

Legal Sharing

The New Companies Ordinance (Cap. 622)

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As you may note, The New Companies Ordinance (“**New CO**”) (Cap. 622) commenced operation with effect from 3rd March 2014. We set out the major changes of the New CO as follows:-

Abolishment of Memorandum of Association

1. The New CO abolishes the requirement of a company to have a Memorandum of Association as a constitutional document. Hence, a company that is incorporated in Hong Kong after 3rd March 2014 shall only have an Article of Association, which shall set out the following mandatory clauses:-

- (i) The name of the company;
- (ii) Members’ liabilities; and
- (iii) Capital and initial shareholdings.

No Par Value

2. The New CO also abolishes the par value of share. As such, the concept of nominal value, premium and authorized capital will be history and a company will have more flexibility in structuring its share capital.

New Model of Article of Association

3. A new model of Article of Association will be introduced. The existing Article of Association of a company, in so far as not modified by the New CO, will continue to apply. However, some clauses in the Article

of Association may become void and obsolete by virtue of the New CO.

Requirement of a Natural Person as Director

4. Although the restrictions on corporate directorship in public companies, companies limited by guarantee and private companies which are members of a group of companies of which a listed company is a member remain unchanged, the New CO now requires that each private company must have at least one director who is a natural person. The purpose of the new requirement is to enhance the transparency and the accountability of directors of private companies.

5. On top of the common law and fiduciary duties owed by a director, the New CO sets out a list of codified duty of care and skill. Hence, a director of a company owes not only a common law duty but also a statutory duty towards the company.

6. With a view to further improve corporate governance and to avoid conflict of interest between a director and his/her company, the New CO adopts some new measures including but limited to the followings:-

- (i) Members’ approval is required if the directors’ guaranteed term of employment exceeds 3 years;
- (ii) Hong Kong companies are prohibited from making loan, quasi loan and/or

credit transactions to its directors or to directors of its holding company or to Hong Kong incorporated companies controlled by such Directors, unless disinterested members' approval is obtained; and

(iii) A director is required to disclose not only the nature but also the "extent" of transaction of material interest.

7. The New CO sets out a new statutory timetable for the circulation and passing of shareholders' written resolution. In gist:-

(i) Directors or shareholders representing not less than 5% of the total voting rights may propose a resolution as a written resolution;

(ii) The proposed written resolution must be circulated to every shareholder within 21 days;

(iii) The proposed written resolution will be lapsed if not passed within 28 days after circulation date; and

(iv) Once the written resolution has been passed, the company must notify the same to all shareholders and the company's auditor within 15 days.

Responsible Person

8. Under the New CO, a "responsible person" shall include the officers of the company such as directors, shadow directors, company secretary and other officers who perform managerial functions. These responsible persons may be held liable if the company contravenes provisions under the New CO and where the court accepts that they authorize, permit or participate in such contravention. As such, not only directors have the responsibility to ensure that the company is in strict compliance with the New CO, person holding senior management position and/or shadow directors may also be held liable if the company is found to have contravened the relevant provisions of the New CO.

Execution of Documents

9. After 3rd March 2014, the requirement of

having a common seal for every company is no longer mandatory. According to the New CO, companies have an option of whether to adopt and use a common seal. The New CO also specifies ways where a company may execute documents by way of:-

(i) Affixing the company's common seal pursuant to the provisions stated in its articles of association;

(ii) Signing the document by any two directors or any director and the company secretary or its sole director; or

(iii) Continue to use other ways to execute documents, such as through a director's resolution appointing authorized signatories.

Registration of Charge

10. The New CO preserves the existing registration requirements with new measures stated hereinbelow which aim at improving the registrations system:-

(i) The automatic acceleration of the repayment requirement is removed. The lender can now determine whether the secured amount becomes immediately payable;

(ii) The original charge instrument is no longer required. A certified copy of the charge instrument must be delivered for registration instead and the same shall be made available for public inspection;

(iii) The time period for registration is shortened from 5 weeks to 1 month; and

(iv) The notification of payment, satisfaction of debt, release or cessation must be delivered to the Registrar together with a certified copy of the written evidence of the payment, debt satisfaction, release or cessation and will be made available for public inspection.

This sharing does not constitute legal advice.

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