

**15 April 2014**

The new Companies Ordinance (Cap.622)("the New Ordinance"), which came into effect on 3 March 2014, is a substantial rewrite of Hong Kong companies law. The stated objectives of the changes are to enhance corporate governance, ensure better regulation, facilitate business law and modernize the law.

## **The classic shareholders' dispute**

Time and again we see disputes arising among the shareholders of a company. Classic examples of disputes include dictatorial management style, denial of access to company records, breach of duties or dilution of shareholdings.

In Hong Kong and Asia, this is frequently due to the prevalence of large family businesses and often the root of the problems may lie in a breakdown in personal relationships. However, if the family business is an incorporated company, remedial action must be sought in accordance with company law.

## **Remedial action**

The old Companies Ordinance ('the Old Ordinance") specifically provided protections for companies' and members' interests. These included an order to inspect company records, an action for unfair prejudice, statutory derivative action, or a petition to wind-up the company on just and equitable grounds.

As the provisions relating to shareholder remedies were substantially revised by the Companies (Amendment) Ordinance 2004, the New Ordinance essentially retains these protections, expands upon them slightly, and rearranges them with improved drafting into a distinct part of the New Ordinance, Part 14.

## **Order for inspection of company records (s.152FA→s.740)**

Section 152FA of the Old Ordinance afforded qualifying shareholders a statutory right of access to corporate information in order to protect their economic interests in the company. This was

essentially a codification of a common law right. These protections are now housed at s.740 of the New Ordinance.

Section 740 of the New Ordinance retains the two-stage requirement that the application must be made in "*good faith*" and for a "*proper purpose*". Like its predecessor, records of a company's subsidiaries cannot be inspected under this section, save where the subsidiary's documents constitute documents of the parent company. (Click [here](#) for our previous report on these requirements.)

### **Unfair prejudice (s.168A→ss.724-725)**

The New Ordinance expands the protections where the affairs of the company are being or have been conducted in a manner "*unfairly prejudicial*" to members to now cover proposed acts and omissions. This addresses uncertainty under the Old Ordinance as to whether proposals or threats were actionable.

The New Ordinance also enhances the court's discretion in granting relief in such cases. The Old Ordinance required that orders made by the court must be "*with a view to bringing to an end the matter complained of*". The New Ordinance provides greater flexibility for the court to make "*any order that it thinks fit for giving relief*".

### **Statutory derivative action (ss.168BA-168BK→ss.731-738)**

A "derivative action" is where a member's right to sue is derived from the company's right to sue, where the company is under the control of wrongdoers and cannot bring an action in its own name. A derivative action may be brought at common law or by statute. Under the New Ordinance, the common law right to sue for "fraud on the minority", remains unaffected by the statutory right to sue for "misconduct" committed against the company (but cannot be exercised in respect of the same matter).

The New Ordinance essentially restates the previous provisions. It gives standing to members of associated companies to bring proceedings on behalf of a company (a multiple derivative action), as amended by the Companies (Amendment) Ordinance 2010.

The term "*misfeasance*" is replaced by "*misconduct*"; while defined in the same terms: "*fraud, negligence, breach of duty, or default in compliance with any Ordinance or rule of law*", this is an example of modernized legal language.

### **Winding up on just and equitable grounds (s.177(1)(f)→Cap.32)**

The provisions relating to winding up remain unchanged in Cap. 32, now renamed Companies (Winding Up and Miscellaneous Provisions) Ordinance. (Click [here](#) for our previous report on legislative proposals on the corporate insolvency regime.)

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