



Introduction to Hong Kong Company Law

Building Surveying Division and
Quantity Surveying Division of The
Hong Kong Institute of Surveyors
(HKIS), and Hong Kong Institute of
Construction Managers (HKICM)

13th February 2015



Course Contents

1. Introduction to the new Companies Ordinance (Cap.622) and the new Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap.32)
2. Essential updates in Hong Kong company law as of 3 March 2014
3. Changes in Function and Format of Articles of Association, the five mandatory articles and model articles



Course Contents

4. New requirements for disclosure of company name
5. New sets of documentation for opening a company bank account for HK-incorporated and non-Hong Kong companies



Course Contents

6. Additional essential elements for company meeting such as directors, sole director, shareholders & sole shareholder, IT technology, and written resolution in lieu of meetings
7. Operation of "Turquand's Rules" under common law and the new statutory indoor management rule and its significance
8. New requirements for registration of charge and charge instrument



1. Introduction to the new Companies Ordinance (Cap.622) and the new Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap.32)



Introduction to the new Companies Ordinance

- ◆ Rewrite (not Update) of the Companies Ordinance was endorsed by the Legislative Council in mid-2006 to align with the international standard on corporate governance
- ◆ The 1st phase (i.e. the New CO) deals with all provisions relating to live companies (in operation)



Introduction to the new Companies Ordinance

- ◆ The 2nd phase deals with winding-up and insolvency related provisions (drafting from Mid-October 2014 and expected to be operated in July 2016?)
- ◆ New CO contains provisions which govern the various aspects of forming and running a company while the old CO remains provisions for liquidating a company



Introduction to the new Companies Ordinance

- ◆ The New CO was passed by the Legislative Council on 12th July 2012 and became effective on 3rd March 2014 in accordance with the Companies Ordinance (Commencement) Notice 2013
- ◆ The new Companies Ordinance was assigned a new chapter number 622, i.e. Cap. 622



Introduction to the new Companies Ordinance

- ◆ The provisions about searching of director's correspondence address only are withheld until further notice
- ◆ Provision about insolvency and winding up in the old CO will be retained but retitled as the “Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap.32)”



Introduction to the new Companies Ordinance

- ◆ The prospectus regime under the old CO will be moved into the Securities and Futures Ordinance (Cap. 571)
- ◆ All other provisions under the old CO will be repealed
- ◆ The New CO contains more than 921 sections and is divided into 21 parts together with 11 schedules
- ◆ 12 items of subsidiary legislation were also introduced in February 2013



Introduction to the new Companies Ordinance

1. Companies (Words and Expressions in Company Names) Order (Cap 622A)
2. Companies (Disclosure of Company Name and Liability Status) Regulation (Cap 622B)
3. Companies (Accounting Standards (Prescribed Body)) Regulation Cap 622C)
4. Companies (Directors' Report) Regulation (Cap 622D)



Introduction to the new Companies Ordinance

5. Companies (Summary Financial Reports) Regulation (Cap 622E)
6. Companies (Revision of Financial Statements and Reports) Regulation (Cap 622F)
7. Companies (Disclosure of Information about Benefits of Directors) Regulation (Cap 622G)
8. Companies (Model Articles) Notice (Cap 622H)



Introduction to the new Companies Ordinance

9. Company Records (Inspection and Provision of Copies) Regulation (Cap 622I)
10. Companies (Non-Hong Kong Companies) Regulation (Cap 622J)
11. Companies (Fees) Regulation (Cap 622K)
12. Companies (Unfair Prejudice Petitions) Proceedings Rules (Cap 622L)



Introduction to the new Companies Ordinance

- ◆ So, the Hong Kong Company Law includes:
 - Companies Ordinance, Cap. 622
 - Companies (Winding Up and Miscellaneous Provisions) Ordinance, Cap.32
 - 12 subsidiary legislations (Caps. 622A-L)
 - Case law



2. Essential updates in Hong Kong company law (from 3rd March 2014)



Essential updates in Hong Kong company law

- ◆ Abolition of Memorandum of Association (i.e. the sole submission document for incorporation is the Articles of Association)
- ◆ Abolition of Common Seal
- ◆ Formation of company = articles + incorporation form + incorporation fee



Essential updates in Hong Kong company law

- ◆ Types of companies: Companies limited by shares (private and public), *unlimited companies with share capital (private and public)*, company limited by guarantee without share capital
- ◆ For privatization and takeover schemes, headcount test abolished, replaced by disinterested shares test (the number of votes cast against the resolution to approve a scheme of arrangement must not be more than 10% of the votes attached to all disinterested shares)



Essential updates in Hong Kong company law

- ◆ Reducing the threshold to demand a poll from 10% → 5% of total voting rights
- ◆ Codification of directors' duties of reasonable care, skill and diligence: statutory objective and subjective tests are introduced
- ◆ Corporate directorship in private companies is restricted by requiring them to have at least one director who is a natural person
- ◆ Par value for shares abolished



Essential updates in Hong Kong company law

- ◆ Share premium abolished
- ◆ Authorized capital abolished; Statement of Initial Capital is required
- ◆ Court-free procedures for reducing capital, subject to a solvency test
- ◆ Allowing purchase of own shares out of capital, subject to the solvency test
- ◆ Allowing provision of financial assistance to acquire shares, subject to the solvency test



Essential updates in Hong Kong company law

- ◆ Other provisions in relation to disqualification of directors, winding up will remain in the Companies (Winding Up and Miscellaneous Provisions) Ordinance, Cap. 32



Solvency Test

- ◆ The New CO modifies the maintenance of capital rules by introducing a solvency test for the following types of share capital transactions:
 - reductions of share capital (applicable only to the court-free procedure);
 - redemptions and repurchases of shares; and
 - the giving of financial assistance by a company for the acquisition of its own shares



Solvency Test

- ◆ The solvency test is a two-limb test:
 - immediately after the transaction there will be no ground on which the company could be found to be unable to pay its debts; and
 - the company will be able to pay its debts as they become due during the 12 months immediately following the transaction provided that if it is intended that the company will be wound-up within 12 months from the date of the transaction the test would be whether the company will be able to pay its debts within 12 months after the commencement of the winding-up



Solvency Test

- ◆ For reductions of share capital and redemptions and repurchase of shares, **all** directors are required to fill in the new form NSC17 (Solvency Statement)
- ◆ No such requirement for giving of financial assistance to fill in the above prescribed form, but still required to provide the statutory declaration



Types of companies under New CO

- ◆ The term “company” has no strict meaning
- ◆ Generally defined as an association of a number of people with some common object or objects
- ◆ Definition under section 2 of New CO:
 - “a company formed and registered under this Ordinance or an existing company”



Types of companies under New CO

- ◆ Under the new CO, a company must be:
 1. the one **formed and registered** in accordance with the requirements of New CO;
 2. the one **formed and registered** under earlier Companies Ordinances (e.g. The Hong Kong Institute of Builders, Limited is formed in 1997 in accordance with the Companies Ordinance 1984); or
 3. the one **registered** under this or previous Companies Ordinances (i.e. non-HK companies)
- ◆ the one formed by its own Ordinance, e.g. The Hong Kong Institute of Surveyors (香港測量師學會) is formed under The Hong Kong Institute of Surveyors Ordinance, Cap.1148) (not subject to New CO) in 1990



Types of companies under New CO

- ◆ 1) and 2) are further divided into 5 types of HK companies



Types of companies under New CO

- ◆ Five types of companies may be formed under section 66 of the New CO:
 1. a public company limited by shares;
 2. a private company limited by shares;
 3. a public unlimited company with a share capital;
 4. a private unlimited company with a share capital;
 5. a company limited by guarantee without a share capital (e.g. The Hong Kong Institute of Construction Managers, Limited 香港營造師學會有限公司)



Private v Public

- ◆ Private companies v. Public companies A private company is a company which by its articles:-
 - Restricts the right to transfer its shares (限制股票轉讓); and
 - Limits the number of its members to 50 (股東人數最多50人); and
 - Prohibits any invitation to the public to subscribe for any shares or debentures of the company (禁止公開招股)



Private v Public

- The private company does not have to submit to the Companies Registry its annual audited financial statements, so its financial position is not disclosed to the general public and to its competitors
- All private companies (except dormant companies and non-Hong Kong companies) formed after 3rd March 2014 must have **at least one** director who is a natural person (s. 457 New CO)
- The companies formed under the Old CO will have 6 months of grace period to comply with this requirement (i.e. until 3rd September 2014)



Limited by shares v guarantee

◆ Limited Companies

- Liabilities of members are limited to the extent of the nominal value for the shares for which they have subscribed in the event of liquidation
- Limited by shares (股份有限公司): liabilities limited by the amount unpaid on the shares held by them



Limited by shares v limited by guarantee

- ◆ Limited by guarantee (擔保有限公司): liabilities limited by such amount as the members may undertake to contribute to the assets of the company in the event of its being wound up
- ◆ Company limited by guarantee mostly used by charitable organizations while the company limited by shares is more suitable for a company with the object to carry on a business for profit and to divide that profit among the members



Unlimited co

◆ Unlimited Companies

- A company not having any limit on the liability of its members
- Upon liquidation, where the companies' assets are insufficient to meet its liabilities, members with share capital are required to contribute to the company's debts in accordance with their percentage of shareholdings
- According to the information from the Companies Registry, there is no unlimited company formed in HK



Non-Hong Kong cos

- ◆ Non-HK companies registered
 - Companies incorporated outside Hong Kong which established a place of business in Hong Kong
 - It must be registered to the Companies Registry within 1 month from the place of business is established



Correspondence address of company secretary

- ◆ Only the company secretary's correspondence addresses will be shown on the Companies Registry
- ◆ Company secretary's residential address will be replaced automatically by the registered address of the company as the company secretary's correspondence address from 3rd March 2014
- ◆ If the company secretary would like to use a different address from the 'default' address set by the Companies Registry, s/he should submit the Form ND2B



Annual Return

- ◆ The legal requirements for submission of annual return (Form NAR1) by every companies in Hong Kong are laid down in Division 5, Part 12 of the New CO, i.e. sections 662-665 New CO
- ◆ The annual return must be signed either by a director or the company secretary
- ◆ There are new change in relation to the submission of annual return by public companies and companies limited by guarantee
- ◆ There will no longer be the Form AR2-Certificate of No Change and AR3



Annual Return

- ◆ For an existing company, the new requirements only apply to the first financial year of the company that begins on or after the commencement date of the new CO (i.e. 3rd March 2014) and all subsequent financial years

Summary



	Private co	Public co	Guarantee co
Time for delivery of NAR1	Within 42 days after the return day		
Return day	Anniversary of the date of incorporation	6 months after the end of accounting year end date	9 months after the end of accounting year end date
Other documents submitted together	NIL	certified true copies of relevant financial statements, directors' report and auditors' report	
Submission fee	HK\$105		
Late submission penalty	Between 42 days and 3 months – HK\$870; between 3 and 6 months – HK\$1,740; between 6 and 9 months – HK\$2,610; longer than 9 months – HK\$3,480		



AR: Dormant co

- ◆ Dormant companies are not required to submit annual return



AR: Non-HK co

- ◆ Within 42 days after each anniversary of the date on which the certificate of registration was issued, the registered non-Hong Kong company must deliver the annual return (Form NN3) for registration together with a certified copy of its latest published accounts for a period of not less than 1 year



3. Changes in Function and Format of Articles of Association, the five mandatory articles and model articles



5 mandatory articles and model articles

- ◆ There are 5 mandatory articles specified in the new CO and 3 sets of Model Articles referred to in the Companies (Model Articles) Notice (Cap 622H):
 - Model articles for public companies limited by shares (s.2 & Schedule 1),
 - Model articles for private companies limited by shares (s.3 & Schedule 2) and
 - Model articles for companies limited by guarantee (s.4 & Schedule 3)



5 mandatory articles and model articles

◆ The 5 mandatory articles are:

1. Company Name (s.81 New CO);
2. Company's objects (s.82 New CO), (optional), BUT mandatory for company's licensed to dispense with "Limited" in their name (s.103 New CO);
3. Members' liabilities (s.83 New CO), i.e. limited or unlimited;
4. Liabilities or contributions of members of limited company (s.84 New CO); and
5. Capital and initial shareholdings (s.85 New CO)

Capital and initial Shareholdings

Share Capital and Initial Shareholdings on the Company's Formation

股份的類別 (如普通股 / 優先股等) Class of Shares (e.g. Ordinary / Preference etc.)	建議發行的 股份總數 Total Number of Shares Proposed to be Issued	貨幣 Currency	創辦成員認 購的股本總 額 Total Amount of Share Capital to be Subscribed by Founder Members (a)	建議發行的股份 的將要繳付或視 為已繳付的總款 額 Total Amount to be Paid Up or to be Regarded as Paid Up on the Shares Proposed to be Issued (b)	建議發行的股份 的尚未繳付或視 為尚未繳付的總 款額 Total Amount to Remain Unpaid or to be Regarded as Unpaid on the Shares Proposed to be Issued (a) - (b)



No authorised share capital

- ◆ Authorised share capital is not required to state in the AOA
- ◆ The new law only requires to state the “initial share capital” at the time of incorporation
- ◆ So it is no longer to pass an ordinary resolution to increase the authorised share capital
- ◆ All companies are now allowed to express its capital in foreign currencies



Articles of a company with a share capital

- ◆ The articles of a company with a share capital **may** (not must) state the maximum number of shares that the company may issue (s.85(2) New CO) (optional now!)
- ◆ Prepare the Article of Association (the above 5 mandatory articles + other articles in Schedules 1,2 or 3 in Cap 662H or your own specific set of articles) (in A4 page format)
- ◆ The Articles of Association is signed by the founder member(s)



Formation of company (section 67 New CO)

- ◆ Minimum number of shareholders (members) = 1 [s 67(1) New CO] except listed companies
- ◆ The founder member(s) sign the articles of associations of the company intended to be formed
- ◆ The shareholder(s) deliver to the Companies Registry the incorporation form (NNC1 or NNC1G) and a copy of the Articles of Association (公司章程細則)
- ◆ Payment of prescribed fee under the Companies (Fees) Regulation (Cap 622K) (currently HK\$1,720)



The Company Name

- ◆ A company may be registered with its name expressed either in English or Chinese or both
- ◆ Avoid using the term: Chamber of Commerce, Kaifong, levy, savings, Tourist Association, Tourism Board, Trust, Trustee, 受託, 信託, 旅遊協會, 旅遊發展局, 商會, 街坊, 徵費, 儲蓄)
- ◆ The word “Bank” cannot be used also unless approved by the Hong Kong Monetary Authority



Restrictions on the choice of name

- ◆ Section 100 states that the company name:
 1. must not be **too similar or the same** as that already appearing on the index of the companies kept in the Companies' Registry which is open to public;
 2. gives the impression that the company is connected with the Central People's Government or the Government of Hong Kong Special Administrative Region
 3. the use of which constitutes a criminal offence; or
 4. is offensive or contrary to the public interest



Shadow company loophole

- ◆ *The Walt Disney Company v D Land Travel Limited* (HCA3864/2001, 5th December 2007), D is using the name “**迪士尼旅遊有限公司**” for business
- ◆ The judge ordered the defendant to change its Chinese name in the Companies Registry
- ◆ This is the problem of “Shadow company”
- ◆ A rogue may form a company called “Hsin Chong Construction (Far East) Limited”
- ◆ Innocent creditors may guess this is the subsidiary or related company to Hsin Chong Construction Group Limited and thus provides credit to this company



Shadow company loophole

- A company name registration at the Companies Registry or a business name registered with the Business Registration Office is **not** the same as a trademark registration at the Trade Marks Registry.
- A business or company name registration is **not** an indication of trademark rights.
- Having registered a company name with the Companies Registry or a business name with the Business Registration Office, you are still required to apply for registration of your trademarks with the Trade Marks Registry.
- Only the registered trademark owner has an **exclusive right to use the trademark** in relation to the goods and services **in Hong Kong** for which the mark is registered.



4. New requirements for disclosure of company name



Name Plate

- ◆ A name plate must be affixed to every registered office or business venue of the company in a conspicuous position and in legible letters, s. 659 New CO and s.3 of the Companies (Disclosure of Company Name and Liability Status) Regulation (Cap 622B)



Name Plate

- ◆ If a location is the registered office or the business venue of more than 6 companies, they can display its registered names through an electronic device for at least 15 continuous seconds at least once in every 4 minutes or the registered name can be displayed within 4 minutes after being requested, s.3 of the Companies (Disclosure of Company Name and Liability Status) Regulation (Cap 622B)



Name Plate

- ◆ No name plate is required if the company has had no accounting transaction at any time since its incorporation, s.4 of the Companies (Disclosure of Company Name and Liability Status) Regulation (Cap 622B)



Disclosure of company name

- ◆ A company must state its registered name in legible characters —
 - in any communication document of the company (receipt, bill, company letter, e-mail, poster, advertisement, etc);
 - in any transaction instrument of the company (i.e. contract, agreement, sale order, invoice, etc); and
 - on any website of the company
- (Ref: Cap. 622B, s.4)



Violation of Cap. 622B

- ◆ Violation of these provisions will be imposed a fine not exceeding HK\$10,000 against the company and every director of the company each, s. 660 New CO



5. New sets of Documentation for opening a company bank account for HK-incorporated and offshore (e.g. BVI, PRC, etc.) companies



Documents have to be submitted

1. Certified True Copy of Certificate of Incorporation, Certificate of Registration (for non-HK companies), and subsequent Certificate of change of name, if any
2. Certified True Copy of Business Registration Certificate
3. Newly formed company: Certified True Copy of all legal forms (i.e. NNC1 or NNC1G) submitted to Companies Registries, Directors' Declaration detailing particulars of the Directors and Principal Shareholders, and Certification Letter from CPA or Lawyer



Documents have to be submitted

4. Formed over 1 year: Certified True Copy of Form NAR1 plus all subsequent legal forms, Return of Allotments, Instrument of Transfer detailing the particulars of the Directors and Principal Shareholders
5. Certified True Copy of Directors', Authorized signatories' and Principal Shareholders' Hong Kong identity cards or passports
6. Residential Address Proof



Documents have to be submitted

7. Proof of business (e.g. invoices, contracts, license, or business plan, etc.)
8. Minutes of Meeting [Optional]
9. Completed account opening form, and signature cards
10. Mandate for opening a limited company account duly signed by a quorum of Directors
11. Initial Deposit



The documents required to open a bank account in HK

1. Original copy of Identity certificate of directors (Identity certificate, HK & Macao passport or passport which issued by original country where the holder belongs to)
2. Original copy of business license (for PRC companies, i.e. 國家工商管理行政管理局頒發、最新年檢記錄的營業執照)



The documents required to open a bank account in HK

3. Original copy of Certificate of Incorporation (for BVI; for PRC, i.e. 組織機構代碼證)
4. Original copy of Memorandums and Articles of Association/ Articles of Association



The documents required to open a bank account in HK

5. Certified True Copies prepared and signed by CPA
6. Board Meeting Resolutions (for BVI)
7. Residential address proof (water, electricity or phone bills in the latest three months)



The documents required to open a bank account in HK

8. Business transaction records (Letter of Credits, Business Contract, Reference Letters, Account Statements, Tax Return, etc) & Business plan (some banks need it) (for PRC, i.e. 稅務登記證 / 地稅 / 國稅)



The documents required to open a bank account in HK

9. A certificate of incumbency (董事在職證明，亦稱為現任董事證明書) or a certificate of good standing (存續證明，亦稱為信譽良好證明) (for BVI)
10. Clients should need to pay the Name Search fees to Bank with HONGKONG company and the company which registered at OVERSEAS

Sample Documents for BVI Companies (refer to Appendix 1)

TERRITORY OF THE BRITISH VIRGIN ISLANDS
BVI BUSINESS COMPANIES ACT, 2004

CERTIFICATE OF INCORPORATION
(SECTION 7)

The REGISTRAR of CORPORATE AFFAIRS, of the British Virgin Islands HEREBY CERTIFIES, that pursuant to the BVI Business Companies Act, 2004, all the requirements of the Act in respect of incorporation having been complied with,

Investments Group Ltd

BVI COMPANY NUMBER: 157

is incorporated in the BRITISH VIRGIN ISLANDS as a BVI BUSINESS COMPANY, this 25th day of March, 2010.

 
for REGISTRAR OF CORPORATE AFFAIRS
25th day of March, 2010

Sample Documents for BVI Companies (refer to Appendix 2)



TERRITORY OF THE BRITISH VIRGIN ISLANDS
BVI BUSINESS COMPANIES ACT, 2004

CERTIFICATE OF GOOD STANDING
(SECTION 235)

The REGISTRAR OF CORPORATE AFFAIRS, of the British Virgin Islands HEREBY CERTIFIES
that, pursuant to the BVI Business Companies Act, 2004,

Investments Group Ltd
BVI COMPANY NUMBER: 157

1. Is on the Register of Companies;
2. Has paid all fees, annual fees and penalties that are due and payable;
3. Has not filed articles of merger or consolidation that have not become effective;
4. Has not filed articles of arrangement that have not yet become effective;
5. Is not in voluntary liquidation; and
6. Proceedings to strike the name of the company off the Register of Companies have not been instituted.




REGISTRAR OF CORPORATE AFFAIRS
6th day of April, 2010

Sample Documents for PRC Companies (refer to Appendix 3)



Sample Documents for PRC Companies (refer to Appendix 4)



中华人民共和国 组织机构代码证 (副本)	
代 码	7 5 4 5 [redacted] - 6
机 构 名 称	汕头市澄海区 [redacted] 有限公司
机 构 类 型	企业法人(法定代表人:唐 然)
地 址	广东省汕头市澄海区 [redacted]
有 效 期	自2007年9月14日至2011年9月14日 (有效期届满前30日内办理换证)
颁 发 单 位	广东省汕头市质量技术监督局
登 记 号	组代管440515-[redacted]-1

说 明	
1.	中华人民共和国组织机构代码是组织机构在中华人民共和国境内唯一的、始终不变的法定代码标识,《中华人民共和国组织机构代码证》是组织机构法定代码标识的凭证,分正本和副本。
2.	《中华人民共和国组织机构代码证》不得出租、出借、冒用、转让、伪造、变造、非法买卖。
3.	《中华人民共和国组织机构代码证》登记项目发生变化时,应向发证机关申请变更登记。
4.	各组织机构应当按照有关规定,接受发证机关的年度检验。
5.	组织机构依法注销、撤消时,应向原发证机关办理注销登记,并交回全部代码证。

已办卡

中华人民共和国 国家质量监督检验检疫总局 签发

今后每年9月证书年检
不再另行通知 年检记录

年 月 日	年 月 日	年 月 日	年 月 日

NO.2007 11

Sample Documents for PRC Companies (refer to Appendix 5)

税务登记证

豫国税山字 4108 33 号

纳税人名称：焦作市

法定代表人(负责人)：申

地 址：焦作市山阳区

登记注册类型：个人独资企业

经营范围：加工：轻质碳酸钙

批准设立机关：焦作市工商行政管理局山阳分局

扣缴义务：依法确定

发证税务机关
二〇〇六年九月十二日

国家税务总局监制



6. Additional essential elements for company meetings such as directors, sole director, shareholders & sole shareholder, IT technology, and written resolution in lieu of meetings



Essential elements of a valid meeting

- ◆ Who can call the meeting?
 - It is called by the person who has the authority to call the meeting (in accordance with the AOA), e.g. the director or company secretary under the instruction of a director and shareholder or the court
- ◆ Proper notices to proper personnel
 - Sufficient number of days of notice



Essential elements of a valid meeting

◆ Quorum

- The quorum of the meeting was present when the meeting was due to start, and the quorum was maintained throughout the meeting (for one member company, quorum is 1; the other companies, quorum must be 2 or above)

◆ Date, place and time

◆ The resolution to be passed (ordinary or special ??)



Board meeting resolution

- ◆ Articles, charters, constitutions, bylaws, etc. are ongoing rules (which is the Board's internal specification of how the Board will be organized and operated)
- ◆ A resolution is used by the Board to draw attention to:
 - a single act or Board decision
 - for example, to approve or adopt a change to a set of rules, new program, new contract, etc
- ◆ Thus, resolutions are to be included in the minutes for a Board meeting



AGM / EGM:

Special Resolution (特別決議案)

- ◆ Special resolution must get acceptance from at least 75% of the shareholders present (not 75% nominal value of total shareholding) in that meeting



AGM

- ◆ Part 12 of the New CO (i.e. s.547-665 New CO) provides that every company *may* hold at least once in every financial year a meeting of its members



AGM

- ◆ The first AGM for **private company or company limited by guarantee** must be held within 9 months after the anniversary of the company's incorporation or 3 months after the end of the accounting year end date, whichever is the later



AGM

- ◆ The first AGM for **other companies** must be held within 6 months after the anniversary of the company's incorporation or 3 months after the end of the accounting year end date, whichever is the later



AGM

- ◆ The subsequent AGM for **private company or company limited by guarantee** must be held within 9 months after the accounting year end date
- ◆ The subsequent AGM for **other companies** must be held within 6 months after the accounting year end date



No AGM required

- ◆ AGM is not required under the following circumstances:
 - Dormant companies
 - One-member companies
 - Everything are done by written resolution and signed by all members
 - Resolution passed and resolved to dispense with holding AGM by all members (such unanimous resolution will have continuous effect until its revocation)



Different places for AGM at the same time

- ◆ A company may hold a general meeting at 2 or more places using any technology that enables the members of the company to exercise their rights to listen, speak and vote at the meeting. A company may set out rules and procedures for holding a dispersed meeting in the company's articles (s.584 New CO)
- ◆ The technology may be video conference or even telephone conference



Notice of General Meeting

- ◆ Notice must be issued for every general meeting and be sent to all persons entitled to receive the notice, e.g. members and auditors
- ◆ The numbers of days' notice specified in CO refers to 'clear days' (完整日), i.e. excluding the date of notice and the date of meeting. (*Securities and Futures Commission v Stock Exchange of Hong Kong* (1992))
- ◆ The period of notice required depends on the type of meeting and the provisions of the company's AOA
- ◆ In any event, not less than 21 clear days' notice must be given for holding AGM
- ◆ For EGM, not less than 14 clear days' notice must be given



New medium to send notice

- ◆ Notice of general meeting must be given to company directors, members and auditor:
 - In hard copy form or
 - in electronic form or
 - By making the notice available on a website



Special notice

- ◆ **Special notice** is required when the meeting will consider **a change of auditor and/or director**
- ◆ Special notice is a notice given to the company by a member at least 28 days before the meeting
- ◆ It is a notice that the member intends to move a resolution relating to a change of auditor
- ◆ Once a special notice is received, the company must give at least 14 clear days' notice to its members for this proposed resolution



Proxy

- ◆ Sections 596-598 New CO provides that any shareholder who is entitled to attend and vote at a meeting may appoint proxy to attend and **vote by poll, on a show or hands or vote in the way specified by the shareholder on his behalf**, including the right to speak at any meeting



Poll

- ◆ A poll may be demanded on any question (except the election of the chairman of the meeting or any adjournment of the meeting) and can be made by:
 - A least 5 shareholders having the right to vote at the meeting;
 - A member or members representing at least 5% of the total voting rights of all the members having the right to vote at the meeting; or
 - By the chairman of the meeting



Poll

- ◆ If, before or on the declaration of the result on a show of hands at a general meeting, the chairman of the meeting knows from the proxies received by the company that the result on a show of hands will be different from that on a poll, the chairman must demand a poll



AGM / EGM:

Special Resolution (特別決議案)

- ◆ CO provides that the following requires a special resolution:
 1. Change the objects clause of the company
 2. Alter AOA of the company
 3. Change of company's name
 4. Re-register the unlimited company with limited liability
 5. Provide financial assistance for the acquisition of the company's shares
 6. Buy back company's shares



AGM / EGM:

Special Resolution (特別決議案)

- ◆ CO provides that the following requires a special resolution:
 7. Reduce company's issued share capital (in addition to court approval)
 8. Approval of assignment of office by director
 9. Authorize the director to make statutory declaration to declare the dormant status of the company
 10. Wind up the company by court
 11. Wind up the company voluntarily (by shareholders or creditors)



AGM / EGM:

Special Resolution (特別決議案)

- ◆ After passing the special resolution, a copy of the resolution must be submitted to the Companies Registry within 15 days from passing for their records



AGM / EGM:

Ordinary Resolution (普通決議案)

- ◆ The following must be satisfied to pass an ordinary resolution:
 - The ordinary resolution must get acceptance from at least 50% of the shareholders present (not 50% nominal value of total shareholding) in that meeting



Shareholders' resolution in writing in lieu of formal general meeting

- ◆ Sections 548 and 612 New CO allows written resolution to take place the formal general meeting
- ◆ A written resolution **signified** by or on behalf of **all voting members** shall be treated as a resolution passed at a general meeting of the company



Written resolution in lieu of formal general meeting

- ◆ Anything needed to be passed by ordinary resolution or special resolution may be passed as a written resolution
- ◆ Such a written resolution will only become effective on the date it was **signified** by the last member, **but it must be signified by the last member within 28 days from the first day of circulation (s.558 New CO)**



Written resolution in lieu of formal general meeting

- ◆ **The agreement of a member to a proposed written resolution is ineffective if signified after the end of 28 days**



Shareholders' resolution in writing in lieu of formal general meeting

- ◆ But a physical general meeting must be held under the following circumstances:
 - Removal of auditors
 - Resignation of auditors
 - Removal of directors



Signified

- ◆ Signed in hard copy
- ◆ Received from that member (or his representative) a document identifying the resolution and **indicating** the member's agreement to that resolution by electronic form



15 days

- ◆ After passing the written resolution, the company must notify every shareholder and the auditor within 15 days and a copy of the resolution must be submitted to the Companies Registry within 15 days



Records of resolutions and general meetings

- ◆ A company must keep records comprising copies of all resolutions of members passed, minutes of all proceedings of general meetings for **at least 10 years** from the date of the resolution, meeting or decision (s.618 New CO)
- ◆ If the company fails to keep the above records, the company and every responsible person of the company commit an offence and each is liable to a fine of HK\$50,000 and to a daily fine of HK\$1,000



Minutes of directors' meeting

- ◆ A company must cause minutes of all proceedings at meetings of its directors to be recorded
- ◆ The meeting records must be kept for at least 10 years
- ◆ Minutes signed by chairman are evidence of the proceedings at the meeting
- ◆ Sole director of a private company must provide the company with the written record of that decision within 7 days after the decision is made (s.481 New CO)



7. Operation of “Turquand’s Rules”
under common law and the new
statutory indoor management rule



Operation of “Turquand’s Rules”

- ◆ If a director purports to contract on behalf of a company when he does not in fact have authority, the other person with whom he deals, the outsider, may be able to hold the company bound by the contract if the rule in *Royal British Bank v Turquand* (1856) applies



Royal British Bank v Turquand (1856)

- ◆ Subject to approval from the general meeting, the board borrowed money from bank on the document bearing the company's seal, but no resolution had been passed about this loan
- ◆ HELD: even if no resolution had in fact been passed by the company in general meeting, the company was bound. Under the AOA, the directors might have had the authority to borrow, the third party was entitled to assume they had that authority



Royal British Bank v Turquand (1856)

- The rule in Turquand's case (indoor management rule) protects the third party dealing with a company *bona fide* and without notice of the fact the company's internal management requirements have not been followed
- The third party is not required to investigate to ensure that all internal regulations have been complied with
- **In the absence of facts putting the third party on inquiry**, he is entitled to assume that all matters of internal management and procedure required by the articles have been complied with



Exceptions to Turquand's Rules

- ◆ The protection to third party will fail if there should be **due inquiry**



Due inquiry

- ◆ **Due inquiry** extends the ambit of actual knowledge by requiring an outsider to make further inquiries to determine the regularity of the transaction where the circumstances of the transaction are such as to put the outsider on notice; see *Morris v Kanssen* [1946] AC 459



Statutory indoor management rule

- ◆ **Section 117 New CO** provides that in favour of the honest and innocent third party, the power of the directors to bind the company will be deemed to be free of any limitation under the AA, any resolutions of the company or any agreement between the members of the company
- ◆ The third party is presumed, unless the contrary is proved, to have acted in good faith



Statutory indoor management rule

- ◆ The third party is not to be regarded as acting in bad faith (dishonest) by reason only of the third party's actual knowledge
- ◆ The third party is not required to inquire as to the limitations on the power of the company's directors to bind the company or authorize others to do so



Statutory indoor management rule

- ◆ **Sections 118 and 119** provide that the protection afforded to a person by **section 117** will not apply where the third party is an “insider” (for example, a director of the company or of a holding company of the company; or an entity connected with such a director); or where the company in question is an exempted company



Statutory indoor management rule

- ◆ An exempted company refers to a company permitted to be registered by a name without “Limited” as the last word of the name, see section 103 of the new CO, and that is exempt from tax under section 88 of the Inland Revenue Ordinance (Cap. 112)



Statutory indoor management rule

- ◆ Section 120 provides that a person is not to be regarded as having notice of any matter merely because the matter is disclosed in the articles of a company kept by the Registrar; or a return or resolution kept by the Registrar



8. New requirements for registration of charge and charge instrument



PART 8:Registration of charges: 333 to 356

- ◆ Expansion of property charged to include e.g. aircraft
- ◆ If the charge is not registered in accordance with the time requirement (i.e within 1 month)
 - The secured amount does not become immediately due and payable
 - The chargee no longer has an automatic acceleration right – now merely a discretionary right



Section 333

- ◆ For registration purpose
 - Copy of instrument delivered for registration is certified if director or company secretary of the company or non-HK company – certifies as a true copy or
 - By any other person interested in the charge



List of registrable charges

- ◆ A charge on an aircraft/ship or any share in an aircraft/ship
- ◆ Fixed charge (i.e fixed asset)
- ◆ Floating charge (i.e. inventory)
- ◆ Land and building
- ◆ Book debts



Acceleration clauses

- ◆ Remove the statutory automatic acceleration from the new Companies Ordinance
- ◆ *Acceleration clauses* are terms in loan agreements that require the borrower to pay off the loan immediately if certain conditions are met.
- ◆ For example, most home mortgages have an acceleration clause that is triggered if the borrower misses too many payments.
- ◆ Acceleration clauses most often appear in mortgages, both residential and commercial. They also appear in some leases



Deadline for Registration: section 335

- ◆ Deadline: within one month from the date of the instrument creating the charge



Contravention of 335 or 336

- ◆ Unless time is extended by the court under 346
- ◆ The company or the non-HK company commits an offence
 - Level 5 (\$50,000) and \$1,000 daily
- ◆ Subject to 346, the charge is void against any liquidator and creditor of the company or non-HK company “so far as any security on its undertaking or property is conferred by the charges”



Company acquiring property subject to a charge: section 338

- ◆ Must register
 - Statement of particulars and the instrument
 - One month after acquisition is completed
- ◆ Sec 339 similar for non-HK company
- ◆ Non-HK company must also register charge created by the company or a charge subsisting when property was acquired on registration



Loopholes on registration of the particulars of charges only

- ◆ It is common for charge deeds to prohibit the chargor from creating further encumbrances on the company's assets ranking in priority to or *pari passu* (i.e. equally) with the floating charge (known as negative pledge clause)
- ◆ Where the subsequent chargee takes his charge without actual notice of the negative pledge clause in a previous floating charge, the subsequent charge will rank prior to the floating charge



Loopholes on registration of the particulars of charges only

- ◆ Before 3rd March 2014, only particulars of a charge (not the entire document) are required to be registered at the Companies Registry under the old Companies Ordinance, thus notice of registration of a previous charge is not tantamount to notice of its specific provisions, including any negative pledge clause.
- ◆ The subsequent chargee cannot be treated as receiving the actual notice.
- ◆ So the new Companies Ordinance (Cap. 622) requires the registration of the certified copy of the entire charge document to protect the interest of the subsequent chargee



Charges on non-HK property

- ◆ Charges on property owned by registered non-Hong Kong companies are not required to be registered if the charged property was not in Hong Kong when the charge was created or when the property was acquired by the registered non-Hong Kong company



Instrument Creating or Evidencing the Charge

- ◆ Please state the type or nature of the instrument creating or evidencing the charge, such as ‘Mortgage’, ‘Debenture’, ‘Floating Charge’, ‘Trust Deed’
- ◆ Please note that only a certified copy (not the original charge document!) of the instrument creating or evidencing the charge is required to be delivered with the Form NM1 for registration



Instrument Creating or Evidencing the Charge

- ◆ A copy of an instrument in relation to a charge is a certified copy if it is certified as a true copy by (a) a director or company secretary of the company or registered non-Hong Kong company delivering the copy for registration or (b) a person authorized by that company or registered non-Hong Kong company for the purpose

Appendix 1



TERRITORY OF THE BRITISH VIRGIN ISLANDS
BVI BUSINESS COMPANIES ACT, 2004

CERTIFICATE OF INCORPORATION
(SECTION 7)

The REGISTRAR of CORPORATE AFFAIRS, of the British Virgin Islands HEREBY CERTIFIES, that pursuant to the BVI Business Companies Act, 2004, all the requirements of the Act in respect of incorporation having been complied with,

Investments Group Ltd

BVI COMPANY NUMBER: 157

is incorporated in the BRITISH VIRGIN ISLANDS as a BVI BUSINESS COMPANY, this 25th day of March, 2010.

 
for REGISTRAR OF CORPORATE AFFAIRS
25th day of March, 2010

Appendix 2



TERRITORY OF THE BRITISH VIRGIN ISLANDS
BVI BUSINESS COMPANIES ACT, 2004

CERTIFICATE OF GOOD STANDING
(SECTION 235)

The REGISTRAR OF CORPORATE AFFAIRS, of the British Virgin Islands HEREBY CERTIFIES that, pursuant to the BVI Business Companies Act, 2004,

Investments Group Ltd

BVI COMPANY NUMBER: 157

1. Is on the Register of Companies;
2. Has paid all fees, annual fees and penalties that are due and payable;
3. Has not filed articles of merger or consolidation that have not become effective;
4. Has not filed articles of arrangement that have not yet become effective;
5. Is not in voluntary liquidation; and
6. Proceedings to strike the name of the company off the Register of Companies have not been instituted.



REGISTRAR OF CORPORATE AFFAIRS
6th day of April, 2010



REGISTRAR OF CORPORATE AFFAIRS
6th day of April, 2010

Appendix 3



Appendix 4



**中华人民共和国
组织机构代码证**
(副本)

代 码 7 5 4 5 - 6

机构名称 汕头市澄海区 有限公司

机构类型 企业法人(法定代表人:唐 然)

地 址 广东省汕头市澄海区

有效 期 自2007年9月14日至2011年9月14日
(有效期届满前30日内办理换证)

颁发单位 广东省汕头市质量技术监督局

登 记 号 组代管440515- -1

说 明

1. 中华人民共和国组织机构代码是组织机构在中华人民共和国境内唯一的、始终不变的法定代码标识,《中华人民共和国组织机构代码证》是组织机构法定代码标识的凭证,分正本和副本。
2. 《中华人民共和国组织机构代码证》不得出租、出借、冒用、转让、伪造、变造、非法买卖。
3. 《中华人民共和国组织机构代码证》登记项目发生变化时,应向发证机关申请变更登记。
4. 各组织机构应当按有关规定,接受发证机关的年度检验。
5. 组织机构依法注销、撤消时,应向原发证机关办理注销登记,并交回全部代码证。

已办卡

中华人民共和国 国家质量监督检验检疫总局 签发

今后每年9月证书年检
不再另行通知 年检记录

	年 月 日	年 月 日	年 月 日
--	-------	-------	-------

NO.2007 11

Appendix 5




税 务 登 记 证

豫国 税 山 字 4108 33 号

纳 税 人 名 称 : 焦 作 市

法 定 代 表 人 (负 责 人) : 申

地 址 : 焦 作 市 山 阳 区

登 记 注 册 类 型 : 个 人 独 资 企 业

经 营 范 围 : 加 工 , 轻 质 碳 酸 钙

批 准 设 立 机 关 : 焦 作 市 工 商 行 政 管 理 局 山 阳 分 局

扣 缴 义 务 : 依 法 确 定

发 证 税 务 机 关 

二〇〇六 年 九 月 十 二 日

国家税务总局监制