



The New Hong Kong Companies Ordinance

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Topics to be considered to-day

- **Enhancing Corporate Governance**
 - Requiring at least one natural person as director for private companies
 - Clarifying the standard of directors' duty of care, skill and diligence
 - Expanding the prohibitions on loans and similar transactions to cover a wider category of persons connected with a director
 - Requiring disinterested members' approval for various prohibited transactions



Topics to be considered to-day (2)

- ***Modernising the Law***
 - Withholding residential addresses of directors and company secretaries and full ID numbers of individuals from public inspection to foster protection of personal information
- ***Facilitating Business***
 - Introducing new exceptions to prohibitions on loans and similar transactions in favour of directors and connected entities
- ***Ensuring Better Regulation***
 - Enabling the Registrar of Companies (the “Registrar”) to give directions to a company relating to appointment of directors and company secretaries

3



At least one natural person director for private companies

- **Section 456** new Companies Ordinance (No. 28 of 2012) (“new CO”) maintains Cap 32 (s154A) restriction of corporate directorship in public companies, companies limited by guarantee and private companies which are members of a group of companies of which a listed company is a member.
- Public consultation in 2008 on abolition of corporate directorship. Conclusion was to follow the UK approach of requiring at least one natural person director.
- **Section 457** new CO restricts corporate directorship by requiring a private company (other than one within the same group as a listed company) to have at least one director who is a natural person.

4



At least one natural person director for private companies (2)

- For existing private companies with no natural person director, there will be a grace period of 6 months after commencement of new CO to comply with the new requirement of at least one natural person director (**Schedule 11 section 89**).



Directors' duty of care, skill and diligence

- Public consultation in 2008 on codification of directors' general duties (fiduciary duties and duty of care, skill and diligence). Conclusion was to clarify the standard of directors' duty of care, skill and diligence in new CO based on s 174 of UK Companies Act 2006, instead of full codification of directors' general duties.
- Subjective test standard in old case law too lenient nowadays. Judicial trend in other common law jurisdictions to adopt a mixed objective and subjective test. Common law position in Hong Kong on standard of directors' duty of care, skill and diligence not entirely clear.



Directors' duty of care, skill and diligence (2)

- **Section 465(1) and (2)** new CO -
 - “(1) A director of a company must exercise reasonable care, skill and diligence.
 - (2) Reasonable care, skill and diligence mean the care, skill and diligence that would be exercised by a reasonably diligent person with –
 - (a) the general knowledge, skill and experience that may reasonably be expected of a person carrying out the functions carried out by the director in relation to the company; and
 - (b) the general knowledge, skill and experience that the director has.”

7



Directors' duty of care, skill and diligence (3)

- A test of dual objective and subjective standard in section 465(2). In deciding whether there is any breach of the duty, a director's conduct is compared to the standard that would be exercised by a reasonably diligent person having the knowledge etc as set out in section 465(2).
- **Section 466** new CO preserves the existing civil consequences of breach (or threatened breach) of the duty.

8



Expanding loan prohibitions and a wider category of connected persons

Cap 32 position

- Cap 32 (s 157H) prohibits a company from entering into loans or other similar transactions in favour of a director or persons connected with him.
- The categories of connected persons could be found in s 157H(2)(c), (3)(c), (4)(c), (8) and (9) Cap 32. Not sufficient to cover all parties closely associated with directors.

9



Expanding loan prohibitions and a wider category of connected persons (2)

New CO

- The prohibitions are expanded in **Part 11** of new CO to cover a wider category of persons connected with a director –
 - **sections 502 and 503** – prohibit a specified company (defined in **section 491(1)**) from making a loan or quasi-loan to, or entering into credit transaction as creditor for an entity connected with a director without prescribed approval of members;
 - **sections 486 to 488** – provide for the coverage of an entity connected with a directors.

10



Expanding loan prohibitions and a wider category of connected persons (3)

- **Sections 486 to 488** new CO cover on top of those connected persons in Cap 32 –
 - an adult child, adult step-child, adult illegitimate child or adopted child of any age;
 - a parent;
 - a cohabitee;
 - a minor child, minor step-child, minor illegitimate child or minor adopted child of the cohabitee who lives with the director;
 - an associated body corporate as defined in section 488;
 - a trustee of a trust which includes the director's minor adopted child;
 - a business partner of the director's minor adopted child.

11



Disinterested members' approval

Cap 32 position

- Except for specified transactions (most of which relate to purchase or redemption of a company's own shares), no provision in Cap 32 restricting members' rights to vote or require members to abstain from voting in relation to transactions in which they have an interest.

12



Disinterested members' approval (2)

New CO

- New requirement for disinterested members' approval for connected transactions applicable to –
 - public companies for the 3 types of prohibited transactions covered by Part 11 (i.e. loans and similar transactions; payment for loss of office; and directors' long-term employment);
 - private companies or companies limited by guarantee that is a subsidiary of a public company for loans and similar transactions.

13



Disinterested members' approval (3)

- If a company is subject to disinterested members' approval requirement, the resolution at its general meeting is passed only if every vote in favour of the resolution by the interested members is disregarded (**sections 496(2)(b)(ii) & (5), 515(1)(b)(ii) & (4), 518(2)(b)(ii), (4) & (5) and 532(2)(b)(ii) & (4)**).
- In general, the voting rights of the following persons as members of a company may be restricted –
 - relevant directors or former directors;
 - relevant connected entities;
 - any person who holds any shares in the company in trust for these persons / entities.

14



Withholding personal information from public inspection

Cap 32 position

- Requires residential addresses of directors and company secretaries and full ID numbers of individuals on Companies Register to be open to public inspection.
- There are concerns over protection of personal privacy and possible misuse of personal data.



Withholding personal information from public inspection (2)

New CO

- Seeks to strike a reasonable balance between protecting privacy and satisfying the need to access information by introducing new arrangement as set out below.
- Only partial ID numbers (say, A123xxx) will be disclosed.
- Directors are required to provide correspondence addresses in addition to residential addresses (**sections 643 and Schedule 2 section 3**).



Withholding personal information from public inspection (3)

- For registration of documents after commencement of new CO, directors' residential addresses will be withheld and directors' correspondence addresses will be disclosed (**section 54**).
- 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 (**sections 55 and 56**).
- Company secretaries need not provide residential addresses and only their correspondence addresses are disclosed (**section 650 and Schedule 2 section 5**).



Withholding personal information from public inspection (4)

- For residential addresses and ID numbers in documents already registered on the Companies Register, procedures for application for masking apply (**section 49**).
- The residential addresses and full ID numbers withheld from public inspection are available to the Registrar and specified categories of persons, to be specified through subsidiary legislation (**sections 51 and 58**).
- Interested persons may apply for Court Order for disclosure of residential addresses and full ID numbers (**sections 52 and 59**).



Withholding personal information from public inspection (5)

- After the new law has been enacted, members of the public and stakeholders raised concerns (including objection from the media) about the new arrangement for inspection of directors' personal information on the Companies Register.
- Proposed way forward as endorsed by the LegCo –
 - to give more time for the community to build consensus on the issues involved in the new arrangement;
 - to consider matters relating to the new arrangement only after commencement of the new CO;
 - not to make the subsidiary legislation concerning the new arrangement at this stage;

19



Withholding personal information from public inspection (6)

- not to include the relevant provisions for the new arrangement in the commencement notice to be made for commencing the new CO (Note : the commencement notice has to be endorsed by the LegCo);
- new filing requirement for company secretaries' addresses (i.e. only required to file correspondence addresses but not residential addresses) will continue to be implemented as stakeholders' concern focuses on directors' personal information;
- pending further deliberations, full ID numbers of company secretaries and other individuals will, together with those of directors, continue to be made available on the Companies Register.
- For details, see paper on the proposed way forward submitted by the Administration to the LegCo Panel on Financial Affairs on 28.3.2013 (LC Paper No. CB(1)788/12-13(01)).

20



New exceptions to prohibitions on loan transactions

Cap 32 position

- Cap 32 (s 157H) prohibits a company from entering into loan transactions in favour of its directors, its holding company's directors or any of their connected persons.
- Exceptions are set out in s 157HA Cap 32. Members' approval as an exception only applies to a private company which is not a member of the same group as a listed company (s 157HA(2)).

21



New exceptions to prohibitions on loan transactions (2)

New CO

- Extends the members' approval exception to all companies. At the same time imposes disinterested members' approval requirement as safeguards for minority shareholders in the case of –
 - a public company;
 - a private company or company limited by guarantee that is a subsidiary of a public company.

22



New exceptions to prohibitions on loan transactions (3)

- **Sections 500 to 504** – prohibit loan transactions unless with “prescribed approval of members” (**section 496**).
- Two new exceptions to the prohibitions -
 - loan, quasi-loan and credit transaction of value not exceeding 5% of net assets or called-up share capital (**section 505**);
 - funds to meet expenditure, incurred or to be incurred by a director, on defending proceedings or in connection with an investigation or regulatory action (**sections 507 and 508**).

23



Registrar’s directions to appoint directors and company secretaries

- Cap 32 (ss 153A and 153) requires a private company to have at least one director and a public company at least two directors. An offence in the event of contravention.
- Cap 32 (s 154) requires every company to have a company secretary though there is no offence provision for failure to appoint one.
- For better enforcement of statutory requirements to have directors and company secretaries, new CO empowers the Registrar to issue directions to a company to appoint directors and company secretaries (**sections 458 and 476**).
- Non-compliance with the direction is an offence. The company and every responsible person of the company will be liable to a fine.

24



Thank you