

Companies Registered under the Companies Ordinance (Relevant to AAT Examination Paper 6 – Fundamentals of Business Law)

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Introduction

Under the Companies Ordinance, Cap. 622¹, there are three types of company that can be registered in the Companies Registry, and the Companies Ordinance could therefore be applied to them. These are companies formed and registrable under the Companies Ordinance, companies not formed under the Companies Ordinance but registrable, and registered non-Hong Kong companies.

Companies formed and registered under the Companies Ordinance²

Under Section 2 in the Companies Ordinance, a “company” means a company that is formed and registered under the Ordinance or an existing company. “Existing company” refers to a company formed and registered under the former Companies Ordinance.

There are three types of companies that may be created under the Companies Ordinance. They are: company limited by shares, company limited by guarantee and an unlimited company. A company is a *company limited by shares* if the liability of its members is limited by the company’s articles to any amount unpaid on the shares held by the members. A company is a *company limited by guarantee* if it does not have share capital and the liability of its members is limited by the company’s articles to the amount that the members undertake, by those articles, to contribute to the assets of the company in the event of its being wound up. A company is an *unlimited company* if there is no limit on the liability of its members. Some of these companies can be further sub-divided into *private companies* and *public companies*.

Any person may form a company by signing the articles of the company intended to be formed and delivering to the Registrar for registration an incorporation form in the specified format together with a copy of the articles. Once an incorporation form has been registered and a copy of the articles has been delivered, the Registrar of Companies will issue a certificate of incorporation certifying that the company is incorporated under this Ordinance and that it is a limited company or an unlimited company.

A so-called “shelf company” is a ready-made company that has already been formed and registered in the Companies Registry. It can be purchased from professional firms such as solicitors, accountancy and company secretarial firms, or corporate

¹ Unless otherwise stated, the “section number” in this article refers to sections under the Companies Ordinance.

² More detailed discussion of the types of company under the Companies Ordinance, Cap 622 and the incorporation procedure can be found in the earlier technical articles “Companies Ordinance, Parts 1 to 4”.

service providers. The professional firm usually states that the company has not commenced its business since incorporation and has no outstanding liabilities. Despite this, a shelf company may have hidden liabilities, especially if it was set up some time ago. In the past, purchasing a company from “the shelf” had the advantages of being quicker and simpler than forming a new company through the incorporation process. This may no longer be the case following the introduction of the new e-Registry system.

Companies not formed, but registrable under the Companies Ordinance

Part 17 of the Companies Ordinance provides for another group of companies that are not formed, but registrable, under the Ordinance. The Registrar of Companies may, upon application by an *eligible company* in a specified form, register a company as an unlimited company; or a company limited by guarantee (Section 807, Companies Ordinance). Only these two types of company may be registered under this Part of the ordinance.

An “eligible company” is defined as a company formed after 1 May 1865 in pursuance of an Ordinance other than the Companies Ordinance or a former Companies Ordinance; or otherwise constituted after that date according to law (Section 806, Companies Ordinance). Upon registering an eligible company under this Part, the Registrar must issue to it a certificate of registration. However, registering a company through this procedure is not common, and unlimited companies in particular are rare.

Registered non-Hong Kong company

A “non-Hong Kong company” is a company incorporated outside Hong Kong that establishes a place of business in Hong Kong. “Registered non-Hong Kong company” refers to a non-Hong Kong company that is registered in the Companies Register as a registered non-Hong Kong company (section 2). These companies are mainly regulated under Part 16, Non-Hong Kong Companies.

A non-Hong Kong company must, within one month after the establishment of the place of business, apply to the Registrar for registration as a registered non-Hong Kong company. It is an offence if a non-Hong Kong company fails to do so.

The term “place of business” is not clearly defined but includes a share transfer office and a share registration office. In *Kam Leung Sui Kwan v Kam Kwan Lai and others* (2015), the Court of Final Appeal accepted that the word “establish” indicates that some degree of regularity and permanence of location is required. It went on to explain that:

In our view “place of business” connotes a place where or from which the company either carries on or possibly intends to carry on business. While “business” is not confined to commercial transactions or transactions which create legal obligations, there is no reason to suppose that it covers purely internal organisational changes in the governance of the company itself. The

notion that it does seem to follow from a belief that a company must have a place of business somewhere, but (leaving aside the share transfer and registration office) there is nothing in fact or law which requires a company which does not carry on business at all to have a place of business, and there is nothing strange in finding that such a company has not established one anywhere.

In that case, the court found that the company in question had not established a place of business in Hong Kong based on the following factual observations:

There was no evidence that the Company (i.e. Yung Kee Holdings Limited) had or needed an office in the building or kept its books and records there; it kept no accounts and its register of members was kept in the BVI with a copy kept by the Company's agent at its own office elsewhere in Hong Kong. The Company did not keep a share transfer or share registration office in Hong Kong. It held no board or general meetings prior to April 2009, and since then there were only 8 resolutions of the Company or its directors, which were all concerned with internal matters such as the payment of dividends or changes to the composition of the board. Indeed, but for Kwan Lai's decision to take control of the board the only matters which would have occupied the attention of the Company's directors in 2009 would have been the declaration of dividends.

Many of the resolutions in question were paper resolutions. Thus the important resolution of the Company amending its Articles (dealing with the quorum and length of notice for Board meetings) and appointing Carrel to be a director of the Company ... was a written resolution of the shareholders of the Company and was signed by Kwan Lai alone. He signed the document three times, once in his own right and once on behalf of each of his companies Legco and Everway, who together held 55% of the shares in the Company. It appears to have been signed on the 8th Floor of the Yung Kee Building but could have been signed anywhere; and it is fanciful to suppose that by signing a document three times the sole signatory constituted the place where he signed it the Company's place of business.

In order to be registered as a non-Hong Kong company, the application must be made in the specified form, must contain the particulars prescribed by procedural regulations, must contain the required details of at least one person who is proposed to be an authorized representative on registration of the non-Hong Kong company, must be accompanied by the documents prescribed by procedural regulations and must be delivered to the Registrar.

An "authorized representative", in relation to a registered non-Hong Kong company, means:

- (a) a natural person resident in Hong Kong;
- (b) a solicitor corporation;
- (c) a corporate practice as defined by section 2(1) of the Professional Accountants Ordinance (Cap. 50); or
- (d) a firm of solicitors or certified public accountants (practising),

that is authorized to accept on the company's behalf service of any process or notice required to be served on the company.

The required details, in relation to an authorized representative, are:

- (a) the name and address of the representative;
- (b) the date on which the representative was authorized; and
- (c) in the case of a natural person, the number of the representative's identity card; or if the representative does not have an identity card, the number and issuing country of any passport held by the representative.

Conclusion

For the Companies Ordinance to be applied to a company, that company must be registered or registrable under the Companies Registry. For example, if the remedies for unfair prejudice to members' interests under Part 14, Division 2 of the Companies Ordinance were to be applied, the court would first ascertain whether it has jurisdiction over the company. In the Kam Leung Sui Kwan case, the Court of Final Appeal found that the courts of Hong Kong have no jurisdiction to make an order under the unfair prejudice provision against the company in question because it is not a non-Hong Kong Company as defined under the Companies Ordinance.