



# The New Companies Ordinance

Companies Registry



## Part 9

# Accounts and Audit





## Introduction of “accounting reference period”

- S 367 provides for the determination of a company’s **first financial year** and subsequent financial years by reference to its **accounting reference period**.
- A company’s first financial year after the commencement of the new CO begins on the first day of its first accounting reference period and ends on the last day of that period (s 367(1)).
- For an existing company, the first accounting reference period begins on the day immediately following the end date of the company’s accounts for the financial year immediately before the commencement of the new CO and ends on the first anniversary of that date (ss 368(1), 369(1) to (4)).
- The financial year is the period by reference to which the company’s financial statements are to be prepared (s 379(1)).

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### Examples

Commencement date of new CO : 3 March 2014

#### Company A

- ◆ Current financial year : 1 April 2013 to 31 March 2014
- ◆ End date of company’s accounts prepared under Cap 32 : 31 March 2014
- ◆ Company’s first accounting reference period under the new CO :  
1 April 2014 to 31 March 2015

#### Company B

- ◆ Current financial year : 1 January 2014 to 31 December 2014
- ◆ End date of company’s accounts prepared under Cap 32 : 31 December 2014
- ◆ Company’s first accounting reference period under the new CO:  
1 January 2015 to 31 December 2015

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- For a company formed and registered under the new CO, the first accounting reference period begins on the incorporation date and ends on –
  - ◆ a date specified by the directors falling within 18 months after the company's incorporation; or
  - ◆ if none specified, the last day of the month of the first anniversary of the company's incorporation (ss 368(2), 369(5) to (7)).



- Every subsequent accounting reference period is a period of 12 months beginning immediately after the end of the previous accounting reference period and ending on the company's accounting reference date (s 368(3)).
- Accounting reference date (s 370)
  - ◆ For an existing company, the accounting reference date is the anniversary of the end date of the company's accounts for the financial year immediately before the commencement of the new CO.
  - ◆ For a company formed and registered under the new CO, it is a date specified by the directors, or the anniversary of the company's incorporation (s 369(5) to (7)).



## Part 10

# Directors and Company Secretaries



## Indemnification of officers against liability to company

- Currently covers officers and auditors (s165 of Cap 32). Auditors have specific provision in new CO (s 415)
- Avoidance of provisions that indemnify a director against liability. Restates s 165, but extends the prohibition to include indemnity for a director of an associated company (s 468(3)) and extends scope of permitted liability insurance to a director of an associated company (s 468(4))
- S 469 provides for permitted indemnity against liability incurred by a director to a third party. The indemnity must not cover liability to pay a fine in criminal proceedings, in defending criminal proceedings in which the director is convicted etc.
- Permitted indemnities to be disclosed in directors' report (s 470) and copies to be kept (s 471) and to be available for inspection by members (s 472)



## Clarifying directors' duty of care, skill and diligence (s 465)

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- A director must exercise reasonable care, skill and diligence, i.e. the care, skill and diligence that would be exercised by a reasonably diligent person with –
  - ◆ 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 ("objective test"); and
  - ◆ the general knowledge, skill and experience that the director has ("subjective test")
- The duty has effect in place of the common law rules and equitable principles as regards the duty to exercise reasonable care, skill and diligence (s 465(4))
- The duty applies to a shadow director (s 465(5))
- The consequences of breach are the same as would apply if the common law rules or equitable principles that it replaces applied (s.466)

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## Ratification of conduct by directors by disinterested members' approval (s 473)

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- Ratification of conduct involving negligence, default, breach of duty or breach of trust.
- By resolution, disregarding the votes of a member who is a director in respect of whose conduct the ratification is sought, or who is an entity connected with that director or holder of any shares in the company in trust for that director or entity.
- Does not affect the validity of a decision taken by unanimous consent of the members or power of the directors to agree not to sue, or to settle or release a claim made on behalf of the company.

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## Part 11

# Fair Dealing by Directors



## Transactions with directors or their connected entities

- Expanding the prohibitions on loans and similar transactions to cover a wider category of persons connected with a director. For example, adult children, cohabitantes, parents (s 486)
  - ◆ Connected entity means family members (s 487), person in cohabitation relationship, associated body corporate (s 488), specified categories of trustees and partner
- Requiring disinterested members' approval in the case of public companies (ss 496(2)(b)(ii), (5), 515(1)(b)(ii), (4), 518(2)(b)(ii), (4), 532(2)(b)(ii)(4)
  - ◆ Interested parties: the relevant directors, connected entities and any person who holds any shares in the company in trust for these persons/entities
- Requiring members' approval for directors' employment exceeding three years (s 534)



- Widening the ambit of disclosure of material interest
  - ◆ cover “transaction” and “arrangement”, instead of just “contract” (s 536(1))
  - ◆ for a public company, the ambit of disclosure is widened to include disclosure of material interest of entities connected with director (s 536(2)), except interest that the director is not aware of (s 536(4)(a))
  - ◆ disclose the “nature and extent” of interest, instead of just “nature”
  - ◆ also covers shadow directors (s 540)
  - ◆ procedures for declaration of interest (ss 537 to 539)



- New exemptions and exceptions
  - ◆ exemptions from prohibition on loans etc with prescribed approval of members (ss 500 to 504)
  - ◆ exception for small loans etc not exceeding 5% of net assets or called up capital (s 505)
  - ◆ exception for expenditure on defending proceedings etc (s 507) or in connection with investigation or regulatory action (s 508), subject to financial limit and requirements as to repayment
- Removing criminal sanction (s 157J of Cap 32). Civil consequences only (s 513)
  - ◆ voidable at company’s instance, with exceptions (s 513(1))
  - ◆ directors and others liable to account to company
- Extending the prohibitions on payments for loss of office (ss 163 to 163D of Cap 32) to payment to entity connected with director or former director (s 516)) and to payment to director of holding company (s 521)



## Part 12

# Company Administration and Procedure



### Introducing a comprehensive set of rules for written resolution

- Anything that may be done by a resolution passed at a general meeting or class meeting, without any previous notice being required, may be done by a written resolution. Exception - a resolution removing auditor or director (s 548).
- An ordinary or a special resolution required to be passed by any Ordinance may be passed as a written resolution; and a reference in any Ordinance to an ordinary or a special resolution includes a written resolution (s 548(3)).
- A written resolution is passed when all members who are entitled to vote have signified their agreement (s 556).





- Procedure for proposing and requesting circulation of a written resolution
  - ◆ The directors or a member may propose a resolution to be passed as a written resolution (s 549).
  - ◆ A company must circulate a proposed written resolution to all members who are entitled to vote if it has received requests from members representing not less than 5% of the total voting rights or a lower percentage specified in the articles (s 552).
  - ◆ A member who proposes a written resolution may request the company to circulate with the resolution a statement of not more than 1000 words on the resolution (s 551).
  - ◆ A company is not bound to circulate the statement if the Court is satisfied that the right is being abused or being used to secure needless publicity for defamatory matter (s 554).

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- Procedure for circulating written resolution and statement
  - ◆ Circulation by sending the copies in hard copy or electronic form or by making them available on the website (s 553).
  - ◆ The company must send to the auditor a copy of the proposed written resolution and other document relating to the resolution that is required to be sent to the members (s 555).
- Procedure for signifying agreement
  - ◆ A member signifies agreement when the company receives a document identifying the resolution and indicating the member's agreement (s 556(2)).
  - ◆ The period for agreeing to the proposed written resolution is 28 days or such period as specified in articles (s 558).
  - ◆ A member's agreement to a written resolution, once signified, may not be revoked (s 556(4)).
  - ◆ Any document containing or accompanying a proposed written resolution may be sent by electronic means (s 560).

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- If a resolution is passed as a written resolution, the company must send a notice of that fact to every member and the auditor within 15 days (s 559).
- The statutory provisions do not override any rule of law e.g. the common law principle of unanimous shareholders' consent (s 547(3)).
- Articles may provide its own procedures for passing a written resolution provided unanimous members' approval is required (s 561(2), (3)).



## Dispensation with the holding of AGM

- Circumstances in which company not required to hold AGM
  - ◆ If done by written resolution (s 612(1)).
  - ◆ Single member company (s 612(2)(a)).
  - ◆ Members' unanimous resolution to dispense with the holding of AGM in respect of a particular financial year or for subsequent financial years (ss 612(2)(b) and 613). Copy of the resolution is required to be delivered to the Registrar for registration (s 622(1)(g)).
  - ◆ A dormant company as defined in section 5 (s 611).



- Where no AGM is held –
  - ◆ Directors (failing which members) may appoint the company's first auditor for the company's first financial year (ss 395(3), 396(6)).
  - ◆ Copy of financial statements and reports to be sent to the members (s 430(3)).
  - ◆ Current auditor deemed to be re-appointed unless he declines (s 403). For other exceptions to deemed reappointment see s 403(2).
  - ◆ If reappointment declined members replace retiring auditor at a general meeting (s 396(3), (4)).
  - ◆ Members holding at least 5% of total voting rights may request directors to call a meeting (s 566).



- When AGM required to be held after dispensation
  - ◆ Any member may request the company to convene an AGM for a particular financial year by giving notice to the company not later than 3 months before the end of the statutory period for holding an AGM (s 613(5)).
  - ◆ The unanimous resolution for dispensing with holding an AGM is revocable by an ordinary resolution (s 614).
- For transitional and saving arrangement – Schedule 11 s 107



## Engagement of shareholders in decision making

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- S 115A of Cap 32 enables members to request the company to circulate at the expense of the requisitionists a proposed resolution for an AGM or a statement relating to any proposed resolution or business to be dealt with at any general meeting.
- Ss 582, 615 and 616 provide that the expenses of circulation of the statement and the resolution in relation to an AGM are to be paid by the company if the request is received in time to enable the company to send a copy of the statement or resolution with the notice of meeting.



## Lowering the threshold for demanding a poll

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- The threshold for members to demand a poll is reduced from 10% (in s 114D(1)(b) of Cap 32) to 5% of the total voting rights (s 591(2)(b)).
- The other threshold of at least 5 members is retained (s 591(2)(a)).



## Clarification of the rights of proxy

- Subject to the articles, 2 members present in person or by proxy is a quorum of a general meeting (s 585(3)). Currently s 114A(1)(c) of Cap 32 requires 2 members personally present to be a quorum.
- A proxy may exercise all or any of the member's rights to attend, speak and vote at a general meeting (s 596(1)). Currently s 114C(1A)(a) of Cap 32 allows a proxy to vote on a poll only.
- Subject to the articles, a proxy may be elected as the chairperson of a general meeting (s 602). There is no express provision to that effect in Cap. 32.
- Where a proxy put forward by a company is appointed by a member to be his proxy, s 603 requires the proxy to vote in the way specified in the appointment of the proxy. There is no requirement for a proxy to vote according to the terms of appointment in Cap 32.
- The appointment of a proxy is regarded as revoked if the appointor attends and votes at the meeting (s 605).

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## Part 13

# Arrangements, Amalgamation, and Compulsory Share Acquisition in Takeover and Share Buy-Back

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## Scheme of Arrangement - headcount test

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- Headcount test in current CO
  - ◆ S 166(2)... “majority in number” (“headcount test”) “representing three-fourths in value of the creditors... or members...” (“share value test”). Court may sanction scheme which will be binding on all creditors or members, i.e. court still has discretion whether or not to sanction scheme even if both tests are satisfied.
  - ◆ The problem of share splitting *Re PCCW Ltd* case
  - ◆ Australia amended the Corporations Act in 2007 to give the court a discretion to approve a members’ scheme even though majority in number is not obtained.

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- ◆ Listed companies must also satisfy rule 2.10(b) of the Takeovers Code, i.e. number of votes cast against the scheme must not be more than 10% of the votes attaching to disinterested shares
- ◆ The provision originally only applied to insolvent company schemes until extended to non-insolvent schemes in 1900
- ◆ Headcount test inconsistent with “one share one vote” principle
- ◆ Most shares in listed companies within the Central Clearing and Settlement Scheme (CCASS) are registered in the name of HKSCC Nominees Ltd.

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- Headcount test retained for creditors' schemes (s 674(1)(a), (b))
- For members' schemes the headcount test is retained but the court may order otherwise (s 674(1)(c)(ii)), but for an arrangement involving a general offer (s 707) or a takeover offer the test is at least 75% in value of members voting and the votes cast against the arrangement do not exceed 10% of the total voting rights attached to all disinterested shares (s 674(2)(a)(ii), (b)(ii) & 674(3))
- Specific provision as to costs (s 676)
- Schemes for facilitating reconstruction and amalgamation of companies (s 675)
  - ◆ Revising definition of "property" and "liabilities" in current CO s 167(4) to permit transfer of contract of personal service, thus reversing the effect of *Nokes v Doncaster Amalgamated Collieries Ltd* (1940)

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## Part 14

# Remedies for Protection of Companies' or Members' Interests



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## Remedies for unfair prejudice

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- extended to cover proposed acts and omissions (ss 724(1)(b))
- “with a view to bringing to an end the matter complained of “in s 168A(2) of Cap 32 replaced by any order “that it thinks fit for giving relief in respect of the matter” complained of (s 725(1))
- CJ’s rule making power in s 168A(6) replaced by express power under s 727 (see Companies (Unfair Prejudice Petitions) Proceedings Rules LN 131/2013, Cap 622L)



## Allowing a member of an associated company to bring a statutory derivative action - “multiple derivative action”

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- Statutory derivative action (SDA) introduced as Part IVAA of current CO by Companies (Amendment) Ordinance 2004. Subsequently CFA held in the *Waddington* case (2008)11 HKCFAR 370 that a multiple derivative action was possible at common law.
- Amendments were made in 2010 to provide for multiple derivative action. Sections 731 to 738 restate these provisions.
- Changes include “misfeasance” changed to “misconduct” and “related company” changed to “associated company” (defined in s 2(1)).