# CAP. 622: HONG KONG COMPANIES ORDINANCE

## TABLED SUMMARY OF THE 21 PARTS OF CAP. 622

The Companies Ordinance (Cap.622) is divided into 21 parts consisting of 921 Sections and 11 Schedules. The goal of the law was to provide a modernized legal framework for the incorporation as well as the continuing operation of all companies operating and existing here in Hong Kong. The Legislature's goal in re-writing the law was to achieve four main objectives: (i) to enhance corporate governance; (ii) to ensure better regulations of a company from both internal and external forces; (iii) to facilitate more business; and most importantly; and (iv) to modernize the law and bring it current with other jurisdictions.

Provided in a table form is the brief summary and outline of the each of the new 21 Parts of the Ordinance:

| Part Number & Name | Part Outline Summary |
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| Part 1 (Preliminary) | Sets out the title of the new Ordinance, the commencement provision, and the definitions of various terms and expressions that are used in this Ordinance. |
| Part 2 (Registrar of Companies and Companies Register) | Deals with the general functions and powers of the Registrar of Companies ("the Registrar"). Part 2 groups the existing provisions relating to the office of the Registrar and the register maintained by the Registrar. It also clarifies the powers of the Registrar to maintain and safeguard the integrity of the register, having regard to the development of the Companies Registry (CR)'s information system which will enable the electronic delivery of documents to or by the Registrar. This Part introduced new provisions for non-disclosure of residential addresses and full identity card/passport numbers in the register to enhance protection of personal data. |

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| Part 3 (Company Formation and Related Matters, and Re-registration of Company) | Part 3 deals with company formation, registration, and related matters. This Part also provides for new requirements for the Articles of Association of a company *following the abolition* of the Memorandum of Association. Part 3 also makes the keeping and use of a common seal by a company *optional* to facilitate business operation. |
| Part 4 (Share Capital) | Part 4 deals with the core concepts about share capital - its creation, transfer and alteration. In particular, this Part introduced a mandatory *no-par regime* for all companies with a share capital to modernise the share capital regime. |
| Part 5 (Transactions in relation to Share Capital) | Part 5 contains the provisions concerning capital maintenance (reduction of capital and purchase of a company's own shares) and the giving of financial assistance by a company to another party for the purpose of acquiring shares of that company or its holding company. To facilitate business operation, this Part 5 streamlined and rationalized the existing rules by introducing new exceptions based on the solvency test for reduction of capital, buy-backs and financial assistance. |
| Part 6 (Distribution of Profits and Assets) | Part 6 deals with the distribution of profits and assets to the members of the company. The usual form of distribution is through payment of dividends. While there was no fundamental change to the current rules under the predecessor Companies Ordinance, the modernized language of this Ordinance should facilitate easier understanding and comprehension of all provisions of this Part 6. |





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| Part 7 (Debentures) | Part 7 deals with a miscellany of matters concerning debentures. This Part 7 looks at: (i) the register of debenture holders; (ii) rights to inspect and make copies of the register; (iii) definition of debentures; (iv) trust deeds and other documents; (v) meetings of debenture holders, etc. Part 7 also introduced new requirements for registration of the allotment of debentures and filing of a return of allotment to align with similar requirements for shares. |
| Part 8 (Registration of Charges) | Part 8 deals with the registration of charges by both Hong Kong and registered non-Hong Kong companies. This Part set out the types of charges which require registration, the registration procedures and the consequences of non-compliance. It also contains provisions to regulate related matters, such as requiring companies to keep, and allow inspection of, copies of instruments of charges and registers of charges. It introduced improvements to the current registration system, including: revising the list of registrable charges and requiring a certified copy of the charge instrument to be registered and available for public inspection to enhance transparency of the company. |

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| Part 9 (Accounts and Audit) | Part 9 contains the accounting and auditing provisions in relation to: (i) the keeping of accounting records; (ii) the preparation and circulation of annual financial statements; (iii) directors' and auditor's reports; and (iv) the appointment and rights of auditors. New provisions were introduced in this Part 9 to facilitate small and medium enterprises (SMEs) so that they can take advantage of simplified accounting and reporting requirements, to require public and large companies to include an analytical business review in directors' reports, and to enhance auditors' right to information. This Part 9 also introduced new sanctions relating to the contents of auditor's reports. |
| Part 10 (Directors and Company Secretaries) | Part 10 deals with directors and company secretaries of a company. It mainly reorganizes, with some modifications, the existing provisions of the predecessor Companies Ordinance relating to the appointment, removal and resignation of directors and company secretaries. This Part also clarified the standard of directors' duty of care, skill and diligence *as these standards are now codified* under this part. |
| Part 11 (Fair Dealing by Directors) | Part 11 covers fair dealing by directors and deals with specified situations in which a director is perceived to have a conflict of interest. This Part now governs transactions involving directors or their connected entities which require members' approval (namely loans and similar transactions, long-term service contracts and payments for loss of office), and covers disclosure by directors of material interests in transactions, arrangements or contracts. More importantly, this Part *introduced new statutory provisions* requiring members' approval for director's long-term employment by a company. It further requires disinterested members' approval in the case of public companies and subsidiaries of public companies. |





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| Part 12 (Company Administration and Procedure) | Part 12 governs resolutions and meetings, registers (including registers of members, directors and company secretaries), company records, registered offices, publication of company names, and annual returns. It introduced a number of changes to enhance shareholders' engagement in and the transparency of the decision-making process of a company. This Part also revised the provisions relating to registers, registered offices, and annual returns to suit the needs of the modern community. |
| Part 13 (Arrangements, Amalgamation and Compulsory Share Acquisition in Takeover and Share Buy-Back) | Part 13 re-stated, with some amendments, the provisions of the predecessor Companies Ordinance concerning schemes of arrangements, reconstructions or amalgamations of a company with other companies, and compulsory acquisitions. The "headcount test" for approving a scheme of arrangement that involves a takeover offer or a general offer to buy back shares is now replaced by a new requirement that the dissenting votes do not exceed 10% of the votes attaching to all disinterested shares. For other schemes, the headcount test was retained, with a new discretion given to the Court to dispense with the test for members' schemes in appropriate circumstances. This Part also introduced a Court-free statutory amalgamation procedure for wholly-owned intra-group companies. |
| Part 14 (Remedies for Protection of Companies' or Members' Interests) | Part 14 consolidated the existing provisions concerning shareholder remedies under the predecessor Companies Ordinance. The scope and operation of the unfair prejudice remedy was refined under this Ordinance. |

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| Part 15 (Dissolution by Striking Off or Deregistration) | Part 15 sets out the provisions on striking off and deregistration of defunct companies, restoration of companies that have been struck off or deregistered, and other related matters such as the treatment of properties of dissolved companies. This Part 15 also introduced changes which streamlined the existing procedures for striking-off and restoration of companies. This Part further imposed new requirements to prevent any possible abuse of the deregistration procedure. |
| Part 16 (Non-Hong Kong Companies) | Part 16 deals with companies incorporated outside Hong Kong which have since established a place of business in Hong Kong. There were no fundamental changes to the current rules. |
| Part 17 (Companies Not Formed, but Registrable, under this Ordinance) | Part 17 pertains to companies not formed under this Ordinance *or* even under the predecessor Companies Ordinance but are none-the-less eligible to be registered under this Ordinance. There were no fundamental changes to the current rules. |
| Part 18 (Communications to and by Companies) | Part 18 builds on the rules governing communications by a company to another person introduced in the previous Companies (Amendment) Ordinance 2010. These new rules were also intended to facilitate electronic communications by a company's members and debenture holders to the company. |





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| Part 19 (Investigations and Enquiries) | Part 19 deals with investigations and enquiries into a company's affairs by inspectors and the Financial Secretary. The goal here in Part 19 was to modernize the existing provisions by reference to similar powers under the Securities and Futures Ordinance (Cap.571) and the Financial Reporting Council Ordinance (Cap.588). This Part also provided new powers for the Registrar to obtain documents, records and information for the purposes of ascertaining whether any conduct that would constitute specified offences relating to giving false or misleading statement has taken place. These new powers were aimed at facilitating enforcement and to safeguard the integrity of the public register. |
| Part 20 (Miscellaneous) | Part 20 contains a number of miscellaneous provisions, including miscellaneous offences and the new power for the Registrar to compound specified offences. |
| Part 21 (Consequential Amendments, and Transitional and Saving Provisions) | Part 21 deals with the transitional and saving provisions and consequential amendments that were required for the commencement of this Companies Ordinance. |

# CAP.622: HONG KONG COMPANIES ORDINANCE

## Introduction to the New Law

### General Background

0.001 The Companies Ordinance (Cap.622) is now more than two-years old as Hong Kong now has had all this time to digest and apply the new law. This was no mere 'amended' Ordinance but was instead a complete re-writing of Hong Kong's companies law as it was finally introduced and implemented after a comprehensive and substantial review of the relevant legislation in Hong Kong and also in various jurisdictions, as well as company law practices and case law. Note that the preamble of the Companies Ordinance states that this law is:

> *"...an ordinance to reform and modernize Hong Kong company law, to restate part of the enactments relating to companies, to make other provision relating to companies, and to provide for incidental and connected matters..."*

0.002 This Ordinance took effect more than two-years ago back on 3 March 2014. From this point going forward, all existing provisions of the predecessor Companies Ordinance, except for those relating to winding-up and insolvency of companies and prospectuses, have now been fully repealed. The surviving Companies Ordinance was renamed as *The Companies (Winding-Up and Miscellaneous Provisions) Ordinance (Cap.32)*. The prospectus regime, with possible reforms, was intended to be incorporated in the *Securities and Futures Ordinance* (Cap.571). All the other provisions relating to Hong Kong companies were revised and contained in this Ordinance.

0.003 This Ordinance evolved from the predecessor Companies Ordinance ("predecessor CO").

0.004 The predecessor CO was enacted in 1932 with its major provisions originating from the 1929 Companies Act of the United Kingdom. The predecessor CO provided the legal framework for a company, from cradle to grave, and includes provision governing its daily operation and interaction with shareholders and creditors. The predecessor CO has once been substantially reviewed and amended in 1984, in the light of the changes in the world at that time. However, those amendments were already about twenty years ago, and the company law regimen and the legal framework remain largely undisturbed. With the fast growth of economy, the regimen need to be substantially amended and modernized in

order to provide a contemporary and up-to-date legal infrastructure for the incorporation and operation of companies in Hong Kong. It also aimed to help strengthen Hong Kong's competitiveness as an international commercial and financial centre.

**0.005** The rewrite of the Ordinance commenced in mid-2006 and was led by a Company Bill Team set up under the Financial Services and the Treasury Bureau. It took about 10 years[1] for the review and the rewrite of the Ordinance and the formulation of the Companies Bill; and the Bills Committee had a total 44 meetings to consider the Companies Bill.[2].

**0.006** The Companies Bill was introduced into the Legislative Council on 26 January 2011, passed on 12 July 2012 and was subsequently gazetted as the Companies Ordinance (Ord. No. 28 of 2012) on 10 August 2012.

**0.007** In November 2013, the Registrar of Companies specified the new forms to be used under the Companies Ordinance in the Gazette (G.N. 6495); these new forms would be effective from 3 March 2014. For the purpose of smooth transition, the Companies Registry will continue to accept most of the existing forms specified under the CO for a grace period of time. Readers can refer to the Companies Registry External Circular No. 2/2013 dated 1 November 2013 for details.

**0.008** There are two issues which readers and practitioners should take note of, before one starts to go fully into the newly enacted legislation.

### Not the whole legislation is repealed

**0.009** Although this new legislation has since been enacted, it does not follow that the old legislation was completely repealed - those provisions on winding-up, disqualification of directors, receivers and managers, prospectuses and prevention of evasion of the Societies Ordinance continue and remain operative in the predecessor CO[3]. The winding-up and insolvency-related provisions will be dealt with under the modernization of corporate insolvency law exercise.[4] This Companies Ordinance (Cap.622) was aptly entitled the "Companies Ordinance"

[1] For details of the history see : the Legislative Council papers "*Paper for the House Committee Report of the Bills Committee on Companies Bill*" (LC Paper No. CB(1)2154/11-12) and also "*Background brief on subsidiary legislation for implementation of the new Companies Ordinance*" (LC Paper No. CB(1)358/12-13(05)).

[2] See the Legislative Council paper "*Consultation Conclusions of the Draft Companies Bill*" CB(1)217/ 10-11(04)

[3] See section 1 Part 1 of Schedule 9 of the Companies Ordinance.

[4] For the sake of completeness, readers might wish to note that at the time of this edition, the Administration is also conducting a review of the insolvency law regime in Hong Kong, and has released an report for consultation: http://www.legco.gov.hk/yr12-13/english/panels/fa/papers/fa0503cb1-867-1-e.pdf





whereas the predecessor CO was renamed as *The Companies (Winding-Up and Miscellaneous Provisions) Ordinance (Cap.32)*.[5]

### Coming into operation

**0.010** It is now well noted that the second issue is that although the Companies Ordinance came into operation on 3 March 2014,[6] *not all the* divisions and provisions of the Companies Ordinance have been brought into operation. In particular, Division 7 of Part 2 of the Companies Ordinance which provides restriction on the use of personal data for office holders under specified circumstances *have not been* brought into force – because of the different and opposing views on protection of privacy on one hand and need for public access to personal information. The Legislative Council Panel has further discussed this Part,[7] and the Administration aims to further consider those relevant provisions.

**0.011** The following sections of this Ordinance were put on hold because of the arguments and controversies generated and continue to be on hold at this time:

| Part | Section | Matters |
|---|---|---|
| 2 | Section 27(3), (4), (5) and (6) insofar as it relates to a director or reserve director | Registrar must record specified address as correspondence address of a director or reserve director |
| 2 | Sections 47, 49, 50, 51 and 52 | Materials in Companies Register Unavailable for Public Inspection |
| 12 | Subdivision 2 of Division 7, *i.e.* Sections 53 to 59 | Non-disclosure of residential address and identification number contained in certain documents |
| 12 | Section 643(1)(a)(ii), (2)(b) and (3)(b) insofar as it relates to a correspondence address | Particulars of directors to be registered in a company's register of directors |
| 12 | Section 643(5) | Particulars of directors to be registered in a company's register of directors |

[5] Section 912 and Section 2 of Part 1 Schedule 9 of the Companies Ordinance.

[6] Companies Ordinance (Commencement) Notice L.N.163 of 2013 (21 October 2014); but note that some parts of Division 7 of Part 2 on the withholding of the disclosure of the privacy information of the directors are shelved on 28 March 2013. See chapter 3 for more details.

[7] See, e.g. the LegCo paper LC Paper No. CB(1)788/12-13(01).

| Part | Section | Matters |
|---|---|---|
| 12 | Section 644 | Certain particulars not to be inspected |
| 12 | Section 645(5) | To notify Registrar of appointment and change in respect of the correspondence address |
| 12 | Section 647(4) and (5) | Registrar to keep an index of directors |
| 12 | Section 651 | Identification number not to be inspected |
| 12 | Section 657(2)(g) | Financial Secretary prescribes the manner in which and the extent to which a company may exercise the powers under section 644 or 651 |

**Overview**

**0.012** The following terms are used in this reference:

- the Registrar of Companies will be identified as the "Registrar";
- "CO" means the predecessor Companies Ordinance and;
- "Companies Ordinance", "Ordinance" or Cap.622 means this new legislation.

**0.013** A brief description and overview of each Part of the Companies Ordinance continues to be set out at the beginning of each chapter.

**0.014** The format of this Ordinance was considered more modern (comparable to those formats in, *e.g.* United Kingdom legislation): it is now divided into **21 Parts** and **11 Schedules**. Each Part deals with a specific topic *e.g.* Part 18 deals with communications with company and Part 19 covers the extended investigation power to the Registrar of Companies.





| Part no | Part title | Summary |
|---|---|---|
| 1 | Preliminary | Preliminary provisions, including the short title, the commencement date, definitions of terms and the application of the Companies Ordinance. |
| 2 | Registrar of Companies and Companies Register | Provisions relating to the functions and powers of the Registrar, the Companies Register and the registration of documents by the Registrar. |
| 3 | Company Formation and Related Matters, and Re-registration of Company | Provisions relating to company formation and registration, re-registration of unlimited companies as companies limited by shares and related matters. It also provides for new requirements for the articles of association of a company following the abolition of the memorandum of association. |
| 4 | Share Capital | Provisions relating to the share capital of companies. |
| 5 | Transactions in relation to Share Capital | Provisions dealing with certain transactions in relation to a company's share capital, including capital maintenance (the reduction of share capital and redemption or buy-back of a company's own shares) and related rules (financial assistance by a company for the acquisition of its own shares). |
| 6 | Distribution of Profits and Assets | Provisions relating to the distribution of profits and assets to members. |
| 7 | Debentures | Provisions relating to debentures, including new requirements for registration of the allotment of debentures and filing of a return of allotment. |
| 8 | Registration of Charges | Provisions relating to the registration of charges by a company or registered non-Hong Kong company. |

| Part no | Part title | Summary |
|---|---|---|
| 9 | Accounts and Audit | Provisions relating to the keeping of accounting records, the preparation and the publication of annual financial statements, directors' reports and auditor's reports, and the appointment and rights of auditors. |
| 10 | Directors and Company Secretaries | Provisions relating to directors and company secretaries. |
| 11 | Fair Dealing by Directors | Provisions relating to fair dealing by directors. It also deals with a director's disclosure of material interests in transactions, arrangements or contracts. |
| 12 | Company Administration and Procedure | Provisions on company administration and procedure, including resolutions, meetings, keeping of registers and company records and annual returns. |
| 13 | Arrangements, Amalgamation, and Compulsory Share Acquisition in Takeover and Share Buy-Back | Provisions relating to schemes of arrangement or compromise with creditors or members, amalgamation of a company with other companies, and compulsory acquisition of shares following a takeover offer or following a general offer for share buy-back. |
| 14 | Remedies for Protection of Companies' or Members' Interests | Provisions relating to the remedies available for protection of companies' or members' interests, including unfair prejudice remedies, an injunction order, the statutory derivative action, and a court order for inspection of company records. |
| 15 | Dissolution by Striking off or Deregistration | Provisions relating to the dissolution of companies after being struck off the Companies Register by the Registrar or the court or after being deregistered by the Registrar. |





| Part no | Part title | Summary |
|---|---|---|
| 16 | Non-Hong Kong Companies | Provisions relating to non-Hong Kong companies, i.e. companies incorporated outside Hong Kong that have established a place of business in Hong Kong |
| 17 | Companies not Formed, but Registrable, under this Ordinance | Provisions relating to companies not formed under the Companies Ordinance or CO but eligible to be registered under the Companies Ordinance. |
| 18 | Communications to and by Companies | Provisions relating to communications in electronic or hard copy form between a company and its members, debenture holders and other persons. It also deals with communications by means of website. |
| 19 | Investigations and Enquiries | Provisions relating to investigations and enquiries into companies' affairs. |
| 20 | Miscellaneous | Miscellaneous provisions. |
| 21 | Consequential Amendments, and Transitional and Saving Provisions | Provides for the inclusion in Schedule 9 of consequential amendments and for the inclusion in Schedule 10 of transitional and saving provisions. |

**0.015** Sections relevant to a particular issue or concern were regrouped and put into the same divisions under this Ordinance, but for the offences herein, these were then placed under the individual sections (as compared to the predecessor CO where all the penalties were listed and put in the Twelfth Schedule). Accordingly, the format of this Ordinance was considered more efficient as there is now no need for readers to flip pages to refer to the schedules for the relevant offences. The goal here was to make the understanding and comprehension of this Ordinance easier for the end user.

**0.016** If an offence under this Ordinance was committed, both the company and the "responsible person" are now liable to a fine at certain level. The actual amount of

the fine is found in section 113C of the Criminal Procedure Ordinance (Cap.221) and are reproduced in following table for easy reference:

| Levels | Amount of fine (HK$) |
|---|---|
| Level 1 | $1 to $2,000 |
| Level 2 | $2,001 to $5,000 |
| Level 3 | $5,001 to $10,000 |
| Level 4 | $10,001 to $25,000 |
| Level 5 | $25,001 to $50,000 |
| Level 6 | $50,001 to $100,000 |

**0.017** The language in the Ordinance has also been improved. The drafting of the Ordinance is also in the modern style. For example, complicated and lengthy sections are separated into various sections. The number of sections of the Ordinance has therefore been doubled. Generally speaking, it should be easier to read and comprehend when compared to the predecessor CO.

**Notes of Reference**

- Where applicable, relevant Hong Kong cases are included in this reference, but note that not all sections are verbatim identical to those sections in the predecessor CO; and
- previous court cases may not be directly applicable and relevant to this new legislation.





# *Part 1*

# PRELIMINARIES



**Brief Overview of Part 1**

Part 1 of the Companies Ordinance (Cap.622) sets out the preliminary issues associated with this Ordinance. It contains initiatives which aim at improving regulation and modernizing company law in Hong Kong.

Major changes include replacing the formulation of "officer who is in default" with "responsible person" to strengthen the enforcement regime (section 3), and streamlining the types of companies that can be formed (sections 7 to 12).

Part 1 is divided into five Divisions and they deal with the:

(i) title of the Ordinance, the interpretation and definitions of major terms (Section 2);
(ii) definition of the responsible person (Section 3);
(iii) holding company and subsidiary companies (Sections 13 to 16);
(iv) ways of certifying translation (Section 4);
(v) types of companies that can be formed under this Ordinance (Sections 7 to 12); and
(vi) the application of this Ordinance to companies registered prior to the commencement of this Cap.622 (Sections 17 to 19).

## Part 1
## Preliminary

### Division 1 Short Title and Commencement

**1. Short title and commencement**

(1) This Ordinance may be cited as the Companies Ordinance.

(2) This Ordinance comes into operation on a day to be appointed by the Secretary for Financial Services and the Treasury by notice published in the Gazette.

### COMMENTARY

**Overview**

1.01 The aim of this rewrite and revision of the Companies Ordinance was to provide a modernised legal regime for the formation and operation of companies in Hong Kong. In January 2011, the Companies Bill was introduced into the Legislative Council and a Bills Committee was formed to scrutinize the Companies Bill. The Companies Bill was passed on 12 July 2012 and it was subsequently gazetted as the new Companies Ordinance (Ord. No. 28 of 2012) (the "Companies Ordinance") on 10 August 2012. It replaced a substantial part of the predecessor Companies Ordinance and introduced significant changes to Hong Kong's company law regime, save and except the law on corporate insolvency, prospectus and those provisions not covered by the Companies Ordinance. These aspects have since been collected and remain in effect under the Companies (Winding-Up and Miscellaneous Provisions) Ordinance (Cap.32). This new Companies Ordinance (Cap.622) commenced and officially came into effect on 3 March, 2014.[1]

1.02 It is worth noting that, notwithstanding the enactment and the commencement of this (new) Companies Ordinance, *not* all the sections in the predecessor regime were repealed. Those provisions in the predecessor Companies Ordinance relating to the winding-up of a company and corporate insolvency survived the enactment of this new Companies Ordinance (Cap.622) and remain applicable. As such, all the miscellaneous provisions

[1] The Companies Ordinance (Commencement) Notice 2013 (L.N. 163 of 2013) (25 October 2013); but note that some parts of Part 2 and 12 on the withholding of the disclosure of the privacy information of the directors are shelved on 28 March 2013. See chapter 3 for more details.





relating to prospectuses and the winding-up of a company continued to be in effect after 3 March 2014 and thusly renamed the Companies (Winding-Up and Miscellaneous Provisions) Ordinance (Cap.32). Where appropriate, references to the predecessor Companies Ordinance and regime may still be made in this publication. This will be indicated accordingly throughout the text.

1.03 Those certain sections of the predecessor Companies Ordinance still recognize and have accordingly been aptly renamed as the Companies (Winding-Up and Miscellaneous Provisions) Ordinance (Cap.32).[2] References to this newly renamed Cap.32 will also be indicated throughout the text. This newly renamed Cap.32 also came into effect back on 3 March 2014, at the same time this (new) Cap.622 was enacted.

**Layout**

1.04 The layout of this Ordinance is different from that of the predecessor CO. This Ordinance is divided into different Parts, each Part consisting of various "Divisions" and some Divisions also consisting of Subdivisions. This layout format follows those in the foreign jurisdictions, and is styled to assist readers to navigate through the ordinance itself. Moreover, compared with the predecessor CO, this new Cap.622 is drafted in a more modern and plain English style. This plain drafting and improved layout was one of the Guiding Principles of the Rewrite.

**Subsidiary Legislation**

1.05 This Companies Ordinance also contains a number of provisions which empower both the Financial Secretary and the Chief Justice to make regulations and subsidiary legislation on various administrative, procedural and technical matters. The regulations and subsidiary legislation mainly reinstate those matters which were prescribed in the predecessor CO provisions as well as those regulations which were repealed upon the commencement of this (new) Ordinance.

1.06 The subsidiary legislations as listed below include:

*On company names*

(a) Companies (Words and Expressions in Company Names) Order (L.N. 7 of 2013)
(b) Companies (Disclosure of Company Name and Liability Status) Regulation (L.N. 8 of 2013)

[2] Section 912 and Section 2 of Part 1 Schedule 9 of this Companies Ordinance.

*On company records*

(c) Company Records (Inspection and Provision of Copies) Regulation (L.N. 78 of 2013) (as amended by Resolution of the Legislative Council (L.N. 128 of 2013))

*On accounts and audit*

(d) Companies (Accounting Standards (Prescribed Body)) Regulation (L.N. 9 of 2013)
(e) Companies (Disclosure of Information about Benefits of Directors) Regulation (L.N. 35 of 2013) (as amended by the Companies (Disclosure of Information about Benefits of Directors) (Amendment) Regulation 2013 (L.N. 76 of 2013))
(f) Companies (Directors' Report) Regulation (L.N. 10 of 2013) (as amended by Resolution of the Legislative Council (L.N. 47 of 2013))
(g) Companies (Summary Financial Reports) Regulation (L.N. 11 of 2013) (as amended by Resolution of the Legislative Council (L.N. 48 of 2013))
(h) Companies (Revision of Financial Statements and Reports) Regulation (L.N. 34 of 2013) (as amended by the Companies (Revision of Financial Statements and Reports) Amendment) Regulation 2013 (L.N. 75 of 2013))

*On others matters*

(i) Companies (Model Articles) Notice (L.N. 77 of 2013) (as amended by Resolution of the Legislative Council (L.N. 127 of 2013))
(j) Companies (Non-Hong Kong Companies) Regulation (L.N. 79 of 2013)) (as amended by Resolution of the Legislative Council (L.N. 129 of 2013))
(k) Companies (Fees) Regulation (L.N. 80 of 2013)
(l) Companies (Unfair Prejudice Petitions) Proceedings Rules (L.N. 131 of 2013)

1.07 For reference, the annotations for both the subsidiary legislation of Cap. 622 as well as the surviving subsidiary legislation for Cap.32 are provided in the corresponding volumes of this publication.

### Division 2 Interpretation of this Ordinance: General

#### 2. Interpretation

(1) In this Ordinance—

***accounting transaction*** (會計交易), in relation to a company, means a transaction that is required by section 373 to be entered in the company's





accounting records, excluding a transaction arising from the payment of any fee that the company is required by an Ordinance to pay;

***articles*** (章程細則), in relation to a company, means the articles of association of the company;

**Note—**

Please also see section 98. A condition of an existing company's memorandum of association is to be regarded as a provision of the company's articles.

***associated company*** (有聯繫公司), in relation to a body corporate, means—

(a) a subsidiary of the body corporate;
(b) a holding company of the body corporate; or
(c) a subsidiary of such a holding company;

***body corporate*** (法人團體)—

(a) includes—
(i) a company; and
(ii) a company incorporated outside Hong Kong; but
(b) excludes a corporation sole;

***certified public accountant (practising)*** (執業會計師) has the meaning given by section 2(1) of the Professional Accountants Ordinance (Cap.50);

***commencement date*** (生效日期), in relation to any provision of this Ordinance, means the date on which that provision comes into operation;

***Companies Register*** (公司登記冊) means the records kept under section 27;

***company*** (公司) means—

(a) a company formed and registered under this Ordinance; or
(b) an existing company;

***company secretary*** (公司秘書) includes any person occupying the position of company secretary (by whatever name called);

***contributory*** (分擔人), in relation to a company, means a person liable to contribute to the assets of the company in the event of its being wound up;

***Court*** means the Court of First Instance;

***court*** (法院) means a court of competent jurisdiction of the Hong Kong Special Administrative Region and includes a magistrate;

***debenture*** (債權證), in relation to a company, includes debenture stock, bonds and any other debt securities of the company,
whether or not constituting a charge on the assets of the company;

***director*** (董事) includes any person occupying the position of director (by whatever name called);

***document*** (文件) includes—

(a) a summons, notice, order and any other legal process; and
(b) a register;

***electronic record*** (電子紀錄) means a record generated in digital form by an information system, which can be—

(a) transmitted within an information system or from one information system to another; and

(b) stored in an information system or other medium;

***existing company*** (原有公司) means a company formed and registered under a former Companies Ordinance;

***financial year*** (財政年度), in relation to a company, means a financial year of the company determined in accordance with Division 3 of Part 9;

***former Companies Ordinance*** (《舊有公司條例》) means—

(a) the Companies Ordinance 1865 (1 of 1865);

(b) the Companies Ordinance 1911 (58 of 1911); or

(c) the predecessor Ordinance;

***founder member*** (創辦成員)—

(a) in relation to a company formed and registered under this Ordinance, means a person who signs on the company's articles for the purposes of section 67(1)(a); or

(b) in relation to an existing company, means a person who subscribed to or signed on the company's memorandum of association;

***group of companies*** (公司集團) means any 2 or more bodies corporate one of which is the holding company of the other or others;

***identity card*** (身分證) means an identity card issued under the Registration of Persons Ordinance (Cap.177);

***Index of Company Names*** (《公司名稱索引》) means the index of names kept under section 30;

***information system*** (資訊系統) has the meaning given by section 2(1) of the Electronic Transactions Ordinance (Cap.553);

***listed company*** (上市公司) means a company that has any of its shares listed on a recognized stock market;

***listing rules*** (《上市規則》) means the rules made under section 23 of the Securities and Futures Ordinance (Cap.571) by a recognized exchange company that govern the listing of securities on a stock market it operates;

***manager*** (經理), in relation to a company—

(a) means a person who performs managerial functions in relation to the company under the directors' immediate authority; but

(b) excludes—

(i) a receiver or manager of the company's property; and





(ii) a special manager of the company's estate or business appointed under section 216 of the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap.32);

***member*** (成員), in relation to a company, means—

(a) a founder member of the company; or

(b) a person who agrees to become a member of the company and whose name is entered, as a member, in the company's register of members;

***non-Hong Kong company*** (非香港公司) means a company incorporated outside Hong Kong that—

(a) establishes a place of business in Hong Kong on or after the commencement date of Part 16; or

(b) has established a place of business in Hong Kong before that commencement date and continues to have a place of business in Hong Kong at that commencement date;

***officer*** (高級人員), *in relation to a body corporate, includes* a director, manager or company secretary of the body corporate;

***Official Receiver*** (破產管理署署長) means the Official Receiver appointed under the Bankruptcy Ordinance (Cap.6);

***ordinary resolution*** (普通決議)—see section 563;

***predecessor Ordinance*** (《前身條例》) means the Companies Ordinance (Cap.32) as in force from time to time before the commencement date of section 2 of Schedule 9;

***recognized exchange company*** (認可交易所) means a company recognized under section 19(2) of the Securities and Futures Ordinance (Cap.571) as an exchange company for operating a stock market;

***recognized stock market*** (認可證券市場) has the meaning given by section 1 of Part 1 of Schedule 1 to the Securities and Futures Ordinance (Cap.571);

***redeemable shares*** (可贖回股份) means shares that are to be redeemed, or are liable to be redeemed, at the option of the company or the shareholder;

***registered non-Hong Kong company*** (註冊非香港公司) means a non-Hong Kong company that is registered in the Companies Register as a registered non-Hong Kong company;

***Registrar*** (處長) means the Registrar of Companies appointed under section 21(1);

***reserve director*** (備任董事), in relation to a private company, means a person nominated as a reserve director of the company under section 455(1);

***Secretary*** (局長) means the Secretary for Financial Services and the Treasury;

***shadow director*** (幕後董事), in relation to a body corporate, means a person in accordance with whose directions or instructions (excluding advice given in a professional capacity) the directors, or a majority of the directors, of the body corporate are accustomed to act;

***share*** (股份)—

(a) means a share in a company's share capital; and

(b) if any of the company's shares is converted into stock, includes stock;

***share warrant*** (股份權證) means a warrant—

(a) stating that the bearer is entitled to the shares specified in the warrant; and

(b) enabling the shares to be transferred by delivery of the warrant;

***special resolution*** (特別決議)—see section 564;

***specified form*** (指明格式) means the form specified under section 23;

***unlisted company*** (非上市公司) means a company that does not have any of its shares listed on a recognized stock market;

***written resolution*** (書面決議)—see Subdivision 2 of Division 1 of Part 12.

(2) In this Ordinance—

(a) a reference to this Ordinance includes any subsidiary legislation made under this Ordinance; and

(b) a reference to a provision of the predecessor Ordinance, except in Part 21 and Schedule 11, includes the provision, or such part of the provision, having a continuing effect under Schedule 11 or by virtue of section 23 of the Interpretation and General Clauses Ordinance (Cap.1).

(3) In this Ordinance—

(a) a reference to a manager of the property of a body corporate includes a manager of part of that property;

(b) a reference to a receiver of the property of a body corporate includes—

(i) a receiver of part of that property; and

(ii) a receiver of the income arising from that property or part of that property; and

(c) a reference to the appointment of a manager or receiver made under powers contained in an instrument includes—

(i) an appointment made under powers conferred by an Ordinance; and

(ii) an appointment made under powers that, by virtue of an Ordinance, are implied in and have effect as if contained in an instrument.





(4) For the purposes of this Ordinance—

(a) a document or information is sent or supplied in hard copy form if it is sent or supplied—

(i) in paper form; or

(ii) in a similar form capable of being read;

(b) a document or information is sent or supplied in electronic form if it is sent or supplied—

(i) by electronic means; or

(ii) by any other means while in electronic form; and

(c) a document or information is sent or supplied by electronic means if it is sent or supplied in the form of an electronic record to an information system.

(5) In subsection (4)—

(a) a reference to sending a document—

(i) includes supplying, delivering, forwarding or producing the document and, in the case of a notice, giving the document; but

(ii) excludes serving the document; and

(b) a reference to supplying information includes sending, delivering, forwarding or producing the information.

(6) A note located in the text of this Ordinance is provided for information only and has no legislative effect.

## COMMENTARY

**Overview**

This section 2 herein sets out the definitions and interpretation of the major terms in the Companies Ordinance. Unfortunately, this section is not a "Glossary section" by which a reader could find all the terms and their definitions used in this (new) Companies Ordinance. For some definitions, one would have to look elsewhere in the Companies Ordinance for statutory definitions and meanings. *E.g.* "dormant company" could not be found here but would be defined in subsequent section 5(6) of this Ordinance. **2.01**

**Reviewing section 2 of the Ordinance**

New definitions were introduced in this Ordinance and they include: **2.02**

(a) certified public accountant;
(b) commencement date;
(c) companies register;
(d) "company secretary";

(e) "former Companies Ordinance"
(f) "Identity card";
(g) "Listing Rules";
(h) "ordinary resolution";
(i) "predecessor Ordinance";
(j) "registered non-Hong Kong company";
(k) "Secretary".

**2.03** Most of definitions in the predecessor Companies Ordinance were re-enacted in this (new) Ordinance with certain exceptions. Notably, the following 41 definitions of the predecessor Companies Ordinance *have not* been included in section 2 of this (new) Ordinance:

1. accounts
2. agent
3. amend
4. annual return
5. authorized financial institution
6. book and paper
7. certificate of solvency
8. company limited by guarantee
9. creditors' voluntary winding up
10. default fine
11. entitled person
12. general rules
13. group accounts
14. image record
15. imaging method
16. incorporation form
17. issued generally
18. liquidator
19. members voluntary winding up
20. memorandum
21. the minimum subscription
22. notice of intent
23. offer to sell
24. place of business
25. prescribed
26. prescribed securities
27. printed
28. private company
29. prospectus
30. recognized certificate
31. recognized exchange controller





32. record
33. relevant financial documents
34. resolution for reducing share capital
35. a resolution for voluntary winding up
36. specified corporation
37. structured product
38. summary financial report
39. Table A
40. the time of the opening of the subscription lists
41. unlimited company

**2.04** As noted above, readers should note that section 2 of this Cap.622 does not solely contain all the definitions as applied and utilized throughout this new Cap.622. The definitions in relation to winding-up provisions remain in the predecessor CO under a new title – the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap.32). The following definitions do not appear in this section 2 definition provision but they do appear elsewhere in other Parts of this Ordinance including:

(a) Commission[3]
(b) digital signature[4]
(c) officer who is in default[5]
(d) summary financial report[6]

**2.05** Note also that some parts of this Ordinance have their own interpretation section (and these would be set out separately, where they appear, in this publication). Section 2(1) of this Ordinance is therefore not an exhaustive list of definitions in this Ordinance.

**Terms as included and defined in subsection 2(1) of the Ordinance**

*"Accounting Transaction"*

**2.06** This definition reinstates the predecessor definition of "relevant accounting transaction" in section 344A(9)(b) of the predecessor CO.

*"Articles"*

**2.07** This definition reinstates the predecessor definition of "articles" in section 2(1) of the predecessor CO but with the following modification:

[3] The definition of "Commission" appears in section 203(1) of this Companies Ordinance.
[4] The definition of "digital signature" appears in section 20(1) of this Companies Ordinance.
[5] This definition was defined in section 351(2) of the predecessor CO and is now changed to "responsible person" and now appears in section 3 of this Ordinance.
[6] The definition of "summary financial report" has been rewritten and is now found in section 357(1) of this Ordinance.

a condition of an existing company's memorandum of association is regarded as a provision of the articles (See also section 93 of Ordinance). This Cap.622 abolished the requirement to have a memorandum of association as a constitutional document of a company. A company incorporated in Hong Kong under this Ordinance is now only required to have articles of association and the information which was required to be contained in the memorandum of articles will be set out in the articles of association.

*"Associated Company"*

2.08 This definition adopts the definition of "*related company*" in sections 165(5) and 168BA of the predecessor CO.

*"Body Corporate"*

2.09 This definition reinstates the predecessor definition of "body corporate" in section 2(3) of the predecessor CO. But note that section 357(3) in Part 9 of this Ordinance provides for the definition of a 'body corporate' which is a wholly owned subsidiary of another 'body corporate'.

*"Certified Public Accountant"*

2.10 This is a new definition which was introduced in this Ordinance. It adopts the definition of "certified public accountant (practicing)" as it appears in section 2(1) of the Professional Accountants Ordinance (Cap.50).

*"Commencement Date"*

2.11 This is a new definition and is added for administrative purpose.

*"Companies Register"*

2.12 This is a new definition, which cross-references itself to section 27 of this Cap.622.

*"Company"*

2.13 This is a general definition and it reinstates the predecessor definition of "company" which was in section 2(1) of the predecessor CO.[7] The term "company" may have different definitions under a Division or Part in this (new) Ordinance to which it relate, *e.g.* section 20(1), Part 2 (Registrar of Companies and Companies Register) of this Ordinance.

[7] Note however that "company" has another definition under and for the purpose of section 20(1) of this Cap.622.





*"Company Secretary"*

2.14 This is a new definition as there is no corresponding definition of "secretary" in the predecessor CO.

*"Contributory"*

2.15 This definition reinstates only the first part of the predecessor definition of "contributory" in (former) section 171 of the predecessor CO. The latter part of (former) section 171 as it appeared in the predecessor CO was removed as it was in relation to the exercise to modernize corporate insolvency law.

*"Court"*

2.16 This term refers specifically to the Court of First Instance in the court system of Hong Kong. The definition reinstates the predecessor definition of "court" which was in section 2(1) of the predecessor CO. Note that there is another definition of a generic term "court" (see below).

*"court"*

2.17 This is a generic term which defines "court" to mean a court of competent jurisdiction of Hong Kong and includes a magistrate. Note that "magistrate" who has criminal jurisdiction is included in this definition.

*"Debenture", "Director" and "Document"* [8]

2.18 These definitions are the same as those in the predecessor definitions in section 2(1) of the predecessor CO.

*"Electronic Record"*

2.19 This definition in essence reinstates the predecessor definition of "electronic record" in section 2(1) of the predecessor CO with cross-referenced to section 2(1) of the Electronic Transactions Ordinance (Cap.553). Apparently, for the sake of convenience, instead of referring to the section 2(1) of the Electronic Transactions Ordinance (Cap.553) this section sets out, in verbatim, the whole relevant section in the Electronic Transactions Ordinance.

*"Existing Company"*

2.20 This definition expands the predecessor definition of "existing company" in section 2(1) of the predecessor CO and it now covers companies formed and registered under the predecessor CO.

[8] Again, in section 20(1) of this Ordinance, there is another definition of "document" for the purpose of that section.

*"Financial Year"*

2.21 This definition replaces the definition in section 2(1) of the predecessor CO and provides for the determination of a company's financial year in accordance with Division 3 of Part 9 of this Ordinance.

*"Former Companies Ordinance"*

2.22 This new definition has been added to mean the historical Companies Ordinance 1865, Companies Ordinance 1911 or the predecessor CO.

*"Founder Member"*

2.23 This definition extends the predecessor definition of "founder member" of section 2(1) of the predecessor CO to cover companies formed and registered under this Ordinance.

*"Group of Companies"*

2.24 This definition reinstates the predecessor definition of "group of companies" in section 2(1) of the predecessor CO.

*"Identity Card"*

2.25 This is a new definition added to this Ordinance and is defined as an identity card issued under the Registration of Persons Ordinance (Cap.177).

*"Index of Company Name"*

2.26 This definition, which cross-references to section 30 of this Ordinance, is the same definition as "Registrar's index of company names" in section 2(1) of the predecessor CO, which was cross-referenced to section 22C of the predecessor CO.

*"Information System"*

2.27 This definition reinstates the predecessor definition of "information system" in (former) section 168BAA(1) of the predecessor CO, which also adopts the meaning given by section 2(1) of the Electronic Transactions Ordinance (Cap.553).

*"Listed Company"*

2.28 This definition reinstates the predecessor definition of "listed company" in section 2(1) of the predecessor CO.

*"Listing Rules"*

2.29 This is a new definition in this Ordinance and which cross-references to section 23 of the Securities and Futures Ordinance (Cap.571).





*"Manager"*

2.30 This definition reinstates the predecessor definition of "manager" in section 2(1) of the predecessor CO.

*"Member"*

2.31 This definition reinstates the definition of "member" in section 28 of the predecessor CO.

*"Non-Hong Kong Company"*

2.32 This definition re-instates the definition of "non-Hong Kong company" which appeared in both sections 2(1) and 332 of the predecessor CO.

*"place of business"*

A company is classified as a non-Hong Kong Company if it has established a "place of business" in Hong Kong. In *Kam Leung Sui Kwan v Kam Kwan Lai* [2015] HKEC 2752, the Court of Final Appeal considered that:

> "…*'place of business'* connotes a place where or from which the company either carries on or possibly intends to carry on business. While 'business' is not confined to commercial transactions or transactions which create legal obligations, there is no reason to suppose that it covers purely internal organisational changes in the governance of the company itself."

The Court of Final Appeal in the same case further held that:

> "…the fact that a company's directors discuss its affairs and hold their board meetings in a particular place is not sufficient by itself to make that place the company's "place of business".

Citing Oliver LJ's view in the case *Re Oriel Ltd* [1985] BCLC 343 the Court of Final Appeal confirmed that:

> "….the mere fact that Bridge House constituted the [directors'] private residence does not prevent it from being an established place of business of the company, but it is quite a different thing to assert that the mere presence of the company's directors at their residence followed by the entry of the company into a transaction elsewhere constitutes the residence an established place of business……."

*"establish"*

In *Kam Leung Sui Kwan v Kam Kwan Lai* [2015] HKEC 2752, the Court of Final Appeal held the word "*establish*" indicates that some degree of regularity and permanence of location is required. It is a matter to be decided on the facts of the individual case.

## COMMENTARY

### Overview

**133.01** This section provides for the various obligations which arise in the event of the winding-up of a company which has been re-registered under sections 130 to 132 of this Ordinance or (former) section 19 of the predecessor CO.

**133.02** Notwithstanding registration of an unlimited company as a company limited by shares, this section, liabilities of past members of the unlimited company is to an extent preserved under this section:

1. despite the effects of (former) section 170(1)(a) of the predecessor CO, past members of the company who were members at the time of the re-registration of the company will continue to be liable for debts of the company contracted before the date of the registration for a period of three years after that date;
2. even though existing members of the company have satisfied any obligations which they have under the predecessor CO, where no members at the time of re-registration are existing members on the date of winding-up, persons who were past or present members at the time of re-registration will be liable to contribute to debts of the company contracted before such date, despite the operations of (former) section 170(1)(c) of the predecessor CO; and
3. despite the effect of (former) section 170(1)(d) of the predecessor CO, no limit is placed upon the obligation of a past or present member to contribute if the member was a member at the time of the re-registration of the company.

### Equivalent provisions in the predecessor CO

**133.03** This section re-states section 19(6) of the predecessor CO.





# Part 4

# SHARE CAPITAL



### Brief Overview of Part 4

Part 4 of the Companies Ordinance (Cap.622) deals with share capital, including the creation and alteration of the share capital of a Hong Kong company.

The Ordinance was reformed and modernised in 2014, having replaced the predecessor Companies Ordinance (Cap 32) which had not been heavily reformed since 1984 (the 1984 Ordinance was predominantly based on the UK Companies Act 1929). Since the introduction of this most recently reformed Ordinance, the new regime introduced in Part 4 adopted a mandatory system of no-par for all Hong Kong companies with a share capital and abolished the concept of par (or nominal) value of shares. Since the commencement of the new regime in Cap.622 as of 3 March 2014, a Hong Kong company's shares have no nominal value. This concept *applies to all shares*, including those shares issued before the commencement date of this Ordinance (3 March 2014). Former concepts such as par value, share premium and the requirement for authorised capital have since been abolished under the 2014 regime.

The Ordinance further provides that the amount of authorised capital which was set out in an existing company's constitutional documents is now deemed to be deleted.

Schedule 11 to the Ordinance sets out the transitional arrangements and deeming provisions so that existing companies no longer need to take steps to change their existing share capital and constitutional documents to reflect the no-par regime. The effect of these deeming provisions is that companies no longer have to make an individual assessment of whether contractual

provisions that reference par value and related concepts will not be affected by the abolition of par.

For contracts, resolutions, trust deeds and other documents executed before the commencement date of the Ordinance, any express or implied reference to par or nominal value will be deemed to be a reference to nominal value immediately before the commencement date of this Ordinance.

From the commencement date of the Ordinance as amended on 3 March 2014, any amount in the share premium account and any amount in the capital redemption reserve became part of the company's share capital. The previous permitted uses of share premium are preserved for any such amounts in the share premium account immediately before this commencement date.

Note that the liability of a shareholder for calls on partly paid shares issued before the commencement date (whether the amounts due are in respect of nominal value or premium) are not affected.

*Defining 'Share Capital'*

Share capital is defined as either: (i) the money paid into the company; or (ii) the money legally promised as being available on call, by members in return for shares of that particular company. The share capital of a Hong Kong company formed under the predecessor Company Ordinance (CO) comprised of:

(i) its *authorised share capital*, which is the maximum amount of its capital that can be issued;
(ii) its *issued capital*, which is that amount of the authorised capital which the company has issued to members; and
(iii) its *paid-up capital*, which is that amount of the issued capital which the directors resolve should be paid up by the members to whom the shares are allotted.

Former section 5(4) of the predecessor CO used to require a company having a share capital to state in the capital clause in its memorandum of association the amount of its authorised share capital. For example "the capital of the Company is HK$10,000 divided into 10,000 shares of HK$1.00 each". The HK$1.00 in this example is the minimum value at which shares can be issued. This was also known as "par value".

*No longer a requirement for nominal value of shares*

Sections 134 to 139 of the Ordinance now state the nature of share capital, including transferability and significantly, adopting the system that *no longer requires* par value. Therefore, the concepts of authorised share capital and share premium *are now no longer applicable* when issuing shares.





Under section 135 of the Ordinance, there is no longer the mandatory requirement of a nominal value for all companies with a share capital, including shares issued before the commencement of this Ordinance. This provision now adopted a mandatory system of no-par value for all companies with a share capital.

Division 2 of Schedule 11 provides for transitional arrangement subsequent to the abolition of nominal value and the treatment of any share premium account and capital redemption reserve.

*Allotment of shares*

A company is no longer allowed to issue stock and share warrants. The power exercisable by directors in relation to allotment and issue of shares are now stated in sections 140 to 146 of this Ordinance. These powers are subject to prior approval by resolution of a company.

The Ordinance now extends the requirement of members' consent for allotments of shares to the grants of rights to subscribe for, or to convert securities into shares. Sections 147 to 149 of this Ordinance deals with the situation where it involves commission, expenses and discount when a company issued its shares.

In the past, a company that has allotted a share partly paid has the right to make a call for any or all of the remainder of the agreed capital contribution except as provided by (former) section 52 of the predecessor CO (as former section 52 of the predecessor CO provided that the members may by special resolution determine that a portion shall not be called up otherwise than on winding-up of the company).

In addition, (former) section 56 of the predecessor CO similarly allowed the members of an unlimited company, on re-registration as a limited company, to determine that a portion shall not be called up otherwise than on winding-up of the company.

As such, (former) sections 52 and 56 were *not reinstated* in this Ordinance as the shares no longer have nominal value. In order to save the resolution passed under the predecessor CO, section 32 of Schedule 11 of this Ordinance provides that the repeal of these now former sections 52 and 56 of the predecessor CO *does not affect the validity* of any resolution under these sections 52 and 56 that *were in force immediately before* the repeal.

*Defraying expenses*

Note that (former) section 57 of the predecessor CO provided that where any shares of a company were issued for the purpose of raising money to defray the expenses of the construction works or buildings or plant which cannot be made profitable for a lengthened period, the company may, with

authorization by the articles or special resolution, and the sanction of the court, pay interest on its paid up capital. This is *no longer permissible* under this Ordinance.

However, note that pursuant to section 33(1) of Schedule 11 of this (new) Companies Ordinance, former section 57 of the predecessor CO *continues to apply* to the payment of interest by a company *if* the special resolution authorizing the payment of interest *was passed before* the repeal of this former section 57 of the predecessor CO regardless of when the sanction of the court for the payment is obtained.

Furthermore, section 33(2) of Schedule 11 of this Ordinance provides that the company may charge interest to capital in accordance with (former) section 57 of the predecessor CO if:

(i) interest was paid by a company in accordance with (former) section 57 before its repeal, but not charged to capital; or
(ii) interest is paid by a company after the repeal in accordance with a special resolution authorizing the payment of interest passed before the repeal, regardless of when the sanction of the court for the payment is obtained.

For convenience, all the relevant sections regarding the transfer of shares and transmission of shares are now grouped together in Division 4 of Part 4 of this Ordinance (Sections 150 to 161 of the Ordinance).

A company is now required to give reasons explaining its refusal to register a transfer of shares and transmission of shares upon request. The procedure for replacement of listed companies lost share certificates is simplified and is now contained in sections 162 and 169 of this Ordinance. These two new sections are much easier to read than the formerly condensed section 71A in the predecessor CO.

Sections 170 to 175 of the Ordinance further provides the means for a company to alter its share capital. There are more ways for a company to alter its capital than before the enactment of this Ordinance such as by for example via redenomination of capital into different currency (Section 173 of the Ordinance).

There is also clarification and simplification of the requirements relating to the variation of class rights as prescribed in sections 176 to 184 and new provisions on the rights of members of company without a share capital are prescribed in sections 185 to 193 of the Ordinance. Sections 194 to 199 of the Ordinance provides for the operation of the group reconstruction relief and merger relief. The remaining sections 200 to 202 deal with the miscellaneous provisions regarding share capital.





A "statement of capital", introduced by section 201 of the Ordinance, will be required to be delivered to the Registrar on certain occasions where the capital has been changed.

Summarized below are the changes and revisions introduced by this Part 4 of the Ordinance:

(i) Adoption of a mandatory system of no-par for all companies with a share capital;
(ii) Companies no longer have the power to issue share warrants to the bearer;
(iii) Shareholders' consent now required for allotments of shares to the grants of rights to subscribe for, or to convert securities into, shares;
(iv) Companies now required to give reasons explaining its refusal to register a transfer of shares upon request;
(v) Companies now required to deliver to the Companies Registry a return document or notification, including a statement of capital whenever there is a change to its capital structure;
(vi) Clarification and simplification of those requirements relating to class rights; and
(vii) Simplifying the publication procedures for replacement of lost share certificate of a listed company.

*Considerations for a no-par system*

The Ordinance's migration to a no-par system was deemed to benefit companies by giving them greater flexibility in structuring their share capital. The nature of a share is the same whether or not it has a par value, in that a share still represents a fraction of ownership in a company. The concepts of paid up capital, issued capital and partly paid shares are also still relevant.

*Objectives and principles behind the updated Companies Ordinance*

1. Objective:
   To ensure that company law in Hong Kong is as up-to-date as possible in order to enhance Hong Kong's competitiveness and attractiveness as a major international financial and business centre.

2. Principles:
   - Catering for SMEs - 'think small first'
   - Modernising and clarifying the Law
   - Enhancing corporate governance
   - Enhancing shareholder engagement in the decision-making process
   - Encouraging the use of information technology
   - Plain drafting and improved layout of the new CO

- Providing flexibility for future updating: use of schedules and subsidiary legislation
- Not seeking to compete with the British Virgin Islands as well as other offshore jurisdictions; and benchmark Hong Kong against jurisdictions such as the United Kingdom, Australia, and Singapore.

## Part 4
## Share Capital

### Division 1 Nature of Shares

### 134. Nature and transferability of shares

(1) A share or other interest of a member in a company is personal property.

(2) A share or other interest of a member in a company is transferable in accordance with the company's articles.

### COMMENTARY

**Overview**

134.01 Section 134 provides that shares shall be personal estate and transferable in the manner provided by the articles. This provision and its equivalent under the predecessor CO were enacted to ensure that proprietary rights in shares were to be treated as choses in action. Articles of a private company may contain restriction for a member to transfer shares (Section 11 of this Ordinance).

134.02 The terms "share" and "member" were defined in previous section 2(1) of this Ordinance.

**Defining the transferability of shares**

134.03 In the case of *Silver Stone Development Ltd v Lau Kwong Ching* [2007] 4 HKC 77, [2007] 2 HKLRD 717 (CA), the Hong Kong Court of Appeal set out the indicia for deciding on when a transfer of ownership in shares of a company without the consent of the owner would constitute conversion. See also *China Everbright-IHD Pacific Ltd v Ch'ng Poh* [2003] 2 HKLRD 594; *Kuwait Airways Corp v Iraqi Airways Co (No 4 & 5)* [2002] 2 AC 883.

134.04 There is a line of cases dealing with the legal treatment of electronic transfer of share ownership through computerised book entry systems such as the Central Clearing and Settlements System. For instance in the case of





*Re CA Pacific Finance Ltd* [1999] 2 HKLRD 1, the Court of First Instance followed a line of authorities that shares are in fact fungibles, and that each certificate with HKSCC's depository evidences the same bundle of rights. See also *Re Chark Fung Securities Co Ltd* [2005] HKCU 1694 (unrep., HCCW 362 and 365/1998, 1 December 2005); *Re New Japan Securities International Ltd* [2007] 3 HKLRD 54.

**Equivalent provisions in the predecessor CO**

This section re-states section 65 of the predecessor CO. 134.05

### 135. No nominal value

(1) Shares in a company have no nominal value.

(2) This section applies to shares issued before the commencement date of this section as well as shares issued on or after that date.

**Note—**

Division 2 of Part 4 of Schedule 11 contains transitional provisions relating to the abolition of nominal value.

### COMMENTARY

**Overview**

In the past, companies having a share capital and incorporated in Hong Kong under the predecessor CO were required to have a par or nominal value ascribed to their shares (former section 5(4) of the predecessor CO) being the minimum price at which the shares can be issued. 135.01

The par value (also known as "nominal value") of the shares was defined as the minimum price at which shares can generally be issued. Companies incorporated in Hong Kong under the predecessor CO and having a share capital were required to have a par value ascribed to their shares. 135.02

Under this section 135, shares in a company are no longer required to have a nominal value. Note that this section applies to shares issued *before* the commencement of the Ordinance and see below for the transitional arrangement on the par values of those shares. 135.03

As such, this section 135 abolished the concept of par (nominal) value. As of now, a company's shares will have no nominal value. This concept applies to all shares, including those shares issued before the commencement of this Ordinance as the "no-par" regime is now in full effect. 135.04

135.05 This "no-par" regime provides companies with greater flexibility in structuring their share capital, for example, a company will be able to capitalise its profits without issuing new shares and to allot and issue bonus shares without having to increase its share capital.

135.06 It is generally accepted that par value does not serve its original purpose of protecting creditors and shareholders, and in fact may even be misleading because the par value does not necessarily give an indication of the real value of the shares.

**Equivalent provisions in the predecessor CO**

135.07 There is no equivalent provision in the predecessor CO.

**Transitional Arrangements**

135.08 Subsequent to the abolishment of nominal value, transitional arrangements are introduced for shares issued prior to the abolishment of nominal value.

135.09 Sections 35 to 41 of Schedule 11 (Transitional and saving provisions) of the Ordinance, contain the transitional provisions relating to migration from shares having nominal value to shares having no nominal value. With sections 35 to 41 of Schedule 11 of the Ordinance, the shares issued *before* the commencement of the Ordinance will be deemed as having been converted from shares having nominal value to shares having no nominal value. These provisions of Schedule 11 (particularly the statutory deeming provision in section 40 of Schedule 11) were intended to provide legislative safeguards to ensure that contractual rights defined by reference to par or nominal value and related concepts would not be affected by the migration to no-par.

135.10 Also, note that section 37 of Schedule 11 of the Ordinance is the deeming provision for the amalgamation of the existing share capital amount with the amount in the company's share premium account (and also capital redemption reserve) immediately before the migration to no-par.

135.11 In addition, section 38 of Schedule 11 of the Ordinance preserves substantially the currently permitted uses of the share premium for the amount standing to the credit of the share premium account before the migration to no-par.

**Amount paid on shares issued before commencement date of section 135**

135.12 Section 135 abolishes the concept of nominal value. Previously, under the predecessor CO, the memorandum of association of a company needed to state the amount of share capital with which the company proposed to





be registered, and the division of shares as well as their fixed amount. The amount stated was then to be taken as the total amount of share capital to be issued, and provision was made under (former) section 53 of the predecessor CO for amendment of this amount.

135.13 With this abolition of par (nominal) value, the concept of "share premium" no longer exists. Under this Ordinance, shares can now be issued at any price as determined by the company. The former requirement prohibiting shares to be issued at a discount is now abolished under the Companies Ordinance. It should be noted that director duties would now be applied to scenarios for allocation and discounting of shares in the context that directors' owe fiduciary duties in setting the proper price of shares in the allocation process. See for example *Shearer v Bercain Ltd* [1980] 3 All ER 295

135.14 But for shares issued *before* the commencement date of this section 135 of the Ordinance, section 36 of Schedule 11 of the Ordinance provides that:

(i) the amount paid on the share is the sum of all amounts paid to the company at any time for the share; and

(ii) the amount remaining unpaid on the share is the difference between the issue price of the share and the amount paid on the share.

**Share premium account and capital redemption reserve**

135.15 Section 37(1) of Schedule 11 of this Ordinance provides at the commencement date of this section 135, any amount standing to the credit of the company's share premium account and capital redemption reserve becomes part of the company's share capital.

135.16 Section 37(2) of Schedule 11 of this Ordinance further provides any amount that would be required by a provision of the predecessor CO, which continue to apply as prescribed by Schedule 11 herein, to be transferred to a company's share premium account or capital redemption reserve on or after the commencement date of this section 135 becomes part of the company's share capital.

**Credit of share premium account**

135.17 Notwithstanding the provision of section 37 of Schedule 11, subsequent section 38(1) of Schedule 11 of this Ordinance provides that a company may, on or after the commencement date of this section 135, apply the amount that was standing to the credit of its share premium account immediately before that commencement date to:

(i) pay up, in accordance with an agreement made before that commencement date, shares that are to be issued on or after that commencement date to members of the company as fully paid bonus shares; or

(ii) write off:
  (a) the preliminary expenses of the company incurred before that commencement date; or
  (b) the expenses incurred, commission paid, or discount allowed, before that commencement date, in respect of any issue of shares in the company; or
  (c) provide for the premium payable on redemption of redeemable preference shares issued before 1 September 1991.

135.18 Furthermore, section 38(2) of Schedule 11 of this Ordnance provides that if redeemable shares were issued by a company on or after 1 September 1991 *but* before the commencement date of this section 135 are therefore redeemed on or after the commencement date of section 135, any premium payable on their redemption may be paid out of the proceeds of a fresh issue of shares made for the purpose of the redemption, up to an amount equal to the lesser of:

(i) the aggregate of the premiums received by the company on the issue of the shares redeemed; or
(ii) the amount that was standing to the credit of the company's share premium account immediately before the commencement date of section 135 less any amounts already applied under section 38 of Schedule 11 of this Ordinance.

**Calls on partly paid shares**

135.19 The liability of a shareholder for calls in respect of money remaining unpaid on shares issued before the commencement date of this section 135 (whether on account of the nominal value of the shares or by way of premium) is not affected by the share ceasing to have a nominal value (Section 39 of Schedule 11 of this Cap.622).

**References in contracts and other documents to par or nominal value**

135.20 Section 40 of Schedule 11 of this Cap.622 provides for the reference of various terms, on or after the commencement date of this section 135 herein, for interpreting the following documents entered into, made or executed *before the commencement date of this provision*, including:

(i) a contract (including a company's articles),
(ii) a resolution of a company or of any of its members, or
(iii) a trust deed or other document.

135.21 Section 40(2) of Schedule 11 of this Cap.622 provides that *par or nominal value* of a share (whether made expressly or by implication) refers to:

(i) the nominal value of the share immediately before that commencement date, if the share was issued before the commencement date of this section 135 herein;





(ii) the nominal value that the share would have had if it had been issued immediately before that commencement date, if the share is issued on or after the commencement date of this section 135 but shares of the same class were on issue immediately before that commencement date; or
(iii) the nominal value determined by the directors, if the share is issued on or after the commencement date of this section 135 and shares of the same class were not on issue immediately before that commencement date.

135.22 Furthermore, a reference to the aggregate par or nominal value of the company's issued share capital is a reference to that aggregate as it existed immediately before the commencement date of this section 135:

(i) increased to take account of the nominal value of any shares issued on or after that commencement date; and
(ii) reduced to take account of the nominal value of any shares cancelled on or after that commencement date (Section 40(6) of Schedule 11 of this Cap.622).

135.23 Notwithstanding the provisions of sections 40(2) or 40(6) of Schedule 11 of this Cap.622, if the nominal value of a share is altered on or after the commencement date of this section 135 under a continuing provision, a reference to the par or nominal value of the share is a reference to the nominal value as so altered (Section 40(7) of Schedule 11 of this Cap.622).

135.24 *Share premium* in turn refers to any residual share capital in relation to the share (Section 40(3) of Schedule 11 of this Cap.622), but a reference to *a right to a return of capital on a share* is a reference to a right to a return of capital of a value equal to the amount paid in respect of the nominal value of the share (Section 40(4) of Schedule 11 of this Cap.622).

135.25 Any reference to *a distribution in a winding up in proportion to the capital paid up on a share* is a reference to a distribution in a winding up in proportion to the amount paid in respect of the nominal value of the share (Section 40(5) of Schedule 11 of this Cap.622).

**Summary in regards to share value**

135.26 The nominal amount, nominal value, share premium of the share, company's share premium account or capital redemption reserve *immediately before* that commencement date of this section 135 herein, will be treated as the nominal amount nominal value, share premium of the share, company's share premium account on or after the commencement date (Sections 41(1) and 41(2) of Schedule 11 of this Cap.622).

135.27 *However*, if the nominal amount or nominal value of a share is altered *on or after* the commencement date of this section 135 under a provision of the predecessor CO which continue to apply by virtue of Schedule 11

(5) Nothing in any provision of this Ordinance or in the regulations made under this section is to be construed as preventing a registered non-Hong Kong company—

(a) from providing more extensive facilities than are required by the regulations; or

(b) if a fee may be charged, from charging a lesser fee than that prescribed or none at all.

## COMMENTARY

**Overview**

356.01 Section 356 is a new provision which empowers the Financial Secretary to make regulations regarding the place for registered non-Hong Kong company to keep and make available for inspection copies of charge instruments and register of charges.

**Equivalent provisions in the predecessor CO**

356.02 There is no equivalent provision in the predecessor CO.

356.03 However, this section 356 may be compared to later section 657 on "Regulations about keeping and inspection of company records and provision of copies" for Hong Kong companies in regards to this Ordinance.



# Part 9

# ACCOUNTS AND AUDIT



**Overview of Part 9**

Part 9 (Accounts and Audit) of the Companies Ordinance (Cap.622) contains provisions which relate to the keeping of accounting records, preparation and circulation of annual financial statements, directors' and auditors' reports and the appointments of and rights of auditors. The means of appointment of auditors and the term of auditors and the reporting documents are set out at the end of this Overview of Part 9 in subsection (vii) on Auditors.

This Part 9 lists and contains the accounting and auditing requirements, namely those provisions in relation to: (i) the keeping of accounting records; (ii) the preparation and circulation of annual financial statements; (iii) directors' and auditors' reports; and (iv) the appointment and rights of auditors.

New provisions were introduced to facilitate small and medium-sized enterprises ("SMEs") to take advantage of simplified accounting and reporting, to require public and other large private companies to include an analytical business review in directors' reports, and to enhance auditors' right to information.

**Policy Goals and Major Changes in this Part 9**

Part 9 of this Ordinance contains initiatives that aim at business facilitation by:

(i) relaxing the criteria for companies to prepare simplified financial and directors' reports *i.e.* the "reporting exemption"; and

(ii) making the summary financial report provisions more user-friendly and extending their application to all companies.

Part 9 also contains initiatives to enhance corporate governance by:

(i) requiring public companies and other companies that do not qualify for simplified reporting to prepare a "business review" within the directors' report, whilst allowing private companies to opt out by special resolution;
(ii) empowering auditors to obtain information from a wider range of persons for the performance of their duties; and
(iii) improving transparency with regard to circumstances of cessation of office of an auditor.

Furthermore, this Part also modernises and improves the laws and regulations governing companies by:

(i) clarifying the financial year of a company, requiring companies to hold annual general meetings ("AGMs") and requiring public companies or companies limited by guarantee to file annual returns in respect of every financial year of the company; and
(ii) streamlining disclosure requirements that overlap with the accounting standards

**Highlighted changes to this Part 9**

(i) *Accounting standards*: The use of the Hong Kong Financial Reporting Standards (HKFRS) and Reporting Standards for SMEs (SME-FRS) for Financial Statements has been given statutory recognition;
(ii) *New terminology*;
(iii) *Simplified financial and directors' reports*: The criteria for companies which qualify for this important exemption has been relaxed;
(iv) *Business review*: Public companies and companies that do not qualify for simplified reporting are now required to prepare a "business review";
(v) *Option to issue summary financial reports to members*: This is in lieu of the reporting documents;
(vi) *Accounting reference period and accounting reference date*: These provide clarity regarding the financial year of a company; and
(vii) *Auditors*: While the position is largely the same as before there have been enhancements of auditors' power.

### (i) Accounting standards: use of HKFRS and SME-FRS for Financial Statements

*Overview*

Statutory recognition is indirectly given to the use of Hong Kong Financial Reporting Standards (HKFRS) and Reporting Standards for SMEs





(SME-FRS) for financial statements by sections 380(4) and 380(8)(a) of this Ordinance. See also section 452 of this Ordinance and the Companies (Accounting Standards (Prescribed Body) Regulation (Cap.622C).

Initially, the predecessor CO used to provide for disclosure requirements on the contents of the accounts in the Tenth and the Eleventh Schedules. These Schedules, regarding the general requirements of accounts, are no longer applicable to companies. As such, to simplify the requirements, under this (new) Ordinance, accounting standards issued by Hong Kong Institute of Certified Public Accountants[1] are *now* applicable to the financial statements (Sections 380(4) and 380(8)(a) of this Ordinance). These are the HKFRS and the SME-FRS for Financial Statements.

*Schedule 4*

Schedule 4 of the Ordinance further provides certain accounting disclosure requirements. If a company does not fall within the reporting exemptions, it must also comply with Part 2 of Schedule 4 of this Ordinance in addition to Part 1 of Schedule 4 (Section 380(3)).

### (ii) New terms and terminology

In accordance with this Ordinance, new terms and terminology have been introduced, including:

"financial statement", "accounts"
"consolidated financial statement" "group accounts"
"statement of financial position" "balance sheet"

### (iii) Reporting exemption: simplified accounting and reporting

The criteria for being able to prepare a simplified financial and directors' reports has been relaxed under Part 9.

*Previous section 141D of the predecessor CO*

Former section 141D of the predecessor CO provided that a private company:

i. other than a company which is a member of a group,
ii. could, with all its shareholders' written agreement, prepare simplified accounts and simplified directors' reports.

[1] Under s.452(1) of this Ordinance and the Companies (Accounting Standards (Prescribed Body) Regulation (Cap.622C) the Hong Kong Institute of Certified Public Accountants has been prescribed by the Financial Secretary as the body issuing or specifying statements of accounting practice for the purposes of s.380(8) of this Ordinance.

According to the Small and Medium-sized Entity-Financial Reporting Framework ("SME-FRF") issued by the Hong Kong Institute of Certified Public Accountants ("HKICPA"), a Hong Kong company qualifies for simplified reporting based on the SME-Financial Reporting Standard ("SME-FRS") if it satisfies the requirement under this former section 141D. The SME-FRF was not applicable to groups of companies or guarantee companies at all under the predecessor CO. Certain companies such as insurance and stock-broking companies were specifically excluded under this criteria.

*Types of companies now exempt under sections 361–366 of the new Ordinance*

The *reporting exemption* is now found in Division 2 of Part 9 of this (new) Ordinance and is way broader. The types of companies falling within reporting exemptions are set out in sections 361 to 366 of this Ordinance. These types include:

i. small private company;
ii. eligible private companies; and
iii. small guarantee company.

This Ordinance noted the public's support during consultation of this new law for the relaxation of the size criteria and the suggestion to extend the use of SME-FRS to private companies / groups of any size when members holding certain voting rights in the company approve and no member objects. The Legislative Council (LegCo) and the Bills Committee supported allowing private companies/groups meeting a higher size criteria to prepare simplified reports if members of the company so resolve. Accordingly, the criteria for simplified reporting were therefore relaxed by doubling the eligibility limits for automatic qualification, introducing a higher size criteria for private companies/groups that opt for simplified reporting while retaining the exceptions in former section 141D of the predecessor CO.

*Small private companies: sections 359, 361, 364, and Schedule 3 of the (new) Ordinance*

A private company will be regarded as small private company, and automatically qualifies for reporting exemptions, if it satisfies any two of the following conditions:

(i) total annual revenue of no more than HK$100 million;
(ii) total assets of no more than HK$100 million; and
(iii) on average employs no more than 100 employees.

In the case of a private company that is a holding company it qualifies if it satisfies two of these conditions on the aggregate figure within the group, *i.e.* aggregate total revenue of no more than HK$100m, aggregate total assets of no more than HK$100m or aggregate number of employees within the group is no more than 100.





*Eligible private companies: sections 359, 360, 362, 365, and Schedule 3 of the (new) Ordinance*

An eligible private company is one which satisfies any two of the following conditions:

(i) total annual revenue is not more than HK$200 million;
(ii) total assets is not more than HK$200 million; or
(iii) on average employs no more than 100 employees,

and a resolution is passed by members holding at least 75% of the voting rights that the company is to fall within the reporting exemption for the financial year and no one votes against the resolution. In the case of an eligible private holding company it qualifies for reporting exemption if it satisfies two of these conditions on the aggregate figure within the group.

*Small guarantee company: sections 359, 363, 366, and Schedule 3 of the (new) Ordinance*

"A small guarantee company" automatically qualifies for reporting exemptions. A company limited by guarantee is a "small guarantee company" if its total annual revenue, or in the case of a holding company of a guarantee company its aggregate revenue, does not exceed HK$25 million.

*Defining the term of "Company specified": Companies not eligible for reporting exemption*

Under section 359(4) of this Ordinance, what is considered and described as "company specified" include the following types of companies *are not eligible* for reporting exemptions:

(i) a bank;
(ii) corporation licensed under Part V of the Securities and Futures Ordinance (Cap.571) to carry on regulated activity business;
(iii) insurance company; or
(iv) a company which accepts, by way of trade or business (other than banking business), loans of money at interest or repayable at a premium, otherwise than on terms involving the issue of debentures or other securities (Section 359(4) of this Ordinance).

*Reporting exemptions*

Apart from simplified reports, a company entitled to reporting exemption, is also exempted from:

i. the true and fair view requirement (Section 380(7) of the Ordinance); and
ii. the requirement for inclusion of a business review in the directors' report.

### (iv) Business review

A new requirement is the inclusion of a Business Review as part of the Director's Report. Public companies and companies that do not qualify for the reporting exemption have to submit the Business Review. As per section 388 and Schedule 5 of this Ordinance, the Business Review must consist of, *inter alia*:

(i) a fair review of the company's business;
(ii) a description of the principal risks and uncertainties facing the company;
(iii) particulars of important events affecting the company that have occurred since the end of the financial year; and
(iv) an indication of likely future development in the company's business.

### (v) Option to send summary financial statements

This Ordinance gives companies the option to issue summary financial reports in lieu of the reporting documents[2] to its members without first obtaining prior consent from its members (Section 441 of this Ordinance). However, members receiving summary financial reports are entitled to request a copy of the reporting documents from the company (Section 444 of this Ordinance). Under the predecessor CO, requests had to be made of members before sending summary financial statements.

### (vi) Accounting reference period

The financial year of a company has been clarified. The predecessor CO did not define the accounting reference period of a company. Sections 367 to 370 of this Ordinance now provides for the determination of the financial year of a company by setting out:

i. an accounting reference period, *i.e.* the financial year of a company; and
ii. an accounting reference date, with reference to which financial statements and reports are to be prepared and laid before the company in general meeting or circulated to members of the company.

The accounting reference date is the financial year end. See the commentary on sections 367 to 370 below, and the examples given, to see how this works in detail.

[2] Reporting documents mean the financial statements, directors' report and auditors' reports, see section 357(2) of this Ordinance.





### (vii) Auditors

**Appointment of first auditor**

| First auditors | | Other auditors | | Casual Vacancy |
|---|---|---|---|---|
| AGM required to be held | | AGM required to be held | | |
| ✓ | × | ✓ | × | |
| ① by Directors before AGM (s.395(2)) | ① by Directors before the appointment period[3] in relation to next AGM (s.395(3)) | ① by Members at the previous AGM (s.396(1)); if fail ➔ company must make appointment of auditor by resolution passed at another general meeting (s. 396(5)) | + no person is deemed to be reappointed as auditor under section 403 ➔ ① members resolution (s.396(3)) before the appointment period (s.396(4)) | ① by Directors, if fail to appoint w/i 1 month (s.397(1)) ➔ ② members may, by a resolution passed at a general meeting (s.397(2)) |
| ② if Director has not appoint first auditor, the company may appoint the first auditor by resolution passed at general meeting in accordance with section 396(6) | | If: ❶ no auditor appointed at the AGM (s.398(1)(a)(i)) or ❷ no AGM held (s.398(1)(a)(ii)) | If: ❶ at end of appointment period, no auditor appointed (s.398(1)(b)(i)) and ❷ no person is deemed to be reappointed as auditor (s.398(1)(b)(i)) | |
| ③ if the above fail, then member may apply to court for an order to appoint (s.398(2)) | | ② then member may apply to court for an order to appoint (s.398(1)) | | ③ if the above fail, then member may apply to court for an order to appoint (s.398(3)) |

[3] For definition of appointment period see section 392 of the Companies Ordinance, that is 28 days from: (i) the date copy of the reporting documents for the previous financial year is sent/provided under section 430(3) or 612(1)(b) (as the case may be); or (ii) the last date copy of the reporting documents for the previous financial year must be sent/provided under section 430(3) or 612(1)(b) (as the case may be), which whichever is the earlier.

Division 5 of Part 9 of this Ordinance consolidates the relevant provisions on auditors regarding their appointment, termination and their investigative powers. The provisions are largely the same as before. The most significant changes are the auditor's right to information has been enhanced and there is now greater transparency with regard to cessation of office. The following should be highlighted:

(i) An auditor is deemed to be re-appointed under certain circumstances (Section 403 of this Ordinance). This is a new concept introduced by this Ordinance;

(ii) An auditor is required by sections 406 and 407 of this Ordinance to give opinions on financial statement;

(iii) Under section 410 of this Ordinance (which is a new section), auditors are given qualified privilege for statements made in the course of their duties as auditors;

(iv) An auditor has power under section 412 of this Ordinance to request information and explanation for their performance of duties from a wider range of persons, which include persons holding or being accountable for any accounting records of the company or its Hong Kong incorporated subsidiary. Any person who fails to provide the information commits an offence;

(v) The auditor is now required to make statements upon its cessation to be an auditor (Sections 424 and 425 of this Ordinance):

a. under subsection 425(1), the auditor's duty to make a statement of circumstances connected with the cessation of office is extended from resignation of auditors to where the auditor is removed from office and where a retiring auditor is not reappointed; and

b. a cessation statement and a statement of circumstances made by an outgoing auditor will be covered by qualified privilege so that an outgoing auditor will not, in the absence of its malice, be liable in any action for defamation in respect of the cessation statement or the statement of circumstances made by it under sections 422 to 428 of this Ordinance.





**Appointment and termination of auditor and the reporting documents**

| | | | | |
|---|---|---|---|---|
| | section 610 – has to hold AGM (unless exempted under sections 612/613) w/i 6 months (for public co.) or 9 months (for private co. or companies limited by guarantee) after the end of the accounting reference period. | section 612(1) – written resolution passed in lieu of AGM | section 612(2) – not required to hold AGM<br>(1) the company has only one member<br>(2) dispensed in accordance with section 613 | section 613 dispensation with AGM by written resolution or resolution passed by all members (see the column at the left) |
| ***Term of appointment of auditor*** expiry (s.402) | at the end of the AGM | on the date of the written resolution | at end of appointment period[4] in relation to the next financial year | |
| ***Deemed reappointed*** auditor (s.403) for the next financial year on the same terms of appointment. | | | ❶ at end of appointment period for next financial year, ❷ no person appointed as auditor of the company for that next financial year ➔ the existing auditor is deemed to be reappointed for | |

[4] For definition of appointment period see section 392 of the Companies Ordinance, that is 28 days from: (i) the date copy of the reporting documents for the previous financial year is sent/provided under section 430(3) or 612(1)(b) (as the case may be); or (ii) the last date copy of the reporting documents for the previous financial year must be sent/provided under section 430(3) or 612(1)(b) (as the case may be), which whichever is the earlier.

| | | | | | |
|---|---|---|---|---|---|
| | section 610 – has to hold AGM (unless exempted under sections 612/613) w/i 6 months (for public co.) or 9 months (for private co. or companies limited by guarantee) after the end of the accounting reference period. | section 612(1) – written resolution passed in lieu of AGM | section 612(2) – not required to hold AGM (1) the company has only one member (2) dispense in accordance with section 613 | section 613 dispensation with AGM by written resolution or resolution passed by all members (see the column at the left) |
| | | | that next financial year on the same terms (Except s.403(2)) | |
| Termination of appointment of auditors | See sections 416, 417, 418, 419 and 420 of this Ordinance. | | | |
| Reporting documents (s.357(2)) to be laid before AGM | Annually (s.429(1)) | | No need (s.429(2)) | |
| Copy of reporting documents send to members before AGM | Yes, at least 21 days before AGM (s.430(1)) | No, but send within the time specified under section 431 (s.430(2) and s.431) | | |





**Transitional arrangements**

The transitional arrangements are now obsolete as they were applicable to a financial year beginning before 3 March 2014 and ending on or after that date, therefore financial years ending on this past 2 March 2015 were still subject to the arrangement.

The relevant provisions in the predecessor CO subject to transitional arrangements were, *inter alia*:

- reporting exemption,
- accounting records,
- statements,
- statement of financial position,
- directors' report, and
- appointment of auditor and accounts.

They applied to those issues for a financial year beginning before 3 March 2014[5] and ending on or after that date.

Part 9 of Schedule 11 of the Companies Ordinance provides for the relevant transitional arrangement.

## PART 9
## ACCOUNTS AND AUDIT

### Division 1 Preliminary

**357. Interpretation**

(1) In this Part—

***annual consolidated financial statements*** (周年綜合財務報表) means the consolidated statements required to be prepared under section 379(2);

***annual financial statements*** (周年財務報表) means the statements required to be prepared under section 379(1);

***auditor's report*** (核數師報告) means the report required to be prepared under section 405;

***directors' report*** (董事報告) means—

(a) the report required to be prepared under section 388(1); or

(b) the consolidated report required to be prepared under section 388(2);

[5] The new Companies Ordinance (Cap.622) commenced on 3 March 2014.

***financial statements*** (財務報表) means annual financial statements or annual consolidated financial statements;

***Regulation*** (《規例》) means the regulations made under sections 451 and 452;

***summary financial report*** (財務摘要報告) means a financial report prepared under section 439.

(2) In this Part, a reference to the reporting documents for a financial year is a reference to all of the following—

(a) the financial statements for the financial year;
(b) the directors' report for the financial year;
(c) the auditor's report on those financial statements.

(3) For the purposes of this Part, a body corporate is a wholly owned subsidiary of another body corporate if it has only the following as members—

(a) that other body corporate;
(b) a wholly owned subsidiary of that other body corporate;
(c) a nominee of that other body corporate or such a wholly owned subsidiary.

## COMMENTARY

**Overview**

357.01 Subsection 357(1) of this Ordinance sets out the meanings of certain terms on accounts and audits (including the names of documents) to be used in this Part 9 of the Companies Ordinance.

357.02 The definition of "summary financial report" in subsection 357(1) of this Ordinance was rewritten based on the definitions in sections 2(1) and 141CF(1) of the predecessor CO. The other applicable terms used and defined herewith in section 357(1) of this Ordinance are new.

**Defining those documents to be prepared for the financial year**

357.03 Those documents required to be prepared for a financial year are all listed in subsection 357(2) of this Ordinance. The term "reporting documents for a financial year" consists of:

i. the financial statements,
ii. the directors' report, and
iii. the auditor's report.

There are no equivalent definitions in the predecessor CO.





**Defining what is considered a 'wholly-owned subsidiary' under this Part 9**

357.04 Under subsection 357(3) of this Ordinance, a body corporate is a wholly-owned subsidiary of another body corporate *only if* it has the following as members: (i) that other body corporate; (ii) a wholly owned subsidiary of that other body corporate; or (iii) a nominee of that other body corporate or such a wholly owned subsidiary.

**Equivalent provisions in the predecessor CO**

357.05 Except for the drafting improvement for easy reading, subsection 357(3) of this Ordinance is identical with that of section 124(4) of the predecessor CO.

### 358. Application in relation to financial year beginning on or after commencement date of relevant provision etc.

(1) Each of the following sections applies in relation to a financial year beginning on or after the commencement date of that section—

(a) section 359;
(b) section 379;
(c) section 388;
(d) section 389;
(e) section 429;
(f) section 430;
(g) section 439.

(2) Each of the following sections applies in relation to accounting records for a financial year beginning on or after the commencement date of that section—

(a) section 373;
(b) section 374;
(c) section 376;
(d) section 377.

(3) Each of the following sections applies in relation to financial statements for a financial year beginning on or after the commencement date of that section—

(a) section 380;
(b) section 381;
(c) section 382;
(d) section 383;
(e) section 436;
(f) section 449.

664.08 An Annual Return in the form of a certificate of no change, which is permitted under (former) sections 107(5) and 107(6) of the predecessor CO, *will no longer* be registered with the Registrar as the respective sections have not be reinstated under this Ordinance.

**Equivalent provisions in the predecessor CO**

664.09 This section is comparable to sections 107(1), 107(2), and 107(7) of the predecessor CO.

### 665. Construction of reference to annual return

A reference in this Ordinance to a company's last annual return, or to an annual return delivered in accordance with Section 662, is to be construed as including (so far as necessary to ensure the continuity of the law) a return made up to a date before the commencement date of that section, or forwarded to the Registrar in accordance with the predecessor Ordinance.

**COMMENTARY**

**Overview**

665.01 This section, which provides that reference to the last annual return herein, also refers to an annual return made up to a date *prior to* the commencement of previous section 662 of this Ordinance in accordance with the predecessor CO.

**Equivalent Provisions in the predecessor CO**

665.02 There is no equivalent provision in the predecessor CO. However, this section 665 herein is instead comparable to paragraph 81(3) of Schedule 2 of the UK Companies Act 2006.



# *Part 13*

# ARRANGEMENTS, AMALGAMATION, AND COMPULSORY SHARE ACQUISITION IN TAKEOVER AND SHARE BUY-BACK



**Brief Summary of Part 13**

Part 13 of the Companies Ordinance is principally focused on: (i) schemes of arrangement or compromise with creditors or members; (ii) reconstructions or amalgamations of companies; and (iii) compulsory acquisitions of shares following a takeover offer or following a general offer for a share buy-back.

Part 13 substantially re-instates sections 166 to 168 and Schedules 9 and 13 of the predecessor CO with modifications. The following are the major amendments:

*(i) Expanding the definitions of certain terms*

The definitions for terms of "property" and "liabilities" are revised in the provisions for facilitating reconstructions and amalgamations.

As such, section 675 of this Ordinance generally restated former section 167 of the predecessor CO but accordingly extended definitions of "property"

and "liabilities" as so added in that subsection 675(8) to permit the transfer of contracts of personal services for arrangement and compromise.

The provisions herein also clarified the meanings and applications of "takeover offer", "shares already held by the offeror" and "shares to which the offer relates" in a takeover.

*(ii) Headcount test*

The "headcount test" for approving a scheme of arrangement that involves a general offer or a takeover offer has now been replaced with the requirement that the votes cast against the scheme *do not exceed* 10% of the voting rights attached to all disinterested shares. Note that the test is retained for other schemes but the Court has now been given a new discretion to dispense with the test for members' schemes that retain the test.

Former section 166 of the predecessor CO provided that if a scheme is proposed between a company and its members or creditors or any class of them, the Court may order a meeting of the members or creditors or a class of them to be held. It also provides that if a majority in number ("headcount test") representing three-fourths in value of the creditors or members present and voting at the meeting agree to the proposed scheme, the scheme shall, if sanctioned by the court, be binding on all members or creditors and the company.

Under the predecessor CO, the Court may exercise its discretion not to sanction a scheme even though it has passed the headcount test. So under the "headcount" test element, the majority of those present must vote in favor.

The "headcount" test has proved controversial and this was demonstrated in the case of *Re PCCW Ltd* [1] in 2009 in which share splitting was involved for compliance with the headcount test. This Ordinance retains the "headcount test" in this Part 13 for approving a scheme of compromise or arrangement while giving the Court a new discretion to dispense with the headcount test for members' schemes in certain circumstances under section 674 of this Ordinance.

In those cases where the members' arrangement involves a general offer as defined in section 707 of the Ordinance or a takeover offer, the headcount requirement gives way to a test which requires the votes cast against the arrangement not to exceed 10% of the total voting rights attached to all disinterested shares in the or of the class in the company.

[1] *Re PCCW Ltd* [2009] HKEC 738.





The Ordinance attempted to strike a reasonable balance by having the 'old' headcount test replaced with this 'new' test based on the concept of the 10% objection rule of the Takeovers Code for certain members' schemes. For other members' schemes that retain the headcount test, the court is given a new discretion to dispense with the test in special circumstances, such as where there is evidence that the result of the vote has been unfairly influenced by share splitting.

As for creditors' schemes, this concern for vote manipulation and problems arising from nominee shareholdings do not seem to exist. Accordingly, it is desirable to retain the headcount test to protect small creditors. As it is unlikely for small creditors who oppose a proposed scheme to manipulate the outcome of voting by assigning part of their debts to other persons, there is therefore no need to extend the Court's discretion to dispense with the headcount test to cover creditors' schemes.

*(iii) New court-free statutory amalgamation procedure*

This Ordinance also introduced a new court-free statutory amalgamation procedure for those wholly owned intra-group companies.

An amalgamation is defined as a legal process under which the undertakings, property and liabilities of two or more companies *merged and are brought under one* of the original companies or a newly formed company. The companies' shareholders then become the shareholders of the new or amalgamated company. In the past, an amalgamation could be pursued only under a complex and costly process involving court-sanctioned procedures. As a result, amalgamations were rarely used for business reorganizations. Transfers of a business and assets, on the other hand, have been carried out more frequently, even though they may give rise to various tax exposures.

Under the predecessor CO, those companies intending to amalgamate would have to settle for "intra-group companies" in regards to those procedures under former sections 166 to 167 of the predecessor CO which in turn required Court sanction. However, the Ordinance has now introduced a new set of procedure for amalgamations of wholly owned intra-group companies as so prescribed under sections 678 to 686 herein, which no longer require Court approval.

Under the Ordinance now, this court-free amalgamation procedure, such as those involving intra-group amalgamations, can be carried out without having to involve the court (note however, amalgamations that are more complicated still should be pursued under the court-sanctioned procedure). All of the amalgamating companies in a court-free amalgamation must be incorporated in Hong Kong and must be companies limited by shares within the same group.

An "amalgamating company" is defined as a company that is the subject of an amalgamation proposal. But once the amalgamation process is completed, the single continuing entity will then be referred to as the "amalgamated" company.

There are two types of court-free amalgamations: vertical and horizontal. A *vertical amalgamation* is between a holding company and one or more of its wholly-owned subsidiaries, whereas a *horizontal amalgamation* is between two or more subsidiaries of the same holding company. In a *vertical amalgamation*, the shares of the amalgamating subsidiary will be cancelled and in a *horizontal amalgamation*, the shares of *all but one of* the amalgamating subsidiaries will be cancelled.

Also note that while minority shareholders' rights should not be a concern (since court-free amalgamations apply only to wholly-owned intra-group companies), the Ordinance does contain procedures to protect creditors' rights. The major procedures include:

i. special resolutions approving the amalgamation;
ii. a solvency statement to be made by the directors of each amalgamating company;
iii. a written notice to each secured creditor for consent;
iv. a public notice; and
v. a five-week period for any member or creditor to file an objection to an amalgamation.

Under the new arrangement, among other things, where the board of each amalgamating company must make a statement to:

i. confirm that the assets of the amalgamating company is not subject to any floating charge; and
ii. verify the solvency of the amalgamating company as well as the amalgamated company,

the amalgamation proposal must be approved by the members of each amalgamating company by special resolution.

*(iv) Legal implications of court-free amalgamation*

According to section 685(3) of the Ordinance, the following occur on the effective date of a successful amalgamation, as specified in the Certificate of Amalgamation:

i. Each amalgamating company ceases to exist as an entity separate from the amalgamated company; and
ii. The amalgamated company succeeds to all the property, rights and privileges, and all liabilities and obligations, of each amalgamating company.





That subsequent section 685(4) of the Ordinance also provides that, as from the effective date of an amalgamation:

i. Any proceedings pending by or against an amalgamating company may be continued by or against the amalgamated company;
ii. Any conviction, ruling, order or judgment in favor of or against an amalgamating company may be enforced by or against the amalgamated company; and
iii. Any agreement entered into by an amalgamating company may be enforced by or against the amalgamated company, unless otherwise provided in the agreement.

These legal implications of a court-free amalgamation as now allowed under the Ordinance appear similar to those of a universal transfer (i.e. a full assignment of all assets, rights and liabilities of certain legal entities or economic units) that results in a universal succession by operation of law. Upon completion of a universal transfer, the assets of the amalgamating entities automatically are transferred to the amalgamated entity without the need for an individual contract and/or delivery of the asset, or even registration of the new ownership. Accordingly, this is an efficient tool to streamline business and to conduct business restructuring. The same should be true of a court-free amalgamation given its similarities to a universal transfer, thus meeting one of the Ordinance's goals of streamlining business operations and modernizing and bringing the laws herewith in tune with the rest of the business world.

*(v) Revised offer*

This Ordinance further introduced new provisions and applications which now allow a revised offer to be *treated as the original offer* so long as certain specified conditions are properly met.

The difference herein was that the predecessor CO did not have any such provisions on revised offers after the making of the initial offer. As a result, an offeror who wishes to revise its offer had to make a new takeover offer. This was time consuming and costly.

As such, section 692 of this Ordinance now provides that a revision of the terms of a takeover offer *is not to be regarded* as the making of a new, fresh offer *if* the original terms of the offer state that: (i) the revisions and the acceptance on the previous terms will be regarded as deemed acceptances on the revised terms; and (ii) the revisions are made in accordance with that provision. Section 710 of this Ordinance contains a similar provision for a share buy-back offer.

*(vi) Squeeze out notices*[2]

Furthermore, this Ordinance introduced new provisions to allow an offeror in a takeover offer or share buy-back offer to apply to the Court for an authorization to give squeeze out notices, with the aim of compulsorily acquiring the shares of minority shareholders.

**Transitional Arrangement**

*Arrangement or compromise*

Section 122(1) of Schedule 11 of this Ordinance provides that: (i) former sections 166, 166A and 167 of the predecessor CO; and (ii) rule 117 of the Companies (Winding-up) Rules (Cap. 32H) continue to apply to an arrangement or compromise if, before the commencement date of Division 2 of this Part 13, an application was made to the Court for the purposes of former section 166(1) of the predecessor CO for a meeting to be summoned in relation to the arrangement or compromise. The filing fee of HK$1,045 will continue to apply to an application made under that (former) section 166 of the predecessor CO for sanctioning a compromise or arrangement as allowed under section 122(2) of Schedule 11 of this Ordinance.

*Acquisition offer*

Note that: (i) former sections 168(1), 168(2), 168(3); along with (ii) Schedule 9 of the predecessor CO, also continue to apply to an acquisition offer that was made before the commencement date of Division 4 of this Part 13 as prescribed under section 123 of Schedule 11 of the Ordinance.

## PART 13
## ARRANGEMENTS, AMALGAMATION, AND COMPULSORY SHARE ACQUISITION IN TAKEOVER AND SHARE BUY-BACK

### Division 1 Preliminary

### 666. Interpretation

In this Part—

***child*** (子女) includes a step-child, an illegitimate child and a child adopted in any manner recognized by the law of Hong Kong;

***cohabitation relationship*** (同居關係) means a relationship between 2 persons (whether of the same sex or of the opposite sex) who live together as a couple in an intimate relationship;

[2] See section 693 of this Cap.622.





***offer period*** (要約期), in relation to an offer, means the period within which the offer can be accepted;

***repurchasing company*** (回購公司), in relation to a general offer, means the listed company that makes the offer.

## COMMENTARY

**Overview** 666.01

This section sets out various definitions in Pt. 13. Among other things:

(1) The definition of "child" is the same as the definition of "child" in previous section 484(1) of this Ordinance. Note that the definition of "child" also covers children adopted in any manner recognized by the law of Hong Kong.

(2) The definition of "cohabitation relationship" is the same as the definition of "cohabitation relationship" in previous section 484(1) of this Ordinance. The definition "Cohabitation relationship" includes the situation where 2 persons are living together (whether of the same sex or not).

(3) There is a new definition of the term "offer period" which, in relation to an offer, means the period within which the offer can be accepted. In the predecessor CO, the phrase "the period within which the offer can be accepted" was used *e.g.* in paragraphs 9 and 10 of Schedule 9 and paragraphs 10 and 12 of Schedule 13 of the predecessor CO.

(4) Although the term "repurchasing company" was used in the predecessor CO, no definition was so provided therein. The definition of "repurchasing company" is now introduced in this Ordinance to mean, in relation to a general offer, the listed company that makes the offer.

**Equivalent provisions in the predecessor CO** 666.02

There is no equivalent section in the predecessor CO.

### 667. Associate

(1) In this Part, a reference to an associate of an offeror or member, is—

(a) if the offeror or member is a natural person, a reference to—

(i) the offeror's or member's spouse;

(ii) a person who is in a cohabitation relationship with the offeror or member;

(iii) a child of the offeror or member;

(iv) a child of a person falling within subparagraph (ii) who—

(A) is not a child of the offeror or member;
(B) lives with the offeror or member; and
(C) has not attained the age of 18;

(v) a parent of the offeror or member;

(vi) a body corporate in which the offeror or member is substantially interested; or

(vii) a person who is a party, or a nominee of a party, to an acquisition agreement with the offeror or member; or

(b) if the offeror or member is a body corporate, a reference to—

(i) a body corporate in the same group of companies as the offeror or member;

(ii) a body corporate in which the offeror or member is substantially interested; or

(iii) a person who is a party, or a nominee of a party, to an acquisition agreement with the offeror or member.

(2) In this Part, a reference to an associate of a repurchasing company is a reference to—

(a) a body corporate in the same group of companies as the repurchasing company;

(b) a body corporate in which the repurchasing company is substantially interested; or

(c) a person who is a party, or a nominee of a party, to an acquisition agreement with the repurchasing company.

(3) For the purposes of subsections (1) and (2), an offeror, member or repurchasing company is substantially interested in a body corporate if—

(a) the body corporate, or its directors or a majority of its directors, are accustomed to act in accordance with the directions or instructions of the offeror, member or repurchasing company; or

(b) the offeror, member or repurchasing company is entitled to exercise, or control the exercise of, more than 30% of the voting power at any general meeting of the body corporate.

(4) In subsection (3), a reference to voting power the exercise of which is controlled by an offeror, member or repurchasing company includes voting power the exercise of which is controlled by another body corporate if the offeror, member or repurchasing company is entitled to exercise, or control the exercise of, more than 50% of the voting power at any general meeting of that other body corporate.

(5) For the purposes of subsections (1) and (2), an agreement is an acquisition agreement if—





(a) it is an agreement for the acquisition of—

(i) any of the shares to which the takeover offer or general offer relates; or

(ii) an interest in those shares; and

(b) it includes provisions imposing obligations or restrictions on any of the parties to it with respect to the use, retention or disposal of the party's interests in the shares acquired pursuant to the agreement.

## COMMENTARY

**Offeror or member being a Natural Person** 667.01

Subsection 667(1)(a) herein provides that in Part 13 when the offeror or member is a natural person, the following parties will be treated as an associate of an *offeror* or *member*. This term of 'associate' now includes:

(i) various members of the individual offeror/member;

(ii) their spouse;

(iii) a person (whether of the same sex or of the opposite sex of the offeror or member) living together as a couple in an intimate relationship;[3]

(iv) their child or an under 18 child of a person falling within the cohabitation relationship with the offeror or member;

(v) parents;

(vi) their body corporate in which the offeror or member is *substantially interested*. Offeror or member is considered to be substantially interested in a body corporate, say ABC Limited if:

(a) ABC Limited or the directors or a majority of directors of ABC Limited, are accustomed to act with the directions or instructions of the offeror or member, as the case may be (Subsection 667(3)(a) herein); or

(b) offeror or member is entitled to exercise or control the exercise of, more than 30% of the voting power at any general meeting of ABC Limited (Subsection 667(3)(b) herein).

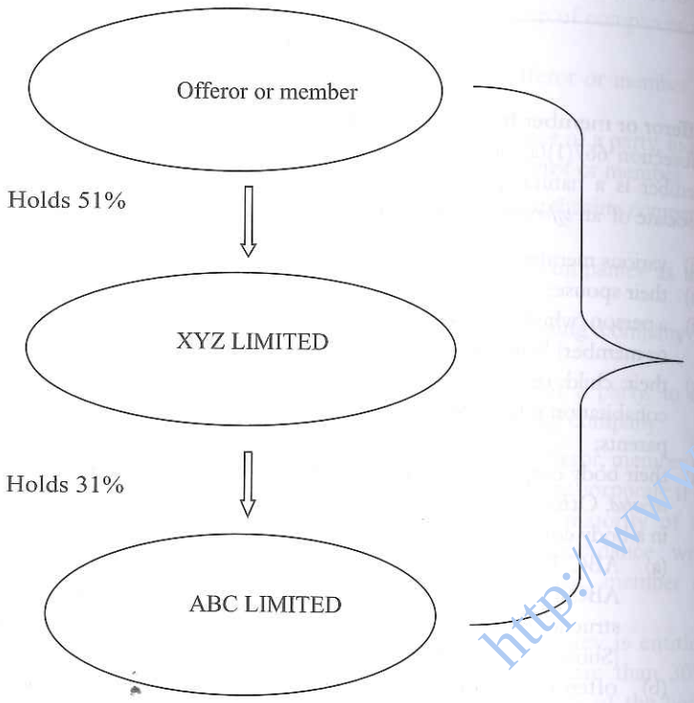
For determination of the 30% voting power, the exercise of voting power controlled by another body corporate will be counted if the offeror or member is entitled to exercise, or control the exercise of, more than 50% of the voting power of that other body corporate.

[3] See section 666(1) of the Ordinance for definition of "cohabitation relationship".

*For example*: XYZ Limited holds 31% voting power in ABC Limited whereas the offeror or member holds 51% voting power in XYZ Limited. Then ABC Limited will be deemed to be an associate of the offeror or member by subsection 667(4) herein. This calculation is similar to the calculation for determination of associated body corporate of director in section 488(2).

In that case, ABC Limited will be regarded as associated with offeror or member.

Example:




As such, ABC Limited is deemed to be an associate of the offeror or member.

(vii) a person, who is a party or a nominee of a party, to an *acquisition agreement* with the offeror or member. An acquisition agreement is defined as:
  (a) an agreement for the acquisition of:
    (aa) any of the shares to which the takeover offer[4] or general offer relates; or
    (bb) an interest in those shares; and

[4] See section 692 of this Ordinance for the definition.





  (b) includes provisions imposing obligations or restrictions on any of the parties to it with respect to the use, retention or disposal of the party's interests in the shares acquired pursuant to the agreement (Subsection 667(5) herein).

**Offeror or member being a body corporate**

667.02 When the offeror or member is a body corporate, the following parties will be treated as an associate of an *offeror or member*.

(i) a body corporate in the same group of companies;
(ii) a body corporate in which the offeror or member is *substantially interested*;[5] or
(iii) a person, who is a party or a nominee of a party, to an *acquisition agreement*[6] with the offeror or member.

667.03 Subsection 667(2) herein provides that in Part 13 the following parties will be treated as an associate of a *repurchasing company*.[7]

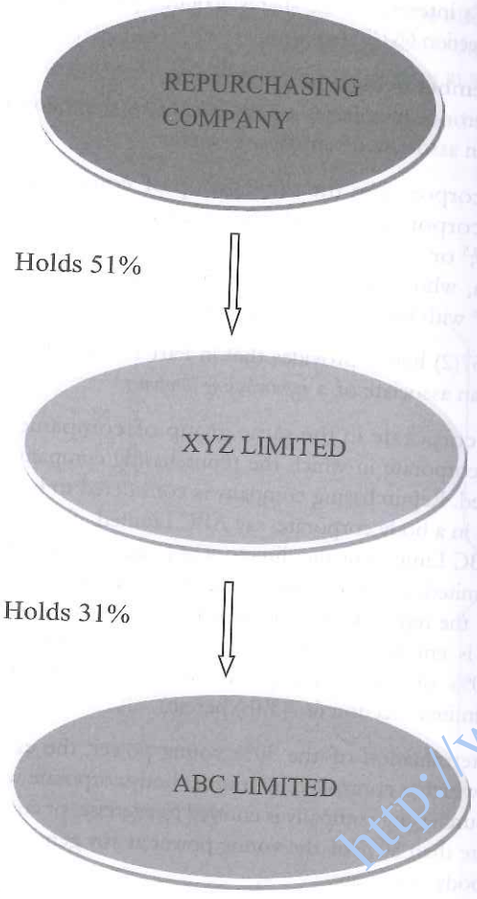
(i) a body corporate in the same group of companies;
(ii) a body corporate in which the repurchasing company is substantially interested. Repurchasing company is considered to be substantially interested in a body corporate, say ABC Limited, if:
  (a) ABC Limited or the directors or a majority of directors of ABC Limited, are accustomed to act with the directions or instructions of the repurchasing company (Section 667(3)(a) herein); or
  (b) it is entitled to exercise or control the exercise of, more than 30% of the voting power at any general meeting of ABC Limited (Section 667(3)(b) herein).

For determination of the 30% voting power, the exercise of voting power which is controlled by another body corporate will be counted if the repurchasing company is entitled to exercise, or control the exercise of, more than 50% of the voting power at any general meeting of that other body corporate.

For example XYZ Limited holds 31% voting power in ABC Limited, whereas the repurchasing company holds 51% voting power in XYZ Limited. Then ABC Limited will be deemed to be an associate of the repurchasing company by Subsection 667(4).

[5] For the calculation of substantially interested see the example for associate for offeror or member who is a natural person above.
[6] For definition of acquisition agreement, see the explanation set out in the paragraph under associate for offeror or member who is a natural person above.
[7] For definition of repurchasing company see section 666 of this Ordinance. The repurchasing company is the listed company that makes the offer.

In the above case, ABC Limited will be regarded as associated with repurchasing company.




(iii) person, who is a party or a nominee of a party, to an *acquisition agreement* [8] with the repurchasing company.

**Equivalent provisions in the predecessor CO**

667.04 There is no equivalent provision in the predecessor CO. Section 667 herein is instead comparable to section 988 of the United Kingdom Companies Act 2006.

[8] For definition of acquisition agreement, see the explanation set out in the paragraph under associate for offeror or member who is a natural person above.





## Division 2 Arrangements and Compromises

### 668. Interpretation

(1) In this Division—

***arrangement*** (安排) includes a reorganization of the company's share capital by the consolidation of shares of different classes, or by the division of shares into different classes, or both;

***company*** (公司), except in Section 675, means a company liable to be wound up under the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap. 32).

(2) In this Division, a reference to a company's articles, in the case of a company not having articles, is to be read as the instrument constituting or defining the constitution of the company.

### COMMENTARY

**Overview**

668.01 This section sets out the various definitions in Division 2 of Part 13 of, among other things:

(1) "arrangement" in subsection 668(1) herein repeats the definition of the term of "arrangement" in (former) section 166(5) of the predecessor CO;

(2) "company" in subsection 668(1) herein. This new definition is a consolidation of (former) sections 166(5) and 167(5) of the predecessor CO.

668.02 Kwan J (as she then was) in *Re Wah Nam Group Ltd* (No 2) [2003] 1 HKLRD 282 stated that:

> "…for the purposes of [former]s.166 [of the predecessor CO, which is the predecessor of ss.668 to 670, 673, 674 and 677 of this (new) Companies Ordinance], so long as the scheme involved an agreement modifying rights, it could be regarded as an "arrangement", even though there was no "compromise" in the sense that the creditors had agreed to accept a lesser sum in full and final settlement of their claims…….An "arrangement" was not limited to something analogous to "compromise" and was treated as being of very wide import…."

## COMPANIES (UNFAIR PREJUDICE PETITIONS) PROCEEDINGS RULES (CAP. 622L)



## PROVIEW EXCLUSIVE CONTENT

1. Comparative Table of the Companies Ordinance (Cap.622)
2. New Forms used and applied by the Companies Ordinance





# *Cap 622*

# SUBSIDIARY LEGISLATION



### Introduction to the Subsidiary Legislation

**0.001** As we are now all aware, there are 12 pieces of subsidiary legislation to this Companies Ordinance (Cap.622) which includes two amendment regulations. These deal with the administrative, procedural and technical details of the Companies Ordinance. Fourteen of these were gazette on various dates but all of them came into force on 3 Mach 2014, the same date as the Ordinance came into effect. The subsidiary legislation have been designated Cap.622A to Cap.622L.

### Time frame in which each of the subsidiary legislation was placed in the gazette by the government

**0.002** The first batch of the 12 subsidiary legislations for the implementation of the Companies Ordinance were placed in the gazette back on 1 February 2013:

(1) Companies (Words and Expressions in Company Names) Order,
(2) Companies (Disclosure of Company Name and Liability Status) Regulation,
(3) Companies (Accounting Standards (Prescribed Body)) Regulation,
(4) Companies (Directors' Report) Regulation, and
(5) Companies (Summary Financial Reports) Regulation.

**0.003** The second batch of the subsidiary legislation were the:

(6) Companies (Revision of Financial Statements and Reports) Regulation
(7) Companies (Disclosure of Information about Benefits of Directors) Regulation.

**0.004** The above two subsidiary provisions were subject to the negative vetting procedure of Legislative Council. As such, they were placed in the gazette on 22 March 2013 and were tabled before Legislative Council at the meeting of 27 March 2013.

**0.005** The following third batch of subsidiary legislations for implementation of the Companies Ordinance were placed in the gazette on or about May 2013:

(8) Companies (Unfair Prejudice Petitions) Proceedings Rules
(9) Companies (Disclosure of Information about Benefits of Directors) (Amendment) Regulation 2013
(10) Companies (Revision of Financial Statements and Reports) (Amendment) Regulation 2013
(11) Company Records (Inspection and Provision of Copies) Regulation
(12) Companies (Model Articles) Notice
(13) Companies (Non-Hong Kong Companies) Regulation
(14) Companies (Fees) Regulation.

**0.006** Note that items (9) and (10) were simply amendment regulations as they amended the above items (2) and (6), respectively.

### Companies (Residential Addresses and Identification Numbers) Regulation still not in force

**0.007** It is certainly worthwhile to note that the one piece of subsidiary legislation which has *not yet been* put into force is the Companies (Residential Addresses and Identification Numbers) Regulation. This regulation deals with the disclosure of details of the residential addresses and full identification or passport numbers of directors or other officers ("protected information"). This regulation was carved out from other regulations and, at the time of this Edition, still has not been put into effect.





**0.008** Division 7 of Part 2[1] of the Ordinance, as originally proposed, was to provide protection of personal data of the directors and company secretaries to a certain extent.

**0.009** This restriction on the use of personal data for office holders under this Ordinance (as originally proposed) stated that:

(i) Protected information is not available at the Register to the public;
(ii) The only information available is the correspondence addresses and some parts of the identity numbers of the directors and the company secretaries;
(iii) As for the existing personal data information currently on the Registrar, a current or former director, reserve director or company secretary of a company may apply to the Registrar and paying a fee to have a correspondence address substituted for their residential address (section 49 of the Companies Ordinance); and
(iv) Any person can apply to have part of their identity number masked.

*Contrary Views*

**0.010** The above proposed regime however attracted heated debates and arguments over issues concerning the protection of privacy, freedom of press, investigative journalism and hindrance of civil process (such as service of documents).

*Shelving the regime*

**0.011** To stem the tide of criticism and to avoid any further delay with the enactment of the Ordinance (Cap. 622), the Administration announced in late March 2013 that they were shelving those controversial provisions and the *Companies (Residential Addresses and Identification Numbers) Regulation* will be put on hold for the time being.[2] This legislation continues to be shelved as of *this date.*

### List of Subsidiary Legislation enacted

**0.012** The 12 pieces of subsidiary legislation, which provide for the relevant technical and procedural matters for the implementation of the Ordinance are as follows:

Cap. 622A: Companies (Words and Expressions in Company Names) Order

Cap. 622B: Companies (Disclosure of Company Name and Liability Status) Regulation

Cap. 622C: Companies (Accounting Standards (Prescribed Body)) Regulation

[1] For details of the Division 7 of Part 2, please refer to Vol.1 of this publication.
[2] See New Arrangement for the Inspection of Personal Information on the Companies Register under the new Companies Ordinance issued by Financial Services and the Treasury Bureau on 28 March 2013.

Cap. 622D: Companies (Directors' Report) Regulation (Cap. 622D)

Cap. 622E: Companies (Summary Financial Reports) Regulation (Cap. 622E)

Cap. 622F: Companies (Revision of Financial Statements and Reports) Regulation

Cap. 622G: Companies (Disclosure of Information about Benefits of Directors) Regulation

Cap. 622H: Companies (Model Articles) Notice

Cap. 622I: Company Records (Inspection and Provision of Copies) Regulation

Cap. 622J: Companies (Non-Hong Kong Companies) Regulation

Cap. 622K: Companies (Fees) Regulation

Cap. 622L: Companies (Unfair Prejudice Petitions) Proceedings Rules

## Summary of the Subsidiary Legislation enacted under the Companies Ordinance

***On company names***

*Companies (Words and Expressions in Company Names) Order (Cap. 622A)*

**0.013** This order was made:

(i) by the Financial Secretary;
(ii) under section 101 of the Companies Ordinance;
(iii) for the use of section 100(2)(b); and
(iv) was placed in the gazette on 1 February 2013.

**0.014** Prior approval of the Registrar is required if a company proposes to register a name containing words or expressions stated in this order. This order came into operation upon the commencement of section 101 of the Companies Ordinance (3 March 2014).

**0.015** Section 100(2)(b) of the Ordinance retained an existing arrangement under which approval has to be sought from the Registrar of Companies should a company wish to register a name containing certain words or expressions as specified in the subsidiary legislation. Cap. 622A sets out the updated list of words and expressions by which a company is allowed to choose from. This list basically follows the list from that of the (former) Companies (Specification of Names) Order (Cap. 32E) (which was repealed on commencement of this Ordinance)





*but* with the addition of the words "levy" and "tourism board" to guard against the registration of a company name which gives people the impression that the company in question is responsible for the collection of levies or is connected in some way with the Hong Kong Tourism Board.

Note that with this updated list in the Ordinance, several words and expressions in the (former) Cap. 32E were not retained as they were *either* duplicative or no longer required. **0.016**

*Companies (Disclosure of Company Name and Liability Status) Regulation (Cap. 622B)*

Section 659 of the Ordinance empowers the Financial Secretary to make regulations requiring a company to display, state or provide prescribed information in relation to disclosure of a company's name and registered office. **0.017**

Cap. 622B was made pursuant to sections 659 and 660 of the Ordinance and was placed in the gazette on 1 February 2013. This regulation sets out the requirement for a company to display its name at its office, correspondence and documents. This regulation came into operation upon the same date as when sections 659 and 660 of the Ordinance came into operation (3 March 2014). **0.018**

Note that sections 93 and 94 of the predecessor CO stipulated and stated the requirements concerning the display and disclosure of a company's registered name at the company's offices. Cap. 622B, while re-enacting the majority of existing requirements, also introduced the following changes to these requirements: **0.019**

(a) the requirement for the company to paint or affix its name outside of its office is replaced by the requirement for the name to be displayed at the office and so positioned that it can be easily seen by any visitor to the office;
(b) exceptions in certain circumstances under which the requirement to display the name of the company concerned may be dispensed with after taking into account the usual practices of company service providers and liquidators;
(c) provisions added to accommodate the use of electronic devices for the display of company names at a location shared by more than six companies which takes into consideration that a location may serve as the registered offices of multiple companies; and
(d) the obligation to state the company's registered name (and the liability status where applicable) in all communication documents and transaction instruments.

***On accounts and audit***

*Companies (Accounting Standards (Prescribed Body)) Regulation (Cap. 622C)*

**0.020** Section 380 of the Ordinance stipulates that the financial statements of a company must comply with the applicable statements of standard accounting practices issued or specified by a body prescribed by subsidiary legislation.

**0.021** The Companies (Accounting Standards (Prescribed Body)) Regulation (Cap.622C):

(i) was made by the Financial Secretary pursuant to section 452(1) of the Ordinance;
(ii) took effect upon the commencement of section 452(1) of the Ordinance; and
(iii) prescribes that the Hong Kong Institute of Certified Public Accountants will the body for issue or specification of the accounting practice.

*Companies (Directors' Report) Regulation (Cap. 622D)*

**0.022** The Ordinance requires that a directors' report, which is required to be prepared in accordance with section 388 of this Ordinance must be attached to the company's statement of financial position. As with the predecessor CO, the Ordinance and this regulation continues the requirement that director's must prepare the directors' report for laying before a company in its general meeting. Cap. 622D re-enacts certain requirements from the predecessor CO concerning the contents of a directors' report with modifications to align with the provisions and definitions contained in the Ordinance. This new term of "statement of financial position" was known as balance sheet in the predecessor CO.

**0.023** The directors' report *must* now include matters relating to:

(i) company's principal activities,
(ii) matters relating to issued shares,
(iii) details about management contracts, and
(iv) arrangements and other contracts involving directors interests or benefits, donations etc.

**0.024** Also note that to enhance the transparency of corporate governance, the Ordinance expanded the scope of disclosure to require the inclusion of:

(a) information on equity-linked agreements entered into by a company; and
(b) a summary of reasons for resignation or refusal to stand for re-election given by a director if such reasons are: (i) given in a written notice; and (ii) related to the affairs of the company. This requirement does not apply to companies that prepare simplified reports.





**0.025** As regards the disclosure of contracts of significance and which may have a bearing on the business of the company and in which a director (and his connected entity in the case of public company) has material interest in, the scope of application has been expanded to cover transactions and arrangements in line with Part 11 of the Ordinance.

**0.026** The Financial Secretary made Cap. 622D pursuant to section 452(3) of the Ordinance for contents and information required to be provided in the directors' report. This regulation took effect upon the commencement of section 452 of this Ordinance.

*Companies (Summary Financial Reports) Regulation (Cap. 622E)*

**0.027** Under the Ordinance, a company *not falling* within the reporting exemption for the financial year may prepare summary financial reports to its shareholders *in place* of the full set of financial statements documents.

**0.028** The Ordinance expanded and modified the existing arrangement for eligible companies to prepare financial reports in summary form. Cap. 622E sets out the requirements on the forms and contents of a summary financial report as well as the relevant notifications. This new regulation basically follows those requirements of the (former) Companies (Summary Financial Reports of Listed Companies) Regulation (Cap. 32M), which was repealed upon the commencement of this Ordinance. Necessary modifications were made to the wording of this Cap. 622E to reflect the new arrangements in relation to summary financial reports contained in sections 437 to 446 of the Ordinance.

**0.029** The Financial Secretary made Cap. 622E pursuant to sections 452(4) and 452(5) of the Ordinance. This regulation:

(i) took effect upon the commencement of section 452 of the Companies Ordinance (3 March 2014); and
(ii) prescribes the forms and contents of: (i) summary financial report; and (ii) notification for seeking member's intent on receiving summary financial report.

*Companies (Revision of Financial Statements and Reports) Regulation (Cap. 622F)*

**0.030** Section 449 of this Ordinance provides that a company may voluntarily revise its financial statements and make necessary consequential revisions to the summary financial reports and the directors' reports.

**0.031** Section 141E of the predecessor CO provided that the directors of a company may voluntarily revise its accounts (and make necessary consequential revisions to the summary financial report and the directors' report) after the accounts have been provided to its members. The detailed requirements concerning the

revised documents, the manner in which the provisions in the predecessor CO apply to the revised documents and the relevant offences as prescribed in the (former) Companies (Revision of Accounts and Reports) Regulation (Cap. 32N) followed the general principle that the obligations and arrangements concerning the original documents also apply to the revised documents.

**0.032** Section 449 of the Ordinance re-stated this provision and allows for the voluntary revision of financial statements is premised on the same basis.

**0.033** Cap. 622F now basically re-states and re-enacts the former Cap.32N with the necessary modifications to align this regulation in accordance with the requirements and arrangements with the provisions on accounts and audit as stated in Part 9 of the Ordinance.

**0.034** This Cap 622F, as so amended now, took effect upon the commencement of section 450 of the Ordinance (3 March 2014).

*Companies (Disclosure of Information about Benefits of Directors) Regulation (Cap. 622G )*

**0.035** Section 383 of the Ordinance requires that the information concerning benefits of directors, *e.g.* emoluments and retirement benefits, must be stated in the notes to financial statements.

**0.036** Section 383 of this Ordinance basically re-stated sections 161 and 161B of the predecessor CO which required the disclosure of information in the company's accounts as regards to payments relating to a director's services (namely emoluments, pensions and compensation for termination) and dealings in favour of directors (namely loans, quasi-loans and credit transactions as well as guarantees entered into and security provided in relation to such dealings).

**0.037** Cap. 622G re-stated and consolidated the above detailed disclosure requirements. Some modifications and refinements have been made in this regulation, which includes:

(a) the scope of emoluments is clarified to include bonuses and the sums paid to a person for accepting office as a director;
(b) the disclosure requirements applicable to non-cash benefits are expanded to require an indication of the nature of such benefits;
(c) the references to "pensions" are replaced by references to "retirement benefits" to more adequately reflect the intention of the disclosure regime; and
(d) in accordance with section 383(1)(f) of the Ordinance, a new requirement introduced mandates for the disclosure of information on the consideration provided to any third party for making available a director's services.





**0.038** In this regards, the Financial Secretary has, pursuant to sections 451 and 452 of this Ordinance, created this Cap. 622G which took effect upon the commencement of section 452 of this Ordinance (3 March 2014).

***Model Articles samples***

*Companies (Model Articles) Notice (Cap. 622H)*

**0.039** Companies incorporated in Hong Kong are now required to have articles of association for regulation of their internal management. This Ordinance empowered the Financial Secretary to prescribe model articles for companies. A company may adopt any or all of the provisions of the model articles here in Cap. 622H as its articles. This Companies (Model Articles) Notice regulation took effect upon the commencement of section 78 of the Ordinance (3 March 2014).

**0.040** Cap. 622H prescribes the following three sets of model articles as fully set out in this regulation as such:

(i) public companies limited by shares (Schedule 1 of the Notice);
(ii) private companies limited by shares (Schedule 2 of the Notice); and
(iii) companies limited by guarantee (Schedule 3 of the Notice).

**0.041** Note that as compared to the standard articles provided under the predecessor CO, the improvements and revisions to the model articles under this Cap. 622H include:

(a) in respect of decision-making by directors, the model articles contain additional clauses to provide for the procedures for written resolutions and the appointment and removal of alternate director;
(b) in respect of the proceedings of general meetings, an article is added to expressly state the rights of directors and non-members to attend and speak at general meetings whereas the articles relating to the effect, validity and the delivery of relevant notices for proxies are elaborated; and
(c) for matters relating to share capital, the rules relating to forfeiture of partly-paid shares are set out in greater detail and an article is added to deal with surrender of shares in lieu of enforcement of a call for payment. Amendments are also made to reflect the greater flexibility resulting from migration to no-par shares in the Ordinance.

**0.042** Apart from the above-listed revisions, most of the articles were re-worded and revised to enhance the readability and user-friendliness of the model articles by re-organising the articles, presenting them in shorter paragraphs where practicable and adding headings for each article.

**0.043** Furthermore, there are no model articles for unlimited companies as this type of company is relatively rare and often has very specific needs that do not justify a standardized approach.

***On company records***

*Company Records (Inspection and Provision of Copies) Regulation (Cap. 622I)*

**0.044** The Ordinance now provides for the inspection of certain records required to be kept by companies. This Cap. 622I, which was made by the Financial Secretary under sections 356 and 657 of the Ordinance, provides for the detailed arrangements and procedures concerning company records kept by a company in respect of:

- the place for keeping of records;
- the inspection of records -
  - (a) Including:
    - (i) The manner of making a request for inspection of records;
    - (ii) The fee payable for an inspection; and
    - (iii) The obligations of companies to make available company records for inspection during business hours and to permit a copy of company records to be made in the course of inspection.
  - (b) Also empowers the Court to make certain orders relating to the inspection of company records;

and

- the provision of copies of records, which includes:
  - (a) The obligation of companies to provide copies of company records within five business days upon receipt of the request or payment of the prescribed fees for the copies (whichever is the later); and
  - (b) It also prescribes the fee payable for a copy of company records and empowers the Court to make certain orders relating to the provision of a copy of company records.

**0.045** This Ordinance provides that certain company records (such as registers and minutes of general meetings) *may be* kept at a place prescribed by this Company Records (Inspection and Provision of Copies) Regulation *other* than its registered office and be subject to inspection in accordance with the Regulation. The regulation provides that in such cases, the records concerned may be kept anywhere in Hong Kong. The records must also be made available for inspection by those eligible to make the inspection, whereas the person inspecting the records may make copies of the records concerned.





**0.046** For certain types of records such as: (i) registers of members; and (ii) minutes of general meetings, the Ordinance also provides that an eligible person may request such copies of the records in accordance with this regulation. These requests must be entertained within 10 business days by the company. Furthermore, the charge for the copies cannot exceed an amount calculated according to the number of entries (in the case of a register) or otherwise the number of pages as prescribed in this regulation.

***Non-Hong Kong Companies***

*Companies (Non-Hong Kong Companies) Regulation (Cap. 622J)*

**0.047** Non-Hong Kong companies (*i.e.* companies incorporated in a place outside Hong Kong that have established a place of business in Hong Kong) are now exclusively referred to in Part 16 of this Ordinance. Part 16 deals with matters relating to non-Hong Kong companies whereas the procedures and the detailed requirements including the: (i) documents to be delivered upon the registration of non-Hong Kong companies; (ii) the furnishing of supporting documents or certified translation; and (iii) the delivery of annual returns are prescribed by subsidiary legislation. This Cap. 622J basically restates the existing requirements and arrangements in respect of these matters in Part 16 of the Ordinance.

**0.048** Non-Hong Kong companies are required to apply for registration within one month of its establishment of a place of business in Hong Kong. In addition, they must deliver to the Companies Registry certified copies of their:

(i) certificate of incorporation;
(ii) constitution;
(iii) latest accounts; and as well as
(iv) annual returns.

**0.049** This Companies (Non-Hong Kong Companies) Regulation (Cap. 622J), which was made by the Financial Secretary under sections 804 and 805 of the Ordinance, basically re-states the requirements and arrangements (with minor changes where appropriate) applicable to non-Hong Kong companies under former Part XI of the predecessor CO.

***Fees payable to the Companies Registry***

*Companies (Fees) Regulation (Cap. 622K)*

**0.050** Cap. 622K sets out the fees payable to the Companies Registry for its various functions or services and restates the existing fees set out in the Eighth Schedule to the predecessor CO. The predecessor CO provided for an escalating scale to the annual registration fee for late filing of annual returns by companies limited by

(iii) separate meetings of the holders of any class of shares or of debentures of the company; or

(b) the exercise of their powers and the discharge of their responsibilities in relation to the company.

### Division 4 Alternate Directors

### 30. Appointment and removal of alternates

(1) A director (*appointor*) may appoint as an alternate any other director, or any other person approved by resolution of the directors.

(2) An alternate may exercise the powers and carry out the responsibilities of the alternate's appointor, in relation to the taking of decisions by the directors in the absence of the alternate's appointor.

(3) An appointment or removal of an alternate by the alternate's appointor must be effected—

(a) by notice to the company; or

(b) in any other manner approved by the directors.

(4) The notice must be authenticated by the appointor.

(5) The notice must—

(a) identify the proposed alternate; and

(b) if it is a notice of appointment, contain a statement authenticated by the proposed alternate indicating the proposed alternate's willingness to act as the alternate of the appointor.

(6) If an alternate is removed by resolution of the directors, the company must as soon as practicable give notice of the removal to the alternate's appointor.

### 31. Rights and responsibilities of alternate directors

(1) An alternate director has the same rights as the alternate's appointor in relation to any decision taken by the directors under article 6.

(2) Unless these articles specify otherwise, alternate directors—

(a) are deemed for all purposes to be directors;

(b) are liable for their own acts and omissions;

(c) are subject to the same restrictions as their appointors; and

(d) are deemed to be agents of or for their appointors.





(3) Subject to article 15(3), a person who is an alternate director but not a director—

(a) may be counted as participating for determining whether a quorum is participating (but only if that person's appointor is not participating); and

(b) may sign a written resolution (but only if it is not signed or to be signed by that person's appointor).

(4) An alternate director must not be counted or regarded as more than one director for determining whether—

(a) a quorum is participating; or

(b) a directors' written resolution is adopted.

(5) An alternate director is not entitled to receive any remuneration from the company for serving as an alternate director.

(6) But the alternate's appointor may, by notice in writing made to the company, direct that any part of the appointor's remuneration be paid to the alternate.

### 32. Termination of alternate directorship

(1) An alternate director's appointment as an alternate terminates—

(a) if the alternate's appointor revokes the appointment by notice to the company in writing specifying when it is to terminate;

(b) on the occurrence in relation to the alternate of any event which, if it occurred in relation to the alternate's appointor, would result in the termination of the appointor's appointment as a director;

(c) on the death of the alternate's appointor; or

(d) when the alternate's appointor's appointment as a director terminates.

(2) Paragraph (1)(d) does not apply if the appointor is reappointed after having retired by rotation at a general meeting or is regarded as having been reappointed as a director at the same general meeting, and in such a case, the alternate director's appointment as an alternate continues after the reappointment.

(3) If the alternate was not a director when appointed as an alternate, the alternate's appointment as an alternate terminates if—

(a) the approval under article 30(1) is withdrawn or revoked; or

(b) the company by an ordinary resolution passed at a general meeting terminates the appointment.

## Division 5 Managing Directors

### 33. Appointment of managing directors and termination of appointment

(1) The directors may—

(a) from time to time appoint one or more of themselves to the office of managing director for a period and on terms they think fit; and

(b) subject to the terms of an agreement entered into in any particular case, revoke the appointment.

(2) A director appointed to the office of managing director is not, while holding the office, subject to retirement by rotation under article 24. While holding the office, the director must also not be taken into account in determining the rotation of retirement of directors under that article.

(3) The appointment as a managing director is automatically terminated if the managing director ceases to be a director for any reason.

(4) The directors may determine a managing director's remuneration, whether by way of salary, commission or participation in profits, or a combination of them.

### 34. Powers of managing directors

(1) The directors may entrust to and confer on a managing director any of the powers exercisable by them on terms and conditions and with restrictions they think fit, either collaterally with or to the exclusion of their own powers.

(2) The directors may from time to time revoke, withdraw, alter or vary all or any of those powers.

## Division 6 Directors' Indemnity and Insurance

### 35. Indemnity

(1) A director or former director of the company may be indemnified out of the company's assets against any liability incurred by the director to a person other than the company or an associated company of the company in connection with any negligence, default, breach of duty or breach of trust in relation to the company or associated company (as the case may be).

(2) Paragraph (1) only applies if the indemnity does not cover—





(a) any liability of the director to pay—

(i) a fine imposed in criminal proceedings; or

(ii) a sum payable by way of a penalty in respect of non-compliance with any requirement of a regulatory nature; or

(b) any liability incurred by the director—

(i) in defending criminal proceedings in which the director is convicted;

(ii) in defending civil proceedings brought by the company, or an associated company of the company, in which judgment is given against the director;

(iii) in defending civil proceedings brought on behalf of the company by a member of the company or of an associated company of the company, in which judgment is given against the director;

(iv) in defending civil proceedings brought on behalf of an associated company of the company by a member of the associated company or by a member of an associated company of the associated company, in which judgment is given against the director; or

(v) in connection with an application for relief under section 903 or 904 of the Ordinance in which the Court refuses to grant the director relief.

(3) A reference in paragraph (2)(b) to a conviction, judgment or refusal of relief is a reference to the final decision in the proceedings.

(4) For the purposes of paragraph (3), a conviction, judgment or refusal of relief—

(a) if not appealed against, becomes final at the end of the period for bringing an appeal; or

(b) if appealed against, becomes final when the appeal, or any further appeal, is disposed of.

(5) For the purposes of paragraph (4)(b), an appeal is disposed of if—

(a) it is determined, and the period for bringing any further appeal has ended; or

(b) it is abandoned or otherwise ceases to have effect.

### 36. Insurance

The directors may decide to purchase and maintain insurance, at the expense of the company, for a director of the company, or a director of an associated company of the company, against—

(a) any liability to any person attaching to the director in connection with any negligence, default, breach of duty or

breach of trust (except for fraud) in relation to the company or associated company (as the case may be); or

(b) any liability incurred by the director in defending any proceedings (whether civil or criminal) taken against the director for any negligence, default, breach of duty or breach of trust (including fraud) in relation to the company or associated company (as the case may be).

### Division 7 Company Secretary

### 37. Appointment and removal of company secretary

(1) The directors may appoint a company secretary for a term, at a remuneration and on conditions they think fit.

(2) The directors may remove a company secretary appointed by them.

## PART 3
## Decision-Taking by Members

### Division 1 Organization of General Meeting

### 38. General meetings

(1) Subject to sections 611, 612 and 613 of the Ordinance, the company must, in respect of each financial year of the company, hold a general meeting as its annual general meeting in accordance with section 610 of the Ordinance.

(2) The directors may, if they think fit, call a general meeting.

(3) If the directors are required to call a general meeting under section 566 of the Ordinance, they must call it in accordance with section 567 of the Ordinance.

(4) If the directors do not call a general meeting in accordance with section 567 of the Ordinance, the members who requested the meeting, or any of them representing more than one half of the total voting rights of all of them, may themselves call a general meeting in accordance with section 568 of the Ordinance.





### 39. Notice of general meetings

(1) An annual general meeting must be called by notice of at least 21 days in writing.

(2) A general meeting other than an annual general meeting must be called by notice of at least 14 days in writing.

(3) The notice is exclusive of—

(a) the day on which it is served or deemed to be served; and

(b) the day for which it is given.

(4) The notice must—

(a) specify the date and time of the meeting;

(b) specify the place of the meeting (and if the meeting is to be held in 2 or more places, the principal place of the meeting and the other place or places of the meeting);

(c) state the general nature of the business to be dealt with at the meeting;

(d) for a notice calling an annual general meeting, state that the meeting is an annual general meeting;

(e) if a resolution (whether or not a special resolution) is intended to be moved at the meeting—

(i) include notice of the resolution; and

(ii) include or be accompanied by a statement containing any information or explanation that is reasonably necessary to indicate the purpose of the resolution;

(f) if a special resolution is intended to be moved at the meeting, specify the intention and include the text of the special resolution; and

(g) contain a statement specifying a member's right to appoint a proxy under section 596(1) and (3) of the Ordinance.

(5) Paragraph (4)(e) does not apply in relation to a resolution of which—

(a) notice has been included in the notice of the meeting under section 567(3) or 568(2) of the Ordinance; or

(b) notice has been given under section 615 of the Ordinance.

(6) Despite the fact that a general meeting is called by shorter notice than that specified in this article, it is regarded as having been duly called if it is so agreed—

(a) for an annual general meeting, by all the members entitled to attend and vote at the meeting; and

(b) in any other case, by a majority in number of the members entitled to attend and vote at the meeting, being a majority together representing at least 95% of the total voting rights at the meeting of all the members.

**40. Persons entitled to receive notice of general meetings**

(1) Notice of a general meeting must be given to—
(a) every member; and
(b) every director.

(2) In paragraph (1), the reference to a member includes a transmittee, if the company has been notified of the transmittee's entitlement to a share.

(3) If notice of a general meeting or any other document relating to the meeting is required to be given to a member, the company must give a copy of it to its auditor (if more than one auditor, to everyone of them) at the same time as the notice or the other document is given to the member.

**41. Accidental omission to give notice of general meetings**

Any accidental omission to give notice of a general meeting to, or any non-receipt of notice of a general meeting by, any person entitled to receive notice does not invalidate the proceedings at the meeting.

**42. Attendance and speaking at general meetings**

(1) A person is able to exercise the right to speak at a general meeting when the person is in a position to communicate to all those attending the meeting, during the meeting, any information or opinions that the person has on the business of the meeting.

(2) A person is able to exercise the right to vote at a general meeting when—
(a) the person is able to vote, during the meeting, on resolutions put to the vote at the meeting; and
(b) the person's vote can be taken into account in determining whether or not those resolutions are passed at the same time as the votes of all the other persons attending the meeting.

(3) The directors may make whatever arrangements they consider appropriate to enable those attending a general meeting to exercise their rights to speak or vote at it.

(4) In determining attendance at a general meeting, it is immaterial whether any 2 or more members attending it are in the same place as each other.

(5) Two or more persons who are not in the same place as each other attend a general meeting if their circumstances are such that if they have rights to speak and vote at the meeting, they are able to exercise them.





**43. Quorum for general meetings**

(1) Two members present in person or by proxy constitute a quorum at a general meeting.

(2) No business other than the appointment of the chairperson of the meeting is to be transacted at a general meeting if the persons attending it do not constitute a quorum.

**44. Chairing general meetings**

(1) If the chairperson (if any) of the board of directors is present at a general meeting and is willing to preside as chairperson at the meeting, the meeting is to be presided over by him or her.

(2) The directors present at a general meeting must elect one of themselves to be the chairperson if—
(a) there is no chairperson of the board of directors;
(b) the chairperson is not present within 15 minutes after the time appointed for holding the meeting;
(c) the chairperson is unwilling to act; or
(d) the chairperson has given notice to the company of the intention not to attend the meeting.

(3) The members present at a general meeting must elect one of themselves to be the chairperson if—
(a) no director is willing to act as chairperson; or
(b) no director is present within 15 minutes after the time appointed for holding the meeting.

(4) A proxy may be elected to be the chairperson of a general meeting by a resolution of the company passed at the meeting.

**45. Attendance and speaking by non-members**

(1) Directors may attend and speak at general meetings, whether or not they are members of the company.

(2) The chairperson of a general meeting may permit other persons to attend and speak at a general meeting even though they are not—
(a) members of the company; or
(b) otherwise entitled to exercise the rights of members in relation to general meetings.

**46. Adjournment**

(1) If a quorum is not present within half an hour from the time appointed for holding a general meeting, the meeting must—
(a) if called on the request of members, be dissolved; or