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New Hong Kong Companies Ordinance: a Snapshot

On 3 March 2014, the new Companies Ordinance (the “New CO”) will come into effect in Hong Kong. This is expected to have a significant impact on the incorporation and operation of companies in Hong Kong; although the number of immediate steps you may have to take are limited because of the deeming provisions set out in the New CO. This Alert aims to provide a snapshot of key changes that affect private limited companies incorporated prior to 3 March 2014.

Although existing companies are not required to amend their constitutional documents to reflect changes brought about by the New CO, if constitutional documents are not amended, existing companies may not be able to take advantage of new provisions, such as the shortening of the notice period for general meetings (other than annual general meetings). You may also consider adopting new articles of association which comply with the New CO so that the articles themselves are definitive of how the company is regulated, and you need not always check if certain provisions have been superseded at law under the New CO.

Operations of Private Limited Companies

Issue	Key Provisions under the New CO	Implications for Existing Companies
Director(s)	At least one director who has to be a natural person. Corporate directors are permitted if there is one natural person director. As with the existing regime, no residency requirements applicable to directors.	An existing company should check if there is at least one director who is a natural person. If not, a natural person must be appointed as director on or before 2 September 2014.
Shareholder(s)	No changes to the existing requirement for at least one shareholder. As with the existing regime, both individual and corporate shareholders are permitted, and there are no residency requirements for shareholders.	No immediate action required.

Issue	Key Provisions under the New CO	Implications for Existing Companies
Secretary	<p>No changes to the existing requirement for at least one secretary resident in Hong Kong.</p> <p>As with the existing regime, both individual and corporate secretaries are permitted.</p>	No immediate action required.
Share capital	<p>Shares will have no nominal/par value and there will be no authorised share capital, although a company may specify the maximum number of shares to be issued in its articles of association.</p>	<p>Shares of an existing company will be deemed not to have a par value after 3 March 2014. Any amount standing to the credit of its share premium account and capital redemption reserve will be deemed to become part of its share capital.</p> <p>No requirement to change a company's existing articles of association or to replace existing share certificates solely for this reason.</p> <p>Please do keep a record, however, of the company's historical par values as contracts entered into prior to 3 March 2014 may stipulate the issue of shares for a price no lower than par, and for that purpose, the historical par value would be relevant to determine the minimum price at which shares under the pre-existing contracts can be issued.</p> <p>You must also note such requirements will abolish references to share premium in the presentation of accounts for financial years commencing after 3 March 2014 and in future resolutions and documentation relating to shares.</p>
Memorandum of association	<p>Memorandum of association will be abolished in its entirety.</p>	<p>As a result of the deeming provisions in the New CO, no immediate action is required solely for this reason.</p>
Execution of Deeds		
Execution of documents	<p>The adoption and use of common seal is optional under the New CO and the fixing of a seal is no longer a mandatory requirement for the execution of deeds by a company (unless a company's articles of association provide that deeds must be executed under seal).</p> <p>The New CO provides that a company may execute a document as a deed by:</p> <ul style="list-style-type: none"> • affixing its common seal in accordance with its articles of association; <p>Or:</p> <ul style="list-style-type: none"> • if the company has only one director, that director signing the document; • if the company has more than one director, two directors or any director and the company secretary signing the document. 	<p>Recommended (but not mandatory) change to a company's articles of association.</p> <p>If a company wishes to avail itself of the new flexibility of executing a deed without the need to affix the common seal, relevant amendments should be made to the company's articles of association.</p> <p>We also recommend retaining seals as existing practices in conveyancing and other areas may still require the application of seals.</p>

Issue	Key Provisions under the New CO	Implications for Existing Companies
Meetings and Resolutions		
Annual general meetings	(1) Dormant companies, (2) companies having only one member and (3) those companies who have had unanimous shareholder approval to so dispense with an annual general meeting are not required to hold annual general meetings. In other cases, provided that the relevant documents are circulated and approved by way of written resolution, there is no longer a requirement to hold an annual general meeting.	Secretary of an existing company must take note of the new administrative requirements and revise internal procedures as appropriate.
General meetings	Except for annual general meetings which require 21 days' notice, notice period for general meetings (regardless of whether an ordinary or a special resolution is proposed at such meetings) is 14 days. General meetings may be held at two or more places using any electronic technology which will enable all attending members to be heard.	
Right to demand a poll	Members holding at least 5% (instead of 10% under the existing regime) of the total voting rights may demand a poll at general meetings.	
Declaration of interest	A director must declare the nature and extent of his material interests in any "transaction, arrangement or contract", regardless of the provisions in the articles of association.	
Transactions involving directors	Prohibitions on the making of loans, quasi-loans and the provision of guarantees and security for loans/quasi-loans made to directors have been expanded to cover a wider group of persons/entities "connected" with the director. Certain exceptions to the prohibitions have been introduced, for example loans or quasi-loans of value not exceeding 5% of the net assets of the company. Certain particulars of these transactions will be required to be entered into a register to be maintained by the company. Restrictions on payments to directors and former directors as compensation for loss of office have been expanded to include payments to persons/entities "connected" with the director, and payments to a person made at the direction of or for the benefit of the director or "connected" person/entity. The employment of a director with provisions guaranteeing a term which exceeds or may exceed three years, is subject to prior shareholder approval.	
Shareholders' written resolutions	The New CO provides statutory procedures for proposing, passing and recording a shareholders' written resolution.	
Ratification of conduct of directors	A company may ratify conduct by a director involving negligence, default, breach of duty or breach of trust in relation to the company, provided that such ratification is approved by members other than the director, any entity connected with the director or any member who holds shares on trust for the director or connected entity. The ability to ratify such conduct shall remain subject to any acts or conduct which, as a matter of rule of law, are incapable of being ratified.	
Disclosure of permitted indemnity	Where a company has, directly or indirectly, provided an indemnity in favour of a director or former director under the limited circumstances as permitted in the New CO, details of the indemnity provisions must be contained in the directors' reports which accompany a company's financial statements, and a copy of the document containing the indemnity provision (or a written memorandum setting out the terms) must be kept at the registered office of the company for at least one year after the date of termination or expiry of the provision. The document or memorandum must be kept available for inspection.	
Management contracts	Where a company has entered into a contract whereby a person undertakes the management and administration of the whole or any substantial part of any business of the company, other than contracts of service with a director or full time employee of a company, details (including the name of every director and shadow director interested in the contract and the nature and extent of such interest) of such management contracts must be disclosed in the directors' reports which accompany a company's financial statements. A copy of the management contract (or a written memorandum setting out the terms) must be kept at the registered office of the company for at least one year after the date of termination or expiry of the management contract. The contract or memorandum must be kept available for inspection.	

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Liability of Officers		
Responsible person	<p>Under the existing regime, an officer is liable for an offence if he “knowingly and wilfully authorises or permitted the default”. The burden of proving “knowingly and wilfully” is very high.</p> <p>The New CO has lowered the threshold and provides that a “responsible person” (including an officer or a shadow director of the company and an officer or a shadow director of a corporate officer of the company) will be liable if he “authorises or permits, or participates in the contravention or failure”. This lowered threshold will require officers to be more vigilant as it is conceivable that there can now be liability for recklessness.</p>	The New CO imposes liability on an officer at a lowered threshold. Officers of an existing company should familiarise themselves with the obligations under the New CO in order to minimise risk of personal liability.
Directors’ duties	Directors’ duties which require directors to exercise “reasonable care, skill and diligence” are codified.	Codification of duties does not change directors’ duties in substance. Directors must continue to perform their duties using their own skills and experience (i.e., a subjective test) and the skills any person in their position would reasonably be expected to have when carrying out the functions of that position (i.e., an objective test).

Filing Requirements of Private Limited Companies

Issue	Key Provisions under the New CO	Implications for Existing Companies
Annual returns	Annual returns must be filed with the Companies Registry in specified form within 42 days after the anniversary of the date of the company’s incorporation.	<p>Same requirement except that annual return in the form of a certificate of no change will no longer be accepted.</p> <p>Annual returns filed after the commencement of the New CO will be required to state the share capital, including any premium paid, for each class of shares issued by the company.</p>
Directors and company secretaries	<p>Appointment, resignation and changes in particulars of directors or company secretaries (e.g., correspondence/usual residential address, passport or HK ID details) must be filed with the Companies Registry in specified form within 15 days.</p> <p>On 3 March 2014, a corporate company secretary’s registered office address is deemed to be the secretary’s correspondence address.</p>	<p>The time frame for filing is extended from 14 days to 15 days.</p> <p>A company secretary may file a form after the commencement of the New CO with the Companies Registry if it would like to use another address as its correspondence address.</p>
	There is provision in the New CO that upon the application of a director or a secretary, their personal data can be withheld from public inspection.	This provision has <i>not yet come into effect</i> so that such personal data continues to be available for public inspection.
Removal and resignation of auditors	Removal and resignation of auditors must be filed with the Companies Registry in specified form within 15 days.	This is a new statutory requirement that applies to all Hong Kong limited companies. Relevant forms must be filed within 15 days after the company passes a resolution to remove an auditor or receives a notice of resignation from the auditor.

Issue	Key Provisions under the New CO	Implications for Existing Companies
Share capital	The New CO abolishes the concept of authorised share capital. A “statement of capital” must be filed with the Companies Registry when a company changes its issued share capital.	As with the requirement under the existing regime, a return must be filed when new shares are issued. In addition, an existing company is required to file a statement of capital whenever its share capital is altered in ways as prescribed under the New CO (for example, increase of share capital without allotting new shares, subdivision and consolidation of shares etc).
Charge and release	A certified copy of the charge or release document (in addition to the specified form) is required to be filed with the Companies Registry for registration and public inspection within one month.	The time frame for filing is shortened from five weeks to one month, and a certified copy of the underlying instrument will be made available for public inspection.
Simplified financial reporting and directors’ reports	Small and medium enterprises* may prepare simplified financial statements and are not required to prepare a directors’ report. Companies which do not qualify for simplified reporting are required to prepare a director’s report which complies with the provisions of the New CO, unless they have opted out of doing so by the approval by way of special resolution passed by the members.	An existing company may wish to consider which category it falls into so that it can ascertain its obligations under these provisions.

* (1) If any two of the following criteria are satisfied, a private company *automatically* qualifies for simplified reporting:

- (a) total annual revenue does not exceed HK\$100 million;
- (b) total assets does not exceed HK\$100 million; or
- (c) average number of employees during the financial year does not exceed 100.

(2) If any two of the following criteria are satisfied, a private company qualifies for simplified reporting *provided it has obtained the approval of members holding at least 75% of the voting rights with no other members objecting*:

- (a) total annual revenue does not exceed HK\$200 million;
- (b) total assets does not exceed HK\$200 million; or
- (c) average number of employees during the financial year does not exceed 100.

Please note that this Alert aims to highlight some of the key changes and implications for private companies only and is not meant to be exhaustive. Please speak to your usual contact at Reed Smith Richards Butler if you require any advice.

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