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SOLICITORS



Hong Kong Law

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## KEY CHANGES UNDER THE NEW COMPANIES ORDINANCE PART THREE – COMPANY ADMINISTRATION, PROCEDURE AND OPERATIONS

### Introduction

The New Companies Ordinance (Cap. 622) (the **New CO**) will come into force on 3 March 2014. Following commencement of the New CO, the current Companies Ordinance (Cap. 32) (the **Old CO**) will be retitled as the “Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap. 32)”. The core provisions affecting the operation of companies under the Old CO will be repealed, except those provisions relating to winding-up and insolvency of companies and prospectuses.

Charltons is preparing a series of newsletters summarising the key changes to the company law framework under the New CO. In this third newsletter, we discuss certain key changes impacting on a company’s administration, procedure and operations, including changes in relation to annual general meetings, annual returns, written resolutions, shareholder meetings and execution of documents.

### Annual General Meeting (AGM)

**New CO references: sections 430(3), 609 to 614**

#### Position under the Old CO

The Old CO requires every company to hold an AGM in each year, with not more than 15 months between the date of one AGM and the next. There are no rules on shorter accounting periods. In addition, there is no provision to regulate the first accounting period, except that the first AGM has to be held within 18 months of incorporation.

Under the Old CO, every company is required to hold AGMs, although a company can dispense with holding AGMs if everything that is required or intended to be done at the meeting is done by written resolutions, and a copy of each of the documents (including any accounts or records) which would be required to be laid before the meeting is provided to each member of the company.



## **Key changes under the New CO**

### *Time for holding AGM*

Unless exempted, companies are required to hold an AGM within six months (for public companies) or nine months (for private companies or companies limited by guarantee) after the end of their accounting reference period.

### *Resolution to dispense with requirement to hold AGM*

Section 613 of the New CO allows a company to dispense with the requirement for holding of AGMs by passing a written resolution or a resolution at a general meeting by all members. After passing the resolution, the company will not be required to hold any AGMs for the financial year or for subsequent financial years to which the resolution relates. The financial statements and reports originally required to be laid before an AGM still need to be sent to the members (section 430(3)).

Under section 613(5) of the New CO, any member may request the company to convene an AGM for a particular year. Such notice must be given no later than three months prior to the last day that the company would otherwise be required to hold an AGM for the relevant financial year.

The company may also revoke the resolution dispensing with AGMs by passing an ordinary resolution to that effect.

### *Single member companies*

Single member companies are not required to hold AGMs (section 612(2)(a) of the New CO). However, a single member company is still required to send financial statements and reports to its member under section 430(3).

### *Written resolution procedure*

The written resolution procedure under the Old CO is retained in section 612(1) of the New CO for any company (including a public company or a company limited by guarantee) wishing to dispense with an AGM on a specific occasion by a written resolution.

### *Dormant companies*

As was the case under the Old CO, dormant companies are exempt from the requirement to hold AGMs. Dormant companies are also exempt from the requirements to prepare financial statements and reports.

## **Annual Return**

**New CO references: section 662, schedule 6**

### **Position under the Old CO**

The Old CO provides that, except where the company is a private company having a share capital, the annual return is required to be filed within 42 days after the AGM for the year. The Old CO further provides that, except where the company is a private company, the annual return shall include certified copies of the company's balance sheet and reports laid before the company in general meeting to which the return relates.

### **Key changes under the New CO**

#### *Public companies and guarantee companies*

The annual return must be filed within 42 days after the company's return date. The return date is six months after the end of the company's accounting reference period for public companies, or nine months after such period for companies limited by guarantee.

#### *Private companies*

Private companies are still required to file their annual returns within 42 days after the anniversary of their incorporation.

#### *Information to be included in, and documents to accompany, annual return*

Schedule 6 of the New CO sets out the information to be included in an annual return and the documents required to accompany it. The requirement for listed companies to file the details of all members in their annual returns has been relaxed. Section 2 of schedule 6 requires listed companies to include particulars only of members who held 5% or more of the issued shares in any class of the company's shares as at the date of the annual return.

### **Written Resolutions**

#### **New CO references: sections 547 to 561**

#### **Position under the Old CO**

The Old CO provides that anything which may be done by a company by resolution in a general meeting may be done, without a meeting and without any previous notice, by a resolution signed by all members of a company.

#### **Key changes under the New CO**

The New CO establishes procedures for proposing, passing and recording written resolutions.

Section 549 provides that the directors or a member of a company may propose a resolution as a written resolution. A member of the company who proposes the resolution may request the company to circulate with the resolution a statement of not more than 1,000 words on the subject matter of the resolution (section 551).

Once a written resolution is proposed, the company has a duty to circulate the resolution to every member for agreement if it has received requests from members representing not less than 5% of the total voting rights (or a lower percentage if specified in the company's articles) (section 552). Circulation may be effected by sending the copies in hard copy form or electronic form or by making the copies available on a website (section 553).



The period for agreeing to the proposed written resolution is 28 days or such period as specified in the company's articles (section 558). The proposed written resolution will lapse if not passed within 28 days after the circulation date (or such other period as provided for in the articles). Members may signify their agreement to a proposed written resolution and send it back to the company either in hard copy form or electronic form (section 556). A written resolution requires agreement in writing by all eligible members of a company (section 556(1)). If a resolution is passed as a written resolution, the company must send a notice of that fact to every member and the auditor of the company within 15 days (section 559).

The new procedures will not replace the common law doctrine of unanimous consent to the effect that, if all the members of a company actually agree on a particular decision which can be made at a general meeting, the decision is binding and effective without a meeting (section 547(3)). A company's articles may also set out alternative procedures for passing a resolution without a meeting, provided that the resolution has been agreed by the members unanimously (section 561).

## Permitting a General Meeting to be Held at More Than One Location

**New CO references: section 584**

### Position under the Old CO

The Old CO does not have express provision permitting a general meeting to be held at two or more places.

### Key changes under the New CO

Section 584 of the New CO permits a company to hold a general meeting at two or more places using any technology that enables the members of the company who are not together at the same place to listen, speak and vote at the meeting. A company may set out rules and procedures for holding a dispersed meeting in its articles.



## Execution of Documents

**New CO references: sections 124 to 125 and 127 to 129**

### Position under the Old CO

The Old CO requires every Hong Kong company to have a common seal. A company must be authorised by its articles of association to have an official seal for use outside Hong Kong, and have objects which require the transaction of business outside Hong Kong. In addition, under the Old CO, an attorney can only bind a company in respect of deeds executed by him on its behalf outside Hong Kong.

### Key changes under the New CO

#### *Common seal optional*

Section 124 of the New CO makes the keeping and use of a common seal optional.

#### *Overseas seal*

Section 125 allows a company to have an official seal for use outside Hong Kong, removing the restrictions under the Old CO.

## *Execution of documents by company*

Section 127 provides that a company may execute a document:

- under its common seal in accordance with its articles (section 127(1) and (2));
- in the case of a company with only one director, by having the document signed by the director (section 127(3)(a)); or
- in the case of a company having two or more directors, by having the document signed by any two directors or by any director and the company secretary (section 127(3)(b)).

In favour of a good faith purchaser for value, a document is to be regarded as having been executed by a company if the document purports to have been signed in accordance with section 127(3)(a) or (b).

Section 127(5) provides that a document signed in accordance with section 127(3)(a) or (b) and expressed to be executed by the company has effect as if the document had been executed under the company's common seal.

## *Execution of deeds by company*

Section 128 of the New CO provides that a company may execute a deed by:

- executing it in accordance with section 127;
- having it expressed to be executed by the company as a deed; and
- delivering it as a deed.

## *Execution of documents by attorney*

Section 129 of the New CO allows a company to authorise any person as its attorney to execute a deed or any other document on its behalf in Hong Kong or elsewhere.

### **Practical considerations and recommended steps**

Although a company may continue to employ other methods to execute documents, the deeming provisions in favour of good faith purchasers for value will only apply to documents executed in accordance with section 127 of the New CO.

In order to take full advantage of the new flexibility in executing documents (including deeds), a company should review its articles of association and remove any "legacy" limitations regarding use of the seal or execution.

The New CO is silent on the valid mode(s) of execution of a Hong Kong law deed by a foreign company. Foreign companies should therefore continue to execute deeds in the same way as under existing practice.



## Statutory Protection for Persons Dealing With Companies

**New CO references: sections 117 to 118, 120**

### Position under the Old CO

There are no express provisions to protect persons dealing with companies under the Old CO.

### Key changes under the New CO

Sections 117 and 118 of the New CO provide statutory protection for persons dealing with a company in addition to the common law “indoor management rule”. The “indoor management rule” provides that a third party dealing in good faith with a company is not bound to inquire whether acts of internal management have been regular and is entitled to presume that acts within the company’s constitution and powers have been properly and duly performed.

Section 117 provides that in favour of a person dealing with a company in good faith, the power of the directors to bind the company will be deemed to be free of any limitation under the articles of association, any resolutions of the company or any agreement between the members of the company. Good faith will be presumed (unless the contrary is proved). A person will not be regarded as acting in bad faith by reason only of the person’s knowing that an act is beyond the directors’ powers. In addition, third parties are not required to inquire as to any limitations on the directors’ power, and will not be regarded as having constructive notice of any matters publicly disclosed in the articles or any return or resolution kept by the Companies Registrar.

Section 118 provides that the protection afforded to a person by section 117 will not apply where the party to a transaction with a company is an “insider” (for example, a director of the company or of a holding company of the company; or an entity connected with such a director).

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