

# New Companies Ordinance

## Briefing Notes on Part 20

### Miscellaneous

#### INTRODUCTION

Part 20 (Miscellaneous) of the new Companies Ordinance (Cap. 622) (“new CO”) contains miscellaneous provisions that mainly re-enact provisions in the old Companies Ordinance (Cap. 32) (“the old Ordinance”) that may be classified into the following categories -

- (a) miscellaneous offences, namely the offences for false statements and for improper use of “Limited” or “有限公司” etc., based on sections 349<sup>1</sup> and 350<sup>2</sup> of the old Ordinance respectively;
- (b) miscellaneous provisions relating to investigation or enforcement measures, including provisions mirroring sections 306<sup>3</sup>, 351A<sup>4</sup>, 351B<sup>5</sup> and 352<sup>6</sup> of the old Ordinance, and a new power for the Registrar of Companies (“the Registrar”) to compound specified offences under the new CO;
- (c) miscellaneous provisions relating to misconduct by an officer or auditor of a company derived from section 358<sup>7</sup> of the old Ordinance; and
- (d) other miscellaneous provisions, such as those modelled on sections 49Q(3)(b) and (c)<sup>8</sup>, 354<sup>9</sup>, 355<sup>10</sup>, 357<sup>11</sup>, 359A<sup>12</sup> and 360<sup>13</sup> of the

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<sup>1</sup> Section 349 of the old Ordinance: “*Penalty for false statements*”.

<sup>2</sup> Section 350 of the old Ordinance: “*Penalty for improper use of “Limited”, “Corporation” or “Incorporated”*”.

<sup>3</sup> Section 306 of the old Ordinance: “*Enforcement of duties under Ordinance by court order*”.

<sup>4</sup> Section 351A of the old Ordinance: “*Limitation on commencement of proceedings*”.

<sup>5</sup> Section 351B of the old Ordinance: “*Production and inspection of books where offence suspected*”.

<sup>6</sup> Section 352 of the old Ordinance: “*Application of fines*”.

<sup>7</sup> Section 358 of the old Ordinance: “*Power of court to grant relief in certain cases*”.

<sup>8</sup> Section 49Q of the old Ordinance: “*Power for Chief Executive in Council to modify certain sections*”.

<sup>9</sup> Section 354 of the old Ordinance: “*Saving as to private prosecutors*”.

<sup>10</sup> Section 355 of the old Ordinance: “*Saving for privileged communications*”.

<sup>11</sup> Section 357 of the old Ordinance: “*Costs in actions by certain limited companies*”.

<sup>12</sup> Section 359A of the old Ordinance: “*Power to make regulations*”.

<sup>13</sup> Section 360 of the old Ordinance: “*Power to amend requirements as to accounts, Schedules, tables, forms and fees*”.

old Ordinance, and provisions that deal with paperless holding and transfer of shares and debentures<sup>14</sup>.

## **POLICY OBJECTIVES AND MAJOR CHANGES**

2. The new initiatives under this Part aim at improving the regulatory regime and removing the anomaly relating to security for costs under the old Ordinance, namely:-

- (a) Redefining the scope of the offence for making false statements (paragraphs 4 to 5 below);
- (b) Empowering the Registrar to compound specified offences (paragraphs 6 to 16); and
- (c) Widening the categories of companies in respect of which the court may require security for costs in civil actions (paragraphs 17 to 21).

3. The details of the above changes in Part 20 are set out in paragraphs 4 to 21 below.

### **Redefining the scope of the offence for making false statements (Section 895)**

#### Position under the old Ordinance

4. Section 349 of the old Ordinance provides for a criminal offence where any person wilfully makes a statement to the Registrar which is false in any material particular, knowing it to be false. The requisite mental element of the offence requires proof of knowledge and wilful intent and does not cover the making of a misleading statement or making of false statements recklessly.

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<sup>14</sup> Section 908 of the new CO and Schedule 8. The provisions in Schedule 8 have been incorporated into the old Ordinance after enactment of the Companies (Amendment) Ordinance 2010. Implementation of the provisions would be subject to the enactment of an ordinance for a scripless securities market, the legislative exercise for which is under preparation.

## Position and key provisions in the new CO

5. **Section 895** provides for the matters covered by section 349 of the old Ordinance subject to the modifications that the offence is extended to cover “a statement that is misleading, false or deceptive in any material particular” and that the mental element covers acts committed “knowingly or recklessly”.

## **Empowering the Registrar to compound specified offences (Section 899)**

### Position under the old Ordinance

6. The Registrar has implemented a range of administrative measures to encourage due compliance with the filing obligations under the old Ordinance in addition to prosecution for non-compliance<sup>15</sup>. There is no power to compound offences under the old Ordinance.

### Position under the new CO

7. To further expand the repertoire of measures to encourage due compliance with filing obligations and to optimise the use of judicial resources, the new CO introduces a new power for the Registrar to compound, at her discretion, specified offences as set out in Schedule 7 to the new CO.

8. In compounding an offence, the Registrar will give a notice to a company in breach to offer it an opportunity to rectify the default by paying an amount of HK\$600 to the Registrar as a compounding fee and remedying the breach constituting the offence within a specified period. If the company accepts and complies with the terms of the notice, no prosecution will be initiated against it for that offence.

9. The general principles for determining which offences should be compoundable offences were developed by an expert working group and agreed by the Standing Committee on Company Law Reform.

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<sup>15</sup> These include publication of various information pamphlets, posters and external circulars to provide general guidelines on compliance. While information pamphlets are distributed to company promoters on incorporation or registration of companies, posters on compliance are placed in the public areas of the Companies Registry. In addition, companies may also subscribe to an Annual Return e-Reminder/e-Alert Service to receive electronic notifications on the filing of annual returns.

10. In accordance with these principles, the compound offer regime will apply to straightforward, minor regulatory offences committed by companies that are easily detectable by the Registrar from objective reliable evidence. Schedule 7 to the new CO sets out the offences identified as appropriate for compounding. These are failure to deliver directors' written consents to act to the Registrar<sup>16</sup>, failure to engrave name on a company's common seal<sup>17</sup>, improper use of the common seal<sup>18</sup>, failure to file annual returns<sup>19</sup> and failure to deliver accounts<sup>20</sup>.

11. Some other minor regulatory offences included in subsidiary legislation have also been included in Schedule 7<sup>21</sup>. These are offences for failure to display continuously the company's registered name<sup>22</sup> at the registered office and business venue, failure to disclose the company's registered name, etc. in its communication documents, transaction instruments and on any of its websites<sup>23</sup>. Additionally, similar offences for registered non-Hong Kong companies which are set out in the new CO have also been included<sup>24</sup>.

### Key provisions in the new CO

12. **Section 899** gives the Registrar a new power to compound specified offences under the new CO.

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<sup>16</sup> Section 74(2) of the new CO.

<sup>17</sup> Section 124(3) of the new CO: offence by a Hong Kong company for failure to produce its common seal in metallic form and to engrave name on the seal.

<sup>18</sup> Section 124(4) of the new CO: offence by officers of Hong Kong companies for improper use of the common seal.

<sup>19</sup> Section 662(6) of the new CO: failure to file annual returns by Hong Kong companies within the prescribed time; and section 788(3) of the new CO: failure to file annual returns by registered non-Hong Kong companies within the prescribed time.

<sup>20</sup> Section 789(3) of the new CO: failure to deliver accounts by registered non-Hong Kong companies.

<sup>21</sup> Section 911 of the new CO provides that the Financial Secretary may by notice published in the Gazette amend Schedule 7. A notice amending the Schedule was published in the Gazette on 25 October 2013.

<sup>22</sup> Section 7(1) of the Companies (Disclosure of Company Name and Liability Status) Regulation (Cap. 622B) in respect of section 3(1) of the Regulation.

<sup>23</sup> Section 7(1) of the Companies (Disclosure of Company Name and Liability Status) Regulation (Cap. 622B) in respect of section 4 of the Regulation.

<sup>24</sup> Section 792(6) of the new CO re section 792(1) and (2). This was added to Schedule 7 at the same time as the offences applicable to local companies were added.

13. **Section 899(1)** provides that the Registrar may, if she has reason to believe that a person has committed an offence specified in **Schedule 7**, give the person a notice in writing which -

- (a) states that the Registrar has reason to believe that the person has committed the offence and setting out the particulars of the offence;
- (b) sets out the conditions upon which no proceedings will be instituted against the person in respect of the offence, including the amount of compounding fee to be paid and the period within which the conditions have to be complied with; and
- (c) requests any other information that the Registrar thinks fit.

14. **Section 899(2)** states that the notice may be given only before the proceedings on the offence commence. **Section 899(3)** empowers the Registrar, by a further written notice, to extend the period within which the conditions as specified in the notice issued have to be complied with<sup>25</sup>. **Section 899(4)** provides that the notice under **section 899(1)** may not be withdrawn during the period specified in the notice or the extended period.

15. **Section 899(7)** clarifies that the payment of the compounding fee specified in the notice is not to be taken as an admission by the person of any liability for the offence alleged in the notice to have been committed by that person.

16. The specified offences that are compoundable are set out in **Schedule 7** (see paragraphs 10 and 11 above). **Section 911(1)** provides that the Financial Secretary may amend the Schedule by notice published in the Gazette.

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<sup>25</sup> It also specifies that such power of extension may be exercisable during, or after the end of, that period.

## **Widening the categories of companies in respect of which the court may require security for costs in civil actions (Section 905)**

### Position under the old Ordinance

17. Section 357 of the old Ordinance provides that where a limited company is a plaintiff, if there is reason to believe that the company will be unable to pay the costs of the defendant if the defendant is successful in its defence, the court may require sufficient security to be given for those costs, and may stay all proceedings until the security is given. However, section 357 only applies to a limited company which is formed and registered under the old Ordinance or an existing limited company, i.e. one formed and registered under an earlier Companies Ordinance. Therefore, a plaintiff which is an unlimited company or a company incorporated outside Hong Kong would not be caught by the section.

18. In a number of Hong Kong cases involving applications for security for costs against companies incorporated outside Hong Kong, the court recommended the amendment of section 357 of the old Ordinance to remove the anomaly that a company incorporated outside Hong Kong but having its central management and control in Hong Kong is immune from any security for costs as it is neither ordinarily resident out of the jurisdiction under Order 23 rule 1(1)(a) of the Rules of the High Court (Cap. 4A) nor a company caught by section 357 of the old Ordinance.

### Position and key provisions in the new CO

19. The new CO widens the categories of companies in respect of which the court may require security for costs in actions. It is considered reasonable and just to order a foreign plaintiff to give security for costs in view of the difficulties that a defendant may encounter in enforcing a judgment against a foreign party. This also covers the loophole under Order 23 rule 1(1)(a) of the Rules of the High Court (Cap. 4A) in the situation where the plaintiff is a company incorporated outside Hong Kong but having its central management and control in Hong Kong.

20. **Section 905** re-enacts the matters in section 357 of the old Ordinance and extends the provisions to all types of companies incorporated outside Hong Kong, irrespective of whether the company is a limited or an unlimited company.

21. **Section 905** is not extended to unlimited companies incorporated in Hong Kong. It is an established common law principle that the insolvency or poverty of a plaintiff is no ground for requiring him to give security for costs. The only exception is in the case of a limited company under section 357 of the old Ordinance. This is considered a price for the privilege of limited liability and therefore the provision is not extended to unlimited companies.

## **TRANSITIONAL AND SAVING ARRANGEMENTS**

22. The only transitional provision relates to **section 897** of the new CO where an application for inspection and production of documents made before the commencement of the new CO will continue to be dealt with under the provisions of the old Ordinance (**section 149 of Schedule 11** to the new CO).

Companies Registry  
May 2014 (Updated)