



Hong Kong Law

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KEY CHANGES UNDER THE NEW COMPANIES ORDINANCE PART SEVEN – ABOLITION OF MEMORANDUM OF ASSOCIATION AND MATTERS RELATING TO THE ARTICLES OF ASSOCIATION

Introduction

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 The core provisions affecting the operation of companies under the Old CO will be repealed, except those provisions relating to winding-up and insolvency of companies and prospectuses.

Charltons is preparing a series of newsletters summarizing the key changes to the company law framework under the New CO. In this seventh newsletter, we discuss key changes relating to the memorandum and articles of association.

Abolition Of The Memorandum Of Association

New CO references: sections 67 and 98

Position under the Old CO

Under the Old CO, the constitutional documents of a company formed in Hong Kong are the memorandum of association (**Memorandum**) and the articles of association (**Articles**). As all the information provided on incorporation apart from the objects clause and the authorised capital (which will be removed following the migration to no par under the New CO) is contained in the Articles and the incorporation form, the need to retain the Memorandum as a separate constitutional document has reduced.

Key changes under the New CO

The New CO abolishes the requirement for a company to have a Memorandum. A company incorporated in Hong Kong will only have a single constitutional document (the Articles).

For an existing company, provisions set out in its memorandum are deemed to be provisions of its Articles (section 98 of the New CO). However, any such provisions relating to authorized share capital and par value are regarded as deleted (section 98(4)), to reflect the migration to no par.

Practical considerations and recommended steps

Owing to the deeming provision referred to above, it will not be necessary for an existing company established under the Old CO to make changes to its constitutional documents as a result of the abolition of the Memorandum.

However, companies may take the opportunity to review and amend their existing constitutional documents, in particular to take advantage of some of the new initiatives under the New CO and to ensure the Articles comply with the provisions of the New CO (see below a discussion on recommended amendments to the Articles). For ease of reference, a company may wish to expressly restate in its Articles any provisions of the Memorandum that are deemed carried over to the Articles.

Removal of provisions formerly contained in the Memorandum

If a company wishes to remove any provision of the Memorandum now deemed to be contained in the Articles, and which does not constitute a mandatory provision (see below), it may do so by way of special resolution. For example, a company may consider removing its object clause, as discussed below.

Objects clause

The objects clause was previously included in the Memorandum. It states the purpose(s) for which a company is formed and the intended business activities of the company. Since 1997, the objects clause has been optional. For most companies¹, it is not mandatory to state the objects in the Articles but a company may do so (section 82(2) of the New CO). Where a company does not state its objects, it has the capacity and the rights, powers and privileges of a natural person (section 115 of the New CO), but may not exercise its powers in a manner contrary to its constitutional documents.

Older companies that retain an objects clause in their constitutional documents should consider taking the opportunity occasioned by the abolition of the Memorandum to delete the objects clause, thereby giving them greater flexibility in their operations and dealings.

Some companies may wish to retain specific object clauses. For example in the case of a charitable company, the objects will be restricted to a charitable purpose. In the case of a joint venture company, the parent companies may wish to specify the exact purpose and business for which the joint venture was formed in an objects clause.

If the objects clause is not deleted, it is deemed to be carried over to the Articles following abolition of the Memorandum. In such cases, a counterparty enquiring as to a company's capacity to enter into a particular transaction (for example, to borrow or provide security) should review any objects clause in the former Memorandum (now deemed to be in the Articles) to determine whether there are any restrictions on a company's powers.

However, note that section 117 of the New CO provides that in favour of a person dealing with a company in good faith, the power of the directors to bind the company will be deemed to be free of any limitation under the Articles, any resolutions of the company or any agreement between the members of the company (more information on the statutory protection of outsiders is contained in our newsletter on "Company Administration, Procedure and Operations").

Mandatory Provisions In Articles

New CO references: sections 81, 83 to 85

¹ An association incorporated with a licence granted under section 103 of the New CO (i.e. to dispense with the word "Limited" as the last word of its name), or a company with such a licence, must state the company's objects whilst the licence remains in force (section 82(1)).

New companies incorporated under the New CO must have Articles that include provisions dealing with the following matters:

- the name of the company (section 81);
- the objects of the company, if the company has been granted a licence to dispense with the use of the word “Limited” in its name under section 103 (section 82);
- details of members’ liabilities (section 83);
- details of liabilities or contribution of members (section 84); and
- details of initial capital and initial shareholding (section 85).

Generally, existing companies established under the Old CO will comply with the requirements to have the mandatory articles by virtue of the deeming provision in section 98 of the New CO (as discussed above).

Model Articles

New CO references: Sections 78 to 80, Companies (Model Articles) Notice

Position under the Old CO

Under the Old CO, a company limited by shares may register customised Articles upon incorporation. If no Articles are registered, or if Articles are registered, in so far as they do not exclude or modify the regulations set out in Table A of the First Schedule to the Old CO (the **Table A Articles**), the regulations set out in Table A will be the Articles of the company.

Key changes under the New CO



The New CO empowers the Financial Secretary to prescribe different model articles (**Model Articles**) for different types of companies. These Model Articles replace the Table A Articles and the other tables in the First Schedule to the Old CO for companies incorporated after the commencement of the New CO, and will be in addition to the mandatory Articles that a company must have (as discussed above).

A company may adopt as its articles all or any of the provisions of the Model Articles prescribed for the type of company to which it belongs. The appropriate Model Articles will also apply in so far as the articles of the company do not exclude or modify the Model Articles. Therefore, if a company established under the New CO does not register any additional articles upon incorporation, the Model Articles prescribed for that type of company will apply. The Companies (Model Articles) Notice prescribes Model Articles for public companies limited by shares, private companies limited by shares and companies limited by guarantee.

Major changes under Model Articles compared to the Table A Articles

The major changes introduced in the Model Articles (compared to the Table A Articles) include the following:

Directors

- public companies: new articles have been added to provide detailed procedures for written resolutions;
- private companies and guarantee companies: a new article dealing with unanimous decisions of directors is added;
- articles dealing with the appointment and removal of alternate directors have been added;
- articles on voting at directors' meetings where there is a conflict of interests have been updated to take into account changes regarding disclosures of directors' interests and voting requirements in respect of connected transactions under the New CO, and other changes;
- articles on directors' meetings have also been revised to cater for dispersed meetings, i.e. where directors meet via telecommunication or video conferences, or with the aid of other communication technology;

Proceedings at general meetings

- an article has been added on the rights of directors and anyone who is not a member of the company to attend and speak at a general meeting;
- articles relating to the effect, validity and the delivery of relevant notices for proxies have been set out in greater detail;
- articles on the contents and timeframe for notices of meetings have also been revised to align with those provided for in the New CO;

Share capital

- public companies: the articles relating to forfeiture of partly-paid shares are set out in greater detail (note the default position under the Model Articles for private companies is that shares must be fully paid up on issue);
- public companies: an article has been added to deal with surrender of shares in lieu of enforcement of a call for payment;
- amendments have also been made to reflect provisions in the New CO, providing for greater flexibility resulting from migration to no-par regime.

Practical Considerations And Recommended Steps

The Model Articles will have no impact on existing companies incorporated under the Old CO. The Table A Articles will continue to apply to such existing companies unless excluded or modified by the articles. However, an existing company can amend its articles to follow the Model Articles if it so chooses.

Recommended Amendments To Articles

Companies may wish to review and amend their existing constitutional documents in order to take advantage of some of the new initiatives under the New CO and to ensure the Articles comply with the provisions of the New CO. Some of the key areas where a company may consider amending its Articles are set out below:

Abolition of Memorandum

- *Restate provisions from Memorandum*: For ease of reference, a company may wish to expressly restate any provisions formerly contained in the Memorandum (now abolished). All such provisions are deemed carried over to the Articles (whether or not expressly restated).

- *Deletion of objects clause:* A company may consider deleting its object clause for greater flexibility (as discussed above).

Share capital

- *References to par value:* The New CO abolishes the concept of par (or nominal) value of shares for both existing companies and new companies. Companies may wish to amend their Articles to reflect the no par regime, notwithstanding transitional measures and deeming provisions contained in the New CO so that existing companies are not required to change their Articles following migration to no par.
- *Maximum number of shares:* The New CO provides that the amount of authorised share capital set out in an existing company's constitutional documents is deemed to be deleted. Accordingly, the default position will be that there is no limit on the number of shares that the directors can issue. If shareholders so wish, they can amend the Articles to specify a maximum number of shares that may be issued. The maximum number of shares that a company may issue can subsequently be changed by way of ordinary resolution.
- *Reduction of share capital, financial assistance, share buy backs:* The Articles should be reviewed to identify and delete provisions that may impair a company's ability to take advantage of the more flexible procedures for reducing share capital, financial assistance and share buy backs under the New CO.



Meetings

- *Notice periods:* Under the New CO, the notice period for an AGM is at least 21 days. In any other case the notice period is at least 14 days for a limited company, and at least 7 days for an unlimited company (section 571(1)). If the Articles require a longer period of notice the meeting must be called by notice of that longer period (section 571(2)). Previously, the notice period for passing a special resolution at an extraordinary general meeting was 21 days. A company may wish to amend its Articles to reduce its notice periods to the new statutory minimum.
- *Proxies:* Under the Old CO, a proxy is not entitled to vote on a show of hands unless the Articles provide otherwise. The New CO provides that a proxy may exercise all or any of the member's rights to attend and to speak and vote at a general meeting (including voting on a show of hands, except in the case of multiple proxies) (section 596(1) and 591(3)). A company may wish to amend its Articles to include an express right for a proxy to vote on a show of hands. The Articles may also give more extensive rights to its members or proxies than are provided in the New CO (section 608).
- *Polls:* Under the New CO the threshold requirement for members to demand a poll has been reduced from 10% to 5% of the total voting rights. A provision to the contrary in the Articles will be void (section 591).
- *Meetings in two or more places:* Under section 584 of the New CO, a company may hold a general meeting at two or more places using any technology that enables the members who are not together at the same place to listen, speak and vote at the meeting, subject to any provision of its articles. A company may wish to ensure that there is no conflicting provision in the Articles.

Written Resolutions

- *Circulation:* Under the New CO a company must circulate a proposed written resolution to all members who are entitled to vote if it has received requests from members representing not less than 5% of the total voting rights or a lower percentage specified for the purpose in the Articles (section 552). A company may wish to specify a lower threshold for circulation of written resolutions.
- *Deadline for agreement:* The period for agreeing to a proposed written resolution is 28 days, or such period as is specified in the Articles (section 558). If a company wants a longer or shorter deadline for agreeing a written resolution, this should be set out in the Articles.
- *Alternative procedures:* The Articles may also set out alternative procedures for passing a resolution without a meeting, provided that the resolution has been agreed to by all the members entitled to vote (section 561).



Execution of documents

- In order to take full advantage of the new flexibility in executing documents including deeds (in particular as regards optional use of a common seal), a company should amend its Articles to remove any prescriptive provisions regarding use of the seal or execution.

Directors' interests

- Provisions in the Articles on voting at directors' meetings where there is a conflict of interest should be updated to take into account the changes as regards disclosures of directors' interests and voting requirements in respect of connected transactions under the New CO.

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