

## PART 14

### REMEDIES FOR PROTECTION OF COMPANIES' OR MEMBERS' INTERESTS

#### Division 1 – Preliminary

##### 14.1 Interpretation

In this Part –

“company” (公司) includes a non-Hong Kong company.

#### Division 2 – Remedies for Unfair Prejudice to Members' Interests

##### 14.2 Interpretation

(1) In this Division, a reference to a member of a company includes –

- (a) the personal representative of a person who, immediately before the person's death, was a member of the company; and
- (b) a trustee of, or a person beneficially interested in, the shares of the company by virtue of the will or intestacy of another person who, immediately before that other person's death, was a member of the company.

(2) In this Division, a reference to a past member of a company includes the personal representative of a person who, immediately before the person's death, was a past member of the company.

(3) For the purposes of this Division, a person is not a past member of a company unless –

- (a) the person was, but is no longer, a member of the company; and
- (b) the person ceased to be such a member on or after 15 July 2005.

### **14.3 When Court may order remedies**

(1) The Court of First Instance may exercise the power under section 14.4(1)(a) and (2) if, on a petition by a member of a company, it considers that –

- (a) the company’s affairs are being or have been conducted in a manner unfairly prejudicial to the interests of the members generally or of one or more members (including the member); or
- (b) an actual or proposed act or omission of the company (including one done or made on behalf of the company) is or would be so prejudicial.

(2) The Court of First Instance may exercise the power under section 14.4(1)(b) and (2) if, on a petition by the Financial Secretary under section 19.44(3),<sup>25</sup> it considers that –

- (a) a company’s affairs are being or have been conducted in a manner unfairly prejudicial to the interests of the members generally or of one or more members; or
- (b) an actual or proposed act or omission of a company (including one done or made on behalf of the company) is or would be so prejudicial.

(3) The Court of First Instance may exercise the power under section 14.4(4) if, on a petition by a past member of a company, it considers that at the time when the past member was a member of the company –

- (a) the company’s affairs were conducted in a manner unfairly prejudicial to the interests of the members at that time generally or of one or more members at that time (including the past member); or

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<sup>25</sup> A consultation draft of Part 19 will be published later.

- (b) an actual act or omission of the company (including one done or made on behalf of the company) was so prejudicial.

#### **14.4 Remedies that Court may order**

- (1) The Court of First Instance may –
  - (a) for the purposes of section 14.3(1), make any order that it thinks fit for giving relief in respect of the matter mentioned in section 14.3(1)(a) or (b); and
  - (b) for the purposes of section 14.3(2), make any order that it thinks fit for giving relief in respect of the matter mentioned in section 14.3(2)(a) or (b).
- (2) Without limiting subsection (1), the Court of First Instance –
  - (a) may make any or all of the following orders –
    - (i) an order –
      - (A) restraining the continuance of the conduct of the company’s affairs in the manner mentioned in section 14.3(1)(a) or (2)(a);
      - (B) restraining the doing of the act mentioned in section 14.3(1)(b) or (2)(b); or
      - (C) requiring the doing of an act that, as mentioned in section 14.3(1)(b) or (2)(b), the company has omitted, or has proposed to omit, to do;
    - (ii) an order that proceedings that the Court thinks fit be brought in the company’s name against any person, and on any terms, that the Court so orders;
    - (iii) an order appointing a receiver or manager of either or both of the following –

- (A) the company's property, or any part of the property;
- (B) the company's business, or any part of the business;
- (iv) any other order that the Court thinks fit, whether –
  - (A) for regulating the conduct of the company's affairs in future;
  - (B) for the purchase of the shares of any member of the company by another member of the company;
  - (C) for the purchase of the shares of any member of the company by the company and the reduction accordingly of the company's capital; or
  - (D) for any other purpose; and
- (b) may order the company or any other person to pay any damages, and any interest on those damages, that the Court thinks fit to a member of the company whose interests have been unfairly prejudiced by the conduct of the company's affairs or by the act or omission.

(3) The Court of First Instance may, on making an order under subsection (2)(a)(iii), specify the powers and duties of, and fix the remuneration of, the receiver or manager.

(4) For the purposes of section 14.3(3), the Court of First Instance may order the company or any other person to pay any damages, and any interest on those damages, that the Court thinks fit to a member of the company at the material time whose interests were unfairly prejudiced by the conduct of the company's affairs or by the act or omission.

(5) To avoid doubt, a member, past or present, of a company is not entitled to recover, by way of damages under subsection (2)(b) or (4), any loss

that solely reflects the loss suffered by the company that only the company is entitled to recover under the common law.

(6) In this section –  
“material time” (關鍵時間) means the time when the past member was a member of the company.

#### **14.5 Alteration of constitution by Court order**

(1) This section applies if a company’s constitution is altered by an order under section 14.4.

(2) The alteration has the same effect, and this Ordinance applies to the constitution, as if the alteration were made by a resolution of the company.

(3) Despite anything in this Ordinance, the company has no power, without the leave of the Court of First Instance, to alter the constitution in a way that is inconsistent with the order.

(4) Within 14 days after the order is made, the company must deliver an office copy of the order to the Registrar for registration.

(5) If a company contravenes subsection (4), the company, and every responsible person of the company, commit an offence, and each is liable to a fine at level 3 and, in the case of a continuing offence, to a further fine of \$300 for each day during which the offence continues.

(6) In this section, a reference to an alteration made to a company’s constitution includes an addition made to the constitution.

#### **14.6 Chief Justice may make rules**

(1) Subject to the approval of the Legislative Council, the Chief Justice may make rules –

- (a) for regulating proceedings under this Division; and
- (b) for prescribing fees payable in respect of such proceedings.

(2) If the rules empower a person to put a question to another person, they may also provide that that other person's reply to the question may be used in evidence against that other person.

(3) The rules may empower the Court of First Instance –

(a) to fix any fee payable in respect of such proceedings that is not prescribed by the rules; and

(b) to vary the fee so fixed.

(4) The rules may provide that a fee payable to a person in respect of such proceedings is recoverable as a debt due to the person.

(5) A fee may be prescribed by the rules, or fixed or varied by the Court of First Instance under the rules, by reference to a scale of fees and percentages.

(6) A fee may be so prescribed, fixed or varied without reference to the amount of administrative or other costs incurred or likely to be incurred in relation to such proceedings.

(7) A fee so prescribed, fixed or varied is not invalid by reason only of the amount of the fee.

#### **14.7 Transitional arrangements**

(1) If, before 15 July 2005, a petition has been presented for an order under section 168A of the Companies Ordinance (Cap. 32) as in force immediately before that date, that section continues to apply in relation to the petition as if it had not been amended by section 4 of Schedule 3 to the Companies (Amendment) Ordinance 2004 (30 of 2004).

(2) If, on or after 15 July 2005 but before the commencement of this Division, a petition has been presented for an order under section 168A of the Companies Ordinance (Cap. 32) as in force immediately before that commencement, that section continues to apply in relation to the petition as if it had not been repealed.

### **Division 3 – Remedies for Others’ Conduct in relation to Companies etc.**

#### **14.8 Application of section 14.9**

- (1) Section 14.9 applies if, in relation to a company –
  - (a) a person has engaged, is engaging or is proposing to engage in conduct that constituted, constitutes or would constitute –
    - (i) a contravention of this Ordinance;
    - (ii) a default relating to a contravention of this Ordinance; or
    - (iii) a breach specified in subsection (4); or
  - (b) a person has refused or failed, is refusing or failing, or is proposing to refuse or fail, to do an act or thing that the person is required by this Ordinance to do.
- (2) Section 14.9 also applies if, in relation to a company –
  - (a) a person had engaged, was engaging or was proposing to engage, before the commencement of this section, in –
    - (i) conduct that constituted or would constitute a contravention of the predecessor Ordinance and that would constitute a contravention of this Ordinance as well;
    - (ii) conduct that constituted or would constitute a default relating to a contravention of the predecessor Ordinance and that would constitute the same default relating to a contravention of this Ordinance as well; or
    - (iii) conduct that constituted or would constitute a breach specified in subsection (4); and
  - (b) the engagement or proposal still subsists.
- (3) Section 14.9 also applies if, in relation to a company –

- (a) a person had refused or failed, was refusing or failing, or was proposing to refuse or fail, before the commencement of this section, to do an act or thing that the person was required by the predecessor Ordinance to do;
  - (b) the person is required by this Ordinance to do the act or thing as well; and
  - (c) the refusal, failure or proposal still subsists.
- (4) The breach specified for the purposes of subsection (1)(a)(iii) or (2)(a)(iii) is –
  - (a) a breach of the person’s fiduciary duties owed to the company in any capacity other than as a director of the company;
  - (b) a breach of the person’s fiduciary or other duties as a director of the company owed to the company; or
  - (c) a breach of the company’s constitution.
- (5) In this section, a reference to a default relating to a contravention of this Ordinance or the predecessor Ordinance is a reference to –
  - (a) an attempt to contravene the Ordinance;
  - (b) aiding, abetting, counselling or procuring another person to contravene the Ordinance;
  - (c) inducing or attempting to induce, whether by threats, promises or otherwise, another person to contravene the Ordinance;
  - (d) the person being in any way, directly or indirectly, knowingly concerned in, or a party to, a contravention of the Ordinance by another person; or
  - (e) conspiring with others to contravene the Ordinance.

## **14.9 Court may order remedies**

(1) The Court of First Instance may, on application by the Financial Secretary under section 19.44(4) or (5), do any or all of the following –

- (a) grant an injunction, on the terms that the Court thinks fit –
  - (i) in the case of section 14.8(1)(a) or (2), restraining the person from engaging in the conduct or requiring the person to do any act or thing; or
  - (ii) in the case of section 14.8(1)(b) or (3), requiring the person to do any act or thing;
- (b) order the person to pay damages to any other person;
- (c) declare any contract to be void or voidable to the extent specified in the order.

(2) The Court of First Instance may, on application by a member or creditor of the company whose interests have been, are or would be affected by the conduct or by the refusal or failure, do any or all of the following –

- (a) grant an injunction, on the terms that the Court thinks fit –
  - (i) in the case of section 14.8(1)(a) or (2), restraining the person from engaging in the conduct or requiring the person to do any act or thing; or
  - (ii) in the case of section 14.8(1)(b) or (3), requiring the person to do any act or thing;
- (b) order the person to pay damages to any other person;
- (c) declare any contract to be void or voidable to the extent specified in the order.

(3) The Court of First Instance may grant an injunction under subsection (1)(a)(i) or (2)(a)(i) restraining a person from engaging in a conduct –

- (a) whether or not it appears to the Court that the person intends to engage again, or to continue to engage, in the conduct;
- (b) whether or not the person has previously engaged in the conduct; and
- (c) whether or not there is an imminent danger of substantial damage to any other person if the person engages in the conduct.

(4) The Court of First Instance may grant an injunction under subsection (1)(a) or (2)(a) requiring a person to do an act or thing –

- (a) whether or not it appears to the Court that the person intends to refuse or fail again, or to continue to refuse or fail, to do the act or thing;
- (b) whether or not the person has previously refused or failed to do the act or thing; and
- (c) whether or not there is an imminent danger of substantial damage to any other person if the person refuses or fails to do the act or thing.

(5) To avoid doubt, a person is not entitled to recover, by way of damages under subsection (1)(b) or (2)(b), any loss that solely reflects the loss suffered by the company that only the company is entitled to recover under the common law.

#### **14.10 Provisions supplementary to section 14.9**

(1) The Court of First Instance may grant an interim injunction or interim damages, or both, on the terms and conditions that it thinks fit pending the determination of an application under section 14.9(1) or (2).

(2) The Court of First Instance may discharge or vary an injunction granted under subsection (1) or section 14.9(1) or (2).

#### **14.11 Transitional arrangements**

If, before the commencement of this Division, an application has been made for the purposes of section 350B of the Companies Ordinance (Cap. 32) as in force immediately before that commencement, that section continues to apply in relation to the application as if it had not been repealed.

### **Division 4 – Derivative Action for Remedies for Misconduct against Companies etc.**

#### **14.12 Interpretation**

In this Division –

“misconduct” (不當行為) means fraud, negligence, breach of duty, or default in compliance with any Ordinance or rule of law;

“proceedings” (法律程序) means any proceedings (other than criminal proceedings) within the jurisdiction of the court.

#### **14.13 Member of company or of associated company may bring or intervene in proceedings**

(1) If misconduct is committed against a company, a member of the company or of an associated company of the company may, with the leave of the Court of First Instance granted under section 14.14, bring proceedings in respect of the misconduct before the Court on behalf of the company.

(2) If, because of misconduct committed against the company, a company fails to bring proceedings in respect of any matter, a member of the company or of an associated company of the company may, with the leave of the Court of First Instance granted under section 14.14, bring proceedings in respect of the matter before the court on behalf of the company.

(3) If, because of misconduct committed against the company, a company fails to diligently continue, discontinue or defend proceedings, a member of the company or of an associated company of the company may, with the leave of the Court of First Instance granted under section 14.14, intervene in

the proceedings before the court for the purpose of continuing, discontinuing or defending those proceedings on behalf of the company.

(4) The cause of action in relation to the proceedings under subsection (1) or (2) is vested in the company. Any of those proceedings must be brought in the name of, and the relief (if any) must be sought on behalf of, the company.

(5) The right to continue, discontinue or defend any proceedings intervened in under subsection (3) is vested in, and the relief (if any) must be sought on behalf of, the company.

(6) Subject to section 14.17, this Division does not affect any common law right of a member of a company, or a member of an associated company of a company, to bring proceedings on behalf of the company, or intervene in any proceedings to which the company is a party.

(7) This section does not prevent a member of a company, or of an associated company of a company, from bringing proceedings in respect of the company, or intervening in any proceedings to which the company is a party, on the member's own behalf in respect of any personal right.

#### **14.14 Leave of Court to bring or intervene in proceedings**

(1) On application by a member of a company or of an associated company of a company, the Court of First Instance may grant leave for the purposes of section 14.13(1), (2) or (3) if it is satisfied that –

(a) on the face of the application, it appears to be in the company's interests that leave be granted to the member;

(b) in the case of –

(i) an application for leave to bring proceedings under section 14.13(1) or (2), there is a serious question to be tried and the company has not itself brought the proceedings; or

(ii) an application for leave to intervene in proceedings under section 14.13(3), the company

has not diligently continued, discontinued or defended the proceedings; and

- (c) except where leave is granted by the Court under subsection (5), the member has served a written notice on the company in compliance with subsections (3) and (4).

(2) The Court of First Instance may refuse to grant leave if it is satisfied that –

- (a) in the case of an application for leave to bring proceedings under section 14.13(1) or (2), the member has, in the exercise of any common law right, brought proceedings on behalf of the company in respect of the same cause or matter; or
- (b) in the case of an application for leave to intervene in proceedings under section 14.13(3), the member has, in the exercise of any common law right, intervened in the proceedings in question to which the company is a party.

(3) The written notice must be served on the company, at least 14 days before the member applies for leave in respect of the company, by leaving the notice at, or by sending the notice by post to –

- (a) in the case of a company as defined by section 1.2(1), its registered office; or
- (b) in the case of a non-Hong Kong company, the address of an authorized representative of the company shown in the Register.

(4) The written notice must state –

- (a) the member's intention to apply for leave for the purposes of section 14.13(1), (2) or (3) in respect of the company; and
- (b) the reasons for that intention.

(5) The Court of First Instance may grant leave to dispense with the service of a written notice for the purposes of subsection (1)(c).

**14.15 Approval or ratification of conduct does not bar derivative action**

(1) If a company's members approve or ratify any conduct, the approval or ratification –

- (a) does not prevent a member of the company, or of an associated company of the company, from –
  - (i) bringing proceedings under section 14.13(1) or (2);
  - (ii) intervening in proceedings under section 14.13(3);  
or
  - (iii) applying for leave for the purposes of section 14.13(1), (2) or (3);
- (b) is not a ground for the Court of First Instance to refuse to grant leave for the purposes of section 14.13(1), (2) or (3);  
or
- (c) is not a ground for the court to determine the proceedings brought or intervened in by the member in favour of the defendant.

(2) Despite subsection (1), the court may, after having regard to the matters specified in subsection (3), take the approval or ratification into account in deciding what judgment or order to make in respect of –

- (a) any proceedings brought or intervened in under section 14.13(1), (2) or (3); or
- (b) an application for leave for the purposes of section 14.13(1), (2) or (3).

(3) The matters are –

- (a) whether the members were acting for proper purposes, having regard to the company's interests, when they approved or ratified the conduct;
- (b) to what extent those members were connected with the conduct, when they approved or ratified the conduct; and
- (c) how well-informed about the conduct those members were, when they decided whether or not to approve or ratify the conduct.

**14.16 No discontinuance or settlement of proceedings without leave of Court**

If proceedings are brought or intervened in under section 14.13(1), (2) or (3), the proceedings must not be discontinued or settled without the leave of the Court of First Instance.

**14.17 Court may dismiss derivative proceedings brought by member under common law etc.**

- (1) This section applies if –
  - (a) after the Court of First Instance grants leave to a member of a company, or of an associated company of a company, for the purposes of section 14.13(1) or (2), the member, in the exercise of any common law right, brings proceedings on behalf of the company in respect of the same cause or matter; or
  - (b) after the Court of First Instance grants leave to a member of a company, or of an associated company of a company, for the purposes of section 14.13(3), the member, in the exercise of any common law right, intervenes in the proceedings in question to which the company is a party.
- (2) The Court of First Instance may –

- (a) order to be amended any pleading or the indorsement of any writ in the proceedings brought under the common law, or in the intervention under the common law;
- (b) order to be struck out such pleading or that indorsement, or anything in such pleading or that indorsement; and
- (c) order the proceedings brought under the common law, or the intervention under the common law, to be stayed or dismissed or judgment to be entered accordingly.

(3) This section is in addition to, and does not derogate from, any power of the Court of First Instance given by the law.

#### **14.18 Court's general powers to order and direct**

(1) The Court of First Instance may make any order, and give any direction, that it thinks fit in respect of –

- (a) any proceedings brought or intervened in under section 14.13(1), (2) or (3);
- (b) an application for leave for the purposes of section 14.13(1), (2) or (3);
- (c) a refusal to grant such leave; or
- (d) an order under section 14.17(2).

(2) Without limiting subsection (1), the Court of First Instance may do any or all of the following under paragraph (a) or (b) of that subsection –

- (a) make an interim order pending the determination of the proceedings or application;
- (b) give a direction concerning the conduct of the proceedings or application;
- (c) make an order directing the company, or an officer of the company –

- (i) to provide, or not to provide, any information or assistance that the Court thinks fit for the purpose of the proceedings or application; or
  - (ii) to do, or not to do, any other act;
- (d) make an order appointing an independent person to investigate and report to the Court on –
  - (i) the company’s financial position;
  - (ii) the facts or circumstances that gave rise to the proceedings or application; or
  - (iii) the costs incurred by the parties to the proceedings or application, and by the member who brought or intervened in the proceedings or who made the application.

(3) If the Court of First Instance appoints an independent person under subsection (2)(d), it may –

- (a) order any or all of the following persons to be liable for any expenses arising out of the investigation –
  - (i) the company;
  - (ii) the parties to the proceedings or application;
  - (iii) the member who brought or intervened in the proceedings or who made the application;
- (b) review, vary or revoke an order made under paragraph (a); and
- (c) make any other order that it thinks fit for the purposes of that subsection.

(4) The Court of First Instance may, in relation to one or more persons who are liable for any expenses under an order made or varied under subsection (3), determine the nature and extent of the liability of the person or each of the persons.

#### **14.19 Court may order costs**

(1) The Court of First Instance may make any order that it thinks fit about the costs –

- (a) incurred or to be incurred in relation to –
  - (i) any proceedings brought or intervened in, or to be brought or intervened in, under section 14.13(1), (2) or (3); or
  - (ii) an application for leave for the purposes of section 14.13(1), (2) or (3); and
- (b) incurred or to be incurred by the member, the company, or any other parties to the proceedings or application.

(2) An order may require the company to indemnify, out of its assets, the member against the costs incurred or to be incurred by that member in bringing or intervening in the proceedings or in making the application.

(3) The Court of First Instance may only make an order about costs (including the requirement as to indemnification) under this section in favour of the member if it is satisfied that the member was acting in good faith in, and had reasonable grounds for, bringing or intervening in the proceedings or making the application.

#### **14.20 Transitional arrangements**

If, before the commencement of this Division, an application has been made for leave to bring or intervene in proceedings under section 168BC of the Companies Ordinance (Cap. 32) as in force immediately before that commencement, Part IVAA of the Companies Ordinance (Cap. 32) as in force immediately before that commencement continues to apply in relation to the application and, where leave is granted to bring or intervene in proceedings, to the proceedings so brought or intervened in, as if that Part had not been repealed.

## **Division 5 – Members’ Inspection of Company’s Records**

### **14.21 Interpretation**

In this Division –

“record” (紀錄) includes books and paper.

### **14.22 Court may order inspection of records**

(1) On application by a required number of a company’s members, the Court of First Instance may make an order –

- (a) authorizing a person who is the applicant or one of the applicants to inspect any records of the company; or
- (b) authorizing a person who is not the applicant or one of the applicants to inspect any records of the company on behalf of the applicant or applicants.

(2) The Court of First Instance may make an order authorizing a person to inspect records if it is satisfied that –

- (a) the application is made in good faith; and
- (b) the inspection is for a proper purpose.

(3) If the Court of First Instance makes an order authorizing a person to inspect records, the person may, unless the Court otherwise orders, make copies of the records.

(4) If the Court of First Instance makes an order authorizing a person to inspect records, it may make any other order that it thinks fit, including –

- (a) an order requiring the company, or an officer of the company, to produce any records to the person;
- (b) an order specifying the records that may be inspected by the person;
- (c) an order requiring the applicant to pay the expenses reasonably incurred by the company in the inspection; and

(d) an order permitting the person to disclose any information or document obtained as a result of the inspection to any other person specified in the order.

(5) A person who complies with an order made under subsection (1) or (4) does not incur any civil liability by reason only of the compliance.

(6) In this section, a reference to a required number of a company's members is a reference to –

(a) the number of members that represents at least 2.5% of the voting rights of all the members having a right to vote at the company's general meetings at the date of application;

(b) the number of members that holds shares in the company on which there has been paid up an aggregate sum of at least \$100,000; or

(c) at least 5 members of the company.

#### **14.23 Preservation of secrecy**

(1) If, on application by one or more members of a company, the Court of First Instance makes an order under section 14.22(1) authorizing a person to inspect records, the person must not, without the company's prior consent in writing, disclose any information or document obtained as a result of the inspection to another person who is not an applicant.

(2) Despite subsection (1), the person may disclose such information or document to another person if the disclosure is –

(a) required with a view to the institution of, or otherwise for the purpose of, any criminal proceedings;

(b) permitted in accordance with an order made under section 14.22(1) or (4); or

(c) permitted in accordance with law or a requirement made under law.

(3) If the Court of First Instance makes an order under section 14.22(1) authorizing a person to inspect records, the person must not, unless the Court otherwise orders, use any information or document obtained as a result of the inspection for any purpose other than the purpose for which the inspection is applied for.

(4) A person who contravenes subsection (1) or (3) commits an offence and is liable –

(a) on conviction on indictment to a fine of \$150,000 and to imprisonment for 2 years; or

(b) on summary conviction to a fine at level 5 and to imprisonment for 6 months.

#### **14.24 Legal professional privilege**

Section 14.22, or an order made under it, does not authorize a person to inspect any records containing information that is subject to legal professional privilege.

#### **14.25 Transitional arrangements**

If, before the commencement of this Division, an application has been made for an order for inspection under section 152FA of the Companies Ordinance (Cap. 32) as in force immediately before that commencement, sections 152FA, 152FB, 152FC, 152FD and 152FE of the Companies Ordinance (Cap. 32) as in force immediately before that commencement continue to apply in relation to the application and, where an order for inspection is made, to the inspection, as if they had not been repealed.