

# Companies Ordinance: highlights of major changes (part one)

Ada Chung and Karen Ho set out the measures in the legislation that should streamline procedures and facilitate business

**T**he commencement of the new Companies Ordinance (Cap. 622) on 3 March signifies a new chapter in the company law of Hong Kong.

The new ordinance replaces those provisions in the old Companies Ordinance, Cap. 32 governing the formation and operation of companies, which are repealed. The provisions of the old ordinance relating mainly to prospectuses and insolvency shall remain in Cap. 32, which is renamed the Companies (Winding up and Miscellaneous Provisions) Ordinance.

The new ordinance aims to achieve four main objectives, namely, enhancing corporate governance, facilitating business, ensuring better regulation, and modernizing Hong Kong's company law.

This article aims to set out some of the major changes introduced to facilitate business and modernize the law.

## Facilitating business

### Streamlining procedures

With the aim of facilitating business, certain procedures have been streamlined:

An alternative court-free procedure based on the solvency test has been introduced for reduction of capital. This is faster and cheaper than the procedure under the predecessor ordinance, which involves filing an application to the court.

Under the new ordinance, all companies, not just private companies, are allowed to fund share buy-backs out of capital subject to the solvency test, and the restrictions on the company or any of its subsidiaries providing financial assistance for the purchase of shares in the company are streamlined and relaxed.

All types of companies may provide financial assistance, provided that the solvency test and one of the three procedures set out in the new ordinance are complied with.

A uniform solvency test has also been introduced. A company can satisfy the solvency test in relation to a transaction if immediately after the transaction there will be no ground upon which the company

would default on debts; and either (i) if it is intended to start winding up within 12 months the company will be able to pay its debts in full within 12 months of the winding up; or (ii) in any other case the company will be able to pay its debts as they fall due during the 12 months after the transaction.

Every company is required to hold annual general meetings under the old ordinance. However, a company is not required to hold an AGM if everything required to be done at the meeting is done by written resolutions and a copy of the documents required to be laid before the meeting is provided to each member. To simplify the decision-making process, under the new ordinance, apart from retaining the written resolution procedure, a single member company is not required to hold AGMs and a company may dispense with the requirement to hold AGMs by passing a resolution of all members. In such a case, the financial statements and reports, which would otherwise be required to be laid before an AGM, will need to be sent to members. To safeguard the interests of members, any member may request the company to convene an AGM. Members may also revoke the resolution to dispense with AGMs by passing an ordinary resolution to that effect.

Under the old law, companies can only amalgamate with a court sanction. A new court-free regime for amalgamations is introduced in the new ordinance. The new regime is confined to amalgamations of wholly owned intra-group companies where minority shareholders' interest would normally not be an issue. Under the new regime, an amalgamation may either be vertical (i.e. between the holding company and one or more of its wholly-owned subsidiaries) or horizontal (i.e. between two or more subsidiaries of the same holding company).

In addition, where specified conditions are met, the new ordinance introduces a new administrative restoration procedure for a company struck off by the Registrar of Companies without the need for recourse to the court.

### Facilitating simplified reporting

Previously, a private company (not being a member of a corporate group) may, with the written agreement of all its shareholders, prepare simplified accounts and directors' reports. Under the new ordinance, simplified reporting is extended to more companies. The types of companies that are qualified for simplified reporting, or fall within the reporting exemption, are:

- i. A small private company/holding company of a group of small private companies which meets two of the following conditions in a financial year:
  - Total revenue/aggregate total revenue not exceeding HK\$100 million;
  - Total assets/aggregate total assets not exceeding HK\$100 million; or
  - Employees/aggregate employees not exceeding 100.
- ii. An eligible private company/holding company of a group of eligible private companies, which meets a higher size criteria, namely, two of the following conditions, in a financial year:
  - Total revenue/aggregate total revenue not exceeding HK\$200 million;
  - Total assets/aggregate total assets not exceeding HK\$200 million; or
  - Employees/aggregate employees not more than 100.This applies provided that there is 75 percent approval from members and no objection from the remaining members.
- iii. A small guarantee company/holding company of a group of small guarantee companies with total revenue/aggregate total revenue not exceeding HK\$25 million in a financial year.
- iv. The exemption under the old ordinance is also retained, namely, a private company (not being a member of a corporate group) with unanimous members' written agreement may opt for simplified reporting.

The major reporting exemptions include:

- The financial statements may be prepared in compliance with the Small-

and Medium-sized Entity Financial Reporting Framework and Financial Reporting Standard, issued by the Hong Kong Institute of CPAs;

- There is no requirement for financial statements to give a “true and fair view”, nor for auditors to express a “true and fair view” opinion on financial statements;
- There is no requirement to disclose auditor’s remuneration in financial statements; and
- There is no requirement to disclose the material interests of directors in transactions, arrangements or contracts of significance.
- There is no requirement to include the following information in the directors’ report:
  - Business review;
  - Particulars of arrangements to enable directors to acquire benefits by the acquisition of shares or debentures;
  - Donations made by the company;
  - Reasons for the resignation, or refusal to stand for re-election, of directors;
  - Material interests of directors in transactions, arrangements or contracts of significance entered into by a specified undertaking of a company; and
- Subsidiary undertakings may be excluded from consolidated financial statements in accordance with applicable accounting standards.

### Facilitating business operations

The old law stipulates that every company shall have a common seal with the company name engraved in legible characters. Further, having an official seal for use outside Hong Kong is subject to restrictive requirements. Under the new ordinance, the mode of execution of documents is simplified by making the use of a common seal optional and relaxing the requirements to have an official seal for use abroad.

To keep up with technological development, the new ordinance permits a general meeting to be held at more than one location using electronic technology. A company may set out rules and procedures for holding such a meeting in its articles.

The new ordinance sets out the rules governing communications that are authorized or required to be made to or by companies. For instance, such communication in electronic form to or by a company can be made only with the recipient’s consent or deemed consent.

Existing companies may wish to amend their articles, instruments creating debentures or any other agreements, as appropriate, to specify the period for the deemed receipt of document or information in electronic form or communicated by means of the company’s website. If the period is not so specified, the period is 48 hours pursuant to the new ordinance except where the contrary is proved.

### Modernizing the law

To modernize the law, various initiatives have been introduced:

#### Rewriting the law in simple language

We have modernized the language and re-arranged the sequence of some of the provisions in a more logical and user-friendly order, so as to make the new ordinance more readable and comprehensible. Under the current drafting convention, the new ordinance is written in simple and plain language.

#### Abolishing the memorandum of association

The memorandum of association has been abolished for all companies. For existing companies, the conditions in the memorandum are deemed to be contained in the articles of association, except for conditions relating to authorized share capital and par value, which are regarded to be deleted for all purposes. For companies which apply to be incorporated under the new ordinance, they need to submit their incorporation form and articles of association only. In addition to the mandatory articles required for every company, companies may choose to adopt all or any of the provisions of the Model Articles prepared for the type of companies to which they belong. These Model Articles are set out in the Companies (Model Articles) Notice (Cap. 622H).

#### Abolishing par value

In line with international trends, the opportunity has been taken to migrate to a mandatory no-par regime for all companies. As a result, relevant concepts such as “authorized share capital”, “share premium” and “nominal value” no longer exist. Retiring the concept of par value creates an environment of greater certainty, simplifies accounting entries and gives companies greater flexibility in structuring their share capital.

### Streamlining the types of companies

The types of companies that can be formed under the new ordinance are streamlined:

- Unlimited companies without share capital are abolished;
- Companies limited by guarantee, whether private or non-private, are categorized as a separate type of companies; and
- Definition for “public company,” i.e. a company other than a private company or a company limited by guarantee, is introduced.

The five types of companies that can be formed under the new ordinance are:

- Public company limited by shares;
- Private company limited by shares;
- Company limited by guarantee without share capital;
- Public unlimited company with share capital; and
- Private unlimited company with share capital.

### Clarifying the rules on indemnification of directors

There were no provisions in the old ordinance regulating a director’s right to be indemnified against liabilities to third parties. In this respect, to clarify the legal position, the rules on indemnification of directors against third parties are clarified under the new ordinance. With the exception of certain liabilities and costs (such as fines and penalties), a company is permitted to indemnify a director against liabilities to a third party if the specified conditions are met.

### Looking ahead

To prepare all for the change, the Companies Registry has sent circular letters to more than one million companies on the register to announce the commencement of the new ordinance, highlighting the major changes. A dedicated hotline has been set up to answer enquiries relating to the new ordinance. Comprehensive information about the new ordinance is available at the “New Companies Ordinance” section on the Companies Registry’s website: [www.cr.gov.hk](http://www.cr.gov.hk). Briefing materials, highlights of major changes and answers to frequently asked questions have also been uploaded on the website.



**Ada Chung** is the Institute’s Council member and Registrar of Companies and **Karen Ho** is Deputy Principal Solicitor of the Companies Registry.