



The new Companies Ordinance One Year On

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Registrar of Companies
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The New Companies Ordinance

- ❑ Passed by the Legislative Council on 12 July 2012
- ❑ 12 pieces of subsidiary legislation – the legislative process completed on 17 July 2013
- ❑ Commencement on 3 March 2014

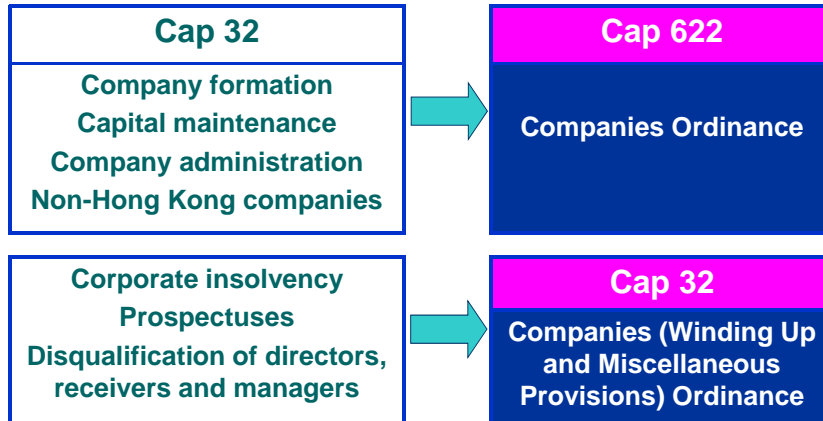
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The Change



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Four major objectives

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



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Implementation of the new CO (1)

Preparatory work

- Issued 16 external circulars and 4 guidelines to elaborate on specific aspects
- Specified 83 forms for use under the new CO and 9 forms for use under Cap 32



Implementation of the new CO (2)

Comprehensive publicity campaign

- A dedicated thematic section on CR's website to provide –
 - briefing materials on all 21 parts of the new CO and 12 pieces of subsidiary legislation
 - highlights of key changes
 - answers to FAQs
 - reference tables
 - transitional arrangements
 - new forms



Implementation of the new CO (3)

Comprehensive publicity campaign (Cont'd)

- Answered over 60,000 public enquiries with the addition of a hotline.
- Organized and participated in over 70 briefings and seminars for –
 - professional bodies
 - business organizations
 - tertiary institutions
 - other government departments



Implementation of the new CO (4)

Transition to the new regime

- First week of implementation: over 99% of companies used new forms for incorporation applications
- 3-month transitional period for filing of new forms
 - by May 2014, 80% of statutory forms received were in new format
 - In early June, usage rate of new forms was close to 100% (out of over 10,000 documents received daily)
- Revamped information system running smoothly, fully supporting CR's new roles and functions under the new CO



Implementation of the new CO (5)

Achievement of the objectives

Facilitate business operation and cater for the needs of SMEs

- From 3.3.2014 to 31.12.2014 –
 - around 55% of new companies incorporated electronically adopted the sample articles of association provided at e-Registry (www.eregistry.gov.hk)
 - 127 applications for restoration of companies to the Companies Register using the administrative restoration procedure were received (about 44.4% of total no. of applications for company restoration)



Implementation of the new CO (6)

Achievement of the objectives (Cont'd)

- 92 out of 102 companies reduced capital by the alternative court-free procedure, representing a 6-fold increase in the total no. of companies that have reduced their capital (14 in 2013)
- 10 groups of companies used the court-free procedure of amalgamation



Implementation of the new CO (7)

Administrative restoration procedure

- A company struck off from the Register may apply to the Registrar to be restored to the Register if
 - the company was in operation or carrying on business at the time of struck off
 - in the event the company had immovable property in HK which became vested in Government as bona vacantia – Government has no objection to restoration
 - company's records in the Register are brought up to date **(section 761)**



Implementation of the new CO (8)

Court-free reduction of capital

- The old CO only allows a reduction of share capital if it is approved by the shareholders via a special resolution and if the reduction is confirmed by the court.
- The new CO introduces, as an alternative procedure, a general court-free procedure based on a solvency test which should be faster and cheaper and can be utilised by all companies. **(sections 215 to 225)**



Implementation of the new CO (9)

Court-free reduction of capital (Cont'd)

- The company must publish notices in the Gazette and newspapers to alert the creditors and creditors may object to the court against the reduction.
- The directors must confirm the solvency of the company by signing a solvency statement.



Implementation of the new CO (10)

Enforcement of statutory provisions

- Given the new powers of the Registrar under the new CO, CR has set up a new Inspection Unit in its Enforcement Section to conduct checks and site visits of registered office addresses of companies
- 83 summonses were issued against 11 related companies and their directors for failing to hold AGMs and lay accounts before AGMs



Highlights of Key Changes (1)

Abolition of the memorandum for all companies

- For companies incorporated under the old CO –

A condition of the memorandum of an existing company immediately before commencement of the new CO is regarded as a provision of that company's articles of association, except that any such condition setting out authorised share capital and the par value of shares are regarded as deleted (**Section 98**).

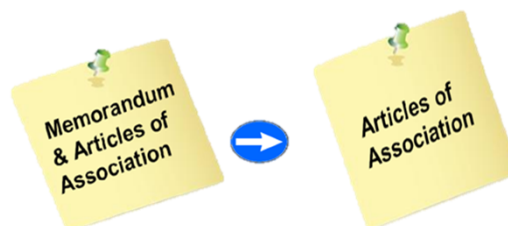


Highlights of Key Changes (2)

Abolition of the memorandum for all companies (Cont'd)

- For companies incorporated under the old CO –

All references in any other ordinances / documents etc. to memorandum are references to articles of association (**Section 98**).





Highlights of Key Changes (3)

Abolition of the memorandum for all companies (Cont'd) Mandatory Articles

- Every company is **required** to have articles on the following :
 - Company name (**section 81**)
 - If the company has a licence to dispense with the use of the word “limited” in its name – objects (**section 82(1)**)
 - A statement that the liability of members is limited or unlimited, as the case may be (**section 83**)
 - Details of liabilities / contributions of members (**section 84**)
 - Capital and initial shareholding on formation (**section 85**)
- These mandatory articles comprise information previously set out in the memorandum



Highlights of Key Changes (4)

Abolition of the memorandum for all companies (Cont'd) 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 (**section 82(2)**)
- A company **may** state the maximum number of shares that the company may issue



Optional Articles

Highlights of Key Changes (5)

Abolition of the memorandum for all companies (Cont'd) Model Articles / Bespoke Articles

- For additional regulation, all companies may use 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 (**sections 78 and 79**)
- Companies (Model Articles) Notice (Cap. 622H) prescribes Model Articles for:
 - public company limited by shares (Schedule 1)
 - private company limited by shares (Schedule 2)
 - guarantee company (Schedule 3)



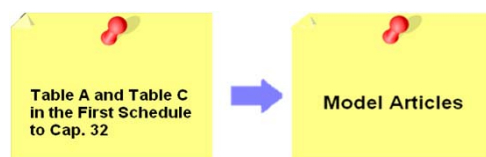
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Highlights of Key Changes (6)

Abolition of the memorandum for all companies (Cont'd)

- Model Articles 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 (**section 80**)



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Highlights of Key Changes (7)

Common Seal

- the keeping and use of common seal is optional
- A company may, without using a seal, execute a document by having it signed by its officers -
 - 2 directors; or
 - a director and the company secretary; or
 - in the case of a company with only one director, the sole director (**section 127**)
- A company may execute a deed by having it so signed and expressed to be executed as a deed and delivering it as a deed. (**section 128**)



Highlights of Key Changes (8)

Disclosure of company name

- Companies (Disclosure of Company Name and Liability Status) Regulation (Cap 622B) requires a company to display continuously its registered name at its registered office and business venue.
- A company is also required to state its registered name in the company's communication documents and transaction instruments and on its website.
- For a company with bilingual names, it is sufficient to display or state either the English name or the Chinese name. (CR External Circular No. 13/2014)

Highlights of Key Changes (9)

Abolishing par value of shares

- Adopting a mandatory system of no-par for all companies with a share capital.
- Relevant concepts such as authorised share capital and share premium were abolished.
- Deeming provisions to ensure that contractual rights defined by reference to par value and related concepts are not affected by the abolition of par (**sections 35 to 41 of Schedule 11**). The deeming provisions should save considerable work, expense and time for companies and reduce the possibility of disputes.

Highlights of Key Changes (10)

Abolition of par value

A company was incorporated under the old CO. As at 2 Mar 2014 the company has issued 10 shares with a par value of \$1 per share.

	2 Mar 2014	3 Mar 2014
Share capital	10	14
Share premium	3	nil
Capital redemption reserve	1	nil
Retained profits	2	2
Total equity	16	16



Highlights of Key Changes (11)

Uniform solvency test

- Under the old CO, solvency tests were provided in respect of (a) buy-backs of its own shares out of capital by a private company (**sections 49K(3), (4) and (5)**); and (b) financial assistance to acquire shares given by an unlisted company (**section 47F(1)(d) and (2)**). There were minor differences between them.
- It is desirable to adopt a uniform solvency test for buy-backs of shares out of capital and financial assistance, and extend its application to the court-free procedure for reduction of capital, for consistency in the law.
- A uniform solvency test is applicable to reduction of capital, buy-backs and financial assistance. (**Section 204**)



Highlights of Key Changes (12)

Uniform solvency test (Cont'd)

- **Section 205** sets out the content of the uniform solvency test.
- A company satisfies a solvency test in relation to a transaction if:
 - immediately after the transaction there will be no ground on which the company could be found to be unable to pay its debts; and
 - 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 the transaction.
- The directors must sign a solvency statement in support of their view.

Highlights of Key Changes (13)

Improving the registration of charges

- Updating the list of registrable charges.
- Requiring a certified copy of the charge instrument to be registrable and available for public inspection.
- Registration period shortened to a month.



Highlights of Key Changes (14)

Restriction on corporate directorship

- The new CO requires at least one individual to be a director of a private company (**section 457**) (grace period of 6 months has expired)

Directors' duty of care, skill and diligence

- 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.

Highlights of Key Changes (15)

Directors' duty of care, skill and diligence (Cont'd)

- 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 –
 - 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”)

(section 465)



Highlights of Key Changes (16)

Transactions with directors

- 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, cohabitees, parents.
 - “Connected entity” includes family members, person in cohabitation relationship, associated body corporate, specified categories of trustees and business partner. (section 486)



Highlights of Key Changes (17)

Transactions with directors (Cont'd)

- Members' approval is required for employment contracts with 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)**
- Disinterested members' approval of transactions with directors is required in the case of public companies. **(sections 496(2)(b)(ii)& 5, 515(1)(b)(ii) & 4, 518(2)(b)(ii)&(4) and 532(2)(b)(ii)&(4))**



Highlights of Key Changes (18)

Transactions with directors (Cont'd)

- The prohibitions on payments for loss of office are extended to cover payment to an entity connected with the director or former director **(section 516(3))** and to payment to director or former director of holding company. **(section 521(2))**
- The ambit of disclosure of material interest in contract of significance with the company is widened to cover “transaction” and “arrangement”, instead of just “contract”. **(sections 536(1)&(2))**
- For a public company, the scope is widened to include material interest of entities connected with the director. **(section 536(2))**



Highlights of Key Changes (19)

Annual Return

- Annual return of a company must be registered within 42 days after the company's return date, i.e.
 - Public company – 6 months after the end of its accounting reference period
 - Guarantee company – 9 months after the end of its accounting reference period, e.g. financial year ends on 31.3.2015, annual return must be delivered within 42 days after 31.12.2015
 - Private company – anniversary of incorporation (no change)



Highlights of Key Changes (20)

- Upon commencement of the new CO, companies limited by guarantee become a specified category of companies –
 - at least two directors are required
 - corporate director is not allowed
 - the annual return must be delivered together with a certified copy of the financial statements, director's report and auditor's report
 - an escalating scale of annual registration fee is introduced for the filing of annual returns.



Highlights of Key Changes (21)

Scheme of Arrangement – Headcount Test

- Headcount test in old CO
 - the scheme has to be approved by “a majority in number” (headcount test) “representing three-fourths in value of the members ...” (“share value test”) present and voting at the meeting. Court still has discretion whether or not to sanction scheme even if both tests are satisfied.
 - listed companies must also satisfy rule 2.10(b) of the Code on Takeovers and Mergers, i.e. number of votes cast against the scheme must not be more than 10% of the votes attaching to disinterested shares.



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Highlights of Key Changes (22)

Scheme of Arrangement – Headcount Test (Cont'd)

- The headcount test was reviewed in the light of *Re PCCW Ltd* case where there was evidence of share splitting.
- 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. The headcount test does not serve to reflect the views of shareholders.



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Highlights of Key Changes (23)

Scheme of Arrangement – Headcount Test (Cont'd)

- For members' scheme of arrangement involving a general offer to buy back shares or a takeover offer, the headcount test is replaced by the requirement that the votes cast against the scheme do not exceed 10% of the total voting rights attached to all disinterested shares. **(sections 674(2)&(3))**
- The headcount test is retained for other members' schemes but the Court is given a discretion to dispense with the test in special circumstances. **(sections 674(1)(c)(ii)&(d)(ii))**
- Court may order costs against a member only if his opposition to the scheme is frivolous or vexatious. **(section 676(5))**



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CR's e-Initiatives

- One-stop electronic company incorporation and business registration -
 - time required is less than 1 hour
 - electronic certificates and hard copy certificates have same legal effect
 - 4 samples of Articles of Association, 2 for private company and one each for public company and guarantee company
- New search functions of Company Search Mobile Service were launched in December 2014 (CR External Circular No. 14/2014).
- Full Scale Electronic Filing Service @ e-Registry was launched in March 2015 (CR External Circular No. 1/2015).



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