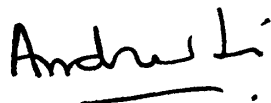
These Rules shall come into operation on the day appointed for the commencement of Schedule 3 to the Companies (Amendment) Ordinance 2004 (30 of 2004).

2. Applications to be made by originating summons

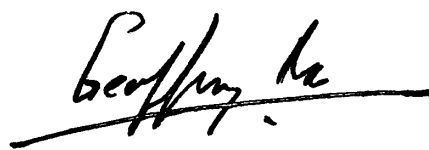
Order 102, rule 2 of the Rules of the High Court (Cap. 4 sub. leg. A) is amended by adding -

“(4) An application under section 168BD of the Ordinance for leave to dispense with the service of a written notice required by that section may be made by ex parte originating summons.” .

Made this 6th day of May 2005.



Andrew LI
The Hon. Chief Justice



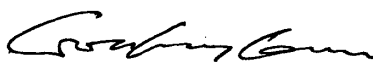
The Hon. Mr. Justice MA
Chief Judge of the High Court



The Hon. Mr. Justice REYES



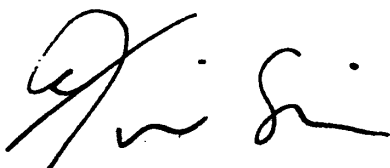
Mr. MOK Yeuk Chi



Mr. Godfrey LAM



Mr. Nicholas HUNSWORTH



Mr. Patrick SWAIN



Mr. Wesley WONG



Mr. Jeremy S.C. POON
Secretary

Explanatory Note

The object of these Rules is to put beyond doubt that an application under section 168BD of the Companies Ordinance (Cap. 32) for leave to dispense with the service of a written notice required by that section may be made by ex parte originating summons.

**COMPANIES (AMENDMENT) ORDINANCE 2004
(AMENDMENT OF SCHEDULE 3) NOTICE 2005**

(Made under section 4 of the Companies (Amendment)
Ordinance 2004 (30 of 2004))

1. Interpretation

Section 1 of Schedule 3 to the Companies (Amendment) Ordinance 2004 (30 of 2004) is amended by adding –

“(3) Section 2 is amended by adding –

“(12) The reference to a non-Hong Kong company in the definition of “specified corporation” in subsection (1) shall, before the commencement of section 1(1) of Schedule 2 to the Companies (Amendment) Ordinance 2004 (30 of 2004), be deemed to be a reference to an oversea company as is for the time being defined under this Ordinance.”.”.



Secretary for Financial Services and
the Treasury

3 May 2005

Explanatory Note

The object of this Notice is to modify the new definition of “specified corporation” added by section 1(1) of Schedule 3 to the Companies (Amendment) Ordinance 2004 (30 of 2004), for the purpose of ensuring that the amendment made by that section can be given effect in view of the order in which the Schedules to the Companies (Amendment) Ordinance 2004 (30 of 2004) will respectively commence.