

Forum on the New Companies Ordinance –What Directors Need to Know

從董事角度認識《新公司條例》研討會 17/3/2014

Panel Discussion by Professionals

Highlights on

1. Part 8: Registration of Charges
2. Part 11: Fair Dealing by Directors
3. Part 13: Arrangements, Amalgamations & Compulsory Share Acquisition in Takeovers & Share Buy Back

Written by:

Ms Julianne Doe, Partner, Dentons

ORGANISER 主辦機構



SUPPORTING ORGANISATION 支持機構



公司註冊處
COMPANIES REGISTRY

The New Companies Ordinance - What Directors Need to Know

Part 8 Registration of Charges
Part 11 Fair Dealing by Directors
Part 13 Arrangements, Amalgamations &
Compulsory Share Acquisition in Takeovers &
Share Buy Back

17 March 2014

Part 8 Registration of Charges (1)

- *The Companies Ordinance does not in general regulate loan financing. There are however 2 main areas where it deals with this: provision of debentures (in Part 7) and registration of company charges (Part 8).*
- *The statutory provisions require companies to register with the Registrar details of particular categories of charges granted over the assets of the company. Registration affect the validity of the charge against the liquidator and other secured creditors.*
- *Cap 622 retains the previous regime provisions but with some notable changes:*
 - *the list of registrable charges*
 - *new requirement for the instrument of charge to be registered*
 - *time for registration changed from 5 weeks to 1 month.*

Part 8 Registration of Charges (2)

Old CO	New CO
<ul style="list-style-type: none">• Specified charges created by cos. incorporated in HK and the acquisition by such companies of property subject to specified charges must be registered with the Companies Registry.• For a non-Hong Kong Company registered under Part XI of old CO, specified charges created on property in Hong Kong and the acquisition of property in Hong Kong subject to specified charges must also be registered	<p><u>No significant changes to the existing provisions</u> on which entities must file charges</p>

Part 8 Registration of Charges (3)

Old CO	New CO
<p>The following charges must be registered:</p> <ol style="list-style-type: none">1. Charge for the purpose of securing any issue of debentures2. Charge on uncalled share capital of the company; or calls made but not paid;3. Charge created or evidenced by an instrument which, if executed by an individual, would require registration as a bill of sale;4. Charge on land;5. Charge on book debts of the company6. Floating charge;7. Charge on a ship / share in a ship;8. Charge on goodwill, patent / licence under a patent, trademark , copyright or licence under a copyright	<ul style="list-style-type: none">• 2 new heads of registrable charge :<ol style="list-style-type: none">1. charge over aircraft / share in aircraft2. charge on instalments on the issue price of shares which are due but not paid• Charge for the purpose of securing an issue of debentures - no longer registrable• Charge over bank accounts & a shipowner's lien on subfreights - not "charges on book debts" - -> therefore not registrable

Part 8 Registration of Charges (4)

Old CO	New CO
<p>Original charge instrument together with the prescribed particulars of the charge contained in the Form M1 must be submitted to the Companies Registry for registration.</p> <p>Only the prescribed particulars are available for public inspection</p>	<p>Both a statement of particulars of the charge created by the company and a certified copy of the instrument (if any) creating the charge must be delivered to the Companies Registry for registration.</p> <p>Charge instrument itself will be available for public inspection</p>
<p>Prescribed time for registration - 5 weeks</p>	<p>Prescribed time for registration shortened to 1 calendar month</p>

Part 8 Registration of Charges (5)

Old CO	new CO
<p data-bbox="104 319 904 425">If company fails to register particulars of a charge:</p> <ul data-bbox="104 491 904 1159" style="list-style-type: none"><li data-bbox="104 491 904 596">- charge is void against company's liquidator and creditors<li data-bbox="104 662 904 822">- money secured by such charge is automatically accelerated and becomes immediately payable.<li data-bbox="104 888 904 1159">- company and every officer in default are liable on summary conviction to a Level 5 fine, with an additional \$1,500 fine for each day that the default continues	<p data-bbox="946 319 1843 425">If a company fails to register particulars of a charge:</p> <ul data-bbox="946 491 1843 1330" style="list-style-type: none"><li data-bbox="946 491 1843 596">- as before, results in the charge being void.<li data-bbox="946 662 1843 993">- automatic acceleration of the money secured by the charge - removed. The lender will, instead, determine whether or not the money (which was meant to be secured) becomes immediately payable.<li data-bbox="946 1059 1843 1330">- company & every responsible person in default continue to be liable to a Level 5 fine, with the <u>additional fine reduced from \$1,500 to \$1,000</u> for each day that the default continues

Part 11 Fair Dealing by Directors (1)

Part 11 provisions relating to fair dealing by directors, particularly in situations in which a director is perceived to have a conflict of interest.

It governs transactions involving directors or their connected entities which require members' approval - loans and similar transactions, payments for loss of office and directors' long-term employment), and covers disclosure by directors of material interests in transactions, arrangements / contracts.

It:

- (a) expands the prohibitions on loans and similar transactions to cover a wider category of persons connected with a director
- (b) requires disinterested members' approval for various prohibited transactions
- (c) expands prohibitions on payments for loss of office
- (d) requires members' approval for directors' employment exceeding 3 years
- (e) Widens the ambit of disclosure currently required under s 162 of old CO

Part 11 Fair Dealing by Directors (2)

1) Expansion of prohibitions on loans & similar transactions to cover a wider category of persons connected with a director

Old CO - prohibits a company from entering into loans or other similar transactions with a director or persons connected with the director.

New CO - prohibition expanded to cover a wider category of persons connected with a director. s486 to 488 provide for the coverage of an entity connected with a director. It covers, on top of those in Cap. 32 –

- (a) an adult child, adult step-child, adult illegitimate child or adopted child of any age;
- (b) a parent;
- (c) a cohabitee;
- (d) a minor child, minor step-child, minor illegitimate child or minor adopted child of the cohabitee who lives with the director;
- (e) an associated body corporate as defined in section 488;
- (f) a trustee of a trust which includes the director's minor adopted child; and
- (g) a business partner of the director's minor adopted child.

Part 11 Fair Dealing by Directors (3)

2. Requiring disinterested members' approval for various prohibited transactions (Ss 496, 515, 518 and 532)

Old CO - No restriction on members' rights to vote or requiring members to abstain from voting in relation to transactions in which they have an interest. (save for some specified transactions)

New CO:

- requirements for members' approval for the **three types of prohibited transactions** covered by Part 11 (i.e. loans, quasi-loans and credit transactions; payments for loss of office; and directors' long-term employment), have incorporated the disinterested members' voting requirement for public companies set out in Divisions 2 to 4 of Part 11.
- For loans, quasi-loans and credit transactions, the disinterested members' approval requirement is extended to a private company or company limited by guarantee that is a subsidiary of a public company (s491, 496(2)(b)(ii) and 515(1)(b)(ii))

Part 11 Fair Dealing by Directors (4)

2. Requiring disinterested members' approval for various prohibited transactions (Ss 496, 515, 518 and 532) (contd)

- If a company is subject to the disinterested members' approval requirement, the resolution at a general meeting of such a company is passed only if every vote in favour of the resolution by the interested members is disregarded (s496(2)(b)(ii) and (5), 515(1)(b)(ii) and (4), 518(2)(b)(ii), (4) and (5) and 532(2)(b)(ii) and (4)).*

Part 11 Fair Dealing by Directors (5)

3. *Expanding prohibitions on payments for loss of office (Ss 516 - 529)*

Unlawful under ss 163 to 163D of old CO to make payments to directors or former directors of a company, as compensations for loss of office or as consideration for retirement from office, without company's prior approval.

BUT *potential loopholes under these provisions:*

(a) payments may be made indirectly via other parties; and

(b) coverage may not be wide enough as the restriction on payment for loss of office to a director in connection with a transfer of a company's undertaking or property, or in connection with certain types of transfer of shares (s163A and 163B) do not cover transfers in respect of a subsidiary's undertaking or shares in the subsidiary.

Part 11 Fair Dealing by Directors (6)

3. Expanding prohibitions on payments for loss of office (Ss 516 - 529) (contd)

Loss of office payment provisions are extended by s516(3) to include –

(a) payment to an entity connected with the director; and

(b) payment to a person made at the direction of, or for the benefit of the director or an entity connected with the director.

- s521(2) extends prohibition to include payment by a company to a director or former director of its holding company.*
- s522(2) extends provisions to include the payment made in connection with a transfer of the undertaking or property of the company's subsidiary.*
- By s516(1) (definition of “takeover offer”) and s523(1) - prohibitions in connection with a share transfer are extended to include all transfers of shares in the company or in its subsidiary resulting from a takeover offer.*

Part 11 Fair Dealing by Directors (7)

4. Requiring members' approval for directors' employment exceeding 3 years (Sections 530 to 535)

Old CO - no provision requiring members' approval for long-term employment of a director. **Risk** - director may arrange long-term employment which entrenches him in office or makes it very expensive for the company to remove him from office before his contract expires (eg entitlement to damages for early termination).

New CO - s534 requires approval of the members for any contracts under which the guaranteed term of employment of a director with the company exceeds or may exceed 3 years

Part 11 Fair Dealing by Directors (8)

5. Widening the ambit of disclosure under previous s 162 ,Cap. 32 (Ss 536 - 542)

Old CO - requires a director, who has a material interest, directly or indirectly, in a contract or proposed contract with the company which is of significance to the company's business, to disclose to the board of directors the nature of such interest at the earliest meeting of directors that is practicable. (Relatively narrow)

New CO

- *Ambit of disclosure is widened to cover “transactions” and “arrangements” instead of just “contracts” (s536(1) and (2))*
- *for a public company, ambit of disclosure is widened to include disclosure by a director of any material interest of entities connected with him, except that a director is not required to declare an interest if he is not aware of the interest or the transaction in question (s536(2) and (4)(a))*
- *a director is required to disclose the “nature and extent” of the interest instead of just disclosing the “nature” of the interest (s536(1) and (2))*
- *the disclosure requirements are extended to shadow directors (s540)*

Part 11 Fair Dealing by Directors (9)

6. New exemptions from prohibitions on loans & similar transactions in favour of directors and connected entities (s500 to 504, 505, 507 and 508)

Old CO

- *prohibits, subject to certain exceptions, a company from entering into any direct or indirect loan transactions in favour of its directors, directors of its holding company or any of their connected persons.*
- *a private company which is not a member of a group which includes a listed company is exempted from the prohibitions IF the loan transaction is approved by members in general meeting (s157HA(2)).*

Part 11 Fair Dealing by Directors (10)

6. New exemptions from prohibitions on loans & similar transactions in favour of directors & connected entities (s500-504, 505, 507, 508)

- s500-504 - generally that company must not make loans, and a public/private company or company limited by guarantee that is a subsidiary of a public company must not make quasi-loans or enter into credit transactions, in favour of a director of the company or of its holding company without members' approval
- Prohibitions on loans - extended to a body corporate controlled by a director of the company or of its holding company. Prohibitions on quasi-loans and credit transactions - extended to entities connected with a director of the company or of its holding company.

Part 11 Fair Dealing by Directors (10)

6. New exemptions from prohibitions on loans & similar transactions in favour of directors & connected entities (s500-504, 505, 507, 508)(contd)

Two new exceptions to the prohibitions –

(a) exception for loan, quasi-loan and credit transaction of value not exceeding 5% of net assets or called-up share capital (s505);

(b) exception for funds to meet expenditure, incurred or to be incurred by a director, on defending proceedings or in connection with investigation / regulatory action (s507-8)

Modifications to exceptions in s157HA of the old CO –

(a) The exception for expenditure on company business - the conditions for company's approval and discharge of liability set out in s157HA(4) as well as the financial limit with reference to 5% of the company's net assets are removed;

(b) The exception for home loan - the financial limit of not exceeding 80% of the value of the premises has been removed and the financial limit with reference to 5% of the company's net assets has been relaxed;

(c) The exception for leasing goods and land etc - financial limit with reference to 5% of the company's net assets has been relaxed; and

(d) The exception for transaction in ordinary course of business - financial limit of \$750,000 & further financial limit with reference to 5% of company's net assets removed.

Part 11 Fair Dealing by Directors (11)

7. Modifying the scope of private companies that are subject to more stringent restrictions similar to a public company (s491, 501 to 504)

Repealed criminal sanction and clarified that civil consequences under s513 for contravention of the provisions on loans and similar transactions are sufficient.

Part 13 Arrangements, Amalgamations, Compulsory Share Acquisitions in Takeovers & Buybacks (1)

1. Takeover and Privatisation Schemes (s668-677 of new CO)

Old CO	New CO
<p>A members' scheme involving a takeover offer or a general offer (i.e. a share buy-back offer) requires:</p> <ul style="list-style-type: none">(i) approval by shareholders representing at least 75% of the voting rights present and voting at the shareholders' meeting; and(ii) the votes cast against the scheme not exceeding 10% of the total voting rights attached to all disinterested shares (the "10% Objection Test")	<ul style="list-style-type: none">• Major change for privatisation schemes is that the 10% Objection Test replaces the traditional Headcount Test• if a shareholder applies to court to challenge a scheme involving a takeover offer or a general offer, the court may only order costs against that shareholder if the opposition is frivolous or vexatious. The court has discretion to require the company to indemnify an opposing shareholder for its costs

Part 13 Arrangements, Amalgamations, Compulsory Share Acquisitions in Takeovers & Buybacks (2)

2. *Other members' schemes*

Old CO	New CO
<p>A members' scheme <u>not involving a takeover offer or a general offer</u> requires: (i) approval by shareholders representing at least 75% of the voting rights present and voting and (ii) <u>unless</u> court orders otherwise, approval by a majority in number of shareholders present & voting (the "Headcount Test")</p>	<p>Headcount Test is retained for members' schemes (other than privatisation schemes) but the court now has the discretion to dispense with the Headcount Test requirement</p>

Part 13 Arrangements, Amalgamations, Compulsory Share Acquisitions in Takeovers & Buybacks (3)

3. *Creditors' schemes*

Old CO	New CO
a creditors' scheme requires: (i) approval by creditors representing at least 75% in value present and voting at the creditors' meeting; and (ii) the Headcount Test to be satisfied	the Headcount Test is retained for creditors' schemes and the court has no discretion to dispense with the Headcount Test for creditors' schemes

Part 13 Arrangements, Amalgamations, Compulsory Share Acquisitions in Takeovers & Buybacks (4)

4. **Amalgamation Process (Division 3 of new CO)**

Introduces a court-free regime for amalgamations of wholly-owned companies within same group - conditions to be satisfied are as follows:

- (i) each amalgamating company must be a HK incorporated company limited by shares;*
- (ii) each amalgamating company must be part of the same wholly-owned group of companies;*
- (iii) each director of an amalgamating company who voted in favour of the amalgamation must make a specified solvency statement;*
- (iv) each amalgamating company must be solvent, and the amalgamated company must be able to pay its debts for the following twelve months after the amalgamation takes place;*

Part 13 Arrangements, Amalgamations, Compulsory Share Acquisitions in Takeovers & Buybacks (5)

4. Amalgamation Process (Division 3 of new CO)

- (v) if any amalgamating company has created a floating charge, each person entitled to that security must give written consent to the amalgamation proposal. In unusual circumstances, the consent of other beneficiaries of security may also be required;*
- (vi) no creditor of an amalgamating company will be prejudiced*
- (vi) secured creditors must be notified in writing*
- (vii) amalgamation must be approved by each amalgamating company's shareholder s- approval process must be in accordance with procedures set out in the articles of association of each amalgamating company*

Part 13 Arrangements, Amalgamations, Compulsory Share Acquisitions in Takeovers & Buybacks (6)

4. Amalgamation Process

Until the amalgamation becomes effective, shareholder/creditor or other person to whom an amalgamating company is under an obligation may object by making an application to the Court

- (a) vertical statutory amalgamation may be effected in around 25 days;*
- (b) horizontal statutory amalgamation may be effected in around 4 days.*

The amalgamated company succeeds to all property, rights and privileges, and all liabilities and obligations, of each amalgamating company

Part 13 Arrangements, Amalgamations, Compulsory Share Acquisitions in Takeovers & Buybacks (7)

5. Takeover Offer (s689, 691, 692, 693, 707, 709, 710 and 712)

- Section 168 & Ninth Schedule of Cap. 32, deal with the compulsory acquisition of shares following a takeover. S 168 applies, inter alia, where a company makes an offer to acquire all the shares not already held by it in another company on terms which are the same in relation to all the shares to which the offer relates. There are no clear definitions of what would constitute “shares already held by an offeror” and “shares to which the offer relates”.
- Cap. 32 does not have any provision on revised offers to provide for unexpected changes of circumstances after the making of an offer. As a result, an offeror who wishes to revise his offer will have to make a new takeover or share buy-back offer and address the acceptances received under the old offer.

Part 13 Arrangements, Amalgamations, Compulsory Share Acquisitions in Takeovers & Buybacks (8)

5. Takeover Offer (s689, 691, 692, 693, 707, 709, 710 and 712)(contd)

- Section 689(1) defines a takeover offer. First, it must be an offer to acquire all the shares (or shares of any class) in the company except those that, at the date of the offer, are held by the offeror. Secondly, in relation to all the shares to which the offer relates (or all the shares of the class to which the offer relates), the terms of the offer must be the same.
- Sections 689 and 691 clarify that shares to which a takeover offer relates.
- Section 692 provides that a revision of the terms of a takeover offer is not regarded as the making of a fresh offer if the terms provide for revision and the acceptances on the previous terms to be regarded as acceptances on the revised terms; and the revision is made in accordance with that provision. Section 710 contains a similar provision in the case of a share buy-back offer.

Part 13 Arrangements, Amalgamations, Compulsory Share Acquisitions in Takeovers & Buybacks (9)

5. Takeover Offer (s689, 691, 692, 693, 707, 709, 710 and 712)

- Introducing new provisions to allow an offeror in a takeover offer or share buy-back offer to apply to court for an authorisation to give squeeze out notices (Sections 693 and 712)
- Section 693(3) to (7) provides for the mechanism which will apply if the offeror has been unable to trace the relevant shareholders after reasonable enquiry. The consideration offered must be fair and reasonable and the court may not make an order unless it considers that it is just and equitable to do so having regard, in particular, to the number of shareholders who have been traced but have not accepted the offer. Section 712(4) to (8) provide for a similar mechanism in the case of a share buy-back offer
