

新《公司條例》
New Companies Ordinance

關於公司董事和公司管理的主要改變
Major Changes relating to Directors
and
Company Administration

副主席律師(公司法改革)
何劉家錦女士
Mrs Karen Ho
Deputy Principal Solicitor
(Company Law Reform)
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關於公司董事的主要改變
Major Changes affecting Directors



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業務審視 Business review

- 新條例規定在董事報告內加入業務審視，而該審視須涵蓋以下資料

The new CO requires a directors' report to include a business review which should cover the following information of a company

- ◆ 公司業務的中肯審視
a fair review of its business
- ◆ 公司面對的主要風險及不明朗因素的描述
a description of its principal risks and uncertainties



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業務審視 (續) Business review (cont'd)

- ◆ 在財政年度終結後發生，並對公司有影響的重大事件的詳情
particulars of any important events affecting it which have occurred since the end of the financial year
- ◆ 公司業務相當可能有的未來發展的揭示
an indication of likely future development in its business
- ◆ 探討公司的環境政策及表現，包括公司遵守對其有重大影響的有關法例及規例的情況
a discussion on its environmental policies and performance, including compliance with the relevant laws and regulations that have a significant impact on the company



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業務審視 (續) Business review (cont'd)

- ◆ 公司與其僱員、顧客及供應商，以及與其他人士(對公司有重大影響而公司的興盛繫於該等人士)的重要關係的說明 (第388條及附表5)
an account of its key relationships with employees, customers, suppliers and others that have a significant impact on the company and on which its success depends (section 388 & Schedule 5)



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業務審視 (續) Business review (cont'd)

- 下列公司無須擬備業務審視-
The following companies are not required to prepare a business review -
 - ◆ 「在提交報告方面獲豁免」的公司
companies falling with the reporting exemption
 - ◆ 不屬「在提交報告方面獲豁免」的私人公司，但獲得75%的成員批准
a private company that does not fall within the reporting exemption with 75% approval from members
 - ◆ 法人團體的全資附屬公司 (第388(3)條)
a wholly owned subsidiary of a body corporate (section 388(3))



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董事有責任以謹慎、技巧及努力行事 Directors' duty of care, skill and diligence

- 舊《公司條例》沒有關於董事有責任以謹慎、技巧及努力行事的條文，而香港普通法在這方面的情況亦非清晰。
There is no provision in the old CO on the directors' duty of care, skill and diligence. The common law position in HK is not entirely clear.
- 在新條例下，董事須以合理水平的謹慎、技巧及努力行事，即指任何合理努力並具備以下條件的人在行事時會有的謹慎、技巧及努力—
Under the new CO, 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 –

董事有責任以謹慎、技巧及努力行事 (續) Directors' duty of care, skill and diligence (cont'd)

- ◆ 可合理預期任何人在執行有關董事就有關公司所執行的職能會具備的一般知識、技巧及經驗(「客觀準則」)；及
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
- ◆ 該董事本身具備的一般知識、技巧及經驗(「主觀準則」) (第465條)。
the general knowledge, skill and experience that the director has ("subjective test") (section 465)
- 該項職責亦適用於幕後董事。
The duty also applies to a shadow director.

追認董事的行為 Ratification of conduct of directors

- 追認涉及疏忽、失責、失職或違反信託的行為，須由成員藉決議提出，但如該成員屬董事，而其行為是尋求追認的對象，或是與該董事有關連的實體，或以信託方式，為該董事或該實體持有公司的股份，則無須理會該成員所投的一票（第473條）。
Ratification of conduct involving negligence, default, breach of duty or breach of trust is 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 (section 473).
- 並不影響成員一致同意作出的決定的有效性，或董事同意不提起訴的權力，亦不影響董事就他們代表公司提出和解或放棄申索的權力（第473(6)條）。
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 (section 473(6)).



與董事的交易 Transactions with directors

- 擴大公眾公司受禁貸款及類似交易的範圍，以包括更多與董事有關連的人。例如成年子女、同居者、父母。
For public companies the prohibitions on loans and similar transactions are extended to cover a wider category of persons connected with a director. For example, adult children, cohabittees, parents.
 - ◆ 關連實體包括家庭成員、有同居關係的人士、有聯繫的法人團體、指明類別的信託人及合夥人（第486條）。
Connected entity includes family members, person in cohabitation relationship, associated body corporate, specified categories of trustees and partner (section 486).



與董事的交易 (續) Transactions with directors (cont'd)

- 公眾公司須獲無利益關係成員的批准，才可進行有關交易（第496(2)(b)(ii)條）。

Disinterested members' approval of the transaction is required in the case of public companies (section 496(2)(b)(ii)).

- ◆ 有關人士：有關董事、有關連實體，以及以信託方式，為該等人士／該等實體持有公司股份的人士。

Interested parties: the relevant directors, connected entities and any person who holds any shares in the company in trust for these persons/entities.



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與董事的交易 (續) Transactions with directors (cont'd)

- 為方便營商，引入了新的豁免條文及例外情況

To facilitate business, new exemptions and exceptions are introduced

- ◆ 已獲得成員訂明批准的禁制貸款
exemptions from prohibition on loans etc with prescribed approval of members
- ◆ 價值不超過淨資產額或已催繳股本5%的小型貸款等（第505條）
exception for small loans etc not exceeding 5% of net assets or called up capital (section 505)
- ◆ 有關下述事項：為支付在法律程序中辯護，或在與調查或規管行動有關連的情況下的支出，但須受有關還款的規定所規限（第507及508條）
exception for expenditure on defending proceedings etc or in connection with investigation or regulatory action, subject to requirements as to repayment (section 507 & section 508)



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與董事的交易 (續)

Transactions with directors (cont'd)

- 舊《公司條例》的刑事制裁已刪除。民事後果有以下 -
The criminal sanction in old CO is removed. Civil consequences only -
 - ◆ 交易可由公司提出要求而致使無效，但有例外情況
voidable at company's instance, with exceptions
 - ◆ 董事及其他人有責任向公司作出彌償
directors and others liable to account to company



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與董事的交易 (續)

Transactions with directors (cont'd)

- 董事受僱用的保證年期超過3年須獲成員批准。如屬公眾公司，則無須理會董事，或以信託形式為董事持有股份的人士所投的一票（第534條）。
Members' approval is required for directors' employment for a guaranteed term exceeding three years. For public companies, the votes of the director or the person holding shares in trust for him must be disregarded (section 534).
- 就失去職位而作出付款的禁制，其範圍擴大至包括向董事或與前董事有關連的實體作出的付款，以及向控股公司的董事作出的付款（第516(3)及521(2)條）。
The prohibitions on payments for loss of office are extended to cover payment to entity connected with director or former director and to payment to director of holding company (section 516(3) & section 521(2)).



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與董事的交易 (續) Transactions with directors (cont'd)

- 擴大披露在公司重要合約中具相當份量的利害關係的範圍
The ambit of disclosure of material interest in contract of significance with the company is widened
 - ◆ 涵蓋「交易」及「安排」，而不僅是「合約」
covers “transaction” and “arrangement”, instead of just “contract”
 - ◆ 如屬公眾公司，範圍擴大至包括與董事有關連的實體具相當份量的利害關係。董事並不知悉的利害關係則除外（第536(2)、(5)條）
for a public company, the scope is widened to include material interest of entities connected with director, except interest that the director is not aware of (section 536(2), (5))



與董事的交易 (續) Transactions with directors (cont'd)

- ◆ 披露利害關係的「性質及範圍」，而不僅是「性質」
disclose the “nature and extent” of interest, instead of just “nature”
- ◆ 亦涵蓋幕後董事（第540(1)條）
also covers shadow directors (s 540(1))
- ◆ 訂明申報利益的程序（第537至539條）
procedures for declaration of interest are set out (s 537 to s 539)



有關公司管理的主要改變 Major Changes relating to Company Administration



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書面決議 Written resolution

- 舊《公司條例》沒有訂明有關提出和通過書面決議的程序。
The old CO does not provide for the procedures for proposing and passing a written resolution.
- 任何可藉在公司成員大會，或某類別成員的會議上通過的決議而作出的事情，均可在無須事先通知的情況下，藉公司成員的書面決議作出(第548條)。例外情況-免任核數師或董事的決議。
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 (section 548).
Exception - a resolution removing auditor or director.



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書面決議 (續) Written resolution (cont'd)

- 提出及通過書面決議的程序
Procedure for proposing and passing a written resolution
 - ◆ 董事或佔總表決權5%的成員可提出書面決議 (第549及552條)。
The directors or members holding 5% of total voting rights may propose a written resolution (section 549 & section 552).
 - ◆ 書面決議可以印本或電子形式傳閱，或在網站上提供有關文本 (第553條)。
Written resolutions may be circulated by sending in hard copy or electronic form or by making them available on the website (section 553).
 - ◆ 表示同意的期限為28日，或公司的章程細則指明的期限 (第558條)。
The period for agreeing to the proposed written resolution is 28 days or such period as specified in the articles (section 558).



書面決議 (續) Written resolution (cont'd)

- ◆ 當所有有權表決的成員表示同意某書面決議，該決議即獲通過 (第556條)。
A written resolution is passed when all members who are entitled to vote have signified their agreement (section 556).
- ◆ 提出書面決議的成員可要求公司在傳閱決議的同時，傳閱一份關於該決議而字數不多於1 000字的陳述書 (第551(2)條)。
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 (section 551(2)).
- ◆ 如法院信納要求傳閱陳述書的權利正被濫用，或正被用以在帶誹謗成分的事宜上，取得不必要的宣傳，則公司無須傳閱陳述書 (第554(1)條)。
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 (section 554(1)).



書面決議 (續) Written resolution (cont'd)

- 法定條文不會取代法律規則，例如普通法中成員一致同意的原則 (第547(3)(a)條)。
The statutory provisions do not override any rule of law e.g. the common law principle of unanimous shareholders' consent (section 547(3)(a)).
- 只要規定須獲得成員一致同意，公司的章程細則可自訂通過書面決議的程序 (第561條)。
Articles may provide its own procedures for passing a written resolution provided unanimous members' approval is required (section 561).



免除舉行周年成員大會 Dispensation with the holding of AGM

- 在下列情況下，公司無須舉行周年成員大會
Circumstances in which company not required to hold AGM
 - ◆ 所有事情已藉書面決議作出 (第612(1)條)
If everything done by written resolution (section 612(1))
 - ◆ 公司只有一名成員 (第612(2)(a)條)
Single member company (section 612(2)(a))
 - ◆ 成員一致決議，就某財政年度或其後的財政年度，免除舉行周年成員大會 (第612(2)(b)條)
Members' unanimous resolution to dispense with the holding of AGM in respect of a particular financial year or for subsequent financial years (section 612(2)(b))



免除舉行周年成員大會(續) Dispensation with the holding of AGM (cont'd)

- 如沒有舉行周年成員大會—
Where no AGM is held –
 - ◆ 董事（否則成員）可就公司首個財政年度，委任首位核數師（第395及396(6)條）。
Directors (failing which members) may appoint the company's first auditor for the company's first financial year (section 395 & section 396(6)).
 - ◆ 將財務報表及報告等的文本送交成員（第430(3)條）
Copy of financial statements and reports to be sent to the members (section 430(3)).



免除舉行周年成員大會(續) Dispensation with the holding of AGM (cont'd)

- ◆ 現任核數師當作再度獲委任，除非被他拒絕（第403條）
Current auditor deemed to be re-appointed unless he declines (section 403).
- ◆ 如再度委任被拒，由成員在成員大會委任新核數師（第396(3)條）
If reappointment declined, members replace retiring auditor at a general meeting (section 396(3)).



免除舉行周年成員大會(續) Dispensation with the holding of AGM (cont'd)

- 即使免除舉行周年成員大會，但如出現以下情況，公司亦須舉行大會-
AGM is required to be held after dispensation if -
 - ◆ 任何成員要求公司召開周年成員大會，而該要求是在舉行周年成員大會的法定限期結束前的3個月之前發出 (第613(5)條)。
a member requests the company to convene an AGM by giving notice to the company not later than 3 months before the end of the statutory period for holding an AGM (section 613(5)).
 - ◆ 成員藉普通決議，把免除舉行周年成員大會的一致決議撤銷 (第614條)。
the unanimous resolution for dispensing with holding an AGM is revoked by an ordinary resolution (section 614).



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讓股東參與決定 Engagement of shareholders in decision making

- 公司如及時收到成員就周年成員大會提出的決議及有關陳述書的要求，使公司能夠在發出會議的通知時，可同時送交該陳述書或決議的文本，則公司須支付傳閱該等文件的費用 (第582及616條)。
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
(section 582 & section 616).



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讓股東參與決定 (續)

Engagement of shareholders in decision making (cont'd)

- ◆ 如要求傳閱陳述書的權利正被濫用，或正被用以在帶誹謗成分的事宜上，取得不必要的宣傳，則公司無須傳閱該陳述書 (第583條)。
Company not required to circulate the statement if the right is abused or is used to secure needless publicity for defamatory matter (section 583).
- 成員要求以投票方式表決的最低人數規定，由佔總表決權的10%。
The threshold for members to demand a poll is reduced from 10% to 5% of the total voting rights (section 591(2)(b)).



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釐清代表的權利

Clarification of the rights of proxy

- 除公司的章程細則另有規定外，2名親身出席，或委派代表出席的成員，即構成公司成員大會的法定人數 (第595(3)條)。舊《公司條例》規定須有2名成員親身出席，才構成法定人數。
Subject to the articles, 2 members present in person or by proxy form a quorum of a general meeting (section 595(3)). The old CO requires 2 members personally present to be a quorum.
- 成員的代表可行使成員所有，或任何以下的權利：出席成員大會，成員大會上發言及表決 (第596條)。舊《公司條例》訂明，除公司的章程細則另有規定外，第32章只容許代表以投票方式表決。
A proxy may exercise all or any of the member's rights to attend, speak and vote at a general meeting (section 596). The old CO allows a proxy to vote on a poll only.



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釐清代表的權利 (續) Clarification of the rights of proxy (cont'd)

- 除公司的章程細則另有規定外，代表可獲推選為成員大會的主席(第602條)。舊《公司條例》則沒有明文規定。
Subject to the articles, a proxy may be elected as the chairperson of a general meeting (section 602). There is no express provision to that effect in the old CO.
- 如委任人出席會議並作出表決，即被視為撤銷其代表的委任 (第605條)。
The appointment of a proxy is regarded as revoked if the appointor attends and votes at the meeting (section 605).
- 有股本公司的股東可委任多名代表 (第596(3)條)。
Multiple proxies are allowed in the case of a company having a share capital (section 596(3)).



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不公平損害的補救 Remedies for unfair prejudice

- 擴大不公平損害補救的範圍，以涵蓋擬作出，或不作出的作為。
Extended to cover proposed acts and omissions.
- 舊《公司條例》中「為了結遭投訴的事項」，由法院可作出「它認為合適」的命令，就遭投訴的「事項提供濟助」所取代。
“with a view to bringing to an end the matter complained of” in old CO replaced by any order “that it thinks fit for giving relief in respect of the matter” complained of.
- 舊《公司條例》下，《公司(清盤)規則》適用於不公平損害的法律程序。在新條例下，終審法院首席法官獲賦予明確權力訂立規則，規管不公平損害的法律程序(見《公司(不公平損害呈請)法律程序規則》(第622L章))。
Under the old Co, the Winding Up Rules were applicable to unfair prejudice proceedings. Under the new CO, CJ is given express power to make rules to regulate such proceedings (see Companies (Unfair Prejudice Petitions) Proceedings Rules, Cap 622L).



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「多重衍生訴訟」 “multiple derivative action”

- 法定衍生訴訟於二零零四年引入，其後終審法院認為普通法容許多重衍生訴訟。
Statutory derivative action introduced in 2004. Subsequently CFA held that a multiple derivative action was possible at common law.
- 二零一零年作出的修訂，就多重衍生訴訟作出規定，有聯繫公司的成員，可就對公司作出的不當行為提起法律程序。新條例重述該等條文。
Amendments were made in 2010 to provide for multiple derivative action to enable a member of an associated company to bring proceedings in respect of misconduct committed against a company. Such provisions are restated in the new CO.



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