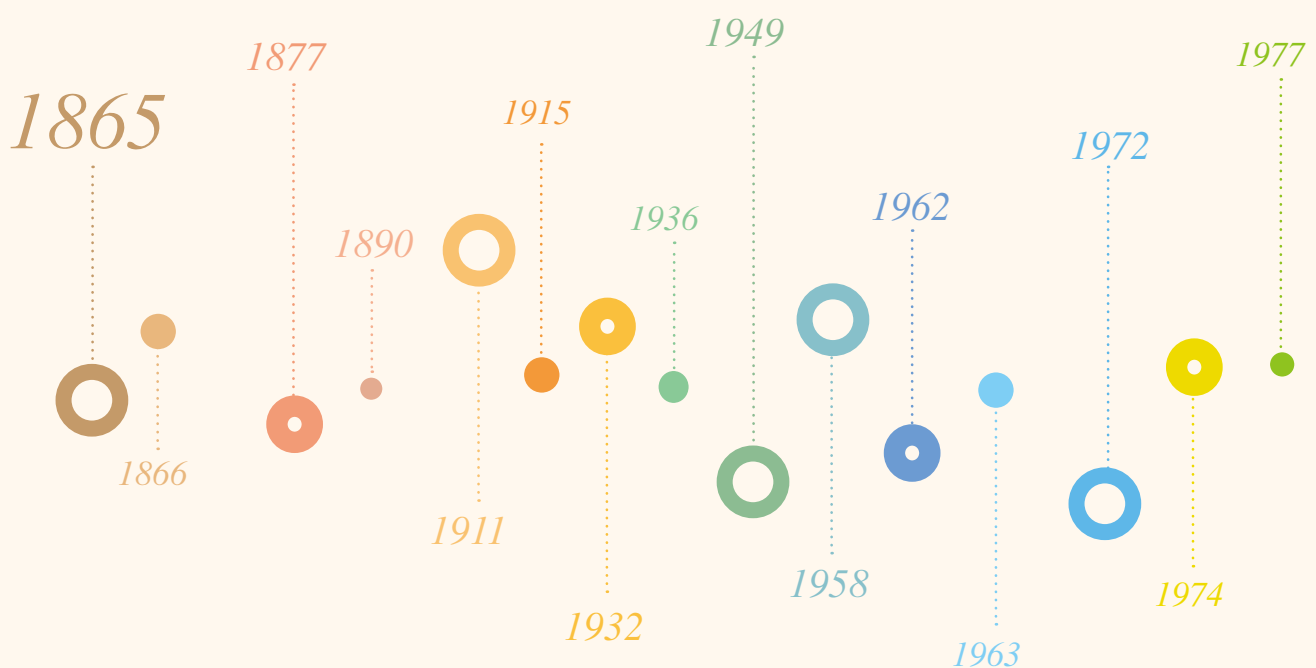


II. Evolution of the legal framework for company incorporation

Although Hong Kong became a British colony in 1842, the history of company incorporation in Hong Kong did not begin until 1865, when the first Companies Ordinance was passed by the local legislature. Before 1865, there were no local companies in Hong Kong. Companies operating in Hong Kong at that time were foreign companies or other forms of business vehicles registered in other places. For example, Jardine Matheson was a partnership registered in Guangzhou in 1832, but moved its head office to Hong Kong in 1842. The company was formally registered in Hong Kong as a local company in 1906. Another example is A.S. Watson, which opened its first dispensary in Guangzhou in 1828 and extended its operations to Hong Kong in 1841. It was registered as a company in Hong Kong in 1886.

Before the Companies Ordinance 1865, companies

that were incorporated elsewhere and established their offices in Hong Kong were governed by British law, which was extended to the colony on 29 January 1841 by the proclamation (dated 2 February 1841) issued by Sir James John Gordon Bremer, Commander-in-Chief, and Captain Charles Elliot, Plenipotentiary, on the proviso that the British legislation was general and not purely local in nature, and not unsuited to the circumstances of Hong Kong and its inhabitants. For example, the Oriental Banking Corporation (headquartered in London with its first branch established in Hong Kong in 1845), and Standard Chartered Bank (which registered in the United Kingdom in 1853 and established its Hong Kong office in 1859) were among the first few banking corporations granted the right of issuance of bank notes in Hong Kong, and the operations of their Hong Kong offices were regulated by the United Kingdom laws to the extent that they were appropriate to the circumstances of Hong Kong and its inhabitants. Rules regarding company incorporation in the United



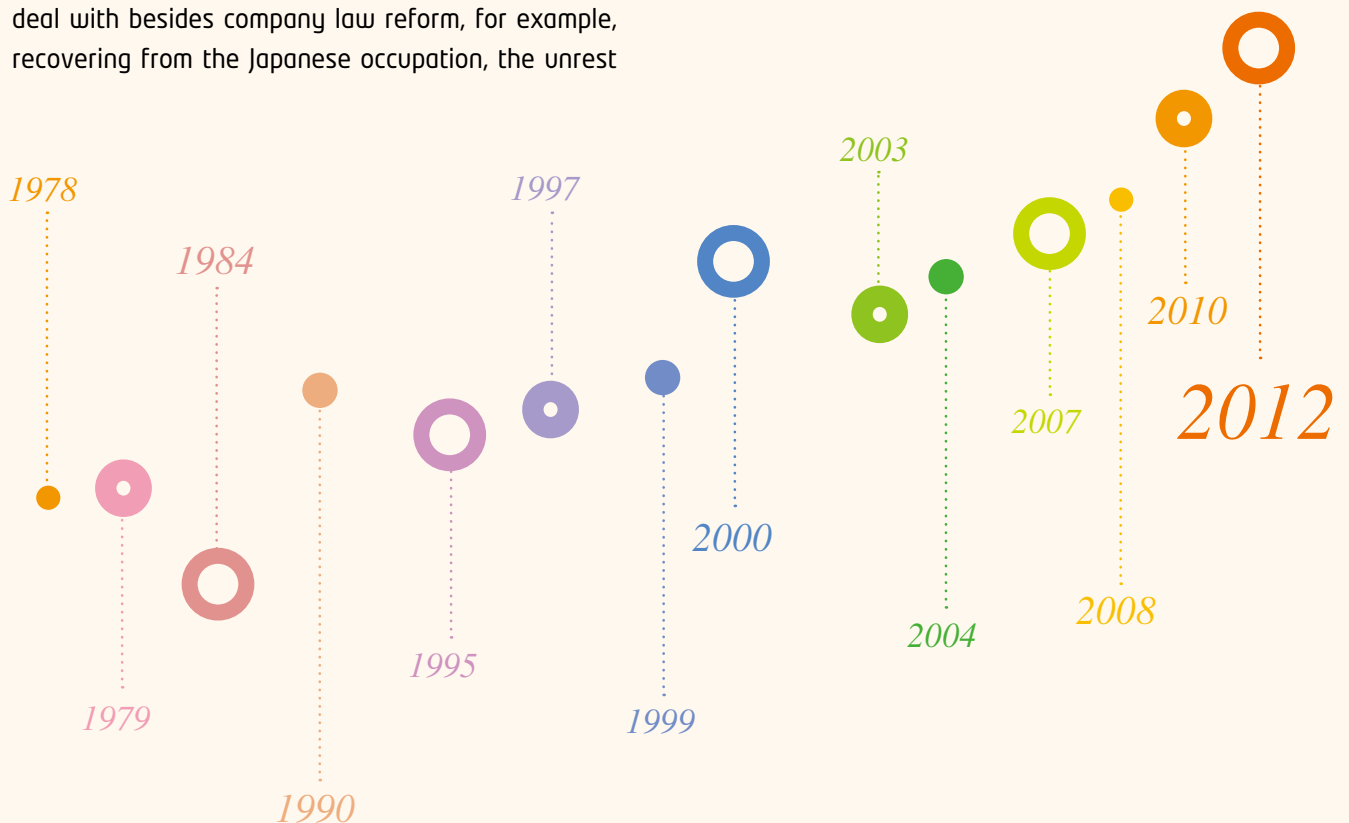
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Kingdom therefore also took effect in Hong Kong, although there was no registration of companies in Hong Kong until 1865 when the first Companies Ordinance came into effect.

The development of company law in Hong Kong can be divided into three distinct periods. The first covered the years from 1865 to 1948, the second from 1948 to 1984 and the third essentially reflects the position since 1984. During the first period, company law reform in Hong Kong largely took the form of following the most up-to-date English legislation. Thus, the 1862 Act was followed by the 1865 Ordinance, the 1908 Act by the 1911 Ordinance and the 1929 Act by the 1932 Ordinance. However, after 1932, Companies Ordinance in Hong Kong ceased to keep pace with developments in the United Kingdom, as Hong Kong had other more urgent matters to deal with besides company law reform, for example, recovering from the Japanese occupation, the unrest

in the Mainland and finding a role for itself during the Korean and Vietnam wars. Nevertheless, the genesis of the current framework is the Companies Ordinance 1865 which mirrored the United Kingdom Companies Act 1862, the latter representing the consolidation of legislative changes in England through the preceding 20 years.

The legislation relating to the incorporation of companies and related matters (i.e., the filing formality) is contained in Part I of the Companies Ordinance. This Part prescribes the procedures and requirements involved in incorporation, the content of memorandum and articles of association, their statutory form and registration. As will be seen below, very little of real substance in this Part has changed since its original formulation in 1865. Nevertheless, a few changes are worth noting, as listed below.



II. Evolution of the legal framework for company incorporation



The Companies Ordinance 1865 was formed on the basis of the 1862 Act in the United Kingdom. The transplantation was primarily for the benefit of British business rather than local business, and the adoption of the legislation was important for the maintenance of investment by English companies in the colony. Despite the obvious social, cultural and economic differences between Hong Kong and England in 1865, the English legislation was adopted practically verbatim. The early 1860s witnessed a financial boom in the treaty ports in China, and businessmen in Hong Kong were highly optimistic about Hong Kong's future prospects. In a sense, the passing of the 1865 Ordinance was an inevitable event, given the times. In that year, the first Companies Ordinance in Hong Kong came into operation, with Part I concerning the constitution and incorporation of companies.

The minimum number of persons who could combine their capital to carry on a particular business, required for the incorporation of a joint stock company was 7. It was stated that any 7 or more persons associated for

any lawful purpose could, by subscribing their names to a memorandum of association, and otherwise complying with the requirements of this ordinance in respect of registration, form an incorporated company, with or without limited liability. It was also prohibited to register companies with identical or resembling names.

Two kinds of limited liability were provided for under the ordinance. One was to limit their liability to the amount unpaid on the shares respectively held by them, i.e. a company limited by shares. The memorandum of association of such a company should contain certain prescribed information, such as the name of the proposed company, with the word "limited" appearing at the end of the name. The second type of limited liability was to the amount that the members may respectively undertake by the memorandum of association to contribute to the assets of the company in the event of its being wound up, i.e. a company limited by guarantee. There is also a third form of company, i.e. a company having no limit placed on the liability of its members, or an unlimited company.

The memorandum had to be signed by each subscriber. The memorandum included a covenant to observe all of the conditions of the memorandum. Certain matters in the memorandum, such as the increase of capital or the division of its capital into shares, could be altered by its members under certain circumstances.

Once the memorandum of association and the articles of association were registered, the Registrar must certify that the company was incorporated. A copy of the memorandum of association and the articles of association must be forwarded to every member at his request with the payment of a certain fee.

The company could also change its name. The Registrar of Companies must enter the new name of the company in the Register in place of the old name, and must issue a certificate of incorporation on change of name that reflected the new circumstances.

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1866



In those days, companies formed for the purpose of conducting banking business were often incorporated by a special ordinance; for example, the Hongkong and Shanghai Banking Corporation Limited was incorporated under Ordinance No. 5 of 1866. Such special ordinances often contained special provisions that were not found in the Companies Ordinance, and the banking corporations were therefore not to be affected by the general provisions in the Companies Ordinance. Thus, it was made clear in the 1866 amendment that nothing in the Companies Ordinance 1865 applied to or affected such corporations.

Furthermore, Ordinance No. 3 of 1866 provided the rules for the registration of companies existing at the time of the commencement of the Companies Ordinance 1865 or thereafter formed under any other ordinances or Letters Patent. A series of documents were required to be delivered to the Registrar of Companies prior to the registration of such companies, although the lists vary according to the nature of the companies.

1877



The changes to the law authorised the Governor to direct a charitable company (i.e. "a limited company for non-profit purpose, such as for the purpose of promoting commerce, art, science, religion, charity, or any other useful object, and that it was the intention of such association to apply any profits or other income of the association, in promoting its objects, and prohibited the payment of any dividend to the members of the association") to be registered with limited liability without adding the word "Limited" to its name. However, a number of conditions and regulations could be imposed in the licence granted by the Governor in return for the privilege of limited liability.

II. Evolution of the legal framework for company incorporation

1890



For the first time in the history of Hong Kong, a company was permitted to alter its objects (or purposes) as stated in its memorandum of association or deed of settlement. This followed an earlier ordinance, The Hongkong Land Investment and Agency Company Limited Ordinance 1890, passed on 9 April 1890, which allowed The Hongkong Land Investment and Agency Company Limited to transact business elsewhere than in the Colony and to extend its powers of investments, which it was unable to do under its articles of association. This 1890 Amendment Ordinance followed *mutatis mutandis* the Companies Act which was then passing through the Imperial Parliament on the subject. Generally speaking, the objects of a company are stated in a clause contained in the memorandum of association for the company regarding its general commercial objects. The scope of business of a company is confined by the objects of the company, and, where the business activity of a company falls outside its objects (i.e. ultra vires), the transaction conducted will be void. Hence, the objects clause (i.e. the clause that sets out the purposes) of a company defines the scope of the company for doing business. Before this amendment, alteration of this clause was forbidden.

The ultra vires doctrine is intended for the benefit of the members and creditors of a company, who are entitled to be secure in the knowledge that if the company extends its business beyond the permitted objects, any contracts made will be void and incapable of ratification by the company.

The amendment in Ordinance No. 25 of 1890 allowed a company to alter its objects by special resolution. However, such alteration was subject to the confirmation of the court on petition by the company. The ordinance set out a list of circumstances under which the proposed alteration might be confirmed, such as to carry on the business more economically or more efficiently; to attain its main purpose by new or improved means; to enlarge or change the local area of its operation; to carry on certain business or businesses which under existing circumstances might conveniently or advantageously be combined with the business of the company; or to restrict or abandon any of its objects. In addition, the company was required to deliver the court's confirmation order to the Registrar of Companies within a certain period of time. The company could be liable to pay a fine for default of such delivery.

1911



In 1911, a new Companies Ordinance was promulgated. This ordinance followed the 1908 Act in the United Kingdom. In essence, it revised a large part of the previous Companies Ordinance 1865.

Large partnerships consisting of more than 20 persons for providing financial services, such as banking, were prohibited under this ordinance. It was stated that to carry on the business of banking or any other business that had for its objects the acquisition of gain, a company rather than a partnership had to be formed and registered under the Companies Ordinance 1911 or other special ordinance or charter.

In terms of private companies, the minimum number of persons required to form a private company was reduced from 7 to 2 persons. The lower threshold for the establishment of a private company facilitated the incorporation of such companies and resulted in a mild increase in the number of newly incorporated companies in the next two decades (1910s -1920s).

The ordinance also included a few changes regarding the memoranda of companies limited by guarantee. For example, the memorandum must state that the liability of the members was limited, and if the company had a share capital, the memorandum must also state the amount of

share capital registered and the division of the capital into shares of a fixed amount; each subscriber must take at least one share; and each subscriber must state against his name the number of shares he took.

In the case of an unlimited company, if the company had a share capital, each subscriber must take at least one share; and state the number of shares he took.

This ordinance also extended the time limit for the delivery of alteration of objects to the court from 15 days to 28 days and increased the fine for default from a penalty not exceeding \$50 to one not exceeding \$100 for every day's default.

It also allowed the alteration of articles of association by a company by special resolution subject to the conditions contained in its memorandum.

The effect of the memorandum and articles of the company was also made clear in the new law. It was stipulated that the memorandum and articles would bind the company and the members thereof to the same extent as if they respectively had been signed and sealed by each member. In addition, any money payable by any member to the company under the memorandum or articles would be a debt due from him to the company in the nature of a speciality debt.

The penalty that a company was liable to pay for failing to send to the members, at their request, a copy of the memorandum and of the articles was reduced from a fine not exceeding \$25 to one not exceeding \$10.

A restriction on not-for-profit companies was imposed by the new law. It was stated that a company formed not for profits could not hold more than two acres of land without the licence of the Governor. The Governor could by licence empower any such company to hold lands in such quantity, and subject to such conditions, as he might think fit.

Some new provisions as to companies limited by guarantee were introduced in the new law. It was stipulated that for new companies limited by guarantee, only members could participate in the divisible profits of the company. In addition, any provision purporting to divide the undertaking of the company into shares or interest would be treated as a provision for share capital, notwithstanding that the nominal amount or number of the shares or interests was not specified thereby.

II. Evolution of the legal framework for company incorporation



1915

A number of amendments were made to the 1911 Ordinance under Ordinance No. 31 of 1915. The bill was complementary to the China (Companies) Order-in-Council 1915 issued by His Majesty-in-Council, and together they were intended to increase the control over Hong Kong companies which carried on business in China. There were two types of Hong Kong company: those that were managed from Hong Kong and those that were managed from a location in China. The former were termed in the Order-in-Council and the 1915 Amendment Ordinance “Hongkong China Companies”, and the latter “China Companies”.⁵

In the case of Hongkong China Companies, the Colonial Government and Courts had territorial jurisdiction and effective control over the company through its directors and officers in Hong Kong, whatever their nationality. In the case of China Companies, as their directors and officers were resident outside the British Dominions, there was no effective control over the company, unless some of its directors and officers were of British nationality, because the jurisdiction of the Supreme Court for China, which existed at the time, was in general confined to British subjects and protected persons. It was this difficulty which led to the enactment of the Order-in-Council and the 1915 Ordinance.⁶

For China Companies limited by shares, the solution adopted was to require that the majority of its directors and its auditors be British subjects, and that only a British subject could be appointed to act as liquidator of such

5 Section 2, Ordinance 31 of 1915.

6 Legislative Council meeting dated 2 December 1915, Hong Kong Hansard pp 90-91.



a company, or as receiver or manager on behalf of the debenture holders, except with the sanction of the Court. Furthermore, their shares must be issued either as fully paid up or upon the term that they be fully paid up within three months after allotment, to avoid the difficulty of recovering calls from persons of non-British nationality in China. In the comparatively rare case of companies limited by guarantee, such companies were not allowed to operate without the consent of the Minister, who could as a condition of this consent require that only a British subject could be a member, or that any member who was not a British subject had to give security for insuring the payment of the amount for which he would be liable under the guarantee.

The Order-in-Council also provided that the jurisdiction conferred by the Hong Kong Companies Ordinances upon any Court in Hong Kong could be exercised by the Supreme Court for China, and that that jurisdiction would be exercised in conformity with the provisions of the Hong Kong Companies Ordinances. The Order-in-Council and 1915 Ordinance together provided that in all matters relating to a Hongkong China Company, the jurisdiction of the Supreme Court of Hong Kong and of the Supreme Court for China were concurrent and mutually auxiliary, and proceedings could be transferred from one Supreme Court to the other. They could also enforce each other's orders in all matters relating to China Companies.⁷

At the same time, a register of companies at Shanghai was established, where all documents relating to China Companies would be filed and fees paid. All acts

undertaken by or before the Registrar at Shanghai had the same validity as if they had been undertaken by or before the Registrar of Companies in Hong Kong.⁸ All documents required by the Companies Ordinance to be filed with the Registrar of Companies were required, in the case of a China Company, to be filed with the Registrar at Shanghai, and a copy of all such documents, in the case of a Hongkong China Company, had to be filed with the Registrar at Shanghai.⁹ All fees which a company was required to pay to the Registrar of Companies was, in the case of a China Company, to be paid to the Registrar at Shanghai.¹⁰

The address in the Colony at which the registered office of the company was to be situated was no longer required to be stated in the memorandum; it was enough if it was stated that "The registered office of the company will be situated in Victoria, Hong Kong". So one could not find out the address of the registered office of a company by inspection of its memorandum.

An additional restriction on the name of the company was stipulated in the laws. To prevent improper use of the word "British", it was stated that the name of the company should not include the word "British" except with the permission of the Governor. However, a China Company could be registered under a name which included the word "British" without any such permission, because a China Company would now have a real and substantial British character under the new law.¹¹

7 Ordinance 31 of 1915, s 5.

8 Ibid, s 3(2).

9 Ibid, s 3(3).

10 Ibid, s 3(4).

11 Ibid, at 92.

II. Evolution of the legal framework for company incorporation

1932



The purpose of the 1932 Ordinance was to consolidate and amend company law with a view to bringing it into line with that prevailing in England. It followed the Companies Act 1929 very closely, although it was also necessary to incorporate special local provisions taken from the existing ordinances, e.g. provisions for China companies within the limits of the China Orders-in-Council. This ordinance was the last occasion on which Hong Kong law directly followed a consolidation made in the United Kingdom.

The Companies Ordinance 1932 made a number of amendments to the 1911 Ordinance:

Firstly, the memorandum and articles of association had to be printed in the English language.

Secondly, a company was allowed to alter its memorandum to enable it to sell or dispose of the whole or any part of the undertaking of the company, or to amalgamate with any other company or body of persons. A member of the company was not bound by an alteration made in the memorandum or articles after he became a member, if the alteration required him to take or subscribe for more shares than he already had, or increased his liability to contribute to the share capital of, or otherwise to pay money to, the company, unless he agreed in writing to be thus bound.

A company that issued after the date of the alteration any copies of the memorandum which were not in accordance with the alteration would be liable to a fine not exceeding \$10 for each copy so issued.

A company not having a share capital was required, according to the new rule, to give notice to the Registrar of Companies of the increase in the number of members in the company. The company and every officer of the company who was in default of compliance would be liable to a fine.

A number of statutory forms of memorandum and articles were also provided for different companies, such as a company limited by shares, a company limited by guarantee and not having a share capital, a company limited by guarantee and having a share capital, and an unlimited company having a share capital, in the Tables in the First Schedule to the ordinance.

A new power was given to the Registrar of Companies to order a change of name where the company inadvertently registered under a name in conflict with the requirements of the ordinance. With some exceptions, certain words were not allowed to be used in a company name, for example, "Chamber of Commerce", "Building Society", "Royal", "Imperial", "Municipal", "Chartered", "Co-operative", and "British".

An association formed under a licence from the Governor for promoting charitable objects without the word "Limited" in its name might be regulated by such conditions and regulations stated in the licence, and such conditions and regulations should be inserted in the memorandum and articles, or in one of those documents, if the Governor so directed.

Changes of corporate form were permitted. An unlimited company could be registered under the ordinance as a limited company, and a company already registered as a limited company could re-register.

The definition of member was provided in the ordinance: it stated that the subscribers of the memorandum of a company would be deemed to have agreed to become members of the company, and on its registration would be entered as members in its register of members.

The meaning of "private company" was also stipulated in the ordinance, as well as the circumstances in which a company ceased to be a private company.

It was further provided that the number of members in a company must not be reduced below the legal minimum (which was 2), and if the company carried on business for more than 6 months when the number of members was so reduced, every person who was a member of the company during that time would be severally liable for the payment of the whole debts of the company contracted during that time, and could be severally sued for them.

1936



The words “savings”, “trust”, or “trustee” were not allowed to be used in the name of a company, unless the consent of the Governor to such registration had been obtained. This was to prevent a company being registered with the name “Savings Bank” or “Savings Society” without any intention of conducting its business on the principles governing Trustee Savings Bank in England, or registered with the word “Trust” or “Trustee” in its name without being subject to conditions imposed on public companies registered as Trust Companies.¹²

1949



The 1949 Amendment Ordinance was introduced to allow companies incorporated outside the Colony to acquire, hold and dispose of immovable property without, as was at the time necessary, obtaining the consent of the Governor-in-Council for so doing. The requirement of consent was thought to be irksome to foreign companies, and had entailed application to and scrutiny by the Governor-in-Council on each occasion. It followed a similar provision in the United Kingdom, which had since been repealed in 1947. This change in the 1949 Ordinance was intended to bring the law of the Colony into line with that then existing in the United Kingdom.

The opportunity was also taken to delete from the principal ordinance all references to China Companies and Hong Kong China Companies as a result of the registration of such companies under Proclamation No. 27 and the regulation made thereunder.¹³

12 Legislative Council meeting dated 19 March 1936, Hong Kong Hansard p 45.

13 Legislative Council meeting dated 12 January 1949, Hong Kong Hansard pp 6-7.

II. Evolution of the legal framework for company incorporation

1958



As mentioned above, the 1932 Ordinance allowed a company formed for charitable purpose to hold no more than two acres of land without the licence of the Governor. The 1958 Ordinance changed this by providing that such company could not hold land at all in the Colony except with a licence granted by the Governor. This was intended to prevent the accumulation of excessive areas of land in the hands of charitable bodies and thereby to ensure that the best use and development be made of such land as was available in the Colony, as the land shortage was notorious. Another important reason for the change was to do with revenue, as these corporations never died and therefore land held by them never became liable to estate duty.¹⁴

Furthermore, the 1958 amendment enlarged the meaning of "charitable purpose". Under the previous law of 1932, charitable purpose was defined as being for the purpose of promoting art, science, religion, charity or any other like object not involving the acquisition of gain by the company or by its individual members. However, the 1958 revision made it clear that charitable purpose included purposes such as the relief of poverty, the advancement of art, education, learning, literature, science or research, the making of provision for the cure or mitigation or prevention of, or for the care of persons suffering from or subject to, any disease or infirmity or disability affecting human beings (including the care of women before, during and after childbirth), the advancement of religion, any ecclesiastical purpose, the promotion of the moral, social and physical well-being of the community, or any other purpose beneficial to the community not falling under any of the preceding paragraphs. In addition, "land" was defined as including any estate or interest in land, buildings, messuages and tenements of whatsoever nature or kind.

¹⁴ Legislative Council meeting dated 25 June 1958, Hong Kong Hansard pp 209-217.

1962



The Companies Law Revision Committee was set up to consider and make recommendations as to the revision of company legislation. After the Registrar General got tied up with the banking collapses in 1965, the Committee was suspended for a short period of time, but was reconstituted in 1968. With the work of this Committee, company law revision in Hong Kong entered a new era. Unlike the previous revision of the 1932 Ordinance, Hong Kong had become a significant industrial and commercial centre, and its company law was planned to have its own features rather than being a direct copy of practice in the United Kingdom.

1963



While the Companies Law Revision Committee was working on the full-scale revision of the Companies Ordinance, which would inevitably take a long time, certain important changes were made to the law separately from the revision. The most important change made in this year was the introduction of provisions for the alteration of objects without the court's confirmation and power to the Financial Secretary to appoint an inspector to investigate the affairs of a company in certain circumstances based broadly on the United Kingdom's Companies Act 1948. Before the change, a company was allowed to alter its objects in the memorandum only if it was confirmed by the court. The new law dispensed with the need for confirmation by the court in every case. However, a change in the company's object was subject to challenge before the courts. The application must be made within 21 days after the date on which the resolution altering the company's objects was passed.

II. Evolution of the legal framework for company incorporation

1972



The Companies (Amendment) Bill 1972 was the first of several bills which were designed to give effect to the recommendations of the Report of the Companies Law Revision Committee on the Protection of Investors. Its object was to lay down a better legal framework for the presentation of prospectuses, when shares or other securities were offered for sale to the public. Hong Kong's financial sector was buoyed up by the strength of its economy and the confidence it engendered in local and overseas investors. The rapid growth of the economy led to the establishment of three other exchanges in the late 1960s and early 1970s and the rising share prices and volume in the stock market had outperformed those of most other world markets. But the process of rapid growth brought its own problems. Concern and worry, because its high price-earnings ratio and low dividend yield had reached a highly speculative stage, being out of proportion to what was generally regarded as a reasonable level even in the most promising economy in other countries, led to public opinion urging the government to enact legislation to control or regulate the operation of the market in order to protect investors. This bill was part of a programme designed to bring more order and efficiency into the conduct of trading in securities of all kinds, thereby providing greater protection for the interests of the investing public.

The bill was based on the recommendations contained in Chapter 8 of the Companies Law Revision Committee's report. This chapter covered the requirements for the issue in Hong Kong of prospectuses of companies registered either there or overseas. The Companies Ordinance

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as it stood at the time was based very largely on the United Kingdom Companies Act of 1929. Since then, the 1948 Companies Act had been passed in the United Kingdom, following recommendations made by the Cohen Committee, and in 1962 the Jenkins Committee Report was produced. This report reviewed the workings of, and recommended changes to, the 1948 Companies Act and the 1958 Prevention of Fraud (Investments) Act. Both the 1948 Companies Act and the Jenkins Committee Report contained a number of provisions or recommendations concerning prospectuses, and most of these were included in the 1972 Bill, together with a number of points which were added by the Hong Kong Government as a result of its own experience. The whole of this bill, together with the substantive ordinance, constituted what was, in the then Financial Secretary, Sir Haddon-Cave's view, "probably one of the most up to date pieces of legislation on prospectuses in the world today".¹⁵

Clause 2 extended the existing definition of "prospectus" to include documents which did not actually offer shares or debentures, but were calculated to invite offers from the public. Clause 3 amended Section 30 to correspond with the United Kingdom Act of 1948 to include provisions as to criminal liability for untrue statements in statements in lieu of prospectuses, which were similar to those provided for untrue statements in prospectuses. Clause 5 amended Section 38 of the Companies Ordinance to provide that every prospectus was to be in English, with a Chinese translation, and that it should include the information prescribed in the Third Schedule. Clause 6 prohibited the

publication of an abridged prospectus (by new Section 38B) and inclusion in a prospectus of an expert's statement unless he consented in writing (new Section 38C). It also inserted a new Section 38A which empowered the Registrar of Companies to issue a certificate of exemption having effect to relax the provisions of the Third Schedule if, in his opinion, strict compliance would be irrelevant or unduly burdensome in particular circumstances. Section 38D provided, among other things, that the whole prospectus was to be lodged with the Registrar of Companies before issue to the public. The responsibility for providing the Chinese translation rested entirely with the sponsors of the issue and, if it gave an inadequate or misleading impression of the English version, the Registrar of Companies could refuse to accept it. However, registration of a prospectus did not mean that the share issue was endorsed by the Government in any way whatsoever as a sound investment. It merely meant that the prospectus concerned had met all the statutory requirements for publication.¹⁶

Clause 7 repealed and replaced Section 40 relating to civil liability for mis-statements in prospectuses, so as to correspond with Section 43 of the United Kingdom Act. It made directors and promoters of prospectuses as well as experts quoted in them liable to pay compensation to subscribers in cases where false or misleading statements were made in prospectuses and Clause 8 established criminal liability for such offences. Clause 18 provided for the regulation of the prospectuses of foreign companies in much the same way as those of Hong Kong companies.

¹⁵ Legislative Council meeting dated 1 November 1972, Hong Kong Hansard pp 83-85.

¹⁶ Ibid.

II. Evolution of the legal framework for company incorporation

1974

The Companies (Amendment) Bill 1974 was the first of a series of bills designed to give effect to the recommendations of the second report of the Companies Law Revision Committee. This report, which was tabled at the Legislative Council on 1 August 1973, covered an extremely wide range of subjects in the general field of company law. The Government was of the view that to attempt to implement the Committee's recommendations all at once, in the form of a completely rewritten Companies Ordinance, would have been a lengthy, complicated and altogether too formidable task. It decided, therefore, to start by implementing in this bill the Committee's recommendations on company accounts and directors' reports, which must be filed with the Companies Registry, as the accounts provisions of the ordinance, being more or less self-contained, could be brought up to date comparatively easily.

The existing provisions of the Companies Ordinance relating to company accounts and directors' reports were almost identical with those of the United Kingdom Companies Act of 1929. The Companies Law Revision Committee studied the changes made by the United Kingdom Companies Acts of 1948 and 1967, together with a number of other changes recommended by the Jenkins Committee on Company Law Reform, but which had not yet been the subject of legislation in the United Kingdom. In passing, the Committee noted that there was no part of company law in which more sweeping changes had been made in United Kingdom than the statutory provisions relating to company accounts.

Clause 12 amended Section 123 of the principal ordinance by requiring a company's balance sheet and profit and loss account to give a true and fair view of the state of its affairs and of its profit or loss by, inter alia, being drawn up in accordance with the requirements of the Tenth Schedule. This gave effect to equivalent provisions to those in the United Kingdom Companies Act 1948, which set out in general terms the objectives and the standard of disclosure required, whilst prescribing certain specific information that must be given. A new Section 124 further required a holding company to prepare group accounts dealing with



the profit and loss of the company and its subsidiaries. Group accounts must, under Section 125, be consolidated accounts comprising a consolidated balance sheet of the holding company and subsidiaries and a consolidated profit and loss account.

As for directors' reports, a new Section 129D in Clause 12 required the attachment to a company's balance sheet of a comprehensive directors' report which must include, inter alia, details on the state of its affairs, its profit and loss, its principal activities, its proposed dividend, transfers to reserves, changes in fixed assets, issues of shares and debentures and the list of its directors, together with any other matters necessary to help its shareholders better understand the state of its affairs.

Clause 13, which introduced the new Section 141, made radical changes in the matters required to be stated in the auditors' report. Hitherto, the auditors could simply state a true and correct view according to the best of their information and the explanations given to them, and as shown by the books of the company. In the view of the Companies Law Revision Committee, this was not enough to ensure that a full picture was presented of the company's affairs, and the Committee pointed out that, in the United Kingdom, it had been held that if a company's affairs were incompletely revealed by its books, the auditors might nevertheless feel that they were entitled to certify that the balance sheet had been properly drawn up if it accorded with the books. Under the new section, the auditors' report had to state whether, in the auditors' opinion, the accounts had been properly prepared in accordance with the provisions of the ordinance and whether, in their opinion, the accounts provided a true and fair view of the company's position.¹⁷

The Companies (Amendment) (No. 2) Bill 1974 amended the principal ordinance to provide for the priority of severance payments by employers to employees.

The Companies (Amendment) (No. 3) Bill 1974 was introduced to prohibit the unauthorised use of the Hong Kong Tourist Association's name, in either English

or Chinese. This was not prohibited at the time, and experience had shown that it should be. For example, an association operating in the tourist trade had been using a Chinese name similar to the Chinese name used by the Hong Kong Tourist Association, which could have led to some confusion. The amended Section 20 made the unauthorised use of the name of the association or any name closely resembling that of the association an offence.¹⁸

The Companies (Amendment) (No. 4) Bill 1974 amended only Section 20 of the Companies Ordinance by improving the existing provisions that regulated the use of names by companies. Under the existing law, no company could be registered by a name which was identical to one by which a company in existence was already registered, or so nearly resembled an existing name as to be calculated to mislead or deceive. Clause 2(a) of this bill added a provision which similarly prohibited the use of the name of a company incorporated outside Hong Kong which had complied with the requisite part of the Companies Ordinance allowing companies incorporated outside Hong Kong to carry on business in Hong Kong. In addition, it sought to prohibit the use of a name identical with that of a body corporate, incorporated or established under an ordinance. At the time, the Companies Ordinance continued to prohibit the registration of companies by certain names without the consent of the Governor, such as names which included the words "Royal", "Imperial", "Municipal", "Chartered", "Co-operative", "British", "Savings", "Trust", and "Trustee". By clause 2(b) of the bill, it was proposed to add the word "Kaifong" to this list.

The power of the Governor to allow or refuse to allow the use of such names was, however, delegated to the Registrar General, who carefully examined each application to establish whether the use of one of these names would be misleading if allowed, and exercised his discretion accordingly. As the use of the word "Kaifong" in a company name was open to very obvious abuse, it was the Government's view that the ordinance should be amended to restrict its use.¹⁹

17 Legislative Council meeting dated 3 July 1974, Hong Kong Hansard pp 973-976.

18 Legislative Council meeting dated 31 July 1974, Hong Kong Hansard pp 1077-1078.

19 Legislative Council meeting dated 13 November 1974, Hong Kong Hansard p 161.

II. Evolution of the legal framework for company incorporation

1977



The new Section 20A of the Companies Ordinance 1977 established a system of name reservation, either for a newly incorporated company or for a new name for an existing company. The reservation period was three months from the making of the application, with power to the Registrar to extend for a further period of three months. This was repealed in 1990 by Section 4 of the Companies (Amendment) Ordinance 1990 (Ordinance No. 60 of 1990).

1978



The Companies (Amendment) Bill 1978 allowed existing companies already formed for charitable purpose using the word "Limited" to dispense with the word "Limited" in their names.

1860s  2010s

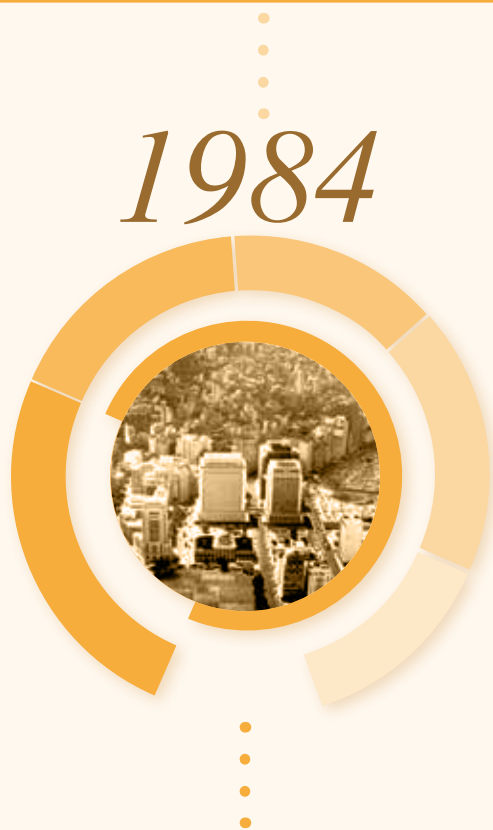
1979



In the Companies (Amendment) Bill 1979, Section 71A was introduced to provide statutory protection for listed public companies against claims for damages arising out of their replacing lost share certificates. Prior to this, the only statutory provision governing the issue of replacement share certificates was Section 14 of the Companies (Reconstruction of Records) Ordinance, which provided that the registered holder of shares, or someone claiming so to be, might apply to a company for the issue of a new share certificate when he no longer had the original. If the company then issued a new one, it was indemnified against all loss subsequently incurred by any person by reason of its having done so. But Section 14 applied only to companies incorporated before 25 December 1941. In the knowledge that they were not covered by a statutory indemnification, companies incorporated after December 1941 were left to decide themselves whether they wished to issue replacement certificates. In most cases, they were reluctant to do so unless the applications were covered by an indemnity from a bank or some other form of guarantee. In its second report, the Companies Law Revision Committee recommended that the protection in Section 14 of the Companies (Reconstruction of Records) Ordinance be extended to all companies. After consulting the Federation of Share Registrars and the Exchange Banks Association, the government concluded that only listed public companies should be covered, because the number of cases involving lost share certificates in respect of private or non-listed public companies was small, and identifying the rightful owners of their shares was rarely a problem.²⁰

²⁰ Legislative Council meeting dated 17 October 1979, Hong Kong Hansard pp 73-74.

II. Evolution of the legal framework for company incorporation



By 1980, Hong Kong was a major industrial and commercial centre. With so much corporate activity, Hong Kong clearly needed a more up-to-date company law than its 1932 model. The Companies (Amendment) Bill 1984 continued the law reform journey which had commenced in 1974 when a programme of legislation was initiated to implement the recommendations of the Companies Law Revision Committee Second Report published in April 1973. As a result, the Companies Ordinance was amended again in 1984, which was seen as great progress, but only in the sense that the 1984 Hong Kong legislation was to catch up with the United Kingdom's 1948 consolidation.²¹ With the passage of the 1984 Bill, the Standing Committee on Company Law Reform was established to react to particular and discrete points of law put to it by the Registrar of Companies or other members of the public.

The major amendments in the Companies (Amendment) Ordinance 1984 were as follows:

Prior to the amendment, there were discussions regarding the proposal that every company should have certain

specified powers except to the extent that they were excluded expressly or by implication by its memorandum. These powers were intended to be merely ancillary powers exercisable in the course of carrying on a company's business, and were not its objects. This was to make a distinction between the objects of the company and powers by which a company achieved those objects. Thus, a major feature of the change was the creation of the Seventh Schedule to the ordinance, which contained a list of powers automatically included in a company's memorandum unless expressly excluded or modified by the memorandum or articles. For example, Clause 1 of the Seventh Schedule allowed a company to carry on any other business which would enhance the value of any of the property or rights of the company. Furthermore, Clause 26 empowered the company to do all such other things as were incidental or conducive to the attainment of the objects and the exercise of the powers of the company.

The amended ordinance also contained a new Table A.

The minimum number of persons required for the incorporation of a public company was reduced to 2. Before the amendment, the minimum number of persons required for the incorporation of such company was set at 7, even though the minimum number of persons required for the incorporation of a private company had already been reduced from 7 to 2 in 1911.

The definition of a company limited by shares was changed slightly. It was provided that where the memorandum of the company stated that the liability of the members was limited, the company was deemed to be a company limited by shares.

The memorandum was no longer required to bear the same stamp as if it were a deed. However, the witness who attested the signature should sign his name and state his occupation and address in legible form.

The company could not alter the memorandum except as allowed by the express provision in the ordinance. There were two minor amendments to the power to object to an alteration of the objects of the company. Under the new law, application could be made to the court to annul the alteration by holders of 5% instead of 15% of the nominal

²¹ C Bates, "Companies Amendment Ordinance 1984-I", (1985) 15 Hong Kong Law Journal 167.



value of the issued shares or of the company's debenture holders. Debenture holders would continue to have power to apply to the court only if the terms of their debentures entitled them to object to such alterations. Secondly, such application could be made within 28 days instead of 21 days after the alteration was made. The notice of the special resolution for the alteration of the objects must be duly given to all of the members of the company. The resolution might abandon or restrict any of the objects or adopt any new lawful object.

It was required that the memorandum after alteration should be certified as correct by an officer of the company. However, the range of the default fine for the company and every officer for failing to deliver notice of the alteration of the company's object to the shareholders was deleted.

A new Subsection 13(1A) was added to state that a company could not make any alteration or addition in its articles which was inconsistent with any special rights attached to a class of shares (i.e. class rights) in the company.

Section 19 of the Companies Ordinance, as amended by the 1984 Ordinance, provided for the re-registration of unlimited companies as limited companies, and required that a special resolution be passed and an application lodged with the Registrar together with the required documents.

Section 22A was added, giving the Registrar power to require a company to abandon a name by which the nature of the activities of the company was misleading and was likely to cause harm to the public. Before the amendment, the Registrar in Hong Kong did not have a power similar to that of the Registrar of Companies in the United Kingdom, who had a general power to refuse any name which in his opinion was undesirable: there had been a debate as to whether to incorporate a similar power into the Companies Ordinance in Hong Kong. However, the power regarding the undesirability of company names was not adopted in Hong Kong. Rather, the new Section 22A gave the Registrar powers in respect of misleading names.

The insertion of Section 25A was another important breakthrough in the laws. It was trite law that the memorandum of association was unalterable except as

provided by the ordinance, but the articles of association were freely alterable by special resolution. It was therefore possible to render unalterable a provision normally contained in the articles by including it in the memorandum. A new Section 25A was introduced in the amendment to provide that a company could amend by special resolution any provisions contained in its memorandum which could have been contained in its articles. The fine for the company and every officer for failing to provide copies of the updated memorandum and articles after alteration to the members upon request was increased from \$25 to \$5,000. Members but not debenture holders were given power to apply to the court to overrule the alteration. This section also applied to companies registered before the commencement of these amendments.

Section 28A was added to prohibit a company from being a member of its holding company, and any allotment or transfer of shares in a company to its subsidiary would be void. This section did not apply to pre-existing arrangements and was subject to various exceptions.

Section 31 was amended to provide that the liability for carrying on business without having at least 2 members for more than 6 months was changed from the payment of the whole debts of the company contracted during that time to the payment of the debts of the company contracted during the period or that part of it. This section was repealed in 2003, when the minimum number of members was further reduced to one.

A new Section 32A was added to regulate matters concerning pre-incorporation contracts. In principle, a company could not contract until it had been incorporated, and it is a basic principle of Hong Kong company law that it can only act through the powers of management vested in its directors. The new rule stipulated that before a company was incorporated, the promoters or persons who purported to act on behalf of the company could enter into contracts either in the name of or on behalf of the company. The company could ratify the contract to the same extent as if it had already been incorporated at that time, and as if the contract had been entered into on its behalf by an agent acting without its authority.

II. Evolution of the legal framework for company incorporation

1990



A number of amendment ordinances were passed this year. The Companies (Amendment) (No. 2) Ordinance 1990 (Ordinance No. 17 of 1990) was enacted to implement a new system of keeping company documents on microfilm which could be inspected by the public on payment of a fee.

The incorporation fee was increased from 600 to 1,000 dollars from 1 April 1990 under the Companies (Amendment) (No. 3) Ordinance 1990 (Ordinance No. 28 of 1990).

In determining whether one name was the same as another, Section 20(3) was added under Companies (Amendment) (No. 5) Ordinance 1990 (Ordinance No. 60 of 1990) to provide that certain words were disregarded such as "company", "company limited", "limited", "unlimited", "public limited company", etc. Besides this, a few rules regarding the change of company names were added in Section 22. A new Section 22B was also added to empower the Governor (now the Chief Executive of Hong Kong Special Administrative Region) to specify words or expressions which required his approval before they could be included in a company name. Section 22C was also added, which required the Registrar to keep an index of company names which contained the name of every company incorporated in Hong Kong, as well as the name of every oversea company incorporated outside Hong Kong with a place of business in Hong Kong. The Governor could require that any other class of body (whether incorporated or not) also be listed on the index of company names.

The Companies (Amendment) Ordinance 1990 (Ordinance No. 7 of 1990) added the Twelfth Schedule to the Companies Ordinance. The fines and terms of imprisonment for offences under the Ordinance were taken out of the substantive sections and put into the Schedule.

1995



Companies (Amendment) Ordinance 1995 (Ordinance No. 83 of 1995) initiated the use of Chinese in corporate documents in Hong Kong. Before this amendment, it was established as a general rule that corporate documents should be printed in English. Starting from this amendment, the company's memorandum and articles of association could be printed in either English or Chinese.

In addition, the Registrar could pre-print his signature on the certificate of incorporation.

1860s  2010s

1997



With the handover of Hong Kong to China, a major amendment to the Companies Ordinance in 1997 was the renaming of relevant government bodies that appeared in the Ordinance, for example, "Governor" was renamed "Chief Executive". The Chinese words "有限公司" were added to the end of the name of a company where a Chinese name was used.

In addition, problems regarding the objects clause were addressed in the 1997 amendments. The existing Section 5(1) was repealed and substituted by new Subsections 5(1) and 5(1A), which basically means that companies are no longer required to set out objects in their memoranda, apart from a Section 21 company. A new Section 5A expressly confers on a company "the capacity and the rights, powers and privileges of a natural person". This means that companies shall now have unlimited capacity to enter into any transaction that a natural person may so enter. Section 5B then provides that if a company has objects, it should not go beyond those objects, and should a company enter into a transaction beyond its objects, a shareholder can obtain an injunction to restrain such conduct. But if the transaction has already been entered into, that transaction is not invalid by reason of it being beyond the objects. Section 5C further abolished the common law doctrine of constructive notice, by providing that an outsider shall not be presumed to know any matter (including company objects) merely because of its being disclosed in the memorandum or articles kept by the Registrar or a return of resolution lodged with the Registrar. These sections partially abolished the doctrine of ultra vires in Hong Kong.

In determining whether one name is the same as another, Section 20(3), as added by the Companies (Amendment) (No.5) Ordinance 1990 (see above under 1990), was amended by the Companies (Amendment) Ordinance 1997 to add the Chinese words and expressions "公司", "有限公司", "無限公司" and "公眾有限公司".

II. Evolution of the legal framework for company incorporation

1999



A new statutory procedure to deregister defunct solvent private companies was introduced by the Companies (Amendment) Ordinance 1999.

2000



A Section 21 company that wanted to alter its memorandum or articles was no longer required to give the same notice to the Registrar relating to the proposed alteration as it was required to give to its members. (Note: such alteration could only be made if approved by the Registrar).

1860s  2010s

2003



The Companies (Amendment) Ordinance 2003 was passed on 2 July 2003 and came into operation on 13 February 2004 (except Sections 158C(1)(a) and (b) relating to index of directors which became operative at a later stage).

The amendment allowed one person to form a company as opposed to the previous minimum of 2 (Section 4). Statistics show that after this amendment to allow the formation of one-member companies, most companies incorporated in Hong Kong have been one-member companies, which indicate that the one-member company in Hong Kong is a popular business vehicle.

Another important change was the prohibition of the formation of a company limited by guarantee with a share capital (Section 4(4)).

Prior to the amendment, an application could be made to the court to annul an alteration of company's objects or conditions in the memorandum, for both public and private companies. Under the new law, this is restricted to private companies (Sections 8(1) and 25A).

Section 23 was also amended to make it clear that the memorandum and articles shall have effect as a contract between the company and each member and between a member and each other member. Before this amendment, in the case of *Ng Kin Kenneth v HK Football Association Ltd* [1994] 1 HKC 734, it was held that, under Section 23, whilst articles did in fact constitute a contract between the company and its members in respect of their ordinary rights as members, the contractual force given to the articles of association was limited to those provisions which were envisaged for disputes between the company and its members. Thus, where the articles, from the words used, envisaged disputes between members, they were not enforceable by the company against its members. This amendment made it clear that the members and the company could bring legal proceedings to enforce any of the provisions of the memorandum and articles which may have been breached by any party to this statutory contract. The amended section was applied in the case of *Yung Siu Ying v Hong Kong Sailing Federation* (2010) HKCU 254.

II. Evolution of the legal framework for company incorporation



2004

Ordinance 30 of 2004 which took effect on 11 July 2008 made a number of amendments to the ordinance: “Subscriber” was substituted by “founder member” in the ordinance.

Exceptions were made to the attestation requirement stipulated in Section 12. Prior to this, the articles were required to be signed by each subscriber in the presence of a witness who shall attest the signature by signing his name and stating his occupation and address in legible form. Under the amendment, it was stipulated that where the articles were delivered to the Registrar in the form of an electronic record and each founder member had authenticated his signature in such manner as the Registrar might direct, the attestation requirement would not apply. The attestation requirement was removed by a further amendment in 2010 (12 of 2010, Section 5).

Prior to the 2004 amendment which took effect on 11 July 2008 (30 of 2004, Section 2), incorporation was undertaken by delivering the memorandum and the articles to the Registrar for registration. From 11 July 2008, registration has been undertaken by delivering an incorporation form to the Registrar for registration together with copies of the memorandum and articles certified to be a true copy of the original by a founder member. The requirement of certification by a founder member was, however, removed by an amendment in 2010 (12 of 2010, Section 7).

The incorporation form must be in the specified form containing specified particulars as required by a new Section 14A, such as the name of the company, the address of its registered office, a statement as to whether it was limited by shares, by guarantee or unlimited, etc. Further particulars to be included were added in 2010 (12 of 2010, Section 6):

- (i) if the company is limited by guarantee, the number of members with which the company proposes to be registered on its incorporation;
- (ii) if a director who is not a signatory of the incorporation form does not make a statement of consent and age, a statement by the signatory that the non-signatory director has given consent and attained the age of 18;
- (iii) a statement that the company’s memorandum and articles have been duly signed; and
- (iv) a statement that the contents of copies of the memorandum and articles are the same as the original.

1860s 2010s

2007



Major amendments to the provisions concerning non-Hong Kong companies took effect on 14 December 2007 with the commencement of Schedule 2 to the Companies (Amendment) Ordinance 2004. The main purpose of the amendments was to modernise the registration regime for “oversea companies” (renamed “non-Hong Kong companies”), while enhancing the disclosure requirements of these companies.

2008



A number of amendments made in 2004 (see above under 2004) took effect this year.

II. Evolution of the legal framework for company incorporation

2010



After the implementation of the Companies (Amendment) Ordinance 2010 (Ordinance No. 12 of 2010) on 10 December 2010, the Registrar was given new powers to enhance enforcement against abuses of the company name registration system, including the power to act upon a court order under Section 22(3B) to direct a company to change its infringing name and, under Section 22AA, the power to replace that name with the company's registration number if it fails to comply with the Registrar's direction to change name. The same power to replace the name of a company is given to the Registrar where a company fails to comply with a direction to change its name which is too similar to that of another company on the register; gives the impression that the company is connected with the Central People's Government or the Government of the Hong Kong Special Administrative Region; or where the use of the name constitutes a criminal offence; or is offensive or contrary to the public interest.

Pursuant to the new Section 18A, as added by Ordinance No. 12 of 2010, Section 10, which came into force on 21 February 2011, each consent to act given by a director for the purpose of Section 14A in relation to a company intended to be incorporated must be delivered to the Registrar in the specified form not later than 14 days after the date of incorporation of the company.

1860s  2010s

2012



On 12 July 2012, the Legislative Council passed the Companies Bill, which was subsequently published in the Gazette on 10 August 2012 as the new Companies Ordinance (Ordinance No. 28 of 2012). The new Companies Ordinance (CO) will be brought into operation after enactment of the relevant subsidiary legislation, tentatively scheduled for the first quarter of 2014.

The new CO, which consists of 921 sections and 11 schedules, brings the Hong Kong company law fully up to date, reinforces Hong Kong's position as a world-class location in which to do business and provides a modernised legal framework for the incorporation and operation of companies in Hong Kong. The new CO aims to achieve four main objectives: enhance corporate governance, ensure better regulation, facilitate business and modernise the law. A summary of the major initiatives introduced to achieve these objectives is set out in [Annex II](#).