

Companies (Amendment) Ordinance 2004 Phase III Come Into Force

In 2004, the most significant event in Corporate Law development is the enactment (in July 2004) of the "Companies (Amendment) Ordinance 2004". The enactment is come into force in three phases. The Schedule 3 which is related to the enhancement of the corporate governance regime by strengthening remedies for minority shareholders, which has come into effect on 15 July 2005.

Derivative Action - The major amendment to this regime is that the new CO give the minority shareholders a statutory right of Derivative Action¹, that is,

"(a) the bringing of proceedings in respect of misfeasance committed against a specified corporation;

(b) the bringing of proceedings in respect of any matter where a specified corporation fails to bring proceedings in respect of such matter by reason of misfeasance committed against the specified corporation; and

(c) the intervention in proceedings in respect of any matter where a specified corporation fails to diligently continue, discontinue or defend the proceedings in respect of such matter by reason of misfeasance committed against the specified corporation,

where in relation to the proceedings brought or intervened in, the cause of action or right to continue, discontinue or defend those proceedings, as the case may be, is vested in the specified corporation and relief, if any, is sought on behalf of the specified corporation."

[S168BB, Companies Ordinance (Hong Kong)]

"misfeasance" (不當行為) means fraud, negligence, default in compliance with any enactment or rule of law, or breach of duty." And of course, the court may grant leave on some specified conditions.

Members' Rights to Inspect Company Records - The CO is amended to give members statutory rights to inspect Company Records of a specified corporation on application to the court¹ under certain conditions, that is, number of members representing not less than 2.5% of the total voting rights, any number of members holding shares of not less than HKD100,000 or not less than five members. *[S152FA to S152FE, Ibid]*

Unfair Prejudice Remedies - The CO is amended to give members of specified corporations alternative remedies to winding up the company, where a member has been unfairly prejudiced,

(1) The court may award damages and interest to existing members.

(2) A past member may commence an action (but the court may only award damages)

(3) The member do not entitle to recover by way of damages any loss that is solely the right of the Specified corporation.

Injunction Orders - The CO is amended to give the affected person or the Financial Secretary¹ the right to apply to the court for Injunction Order in respect of restraining any person from doing anything which is in breach of his fiduciary or other duties owed to a specified company, or any conducts which is contravenes the Companies Ordinance.

[S350B(1), Ibid]

A very interesting development here is that , "specified corporation" (指明法團) means a company or a non-Hong Kong company¹ (which is a wider definition than "oversea company" previously; that is to say, a members of the offshore companies may apply for intervention of the Hong Kong Courts and exert his statutory right. However, whether the Hong Kong Courts have jurisdictions is remain to be tried.