



The New Hong Kong Companies Ordinance (Cap. 622)

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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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Streamlining types of companies

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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Streamlining types of companies (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 (see **section 9** for definition which applies to existing as well as companies formed under New CO)
- Non-private companies become “public companies”, which mean companies other than private companies or guarantee companies (see **section 12**)

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Streamlining types of companies (3)

Under the New CO, 5 types of companies may be formed:

- **section 66** of New CO:
 - 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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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

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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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Retiring the concept of par (3)

Major changes

- Under Cap. 32 companies incorporated in Hong Kong and having a share capital are required to have a par value ascribed to their shares (**section 5(4)(a)**). This represents the minimum amount at which a share can be issued
- Companies must also declare in their Memorandum of Association the maximum amount of share capital that may be issued by the company (the requirement for "authorized share capital") (**section 5(4)(a)**)
- The amount of the excess of the issue price of the share over its par value is designated as "share premium". Under Cap. 32, there are restrictions on how a company can deal with share premium and how it must be accounted for (**section 48B**)

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Retiring the concept of par (4)

- 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 (**section 98(4)**). The share capital of a company would be its issued share capital

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Retiring the concept of par (5)

- **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. The notion of issued or paid capital will continue to be relevant even after the abolition of par value, and it will then include the amount previously credited to the share premium account. In other words, it 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 (**section 37 of Schedule 11**).

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Retiring the concept of par (6)

- 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 (**section 38 of Schedule 11**). 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 (**section 37 of Schedule 11**)

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Retiring the concept of par (7)

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 (**section 170**)
- Companies will continue to be able to effectively consolidate and subdivide shares. Whilst there is no nominal amount to be divided for no-par shares, a similar result to subdivision can be achieved by increasing the number of shares. The process of consolidating shares into a smaller number should be considerably simplified where there are no par values to contend with. The number of shares will just reduce with no visible effect on the share capital (**section 170(2)(e)**)

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Retiring the concept of par (8)

- 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 (**section 170(2)(d)**)



Retiring the concept of par (9)

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 (**section 135**). There is no conversion process required from the companies



Retiring the concept of par (10)

- The New CO contains transitional and deeming provisions relating to the move from par value shares to no-par value shares (**sections 35 to 41 of Schedule 11**). The provisions are intended to provide legislative safeguards to ensure that contractual rights defined by reference to par value and related concepts will not be affected by the abolition of par. The transitional and deeming provisions will save considerable work, expense and time for companies and reduce the possibility of disputes.
- For example, the statutory deeming provision in the New CO (**section 40 of Schedule 11**) provides that for the purpose of interpreting and applying (i) a resolution of a company made and (ii) a trust deed or other document executed before the commencement of the New CO, a reference to the par or nominal value of a share (whether made expressly or by implication) is a reference to the nominal value of the shares immediately before that commencement date

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Retiring the concept of par (11)

- 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

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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 (**sections 58 to 63**). Court approval is not required if the sole purpose of the reduction is to re-designate the nominal value of shares to a lower amount (**section 58(3)**)
 - 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

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Transactions in relation to Share Capital (2)

- **Sections 215 to 225** provide for the said court-free procedure, 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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Transactions in relation to Share Capital (3)

- **Share buy-backs 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 (**sections 49A and 49B**). This rule is derived from the capital maintenance doctrine. There is an exception for private companies which may fund a buy-back by payment out of capital based on a solvency test (**sections 49I to 49N**)
- Under the New CO, all companies are allowed to fund buy-backs out of capital, subject to a solvency requirement

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Transactions in relation to Share Capital (4)

- **Sections 258 to 266** retain 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**
 - **Section 47A** of 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

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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 set out in **sections 283 to 289**
- The first procedure, set out in **section 283**, 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 (paid up share capital and reserves of the company (as disclosed in the most recent audited financial statements of the company))
- The second procedure, set out in **section 284**, provides that a company may give financial assistance if it is approved by written resolution of **all** members of the company

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Transactions in relation to Share Capital (6)

- The third procedure, set out in **sections 285 to 288**, 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
- **Section 47C(4)(b)** of Cap. 32 provides that the prohibition on financial assistance does not apply to employee share schemes, provided that the financial assistance is restricted to the provision of money for the purchase or subscription of fully paid shares. This is relaxed in the New CO. **Section 280** allows financial assistance 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

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Transactions in relation to Share Capital (7)

- **Uniform solvency test**

- Under Part II of Cap. 32, a solvency test is provided for in respect of (a) buy-backs of its own shares out of capital by a private company (**section 49K(3), (4) and (5)**); and (b) financial assistance to acquire shares given by an unlisted company (**section 47F(1)(d) and (2)**)
- Both solvency tests are based on cash flow alone, but there are minor differences between them, as follows –
 - (a) for buy-backs, **under section 49K(5)**, the solvency statement has to be accompanied by an auditors' report; and
 - (b) for financial assistance, **section 47F(1)(d)(i)** has an additional requirement for the solvency statement which provides for the situation where the company intends to commence winding up within 12 months of the date of the proposed financial assistance

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Transactions in relation to Share Capital (8)

- It is desirable to adopt a uniform solvency test for buy-backs and financial assistance, and extend its application to the court-free procedure for reduction of capital, for consistency in the law. The New CO adopts the approach for financial assistance set out in **section 47F(1)(d)**, as it can give clarity and certainty on how the solvency test may apply in different scenarios
- **Section 204** of the New CO provides that a uniform solvency test will be applicable to reduction of capital, buy-backs and financial assistance. **Section 205** sets out the content of the uniform solvency test, which in substance, re-enacts **section 47F(1)(d)** of Cap. 32.

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Transactions in relation to Share Capital (9)

- 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
- No auditors report is required

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Statement of capital

- Under Cap. 32, the capital structure of a company can only be ascertained by searching through a number of documents on the register, e.g. the annual return, any return of allotment filed since the annual return, any documents filed in relation to a permitted reduction of capital. It is therefore not easy to ascertain the capital structure at a specific moment in time without a thorough check of the register
- A statement of capital is in essence a “snapshot” of a company’s total subscribed capital at a particular point in time

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Statement of capital (2)

- The New CO requires a company to deliver to the CR such a statement to be contained in a return or notification, whenever there is a change to its capital, e.g. where there is an allotment of shares (**section 142**) or a permitted alteration of share capital (**section 171**). A statement of capital will show the company's share capital information as at the time the company has so changed its share capital
- **Section 201** of the New CO sets out the information to be contained in a statement of capital. This new requirement enhances the requirements under Cap. 32 for notification to the CR of changes of a company's share capital. This will ensure that the public register contains up-to-date information on a company's share capital structure

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Distribution of Profits

- The specific provisions on distributions are contained in **sections 79A to 79P** of Part IIA of Cap. 32. The usual form of distribution is dividend. Distribution can only be made out of profits available for the purpose
- **Part 6** (Distribution of Assets and Profits) of the New CO contains provisions that deal with distribution of profits and assets of a company to members. **Part 6** does not introduce fundamental changes to the distribution provisions in Cap. 32 as the rules under Cap. 32 have generally worked well. It mainly reorganises the provisions in Cap. 32 and proposes some minor technical amendments

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Companies (Disclosure of Information about Benefits of Directors) Regulation (Cap. 622G)



- **Section 161** of Cap. 32 provides for the disclosure of the aggregate amount of the various types of payments to directors in respect of their services e.g. directors' emoluments. **Section 161B** sets out the particulars to be disclosed in a company's accounts for any dealings entered into by the company in favour of its directors which involve loans, quasi-loans or credit transactions etc
- The Companies (Disclosure of Information about Benefits of Directors) Regulation mainly restates and consolidates the disclosure requirements set out in Cap. 32, with necessary modifications for alignment with the relevant provisions on fair dealings by directors under Part 11 of the New CO

Companies (Disclosure of Name and Liability Status) Regulation (Cap. 622B)



- Section 93 of Cap. 32 sets out the requirements for publication of a company name for local companies, and section 337 regulates non-Hong Kong companies
- Companies (Disclosure of Name and Liability Status) Regulation is a new regulation which sets out requirements for local Hong Kong companies re display of name at registered office and business venue and disclosure of name and liability status in communication documents, transaction instruments and websites
- Requirements for non-Hong Kong companies are set out in section 792 of the New CO
- There is a new definition of "business venue" which is defined as a place other than registered office where the company carries on business and that is open to the public (under Cap. 32 the name must be displayed on the outside of every place at which the company carries on business whether open to the public or not)

Companies (Disclosure of Name and Liability Status) Regulation (Cap. 622B) (2)



- New exceptions are added for a company which has had no accounting transaction at any time since incorporation, or where a liquidator etc has been appointed and the registered officer or business venue of the company is the same as that of the liquidator
- Where a location is a registered office or business venue for more than 6 companies, new provisions are introduced to facilitate the display of the names electronically
- Provisions are added to require the company name and liability status to be disclosed on company websites and communication documents and transaction instruments in electronic form as well as hard copy form
- The obligation to display the name is more flexible than under Cap. 32 as it need not be displayed outside the location but at the location and so positioned that it may be easily seen by any visitor to the location

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Other Major Changes



- **Abolition of the requirement for companies to have a memorandum of association:**
 - For existing companies conditions of their memorandum of association are deemed to be articles of association, except those relating to authorized capital or par value, which are regarded, for all purposes as deleted
- **Introduction of a new concept of “responsible person” to replace “officer who is in default”**
 - The threshold for prosecution of officers will be “knowingly or recklessly” and not “knowingly and wilfully”

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Other Major Changes (2)

- **Changes in registration of charges:**
 - A certified copy of the charge instrument will be registered and available for public inspection
 - Time for registration is one month from the date of creation (not 5 weeks as under Cap. 32)
- **Introduction of a new power for the Registrar to compound specified offences rather than prosecute**

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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)

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Thank you