

New Hong Kong Companies Ordinance: Reduction of capital and share buy-backs

WHEN IN FORCE: 3 March 2014

COMPANIES AFFECTED: All Hong Kong incorporated companies

NEW PROVISIONS: Part 5 of new CO: ss203-273

WHAT ARE THE NEW CHANGES CONCERNING REDUCTION OF CAPITAL?

Summary of changes

- Under the existing legislation, a company must go through a court-sanctioned process in order to reduce its share capital.
- The new CO introduces a new court-free process for capital reduction. The court-free process requires directors to give a solvency statement in order to reduce the company's capital.
- The new CO also retains the existing court-sanctioned process for reduction of share capital, so there are two separate ways to reduce capital.

Implications for practice

- The court-free process simplifies the procedures for reducing share capital. It will be a faster and cheaper alternative to the court-sanctioned process.

HOW TO USE THE NEW COURT-FREE CAPITAL REDUCTION PROCESS

- Under the court-free process:
 - the proposed capital reduction must be approved by the directors of the company;
 - each director must sign a solvency statement;
 - within 15 days of the date of the solvency statement, the shareholders of the company must pass a special resolution approving the reduction of share capital;
 - certain public notices must be published in the Government Gazette, in one specified Chinese newspaper and in one specified English newspaper; and

- certain forms (including the solvency statements in specified Form NSC17) must be filed with the Companies Registry.
- Any creditor or non-approving shareholder of the relevant company may, within 5 weeks of the date of the special resolution, apply to the court for cancellation of the resolution. Upon such application, the court must either make an order confirming or cancelling the special resolution for the reduction of share capital.
- If no application is made to a court by a creditor or a non-approving shareholder, a return setting out the share capital of the relevant company must be filed with the Companies Registry no earlier than 5 weeks and no later than 7 weeks after the date of the special resolution. The reduction of share capital takes effect from the date on which such return is registered by the Companies Registry.

WHAT DOES THE SOLVENCY STATEMENT SAY?

- The solvency statement is a uniform solvency statement that applies not only to the court-free process for reduction of share capital but also to share buy-backs out of capital.
- For this purpose, the solvency statement must be in the form prescribed by the Companies Registry (Form NSC17).
- The solvency statement must be made by all directors of the company.
- In the solvency statement, each director must form the opinion that:
 - immediately after the transaction there will be no ground on which the company could be found to be unable to pay its debts; and
 - either (a) if it is intended to commence the winding up of the company within 12 months after the date of the reduction of share capital, the company will be able to pay its debts in full within 12 months after the commencement of the winding up; or (b) in any other case, the company will be able to pay its debts as they become due during the period of 12 months immediately following the date of the reduction of share capital.
- In forming their opinion, the directors must:
 - inquire into the company's state of affairs and prospects; and
 - take into account all the liabilities of the company (including contingent and prospective liabilities).
- It is a criminal offence for a director to make a solvency statement without having reasonable grounds for such opinion. Such director may be liable for a fine of up to HK\$150,000 and imprisonment of up to 2 years.

Implications for practice

- Directors should carefully enquire as to the state of affairs of the company before signing a solvency statement. This may include instructing professional accountants and financial advisers to assess the current financial status of the company and the projected financial health of the company after the capital reduction.
- The basis for forming the opinion in a solvency statement should be recorded by the directors in writing. The directors' resolution approving the capital reduction should also set out clearly the factors that the directors have taken into account and the reasons for forming their opinion in the solvency statement.

RESERVES ARISING FROM A REDUCTION OF SHARE CAPITAL

- It is unclear under the existing legislation whether reserves arising from a reduction of share capital can be regarded as distributable reserves.
- Section 214 of the new CO clarifies that reserves arising from a reduction of share capital may be regarded as realised profits and may be distributed to shareholders as dividends.

WHAT ARE THE NEW CHANGES CONCERNING SHARE BUY-BACKS FOR LISTED COMPANIES?

New provisions: Part 5, Division 4 of new CO: ss233 - 273

Summary of changes

- At present, a Hong Kong incorporated company that is listed on the Hong Kong Stock Exchange may buy back its shares by way of (a) a general offer, (b) an on-market share buy-back or (c) an off-market share buy-back, in each case, subject to the Securities and Futures Commission's Code on Share Repurchases.
- The new CO retains the same regime except that share buy-backs by a listed company may now be funded out of capital (other than for on-market share buy-backs).
- Share buy-backs funded out of share capital must be approved by a special resolution passed by disinterested shareholders and supported by a solvency statement signed by all directors of that company. Similar to the court-free process for capital reduction, there are requirements for publishing public notices and making filings with the Companies Registry.

WHAT ARE THE NEW CHANGES CONCERNING SHARE BUY-BACKS FOR UNLISTED COMPANIES?*Summary of changes*

- The existing legislative position remains largely unchanged - a share buy-back must be approved by a special resolution of the shareholders.

- The new CO clarifies that a special resolution of the shareholders will not be effective unless a contract or memorandum of the terms of the buy-back contract is sent or made available to shareholders in accordance with the procedures set out in the new CO.
- Similar to the existing legislation, the new CO permits an unlisted company to fund a share buy-back out of capital. The new procedures are aligned with the court-free process for reduction of share capital in that the shareholders of the company must pass a special resolution, all the directors must sign a solvency statement, and similar requirements apply for publishing public notices and making filings with the Companies Registry.
- Under the new CO, a share buy-back funded out of capital does not need to be expressly authorised by the company's articles of association (as is required under the existing legislation), but there must not be an express prohibition in the articles of association against so funding a share buy-back.
- The new CO also removes the existing requirement for an auditor's report to be prepared when funding a share buy-back out of share capital.
- In April 2013, the Financial Services and Treasury Bureau published a consultation paper titled "Improvement of Corporate Insolvency Law Legislative Proposals". In this consultation paper, it was proposed that where a company has redeemed or bought back its own shares by payment out of its capital and the company is subsequently wound up insolvent within one year of the redemption or buy-back, the following persons should be jointly and severally liable to contribute to the assets of the company an amount not exceeding the payment made by the company in respect of the shares redeemed or bought back by the company so as to meet the deficiency in the company's assets:
 - the recipient of the payment of the redeemed or bought-back shares; and
 - the directors who made the solvency statement which supported the redemption or buy-back without having reasonable grounds for the opinion expressed in the statement.

Implications for practice

- Unlisted companies may fund a share buy-back out of capital under the simplified procedures in the new CO.
- Although the requirement to prepare an auditor's report has been removed, directors should nonetheless consider whether an auditor's report should be prepared to assist them in forming the opinions in their solvency statements.
- Assuming the proposals made by the Financial Services and Treasury Bureau are implemented, directors who make a solvency statement which supports a share buy-back and recipients of the payment from a share buy-back should be made aware of their potential liabilities if the relevant company is wound up insolvent within one year of the share buy-back.

司力达律师楼

新香港《公司条例》： 减少股本和回购股份

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

新条文：新《公司条例》第5部：第203-273条

与减少股本有关的新变更是甚么？

变更概要

- 根据现行法例，公司必须通过法院审批的程序方可减少股本。
- 新《公司条例》就减少股本引入新设的无须经法院审批的程序。该项无须经法院审批的程序规定董事须作出偿付能力陈述，方可减少公司股本。
- 新《公司条例》也保留现有有关减少股本的经法院审批的程序，故此有两个方法减少股本。

对实施的影响

- 无须经法院审批的过程简化了减少股本的程序。这将是较经法院审批的过程更快和更便宜的替代方法。

如何使用新设的无须经法院审批的程序减少股本

- 根据无须经法院审批的程序：
 - 建议减少股本必须经公司董事批准；
 - 每位董事必须签署偿付能力陈述；
 - 在发出偿付能力陈述之日后15日内，公司股东必须通过特别决议案批准减少股本。
 - 若干公司公告必须在政府宪报、一份指定的中文报章和一份指定的英文报章刊登；及
 - 若干表格（包括载于指定表格NSC17内的偿付能力陈述）必须于公司注册处存档。
- 任何债权人或没有批准有关决议的公司股东，可在特别决议案通过之日后5个星期内，向法院申请撤销该项决议。法院如接获申请，必须作出确认或撤销有关减少股本的特别决议的命令。

- 如债权人或没有批准有关决议的股东并无向法院作出申请，载有相关公司股本的申报表必须于不迟于特别决议日期后5个星期及不迟于特别决议日期后7个星期于公司注册处存档。减少股本由公司注册处登记该申报表之日起生效。

偿付能力陈述是关于甚么？

- 偿付能力陈述是一项统一的偿付能力陈述，不仅适用于无须经法院审批而进行的减少股本，也适用于从资本中拨款用以回购股份。
- 就此而言，偿付能力陈述必须以公司注册处指定的表格编制(NSC17表格)。
- 偿付能力陈述必须由公司全体董事作出。
- 在偿付能力陈述中，每名董事必须提出意见，指出：
 - 在紧随某事宜的进行后，将会没有认定公司无能力偿付其债项的理由；及
 - (a)如公司拟在减少股本之日后12个月内展开清盘，公司将会有能力在展开清盘后12个月内支付其债项；或(b)在任何其它情况下，公司将会有能力偿付在紧接减少股本后12个月内偿付到期的债项。
- 在提出意见时，董事必须：
 - 查究有关公司的事务状况和前景；及
 - 考虑公司的所有负债（包括或有或潜在负债）。
- 董事就有关意见无合理理由支持的情况下作出偿付能力陈述属刑事罪行。该名董事或会被处以最高150,000港元的罚款及监禁最多两年。

对实施的影响

- 董事应在签立偿付能力陈述前小心查询公司的事务状况。这可能包括指示专业会计师和财务顾问评估公司目前的财政状况，以及公司在减少股本后的预测财政稳健程度。
- 提出偿付能力陈述意见的基础应由董事以书面记录。批准减少股本的董事决议案也应清楚载列董事已考虑的因素及其作出偿付能力陈述中意见的理由。

因减少股本而产生的储备

- 根据现行法例，现不清楚因减少股本而产生的储备可否视为可分派储备。
- 新《公司条例》第214条澄清，因减少股本而产生的储备可被视为已实现利润以及可以股息方式分派予股东。

有关上市公司回购股份的新变更是甚么？

新条文：新《公司条例》第5部第4分部：第233-273条

变更概要

- 目前，在香港联交所上市并在香港注册成立的公司可以下列方式回购其股份(a)公开要约；(b)在市场上回购股份；或(c)在市场外回购股份，在各项情况下，须受证券及期货事务监察委员会的《股份购回守则》规限。
- 新《公司条例》保留相同的制度，惟上市公司进行股份回购将可从资本中拨款提供资金（在市场回购股份除外）。
- 从资本中拨款用以回购股份必须经无利害关系的股东以特别决议案批准，并获该公司全体董事签署的偿付能力陈述支持。与减少股本的无须经法院审批过程相似，公司须遵守发布公告与在公司注册处存档的规定。

有关非上市公司回购股份的新变更是甚么？

变更概要

- 现有法例大致上仍维持不变 - 回购股份必须经股东以特别决议案的方式批准。
- 新《公司条例》澄清，除非根据新《公司条例》的程序将有关回购合约条款的合约或备忘录发送给或供予股东，否则股东的特别决议案将不会生效。
- 与现有法例类似，新《公司条例》准许非上市公司从资本中拨款回购股份。新程序与减少股本的无须经法院审批的过程一致，据此公司股东必须通过特别决议案，全体董事必须签署具偿付能力陈述，而有关发布公告以及于公司注册处存档的规定亦同样适用。
- 根据新《公司条例》，从资本中拨款回购股份并不需要获公司组织章程细则明示授权（根据现有法例有此规定），但在组织章程细则内不得明确禁止以此种方式为购回股份提供资金。
- 新《公司条例》也免除就从资本中拨款回购股份时须编制核数师报告的现有规定。
- 在2013年4月，财经事务及库务局刊发一份名为“优化公司破产法例立法建议”的咨询文件。这份咨询文件建议，若公司从股本中拨款赎回或回购股份，而公司随后在赎回或回购股份后一年内因无力偿债而清盘，以下人士须共同及个别向公司的资产注入不超过就公司赎回或回购股份所支付的款项，从而填补公司资产的不足：
 - 赎回或回购股份的款项的收款人；及
 - 作出支持赎回或回购股份的偿付能力陈述的董事，但无合理理由支持他在陈述中表达的意见。

对实施的影响

- 根据新《公司条例》下的简化程序，非上市公司可从资本中拨款为回购股份提供资金。
- 尽管已免除编制核数师报告的规定，但董事应考虑应否编制核数师报告以协助他们作出偿付能力陈述内的意见。

- 假设财经事务及库务局所提出的建议得以实施，如相关公司在作出购回股份后一年内清盘，作出偿付能力陈述支持购回股份的董事以及回购股份款项的收款人应知悉他们的潜在责任。