New Hong Kong Companies Ordinance: Articles of Association

WHEN IN FORCE: 3 March 2014

COMPANIES AFFECTED: All Hong Kong incorporated companies. This alert focuses on existing companies limited by shares

NEW PROVISIONS: Part 3 of new CO

1. NO REQUIREMENT TO AMEND ARTICLES

- The new CO does not require existing companies to amend their articles of association. We expect, however, that many will wish to do so to reflect or take advantage of changes under the new legislation.

- Set out in this alert are some areas in respect of which an existing company limited by shares may wish to amend its articles.

- Please see our previous alert “Memorandum of Association is retired from the constitutional documents” for details on how provisions previously contained in an existing company's memorandum will be deemed to be provisions of its articles.

2. DESCRIPTION OF CERTAIN POSSIBLE AMENDMENTS TO THE ARTICLES

Removal of object clause

- Under the new CO, the object clause (along with other provisions) previously included in an existing company's memorandum of association are deemed to be contained in the articles. Shareholders may wish to pass a special resolution to remove the object clause, thereby broadening the company’s powers.

Abolition of nominal value

- The new CO prescribes that shares in a company, whether issued before or after the commencement date of the new CO, have no nominal value. The concept of nominal value is therefore abolished.

- The new CO does not require any change to be made to the articles to reflect the abolition of nominal value. Deeming provisions treat a reference to nominal value of a share as meaning the nominal value the share would have had if it had been issued immediately before the commencement date of the new CO.
• Notwithstanding the deeming provisions, an existing company may wish to review its articles to determine whether any specific change should be made, having regard to its unique circumstances, such as to ensure that any contractual rights and obligations will not be affected by the abolition of nominal value and the deeming provisions.

**Maximum number of shares**

• With the abolition of nominal value, the statement in a company’s memorandum of association regarding its authorized share capital is deemed deleted.

• A company may, however, choose (but is not required) to state in the articles the maximum number of shares it may issue. Any change to that maximum number stated in the articles may be made by way of shareholders’ ordinary resolution.

### 3. FURTHER POSSIBLE AMENDMENTS TO THE ARTICLES

In addition to the above, an existing company may consider amending its articles in respect of the following areas:

**Meetings and resolutions**

• Timing for the appointment and termination of proxies – to be in line with the new statutory limits.

• Demanding a poll – to lower the minimum shareholding requirement to 5%.

• Notice for passing a special resolution at an extraordinary general meeting – to reduce the notice period to 14 days.

• Annual general meetings – to dispense with AGMs by unanimous shareholders’ consent (not for listed companies).

• Timing of annual general meeting – to comply with new time limits.

• Proxies – to permit proxies to vote on a show of hands.

• Amending proposed resolutions – to revise procedures.

• Written resolutions – to simplify the default procedures in the new CO.

**Directors**

• Declaration of interests – to revise procedures.

**Share capital**

• Granting share options or issuing convertible securities – to reflect the requirement for shareholder approval to empower the board to grant the same (which is a broader requirement than under existing legislation).
• Issue of stock or bearer share warrants – to remove the power as this is now redundant.

• Determination of terms, conditions and manner of redemption of redeemable shares – to authorize directors to so determine without requiring further shareholder approval.

Removing restrictions

• The new CO sets out more flexible procedures to carry out alterations to, and reductions of, share capital. The articles should be checked to ensure they do not constrain the company from making use of these new procedures.

Execution of documents

• Ability to execute deeds under hand – to provide flexibility for executing deeds without using the seal.

Communication

• Communication with members through electronic means and deemed timing of receipt of information communicated through electronic means – to provide for this in the articles and to specify timing.

4. PROCEDURE FOR AMENDING ARTICLES

Timing

• Since amendments are not compulsory, most companies may decide to change their articles at the first AGM following the new CO coming into effect (or, for private companies, by shareholders’ written resolution) rather than holding a specific general meeting for this purpose.

Type of shareholders’ resolution

• An amendment to the articles will require a shareholders’ special resolution, with the exception, as discussed above, of the provision (if any) limiting the maximum number of shares that the company may issue.

Companies Registry formalities

• Following an amendment to the articles, certain specified forms and documents including a notice of alteration and a certified copy of the articles as altered must be delivered to the Companies Registry within 15 days after the alteration takes effect, except for the types of amendments referred to in the next paragraph, where a different time period applies to cater for the objection process.

• In the case of an amendment by a private company to (i) its objects or (ii) provisions currently contained in its memorandum of association which could lawfully have been contained in its articles instead (and which will be deemed under the new CO to form part of the articles), an application to court to cancel the alteration may be made — within 28 days after the passing of the resolution by an application of holders of at least 5% of the issued shares (or shares in any class) of the company — and the alteration will not have effect except insofar
as it is confirmed by the court. If no application to court is made within the 28-day period, the company must then deliver certain specified forms and documents to the Companies Registry within 15 days thereafter.

New CO mandatory provisions

- The new CO requires that certain mandatory provisions must be included in a company's articles, namely: (i) the company name; (ii) a statement that the liability of the members is limited; (iii) a statement that the liability of the members is limited to any amounts unpaid on the shares; and (iv) its initial shares and initial share capital. Items (iii) and (iv) above do not apply to an existing company. Items (i) and (ii) do apply to an existing company and given they are already contained in its memorandum of association, they will be deemed to be contained in its articles by virtue of the new CO. Therefore, the mandatory provisions are satisfied automatically for existing companies.

- If an existing company amends its articles or adopts new articles, it should consider including the company's name as a numbered article in the articles rather than relying on the new CO deeming provisions. There is no need for existing companies to expressly include the other mandatory provisions because either the relevant deemed mandatory provision cannot be altered or the relevant mandatory provision does not apply to existing companies.
司力达律师楼

新香港《公司条例》：组织章程细则

实施日期：2014年3月3日

受影响公司：所有在香港注册成立的公司。本简介集中于现有的股份有限公司。

新条文：新《公司条例》第3部

1. 无须修订章程细则的规定

- 新《公司条例》并没有规定现有公司须修订其组织章程细则。然而，我们预计很多公司将有意修订其组织章程细则以反映或利用新法例下的变更。
- 本简介载列现有的股份有限公司可能有意修订其章程细则的方面。
- 就现有公司的组织章程大纲内先前收录的条文如何被视作为该公司章程细则的条文，请参阅我们之前发出题目为“从章程文件中摒除组织章程大纲”的简介。

2. 有关对章程细则可能作出若干修订的描述

- 剃去宗旨条文
  - 根据新《公司条例》，之前收录在现有公司的组织章程大纲内的宗旨条文（连同其它条文）被视作收录于章程细则内。股东可能希望通过特别决议案删去宗旨条文，从而扩大公司的权力。

- 废除面值
  - 新《公司条例》详明一家公司的股份（不论在新《公司条例》开始实施日期之前或之后发行）均无面值。因此，面值的概念被废除。
  - 新《公司条例》并没有规定对章程细则作出任何变更，从而反映废除面值的规定。推定条文将提及的股份面值视为：如股份在紧接新《公司条例》开始实施日期前发行本可具有的面值。
  - 尽管设有推定条文，现有公司或许希望在考虑其独特的情况（如确保任何合约权利及责任不会受废除面值及受推定条文影响）后，审阅章程细则以决定应否作出任何特定变更。

- 最高股份数目
  - 随着废除面值，公司组织章程大纲内有关其法定股本的声明被视作删除。
  - 然而，公司可选择（但毋须）在章程细则内说明其可发行的最高股份数目。变更章程细则内最高股份数目可以通过股东普通决议案的方式作出。
3. 可能对章程细则作出进一步修订

除上文所述外，现有公司或会考虑就以下方面修订其细则:

**会议及决议**
- 委任及终止委任受委代表的时间 - 与新的法定限制一致。
- 要求进行投票 - 降低最低持股要求至5%。
- 于特别股东大会上通过特别决议案的通知 - 将通知期缩短至14日。
- 周年成员大会 - 以一致的股东同意免除举行周年成员大会（并不适用于上市公司）。
- 举行周年成员大会的时间 - 遵照新的时间限制。
- 受委代表 - 准许受委代表以举手方式投票。
- 修订建议决议案 - 修订程序。
- 书面决议案 - 对新《公司条例》原设程序进行简化。

**董事**
- 申报利益 - 修订程序。

**股本**
- 授出购股权或发行可转债证券 - 反映赋予董事会权力授出购股权或可转债证券须获得股东批准的规定（较现行法例要求更阔）。
- 发行股额或不记明股份权证 - 由于此规定现属多余，故删除有关权力。
- 决定赎回可赎回股份的条款、条件及方式 - 授权董事会无须股东进一步批准。

**删除限制**
- 新《公司条例》载有更多灵活的程序以变更及减少股本。应查阅章程细则以确保章程细则并没有限制公司使用该等新程序。

**签立文件**
- 亲笔签立契据的能力 - 为在没有使用印章的情况下签立契据提供灵活性

**通讯**
- 通过电子方式与成员通讯以及通过电子方式通讯时视作收取信息的时间 - 在章程细则内加以规定并指明时间。
4. 修订章程细则的程序

时间
- 由于修订并无属强迫性质，大部分公司可以决定在新《公司条例》生效后在首次举行的周年成员大会上更改其章程细则（或就私人公司而言，以股东书面决议案的方式）而非就此举行股东特别大会。

股东决议案的类别
- 修订章程细则将需要股东的特别决议案，如上文所述，例外情况是限制公司可发行的股份的最高数额的条文（如有）。

公司注册处的正式程序
- 于修订章程细则后，若干指定表格及文件（其中包括更改通知及经修订章程细则的经核记副本）必须于变更生效后15日内送交公司注册处，惟下一段所指的修订类别除外，不同的时间适用以顾及反对过程。

- 就私人公司对以下方面作出的修订而言：(i) 公司宗旨；或(ii) 组织章程大纲现时所载或会合法地载于章程细则的条文（并根据新《公司条例》被视作章程细则的一部分），可以向法院申请取消更改。在决议案通过后28日内，由持有该公司已发行股份数目（或任何类别的股份）最少5%的人提出申请。更改仅在法庭确认的范围内有效。如并未在28日内向法院作出申请，公司必须在此之后的15日内向公司注册处递交若干指定表格及文件。

新《公司条例》的强制性条文
- 新《公司条例》规定必须在公司的章程细则内收录若干强制性条文，即：(i) 公司名称；(ii) 有关成员的法律责任是有限的声明；(iii) 有关成员的法律责任受到股份的任何未缴金额所限的声明；及(iv) 其初始股份及初始股本。第(iii)及(iv)项并不适用于现有公司。第(i)及(ii)项适用于现有公司，鉴于其已载于组织章程大纲，该两项籍新《公司条例》被视为载于章程细则内。因此，就现有公司而言，强制性条文均自动获得满足。

- 如现有公司修订其章程细则或采纳新章程细则，该公司应考虑在章程细则内收录公司的名称作为章程细则编号条款，而非依新《公司条例》的推定条文。现有公司毋须明确地收录其它强制性条文，皆因无法更改相关的推定强制性条文无法更改或相关的强制性条文并不适用于现有公司。