



Major Changes Introduced by the New Companies Ordinance – Private and Public Companies¹

1. Abolition of Memorandum of Association

Change	Note/Action
<ul style="list-style-type: none"> Memorandum of Association is abolished for all local companies. Current provisions in the Memorandum of Association (except the authorised share capital which is deemed to be deleted) will be regarded as provisions of the Articles of Association (the “Articles”). Articles is the only constitutional document of a company. 	<ul style="list-style-type: none"> No requirement for existing companies to amend the Articles. Consider amending the Articles to take advantage of changes under the new Companies Ordinance (the “new CO”).

2. Abolition of Par Value

Change	Note/Action
<ul style="list-style-type: none"> Shares of all local companies will have no par or nominal value, regardless of when the companies are formed and when the shares are issued. Relevant concepts such as “authorised share capital”, “share premium” and “capital redemption reserve” will also be abolished. Amount in the “share premium account” and “capital redemption reserve” become part of the company’s share capital. Transitional and deeming provisions relating to the migration to no-par system are contained in Schedule 11 to the new CO. Companies may state in their Articles the maximum number of shares they may issue. 	<ul style="list-style-type: none"> No action required from the company for the conversion to no-par system. Review contracts and documents containing reference to par value and the related concepts to see if specific changes should be made.

3. Keeping of Common Seal and Execution of Documents

Change	Note/Action
<ul style="list-style-type: none"> The keeping and use of a common seal becomes optional. Companies may execute a deed under hand instead of common seal. Provides for the requirements for execution of documents: <ul style="list-style-type: none"> » if one director – by that director » if two or more directors – by (i) two directors; or (ii) one director and the company secretary » subject to certain requirements, documents executed in accordance with the above manner can be deemed to have been executed under the common seal or to have been executed as a deed 	<ul style="list-style-type: none"> If a company decides to keep a common seal, the existing requirements in its Articles governing the use of the common seal will continue to apply. If a company chooses not to keep a common seal, it should amend its Articles.

¹ For changes affecting companies limited by guarantee, please refer to the separate legal update.

4. Accounting Reference Period

Change	Note/Action
<p>Accounting Reference Period (“ARP”)</p> <ul style="list-style-type: none"> ARP is used in the new CO to determine the financial year of a company. It is also the period by reference to which the annual financial statements are to be prepared. For example, if the existing financial year end is 31 December every year, the ARP is from the 1 January of a year to 31 December of the same year. <p>Determination of the First ARP for an existing company under the new CO</p> <ul style="list-style-type: none"> The First ARP begins on the day immediately following the end date of the company’s accounts for the financial year immediately before the commencement of the new CO and ends on the first anniversary of that date. <p><u>Examples</u></p> <p>Existing companies with financial year ended on 31 December every year Current financial year : 1 Jan 2014 to 31 Dec 2014 End date of company’s accounts to be prepared under <u>current CO</u> : 31 Dec 2014 Company’s first ARP under <u>new CO</u> : 1 Jan 2015 to 31 Dec 2015</p> <p>Existing companies with financial year ended on 31 March every year Current financial year : 1 Apr 2013 to 31 Mar 2014 End date of company’s accounts to be prepared under <u>current CO</u> : 31 Mar 2014 Company’s first ARP under <u>new CO</u> : 1 Apr 2014 to 31 Mar 2015</p> <ul style="list-style-type: none"> The new CO allows directors to alter the ARP by directors’ resolution. In the case of a public company, a specified form has to be filed with the Companies Registry (“CR”) within 15 days. Unless the ARP is shortened or extended, every subsequent ARP is for a period of 12 months beginning immediately after the end of the previous ARP. 	<ul style="list-style-type: none"> ARP is relevant to the timing of the Annual General Meeting (“AGM”), the laying/sending of reporting documents (i.e. financial statements, directors’ report and auditors’ report) and the filing of the annual return (except private companies). A company should be well aware of its First ARP under the new CO as the <u>new requirements</u> regarding preparation of financial statements, simplified reporting, holding of AGM and laying/sending of financial statements etc. start applying to the company from its First ARP onwards. Regarding these areas, the current CO continues to apply to a financial year that begins before the commencement of the new CO (i.e. before 3 March 2014) and ends on or after that date. Companies with March year end will be the first group of companies to be impacted by the new CO.

5. Annual General Meetings

Change	Note/Action
<p>Timing of holding AGM</p> <ul style="list-style-type: none"> Under the current CO, a company must hold its AGM in each <u>calendar year</u>. The interval between two AGMs must not exceed 15 months. Under the new CO, a company must hold its AGM in respect of each <u>financial year</u> instead of in each calendar year, i.e. with reference to its ARP:- <ul style="list-style-type: none"> » for a private company not being a subsidiary of a public company – within 9 months after the end of its ARP » for a public company and its subsidiaries – within 6 months after the end of its ARP 	<ul style="list-style-type: none"> A company that wishes to dispense with the holding of AGM should review and amend its Articles to ensure that it is allowed to do so. The new provisions under the new CO regarding holding of AGM and dispensation of the holding of AGM start applying to a company’s AGM for the First ARP.

Change (con't)	Note/Action (con't)
<p>Circumstances under which an AGM is not required to be held</p> <ul style="list-style-type: none"> • Under the new CO, a company is not required to hold an AGM under the following circumstances:- <ul style="list-style-type: none"> i. if it is done by a written resolution (also allowed under the current CO); or ii. if it is a single member company; or iii. if all members pass a written resolution or a resolution at a general meeting to dispense with the holding of AGMs in respect of a particular financial year or for subsequent financial years (such resolution is required to be filed with the CR within 15 days); or iv. if it is a dormant company as defined in s5 of the new CO (also exempted under the current CO) • When the AGM is not required to be held in respect of a financial year, the current auditor can be deemed to be re-appointed for the next financial year on the same terms of appointment, subject to certain exceptions e.g. if the current auditor was appointed by the directors to fill a casual vacancy or if the Articles require an actual appointment. 	

6. Laying and Sending of Reporting Documents

Change	Note/Action
<ul style="list-style-type: none"> • A company's directors are required to lay before the company's AGM the reporting documents (i.e. financial statements, directors' report and auditors' report) in respect of each financial year, which align with the timing of the holding of AGM under the new CO:- <ul style="list-style-type: none"> >> for a private company not being a subsidiary of a public company – within 9 months after the end of its ARP >> for a public company and its subsidiaries – within 6 months after the end of its ARP • In the case where AGM is not required to be held as a result of being a single member company or dispensation of holding of AGM, copies of the reporting documents must be sent to every member within 9 months (for a private company not being a subsidiary of a public company) or 6 months (for a public company and its subsidiaries) after the end of the ARP. 	<ul style="list-style-type: none"> • The new requirements start applying to the reporting documents in respect of the First ARP.

7. Simplified Reporting

Change	Note/Action
<ul style="list-style-type: none"> • Under the new CO, the following companies are qualified for simplified reporting and entitled to reporting exemption:- <ul style="list-style-type: none"> i. any small private company/holding company of a group of small private companies that satisfies any two of the following conditions: (a) total annual revenue/aggregate total annual revenue of not more than HK\$100 million; (b) total assets/aggregate total assets not more than HK\$100 million; (c) average/aggregate average employees no more than 100 	<ul style="list-style-type: none"> • The requirements in relation to simplified reporting apply to a financial year that begins on or after the new CO commencement. • Consider whether simplified reporting would be applicable to the company.

Change (con't)	Note/Action (con't)
<ul style="list-style-type: none"> ii. an eligible private company/holding company of a group of eligible private companies that satisfies any two of the following conditions: (a) total annual revenue/aggregate total annual revenue not more than HK\$200 million; (b) total assets/aggregate total assets not more than HK\$200 million; (c) average/aggregate average employees no more than 100; together with the approval of members holding at least 75 percent of the voting rights with no other members objecting iii. a small guarantee company/holding company of a group of small guarantee companies with total annual revenue/aggregate total annual revenue not more than HK\$25 million iv. a private company (not being a member of a corporate group) with written agreement of all shareholders to adopt simplified reporting (also available under current CO) <ul style="list-style-type: none"> • Certain businesses are not qualified for simplified reporting e.g. banks, SFO licensed corporations and insurance companies. 	<ul style="list-style-type: none"> • Reporting exemptions include exemption from requirement to disclose auditor's remuneration in the financial statements, give a "true and fair view" in the financial statements, include a business review in the directors' report etc.

8. Business Review

Change	Note/Action
<ul style="list-style-type: none"> • The new CO requires companies to prepare, as part of the directors' report, a business review consisting of:- <ul style="list-style-type: none"> » fair review of the company's business » principal risks and uncertainties facing the company » likely future development » analysis of company's performance with financial key performance indicators • The following companies are exempted from preparation of business review:- <ul style="list-style-type: none"> » those qualified for simplified reporting » a wholly-owned subsidiary of another body corporate » private companies not qualified for simplified reporting but opt out of the requirement to prepare a business review by a special resolution 	<ul style="list-style-type: none"> • Private companies not qualified for simplified reporting should consider whether they would like to opt out of this requirement, and if so, a special resolution has to be passed at least 6 months before the financial year end.

9. Annual Returns ("AR")

Change	Note/Action
<ul style="list-style-type: none"> • There is no change to the requirement to file ARs of a private company, i.e. file within 42 days after the anniversary date of its incorporation. • Under the current CO, AR of a public company has to be filed within 42 days after the date of <u>AGM</u>. Under the new CO, it has to be filed within 42 days after the company's return date, i.e., 6 months after the end of each ARP. • A listed company is only required to state in the AR the particulars of members who hold 5 percent or more of the issued shares in any class of the company's shares as at the date of AR. 	<ul style="list-style-type: none"> • The new requirement for AR to be filed by public companies will start applying from their first ARP onwards. For the financial year which begins before the commencement date of the new CO and ends on or after that date, the AR should continue to be delivered within 42 days after the date of the AGM.

10. General Meetings

Change	Note/Action
<ul style="list-style-type: none"> Under the new CO, any meetings of members which are not AGMs will be called General Meetings (instead of Extraordinary General Meetings under the current CO). Notice period for AGM under the new CO remains at 21 days. In any other case the notice period is at least 14 days (under the current CO, special resolutions will require at least 21 days' notice). If the company's Articles specify a longer period of notice the meeting must be called by notice of that longer period. The requirement to send special notice to the company at least 28 days before the meeting for certain resolutions such as removal of director or auditor remains unchanged. Subject to the company's Articles, general meetings may be held 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. 	<ul style="list-style-type: none"> Existing companies should review their Articles to see if the notice requirement therein is longer than the new requirement under the new CO and if so, consider whether to amend the Articles to align with the new requirement.

11. Written Resolutions

Change	Note/Action
<ul style="list-style-type: none"> The new CO provides procedures for proposing and passing members' written resolutions. A resolution can be proposed by directors or members of the company. Anything that can be done at general meeting can be done by written resolution except removal of director and auditor. A company is required to circulate a proposed written resolution to all members in hard copy, electronic form or through website if the request is from members holding not less than 5 percent of the total voting rights (or a lower threshold as specified in the Articles). The proposed resolution is passed when all eligible members signify their agreement. The proposed resolution will lapse if agreement to it is not signified by all eligible members within 28 days or such period specified in the Articles. Once the agreement is signified, it cannot be revoked. After the proposed resolution is passed, the company should notify every member and the auditor within 15 days. 	<ul style="list-style-type: none"> If the company's Articles presently contain no express provisions on written resolutions, the procedures set out in the new CO will apply. If it wishes to adopt its own procedures which are different from those stated in the new CO, it may amend its Articles provided that its own procedures should not require anything less than unanimous members' approval.

12. Allotment and Issue of Shares

Change	Note/Action
<ul style="list-style-type: none"> Subject to certain exceptions such as issue of bonus shares, the new CO extends the requirement of shareholders' approval for allotment of shares to cover the granting of right to subscribe for, or to convert any security into, shares in the company. 	

Change (con't)	Note/Action (con't)
<ul style="list-style-type: none"> If the company is required to hold an AGM, the approval expires on the earlier of <ol style="list-style-type: none"> the conclusion of the AGM held next after the approval was given; the expiry of the period within which the next AGM after the approval was given is required to be held. If the company is not required to hold an AGM because it has opted to use the written resolution, the approval will expire on the date which the written resolution is passed. If the company is not required to hold an AGM for any other reasons e.g. dispensation of holding of AGM, the approval will expire on the date specified in the approval, which must not be more than 12 months after the approval was given. 	

13. Directors

Change	Note/Action
<p>Corporate Directors</p> <ul style="list-style-type: none"> While maintaining the restriction on corporate directorship in public companies, companies limited by guarantee and private companies being members of a group of which a listed company is a member, the new CO introduces a new requirement that every private company must have at least one director who is a natural person. <p>Declaration of directors' interest</p> <ul style="list-style-type: none"> The current CO requires a director who has a material interest in a contract or proposed contract which is of significance to the company's business, to disclose to the board of directors the nature of such interest at the earliest board meeting. Under the new CO, the ambit of disclosure is widened by requiring "transactions" and "arrangements" to be disclosed in addition to "contracts". Also, a director is required to disclose the "nature and extent" of his interest instead of just disclosing the "nature" of the interest. Means of declaration of interest by the director under new CO include:- <ol style="list-style-type: none"> directors' meeting written notice to other directors in hard copy (by hand or post) or electronic form (by agreed electronic means) general notice given in a directors' meeting or in writing and sent to the company <p>Directors' duty of care, skill and diligence</p> <ul style="list-style-type: none"> Currently, the directors' duty of care, skill and diligence is governed by common law and the standard required is not entirely clear. Such duty is codified in the new CO. The new CO introduces a mixed objective and subjective test for the standard of a director's duty to exercise reasonable care, skill and diligence, which is stricter than the traditional subjective test. 	<ul style="list-style-type: none"> A grace period of 6 months after the commencement date of the new CO is provided for the existing companies to comply with the new requirement. Companies should inform directors of the new requirements regarding declaration of directors' interest and updating the relevant internal policies, if any. The CR has issued "A Guide on Directors' Duties" (the "Guide") which will be effective upon commencement of the new CO on 3 March 2014. Directors should read the Guide to acquaint themselves with the principles that they should observe when carrying out their duties as directors. A copy of the Guide can be downloaded from the CR's website (http://www.cr.gov.hk/en/companies_ordinance/publications-guidelines.htm).

Change (con't)	Note/Action (con't)
<ul style="list-style-type: none"> • In deciding whether a director has fulfilled his duty of care, skill and diligence, his conduct is compared to the standard that would be exercised by a reasonably diligent person having: <ul style="list-style-type: none"> a. the general knowledge, skills and experience that may reasonably be expected of a person carrying out the functions carried out by the director in relation to the company (objective test); and b. the general knowledge, skill and experience that the director has (subjective test) 	

14. Transactions in relation to share capital

Change	Note/Action
<ul style="list-style-type: none"> • A uniform solvency test is introduced for the following transactions: <ul style="list-style-type: none"> » court-free capital reduction » share buyback and redemption out of capital » giving of financial assistance for acquisition of the company's own shares • In addition to certain procedures which the company should comply with, a solvency statement has to be signed by the directors to the effect that the company can satisfy the uniform solvency test. Directors must have reasonable grounds for making the solvency statement. 	<ul style="list-style-type: none"> • Directors should be briefed on their duties in relation to the making of solvency statements.

15. Responsible Person

Change	Note/Action
<ul style="list-style-type: none"> • The new CO replaces the formulation of “officer who is in default” with “responsible person” with the aim of enhancing enforcement by extending the scope to cover reckless acts/omissions of officers. • A “responsible person” is an officer or shadow director of a company or non-Hong Kong company who authorises or permits, or participates in, the contravention or failure: <ul style="list-style-type: none"> » “officer” includes a director, manager or company secretary » “shadow director” means a person in accordance with whose directions or instructions the directors, or majority of directors, of the body corporate are accustomed to act • “Responsible persons” also include officers and shadow directors of corporate officers and corporate shadow directors. 	

16. Registration of Charges

Change	Note/Action
<ul style="list-style-type: none">The new CO updates the list of registrable charges.The new CO requires a certified copy of the charge instrument to be registered and made available for public inspection.The period for delivery of the certified copy of charge instrument and the prescribed particulars to the CR for registration has been shortened from five weeks to one month.The new CO has also made a number of other changes in respect of the registration of charges e.g. replacing “automatic acceleration provision” with a “discretionary acceleration provision”.	

17. Changes in Statutory Forms

Change	Note/Action
<ul style="list-style-type: none">With effect from 3 March 2014, existing forms of the CR will be replaced by new specified forms.However, as a transitional arrangement, CR will still accept existing forms under the current CO for a period of 3 months (except for a few specified forms such as forms in respect of new incorporation, deregistration, release of charge etc.).	<ul style="list-style-type: none">Mayer Brown JSM will start using the new statutory forms for its clients in due course.If it has been the practice of the company to complete and file the statutory forms without our assistance, please note the use of the new statutory forms, which can be downloaded from the CR’s website (http://www.cr.gov.hk).

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