

New Companies Ordinance
Briefing Notes on Part 12
Company Administration and Procedure

INTRODUCTION

Part 12 (Company Administration and Procedure) of the new Companies Ordinance (“new CO”) governs resolutions and meetings, keeping of registers, company records, registered offices, publication of information relating to companies and annual returns.

POLICY OBJECTIVES AND MAJOR CHANGES

2. Part 12 contains initiatives that aim at enhancing corporate governance, facilitating business and modernising the law. The initiatives that aim at enhancing corporate governance include –

- (a) Introducing a comprehensive set of rules for proposing and passing a written resolution (paragraphs 5 to 8 below);
- (b) Requiring a company to bear the expenses of circulating members’ statements relating to business of, and proposed resolutions for, Annual General Meetings (“AGMs”) (paragraphs 9 to 12); and
- (c) Reducing the threshold requirement for members to demand a poll from 10% to 5% of the total voting rights (paragraphs 13 to 14).

3. The initiatives that aim at facilitating business include –

- (a) Permitting a general meeting to be held at more than one location by using technology that enables members apart to listen, speak and vote at the meeting (paragraphs 15 to 16);
- (b) Allowing companies to dispense with AGMs by unanimous shareholders’ consent (paragraphs 17 to 20); and

- (c) Updating the provisions relating to keeping and inspection of company records (paragraphs 23 to 32).
4. The initiatives that aim at modernising the law include –
- (a) Clarifying the rights and obligations of proxies and enhancing the right to appoint proxies (paragraphs 21 to 22);
 - (b) Requiring public companies or companies limited by guarantee to file annual returns in respect of every financial year and requiring the annual return of a listed company to include particulars relating to members who held 5% or more of the issued shares (paragraphs 33 to 36); and
 - (c) Empowering the Financial Secretary (“FS”) to make regulations to require a company to display its name and related information in certain locations and to state prescribed information in documents or communications (paragraphs 37 to 38).

Introducing a comprehensive set of rules for proposing and passing a written resolution (Sections 548 to 561)

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

5. Section 116B of Cap. 32 provides that anything which may be done by a company by resolution in a general meeting may be done, without a meeting and without any previous notice, by a resolution signed by all members of a company. There is widespread use of such written resolutions, especially by small and medium-sized enterprises, for their decision-making process but there are no established statutory rules for proposing and passing a written resolution.

Position under the new CO

6. The new CO provides the procedures for proposing, passing and recording written resolutions. The new procedures facilitate the use of written resolutions for decision-making, which is more expeditious and less costly than passing a resolution in a general meeting.

Key provisions in the new CO

7. **Subdivision 2 of Division 1** of Part 12 provides the procedures for proposing, passing and recording written resolutions. **Section 549** provides that the directors or a member of a company may propose a resolution as a written resolution. A member of the company who proposes the resolution may request the company to circulate with the resolution a statement of not more than 1 000 words on the subject matter of the resolution (**section 551**). Once a written resolution is proposed, the company has a duty to circulate the resolution to every member for agreement if it has received requests from members representing not less than 5% of the total voting rights or a lower percentage specified in the company's articles (**section 552**). The circulation may be effected by sending the copies in hard copy form or electronic form or by making the copies available on a website (**section 553**). The period for agreeing to the proposed written resolution is 28 days or such period as specified in the company's articles (**section 558**). Members may signify their agreement to a proposed written resolution and send it back to the company either in hard copy form or electronic form (**section 556**). If a resolution is passed as a written resolution, the company must send a notice of that fact to every member and the auditor of the company within 15 days (**section 559**).

8. The new procedures will not replace the common law doctrine of unanimous consent or so-called *Duomatic* principle that, if all the members of a company actually agree on a particular decision which can be made at a general meeting, the decision is binding and effective without a meeting (**section 547(3)** which restates the law under section 116BB(2) of Cap. 32). A company's articles may also set out alternative procedures for passing a resolution without a meeting, provided that the resolution has been agreed by the members unanimously (**section 561**).

Requiring a company to bear the expenses of circulating members' statements relating to business of, and proposed resolutions for AGMs (Sections 580 to 582, 615 and 616)

Position under Cap. 32

9. Section 115A of Cap. 32 enables members representing at least 2.5% of the total voting rights of a company or 50 or more members who have paid

up an average sum of not less than \$2,000 per member, to request the company to circulate a proposed resolution for the next AGM or a statement of not more than 1 000 words relating to any proposed resolution or business to be dealt with at any general meeting. A company is not bound to circulate a statement where the court is satisfied that the right is being abused to secure needless publicity for defamatory matter. Under section 115A(1), members making the requisition need to bear the expenses unless the company resolves otherwise. This may hinder minority shareholders from making such requisition.

Position under the new CO

10. To enhance the right of minority shareholders, the expenses of circulating members' proposed resolutions for AGMs, and members' statements relating to the proposed resolution or other business to be dealt with at AGMs will be borne by the company, if such documents are received in time for sending with the notice of the meeting. The criteria for not requiring the circulation of a members' statement is changed to abuse or use to secure needless publicity for defamatory matter.

Key provisions in the new CO

11. **Section 580** provides members a power to request circulation of statements concerning the business to be dealt with at general meetings along the lines of section 115A of Cap. 32. **Section 581** imposes a duty on the company to circulate members' statements in the same manner as the notice of meeting. Under **section 582**, if the meeting concerned is an AGM and a members' statement is received in time for sending with the notice of the meeting, the expenses will be borne by the company. Otherwise, the expenses will be paid by the members concerned. **Section 583** provides that a company is not required to circulate a statement if the court is satisfied that the rights given by **section 580** are being abused or used to secure needless publicity for defamatory matter.

12. **Sections 615** and **616** contain similar provisions in respect of members' proposed resolutions for AGMs. A circulation request must be received by the company not later than 6 weeks before the AGM, or if later, before the time at which notice of meeting is given. The company is obliged to circulate the resolution at the company's expense, which is a new requirement.

Reducing the threshold requirement for members to demand a poll from 10% to 5% of the total voting rights (Section 591)

Position under Cap. 32

13. Under section 114D of Cap. 32, members have the right to demand a poll and such a right cannot be excluded by the articles. It may be exercised on any question, except the election of the chairman of the meeting or the adjournment of the meeting, if the demand is made by –

- (a) not less than 5 members having the right to vote at the meeting;
- (b) members representing not less than 10% of the total voting rights; or
- (c) members holding not less than 10% of the total paid up share capital of the company carrying the right to vote at the meeting.

A proxy has the same right as the member for whom he is proxy to join in demanding a poll.

Key provision in the new CO

14. In line with the provision in section 113 of Cap. 32 that shareholders holding not less than 5% of the voting rights are able to requisition an extraordinary general meeting, the threshold requirement for demanding a poll is lowered from 10% to 5% of the total voting rights under **section 591**.

Permitting a general meeting to be held at more than one location by using technology that enables members apart to listen, speak and vote at the meeting (Section 584)

Position under Cap. 32

15. With the development of electronic communications, it is not uncommon for a company to hold its general meeting at two or more venues with advanced technology. However, Cap. 32 does not have express provision permitting a general meeting to be held at two or more places.

Key provision in the new CO

16. To keep up with technological development and subject to any provision of the company's articles, **section 584** permits a company to hold a general meeting at two or more places using any technology that enables the members of the company who are not together at the same place to listen, speak and vote at the meeting. A company may set out rules and procedures for holding a dispersed meeting in its articles.

Allowing companies to dispense with AGMs by unanimous shareholders' consent (Sections 612 to 614)

Position under Cap. 32

17. Every company is required to hold AGMs under section 111 of Cap. 32. A company may however dispense with holding AGMs if everything that is required or intended to be done at the meeting is done by written resolutions in accordance with section 116B of Cap. 32, and a copy of each of the documents (including any accounts or records) which under Cap. 32 would be required to be laid before the meeting is provided to each member of the company (section 111(6)). For many private companies, the obligation to hold AGMs could be redundant and potentially burdensome.

Position under the new CO

18. To simplify the decision-making process, a company may dispense with the requirement for holding of AGMs and a single member company is not required to hold an AGM at all.

Key provisions in the new CO

19. **Section 613** allows a company to dispense with the requirement for holding of AGMs by passing a written resolution or a resolution at a general meeting by all members. Under **Section 622**, the company is required to deliver a copy of the resolution to the Registrar of Companies ("the Registrar") for registration within 15 days after it is passed. After passing the resolution, the company will not be required to hold any AGMs for the financial year or

for subsequent financial years to which the resolution relates. The financial statements and reports originally required to be laid before an AGM will still need to be sent to the members under **section 430(3)** of Part 9. Any member may request the company to convene an AGM for a particular year under **section 613(5)**. The company may also revoke the resolution by passing an ordinary resolution to that effect under **section 614**. For a single member company, **section 612(2)(a)** provides that such a company is not required to hold an AGM at all.

20. In practice, it is unlikely for a public or a guarantee company to dispense with holding an AGM by unanimous members' consent but the possibility could not be ruled out. The written resolution procedure under section 111(6) of Cap. 32 is therefore retained in **section 612(1)** in case a company might wish to dispense with an AGM on a specific occasion by a written resolution. This provision also provides flexibility for private companies which do not wish to dispense with AGMs under **section 613**.

Clarifying the rights and obligations of proxies and enhancing the right to appoint proxies (Sections 588, 591, 596, 602 to 605)

Position under Cap. 32

21. The system of proxy voting helps ensure that the views of members who are unable to attend a meeting in person will still be voiced and considered. There are a number of limitations in Cap. 32 concerning proxies –

- (a) unless the articles otherwise provide, a proxy is not entitled to vote on a show of hands (section 114C(1A)(a));
- (b) there is no statutory provision expressly providing that a proxy may be elected as a chairman of a meeting;
- (c) there is no requirement for a proxy to vote on a poll according to the terms of appointment;
- (d) there is no express provision for the revocation of the appointment of a proxy if the appointor attends and votes at the meeting;

- (e) members of a company limited by guarantee may have a right to appoint a proxy only if it is provided in the company's articles (section 114C(1A)). It is noted that some guarantee companies may wish to exclude non-members from attending their meetings and from being appointed as proxies; and
- (f) unless the articles otherwise provide, the number of proxies that may be appointed by a shareholder to attend on the same occasion is limited to two (section 114C(2)). Such a default cap on the maximum number of proxies that a shareholder may appoint on the same occasion is considered to be unnecessarily restrictive.

Key provisions in the new CO

22. The rights and obligations of a proxy are clarified in the following manner –

- (a) **Section 596** provides that a member of a company is entitled to appoint a proxy and **section 596(2)** provides that a company limited by guarantee may confine proxies to members of the company in its articles;
- (b) **Section 596(3)** allows multiple proxies in the case of a company having a share capital. Multiple proxies can only vote on a poll. They are not entitled to vote on a show of hands because it would go against the basis upon which the show of hands mechanism was premised, thus distorting the result (**section 588(2)**);
- (c) **Section 596(1)** provides that a proxy may exercise all or any of the member's rights to attend and to speak and vote at a general meeting (i.e. including voting on a show of hands, multiple proxies excepted) and **section 591(3)** authorises a proxy to demand a poll;
- (d) **Section 602** expressly provides that a proxy may be elected as the chairperson of the general meeting, subject to any provisions of the company's articles;

- (e) Where a proxy put forward by a company is appointed by a member to be his proxy, **section 603(2)** requires the proxy to vote in the way specified in the appointment of the proxy. This is to overcome the possibility of a shareholder being disenfranchised by a person, who is put forward by the board as a proxy, deliberately failing to vote in accordance with the shareholder's instructions; and
- (f) **Section 605(1)** provides that the appointment of a proxy will be revoked if the appointor attends in person and votes at the meeting.

Updating the provisions relating to keeping and inspection of company records

Position under Cap. 32

23. There are rights to inspect certain records which are required to be kept by companies under Cap. 32. Copies of the records may also be provided in some cases. Such records comprise registers, minutes, copies of resolutions and other documents required to be kept by a company and include –

- Register of debenture holders (section 75)
- Register of charges (section 90)
- Register and index of members (sections 95, 96, 98, schedule 14) and branch registers (sections 103, 104)
- Register of quasi-loans and credit transactions (section 161BB)
- Written resolutions of members, records of minutes of proceedings of meetings of members and decisions of a sole member (sections 116B, 116BC, 119, 119A, 120)
- Books of accounts (section 121)
- Management contracts (section 162A)
- Register of directors and secretaries (sections 158, 158A).

24. Section 348C of Cap. 32 applies generally to the form in which such records are required to be kept by a company. Specifically, where records are kept by the company otherwise than in legible form, inspection of a reproduction of such records in legible form is required (section 348C(3)). The arrangement for inspection and provision of copies of individual types of records, such as the time allowed for inspection, the number of days within

which a copy of the requested records should be sent, and the maximum fees payable, vary. These requirements are prescribed individually for each type of record in the respective sections or schedule.

25. Under section 103 of Cap. 32, a company must apply to the Chief Executive for a licence for keeping an overseas branch register of members and pay an annual licence fee. However, it is considered that the licence system is out of date and may discourage Hong Kong companies from listing their shares on an overseas stock exchange.

26. As regards the period of time for keeping the records, section 95(1)(c)(ii) of Cap. 32 provides in respect of the register of members that entries relating to a former member of a company may be destroyed after 30 years. Cap. 32 is otherwise silent on the period for keeping other records such as records of resolutions and meetings. The period of 30 years for keeping records of former members is considered too long compared to comparable overseas jurisdictions and taking into account that accounting records are only required to be kept for 7 years under section 121 of Cap. 32 (restated in section 377(2) of the new CO).

Position under the new CO

27. While the main provisions concerning the rights to inspect and obtain copies of records are retained in the new CO, the detailed provisions concerning the arrangement for inspection and provision of copies and related matters will be provided for by subsidiary legislation. The relocation of provisions consolidates the arrangements for different types of company records, and allows a consistent and comprehensive approach covering different types of company records, thus facilitating compliance by companies and timely updating of the detailed arrangements in future to meet changing needs.

28. The new CO contains provisions that apply to all “*company records*” which is defined in **section 654** to mean any register, index, agreement, memorandum, minutes or other document required by the new CO to be kept by a company, but does not include accounting records (which are governed by sections 373 to 378). To cater for the relocation, **section 657** provides that the detailed requirements concerning inspection and provision of copies of company records may be provided by regulations.

29. The licence system and fee for keeping an overseas branch register is abolished and replaced by a notification system which requires companies that keep a branch register to notify the Registrar of the address where the branch register is kept and of any change or discontinuation of the register.

30. The 30-year period provided in section 95 of Cap. 32 for keeping entries of former members in the register of members is reduced to 10 years in the new CO. Incidental to that change, the 30-year time limit prescribed in section 102(2) of Cap. 32 for adducing evidence to challenge the accuracy of an entry in the register of members is removed. Removal of the 30-year time limit has the effect of removing any limitation on admissibility of evidence for the purpose of rectification of the register by the court. As regards other records e.g. records of resolutions and meetings of members, the new CO provides a minimum period of 10 years for keeping such records.

Key provisions in the new CO

31. **Sections 618, 619 and 620** provide that a company must keep its records of resolutions and meetings of members, etc. available for inspection at the company's registered office or a prescribed place. The prescribed place, manner of inspection and the fees payable in respect of the records will be set out in the regulations that the FS is empowered to make under **section 657** (i.e. Company Records (Inspection and Provision of Copies) Regulation). Similar requirements apply to other company records, for example, the company's register of members (**sections 627, 628 and 631**), the register of directors (**sections 641 and 642**) and the register of company secretaries (**sections 648 and 649**) which are required to be kept separately under the new CO. **Section 655(4)** allows inspection of company records kept in electronic form to be inspected by electronic means if so requested by the person inspecting the records.

32. **Sections 636 to 639** provide for new requirements in relation to the keeping of a branch register of members outside Hong Kong. The requirement for a company to keep records of resolutions and meetings of members, etc. and entries relating to former members in the register of members for 10 years is provided in **sections 618 and 627** respectively. **Section 635** provides that the register of members is prima facie evidence of the matters therein. No time limit for adducing evidence to challenge the accuracy of an entry in the register is specified in the new CO.

Requiring public companies or companies limited by guarantee to file annual returns in respect of every financial year and requiring the annual return of a listed company to include particulars relating to members who held 5% or more of the issued shares (Sections 662, 664 and section 2 of Schedule 6 to the new CO)

Position under Cap. 32

33. Section 122 of Cap. 32 requires accounts to be made out every year and to be laid before the company at its AGM, and those accounts must be made up to a date falling not more than a specified number of months before the date of the AGM. Section 111 of Cap. 32 requires every company to hold an AGM in each year and not more than 15 months is to elapse between the date of one AGM and the next. Section 109(1) of Cap. 32 provides that, except where the company is a private company having a share capital, the annual return is required to be filed within 42 days after the AGM for the year. Section 109(3) of Cap. 32 further provides that, except where the company is a private company, the annual return shall include certified copies of the company's balance sheet and reports laid before the company in general meeting to which the return relates.

Position under the new CO

34. With regard to the annual return of a public company or company limited by guarantee, the requirement to file the annual return within 42 days of the AGM under section 109(1) of Cap. 32 has been changed as an AGM may be dispensed with under **section 612(2)** of the new CO. The annual return is no longer required to be filed in each calendar year. There is no change to the requirement to file annual returns of private companies under section 109(1A) of Cap. 32 (section 662(1), (2) of new CO), which requires the annual return of a private company to be completed within 42 days after the anniversary of the date of its incorporation and filed forthwith.

Key provisions in the new CO

35. **Section 610** sets out the requirements for companies to hold AGMs. In the case of a public company or a company limited by guarantee, **section 662(3) and (4)** provides that the annual return is to be filed within 42 days after the company's return date i.e. 6 months (for public companies) or 9 months (for

companies limited by guarantee) after the end of the company's accounting reference period. Sections 368 to 370 in Part 9 of the new CO provide for the determination of the accounting reference period of a company.

36. **Section 664(3)** provides that an annual return must contain the information specified in Schedule 6. **Section 2 of Schedule 6** provides that in the case of a listed company, the particulars relating to members and share capital required in the annual return are limited to those relating to members who held 5% or more of the issued shares in any class of the company's shares as at the date of the return.

Empowering the FS to make regulations to require a company to display its name and related information in certain locations and to state prescribed information in documents or communications (Section 659)

Position under Cap. 32

37. Under section 93(1) of Cap. 32, every company must display its name on the outside of every office or place in which its business is carried on and mention its name in the documents specified in that section (e.g. business letters, notices, official publications, and contracts).

Position under the new CO

38. There are changes to the rules on publication of company names. As the rules involve technical details and may change with developments in technology, they will be stated in the subsidiary legislation to facilitate future amendments. **Section 659** empowers the FS to make the relevant regulations which are proposed to be contained in the Companies (Disclosure of Company Name and Liability Status) Regulation.

TRANSITIONAL AND SAVING ARRANGEMENTS

39. Transitional and saving arrangements are set out in **sections 98 to 121 of Schedule 11** to the new CO and are basically as follows -

- **Written resolution**

Sections 116B (except subsections (7), (8), (9) and (10)), 116BA and 116BB of Cap. 32 continue to apply in relation to resolutions sent or circulated to a member before the commencement of **Subdivision 2 of Division 1 of Part 12**.

- **Members' statements**

In so far as it relates to the circulation of any statement in relation to an AGM, section 115A of Cap. 32 continues to apply in relation to requisitions made to a company under section 115A(1)(b) of Cap. 32 before the commencement of **Subdivision 6 of Division 1 of Part 12**.

- **Voting at meetings**

Sections 114A(1)(e), 114D, 114E and 116(2) of Cap. 32 continue to apply to meetings of which notice was given before the commencement of **Subdivision 8 of Division 1 of Part 12**.

- **Proxies and corporate representatives**

Sections 114C and 115 of Cap. 32 continue to apply to meetings of which notice was given before the commencement of **Subdivision 9 of Division 1 of Part 12**.

- **Annual general meetings**

- (1) The repeal of section 115A of Cap. 32 does not affect its application in relation to a requisition under section 115A(1)(a) of Cap. 32 made to a company before the repeal.
- (2) If a company is required to lay at its AGM an account or a balance sheet in accordance with section 122 of Cap. 32, section 111(1), (5) and (6) of Cap. 32 continue to apply in relation to an AGM at which the account or balance sheet is to be laid.
- (3) In so far as it relates to giving notice of a resolution in relation to an AGM, section 115A of Cap. 32 continues to apply in relation to requisitions made to a company under section 115A(1)(a) of Cap. 32 before the commencement of **sections 615 and 616** of the new CO.

- **Records of resolutions and meetings**

- (1) Sections 116B(7), (8), (9) and (10), 116BC, 119, 119A and 120 of Cap. 32 continue to apply in relation to resolutions passed, meetings held or decisions taken before the commencement of **sections 617 to 621**.
- (2) A company is not required to keep a record or the minutes that have been entered into a book in accordance with section 116B(7), 116BC(3) or 119(1) of Cap. 32 if the record or the minutes have been kept for at least 10 years from the date of the resolution, meeting or decision, as the case may be.

- **Right to inspect records of resolutions and meetings**

Sections 120(1), (3) and (4) and 348C(3) of Cap. 32 continue to apply in relation to –

- (1) a request received by the company before the commencement of **section 620** for inspecting the books containing the minutes of proceedings of any general meeting of the company;
- (2) a request received by the company before the commencement of **section 620** for inspecting the record made in accordance with section 116B(7) of Cap. 32; and
- (3) a request received by the company before the commencement of **section 620** for inspecting the record made in accordance with section 116BC(3) of Cap. 32.

- **Right to obtain copies of records of resolutions and meetings**

Sections 120(2), (3) and (4) and 348C(3) of Cap. 32 continue to apply in relation to –

- (1) a request received by the company before the commencement of **section 620** for a copy of the books containing the minutes of proceedings of any general meeting of the company;
- (2) a request received by the company before the commencement of **section 620** for a copy of the record made in accordance with section 116B(7) of Cap. 32; and

(3) a request received by the company before the commencement of section 620 for a copy of the record made in accordance with section 116BC(3) of Cap. 32.

- **Register of members**

(1) A register of members kept under section 95 of Cap. 32 is to be regarded as a register of members kept for the purposes of **section 627**.

(2) Sections 98(1), (3) and (4) and 348C(3) of Cap. 32 continue to apply in relation to a request received by the company before the commencement of **section 631** for inspecting a register of members or index of members' names.

(3) Sections 98(2), (3) and (4) and 348C(3) of Cap. 32 continue to apply in relation to a request received by the company before the commencement of **section 631** for a copy of a register of members (or any part of it).

(4) Section 99 of Cap. 32 continues to apply in relation to a closure of a register of members if the notice for the closure was given before the commencement of **section 632**.

(5) Section 104 of Cap. 32 continues to apply in relation to a register of members kept under a licence issued under section 103 of Cap. 32.

- **Inspection of register of directors and secretaries**

Sections 158(7), (8) and (9) and 348C(3) of Cap. 32 continue to apply in relation to a request received by the company before the commencement of **sections 642 and 649** for inspecting a register of directors and secretaries.

- **Register of directors**

A register of directors and secretaries kept by a company under section 158(1) of Cap. 32, in so far as it relates to the company's

directors or reserve directors, is to be regarded as a register of directors kept for the purposes of **section 641**.

- **Register of company secretaries**

A register of directors and secretaries kept by a company under section 158(1) of Cap. 32, in so far as it relates to the company secretary or joint company secretaries of the company, is to be regarded as a register of company secretaries kept for the purposes of **section 648**.

- **Annual return**

(1) Except where the company is a private company having a share capital, if the financial year (as defined in section 2(1) of Cap. 32) of the company begins before the commencement of **section 662** and ends on or after that date, sections 107 and 109 of Cap. 32 continue to apply in relation to the company for that financial year.

(2) If the company is a private company having a share capital, sections 107 and 109 of Cap. 32 continue to apply in relation to the company's annual returns made up to a date before the commencement of **section 662**.

Companies Registry
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