

PART 3

COMPANY FORMATION AND RELATED MATTERS, AND RE-REGISTRATION OF COMPANY

Introduction

1. Part 3 deals with company formation and registration, re-registration of unlimited companies as companies limited by shares and related matters. The part contains provisions setting out the types of company¹ that may be formed, and their formation procedure. There is also an improved company name registration system which will be introduced ahead of the CO rewrite through the Companies (Amendment) Bill 2010. Part 3 also provides for new requirements for the articles of association (“AA”) of a company following the proposed abolition of the memorandum of association (“MA”), and modifies the provisions governing the execution of documents.

There are certain provisions that will apply only in the transition period between the enactment of the CB and the commencement of the no-par regime. Since these provisions will only be relevant during the transition period, they are not currently included in the draft CB but they will be finalised and included in the CB, when it is introduced in the LegCo.

- The significant changes to be introduced under this Part are highlighted below:
 - (a) **Expediting the company name registration process and enhancing enforcement against “shadow companies”²;**
 - (b) **Abolishing the MA ;**

¹ Under the CB, five types of companies can be formed, namely (a) private companies limited by shares; (b) public companies limited by shares; (c) private unlimited companies with a share capital; (d) public unlimited companies with a share capital; and (e) guarantee companies that do not have share capital (see the Explanatory Notes on Part 1 of the draft CB contained in FSTB, *Consultation Paper on Draft Companies Bill - First Phase Consultation* (December 2009), pages 76 to 78.

² “Shadow companies” refer to those companies incorporated in Hong Kong with names which are very similar to existing and established trademarks or trade names of other companies and which pose themselves as representatives of the owners of such trademarks or trade names to produce counterfeit products in Mainland China bearing such trademarks or trade names.

(c) Making the keeping and the use of a common seal optional and relaxing the requirements for a company to have an official seal for use abroad; and

(d) Reforming company re-registration provisions.

Significant Changes

(a) Expediting the company name registration process and enhancing enforcement against “shadow companies”

2. In February 2010, we introduced the Companies (Amendment) Bill 2010 into LegCo. One of the key proposals in the Bill is to expedite the company name registration process. A company name will be accepted for registration instantaneously if it satisfies certain requirements, including, among others, that it is not identical to another name on the register and does not contain certain specified words or expressions. A new criterion for registration has been added so that where a proposed name is the same as a name for which a direction to change name has been given, such name cannot be registered except with the consent of the Registrar. After incorporation, if a company’s name is found to be objectionable, the Registrar will be empowered to direct the company in question to change its name within a period specified by the Registrar. The relevant provisions in the Companies (Amendment) Bill 2010 are restated in **Clauses 3.39(2)(c), 3.48 and 3.49** of the CB. The revised procedures will shorten the processing time for company incorporation from four working days to one day. This will put Hong Kong on a par with comparable jurisdictions such as the UK and Singapore.

3. To address concerns of the business community, especially trademark/trade name owners, we also propose in the Companies (Amendment) Bill 2010 to strengthen our company name registration system to enhance enforcement against possible abuses by “shadow companies” by empowering the Registrar to act pursuant to court orders to direct a “shadow company” to change its name. The provision is restated in **Clause 3.48(2)(a)** of the CB. The Registrar may substitute the company’s name with its registration number if it fails to comply with the Registrar’s direction to change name. The same power to substitute a company name will also be given to the

Registrar where a company fails to comply with a direction to change its name that is too similar to that of another company on the register; gives the impression that the company is connected with the Hong Kong Government or the Central People's Government; constitutes a criminal offence; or is contrary to the public interest. This provision is restated in **Clause 3.50** of the CB.

4. The Companies (Amendment) Bill 2010 is being scrutinised by LegCo. The relevant clauses in the CB may have to be amended subject to amendments made to the Companies (Amendment) Bill 2010, if any.

(b) Abolishing the MA

Background

5. Under the CO, the MA and the AA together comprise the constitution of a company. Broadly, the MA includes basic information about a company which the outside world needs to know, while the AA deal with the internal regulations of the company. The MA used to contain important information about the company, particularly its objects. However, the objects clause is now less significant, given the 1997³ abolition of the doctrine of ultra vires in relation to corporate capacity, with all companies now having the capacity and the rights and powers of a natural person⁴.
6. In 2008, the CR introduced streamlined incorporation procedures where persons wishing to incorporate a company are required to deliver to the Registrar a duly completed incorporation form together with copies of the MA and AA, if any. The incorporation form requires information including, among other things, the company name, address of the registered office, the type of company, particulars of the founder members, directors and secretaries, a statement of capital and initial shareholdings and a statement that all the requirements of the CO on the registration of the company have been complied with.

³ The Companies (Amendment) Ordinance 1997 (Ordinance No.3 of 1997).

⁴ Since the 1997 amendments, objects clauses are optional except for the so-called "section 21 companies" which are found subject to section 21 of the CO. "Section 21 companies" are allowed to dispense with the word "Limited" in their names. Such companies are formed for promoting commerce, art, science, religion, charity or any other useful object, and are required to apply their profits, if any, or other income in promoting their objects. The similar provisions are reinstated in **Clause 3.42** of the draft CB.

7. We note that the information provided by the incorporation form and the AA contains virtually all the information required by the MA, with the exception of the objects clause and the authorised capital⁵. The need to retain the MA as a separate constitutional document is therefore diminished. In some common law jurisdictions such as Australia and New Zealand, companies have only a single constitutional document.
8. Under the CO, there are provisions in section 8 and section 25A respectively governing the alteration of object clauses in the MA and the alteration of the provisions contained in the MA which were originally intended to be contained in the AA (the “section 25A type of conditions”). Both provisions permit, in the case of private companies, applications by their members to the court to object to the alteration. With the abolition of the MA, provisions will be made in the CB to cater for the alteration of object clauses and of section 25A type of conditions as they would be contained in the AA and to provide for the members’ right of objection.

Proposal

9. It is proposed that the MA of a company should be abolished altogether. **Clause 3.2** states that person(s) may form a company by delivering to the Registrar for registration an incorporation form in the specified form and a copy of the company’s articles. **Clauses 3.3 to 3.8** and **3.14 to 3.24** set out the requirements of the incorporation form and the AA respectively, which should include information currently contained in the MA. In particular, the incorporation form will contain the name, address and type of company (**Clause 3.5(1)**), the particulars of the founder member(s) (**Clause 3.5(2)**), director(s) and officer(s) (**Clause 3.6**), information on the shares and share capital (**Clause 3.7**) and a statement of compliance (**Clause 3.8**). The AA will contain the company name (**Clause 3.20**), members’ liabilities or contributions, (**Clauses 3.22** and **3.23**) and information on capital and initial shareholdings (**Clause 3.24**). As a result of the migration to no-par, the authorised capital requirement will be removed but **Clause 3.24(3)** provides that a company having a share capital may state in its articles the maximum number of shares that the company may issue. “Section 21 companies”⁶ must also state the company’s objects in the AA (**Clause 3.21**), while other companies have the option of doing so.

⁵ See paragraph 9.

⁶ See footnote 4.

10. Upon the abolition of the MA, references to the MA in various provisions of the CO are removed or amended to mean the AA in the CB. In respect of companies which are formed before the CB comes into force, **Clause 3.36** states that conditions that are contained in a company's MA would be deemed to be regarded as provisions of the company's AA after the commencement of the new CO.
 11. **Clause 3.17** empowers the FS to prescribe different model articles for different types of companies. These model articles replace Table A and the other tables in Schedule 1 of the current CO for companies incorporated after the commencement of the new CO.
 12. **Clauses 3.27, 3.34 and 3.35** will require companies to notify the Registrar of any alterations to the AA, including alterations by an order of the court or other Ordinance(s).
 13. **Clause 3.28** will allow a company's alteration to its objects under its AA and **Clause 3.30(1)** will permit the right of members of a company to apply to the court to object to the resolutions for altering the conditions of the company's AA with respect to its objects.
 14. **Clause 3.29** provides for the alteration of the CO section 25A type of conditions in an existing company's AA and **Clause 3.30(3)** preserves the right of members of an existing company to object to the resolutions for altering such conditions.
- (c) **Making the keeping and the use of a common seal optional and relaxing the requirements for a company to have an official seal for use abroad**

Background

15. Section 93(1)(b) of the CO stipulates that every company shall have a common seal with the company name engraved in legible characters. The use of the common seal by companies is required generally for executing deeds (particularly in conveyancing transactions), and, for the purposes of sections 71, 73 and 73A of the CO, in issuing share certificates and share warrants.

16. With the rapid increase in both volume and value of modern day business transactions and contracts, we consider it necessary to simplify the mode of execution of documents. In this respect, both the UK and Australia have given companies the choice of not keeping or using a common seal to execute documents and deeds.
17. Also in relation to the company's seal, section 35(1) of the CO provides that a company may have an official seal for use outside Hong Kong, provided that it is authorised by the AA of the company and that the objects of the company require or comprise the transaction of business outside Hong Kong. We note that there are no such requirements in common law jurisdictions such as the UK.

Proposal

18. It is proposed that the keeping and the use of a common seal should be optional. **Clause 3.63** states that a company may have a common seal. This gives flexibility to companies and does not prejudice those companies which may still wish to keep and use their common seals.
19. In connection with the change, **Clause 3.66** sets out the requirements for execution of documents by a company. In particular, **Clause 3.66(2)** allows a company to execute a document by having the document signed by a director (in the case of one-director company) or by two authorised signatories (in the case of a company having two or more directors). **Clause 3.66(4)** provides that a document signed in accordance with **Clause 3.66(2)** and expressed to be executed by the company has effect as if the document had been executed under the company's common seal.
20. As for the use of official seals outside Hong Kong, we propose to follow the relevant provisions in the UKCA 2006. **Clause 3.64** states that a company may have an official seal for use outside Hong Kong. The existing requirements concerning the objects of the company and authorisation by the AA have been abolished.

(d) **Reforming company re-registration provisions**

Background

21. Under the CO, there are only two statutory provisions which have the effect of bringing about a change in company type. Under section 19 of the CO, unlimited companies may be re-registered as limited companies by shares or by guarantee. Section 30 of the CO stipulates that, if a private company alters its AA in such a manner that it no longer fulfils the conditions of being a private company, it shall, as on the date of the alteration, cease to be a private company and must file with the Registrar documents and information as required in the Second Schedule to the CO.
22. We note that the format and the information required by the Second Schedule are outdated, unnecessarily detailed and complicated. There is a need to simplify the requirements. There is also scope for improving the provisions on changing an unlimited company to a limited company.

Proposal

23. **Clause 3.33** provides for alteration of the AA which affects the status of a private company. In particular, the requirement to file a prospectus or a statement in lieu of prospectus (i.e. the Second Schedule) under section 30 of the CO has been removed. However, the company must deliver to the Registrar within 15 days an annual financial statement for the financial year immediately preceding the financial year in which the alteration of the AA is made.
24. **Clause 3.69** provides for the matters in section 19(1) of the CO with the modification that an unlimited company may only re-register as a company limited by shares under the new CO. There must be a statement on the share capital structure, which after re-registration must conform to the requirements in the CB. **Clause 3.70** deals with how the application for re-registration should be made, and **Clause 3.71** provides for a fresh certificate of incorporation to be issued by the Registrar to the company after the re-registration.

Other Changes

(a) Providing statutory protection for persons dealing with a company

25. Under **Clause 3.55**, a company's exercise of powers will be limited by its AA after the elimination of the MA. To supplement the provision, we have made reference to sections 40 to 42 of the UKCA 2006, and propose to add **Clauses 3.56 to 3.58** with a view to providing statutory protection for persons dealing with a company in addition to the common law indoor management rule⁷. **Clause 3.56** is introduced to provide that in favour of a person dealing with a company in good faith, the power of the directors to bind the company will be deemed to be free of any limitation under the AA, any resolutions of the company or any agreement between the members of the company. Under **Clause 3.56**, a person dealing with a company is presumed, unless the contrary is proven, to have acted in good faith. **Clauses 3.57 and 3.58** set out the exception to **Clause 3.56**. **Clause 3.57** provides that transactions or act entered into by a company involving directors or their associates are voidable. **Clause 3.58** states that **Clause 3.56** does not apply to transaction or act of company permitted to be registered by name without "Limited", i.e. "section 21 companies".

(b) Allowing an attorney to execute not only deeds but also other documents on behalf of the company locally or outside Hong Kong

26. Under section 34 of the CO, a company may empower any person, to act generally or in respect of specified matters, as its attorney to execute deeds on its behalf outside Hong Kong. A deed signed by the attorney on behalf of the company and under his seal binds the company and has the same effect as if it were under the common seal. In view of the increasing volume of local and overseas business activities of Hong Kong companies, the current provision may be unduly restrictive.

27. It is proposed that the scope of the current section 34 of the CO be widened. **Clause 3.68** states that a company may authorise any person as its attorney to execute a deed or any other document on its behalf in Hong Kong or elsewhere. This clause is in line with section 47 of UKCA 2006.

⁷ Also known as "rule in *Turquand's* case". It refers to the common law rule that a third party dealing in good faith with a company is not bound to inquire whether any internal procedures contained in the company's constitution regulating the conferment of authority have been complied with and is entitled to presume that a person held out by the company has the necessary authority to act on behalf of the company, see *Royal British Bank v Turquand* (1856) 119 ER 886.