

Restructuring Services

# Hong Kong's new Companies Ordinance

Advisory

## Introduction

On 3 March 2014, Hong Kong's new Companies Ordinance ("New CO") and its subsidiary legislation became effective <sup>(1)</sup>. While most of the provisions in relation to company formation, administration and operation have been repealed, the winding-up and insolvency-related provisions have been retained and have been retitled as "Companies (Winding Up and Miscellaneous Provisions) Ordinance". With regard to these insolvency related provisions, there have been no changes.

However, there have been changes to the New CO that will impact some of the procedures for restructuring companies, in particular solvent companies. We have sought to highlight these changes in this newsletter, by setting out a comparison between the old and new provisions.

## Highlighted changes

	Predecessor Ordinance	New CO
<b>Deregistration</b>	<ul style="list-style-type: none"> <li>• Only available for private companies</li> <li>• Non-private companies and certain categories of business (e.g. authorized institution as defined in the Banking Ordinance) were not allowed to apply for deregistration</li> <li>• Limited conditions should be able to meet by eligible companies to apply for deregistration. These included:-               <ol style="list-style-type: none"> <li>i. has not commenced operation or business or has not been in operation or carried on business for three months;</li> <li>ii. No outstanding liabilities</li> <li>iii. All members agree to the deregistration</li> </ol> </li> </ul>	<ul style="list-style-type: none"> <li>• Deregistration procedure is extended to companies limited by guarantee (with certain exceptions)</li> <li>• Public companies and certain categories of business continue to be excluded</li> <li>• Additional conditions for deregistration have been created. These include:-               <ol style="list-style-type: none"> <li>i. Confirm that the company is not a party to any legal proceedings</li> <li>ii. Has no immovable property</li> <li>iii. None of the assets of its subsidiaries (if any) consist of any immovable property in Hong Kong</li> </ol> </li> </ul>

(1) : save for certain provisions such as restricted disclosure of directors' residential addresses.

## Highlighted changes (Continued)

	Predecessor Ordinance	New CO
<b>Restoration</b>	<ul style="list-style-type: none"> <li>Previously, where companies were deregistered by the Registrar under Section 291, where it appeared that the company was no longer in operation, it was necessary to apply to Court for its restoration under S291(7),</li> </ul>	<ul style="list-style-type: none"> <li>In such circumstances, the Registrar may on application by a director or member of the company, restore the company as long as three conditions are met. They are:- <ul style="list-style-type: none"> <li>i. The company was in operation when it was struck off</li> <li>ii. The Government has no objection,</li> <li>iii. The applicant must bring up to date the company's records</li> </ul> </li> </ul>
<b>Capital reduction</b>	<ul style="list-style-type: none"> <li>Required court and shareholders' approval</li> <li>Court approval is not required only when the sole purpose is to re-designate the nominal value of shares to a lower amount</li> </ul>	<ul style="list-style-type: none"> <li>A faster and cheaper court-free procedure based on a solvency test, whereby the directors are required to certify the company's solvency before members provide approval by way of special resolution. Creditors and non-approving members will be provided five weeks to object.</li> </ul>
<b>General meetings</b>	<ul style="list-style-type: none"> <li>Any meeting of members which was not an Annual General Meeting ("AGM") was called an Extraordinary General Meeting</li> <li>The ordinance did not have express provision permitting a general meeting to be held at two or more places</li> <li>Notice period for AGM is 21 days. Notice period for special resolutions required at least 21-day notice, subject to provisions set out in the previous Companies Ordinance</li> </ul>	<ul style="list-style-type: none"> <li>Any meeting of members which is not an AGM is now called a General Meeting</li> <li>It is now possible to hold a general meeting at two or more places using electronic technology subject to the provisions of the company's articles</li> <li>Notice period for AGM remains at 21 days. In other cases it is 14 days save for when a longer period is required by the company's articles or special notice is required as specified in the Companies Ordinance</li> </ul>
<b>Passing of written resolutions</b>	<ul style="list-style-type: none"> <li>Previously there were no statutory rules on procedures for written resolutions</li> </ul>	<ul style="list-style-type: none"> <li>New statutory rules for proposing, passing and recording of a written resolution have been introduced. Among these, it is a requirement to notify every member and the auditor within 15 days of the passing of the resolution</li> </ul>

## Highlighted changes (Continued)

	Predecessor Ordinance	New CO
<b>Corporate director</b>	<ul style="list-style-type: none"> <li>It was required that there be at least one director, which could be a corporate or individual for private companies (other than public companies and certain types of private companies)</li> </ul>	<ul style="list-style-type: none"> <li>Must have at least one natural person as director (6-month grace period). This implies that you can no longer have a body corporate as a sole director</li> </ul>

The list above should be noted that the list is not exhaustive, and cannot be regarded as legal advice. Some changes in the New CO may have transitional arrangements, which are specified in Schedule 11 of Cap 622.

## Corporate insolvency and winding-up provisions

As these existing insolvency and winding-up provisions date back to 1984, and are based on the English Insolvency Act of that time, the Government of Hong Kong Special Administrative Region has signaled its intention to review and reform them. In mid-April 2013, it released a Consultation Document on Legislative Proposals for the Improvement of Corporate Insolvency Law. Some of the areas for which reform is being considered are summarised as below:

- Commencement of winding-up
- Appointment, powers, vacation of office and release of Provisional Liquidators and Liquidators
- Conduct of winding-up
- Voidable transactions
- Investigation during winding-up

On 28 May 2014, Financial Services and the Treasury Bureau released the consultation conclusions on the "Improvement of Corporate Insolvency Law Legislative Proposals". An amendment bill is expected to be introduced to the Legislative Council in 2014/15.

In parallel, the Government announced its plan to introduce a statutory corporate rescue procedure to address Hong Kong's lack of a statutory moratorium for companies in financial difficulties wishing to consider rescue plans and avoid liquidation. Detailed proposals are expected to be announced later in 2014, alongside the changes to the corporate insolvency provisions.

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