

# The Aspen Post

January 2014



Aspen Group Limited

Don't want to bore you with a long newsletter.  
But this time we have to.

## NEW HONG KONG COMPANIES ORDINANCE

After an extensive rewrite, the new Hong Kong Companies Ordinance (CO) will take effect the first quarter of 2014. The new Ordinance is expected to achieve four main objectives: (1) enhance corporate governance; (2) ensure better regulations; (3) facilitate business; and (4) modernize the law.

Following are the major initiatives.

### Accountability of Directors

Starting on March 2014, every private company must have at least one natural person to act as director, to enhance transparency and accountability. Corporate directorships are still allowed in conjunction with the individual director and we recommend this combination for ease of management.

Clear guidance on directors' duty of care, skill and diligence has been provided.

Aspen is able to provide professional, individual directors suitable for every structure. Please contact us directly for fees and details.

### IF YOU WON'T READ MORE, READ THIS:

All Hong Kong Companies **MUST** have at least one natural person as director. Companies registered before March 2013 have 6 months to add or replace its directorship.

### Shareholders Engaged in the Decision-Making Process

A comprehensive set of rules has been introduced for proposing and passing a written resolution by shareholders.

All companies shall bear the expenses of circulating members' statements relating to the business of, and proposed resolutions for, Annual General Meetings, if they are received in time to be sent with the notice of the meeting.

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### Disclosure of Company Information

Public companies and the larger (i.e., companies that do not qualify for simplified reporting) private companies, and guarantee companies shall prepare a more comprehensive directors' report to include an analytical and forward-looking "business review". Private companies can opt out by special resolution.

### Shareholder Protection

The new CO offers effective rules to deal with directors' conflicts of interests.

All transactions of public companies and their subsidiaries require the approval of disinterested shareholders.

Directors' conduct must be ratified by disinterested shareholders' to prevent conflicts of interest and possible abuse of power.

Privatizations and specified schemes of arrangement shall require not more than 10% disinterested voting.

The unfair prejudice remedy scope is extended to cover "proposed acts and omissions".

### Auditors' Powers and Rights

Auditor powers are extended towards a wider range of persons who can be requested to provide information or explanations. These persons include

officers of a company's subsidiary undertakings in Hong Kong and any person holding or accountable for the company or its subsidiary undertakings' accounting records. Failure to provide the information or explanation is an offence.

### Accuracy of Information on the Public Register

The powers of the Registrar have been extended with regards to the registration, and the manner documents are authenticated and delivered to the Registry. Documents that don't comply will be withheld from registration.

The Registrar has increased powers to rectify typographical or clerical errors; making annotations, and requiring a company to resolve any inconsistency or provide updated information.

The Registrar shall be able to apply to the court to remove inaccurate, forged, information or information that derives from anything invalid, ineffective or done without the authority of the company.

Any company that suffers changes to the capital structure shall deliver to the Registry a return, including a statement of capital.

### Registration of Charges

Registrable charges have been revised. For example, now, charges on an aircraft or any share in an aircraft are registrable.

Issuance of debentures shall not require registration of a charge.

The lender has the choice to determine if a secured amount becomes immediately payable when a charge is void due to non-compliance with the registration requirements.

Certified copy of the charge instrument (in addition to the prescribed particulars of the charge) must be registered and available for public inspection.

The time frame to deliver to the Registrar charge instruments is one month.

Written evidence of satisfaction/release of a charge shall accompany a notification to the Registrar for registration of the satisfaction/release.

### Additional Deregistration Procedures

Three additional conditions for deregistering defunct companies apply:

1. The applicant must confirm that the company is not a party to any legal proceedings.
2. That the company does not have immovable property in Hong Kong.
3. That none of the company's subsidiaries have any immovable property in Hong Kong.

### Improving Enforcement

Enhancements to the Companies Ordinance include improved enforcement procedures. Most notably, the following:

A person under investigation shall maintain records or documents and shall verify statements made by statutory declaration.

There are better safeguards to ensure the confidentiality of information obtained in investigations and enquiries.

Better protection of informers.

The Registrar shall be able to obtain documents or information to ascertain whether any conduct that would constitute an offence in relation to the provision of false or misleading statements to the Registrar has taken place.

The CO observes strict enforcement of liabilities to officers of companies in contravention of the new Ordinance.

The threshold for prosecuting a breach or contravention is lower and now covers reckless acts through a new definition of "responsible person".

Auditors who knowingly or recklessly cause two important statements to be omitted from the auditor's report commit an offence.

The Registrar will be able to compound specified offences to optimize the use of judicial resources.

## MEASURES FOR FACILITATING BUSINESS

### Streamlining Procedures

Companies can dispense with Annual General Meetings by unanimous shareholders' consent.

There is now an alternative court-free procedure for reducing capital based on a solvency test.

All types of companies can purchase their own shares out of capital, subject to a solvency test.

All types of companies can provide financial assistance to another party for the purpose of acquiring the company's own shares or the shares of its holding company, subject to a solvency test.

There is now court-free statutory amalgamation procedure for wholly owned intra-group companies.

The procedure for restoring dissolved companies by court order has been streamlined.

Administrative restoration of a company dissolved by the Registrar is now allowed without applying to the court.

### Simplified Reporting

Small to medium enterprises can prepare simplified financial and directors' reports. Small guarantee companies and groups of small guarantee companies, with total annual revenue not exceeding \$25 million HKD, qualify for simplified reporting.

A private company or a group of private companies not qualified as a "small private company" or a "group of small private companies", respectively, may prepare simplified reports if it meets a higher size criteria and if the members holding 75% of the voting rights so resolve and no member objects.

Summary financial reporting provisions are extended for use to all companies in general.

### Facilitating Business Operations

The use of a common seal is now optional. There is ease in the requirements for a company to have an official seal for use abroad. Please contact Aspen if your entity requires an additional company seal.

General meetings can be held at more than one location using electronic technology.

New rules governing communications to and by companies in electronic form have been established.

## MEASURES FOR MODERNISING THE LAW

### Abolishing Par Value for Shares

Adopting a mandatory system of no-par value [of shares] for all companies with a share capital.

### Share Warrants to the Bearer are not allowed

Companies will not be able to issue share warrants to bearer because they are rarely issued by companies and are undesirable from the perspective of anti-money laundering.

### Better Protection of Personal Data

Directors' residential addresses and full identity card/passport numbers of individuals shall be withheld from public inspection.

### Clarifying the Rules on Indemnification of Directors against Liabilities to Third Parties

Rules for the indemnification of directors against liabilities to third parties are now ample and clear.

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## BELIZE RECORDS MAINTENANCE ACT

The Government of Belize passed Act #18, the Accounting Records (Maintenance) Act. This Act makes provisions for the maintenance and retention of accounting and financial records of companies and other entities. These are important changes for Belize.

### IF YOU WON'T READ MORE, READ THIS:

You will have to keep accounting records, financial statements, general and subsidiary ledgers, sales slips; contracts and invoices; and records and documents which explain the entity's assets and liabilities and save them for at least 5 years.

The records kept must explain all sums of money received and expended and the matters in respect of which the receipt and expenditure take place.

This also means keeping bank statements no matter where the bank is located.

The duty to maintain these records has now fallen on the registered agent. While records can continue to be kept outside of Belize, each director is responsible for stating where said records are located; providing them within a reasonable period of time when the records are requested; and keeping the records for at least 5 years after the company has ceased to operate.

These new requirements apply to all types of entities registered in Belize including IBCs, Trusts, and Foundations.

When Aspen provides directorship services, financial records shall be maintained at our Hong Kong office. Aspen also provides accounting and auditing services. Please contact us for a quotation of our fees for this service.

Why is this significantly different? The IBC Act of Belize has been broad with regards to the maintenance of records demonstrating the financial condition of a company. There was not a set time frame dictating the years that records had to be held. In fact, most records followed rules of best practice (or, to be frank, of practicality) of each company manager or director.

The Maintenance Act leans heavily on the registered agent to pursue accurate record keeping and maintenance. This has led to the implementation of numerous policies brought forth by each registered agent. Some agents have exaggerated the requirements of the law and others have passed on some of the weight of the law to the professional intermediaries.

### Immobilization of Bearer Shares

Bearer shares in Belize have been immobilized for quite some time. In this issue we wish to remind you that registered agents will resign to act from any company that has still not surrendered its bearer shares. Resignation by the registered agent will render the company inactive.

Aspen can assist in converting bearer shares into registered shares while still providing confidentiality. If you MUST continue holding bearer shares, there are procedures to ensure their custody and safe keeping.

If you have any questions or doubts with regards to your Belize company, please contact us at [enquiries@aspenoffshore.com](mailto:enquiries@aspenoffshore.com).

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### PANAMA: BYE-BYE BEARER SHARES

Law 47 of August 6, 2013 introduced immobilization of bearer shares to the Republic of Panama.

Customarily, all Panama companies are incorporated with bearer shares; this is still possible; however, the shares are to be kept in the Republic of Panama by an Authorized Custodian.

This law shall become effective on August 6, 2015. As such, all companies incorporated after this date shall have its bearer share certificates held by the appointed custodian.

### IF YOU DON'T READ MORE, READ THIS:

Panamanian companies registered before the effective date, have 3 years to do one of the following:

- a. Exchange bearer share certificates for registered shares; or
- b. Deliver bearer shares to an authorized custodian. Some foreign entities qualify as custodians.

Aspen Legal Services in Panama City, Panama; a duly licensed law firm; provides custodianship services for bearer shares as authorized by the law in the Republic of Panama. There is an annual fee for the custodianship.

Bearer shares which have not been committed or exchanged for registered shares shall lose their economic entitlement and voting rights in the relevant companies.

Aspen Legal Services can assist you in exchanging bearer shares, modifying the memorandum and articles to reflect the exchange, and in providing custody services.

So, while it is not a definitive good-bye to bearer shares in Panama, it is highly unlikely that we will see much of them again.

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### P.S. WHAT'S IN STORE FOR 2014?

It's been some time since we issued a newsletter, for this, I personally apologize and promise to get better.

As you know, our motto has never been "bigger and better". Our vision and mantra has always been to stay inconspicuous; be lean & mean, graceful, and agile. It is with these qualities that we best serve you. The drawback to our mantra is that there isn't always time to personally issue a newsletter. But, these are best when you know who writes them. There is no copy and paste here!

Many have asked, what's in store for 2014, and my response is this: Compliance and more compliance. Extensive and expensive enhanced due diligence; larger filing cabinets; secure cloud storage (if there is such a thing). Virtual accounting services for all

companies, from active ones to the sleepy holding companies.

*“You can’t handle the truth!”*

– Gen. Jessep : A Few Good Men

2014 is rough. It brings personal visits from us to you, from you to registered agents; to our bankers, and from regulators; and from you, to all. We will all, incrementally rack up frequent flyer miles. KYC has taken a new light, the usual copy of a utility bill and passport; along with a copy of a letter of bank reference does not suffice. There must be more and more substance, embellishments, and if the truth is too true, well, we’ll have to see about that.

It seems the truth today is our worse enemy, to quote fictional General Jessep, in A Few Good Men—interpreted by Jack Nicholson—compliance personnel banks, regulators, and other similar individuals, simply, “can’t handle the truth”.

Compliance is also tethered by computer systems and algorithms that are supposed to sniff out suspicious transactions; but these systems can’t tell the difference between a sudden inheritance and a cash payment. Even if you can prove the funds are a gift of love, it may seem too difficult for a compliance officer to handle this truth. After all, compliance training is greatly modeled by life experience or exposure.

Take these examples: in Hong Kong, 5 million USD is the least a private bank will accept to open a bank account. It is normal for a regular checking account to receive regular payments in the hundreds of thousands per payment. However, in Europe, inward or outward remittances exceeding 5 thousand Euros are frowned upon and a source of funds that is outside of a person’s expected income is not kosher.

Recently, the EU Commission (EC) has tightened (more) key corporate tax rules to reduce tax avoidance in Europe. The hope is to close loopholes in the Parent-Subsidiary Directive, which some companies use to escape taxation. The tightening in rules will not allow tax planning arrangements such as the hybrid loan or tax free back to back loans. When using European companies as part of a tax planning strategy, these new measures will have to be observed.

Nothing is secret anymore, heck; in 2013 there have been continuous scandals from Edward Snowden, to

information leaks through Playstation consoles, and the United States government tapping Chancellor Angela Merkle.

Offshore Leaks website <http://offshoreleaks.icij.org>, by the International Consortium of Investigative Journalists, publishes a data base where individuals or companies can be searched. The home page states that they do not purport anyone listed has done anything wrong or illegal. So, why is there such a website? Many company registries in the world provide public information free of charge. Do we really need yet another unauthorized source holding the same information?

Truth be told, there is nothing illegal about maintaining international companies and their relevant bank accounts.

As such, for 2014, Aspen has developed better ways to handle the truth. We have increased safeguards for protecting the truth and keeping track of it. We have acquired new, robust information management systems and due diligence tools. We are designing leaner structures that make sense and solid; structures that can withstand the scrutiny of a logarithm and the impersonality of a compliance officer. Aspen continues to reject ineptitude from compliance departments and from those who claim to know it all. Most importantly, we are taking just a little longer to get it right.

I wish you, your loved ones, and corporate families a fruitful year. LHB

