Part 12
Company Administration and Procedure
Division 1
Resolutions and Meetings
Subdivision 1
Preliminary

547. Interpretation

(1) In this Division—

circulation date **(傳閱日期), in relation to a written resolution or a proposed written resolution, means—**

(a) the date on which copies of the resolution are sent to eligible members in accordance with section 553; or

(b) if copies are sent to eligible members on different days, the first of those days;

electronic address **(電子地址) means any sequence or combination of letters, characters, numbers or symbols of any language or, any number, used for the purposes of sending or receiving a document or information by electronic means.**

(2) For the purposes of this Division—

(a) in relation to a proposed written resolution, the eligible members are the members who would have been entitled to vote on the resolution on the circulation date of the resolution; and

(b) if the persons entitled to vote on the resolution change during the course of the day that is the circulation date of the resolution, the eligible members are the persons entitled to vote on the resolution at the time that the first copy of the resolution is sent to a member for agreement.

(3) Nothing in this Division affects the operation of any other Ordinance or rule of law as to—

(a) things done otherwise than by passing a resolution;

(b) circumstances in which a resolution is or is not to be regarded as having been passed; or

(c) cases in which a person is precluded from alleging that a resolution has not been duly passed.

History

This is a new provision. There was no interpretation provision like this for s 116B of the former Companies Ordinance (Cap 32). Subsections (1) and (2) are derived from the UK Companies Act 2006, ss 289, 290, 298(2) and 333(4); and subsection (3) is derived from s 116BB(2) of the former Companies Ordinance (Cap 32) and s 281(4) of the UK Companies Act 2006.

For an equivalent provision to subs (3) in Australia, see Corporations Act 2001, s 249A(7). There is no equivalent provision in Singapore.

Overview

This section provides interpretation for key terms used in Division 1 of Part 12 of Cap 622. For example, the term 'circulation date' is found in ss 553, 555, 558 and 'electronic address' is found in ss 560, 572, 599 in the new Companies Ordinance (Cap 622).

Subdivision 2
Written Resolution

548. Written resolution

(1) Anything that may be done by a resolution passed at a general meeting of a company may be done, without a meeting and without any previous notice being required, by a written resolution of the members of the company.

(2) Anything that may be done by a resolution passed at a meeting of a class of members of a company may be done, without a meeting and without any previous notice being required, by a written resolution of that class of members of the company.

(3) If a resolution is required by any Ordinance to be passed as an ordinary resolution or a special resolution, the resolution may be passed as a written resolution; and a reference in any Ordinance to an ordinary resolution or a special resolution includes a written resolution.

(4) A reference in any Ordinance to the date of passing of a resolution or the date of a meeting is, in relation to a written resolution, the date on which the written resolution is passed under section 556.

(5) A written resolution of a company has effect as if passed by—

(a) the company at a general meeting; or

(b) a meeting of the relevant class of members of the company, as the case may be, and a reference in any Ordinance to a meeting at which a resolution is passed or to members voting in favour of a resolution is to be construed accordingly.

(6) This section does not apply to—

(a) a resolution removing an auditor before the end of the auditor's term of office; or

(b) a resolution removing a director before the end of the director's term of office.

History

This is a new provision. It is derived from s 116B of the former Companies Ordinance (Cap 32). The original ss 116B, and 81 of the Companies (Amendment) Ordinance, No 6 of 1984, were the products of the Second Report of the Hong Kong Companies Law Revision Committee which referred to the Jenkins Committee (Report of the Company Law Committee (1962) Cmnd 1749, paras 460, 468(d)). The aim was to provide for the recognition of written resolutions without a meeting.

For equivalent provisions:

1. UK: Companies Act 2006, s 288;
2. Australia: Corporations Act 2001, s 249A;
3. Singapore: Companies Act (Chapter 50), s 184A.

Overview

This section, together with ss 289 to 300, are expanded versions of s 116B of the former Companies Ordinance (Cap 32). It provides a method for a company to act on a matter that might otherwise require a resolution at a general meeting. The written resolution should be signed by or on behalf of all members who are eligible to vote in a general meeting. There are, however, two exceptions where the written resolution procedure is not applicable:

(1) a resolution removing an auditor before the term of office expires; and

(2) a resolution to remove a director from office before the term of office expires.

The aim is to simplify procedures for small and medium enterprises, as well as to relieve these companies of the cost and logistics involved in organising a general and special meeting. Such simplification measures were noted in the First Phase Consultation of the draft Companies Bill issued on 17 December 2009, at para 2.17 under the heading '*Measures to enhance the timeliness and transparency of company information and proceedings*', which states that 'This is expected to benefit shareholders of SMEs in particular, as SMEs often use written resolutions for their decision-making …'.

However, this new provision assumes that the contents in the written document are unanimous, otherwise the process could be drawn out and tedious in order to ensure that the wording is accepted by the signatories.

Subsection (3) makes it clear that a resolution may be agreed upon in accordance with s 548 even if it is required to have been passed as a special resolution. As to special resolutions generally, see s 564, below.

See also s 556 in Cap 622 on the procedure for signifying agreement to proposed written resolutions. This section should be read along with ss 549, 551 and 552 which stipulate members' powers to propose a written resolution and to circulate the resolution where the resolution is proposed by not less than 5 per cent of the total voting rights of all members who are entitled to vote.

Note that s 561 of Cap 622 states that the articles of a company may provide alternative procedures provided there is unanimous agreement between all members.

The company must keep records of all the signed resolutions (s 618). Another important matter to note is that this provision does not affect

common law doctrines: see *Tsao Chin Lam v Tin Ka Kung* [1995] 2 HKC 671 (CA).

The Common Law doctrine – the *Duomatic* principle

In a series of cases dating back over one hundred years the courts have taken a pragmatic approach to informal unanimous consent.[1] This has been both realistic and convenient, but lacking in terms of adequate attention to the theoretical basis for the court's approach. The cases show that the courts have treated the unanimous consent of the members of a company who are entitled to vote as binding on the company on the matter in question, without the need for a properly convened meeting, or even without any meeting at all. Applicable to general, board and class meetings, this approach realistically reflects the way decisions are often made in companies with few members and conveniently provides validity for decisions taken informally whilst at the same time provides a model which may be adopted as a normal course to follow. However, the lack of a clear underlying rationale gives rise to some uncertainty in predicting the limits which the courts would recognise.[2]

For a narrowing of the *Duomatic* principle see, *Re BDG Roof Bond Ltd v Douglas* [2000] 1 BCLC 401, (2001) 22 Company Lawyer 130 (Cabrelli).

In *Re George Newman and Co Ltd* [1895] 1 Ch 674 (CA) at 686, the court said in relation to a gift made to a director:

> Individual assents given separately may preclude those who give them from complaining of what they have sanctioned; but for the purpose of binding a company in its corporate capacity individual assents given separately are not equivalent to the assent of a meeting. The company is entitled to the protection afforded by a duly convened meeting, and by a resolution properly considered and carried and duly recorded. The articles of this company, wide as they are, do not authorize such presents as those impeached by the liquidator.

1 See inter alia *Hallows v Fernie* (1867) LR 3 Eq 520; *Salomon v Salomon & Co Ltd* [1897] AC 22 (HL); *AG for Canada v Standard Trust Co of New York* [1911] AC 498 at 504–505 (PC); *Parker & Cooper Ltd v Reading* [1926] Ch 975; *Bobbie Pins Ltd v Robertson* [1950] NZLR 301; *Re Duomatic Ltd* [1969] 2 Ch 365; *Perseus Mining NL v Land Brokers (Perth) Pty Ltd* [1972] WAR 12; *Cane v Jones* [1980] 1 WLR 1451; *Multinational Gas and Petrochemical Co v Multinational Gas and Petrochemical Services Ltd* [1983] Ch 258 (CA); *Re Fletcher Hunt (Bristol) Ltd* [1989] BCLC 108; *Wright v Atlas Wright (Europe) Ltd* [1999] 2 BCLC 301 (CA).

2 For recent consideration of the principle, see *Re EIC Services Ltd v Phipps* [2004] 2 BCLC 589 (CA), at para 122; *Tam Po Kei v Tam Bo Kin (No 1)* [2011] 1 HKLRD 537 at para 67 (winding up substituted for buy-out order) and on appeal [2012] 2 HKLRD 1227 (CA); and the application for leave to appeal to the CFA was dismissed [2012] HKCU 1501 (unreported, CACV 267/2010, 20 July 2012) (CA); *Timmerton Co Inc v Li Kwok Po David* [2013] 1 HKLRD 1100; *Rolfe v Rolfe* [2010] EWHC 244 (Ch); *Schofield v Schofield* [2011] EWCA Civ 154 (CA).

However, *Parker & Cooper v Reading* [1926] Ch 975 and subsequent cases have developed the approach that a meeting would be unnecessary if all the members have assented regardless whether assent had been given at different times and places, provided that the transaction was *intra vires* and honest, and especially if the transaction was for the company's benefit. Doubts were cast on this approach by the Privy Council in *EB & Co Ltd v Dominion Bank* [1937] 3 All ER 555 (PC) at 566 but the court found it unnecessary to express any view on *Parker & Cooper* regarding assent given otherwise than at a meeting. Similar doubts were expressed in *Re Meyer Douglas Pty Ltd* [1965] VR 638 and *E H Day Pty Ltd (in liq) v Dey* [1966] VR 464. Despite a string of cases following *Parker & Cooper* (above), the requirement of a meeting was argued in *Brick and Pipe Industries Ltd v Occidental Life Nominees Pty Ltd* (1990) 3 ACSR 549 where Ormiston J rejected the argument very firmly. After a comprehensive review of the authorities, he concluded:

> In short there is no reason in principle why the assent of the membership of the company cannot be expressed in whatever way is appropriate to establish the fact. The principle derives from the simple statement of Lord Davey in *Salomon v Salomon & Co Ltd* [1897] AC 22 at 57 where he said: 'The company is bound in a matter intra vires by the unanimous agreement of its members'. The plaintiff's contention that the members must express their agreement in general meeting is therefore rejected.

This dismisses the requirement for a meeting in the context of unanimous assent but emphasises the fact of assent. Assent is actual not potential, though actual assent may be inferred by acquiescene. Statutory assent provisions (e.g. CO (Cap 622), s 548; UKCA 2006, s 288; Australian Corporations Act 2001, s 249A) require the assent to be in writing, and therefore the fact of assent is self-evident where such provisions are relied on.

The *Duomatic* principle may not apply where the company is in financial trouble and the interests of creditors are relevant: *Secretary of State for Business, Innovation and Skills v Doffman* [2010] EWHC 3175 (Ch); *Re Tulsesense Ltd* [2010] EWHC 244 (Ch).

Theoretical basis

There are various principles under which the informal assent doctrine could be subsumed. These may include, on a narrower or wider view of the doctrine:

- the irregularity principle;
- the doctrine of waiver;
- the equitable principle of estoppel; and
- lifting the veil of incorporation.

The theoretical underpinning of the common law doctrine of unanimous informal assent may affect issues such as the extent of unanimity, third party rights and impose other limitations on the doctrine. For a consideration of some of these issues, see, inter alia, *Herrman v Simon* (1990) 4 ACSR 81 (NSWCA); *Re Compaction Systems Pty Ltd* [1976] 2 ACLR 135; *Re PW Saddington & Sons Pty Ltd* (1990) 2 ACSR 158. Contrast the approach in relation to third party rights such as auditors in *Brick & Pipe Industries Ltd v Occidental Life Nominees Pty Ltd* (1990) 3 ACSR 649 at 688. For a consideration of the theorectical basis of the common law doctrine, see P Lawton 'Corporate Governance and Informal Decision Making' (1995) Vol 1 Corporate Governance Quarterly (Part I) 17 at pp 22–24.

Board meetings

Early cases held that in the absence of a specific enabling article, the board of directors could not rely on the doctrine of unanimous informal assent: see e.g. *Nicol's Case* (1885) 29 Ch D 421 (CA). *Re Bonelli's Telegraph Co, Collies Claim* (1871) LR 12 Eq 246 was an exception to this general trend applying the doctrine to decisions of the board. Recent decisions have confirmed the latter approach (see *Charterhouse Investments Trust Ltd v Tempest Diesels Ltd* [1986] BCLC 1; *Runciman v Walter Runciman Plc* [1992] BCLC 1084; and *Hunter v Senate Support Services Ltd* [2005] 1 BCLC 175) and have also accepted that directors may meet in a casual manner for the transaction of business, but that they must intend for the meeting to be a board meeting: see e.g. *Swiss Screens (Australia) Pty Ltd & Anor v Burgess & Ors* (1987) 5 ACLC 1076. In *HL Bolton (Engineering) Co Ltd v TJ Graham & Sons* [1957] 1 QB 159 (CA), the three directors of the company often agreed for contracts to be entered into and implemented other decisions by meeting informally without holding formal meetings, passing resolutions or recording decisions in any minutes. The full board met once a year and the conduct of the company's business was left to the directors individually. It was held that having regard to the standing of the directors in the conduct of the company's business, the intention of the directors was the intention of the company. This is similar to the controlling mind test used in cases such as *Tesco Supermarkets v Nattrass* [1972] AC 153 (HL); *R v ICR Haulage Ltd* [1944] KB 551; *Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd* [1915] AC 705 (HL).

The informal unanimous resolution procedure is obviously the better practice. Where the company's articles provide for such a procedure in relation to directors, it cannot be used to circumvent the requirements relating to the quorum for board meetings particularly where most of the directors are overseas: see *Hood Sailmakers Ltd v Axford* [1997] 1 BCLC 721, [1997] BCC 263; *Davidson & Begg Antiques Ltd v Davidson* [1997] BCC 77.

Limitations on the application of the common law doctrine

1. *Transaction must not be ultra vires*

   Since the consent of the members is treated as the consent of the company, the members cannot do that which the company itself cannot do, even if acting unanimously: see *Parker & Cooper v Reading* [1926] Ch 975 at 984 and 985 per Astbury J. The ultra vires limitation is now less important given ss 115 to 119 (above). Whilst s 116(1) purports to prevent a company from acting in contravention of any restriction in its articles and subs (3) gives a member power to restrain a contravening act, an act is not invalid by reason only that it contravenes subs (1): see subs (5). If unanimous informal consent is obtained for such an act and no member seeks to restrain a contravention of any restriction in the company's articles, then presumably the consent is effective.

2. *Assent must be informed assent*

   It is a prerequisite of any decision at a company meeting that notice of that meeting contains sufficient information to enable a member to decide whether or not to attend in the first place, see s 576 (Contents of notice). This is particularly so in the case of special business or where a special resolution is proposed. There is authority that the doctrine of unanimous informal assent can be applied only where all the members are sufficiently informed that they are in a position to make a decision: see *Herrman v Simon* (1990) 4 ACSR 81. Statutory provisions contain a variety of requirements on this issue, ranging from:

   - disclosure to the members and the obtaining of their approval (see e.g. ss 521, 522, payments to directors for loss of office etc);
   - the availability of documents for inspection at the meeting at the company's registered office (see e.g. s 245(2), unlisted companies purchasing their own shares);
   - the circulation of representations to every member of the company to whom notice of the relevant meeting is sent (see e.g. s 463).

   This raises the issue of whether the Common Law principle will apply in such cases and also whether a statutory informal assent procedure should make special provision for those circumstances to ensure that the information regarded as necessary to inform members sufficiently is supplied to them. The UK provisions do so (Companies Act 2006, Sch 15A, Part 2), as to some extent does the Australian procedure for written resolutions of exempt proprietary companies (Corporations Act 2001, s 249A(5)). Hong Kong's Ordinance now does so in respect of a company providing financial assistance to acquire its own shares (see ss 284, 285) or an unlisted

to reject properly executed proxies because he believes them to have been obtained by misrepresentation: see *Holmes v Jackson* (1957) The Times, April 3.

Proxy forms may be invalid and rejected on several grounds including:

1. The form is unsigned or (where required by the articles in the case of a corporation) unsealed;
2. Where the signature is not attested or witnessed when required by the articles (see *Harben v Phillips* (1883) 23 Ch D 14 (CA)) and for this purpose a proxy cannot validly witness his own appointment (see *Ex parte Cullen* [1891] 2 QB 151);
3. Alterations of a major character have not been initialled;
4. The proxy form is incomplete, deficient or in any way contrary to the form and content required by the articles.

However, proxies must be construed with benevolence to avoid frustrating the intention of the member giving the proxy and the courts do not support the rejection of proxies containing a mistake which is inoffensive in nature and unlikely to mislead shareholders: see *Dominion Mining NL v Hill (No 1)* [1971] 2 NSWLR 259. In *Oliver v Dalgleish* [1963] 3 All ER 330, Buckley J said:

> ... a mere misprint or some quite palpable mistake on the face of the document does not, in my judgment, entitle the company to refuse to accept the proxy. (proxy form wrongly described meeting as a 'general meeting' instead of an 'extraordinary meeting').

Note also the flexible approach to a 'general' proxy where the articles were directory in nature in *Isaacs v Chapman* (1916) 32 TLR 183. Where the company's articles provided for the insertion of the number of votes which a proxy was entitled to, proxies sent out which did not contain such information were held to be invalid, see *Davey v Nyaminga Petroleum* (1954) (3) SA 133.[8] It is not necessary that a named person is nominated as proxy as long as the appointee is sufficiently described (e.g. a member for the time being of a specified firm) to be identified: see *Bombay Burmah Trading Corp Ltd v Dorabji Curseti Shroff* [1905] AC 213 (PC). The signing of 'blank' proxy forms by a member, omitting the name of the appointee, and orally or in writing authorising another person to fill in the blank at some later time before the proxy form is deposited or used is perfectly acceptable: see *Sadgrove v Bryden* [1907] 1 Ch 318; *Re Lancaster* (1877) 5 Ch D 911. The Hong Kong Stock Exchange's Guide on General Meetings states at para 4.2 that the proxy form should make

8 Contrast *Oliver v Dalgleish* (supra) (two way proxy forms used, same person appointed proxy by different members some giving proxy forms for and others against a resolution; proxy voted in favour of resolution without specifying how many votes he was casting, held valid to the extent of the votes cast in favour of the resolution).

a clear reference to a shareholder's right to appoint a proxy of his own choice to attend, speak and vote on any particular matter at the meeting and provide a space for the name of the proxy. If a proxy form confuses shareholders or hinders the exercise of their voting rights due to typos, errors etc, the issuer should make a correction statement and distribute a new proxy form (para 4.6). It should also explain to shareholders the validity of old and new proxy forms and how any old proxy form already received by the agent will be handled.

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602. Chairing meeting by proxy

(1) A proxy may be elected to be the chairperson of a general meeting by a resolution of the company passed at the meeting.

(2) Subsection (1) is subject to any provision of the company's articles that states who may or who may not be chairperson.

History

This is a new provision, derived from s 328 of the UK Companies Act 2006.

For an equivalent provision in Australia, see the Corporations Act 2001, s 250BC.

Overview

This section expressly provides that a proxy may be elected as the chairperson of a general meeting, subject to any provisions of the company's articles. In the Consultation Paper of the First Phase Consultation of the draft Companies Bill issued on 17 December 2009, it was noted at para 21(b) that this was one of the limitations of the former Companies Ordinance (Cap 32).

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603. Company-sponsored proxy's duty to vote in the way specified in appointment of proxy

(1) This section applies to a person who is named by a company as a proxy, whether the nomination is made in—

(a) an instrument of proxy issued by the company in relation to a general meeting; or

(b) an invitation to appoint a proxy issued by the company in relation to the meeting.

(2) If the person has been duly appointed as a proxy by a member entitled to vote at the meeting, that person must, subject to section 588—

(a) vote as a proxy—

(i) on a show of hands; or

(ii) on a poll; and

(b) vote in the way specified (if any) by the member in the appointment of proxy.

(3) If the person has been duly appointed as a proxy by 2 or more members entitled to vote at the meeting and the members specify different ways to vote in their appointment of proxy, the proxy—

(a) must, subject to section 588(2), vote on a show of hands in the way specified by the member or members representing a simple majority of the total voting rights that the proxy is authorized to exercise at the meeting; and

(b) if there is no majority, must not vote on a show of hands.

(4) A person who knowingly and wilfully contravenes subsection (2) or (3) commits an offence and is liable to a fine at level 3.

History

This is a new provision. It is derived from s 250BB(1) and (2) of the Australian Corporations Act 2001.

For an equivalent provision in the UK, see the UK Companies Act 2006, s 324A.

Overview

In the Consultation Paper of the First Phase Consultation of the draft Companies Bill issued on 17 December 2009 at para 22, it was noted that the former Companies Ordinance (Cap 32) did not require a person put forward by the company board as a proxy to vote the proxies on any poll according to their terms. It referred to the Standing Committee on Company Law Reform's Corporate Governance Review, namely the Consultation Paper on Proposals made in Phase II of the Review (June 2003) at paras 21.95 to 21.98, which recommended introducing such a statutory requirement so as to overcome the possibility of shareholders being disenfranchised by a person, who is put forward by the board, but who deliberately fails to vote that proxy in accordance with the shareholder's instructions. In Australia, this issue of 'cherry picking', or exercising proxies that support a proxy's position but disregarding those that do not, was addressed in 2011 by statutory means – see Australian Corporations Act 2001 s 250BB, introduced by the Corporations Amendment (Improving Accountability on Director and Executive Remuneration) Act 2011.

Section 603(1) sets out the application of the provision (to a proxy by instrument or invitation), while s 603(2) requires that subject to s 588 (general rules on voting) a proxy duly appointed and entitled to vote at a meeting must vote on a show of hands or by poll and vote in the way specified by the member in the appointment of proxy. Section 603(3) deals with the situation where a proxy appointed by 2 or more members is entitled to vote but the members specify different ways to vote. Section 603(3)(a) requires that in this situation the proxy must, if he does not abstain from voting on a show of hands required under s 588(2), vote

in the way specified by the member(s) representing a simple majority. If no such majority exists, he must not vote on a show of hands: s 603(3)(b). Section 603(4) makes it an offence to knowingly and willingly contravene s 603(3) and (4).

As to contravention, a level 3 fine is HK$0 to $10,000.

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604. Notice required of termination of proxy's authority

(1) This section applies to a notice that the authority of a person to act as proxy is terminated (*notice of termination*).

(2) The termination of the authority of a person to act as proxy does not affect—

(a) whether there is a quorum at a general meeting (irrespective of whether the proxy has been counted in deciding the question);

(b) the validity of anything the person does as chairperson of a general meeting; or

(c) the validity of a poll demanded by the person at a general meeting,

unless the company receives notice of the termination before the commencement of the meeting.

(3) The termination of the authority of a person to act as proxy does not affect the validity of a vote given by that person unless the company receives notice of the termination—

(a) before the commencement of the meeting or adjourned meeting at which the vote is given; or

(b) in the case of a poll taken more than 48 hours after it is demanded, before the time appointed for the taking of the poll.

(4) If the company's articles require or permit members to give notice of termination to a person other than the company, the references in subsections (2) and (3) to the company receiving notice have effect as if they were—

(a) references to that person; or

(b) references to the company or that person,

as the case requires.

(5) Subsections (2) and (3) have effect subject to any provision of the company's articles that has the effect of requiring notice of termination to be received by the company or another person at a time earlier than that specified in those subsections.

(6) Subsection (5) is subject to subsection (7).

(7) A provision of the company's articles is void in so far as it would have the effect of requiring notice of termination to be received by the company or another person earlier than the following time—

(a) in the case of a general meeting or adjourned general meeting, 48 hours before the time for holding the meeting or adjourned meeting;

(b) in the case of a poll taken more than 48 hours after it was demanded, 24 hours before the time appointed for the taking of the poll.

(8) In calculating the periods mentioned in subsections (3)(b) and (7), no account is to be taken of any part of a day that is a public holiday.

History

This is a new provision. It is derived from s 330 of the UK Companies Act 2006.

There are no equivalent provisions elsewhere.

Overview

This section ensures that, subject to a company's articles, an appointed proxy's actions at a meeting are valid unless notice of termination of the proxy's authority is given before the meeting starts. The company's articles may specify a longer advance notice period but this cannot be more than 48 hours in advance of the meeting (excluding public holidays).

605. Effect of member's voting in person on proxy's authority

(1) A proxy's authority in relation to a resolution is to be regarded as revoked if the member who has appointed the proxy—

(a) attends in person the general meeting at which the resolution is to be decided; and

(b) exercises, in relation to that resolution—

(i) the voting right attached to the shares in respect of which the proxy is appointed; or

(ii) if the company does not have a share capital, the voting right the member is entitled to exercise.

(2) A member who is entitled to attend, speak or vote (either on a show of hands or on a poll) at a general meeting remains so entitled in respect of that meeting or any adjournment of it, even though a valid appointment of a proxy has been delivered to the company by or on behalf of that member.

History

This is a new provision. It is derived from article 39(2) of the UK Companies (Model Articles) Regulations 2008 for public companies, and article 46(1) for private companies.

Overview

This section codifies the common law principle that the appointment of a proxy will be revoked if the appointor attends and votes at the meeting. It was noted in the First Phase Consultation of the draft Companies Bill issued on 17 December 2009 at para 23 that in the absence of any

contractual obligation, a member retained the right after appointing a proxy, to attend and vote in person to give his own vote according to his own volition. If the member did so, the proxy could implicitly be regarded as revoked. The common law principle that the appointment of a proxy would be revoked if the appointer failed to attend and vote at the meeting was not set out in the former Companies Ordinance (Cap 32).

606. Representation of body corporate at meetings

(1) A body corporate may by resolution of its directors or other governing body—

(a) if it is a member of a company, authorize any person it thinks fit to act as its representative at any meeting of the company; and

(b) if it is a creditor (including a holder of debentures) of a company, authorize any person it thinks fit to act as its representative at any meeting of any creditors of the company held under the provisions of—

(i) this Ordinance; or

(ii) any debenture or trust deed or other instrument.

(2) A person authorized under subsection (1) is entitled to exercise the same powers on behalf of the body corporate as that body corporate could exercise if it were an individual member, creditor, or holder of debentures, of the company.

History

This section is derived from s 115(1) and (2) of the former Companies Ordinance (Cap 32) and s 323 of the UK Companies Act 2006.

For equivalent provisions:

1. Australia: Corporations Act 2001, s 250D;
2. Singapore: Companies Act (Chapter 50), s 179(3)(a).

Overview

This provision expressly provides for the appointment of a corporate representative. The corporate representative will be entitled to vote and exercise other powers on behalf of the body corporate member at meetings. The corporate representative must be counted in determining whether a quorum is present: see *Re Kelantan Coconut Estates Ltd* (1920) WN 274. It is usual for a corporate representative to be provided with a certified copy of the board resolution of the appointing corporation to give documentary evidence of his right to attend and vote at the meeting. Standard articles do not require any specific evidence of an appointment as corporate representative, in contrast to the position with proxies (as to which see Overview to s 600).

Most corporate shareholders or creditors take advantage of s 606, rather than appoint a proxy to act on their behalf. This is because a corporate

representative enjoys the same rights and powers of a meeting as the appointing body corporate could exercise were it an individual member etc.

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607. Representation of recognized clearing house at meetings

(1) A recognized clearing house within the meaning of section 1 of Part 1 of Schedule 1 to the Securities and Futures Ordinance (Cap. 571) may, if it or its nominee is a member of a company, authorize any person or persons it thinks fit to act as its representative or representatives, at any meeting of the company.

(2) If more than one person is authorized under subsection (1), the authorization must specify the number and class of shares in respect of which each person is so authorized.

(3) A person authorized under subsection (1) is entitled to exercise the same powers on behalf of the recognized clearing house (or its nominee) as that clearing house (or its nominee) could exercise if it were an individual member of the company.

History

This section is derived from s 115(1A) and (3) of the former Companies Ordinance (Cap 32.)

For an equivalent provisions in Singapore, see the Singaporean Companies Act (Chapter 50), s 179(3)(b).

Overview

This provision allows a recognised clearing house (or its nominee) to authorise one or more persons to act as its representatives at any meeting of a company. Unlike the position for other body corporate members dealt with under s 606, in the case of a recognised clearing house, it may appoint more than one corporate representative provided that the authorisation specifies the number and class of shares in respect of which each representative is authorised. In other words, multiple corporate representatives can be appointed to represent the shares held by the recognised clearing house. Since the recognised clearing house holds the legal title of listed shares as nominee for those investors who choose to only hold the beneficial interests but not legal title, the possibility of the clearing house appointing multiple corporate representatives enables such investors to vote in respect of their own shares at meetings of the company.

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608. Saving for more extensive rights given by articles

Nothing in this Subdivision prevents a company's articles from giving more extensive rights to members or proxies than are given by this Subdivision.

History

This is a new provision. It is derived from s 331 of the UK Companies Act 2006.

There are no equivalent provisions elsewhere.

Overview

This section makes it clear that the company's articles may confer more extensive rights than are provided for under the provisions of the Ordinance on members and their proxies. If the articles purport to cap the maximum number of proxies at 2, this would be void as being restrictive of the rights given by s 596.

Subdivision 10
Annual General Meetings

609. Interpretation

In this Subdivision—

***accounting reference period* (會計參照期) has the meaning given by section 368.**

History

This is a new provision. There was no such interpretation provision in the former Companies Ordinance (Cap 32).

Overview

The term 'accounting reference period' has the same meaning as in s 368. The time for holding an annual general meeting is determined with reference to the accounting reference period of a company: see s 610.

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610. Requirement to hold annual general meeting

(1) Subject to subsections (2) and (3), a company must, in respect of each financial year of the company, hold a general meeting as its annual general meeting within the following period (in addition to any other meetings held during the period)—

(a) in the case of a private company or a company limited by guarantee, 9 months after the end of its accounting reference period by reference to which the financial year is to be determined; and

(b) in the case of any other company, 6 months after the end of its accounting reference period by reference to which the financial year is to be determined.

(2) If the accounting reference period mentioned in subsection (1) is the first accounting reference period of the company and is

Part 18
Communications to and by Companies
Division 1
Preliminary

821. Interpretation

(1) In this Part—

address **(地址) includes a number, or any sequence or combination of letters, characters, numbers or symbols of any language, used for the purpose of sending or receiving a document or information by electronic means;**

applicable provision **(適用條文)**

(a) in Division 3, means a provision of this Ordinance or the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap. 32) that authorizes or requires the document or information to be sent or supplied to a company; or

(b) in Division 4, means a provision of this Ordinance or the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap. 32) that authorizes or requires the document or information to be sent or supplied by a company to another person;

business day **(辦公日) means a day that is not—**

(a) a general holiday; or

(b) a black rainstorm warning day or gale warning day as defined by section 71(2) of the Interpretation and General Clauses Ordinance (Cap. 1);

document **(文件), except in Division 2, excludes a document that is issued for the purpose of any legal proceedings.**

(2) In this Part—

(a) a reference to sending a document, except in Division 2—

(i) includes supplying, delivering, forwarding or producing the document and, in the case of a notice, giving the document; but

(ii) excludes serving the document; and

(b) a reference to supplying information includes sending, delivering, forwarding or producing the information.

(3) For the purposes of this Part, a person sends a document, or supplies information, by post if the person posts a prepaid envelope containing the document or information.

History

This section is derived from s 168BAA of the former Companies Ordinance (Cap 32).

Overview

The main objective of Part 18 is to govern how companies can communicate with their members, debenture holders and other persons.

It enables companies to make wider use of electronic means, notably websites, for disseminating information.

Previously, electronic communications were covered in general provisions of the former Companies Ordinance (Cap 32) and the Electronic Transactions Ordinance (Cap 553); but given the rapid rise of information technology, these were seen as restrictive and deficient. While Regulation 1 of Table A in the First Schedule to the former Companies Ordinance (Cap 32) provided that any requirement of written communication between a company, its directors or members could also be satisfied by electronic means (as long as the person to whom the communication is given has consented), it was unlikely this would be sufficient to constitute 'consent' for the purposes of the Electronic Transactions Ordinance (ss 5, 5A and 15).

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822. Minimum period specified for purposes of sections 828(3), 831(4) and 833(6)

(1) This section specifies the minimum period of the notice of revocation, in relation to an agreement between a company and another person, for the purposes of sections 828(3), 831(4) and 833(6).

(2) The minimum period is whichever is the longer of the following—

(a) a period of 7 days;

(b) the period set out in subsection (3) or (4).

(3) If that other person is not a company, the period set out for the purposes of subsection (2)(b) is—

(a) where that other person is a member of the company, the period specified for the purpose in the company's articles;

(b) where that other person is a debenture holder of the company, the period specified for the purpose in the instrument creating the debenture; or

(c) where that other person is not such a member or holder, the period specified for the purpose in any agreement between the person and the company.

(4) If that other person is a company, the period set out for the purposes of subsection (2)(b) is—

(a) where that other person is a member of the company, the period specified for the purpose in the company's articles;

(b) where the company is a member of that other person, the period specified for the purpose in the person's articles;

(c) where that other person is a debenture holder of the company or where the company is a debenture holder of that other person, the period specified for the purpose in the instrument creating the debenture; or

(d) where neither that other person nor the company is such a member or holder, the period specified for the purpose in any agreement between the person and the company.

History

This section is derived from s 168BAB of the former Companies Ordinance (Cap 32).

Overview

Section 822 specifies the minimum period for notice of revocation of an agreement by a person (other than the Registrar of Companies), with a company for the sending or supply of documents or information to that person by the company.

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823. Period specified for purposes of sections 828(7)(a), 831(7)(a) and 833(12)(b)

(1) This section specifies—

(a) the period, in relation to a document or information sent or supplied to a company by another person, for the purposes of section 828(7)(a); and

(b) the period, in relation to a document or information sent or supplied by a company to another person, for the purposes of sections 831(7)(a) and 833(12)(b).

(2) The period is the period set out in subsection (3), (4) or (5).

(3) If that other person is not a company, the period set out for the purposes of subsection (2) is—

(a) where that other person is a member of the company, the period specified for the purpose in the company's articles;

(b) where that other person is a debenture holder of the company, the period specified for the purpose in the instrument creating the debenture; or

(c) where that other person is not such a member or holder, the period specified for the purpose in any agreement between the person and the company.

(4) If that other person is a company, the period set out for the purposes of subsection (2) is—

(a) where that other person is a member of the company, the period specified for the purpose in the company's articles;

(b) where the company is a member of that other person, the period specified for the purpose in the person's articles;

(c) where that other person is a debenture holder of the company or where the company is a debenture holder of that other person, the period specified for the purpose in the instrument creating the debenture; or

(d) where neither that other person nor the company is such a member or holder, the period specified for the purpose in any agreement between the person and the company.

(5) If the articles, instrument or agreement does not specify the period, the period set out for the purposes of subsection (2) is 48 hours.

(6) In calculating a period of hours mentioned in subsection (5), any part of a day that is not a business day is to be disregarded.

History

This section is derived from s 168BAC of the former Companies Ordinance (Cap 32).

Overview

Section 823 deals with the time when a document or information, which is sent or supplied by a company to another person (other than the Registrar of Companies), is regarded as being received.

Existing companies may wish to amend their articles if they do not want the default 48 hours in subs (5) to apply.

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824. Time specified for purposes of sections 828(7)(b), 829(5)(a), 831(7)(b) and 832(5)(a)

(1) This section specifies—

(a) the time, in relation to a document or information sent or supplied to a company by another person, for the purposes of sections 828(7)(b) and 829(5)(a); and

(b) the time, in relation to a document or information sent or supplied by a company to another person, for the purposes of sections 831(7)(b) and 832(5)(a).

(2) The time is whichever is the later of the following—

(a) the second business day after the day on which the document or information is sent or supplied;

(b) the time set out in subsection (3) or (4).

(3) If that other person is not a company, the time set out for the purposes of subsection (2)(b) is—

(a) where that other person is a member of the company, the time specified for the purpose in the company's articles;

(b) where that other person is a debenture holder of the company, the time specified for the purpose in the instrument creating the debenture; or

(c) where that other person is not such a member or holder, the time specified for the purpose in any agreement between the person and the company.

(4) If that other person is a company, the time set out for the purposes of subsection (2)(b) is—

(a) where that other person is a member of the company, the time specified for the purpose in the company's articles;

(b) where the company is a member of that other person, the time specified for the purpose in the person's articles;

(c) where that other person is a debenture holder of the company or where the company is a debenture holder of

that other person, the time specified for the purpose in the instrument creating the debenture; or

(d) where neither that other person nor the company is such a member or holder, the time specified for the purpose in any agreement between the person and the company.

History

This section is derived from s 168BAD of the former Companies Ordinance (Cap 32).

Overview

Section 824 deals with the time when a document or information, which is sent or supplied by a company to another person (other than the Registrar of Companies) by way of post is regarded as being received.

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825. Address specified for purposes of sections 831(3)(b)(iii) and 832(2)(b)

(1) This section specifies the address, in relation to a document or information sent or supplied by a company to another person, for the purposes of sections 831(3)(b)(iii) and 832(2)(b).

(2) Subject to subsections (3) and (4), the address is—

(a) an address specified for the purpose by that other person generally or specifically; or

(b) an address to which a provision of this Ordinance authorizes or requires the document or information to be sent or supplied.

(3) If that other person (whether or not a company) is a member, debenture holder, director or company secretary of the company, the address is—

(a) the address specified in subsection (2); or

(b) the person's address as shown in the company's register of members, register of debenture holders, register of directors or register of company secretaries.

(4) If that other person is a company and is not a person covered by subsection (3), the address is—

(a) the address specified in subsection (2); or

(b) its registered office.

(5) If the company is unable to obtain an address specified in subsection (2), (3) or (4), the address is that other person's address last known to the company.

History

This section is derived from s 168BAE of the former Companies Ordinance (Cap 32).

Overview
Section 825 deals with the address in relation to a document or information sent or supplied by a company to another person for the purposes of hand delivery, or by post, under ss 831(3)(b)(iii) and 832(2)(b).

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826. Effect of this Part on sending documents etc. to Registrar
In its application in relation to documents or information to be sent or supplied to the Registrar, this Part has effect subject to Part 2.

History
This provision is new.

It is derived from s 1143(3) of the UK Companies Act 2006.

Overview
Section 826 requires that, in relation to communications between companies and the Companies Registry, the application of the provisions in Part 18 is subject to Part 2 of the Companies Ordinance (Cap 622).

Division 2
Service of Document on Company

827. Service of document
A document may be served on a company by leaving it at, or sending it by post to, the company's registered office.

History
This section is derived from s 356 of the former Companies Ordinance (Cap 32).

For equivalent provisions:

1. UK: Companies Act 2006, Sch 4 Part 2;
2. Australia: Corporations Act 2001, s 109X;
3. Singapore: Companies Act (Chapter 50), s 387.

Overview
Section 827 provides that a document may be served on a company by sending it by post to the company's registered office or by leaving it at the office of that company. 'Company' means a Hong Kong incorporated company: s 2(1). 'Document' includes summons, notice, order, and other legal process: s 2(1). For service of statutory demands, see s 178(1)(a) of the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap 32).

The general provisions of s 827 are, in appropriate cases, superseded by more specific provisions (such as s 178(1)(a)) regarding service: per Mayo J in *Re YS Lee & Sons Jewellery Co Ltd* [1984] HKC 470 at 472. A company cannot benefit from its own failure to learn of the postal service of a writ upon it at its vacated registered office – the court held that service was regular as s 827 has been complied with: *United Venture Navigation Co Ltd v Shum Yuen Nim* [1991] 2 HKC 73 at 86; *Ho Kwok Wah v Group Jewellery Arts Ltd* [2000] 3 HKC 595 (CA).

The question of what constitutes service in the ordinary course by post was considered by the Hong Kong Court of Appeal in *Treasure Land Property Consultants (A Firm) v United Smart Development Ltd* [1995] 3 HKC 30 at 34–35. The Court of Appeal found that the trial judge had erred in taking judicial notice of what he believed to be the ordinary course by post, in the absence of evidence. However, Nazareth VP's conclusions that service of a writ on a limited company is governed by (then) s 356, rather than by RHC Ord 10 r 1 were not followed in *Guangdong International Trust and Investment Corp Hong Kong (Holdings) Ltd v Yuet Wah (Hong Kong) Wah Fat Ltd* [1997] 1 HKLRD 489, [1997] 2 HKC 696.

For service of documents on a non-Hong Kong company, see s 803.

Division 3
Other Communication to Company by Person who is not Company

828. Communication in electronic form
(1) This section applies if a document or information is sent or supplied, in electronic form, to a company by a person who is not a company.
(2) The document or information is sent or supplied to the company for the purposes of an applicable provision if—
(a) the company—
(i) has agreed, generally or specifically, that the document or information may be sent or supplied to it in electronic form and has not revoked the agreement; or
(ii) is to be regarded under a provision of this Ordinance as having so agreed;
(b) the document or information is sent or supplied—
(i) by electronic means to an address—
(A) specified for the purpose by the company generally or specifically; or
(B) regarded under a provision of this Ordinance as having been so specified for the purpose; or
(ii) by hand or by post to an address specified in subsection (4); and