

PART 17

COMPANIES NOT FORMED, BUT REGISTRABLE, UNDER THIS ORDINANCE

Division 1 – Preliminary

17.1 Interpretation

In this Part –

“constitutional document” (章程性質文件), in relation to an eligible company,
means –

- (a) an Ordinance constituting or regulating the company; or
- (b) a non-statutory constitutional document of the company;

“eligible company” (合資格公司) means a company –

- (a) formed after 1 May 1865 in pursuance of an Ordinance other than this Ordinance or a former Companies Ordinance; or
- (b) otherwise constituted after that date according to law;

“non-statutory constitutional document” (不屬法定的章程性質文件), in relation to an eligible company, means any deed of settlement, or other instrument, constituting or regulating the company.

Division 2 – Registration of Eligible Companies

17.2 Registrar may register eligible company

(1) The Registrar may, on application by an eligible company, register the company as –

- (a) an unlimited company; or
- (b) a company limited by guarantee.

(2) An application for the purposes of subsection (1) must be in the specified form.

(3) An application for the purposes of subsection (1) must be accompanied by –

- (a) a copy of every constitutional document of the eligible company; and
- (b) in the case of an application for registration as a company limited by guarantee, a copy of the resolution complying with section 17.5(2).

(4) A registration under subsection (1) is not invalid by reason only of it having taken place with a view to the eligible company being wound up.

17.3 General restrictions on Registrar’s power to register

(1) If the liability of the members of an eligible company is limited by an Ordinance or otherwise according to law, the Registrar must not register the company under this Part.

(2) The Registrar must not register an eligible company under this Part as a company limited by guarantee unless –

- (a) if the company has an English name only –
 - (i) the name by which the company is to be registered has “Limited” as the last word of that name; and
 - (ii) a Chinese equivalent of it that the company may use has “有限公司” as the last 4 Chinese characters of the equivalent;
- (b) if the company has a Chinese name only –
 - (i) the name by which the company is to be registered has “有限公司” as the last 4 Chinese characters of that name; and
 - (ii) an English equivalent of it that the company may use has “Limited” as the last word of the equivalent; or

- (c) if the company has both an English name and a Chinese name –
 - (i) the English name by which the company is to be registered has “Limited” as the last word of that name; and
 - (ii) the Chinese name by which the company is to be registered has “有限公司” as the last 4 Chinese characters of that name.

17.4 Registrar must not register without members’ assent

(1) The Registrar must not register an eligible company under this Part as an unlimited company unless there is assent to the registration by a majority of the members present at a general meeting of the company convened for the purpose.

(2) The Registrar must not register an eligible company under this Part as a company limited by guarantee unless there is assent to the registration by at least 75% of the members present at a general meeting of the company convened for the purpose.

(3) For the purposes of this section, in computing a majority, or 75%, of the members where a poll is demanded, the number of votes to which each member is entitled according to the eligible company’s regulations must be taken into account.

(4) In this section, a reference to a member present at a general meeting is –

- (a) a reference to a member present in person; or
- (b) if proxies are allowed by the eligible company’s regulations, a reference to a member present by proxy.

17.5 Registrar must not register without resolution declaring amount of guarantee

(1) The Registrar must not register an eligible company under this Part as a company limited by guarantee unless the members pass a resolution that complies with subsection (2).

(2) The resolution must declare that each person who is a member of the eligible company undertakes that if the company is wound up while the person is such a member, or within one year after the person ceases to be such a member, the person will contribute an amount required of the person, not exceeding a specified amount, to the company's assets –

- (a) for the payment of the company's debts and liabilities contracted before the person ceases to be such a member;
- (b) for the payment of the costs and expenses of winding up the company; or
- (c) for the adjustment, among the contributories, of their rights.

17.6 Eligible company must pay registration fee

Before the Registrar registers an eligible company under this Part, the company must pay a prescribed fee to the Registrar for the registration.

17.7 Registrar must issue certificate of registration

On registering an eligible company under this Part, the Registrar must issue to it a certificate of registration, with the Registrar's signature or printed signature.

Division 3 – Consequences of Registration

17.8 Application

This Division applies if an eligible company is registered under this Part as an unlimited company or a company limited by guarantee.

17.9 Status, property, rights and liabilities of eligible company

(1) On being issued with a certificate of registration under section 17.7, the eligible company is to be regarded as having been incorporated under this Ordinance as an unlimited company or a company limited by guarantee, whichever is applicable.

(2) Subsection (1) does not operate to create a new legal entity for the eligible company.

(3) The registration does not affect the eligible company's property.

(4) The registration does not affect the eligible company's rights and liabilities in respect of –

- (a) any debt or obligation incurred by or on behalf of, or owed to, the company before the registration; or
- (b) any contract entered into by or on behalf of the company before the registration.

17.10 Continuation of existing proceedings

(1) Subject to subsection (2), any action or other legal proceedings that are, at the time of registration, pending by or against the eligible company, or any of its officers or members, may be continued in the same manner as if the registration had not taken place.

(2) Execution must not be issued against the effects of a member of the eligible company on any judgment, decree or order obtained in any such pending action or proceedings.

(3) If the eligible company's property and effects are insufficient to satisfy the judgment, decree or order, an order may be obtained for winding up the company.

17.11 Continuation of existing constitutional document

(1) The provisions in a constitutional document of the eligible company are to be regarded as conditions and regulations of the company in the same manner and with the same incidents as if those provisions were, had the company been formed under this Ordinance, contained in the articles with which the company would have been formed.

(2) In subsection (1), a reference to a constitutional document of an eligible company includes, in the case of an eligible company registered as a company limited by guarantee, the resolution complying with section 17.5(2).

17.12 Eligible company may substitute articles for non-statutory constitutional document

(1) The eligible company may alter the form of its constitution by substituting articles for a non-statutory constitutional document of the company.

(2) An alteration must be made by special resolution.

17.13 This Ordinance applies to eligible company

(1) Subject to section 17.14, this Ordinance applies to the eligible company and its officers, members, contributories and creditors in the same manner in all respects as if the company had been formed under this Ordinance.

(2) Despite anything in a constitutional document of the eligible company, a provision of this Ordinance applies to the company if the provision relates to an unlimited company's registration as a limited company.

17.14 Exceptions to section 17.13(1)

(1) The eligible company may not adopt as its articles any or all of the provisions of the model articles prescribed under section 3.16,²⁷ unless those provisions are adopted by special resolution.

²⁷ A consultation draft of Part 3 will be published later.

(2) Subject to section 17.15, the eligible company does not have any power to alter a provision in an Ordinance relating to the company.

(3) If the eligible company is wound up, a person specified in subsection (5) is a contributory –

- (a) liable to pay or contribute to the payment of –
 - (i) the company's debts and liabilities contracted before the registration;
 - (ii) any sum for the adjustment of the rights of the members among themselves in respect of those debts and liabilities; and
 - (iii) the costs and expenses of winding up the company, so far as relating to those debts and liabilities; and
- (b) liable to contribute to the company's assets all sums due from the person in respect of the liability under paragraph (a).

(4) In the event of the death, bankruptcy or insolvency of such a contributory, the provisions of this Ordinance with respect to the personal representatives, and to the trustees of bankrupt or insolvent contributories, apply.

(5) The person specified for the purposes of subsection (3) is a person who is liable to pay or contribute to the payment of the eligible company's debts and liabilities contracted before the registration.

17.15 Eligible company's power to alter constitution

This Ordinance does not derogate from any power, vested in the eligible company, by virtue of a constitutional document of the company, of altering its constitution or regulations.