



Perspectives on the New Companies Ordinance

Ms Phyllis McKenna
Deputy Principal Solicitor
(Company Law Reform)



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The new Companies Ordinance

- Passed by the Legislative Council on 12 July 2012
- 21 Parts comprising 921 sections and 11 schedules
- 13 items of subsidiary legislation – to be introduced into Legislative Council in batches commencing February 2013
- Commencement expected in 2014 after enactment of subsidiary legislation

Four major objectives of the new CO



- Enhancing corporate governance
- Ensuring better regulation
- Facilitating business
- Modernising the law



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Topics to be considered to-day



- **Modernizing the Law**
 - Abolition of Memorandum of Association (“MA”) for **all** companies
 - Migration to mandatory no-par for **all** companies
 - Better protection of personal data
- **Ensuring Better Regulation**
 - Lowering the threshold for contravention by officers through a new definition of “responsible person”
 - Empowering the Registrar to compound specified offences to encourage due compliance and optimize the use of judicial resources

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Abolition of the MA for all companies



Background

- ❑ Abolition of ultra vires rule, means the objects clause has become less significant with most companies having the capacity and right powers and privileges of a natural person (section 5A of Cap 32 and **section 115** of new CO)
- ❑ Most information is now contained in the incorporation form and AA and most provisions of the MA can be amended
- ❑ The need for MA as a separate constitutional document has diminished
- ❑ Under new CO, the MA is abolished for all companies

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Abolition of the MA for all companies (2)



- ❑ Pursuant to **section 67** of the new CO, any one or more persons may form a company by signing the articles of the company intended to be formed and delivering to the Registrar for registration: (i) an incorporation form; and (ii) a **copy** of the articles
- ❑ The agreement by the subscribers to take up shares in the company (previously set out in the MA) will now be in the articles, which will be signed by all of the subscribers
- ❑ The incorporation form must contain a statement confirming that the company's articles have been signed for the purposes of section 67(1)(a) by every person proposing to become a member of the company on formation and a statement that the articles delivered under section 67(1)(b)(ii) are the same as those signed by the founder members / subscribers (**section 68(1)(e)**)

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Abolition of the MA for all companies (3)



Mandatory Articles

- Every company is statutorily **required** to have articles on the following:
 - Company name (**section 81**)
 - If the company has a licence to dispense with the use of the word “limited” in its name – objects (**section 82(1)**)
 - Members liabilities (**section 83**)
 - Liabilities / Contributions of members (**section 84**)
 - Capital and initial shareholding on formation (**section 85**)
- These mandatory articles comprise information previously set out in the MA

Optional Articles

- Any company other than one with a licence to dispense with the use of the word “limited” in its name **may** state objects (**section 82(2)**)
- A company **may** state the maximum number of shares that a company may issue

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Abolition of the MA for all companies (4)



Model Articles / Bespoke Articles

- For additional regulations, all companies may create bespoke articles or may adopt all or any of the Model Articles to be prescribed by the Financial Secretary for the type of company to which it belongs (**sections 78 and 79**)
- Companies (Model Articles) Notice will prescribe Model Articles for:
 - (1) public company
 - (2) private company limited by shares
 - (3) guarantee company
- These replace Table A and Table C in the First Schedule to Cap 32
- The Model Articles will apply by default if no additional articles are filed by the company or in so far as not excluded / modified by any articles so filed (**section 80**)

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Abolition of the MA for all companies (5)



Existing Companies

- **Section 98:**
 - A condition of the MA of an existing company immediately before commencement of the new CO is deemed to be regarded as a provision of that company's articles of association, except that any such condition setting out authorized share capital and the par value of shares are to be regarded as deleted for all purposes
 - All references in any other ordinances / documents etc to MA is a reference to Articles of Association

What Needs to be Done

- The deeming provisions ensure that existing companies need not take any steps as a result of the changes – the deeming provisions are sufficient to ensure compliance
- However companies may wish to take this opportunity to review their constitutional documents to see if there are any changes that they wish to make as a result of the new CO

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Retiring the concept of par



Retiring the Concept of Par

- Abolition of Par Value of Shares for **all** companies
 - 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
 - Upon commencement of **section 135** of the new CO, a company's shares will have no nominal value. This applies to all companies
 - Relevant concepts such as nominal value and share premium will be abolished
 - 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 (**section 40 – Schedule 11**)

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Retiring the concept of par (2)



- Existing share capital will be amalgamated with any amount standing to the credit of the company's share premium account and capital redemption reserve (**section 37 – Schedule 11**)
- The currently permitted uses of the share premium account are preserved for credit balance of share premium account on date of migration to no-par (**section 38 – Schedule 11**)
- **Section 170** 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
- Mandatory no-par regimes exist in Australia, New Zealand and Singapore

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Retiring the Concept of Par (3)



- *The Companies Registry has issued an External Circular on this topic which can be accessed at:*

http://www.cr.gov.hk/en/publications/guidelines_01.htm

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Better protection of personal data



Current CO

- Requires residential addresses of directors and company secretaries and full ID numbers of individuals on Companies Register open to public inspection

New CO

- Directors are required to provide correspondence addresses in addition to residential addresses (**section 643 and Schedule 2 section 3**)
- Only partial ID (say, A123XXX) will be disclosed
- For registration of documents after commencement of new CO, withholding directors' residential addresses and disclosing directors' correspondence addresses (**section 54**) (Note: Where or if the correspondence address is found to be ineffective, the Registrar will replace the correspondence address with the residential address on the public register)

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Better protection of personal data (2)



- Company secretaries need not provide residential addresses and only their correspondence addresses are disclosed (**section 650 and Schedule 2 section 5**)
- For residential addresses and ID numbers in documents already registered on the Companies Register, no automatic non-disclosure (**section 49**) –
 - Directors and company secretaries have to apply for withholding residential addresses and masking part of an ID number
 - Other individuals have to apply for masking part of an ID number
- The residential addresses and full ID numbers withheld from public inspection are available to the Registrar and specified categories of persons which will be specified through subsidiary legislation to be tabled in LegCo for discussion in May 2013, or under court order (**sections 51, 52, 58, 59**)

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Responsible Person



- Lowering the threshold for contravention by officers through a new definition of “responsible person”
 - The Companies Ordinance attributes criminal liability to an officer in default if he knowingly and wilfully authorizes or permits the default. The evidential burden is very high because of the requirement of “wilfulness”
 - The offences involved are mostly regulatory in nature and the majority (over 90%) are summary offences punishable by fine
 - “Responsible person” is defined in the new CO as an officer of a company who authorizes or permits, or participates in, the contravention or failure (section 3)
 - The effect of the new formulation is to lower the prosecution threshold to remove the “wilful” element

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Responsible Person (2)



- The original proposal for the new formulation in the Companies Bill was modelled upon section 1121 of the UK Companies Act 2006 and had an additional limb of “fails to take all reasonable steps to prevent the contravention”
- This caused concern during the legislative process that negligence was being criminalized
- After much lively debate, the administration agreed to amend the formulation recognizing that the amended formulation would still achieve the policy objective of ensuring better regulation

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Compounding



- **Section 899** empowers the Registrar, at her discretion, to compound specified offences so as to:
 - Encourage compliance with the provisions of the new CO, and
 - Optimize the use of judicial resources
- Specified offences are set out in **Schedule 7** of the new CO:
 - Failing to deliver director's written Consent to Act (**section 74(2)**)
 - Failing to engrave name etc. on common seal (**section 124(3)**)
 - Improper use of the common seal (**section 124(4)**)
 - Failure to file annual returns (**sections 662(6)** and **section 788(3)** re registered non-Hong Kong companies)
 - Failure by a registered non-Hong Kong company to deliver accounts (**section 789(3)**)

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Compounding (2)



- Additional offences relating to the display of company names will be added upon enactment of the Companies (Display and Publication of Company Name and Liability Status) Regulation
- Corresponding offences for registered non-Hong Kong companies re the display of names will also be added (**section 792(6)** of the new CO re breach of **section 792(1) and (2)**)
- The Registrar may, if she has reason to believe a prescribed offence has been committed, give the company notice in writing which:
 - (i) States that the Registrar has reason to believe the company has committed the offence and setting out particulars of the offence; and
 - (ii) Conditions upon which no prosecution action will be taken including:
 - Amount of the compounding fee to be paid;
 - The period within which conditions must be complied with; and
 - Any other information that the Registrar considers necessary

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Compounding (3)



- Where the offence is a failure to do a particular act, the Notice will require the act to be done within a specified period (which can be extended)
- The compounding fee will be set as HK\$600
- If the fee is paid and the act is done, no prosecution action will be taken
- If either the fee is not paid or the act is not done, the Registrar may proceed with prosecution action
- The payment of compounding fee is not an admission of liability
- The Notice may only be issued before proceedings for any contravention are commenced
- Offences will be confined to those offences that are straight forward minor regulatory offences committed by a company that are punishable by a fine only

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Looking Forward



- ***The CR will be hosting seminars and workshops on the new CO for stakeholders***
- ***The new CO can be accessed at:***
< <http://hklaw.ccgo.hksarg/eng/index.htm> >
- ***The CR website has information on the new CO, please visit the website at: < [http:// www.cr.gov.hk](http://www.cr.gov.hk) >***



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Thank you

Companies Registry : www.cr.gov.hk