

# Part 3

## Company Formation and Related Matters, and Re-registration of Company

### INTRODUCTION

Part 3 (Company Formation and Related Matters, and Re-registration of Company) of the new Companies Ordinance (Cap. 622) (“new CO”) contains provisions relating to company formation and registration, re-registration of unlimited companies as companies limited by shares and related matters.

### POLICY OBJECTIVES AND MAJOR CHANGES

2. Part 3 contains initiatives that aim at facilitating business operation and modernising the law, namely –

- (a) Abolishing the Memorandum of Association (paragraphs 5 to 11);
- (b) Reforming company re-registration provisions (paragraphs 12 to 14);
- (c) Providing statutory protection for persons dealing with a company (paragraphs 15 to 17);
- (d) Making the keeping and use of a common seal optional and relaxing the requirements for a company to have an official seal for use abroad (paragraphs 18 to 20); and
- (e) Widening the scope of documents an attorney can execute on behalf of a company locally or outside Hong Kong (paragraphs 21 and 22).

3. The details of the major proposals in Part 3 are set out in paragraphs 5 to 22 below.

4. Apart from the above major proposals, Part 3 also provides for a company to appeal to the Administrative Appeals Board instead of to the court against a direction issued by the Registrar of Companies (“the Registrar”) concerning the company’s name (paragraphs 23 and 24 below) as suggested by Members of the Bills Committee on the Companies (Amendment) Bill 2010. In addition, it sets out the types of companies that may be formed. It also incorporates changes introduced through the Companies (Amendment) Ordinance 2010, which provided for an improved company name registration system following the implementation of the new electronic company registration and filing of document services.

#### **Abolishing the Memorandum of Association (“MA”) (Sections 67 to 70, 75 to 85 and 98)**

#### Position under the Companies Ordinance (Cap. 32) (“Cap. 32”)

5. Under Cap. 32, the constitutional documents of a company formed in Hong Kong are the MA and the articles of association (“AA”). The MA used to contain the objects clause of the company. However the objects clause of a company is now less significant given the abolition of the doctrine of ultra vires in relation to corporate capacity in 1997 and all companies now have the capacity and rights of a natural person. As all the information provided on incorporation apart from the objects clause and the authorised

capital<sup>1</sup> (which will be removed following the migration to no par) is contained in the AA and the incorporation form, the need to retain the MA as a separate constitutional document has diminished.

6. Under section 9 of Cap. 32, a company limited by shares may register AA upon incorporation. These may be bespoke AA. Section 11 of Cap. 32 provides that for such a company if no AA are registered, or if registered, in so far as they do not exclude or modify the regulations set out in Table A of the First Schedule to Cap. 32, the said regulations set out in Table A will be the AA of the company. Section 9 of Cap. 32 requires a company limited by guarantee and an unlimited company to register AA on incorporation. Tables C and E of the First Schedule to Cap. 32 provide the statutory forms of AA for these companies.

#### Position and key provisions under the new CO

7. The new CO abolishes the requirement for an MA. **Section 67** states that person(s) may form a company by, amongst other things, delivering to the Registrar for registration an incorporation form in specified form and a copy of the company's AA. **Sections 67 to 70** and **75 to 85** set out the requirements of the incorporation form and the AA respectively. Subject to the amendments in the new CO, these will include all the information currently contained in the MA. These provisions of the new CO provide mandatory AA that a company **must** have.

8. **Section 78** empowers the Financial Secretary ("FS") to prescribe different model AA for different types of companies. These model AA replace Table A and the other tables in the First Schedule to Cap. 32 for companies incorporated after the commencement of the new CO, and will be in addition to the mandatory AA that a company must have. **Section 79** of the new CO provides that a company may adopt as its articles all or any of the provisions of the model AA prescribed for the type of company to which it belongs and **section 80** of the new CO provides that the appropriate model AA will apply in so far as the articles of a company do not exclude or modify the model AA. Therefore, if a company does not register any additional articles upon incorporation, the model AA prescribed for that type of company will apply. The Companies (Model Articles) Notice (Cap. 622H) prescribes model AA for public companies limited by shares, private companies limited by shares and companies limited by guarantee.

9. As a result of the migration to no par, the authorised share capital requirement will be removed but **section 85(2)** provides that a company having a share capital **may** state in its AA the maximum number of shares that it may issue.

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<sup>1</sup> Authorised capital is the maximum amount, usually specified in monetary terms, that a company is permitted by its constitutional document to raise by issuing shares. Shares can but need not be issued up to the authorised level.

10. **Sections 88 and 96** require companies to notify the Registrar of any alterations to the AA, including alterations by an order of the court. **Section 89** allows a company to alter its objects set out in its AA and **section 91(1)** gives members of private companies the right to apply to the court in certain circumstances to object to the resolutions for altering the provisions of the company's AA with respect to its objects. **Section 90** provides for the alteration of Cap. 32 section 25A type conditions in an existing private company's AA and **section 91(3)** preserves the right of members of an existing private company to object to the resolutions for altering such conditions.

11. **Section 98** provides that conditions (i.e. provisions) of the MA of an existing company (i.e. a company formed and registered under Cap. 32 or a former Ordinance), such as objects clause (if any) and members' liability, will be deemed to be regarded as provisions of the company's AA. **Section 98(4)** provides however that any condition contained in the MA of an existing company stating the authorised share capital of the company or dividing the share capital of the company into shares of a fixed amount is regarded as deleted. This is again a result of the migration to no-par.

## Reforming company re-registration provisions (Sections 94 and 95, 130 to 132)

### Position under Cap. 32

12. The provisions concerning re-registration of unlimited companies as limited companies are set out in section 19 of Cap. 32, and the provisions on private companies changing to public companies are set out in section 30 of Cap. 32. The provisions are outdated and unnecessarily detailed. For example, the requirement to file a prospectus or a statement in lieu of prospectus (i.e. the Second Schedule to Cap. 32) under section 30 of Cap. 32 is unduly onerous and serves no useful purpose<sup>2</sup>.

### Position and key provisions under the new CO

13. Part 3 of the new CO simplifies the provisions under Cap. 32. **Section 94** provides for alteration of the AA which changes the status of a private company. The company must deliver to the Registrar within 15 days after the date on which the alteration takes effect a copy of the company's annual financial statement prepared for the financial year immediately preceding the financial year in which the alteration of the AA is made. The requirement to file a statement in lieu of a prospectus has been removed. **Section 95** further provides for alteration of the AA which changes the status of a public company to that of a private company.

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<sup>2</sup> It serves no useful purpose for companies merely re-registering as public companies without going forward to raise funds. In any event, prospectuses would be required in the case of public companies going to raise funds.

14. **Section 130** provides for the matters in section 19(1) of Cap. 32 with the modification that an unlimited company may only re-register as a company limited by shares under the new CO. There must be a statement on the share capital structure, which after re-registration must conform to the requirements in the new CO. **Section 131** deals with how the application for re-registration should be made, and **section 132** provides for a fresh certificate of incorporation to be issued by the Registrar to the company after the re-registration.

### Providing statutory protection for persons dealing with a company (Sections 116 to 119)

#### Position under Cap. 32

15. There are no such provisions under Cap. 32.

#### Position and key provisions under the new CO

16. **Section 116** provides that a company's exercise of powers will be limited by its AA after the elimination of the MA. To supplement the provision, we have made reference to sections 40 to 42 of the United Kingdom Companies Act 2006 ("UKCA 2006") and added **sections 117 to 119** to provide statutory protection for persons dealing with a company in addition to the common law indoor management rule<sup>3</sup>. **Section 117** provides that in favour of a person dealing with a company in good faith, the power of the directors to bind the company will be deemed to be free of any limitation under the AA, any resolutions of the company or any agreement between the members of the company.

17. **Sections 118 and 119** provide that the protection afforded to a person by **section 117** will not apply where the party to a transaction with a company is an "insider" (for example, a director of the company or of a holding company of the company; or an entity connected with such a director); or where the company in question is an exempted company<sup>4</sup>, unless the person is unaware, at the time that the act is done, that the company is an exempted company or unless the exempted company has received full consideration in respect of the act done, and the person is unaware that the act in question is not permitted by any relevant document of the exempted company or is beyond the powers of the directors.

### Making the keeping and use of a common seal optional and relaxing the requirements for a company to have an official seal for use abroad (Sections 124, 125 and 127)

#### Position under Cap. 32

18. Section 93(1)(b) of Cap. 32 stipulates that every company shall have a common seal with the company name engraved in legible characters. Further, for a company to have an official seal for use outside Hong Kong, there must be authorisation by the AA and the company must have objects which require or comprise the transaction of business outside Hong Kong.

<sup>3</sup> Also known as the "rule in *Turquand's case*", i.e. the rule that a third party dealing in good faith with a company is not bound to inquire whether acts of internal management have been regular and is entitled to presume that acts within the company's constitution and powers have been properly and duly performed, see *Royal British Bank v Turquand* (1856) 119 ER 886.

<sup>4</sup> An exempted company refers to a company permitted to be registered by a name without "Limited" as the last word of the name, see section 103 of the new CO, and that is exempt from tax under section 88 of the Inland Revenue Ordinance (Cap. 112). It is essentially the same as a "section 21 company" under Cap. 32.

### Position and key provisions under the new CO

19. To facilitate business, it is necessary to simplify the mode of execution of documents by making the keeping and the use of a common seal optional. **Section 124** states that a company may have a common seal. This gives flexibility to companies and does not prejudice those companies which may still wish to keep and use their common seals. In connection with the change, **section 127** sets out the requirements for execution of documents by a company. In particular, **section 127(3)** allows a company to execute a document (in the case of a company with only one director) by having the document signed by the director or (in the case of a company having two or more directors) by two authorised signatories. **Section 127(5)** also provides that a document signed in accordance with **section 127(3)** and expressed to be executed by the company has effect as if the document had been executed under the company's common seal.

20. **Section 125** states that a company may have an official seal for use outside Hong Kong, removing the current restrictive requirements.

### **Widening the scope of documents an attorney can execute on behalf of a company locally or outside Hong Kong (Section 129)**

#### Position under Cap. 32

21. Under Cap. 32, an attorney can only bind a company in respect of deeds executed by him on its behalf outside Hong Kong. This is unduly restrictive taking into account the increasing volume of local and overseas business activities.

### Position and key provisions under the new CO

22. **Section 129** widens the scope by stating that a company may authorise any person as its attorney to execute a deed or any other document on its behalf in Hong Kong or elsewhere.

### **Allowing a company to appeal to the Administrative Appeals Board instead of to the court (Section 109)**

#### Position under Cap. 32

23. Under Cap. 32, where the Registrar is satisfied that the name of a company gives so misleading an indication of the nature of its activities as to be likely to do harm to the public, or that the name constitutes a criminal offence, or that it is offensive or otherwise contrary to the public interest, the Registrar may direct the company to change its name under section 22A of Cap. 32. The company may apply to the court to set the direction aside.

### Position and key provisions under the new CO

24. At the meeting of the Bills Committee on the Companies (Amendment) Bill 2010, Members suggested that a company should be allowed to appeal to the Administrative Appeals Board, instead of to the court, against a change-of-name direction / notice issued by the Registrar in view of the cost and time involved in court proceedings. The Administration agrees with the suggestion. For local companies, the relevant changes have been incorporated in **section 109**.

## ACTIONS TO BE TAKEN BY STAKEHOLDERS

25. With the deeming provisions set out in the new CO for abolition of the MA, there is no need for companies to do anything in this respect. However, companies may wish to take the opportunity at this time review their current constitutional documents to take advantage of some of the new initiatives set out in the new CO, for example the new provisions making the company seal optional, and to ensure that the provisions of their AA comply with the provisions of the new CO.

26. There are changes in the law as a result of the new CO which may impact upon the provisions of a company's AA. A list of provisions in AA which will be void as a result of the new CO is available at the Companies Registry's website at [www.cr.gov.hk](http://www.cr.gov.hk) under the "New Companies Ordinance" section. If in doubt about any provisions companies should seek their own legal advice.

## TRANSITIONAL AND SAVING ARRANGEMENTS

27. There are no transitional arrangements for abolition of the MA and the deeming provisions as set out in section 98 of the new CO have been explained in paragraph 11 above. This will affect all existing companies as at the date of commencement of the new CO. For other changes made under this Part, the general transitional provisions are that for actions commenced under Cap. 32 and in progress when the new CO commences, Cap. 32 provisions will continue to apply. For actions commenced on or after the commencement date of the new CO, the new CO provisions will apply. For the detailed transitional provisions please refer to **sections 3 to 12 of Schedule 11** to the new CO.