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Doing Business in Hong Kong

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Legislation:

Companies Ordinance (Cap. 622)

Business Registration Ordinance (Cap. 310)

Incorporation

2 types of incorporation

- By hand
- By e-incorporation

Documents required:

- Articles of incorporation
- NNC1 or NNC1G
- IRBR1 for business registration

to be submitted to the Companies Registry

Basic information required:

- Types of company
- Name of the company
- Registered office address
- Will the statutory books e.g. registers of members / directors / company secretaries to be kept at the registered office address
- Who will be the director(s)
- Who will be the company secretary
- Will the company have share capital
- Who will be the shareholder(s) and the respective number of share(s) to be held by the shareholder(s) / member(s)

Types of companies

S66

Only the following companies may be formed under this Ordinance —

- (a) a public company limited by shares;
- (b) a private company limited by shares;
- (c) a public unlimited company with a share capital;
- (d) a private unlimited company with a share capital;
- (e) a company limited by guarantee without a share capital.

Meaning of share

S2

share (股份) —

means a share in a company's share capital

S134

- A share or other interest of a member in a company is personal property.
- A share or other interest of a member in a company is transferable in accordance with the company's articles.

S135 Shares does not have nominal value

Private company

S11

..... a company is a private company if –

its articles

- restrict a member's right to transfer shares;
- limit the number of members to 50; and
- prohibit any invitation to the public to subscribe for any shares or debentures of the company; and
- it is not a company limited by guarantee.

Member excludes –

- a member who is an employee of the company; and
- a person who was a member while being an employee of the company and who continues to be a member after ceasing to be such an employee.

Joint holders will be counted as one member.

Partly paid shares

S142

Return of Allotment

- A return —

(d) for any shares allotted for consideration
(whether wholly or partly cash consideration
or non-cash consideration)

Similarities and differences between unlimited company and limited company with share capital

Similarities

- shares can be transferred
- private company usually requires directors' approval
- instrument of transfer (contract notes) has to be stamped by paying 0.2% stamp duty on the higher of the net asset value or the consideration paid
- new share certificate has to be issued to the transferee i.e. buyer
- share certificate issued to the transferor i.e. seller has to be cancelled
- register of members has to be updated within 2 months
- shareholders' rights can be varied

Differences

Limited company can but unlimited company cannot:

- increase its issued share capital i.e. allotment of shares
- shareholders' prior approval to the allotment must be obtained
- directors to determine the issue price
- alter the maximum number of shares to be issued
- redenomination of the currency of its share capital
e.g. from USD to HKD
- shareholder resolution has to be passed to approve the redenomination
- specified form has to be filed with the Companies Registry

Conversion

From private to public company

- Shareholders to pass special resolution either at a general meeting or by written resolution
- New articles of association removing definition of a private company
- Specified form and audited financial statements have to be filed with the Companies Registry with the other two mentioned above

From public to private company

- Shareholders to pass special resolution either at a general meeting or by written resolution
- New articles of association containing definition of a private company
- Specified form has to be prepared

From unlimited company to limited company

- Pass a special resolution to approve the conversion
- New articles of association stating that the liability of the shareholders of the company is limited
- Specified form has to be prepared

There is no conversion:

- from limited company to unlimited company because shareholders' liability should not be increased
- from company limited by guarantee to company with share capital

Should company limited by guarantee be used for 'for profit trading' purpose

- Part 6: distribution of profits and assets does not exclude this type of company, this means that if the articles of association permit, distribution of profits and assets is feasible
- in the corporate tax return form, there is no need to report the change of membership
- Stamp Duty Ordinance does not cover change of membership

PART 4 DETAILS OF THE CORPORATION

4.1 Postal address if different from that printed on this return:

4.2 If the postal address stated in Item 4.1 is the same as your current main business address, "✓" the box.

4.3 Telephone Number:

4.4 Principal business activity:
Principal product or service:
If different from that previously reported, "✓" the box.

PART 5 RETURN FORM LANGUAGE

If you wish to receive future Profits Tax Returns in CHINESE, "✓" the box.

PART 6 AUTHORIZED REPRESENTATIVE
(Complete only if you have appointed a representative. Such an appointment is NOT compulsory.)

I hereby authorize
of (Address)

to handle the tax affairs on behalf of the Corporation.

The representative's Business Registration No. and Branch No., if any

The representative's Reference No.

PART 7 GENERAL MATTERS "✓" the appropriate boxes

		Yes	No
7.1	Are your accounts required to be audited? If yes, complete Item 7.1.1. If you are a SMALL corporation, complete also Items 7.1.2 and 7.1.3.	<input type="checkbox"/> 11	<input type="checkbox"/>
7.1.1	Did the Auditor(s) in his/her Report express an adverse opinion or a disclaimer of opinion?	<input type="checkbox"/> 12	<input type="checkbox"/>
7.1.2	State the name of the Auditor(s) who prepared your Auditor's/Auditors' Report for the basis period:		
7.1.3	State the date of the Auditor's/Auditors' Report:		
7.2	State your basis period: From to Is the accounting date for this year different from that of last year?	<input type="checkbox"/> 13	<input type="checkbox"/>
7.3	Did you commence business within the basis period? If yes, state the date of commencement:	<input type="checkbox"/> 14	<input type="checkbox"/>
7.4	Did you cease business within the basis period? If yes, complete Items 7.4.1, 7.4.2 and 7.4.3.	<input type="checkbox"/> 15	<input type="checkbox"/>
7.4.1	State the date of cessation:		
7.4.2	On cessation, was your business or any part thereof transferred to and carried on by another person? If yes, state the name of this person:	<input type="checkbox"/> 16	<input type="checkbox"/>
7.4.3	On cessation, were any of the assets of your business sold or transferred to an associated person?	<input type="checkbox"/> 17	<input type="checkbox"/>
7.5	Are your financial statements prepared in a foreign currency? If yes, state the currency and the conversion rate used to convert to HK dollars. Currency Conversion rate	<input type="checkbox"/> 18	<input type="checkbox"/>
7.6	Are you a private company? If yes, complete Item 7.6.1.	<input type="checkbox"/> 19	<input type="checkbox"/>
7.6.1	Has there been any change in your shareholders during the basis period?	<input type="checkbox"/> 20	<input type="checkbox"/>
7.7	During the basis period, were you a party to an amalgamation under section 680 or 681 of the Companies Ordinance (Cap. 622)?	<input type="checkbox"/> 21	<input type="checkbox"/>
7.8	During the basis period, were you involved in any processing arrangement in the Mainland of China? If yes, complete Item 9.2.2.	<input type="checkbox"/> 22	<input type="checkbox"/>

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DO NOT WRITE IN THIS SPACE

Officers

S2 include director, manager or company secretary

Manager, in relation to a company –

- Means a person who performs managerial functions in relation to the company under the directors' immediate authority; but
- Excludes
 - a receiver or manager of the company's property; and
 - a special manager of the company's estate or business appointed under section 216 of the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap 32)

Company Secretary

- S2 Officer of the company
- No specific qualification required
- S474(2) either ordinarily reside for natural person or having a registered office place of business in Hong Kong for body corporate
- S475 If a company has a sole director, that person cannot also be a company secretary
- Can certify records of proceedings of director / member meetings e.g. S621
- Can sign documents pursuant to S127
- Can sign directors' report S391
- Act at the instruction of the board of directors

- Appointment is to be made by the board of directors / in accordance with the articles of association
- Resignation can be done in accordance with the articles of association / appointment agreement
- Removal (termination of service) is to be made by the board of directors / in accordance with the articles of association

Changes in company secretary have to be reported to the Companies Registry within 15 days from the changes by filing ND2A.

S476 Direction Requiring Company to Appoint Company Secretary

If a company does not have a company secretary

- the Registrar may direct the company to appoint a company secretary

(6) If a company fails to comply with a direction under this section, the company, and every responsible person of the company commit an offence....

Directors

Minimum number

- S453 at least 2 for a public company; and a company limited by guarantee
- S454 at least 1 for a private company
- S456 body corporate cannot be appointed as a director for a public company, a company limited by guarantee or a private company within a group of which there is a listed company
- S457 Corporate director can be appointed to a private company which has a natural person as director

Minimum age

- S459 18 years old

Directors

- Appointment can be made by the members or by the board of directors in accordance with the articles of association
- Resignation can be done in accordance with the articles of association / service agreement
- Removal is effective on passing of an ordinary resolution subject to:
 - ◆ Special notice has been given by a member to the company proposing the ordinary resolution
 - ◆ The director to be removed is given opportunity to circulate a statement protesting against his / her removal
 - ◆ He / she is allowed to attend the general meeting which will consider the ordinary resolution
 - ◆ ND2A has to be filed with the Companies Registry within 15 days after the passing of the resolution

Duties of director

S465

- A director of a company must exercise reasonable care, skill and diligence.
- Reasonable care, skill and diligence mean the care, skill and diligence that would be exercised by a reasonably diligent person with —
 - ◆ the general knowledge, skill and experience that may reasonably be expected of a person carrying out the functions carried out by the director in relation to the company; and
 - ◆ the general knowledge, skill and experience that the director has.

A Guide on Directors' Duties published by the
Companies Registry

Kenneth Cheung Chi Shing (former Chairman of
Styland Holdings Limited Stock Code 0211) &
others Case No. HCMP 1702/2008

Kenneth Cheung Chi Shing & his wife Yvonne
Yeung were given 12 years disqualification order
and a penalty of HK\$85 million.

Material interests in transaction, arrangement or contract

S536 director must declare material interests

S537 Declaration to Directors: Timing

- If the transaction has been entered into: as soon as reasonably practicable
- If it is a proposed transaction: before it is entered into

Changes subsequent to incorporation

- Company name

Passing of a special resolution and filing of the specified form with the Companies Registry

S109 & 110 Registrar of Companies may direct a company to change its name if the name is offensive / too similar or identical to an existing name. The Registrar can change with 'Company Registration Number' as its prefix followed by the company's registration number.

- Business scope

If a company changes its business scope, IRBR has to be completed and submitted to the Business Registration Office.

- Change of registered office address

IRC3111A has to be submitted to the Business Registration Office

NR1 is to be filed with the Companies Registry within 15 days.

Hong Kong corporate tax principle – tax on individual company and any tax losses are to be carried forward within that individual company

Inland Revenue Ordinance

19(C)(4) where in any year of assessment a corporation or a person, who is not an individual, a partnership or a corporation, carrying on a trade, profession or business sustains a loss in that trade, profession or business, the amount of that loss shall be set off against the assessable profits of the corporation or person (including its share of the assessable profits of a partnership in which it is a partner) for that year of assessment and to the extent not so set off, shall be carried forward and set off against the corporation's or the person's assessable profits of such a partnership for subsequent years of assessment.

S61B of IRO Utilization of losses to avoid tax

Where the Commissioner is satisfied that-

- any change in the shareholding in any corporation, as a direct or indirect result of which profits have been received by or accrued to that corporation.....; and
- the sole or dominant purpose of the change was for the purpose of utilizing any loss or any balance of any loss sustained in a trade, profession or business carried on by the corporation, in order to avoid liability on the part of that corporation,,
- the set off of any such loss or balance of loss against any such profits shall be disallowed.

Amalgamation of companies

Advance rulings 55 to 58 of the Inland Revenue Department

Vertical and horizontal amalgamation

Amalgamated company – the company which will remain in existence after amalgamation

Amalgamating company – the company will disappear after amalgamation

Directors of amalgamating company have to make a solvency statement stating that:

- There is no ground on which the amalgamating company could be found to be unable to pay its debts; and
- The amalgamated company will be able to pay its debts as they fall due during the period of 12 months immediately after the date on which the amalgamation is to become effective.

Repurchase of shares

Condition: the company must have some shares not being redeemable shares

Shares will be cancelled after the repurchase

Only fully paid shares can be repurchased

Repurchase of shares can be

- out of distributable profits; OR
- out of share capital – in this case the directors must make a solvency statement

Meetings

Meeting of the directors – in accordance with the articles of association

S483 company with sole director can pass written records to the company within 7 days after a decision is made.

Members – annual general meeting
general meeting

General Meeting

S571(1) A general meeting must be called by notice of –

- In the case of an annual general meeting, at least 21 days; and
- In any other case-
- If the company is a limited company, at least 14 days; and
- If the company is an unlimited company, at least 7 days.

Annual General Meeting

S613(1) A company can dispense with the holding of annual general meeting by passing a resolution if passed by all members of the company.

S622(1)(g) requires the resolution to be filed with the Companies Registry.

S614(1) an ordinary resolution can be passed to revoke the resolution passed under S613(1).

S622 does not specify that the resolution passed under S614(1) has to be filed.

Special resolution

S564 stipulates that special resolution means a resolution that is passed by a majority of at least 75%.

Ordinary resolution

S563(1) pass by a simple majority

How votes should be cast

S588 on a show of hands every person has one vote
on a poll every share has one vote

S590 by show of hands and the resolution is passed if the chairperson declares that it is passed

S591(2) who can demand a poll

- At least 5 members
- People holding 5% of the voting rights
- Chairperson

S592 chairman must request for a poll if the number of proxies received indicates that the result will be different from the result of a show of hands

Written resolution

S548(5) A written resolution ... has effect as if passed by –

- the company at a general meeting; or
- a meeting of the relevant class of members of the company

sufficient votes must be obtained within 28 days from the date of circulation of the resolution, otherwise it will lapse

Accounts and audit

Primary accounting reference date

S369(5) For a company formed and registered under this Ordinancethe primary accounting reference date is –

- a date specified by the directors before the relevant date for the purposes of this paragraph; or
- in the absence of such a specified date, the relevant date.

Accounts and audit (Cont'd)

S369(7) In this Section-

Relevant anniversary, in relation to a company's incorporation, means the anniversary of the company's incorporation that first occurs after this section comes into operation;

relevant date means the last day of the month in which the relevant anniversary of the company's incorporation falls.

S369(6) a date specified for the purposes of subsection (5)(a) must fall within 18 months after the date of the company's incorporation.

For adoption of audited financial statements, a private company has 9 months to either adopt the statements at annual general meeting or circulate to all its members.

S431(5)(b) If the primary accounting period is more than 12 months, the financial statements have to be adopted within 3 months.

Appointment of first auditors

S395 appointment can be made by the directors before the first annual general meeting or, if annual general meeting is not to be held, on or before the statutory time for laying the financial statements.

Re-appointment of auditors

Auditors are either re-appointed at annual general meeting; or

S403 the company is not required to hold annual general meeting and no person has been appointed as auditor for the next financial year, then the current auditors will be deemed to be reappointed.

Casual vacancy created by the resignation of auditors

Re-appointment can be done by the board of directors

- Directors can appoint new auditors to fill up the vacancy
- NA2 has to be filed by the Company with the Companies Registry within 15 days from receipt of the notice of resignation
- When the new auditor seeks re-appointment, special notice has to be given to the company

Re-appointment can also be made by the members of the company

Termination of the service of auditors by removal

- general meeting has to be convened and an ordinary resolution passed to effect the removal
- auditors have the right to make representation and be heard at the general meeting against the removal

Dormant company

A special resolution has to be passed to put a company into dormancy to be effective either on the delivering of the special resolution to the Companies Registry for filing; or a later date as specified in the resolution.

The company must not enter into any accounting transaction during its own dormancy.

A dormant company will be exempted from:

- filing annual return
- holding annual general meeting
- preparing audited financial statements
- appointing auditors

De-registration

A company can be de-registered by applying to the Inland Revenue Department and the Companies Registry.

An application must not be made unless, at the time of the application—

- (a) all the members agree to the deregistration;
- (b) the company has not commenced operation or business, or has not been in operation or carried on business during the 3 months immediately before the application;

De-registration (Cont'd)

- (c) the company has no outstanding liabilities;
- (d) the company is not a party to any legal proceedings;
- (e) the company's assets do not consist of any immovable property situate in Hong Kong; and
- (f) if the company is a holding company, none of its subsidiary's assets consist of any immovable property situate in Hong Kong.

Application can be made to the Court to re-instate the company within 20 years after dissolution.

Non-Hong Kong companies

Companies incorporated outside of Hong Kong can be registered as non-Hong Kong companies.

Business registration certificate can be applied first.

If the constitutional documents were not prepared either in English or Chinese, then certified translation has to be arranged.

Audited financial statements may have to be filed depending on the legal requirements of the jurisdictions where the companies were incorporated.

Non-Hong Kong companies (Cont'd)

An authorized representative (natural person, CPA firm / law firm) having a local address has to be appointed to accept service of process and notice on behalf of the company.

There must be a place of business in Hong Kong.

Personal particulars of the director(s), company secretary (if any), registered office address in its place of incorporation have to be inserted in NN1.

After registration, any changes in the details reported in NN1 have to be filed with the Companies Registry.

Annual return (NN3) has to be filed within 42 days from the anniversary of its registration.

Non-Hong Kong companies can cease business any time by filing NN13 within 7 days from the date of cessation

Useful links

- <http://www.cr.gov.hk/en/home/index.htm>
- <http://www.gov.hk/en/business/registration/businesscompany/>
- <http://www.ird.gov.hk/index.htm>
- http://www.judiciary.gov.hk/en/legal_ref/judgments.htm
- <http://www.legislation.gov.hk/blis/eng/index.htm>
- <http://www.hkex.com.hk/eng/newsconsul/hkexnews/2016news.htm>
- <http://www.sfc.hk/web/EN/index.html>

THE END

