



The New Hong Kong Companies Ordinance (Cap. 622)

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8.11.2013



The New Companies Ordinance (“New CO”)

- Passed by the Legislative Council on 12 July 2012
- 12 pieces of subsidiary legislation –
the legislative process completed on 17 July 2013
- commencement expected in March 2014



Structure of the New CO

- Divided into 21 Parts, comprising 921 sections and 11 Schedules
 - Part 1 – Preliminary
 - Part 2 – Registrar of Companies and Companies Register
 - Part 3 – Company Formation and Related Matters, and Re-registration of Company
 - Part 4 – Share Capital
 - Part 5 – Transactions in relation to Share Capital
 - Part 6 – Distribution of Profits and Assets
 - Part 7 – Debentures
 - Part 8 – Registration of Charges
 - Part 9 – Accounts and Audit
 - Part 10 – Directors and Company Secretaries



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Structure of the New CO (2)

- Part 11 – Fair Dealing by Directors
- Part 12 – Company Administration and Procedure
- Part 13 – Arrangements, Amalgamation, and Compulsory Share Acquisition in Takeover and Share Buy-Back
- Part 14 – Remedies for Protection of Companies' or Members' Interests
- Part 15 – Dissolution by Striking Off or Deregistration
- Part 16 – Non-Hong Kong Companies
- Part 17 – Companies not Formed, but Registrable, under this Ordinance
- Part 18 – Communications to and by Companies
- Part 19 – Investigations and Enquiries
- Part 20 – Miscellaneous
- Part 21 – Consequential Amendments, and Transitional and Saving Provisions

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Structure of the New CO (3)

- **12 items of subsidiary legislation**
 - Companies (Words and Expressions in Company Names) Order (Cap 622A)
 - Companies (Disclosure of Company Name and Liability Status) Regulation (Cap 622B)
 - Companies (Accounting Standards (Prescribed Body)) Regulation (Cap 622C)
 - Companies (Directors' Report) Regulation (Cap 622D)
 - Companies (Summary Financial Reports) Regulation (Cap 622E)
 - Companies (Revision of Financial Statements and Reports) Regulation (Cap 622F)
 - Companies (Disclosure of Information about Benefits of Directors) Regulation (Cap 622G)
 - Companies (Model Articles) Notice (Cap 622H)
 - Company Records (Inspection and Provision of Copies) Regulation (Cap 622I)
 - Companies (Non-Hong Kong Companies) Regulation (Cap 622J)
 - Companies (Fees) Regulation (Cap 622K)
 - Companies (Unfair Prejudice Petitions) Proceedings Rules (Cap 622L)

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New CO – Four Major Objectives

- **Enhancing Corporate Governance**
- **Ensuring Better Regulation**
- **Facilitating Business**
- **Modernising the Law**



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New CO – Four Major Objectives (2)

- **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



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New CO – Four Major Objectives (3)

- **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

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New CO – Four Major Objectives (4)

- **Facilitating Business**

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



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New CO – Four Major Objectives (5)

- **Modernising the Law**

- Rewriting the law in simple and plain language
- Abolishing Memorandum of Association
- Retiring the concept of par value

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MODERNIZING THE LAW

Streamlining types of companies that may be formed

Under Cap. 32, 8 different types of company can be formed:

- Private company limited by shares
- Non-private company limited by shares
- Private company limited by guarantee without share capital
- Non-private company limited by guarantee without share capital
- Private unlimited company with share capital
- Non-private unlimited company with share capital
- Private unlimited company without share capital
- Non-private unlimited company without share capital

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MODERNIZING THE LAW

Streamlining types of companies that may be formed (2)

Under the New CO:

- Unlimited companies without share capital are abolished (there are none registered and there are unlikely to be such registered in the future)
- Companies limited by guarantee, whether private or non-private are amalgamated and become companies limited by guarantee. A separate category of company generally treated in the same way as public companies, e.g. they will all be required to file accounts
- Non-private companies become “public companies”, which mean companies other than private companies or guarantee companies

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MODERNIZING THE LAW

Streamlining types of companies that may be formed (3)

Under the New CO:

- 5 types of companies may be formed:
 - a public company limited by shares
 - a private company limited by shares
 - a public unlimited company with share capital
 - a private unlimited company with share capital
 - a company limited by guarantee without a share capital
- Registrar will inform all existing private companies limited by guarantee of their new obligations under the New CO by issuing a letter to them

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MODERNIZING THE LAW

Abolition of the requirement for a memorandum of association for all companies

Background

- Abolition of ultra vires rule in 1997, means the objects clause has become less significant with most companies having the capacity and right powers and privileges of a natural person
- Most information is now contained in the incorporation form and articles of association and most provisions of the memorandum can be amended
- The need for the memorandum as a separate constitutional document has diminished
- Under New CO, the requirement for a memorandum of association is abolished for all companies

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MODERNIZING THE LAW

Abolition of the requirement for a memorandum of association for all companies (2)

Mandatory Articles

- Every company is statutorily **required** to have articles on the following:
 - Company name
 - If the company has a licence to dispense with the use of the word “limited” in its name – objects
 - A statement that the liability of members is limited or unlimited, as the case may be
 - Details of liabilities / contributions of members
 - Capital and initial shareholding on formation
- These mandatory articles comprise information previously set out in the memorandum

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
- A company **may** state the maximum number of shares that a company¹⁵ may issue



MODERNIZING THE LAW

Abolition of the requirement for a memorandum of association for all companies (3)

Model Articles / Bespoke Articles

- For additional regulations, all companies may create bespoke articles or may adopt all or any of the Model Articles prescribed by the Financial Secretary for the type of company to which it belongs
- Companies (Model Articles) Notice (Cap. 622H) prescribes Model Articles for:
 - (1) public company limited by shares (Schedule 1)
 - (2) private company limited by shares (Schedule 2)
 - (3) guarantee company (Schedule 3)
- 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 even if filed in so far as the registered articles do not exclude or modify the Model Articles



MODERNIZING THE LAW

Abolition of the requirement for a memorandum of association for all companies (4)

Existing Companies

- A condition of the memorandum 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 memorandum 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 wish¹⁷ to make as a result of the New CO



MODERNIZING THE LAW

Retiring the concept of par

Background

- Nominal value (also known as "par value") of shares is the minimum price at which shares can generally be issued
- It is generally accepted that par value does not serve its original purpose of protecting creditors and shareholders, and in fact may even be misleading because the par value does not necessarily give an indication of the real value of the shares
- The New CO adopts a mandatory system of no-par for all local companies having a share capital and retires the concept of par value for all shares



MODERNIZING THE LAW

Retiring the concept of par (2)

- This is in line with international trends to provide companies with greater flexibility in structuring their share capital. In other comparable common law jurisdictions, there is also growing acceptance of no-par value shares. Jurisdictions that have adopted mandatory no-par value shares include Australia, New Zealand and Singapore
- There is no essential difference between a share of no par value and one having a par value. Both represent a share, being a fraction of the equity, but par value share has attached to it a fixed face value, and share without par value does not
- It is considered that retiring the concept of par creates an environment with greater clarity and simplicity and is more desirable for the business community generally

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MODERNIZING THE LAW

Retiring the concept of par (3)

- Under the New CO, as a result of migration to mandatory no-par, relevant concepts such as par value, share premium, and requirement for authorised share capital are no longer necessary and are abolished
- **Authorised share capital**
- Upon commencement of the New CO, the provisions in the Memorandum of Association of an existing company (deemed to be provisions in the Articles of Association after commencement of the New CO) relating to authorised share capital and par value of the shares are for all purposes to be regarded as deleted. The share capital of a company would be its issued share capital

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MODERNIZING THE LAW

Retiring the concept of par (4)

- **Share capital**
 - The full proceeds of a share issue will be credited to share capital under the new regime and become the company's share capital. In other words, share capital will represent the total amount that the company actually receives from its shareholders as capital contribution.

- **Share premium account**
 - With the abolition of par value, "share premium" will no longer exist. There is a deeming provision in the New CO to provide for the amalgamation of the existing share capital amount with the amount in the company's share premium account.

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MODERNIZING THE LAW

Retiring the concept of par (5)

- The currently permitted uses of share premium existing on the date of commencement of the New CO will be preserved, e.g., to pay up shares which are issued as bonus shares. For this purpose, the company should continue to maintain records of the balance of the former share premium account

- **Capital redemption reserve**
 - On the commencement date of the New CO, any amount standing to the credit of the company's capital redemption reserve becomes part of the company's share capital

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MODERNIZING THE LAW

Retiring the concept of par (6)

Alteration of share capital

- A company will have greater flexibility to alter its share capital in a no-par environment, e.g. a company will be able to capitalise its profits without issuing new shares and to allot and issue bonus shares without increasing its share capital
- Companies will continue to be able to effectively consolidate and subdivide shares
- Bonus shares can continue to be issued notwithstanding that there will no longer be a share premium account since in a no-par environment, shares can be issued without transferring an amount to the share capital account

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MODERNIZING THE LAW

Retiring the concept of par (7)

Transitional arrangements

- It is expected that the New CO will commence operation in the first quarter of 2014. The abolition of par value for the shares of all Hong Kong companies will take effect immediately upon commencement of the New CO
- The new regime applies to all local companies regardless of whether the companies are formed before or after the commencement date of the New CO. All shares issued, before, on and after the commencement date of the New CO shall have no par value. The law will deem all shares issued before the abolition to have no par value. There is no conversion process required from the companies
- The New CO contains transitional and deeming provisions relating to the move from par value shares to no-par value shares

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MODERNIZING THE LAW

Retiring the concept of par (8)

- Nonetheless, individual companies may wish to review their particular situation to determine if they need to introduce more specific changes to their documents having regard to their own unique circumstances, e.g. the company's constitutional documents, contracts entered into by the company, trust deed involving the company and share certificates for use under the no-par regime by the company

- *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>](http://www.cr.gov.hk/en/publications/guidelines_01.htm)



FACILITATING BUSINESS

Transactions in relation to Share Capital

- **Court-free reduction of capital**
 - Cap. 32 only allows a reduction of share capital if it is approval by the shareholders via a special resolution and if the reduction is approved by the court

 - The New CO introduces, as an alternative procedure, a general court-free procedure based on a solvency test which will be faster and cheaper and can be utilised by all companies



FACILITATING BUSINESS

Transactions in relation to Share Capital (2)

- The court-free procedure is subject to compliance with the solvency test. The key features of the procedure include –
 - (a) all the directors need to sign the solvency statement;
 - (b) members' approval by a special resolution;
 - (c) notices in the Gazette and newspapers;
 - (d) register the solvency statement with the CR;
 - (e) any creditor or non-approving member of the company may, within five weeks after the special resolution is passed, apply to the court for cancellation of the resolution; and
 - (f) register the relevant return with the CR after the expiry of objection period.

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FACILITATING BUSINESS

Transactions in relation to Share Capital (3)

- **Shares buy-back out of capital**
 - Under Cap. 32, the general rule is that a company can only buy back its shares using distributable profits or using the proceeds of a fresh issue of shares. There is an exception for private companies which may fund a buy-back by payment out of capital based on a solvency test
 - Under the New CO, all companies are allowed to fund buy-backs out of capital, subject to a solvency requirement

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FACILITATING BUSINESS

Transactions in relation to Share Capital (4)

- The New CO retains most of the Cap. 32 requirements and procedures applicable to buy-backs by a private company out of capital, and extend them to all companies. The requirements and procedures are similar to the new court-free procedure for reduction of capital

- **Financial assistance to acquire shares**

- Cap. 32 prohibits a company and its subsidiaries from giving financial assistance for the purpose of acquiring shares in the company. The broad prohibition is subject to certain exceptions



FACILITATING BUSINESS

Transactions in relation to Share Capital (5)

- The main change under the New CO is to allow all types of companies (listed or unlisted) to provide financial assistance, subject to satisfaction of the solvency test and one of the three procedures
- The first procedure provides that a company may give financial assistance if the assistance, and all other financial assistance previously given and not repaid, is in aggregate less than 5% of the shareholders' funds
- The second procedure provides that a company may give financial assistance if it is approved by written resolution of **all** members of the company

FACILITATING BUSINESS

Transactions in relation to Share Capital (6)



- The third procedure provides that a company may give financial assistance if it is approved by an ordinary resolution. Shareholders holding at least 5% of the total voting rights or members representing at least 5% of the total members of the company may apply to the court to restrain the giving of the assistance
- Financial assistance is allowed for all types of employee share schemes if the assistance is given in good faith in the interest of the company for the purposes of an employee share scheme or the giving of the assistance is for the purposes of enabling or facilitating transactions to acquire the beneficial ownership of shares for the employees
- The New CO provides that a uniform solvency test will be applicable to reduction of capital, buy-backs and financial assistance

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FACILITATING BUSINESS

Transactions in relation to Share Capital (7)



- A company satisfies a solvency test in relation to a transaction if:
 - (a) immediately after the transaction there will be no ground on which the company could be found to be unable to pay its debts; and
 - (b) either (i) if it is intended to commence winding up within 12 months, the company will be able to pay its debts in full within 12 months of the commencement of the winding up; or (ii) in any other case the company will be able to pay its debts as they become due during 12 months after transaction
- A solvency statement must be made and signed by all directors for buy-backs and reductions of capital, and made and signed by a majority of directors for financial assistance
- There is no need for an auditor's report

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CR Website

- For full details of major changes, please visit the CR website at:

[<http://www.cr.gov.hk>](http://www.cr.gov.hk)



Thank you