¶1-000 Purpose of this Manual

This Manual is designed to help you cope with the duties and responsibilities that the law imposes on, and the community expects of you as a company director. In particular, it seeks to identify those areas and activities in which you have a potential personal liability.

The topics included in this Manual are comprehensive, ranging from discussion on the most fundamental issues such as a director's fiduciary duties to a hotly debated topic in recent years, corporate governance. This Manual will raise awareness in directors and/or would-be directors so that they are better equipped with the knowledge to play the role of a corporate leader.

This chapter discusses the sources of Hong Kong law governing the operations and functions of the corporation and the implications of the corporate as an entity.

Legislative structure

¶1-020 Sources of Hong Kong laws referred to in the Manual

This section provides a brief introduction to all the laws referred in this Manual.

Company law

Company law in Hong Kong is mainly governed by the provisions of the *Companies Ordinance* (Cap 622) and the *Companies (Winding-Up and Miscellaneous Provisions) Ordinance* (Cap 32) and, in a few areas, common law. Listed companies are also subject to the terms of the *Securities and Futures Ordinance* (Cap 571).

The original *Companies Ordinance* (Cap 32) was modelled on the United Kingdom's *Companies Act 1862*. Company legislation in Hong Kong now differs in some details from company legislation in England but the underlying general principles still remain the same. While decisions of the House of Lords, and of the Privy Council (on non-Hong Kong appeals) made prior to 30 June 1997 are persuasive authority in Hong Kong, the Court of Final Appeal can also "depart from previous decisions of the Privy Council on appeals from Hong Kong" in developing Hong Kong's "own versions of the common law... to suit local circumstances of Hong Kong" (*China Field Ltd & Anor v Appeal Tribunal (Buildings) & Anor* [2009] 5 HKC 231, CFA and see *A Solicitor (24/07) v Law Society of Hong Kong* [2008] 2 HKC 1, CFA). Further, as the Hong Kong company law legislation has drawn on several common law jurisdictions other than England, the Hong Kong

courts are able to "refer to precedents of other common law jurisdictions" (Art 84 of the *Basic Law*).

The former *Companies Ordinance* (Cap 32) was supplemented by subsidiary legislation which includes the *Companies (Disqualification Orders) Regulation*, the *Companies (Forms) Regulations*, the *Companies (Report on Conduct of Directors) Regulation*, the *Companies (Winding Up) Rules* and the *Companies (Disqualification of Directors) Proceeding Rules*, which also govern company law in Hong Kong. Unless otherwise stated, all section references in this chapter and in this Manual are to the Hong Kong *Companies Ordinance* (Cap 622) which took effect (with few exceptions) from 3 March 2014.

Large-scale developments mooted from 2006

From 2006, the Government of the HKSAR had undertaken an extensive review of the company legislation with a view to rewriting the former *Companies Ordinance* (Cap 32). Three consultative papers, the Company Law Rewrite papers, were issued and several amendments have been made already to the Ordinance based on suggestions from papers 1 and 2 in particular.

The *Companies (Amendment) Ordinance 2010* (with effect, partly on 10 December 2010 and the rest on 1 February 2011) dealt with some of the recommendations from Company Law Rewrite Paper 2 including company names, extension of the statutory derivative action to include "multiple derivative actions", and extended electronic communications. The Companies Registry has published guidelines on Company Names to assist with observance of those new provisions; materials on electronic filing of documents and information have also been provided by the Registry.

The new ordinance

The *Companies Ordinance 2012* was enacted by the Legislative Council ("LegCo") on 12 July 2012 but did not come into force until 3 March 2014. Amendments to the old Ordinance are in 921 sections and 11 Schedules. For directors, particular clauses of interest are those contained in Part 10 (Directors and Company Secretaries, from ss 453 to 483) and Part 11 (Fair Dealing by Directors, from ss 484 to 546).

Part 10 deals with various matters including appointment, removal, resignation of directors and of company secretaries, liabilities and contains a codification of the care, skill and diligence duty of directors, and provides that the "penalty" on breach will be subject to common law and equitable principles as currently apply (ss 465 and 466).

Part 11 deals with all types of companies, and can in certain cases refer to a former director. This part also deals with financial assistance and with loans to directors.

Phase One of the consultation into the relevant subsidiary legislation, to complement the new ordinance when it came into force in 2014 as the *Companies Ordiancne* (Cap 622), began in September 2012.

Some of the amendments in Cap 622 are based on recent amendments to the company laws of several overseas, common law jurisdiction, such as:

- the Australian *Corporations Act 2001*,
- the *Companies Act 1993* (as amended) of New Zealand,
- the *Companies Act* (Cap 50) of Singapore, and
- the *Companies Act 2006* of the United Kingdom.

This means that in interpreting the legislation from 2014 the Hong Kong courts, as authorised by Art 84 of the *Basic Law*, and in conformity with the opinion of the Court of Final Appeal on the question of "Hong Kong common law", will have a large database of decisions to draw on when the Ordinance comes into effect so that similar problems already faced overseas may act as guidance for Hong Kong.

In addition to the regulation of the company by the *Companies Ordinance* (Cap 622), a public company that has been listed or registered on the Stock Exchange is subject not only to the *Securities and Futures Ordinance* (Cap 571) and subsidiary legislation thereon, but also a large amount of non-statutory regulatory materials such as the *Listing Rules* and various Codes (eg, the *Code of Corporate Governance Practices* and the *Takeover Codes*), and guidance note (some of which are found in the Appendices to the *Listing Rules*).

An additional non-statutory Guide which takes effect on 31 December 2012 is the *Environmental, Social and Governance Reporting Guide* (the "ESG Guide"), which will be an Appendix to the *Listing Rules*. The *ESG Guide* requires the listed company to provide disclosure on:

- workplace quality,
- environmental protection,
- operating practices, and
- community involvement.

At its commencement (from 1 January 2012), the *ESG Guide*'s provisions will be treated as "recommended practice", meaning that it is desirable to follow the provisions but not essential. Eventually it is anticipated that observance of the *ESG Guide* be required to comply or be asked to "explain" the variation in observance. This will make the provisions similar to the manner in which "Code" provisions are treated under the *Code of Corporate Governance Practices*.

Anti Money Laundering

While generally a company and its directors and officers, are responsible for the company's observance of

- the *Drug Trafficking (Recovery of Proceeds) Ordinance* (Cap 405),
- the *Organised and Serious Crimes Ordinance* (Cap 455) and
- the *United Nations (Prevention of Terrorism) Ordinance*,

to ensure that there is no money laundering or financing of terrorists, the *Anti-Money Laundering and Counter-Terrorist Financing (Financial Institutions) Ordinance* (Cap 615) binds a variety of "financial institutions" including

- licensed corporations (see Sch 1, Part 1, s 1 of the *Securities and Futures Ordinance* (Cap 571), and Sch 5, Part 1 listing the 10 types of licences available for "regulated activities" under the Ordinance),
- licensed insurance companies and others under the *Insurance Companies Ordinance* (Cap 41),
- "authorised institutions" under the *Banking Ordinance* (Cap 155) (so licensed banks, restricted licensed banks, and deposit taking companies),
- money changing services (see s 24 of *Anti-Money Laundering and Counter-Terrorist Financing (Financial Institutions) Ordinance* (Cap 615)), and
- the Post Master General ("PMG").

For a detailed list, see Sch 1, Part 2 of the *Anti-Money Laundering and Counter-Terrorist Financing (Financial Institutions) Ordinance* (Cap 615).

Following on the Lehman Brothers-related product problems of recent years, the Financial Services and Treasury Bureau consulted the public and stakeholders broadly on two matters in particular, in respect of listed companies. The first was the establishment of an Investor Education Council, which has now been made possible by amendments in 2011 to the *Securities and Futures Ordinance* (Cap 571) enabling the setting up of the Council for which the Securities and Futures Commission has delegated its responsibilities, for investor education, to an Investor Education Council. The second matter concerns financial disputes resulting from investments in Lehman Brothers-related products. This has been the establishment of a Financial Dispute Resolution Centre which commenced functioning in 2012.

Liability

Unlike partnerships, where all partners generally are liable without limitation for the firm's debts, a member of a registered, limited company is liable either (a) for the unpaid portion of his shareholding (if any), or (b) in the case of a corporation limited by guarantee, liability is restricted in amount he guaranteed to pay. A company may also be unlimited in which case, members' liability is unlimited.

Takeovers and mergers

For a public company, or a listed company whose primary listing is in Hong Kong, or for a REIT with a primary listing in Hong Kong (see Part IV of the *Securities and Futures Ordinance* (Cap 571)), takeovers and mergers are governed by the *Codes on Takeovers and Mergers and Share Buy-backs* which represent the integration of the previously separate *Takeovers Code* and the *Share Repurchases Code*. The Codes do not have the force of law; they seek to cultivate an environment of voluntary compliance. Their administration is undertaken by the Takeovers and Mergers Panel.

A takeover of a private company is a matter of contract. The process is referred to as a merger and acquisition ("M&A"). It is regulated by the contract between the parties, the common law, and any relevant provisions of the *Companies Ordinance* (Cap 622) and associated legislation.

Income taxation

The system of taxation operating in Hong Kong is that of a territorial basis, ie only income with a Hong Kong source is subject to tax. Income tax is levied under the *Inland Revenue Ordinance* (Cap 112). It can be categorised into "salaries tax" and "profits tax".

Individuals are chargeable for salaries tax on any income with a Hong Kong source which has been obtained from an office, employment or pension. However, note that even though services may be rendered in Hong Kong, an employee may not be subject to salaries tax if the period he spent in Hong Kong does not exceed a total of 60 days during the year of assessment.

Individuals, corporations, partnerships and all unincorporated businesses carrying on a trade, profession or business in Hong Kong are subject to profits tax on profits which are generated from sources within Hong Kong. In determining liability to profits tax, assessable profits or loss, as the case may be, are aggregated to determine the total loss or profit.

Labour law

The set of Ordinances which govern labour law in Hong Kong includes the following:

- the *Employment Ordinance* (Cap 57),
- the *Contracts for Employment Outside Hong Kong Ordinance* (Cap 78),
- the *Employees Retraining Ordinance* (Cap 423),
- the *Labour Relations Ordinance* (Cap 55),
- the *Labour Tribunal Ordinance* (Cap 25),
- the *Trade Unions Ordinance* (Cap 332),
- the *Sex Discrimination Ordinance* (Cap 480), and
- the *Disability Discrimination Ordinance* (Cap 487).

Besides statutory provisions, labour law in Hong Kong is also based on English common law concepts. The relationship between the employer and the employee is based on the individual contract of employment, and there is little restriction from legislation affecting the freedom to contract. This contractual basis is supplemented by statutory minimum standards. There is little reliance on collective bargaining and industrial action. Matters such as confidentiality, restraint of trade and the distinction between employees and contractors are governed by the common law. Some rights and protections in the *Employment*

Ordinance (Cap 57) are negotiable but others are compulsory and may not be opted out of.

Since 1 May 2011, the *Minimum Wage Ordinance 2011* has provided a minimum wage for every employee in Hong Kong other than those referred to in ss 6 and 7; for those to whom it applies, they are entitled to receive the minimum wage of HK$30 per hour; this rate was set from 1 May 2103 replacing the original rate of HKD28 per hour.

In *HKSAR v Lor Wai Por* [2010] 6 HKC 157, s 64B of the *Employment Ordinance* (Cap 57) was applied to the sole director of a one-member company by making him an "employer" within the definition in s 2 of that Ordinance. He was then personally liable to employees for unpaid wages.

¶1-040 Application of precedents from United Kingdom

While English cases are cited in company law in Hong Kong, they are of persuasive authority. Following recent decisions of the Court of Final Appeal (see ¶1-020), Hong Kong courts "must develop the common law of Hong Kong to suit the circumstances of Hong Kong". On this see *China Field Ltd & Anor v Appeal Tribunal (Buildings) Ltd & Anor* [2009] 5 HKC 231, per Lord *Millett* NPJ at para 257; and see *A Solicitor (24/07) v Law Society of Hong Kong* [2008] 1 HKC 1.

Article 84 of the *Basic Law* then makes it clear that Hong Kong Courts are able to follow relevant precedents from any other common law jurisdiction. As changes in company law reflect legislation in Australia, New Zealand and Singapore as well as England, the courts have a broad base of decisions that they can consult if they so wish.

Though the *Companies Ordinance* (Cap 622) came into force on 3 March 2014, it is expected that, at least in early years, reference will continue to be made to external common law decisions, as overseas company legislation was referred to in the formulation of the substance of the 2012 Ordinance.

¶1-060 Importation of English law

The development of company law in Hong Kong can be traced to three distinct periods. The first covered the years from 1865 to 1948, the second from 1948 to 1984 and the third from 1985 to early 2014.

The former *Company Ordiance* (Cap 32) had its beginnings in the *Companies Ordinance 1865* which was based on the English *Companies Act 1862*. The latter was the consolidation of English legislative changes of the preceding 20 years. Subsequent consolidations of the English *Companies Act* in 1908 and 1929 were duplicated in 1911 and 1932 respectively.

This synchronisation of company law in the two jurisdictions ended with the introduction of the English *Companies Act 1948*, when the new provisions were not similarly enacted in Hong Kong. This Act incorporated a majority of the recommendations of the Cohen Committee whose terms of reference were "to consider and report what major amendments are desirable in the *Companies*

Act 1929 and, in particular, to review the requirements prescribed in regard to the formation and affairs of companies and the safeguards afforded for investors and for the public interest". A further divergence arose in 1967 when Hong Kong did not duplicate the English reforms which incorporated some of the recommendations of the Jenkins Committee.

Subsequently there were no significant changes to the *Companies Ordinance* until 1984. In that year, the *Companies (Amendment) Ordinance* was enacted. The amending provisions reflected the majority of the recommendations contained in the Second Report of the Companies Law Revision Committee published in 1973. This relied heavily on the English *Companies Act 1948*.

In early 1984 the Hong Kong government, in response to the last recommendation of the Second Report of the Companies Law Revision Committee, established the Standing Committee on Company Law Reform which was mandated "to advise on amendments required to the *Companies Ordinance* as and when experience has shown them to be necessary". In keeping with the practices of the past, the Standing Committee has attempted to keep abreast of the development of company law in the United Kingdom.

There has been a distinct trend of divergence between the United Kingdom and the Hong Kong enactments due in part to the different pace of company law reform but also because of the different legal demands imposed upon the United Kingdom as a member of the European Union. However despite this, the *Companies Ordiannce* (Cap 622) probably will follow appropriate English and Australian judgments, at least at the beginning, in establishing Hong Kong's interpretation of Cap 622.

Corporate characteristics

¶1-160 General

The classic definition of the purpose of incorporation is provided by *Marshall* CJ of the US Supreme Court (in *Dartmouth College v Woodward NH* (1819) 4 Wheat 518) where he said:

> "A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly or as incidental to its very existence. These are such as are supposed best calculated to effect the object for which it was created. Among the most important are immortality, and, if the expression may be allowed, individuality; properties by which a perpetual succession of many persons is considered as the same, and may act as a single individual. They enable a corporation to manage its own affairs, and to hold property without the perplexing intricacies, the hazardous and endless necessity, of perpetual conveyances for the purpose of transmitting it from hand to hand. It is chiefly for the purpose of clothing bodies of men, in succession, with these qualities and capacities, that corporations were invented, and are in use. By these means, a perpetual succession of individuals are capable of acting for the promotion of the particular object, like one immortal being."

The principal characteristics of a company can be displayed by comparing the company with the partnership.

The essential distinction between a company and a partnership is one of structure. A company is a person distinct and separate from its members, a partnership, on the other hand, is two or more persons trading together. The partnership is not a separate, legal entity in Hong Kong. But in both cases, it is assumed that the members/partners have entered into these transactions to make a profit.

There are many other points of comparison in the following paragraphs.

¶1-180 Perpetual succession

A company has a continued existence and can be dissolved only by operation of law. A continuity of business is therefore certain and is unaffected by the death of even the principal shareholder. Per *Greer* LJ in *Stepney Corp v Osofsky* (1937) 3 All ER 289 CA, at para 291, "A corporate body has no soul to be saved or body to be kicked".

Where the company has only one member, the *Companies Ordinance* provides that the existing member, as the sole director, may nominate a reserve director to act in his place in the event of the death of the sole director (s 455).

The element of perpetual succession enables a company to hold property without the constant problem of transmitting it from one generation to the next. "It is chiefly for the purpose of clothing bodies of men in succession, with these qualities and capacities, that corporations were invented and are now in use" (per *Marshall* CJ in *Dartmouth College v Woodward NH* (1819) 4 Wheat 518). With a partnership, the retirement or death of one of two partners usually brings the partnership to an end.

¶12-000 Introduction

A company generally consists of two organs, the board of directors and the general meetings of members. The Articles of Association of companies usually govern the calling and conduct of meetings as such activities form part of the internal regulation of companies.

The will of the members is generally expressed at meetings through the passing of resolutions. Hence, meetings are important decision-making processes where policy matters, administrative solutions and the decisions for actions are made.

By convention, company law refers to company meetings as shareholders' meetings. However, company meetings are generally categorised broadly into the following:

- *Members' or shareholders' meetings*, commonly known as general meetings;
- *Directors' meetings*, commonly known as board meetings.

Members' meeting

¶12-200 Types of members' meeting

General meetings are meetings of members of the company. General meetings fall into two categories:

- annual general meetings, and
- extraordinary general meetings.

In addition to general meetings, there are:

- meetings of holders of a class of shares,
- board of directors' meetings,
- committee meetings,
- creditors' meetings,
- liquidators' meetings, and
- court meetings.

The rules regulating company meetings are primarily contained in the Articles of Association (see ss 6-22 for board meetings, ss 32-59 for general meetings and s 60 for class meetings, Sch 1 of the *Companies (Model Articles) Notice* (Cap 622H)). The Ordinance contains provisions (in particular in Part IV, ss 111-120) relating to general meetings, but these provisions are not exhaustive. Unless expressly provided for in the *Companies Ordinance* (Cap 622), the regulations set out in the Articles of Association with respect to company meetings must be followed. For a listed company, the *Listing Rules* should also be complied with.

In addition to regulations in the Articles of Association, committee meetings may derive their terms of reference from the board of directors.

¶12-220 Annual general meeting

All companies are required to hold annual general meetings ("AGMs") (see s 610 of Cap 622) subject to the terms of s 612 of Cap 622 (noted that an AGM is not required if, eg, everything required or intended to be done is done by written resolution) and s 613 of Cap 622 (dispensing with an AGM where the members resolve not to hold a meeting).

Subject then to s 612 or s 613, s 610 of the *Companies Ordinance* (Cap 622) provides that every company must hold an AGM. A private company and a company limited by guarantee must do so nine months after the end of the "accounting reference period". Any other company must hold it six months after the end of the accounting reference period. An "accounting reference period" is defined in s 368 of Cap 622.

Subject to ss 612 and 613, default in holding an AGM constitutes an offence for which the company, and every responsible person, is liable to a level 5 fine, which is HK$50,000 (see Sch 8 of the *Criminal Procedure Ordinance* (Cap 221)). A "responsible person" is defined in s 3 of Cap 622 to mean "an officer or shadow director of the company". Section 2(1) of Cap 622 defines an "officer" as "directors, managers and company secretaries".

In *Re Asiafair International Ltd & Ors* [2011] 1 HKC 63, solicitors conducting due diligence prior to the company seeking listing, found that a sign had not been held during the preceding two years, and that loss and profit accounts had not been laid before the shareholders.

The court extended the time for holding the meetings upon an undertaking to furnish, the court order and reasons for giving it, to the Hong Kong Stock Exchange, and to refer to it in any prospectus for listing.

The court stressed that compliance with corporate governance provisions required by the Companies Registry were important, and that directors should be mindful of these duties. The court also added an observation that no order should be granted which enabled a public company to "gloss over infractions".

Extension of financial year

Section 367 of the *Companies Ordinance* (Cap 622) provides that where a holding company or its subsidiary wishes to extend its financial year so that the subsidiary's financial year will coincide with that of its holding company and, consequently, it has to postpone the presentation of its audited accounts from one calendar year to the next, the directors of the company whose financial year is to be changed must submit an application to the Registrar of Companies. The Registrar of Companies may then direct that the submission of accounts to a general meeting, the holding of an AGM, or the making of an annual return, is not required in the earlier of the said calendar years.

Arranging the AGM

(1) Obtain profit and loss account and balance sheet, and if the company is a holding company, obtain consolidated accounts.

(2) Prepare directors' report as required by s 388 of Cap 622.

(3) Convene a directors' meeting to pass a directors' resolution to accept and sign the accounts, recommend any dividend and convene the AGM.

(4) Send to all members of the company and the auditor a notice of AGM together with a copy of the company's annual accounts, with the directors' report attached.

Notice of AGM

Subject to any longer period of notice which may be required by the Articles of Association s 571 of Cap 622 provides:

- at least 21 clear days' notice must be given to each member and the auditor in writing before the date of the AGM, and
- the meeting can be convened by short notice provided all the members entitled to attend and vote, agree in writing.

Each notice should be accompanied by a copy of:

- the audited accounts (or consolidated accounts, if it is a holding company),
- the directors' and auditors' reports, and
- the proxy form.

Unless otherwise provided for in the Articles of Association, the notice of meeting must state the place, date and hour of the meeting and, in case any special business is to be transacted at the meeting, indicate the nature of such business.

Where the directors of a company have deliberately convened an AGM on a date designed to prevent shareholders from exercising their voting powers, the court may restrain the directors from doing so.

Business at an AGM may be ordinary or special. The Articles of Association of most companies usually provide that, at the AGM, ordinary business includes:

- considering the accounts, balance-sheets and reports of directors and auditors,
- declaring of a dividend,
- electing directors in place of those retiring or re-appointing directors who retire, and
- appointing and fixing the remuneration of auditors.

All other business at the AGM is special. All business at an extraordinary general meeting is special. Nevertheless, they still must be stated clearly in the notice.

Where the company is listed on the Hong Kong Stock Exchange, it must publish notice of every AGM in the newspapers on at least one business day.

Consent to short notice

An AGM is deemed to be duly called notwithstanding that less than 21 clear days' notice was given if it is so agreed by all the members having the right to attend and vote at the meeting.

Accounts presented

The directors must lay before the company in a general meeting copies of the company annual accounts, the directors' report and the auditors' report in respect of each financial year of the company (s 431 of Cap 622). The accounts must be made up to a date which is not more than six months before the date of the meeting (where the company is a private company or a company limited by guarantee, the relevant period is not more than nine months). The court has the discretion of substituting another general meeting for the laying of accounts and extending the periods of six or nine months for whatever reason it thinks fit (s 431).

A copy of the balance sheet, together with a copy of the directors' report and auditors' report, must be sent to every member of the company not less than 21 days before the date of the meeting (ss 430 and 431 of Cap 622). If all members entitled to attend and vote at the meeting give their consent, the documents may be sent in less than 21 days prior to the meeting.

The usual practice for companies is to time AGMs to coincide with the laying of accounts and the declaration of dividends.

Section 833 of Cap 622 permits the notice to be published on the website of the company.

¶12-240 Extraordinary general meeting

An extraordinary general meeting ("EGM") is any general meeting other than an annual general meeting. See also the *Companies (Model Articles) Notice* (Cap 622H).

An EGM may be convened:

- by a director whenever he thinks fit,
- by the board of directors passing a resolution to convene an EGM and directing the secretary to give notice to the members,
- by the board of directors on the requisition of the members holding at the date of deposit of the requisition at least 5% of the total voting rights of all the members entitled to vote at the meeting (s 566 of Cap 622),
- by members of the company (if the directors fail to convene the meeting within 21 days upon the members' requisition) (s 567 of Cap 622), or
- by the Court ordering a general meeting to be called, held and conducted in any manner the Court thinks fit (s 570 of Cap 622).

In *Forichielli v Valentina & Anor* [2011] 3 HKC 215, an application was made under s 114B in the former *Companies Ordinance* (Cap 32) for an order of the court to convene an EGM to remove a director. The exclusive client of the company (of which there were two members) had refused to continue to deal with the company unless the director was moved from the Board. That director (the minority shareholder) refused to cooperate, and thus it was impractical to call such a meeting. The remaining director (the majority shareholder) was empowered by

the court to convene an EGM to consider certain resolutions. Further the court held that attendance by one member, either personally or by proxy, would constitute a quorum for the EGM.

Note that only the shareholders who have a right to vote on the occurrence of certain events, can join in a requisition if those events have occurred by the date of the deposit, eg shareholders with preference share-carrying votes can make a requisition only when dividends are in arrears. Also, the right to vote may be lost if any calls for capital are unpaid.

Requisition form

The object of the meeting must be stated in the requisition, which must be signed by the requisitionists. The requisition must be deposited at the company's registered office. It is not necessary that all requisitionists sign on the same form. Several documents of like form may be used.

Notice of EGM

The notice of EGM should specify the place, date and time of, and the general nature of the business to be transacted at, the EGM. Notice is to be given in writing at least 14 days before the meeting (s 39(2) of Sch 1 of the *Companies (Model Articles) Notice* (Cap 622H)).

¶12-260 Class meetings

Class meetings are sometimes held for a certain class of members in the company instead of all members of the company.

See s 60 of Sch 1 of the *Companies (Model Articles) Notice* (Cap 622H). See also s 623 (on a class meeting of a company with share capital) and s 624 (on a class meeting of a company without share capital), and see *Cumbrian Newspapers Group Ltd v Cumberland & Westmoreland Herald Newpaper and Printing Co Ltd* [1986] 2 All ER 816.

¶12-280 Convening a members' meeting

"Convene" means "to cause to come together". In order for a meeting to be valid, the following conditions must be met:

- it must be properly convened (ie, it must be convened by the proper person, the notice must be properly drafted and served, the length of notice must be adequate, etc),
- it must be properly constituted (ie, there must be a quorum and chairman, etc),
- it must be properly conducted (ie, the manner in which a motion is proposed and voted on, the manner in which resolutions are passed, adjournments, etc), and
- its proceedings must be minuted and the minutes entered in books must be kept for the purpose in accordance with the *Companies Ordinance* (Cap 622) (s 481).

¶12-300 Notice of meeting

In general, notices should be carefully drafted. The notice must state the place, date and time for the meeting and the nature of the business to be transacted. It must give sufficient information to enable the recipient to decide whether or not to attend the meeting and specify if a resolution is to be passed as a special resolution. In practice, the proposed resolution is set out in the notice with the words "proposed to be passed as an ordinary resolution" or "proposed to be passed as a special resolution".

Particular regard must be had to the different length of notices required in different circumstances, both under the *Companies Ordinance* and the Articles of Association.

If a material fact is not disclosed in the notice, any resolution passed at the meeting called may be invalid and will not be binding on any member who did not attend the meeting (on this see *Tiessen v Henderson* [1899] 1 Ch 861; and *To Kin Wah v Tuen Mun District Officer & Ors* [2006] 1 HKC 407, CA).

At common law, the fairness and reasonableness of a notice depends on whether it will be considered fair and reasonable by the ordinary man on the street.

Any provision contained in a company's Articles of Association shall be void if it provides for the calling of a meeting (except for the annual general meeting and a meeting for the passing of a special resolution) of the company by a notice in writing shorter than 14 days (other than an unlimited company) and seven days (in the case of an unlimited company).

Special notice

Where a special notice of a resolution is required under the *Companies* Ordinance (Cap 622), the resolution is not effective unless a notice of the intention to move it has been given to the company not less than 28 days before the meeting at which it is moved. The company must give its members a notice of any such resolution at the same time and in the same manner as it has been given notice. If it is not practicable for the company to give notice to its members as aforesaid, the notice must be given at least 14 days before the meeting (s 578(3) of Cap 622).

However, if after a notice of the intention to move such a resolution has been given to the company, a meeting is called for 28 days or less after the notice, the notice is deemed to have been properly given although it was not given to the company within the time required (s 578 (4) of Cap 622).

Notice for ordinary resolutions

The length of a notice required for an extraordinary general meeting to pass an ordinary resolution is 14 clear days, which excludes the date of the notice and the date of the meeting. Resolutions which are to be passed at an AGM require at least 21 clear days' notice.

Notice for special resolutions

To put a special resolution to a general meeting, 21 clear days' notice must be given. For the special resolution to be passed, it must have the approval of not less than three-fourths of the members present and voting. The notice of meeting must also specify that the resolution is to be proposed as a special resolution.

To whom notice is given

Subject to the terms of the company's Articles, s 574 of Cap 622 provided that notice of a general meeting is to be given to (a) every member of the company, and (b) every director (see also s 40 of Sch 1 of the *Companies (Model Articles) Notice* (Cap 622H)). Section 40(3) of Cap 622H requires notice of the general meeting or of any other document relating to the meeting, which is required to be given to a member, is also required to be given to its auditor.

Mode of giving notice

Section 572 of Cap 622 provides that notice must be given (a) in hard copy form or in electronic form, or (b) by making the notice available on a website.

¶12-320 Quorum

A quorum is the minimum number required to attend a meeting for the meeting to be valid (s 585 of Cap 622). The Articles may prescribe any number to form a quorum (see Sch 1 of the *Companies (Model Articles) Notice* (Cap 622H)).

No business can be transacted at any general meeting unless a quorum of members is present at the time when the meeting proceeds to business (see s 43 of Sch 1 of Cap 622H).

To be counted as quorum a member must have the right to attend and vote.

Unless expressly provided in the Articles, a proxy is not counted as quorum (see ss 53-57 of Sch 1 of Cap 622H).

If within half an hour from the time appointed for the meeting a quorum is not present, the meeting, if convened upon the requisition of members, shall be dissolved; in any other case be adjourned to the same day in the next week or to another day and time (see s 46(1) of Sch 1 of Cap 622H and also s 587 of Cap 622 for resolutions passed at an adjourned meeting).

Quorum at general meetings

The quorum provided in the *Companies Ordinance* is two (see s 585 of Cap 622 and s 43 of Sch 1 of Cap 622H).

One-man meetings

There are exceptions to the general rule that a quorum must consist of two persons:

The principles of corporate governance

¶24-000 Meaning of corporate governance

There is no clear definition of corporate governance but it does represent good practice for a variety of institutions, and in particular for a company, whether private, public or listed. In the context of a company, corporate governance seeks to inculcate a sense of accountability and responsibility in directors, and instill participation by shareholders and other corporate participants. It can be said to have become prominent as a concept after the publication of the Cadbury Report (1992) that produced a *Code of Best Practice*.

Essentially, corporate governance is concerned with the way in which companies are directed or controlled as distinct from the manner in which management carries out the managerial aspects of a company. Corporate governance addresses the issues facing boards of directors, such as the interaction with top management, and relationships with the owners and others interested in the affairs of the company.

The practical approach to corporate governance is to bring closer together the parties concerned with corporations, eg, the people who direct corporate destinies, the shareholders as owners, the stakeholders who have an interest in the well-being of the corporation. Achieving the well-being of a company, often now requires the directors to consider creditors of the company, employees, suppliers and sometimes also the environment. In the context of Hong Kong, this extension of those for whom the directors could be responsible, is probably too far-reaching as most companies, public and private, are family companies. This factor does not detract from the basic requirement for a company to exercise good corporate governance in the conduct of its affairs.

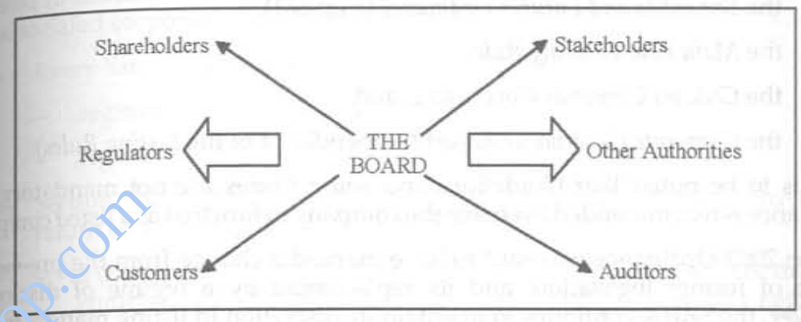
On a wider scope, the objective of corporate governance is social responsibility.

The fundamental principles of corporate governance are:

- the necessity to examine the directors' role in directing and controlling the destiny of the company,
- the need for fairness in pursuing its objects,
- the need to involve the key players of corporate life like the shareholders, customers, staff and stakeholders,

- the need to ensure that those with responsibilities are accountable for their actions to groups with interests in the company, and
- the need for transparency in its activities.

SCHEMATIC REPRESENTATION OF THE ESSENTIALS OF CORPORATE GOVERNANCE DYNAMICS



¶24-020 Framework and systems of disclosure

Corporate governance is actually a form of self-regulation. It is more appropriately thought of as a set of facilitative mechanisms having the underlying objective of achieving best practices from all corporate participants.

Corporate governance involves the following:

- the establishment of an effective legal and regulatory framework for the processes whereby a company carries out its businesses,
- the board of directors who oversees the management of the business,
- the shareholders who are the owners of companies,
- the internal control mechanisms of the company,
- a balance between independent and executive directors, and
- consideration of the interests of customers, society and the environment.

A good corporate governance framework would involve interplay between structures, legal and corporate, and accountability and transparency of directors and the business conditions that are necessary to encourage entrepreneurship and long-term sustainability.

In Hong Kong, there are existing laws, rules and regulations to provide for a framework for directors to adopt systems within their corporations which would help them run and direct the entities. Therefore, the root of the problems in corporate abuses could be due to dishonesty, greed and selfish motives which

the enforcers of company law and regulations should address. It is important for companies in Hong Kong not just to follow the form of corporate governance but to adhere to its spirit and substance.

The regulation of a listed company in Hong Kong is provided for in various legislation, codes, guidelines and rules. These include:

- the *Companies Ordinance* (Cap 622),
- the *Securities and Futures Ordinance* (Cap 571),
- the *Main Board Listing Rules*,
- the *Code on Corporate Governance*, and
- the *Corporate Governance Report* (Appendix 14 of the *Listing Rules*).

It is to be noted that Guidelines and some Codes are not mandatory, but observance is recommended to enable the company to function as a listed company.

The 2003 Ordinance was said to have marked a change from the pre-vetting regime of former legislation, and its replacement by a regime of disclosure. However, the SEHK continues to maintain its discretion in listing matters (see on this point, the extension of the powers of the Securities and Futures Commission ("SFC") in relation to the issue of advertisements) and offer documents for structured products which has been removed from the *Companies Ordinance* (Cap 622) prospectus regime, and left with the SFC.

¶24-040 Disclosure for listed companies

For companies listed on the Stock Exchange of Hong Kong (the "SEHK"), the disclosure regime is stringent and demanding. The launch of the Growth Enterprise Market ("GEM") in 1999 provides a Second Board for high risk investments, where the concept of disclosure is important in allowing sophisticated investors in this market to have less protection than a casual investor.

Part XV of the *Securities and Futures Ordinance* (Cap 571) (s 308 to 399) provides extensively for disclosure by directors of listed companies, and others. Various rules and guidelines also refer to necessary disclosure.

Part XV refers to various requirements of disclosure. In relation to transactions, Ch 14 of the *Main Board Listing Rules* deals with notifiable transactions, and Ch 14A deals with connected transactions.

Part XV requires directors (and the chief executive) of a listed company to disclose interests in the company, its subsidiaries and its holding company. There is also an obligation on a substantial shareholder (5% and more of the shares (with voting rights) of the company). These provisions apply to persons and corporations whether or not the person with the interest (or with a defined "deemed" interest) is resident in Hong Kong, and whether or not the corporation with a duty to disclose is incorporated in Hong Kong. All transactions (as connected or notifiable) of directors and chief executives must be disclosed, and within the

time limit; for the substantial shareholder it is only when the transaction crosses a numerical barrier. Notification is to be given to the SEHK and to the company. Every listed company is required to keep a register to record interests and notices (s 336 of the *Securities and Futures Ordinance* (Cap 571)). Notice of entries is to be given to the SEHK; a company that is an "authorised institution" under the *Banking Ordinance* (Cap 155), is required to give notice to the Hong Kong Monetary Authority. Directors and chief executive, and also substantial shareholders, are also required to disclose their interests in shares and debentures in listed accompanies and associated corporations (where appropriate).

- Every listed company must keep the following registers:
  - register of substantial shareholders, and
  - register of directors' and chief executives' interests.
- Section 662 of the *Companies Ordinance* (Cap 622) requires the annual return of a listed company to include:
  - a copy, certified by a director or manager or the secretary of the listed company to be a true copy, of every balance sheet laid before the company in a general meeting during the period to which the return relates (including every document required by law to be annexed to the balance sheet), and
  - a copy, certified as aforesaid, of the report of the auditors on, and of the report of the directors accompanying, each such balance sheet. See also Sch 6, Part 1, s 2.

Formerly, the SEHK published a *Code of Best Practice* as a set of voluntary guidelines for boards of directors to observe. The Code was not legally binding. However, a listed company was required to provide reasons, in its annual report, for non-compliance with the *Code of Best Practice*. The Code was repealed from 1 January 2005, and replaced by a *Code of Corporate Governance*. The *Code of Corporate Governance* and the *Corporate Governance Reports* are now found in Appendix 14 of the *Listing Rules*. Most paragraphs of the Code contain principles, relevant provisions for each principle, and the best practice associated with each principle. Compliance is not mandatory as each company can develop its own principles of corporate governance. It is to be noted that there must be some form of corporate governance; also noted that a report of the company's corporate governance must be included in the annual report of the company (see ¶25-160).

The SEHK's *Listing Rules* also require disclosure and submission of interim reports, announcements affecting the listed company's business (quarterly reports for GEM companies) with a view to enhancing the dissemination of timely and relevant information to the public.

The issues concerning corporate governance should always be in the mind of a prudent and responsible director of a listed corporation.

It should be mentioned that corporate governance practices may vary from one company to another, eg, the practices of small family-owned companies would differ comparably from the practices of listed companies. Companies that are listed generally experience the most extensive separation of corporate governance from ownership of the company. Therefore, it is in these listed companies that the demands for proper governance are more intense.

Corporate governance practice by the board

¶24-240 Functions of the board

The directors are elected by shareholders. The directors are in law required to act as a board in any decision pertaining the company. The relationship between the board and management is a partnership effort to ensure that the company's strategic plans and short-term objectives are achieved successfully. Each party has its functions clearly defined and understood. The chief executive officer undertakes to carry out the day to day managerial aspects of the company, whilst the board merely oversees the implementation of the policy direction.

In most companies, the board's functions normally include the following:

- undertaking strategic planning and providing the direction for the company to progress towards its overall corporate mission,
- appointing the leadership team that will put those objectives into effect,
- adopting strategic plans for the company including general and specific goals and comparing actual results with projected plans,
- adopting an annual budget and monitoring the quantitative and qualitative performance of the company against targets and objectives,
- adopting clearly defined delegation of authority from the board to the chief executive officer and monitoring senior management performance,

- determining the reporting systems and internal controls (both operational and financial) together with appropriate monitoring of compliance activities and addressing any principal risks facing the business,
- establishing and monitoring policies directed to ensure the company complies with the law and confirms with the highest standards of financial reporting and ethical behaviour,
- overseeing the financial position of the company and ensuring that the company accounts conform with the Hong Kong Accounting Standards,
- determining that satisfactory arrangements are in place for auditing the company's financial accounts and that the scope of the external audit is adequate, and
- continuously reviewing the board's own processes and effectiveness and ensuring the balance of competence on the board.

¶24-260 Board structure, size and composition

The key members of a company's board are generally known as directors but they are designated with definite roles. Collectively, decisions of a company are made at a meeting of the board of directors.

Chairperson

The chairperson plays a crucial leadership role in leading the board to function effectively. His areas of responsibility normally include:

- ensuring a right balance between executive and non-executive directors and their full participation in board activities,
- evaluating the board members' performance,
- ensuring that all relevant issues are on the agenda and that non-executive directors receive such information needed by them to be effective board members, and
- conducting meetings effectively, fairly and democratically, and being skillful in dealing with people in a diplomatic manner and able to get the best out of people even when they are under stress.

The combination of the roles of chairperson and chief executive in one person tends to lead to a concentration of power and can lead to conflicts. However, under specific and special conditions, it is necessary to have a person act in the combined role of chairperson as well as chief executive. The specific and special circumstances include:

- small companies which cannot afford the additional costs involved in the separation of roles,

- wholly owned subsidiaries of overseas parent companies, and
- major restructuring of companies where the temporary merger of roles is justified.

The chairperson is, therefore, a person who provides a visionary leadership role to the company and shows the company how it should be governed. The qualities of a chairperson would include good communication skills, strength as a leader, and a sufficiently adequate intellectual capacity to deal with complex issues.

¶24-280 Appointment of directors

The appointment of directors to the board should be carried out with proper selection procedures and should be a matter for the board of directors to consider. Generally, the terms of appointment of a director are determined by the company's articles, which will, *inter alia*, specify the period of office and the numbers to retire by rotation at the annual general meeting.

Directors are required to serve a minimum term while the managing director can be appointed for such period and on such terms as the board thinks fit.

Directors should recognise that their responsibilities to the other members of the board and to the company as a whole require that, if disagreements occur, every effort should be made to resolve the issue and avoid dissension. If a director cannot get along with the others or dissents on issues, after every effort has been made to resolve the disagreement, it would be proper for him to resign.

Directors' retirement by rotation is a natural process to allow members to re-elect or not to re-elect directors as they deem fit.

For listed companies, the SEHK must be notified of the appointment of any new directors immediately thereafter. At the same time, the newly appointed director must sign and submit to the SEHK a letter of undertaking in the prescribed form (Form B, Appendix 5 of the *Listing Rules*). The SEHK must also be informed of the proposed removal of a director.

¶24-300 Executive and non-executive directors

For listed companies it is a requirement that "independent non-executive directors" and independent directors are included as members of the board. The *Listing Rules* of the SEHK have been revised to require a listed company to have a minimum of three independent non-executive directors on its board.

Executive directors are full-time employees of a company and part of the senior management team. They are responsible for the overall governance of the company. They report to the board the concerns and comments of the various stakeholders. Executive directors also implement any changes agreed upon at board meetings. Their management responsibilities normally include:

- implementing the policies of the board and playing their operational role within the company,

- carrying out the day-to-day operations and control of the business of the company,
- communicating to other senior managers the strategies and policies adopted by the board as well as relaying feedback to the board, and
- collecting information on the business environment, and propose policies and strategies for consideration of the board.

Independent non-executive directors and independent directors have in recent years been highly regarded to play an independent role in board affairs. The term "independent" here means independence of thought and attitude so that an independent perspective or view could be presented to the board. The appointment of independent directors is currently not strictly regulated but certain rules may apply for their appointments in the banking, insurance and security industry. The main functions of non-executive directors are:

- to provide an independent appraisal of the board's deliberations and a check on management,
- to strengthen the board in general business experience by their specialist experience or training, and
- to provide access to governments, authorities, and act as a specialist source of information.

Broadly speaking, the non-executive director or independent director could play his role as the stakeholder representative. As an adviser, the independent director should satisfy himself that the company's transactions are conducted in accordance with the highest standards of propriety and within the law.

Nominee directors

A major shareholder or creditor with substantial shareholdings (that is a holding of 5% or more of shares with voting rights) may appoint to the board a director who represents his interests. This is a particularly sensitive appointment as a director's fiduciary duties require him to act in the interest of the company and shareholders as a whole and not only in the interest of those who nominated him. As a practice of good governance, it is advisable for the nominee director to disclose his obligations to people or bodies other than to the company if there should be an element of conflict concerning an issue. He should also refrain from participating in the board's consideration of that issue.

Alternate director

An alternate director is a director in the eyes of the law even though he acts as an agent for the principal director. In the absence of the principal, the alternate director is entitled to speak and participate in the deliberation and voting, and he is treated equally with the rest of the other directors.

¶33-000 Introduction

Directors, in carrying out their duties and responsibilities, are required by the legislation to concern themselves with the affairs of the company's employees, although ultimately they are to benefit the company. Directors should also concern themselves with matters relating to taxation, labour laws and health and safety regulations in the workplace.

There are several laws that impinge on the various aspects of the operation of business. In *HKSAR v Lor Wai Por* [2010] 6 HKC 157, the sole shareholder of a company was found guilty of failing to pay wages and allowances to staff when the company was in financial difficulties. The shareholder-director was found personally liable for these payments despite the fact that the employees had been compensated under the *Protection of Wages on Insolvency Ordinance* (Cap 380). The terms of the *Employment Ordinance* (Cap 57) were broad enough to make the director an "employer". The director was ordered to obtain the money owing and to pay it into court.

Although the following contents do not purport the directors with technical know-how with regards to taxation laws and labour laws of Hong Kong, they will provide directors with sufficient knowledge of those laws so as they can make more informed judgments about running their companies.

In the discussion relating to taxation laws, emphasis will be placed on the taxation of companies.

Employment law

¶33-200 General

The basic laws which govern the rights of employees in Hong Kong are:

- the *Employment Ordinance* (Cap 57) which stipulates certain minimum terms and conditions in relation to employment contracts,
- the *Employees' Compensation Ordinance* (Cap 282) which covers for injury compensation,

- the *Minimum Wage Ordinance* (Cap 608) to provide that a minimum wage of HK$28 per hour is to be paid to employees other than those who are exempted under the ordinance,
- the *Sex Discrimination Ordinance* (Cap 480) which prohibits discrimination on grounds of sex, marital status and pregnancy,
- the *Family Status Discrimination Ordinance* (Cap 527) which prohibits discrimination on grounds of family status,
- the *Disability Discrimination Ordinance* (Cap 487) which prohibits discrimination on grounds of disability,
- the *Race Discrimination Ordinance* (Cap 602) which prohibits discrimination harassment and vilification on the ground of race,
- the *Factories and Industrial Undertakings Ordinance* (Cap 59) which covers employment in factories and industrial undertakings,
- the *Employment of Young Persons and Children at Sea Ordinance* (Cap 58) which regulated the employment of young persons and children at sea,
- the *Employment of Children Regulations* which regulate the employment of children under 13 or who have not completed Form III of secondary school education,
- the *Women and Young Persons (Industry) Regulations* which covers the employment of women and young persons in industry,
- the *Occupation Retirement Scheme Ordinance* (Cap 426) which regulates retirement benefit schemes, and
- the *Occupational Safety and Health Ordinance* (Cap 509) which covers the safety and health of persons while they are at work.

Employment contracts

¶33-260 Definition

The *Employment Ordinance* (Cap 57) is based on the English master and servant relationship expressed in the contract of service. The Ordinance defines a contract

of employment as "any agreement, whether in writing or oral, express or implied, whereby one person agrees to serve his employer as an employee (s 2).

The *Employment Ordinance* (Cap 57) applies to most, but not all, contracts of employment in Hong Kong. It does not apply to:

- a person who is a member of the family of the proprietor of the business in which he or she is employed and who lives in the same premises as the proprietor,
- an employee as defined in the *Contracts for Employment outside Hong Kong Ordinance* (Cap 78),
- a person who is serving under a crew agreement within the meaning of the *Merchant Shipping (Seafarers) Ordinance* (Cap 478) or on board a ship which is not registered in Hong Kong, and
- a contract of apprenticeship registered under the *Apprenticeship Ordinance* (Cap 47), except to the extent provided in that Ordinance.

When an employer engages someone to work in an employer-employee relationship, the relationship is governed by the contract of service that comes into existence between the parties.

¶33-270 Contract of service

At its most basic, a contract of service involves an agreement on the part of the employee to provide services, and an agreement on the part of the employer to pay for those services. Both sides are free to negotiate the basis upon which the agreement is to be carried out, or the detailed terms of the contract. Where the *Employment Ordinance* (Cap 57) applies, the contract cannot stipulate terms which are less favourable than the minimum requirements prescribed by the Ordinance.

Terms of service can also be agreed upon between employers and trade unions acting for a whole class of employees.

A contract of service need not be made in writing. A contact which is verbal is valid and many contracts of employment are created this way. Nevertheless, keeping a written record in relation to a contract is sensible business practice. It is preferable to reduce contracts of service to writing to be signed by both parties.

A contract of service must also be distinguished from a contact for services. A contract for services is entered into with a non-employee or an independent contractor.

¶33-380 Formalities

A legally enforceable contract of service has:

- an offer and acceptance,
- consideration,

- parties who intend to create a legal relationship,
- parties with the legal capacity to enter into the contract,
- genuine consent as to what is actually agreed upon, and
- work which must not be illegal.

The requirement that the parties must intend to create a legal relationship would be relevant in the case of a volunteer. A person who volunteers to help out as a good neighbourly gesture would not ordinarily be regarded as an employee but each case would have to be decided on the facts.

¶33-390 Contents

Where the *Employment Ordinance* (Cap 57) applies, certain requirements relating to contents of employment contacts are mandatory.

The most important point to note is that the contract may not contain terms which are less favourable than the minimum conditions set out in the *Employment Ordinance* (Cap 57). Any term which is less favourable will be void. An employer can, of course, agree to terms of employment that are more advantageous to the employee than the provisions of the Ordinance.

Written contacts of service should include a provision for termination by either party.

The basic terms of a contract of employment covered by the Ordinance include:

- notice provisions,
- end-of-year payment,
- annual leave and rest days,
- maternity protection, and
- sick allowance.

¶33-400 Employee

It is important to distinguish between an employee and a non-employee because of the rights and duties involved in the existence of an employment relationship. Where an employment relationship is created there are certain obligations imposed on employers by legislation.

Over the years a number of tests have been developed to determine whether a worker is an employee. The court will consider the following factors when determining whether a contract of employment has been created:

- who controls the type of work and the manner in which it is to be carried out,
- the nature of the task undertaken and the degree of skill required,

- whether the function must be performed by the individual or may be delegated to another,
- the amount and manner of payment,
- the opportunity for profit and loss,
- the obligation of the individual to invest,
- the permanency of the arrangement,
- who provides the tools and equipment,
- whether there are defined or regular hours of work,
- whether one party is obliged to work exclusively for the other,
- the expressed intention of the parties, and
- who has the right to exercise overall control of the manner of performing the task.

Terms of employment

¶33-460 Wages

The *Employment Ordinance* (Cap 57) defines wages and the period in relation to which wages may be calculated, and the manner in which wages may be paid (ss 22-28). Unless otherwise proven, the period in respect of which wages are payable is one month. The *Minumum Wage Ordinance* (Cap 608) will amend the hourly rate of the minimum wage to HK$32.50 per hour from 1 May 2015. The Ordinance also restricts deductions which can lawfully be made by an employer from wages (s 32).

The *Minimum Wage Ordinance* (Cap 698) will increase the hourly wage from HK$30.00 to HK$32.50 per hour from 1 May 2015.

¶33-470 Hours of work

Although there are restrictions on the hours which may be worked by children and young persons in industry, the *Employment Ordinance* (Cap 57) contains no restrictions on the maximum hours which an employee may be required to work.

¶33-480 End-of-year payments

Although there is no legal obligation upon an employer to include an end-of-year payment as part of the contract, if he does so the *Employment Ordinance* (Cap 57) will govern such a payment (ss 11D, 11E and 11F). If no payment period is specified, it is deemed to be the Chinese Lunar Year. If the amount is not specified it will be one month's wages and payment will become due on the last day of the payment period.

¶33-490 Rest days

An employee is entitled to one rest day in every period of seven days. Rest days shall be in addition to any statutory, alternative or substituted holiday (ss 17 and 18).

¶33-500 Public holidays

An employee is entitled under the *Employment Ordinance* (Cap 57) to 12 public holidays each calendar year.

Subject to ss 39(1A), (2) and (3), an employee shall be granted a statutory holiday by his employer on each of the following days:

- Lunar New Year's Day or, if that day falls on a Sunday, then the fourth day of Lunar NewYear,
- the second day of Lunar New Year or, if that day falls on a Sunday, then the fourth day of Lunar New Year,
- the third day of Lunar New Year or, if that day falls on a Sunday, then the fourth day of Lunar New Year,
- Ching Ming Festival,
- Labour Day, being the first day of May,
- Tuen Ng Festival,
- the day following the Chinese Mid-Autumn Festival or, if that day falls on a Sunday, the Chinese Mid-Autumn Festival Day,
- the Chung Yeung Festival,
- the Chinese Winter Solstice Festival or Christmas Day, at the option of the employer,
- the first day of January,

- Hong Kong Special Administrative Region Establishment Day, being the first day of July, and
- National Day, being the first day of October.

¶33-510 Annual leave

The *Employment Ordinance* (Cap 57) prescribes between seven and 14 days annual leave for every 12 months of continuous service, depending on the number of years of service of the employee.

An employee must have accrued at least 12 months' service in order to qualify for statutory annual leave (s 41AA).

¶33-520 Sickness allowance

An employee who has been employed under a continuous contract for at least one month accrues sickness allowance at the rate of two paid sickness days for each completed calendar month during the first 12 months of employment and at a rate of four paid sickness days for each such month thereafter. The allowance may be accumulated up to a maximum of 120 paid sickness days. An employee who takes less than four consecutive days as sickness days shall not (except in the case of pregnancy or post-natal sickness) be entitled to sickness allowance in respect thereof (s 33 of Cap 57).

¶33-530 Maternity leave

An employee who is employed under a continuous contract immediately before the expected date of commencement of maternity leave is entitled to a continuous period of ten weeks maternity leave. To qualify for paid maternity leave the employee must have been employed for a period of not less than 40 weeks immediately before the expected date of commencement of maternity leave.

Termination

¶33-580 Right to terminate

A contract of service can be terminated either by the employer or the employee. Dismissal is a form of termination of employment at the initiative of the employer. Resignation is a form of termination of employment at the initiative of the employee.

The right of an employer to dismiss or "fire" an employee is qualified. The law generally requires that employment should not be terminated without due notice or payment in lieu of notice, except in the case of misconduct which warrants summary dismissal. The employee is equally obliged to give due notice of resignation in most circumstances although an employee may terminate his employment contract without notice or payment in lieu in circumstances such as danger of violence or disease not contemplated by the contract or where the employer breaches the contract so that the employee may resign and claim constructive dismissal.

An employer is prohibited from terminating a pregnant employee's continuous contract, after she has served notice of pregnancy, except for reasons stated in s 9 of the *Employment Ordinance* (Cap 57). However if the pregnant employee served such notice after being informed of her termination, the employer should immediately withdraw the termination or notice of it.

An employee may be granted remedies against his employer if the employer, intending to reduce any protection conferred by the Ordinance, dismisses an employee who has been employed under a continuous contract for a period of not less than 24 months. The law also prohibits an employer from dismissing an employee whilst pregnant, on maternity leave or sick leave, where dismissal is as a result of union membership or as a result of an employee having given any evidence or information against his employer in relation to a safety at work claim or a claim in relation to the enforcement of any provisions of the *Employment Ordinance* (Cap 57).

¶33-590 Notice

In accordance with the *Employment Ordinance* (Cap 57) either party to a contract of employment may at any time terminate the contract by giving notice to the other either orally or in writing.

Contracts of service should specify the length of notice of termination required by either party and may also specify the method by which notice is to be given.

If the contract of service does not specify a notice period the *Employment Ordinance* (Cap 57) sets out certain minimum notice requirements and also provides that in the absence of an express agreement to the contrary every continuous contract shall be deemed to be a contract for one month, renewable from month to month.

The *Employment Ordinance* (Cap 57) provides that the services of an employee on probation may be terminated by the employer or the employee without notice during the first month and by any notice period agreed in the contract, but not less than seven days' notice thereafter.

In all other cases the employee is entitled to:

- not less than one month's notice of termination where the contract is for one month renewable from month to month and the contract does not otherwise provide for the length of notice required to terminate the contract, or