(i) an application to the Registrar under section 776(2) or (3) for registration of the company;

(ii) a return delivered to the Registrar for registration under section 791(1) in relation to a change in the directors of the company; or

(iii) a return delivered to the Registrar for registration under section 791(1) in relation to a change in the particulars of the directors of the company delivered to the Registrar under Part 16.

(2) For the purposes of this Subdivision—

(a) an address of a person does not cease to fall within section 54(2)(a) just because the person ceases to be a director of the company; and

(b) a reference to a director includes, to that extent, a former director.

(3) Subsection (2)(b) does not apply to a reference to a director in section 55 or 56.

COMMENTARY

Note that this section 53 has still not yet come into operation.

Corresponding statutory provisions

53.01 *Even though this provision is not yet in operation*, this section, however, may still be compared to ss.240(1)(a), 240(2), and 240(3) of the UK Companies Act 2006.

Overview

53.02 This section contains the definitions of various terms appearing in Subdivision 2 of Division 7 of Part 2 of this Ordinance.

53.03 Note that the definition of "director" in this part is different from and is wider than the definition of "director" in previous s.2(1) of this Ordinance as the definition of director here also includes a reserve director.

53.04 The term *director* now includes any person occupying the position of director (by whatever name called) and by which now includes a shadow director and a reserve director. A *director* is a person from a group of managers who leads or supervises a particular area of a company, program, or project. The *director*, as appointed or elected (as the case may be) has

the responsibility for determining and implementing the company's policy. A *director* does not have to be a stockholder (shareholder) or an employee of the firm, and may only hold the office of director (see qualifications for directors). *Directors* act on the basis of resolutions made at directors' meetings, and derive their powers from the corporate legislation and from the company's articles of association – This definition now includes a *shadow director*, which in relation to a body corporate, means 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.

54. Registrar must not make residential address and identification number available for public inspection

(1) Subsection (2) applies if—

(a) a document—

(i) is delivered to the Registrar for registration in respect of a company under this Ordinance or the Companies (Winding-Up and Miscellaneous Provisions) Ordinance (Cap.32) and is in a form prescribed by or under, or specified under, the relevant Ordinance; or

(ii) is delivered to the Registrar for registration in respect of a company under a provision of the predecessor Ordinance having a continuing effect under Schedule 11 or by virtue of section 23 of the Interpretation and General Clauses Ordinance (Cap.1) and is in a form specified under section 914(6)(a) or (8)(a);

(b) any part of the document is required by the relevant Ordinance to contain, and contains—

(i) the usual residential address of a director of the company; or

(ii) the full number of the identity card or passport of any person; and

(c) the Registrar records the information contained in the document for the purposes of section 27(1).

(2) The Registrar must not make available for public inspection under section 45(1)—

(a) an address contained, as the usual residential address of a director of the company, in any part of the document that is required by the relevant Ordinance to contain that usual residential address; or

(b) a number contained, as the full number of the identity card or passport of any person, in any part of the document that is required by the relevant Ordinance to contain that full number.

(3) In this section—

relevant Ordinance (有關條例), in relation to a document or any part of a document, means the Ordinance under which the document is delivered to the Registrar for registration.

COMMENTARY

Note that this section 54 has still not yet come into operation.

Corresponding statutory provisions

54.01 *Even though this provision is not yet in operation*, this section, however, may still be compared to ss.242(1) and 242(2) of the UK Companies Act 2006.

Overview

54.02 This provision requires the Registrar *not to make available for public inspection* a director's usual residential address or the full identity or passport number of any person contained in an applicable document delivered to the Registrar for registration. See [21.03] above for the definition and application of *Companies Registrar*.

55. Registrar may make protected address available for inspection

(1) Despite section 54(2)(a), the Registrar may make a protected address available for public inspection in accordance with section 56 if—

(a) communications sent by the Registrar to the director, and requiring a response within a specified period, remain unanswered; or

(b) there is evidence that the service of documents by the Registrar at the relevant correspondence address of the

director is not effective to bring them to the notice of the director.

(2) The Registrar must not make a decision under subsection (1) unless the Registrar—

(a) has notified the director and the company that he or she proposes to make the protected address available for public inspection under subsection (1); and

(b) has considered any representation made within the period specified under subsection (3)(b).

(3) A notice under subsection (2)(a)—

(a) must state the grounds for the proposal; and

(b) must specify a period within which representations may be made before the protected address is made available for public inspection under subsection (1).

(4) A notice under subsection (2)(a) must be sent to the director—

(a) at the protected address; or

(b) if it appears to the Registrar that service at the protected address may not be effective to bring it to the notice of the director, at the relevant correspondence address of the director.

COMMENTARY

Note that this section 55 has still not yet come into operation.

Corresponding statutory provisions

Even though this provision is not yet in operation, this section, however, may still be compared to s.245 of the UK Companies Act 2006. 55.01

Overview

55.02 The combined effect of this provision and subsequent s.56 of the Ordinance examines the scenario where communication with a director at the director's correspondence address is ineffective, the Registrar may, after considering the representations of the director and the company concerned, place the director's usual residential address on the Register as the director's correspondence address and as such make it available for public inspection. Such placement will last for five years. See [21.03] above for the definition and application of *Companies Registrar*.

55.03 See also subsequent section 56 of this Ordinance for supplementary requirements.

56. Provision supplementary to section 55

(1) If the Registrar is to make a protected address available for public inspection under section 55(1), he or she must proceed as if—

(a) a notice had been delivered to the Registrar for registration under section 645(4) stating that the correspondence address of the director is changed to the protected address; or

(b) a return had been delivered to the Registrar for registration under section 791 stating that the correspondence address of the director is changed to the protected address.

(2) The Registrar must give written notice of having done so—

(a) to the director; and

(b) to the company.

(3) A written notice must also state the decision date in relation to the protected address.

(4) A written notice under subsection (2)(a) must be sent to the director—

(a) at the protected address; or

(b) if it appears to the Registrar that service at the protected address may not be effective to bring it to the notice of the director, at the relevant correspondence address of the director.

(5) On receipt of a written notice, the company must enter the protected address in its register of directors as the correspondence address of the director.

(6) If, within 5 years after the decision date for a protected address, the director notifies the company of another address as his or her usual residential address—

(a) the company must enter that other address in its register of directors as the usual residential address and the correspondence address of the director; and

(b) the company must proceed with the notice or return under section 645(4) or 791 as if the correspondence

address of the director was also changed to that other address.

(7) During the period of 5 years after the decision date for a protected address—

(a) the company must not enter in its register of directors as the correspondence address of the director any address other than—

(i) the protected address; or

(ii) if, after the protected address is made available for public inspection under section 55(1), an address is notified by the director to the company as his or her usual residential address, the address so notified; and

(b) the company must not state in the notice or return under section 645(4) or 791 that the correspondence address of the director is changed to any address other than—

(i) the protected address; or

(ii) if, after the protected address is made available for public inspection under section 55(1), an address is notified by the director to the company as his or her usual residential address, the address so notified.

(8) Subsections (5), (6)(a) and (7)(a) do not apply to—

(a) a non-Hong Kong company registered under section 777(1); or

(b) a company that was, at any time before the commencement date of Part 16, registered in the register kept under section 333AA of the predecessor Ordinance.

(9) If a company contravenes subsection (5), (6) or (7), the company, and every responsible person of the company, commit an offence, and each is liable to a fine at level 4 and, in the case of a continuing offence, to a further fine of $700 for each day during which the offence continues.

(10) In this section—

decision date (決定日期), in relation to a protected address, means the date on which the Registrar decides to make the protected address available for public inspection under section 55(1).

COMMENTARY

Note that this section 56 has still not yet come into operation.

Corresponding statutory provisions

56.01 *Even though this provision is not yet in operation*, this section, however, may still be compared to s.246 of the UK Companies Act 2006.

Overview

56.02 The combined effect of this provision and previous s.55 examines the scenario where communication with a director at the director's correspondence address is ineffective, the Registrar may, after considering the representations of the director and the company concerned, place the director's usual residential address on the Register as the director's correspondence address and as such make it available for public inspection. Such placement will last for five years.

56.03 See [21.03] above for the definition and application of *Companies Registrar*; see also previous s.55 of this Ordinance.

57. Restriction on use or disclosure of protected information

The Registrar must not use or disclose protected information except—

(a) as permitted by section 58; or

(b) in accordance with section 59.

COMMENTARY

Note that this section 57 has still not yet come into operation.

Corresponding statutory provisions

57.01 *Even though this provision is not yet in operation*, this section, however, may still be compared to s.242(3) of the UK Companies Act 2006.

Overview

57.02 The Registrar must not use or disclose protected information *except*:

(i) in those circumstances as listed in subsequent s.58, i.e. in the discharge of the Registrar's duties and functions; *or*

(ii) in accordance with later s.59, *i.e.* as ordered by a court.

58. Permitted use or disclosure of protected information by Registrar

(1) The Registrar may use—

(a) a protected address for communicating with the director in question; or

(b) a protected identification number for communicating with the person in question.

(2) The Registrar may use protected information for the purpose of or in connection with the performance of the Registrar's functions.

(3) The Registrar may, on application made for the purposes of this subsection, disclose protected information to a person specified by regulations made under subsection (5)(e). A disclosure may only be made in accordance with regulations made under subsection (5).

(4) An application for the purposes of subsection (3) must—

(a) contain the information required by regulations made under subsection (5)(a);

(b) be accompanied by the documents required by regulations made under subsection (5)(b); and

(c) be accompanied by a fee prescribed by regulations made under subsection (5)(c).

(5) The Financial Secretary may make regulations—

(a) providing for the information to be contained in an application made for the purposes of subsection (3), including any information specified by the Registrar for such an application;

(b) providing for the documents to accompany such an application, including any document specified by the Registrar for such an application;

(c) prescribing the fees payable for the purposes of subsection (3) to accompany such an application;

(d) providing for the powers of the Registrar to require additional documents and information to be provided to the Registrar for the purposes of determining such an application;

(e) specifying the persons to whom protected information may be disclosed; and

287. Power of Court to adjourn application

(1) The Court may adjourn proceedings on an application under Section 286 so that an arrangement may be made to its satisfaction for the protection of the interests of dissentient members.

(2) The Court may give any directions and make any orders it thinks expedient for facilitating or carrying into effect any such arrangement.

COMMENTARY

Corresponding statutory provisions

287.01 Section 287 is a new provision, though it may be compared to s.47G(5) of the New Zealand Companies Act 1993.

Overview

287.02 This section empowers the Court of First Instance, on an application under s.286, to: (i) adjourn proceedings; (ii) give directions; and (iii) make any such orders at its own discretion.

288. Power of Court to confirm or restrain giving of financial assistance

(1) On an application under Section 286, the Court must make an order confirming or restraining the giving of financial assistance, and may do so on any terms and conditions it thinks fit.

(2) If the Court confirms the giving of financial assistance, it may by order alter or extend any date or period of time specified—

(a) in the directors' resolution under Section 285(1)(a) or the resolution of the company under Section 285(1)(d); or

(b) in any provision of this Division applying to the giving of financial assistance.

(3) If the Court thinks fit, the order may—

(a) provide for the company to buy back the shares of any of its members and for the reduction accordingly of the company's share capital;

(b) make any alteration to the company's articles that may be required as a consequence;

(c) require the company not to make any, or any specified, alteration to its articles.

(4) If the order of the Court requires the company not to make any, or any specified, alteration to its articles, the company does not have power to make any such alteration without leave of the Court.

(5) The powers of the Court under this section do not limit its powers under Section 287.

COMMENTARY

Corresponding statutory provisions

Section 288 is a new provision, though it may be compared to s.47G(5) and s.47G(6) of the New Zealand Companies Act 1993. 288.01

Overview

This section provides that the Court of First Instance, on an application under s.286, must *either confirm or restrain* the giving of financial assistance. The Court may order the alteration or extension of any date or period of time specified in the directors' resolution or Division 5 of Part 5. 288.02

Powers of the Court in regards to confirming or restraining the award of financial assistance

This provision further empowers the Court of First Instance to make the following ancillary orders: 288.03

(i) order the company to buy back the shares of any of its members;
(ii) order the reduction of the company's share capital;
(iii) order the company to alter its articles; or
(iv) order the company not to make any, or any specified, alteration to its articles.

If the Court makes an order in terms of (iv) above, *but the company wishes to alter its articles*, the company must first obtain the Court's leave/permission before attempting to do so. 288.04

(4) For the purposes of this Part, any financial statements are referential financial statements if the distribution in question is made pursuant to determinations made by reference to financial items as stated in the financial statements under section 302.

COMMENTARY

Corresponding statutory provisions

290.01 Section 290 restates (former) ss.79A(1), 79A(2), 79C(2), and 79F(2) of the predecessor CO.

Overview

290.02 This provision sets out the meaning of terms to be used and applied throughout Part 6 relating to distribution of profits and assets. Such terms include:

- The definitions of "called up share capital", "capitalization" and "net assets" are reproduced from (former) s.79A(1) of the predecessor CO;
- The definition of "distribution" is reproduced from (former) s.79A(1) of the predecessor CO with the *exception* that it is *expressly stated* in the definition that financial assistance given by the company to a member under ss. 283, 284 or 285 herein *is not a distribution*;
- The definitions of "financial assistance" and "financial items" are added in this provision; and
- The definition of "undistributable reserves" is a rewrite of the definition of "undistributable reserves" of (former) s.79C (2) of the predecessor CO.

Five excepted distributions from Part 6

290.03 It is helpful to consider the 5 types of distributions which are *expressly excepted* from the statutory provisions as set out in this Part 6 of this Ordinance.

Excepted distribution 1: issue of bonus shares

290.04 An issue of bonus shares is financed out of the "undistributable reserves" of the company, which is essentially a reserve that cannot be distributed to the shareholders in the form of cash, but is available for payment of the company's creditors. See *Palmer's Company* Law, paras 9.846 to 9.848.

Excepted distribution 2: redemption or buy-back of the company's own shares out of capital or unrealized profits

290.05 These are excepted because of the separate requirements and protection afforded under Division 4 of Part 5 of the Ordinance. Under this Ordinance, share redemptions and buy-backs are not limited to private companies, but

would include public companies as well (s.233). Separate requirements for share buy-backs are set out for listed and unlisted companies respectively (s.236).

Excepted distribution 3: reduction of capital which are unpaid or repayment of paid up capital

290.06 These are excepted because there are separate requirements and protections for reduction of capital set out under Division 3 of Part 5 of this Ordinance. Under the Ordinance, a Court-free procedure for reduction of capital is provided under ss.215 to 225, and the main requirement being a solvency statement signed by all the directors of the company.

Excepted distribution 4: distribution of assets to members upon winding up

290.07 When a company winds-up, the statutory provisions relating to distributions will take effect, and shareholders will only receive distributions after all the company's creditors have been paid off.

Excepted distribution 5: financial assistance provided by the company to a member

290.08 These are subject to the express requirements and protections set out in ss. 283 to 285.

Differences from the predecessor CO

290.09 Note that under the predecessor CO, it was held in the context of reduction of capital that the excess credit over the accumulated losses could be credited to a capital reduction reserve account, rather than the share premium account, and it was held that the account should be limited in application either to cases in which the capital of the company has been increased for new consideration or is the result of the capitalisation of distributable profits; see *Re New Smart Energy Group Ltd* [2013] 1 HKLRD 506.

290.10 Note that after this Ordinance came into force, it was anticipated that there would be far less reductions of capital petitions, although such may still be possible. For an example of a reduction of capital after the Ordinance came into force; see *Re CNT Security Group Ltd* [2014] 4 HKLRD 659.

291. Realized profits and losses

(1) In this Part, a reference to realized profits or realized losses of a company is a reference to those profits or losses of the company that are regarded as realized profits or realized losses for the purpose of any financial statements prepared by the directors in accordance with principles generally accepted, at the time when the financial statements are prepared, with respect to the determination for accounting purposes of realized profits or realized losses.

(2) Subsection (1) does not affect any specific provision (whether in an Ordinance or otherwise) under which profits or losses of any description are regarded as realized.

(3) If, after making all reasonable enquiries, a company's directors are unable to determine whether or not a particular profit or loss made before 1 September 1991 is realized, they may treat the profit as realized, and the loss as unrealized, for the purposes of this Part.

COMMENTARY

Corresponding statutory provisions

291.01 Section 291 is a restatement of (former) ss.79A(3) and 79B(4) of the predecessor CO.

Overview

291.02 This section provides that "realized profits" or "realized losses", in relation to a company's accounts, are those profits or losses of the company which should be treated as realized in accordance with principles generally accepted for accounting purpose for the determination of realized profits or realized losses at the time accounts are prepared. Refer to subsequent ss.292 to 294 which provides the determination of "realized profits" or "realized losses".

Realized profits or Realized losses defined

291.03 *Realized profits or Realized losses*, in relation to a company's accounts, are those profits or losses of the company which should be treated as realized in accordance with principles generally accepted for accounting purpose for the determination of realized profits or realized losses at the time accounts are prepared.

292. Certain amount to be regarded as realized profit or loss

(1) For the purposes of this Part, a provision other than an amount specified in subsection (2) is to be regarded as a realized loss.

(2) The amount is one written off or retained by way of providing for a diminution in value of a fixed asset appearing on a revaluation of—

(a) all of the company's fixed assets; or

(b) all of the company's fixed assets other than goodwill.

(3) For the purposes of subsection (2), any consideration by the directors of the value at a particular time of a fixed asset is to be regarded as a revaluation of the asset if—

(a) in the case of a listed company, the conditions specified in subsection (4)(a) and (b) are satisfied; or

(b) in the case of any other company—

(i) where the referential financial statements are the financial statements specified in section 304, the conditions specified in subsection (4)(a) and (b) are satisfied; or

(ii) where the referential financial statements are the financial statements specified in section 305 or 306, the condition specified in subsection (4)(a) is satisfied.

(4) The conditions are—

(a) that the directors are satisfied that the aggregate value at that time of the company's fixed assets is not less than the aggregate amount at which they are for the time being stated in the financial statements; and

(b) that it is stated in a note to the referential financial statements that—

(i) the directors have considered the value of the company's fixed assets without actually revaluing them;

(ii) the directors are satisfied that the aggregate value at the time of consideration of those assets is or was not less than the aggregate amount at which they are or were for the time being stated in the financial statements; and

(iii) accordingly, by virtue of this subsection, amounts are stated in the referential financial statements on the basis that a revaluation of the company's fixed assets is to be regarded as having taken place at that time.

(5) For the purposes of this Part, if—

(a) on the revaluation of a fixed asset, an unrealized profit is shown to have been made; and

(b) on or after the revaluation, a sum is written off or retained for depreciation of the fixed asset over a period,

the amount by which the sum exceeds the projected sum in relation to the depreciation of that asset over the period is to be regarded as a realized profit made over the period.

(6) In determining whether a company has made a profit or loss on an asset for the purposes of subsection (5), the value given to the asset in the earliest available record of its value made on or after its acquisition by the company is to be regarded as the cost of the asset if—

(a) there is no record of the original cost of the asset; or

(b) a record of the original cost of the asset cannot be obtained without unreasonable expense or delay.

(7) In subsection (5)—

projected sum (預計款項), in relation to a depreciation of a fixed asset, means a sum that would have been written off or retained for depreciation if the revaluation of the asset had not been made.

(8) For the purposes of this section, an asset of a company is to be regarded as a fixed asset if it is intended for use in the company's activities, or otherwise to be held for the purpose of the company's activities, on a continuing basis.

COMMENTARY

Corresponding statutory provisions

292.01 Section 292 is a restatement of (former) s.79K of the predecessor CO.

Overview

292.02 Any provision in an account is treated as a realized loss by this s.292, *except* that the provision for revaluation for diminution in value of a fixed asset arises on revaluation of all the fixed assets or all the fixed assets other than goodwill. To qualify for the exception, the directors have to comply with the conditions specified in that sub-s. 292(4).

292.03 The general rule is that if a sum is written off or retained with respect to the original value/cost of a fixed asset, which is defined as the "*projected sum*" under sub-s. 292(7) herein, it will be treated as a realized loss.

292.04 However, if that asset is revalued and an unrealized profit is made, the difference between the revaluation and the original costs of the fixed assets,

and the difference between the new and original depreciation charge, will be treated as a realized profit respectively. See also [291.03] for the definitions of realized profits/losses.

Meaning of "fixed asset"

292.05 The meaning of "*fixed asset*" is not expressly set out in this Ordinance. Reference should therefore be made to the common law. In the matter of *Ammonia Soda Co Ltd v Chamberlain* [1918] 1 Ch 266, Swinfen Eady LJ explained the difference between fixed assets and current assets at 286-7:

"...What is fixed capital? That which a company retains, in the shape of assets upon which the subscribed capital has been expended, and which assets either themselves produce income, independent of any further action by the company, or being retained by the company are made use of to produce income or gain profits. A trust company formed to acquire and hold stocks, shares, and securities, and from time to time to divide the dividends and income arising therefrom, is an instance of the former. A manufacturing company acquiring or erecting works with machinery and plant is an instance of the latter. In these cases the capital is fixed in the sense of being invested in assets intended to be retained by the company more or less permanently and used in producing an income. What is circulating capital? It is a portion of the subscribed capital of the company intended to be used by being temporarily parted with and circulated in business, in the form of money, goods or other assets, and which, or the proceeds of which, are intended to return to the company with an increment, and are intended to be used again and again, and to always return with some accretion..."

292.06 Note also the definition set out in the UK Companies Act 2006 under that s.853(6) which states that: "fixed assets" means assets of a company which are intended for use on a continuing basis in the company's activities. See also *Palmer's Company Law* (reviewed July 2013), para. 9.814 et seq.

293. Certain amount relating to insurance company with long term business to be regarded as realized profit or loss

(1) This section applies to a company that is an insurer and carries on long term business.

(2) For the purposes of this Part—

(a) an amount properly transferred to the statement of comprehensive income of the company from a surplus in the fund maintained by it in respect of the long term business is to be regarded as a realized profit; and

(b) a deficit in that fund is to be regarded as a realized loss.

(3) Subject to subsection (2), any profit or loss arising in the company's long term business is to be disregarded for the purposes of this Part.

(4) In this section—

(a) a reference to a surplus in a fund maintained by a company is a reference to an excess of the assets representing the fund over the company's liabilities attributable to its long term business, as shown by an actuarial investigation; and

(b) a reference to a deficit in such a fund is a reference to an excess of those liabilities over those assets, as shown by an actuarial investigation.

(5) In this section—

actuarial investigation (精算調查) means an investigation—

(a) made under section 18 of the Insurance Companies Ordinance (Cap.41); or

(b) made pursuant to a requirement imposed under section 32 of that Ordinance;

insurer (保險人) has the meaning given by section 2(1) and (2) of the Insurance Companies Ordinance (Cap.41);

long term business (長期業務) has the meaning given by section 2(1) of the Insurance Companies Ordinance (Cap.41).

COMMENTARY

Corresponding statutory provisions

293.01 Section 293 is a restatement of (former) s.79E of the predecessor CO. This section is also comparable to s.843 of the UK Companies Act 2006.

Overview

293.02 This provision provides the necessary reference to the Insurance Companies Ordinance (Cap.41) and also for the determination of realized profit or loss ([291.03]) for insurance company.

293.03 Section 2(1) of the Insurance Companies Ordinance (Cap.41) provides, *inter alia*, the following definitions of the terms applied herein:

> "***insurer*** *(保險人) means a person carrying on insurance business but does not include Lloyd's;*

> ***long term business*** *(長期業務) means any of the classes of insurance business specified in Part 2 of the First Schedule.".* Part 2 of the First Schedule sets out 9 classes of business."

293.04 Section 2(2) of the Insurance Companies Ordinance (Cap.41) further provides:

> *"(2) References in [the Insurance Companies Ordinance] to an insurer include references to an insurer formed or established in Hong Kong and carrying on insurance business outside Hong Kong, whether or not the insurer is also carrying on insurance business in Hong Kong."*

294. Distribution in kind: certain amount to be regarded as realized profit

If a company makes a distribution consisting of or including a non-cash asset, and any part of the amount at which the asset is stated in the referential financial statements represents an unrealized profit, that part of that amount is to be regarded as a realized profit for the purpose of determining, before or after the distribution, the lawfulness of the distribution in accordance with this Part.

COMMENTARY

Corresponding statutory provisions

294.01 Section 294 restates (former) s.79L of the predecessor CO. This is also comparable to ss.845 and 846 of the UK Companies Act 2006.

Overview

294.02 This provision provides that when a company:

- makes a distribution consisting of non-cash asset, any amount at which the asset is stated in the accounts for distribution represents an unrealized profit (as defined in [291.03]); *then*
- that profit will be treated as realized for the purposes of the distribution.

295. Application of Part

(1) This Part applies in relation to a distribution made on or after the commencement date of this Part, except a distribution specified in subsection (2).

(2) The excepted distribution is a distribution the amount of which would, had this Part applied in relation to the distribution, be determined under section 302 by reference to the financial items as stated in any financial statements for a financial year or period beginning before the commencement date of this Part.

COMMENTARY

Corresponding statutory provisions

295.01 There is no equivalent provision in the predecessor CO.

Overview

295.02 Section 295 is a new provision which states that this Part 6 of the Ordinance will apply to a distribution made or after the commencement of this Part 6, *except* it is not applicable to a distribution by reference to the financial items in any financial statements for: (i) for a financial year; or (ii) period beginning before the commencement date of this Part 6.

Financial items defined

295.03 *Financial items* means all of the following: (i) profits, losses, assets and liabilities; (ii) provisions; or (iii) share capital and reserves (including undistributable reserves).

296. Saving for other restraints on distribution

This Part does not affect any Ordinance or rule of law, or any provision of a company's articles, restricting the sums out of which, or the cases in which, a distribution may be made.

COMMENTARY

Corresponding statutory provisions

296.01 Section 296 restates the substance of (former) s.79P of the predecessor CO *except* that reference to a company's memorandum is removed.

Overview

296.02 This provision permits a company to include a provision in its articles for restriction of the source of funds for distribution.

Division 2 Prohibitions and Restrictions

297. Prohibition on certain distributions

(1) A company may only make a distribution out of profits available for distribution.

(2) For the purposes of this section, a company's profits available for distribution are its accumulated, realized profits, so far as not previously utilized by distribution or capitalization, less its accumulated, realized losses, so far as not previously written off in a reduction or reorganization of capital.

COMMENTARY

Corresponding statutory provisions

297.01 Section 297 restates (former) ss.79B(1) and 79B(2) of the predecessor CO. This section is also comparable to s.830 of the UK Companies Act 2006.

Company only allowed to make distributions from realized and available profits

297.02 A company can only make distribution out of profits available for distribution. This is designed to ensure that the shareholders can only receive profits made by the company, and not capital of the company, which is generally reserved only for creditors. An unlawful payment of dividend from non-existent profits is much the same thing as an unlawful reduction of capital. See *Sang Lee Investment Co Ltd v Wing Kwai Investment Co Ltd* (unrep., CACV23/1979 18 July 1980) at para. 36.

297.03 A company's *profits available for distribution* are defined as:

i. its *accumulated realized profits* (so far as not previously distributed or capitalized) *less*
ii. its *accumulated realized losses* (so far as not previously written off in a reduction or reorganization of capital).

295.04 As a matter of accountancy treatment, a *profit is regarded as realised* if the company concerned has obtained cash, as opposed to a profit on the books which will not give rise to any immediate cash, the latter termed an unrealized profit. Note that previous ss.291 to 294 provide for the ways to determine realized profit or realized loss ([291.03]).

Defining "accumulated profits gained or loss"

295.05 As for the term "accumulated", it refers to the total of the profits gained or lossess suffered in a particular financial year, excluding profits used previously for a distribution or capitalization and losses previously written off.

Wrongful distribution

295.06 A distribution which is in breach of this provision is unlawful and *ultra vires*, and cannot be ratified or authorized by the shareholders. See *Re Halt Garage* [1982] 3 All ER 1016 at 1038; see also *Ridge Securities Ltd v Inland Revenue Commissioners* [1964] 1 WLR 479 at 495; *Tradepower (Holdings) Ltd v Tradepower (Hong Kong) Ltd* [2010] 1 HKLRD 674 at para 125 to 126.

298. Listed company may only make certain distributions

(1) A listed company may only make a distribution—

(a) if the amount of its net assets is not less than the aggregate of its called up share capital and undistributable reserves; and

(b) if, and to the extent that, the distribution does not reduce the amount of those assets to an amount less than that aggregate.

(2) A listed company must not include any uncalled share capital as an asset for the purpose of determining the amount of its net assets under this section.

COMMENTARY

Corresponding statutory provisions

298.01 Section 298 restates (former) ss.79C(1) and 79C(3) of the predecessor CO. This section is also comparable to s.831 of the UK Companies Act 2006.

Overview

298.02 Apart from the restriction that distribution must be paid out of profit, this provision sets out a *further restriction*, which states that:

> *'a listed company can make distribution only if the amount of its net assets, excluding any uncalled share capital, is greater than the aggregate of its called up share capital and undistributable reserves.'*

Terms defined and referred to under this provision

298.03 *Net assets*, in relation to a company, means the aggregate of the company's assets less the aggregate of its liabilities.

Called up share capital, in relation to a company, means so much of its share capital as equals the aggregate amount of the calls made on its shares (whether or not those calls have been paid), together with: (i) any share capital paid up without being called; and (ii) any share capital to be paid on a specified future date under the articles, the terms of allotment of the relevant shares, or any other arrangements for payment of those shares.

Undistributable reserves, in relation to a company, means: (i) subject to s.290(2) of the Ordinance, the amount by which the company's accumulated, unrealized profits, so far as not previously utilized by capitalization, exceeds its accumulated, unrealized losses, so far as not previously written off in a reduction or reorganization of capital; or (ii) any other reserve that the company is prohibited from distributing by an Ordinance (other than this Part) or by its articles.

299. Restriction on application of unrealized profits

A company must not apply an unrealized profit in paying up debentures or in paying up any amount unpaid on its issued shares.

COMMENTARY

Corresponding statutory provisions

299.01 Section 299 restates (former) s.79B(3) of the predecessor CO. This section is also comparable to s.849 of the UK Companies Act 2006.

Overview

299.02 A company shall not apply unrealized profit ([291.03]) for payment of debentures or any unpaid amount of its issued shares.

Transitional Arrangement (where still applicable)

299.03 Schedule 11, s. 49 of the Ordinance prescribes that if: (i) immediately before 1 September 1991, (ii) a company was authorized by its articles to apply its unrealized profits in paying up (in full or in part) unissued shares to be allotted to the members as fully or partly paid bonus shares, *then* that provision in its articles continues (subject to any alteration of the articles) as authority for those profits to be so applied after that date.

(b) must be passed at least 6 months before the end of the financial year to which the directors' report relates; and

(c) may only be revoked by a special resolution.

(5) Subsections (1), (2) and (3) have effect subject to section 389.

(6) A director of a company who fails to take all reasonable steps to secure compliance with subsection (1) or (2) commits an offence and is liable to a fine of $150,000.

(7) A director of a company who wilfully fails to take all reasonable steps to secure compliance with subsection (1) or (2) commits an offence and is liable to a fine of $150,000 and to imprisonment for 6 months.

(8) If a person is charged with an offence under subsection (6), it is a defence to establish that the person had reasonable grounds to believe, and did believe, that a competent and reliable person—

(a) was charged with the duty of ensuring that subsection (1) or (2) (as the case may be) was complied with; and

(b) was in a position to discharge that duty.

COMMENTARY

Corresponding statutory provisions

388.01 Section 388(1) of the Ordinance is comparable to (former) ss.129D(1) and 129D(3) of the predecessor CO. Sections 388(3) and 388(4) of the Ordinance are comparable to (former) ss.141D(1)(a) and 141D(1)(c) of the predecessor CO whereas ss.388(6) to 388(8) of the Ordinance are comparable to (former) s.129F of the predecessor CO.

388.02 Section 388(2) of the Ordinance is a new provision and accordingly there is no equivalent provision in the predecessor CO.

388.03 Section 388(5) of the Ordinance is the connecting provision which states the relationship between this s.388 of the Ordinance and subsequent s.389 of this Ordinance.

Overview

388.04 All companies (unless *exempted* under s.388(3) of the Ordinance) are required to prepare a business review as part of their director's reports. See [359.14] and [368.04] for the all inclusive definition of companies.

388.05 These new disclosure requirements as prescribed in this provision as well as Schedule 5 of the Ordinance represents this law's effort to provide more transparency with regards to a companies' business matters by having certain public companies (as defined in [382.06]) and companies not qualified for simplified reporting to prepare a more comprehensive directors' report which now includes a business review as of last year. As previously examined, this section's requirement to prepare a business review was applicable since the financial year beginning on or after 3 March 2014, as this was the date of the commencement of this Ordinance.

388.06 Schedule 5 of the Ordinance sets out and lists the minimum contents of what must be included in the business review. The business review is defined as an analytical and forward-looking review of the company or group that provides information about the development, performance, and position of the business of the company or group.

Provision's requirements now in full effect

388.07 It has now been more than three years since this Ordinance has been implemented as all requirements and applications of this provision have been in full effect since 2015. Accordingly, the director's new duty to prepare a director's report as required under this provision includes:

(i) all the necessary information and minimal contents as listed in Schedule 5 of the Ordinance;

(ii) the new business review requirement which now obliges directors to disclose the company's environmental and social policies, overall performance, and an assessment of the future developments affecting their business;

(iii) directors who fail to take all reasonable steps to secure compliance with this new business review requirement are liable to a fine of HK$150,000 and, potentially, to imprisonment for six months under s.388(6) of the Ordinance; and

(iv) that the Listing Rules have also been updated to extend the reach of the new business review requirement to overseas incorporated companies listed on the Hong Kong Stock Exchange.

Director's obligation to produce a director's report

388.08 Directors (as defined in [371.04]) are required to prepare a directors' report for the financial statement or consolidated financial statement pursuant to ss.388(1) and 388(2) of the Ordinance. The directors' report is a report of the company's information which is usually issued with the financial statements.

388.09 A directors' report must contain the following information:

	Information		Reference sections under the (new) Companies Ordinance (Cap.622)
(i)	name of every director		Section 390(1)(a)
(ii)	the principal activities of the company		Section 390(1)(b)
(iii)	particulars of any other matter that is material for the members' appreciation of the state of the company's affairs and the disclosure of which will not, in the directors' opinion be harmful to the business of the company		Section 390(2)
(iv)	management contract		Section 543(2)
(v)	information prescribed by the Companies (Directors' Report) Regulation made by the Financial Secretary		
(vi)	*business review* for all companies except the following companies		
	a.	company falls within the reporting exemption	Section 388(3)(a)
	b.	a wholly owned subsidiary	Section 388(3)(b)
	c.	private company not qualified for reporting exemption may opt out of the preparation of a business review by a special resolution passed by members	Sections 388(3) and (4)

See also Companies (Directors' Report) Regulation (Cap.622D).

Defining the "business review"

388.10 As previously mentioned, a director must now include a *business review* as part of their director's report. In summary, the business review under this Ordinance should be a historical fair review of the business of a company or group (as the case may be) and should also cover important events that have occurred from the end of the financial year to the date of the directors'

report. This assessment should be a forward-looking review that indicates the 'likely future development' of the business.

Principles behind the business review

388.11 To assist companies in assessing what should be placed in the business review report, the Hong Kong Institute of Certified Public Accountants (HKICPA) issued the *'Accounting Bulletin 5: Guidance for the Preparation and Presentation of a Business Review under the Hong Kong Companies Ordinance Cap.622'* at the invitation of Hong Kong's Companies Registry. As such, *Accounting Bulletin 5* set out the guiding principles for the preparation of the business reviews so that it would also be in compliance with Schedule 5 of the Ordinance. These principles include that the business review:

(i) should set forth an analysis of the business through the eyes of the company's board of directors;
(ii) that the scope of the review should be consistent with that of the included financial statements, which should also complement as well as supplement the financial statements to enhance and improve overall corporate disclosure;
(iii) should be understandable and comprehensive;
(iv) should be balanced and neutral, dealing even-handedly with both good and bad aspects of the company; and
(v) should reflect the directors' view of the business and be consistent with information which the directors use in reporting to its members – such views may include strategic priorities of the company, management of capital, financial risk management strategies, managing and allocating resources, etc.

388.12 Directors (as defined in both [371.04] and [383.10]) are *now duty-bound* to consider all those matters that should be included in the business review to provide members with the relevant and material information necessary for a complete understanding of the development, performance and position of the company. In considering what should be included in the review, directors should consider both qualitative and quantitative aspects in the particular circumstances. In simple terms, the nature and circumstances of the matter itself should be assessed and considered as to whether it will have an effect on the members and company as a whole for it to be important enough to be reported in the business review. Other aspects to be considered to improve corporate transparency should be the possible legal, sensitivity, and potential consequences of a corporate transaction or event which may have an effect on all the parties involved.

388.21 Furthermore, a director is also liable to the company for loss suffered by the company as a result of any untrue or misleading statements or the omission of anything required to be included in the director's report as so prescribed in later s.448(2) of the Ordinance. However, note that the director is *only liable if* the director knew or was reckless as to whether, a statement was untrue or misleading, or the director knew an omission was a dishonest concealment of a material fact as so described under that further s.448(3) of this Ordinance.

388.22 But note that s.388(8) of the Ordinance states that a *defence is available* to a director if the director is able to establish that he: (i) had reasonable ground to believe; and (ii) did believe that a competent and reliable person was charged with the duty of seeing that the director's report and business review were complied with and that that person was in a position to discharge that duty.

Additional director duties

388.23 Additionally, as provided and referenced by s.388(5) of the Ordinance, those directors' duties as mandated under those ss.388(1) to 388(3) of the Ordinance will be subject to subsequent s.389 of the Ordinance where *if a private company has conducted certain acts as specified in that section 389(1) of the Ordinance*, then such private company will have to prepare the directors' report in accordance with that subsequent provision as if it was a public company.

389. Provisions supplementary to section 388

(1) This section applies if at any time during a financial year of a private company—

(a) the company registers any transfer of shares in the company in contravention of the restrictions imposed by the company's articles;

(b) the membership of the company exceeds the number specified in section 11(1)(a)(ii); or

(c) the company makes an invitation to the public to subscribe for any shares or debentures of the company.

(2) The directors' report for the financial year is required to comply with section 388 as if the company were a public company.

(3) The Court may, on the application of the company or a person interested in the matter, order that subsections (1) and (2) do not apply.

(4) The Court may make the order on any terms and conditions that the Court thinks just and expedient.

(5) The Court must not make the order unless the Court is satisfied that—

(a) the occurrence of the event mentioned in subsection (1)(a), (b) or (c) was accidental;

(b) it was due to inadvertence or to some other sufficient cause that the event occurred; or

(c) it is just and equitable to grant the relief on other grounds.

COMMENTARY

Corresponding statutory provisions

389.01 The majority of s.389 of the Ordinance is new and accordingly there are no comparable sections in the predecessor CO. But note that to s.382(1)(a) of the Ordinance is equivalent to that (former) s.30(3) of the predecessor CO.

Overview

389.02 If a *private company* (as defined in [382.06]) during a financial year:

(i) registers any transfer of shares in contravention of the restrictions imposed by its articles;
(ii) the membership of the company exceeds 50; or
(iii) makes an invitation to the public to subscribe for any shares or debentures of the company,

pursuant to previous s.388, the directors' report of such company for that financial year must contain the information required as if such private company is a public company.

389.03 The company or person interested in the matter may apply to court for an order not to comply with the said requirement. If the Court is satisfied with any of the conditions specified in s.389(5) of the Ordinance, the Court may make the order on any terms and conditions that it thinks just and expedient.

Comparable provisions

389.04 This s.389 of the Ordinance is comparable to previous s.382 of this very same Ordinance which provides for the additional requirement for preparation of financial statement to be complied by a private company when it ceases to be a private company.

Effect of horizontal amalgamation

681.07 A *horizontal amalgamation* occurs between two or more subsidiaries of the same holding company. On a horizontal amalgamation:

(i) the shares of all but one of the amalgamating subsidiaries will be cancelled (without payment or other consideration); and

(ii) the articles of the amalgamated company will be the same as the articles of the amalgamating company whose share are not cancelled.

682. Directors of amalgamating company must notify secured creditors of proposed amalgamation

(1) The directors of each amalgamating company under Section 680 or 681 must comply with subsection (2)—

(a) if the amalgamation is to be approved by a resolution passed on a poll at a general meeting, at least 21 days before the date of the meeting; or

(b) if the amalgamation is to be approved by a written resolution, on or before the circulation date of the resolution.

(2) Those directors—

(a) must give written notice of the proposed amalgamation to every secured creditor of the amalgamating company; and

(b) must publish notice of the proposed amalgamation in an English language newspaper, and a Chinese language newspaper, circulating generally in Hong Kong.

(3) If the directors of an amalgamating company contravene subsection (1), each of them commits an offence and is liable to a fine at level 3.

(4) In subsection (1)(b)—

circulation date (傳閱日期) has the meaning given by Section 547(1).

COMMENTARY

Corresponding statutory provisions

682.01 Section 682 is a new provision and accordingly there is no equivalent section in the predecessor CO. However, this provision is instead comparable to s.215D(3) of the Singapore Companies Act.

Overview

682.02 The directors of each amalgamating company must notify the company's secured creditors of the proposed amalgamation and publish a notice of the proposed amalgamation in an English and Chinese newspaper in Hong Kong at least 21 days before the date of the general meeting at which the amalgamation will be approved, or if the amalgamation will be approved by written resolution, before the written resolution (as defined in [675.16]) is sent to the shareholders.

682.03 This new provision requires the directors to notify every secured creditor of a proposed amalgamation and to publish a notice in newspapers:

(i) *if the amalgamation will be approved by resolution passed on a poll at a general meeting*– at least 21 days before the date of the meeting; or

(ii) *if the amalgamation will be approved by a written resolution*– on or before the circulation date of the resolution, *i.e.* the date on which copies of the written resolution are sent to members.

682.04 In our example, set out in the vertical amalgamation of s.680, under this provision the directors of Holdco Limited and Subsidiary A must:

- give written notice of the proposed amalgamation to each of their secured creditors; and
- publish notice of the proposed amalgamation in an English language newspaper and a Chinese language newspaper, circulating generally in Hong Kong.

Circulation date

682.05 *Circulation date*, in relation to a written resolution or a proposed written resolution, means: (i) the date on which copies of the resolution are sent to eligible members in accordance with s.553 of the Ordinance; or (ii) if copies are sent to eligible members on different days, the first of those days.

'Director' as defined and applied under this Division 3 of Part 13

682.06 *Director* includes any person occupying the position of director (by whatever name called) and by which now includes a shadow director and a reserve director. A *director* is a person from a group of managers who leads or supervises a particular area of a company, program, or project. The *director*, as appointed or elected (as the case may be) has the responsibility for determining and implementing the company's policy. A *director* does not have to be a stockholder (shareholder) or an employee of the firm, and may only hold the office of director (see qualifications for directors). *Directors* act on the basis of resolutions made at directors' meetings, and derive their powers from the corporate legislation and from the company's articles of association. - This definition now also includes *shadow directors*.

683. Director of amalgamating company must issue certificate on solvency statement

(1) Every director of the amalgamating company who votes in favour of making a solvency statement must issue a certificate—

(a) stating—

(i) that, in the director's opinion, the conditions specified in Section 679(1)(a)(i) and (ii) are satisfied; and

(ii) the grounds for that opinion; and

(b) stating that the condition specified in Section 679(1)(b) is satisfied.

(2) A person who contravenes subsection (1) commits an offence and is liable to a fine at level 4.

(3) A director of the amalgamating company commits an offence if the director votes in favour of making a solvency statement, or otherwise causes a solvency statement to be made, without having reasonable grounds for the opinion and fact expressed in the statement.

(4) A person who commits an offence under subsection (3) is liable—

(a) on conviction on indictment to a fine of $150,000 and to imprisonment for 2 years; or

(b) on summary conviction to a fine at level 6 and to imprisonment for 6 months.

COMMENTARY

Corresponding statutory provisions

683.01 Section 683 is a new provision and accordingly there is no equivalent section in the predecessor CO. However, this provision is instead comparable to ss.215D(6), 215(7), 215I(6) and 215J(5) of the Singapore Companies Act.

Overview

683.02 Section 683 is a new provision which provides that every director of the amalgamating company who votes in favour of making a *solvency statement* under s.679 must issue a certificate on compliance with certain conditions. Note that directors who voted in favour of making a solvency

statement *without reasonable grounds* commits an offence as prescribed in sub-s.683(4).

Example of the process of issuing the certificate of the solvency statement

683.03 In the example on vertical amalgamation under s.680, the respective certificate to be issued by every director (as so defined under [682.06]) of Holdco Limited and Subsidiary A must state, in the director's opinion, that:

(i) as at the date of the statement:

(a) there is no ground on which Holdco Limited and Subsidiary A could be found to be unable to pay its debts and the grounds for that opinion;

(b) no floating charge created by Holdco Limited and Subsidiary A;

(c) no other security created by Holdco Limited or Subsidiary A over a class of assets, to any of which the security interest has not attached; or

(d) such floating charge or other security exists and each person entitled to the charge or security has consented in writing to the amalgamation proposal.

(ii) ABC Limited (the amalgamated company) will be able to pay its debts as fall due during the 12 months immediately after the effective date of the amalgamation and the grounds for that opinion.

683.04 Failure to issue the certificate is an offence. Furthermore, a director of the amalgamating company, that is Holdco Limited and Subsidiary A in our example, commits an offence if the director:

(i) votes in favour of making a solvency statement, or

(ii) makes a solvency statement,

without having reasonable grounds for the opinion and fact expressed in the statement (sub-s.683(3)). Directors who voted in favour of making a solvency statement without reasonable grounds commits an offence as prescribed in sub-s.683(4).

Solvency statement

683.05 Simply put, a *solvency statement* is a statement in writing by all of the directors which states that, as regards the company's situation at the date of the statement: (i) there are no grounds on which the company could be found to be unable to pay or otherwise discharge its debts; and (ii) the company will be able to pay its debts as they fall due during the 12 months immediately following the date of the statement, or, if it is intended to commence an amalgamation, within 12 months of the date of the statement, that the

company will be able to pay or discharge its debts in full within 12 months of the commencement of the amalgamation. The full definition is stated in s.679 of the Ordinance.

Offence

683.06 A director commits an offence if he votes in favour of making a solvency statement without having reasonable grounds for making it as prescribed under sub-s.683(3). The offence carries maximum penalties of 2 years' imprisonment and a fine of $150,000 as prescribed under sub-s.683(4).

684. Registration of amalgamation

(1) For the purpose of effecting an amalgamation, the following documents must be delivered to the Registrar for registration within 15 days after the approval of the amalgamation proposal—

(a) the amalgamation proposal that has been approved;

(b) every certificate required by Section 683(1);

(c) a certificate issued by the directors of each amalgamating company stating that the amalgamation has been approved in accordance with—

(i) this Division; and

(ii) the articles of the amalgamating company;

(d) a notice of appointment of the directors of the amalgamated company;

(e) a certificate issued by the directors, or the proposed directors, of the amalgamated company stating that where the proportion of the claims of the amalgamated company's creditors in relation to the value of that company's assets is greater than the proportion of the claims of an amalgamating company's creditors in relation to the value of that company's assets, no creditor will be prejudiced by that fact.

(2) A document mentioned in subsection (1)(a), (b), (c), (d) or (e) must be in the specified form.

(3) As soon as practicable after the documents mentioned in subsection (1) are registered, the Registrar must issue a certificate of amalgamation.

(4) A certificate of amalgamation may be issued in any form that the Registrar thinks fit.

COMMENTARY

Corresponding statutory provisions

684.01 Section 684 is a new provision and accordingly there is no equivalent section in the predecessor CO. However, this provision is instead comparable to ss.215E(1), 215F(1), and 215F(4) of the Singapore Companies Act.

Overview

684.02 Section 684 is a new provision which sets out that documents required for the registration of the amalgamation, which all must: (i) be in the specified form; and (ii) delivered to the Registrar within 15 days after the approval of the amalgamation proposal.

684.03 The following documents must be delivered to the Registrar within 15 days after approval of the amalgamation:

(i) the approved amalgamation proposal;
(ii) the certificates issued by directors of the amalgamating companies;
(iii) a certificate issued by the directors of each amalgamating company stating that the amalgamation has been approved in accordance with Division 3 of Part 13 and the company's articles;
(iv) a notice of appointment of the amalgamated company's directors; and
(v) a certificate of the amalgamated company's directors stating that where the claims of the amalgamated company's creditors as a proportion of that company's assets are greater than the claims of an amalgamating company's creditors as a portion of that company's assets, no creditor will be prejudiced by that fact.

After the documents have been registered, the Registrar must issue a certificate of amalgamation.

685. Effective date of amalgamation

(1) A certificate of amalgamation issued under Section 684(3) must specify a date as the effective date of the amalgamation.

(2) If an amalgamation proposal specifies a date on which the amalgamation is intended to become effective, and that date is the same as or later than the date on which the Registrar registers the documents mentioned in Section 684(1), that date must be specified in the certificate of amalgamation as the effective date of the amalgamation.

(3) On the effective date of an amalgamation—

(a) the amalgamation takes effect;

(b) each amalgamating company ceases to exist as an entity separate from the amalgamated company; and

(c) the amalgamated company succeeds to all the property, rights and privileges, and all the liabilities and obligations, of each amalgamating company.

(4) On and after the effective date of an amalgamation—

(a) any proceedings pending by or against an amalgamating company may be continued by or against the amalgamated company;

(b) any conviction, ruling, order or judgment in favour of or against an amalgamating company may be enforced by or against the amalgamated company; and

(c) any agreement entered into by an amalgamating company may be enforced by or against the amalgamated company unless otherwise provided in the agreement.

(5) As soon as practicable after the effective date of an amalgamation, the Registrar must make a note of the amalgamation in the Companies Register in relation to each amalgamating company.

COMMENTARY

Corresponding statutory provisions

685.01 Section 685 is a new provision and accordingly there is no equivalent section in the predecessor CO. The section is conceptually equivalent (though not identical) to ss. 224 and 225 of the New Zealand Companies Act 1993 and ss. 215F(2), 215F(3), and 215G of the Singapore Companies Act.

Effective date of amalgamation

685.02 The effective date of the amalgamation will be specified in the certificate of amalgamation issued by the Registrar.

685.03 Subsection 685(2) provides that if an amalgamation proposal specifies a proposed effective date of the amalgamation which is the same or later than the registration date of all the documents by the Registrar, that proposed effective date of the amalgamation must be specified in the certificate of amalgamation as the effective date of the amalgamation.

685.04 Subsections 685(3) and 685(4) set out the legal position on and after the effective date of an amalgamation. But note that this provision as a whole

does not provide when the registration date will be where the proposed effective date of the amalgamation is earlier than the registration date of documents.

Amalgamations merge companies into one company

685.05 The legal effect of an amalgamation is that the amalgamating companies merge together and now exist as one company i.e. the amalgamated company (ss.680(1) and 681(1)). Each amalgamating company ceases to exist as an entity separate from the amalgamated company. The amalgamated company succeeds to all the property, rights and privileges, and all the liabilities and obligations, of each amalgamating company. The process does not involve any "transfer" of property, rights or liabilities from amalgamating companies to the amalgamated company as such. Rather, the amalgamating companies continue as one company following the amalgamation and simply stand in the shoes of the amalgamating companies. See sub-ss.685(3)(b) and 685(3)(c); see also *Carter Holt Harvey Ltd v McKernan* [1998] 3 NZLR 403; *Electra New Zealand Ltd v PGG Wrightson Ltd* [2009] 1 NZLR 577.

685.06 Legal proceedings commenced against an amalgamating company can be continued against the amalgamated company, and contracts entered into with an amalgamating company can be enforced against an amalgamating company (unless the contract provides otherwise) (sub-s.685(4)).

Example of the effective date of an amalgamation

685.07 As shown in the example on the vertical amalgamation, under s.680 of the Ordinance, with effect from the effective date of an amalgamation:

(i) the amalgamation takes effect;
(ii) each amalgamating companies, that is Holdco Limited and Subsidiary A, cease to exist as an entity and are separated from the amalgamated company, that is ABC Limited;
(iii) the amalgamated company, that is ABC Limited, succeeds to all the property, rights and privileges, and all the liabilities and obligations, of each amalgamating companies, which are Holdco Limited and Subsidiary A;
(iv) any proceedings pending by or against an amalgamating company may be continued by or against ABC Limited;
(v) any conviction, ruling, order or judgment in favour of or against Holdco Limited or Subsidiary A may be enforced by or against ABC Limited; and
(vi) any agreement entered into by Holdco Limited or Subsidiary A may be enforced by or against ABC Limited unless otherwise provided in the agreement (CO, ss.689(3) and 689(4)).

COMMENTARY

Corresponding statutory provisions

841.01 Section 841 is comparable to (former) ss.143(1)(a), 143(1)(c), 143(2) and 146A of the predecessor CO.

Financial Secretary's power to appoint an investigator to review and investigate a company's affairs on its own initiative or upon the Court's request

841.02 This provision:

(i) *requires the Financial Secretary to appoint a person* to *investigate a company's affairs* if the Court orders that the company's affairs ought to be investigated (sub-s.841(1); see also s.845 on the directions given for an inspector appointed under this provision); or

(ii) *empowers the Financial Secretary*, if it is satisfied that it is in the public interest even though the company is in the course of being wound up voluntarily, to *appoint a person to investigate the company's affairs* if it appears that there are circumstances suggesting that:

- the company was formed for a fraudulent or unlawful purpose;
- the company's affairs are being or have been conducted:
  - (i) in a manner unfairly prejudicial to the interests of its members generally or to one or more members;
  - (ii) with intent to defraud its creditors or the creditors of any other person; or
  - (iii) for any other fraudulent or unlawful purpose;

or

- the persons concerned with the formation of the company or the management of its affairs have engaged in fraud, misfeasance or other misconduct towards the company, its members or its creditors regarding the formation or management (sub-s.841(2)).

Distinctions from the predecessor CO

841.03 The word "*oppressive*" in (former) s.143(1)(c)(i) of the predecessor CO was replaced by the words "*unfairly prejudicial*" which are the same wordings and terms as used in previous s.724 in Part 14 of this Ordinance.

841.04 Also note that "*members not given all reasonable information*" is no longer a ground for the appointment of an inspector as it is suggested that members will have the right to inspect company records under Division 5 of Part 14 of this Ordinance as a remedy may now also be sought under this same Part 14, Division 5 of the Ordinance.

Members of a company

841.05 *Members of a company* includes: (i) the founding/founder members; as well as (ii) any other person who agrees to become a member of a company and whose name is entered, as a member, in the company's register of members is a member of the company. Part 14 of the Ordinance has *expanded the meaning of a member* to now also include: (i) personal representatives of a deceased member; (ii) trustee of or person beneficially interested in the share by the will or intestacy of a deceased member; and (iii) personal representative of a past member.

842. Notice of appointment as inspector to be delivered to Registrar

(1) A person who is appointed as an inspector under Section 840 or 841 must deliver a notice of the appointment to the Registrar for registration.

(2) The notice must be delivered to the Registrar within 15 days after the date of the appointment and must be in the specified form.

COMMENTARY

Corresponding statutory provisions

842.01 Section 842 is comparable to (former) s.151 of the predecessor CO.

Overview

842.02 Upon appointment, the inspector shall deliver to the Registrar a notice of appointment, in the specified form, within 15 days after the date of the appointment.

Subdivision 3 Financial Secretary's Powers to Give Directions to Inspectors

843. General power of Financial Secretary to give directions regarding investigation

(1) The Financial Secretary may give directions to an inspector regarding an investigation.

(2) The Financial Secretary may give directions under this section—

(a) on the Financial Secretary's own initiative; or

(b) at the request of the inspector.

(3) The Financial Secretary may vary or revoke any directions given under this section.

COMMENTARY

Corresponding statutory provisions

843.01 Section 843 is a new section and there is no equivalent provision in the predecessor CO. However, this provision may instead be comparable to ss.446A(1) and 446A(4) of the UK Companies Act 1985.

Overview

843.02 Section 843 is a new provision which provides general power to the Financial Secretary to *give, vary or revoke directions* to an inspector regarding an investigation. The direction may be given on the Financial Secretary's own initiative or at the request of the inspector.

844. Financial Secretary may give directions regarding subject matter of investigation etc.

(1) Without limiting Section 843, the Financial Secretary may give directions to an inspector with respect to any or all of the following—

(a) the terms or subject matter of the investigation (whether by reference to a specified area of a company's operation, a specified transaction, a specified period of time or otherwise);

(b) the matters the inspector must take into account or must not take into account in conducting the investigation;

(c) the steps the inspector must take or must not take in conducting the investigation.

(2) Without limiting Section 843, the Financial Secretary may also give directions to an inspector to require that the interim report or final report of the investigation—

(a) is to include the inspector's opinion with respect to a specified matter;

(b) is not to make reference to a specified matter;

(c) is to be made in a specified form or manner; or

(d) is to be completed by a specified date.

(3) In this section—

specified (指明) means specified in directions given under this section.

COMMENTARY

Corresponding statutory provisions

Section 844 is a new section and there is no equivalent provision in the predecessor CO. However, this provision may instead be comparable to ss.446A(2), 446A(3), and 446A(5) of the UK Companies Act 1985. 844.01

Financial Secretary's empowered to direct the inspector accordingly

In addition to the powers set out under previous s.843, this s.844 is also a new provision which provides specific powers to the Financial Secretary, including the power to give directions to the inspector: (i) on the terms or subject matter of the investigation; (ii) on the matters to be considered; (iii) the steps to be taken; and (iv) the content of the inspector's interim report and/or final report. 844.02

845. Financial Secretary may give directions to terminate or suspend investigation

(1) Without limiting Section 843, the Financial Secretary may, at any time before the completion of an investigation, direct the inspector—

(a) to terminate the investigation; or

(b) to suspend the investigation for a period as specified by the Financial Secretary.

(2) If the inspector is appointed under Section 841(1), the Financial Secretary must not give directions under subsection (1)(a) unless—

(a) it appears to the Financial Secretary that—

(i) matters have come to light in the course of the investigation which suggest that a criminal offence under the laws of Hong Kong has been committed; and

COMMENTARY

Corresponding statutory provisions

846.01 Section 846, *except sub-s.846(3)*, is comparable to (former) ss.145(1), 145(1A), 145(2) and 150(b) of the predecessor CO. That sub-s.846(3) is instead comparable to both: (i) s.183(4) of Securities and Futures Ordinance (Cap.571); and (ii) s.28(5) of Financial Reporting Council Ordinance (Cap.588).

Overview

846.02 This s.846, along with subsequent ss.847 to 850 set out and list the inspector's powers once appointed by the Financial Secretary under previous ss.840 and 841 as well as later s.853 of the Ordinance.

Inspector empowered to request the delivery of records, documents, etc. during the course of investigation

846.03 This provision empowers an inspector ([840.09]) to require, by written notice, that any of the *following persons*: (i) the company; (ii) existing or former director, manager or company secretary, or any other person involved in the management, of the company; (iii) existing or former banker, solicitor or auditor of the company; and (iv) person whom the inspector has reasonable grounds to believe to be in possession of any record or document that contains or is likely to contain, information relevant to the investigation and/or the information, *to do any or all of the following:*

(1) Produce, within the specified time and at the specified place, any record or document, specified in the notice that:
   (i) is or may be relevant to the investigation; and
   (ii) is in the person's custody or power.

   However an inspector shall not require an authorized institution to produce any record or document or disclose any information in respect of the affairs of its customer unless the inspector:
   - has reasonable grounds to believe that the customer may be able to provide information relevant to the investigation; and
   - certifies in writing that it is satisfied that the production or disclosure is necessary for the investigation.

(2) Take all reasonable steps to "*preserve the record or document*" before it is produced to the inspector. The definition of "preserve the record or documents" includes preventing a person from:
   (i) removing, disposing of or destroying the record or documents;

   (ii) erasing, adding to or altering an entry or other particulars in the record or documents; or
   (iii) interfering with, or causing or permitting any other person to interfere with the record or documents.

(3) Attend, before the inspector at the specified time and place, and answer any question, whether on oath, administered by the inspector, or otherwise, relating to any matter under investigation that the inspector may raise;

(4) Answer any question relating to any matter under investigation that is specified in the notice; and

(5) Give the inspector all other assistance in connection with the investigation that the person is reasonably able to give.

Distinctions from the predecessor CO - Inclusion of new terms

846.04 The terms "books and documents" are replaced by the phrase "record or document" in sub-s.846(1)(a).

846.05 Subsection 846(1)(b) *adds a new power* for the inspector to require the preservation of record and documents. The inspector is now entitled to *require a company to preserve the documents*. In addition, the express power *to require the answering of questions* as mandated under sub-s.846(1)(d) herein is also newly added.

Officer

846.06 *Officer*, in relation to a body corporate, means: a director, manager or company secretary of, or any other person involved in the management of, the body corporate. - *Body corporate*: includes (i) a company; and (ii) a company incorporated outside Hong Kong; *but* excludes a corporation sole.

Director

846.07 *Director* includes any person occupying the position of director (by whatever name called) and by which now includes a shadow director and a reserve director. A *director* is a person from a group of managers who leads or supervises a particular area of a company, program, or project. The *director*, as appointed or elected (as the case may be) has the responsibility for determining and implementing the company's policy. A director does not have to be a stockholder (shareholder) or an employee of the firm, and may only hold the office of director (see qualifications for directors). *Directors* act on the basis of resolutions made at directors' meetings, and derive their powers from the corporate legislation and from the company's articles of association. - This definition now includes a *shadow director*.

Auditor

846.08 An *auditor* means: a person appointed and authorized to examine a company's: (i) accounts and accounting records; (ii) compare the charges with the vouchers: (iii) verify balance sheet and income items; (iv) publish and state the results of; etc. This is usually an *accountant* who conducts an audit to verify the accuracy of the financial records and accounting practices of the company. A proper audit will point out deficiencies in accounting and other financial operations.

Manager

846.09 A *manager* in relation to a company is the person who performs managerial functions in relation to the company under director's immediate authority (but excludes a receiver or manager of the company's property), and may also be a special manager of the company's estate appointed under s.216 of the Companies (Winding-Up and Miscellaneous Provisions) Ordinance (Cap.32).

Company secretary

846.10 *Company secretary* includes any person occupying the position of a company secretary (by whatever name called). The company secretary is an officer appointed by the directors of a firm as responsible for ensuring that firm's and financial obligations under the corporate legislation are complied with. A company secretary's formal duties include: (i) calling meetings; (ii) recording minutes of the meetings; (iii) keeping statutory record books; (iv) proper payment of dividend and interest payments; and (v) proper drafting and execution of agreements, contracts, and resolutions. A company secretary of a company must either be: (i) natural person who ordinarily resides in Hong Kong; or (ii) a body corporate having its registered office or a place of business in Hong Kong.

Agent

846.11 *Agent*, in relation to a company, includes: (i) a banker or solicitor of the company; and (ii) a person, whether an officer of the company or not, who is engaged as an auditor of the company.

Books

846.12 *Books* includes: accounts and accounting information, however compiled or stored, and whether or not recorded in a legible form.

Documents

846.13 The term *documents* includes: (i) register, books or tape recording; (ii) input or output, in whatever form, into or from an information system; and (iii) other document or similar material (whether produced mechanically, electronically, magnetically, optically, manually or by any other means).

Records

846.14 *Record* includes "any record of information" (however compiled or stored) and includes any: (i) books, deed, contract, agreement, voucher and receipt; (ii) document or other material used with or produced by an information system; (iii) information that is recorded otherwise than in a legible form but is capable of being reproduced in a legible form; (iv) document, disc, tape, sound track or other device in which sounds or other data (not being visual images) are embodied so as to be capable (with or without the aid of other equipment) of being reproduced; and (v) film (including a microfilm), disc, tape or other device in which visual images are embodied so as to be capable (with or without the aid of other equipment) of being reproduced.

Information

846.15 *Information* includes: (i) data, text, images, sound codes, computer programmes, software and databases; and (ii) any combination of the things mentioned in paragraph (i) above.

847. Inspector may require production of director's accounts

(1) If an inspector appointed to investigate a company's affairs has reasonable grounds to believe that a director or former director of the company maintains or has maintained an account specified in subsection (2), the inspector may, by notice in writing, require the director or former director to produce to the inspector all documents relating to the account that are in the possession, or under the control, of the director or former director.

(2) The account is one of whatever description maintained by the director or former director (whether alone or jointly with any other person) with a bank, deposit-taking company or similar financial institution (whether in Hong Kong or elsewhere), into or out of which there has been paid—

(a) any emolument, retirement benefit or compensation in respect of the directorship, particulars of which are not contained in the notes to the financial statements of the company for any financial year, contrary to Section 383;

(b) any loan or quasi-loan in favour of the director or former director, or any money that has resulted from or has been used in the financing of any dealing in favour

of the director or former director, particulars of which are not contained in the notes to the financial statements of the company for any financial year, contrary to Section 383; or

(c) any money that has been in any way connected with any misconduct of the director or former director (whether fraudulent or not) towards the company or its members.

COMMENTARY

Corresponding statutory provisions

847.01 Section 847 is comparable to (former) s.145B of the predecessor CO.

Inspector empowered to request the production of a director's bank account(s)

847.02 If an inspector ([840.09]) has reasonable grounds to believe that a director or former director (as defined in [846.07] above) has maintained an account with a bank, a deposit-taking company, or financial institution (in Hong Kong or elsewhere) in to or out of which there has been payment of:

(i) being not shown or contained in the notes to the financial statements accounts in accordance with previous s.383 of the Ordinance:
- emolument, retirement benefit, compensation in respect of directorship; or
- loan or quasi-loan in favour of director or former director; or
- money resulted from or used in the financing of any dealings in favour of director or former director;

(ii) money in connection with any misconduct of director or former director,

then the investigator may by notice in writing require the director or former director to produce *all* documents relating to the account, which are in the possession, or under the control, of the director or former director.

848. Provisions supplementary to sections 846 and 847: powers to require explanation etc.

(1) If a person produces a record or document in compliance with a requirement imposed under Section 846 or 847, the inspector may—

(a) make copies, or otherwise record the details, of the record or document; and

(b) by notice in writing, require the person to provide any information or explanation in respect of the record or document.

(2) If a person gives any answer or provides any information or explanation in compliance with a requirement imposed under subsection (1) or Section 846, the inspector may, by notice in writing, further require the person to verify, within the time specified in that further requirement, the answer, information or explanation by a statutory declaration.

(3) If a person does not give any answer or provide any information or explanation in compliance with a requirement imposed under subsection (1) or Section 846 for the reason that the answer, information or explanation is not within the person's knowledge or in the person's possession, the inspector may, by notice in writing, further require the person to verify, within the time specified in that further requirement, that reason and fact by a statutory declaration.

(4) A statutory declaration mentioned in subsection (2) or (3) may be taken by the inspector.

COMMENTARY

Corresponding statutory provisions

848.01 Section 848 is a new provision and accordingly there is no equivalent section in the predecessor CO. However, this provision may instead comparable to: (i) ss.179(2)(a)(i), 183(1)(b), 183(2), and 183(3) of the Securities and Futures Ordinance (Cap.571); and (ii) ss.27(2)(a), 28(2), 28(3), and 28(4) of the Financial Reporting Council Ordinance (Cap.588).

Additional powers granted to the investigator in the course of his investigation

848.02 Where a person (s.846(2)) produces records or documents under previous ss.846 or 847 of the Ordinance, sub-s.848(1) allows the inspector ([840.09]) to:

- make copies and record the details of the record or document so produced, or
- by written notice, require a person to provide information or explanation in respect of the records or documents.

848.03 Where a person answers or provides records or information under the above sub-s.848(1) or previous s.846 of the Ordinance, the inspector may under

These model articles, as dictated in Schedule 1, contains all the mandatory articles as prescribed by the Ordinance, which are:

- name of the company (s.81 of the Ordinance);
- members' limited liabilities (s.83(1) of the Ordinance);
- the liability of members is limited to any amount unpaid on the shares held by the members (s.84(1) of the Ordinance); and
- information of share capital (s.85(1) of the Ordinance).

Corresponding statutory provisions

H2.02 There is no equivalent section in the predecessor CO. The standard articles of association for non-private companies limited by share were contained in Part I of Table A of the predecessor CO.

3. Model articles for private companies limited by shares

Schedule 2 prescribes the model articles for private companies limited by shares.

Note—

For information that must be stated in the articles of a private company limited by shares, please see sections 81, 83(1), 84(1) and 85(1) of the Companies Ordinance (Cap.622).

COMMENTARY

Overview

H3.01 Section 3 of the Regulation prescribes the model articles contained in this Schedule 2 for the use by private companies limited by shares.

These model articles in Schedule 2 contain all the mandatory articles and provisions as prescribed by the Ordinance, which are:

- name of the company (s.81 of the Ordinance);
- members' limited liabilities (s.83(1) of the Ordinance);
- the liability of members is limited to any amount unpaid on the shares held by the members (s.84(1) of the Ordinance); and
- information of share capital (s.85(1) of the Ordinance).

Corresponding statutory provisions

H3.02 There is no equivalent section in the predecessor CO. The standard articles of association for private companies limited by share were contained in Part II of Table A of the predecessor CO.

4. Model articles for companies limited by guarantee

Schedule 3 prescribes the model articles for companies limited by guarantee.

Note—

For information that must be stated in the articles of a company limited by guarantee, please see sections 81, 83(1) and 84(2) of the Companies Ordinance (Cap.622).

COMMENTARY

Overview

H4.01 Section 4 of the Regulation prescribes the model articles contained in this Schedule 3 for the use by companies limited by guarantee.

The model articles as listed in Schedule 3 contain all the mandatory articles as prescribed by the Ordinance, which are:

- name of the company (s.81 of the Ordinance);
- members' limited liabilities (s.83(1) of the Ordinance); and
- the members undertake to contribute a specified amount upon winding-up of a company (s.84(2) of the Ordinance).

Corresponding statutory provisions

H4.02 There is no equivalent section in the predecessor CO. The standard articles of association for private companies limited by guarantee without a share capital were contained in Table C of the predecessor CO.

5. Saving

This Notice does not affect—

(a) Table A in the First Schedule to the Companies Ordinance 1865 (1 of 1865), as in force from time to time, so far as it applies to an existing company;

(b) Table A in the First Schedule to the Companies Ordinance 1911 (58 of 1911), as in force from time to time, so far as it applies to an existing company;

(c) Table A in the First Schedule to the predecessor Ordinance, so far as it applies to an existing company; and

(d) the articles of an existing company limited by guarantee, whether or not the existing company has a share capital.

PART 2
DIRECTORS AND COMPANY SECRETARY

Division 1 Directors' Powers and Responsibilities

2. 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.

3. 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.

4. Directors may delegate

(1) Subject to these articles, the directors may, if they think fit, delegate any of the powers that are conferred on them under these articles—

(a) to any person or committee;

(b) by any means (including by power of attorney);

(c) to any extent and without territorial limit;

(d) in relation to any matter; and

(e) on any terms and conditions.

(2) If the directors so specify, the delegation may authorize further delegation of the directors' powers by any person to whom they are delegated.

(3) The directors may—

(a) revoke the delegation wholly or in part; or

(b) revoke or alter its terms and conditions.

5. Committees

(1) The directors may make rules providing for the conduct of business of the committees to which they have delegated any of their powers.

(2) The committees must comply with the rules.

Division 2 Decision-Taking By Directors

6. Directors to take decision collectively

A decision of the directors may only be taken—

(a) at a directors' meeting; or

(b) in the form of a directors' written resolution.

7. Calling directors' meetings

(1) Any director may call a directors' meeting.

(2) The company secretary must call a directors' meeting if a director requests it.

(3) A directors' meeting is called by giving notice of the meeting to the directors.

(4) Notice of a directors' meeting must indicate—

(a) its proposed date and time; and

(b) where it is to take place.

(5) Notice of a directors' meeting must be given to each director, but need not be in writing.

(6) If a notice of a directors' meeting has not been given to a director (*the failure*) but the director waives his or her entitlement to the notice by giving notice to that effect to the company not more than 7 days after the meeting, the failure does not affect the validity of the meeting, or of any business conducted at it.

8. Participation in directors' meetings

(1) Subject to these articles, directors participate in a directors' meeting, or part of a directors' meeting, when—

(a) the meeting has been called and takes place in accordance with these articles; and

(b) they can each communicate to the others any information or opinions they have on any particular item of the business of the meeting.

(2) In determining whether directors are participating in a directors' meeting, it is irrelevant where a director is and how they communicate with each other.

(3) If all the directors participating in a directors' meeting are not in the same place, they may regard the meeting as taking place wherever any one of them is.

9. Quorum for directors' meetings

(1) At a directors' meeting, unless a quorum is participating, no proposal is to be voted on, except a proposal to call another meeting.

(2) The quorum for directors' meetings may be fixed from time to time by a decision of the directors, but it must be at least 2, and unless otherwise fixed it is 2.

10. Meetings if total number of directors less than quorum

(1) This article applies if the total number of directors for the time being is less than the quorum required for directors' meetings.

(2) If there is only 1 director, that director may appoint sufficient directors to make up a quorum or call a general meeting to do so.

(3) If there is more than one director—

(a) a directors' meeting may take place, if it is called in accordance with these articles and at least 2 directors participate in it, with a view to appointing sufficient directors to make up a quorum or calling a general meeting to do so; and

(b) if a directors' meeting is called but only 1 director attends at the appointed date and time to participate in it, that director may appoint sufficient directors to make up a quorum or call a general meeting to do so.

11. Chairing of directors' meetings

(1) The directors may appoint a director to chair their meetings.

(2) The person appointed for the time being is known as the chairperson.

(3) The directors may appoint other directors as deputy or assistant chairpersons to chair directors' meetings in the chairperson's absence.

(4) The directors may terminate the appointment of the chairperson, or deputy or assistant chairperson at any time.

(5) If neither the chairperson nor the deputy or assistant chairperson is participating in a directors' meeting within 10 minutes of the time at which it was to start or is willing to chair the meeting, the participating directors may appoint one of themselves to chair it.

12. Voting at directors' meetings: general rules

(1) Subject to these articles, a decision is taken at a directors' meeting by a majority of the votes of the participating directors.

(2) Subject to these articles, each director participating in a directors' meeting has 1 vote.

13. Chairperson's casting vote at directors' meetings

(1) If the numbers of votes for and against a proposal are equal, the chairperson or other director chairing the directors' meeting has a casting vote.

(2) Paragraph (1) does not apply if, in accordance with these articles, the chairperson or other director is not to be counted as participating in the decision-making process for quorum or voting purposes.

14. Alternates voting at directors' meetings

A director who is also an alternate director has an additional vote on behalf of each appointor who—

(a) is not participating in a directors' meeting; and

(b) would have been entitled to vote if he or she were participating in it.

15. Conflicts of interest

(1) This article applies if—

(a) a director or an entity connected with the director is in any way (directly or indirectly) interested in a transaction, arrangement or contract with the company that is significant in relation to the company's business; and

(b) the director's or the entity's interest is material.

(2) The director must declare the nature and extent of the director's or the entity's interest to the other directors in accordance with section 536 of the Ordinance.

(3) The director and the director's alternate must neither—

(a) vote in respect of the transaction, arrangement or contract in which the director or the entity is so interested; or

(b) be counted for quorum purposes in respect of the transaction, arrangement or contract.

(4) Paragraph (3) does not preclude the alternate from—

(a) voting in respect of the transaction, arrangement or contract on behalf of another appointor who does not have such an interest; and

(b) being counted for quorum purposes in respect of the transaction, arrangement or contract.

(5) If the director or the director's alternate contravenes paragraph (3)(a), the vote must not be counted.

(6) Paragraph (3) does not apply to—

(a) an arrangement for giving a director any security or indemnity in respect of money lent by the director to or obligations undertaken by the director for the benefit of the company;

(b) an arrangement for the company to give any security to a third party in respect of a debt or obligation of the company for which the director has assumed responsibility wholly or in part under a guarantee or indemnity or by the deposit of a security;

(c) an arrangement under which benefits are made available to employees and directors or former employees and directors of the company or any of its subsidiaries, which do not provide special benefits for directors or former directors; or

(d) an arrangement to subscribe for or underwrite shares.

(7) A reference in this article to an entity connected with a director has the meaning given by section 486 of the Ordinance.

(8) A reference in this article (except in paragraphs (6)(d) and (9)) to a transaction, arrangement or contract includes a proposed transaction, arrangement or contract.

(9) In this article—

arrangement to subscribe for or underwrite shares (認購或包銷股份安排) means –

(a) a subscription or proposed subscription for shares or other securities of the company;

(b) an agreement or proposed agreement to subscribe for shares or other securities of the company; or

(c) an agreement or proposed agreement to underwrite any of those shares or securities.

16. Supplementary provisions as to conflicts of interest

(1) A director may hold any other office or position of profit under the company (other than the office of auditor) in conjunction with the office of director for a period and on terms (as to remuneration or otherwise) that the directors determine.

(2) A director or intending director is not disqualified by the office of director from contracting with the company—

(a) with regard to the tenure of the other office or position of profit mentioned in paragraph (1); or

(b) as vendor, purchaser or otherwise.

(3) The contract mentioned in paragraph (2) or any transaction, arrangement or contract entered into by or on behalf of the company in which any director is in any way interested is not liable to be avoided.

(4) A director who has entered into a contract mentioned in paragraph (2) or is interested in a transaction, arrangement or contract mentioned in paragraph (3) is not liable to account to the company for any profit realized by the transaction, arrangement or contract by reason of—

(a) the director holding the office; or

(b) the fiduciary relation established by the office.

(5) Paragraph (1), (2), (3) or (4) only applies if the director has declared the nature and extent of the director's interest under the paragraph to the other directors in accordance with section 536 of the Ordinance.

(6) A director of the company may be a director or other officer of, or be otherwise interested in—

(a) any company promoted by the company; or

(b) any company in which the company may be interested as shareholder or otherwise.

(7) Subject to the Ordinance, the director is not accountable to the company for any remuneration or other benefits received by the director as a director or officer of, or from the director's interest in, the other company unless the company otherwise directs.

17. Proposing directors' written resolutions

(1) Any director may propose a directors' written resolution.

(2) The company secretary must propose a directors' written resolution if a director requests it.

(3) A directors' written resolution is proposed by giving notice in writing of the proposed resolution to each director.

(4) Notice of a proposed directors' written resolution must indicate—

(a) the proposed resolution; and

(b) the time by which it is proposed that the directors should adopt it.

(5) Any decision which a person giving notice of a proposed directors' written resolution takes regarding the process of adopting the resolution must be taken reasonably in good faith.

18. Adoption of directors' written resolutions

(1) A proposed directors' written resolution is adopted when all the directors who would have been entitled to vote on the resolution at a directors' meeting have signed one or more copies of it.

(2) Paragraph (1) only applies if those directors would have formed a quorum at the directors' meeting.

(3) It is immaterial whether any director signs the resolution before or after the time by which the notice proposed that it should be adopted.

19. Effect of directors' written resolutions

If a proposed directors' written resolution has been adopted, it is as valid and effectual as if it had been passed at a directors' meeting duly convened and held.

20. Validity of acts of meeting of directors

The acts of any meeting of directors or of a committee of directors or the acts of any person acting as a director are as valid as if the directors or the person had been duly appointed as a director and was qualified to be a director, even if it is afterwards discovered that—

(a) there was a defect in the appointment of any of the directors or of the person acting as a director;

(b) any one or more of them were not qualified to be a director or were disqualified from being a director;

(c) any one or more of them had ceased to hold office as a director; or

(d) any one or more of them were not entitled to vote on the matter in question.

21. Record of decisions to be kept

The directors must ensure that the company keeps a written record of every decision taken by the directors under article 6 for at least 10 years from the date of the decision.

22. Directors' discretion to make further rules

Subject to these articles, the directors may make any rule that they think fit about—

(a) how they take decisions; and

(b) how the rules are to be recorded or communicated to directors.

Division 3 Appointment and Retirement of Directors

23. Appointment and retirement of directors

(1) A person who is willing to act as a director, and is permitted by law to do so, may be appointed to be a director—

(a) by ordinary resolution; or

(b) by a decision of the directors.

(2) A director appointed under paragraph (1)(a) is subject to article 24.

(3) An appointment under paragraph (1)(b) may only be made to—

(a) fill a casual vacancy; or

(b) appoint a director as an addition to the existing directors if the total number of directors does not exceed the number fixed in accordance with these articles.

(4) A director appointed under paragraph (1)(b) must retire from office at the next annual general meeting following the appointment.

24. Retirement of directors by rotation

(1) At the first annual general meeting, all the directors must retire from office.

(2) At every subsequent annual general meeting, one-third of the directors for the time being must retire from office.

(3) Paragraphs (1) and (2) are subject to article 33(2).

(4) For the purposes of paragraph (2), if the number of directors is not 3 or a multiple of 3, then the number nearest one-third must retire from office.

(5) The directors to retire in every year must be those who have been longest in office since their last appointment or reappointment.

(6) For persons who became directors on the same day, those to retire must be determined by lot, unless they otherwise agree among themselves.

(7) At the annual general meeting at which a director retires, the company may appoint a person to fill the vacated office.

(8) A retiring director is regarded as having been reappointed to the office if—

(a) the company does not appoint a person to the vacated office; and

(b) the retiring director has not given notice to the company of the intention to decline reappointment to the office.

(9) However, a retiring director is not regarded as having been reappointed to the office if—

(a) at the meeting at which the director retires, it is expressly resolved not to fill the vacated office; or

(b) a resolution for the reappointment of the director has been put to the meeting and lost.

(10) A person is not eligible for appointment to the office of director at any general meeting unless—

(a) the person is a director retiring at the meeting;

(b) the person is recommended by the directors for appointment to the office; or

(c) a member qualified to attend and vote at the meeting has sent the company a notice of the member's intention to propose the person for appointment to the office, and the person has also sent the company a notice of the person's willingness to be appointed.

(11) The notice of the member's intention to propose the person for appointment to the office must be authenticated by that member and the notice of the person's willingness to be appointed must be authenticated by that person, and they must be sent to the company in hard copy form or in electronic form and received by the company, at least 7 days before the date of the general meeting.

(12) The company may—

(a) by ordinary resolution increase or reduce the number of directors; and

(b) determine in what rotation the increased or reduced number is to retire from office.

25. Retiring director eligible for reappointment

A retiring director is eligible for reappointment to the office.

26. Composite resolution

(1) This article applies if proposals are under consideration concerning the appointment of 2 or more directors to offices or employments with the company or any other body corporate.

(2) The proposals may be divided and considered in relation to each director separately.

(3) Each of the directors concerned is entitled to vote (if the director is not for another reason precluded from voting) and be counted in the quorum in respect of each resolution except that concerning the director's own appointment.

27. Termination of director's appointment

A person ceases to be a director if the person—

(a) ceases to be a director under the Ordinance or the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap.32) or is prohibited from being a director by law;

(b) becomes bankrupt or makes any arrangement or composition with the person's creditors generally;

(c) becomes a mentally incapacitated person;

(d) resigns the office of director by notice in writing of the resignation in accordance with section 464(5) of the Ordinance;

(e) for more than 6 months has been absent without the directors' permission from directors' meetings held during that period; or

(f) is removed from the office of director by an ordinary resolution of the company.

28. Directors' remuneration

(1) Directors' remuneration must be determined by the company at a general meeting.

(2) A director's remuneration may—

(a) take any form; and

(b) include any arrangements in connection with the payment of a retirement benefit to or in respect of that director.

(3) Directors' remuneration accrues from day to day.

29. Directors' expenses

The company may pay any travelling, accommodation and other expenses properly incurred by directors in connection with—

(a) their attendance at—

(i) meetings of directors or committees of directors;

(ii) general meetings; or

(iii) separate meetings of the holders of any class of shares or of debentures of the company; or

(b) the exercise of their powers and the discharge of their responsibilities in relation to the company.

Division 4 Alternate Directors

30. Appointment and removal of alternates

(1) A director (*appointor*) may appoint as an alternate any other director, or any other person approved by resolution of the directors.

(2) An alternate may exercise the powers and carry out the responsibilities of the alternate's appointor, in relation to the taking of decisions by the directors in the absence of the alternate's appointor.

(3) An appointment or removal of an alternate by the alternate's appointor must be effected—

(a) by notice to the company; or

(b) in any other manner approved by the directors.

(4) The notice must be authenticated by the appointor.

(5) The notice must—

(a) identify the proposed alternate; and

(b) if it is a notice of appointment, contain a statement authenticated by the proposed alternate indicating the proposed alternate's willingness to act as the alternate of the appointor.

(6) If an alternate is removed by resolution of the directors, the company must as soon as practicable give notice of the removal to the alternate's appointor.

31. Rights and responsibilities of alternate directors

(1) An alternate director has the same rights as the alternate's appointor in relation to any decision taken by the directors under article 6.

(2) Unless these articles specify otherwise, alternate directors—

(a) are deemed for all purposes to be directors;

(b) are liable for their own acts and omissions;

(c) are subject to the same restrictions as their appointors; and

(d) are deemed to be agents of or for their appointors.