



公 司 註 冊 處  
COMPANIES REGISTRY

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## COMPANIES REGISTRY EXTERNAL CIRCULAR NO. 6 / 2005

### Implementation of shareholder remedies-related provisions of Companies (Amendment) Ordinance 2004

#### Introduction

The Secretary for Financial Services and the Treasury has appointed 15 July 2005 as the commencement date for the shareholder remedies-related provisions in Schedule 3 of the Companies (Amendment) Ordinance 2004 (the Amendment Ordinance) passed by the Legislative Council on 23 July 2004.

2. The Commencement Notice (L. N. 82 of 2005) published in the Gazette on 13 May 2005 and tabled in the Legislative Council on 18 May 2005 specified that Schedule 3, among other provisions of the Amendment Ordinance, will come into operation on 15 July 2005.

3. The main purpose of the amendments in Schedule 3 of the Amendment Ordinance is to enhance the remedies available to shareholders receiving unfair treatment. The major amendments include the introduction of a new right to inspect company records, certain improvements to the unfair prejudice provisions under section 168A, a new right to commence a derivative action and a new right to apply to the court for injunctions. This circular outlines the major changes brought about by the amendments.

4. A specified corporation, referred to in the following paragraphs, includes a company as defined in section 2 and an oversea company as defined in section 332 of the Companies Ordinance.

#### Inspection Order

5. The new sections 152FA to 152FE provide that the court may, on application, make an order to inspect any records of a specified corporation, if the application is made in good faith and for a proper purpose by:—

- (a) any number of members representing not less than 2.5 percent of the total voting rights;
- (b) any number of members holding shares in the specified corporation on which an aggregate sum of not less than \$100,000 has been paid up; or
- (c) not less than 5 members.

## **Unfair Prejudice Remedies**

6. Section 168A is amended to provide that:–
- (a) the section applies to specified corporations, which include a company as defined in section 2 and a non-Hong Kong, i.e. an overseas, company as defined in section 332;
  - (b) the court may award damages and interest to any members whose interests have been unfairly prejudiced;
  - (c) a past member may commence action for unfair prejudice if the unfair prejudicial conduct complained of arose when he was a member of the specified corporation;
  - (d) in respect of any unfair prejudicial claim by past members, the court may only award damages;
  - (e) the damages that may be ordered by the court does not entitle any member of a specified corporation to recover by way of damages any loss that is solely reflective of the loss suffered by the specified corporation which only the specified corporation is entitled to recover under the common law.

## **Statutory Derivative Action**

7. Under the new sections 168BA to 168BK, a member of a specified corporation has a statutory right to bring proceedings on behalf of the specified corporation or to intervene in proceedings to which the specified corporation is a party if:–
- (a) the cause of action or right to continue, discontinue or defend the proceedings is vested in the specified corporation and relief is sought on behalf of the specified corporation;
  - (b) the bringing of proceedings is in respect of misfeasance committed against the specified corporation (misfeasance means fraud, negligence, default in compliance with any enactment or rule of law or breach of duty);
  - (c) the specified corporation fails to bring proceedings or diligently continue, discontinue or defend the proceedings;
  - (d) leave is granted by the court to bring or intervene in such proceedings.

## Conditions for granting leave

8. The court may grant leave if it is satisfied that –
- (a) it appears to be prima facie in the interest of the specified corporation to grant leave;
  - (b) there is a serious question to be tried and the specified corporation has not itself brought the proceedings (if the application is for leave to bring proceedings);
  - (c) the specified corporation has not diligently continued, discontinued or defended the proceedings (if the application is for leave to intervene in proceedings); and
  - (d) unless dispensed with by the court, a 14 days' written notice has been served on the specified corporation.

### Costs of proceedings

9. The court may at any time make any costs orders if it considers appropriate in relation to costs incurred or to be incurred by:-

- the member applicant
- the specified corporation and
- any other parties to the proceedings

A cost order may require indemnification for costs by the specified corporation. The court may only make a costs order in favour of the member if it is satisfied that the member was acting in good faith and had reasonable grounds.

### General powers of court

10. The court may make any order and give any direction including –

- interim orders pending the determination of the proceedings or application
- directions concerning the conduct of the proceedings or application
- injunctions
- appointment of an independent person to investigate and report to the court.

### Derivative action under the common law

11. The new statutory right to bring a derivative action does not affect any common law right of a member of a specified corporation to bring a derivative action on behalf of the specified corporation under the common law.

### **Injunctions**

12. Under the new section 350B(1), where a person has, in relation to a specified corporation, engaged, is engaging or is proposing to engage in conduct that constituted, constitutes or would constitute –

- a contravention of the Companies Ordinance;
- an attempt to contravene the Companies Ordinance;
- aiding, abetting, counselling or procuring another person to contravene the Companies Ordinance;
- inducing or attempting to induce another person to contravene the Companies Ordinance;
- knowingly concerned in, or a party to, a contravention of the Companies Ordinance by another person;
- conspiring with others to contravene the Companies Ordinance;
- a breach of fiduciary duties owed to the specified corporation in any capacity other than as a director; or
- a breach of fiduciary or other duties as a director,

the court may, on the application of the Financial Secretary or a member, or creditor of the specified corporation whose interests have been, are or would be affected by the contravention / breach, grant an injunction restraining the person from engaging in the conduct or requiring him to do any act.

Other powers of the court

13. The court has powers also to grant –
- an interim injunction
  - an order discharging or varying an injunction
  - an order awarding damages to any person

**G W E JONES**  
**Registrar of Companies**

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