CHAPTER 1

CONCEPTS & REGULATORY FRAMEWORK

Historical Perspective

1.001 The roots of the Hong Kong registered company[1] are found in English law where, prior to the Joint Stock Companies Act of 1844,[2] incorporation could only be achieved by the grant of a Royal Charter, letters patent or specific legislation.[3] These methods were slow and costly. Although incorporation by Royal Charter normally left members entirely free from liability[4] or otherwise imposed on them liability limited to an agreed prescribed amount per share, the privilege of incorporation was originally sought for a very different reason — primarily in order to obtain a business or trading monopoly.[5]

1.002 Formation of joint stock companies had been prohibited in 1720 following financial speculation and market crash and only permitted again in 1825. The 1844 Act was the first in a series of legislative measures responding to the growing needs of businessmen who had had to resort to forming partnerships in order to raise large amounts of capital for railways, canals and other large infrastructure projects of the day. The 1844 Act permitted incorporation of by the much quicker, simpler and cheaper means of registering specified documents. The Act began by requiring the incorporation of existing partnerships of at least 25 persons and permitted creditors to sue the

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[1] The expression "Hong Kong registered company" concerns bodies incorporated pursuant to Hong Kong's Companies Ordinances, the current Cap. 622 ("CO" or the "Ordinance"), and also the former Cap. 32, now re-titled as the Companies (Winding-Up and Miscellaneous Provisions) Ordinance (the "CWUO"). However, corporate status may otherwise conferred on bodies pursuant to specific statutory provision, *e.g.* the Hong Kong Institute of Certified Public Accountants established by the Professional Accountants Ordinance (Cap. 50); the College of St John the Evangelist established by The St. John's College Ordinance (Cap. 1089); and owners' corporations incorporated pursuant to the Building Management Ordinance (Cap.344) and covered briefly in chapter 19 of this text.

[2] 7 & 8 Vict, Cap. 110.

[3] Sir Percival Griffiths' "A Licence to Trade" (1974) reminds us: *"a charter was necessary in the first place because associations of individuals had no inherent right of meeting ... without royal sanction the members of such an association would have been in continual risk of being punished as an unlawful assembly."* Compare the Societies Ordinance of Hong Kong (Cap.151), the schedule of which exempts from registration, *inter alia*, companies registered under the Companies Ordinance (Cap.622) but otherwise requires associations of persons to register with the Societies Officer at Police Headquarters.

[4] At common law the Crown had no power to attach liability to individual members — a feature which of itself militated against the grant of charters for trading purposes; see Hansard (2 June 1825) vol 13 cc1018-23, speech of the Attorney General on the repeal of the Bubble Act.

[5] The East India Company enjoyed trading privileges beginning with the importation of pepper through the Proclamation of 1609 and later including the right to govern the subcontinent of India, for over 300 years. The Virginia Company settled England's first colony in America and through constitutional changes in 1621 granted its members self-government through an elected assembly — over 150 years before the Declaration of Independence.

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incorporated company for unpaid debts and then levy execution on the company's members if the debt remained unpaid.[6]

1.003 The 1844 Act was introduced at the height of a speculative boom in technology stocks — railways — following which there was the inevitable crash. Measures to permit the winding up of failed incorporated companies were introduced in 1846 – 1849[7] but their operation was first marred by resistance from purely passive investors who had been called upon to share in meeting the debts of a business in whose management they played no part[8] and then frustrated by conflicts of jurisdiction between the Bankruptcy and Chancery courts.[9] By 1855 the government was persuaded to respond to smaller investors and took the first step towards permitting limited liability for joint stock companies of 25 or more members. The 1855 Act[10] required at least 75% of the nominal capital to have been subscribed, at least 20 members to have paid up at least 20% of their shares and the addition of "Limited" in the company name. Such companies had to wind up upon loss of 75% of their capital and their directors were personally liable for any dividends paid or loans advanced knowing the company was insolvent. All of these measures were consolidated into the 1856 Companies Act[11] which in addition responded further to smaller investors and provided[12] that: *"Any seven or more persons associated for any lawful purpose may, by subscribing their names to a Memorandum of Association, and otherwise complying with the requisitions of this Act in respect of registration, form an incorporated company, with or without liability."*

1.004 Provisions for the protection of members included the requirement to hold annual general meetings and to permit inspection of a company's affairs if requested by investors holding 20% of its shares. Provisions for the protection of creditors included the requirement to maintain a registered office and registers of charges and directors.[13] The First Schedule to the 1856 Act included a default set of "Table A" regulations providing a basic governance structure.

1.005 Hong Kong's first Companies Ordinance of 1865[14] followed the 1856 English legislation as it similarly required at least seven subscribers and provided the same rudimentary provisions for the protection of creditors (establishment and maintenance

[6] The importance of fixing liability on a company's members had been previously emphasised in the Attorney General's speech moving the repeal of the Bubble Act and was later affirmed in *Re Sea, Fire & Life Assurance Co, Greenwood's Case* (1854) 3 DeGM&G 459.

[7] 9 & 10 Vict, Cap 28; 11 & 12 Vict, Cap 45; 12 & 13 Vict, Cap 108.

[8] *Re Sea, Fire & Life Assurance Co, Greenwood's Case* (1854) 3 DeGM&G 459.

[9] This and other features of the early companies statutes were argued at length in speeches introducing the 1856 Companies Bill; see Hansard (1 February 1856) vol 140 cc110-47.

[10] 18 & 19 Vict, Cap. 133.

[11] 25 & 26 Vict, Cap. 89.

[12] 1856 Companies Act, s.6.

[13] Disclosure continued to feature prominently in the further development of company law. The Davey Committee Report of 1895 concluded: "… to secure the utmost publicity is the end to which new legislation on the formation of companies should be directed".

[14] Ordinance No 1 of 1865: "An Ordinance for the Incorporation, Regulation, and Winding-up of Trading Companies and other Associations." A further Companies Ordinance was enacted in 1911. Section 307 applies the provisions of the current Companies Ordinance (Cap.622) to companies incorporated under the 1865 and 1911 legislation.

of a registered office) and the protection of members (requirement to hold general meetings).

1.006 The early form of registered company was markedly easier and cheaper to incorporate than securing private legislation or petitioning for the grant of a Royal Charter or letters patent and responded to the needs of smaller capitalists - many annual returns filed in England in the 1860s reveal companies with ownership spread relatively evenly among dozens or hundreds of shareholders[15] - but did not immediately appeal to the needs of England's small businessmen, almost all of whom carried on business as sole proprietors or partners.

1.007 The picture began to change in 1881.[16] Of a company incorporated in 1875 by seven entrepreneurs and their solicitor to exploit a patent and in which four of the shareholders were allotted shares for no consideration, the court held:

> *"… it is an established fact that when the company was formed it was intended to be a private company, that is, it was intended to carry it on without calling in the public, or issuing any shares except to the then existing shareholders."*[17]

1.008 But it was not until the 1890s that the incorporated company was able to respond to the needs of a sole proprietor. In July 1892 a certain Aron Salomon sold his boot manufacturing business to a registered company. He took part of the £38,783 purchase price[18] in shares - 20,001 shares in his own name and his six family members holding one share each as his nominee — and the balance in debentures with a face value of £10,000 and cash. But the incorporated business soon suffered and Salomon's debentures were cancelled and substituted by fresh debentures of £10,000 issued to Edmund Broderip to secure a further £5,000 advanced by Broderip to Salomon and then to the company. Business conditions remained unfavourable, however, and within only 7 months the company defaulted in paying interest on the fresh debentures.[19]

[15] The Oriental Gas Company Limited, incorporated 26 September 1856, listed 320 shareholders in its 1857 annual return. The Borneo Company Limited, incorporated 31 October 1859, listed 54 shareholders in its 1857 annual return.

[16] *Re British Seamless Paper Box Company* (1881) 17 ChD 467.

[17] *Re British Seamless Paper Box Company* at 479 per Cotton LJ.

[18] Around HK$40,000,000 in today's money; fraud was not pleaded but the trial judge had no doubt the purchase price was exorbitant.

[19] Salomon's business began to suffer quite soon after incorporation and it was in order to raise further funding he surrendered his own debentures in favour of Broderip. It was Broderip, rather than Salomon, who enjoyed secured creditor status on liquidation. Salomon took his appeal to the House of Lords as a pauper.

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Mr Salomon's boot-making business owned by a company, the beneficial owner of which is Mr Salomon; his wife and children hold shares for him as nominees.

Figure 1. Aron Salomon – Sole Proprietor

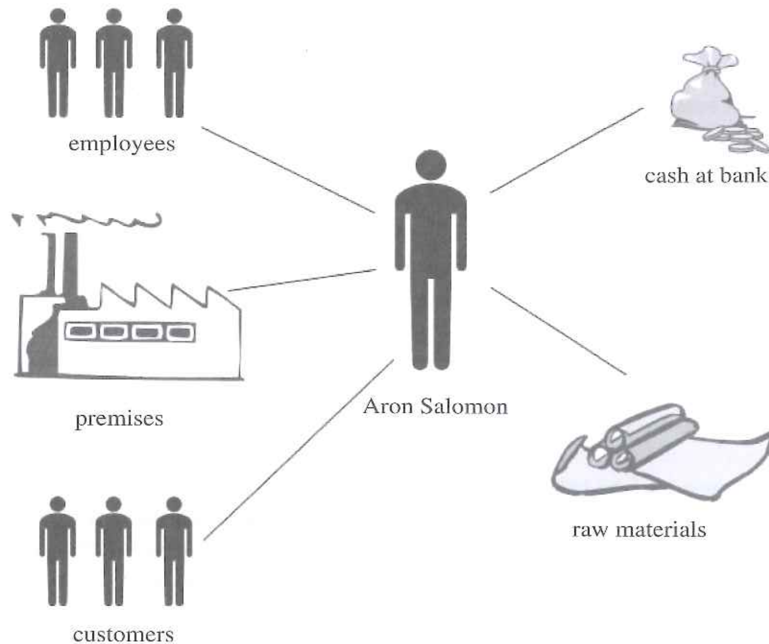
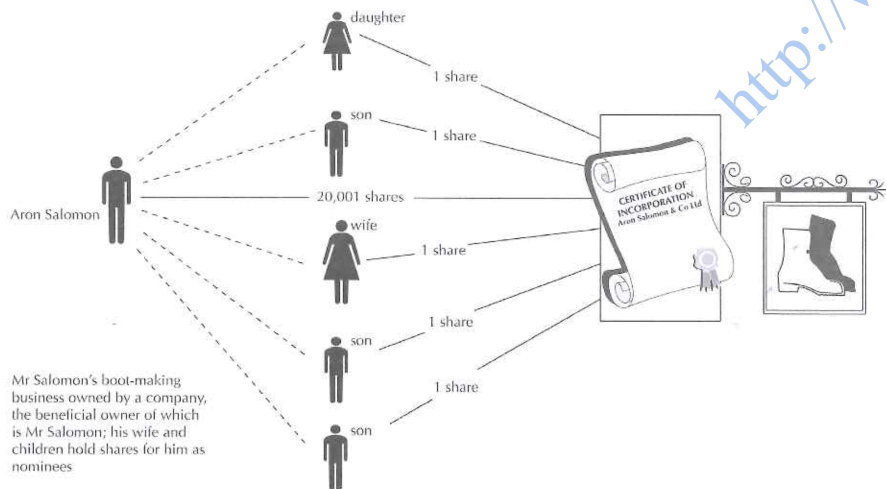


Figure 2. Aron Salomon & Co Ltd



1.009 Vaughan Williams J held at trial that Salomon & Co Limited was the agent of Aron Salomon who was bound to indemnify his principal and ordered that the creditors take priority.[20] The Court of Appeal felt that although the Companies Act was intended to confer separate personality on a corporation it needed at least seven genuinely independent shareholders. A "one-man" company was not what Parliament had in mind and to legalize the arrangement would be a scandal.[21]

1.010 But in a celebrated judgment[22] the House of Lords refused to accept that Salomon & Co Limited was either a sham or the alter ego of its founder and majority owner. The Companies Act did not demand that the seven subscribers to a company's memorandum be obviously independent nor that those subscribers need take a 'substantial' interest, nor that they have a mind and a will of their own:

> *"The company is at law a different person altogether from the subscribers to the Memorandum; and, though it may be that after incorporation the business is precisely the same as it was before, and the same persons are mangers, and the same hands receive the profits, the company is not in law the agent of the subscribers or trustee for them."*[23]

1.011 Incorporation was no longer the province of venture capitalists wishing to finance infrastructure projects of the day nor just a means of affording smaller investors opportunity to speculate with limited liability. The Salomon decision clearly demonstrated that incorporation now offered even the smallest entrepreneur the chance to stand behind a separate legal personality and limit his liability. And it was available to all, through the straightforward process of registration.

1.012 The UK Companies Act was amended in 1907 formally to recognise the concept of the private company and a similar change was introduced in Hong Kong in 1911.[24] However, in neither instance was this achieved by way of specially-designed legislation, but instead by way of exception and concession:[25] a company began life as a public company (and was subject to the full burden of the legislation) unless provisions limiting its shareholders to 50, restricting the transfer of its shares and prohibiting the public from subscribing for its shares were included in its incorporation documents.[26] The UK position was reversed in 1981 when a company was regarded as private unless steps had been taken to register it as a public company.

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[20] *Broderip v Salomon* [1895] 2 Ch 323, per Vaughan Williams J at 332.
[21] It would amount to "a perversion of the Joint Stock Companies Acts"; see also *Broderip v Salomon*, per Lopes LJ at 341.
[22] *Salomon v Salomon & Co Ltd* [1897] AC 22.
[23] *Salomon*, per Lord Macnaghten at 51.
[24] Ordinance No 58 of 1911.
[25] Section 66(10) of the 1911 Ordinance exempted private companies from circulating and filing statutory reports. The principal concession in the 1911 Ordinance regarding annual accounts was that s.77(8) exempting private companies from filing financial statements, a concession which still remains available in Hong Kong under the current CO, ss.662(1) & 662(3).
[26] Section 122 of the 1911 Ordinance.

1.013 For many years incorporated companies in Hong Kong have overwhelmingly been private companies with liability limited by shares[27] and their position as creatures of statutory exception has been debated for some years.[28] The taxonomy introduced by the Companies Ordinance (Cap.622) ("CO" or the "Ordinance") in 2014 provides[29] for: (a) public companies whose members' liability is limited by shares; (b) private companies whose members' liability is limited by shares; (c) public companies with share capital but whose members' liability is unlimited; (d) private companies with share capital but whose members' liability is unlimited; and (e) companies whose members' liability limited by guarantee alone.

1.014 A *private* company is defined: as a company whose members' liability is not limited by guarantee and which is also by its articles of association prohibited from: (i) inviting public subscription for its shares or debentures; (ii) freely transferring its shares; and (iii) registering more than 50 members.[30] Any company other than a private company or a guarantee company falls to be regarded as a *public* company.[31] Model Articles of Association for: (i) public companies are reproduced hereto at [*Appendix 36 of this text*]; (ii) those for private companies are reproduced hereto at [*Appendix 37 of this text*]; and (iii) those for guarantee companies are reproduced hereto at [*Appendix 38 of this text*].

Separate Legal Personality

1.015 Although a company has separate legal personality from the individuals who ultimately own it (shareholders or 'members'), it can only act through natural persons (directors). Unless and until action is taken to terminate its existence through a winding-up, deregistration or striking off a company enjoys a perpetual life and capacity to enter into business relationships and other legally binding obligations, to sue and be sued, entirely independent of its owners.[32]

1.016 The companies courts have a long history of respecting separate legal personality,[33] but the extent to which the privilege of incorporation can be abused has never been far from jurists' minds[34] and this separate personality will be ignored where required by established principles.[35] The Hong Kong courts recognize that use of a corporate structure to evade legal obligations which already exist is objectionable, whereas use of a corporate structure to avoid the incurring of legal obligations which have not arisen is not[36] and the courts will only pierce, draw or lift[37] the corporate veil in exceptional circumstances.[38] Corporate personality was created so as to give to a company separate legal identity in order that it could carry on commercial activities in the same way as an individual and distinct from its shareholders and should be viewed with a healthy commercial realism.[39] But detecting a clear theme through the cases, however, is far from straightforward.

[27] Figures released by the Registrar of Companies as of 30 May 2017 showed some 1,369,251 companies on the register, comprising 1,355,241 private companies, 13,322 guarantee companies and 688 public companies.

[28] The Companies Ordinance Review, commissioned in November 1994, recommended the introduction of a North American-style Business Corporations Ordinance, in which there would not be any private / public distinction.

[29] CO, s.66.

[30] CO, s.11.

[31] CO, s.12.

[32] CO, s.73.

[33] *Gas Lighting Improvement Co v Inland Revenue Commissioners* [1923] AC 723, as per Lord Sumner at 741: *"Between the investor, who participates as a shareholder, and the undertaking carried on, the law interposes another person, real though artificial, the company itself and the business carried on is the business of that company, and the capital employed is its capital and not in either case the business or the capital of the shareholders. Assuming, of course, that the company is duly formed and is not a sham... the idea that it is mere machinery for effecting the purposes of the shareholders is a layman's fallacy. It is a figure of speech which cannot alter the legal aspect of the facts."*

[34] Writing in 1944, Otto Kahn-Freund regretted how the limited liability company had too often become the means by which liabilities could be evaded and real interests concealed (1944) 7 MLR 54; and suggested that: *"the surfeit of companies introduces into many branches of the law an element of caprice incompatible with the certainty which is the life-blood of commercial law."*

Fraud and Evasion of Existing Legal Obligations

1.017 The court will not hesitate to pierce the veil where it finds a company is used to perpetuate a fraud or used deliberately to evade *existing* legal obligations such as avoiding the consequences of a non-solicitation clause,[40] avoiding liability for commission payable in a property transaction,[41] or the obligation to pay employees sums due in lieu of notice.[42]

1.018 The courts have previously held that where assets have been deliberately removed from a company by its *alter ego* controlling shareholder for his own use in order to defeat potential claims against the company the court may pierce the veil and treat the *alter ego* controlling shareholder as liable for the company's debts.[43] It is one thing, however, to strike down a purported transfer of assets as ineffective. It is quite another matter to

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[35] Kahn-Freund observed in 1944 that it was then a matter of guesswork whether the court would allow parties to draw the veil or be forced to draw it; as the cases below will illustrate, an element of guesswork still persists.

[36] *China Ocean Shipping Co v Mitrans Shipping Co Ltd* [1995] 3 HKC 123, per Bokhary JA at 127.

[37] Although these terms may appear at first blush to be interchangeable, Staughton LJ suggested in *Atlas Maritime Co SA v Avalon Maritime Ltd (No.1)* [1991] 4 All ER 769 that there is an important difference: *piercing* the veil amounted to treating the company's rights, liabilities and activities as those of its shareholders (in which case the shareholders would themselves be fixed with the company's liabilities), whereas *drawing or lifting* the veil meant ignoring the existence of the corporate form in order to give effect to a particular legislative provision (such as treating a locally incorporated entity as an enemy alien, as was the case in *Daimler Co Ltd v Continental Tyre & Rubber Co (GB) Ltd* [1916] All ER 191.

[38] "The concept of a limited liability company being a separate legal entity from the person who controls it is well-entrenched in our laws, and the corporate veil should not be lifted unless circumstances clearly require it under established rules." See *Maxgood International Ltd v Charter Victory International Ltd* [2001] 3 HKLRD 547, per Yuen J at 553.

[39] *Winland Enterprises Group Inc v Wex Pharmaceuticals* [2012] 2 HKLRD 757 per Hartmann JA at §50.

[40] *Gilford Motor Co Ltd v Horne* [1933] Ch 935, where a former managing director sought to employ a company controlled by him to evade the consequences of a non-solicitation clause in his contract; the director and his company were both restrained from acting contrary to the clause.

[41] *Centaline Property Agency Ltd v Cyberspeed Technology Co Ltd* [2007] 4 HKLRD 745, where the sales manager of the purchaser of a property, having agreed to purchase the property through P, went and formed a company for the purposes of purchasing the property through a third party at a reduced commission; the sales manager and his company were held liable for breach of contract with P. D's counsel argued in vain that *China Ocean Shipping v Mitrans* supported his client's case, perhaps not appreciating that the legal obligation D had employed his company to evade was the one with P which had already arisen.

[42] *Lee Sow Keng v Kelly McKenzie Ltd* [2004] 4 HKLRD 517, where P had given notice to leave her corporate employer L whose business was carried on under the business name "Kelly McKenzie", only to be dismissed without pay; L's controlling shareholders subsequently formed D in order to carry on L's business and the court held that D had been used by its controlling shareholders to evade the amount due to P. D and its controlling shareholders were liable for that amount.

[43] *Creasey v Breachwood Motors Ltd* [1993] BCLC 480, where directors facing ex-employee P's unfair dismissal claim stripped company W of its assets and injected them into new company B controlled by them which then

hold the transferee of those assets liable in damages for the wrongs committed by the transferor of the assets prior to transfer,[44] an approach by the UK Court of Appeal amounting to a wrong adoption of the principle by which the veil may be pierced and a misuse of the power granted by court rules to substitute one party for the other.[45]

1.019 Similarly in Hong Kong, although at trial the Hong Kong court has held that the owner of an insolvent subsidiary company should be liable in damages to particular creditors of the subsidiary in respect of losses allegedly suffered by the subsidiary upon disposal of assets at an undervalue[46] the Court of Appeal took the contrary view. Even if it could have been shown that the subsidiary had disposed of assets at an undervalue the consequence was that it was for the subsidiary to pursue its own cause of action for the benefit of the subsidiary and all creditors.[47] Lifting or piercing the corporate veil is a relief or remedy and not does not give rise to a cause of action in itself.

1.020 The veil may be pierced where a company has been employed as a device or mere façade to conceal the truth. Although the case of a director causing money to be transferred from a company to his own personal company in order to defeat existing claims of creditors of the first company might otherwise appear risking the wrong adoption of the principle by which a transferee may be made liable for the transferor's pre-existing obligations, where there is identity of personalities then the court will hold that the transferee company is not merely a recipient of funds but a façade to conceal the truth, being the receipt of funds by the director personally.[48] Similar approaches have been found where a supplier to a business was delivering against orders placed by one company but being paid by a second company, both of which were owned and managed by the same individuals,[49] and where a BVI company was treated as acting as nothing more than its controller's *alter ego* in the receipt of funds diverted by him from

carried on W's business and the court ordered that B be substituted as defendant in P's action to recover damages for unfair dismissal; a similar decision was made in *The Tjaskemolen* [1997] CLC 521.

44 *Yukong Line Ltd v Rendsberg Investments Corp (No.2)* [1988] 1 WLR 294, per Toulson J.

45 *Ord v Belhaven Pubs Ltd* [1998] 2 BCLC 447, per Hobhouse LJ at 457: "The approach of the judge in the present case was simply to look to the economic unit, to disregard the distinction between the legal entities that were involved and then to say: since the company cannot pay, the shareholders who are the people financially interested should be made to pay instead. That of course is radically at odds with the whole concept of corporate personality and limited liability and the decision… in *Salomon*".

46 *Horace Yao Yee Cheong v Pearl Oriental Innovation Ltd* (unrep., HCA 916/2006), where in a bold judgment the learned judge felt it impermissible "that assets be stripped away from one entity without proper or sufficient value being given for such assets and at the same time the existing liabilities of that entity (or at least a part of them) are not met and the creditors left high and dry." No doubt it was, but in circumstances where a defendant has not assumed liability for the debts of a subsidiary acquired through a scheme of arrangement, it is respectfully submitted that it is a wrong adoption of the principle by which the veil may be pierced in order to fix the new owner itself with liability; although the learned judge sought to invoke Bokhary JA's distinction in *China Ocean v Mitrans*, if the transferee was not subject to any pre-existing legal obligation in respect of the subsidiary's debts then there was surely no legal obligation which was later evaded.

47 *Horace Yao Yee Cheong v Pearl Oriental Innovation Ltd* (unrep., CACV 146/2009) per Rogers VP at §35: "If the plaintiffs were to succeed in recovering from the defendant on the basis that they were recovering assets that should have belonged to [the subsidiary], the other creditors [of the subsidiary] would not recover their just share."

48 *Trustor AB v Smallbone* [2001] 2 BCLC 436, applied in *Liu Hon Ying v Hua Xin State Enterprise (Hong Kong) Ltd* [2003] 3 HKLRD 347.

49 *Yue Tai Plywood & Timber Co Ltd v Far East Wagoner Construction Ltd* [2001] 2 HKLRD 446.

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the business of which he was director and therefore owed fiduciary duties.[50] Similarly in the case of a company established to receive assets which, in anticipation of insolvency, had been disposed of through an intricate web designed to conceal[51] and also where sale of property at an undervalue to an associate of a director was held to be a sham transaction in which that director was interested.[52]

1.021 But common ownership, even identity of ownership and control, is of itself insufficient to persuade the court to pierce the veil. Time and again the courts talk of piercing the veil in order to achieve justice[53] but where there is no evidence whatsoever of any exceptional circumstances ("shenanigans", in the language of the judge) then the corporate structure is untainted and will be respected.[54]

1.022 Where there is no common identity established between the company and controlling wrongdoer, if the nature of the wrongdoing fixes the company with separate liability (perhaps taking advantage of a corporate opportunity) then the extent of wrongdoing involved would make the company jointly liable with the wrongdoer director for breach of trust.[55] Moreover, where a company has been used as a device or façade to conceal outright criminal activities then the court will unhesitatingly pierce the veil and treat the company's property as that of its criminal owner.[56]

Agency

1.023 It is a cardinal principle of the *Salomon* decision that a company is not in law an agent of its owners, even if their number be just one[57] and that something particular must be shown to constitute it as agent.[58] It is of course very common for some or all of a holding company's business to be conducted by subsidiaries on its behalf, but whether

50 *Gencor ACP Ltd v Dalby* [2000] 2 BCLC 734.

51 *Re a Company* [1985] BCLC 333.

52 *Cheung Hing v Wong Chor Cheung* (unrep., HCA 925/2010).

53 *Centaline Property Agency Ltd v Cyberspeed Technology Co Ltd* [2007] 4 HKLRD 745, per HH Wong at 758.

54 *Toptrans Ltd v Delta Resources Co Inc* [2005] 1 HKLRD 635, where P obtained a judgment against D1 whose assets were insufficient to satisfy it. D1's owner D2 had guaranteed D1's debts and also owned C, but when P sought to seize C's assets, arguing that since C and D1 were under D2's common ownership, the court declined to assist. P's suggestion that C had been used to draw attention away from D1, causing D1 to fade away and leave C with assets but no liabilities had not been established.

55 *CMS Dolphin Ltd v Simonet* [2001] 2 BCLC 704, per Lawrence Collins J at 735 as the company concerned had real premises and staff.

56 *Re H (restraint order)* [1996] 2 BCLC 500, involving excise duty fraud, the proceeds of which had been injected by the defendants into (inter alia) two family companies; see also *HKSAR v Leung Yat Ming* [1999] 2 HKC 754, where a family company was used to facilitate dishonest declarations for rental allowances.

57 *Gramophone and Typewriter Ltd v Stanley* [1908] 2 KB 89, per Cozens Hardy MR at 95: "*it does not in any way diminish the rights or powers of the directors, or make the property or assets of the company [that of the owner], as distinct from the corporation's. Nor does it make any difference if he acquires not practically the whole, but absolutely the whole, of the shares. The business of the company does not thereby become his business.*"

58 *Yukong Line Ltd of Korea v Rendsburg Investments Corp (No.2)* [1998] 1 WLR 294, per Toulson J at 304H; see also *Waddington Ltd v Thomas Chan Chun Hoo* (unrep., HCA 3291/2003, per Barma J: "*I think that it must be acknowledged that there may be several legitimate reasons why a group of companies will be structured in a way that involves the use of wholly owned subsidiaries. For example, it may be thought desirable to have different subsidiaries through which to carry on different aspects of the group's business activities, or there may be legitimate tax planning reasons why particular assets should be held by separate subsidiaries. That being so, in the absence of clear evidence to the contrary, I do not think that the court should be too ready to disregard the separate legal personality of companies within a group, and to regard an asset owning subsidiary as nothing more than a cipher or nominee for its parent or ultimate parent company.*"

such conduct amounts to a relationship of principal and agent will depend on the facts.[59] The following characteristics will usually be addressed:[60]

- Which of the parent and subsidiary was tasked with decision making functions?
- Were the subsidiary's profits: (a) accounted for as those of the parent or subsidiary; (b) made by the skill and direction of the parent or subsidiary; and (c) made by individuals employed by the parent or subsidiary?
- To what extent was the parent in full and constant control of the subsidiary?

Application of those characteristics was not necessary, however, to determine whether the transfer of shares in a fund management business by the subsidiary of an insolvent holding company amounted to an improper disposition of the holding company's property where the situation was straightforward and turned on whether the registered owner of the shares was holding for itself or as bare nominee for the insolvent parent.[61]

Group Structure Operates as Single Enterprise

1.024 Although there is no fundamental legal principle deeming entities within a group as together being treated as one overall enterprise, global businesses often present the advantages of common standards of product or service.[62] The courts, however, have been careful to avoid confusing economic and legal entities[63] but recognise that governments and regulatory bodies look at economic, not legal, entities when considering whether an applicant is fit and proper to be awarded a particular licence or given a particular form of registration, or even to claim compensation for compulsory purchases of land by the government.[64] The overall group structure argument did not prevail, however, when creditors holding judgments obtained in the USA against a UK company and its parent were later denied the opportunity of enforcing those judgments in the UK.[65]

[59] It is not necessarily the case that the subsidiary will be acting as agent and it may well be that the parent acts as agent for the subsidiary.

[60] *Smith, Stone & Knight Ltd v Birmingham Corp* [1939] 4 All ER 116, per Atkinson J at 121.

[61] *Peregrine Investments Holdings Ltd v Asian Infrastructure Fund Management Co Ltd LDC* [2003] 1 HKLRD 209, per Yuen J at 223.

[62] Even before the advent of global branding, multinational businesses ran matrix structures so that particular business lines were undertaken through local dedicated subsidiaries: see *Re Barings plc (No.5)* [1999] 1 BCLC 433 at 443.

[63] *Re Polly Peck International plc* [1996] 2 All ER 433, where a subsidiary's claim as creditor of the parent was not subordinated or postponed to the interests of general creditors.

[64] *DHN Food Distributors Ltd v Tower Hamlets* LBC [1976] 1 WLR 852, a case which along with a small number of similar cases, has been restricted to their own facts.

[65] *Adams v Cape Industries Pty* [1990] Ch 433, per Slade LJ: *"we do not accept as a matter of law that the court is entitled to lift the corporate veil... merely because the corporate structure has been used so as to ensure that the legal liability... in respect of particular future activities... will fall on another member of the group rather than the defendant company."*

Other Examples

1.025 The Family Court is no stranger to spouses using corporate structures to hold matrimonial assets,[66] nor is it intimidated by use of sophisticated structures to obfuscate a spouse's financial affairs, hide assets[67] or wrest control.[68] Whereas family law concerns the court's application of discretionary considerations in distributing matrimonial assets as between husband and wife, often in circumstances where a spouse concedes that a company asset may be treated as his (or hers - as the case may be), company law is of course predominantly concerned with resolving disputes among parties dealing with each other contractually at arms' length.[69] The factual matrix of company ownership may make it easier for the court to pierce the corporate veil[70] in the particular context of a family law dispute but the relevant legal principles to be adopted are no different than in other cases where third party or creditor interests are concerned.[71] Although in appropriate cases the assets of passive investment companies will readily be attributed to the shareholder spouse the courts will be slower to proceed in the case of an active business where there may be other investors involved or the interests of creditors must be respected.[72]

1.026 Related to family disputes are shareholder disputes and the "just and equitable" rationale for addressing jointly-owned companies as if they were quasi partnerships leads the courts to pierce the veil more readily.[73]

1.027 The statutory provisions governing the disqualification of directors entitle the court to have regard to other companies of which a director has also been director or involved in their management.[74]

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[66] *Nicholas v Nicholas* [1984] FLR 285 where at 292 Dillon LJ stated that: *"... although he would have had no difficulty in ordering a transfer of the company's property to he wife if the company were wholly-owned by the husband in light of the fact that 31% of the company was held by third party business associates he could not disregard the principle of separate legal personality."*

[67] *A v A (St George Trustees, Interveners)* [2007] 2 FLR 467 at §18; see also *Prest v Petrodel Resources Ltd* [2013] 2 AC 415 where properties vested in several companies were treated in ancillary relief proceedings as beneficially belonging to the husband.

[68] *Poon v Poon* [1994] 2 FLR 857, where the Family Court restrained the petitioner wife from placing resolutions before a family company general meeting to cause the removal of her husband director and the appointment in his place of her new husband by Chinese custom; her submissions that disputes over the company's affairs were exclusively a matter for the Companies Court was regarded by Thorpe J as unrealistic and contrived: *"This is a family business which the family chose to incorporate. All current disputes within the family should be litigated within this one court."*

[69] *Mubarak v Mubarak* [2001] FLR 673, per Bodey J at §47 to §49.

[70] Or, as Bodey J put it in *Mubarak v Mubarak* at §50: *"...short-circuiting the usual requirement for the company to declare an in specie dividend of its asset to the one spouse so that it may then be transferred by Family Court order to the other."*

[71] *A v A (St George Trustees, Interveners)* [2007] 2 FLR 467 at §21.

[72] *Mubarak v Mubarak* [2001] FLR 673 where, although Bodey J accepted on application of the companies concerned that he was not entitled to pierce the corporate veil in the particular circumstances; see chapter 14 of this text. See also *Goldmen Electronic Co Ltd v Shum Wai* Man [2002] 2 HKC 324, per Poon D-J at 328: *"Where the assets sought to be distributed, including matrimonial home, are held by a company, the court may in appropriate cases lift the corporate veil to effect distribution."*

[73] In *Re Active Team International Ltd* [2005] 4 HKLRD 375, the petitioner and respondent carried on a primary school business through several jointly-owned subsidiaries. However, the court looked at the entire picture.

[74] CWUO, s.168H(2).

1.028 The statutory provisions[75] governing compulsory acquisition of minority interests in takeovers cannot be evaded by use or related companies and nominees.[76] Further, if the particular requirement of a scheme of arrangement[77] to secure a majority of the shares in number, but holding 75% of the shares by value, in order to bind remaining shareholders is met through splitting of a member's shares among several shareholders such device will tarnish the application presented to the court for sanction and likely result in the court's refusal to sanction.[78] In the case of listed companies a general offer or takeover bid for shares pursued by way of scheme of arrangement is in addition subject to the number votes cast against not exceeding 10% of total voting rights attached to all "disinterested" shares.[79]

1.029 In exchange for the grant of the privilege of separate personality and the ability of members to limit their liability in case of business failure,[80] a company must pay an annual registration fee and comply with a number of *ad hoc* and regular reporting requirements in order to disclose important information to creditors. Its owners must observe the internal constitutional rules that provide for its governance and the election of directors. The company's directors, also "shadow" directors,[81] are required to perform their duties with care and skill[82] and its directors must ensure that in conducting its affairs the company observes the requirements of the Ordinance and other relevant laws and are expected to comply with the 11 principles outlined in the Registrar's Guide on Directors' Duties[83]. Directors must in particular be careful not to profit from their position as directors and must disclose material interests they might have in any transactions with the company. Connected transactions are a common feature of the owner-managed incorporated business.[84]

[75] CO, ss.673 and 674.
[76] *Re Bugle Press Ltd* [1961] 270.
[77] CO, s.674.
[78] *Re PCCW* (unrep., CACV 85/2009), per Lam J at §139: *"share splitting, when it occurs on a material scale, does have the effect of distorting the picture in terms of having a resolution fairly representative of the will of the bona fide majority" and at §149: "transferring shares to nominees with direction to vote in a particular manner is only one of the many forms of vote manipulation."*
[79] CO, s.674(2)(a)(ii), as applied in *Re Cheung Kong (Holdings) Ltd* [2015] 2 HKLRD 512.
[80] CWUO, s.170(1) provides that, in the event of a winding-up, past and present members shall be liable to contribute towards the company's liabilities and costs of winding-up but that: "no contribution shall be required from any member exceeding the amount, if any, unpaid on the shares in respect of which he is liable as a past or present member."
[81] CO, s.2: "a person in accordance with whose directions or instructions (excluding advice given in a professional capacity) the directors, or a majority of the directors, of the body corporate are accustomed to act;"
[82] CO, s.465 codifies the duty of care rather than the fiduciary duties owed, applied in *Securities and Futures Commission v Yingneg, Richard* (unrep., HCMP 2502/2012) where directors were disqualified and ordered to compensate the company for losses suffered.
[83] Issued March, 20014. Can be found at: http://www.cr.gov.hk/en/publications/docs/director_guide-e.pdf. See also [*Appendix 1 of this text*].
[84] The owner-managed business has more in common with the ancient form of corporation sole than a company. It is often, but wrongly, assumed that "company" is synonymous with "corporation." The word "company" means fellowship and derives from the Latin "eating bread together," and does not necessarily involve separate legal personality. By contrast, the Financial Secretary Incorporation Ordinance (Cap.1015) constitutes the person for the time being performing the duties of the office of Financial Secretary of Hong Kong to be a corporation sole. The Financial Secretary Incorporated has legal personality with perpetual succession quite separately from the natural person who holds that particular office, but it (the corporation sole) is not a company.

1.030 The advantage of limited liability for a private company's members is in real life more apparent than real. Unless the members contribute significant amounts of capital to a company, major creditors such as banks will invariably seek security in the form of personal guarantees from the members as a condition of lending.

The Private Company

1.031 A private company is a company formed under the Ordinance or the predecessor CO whose members' liability is not limited by guarantee and whose internal constitution (articles of association):

- restricts the company's right to transfer its shares; and
- limits the number of the company's members to 50; and
- prohibits the company from inviting the public to subscribe for its shares[85]

All of these conditions must be maintained, so if it is desired to form a company capable of being owned by more than 50 members, the intending founders will have to form a public company limited by shares. If in addition, the founders wish the company to be permitted to invite the public to subscribe for those shares, they will be looking towards forming a public company that will issue a prospectus and apply to a Stock Exchange to have its shares admitted to the official listings of securities — hence the term 'listed company'. Features specific to listed companies are covered in chapter 4 of this text.

Principal Uses of the Private Company

1.032 Private companies are formed for a wide variety of purposes. Their minimal formation requirements (one man and a lawful purpose) mean that they are found on their own as the legal form of the smallest owner-managed investment vehicle, trading or service business. They are found in their dozens as subsidiary companies within large and powerful local and international corporations. Furthermore, private companies are the ideal means of providing structure to jointly owned enterprises large and small.

[85] CO, s.11.

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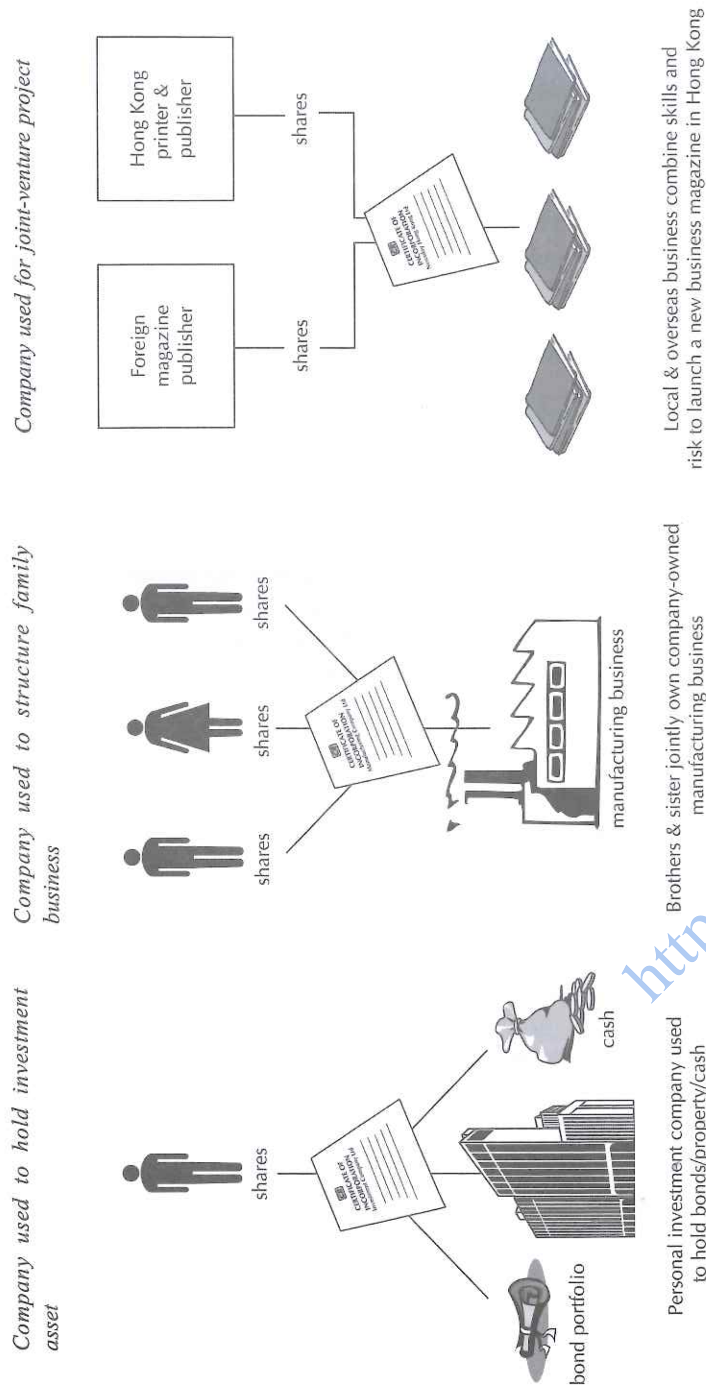
Figure 3.



Local & overseas business combine skills and risk to launch a new business magazine in Hong Kong

1.033 Identity of ownership and management is not required, but a distinguishing feature of many private companies is the deliberately close relationship between owners and managers, whereas in large, often listed, companies a shareholder base of several thousand[86] entrusts the management task to be supervised by a board of around 12. Regardless of the size of a company, however, company law treats owners and managers as occupying entirely separate roles and having separate levels of authority. The fact that the same individuals happen to occupy both roles is a common feature of the private company, which frequently gives rise to considerable confusion.

1.034 The separate legal personality that Aron Salomon was able to exploit in 1897 remains a key advantage for individuals wishing to shelter their personal wealth from taxes, inquisitive third parties or simply for reasons of efficiency. For example, the cost and complexity of selling shares in a company that owns an apartment can be much less than what is involved in selling the apartment itself. And as many apartment owners have discovered, the amount of stamp duty assessable on the value of the shares of a property owning company is a fraction of the equivalent duty charged on the property.[87]

1.035 Hong Kong has a long history of providing corporate and nominee services to local and non-Hong Kong individuals and organisations that are unable to attend personally to the control of transactions or wish to distance themselves from direct ownership of assets or control of transactions. And although a private company must ultimately operate through the medium of one or more individuals, it is possible to engage professional services firms to provide corporate nominee directors and authorised signatories.[88]

1.036 The advantages of confidentiality have also given rise to illegitimate uses of the private company. Tax evasion, money laundering and the covert accumulation of funds for organised crime and terrorist organisations led to the establishment of the 37-member Financial Action Task Force (FATF), which was given responsibility for examining money laundering techniques and trends, reviewing action taken at national and international level, and setting out further measures to be taken to combat money laundering. Hong Kong introduced the Anti-Money Laundering and Counter-Terrorist Financing (Financial Institutions) Ordinance (Cap.615)[89] in 2012 to require financial institutions to enforce customer due diligence measures, including verifying the identities of individual customers and beneficial owners of corporate customers.

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[86] Hong Kong's Mass Transit Railway Corporation has a shareholder base of over 250,000.

[87] The combined *ad valorem* duty, special stamp duty and buyer's stamp duty payable on the purchase of an apartment exceeding HK$21,739,130 can be as high as 43.5% of its full value, whereas the total stamp duty payable by buyer and seller of shares of a company owning the same apartment would be only 0.2 per cent of the net value of the shares.

[88] The dangers of blindly following instructions in circumstances which were undoubtedly suspicious were highlighted in *Agip (Africa) Ltd v Jackson* [1990] Ch 265 where Jackson, a practising accountant, was held liable as constructive trustee of funds which had been misappropriated by the private company of which he was a nominee director: "Mr Jackson and Mr Griffin are professional men. They obviously knew that their clients were laundering money," said Millet J at 294.

[89] Cap.615, enacted 1 April 2012.

1.037 Hong Kong's record in implementing FATF recommendations is very good. However, FATF Annual Reports consistently illustrate the way in which criminal and terrorist funds are laundered through nominee-driven private companies. The CO does not prohibit private companies from appointing corporate nominees but now requires such companies to have at least one natural person appointed as director.[90] Public companies, private companies which are members of groups of companies of which listed companies are members and guarantee companies are prohibited from appointing corporate nominee directors.[91]

1.038 The chapters that follow illustrate the required procedures involved in incorporating, structuring, managing and winding up companies. Also illustrated are the various *ad hoc* and routine disclosure obligations required by the CO. Many of these obligations were reviewed and refined in 2014, not only in order to simplify and clarify the requirements of business owners and managers but also to enhance standards of corporate governance and it is consequently important that individuals who own or manage companies, particularly listed companies, comply with those obligations in a timely manner. The Registrar of Companies regularly prosecutes[92] not only public filing delays and failures but also internal governance failures such as breach of the requirement to register the personal representative of a deceased member within the prescribed period. Breach of securities legislation, takeover codes and stock exchange listing rules can result in criminal prosecution, reference to the Market Misconduct Tribunal and disciplinary sanction by regulatory authorities.

Other Types of Company

1.039 Companies may be formed so that their members' liability is limited or unlimited.[93] Where members' liability is limited, it is usually limited to the amount paid up (or agreed to be paid up) in respect of each share owned. Less frequently, it is limited by a specific amount each member undertakes or guarantees to pay in the event of the company experiencing financial difficulties when being wound up.

1.040 Guarantee companies do not issue shares and do not typically share their profits among members.[94] Members do not have a 'share' in the economic interest that can be sold to someone else, and membership ceases on death or earlier withdrawal. Guarantee companies are, however, inherently more democratic: there is no mechanism for

[90] CO, s.457.
[91] CO, s.456.
[92] Prosecutions commenced during 2010 to 2015 averaged almost 5,000 annually and fines imposed exceeded $10,000,000 annually.
[93] CO, s.66. The term "limited liability company" is, if considered as applicable to the incorporated entity, strictly misleading, since it is not the liability of the company that is limited, but the liability of its owners.
[94] A common misconception is that a guarantee company is not permitted to distribute profits — it is. If a guarantee company desires to obtain a licence to dispense with using "Limited" in its name, it will be required to show to the Registrar's satisfaction that its constitution prohibits the payment of dividends to members. Guarantee companies that do not seek this dispensation are not prohibited from sharing profits among members. The CO, s.99(2) prohibition on participation in divisible profits of a guarantee company applies only to non-members.

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accumulation of other members' interests and so, absent specific provisions in the articles, one member has one (and only one) vote. These are dealt with in chapter 19.

1.041 The statutory definition of the private company[95] specifically excludes companies limited by guarantee.[96] Sports clubs, professional bodies, cultural and recreational societies and educational institutions are commonly incorporated as guarantee companies and these are dealt with in chapter 19 of this text.

1.042 Following China's resumption of sovereignty over Hong Kong in 1997, an increasing number of mainland Chinese companies have established offices in Hong Kong and many such companies have listed their shares on the Hong Kong exchange.[97] Furthermore, Hong Kong's professional services firms have for many years administered non-Hong Kong companies from a variety of low tax jurisdictions. Part XVI of the Ordinance contains a detailed regime governing disclosure obligations, which follow a non-Hong Kong company's establishment of a place of business in Hong Kong. The impact of this regime is covered in chapter 3 of this text.

1.043 The Building Management Ordinance (Cap.344) provides a mechanism whereby owners of an apartment building may incorporate themselves for the purposes of maintaining the common parts of their building. Over 10,000 such corporations have been formed and they are dealt with in chapter 19 of this text.

Other Types of Business Association

1.044 Although the private company appears to be the most popular entity used for investment and business purposes[98] it is by no means the only form available, nor is it necessarily the most suitable. Alternative forms are usually the sole proprietorship, partnership and a form of unincorporated association, the contractual joint venture. In choosing between a private company and other forms of entity, the following key considerations arise.

Limitation of liability

1.045 Limiting liability is relatively unimportant where the mere holding of a passive investment is concerned but more important to owners of trading businesses and investors in high-risk projects. Sole proprietors and partnerships have unlimited liability, whereas the liability of members of a company is limited to the amount which has been agreed as the amount to be paid up on for shares. However, limited liability is

[95] CO, s.11.
[96] There was no such clarity prior to 2014 and so specific regulatory provisions such as the Hong Kong Code on Takeovers & Mergers, rules 2.4 and 2.5 referring to 'public companies' inadvertently applied to guarantee companies.
[97] A greater number of companies whose shares are listed on the stock exchange are incorporated in Bermuda and the Cayman Islands, however.
[98] The Business Registration Office records around 1,400,000 businesses, of which around 1,200,000 are Hong Kong and non-Hong Kong companies; the balance of around 200,000 businesses comprises partnerships and sole proprietorships.

often more apparent than real for members of private companies since major creditors routinely require personal guarantees from members in addition to any security they may take over the company's assets.

Confidentiality

1.046 Investors are rarely keen to disclose the extent of their wealth and business owners are universally wary of allowing competitors knowledge of their financial condition. Sole proprietors and partnerships need not disclose anything beyond the rudimentary Business Registration Ordinance (Cap.310) requirements of owners' names and business address and, unless they engage in certain types of business, need not have their accounts audited.[99] Although private companies need not publicly disclose their financial condition, their accounts must be audited annually and particulars of company officers and the extent to which company assets are secured must be kept up to date with the Registrar.

Formality and cost of compliance

1.047 Sole proprietors and partnerships are able to commence, alter and terminate their entities with minimal formality and low compliance costs. Sole proprietorships are formed at will and partnerships, limited liability partnerships, and limited partnerships are formed by deed or otherwise governed by the Partnership Ordinance (Cap.38). Limited partnerships are in addition governed by the Limited Partnerships Ordinance (Cap.37). Both enjoy maximum flexibility in their ability to organise their entities. Private companies are required to observe a range of statutory requirements and appoint auditors to review their annual financial statements and compliance costs. The privilege of incorporation and grant of limited liability require companies to observe a number of procedural requirements that address their good governance. Private companies cannot be expected simply to wither away once their purpose is completed. They must be formally wound up, liquidated or dissolved; otherwise their affairs are required to be placed in good order to support an application to be deregistered.

Continuity

1.048 Since business assets are vested in the personal names of individual sole proprietors and partners, the departure or death of a sole proprietor or partner operates at common law automatically to terminate the business and can make it difficult for the business to be continued or sold. The deaths of a small number of sole proprietor stockbrokers in the 1990s saw investors' accounts frozen pending the grant of probate to the deceased's estate and these events triggered the Stock Exchange to encourage brokers to incorporate broking operations and to transfer their businesses to them. The separate legal personality of the private company means that business assets are owned by the company rather than the members. Departure or death of a member may deprive a private company of management skills if he is in addition a director, but there is otherwise no impediment to the company continuing its business and it is not uncommon for companies to continue well beyond the lives and expectations of their original founders, often diversifying into completely new businesses.[100]

[99] Solicitors' financial statements need not be filed with the Law Society but accountants' reports made on the firms' books of account must be filed annually.

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Structure

1.049 A sole proprietorship ceases upon the admission of a further proprietor and becomes a partnership, requiring agreement of the partners to a form of partnership deed, failing which their relationship will be governed by the Partnership Ordinance (Cap.38). The addition of a new partner to partnership operates at common law to dissolve the existing partnership and create a fresh partnership, so changes in participation usually require the consent of all existing partners. Although a company's board will reserve the right to decline new members, where they wish to admit newcomers this is achieved by the simple expedient of issuing further shares.

Borrowing

1.050 Use of a company offers two advantages: first, whereas the borrowings of sole proprietorships and partnerships are secured against the personal assets of the proprietors and partners, companies' borrowings are secured against the assets of the company and not its owners;[101] and second, fixed charges require the chargee's consent every time charged property is to be sold and only companies are capable of granting the more flexible form of security known as the 'floating charge' which leaves the company free to acquire and dispose of business assets covered by the charge in the meantime, provided that disposal is in the ordinary course of business. A floating charge enables business to continue unaffected by any changes in the numbers or personalities of the company's owners.[102]

Sole Proprietorship

1.051 Certain professions[103] cannot be carried on in partnership with others or through a separately incorporated entity. Their individual practitioners are, however, required to register under the Business Registration Ordinance (Cap.310) and join a Mandatory Provident Fund scheme. In the earliest days of sole proprietorships only traders were eligible to declare bankruptcy, divide their remaining assets among creditors and later obtain the bankruptcy court's leave to begin again. Professionals who were unable to meet their obligations to creditors used to face the prospect of indefinite imprisonment but equal treatment has been accorded to traders and professionals alike since the 1860s.[104]

1.052 Where a sole proprietor is unable to pay debts which are outstanding or has no reasonable prospect of paying them as they become due, a creditor or the proprietor himself may petition the court for a bankruptcy order to be made. The court (through

[100] Mobile phone manufacturer Nokia began business in 1865 in the forest industry.

[101] In practice it is of course common for the owners of private companies to be asked to guarantee their companies' obligations.

[102] See chapter 7 of this text for a detailed treatment.

[103] For example, that of a barrister.

[104] Section 3 of the Bankruptcy and Insolvency Ordinance (Cap.6), No 5 of 1864, applied to all persons of full age "whether traders or non-traders."

the Official Receiver or, if appointed, the trustee in bankruptcy) then assumes responsibility for the administration of the bankrupt's estate for the benefit of his creditors in a structured manner. Creditors are then required to prove debts due to them and are meantime prohibited from taking their own legal action to recover debts unless they obtain the court's prior permission. The Official Receiver or trustee recovers as much of the bankrupt's property as possible and progressively settles as many of the creditors' proved debts as he can during a period of up to four years before proposing to the creditors that the bankrupt be discharged by the court, after which point he is free to commence business again.

Regulatory Framework

Company Law

1.053 The principal architecture governing the formation and operation of locally incorporated companies and the registration of non-Hong Kong companies is the Companies Ordinance (Cap. 622) ("CO" or the "Ordinance").[105] That governing the winding-up of companies, receivers and managers, prospectus requirements and the disqualification of directors is the Companies (Winding-Up and Miscellaneous Provisions) Ordinance (Cap. 32) ("CWUO").[106]

1.054 While much of the regulatory burden concerning required disclosure and enforcement action for breaches of the Ordinances falls to the Registrar of Companies, a large number of matters require application to the court. These are in turn governed by particular provisions of the Rules of the High Court (Cap.4A) ("RHC")[107] and the Companies (Winding-Up) Rules (Cap. 32H) ("CWUR").

1.055 Rule 5 of Order 102 of the RHC reflects the historical origins of the court of Chancery's jurisdiction over company matters and requires the following applications to be made by petition:

- cancellation of alteration of the objects of a private company (CO, ss.89(5) and 91);
- cancellation of the alteration of a condition contained in a private company's memorandum of association (CO, ss.90(4) and 91);
- confirmation of a reduction in share capital (CO, s.226) where this is not pursued by way of special resolution supported by a solvency statement;

[105] Other important subsidiary legislation of the CO in regulations Cap 622A to Cap 622L addresses: (a) words and expressions in company names; (b), disclosure of company names; (c) accounting standards; (d) directors' reports; (e) summary financial reports; (f) revision of financial statements; (g) disclosure of directors' benefits; (h) model articles of association; (i) inspection of company records; (j) non-Hong Kong companies; (k) fees payable; and (l) unfair prejudice petitions.

[106] The Companies (Winding-Up) Rules (Cap.32H) ("CWUR") in addition provide a detailed administrative regime in respect of creditors' and members' voluntary windings up and court-ordered compulsory windings up.

[107] Jurisdiction over most company matters lies exclusively with the Court of First Instance, although there have been suggestions that owners' corporations may be wound up by the Lands Tribunal; see chapter 19.

- cancellation of variation or abrogation of shareholder rights (CO, s.182) and cancellation of variation or abrogation of rights of any class of members of a company not having a share capital (CO, s.190);
- sanction of compromise or scheme of arrangement (CO, s.673);
- restoration of company to the register in circumstances where the application accompanies an application then to have the company wound up (CO, s.765);
- cancellation of alterations to the form of the company's constitution (CO, s.817); and
- application for relief from liability of an officer of the company or a person employed as its auditor (CO, s.904).

1.056 Specific applications concerning the winding up of a company are governed by rules 5, 6 and 7 of the CWUR and applications concerning unfairly prejudicial conduct proceedings instituted pursuant to s.724 of the Ordinance[108] are governed by the Companies (Unfair Prejudice Petitions) Proceedings Rules (Cap 622L). All other applications are governed by Rule 2 of Order 102 of the RHC.

1.057 Rule 5 of the CWUR provides that every matter or application to be made pursuant to the CWUR shall be heard and determined in chambers, with the exception of the following applications which shall be heard in open court:

- petitions;[109]
- appeals from decisions of the Official Receiver;[110]
- to have a dissolution[111] declared void;
- by the Official Receiver against a liquidator who fails to file periodic returns in the case of lengthy windings up;[112]
- to have any person committed to prison for contempt of any order of the court;
- for individuals to be publicly examined;[113]
- to have the court refer to the Secretary for Justice cases where an officer or member may have been guilty of an offence prior to the winding up of a company; and[114]
- to rectify the register of members.[115]

[108] Provided that the petition does not also seek an order to have the company wound up; see Cap 622L, rule 3.

[109] Note that unopposed winding-up petitions may be heard before a master per CWUO, s.180A.

[110] When acting as such, and not as liquidator.

[111] Whether dissolved after compulsory winding-up (CWUO, ss.226A and 227) or voluntarily (CWUO, ss.239 and 248).

[112] As required by CWUO, s.284(3).

[113] Examination proper will be in chambers or open court, as directed by the judge.

[114] Contrary to CWUO, s.277(1).

[115] CO, s.633.

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1.058 Rule 6 of the CWUR permits chambers applications to be heard and determined by masters, also for such matters to be adjourned and transferred to judges, who may at their discretion then hear the matter in chambers or open court.

1.059 Rule 7 of the CWUR provides that court applications other than petitions shall be made by motion, also that chambers applications shall be made by summons.

1.060 As to all other applications which are governed by Rule 2 of Order 102 of the RHC, these may be made by originating summons.[116] Some of the more common applications are:

- inspections of registers of members, directors & secretaries, general meeting minute books, instruments creating charges;
- ordering the convening of meetings of members or creditors;
- extensions of time for the registration of charges with, or the delivery of documents to, the Registrar;
- restoring a company to the register;
- rectification of the company's register of members;
- instituting inquiries into a company's affairs; and
- declaring void the prior dissolution of a company.

Securities and Futures Ordinance (Cap.571); Codes on Takeovers & Mergers and Share Repurchases

1.061 Enacted in 2002 and brought into effect on 1 April 2003, the Securities and Futures Ordinance (Cap.571) ("SFO") consolidated and amended the law relating to (inter alia) the securities and futures markets of Hong Kong and the protection of investors.[117] The SFO comprises a comprehensive set of law and regulations of which the following are of particular relevance to promoters, owners and managers of companies:

- Part IV, Offers of Investments;
- Part VIII, Supervision and Investigation;
- Part XIII, Market Misconduct Proceedings;
- Part XIV, Offences Relating to Dealings in Securities and Futures Contracts;
- Part XIVA, Disclosure of Inside Information; and
- Part XV, Disclosure of Interests.

[116] With the advent of the Civil Justice Reforms on 2 April 2009 it is no longer the case that such applications are required to be made by originating summons.
[117] Preamble to the Securities and Futures Ordinance (Cap.571).

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1.062 The primary purpose of Part IV of the SFO is to regulate the means by which securities and investment products may be offered to the public and to address standards of conduct in relation to such offers. Part IV of the SFO *refers back* to the prospectus provisions of Parts II and XII of the CWUO.

1.063 Part VIII of the SFO gives the SFC wide powers of investigation and gathering of evidence where it appears that the business of a listed company has been carried on with intent to defraud creditors, for any fraudulent or unlawful purpose or in a manner oppressive to its members.[118] Such powers may also be invoked where it appears that: (a) anyone concerned in the listing engaged in fraud or other misconduct; (b) that persons involved in the management of a listed company's affairs have engaged in fraud or other misconduct towards its members; (c) that the members have not been given full information regarding the company's affairs; or (d) investigation might assist an international investigation in which the Securities and Futures Commission ("SFC") is co-operating. Persons assisting the SFC in an investigation or who are the subject of an investigation are required to answer questions put to them and may not decline to answer for reason only that the answer might incriminate them. The SFO provides, however, that where a person claims privilege against self-incrimination answers given may not be used in any later criminal proceedings other than proceedings concerning perjury and similar offences.[119]

1.064 Parts XIII, XIV and XIVA of the SFO concern civil and criminal proceedings for alleged market misconduct, comprising principally insider dealing, false trading, price rigging and market manipulation, also disclosure of inside information. Where after investigation the SFC finds evidence of market misconduct having taken place it may either prosecute the case summarily in the Magistrates Court or refer the matter to the Department of Justice who will then determine whether, on the strength of the evidence, the matter may be prosecuted in the District or High Court, or referred to the Financial Secretary for referral to the Market Misconduct Tribunal.

1.065 Part XV of the SFO comprises a complex regime requiring directors and substantial shareholders of listed company shares to disclose their interests to: (a) the listed company concerned; and (b) the stock exchange. Originally conceived to replicate UK provisions designed to allow listed companies to determine beneficial ownership and to remain aware of significant changes, information filed pursuant to the provisions of Part XV of the SFO is used primarily by regulators in market surveillance.

1.066 Section 36(1) of the SFO empowers the SFC to make rules which (*inter alia*):

- prescribe the requirements to be met before securities may be listed;
- prescribe the procedure for dealing with applications for listing;
- provide for the cancellation of listing of specified securities; and

[118] SFO, s.179(1).
[119] SFO, s.179(13).

- address the circumstances in which the Stock Exchange shall suspend dealings in securities.

1.067 The Securities and Futures (Stock Market Listing) Rules (Cap.571V) made pursuant to s.36 of the SFO (known colloquially as the "Statutory Listing Rules") should not be confused with the Stock Exchange's own listing rules made pursuant to power granted to the Stock Exchange by that previous s.23 of the SFO.

1.068 Section 399 of the SFO permits the SFC to publish codes and guidelines and pursuant to those ss.399(1) and 399(2), the SFC has published the Codes on Takeovers and Mergers and Share Repurchases.[120] Although neither code comprises subsidiary legislation or regulation as such, their primary purpose is to afford fair treatment for shareholders affected by takeovers, mergers and share repurchases.[121] Neither code has the force of law.[122] Both are framed in non-technical language and should not be interpreted as if they are statutes. The codes represent a consensus of opinion of those who participate in Hong Kong's financial markets and the SFC regarding standards of commercial conduct and acceptable behaviour concerning takeovers, mergers and repurchases.[123]

1.069 The codes apply to directors and actual or intending controlling shareholders of listed companies, their professional advisers and persons participating in particular transactions as well as persons actively engaged in the securities market. The codes are administered by the SFC's Executive Director of Corporate Finance and the Takeovers Panel and the Takeovers Appeal Committee.[124]

1.070 Notwithstanding the fact that none of the codes has the force of law, the disciplinary sanctions which may be invoked are potentially far-reaching. Offenders[125] may be the subject of: (a) a public statement involving criticism; (b) a public censure; (c) a "cold-shoulder" order and effectively barred from participating in the financial markets for a stated period; (d) a ban on advisers appearing before the Executive or Panel for a stated period; or (e) further action such as reporting offenders to professional bodies.[126]

Stock Exchange Listing Rules

1.071 These rules are made by the Stock Exchange pursuant to power granted under s.23 of the SFO which provides that a recognized exchange company may make rules for the proper regulation and efficient operation of the market it operates, the proper regulation of its participants and holders of trading rights, and for the establishment of

[120] At the time of writing, the current edition is June 2010.
[121] §1.2, Introduction of the Codes on Takeovers and Mergers and Share Repurchases.
[122] §1.3, Introduction of the Codes on Takeovers and Mergers and Share Repurchases. See also *Television Broadcasts Ltd v The Takeovers and Mergers Panel* (unrep., HCAL 250/2017) per Hon Lisa Wong J at §34.
[123] §1.3, Introduction of the Codes on Takeovers and Mergers and Share Repurchases.
[124] Both of which are constituted under s.8(1) of the SFO.
[125] Disciplinary proceedings may be invoked for breach of rulings made by the Executive or Panel, and not merely breaches of the codes. See §12.1, Introduction of the Codes on Takeovers and Mergers and Share Repurchases.
[126] §12.2, Introduction of the Codes on Takeovers and Mergers and Share Repurchases.

investor compensation arrangements and known colloquially as the "Exchange Listing Rules". The Exchange Listing Rules are approved by the SFC pursuant to s.24 of the SFO which provides that no rule made by a recognized exchange company shall have effect unless it has the SFC's written approval.

1.072 The Exchange Listing Rules reflect currently acceptable standards in the market and designed to ensure investors have confidence in the market. In particular:[127]

- that applicants for listing are suitable;
- that the issue and marketing of securities is conducted in a fair and orderly manner and investors are given sufficient information to make a properly informed assessment;
- that investors and the public are kept fully informed of all factors that might affect their interests, particularly as regards disclosure of information having a material effect on market activity in, and prices of, listed securities;
- that holders of listed securities are treated fairly and equally;
- that directors of issuers act in the interests of shareholders, particularly where public shareholders are in the minority; and[128]
- that new issues are first offered to existing shareholders unless they have otherwise agreed.

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The Exchange Listing Rules specifically state that these last 4 points seek to secure for investors assurances and equality of treatment which might not otherwise be available if they were to rely on their strict legal rights.

1.073 The principal areas covered by the Exchange Listing Rules address:

- functions, powers and procedures of the Listing Committee, Listing Appeals Committee and review procedures (Chapters 2A & 2B);
- requirements of directors and authorized representatives (Chapter 3);
- requirements of pre-listing sponsors and post-listing compliance advisers (Chapter 3A);
- accountants' reports and property valuations (Chapters 4 & 5);
- suspension, cancellation and withdrawal of listing (Chapter 6);
- methods of listing equity securities (Chapter 7);
- qualifications for listing equity securities (Chapter 8);

[127] Exchange Listing Rule 2.03.
[128] The fact that owners of companies may list their shares and retain as much as 75% of those shares means this is of course the usual position and not the exception.

Mistake	A contract that, when signed, is fundamentally different from that which was initially agreed is void at common law; however, mistake is more difficult to argue where it has been unilateral instead of bilateral.[142]
Non est factum	Unless the character of the document is entirely different to that which the guarantor or indemnifier knew it to be, he will be bound[143]
Duress	The strength of persuasion required in order to vitiate an obligation is high; lenders who exercise their legal rights to threaten to wind up a company will not be regarded as placing the guarantor or obligor under duress;[144] where it is accompanied with threats of non-legal action then the position is quite different
Creditor fraud	Fraud unravels all and fraud on the part of the creditor leaves the guarantor or indemnifier at liberty to walk away from his obligation;[145] misrepresentation by the creditor permits the guarantor or indemnifier to rescind.
Undue influence	Where a guarantor or indemnifier can show that, even though he knew what he was signing and even though he was not mistaken as to what it involved, he was subject to a dominating influence such that his independence of decision-making was substantially undermined, he will be able to resile from his obligation.[146]

[142] *Associated Japanese Bank v Credit du Nord* [1989] 1 WLR 255.

[143] *Saunders v Anglia Building Society* [1971] AC 1004. The mistake had to go to the very character of the document and not merely its legal effect.

[144] *Powell v Hoyland* (1851) 6 Exch 67.

[145] *Spencer v Handley* (1842) 4 M&G 414.

[146] *Royal Bank of Scotland v Etridge* [2002] AC 773. Guarantees or indemnities provided by spouses or partners are not automatically explicable only on the basis that they were procured by undue influence, but will be presumed to have been so procured if the obligor is able to show that: (a) the transaction is not readily explicable by the relationship with the principal debtor; and (b) he placed trust and confidence in another party in relation to the principal debtor's affairs. The lender can rebut this presumption by ensuring that the obligor is given independent legal advice and being satisfied by the legal adviser that the obligor is exercising an independent mind when making his decision.

Chapter 8

OFFICERS AND CORPORATE AUTHORITY

8.001 A company is constituted as a body corporate[1] with separate legal personality entirely independent of its members and has all the rights, powers and duties of a natural person.[2] However, and notwithstanding its legal personality, there is no such "thing" as a company as such as it is a "*persona ficta*"[3] and requires natural persons through whom it can act.[4] When early chartered companies began their adventures in the nature of trade those companies bore the names of the distant lands from which they hoped their profits would return, *e.g.* Hudsons Bay, Morocco, British South Africa and the East Indies. Members shared the business risk by combining to provide capital, often on a voyage-by-voyage basis. Some took a keen interest in directing the company's affairs, whereas others were content to remain passive investors and not particularly interested in the business it was to undertake.[5] Directors were appointed to supervise the day-to-day management of the company, reserving only the most fundamental matters for the approval of members.

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8.002 Even where a company is permitted to appoint *another* body corporate as its director or secretary, that corporate director or corporate secretary ultimately requires an individual's mind and hands in order to express its will as director or secretary and, in turn, express the will of the company on whose behalf it is acting. Identifying whether and how this requirement is met can present particular difficulties where a company is prosecuted for alleged criminal conduct[6] and a necessary part of the corporate personality rulebook involves identifying and establishing principles of attribution by which: (a) individuals' acts are deemed to be those of a company; and (b) the company's directors[7] and other individuals are held liable, although much of this difficulty is ameliorated by the impact of provisions placing "responsible persons" at the focus of liability, although much of this difficulty is ameliorated by the impact of provisions placing "responsible persons" at the focus of liability.[8]

[1] Companies Ordinance (Cap.622) ("CO"), s.73(1).

[2] CO, s.73(2).

[3] *Moulin Global Eyecare Trading Ltd (in liquidation) v Commissioner of Inland Revenue* (2014) 17 HKCFAR 218, adopting Lord Hoffmann in *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 AC 500 at 506B and 507A: *"There is in fact no such thing as the company as such, no ding an sich, only the applicable rules. To say that a company cannot do something means only that there is no one whose doing of that act would, under the applicable rules of attribution, count as an act of the company."*

[4] Lord Chancellor Edward Thurlow was rather more dramatic at the end of the eighteenth century when he stated: *"Corporations have neither bodies to be punished, nor souls to be condemned; they therefore do as they like"* (Poynder, *Literary Extracts,* 1844).

[5] The East India Company's voyage of 1617 was supported by capital from over 700 investors, comprising 15 earls, 82 privy councillors, judges and knights, 13 countesses, 18 widows and spinsters, 26 clergymen, 338 merchants and 213 tradesmen. The company was directed by a governor, a deputy governor and 24 'assistants' - a 24-member board of directors.

[6] *The Corporate Criminal,* Tombs & White (2015) Routlege.

[7] *Meridian Global Funds Management v Securities Commission* [1995] 2 AC 500.

[8] *In Re A Company* [1980] 1 Ch 138, per Lord Denning MR at 143: *"The officer referred to here is a person in a managerial situation in regard to the company's affairs... It seems to me that whenever anyone in a superior*

Directors

Minimum & Maximum Number

8.003 The Companies Ordinance (Cap.622) ("CO" or the "Ordinance") requires public companies and guarantee companies to appoint and maintain at least two directors,[9] both of which must be natural persons.[10] A private company must maintain at least one natural person as director[11] and, provided it is not a member of a group of companies of which a listed company is also a member, a private company is otherwise permitted to appoint corporate entities as directors.[12] A private company with only one natural person as director may, where that person is also the company's sole member, nominate another natural person as reserve director to hold office immediately and in the event of the death of the appointed sole director.[13]

8.004 There is no requirement as to residence but a director must, if an individual, be at least 18 years of age.[14] While executive and non-executive directors typically hold shares in listed companies[15] and closely-held private companies are most often distinguished by the fact that the individual participants are both shareholders and directors, there is no longer formal any requirement in today's Model Articles that directors invest some of their own money in a company as "qualification" shares.

8.005 Neither the CO nor the Model Articles prescribe any maximum number of directors, leaving the matter to the company's member(s). Thus, and to take a practical example, where a company is formed to represent the interests of three or more investors all of whom have significant interests, the company's articles of association might usefully be drafted to prescribe a corresponding minimum number of directors so that each investor is represented on the board and to state an appropriate maximum number of directors in order that the investors remain represented in proportion to their respective ownership, together with a mechanism to ensure that such representation is maintained.

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position in a company encourages, directs or acquiesces in defrauding creditors, customers, shareholders or the like, then there is an offence being committed by an officer of the company in connection with the company's affairs." Note that CO, s.3 provides that a person is a responsible person of a company or non-Hong Kong company if he is an officer or shadow director of the same and authorizes or permits, or participates in, the contravention or failure in question.

9 CO, s.453(2).

10 CO, s.456.

11 CO, ss.454(1) and 457.

12 CO, s.456(1)(b).

13 CO, s.455. Nomination does not of itself operate to appoint the reserve director to office but his details must nevertheless be entered into the register of members (CO, s.641(2)) and the company must file with the Registrar the fact of his nomination (or later cessation) and his details or changes thereto on Specified Forms ND5 (appointment or cessation) and ND7 (change in particulars) (CO,s.645(2)) and include his details in Specified Form NAR1 (annual return) (CO, s.664); a reserve director may give unilateral notice of resignation on Specified Form ND8 if he has reasonable grounds for believing that the company will not notify the Registrar (CO,s.464(3)).

14 CO, s.459(1).

15 Their disclosures and dealings are subject to specific securities regulation; see chapter 4 of this text.

Directors Nominated by Three Parties to a Joint Venture

Suggested Article

The minimum number of directors shall be three and the maximum number of directors shall be nine. The first directors of the company shall be nominated in writing by the company's founding members.

The member or members for the time being holding a majority in nominal value of the A shares in issue shall be entitled to appoint any three persons to be directors of the company, to remove from office any such A director, and to appoint another person in the place of any person so appointed who has ceased for any reason to be a director.

The member or members for the time being holding a majority in nominal value of the B shares in issue shall be entitled to appoint any three persons to be directors of the company, to remove from office any such B director, and to appoint another person in the place of any person so appointed who has ceased for any reason to be a director.

The member or members for the time being holding a majority in nominal value of the C shares in issue shall be entitled to appoint any three persons to be directors of the company, to remove from office any such C director, and to appoint another person in the place of any person so appointed who has ceased for any reason to be a director.

Any person (or his alternate) so appointed by a member or members holding A shares is in these articles called an A director, any person (or his alternate) so appointed by a holder or holders of B shares is in these articles called a B director and any person (or his alternate) so appointed by a member or members holding C shares is in these articles called a C director.

All appointments or removals of directors under this article shall be in writing signed by or on behalf of the member or members effecting the same and shall take effect when delivered to the company's registered office.

Every director appointed pursuant to this article shall hold office until he is either removed or dies or vacates office and neither the company in general meeting nor the directors shall have power to fill any such vacancy. However, the provisions of this article may be relaxed or varied to any extent by agreement in writing made jointly between the holders of the majority in nominal value of the A shares for the time being in issue, the holders of the majority in nominal value of the B Shares for the time being in issue and the holders of the majority in nominal value of the C Shares for the time being in issue.

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Any director appointed pursuant to this article shall be at liberty from time to time to make such disclosures to the member (and where such member is a corporation to its holding company or any of the subsidiary companies of such holding company) appointing him as to the business and affairs of the company as he shall in his absolute discretion determine.

A director need not hold any shareholding qualification. A director who is not a member of the company shall nevertheless be entitled to attend and speak at general meetings of the company or meetings of the holders of any class of shares.

8.006 Whatever the prescribed minimum, if the number of directors falls below that minimum then the remaining directors will typically be permitted to act only so as to ensure the appointment of further directors to fill the vacancies,[16] either by way of making appointments themselves or convening general meeting for the purpose of allowing the members to make additional appointments. Where a maximum number is prescribed, then the board should not appoint additional directors in excess of this limit, otherwise those appointments will be void and it will be necessary to obtain the required members' resolution to increase that limit in order to grant the board power to make or ratify those appointments. If, on the other hand, the company's articles happen to allow the maximum to be increased by ordinary resolution, any further appointments on the part of the members will be regarded as an exercise of that power to amend the maximum number.[17]

Suggested Members' General Meeting Resolutions to Increase Number of and Appoint Directors

It was noted that, pursuant to article XX of the company's articles of association, the maximum number of directors was to be determined by the members in general meeting from time to time, that such maximum was currently set at four and that the company had four directors.

It was resolved that the maximum be increased to 6 with immediate effect and that Mr James Francis and Miss Yue Yuk-ling be elected directors of the company with effect from the conclusion of the meeting.

8.007 The Ordinance provides that acts of the board or of any of its committees and of each of its directors shall nevertheless be valid notwithstanding the later discovery of any defect in appointment of one or more directors, that one or more of the directors was not qualified to hold office or was disqualified from holding office, that one or more of the directors had in fact ceased to hold office or was not entitled to vote on the matter

16 Model Article 10 (public companies); Model Article 12 (private companies); Model Article 11 (guarantee companies).

17 *Worcester Corsetry Co Ltd v Witting* [1936] Ch 640.

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in question.[18] These provisions operate to give legal effect not only to acts of the board or any of its committees, but also of any individual director[19] and protect third parties from the risk of a company attempting to resile from business decisions on grounds of some internal defect in appointment or qualification of its directors but also operates to ensure that any step taken by the directors to maintain any prescribed minimum number of directors is not of itself frustrated on account of any defects in appointment. Directors are treated by the Ordinance as "responsible persons" and are thereby criminally liable for their companies' contraventions of the Ordinance or failures to comply with directions and orders made thereunder if they authorize, permit or participate in such contraventions or failures.[20]

Appointments, changes and reporting requirements

8.008 A company's first directors must be named by the company's founder members on the incorporation form delivered to the Registrar when applying for incorporation of the company.[21] Directors may subsequently be appointed by the members in general meeting[22] and articles of association will typically empower the board to appoint additional or replacement directors.[23] Whether simply titled 'director' or otherwise 'alternate', 'reserve' or 'shadow', the fact of the appointment of that director and his prescribed particulars[24] must be recorded in the company's register of directors[25] and included in the incorporation form and any later notification of a director's appointment.[26] Any changes to a directors' prescribed particulars must be reflected in the company's register of directors and notified to the Registrar.[27]

8.009 First directors named in the incorporation form who are also founder members of a company must confirm in the incorporation form that they consent to act. First directors who are not also founder members must confirm their consent to act by way

18 CO, s.461; see also Model Article 20 (public companies); Model Article 18 (private companies); and Model Article 17 (guarantee companies).

19 Where a managing director is constituted by a committee of the board then it would seem that his acts would remain valid, despite any defect that is later found in his appointment; but a third party on notice of the defect would not, however, be able to rely on the protective nature of these provisions as it would offend the indoor management rule.

20 CO, s.3.

21 CO, ss.67 and 68. Specified Form NNC1 (in the case of public and private companies) and Specified Form NNC1G (in the case of a guarantee company).

22 The appointment of directors of public companies and guarantee companies must be by way of separate resolutions unless the members have unanimously resolved to permit the appointment of several directors by way of a single resolution; see CO, s.460. The Corporate Governance Code, Appendix 14 of the Exchange Listing Rules, further provides that non-executive directors should be appointed for specific terms subject to re-election, also that any director appointed to fill a casual vacancy shall hold office only until the next general meeting, and that each director shall be subject to retirement by rotation at least every 3 years.

23 The appointment of directors is one of the key powers reserved to a company's members and any delegated authority under which the board purports to appoint additional or replacement directors will often require those appointees to retire at the next AGM, when the membership-at-large would have an opportunity to re-elect them.

24 CO, s.68(1)(b) and Schedule 2, Part 3 of the CO - present and any former surname and forename or aliases; correspondence and usual residential address; number of Hong Kong Identity Card; or overseas passport.

25 CO, s.643.

26 Specified Form ND2A.

27 CO, s.645; see also Specified Form ND2B.

of a separate filing.[28] Directors appointed subsequent to incorporation must confirm their consent to act on the form notifying the Registrar of their appointment.[29]

8.010 Two distinct types of change are contemplated by CO, s.645. Any change in directors must be notified within 15 days of the change and any change in any of the director's particulars contained in the register must be notified within 15 days of the change. Given that the Registrar prosecutes[30] companies that fail to notify changes within the 15-day period, it is important to understand what is meant by "the change." The point at which any change in director takes place is clear, but perhaps less so the point at which "any change in the particulars contained in the register" takes place.

8.011 Section 646 of the CO obligates directors to give notice to the company of matters relating to the director that are required for the purposes of CO, ss.643 and 645 to enable the company's compliance with that s.645 of the CO. This is to enable the company to ensure that the register (which is after all the statutory record) may be kept up to date. There is, however, no period prescribed in CO, s.645 within which the director must give the company notice of a change in particulars; neither is there any period prescribed in that s.641 within which the company must update a director's particulars in the register once it has been informed of a change in those particulars.

8.012 It is not uncommon for company officers to be slow in giving the company notice of changes in their particulars and some of these changes (*e.g.* new passport number) may not in fact be known to an officer until well after 15 days of their taking effect. Nevertheless, companies which have diligently notified the Registrar within 15 days of receiving notice of an officer's change in particulars and updating the statutory record have found themselves prosecuted for failing to notify the Registrar of changes in particulars within 15 days of changes in the particulars.

8.013 This approach is, with respect, to misunderstand s.645(4) of the CO. The words are plainly "any change in the particulars *contained in* the register" and *not* "any change in the particulars *which are required to be* contained in the register". Furthermore, this approach would suggest that it is the particulars maintained by the Registrar that form the company's statutory record, rather than what is contained in the company's register of directors.

8.014 The obligation to notify the Registrar of changes[31] in directors is in normal circumstances performed by one of the company's officers on its behalf but resignations call for particular attention. Unless a director holds office pursuant to terms specified in the company's articles or any specific agreement he may resign at any time,[32] whereupon the company must notify the Registrar of the fact.[33] A director who has reasonable

[28] Specified Form NNC3.
[29] Specified Form ND2A.
[30] Before 2007 the Registrar felt it important to list in his Annual Report public companies prosecuted for such breaches.
[31] CO, s.645(1); see also Specified Form ND2A.
[32] CO, s.464(1).
[33] CO, s.464(2).

grounds for believing the company will fail to notify the Registrar of his resignation must nevertheless notify the Registrar unilaterally,[34] stating whether he is required by the company's articles or any agreement to give notice of his resignation and whether that notice has been duly given.[35] A resignation is ineffective unless and until any required notice is given in accordance with the notice requirement and either left at the company's registered office or sent to the company.[36]

Sole director

8.015 A sole director may transact the board's business by way of written resolution otherwise must provide the company with a written record of any decision within seven days of making it,[37] whereupon the company must retain the record for at least 10 years.[38] Although a sole director is not restricted as to when he may transact the board's business[39] he must nevertheless ensure that he does not ignore the requirement to observe important safeguards which impact the manner in which he transacts that business, *e.g.* disclosure to the board of an interest he may have in a transaction with the company. Even where the strict "no conflict" rule is displaced the sole director's other duties do not disappear and the court must scrutinise the transaction with great care to determine whether in carrying out the transaction the director truly has managed to avoid the temptation of putting his personal interests before those of the company,[40] otherwise even where he does disclose to the board he may nevertheless be found to have acted in his own interests rather than those of the company.[41]

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Hong Kong Company Limited

Written Resolutions of the Sole Director Made Pursuant to [Article 20] of the Company's Articles of Association

I, the undersigned, being the sole director of the Company for the time being:

Note that, as part of the arrangements to be made between the Company and Mr Wong Man-yue, sole director of the Company, regarding the premature termination of his service agreement with the company with effect from [date], the Company proposes to make a payment of [$XX] to Mr Wong in consideration of Mr Wong agreeing to accept premature termination and that Mr Wong hereby discloses his interest in this arrangement.

[34] CO, s.464(3); see also Specified Form ND4.
[35] CO, s.464(4).
[36] CO, s.464(5) - notice may be sent to the company by post or electronically.
[37] CO, s.483.
[38] Model Article 20 (private companies).
[39] In the peculiar circumstances of a sole director entitled to exercise all the powers of the board and to vote in respect of contracts in which he was interested the default requirement for a "meeting" is accorded a meaning different from the ordinary meaning of a "coming together of more than one person" and extends to a "meeting" of that sole director; see *Koo Shing Sun v Hung Wing San* [2013] 5 HKLRD 271, adopting *Neptune (Vehicle Washing Equipment) Ltd v Fitzgerald* [1995] 1 BCLC 352, where the sole director had been released by the company and paid himself £100,000 as termination compensation.
[40] *Wong Lung v The Chinese University of Hong Kong* (unrep., HCA 1122/2010).
[41] *Neptune (Vehicle Washing Equipment) Ltd v Fitzgerald (No 2)* [1995] BCC 100.

Further note that this proposed arrangement and Mr Wong's interest in it have been notified to the Company's member(s) who have / has indicated agreement to it.

Resolve that it is in the interests of the company to proceed with the proposed arrangement and that Mr Wong be authorised to sign the same on behalf of the Company.

Wong Man Yue
Mr Wong Man-yue

Dated:

Reserve director

8.016 A reserve director is an individual nominated as such by resolution passed in general meeting by the sole member of a private company[42] where that sole member is also that company's sole director. His particulars must be recorded in the company's register of directors[43] and in the event of the death of the sole director the nominated reserve director will be regarded as the company's sole director for all purposes until the appointment of another individual as director or until his resignation.[44]

8.017 This mechanism is restricted to ensuring the appointment of a successor director and does not operate to nominate a new member or purport to transfer the deceased sole member's share(s). However, once his nomination is converted into an appointment the new sole director is of course empowered to register letters of request from the sole member's executor or administrator and, in due course, register as a new member the individual to whom the share(s) have been transmitted.

Hong Kong Company Limited

Written Resolution of the Sole Shareholder Made Pursuant to Section 548 of the Companies Ordinance

I, Wong Man-yue, being the sole member of the Company for the time being, hereby resolve that Chen Guo be nominated as reserve director of the Company for the purposes of section 455 of the Companies Ordinance.

Wong Man Yue
Mr Wong Man-yue

Dated:

[42] CO, s.455(1). Nominations and cessations are reportable by way of Specified Form ND5, any changes in particulars by way of Specified Form ND7 and any resignations by way of Specified Form ND8.
[43] CO, s.641.
[44] CO, s.455(4).

Alternate directors

8.018 Where a company's articles of association permit the appointment of alternate directors then unless otherwise provided in those articles an alternate is deemed to be the appointor's agent and the appointor is vicariously liable for any tort committed by his alternate while acting as such.[45] Where an appointor has a material interest in any transaction that is significant in relation to the company's business then his alternate is disqualified from being counted towards the quorum of directors required to transact the business and also disqualified from voting in respect of the transaction.[46]

8.019 Model Articles[47] provide that any director may appoint as his alternate either: (a) any other director; or (b) any other person approved by resolution of the directors. Appointments (and any subsequent removals) must be notified to the company in writing or in any other manner approved by the directors, authenticated by the appointor and contain a statement authenticated by the appointee confirming his willingness to act.

8.020 There is no limit to the number of directors for whom a director or, with the required approval, any other person may be appointed as alternate and any director who is appointed as alternate shall have an additional vote at board meetings on behalf of each appointor who is not participating but would have been entitled to vote if he were participating.[48]

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Director may appoint another director as alternate

Suggested Resolutions

Hong Kong Company Limited

Minutes of a Meeting of the Board of Directors of the Company held on [date] at [place] at [time]

Present:	Mr Wong Man-yue (chairman)
	Mr Chen Guo
	Ms Wong Ching-yue
	Mr Charles Yip (secretary)

[45] CO, s.478.
[46] Model Article 15 (public companies); Model Article (private companies); Model Article 15 (guarantee companies).
[47] Model Articles 14, 30, 31 & 32 (public companies); Model Articles 15, 28, 29 & 30 (private companies); Model Articles 14, 26, 27 & 28 (guarantee companies).
[48] Model Article 14 (public companies); Model Article 15 (private companies); Model Article 14 (guarantee companies).

> There was tabled a form of appointment by which Mr Chen Guo appointed Mr Wong Man-yue as his alternate director pursuant to the provisions of article [28] of the company's articles of association with immediate effect and until further notice.
>
> The appointment of Mr Chen was noted.
>
> There was tabled form of notice pursuant to which Ms Wong Ching-yue proposed to appoint Mr Ching Yip-fong as her alternate director pursuant to the provisions of article [28] of the company's articles of association with immediate effect and for a period of 6 months on account of Ms Wong's expected absence from Hong Kong on account of overseas studies.
>
> The nomination of Mr Ching was approved.
>
> There being no further business …

8.021 Particulars of an alternate director, along with any later changes in his appointment or his particulars, must be entered in the register of directors and notified to the Registrar, in similar manner as that required of his appointor.[49]

8.022 Unless a company's articles specifically provide that an alternate may, in addition to representing his appointor at board meetings, act on his principal's behalf to perform managerial functions such as signing cheques, the alternate's actions in breach of such provisions will not bind the company[50] but his appointor is vicariously liable for the alternate's acts or omissions.[51]

De Facto Director

8.023 Regardless of title or description, if a person occupies the position of, or otherwise purports to act as, director[52] then it is irrelevant whether or not he is formally appointed or named as *de jure* director.[53] Although a *de facto* director is held out to be part of the governing structure he cannot be liable for misfeasance or be disqualified unless he is truly in a position to exercise the powers and discharge the functions of a director, for to hold otherwise would make him liable for events over which he has no real control, either in fact or in law.[54]

49 Neither Specified Form NNC1 nor Specified Form NNC1G provide for the notification of the appointment of alternate directors on incorporation but Specified Forms ND2A, ND2B and ND4 identify alternate directors for the purposes of notifying appointments and cessations, also changes in particulars and unilateral resignations.

50 *Zanda Investment v Bank of America NT&SA* [1994] 2 HKC 409.

51 CO, s.478.

52 CO, s.2 - "*director includes any person occupying the position of director (by whatever name called);*"

53 *de jure director* — or indeed, any similarly-named office such as "governor" or "council member".

54 *Secretary of State v Tjolle* [1998] 1 BCLC 333, per Jacob J at 343.

8.024 Nevertheless, in circumstances where he is properly regarded as a *de facto* director then he may for the purposes of establishing liability under the provisions of the Companies (Winding-Up and Miscellaneous Provisions) Ordinance (Cap.32) ("CWUO")[55] be treated as a director even if he has not reached 18 years of age and would be ineligible for formal appointment.[56] Similarly, in the case of a corporate entity purporting to act, even though it would be prohibited from being appointed, as a director of a guarantee company, a listed company or a private company which is a member of a group of companies of which a listed company is also a member.[57]

Shadow Director

8.025 Even where a person does not occupy the position of, or otherwise purports to act as, director he may nevertheless be regarded as a "shadow director" if in the circumstances a majority or all of a company's directors are accustomed to acting in accordance with his instructions.[58] But it must be a majority or all — where just one of several directors routinely complies with the directions of an outsider then that will not of itself be sufficient to constitute that outsider as shadow director.[59]

8.026 Since shadow directors must have sufficient influence as to cause either all or a majority[60] of the board to act in accordance with their instructions or directions[61] — merely influencing one or a minority of the board is insufficient[62] - particular difficulty might arise where the directors of a company's subsidiary are accustomed to acting in accordance with the parent company's instructions or directions. The Ordinance provides that this circumstance alone is insufficient to constitute

55 Such as disqualification from holding office. See CWUO, s.168D and *Official Receiver v Mak Wing Hung* (unrep., HCMP 4189/2002) per Barma J at §13.

56 CO, s.459(3).

57 CO, s.456.

58 A shadow director is defined at s.2 of the Ordinance as a person in accordance with whose instructions the directors or a majority of them are accustomed to act. See *Moulin Global Eyecare Holdings Ltd (In Liquidation) v Olivia Lee Sin Mei* [2009] 3 HKLRD 265 per Carlson DHCJ at §62: "*The hallmark of the shadow director is that he or she exercises real influence over the company's affairs and who directs the acts of the de jure directors.*" See also *Re Hydrodan (Corby) Limited* [1994] BCC 161 *per Millet J at 163: "A shadow director, by contrast, does not claim or purport to act as a director. On the contrary, he claims not to be a director. He lurks in the shadows, sheltering behind others who, he claims, are the only directors of the company to the exclusion of himself. He is not held out as a director by the company. To establish that a defendant is a shadow director of a company it is necessary to allege and prove: (1) who are the directors of the company, whether de facto or de jure; (2) that the defendant directed those directors how to act in relation to the company or that he was one of the persons who did so; (3) that those directors acted in accordance with such directions; and (4) that they were accustomed so to act. What is needed is, first, a board of directors claiming and purporting to act as such; and, secondly, a pattern of behaviour in which the board did not exercise any discretion or judgment of its own, but acted in accordance with the directions of others.*"

59 *Re Unisoft Group Ltd (No.3)* [1994] 1 BCLC 609 per Harman J at 620; see also *Re LehmanBrown Ltd* (unrep., CACV 272/2011) per Kwan JA at §55; *Karla Otto Ltd v Bulent Eren Bayram* [2017] 2 HKLRD 124 following *Re Mumtaz Properties Ltd* [2011] EWCA Civ 610 per Arden LJ: "*one looks to see if the person "was one of the nerve centres from which the activities of the company radiated.*"

60 *Ultraframe v Fielding* [2005] EWHC 1638, per Lewison J at §1272.

61 CO, s.2: "*a person in accordance with whose directions or instructions the directors or a majority of the directors of a company are accustomed to act.*"

62 *Re Unisoft Group Ltd (No.3)* [1994] 1 BCLC 609, where influence over 2 of 5 members of the board was insufficient to constitute the influencer as shadow director; however, where a person does influence the board or a majority of it, influence need not extend to the entire range of the company's activities; see also *Secretary of State v Deverell* [2001] Ch 340, per Morritt LJ at 355.

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a parent company as shadow director[63] of its subsidiaries but where in an ordinary commercial relationship company A (such as a lending bank) influences the directors of company B (such as a corporate customer) then company A may be treated as a shadow director of company B[64] and, accordingly, could be held in breach of duties to company B.[65] Company A's actions would have to extend beyond merely protecting its own interests, however — a position of strong influence does not amount to a fiduciary position.[66] Shadow directors are treated by the Ordinance as "responsible persons" and are thereby criminally liable for their companies' contraventions of the Ordinance or failures to comply with directions and orders made thereunder if they authorize, permit or participate in such contraventions or failures.[67]

8.027 Whether a person is responsible for giving instructions or directions, as opposed to views or advice,[68] must be ascertained objectively from the circumstances. Cause and effect will in most cases suffice of itself, without also having to prove understanding on the part of those members of the board who are influenced[69] - the fact that the board is accustomed to acting on his instructions or directions is sufficient. But the operative word is "acting" and shadow directorship will only commence to run once the board is accustomed to acting and not before, regardless of how active the person attempting to influence may previously have been.[70]

8.028 A shadow director is not deemed to be a director, nor need he have reached the minimum age of 18 years in order to be regarded as shadow director;[71] moreover, his details should not be recorded in the company's register of directors or reported to the Registrar.[72]

8.029 There is no statutory provision in the Ordinance[73] fixing a shadow director with the same full range of duties as are imposed on a *de facto director* and it should not be assumed that the entirety of directors' duties apply to shadow directors.[74] However, if a person is found to exercise sufficient influence as to render him as shadow director

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63 CO, ss.530(2) and 545(7).
64 *Re a Company (No.005009 of 1987)* (1988) 4 BCC 424.
65 Including, it seems, fiduciary duties. See *Yukong Line Ltd of Korea v Rendsburg Investment Corp of Liberia* [1998] 2 BCLC 485; but see also Lewison J's analysis and reservations in *Ultraframe v Fielding* [2005] EWHC 1638 at §1284.
66 *Ultraframe v Fielding* [2005] EWHC 1638, per Lewison J at §1267 & 1268.
67 CO, s.3.
68 Note that, unlike the equivalent Securities and Futures Ordinance (Cap.571) definition (Schedule 1 to Cap. 571), the statutory definition in the Companies Ordinance does not specifically exclude persons merely advising in a professional capacity, but that Cap.571 extends its definition to persons in accordance with whose instructions directors are obliged to act, rather than merely accustomed to act.
69 *Secretary of State v Deverell* [2001] Ch 340, per Morritt LJ at 355.
70 *Ultraframe v Fielding* [2005] EWHC 1638, per Lewison J at §1278.
71 CO, s.459(3).
72 Section 158(10) of the predecessor CO which deemed a shadow director to be a director and officer of a company was repealed upon the commencement of the current Ordinance; see Schedule 11, s.116 of the CO.
73 But see the definition of "director" in the Securities and Futures Ordinance (Cap.571) (Schedule 1 to Cap 571) which embraces shadow directors for all purposes of that Ordinance.
74 *Ultraframe v Fielding* [2005] EWHC 1638, per Lewison J at §1279: *"If Parliament had intended to impose all directors' duties on shadow directors, this would have been easy to achieve by the simple expedient of providing that a shadow director owes the same duties to a company as a director".*

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then he is nevertheless subject to a range of duties, responsibilities and sanctions in particular circumstances as prescribed in the Registrar's Guide on Directior's Duties [*Appendix 1 of this text*]:

- he must exercise the same reasonable care, skill and diligence as is required of *de jure* and *de facto* directors and is subject to the same consequences in the event of breach;[75]
- any provision purporting to exempt or otherwise indemnify a shadow director against liability incurred to a third party is void and any insurance policy the company may take out in respect of a shadow director's negligence, default or breach of duty is void insofar as it purports to provide an indemnity against fines imposed in and the costs of defending criminal proceedings, also the costs of unsuccessfully defending civil proceedings brought by the company or an associated company;[76]
- any loan, quasi-loan or credit transaction must first be disclosed to and approved by the company's members;[77]
- any payment for loss of office (but not loss of status) as shadow director of the company or its holding company must first be disclosed to and approved by the company's members;[78]
- any service contract pursuant to which he undertakes personally (whether directly or through the medium of a third party) to perform services for the company or any subsidiary must first be disclosed to and approved by the company's members;[79]
- he must declare to the company's directors the fact, nature and extent of any interest he has in any other form of proposed or extant transaction, arrangement or contract made with the company;[80]
- if he is interested in any contract made with a company then the directors' report accompanying the company's annual financial statements must disclose the fact, nature and extent of his interest; and[81]
- the Financial Secretary may seek a court order pursuant to CWUO, s.168J(1) to disqualify him from being concerned in the management of a company for up to 15 years.[82]

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75 CO, ss. 465 and 466.
76 CO, ss. 465, 468 and 469. Any permitted indemnities must be disclosed in the directors' report; see CO, s.470.
77 CO, ss.491, 500, 501 and 503.
78 CO, ss.516 and 521. See also CO, s.522 (compensation for loss of office in connection with transfer of the company's business or undertaking) and CO, s.523 (compensation for loss of office in connection with transfer of shares resulting from takeover offer).
79 CO, s.532. Where the company is a public company then the required approval must be obtained without reliance on the votes of or held for the person interested in the service contract.
80 CO, ss.536 and 540.
81 CO, s.543(2).
82 CO, s.879(6).

Corporate directors

8.030 Corporate directors are permitted to be appointed to the board of a private company unless that private company is a member of a group of companies that includes a public listed company. When a corporate body acts as a director it can only do so through a natural person and it is the natural person who should be shown as present at a board or general meeting on behalf of the corporate body. Notwithstanding the statutory prohibition on corporate directors a corporate entity may for the purposes of liability under the provisions of the CWUO be treated as a shadow director of a guarantee company, a listed company or a private company which is a member of a group of companies of which a listed company is also a member.[83]

Hong Kong Company Limited

Minutes of a Meeting of the Board of Directors of the Company held on [date] at [place] at [time]

Present:	Mr Wong Man-yue	
	Mr Chen Guo	Representing Wealthlabel Limited, corporate director of Richland Hong Kong Limited

Chairman
Mr Wong was appointed chairman of the meeting.

Etc

Exercise of powers

8.031 The earliest chartered trading companies began as *ad hoc* speculative ventures constituted as associations trading collectively on behalf of their members. They were able to draw capital from bankers and wealthy investors but managerial control over trading activities was placed in the hands of their merchant founder members with only the most fundamental matters requiring approval of the general body members.[84]

8.032 The Model Articles provide that unless the members resolve to direct the directors to pursue or refrain from certain action management of the company's business and affairs is firmly in the hands of the directors:[85]

[83] CO, s.456.
[84] *The English East India Company* (Chaudhuri, 1965, p25).
[85] Model Articles 2 &3 (public companies); Model Articles 3 & 4 (private companies); Model Articles 2 & 3 (guarantee companies).

"Directors' general authority –

(1) Subject to the Ordinance and these articles, the business and affairs of the company are managed by the directors, who may exercise all the powers of the company.

(2) An alteration of these articles does not invalidate any prior act of the directors that would have been valid if the alteration had not been made.

(3) The powers given by this article are not limited by any other power given to the directors by these articles.

(4) A directors' meeting at which a quorum is present may exercise all powers exercisable by the directors."

"Members' reserve power –

(1) The members may, by special resolution, direct the directors to take, or refrain from taking, specified action.

(2) The special resolution does not invalidate anything that the directors have done before the passing of the resolution."

8.033 It is important to remember that the directors' powers are exercised collectively and as a board, not by each of them as individuals: "directors must act together as a board … it is not sufficient to procure the separate authority of a sufficient number of directors to constitute a quorum".[86]

8.034 The requirement to act together as a board may be fulfilled formally by way of majority vote after meeting together.[87]

Hong Kong Company Limited

Minutes of a Meeting of the Board of Directors of the Company held on [date] at [place] at [time]

Present:	Mr Wong Man-yue
In Attendance:	Mr Chen Guo
	Mr Charles Yip (Secretary)

1. Chairman
Mr Wong was appointed chairman of the meeting.

[86] *Re Haycraft Gold Reduction & Mining Company* [1900] 2 Ch 230 at 235 per Cozens-Hardy J, where the company secretary's notice convening a general meeting was declared invalid, having been issued following informal discussion among directors rather than a board meeting.
[87] Model Article 6 (public companies); Model Article 7 (private companies); Model Article 6 (guarantee companies).

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2. Transfer of Shares
The Secretary tabled a stamped instrument of transfer in respect of 10 shares in the company that were to be transferred from Abacus Nominees Limited to Hamthor Limited. It was resolved that the transfer be approved.

There being no further business, the Meeting closed.

Wong Man Yue
Chairman

8.035 More informal approaches commonly permitted in private and guarantee companies nevertheless require unanimous assent or a resolution in writing.[88]

"Unanimous decisions –

(1) A decision of the directors is taken in accordance with this article when all eligible directors indicate to each other (either directly or indirectly) by any means that they share a common view on a matter.

(2) Such a decision may take the form of a resolution in writing, copies of which have been signed by each eligible director or to which each eligible director has otherwise indicated agreement in writing.

(3) A reference in this article to eligible directors is a reference to directors who would have been entitled to vote on the matter if it had been proposed as a resolution at a directors' meeting.

(4) A decision may not be taken in accordance with this article if the eligible directors would not have formed a quorum at a directors' meeting."

Hong Kong Company Limited

Written Resolutions of the Directors Made Pursuant to [Article 8] of the Company's Articles of Association

We, the undersigned, being all the directors of the Company for the time being, hereby resolve that a stamped instrument of transfer in respect of 10 shares in the company that are to be transferred from Abacus Nominees Limited to Hamthor Limited be approved.

Wong Man Yue
Mr Wong Man-yue

Dated:

Chen Guo
Mr Chen Guo

[88] Model Article 18 (public companies); Model Article 8 (private companies); Model Article 7 (guarantee companies).

OR

Hong Kong Company Limited

Written Resolution of the Sole Director Made Pursuant to [Article 8] of the Company's Articles of Association

I, the undersigned, being the sole director of the Company for the time being, hereby resolve that a stamped instrument of transfer in respect of 10 shares in the Company that are to be transferred from Abacus Nominees Limited to Hamthor Limited be approved.

Wong Man Yue
Mr Wong Man-yue

Dated:

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8.036 There is an important distinction between these two methods. Whereas minutes are required to be written to record or report business that has already *been* transacted at a meeting, the execution of written resolutions is *in itself* the transaction of the business. Whereas meeting resolutions are recorded using the past tense, written resolutions employ the current tense. There is no requirement that written resolutions be signed by all directors at the same time - or even on the same day, but they will not become effective until the point at which the last director's signature is added.

Delegation of powers — committees

8.037 The articles will often permit the delegation of business to committees of the board, whose actions are then merely 'noted' by the board from time to time:

"The directors may delegate any of their powers to committees consisting of such member or members of their body as they think fit; any committee so formed shall in the exercise of the powers so delegated conform to any regulations that may be imposed on it by the directors."[89]

8.038 Listed companies' boards are required to appoint audit committees comprising non-executive directors only and chaired by an independent non-executive director.[90]

[89] Model Articles 4 & 5 (public companies); Model Articles 5 & 6 (private companies); Model Articles 4 & 5 (guarantee companies).

[90] Rule 3.21 of the Exchange Listing Rules.

CHAPTER 19

PARTNERSHIPS, JOINT VENTURES, GUARANTEE COMPANIES, OWNERS' CORPORATIONS

Partnerships

19.001 Partnership is the relationship that subsists between persons carrying on a business in common with a view to profit. [1] The Partnership Ordinance (Cap.38) ("PO") statutory definition specifically excludes relationships between shareholders of companies. Partnerships, limited liability partnerships and limited partnerships are required to register under the Business Registration Ordinance (Cap.310) ("BRO")[2] *[see Appendix 28 of this text]* and to join a Mandatory Provident Fund scheme.[3]

19.002 The 1865 Companies Ordinance introduced a prohibition on large partnerships (10 persons in the case of banking business and 20 persons in the case of all other businesses, though the number was fixed at 20 for all partnerships in 1866).[4] The prohibition was relaxed in 1978 to permit unlimited numbers of professional persons to form partnerships and was removed altogether in 2004. The regulation of banking business is separately provided for in the Banking Ordinance (Cap.155) ("BO").[5]

19.003 The rules for determining the existence of partnership are found at s.2 of the Partnership Ordinance (Cap.38) ("PO"). These rules recite a series of circumstances:

- joint ownership of property;[6]
- sharing of gross returns;
- receipt of a share of profits in a business (prima facie evidence only);
- receipt of repayment of debt in instalments;

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1 Section 3(1) of the Partnership Ordinance (Cap. 38) ("PO").

2 Section 5 of the Business Registration Ordinance (Cap. 310) ("BRO") requires a: "person carrying on business" to register - a definition which at PO, s.3(1)(c) includes partnerships.

3 Partners themselves fall within the definition of self-employed person at s.2 of the Mandatory Provident Fund Schemes Ordinance (Cap 485) ("MPFSO"). Partnership fall within the definition at MPFSO, s.2 of employer; MPFSO, s.7C requires partners to register as self-employed persons and partnerships to register as employers; MPFSO, s.44 imposes criminal liability on partners if they fail to register.

4 Section 4 of the Companies Ordinance of 1865; s.1 of the Companies Ordinance No 1 of 1866.

5 Cap 155, Laws of Hong Kong.

6 "Property" is construed widely and in accordance with s.22 of the Partnership Ordinance (Cap.38), extends to a non-transferable licence granted to an individual. See *Don King Productions Inc v Warren* [2000] Ch 291, as followed in *Yau Wah Hing v Yuen Kay Ming* (unrep., CACV 46/2012).

- profit-driven remuneration or lending; and
- annuity from the profits of the partnership.

None, however, are themselves conclusive when determining whether a partnership exists.

19.004 The courts will instead look at the substance of a relationship and, even if the words state otherwise (*e.g.* "this agreement shall *not* constitute a partnership agreement between the parties hereto"), are prepared to construe a partnership if that is indeed the true nature of the relationship.[7]

General Partnerships

19.005 The business of the partnership must actually be carried on as a partnership. The work of promoters of a business who merely make preparations while awaiting the incorporation of an intended company does not of itself create a partnership.[8] However, if on the facts those preparations are sufficiently extensive as to amount to the parties actually embarking upon the very venture on which they had agreed, then the relationship will be one of partnership.[9]

19.006 Where a partnership is sued or wishes to sue, the Rules of the High Court (Cap,4A) ("RHC")[10] permit action to be undertaken in the name of the firm, rather than in the names of each individual partner. However, RHC Order 81 merely operates to provide a convenient way in which firms may sue or be sued and does not confer any form of incorporated status or legal entity in the partnership.[11]

19.007 A partnership is liable to profits tax as a single entity,[12] but once again this should not be confused as conferring any separate form of incorporated status on the partnership or thinking of it as a form of legal entity. It is the partners themselves who share liability for that tax as individuals.[13] Liability is shared equally or otherwise in accordance with the provisions of their partnership agreement. Partnership books are to be kept at the partnership's place of business and every partner is afforded unrestricted access to those books and to take copies thereof.[14] The PO requires partners to render true accounts and full information of all things affecting the partnership to any partner and

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[7] *Chan Sau-kut v Gray & Iron Construction* [1986] HKLR 84, as followed in *Shah Ajay Kanaiyalal v Wong Tak Kwong, Joly* (unrep., HCA 1431/2008).
[8] *Keith Spicer Ltd v Mansell* [1970] 1 WLR 333.
[9] *Khan v Miah* [2001] 1 All ER 20.
[10] RHC Order 81, rule 1.
[11] Where RHC Order 81 is engaged then a plaintiff is expected to follow the requirements of that Order 81, rule 3 in serving the writ. See *3D-Gold Jewellery Holdings Limited v PriceWaterhouse Coopers* (unrep., HCA 1192/2011) where a writ was served merely marked for the attention of the defendant's general counsel and senior legal counsel.
[12] Section 14 of the Inland Revenue Ordinance (Cap.112) ("IRO") imposes profits tax on the assessable profits of a "person" carrying on a trade, profession or business. The definition of "person" at PO, s.2 includes partnerships.
[13] Section 22 of the Inland Revenue Ordinance (Cap.112).
[14] PO, s,26; see also *Ip Pui Lam, Arthur v Alan Chung Wah Tang* [2015] 2 HKLRD 603.

his legal representative[15] but this obligation is more a reflection of the fiduciary relationship partners owe to each other and there is no general statutory requirement for a partnership to draw up annual accounts, let alone to have accounts audited.[16]

19.008 Partnership is highly personal and, unless the partners agree otherwise, the death or bankruptcy of any partner operates to dissolve the partnership. Furthermore, subject to contrary agreement, a partnership established for a fixed term or particular project will be dissolved upon expiry of that term or completion of that project.[17]

19.009 Where a partnership has been entered into for an undefined time, subject to contrary agreement any partner may give notice to the others of his intention to dissolve the partnership.[18] And where a partnership is completely silent as to terms with regard to duration, then it may be dissolved at will by either or any partner.[19]

19.010 Partnership agreements are interpreted according to the usual principles of the law of contract and govern the relationship between the partners themselves. The standard of conduct expected between partners is that of utmost good faith and unless one partner obtains the consent of the others he is not permitted to carry on a form of business in competition with the partnership, and is liable to pay over all profits made if he is in breach.[20] The agreement will address rights of participation in the business of the partnership, the manner in which capital, profits and losses are to be shared among the partners and any restrictions to be placed on a partner on retirement if he wishes to establish a new form of business that is likely to compete with the partnership. Such restrictions, being covenants in restraint of trade and so unenforceable unless shown to be reasonable in the interests of the parties and in the public interest, are the source of considerable conflict between departing partners and those whom they leave to continue the partnership.[21]

19.011 Partnership agreements do not affect dealings between the partners and third parties. Outsiders derive their protection from s.7 of the Partnership Ordinance (Cap.38), which constitutes every partner as an agent of the entire firm and his colleague partners. Each partner's agency authority is, however, restricted to the purposes of the partnership's business.

[15] PO. s.30
[16] The IRO requires partnership accounts to be submitted in support of profits tax returns but, as is the case with incorporated companies and individuals, does not require such accounts to be audited; partnerships such as law firms are subject to prudential regulation requiring accounts to be accompanied by an accountant's report; see also the Legal Practitioners Ordinance (Cap.159), s.8.
[17] PO, ss.34 and 38; see also *Pearce v Chamberlain* (1750) 2 Ves Sen 33.
[18] PO, s.34.
[19] PO, s.28.
[20] PO, s.32; see also *Scottish CWS v Meyer* [1959] AC 324 at 363 per Lord Keith: "*A partner who starts a business in competition with the business of the partnership without the knowledge and consent of his partners is acting contrary to the doctrine of utmost good faith between the partners*". See also *Kung Cheong Kai v Kung Cheong Ki* (unrep., HCA 704/2013).
[21] A 5-year restriction in respect of a 5 percent capital partner of a firm of solicitors was upheld in *Bridge v Deacons* [1984] AC 705, whereas similar restrictions in respect of salaried partners have not been upheld in *Kao Lee & Yip v Edwards* [1993] HKC 314 and *Kao Lee & Yip v Koo* [1994] 2 HKC 228. In *Deacons v White & Case* [2003] 3 HKLRD 670, a departing capital partner was held to have breached his core duty of loyalty and fidelity in misusing the firm's confidential information for the benefit of himself and the new firm.

19.012 As far as third parties who deal with the partnership are concerned, the acts of a partner will bind the firm and his partners jointly and severally as regards business that is of the kind carried on by the firm, provided it is carried on by him in the usual way,[22] even where money or property is received from a third person and misapplied by a partner while it is the custody of the firm.[23] Whether such business is carried on the "usual" way will be fact-specific: it is "usual" for legal services provided by a law firm to include as an incidental service an escrow account facility but not otherwise.[24]

19.013 Only if the partner: (a) has in fact no authority to act for the firm in the particular matter; *and* (b) the third party with whom he is dealing knows that he has no authority, or does not know or believe that he is in fact a partner, will that agency authority be lost.

19.014 Partners come and go, but third parties are nevertheless entitled to treat as such all apparent partners of the 'old' firm until such time as they have had notice of the change.[25] It is very much in the interests of a departing partner to ensure that his departure is made known. He may not realise that he is still being represented as a partner, but if he knowingly allows himself to be represented as a partner then he will be liable to third parties who have acted on the strength of that representation as if he remained a partner.[26]

19.015 Registration of the partnership under the Business Registration Ordinance (Cap.310) ("BRO") requires a list of all partners' names to be filed[27] and any change to the list of partners or their particulars to be notified within 1 month of the change.[28] Business Registration is, however, merely *prima facie* evidence as the business form and a business registered as sole proprietorship may nevertheless be in substance a partnership.[29] Although the fact that a former partner's name remains on that public record does not of itself amount to him representing himself as continuing to be a partner[30] a third party is entitled to all apparent partners of the partnership as being current partners until a change is duly notified.[31]

19.016 Admission to partnership does not of itself mean a partner incurs liability for anything done by the partnership before joining. Likewise, retirement does not of itself mean that a partner ceases to be liable for what was done before leaving. A retiring partner

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[22] PO, ss.7, 12, and 13; see also *William Allan v Ng & Co* [2012] 2 HKLRD 160; *Lau Chun Ming v Deloitte Touche Tohmatsu* (unrep., CACV 22/2015). It is the third party's perspective that is critical, although partners in a car repair and garage business may agree between themselves not to sell cars, the partnership may be held liable for the unauthorised sale of a car by a partner, per Mocatta J in *Mercantile Credit v Garrod* [1962] 3 All ER 1103. Mocatta J there held that: "I must have regard in deciding this matter to what was apparent to the outside world in general … and to the facts relevant to business of a like kind to that of the business of this partnership so far as it appeared to the outside world."

[23] PO, s.13(b): see also *Hebei Enterprises Limited v Livasiri & Co* (2008) 11 HKCFAR 321.

[24] *Emperor Securities Ltd v Navin Kumar Aggarwal* (unrep., HCA 1167/2011).

[25] PO, s.38.

[26] PO, s.16.

[27] BRO, s.5

[28] BRO, s.8.

[29] *Fu Cheung Co v Win Tat Engineering Ltd* (unrep., HCCT 1/2009).

[30] *Lon Eagle Industrial Ltd v Realy Trading Co* [1999] 4 HKC 675.

[31] *Gloriagate Ltd v May Land Co* (unrep., HCA 1176/2014).

may gain the agreement of the newly constituted firm and its creditors to discharge him from existing liabilities.[32] Such agreements are, however, uncommon and a retiring partner will be rather more concerned to ensure that he does not allow himself to be represented as a partner by the newly constituted firm. He should therefore give actual notice of his retirement to creditors who exist at the time of his retirement and require the continuing partners to remove his name from all partnership materials. An advertisement in the HKSAR Gazette is deemed sufficient notice to persons who did not become creditors of the firm until after his retirement.[33]

NOTICE OF DISSOLUTION OF PARTNERSHIP

Pursuant to Section 38(2) of the Partnership Ordinance (Chapter 38)

NOTICE is hereby given that LAM CHI MING retired from the partnership of Infotech Systems (the "Firm") with effect from [date] and LAM CHI MING shall not be held liable in any way for any debts, liabilities, obligations or commitments incurred by the Firm on or after that date.

Dated:

CHAN & WONG
Solicitors for LAM CHI MING

19.017 Subject to any agreement among the partners any amount due from surviving or continuing partners to an outgoing partner (or, if deceased, his representatives) is a debt accruing at the date of the dissolution of the partnership or death of the partner.[34] The partners are jointly (but not severally)[35] liable for the firm's debts in the event of a partnership becoming insolvent while they are partners and a bankruptcy order may be made against the firm without naming the partners individually.[36] The Official Receiver as trustee in bankruptcy will require creditors to prove their debts and will then proceed to settle these from the partners' jointly owned assets in the first instance, followed by assets the partners own as individuals. Individual partners' assets are, however, subject to the priority of any claims against them by their personal

[32] PO, s.20.

[33] PO, ss.38 and 39.

[34] PO, s.45, as applied in *Brettell v Erving* (unrep., HCA 1195/2015).

[35] PO, s.11 as applied in *Chan Shu Kong v Kwong Hing Trading Company Ltd* (unrep., HCA 1152/2006).

[36] BO, s.7.

creditors.[37] Larger partnerships of eight or more partners fall within the definition of "unregistered company" and may alternatively be wound up under Part 10 of the Companies (Winding-Up and Miscellaneous Provisions) Ordinance (Cap.32) ("CWUO").[38]

Limited liability partnerships

19.018 A limited liability partnership ("LLP") is a particular form of partnership complying with and governed by the provisions of Part 2AAA of the Legal Practitioners Ordinance (Cap.159) ("LPO"). It is not a form of limited partnership governed by the Limited Partnerships Ordinance (Cap.37) (see below at §19.024). Nor is it available generally: the LLP is restricted to the circumstances where a partnership carries on business as a solicitors' firm registered with the Law Society as a Hong Kong firm or a foreign firm and is designated by written agreement between the partners as a partnership to which the provisions of Part 2AAA, LPO shall apply.[39] The LLP is therefore merely an additional choice in the mode of practice for law firms in Hong Kong and remains governed by the general body of rules of common law and equity and the entirety of the provisions of the PO except insofar as they are inconsistent with the provisions or the LPO.[40]

19.019 Where an existing Hong Kong firm or foreign law firm becomes a limited liability partnership then it must:

- include the words "Limited Liability Partnership" or "LLP" (or the Chinese equivalent thereof)[41] as part of its name, display the same visibly and legibly outside every office or place at which it carries on business, on every item of correspondence, publication, invoice, etc;[42]
- notify the Law Society in writing of the fact at least 7 days before becoming an LLP, providing details of the date it is to become an LLP, the intended name and details of the partners' names and addresses;[43] and
- inform its clients of the fact within 30 days.[44]

19.020 The principal advantage of pursuing legal practice by way of the LLP is that the LPO affords measures by which a partner is not, solely by reason of being a partner, jointly

[37] BO, s.11; see also PO, s.38(7).
[38] CWUO, s.326.
[39] LPO, s.7AB.
[40] LPO, s.7AR; in particular, nothing in Part 2AAA affects any right of a partner to be indemnified by another partner or any obligation of a partner to indemnify another partner under any written arrangement made between the partners: LPO, s.7AG.
[41] LPO, s.7AJ.
[42] LPO, s.7AK; this will in turn trigger business registration changes to be reported to the Business Registration Office of the Inland Revenue Department.
[43] LPO, s.7AI(1); the Law Society must keep a list of LLPs: LPO, s.7AO.
[44] LPO, s.7AL.

or severally liable for any partnership obligation arising from the provision of professional services as a result of the default of another partner or an employee, agent or representative of the LLP.[45]

19.021 This protection from liability applies to a partner, however, only if at the time of the default in question:[46]

- the partnership was constituted and designated as an LLP by agreement of the partners;
- the client knew or ought reasonably to have known that the partnership was an LLP;
- the partnership had complied with mandatory requirements prescribing top-up professional indemnity insurance for firms with no aggregate limit in the sum of at least $10,000,000 per claim;[47] and
- the partnership had complied with mandatory requirements prescribing the assignment of one or more overall supervising partners for each matter handled and of whose identities the client has been informed.[48]

19.022 This protection from liability does not apply[49] to a partner, however, where:[50]

- the partner knew of the default at the time of its occurrence and failed to exercise reasonable care to prevent the same; and
- the default was that of the partner or any employee, agent or representative of the partnership who was under the partner's direct supervision in respect of the matter at the time of the default.

19.023 This protection from liability is in any event restricted to defaults arising in the provision of legal services by the partnership and does not protect any interest of a partner in the partnership property from claims against the partnership.[51] All partners therefore remain jointly and severally liable for the LLP's ordinary business obligations.[52]

[45] LPO, s.7AC(1).
[46] LPO, s.7AC(3).
[47] LPO, s.7AD; compliance with the Solicitors' (Professional Indemnity) Rules (Cap.159M) is also required.
[48] LPO, s.7AE.
[49] The consequences are restricted to the protection not being afforded to a partner in certain instances and do not operate to change the character of the firm as a limited liability partnership: where a claim arises in respect of a matter supervised by two partners, the fact that one of the partners failed to exercise reasonable care to prevent its occurrence does not of itself reduce or remove the protection afforded to the other partner.
[50] LPO, s.7AF(1) & (2).
[51] LPO, s.7AF(3).
[52] Such as premises rent, staff salaries and other creditors of the firm but also obligations to clients arising otherwise than from the provision of legal services, e.g. misappropriation of monies from client accounts, resulting instead from the firm's internal control failures.

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Limited partnerships

19.024 A limited partnership is a particular form of partnership complying with and governed by the provisions of the Limited Partnerships Ordinance (Cap.37) ("LPartO").[53] Limited partnerships remain governed by general body of rules of common law and equity and the entirety of the provisions of the PO except insofar as they are inconsistent with the provisions or the LPartO.[54] The principal distinguishing feature afforded to a limited partnership by the LPartO is that one or more partners may be constituted as limited partners who shall not be liable for the firm's debts and obligations.[55] Management of the affairs of a limited partnership lies instead exclusively in the hands of one or more general partners. A limited partnership is, therefore, not a legal entity and instead a relationship subsisting among persons carrying on a business. It is, however, required to be registered with the Registrar of Companies[56] and until an intended limited partnership is so registered it will remain subject to the law governing general partnerships. A limited partnership is therefore not formed as such until it has been registered.[57]

19.025 The LPartO provides the following mandatory requirements in regard to limited partners:

- a limited partner shall have no power to hold out or bind the firm;[58]
- a limited partner purporting to take part in the management of the firm shall thereupon become liable for its debts and obligations as if he were a general partner;[59]
- a limited partner who draws out or receives back any part of his contribution during the continuance of the partnership shall thereupon be liable for the firm's debts and obligations to the extent of such drawings or receipts;[60]
- a limited partner is permitted to inspect the firm's books and examine the prospects of the business;[61]
- death or dissolution of a limited partner does not of itself trigger dissolution of the limited partnership;[62]

53 LPartO, s.4.
54 LPartO, s.6.
55 LPartO, s.3(2); such partners must nevertheless contribute a stated amount of cash or other form of consideration as partnership capital.
56 LPartO, s.4.
57 Brand Farrar Buxbaum LLP v Samuel-Rozenbaum Diamond Ltd [2005] 2 HKLRD 342 per Cheung JA at §16.
58 LPartO, s.5(1).
59 LPartO, s.5(2).
60 LPartO, s.3(4).
61 LPartO, s.5(1) proviso.
62 LPartO, s.5(3); this, along with the provisions at s.5(1) unlike the provisions at s.5(6) which are subject to any agreement, expressed or implied, between the partners, such event cannot feature as trigger for dissolution in any written terms agreed among the partners of a limited partnership.

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- the affairs of a limited partnership shall in the event of dissolution be wound up by the general partners alone unless otherwise ordered by the court;[63] and
- application to wind up the affairs of a limited partnership shall be by petition presented pursuant to the provisions of the CWUO, in which case the general partners shall for the purposes of CWUO and CWUR be treated as if they were directors of a body corporate.[64]

19.026 The LPartO provides that the following requirements shall apply unless otherwise expressly or impliedly agreed between the partners:

- differences arising as to ordinary matters connected with the partnership may be decided by a majority of the general partners;[65]
- consent of the general partners shall be required for any limited partner to assign his share in the partnership, whereupon an assignee shall become a limited partner with all the rights of the assignor;[66]
- the granting of a charge by a limited partner over his share in the partnership shall not of itself entitle other partners to dissolve the partnership;[67]
- consent of the limited partners is not required in order to introduce a new general partner;[68] and
- a limited partner is not entitled to dissolve the partnership by notice.[69]

19.027 Registration of a limited partnership requires delivery to the Registrar of a signed[70] application on Form 1 *[Appendix 51 of this text]* stating that the partnership is limited and reciting the following details of the partnership:[71]

- name, general nature of business, principal place of business;
- term (if any) for which the partnership has been entered into, commencement date;
- full name and address of each limited partner and each general partner; and
- amount contributed by each limited partner[72] and whether paid in cash or otherwise.

63 LPartO, s.5(4).
64 LPartO, s.5(5).
65 LPartO, s.5(6)(a): given the absolute prohibition on limited partners managing the business the extent to which this provision may be varied by agreement among the partners appears to be limited to the extent of general partner agreement, i.e. whether decisions as to differences regarding ordinary matters require more than a mere majority vote, rather than permitting the partnership agreement to provide for involvement of any limited partner.
66 LPartO, s.5(6)(b).
67 LPartO, s.5(6)(c); this is the opposite of the position found at PO, s.35(2) regarding general partnerships.
68 LPartO, s.5(6)(d).
69 LPartO, s.5(6)(e).
70 Form 1 is required to be signed by all partners.
71 LPartO, s.7; Form 1, Appendix to the Limited Partnerships Rules (Cap.37A), the registration fee for which is $340, together with a fee of $8 per $1,000 (or part thereof) of capital contributed by the limited partner(s).
72 Form 1 above does not require disclosure of the capital contributions of general partners.

19.028 Upon registration of a limited partnership the Registrar shall cause a certificate of registration to be issued[73] and include the limited partnership and all statements filed to a register[74] which shall be open to inspection.[75] There is nothing in the form of certificate of registration appearing to require that the name of the firm include the term or reference to "limited liability" in its name, nor is there any provision in the LPartO requiring a firm to include the term or reference to "limited liability" in any letterhead, business correspondence, etc.

19.029 Changes in the firm's name, general nature of business, principal place of business, term of the partnership, names of any general or limited partners, the amounts contributed by limited partners or in the liability of any general partner must be notified to the Registrar on Form 2 *[Appendix 52 of this text]* within 7 days of such change.[76] Notice of any changes whereby a general partner becomes a limited partner or a limited partner assigns his share must in addition be published in the HKSAR Gazette.[77]

19.030 Limited partnerships are wound up as unregistered companies pursuant to Part 10 of the CWUO.[78]

Joint Ventures

19.031 Where two or more individuals or companies wish to pool their complementary resources to run a particular business or share the risks of a particular project their cooperation may take a number of forms, ranging from terms evidenced by way of contract, to a partnership agreement or formation of a jointly owned company (often along with a shareholder agreement) to pursue the purpose. Whatever the chosen form:

- it may involve the running of a business on a long-term basis or the realisation of a particular project; and
- it may be entirely new or it may be an existing business, which it is believed will benefit from the introduction of a further participant.

[73] LPartO, s.12; Form 5, Appendix to the Limited Partnership Rules.

[74] LPartO, s.13.

[75] LPartO, s.14.

[76] LPartO, s.8(1), the filing fee for which is $8; additional or increased limited partners' capital contributions attract a fee of $8 per $1,000 of such contributions; failure to notify on time is punishable by a daily default fine of $50: s.8(2).

[77] LPartO, s.9; Form 6 (general partner becoming limited partner), Appendix to the Limited Partnership Rules (Cap.37A) or Form 7 (assignment of limited partner's share), Appendix to the Limited Partnership Rules (Cap.37A), as the case may be; failure to notify does not carry any penalty but in such event the arrangement or transaction in question shall be of no effect until notice is given; see also LPartO, s.9.

[78] CWUO, s.326 provides that the term "unregistered company" includes any partnership, whether limited or not.

Contractual Joint Ventures

19.032 One form of cooperation often used in the construction sector is the contractual joint venture, an unincorporated association of its participant members. The parties to a contractual joint venture do not commit to the kind of fiduciary relationship required of a partnership and their agreement is invariably for the purpose of one or a finite number of projects.

19.033 A contractual joint venture does not have separate or independent legal personality but is treated at law as a person[79] and falls within definitions such as "person carrying on business" for the purposes of Business Registration[80] and "person" whose profits from his trade, profession or business are assessable to profits tax pursuant to the Inland Revenue Ordinance (Cap.112) ("IRO").[81] The participants divide the various work elements between themselves and compute their individual profit (or loss) on the various work elements they perform or subcontract to each other. Although each participant typically gives the other an indemnity in respect of loss caused by his failure or defective performance on the part of his employees or subcontractors, the strictly contractual nature of their relationship precludes the joint venture from constituting a partnership. There is no holding out or binding of the other participants and they owe each other no duties beyond what is specifically agreed in their oral or written contract terms.

19.034 A joint venture is, therefore, a highly flexible concept and the nature of any particular joint venture will depend to a very large extent on its own facts and on the resources and wishes of the parties — though of course if the participants thereby enter into a fiduciary relationship the arrangement will lean towards being in the nature of a partnership.

19.035 Criminal prosecution for infringements of environmental, employment and safety regulations by construction sector businesses operating independently or through contractual joint ventures is not uncommon.[82] However, as is the case with partnerships, unincorporated bodies of persons are not legal persons at common law and so cannot be sued in damages or convicted of common law offences.[83] Statutory offences

[79] Section 2 of the Interpretation and General Clauses Ordinance (Cap 1): "person" includes any public body and any body of persons, corporate or unincorporated, and this definition shall apply notwithstanding that the word "person" occurs in a provision creating or elating to an offence or for the recovery of any fine or compensation.

[80] BRO, s.3(1)(c) identifies the principal officers of "any other body of persons" as carrying on the business.

[81] IRO, s.14 charges to profits tax the assessable profits arising or derived from Hong Kong of every person carrying on a trade, profession or business in Hong Kong. IRO, s.2 defines "person" to include a "body of persons" which is in turn is defined as: "any body politic, corporate or collegiate and any company, fraternity, fellowship and society of persons whether corporate or not corporate".

[82] Regulation 10(2)(a) of the Electricity Supply Lines (Protection) Regulations (Cap.406H) provides that a person who carries out or permits: *"another to carry out in the vicinity of an underground electricity cable any works which are below ground level... shall ensure that all reasonable measures are taken to prevent the occurrence of an electrical accident..."*

[83] *Ricci v Chow* [1987] 1 WLR 1658 where a libel action can only lie against the individuals who committed the wrongful acts; see Blackstone's Criminal Practice (2017), §A6.15. Unincorporated bodies can of course sue and be sued by way of representative action through the person of a suitable officer; see *Hong Kong Children Association v Chan Mei Kee* (unrep, HCA 9588/2000).

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are an entirely different matter[84] and may, depending upon the elements of the offence,[45] be committed by an unincorporated body[86] and the amount of any fine paid from the funds of the body or association.[87] It is not unknown for a prosecution to be preferred against construction sector joint ventures[88] but it is more often the case that the several corporate entity participants comprising a joint venture are named as defendants and for the court to treat them as principals ultimately responsible for the acts of their joint venture agent,[89] thus avoiding the thornier issue of determining whether it would be legally possible to convict an unincorporated association of the particular offence.[90]

Joint Venture Companies

19.036 An alternative to the contractual joint venture is the equity Joint Venture Company ("JVCO"), which resembles the early form of organisation adopted by merchant adventurers.[91] It is inherently temporary in nature and a compromise arrangement between its participants. Joint venturing has grown rapidly to become an important feature of today's commercial world. The parties' objectives can be limited to single large-scale transactions such as the development of a particular property or the building of turnkey technology and infrastructure projects (*i.e.* the Concorde jetliner and Chek Lap Kok airport). And JVCOs are becoming the preferred means by which foreign manufacturing, distribution and retailing businesses expand and establish themselves throughout the world: Reebok Hong Kong is in fact a JVCO formed between the Swire Group and Reebok; and Starbucks coffee in Hong Kong is a JVCO between Starbucks of Seattle and Hong Kong Land's Maxim Group.

[84] Interpretation and General Clauses Ordinance (Cap 1). s.3.

[85] Different considerations might well apply to statutory offences requiring proof of *mens rea*; see *A-G v Able* [1984] QB 795.

[86] *R v Clerk to Croydon Justices ex parte Chief Constable of Kent* [1989] Crim LR 910. Financial Services and Markets Act 2000: *"If an offence under this Act committed by an unincorporated association (other than a partnership) is shown: (a) to have been committed with the consent or connivance of an officer of the association or a member of its governing body; or (b) to be attributable to any neglect on the part of such an officer or member, that officer or member as well as the association is guilty of the offence and liable to be proceeded against and punished accordingly."*

[87] *Taff Vale Railway v Amalgamated Society of Railway Servants* [1901] AC 426 at 443, per Lord Lindley.

[88] *HKSAR v Hip Hing-Kumagai Joint Venture* (unrep., HCMA 984/1998) where the joint venture itself was named in a summons.

[89] Each company participating in the joint venture is treated as being liable for its own act, omissions and contraventions and could therefore be prosecuted in its own name without reference to any of the other companies involved; see *HKSAR v Gammon Skanska Ltd & Nishimatsu Construction Company Ltd* (unrep., HCMA 38/2003), see also *HKSAR v VW-VES (HK) Ltd* (2015) 18 HKCFAR 84.

[90] In *Jiang Enzhu v Emily Lau Wai-hing* [1999] 3 HKC 8 at 31F per Stock J quoted Adams on Criminal Law: *"To convict an unincorporated association would be a legal nonsense... But of course, individual members of such a body can be prosecuted in their own names in respect of their own acts or omissions as members."* The more recent English case of *R v L(R)* [2009] 1 Crim App R 16 held that the definition of "person" in the interpretation statute was of general application, not limited to criminal offences created by statute, and so included unincorporated bodies of persons and applied unless a contrary intention appeared in the relevant criminal law provision.

[91] The East India Company organised its first voyages as joint ventures independent of each other; its owners did not trade as a permanent, joint stock company until 1657 and private trading through the East India Company was not forbidden until 1692.

19.037 JVCOs are in turn owned by two or more other companies. The reasons behind forming a JVCO are themselves important indicators of how that enterprise should be structured:

- Participants may choose to share a substantial funding risk that neither is able to support on its own; this is a common feature of turnkey and property development projects and such joint ventures will have defined or limited lifespans;[92]
- Participants may have complementary strengths; a manufacturer of capital goods may form a joint venture in a new market with an established organisation that has proven sales, distribution and support operations, making it much easier to have those goods reach that new market quickly; and
- Local limits on foreign participation in a particular market may mean that specified businesses can only be undertaken with a local partner.[93]

19.038 As is the case with private individuals who enter into a shareholder agreement to supplement the articles of association of a private company, participants to a JVCO will find it worthwhile to enter into a formal agreement that provides mechanisms for exit if the business opportunity turns out to be less rewarding than first expected.[94]

> *"...If there is anything beneficial to anybody (other than the lawyers) to come out of this litigation, it will be the lesson it teaches that if in the future a commercial developer proposes entering into a contract for land production (or the like) with HKG, it should insist on HKG's commitment to a predetermined time scale as part of the contractual arrangements. If it cannot achieve this it should refuse altogether to have anything to do with the project, unless indeed it is prepared to shoulder a serious and unquantifiable risk. Any such contract for a joint venture between a commercial developer, and HKG which does not provide in terms for a commitment on the part of HKG to a defined time scale for the execution for the work seems to me to be destined to end in tears."*[95]

19.039 In addition, the JVCO's articles should in turn be drafted specifically to mirror as far as possible many of the financing, control, dispute resolution and termination provisions of the shareholder agreement. It is not possible to duplicate every requirement because there are certain provisions of the Ordinance from which the parties are not permitted to depart.[96] A specimen joint venture shareholder's agreement appears at [*Appendix 35 of this text*].

[92] Several joint ventures were formed for the specific purpose of bidding for and completing contracts to build Hong Kong's new airport.

[93] China's Ministry of Construction announced on 10 May 2004 that foreign companies seeking to pursue construction planning or design work in the PRC must work jointly with at least one Chinese partner approved by the Ministry of Construction.

[94] *Dollfus Mieg et Cie v CDW International Ltd* (unrep., HCA 3517/2002).

[95] *Tin Shui Wai Development Ltd v The Attorney General* (unrep., HCCT 5/1987) per Godfrey J, where the trial ran for 175 days over the course of 28 months. See also *Dollfus Mieg et Cie v CDW International Ltd* (unrep., HCA 3517/2002).

[96] *Russell v Northern Bank Development Corporation Ltd* [1992] BCLC 431.

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Companies Ordinance Section 103 Licence

19.049 Guarantee companies formed for charitable, educational or philanthropic purposes often desire the grant of a licence to dispense with the word 'limited' from their name, either upon formation[105] or at some future point in time.[106] Companies obtaining this dispensation must in any event disclose the fact of their limited liability elsewhere on company stationery and so this feature is a matter of appearance only. But appearances are often important in the world of professional societies and charitable and philanthropic work and many guarantee companies willingly submit themselves to the licence conditions. Guarantee form and a section 103 licence, even where the company is solely entrusted with governing a particular sport, will not of itself alter the essential private character of the company, however, and disputes will require to be resolved through private law means and not the avenue of judicial review; see *Hong Kong Rifle Association v Hong Kong Shooting Association* [2012] 4 HKLRD 411, affirmed on appeal at [2013] 3 HKLRD 362, following *R v Jockey Club, ex parte Aga Khan* [1993] 1 WLR 909.

19.050 The grant of such licences is entirely at the discretion of the Registrar. Special Guidance Notes in regards to the Application for a Licence to Dispense With the Word "Limited" in the Name of a Company (January 2014)[107] require a written application supported by various documents. It will be to an organisation's advantage if it can show that it meets the charitable status criteria within s.88 of the IRO (Cap.112),[108] but this is not an absolute prerequisite: professional bodies, for example, do not necessarily meet the Revenue's requirements for charitable status.

19.051 Where a proposed company intends on incorporation to assume assets, liabilities and activities which already exist in the form of an unincorporated association the Registrar will wish to review the list of items in Appendix I to the Guidance Notes [*Appendix 39 of this text*], of which the principal features are:

- a brief history of operations, Societies Ordinance registration;
- names of proposed founder members and governing council;
- proposed number of members;
- recent financial statements, details of assets and liabilities, subsidiary bodies and controlling interests;
- land search record of any property owned;
- nature of recent activities and outline of plans for specific future events;
- confirmation of any charitable status for tax purposes;

[105] CO, s.103(1).

[106] CO, s.103(3).

[107] Guidance Notes — Application for a Licence to Dispense With the Word "Limited" in the Name of a Company (January 2014); see [*Appendix 39 of this text*].

[108] Profits should be applied solely for charitable purposes, are not expended substantially outside Hong Kong and either: (a) the business is exercised in the course of carrying out the charity's expressed objects; or (b) the work in connection with the business is mainly carried on by persons for whose benefit the charity has been established.

- status in the particular charitable / educational / philanthropic area of interest;
- reasons for application; and
- proposed articles of association drafted to meet the particular requirements of a CO, s.103 licence,[109] with explanations of any requested variances.

19.052 Where an existing company seeks to introduce restrictions necessary to meet the CO, s.103 requirements, the Registrar will wish to review the list of items in Appendix II to the Guidance Notes [*Appendix 39 of this text*], of which the principal features are:

- any pre-incorporation history in unincorporated form;
- current number of members;
- outstanding annual returns or financial statements, if any;
- land search record of any property owned;
- details of any subsidiary bodies and controlling interests;
- nature of recent activities and outline of plans for specific future events;
- confirmation of any charitable status for tax purposes;
- status in the particular charitable/ educational/ philanthropic area of interest;
- reasons for application; and
- marked-up copy of articles of association to meet the particular requirements of a CO, s.103 licence,[110] with explanations of any requested variances.

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19.053 The following particular features should be noted in regard to the required form of articles of association.

19.054 Specific objects must be stated in the articles[111] in order that the purposes to which the company's powers may be directed fall squarely within the proposed charitable, educational, philanthropic, etc, intentions for which the company is being formed or is to be restricted and to which it will address itself in future.

19.055 There must be a clear prohibition on distribution of income and capital gains during the life of the company, also on the extent to which members may be remunerated:[112]

> "(1) The income and property of the [association] shall be applied solely to towards the promotion of the Objects as set out in these articles.

[109] Found at Appendix III to the Guidance Notes. [*Appendix 39 of this text*].

[110] Found at Appendix III to the Guidance Notes. [*Appendix 39 of this text*].

[111] Article 6 of Appendix III to the Guidance Notes. [*Appendix 39 of this text*].

[112] Article 8 of Appendix III to the Guidance Notes. [*Appendix 39 of this text*].

(2) Subject to sub-article (3), none of the income or property of the [association] may be paid or transferred directly or indirectly, by way of dividend, bonus or otherwise howsoever to any member of the Association.

(3) The requirement under sub-article (2) above does not prevent the payment by the [association]:

(a) of reasonable and proper remuneration to a member of the [association] for any goods or services supplied by him or her for the [association];

(b) of reimbursement to a member of the [association] for out-of-pocket expenses properly incurred by him or her for the [association];

(c) of interest on money lent to a member of the [association] at a reasonable and proper rate which must not exceed 2% per annum above the prime rate prescribed for the time being by The Hong Kong and Shanghai Banking Corporation Limited for Hong Kong dollar Loans;

(d) of rent to a member of the [association] for premises let to him or her to the [association]: Provided that the amount of the rent and the other terms of the lease must be reasonable and proper; and such member must withdraw from any meeting at which such a proposal or the rent or other terms of the lease are under discussion; and

(e) of remuneration or other benefit in money or money's worth to a body corporate in which a member of the [association] is interested solely by virtue of being a member of that body corporate by holding not more than one-hundredth part of its capital or controlling not more than a one-hundredth part of its votes."

19.056 There must also be a clear prohibition on the distribution of any surplus on a winding up. It is recommended that a successor body (or mechanism for choosing a successor body) be identified to assume any surplus in the event of a winding up:[113]

"...If, upon the winding up or dissolution of the [association] there remains, after the satisfaction of all its debts and liabilities, any property whatsoever ("the net assets"), the net assets shall not be paid to or distributed among the members of the [association] but shall be given or transferred to some other institution or institutions, having objects similar to the Objects, and which shall prohibit the distribution of its or their income and property amongst its or their members to an extent at least as great as is imposed on the [association] under or by virtue of article [X] above, such institution or institutions to be determined by a resolution of the members of the [association] at or before the time of dissolution and in

[113] Article 37 of Appendix III to the Guidance Notes. [*Appendix 39 of this text*].

default thereof by a Judge of the High Court of the Hong Kong Special Administrative Region having jurisdiction in the matter. If and so far as effect cannot be given to the aforesaid provisions, the net assets shall be applied for charitable purposes as directed by a Judge of the High Court of the Hong Kong Special Administrative Region having jurisdiction in the matter."

19.057 The articles of association will reflect the traditional division of power between governing council and membership-at-large, but the privilege of the CO, s.103 licence requires the governing council to demonstrate a greater degree of transparency and accountability to the general membership than is the case in other types of company. Membership rights provided in the Model Articles [*Appendix 38 of this text*] are only terminated upon voluntary withdrawal or death and so any proposal to include unilateral expulsion powers should be accompanied by right of appeal to the membership in general meeting.[114] Where, however, the body is to function as a professional or self-regulatory organisation, the inclusion of codes of conduct and a disciplinary panel independent of the governing council ought to provide a satisfactory alternative.

19.058 Furthermore, the governing council should be subject to a fixed minimum and maximum number and council membership should be subject to retirement in phases so as to assist continuity but at the same time avoid insularity. Permanent membership of the governing council is not permitted.[115] Council members must take direct responsibility for stewardship of the association's funds and are not normally permitted to delegate bank signatory powers.

19.059 These features are apparent from the Model Articles reproduced at [*Appendix 38 of this text*].

19.060 It is important to note that once a licence has been granted, further changes to the company's articles will require the Registrar's prior written approval — even before they are circulated to members prior to a general meeting. Companies seeking a CO section 103 licence will invariably find it prudent to defer their application until such time as they are comfortable with the operational restrictions that will be expected of them.

Management and administration

19.061 Guarantee companies are often plagued by lack of proper attention to the maintenance of their affairs[116] but ongoing administrative requirements are similar to those of the private company, but with one major exception. The company's annual return (Specified Form NAR1) must be made up to the date of the annual general meeting and filed within 42 days of that meeting, along with a copy of the company's audited financial statements. In contrast to the return for a company with share capital, a guarantee company's return will simply state the number of members with which it is incorporated, or the fact that its membership is unlimited.

[114] Thus avoiding the prospect of cabals attempting to terminate membership without affording adequate opportunity to be heard; see *Re Kam Lan Koon* [2015] 5 HKLRD 79 at §85

[115] Article 11 of Appendix III to the Guidance Notes. [*Appendix 39 of this text*].

[116] *Re Hong Kong Chiu Chow Po Hing Buddhism Association Ltd* [2016] 1 HKLRD 513 at §25.

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19.062 Returns to report changes in directors and their particulars, notification of change in situation of registered office and notification of the creation of any charges over the company's assets are required in the same way as for share capital companies. Likewise, the secretary of a guarantee company is required to maintain statutory records, minute books and, if the company has adopted the same, the common seal. The remedy of a derivative action is not restricted to companies limited by shares. Guarantee companies may be rather less commercial in their objects but they occasionally experience disputes between members and it is possible for one or more members to challenge by way of derivative action on behalf of the company alleged *ultra vires* loans and investments undertaken by the directors[117] and such actions require the grant of leave in the usual way.[118]

Owners' Corporations

19.063 The Building Management Ordinance (Cap.344) ("BMO") provides the legal framework for the formation and operation of owners' corporations and in support of government's policy of encouraging owners of apartments to ensure proper management of their buildings. An owners' corporation represents the interests of individual owners of apartments in privately owned multi-storey buildings and, like any registered company, has separate legal personality with perpetual succession, power to sue and be sued, a common seal and a registered office in Hong Kong.[119] Its members delegate day-to-day duties and responsibilities to a management committee whose membership acts in the same way as any board of directors of a registered company. The management committee is appointed from among the owners of apartments in the building and comprises at the very least a chairman, secretary and treasurer. The management committee may also comprise a vice-chairman and such other number of members as is required by the BMO and according to the number of apartments in the building.[120] The chairman must appointed from among the owners but the secretary and treasurer to the management committee need not be owners nor members of the management committee, nor do they become members of the management committee by virtue of their appointments as secretary or treasurer.[121]

19.064 Management committee members are treated as if they were directors of registered companies for the purposes of any winding up and subject to the provisions of the Companies (Winding-up and Miscellaneous Provisions) Ordinance (Cap.32) ("CWUO"),[122] and similarly treated as directors of registered companies for purposes of disqualification proceedings pursued under both the CWUO and the Securities and Futures Ordinance (Cap.571) ("SFO").[123] Although an owners' corporation's powers

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[117] *So Kwan Nane v Kowloon Stock Exchange Ltd* [1973-1976] HKC 315.
[118] *Re The Pui Ying Middle School of Hong Kong* [2015] 4 HKLRD 864.
[119] Building Management Ordinance (Cap.344), ss.8(2)(a), 8(3), and 8(4).
[120] Section 2(5) of Schedule 2 to the BMO.
[121] Section 2(1)(c) of Schedule 2 to the BMO.
[122] BMO, s.33(2)(a).
[123] BMO, s.33(1): owners' corporations may be wound up under the provisions of Part X of the Ordinance as unregistered companies and, in consequence, fall within the disqualification provisions of Part IVA of the

are limited to those matters concerned with maintaining the common parts of the building,[124] its members do not enjoy limited liability.[125] The Land Registry receives applications to register owners' corporations, issues certificates of registration and maintains a register and facilities to permit public search. At the time of writing, there were over 10,000 owners' corporations in Hong Kong.

Objects and powers

19.065 The objects of an owners' corporation are limited to: (a) the maintenance of the common parts of the building;[126] and (b) whatever may be reasonably required for the enforcement of any deed of mutual covenant for the building.[127] The owners' corporation's powers, which are exercised through its management committee, include engaging staff, keeping the building insured, purchasing items so that owners may enjoy use of the common areas, retaining accountants to audit the books of account and paying honorariums to committee members.[128]

Section 18, Building Management Ordinance (Cap.344)

"(1) The corporation shall—

(a) maintain the common parts and the property of the corporation in a state of good and serviceable repair and clean condition;

(b) carry out such work as may be ordered or required in respect of the common parts by any public officer or public body in exercise of the powers conferred by any Ordinance;

(c) do all things reasonably necessary for the enforcement of the obligations contained in the deed of mutual covenant (if any) for the control, management and administration of the building.

(2) A corporation may, in its discretion—

(a) engage and remunerate staff for any purpose relating to the powers or duties of the corporation under this Ordinance or the deed of mutual covenant (if any);

(aa) subject to subsection (3), and subject to such terms and conditions as to attendance at meetings of a management committee and its sub-committees as the management committee may determine, pay the chairman, vice-chairman (if any), secretary,

CWUO; see section 168C(1)(b) of the CWUO. The definition of "corporation" in Schedule 1 of the SFO extends to any "other body corporate incorporated in Hong Kong" and so directorships of owners' corporations fall within the range of offices from which an individual may be disqualified following petition presented pursuant to SFO, s.214.
[124] BMO, ss.18 and 19.
[125] BMO, s.34.
[126] Defined in the First Schedule to the BMO.
[127] BMO, ss.18(1) and 19.
[128] BMO, s 18(2) prescribes that such honorariums are limited to the sums prescribed in the Fourth Schedule to the BMO.

treasurer and other holders of office of the management committee appointed in accordance with the Second Schedule such allowances as may be approved by the corporation by resolution passed at a general meeting, in accordance with, but not exceeding, the maximum allowances specified in the Fourth Schedule;

(b) retain and remunerate accountants for the purposes of auditing the corporation's books of accounts and preparing the annual income and expenditure accounts and balance sheets;

(c) retain and remunerate a manager or other professional trade or business firm or person to carry out on behalf of the corporation any of the duties or powers of the corporation under this Ordinance or the deed of mutual covenant (if any);

(d) insure and keep insured the building or any part thereof to the reinstatement value thereof against fire and other risks;

(e) purchase, hire or otherwise acquire movable property for use by the owners in connection with their enjoyment of the common parts or to satisfy any requirement of a public officer or public body for the purpose of any Ordinance;

(f) establish and maintain lawns, gardens and playgrounds on the common parts;

(fa) carry out any renovation, improvement or decoration work, as the case may be, to the common parts;

(g) act on behalf of the owners in respect of any other matter in which the owners have a common interest.

(2A) Without prejudice to the generality of subsections (1) and (2), the corporation in the performance of its duties and the exercise of its powers under this section shall have regard to and be guided by Codes of Practice issued from time to time under section 44(1).

(3) A person shall not be entitled to receive an allowance under subsection (2)(aa) in respect of more than one office held by him at the same time.

(4) No provision in a deed of mutual covenant or other agreement shall operate to prevent a person who is otherwise entitled to receive an allowance under this section from receiving that allowance and any such provision, including a provision purporting to substitute some lesser allowance (howsoever named) for that allowance, shall be void and of no effect."

19.066 There is no division of duties between members and management committee similar to that found in registered companies, however, and any resolution passed at a properly convened and constituted meeting of the incorporated owners shall be binding on the management committee in addition to all owners.[129] Further, since these duties are imposed by statute, an owners' corporation cannot waive their performance or acquiesce in their non-performance.[130]

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Section 14, Building Management Ordinance (Cap.344)

"(1) Subject to this Ordinance, at a meeting of a corporation any resolution may be passed with respect to the control, management and administration of the common parts or the renovation, improvement or decoration of those parts and any such resolution shall be binding on the management committee and all the owners.

(2) Without prejudice to the generality of subsection (1), a corporation may by resolution at a meeting remove from office and replace any member (other than a member who is the tenants' representative) of the management committee.

(3) A resolution for the removal of so many members of the management committee as would reduce the number of members below the number required under paragraph 1 of the Second Schedule shall not have effect unless there is appointed, at the meeting at which such resolution is passed, a sufficient number of further members as will comply with such requirements."

Section 29, Building Management Ordinance (Cap.344)

"Subject to this Ordinance, the powers and duties conferred or imposed by this Ordinance on a corporation shall be exercised and performed on behalf of the corporation by the management committee."

Section 29A, Building Management Ordinance (Cap.344)

"(1) No member of a management committee, acting in good faith and in a reasonable manner, shall be personally liable for any act done or default made by or on behalf of the corporation —

(a) in the exercise or purported exercise of the powers conferred by this Ordinance on the corporation; or

(b) in the performance or purported performance of the duties imposed by this Ordinance on the corporation.

(2) The protection conferred by subsection (1) on a member of a management committee shall not in any way affect the liability of the corporation for that act or default."

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[129] BMO. s.14

[130] *Incorporated Owners of Shiu Fung Mansion v Wong Yuk Ming* (unrep., LDBM 341/2014), per HH KW Wong at §96.