

# An Update on the Companies Bill

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*ACRU 2012*

## General Information on the Companies Bill



## General Information on the Companies Bill (1)

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- Introduced into the Legislative Council 26.01.2011
- Bills Committee chaired by Hon Paul Chan Mo-Po, MH, JP
- Expected resumption of Second and Third Reading mid-2012
- Expect to be 14 items of subsidiary legislation
- Expected implementation 2013/2014
- 909 clauses and 10 schedules

## General Information on the Companies Bill (2)

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- The Standing Committee on Company Law Reform
- Over 400 proposals made by the four Advisory Groups
- 5 rounds of public consultation
- Numerous discussions at Public forums and seminars

## Major Objectives of the Companies Bill (1)

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### ➤ Enhancing Corporate Governance

- Strengthening the accountability of directors.
- Enhancing shareholder engagement in the decision-making process.
- Improving the disclosure of company information.
- Fostering shareholder protection.
- Strengthening auditors' rights.



## Major Objectives of the Companies Bill (2)

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### ➤ Ensuring Better Regulation

- Ensuring the accuracy of information on the public register.
- Improving the registration of charges scheme.
- Enhancing the regulation of the voluntary deregistration of companies.
- Improving the enforcement regime.

## Major Objectives of the Companies Bill (3)

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### ➤ Facilitating Business

- Streamlining procedures.
- Facilitating simplified reporting particularly by SMEs.
- Facilitating business operations.



## Major Objectives of the Companies Bill (4)

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### ➤ Modernising the Law

- Retiring the concept of par value.
- Removing the power to issue share warrants.
- Better protection of personal data.
- Rewriting the law in simple and plain language.

## Topics to be Covered Today

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- Abolition of Memorandum of Association
- Abolishing Par Value of Shares
- Changes in the Registration of Charges



## Abolition of Memorandum of Association



## Abolition of Memorandum of Association (1)

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- Abolition of the Ultra Vires Rule.
- A company has the capacity and the rights, powers and privileges of a natural person (section 5A of the Companies Ordinance).
- Objects clause has become less significant for most companies.

## Abolition of Memorandum of Association (2)

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- Most information is contained in the Incorporation Form and Articles of Association and contents of the Memorandum can for the most part be amended.
- The need for the Memorandum as a separate constitutional document has diminished.
- Under the Companies Bill, the Memorandum is abolished (clauses 63 to 65, 70 to 80 and 93).

## Abolition of Memorandum of Association (3)

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### ➤ Clause 62

- A company may be formed under the Companies Bill by delivering to the Registrar an incorporation form and a copy of the articles, no need for a memorandum.

### ➤ Clauses 63 to 65

- Set out the requirements of the incorporation form.

## Abolition of Memorandum of Association (4)

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### ➤ Clauses 70 to 80

- Set out the requirements of the articles.
- There are mandatory articles:–
  - ◆ Name (clause 76)
  - ◆ Objects (if the limited company has a licence to dispense with “limited” in its name) (clause 77)
  - ◆ Members’ liabilities (clauses 78 and 79)
  - ◆ Capital and initial shareholdings (clause 80)

## Abolition of Memorandum of Association (5)

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### Deeming Provision for Existing Companies

#### ➤ Clause 93

- “ (1) A condition that immediately before the commencement date of this Division was contained in the memorandum of association of an existing company and was in force is, for all purposes, to be regarded as a provision of the company's articles;.....
- (5) In any Ordinance in force immediately before the commencement ....., or in any other document made before that date–
- (a) a reference to the memorandum of association of an existing company is a reference to the company's articles; and
  - (b) a reference to a condition of the memorandum of association of an existing company is a reference to a provision of the company's articles.

## Abolition of Memorandum of Association (6)

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#### ➤ Model Articles (clauses 73 to 75)

- The Financial Secretary may prescribe model articles.
- A limited company **may** adopt all or any of the model articles prescribed for the type of company to which it belongs.
- A limited company may exclude all or any of the model articles if it so wishes **but** so far as not excluded they will apply.
- Model articles will be prescribed for:–
  - ◆ Public companies limited by shares (modeled on current Table A)
  - ◆ Private companies limited by shares (simple and concise)
  - ◆ Companies limited by guarantee



## Abolition of Memorandum of Association (7)

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### ➤ Alteration of Articles

- Same as under Companies Ordinance.

### ➤ Clause 83

- Alteration by special resolution except alteration of maximum number of shares that a company may issue (if it chooses to provide this in the articles) which may be done by ordinary resolution.

### ➤ Clause 83(5)

- Must within 15 days of alteration deliver to the Registrar notice of alteration in the specified form and a copy of the articles as altered, certified as correct.

## Abolishing Par Value of Shares



## Abolishing Par Value of Shares (1)

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- Under section 5(4) of the Companies Ordinance, the Memorandum must state the amount of share capital with which the company proposes to be registered and the division thereof into shares of a fixed amount.
- Par value or nominal value is the minimum price at which shares can be issued.

## Abolishing Par Value of Shares (2)

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- Par value does not serve its original purpose of protecting creditors and shareholders and gives no indication of real value of shares.
- Par value gives rise to practical problems, inhibiting raising of new capital and unnecessarily complicating the accounting regime.

## Abolishing Par Value of Shares (3)

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- In the Companies Bill, we legislate for migration to mandatory no-par.
- Adopting a mandatory system of no-par for all companies with a share capital.
- A mandatory system will be simpler for all concerned while an optional no-par system would require legislating for and administering two parallel legal systems, thus necessitating additional costs and complexity.

## Abolishing Par Value of shares (4)

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- Mandatory no-par regimes exist in Australia, New Zealand and Singapore.
- On public consultation, there was majority support for the proposal.

## Abolishing Par Value of Shares (5)

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- Express provisions for the migration to no-par regime (clause 130).
- Upon commencement of clause 130, a company's shares will have no nominal value.
- This applies to all companies:-

Clause 130(2)

"This section applies to shares issued before the commencement date of this section as well as shares issued on or after that date."

## Abolishing Par Value of Shares (6)

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- Commencement date of the Companies Bill is expected to be at least 14 months after enactment to allow time for companies to review their articles etc.
- Relevant concepts such as nominal value and share premium will be abolished (clause 130 and section 38 of Schedule 10).
- Deeming provisions to ensure that contractual rights defined by reference to par value and related concepts will not be affected by the abolition of par. The deeming provisions will save considerable work, expense and time for companies and reduce the possibility of disputes (sections 36 to 42 of Schedule 10).

## Abolishing Par Value of Shares (7)

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- Existing share capital amount will be amalgamated with share premium account and capital redemption reserve (section 38 of Schedule 10).
- The currently permitted uses of the share premium account are substantially preserved for credit balance of share premium account on date of migration to no-par (section 39 of Schedule 10).

## Abolishing Par Value of Shares (8)

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- Clause 165 sets out permitted alterations of share capital. In addition to previous permitted alterations, in the no-par regime a company can now:–
  - Increase share capital without allotting and issuing new shares if funds / assets are provided by members.
  - Capitalize profits with / without allotting / issuing new shares.
  - Allot and issue bonus shares with / without increasing share capital.
- The no-par environment provides increased flexibility.

## Changes in the Registration of Charges



### Changes in the Registration of Charges (1)

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#### ➤ Improving the registration of charges scheme

- Current regime is basically retained with some improvements.
- Updating the list of registrable charges (clause 333):–
  - ◆ It is expressly provided that a charge on an aircraft / share in an aircraft is registrable.
  - ◆ A charge on installments due but not paid on issue price of shares is registrable.

## Changes in the Registration of Charges (2)

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- ◆ Charge for the purposes of securing any issue debentures is removed (as usually registered as a floating charge).
- ◆ It is clarified that a shipowner's lien on subfreights is not regarded as a charge on book debts / floating charge and is not registrable.
- ◆ A charge on cash deposits is not regarded as a charge on book debts.

## Changes in the Registration of Charges (3)

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- Replacing the automatic acceleration of repayment obligation with a choice for the lender (clause 336).
- Requiring a certified copy of the charge instrument to be registrable and available for public inspection (clauses 334, 335 and 337 to 339).
- Shortening the period for delivery to the Registrar of a certified copy of the charge instrument and the prescribed particulars from five weeks to one month (clauses 334, 335 and 337 to 339).

## Changes in the Registration of Charges (4)

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- Requiring a certified copy of written evidence of debt satisfaction or release of a charge to be registered and made available for public inspection (clause 344).
- Clarifying the effect of an order made by the Court to extend the time for registration in respect of criminal liability already incurred (clause 345).
- Empowering the Court to rectify the particulars in the registered charge instrument and evidence of discharge (clause 346).

# Thank You