

Companies Ordinance Cap 622 (Part 3)

(Relevant to AAT Examination Paper 6 – Fundamentals of Business Law)

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Introduction

The new Companies Ordinance, Chapter 622 of the Laws of Hong Kong (“CO”), came into effect on 3 March 2014. In earlier articles in this series, we have discussed some changes in the company legislation relevant to AAT Examination Paper 6. In part 1, we looked at five types of companies that may be formed under the new law, while in part 2 we looked at the simplified reporting system for private or guarantee companies. In this article, we will examine how local companies are formed under the new law.

Incorporation of companies under the Companies Ordinance

A company can only be formed for a lawful purpose. The procedures that must be adhered to in incorporating a new company in Hong Kong are described briefly as follows:

1. Before proceeding to register a company, the founder members should first decide on a suitable name for the company. Under s100 CO, a company must not be registered by a name that is the same as a name appearing in the Index of Company Names, by a name that is the same as a name of a body corporate incorporated under an Ordinance, by a name the use of which would constitute a criminal offence, or by a name that is offensive or contrary to the public interest.

A company must also not be registered by a name that would be likely to give the impression that the company is connected in any way with the Central People’s Government, the HKSAR Government, or any department or agency of the Central People’s Government or the HKSAR Government.

Companies are also prohibited from using certain words under the Companies (Words and Expressions in Company Names) Order, Cap 622A as the company’s name, such as chamber of commerce, kaifong, levy, savings, tourism board, tourist association, etc.

Thus, founder members should first check the proposed name with the names in the index and then make sure that the name is different from the name of a company formed under an ordinance and that the name does not fall into the prohibited category.

2. In order to apply for registration of a company under the new Companies Ordinance, certain registration documents must be delivered to the Companies Registrar (s67 CO) and a prescribed fee must be paid. These documents can be delivered in hard copy form to the Registrar's Shroff. The documents that are to be sent to the Registrar are:

- Incorporation Form. Section 67 of the CO provides that a company may be formed for a lawful purpose by delivering to the Registrar an Incorporation Form in one of the specified forms. The specified forms for incorporation under the CO include Form NNC1 (Incorporation Form (Company Limited by Shares)) and Form NNC1G (Incorporation Form (Company Not Limited by Shares)).

The incorporation form must contain particulars and statements relating to the company; particulars of the founder members, first directors and company secretary; statement by directors; statements relating to articles; and statement of compliance, which is a statement certifying that all the requirements of the CO in respect of the registration of the company have been complied with and that the information, statements and particulars are accurate and consistent with those in the articles.

- Articles of Association. A company must have articles prescribing regulations for the company. The articles must be printed in English or Chinese. Under the old law, a company must deliver both a memorandum of association and articles of association for registration. However, the new CO abolishes memorandum of association, and thus only the articles of association need to be submitted. Section 67 of the CO also requires the founder members to sign the articles and deliver to the Registrar a copy of the articles.

For a private company limited by shares, there must be mandatory provisions in the articles of association stating such information as the company name, whether it is limited or unlimited, the liability of members and capital and initial shareholdings, etc. The articles also regulate the relationship between the company and its members and the members *inter se*, such as matters relating to the general meetings, duties of directors, etc.

The Financial Secretary may prescribe model articles for companies (s78 CO). A company may adopt as its articles any or all of the provisions of model articles (s79 CO). The model articles can be found in the Companies (Model Articles) Notice, Cap 622H. Schedule 1 of Cap 622H gives the model articles for public companies limited by shares, Schedule 2 the model articles for private companies limited by shares and Schedule 3 the model articles for companies limited by guarantee.

- Notice to Business Registration Office (IRBR1): Under the new one-stop company incorporation and business registration service, any person who applies for incorporation under the CO will be deemed to have made a simultaneous application for business registration. The new company must submit the notice to indicate whether it elects for a 3-year business registration certificate and pay the prescribed business registration fee.

The Companies Registry introduced an e-Registry service in 2011, via which electronic application for company incorporation is now possible. The e-Registry is a 24-hour portal to facilitate electronic delivery of the forms to the Registrar of Companies. The presenter can fill in and submit the forms (for example, incorporation forms and articles of association) electronically but he or she must register as a user of the e-Registry before he or she can use the e-services. For simple cases, e.g., where the new company's name does not require special consideration from the Companies Registry, a private company limited by shares can normally be incorporated electronically within an hour or so.

Certificate of Incorporation

Upon registering an incorporation form and a copy of the articles delivered to the Companies Registry, the Registrar will issue a certificate of incorporation certifying that the company is incorporated under the CO, and that said company is either a limited company or an unlimited company. The certificate of incorporation must be signed by the Registrar (s71 CO). Under the new one-stop company incorporation and business registration service, the business registration certificate will be issued together with the certificate of incorporation.

A certificate of incorporation is conclusive evidence that all the requirements of the CO in respect to the registration of the company have been complied with and that the company is registered under the CO (s72 CO). By saying that it is conclusive evidence, this means that the court will not admit evidence that attacks the validity of the company's formation. Otherwise, action could be brought against the validity of the company's incorporation many years after its incorporation and its commencement of business.

The date of incorporation stated in the certificate of incorporation is important for 3 reasons. On and after that date:

- The founder members and all future members are a body corporate with the name stated in the certificate. A body corporate essentially means a corporation which has its own legal personality but is composed of a group of members or 'corporators'. Under the CO, the term body corporate refers not only to a company formed under the new CO, but could also refer to an existing company formed under the old CO or a company incorporated outside Hong Kong (s2 CO).

- The body corporate is capable of exercising all the functions of an incorporated company, and has perpetual succession. For example, a company has the capacity, rights, powers and privileges of a natural person of full age (s115 CO). Perpetual succession means that a company can continue to exist until it is liquidated and its existence is not affected by changes in ownership.
- The founder members and all future members are liable to contribute to the assets of the company in the event of the company being wound up as is mentioned in the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap 32) (s73 CO).

In subsequent articles in this series, we will discuss other major changes in the companies legislation relevant to Paper 6.