

## HONG KONG'S NEW COMPANIES ORDINANCE

The rewrite of the Companies Ordinance has been a focus of the legal industry since it was endorsed by Legislative Council ("LegCo") in mid-2006. The Bill was finally introduced into LegCo in early 2011, and passed in mid-2012. Pursuant to the Gazette dated 21 October 2013, it was announced that the major provisions of the New Companies Ordinance would come into operation on 3 March 2014.

The New Companies Ordinance (Cap. 622) ("New CO") deals with all provisions in the current Companies Ordinance (Cap. 32) ("Old CO") relating to live companies, while the winding-up and insolvency related provisions and prospectus related provisions would remain in the current Companies Ordinance (Cap. 32), which will then be re-named as the Companies (Winding Up and Miscellaneous Provisions) Ordinance ("C(WUMP)O").

The New CO comprises twenty-one parts, with 921 sections and 11 schedules. The major changes are set out as follows:-

### COMPANY

#### 1. Abolition of Memorandum of Association

Following the abolition of the ultra vires rule which greatly reduced the significance of the object clause, and the introduction of filing system which requires most information to be filled in the incorporation form and articles, the need of having a Memorandum of Association has diminished. Under the New CO, the Memorandum is abolished for all companies, and Articles of Association will become the only constitutional document for the companies. Companies are free to adopt all or any of the model articles, and will be deemed so if the registered articles do not expressly exclude or modify the model articles.

#### *Action Required by Existing Company*

The New CO contains deeming provisions to ensure that the Articles of Association for existing companies will comply with the New CO. It is however still advisable to review the articles of your company in view of the changes in other areas of company law.

#### 2. Abolition of Par Value

Under the Old CO, shares in companies incorporated in Hong Kong must have par value. The concept of par value however no longer serves its original purpose to protect creditors as shares nowadays are generally issued at premium. The New CO abolishes par value and uses share capital instead, which saves companies from the hassle of computation of par value and share premium.

#### *Action Required by Existing Company*

The New CO contains deeming provision which would have the effect of amalgamation of the existing share capital account with share premium account. Despite the deeming provision, you are strongly advised to review your company's position to confirm if any contracts or share certificates need to be renewed or re-issued to reflect these changes in law.

#### 3. Restriction on Appointment of Corporate Directors

Under the Old CO, a private company, which is not a member of a group of companies containing a listed company, is not prohibited from appointing a corporate director. The New CO now requires these private companies with corporate directors to appoint at least one additional natural person as director.

#### *Action Required by Existing Company*

The New CO gives a six-month grace period for existing companies to comply with the new requirement. You are strongly encouraged to act early to comply, should your company have corporate directors only.



## DIRECTORS

### 4. Codification of Directors' Duties

Previously, practitioners and company officers were required to look into both the legislation and case law to ascertain directors' duties of care. The New CO codifies the common law, which provided that directors' duties are to be measured by both objective and subjective standard. As a result, in addition to demonstrating the general knowledge, skill and experience that one would normally expect of a director, he must also be assessed based on his personal knowledge, skill and experience.

#### *Lower Prosecution Threshold against Responsible Persons*

Under the old CO, officers were only liable if they knowingly and wilfully authorized or permitted the default. The new CO has significantly lowered the threshold to prosecute. A responsible person, referring to officer or shadow director, who authorizes or permits or participates in the contravention or failure, will be subject to prosecution. Knowledge and wilful conduct on the part of the officer is no longer a prerequisite. Responsible persons now face potential criminal liability for reckless acts and omissions.

#### *Action Required by Existing Company*

Despite the standard of care is about the same under the old and new CO regimes, in light of the lowering of prosecution threshold against responsible persons, companies are encouraged to provide training to directors and senior management such that they can fully understand their duties under the New CO.

## PROCEDURAL CHANGES

### 5. Relaxation of Reduction of Capital

The Old CO allows reduction of share capital only if it is approved by shareholders by way of special resolution and subsequently approved by court. Going through the process is lengthy and costly. With the introduction of New CO, your company can easily reduce capital by way of a court-free procedure. The new requirements are:-

- (a) solvency statement signed by all directors,
- (b) approval of members by way of special resolution within 15 days of solvency statement,
- (c) notice in the Gazette published by the company within one week,
- (d) registration of the solvency statement between five to seven weeks after passing the special resolution, provided that no objection is encountered from any creditor or non-approving member.

### 6. Relaxation of Financial Assistance

Under the Old CO, companies are generally prohibited from giving financial assistance to purchaser of the companies. The case law has made it a troublesome matter that could lead to the whole transaction called off. The New CO relaxes the requirement such that all types of companies, be they listed or unlisted, are allowed to provide financial assistance as long as they pass the solvency test and one of the three tests (de minimus test, unanimous approval test or no objection test) set out in the New CO.

### 7. Introduction of New Headcount Test in Scheme of Arrangements

Under the Old CO, both headcount and share value tests must be satisfied before a scheme of arrangement could be sanctioned by court. To satisfy the two tests, there must be a majority in number representing 75% in value of members or creditors who present and vote at the meeting. The New CO introduces a new headcount test for scheme of arrangements involving general offer or takeover offer. In essence, the new test is that there must be no more than 10% of votes out of all disinterested shares. For scheme of arrangements that do not involve general offer or takeover offer, the old headcount test applies, but the Courts are given discretion to dispense with the test.

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