

Companies Ordinance Cap. 622 (Part 4)

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

CK Chang, KW Sin and LP Chan

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 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, and in part 3 we looked at the incorporation of companies. In this article, we examine the constitutional document under the new law.

Articles

Part 3, Division 2 of the CO deals with articles, or articles of association, which are the most important constitutional document of a company. A company must have articles prescribing rules on internal governance for the company, such as matters relating to the general meetings, appointment of directors, etc. During the incorporation process, a company must submit its articles to the Companies Registry. A company’s articles must be divided into paragraphs, and those paragraphs must be numbered consecutively and be printed in English or Chinese. In the following discussion, a company limited by shares will be used for illustration. There are different provisions for companies limited by guarantee or unlimited company.

A company may adopt as its articles any or all of the provisions of the model articles (s. 79, CO). The model articles can be found in the Companies (Model Articles) Notice, Cap. 622H. This means that if the company is a private company limited by shares, then it can adopt the model articles in Schedule 2 of Cap. 622H. If the company is a public company limited by shares, then it may adopt Schedule 1 of Cap. 622H.

Section 80 of the CO deals with the application of model articles to a limited company. On incorporation, the prescribed model articles form part of the company’s articles, as if those model articles had been registered as the company’s articles. The model articles apply insofar as the registered articles do not exclude or modify the model articles.

Content and effect

Part 3, Division 2, Subdivision 3 of the CO deals with the content and effect of the articles. Apart from the regulations, there are some mandatory clauses in the articles. A company's articles must state the name of the company (s. 81, CO). On the other hand, the company may choose whether to state the company's objects in its articles or not. The only exception is that a company which has been granted a licence under s. 103 of the CO and which wishes to dispense with the words 'Limited' in its name must state its objects (s. 82, CO). The articles of a limited company must also state that the liability of its members is limited (s. 83, CO). The articles of a company limited by shares must state that the liability of its members is limited to any amount unpaid on the shares held by the members (s. 84, CO).

The articles of a company with share capital must state certain information about the share capital and initial shareholding, such as:

- (a) the total number of shares that the company proposes to issue on the company's formation;
- (b) the total amount of share capital to be subscribed by the company's founder members on formation;
- (c) the amount to be paid up or to be regarded as paid up, and the amount to remain unpaid or to be regarded as remaining unpaid, on the total number of shares that the company proposes to issue on formation;
- (d) if the share capital is to be divided into different classes of shares on formation, as well as stating the classes and, for each class:
 - (i) the total number of shares in that class that the company proposes to issue on formation;
 - (ii) the total amount of share capital in that class to be subscribed by the company's founder members on formation;
 - (iii) the amount to be paid up or to be regarded as paid up, and the amount to remain unpaid or to be regarded as remaining unpaid, on the total number of shares in that class that the company proposes to issue on formation (s. 85, CO and s. 8 of Schedule 2).

If a company wishes to protect existing shareholders from dilution of their shareholding, it can state in its articles the maximum number of shares that the company may issue. This is optional. Such provision in the articles can be amended by ordinary resolution (see below).

A company's articles, once registered, have effect as a contract under seal between the company and each member, and between a member and each other member. In addition, they are to be regarded as containing covenants on the part of the company and of each member to observe all the provisions of the articles (s. 86, CO). This is commonly referred to as a statutory contract. Candidates working on AAT Examination Paper 6 Fundamentals of Business Law are advised to revise the case law in this area.

Companies incorporated under the old law

Companies that were incorporated under the old law were required to have both the memorandum of association and the articles of association. They might also have adopted Table A under the old law as their registered articles of association. The new CO abolishes the memorandum of association and now only the articles of association need to be submitted. There are also differences between Table A and the Model Articles, which leads us to ask how these inconsistencies might be resolved.

First, there is a deeming provision under s. 98 of the CO regarding the conditions of memorandum of association of an existing company. A condition that was contained in the memorandum of association and was in force is to be regarded as a provision of the company's articles. Furthermore, any condition in the memorandum of association stating the authorised share capital and the nominal values of shares is to be regarded as deleted and shall not to be regarded as a provision of the company's articles.

Second, the new law does not require existing companies to amend their articles. So, such companies may continue to use their registered articles of association insofar as they are not modified by the provisions of the new CO. Furthermore, under s. 80 of the CO, the model articles will apply where the existing articles do not exclude or modify the model articles. Existing companies should be advised to take this opportunity to review their articles and keep their articles updated if necessary, e.g. by tuning their provisions to adapt to the new no-par regime.

Alteration of articles

Subject to the CO, a company may alter its articles and this can only be achieved by special resolution. However, there is one exception: An alteration in articles to the maximum number of shares that the company may issue may be made by ordinary resolution (s. 88, CO).

An alteration made is as valid as if the alteration were originally contained in the articles. There are some restrictions in the alteration under both the statute and the common law. For companies limited by shares, some mandatory statements cannot be altered, such as a statement that the liability of its members is limited and that the liability of its members is limited to any amount unpaid on the shares. Furthermore, subject to rights to vary class rights under s. 180, CO, a company with a share capital must not make any alteration to its articles that are inconsistent with any rights attached to shares in a class of shares in the company (s. 87, CO). Alteration of articles is also subject to common law, for example, an alteration must be '*bona fide* for the benefit of the company as a whole' (*Allen v Gold Reefs of West Africa (1900)*). Candidates are also advised to review the common law relevant to this area.

Within 15 days after the alteration, the company must deliver to the Registrar for registration a notice of the alteration and a certified copy of the articles as altered. If a company does not do so, the company, and every responsible person of the company, commits an offence, and each is liable to a fine at level 3 and, in the case of a continuing offence, to a further fine of \$300 for each day during which the offence continues (s. 88, CO).

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