CHAPTER 622

COMPANIES ORDINANCE

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[83.02] Overview

This is another mandatory article, dealing with statements previously required to be in the memorandum of association.

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84. Liabilities or contributions of members of limited company

(1) The articles of a company limited by shares must state that the liability of its members is limited to any amount unpaid on the shares held by the members.

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

(a) for the payment of the company's debts and liabilities contracted before the person ceases to be such a member;

(b) for the payment of the costs, charges and expenses of winding up the company; and

(c) for the adjustment, among the contributories, of their rights.

(3) Subsection (1) does not apply to the articles of an existing company that is deemed to be a company limited by shares under section 4(3) of the predecessor Ordinance.

[84.01] History

Subsection (1) of this section is derived from s 4(2)(a) of the former Companies Ordinance (Cap 32) and subsection (2) of the section is derived from s 5(3) of the former Companies Ordinance (Cap 32).

For equivalent provisions:

1. UK: For subs (1) Companies Act 2006, s 3(1) to (3); for subs (2) Companies Act 2006, s 11;
2. Australia: none;
3. Singapore: Companies Act (Chapter 50), s 22(1)(d), (e) (in memorandum).

[84.02] Overview

The section sets out what the articles of the company must state for a company limited by shares and for a company limited by guarantee. These provisions were formerly in the memorandum of association.

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85. Capital and initial shareholdings

(1) The articles of a company with a share capital must state the information required under section 8 (except subsection (1)(d)(iv), (v), (vi) and (vii)) of Schedule 2 to be contained in the company's incorporation form.

(2) The articles of a company with a share capital may state the maximum number of shares that the company may issue.

[85.01] History

This section is new. It is derived from s 5(4)(a) of the former Companies Ordinance (Cap 32) and ss 9(4) and 10 of the UK Companies Act 2006 and art 2(3) of the UK Companies (Shares and Share Capital) Order 2009).

For other equivalent provisions:

1. Australia: none;
2. Singapore: Companies Act (Chapter 50), s 22.

[85.02] Overview

Schedule 2 to Cap 622 s 8 (Statement of Capital and Initial Shareholdings) requires specified information to be contained in the incorporation form (see s 68) and much of the same information is to be included in the articles.

Subsection (2) provides that the articles may state the maximum number of shares that the company may issue.

For a company in existence on 3 March 2014 when Cap 622 came into operation, the conditions of the company's memorandum of association will be regarded as provisions of its articles (s 98(1)), but in so far as a condition states the amount of share capital with which the existing company proposes to be registered or is registered or the division of share capital into shares of a fixed amount the condition is to be regarded as deleted and not to be regarded as a provision of the company's articles (s 98(4)).

It seems that s 85(1) applies only to companies incorporated after the commencement of Cap 622, as the wording in Sch 2 s 8 is inappropriate for existing companies. The most important information, the amount of the issued share capital of existing companies, will in any event be available on the Register from earlier and subsequent annual returns and from subsequent capital statements.

It will be interesting to see how the mandatory articles, ss 81 to 85, are dealt with in the articles of companies incorporated after 2 March 2014. There would be some merit in having the mandatory articles set out in a first Part of the articles followed by the non-mandatory articles. If the company's articles (including the deemed articles under s 98(1)) are being revised after 2 March 2014 see s 87.

86. Effect of articles

(1) Subject to this Ordinance, a company's articles, once registered under this Ordinance or a former Companies Ordinance—

(a) have effect as a contract under seal—

(i) between the company and each member; and

(ii) between a member and each other member; and

(b) are to be regarded as containing covenants on the part of the company and of each member to observe all the provisions of the articles.

(2) Without limiting subsection (1), the articles are enforceable—

(a) by the company against each member;

(b) by a member against the company; and

(c) by a member against each other member.

(3) Money payable by a member to the company under the articles—

(a) is a debt due from the member to the company; and

(b) is of the nature of a specialty debt.

[86.01] History

This section is derived from s 23 of the former Companies Ordinance (Cap 32).

For equivalent provisions:

1. UK: Companies Act 2006, s 33;
2. Australia: Corporations Act 2001, s 140(1);
3. Singapore: Companies Act (Chapter 50), s 39.

[86.02] Overview

The section deals with the effect of articles between the company and its members and between members. The provision is sometimes referred to as the statutory contract.

The registration of the articles of a company is deemed by s 86 to be a contract under seal between the members, and between the members and the company. The effect of this important provision is that the members and the company can bring legal proceedings to enforce any of the provisions of the articles which may have been breached by any party to this statutory contract. This statutory provision is an exception to the rule in *Foss v Harbottle* (1843) 2 Hare 461 that only the company is the proper person to bring legal proceedings to enforce its rights. This exception is based upon the fact that s 86 gives a shareholder a personal right to enforce the provisions of the articles of the company. However, there may be some limits on the rights of the members to have all of the company's articles observed. See further, Gower & Davies, *Principles of Modern Company Law*, (9th Edn) Sweet & Maxwell, (2012) at paras 3–21 to 3–28. The contractual effect of the memorandum and articles of association was confirmed in *Ng Kin Kenneth v Hong Kong Football Association Ltd* [1994] 1 HKC 734 (HC); and see *China Magic Enterprises Ltd v Benefun International Holdings Ltd* [2010] 2 HKC 108 (CFI) at para 15; and s 633. For the difference between suing as a member and suing as a director see *Newmark Capital Corp Ltd & Anor v Coffee Partners & Ors* [2007] 1 HKLRD 718, [2007] HKCU 241 (CFI). The section does not constitute a contract between the company and a director: *Moulin Global Eyecare Holdings Ltd v Olivia Lee Sin Mei* [2010] 2 HKLRD 1096, [2010] 3 HKC 599 (CA). The court should not interfere with decisions made by religious institutions about religious or moral issues: *Re Kam Lan Koon* [2015] 5 HKLRD 79, [2015] HKCU 2053 (CFI) para 99.

Although the articles constitute a statutory contract, the articles cannot be rectified or supplemented by implied terms pursuant to ordinary contract law doctrines. This is because the articles are also a public document from the time of formation of the company and those who deal with the company have a legitimate expectation that the registered articles represent an accurate statement of the company's internal regulations: *Yifung Developments Ltd v Liu Chi Keung Ricky & Ors* [2017] 1 HKLRD 1176, [2016] HKCU 3114 (CFI); appeal dismissed [2017] 5 HKLRD 16, [2017] HKCU 2178 (CA).

Where money is payable to the company by a member under the terms of the memorandum or under the articles, s 86(3) provides that this shall be deemed to be a debt due to the company and that it shall be of the nature of a specialty debt.

Following discussion of the personal rights of shareholders by the Standing Committee on Company Law Reform in their report on the Pascutto Report, February 2000, and Recommendation 92 therein, the Companies (Amendment) Ordinance 2003 amended s 23 to make clear that every member has a personal right to sue to enforce the terms of the memorandum and articles. The new provision seems to be intended to override *MacDougall v Gardiner* (1875) 1 Ch D 13. As to which see s 724 para **[724.13]**. But the scope of s 23 of the former CO has been said to have been limited by the Irregularity Principle, see *Re Hong Kong Sailing Federation* [2010] 1 HKLRD 801, [2010] HKCU 254 (CFI); *Lim Jonathan v She Wai Hung* [2011] 1 HKLRD 305, [2010] HKCU 2683 (CFI) and on the current section see *Re Dalny Estates Ltd* [2017] HKCU 883 (unreported, HCMP 182/2016, 6 April 2017) (CFI); on appeal it was held that the irregularity principle should not have been applied (see **[42.02]**).

Subdivision 4

Alteration of Articles

87. Company may alter articles

(1) Subject to this Ordinance, a company may alter its articles.

(2) Except as provided in Division 8, a company must not alter in its articles any statement mentioned in section 83 or 84(1).

(3) Subject to section 180, a company with a share capital must not make any alteration to its articles that is inconsistent with any rights attached to shares in a class of shares in the company.

(4) Subject to section 188, a company without a share capital must not make any alteration to its articles that is inconsistent with any rights of a class of members of the company.

(5) A company limited by guarantee must not alter in its articles the information required under section 84(2) other than to increase the specified amount.

[87.01] History

This section is derived from ss 7, 13(1), (1A), 25 and 25A(2) of the former Companies Ordinance (Cap 32).

For equivalent provisions:

1. UK: Companies Act 2006, s 21;
2. Australia: Corporations Act 2001, s 136(2);
3. Singapore: Companies Act (Chapter 50), ss 26 and 37.

[87.02] Overview

The section provides the power for the company to alter its articles, subject to the qualifications set out. Subsequent sections provide for the procedure for alteration. Note that, under sub-s (2), any statement pursuant to s 83 and s 84(1) cannot be altered. It is unlikely that this prohibition applies to the limited liability and any liability limited to the amount unpaid on shares conditions in the memorandum of an existing company (s 84(1) does not apply to an existing company deemed to have its liability limited by the amount unpaid on shares: see 84(3)), which are deemed articles after 2 March 2014. Existing companies may wish to alter their articles after 2 March 2014 as a tidying up exercise (see the comment under the Overview to s 85 as the non-application of ss 81 to 85 to existing companies and the suggestion that, in drafting articles for 'new' companies, the mandatory articles could be put in a separate, first Part). Similarly for existing companies, when tidying up their articles, the equivalent of the mandatory articles, ie the clauses

from the former memorandum, to be regarded as articles under s 98(1), could be put in a separate, first Part of the articles. There seems to be nothing to prevent alteration of these deemed articles, but there is no need to do so.

Besides the statutory limitations on the power to alter the articles in the section itself, there is a common law limitation on the power to alter the articles, expressed in *Allen v Gold Reefs of West Africa Ltd* [1900] 1 Ch 656 (CA, Eng), where Lindley MR expounded the test that the alteration must be bona fide for the benefit of the company as a whole. See this case and other alteration cases discussed in Gower & Davies, *Principles of Modern Company Law*, Sweet & Maxwell, (9th Edn, 2012) at paras 3–29 to 3–30 and 19–9 to 19–22. See also *Arbuthnott v Bonnyman* [2015] 2 BCLC 627.

Limitations also arise in the context of not fettering a company's statutory powers. The relevant cases are often in the context of terms of shareholder agreements. In so far as the articles of association of a company or a shareholder agreement to which the company is party purport to require unanimous agreement to alter the articles, such provision would be a fettering of the company's statutory power and not binding on the company. See *Russell v Northern Bank Development Bank* [1992] BCLC 1016 (HL); *Re Greater Beijing Region Expressways Ltd; Muir v Lamp! & Anor* [2004] 4 HKC 626, [2005] 1 HKLRD 338.

The Greater Beijing Region Expressways [1999] 4 HKC 807 (CA), sub nom *Yuk Wah Ho v Gao Jiaren & Anor* [1999] 3 HKLRD 862, [1999] HKCU 1780 (CA), on non-petition cases see *Re Fulham Football Club* (1987) Ltd v Richards [2012] Ch 333; *Re Colt Telecom Group plc (No 2)* [2002] EWHC 2815 (Ch), [2003] BPIR 324; *Re Quiksilver Glorious Sun JV Ltd* [2014] 4 HKLRD 759, [2014] HKCU 1750 (CFI); *Joseph Ghossoub v Team Y & R Holdings Hong Kong Ltd & Ors* [2016] 3 HKLRD 778, [2016] HKCU 2570 (CFA); appeal dismissed [2017] HKCU 1857 (unreported, CACV 6/2017, 21 July 2017 (CA); application for leave to appeal to the CFA dismissed [2017] HKCU 3016 (unreported, CACV 6/ 2017, 24 November 2017 (CA) cases also raised a public policy argument in that a term of the joint venture agreement prohibited a contributory's statutory right to petition for winding up.

Accordingly care should be taken whenever an alteration of the articles is being considered.

For continued application of s 13 of the former Ordinance where a special resolution had been passed before the commencement of Cap 622, see Cap 622 Schedule 11 Part 3 s 8.

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88. Alteration by special resolution or ordinary resolution

(1) Subject to this Ordinance, this section applies to the alteration of a company's articles.

(2) Subject to subsection (3) and any other provisions of this Ordinance, a company may only alter its articles by special resolution.

(3) An alteration in articles to the maximum number of shares

that the company may issue may be made by ordinary resolution.

(4) Subject to this Ordinance, an alteration made in accordance with this section is as valid as if the alteration were originally contained in the articles.

(5) Within 15 days after the date on which an alteration takes effect, the company must deliver to the Registrar for registration—

(a) a notice of the alteration in the specified form; and

(b) a copy, certified by an officer of the company as correct, of the articles as altered.

(6) If a company contravenes subsection (5), the company, and every responsible person of the company, commit an offence, and each is liable to a fine at level 3 and, in the case of a continuing offence, to a further fine of $ 300 for each day during which the offence continues.

[88.01] History

This section is derived from ss 13(1), (2), (3), (4) of the former Companies Ordinance (Cap 32), save for subs (3) which is derived from s 53(1)(a), (2) of the former Companies Ordinance (Cap 32).

For equivalent provisions:

1. UK: Companies Act 2006, s 21;
2. Australia: Corporations Act 2001, s 136(2)
3. Singapore: Companies Act (Chapter 50), ss 26, 35.

[88.02] Overview

An alteration of articles is usually made by special resolution (for special resolution, see s 564), but an alteration to the maximum number of shares that a company may issue may be made by ordinary resolution. Section 85(2) provides that the articles of a company with a share capital may state the maximum number of shares that the company may issue.

The articles may also be altered informally through the unanimous assent of the members, and agreement to such an alteration can be inferred from conduct. See *Re the Sherlock Holmes International Society Ltd (No 2)* [2017] 2 BCLC 14.

For limitations on alterations of articles, see ss 87, 92 and 623.

Notice of the alteration must be given to the Registrar of Companies for registration within 15 days after the date on which the alteration takes effect. The specified form is Form NAA1.

As to contravention, for 'responsible person', see s 3. A level 3 fine is HK$ 0 to HK$ 10,000: Criminal Procedure Ordinance (Cap 221), s 113B and Schedule 8.

For transitional and saving arrangements for alteration of company's objects, certain conditions in memorandum of association and alteration of articles by special resolution, see Cap 622 Schedule 11 ss 6, 7 and 8.

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89. Alteration of company's objects

(1) This section applies to an alteration of the objects of a company as stated in the company's articles.

(2) The company may, by special resolution of which notice has been given to all the members of the company (including members who are not entitled to such notice under the company's articles), alter the objects by—

(a) abandoning or restricting any of the objects; or

(b) adopting any new object that could lawfully have been contained—

(i) in the case of a company formed and registered under this Ordinance, in the company's articles when the articles were registered; or

(ii) in the case of an existing company, in the company's memorandum of association when the memorandum was registered.

(3) If a relevant company passes such a resolution, a notice of the resolution must also be given to all holders of the relevant debentures of the company, and the notice must be the same as the notice mentioned in subsection (2).

(4) For the purposes of subsection (3), if there is no provision regulating the giving of notice to the holders of the relevant debentures, the provisions of the company's articles regulating the giving of notice to members are to apply.

(5) If a relevant company passes a special resolution altering its objects, an application to cancel the alteration may be made to the Court in accordance with section 91, and if an application is made, the alteration does not have effect except in so far as it is confirmed by the Court.

(6) After passing a special resolution altering its objects—

(a) in the case of a relevant company, if no application is made under subsection (5), the company must, within 15 days after the end of the application period, deliver to the Registrar for registration the

documents specified in subsection (7);

(b) in the case of a relevant company, if an application is made under subsection (5), the company—

(i) must immediately give notice of that fact to the Registrar; and

(ii) within 15 days after the date of any Court order cancelling or confirming the alteration or, if an extension of time is granted under subsection (8), within the extended period, must deliver to the Registrar for registration an office copy of the order and, in the case of an order confirming the alteration, the documents specified in subsection (7); or

(c) in the case of a company other than a relevant company, the company must, within 15 days after the date of passing the resolution, deliver to the Registrar for registration the documents specified in subsection (7).

(7) The documents are—

(a) a notice of the alteration in the specified form; and

(b) a copy, certified by an officer of the company as correct, of the company's articles as altered.

(8) The Court may at any time by order extend the period for delivery of any documents under subsection (6)(b).

(9) If a company contravenes subsection (6), the company, and every responsible person of the company, commit an offence, and each is liable to a fine at level 3 and, in the case of a continuing offence, to a further fine of $ 300 for each day during which the offence continues.

(10) In this section—

relevant company (有關公司) means—

(a) a private company; or

(b) a company limited by guarantee that, immediately before the commencement date of this Division, was a private company as defined by section 2(1) of the predecessor Ordinance in force at that time;

relevant debentures (有關債權證) means any debentures, secured by a floating charge, that were issued or first issued before 15 February 1963 or that form part of the same series as any debentures so issued.

[89.01] History

This section is derived from s 8(1), (5), (7), (7A), (8) of the former Companies Ordinance (Cap 32) (which deal with alteration of objects in the memorandum of association).

For equivalent provisions:

1. UK: Companies Act 2006, ss 21 to 27;
2. Australia: Corporations Act 2001, s 136(2) to (6);
3. Singapore: Companies Act (Chapter 50), s 33.

[89.02] Overview

A special resolution is required for alteration of the company's objects. For special resolution see s 564.

Unlike the UK Companies Act 2006, s 22 and the Australian Corporations Act 2001, s 136(3), there is nothing in this section or elsewhere in Cap 622 permitting entrenchment provisions in the company's articles which require conditions to be met or procedures to be complied with for amendment or repeal of articles more restrictive than a special resolution. Thus, an article which required a larger majority than 75 per cent would not be valid. (*Ayre v Skelsey's Adamant Cement Co Ltd* (1904) 20 TLR 587; affirmed on other grounds (1905) 21 TLR 464 (CA)).

Notice of the passing of the resolution by a relevant company (as defined in subs (10)) must be given to holders of relevant debentures (as to which see definition in subs (10)).

If a relevant company passes such resolution, application to the Court to cancel the alteration can be made under s 91 by qualifying members.

Notice of the resolution must be given to the Registrar by a relevant company (as defined in subs (10)) within 15 days after the end of the application period for cancellation (for specified form see Form NAA2) and, if application to the Court has been made, notice of that fact must be immediately given to the Registrar.

As to contravention, for 'responsible person', see s 3. A level 3 fine is from HK$ 0 to $ 10,000.

For transitional and saving provisions relating to special resolutions to alter objects made under s 8 of the former Ordinance, see Cap 622 Schedule 11 Part 3 ss 6 and 7.

90. Alteration of certain articles by existing company

(1) Subject to subsection (2), this section applies to an alteration of any provision of the articles of an existing company if the provision—

(a) was, immediately before the commencement date of

this Division, contained in the company's memorandum of association (whether registered before, on or after 31 August 1984); and

(b) could lawfully have been contained in the company's articles instead of in the memorandum of association when the memorandum was registered.

(2) This section does not apply if any provision of the articles of an existing company—

(a) was, immediately before the commencement date of this Part, contained in the company's memorandum of association (whether registered before, on or after 31 August 1984); and

(b) provides for or prohibits the alteration of any provision mentioned in subsection (1).

(3) An existing company may by special resolution alter any provision mentioned in subsection (1).

(4) If a relevant company passes such a resolution, an application to cancel the alteration may be made to the Court in accordance with section 91, and if an application is made, the alteration does not have effect except in so far as it is confirmed by the Court.

(5) After passing a resolution under subsection (3)—

(a) in the case of a relevant company, if no application is made under subsection (4), the company must within 15 days after the end of the application period, deliver to the Registrar for registration the documents specified in subsection (6);

(b) in the case of a relevant company, if an application is made under subsection (4), the company—

(i) must immediately give notice of that fact to the Registrar; and

(ii) within 15 days after the date of any Court order cancelling or confirming the alteration or, if an extension of time is granted under subsection (7), within the extended period, must deliver to the Registrar for registration an office copy of the order and, in the case of an order confirming the alteration, the documents specified in subsection (6); or

(c) in the case of a company other than a relevant company, the company must, within 15 days after the date of passing the resolution, deliver to the

Registrar for registration the documents specified in subsection (6).

(6) The documents are—

(a) a notice of the alteration in the specified form; and

(b) a copy, certified by an officer of the company as correct, of the company's articles as altered.

(7) The Court may at any time by order extend the period for delivery of any documents under subsection (5)(b).

(8) If a company contravenes subsection (5), the company, and every responsible person of the company, commit an offence, and each is liable to a fine at level 3 and, in the case of a continuing offence, to a further fine of $ 300 for each day during which the offence continues.

(9) This section does not authorize any variation or abrogation of the special rights of any class of members.

(10) In this section—

relevant company (有關公司) means—

(a) a private company; or

(b) a company limited by guarantee that, immediately before the commencement date of this Division, was a private company as defined by section 2(1) of the predecessor Ordinance in force at that time.

[90.01] History

This section is derived from ss 8(1), (5) and 25A(1), (2), (3), (3A), (4) of the former Companies Ordinance (Cap 32).

For equivalent provisions:

1. UK: Companies Act 2006, ss 21 to 27;
2. Australia: Corporations Act 2001, s 136(2) to (6);
3. Singapore: Companies Act (Chapter 50), s 137.

[90.02] Overview

The section applies to existing companies at the commencement of Cap 622. It restates s 25A of the former Companies Ordinance (Cap 32) (Power to alter conditions in memorandum which could have been contained in articles). The section does not apply if any such provision of the articles provides for or prohibits the alteration of any such provision. It is also subject to s 92 (Certain alterations not binding on members) and, in the case of class rights, s 623.

Having passed the resolution to alter the articles, in the case of a relevant company (as defined in subs (10)) the procedure for application to the Court to cancel the alteration under s 91 applies. Subsections 5(a) and (b) are applicable to a relevant company, subs (5)(c) applies to a company other than a relevant company. The notice of alteration form is Form NAA3. As to contravention, for 'responsible person' see s 3. For level 3 fines see commentary under s 89.

91. Application to Court to cancel alteration

(1) An application under section 89(5) to cancel an alteration of the objects of a company may be made—

(a) by the holders of at least 5% in aggregate of the number of the issued shares in the company or any class of the company's issued share capital or, if the company is not limited by shares, by at least 5% of the company's members; or

(b) by the holders of at least 5% in value of the company's debentures that are mentioned in the definition of ***relevant debentures*** in section 89(10).

(2) An application under section 89(5) may be made on behalf of the persons mentioned in subsection (1)(a) or (b) by any one or more of them appointed in writing by all of them for the purpose.

(3) An application under section 90(4) to cancel an alteration of a provision of the articles of an existing company may be made by the holders of at least 5% in aggregate of the number of the issued shares in the company or any class of the company's issued share capital or, if the company is not limited by shares, by at least 5% of the company's members.

(4) An application under section 90(4) may be made on behalf of the persons mentioned in subsection (3) by any one or more of them appointed in writing by all of them for the purpose.

(5) An application under section 89(5) or 90(4) may only be made within 28 days after the date of passing the relevant special resolution.

(6) On an application under section 89(5) or 90(4), the Court—

(a) may cancel or confirm the alteration (either wholly or in part), on any terms and conditions it thinks fit;

(b) may adjourn the proceedings so that an arrangement may be made to its satisfaction for the purchase of the interests of dissentient members; and

(c) may give any directions and make any order that it

thinks expedient for facilitating or carrying into effect any such arrangement.

[91.01] History

This section is derived from s 8(2), (3), (4) of the former Companies Ordinance (Cap 32).

For an equivalent provision in Singapore in relation to memorandum of association, see Companies Act (Chapter 50), s 33(5).

[91.02] Overview

The Court is the Court of First Instance (s 2(1)). In the event of a challenge being made to the resolution which has been passed to amend the objects of a relevant company, (Ie, a private company or company limited by guarantee which immediately before the commencement of Division 2 was a private company: s 89(10)) s 91 provides for various procedures which must be followed by the challengers (such a challenge must be made within 28 days of the passage of the resolution (Per s 91(5) and pursuant to ss 89(5) and 90(4)) notice must be given to the Registrar). The application is made by petition: RHC Ord 102 r 5(1)(a),(b). Before a resolution can be challenged in the Court of the First Instance, the holders of at least 5% in aggregate of the number of issued shares of the company must support the application to have the alteration cancelled. Where the company is not limited by shares, at least 5% of the company's members must approve of the challenge to the amendment. A challenge may also be initiated by the holders of at least 5% of the company's debentures if they are secured by a floating charge and either issued before February 1963 or form part of the same series so issued. In such circumstances, the court has wide powers when presented with a challenge to the change of the objects clause. Thus, pursuant to s 91(6), the court is empowered to make the following orders:

1. to cancel or confirm the alteration, either wholly or in part, and on such terms and conditions as it deems fit;
2. to adjourn the proceedings so that a satisfactory arrangement may be made for the purchase of the interests of dissenting members; and
3. to give such directions as are appropriate to facilitate or carry out any arrangement for the purchase of the dissenting shareholders' interests.

92. Certain alterations not binding on members

(1) Despite any provision in a company's articles, a person who is a member of the company is not bound by any alteration of the articles that takes effect after the date on which the person became a member, if and so far as the alteration—

(a) requires the person to take or subscribe for more

shares than the number of shares held by the person on the date on which the alteration takes effect;

(b) in any way increases the person's liability as at that date to contribute to the company's share capital; or

(c) in any way increases the person's liability as at that date to pay money to the company.

(2) Subsection (1) does not apply if the person agrees in writing before, on or after the alteration taking effect to be bound by the alteration.

[92.01] History

This section is derived from s 25 of the former Companies Ordinance (Cap 32).

[92.02] Overview

Subject to the limitations set out in s 87(2) to (5), generally a company may amend, delete or add to the provisions of its articles by passing a special resolution in accordance with ss 88 to 90. An important statutory exception to this power is provided by this section, which prohibits any alteration to the articles which requires a member to subscribe for more shares than that member had already subscribed for at the date the alteration takes effect, or which in any way increases the liability of the member to contribute to the share capital of the company or to pay money to the company. This prohibition also covers changes in class rights which would have a similar effect upon the member of such a class. (See further, ss 182, 183, 193 and 623). However, any such changes can be made where the member has agreed, in writing, to take up additional shares or to increase the member's liability to contribute to the share capital or to pay money to the company.

Changes which fall short of the conduct prohibited by this section may yet be considered to be unfairly prejudicial to the interests of a member and such changes may therefore come within the terms of s 725A. The power to alter the company's articles must be exercised *bona fide* for the benefit of the company as a whole. (See *Re Hong Kong Spinning, Weaving and Dyeing Co Ltd* (1917) 12 HKLR 1. A different approach was taken by the High Court of Australia in *Gambotto v WCP Ltd* (1995) 182 CLR 432 (HCA). See also Overview to s 87).

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93. Company must incorporate alteration into articles

(1) If an alteration is made to a company's articles, the company must incorporate the alteration in every copy of the articles issued on or after the date on which the alteration takes effect.

(2) If a company contravenes subsection (1), the company, and every responsible person of the company, commit an offence,

and each is liable to a fine at level 3.

[93.01] History

This section is derived from s 27 of the former Companies Ordinance (Cap 32).

[93.02] Overview

Members are entitled to copies of articles on request: see s 97. All copies issued after an alteration must incorporate the alteration. Where there are many alterations the company should have the articles reprinted.

As to contravention, in subs (2) for 'responsible person', see s 3.

A level 3 fine is from HK$ 0 to HK$ 10,000: see Criminal Procedure Ordinance (Cap 221), s 113B and Schedule 8.

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94. Alteration affecting status of private company

(1) If a private company alters its articles so that the articles no longer comply with section 11(1)(a), the company ceases to be a private company on the date on which the alteration takes effect.

(2) In addition to the documents required under section 88(5), the company must, within 15 days after the date on which the alteration takes effect, deliver to the Registrar for registration—

(a) a notice of the change of the company's status in the specified form; and

(b) a copy (certified by an officer of the company to be true) of the company's annual financial statements that are—

(i) prepared in accordance with section 379; and

(ii) prepared for the financial year immediately before the financial year in which the alteration takes effect.

(3) If a company contravenes subsection (2)(a), the company, and every responsible person of the company, commit an offence, and each is liable to a fine at level 3 and, in the case of a continuing offence, to a further fine of $ 300 for each day during which the offence continues.

(4) If a company contravenes subsection (2)(b), the company, and every responsible person of the company, commit an offence,

provides for the registration of the notification of payment, satisfaction, release or cessation and of a certified copy of any instrument evidencing the payment, etc (See Companies Bill Second Phase Consultation Paper Draft May 2010, pp 92–93).

The specified form for the notification is NM2. A fee of HK$ 190 is payable for the application: Companies (Fees) Regulation (Cap 622K), Sch 4 Item 3(b).

For transitional and saving provisions, see Overview to s 333.

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346. Extension of time for registration

(1) The Court may, on application by the company or registered non-Hong Kong company or by a person interested in the charge, order that—

(a) the registration period specified in section 335(5), 336(6), 338(3), 339(4), 340(5), 341(4) or 342(6) be extended;

(b) the time required for registration by section 80 or 82 of the predecessor Ordinance, or that section as extended by section 91 of that Ordinance, having a continuing effect under Schedule 11 be extended; or

(c) the time required for registration by section 91(5) of the predecessor Ordinance having a continuing effect under Schedule 11 be extended.

(2) The Court may make an order under subsection (1) on any terms and conditions that the Court thinks just and expedient.

(3) The Court must not make an order unless the Court is satisfied that—

(a) the failure specified in subsection (5)—

(i) was accidental;

(ii) was due to inadvertence or to some other sufficient cause; or

(iii) is not of a nature to prejudice the position of creditors or members of the company or registered non-Hong Kong company; or

(b) it is just and equitable to grant the relief on other grounds.

(4) If—

(a) the Court makes an order under subsection (1) in relation to a charge or debenture; and

(b) the failure specified in subsection (5) is rectified within the extended period or time,

any liability already incurred for an offence under the offence provision specified in subsection (6) in relation to the registration of the charge or debenture is extinguished.

(5) The failure is—

(a) in the case of subsection (1)(a), a failure to deliver a statement as required under Division 2, 3 or 4, or any accompanying instrument, within that registration period;

(b) in the case of subsection (1)(b), a failure to deliver—

(i) the particulars as required under section 80 or 82 of the predecessor Ordinance having a continuing effect under section 63(2), 64(2), 65(2) or 66(2) of Schedule 11 within that time; or

(ii) a statement as required under section 80 or 82 of the predecessor Ordinance having a continuing effect under section 63(4)(a), 64(4)(a), 65(4) or 66(4) of Schedule 11, or any accompanying instrument, within that time; or

(c) in the case of subsection (1)(c), a failure to deliver—

(i) the particulars as required under section 91(5) of the predecessor Ordinance having a continuing effect under section 67(2) of Schedule 11 within that time; or

(ii) a statement as required under section 91(5) of the predecessor Ordinance having a continuing effect under section 67(4) of Schedule 11, or any accompanying instrument, within that time.

(6) The offence provision is—

(a) in the case of subsection (1)(a), section 337(2), 338(5), 339(6), 340(7), 341(7) or 343(1);

(b) in the case of subsection (1)(b), section 81 or 82 of the predecessor Ordinance having a continuing effect under Schedule 11; or

(c) in the case of subsection (1)(c), section 91(6) of the predecessor Ordinance having a continuing effect under Schedule 11.

[346.01] History

This section is derived ss 86 and 91(1) and (5) of the former Companies Ordinance (Cap 32).

For equivalent provisions:

1. UK: Companies Act 2006, s 873;
2. Australia: Corporations Act 2001, s 266(4);
3. Singapore: Companies Act (Chapter 50), s 137.

[346.02] Overview

Save in relation to criminal liability for failures specified in subs (5) (see below), there is no substantial difference between this section and its predecessor, s 86 of the former Companies Ordinance (Cap 32).

Where the Court is satisfied that the omission to register a charge in due time was:

1. accidental;
2. due to inadvertence or to some other sufficient cause;
3. not of a nature to prejudice the position of creditors or shareholders of the company; or
4. on other grounds just and equitable to grant relief,

then the court may extend the time for registration on such terms as it considers just and expedient. There have been about 10 applications for extension of time each month in the past.

The application for an extension of time for registration may be made to the Court of First Instance by the company or a registered non-Hong Kong company or any person interested. The application is made by originating summons: RHC Ord 102 r 2(1).

As to the circumstances in which it may be 'just and equitable' to grant relief, see *Re MIG Trust Ltd* [1933] Ch 542; 102 LJ Ch 179 (CA); *Re Braemar Investments Ltd* [1989] Ch 54; *Confiance v Timespan Images Ltd* [2005] 2 BCLC 693.

The Court will not make an order extending time once a winding up has been commenced unless there are exceptional circumstances, because the interests of the unsecured creditors in the property of the company will have vested under insolvency law. (See *Braemar Investments Ltd (above), and Ali v Top Marques Car Rental Ltd* [2006] EWHC 109 (Ch)). In circumstances where a winding up order is almost certain or imminent and the application satisfies one of the four requirements set out above, the proper course is to make an order for an extension but subject to the proviso described below. If grounds are shown to the Court that an extension order ought not to have been made for one of the four requirements, an application to set aside such an order should be granted. Otherwise the extension order, subject to the proviso described below (which allows persons who, in the event of a liquidation, are prejudiced by the extension order to apply to the Court

to set aside the extension) is the proper course. (See *Barclays Bank Plc v Stuart London Ltd* [2001] 2 BCLC 316 (CA)).

It is not necessary in every case for the borrower company to file evidence as to its solvency and prospects of being wound up. (See *Re Kosoku Office Supplies Ltd* [2011] 2 HKLRD 281; *Hong Kong Asia Management Ltd v Registrar of Companies* [2017] HKCU 2865 (unreported, HCMP 2177/2017, 10 November 2017)).

The standard condition now imposed by an order for extending time originates in the decision of Clauson J in *Re LH Charles & Co Ltd* [1935] WN 15. Essentially, the condition provides that the extension order shall not prejudice the rights of others acquired before the registration is actually effected. The rights intended to be preserved by this condition are rights acquired against the company's property between the expiration of the five weeks and the extended time allowed by the Court. This is usually stated as x days after the commencement of winding up if a winding up is anticipated. Thus, if before the late registration the company has gone into liquidation, the liquidators' right to distribute all the assets of the company between its creditors is a right acquired against the company's property and is protected by the proviso. (See further *Watson v Duff Morgan (Holdings) Ltd* [1974] 1 WLR 450; *Re Ashpurton Estate* [1983] Ch 110, [1982] 3 All ER 665 (CA); *Sun Hung Kai Bank Ltd v Attorney General* [1986] HKLR 587, [1986] HKCU 266 (CA); *Re Chantry House Development Plc* [1990] BCLC 813; *Exeter Trust Ltd v Screenways Ltd* [1991] BCLC 888 (CA); and see *Barclays Bank plc v Stuart Landon Ltd* [2001] EWCA 140; *The Building & Loan Agency (Asia) Ltd v Joy Rich Development Ltd* [2014] HKCU 2126 (unreported, HCMP 1887/2012, 11 September 2014); *Re Joy Rich Development Ltd* [2016] HKCFI 597, [2016] HKCU 815) (it was only rights acquired during the proviso period that acquired priority).

Subsection (4) provides that if the Court makes an extension order and the failure is rectified within the extended period or time, any liability already incurred for an offence is extinguished. This is different from the previous position under s 86(2) of the former CO, whereby the Court, in making an extension order, could direct that it should not have the effect of relieving the company or its officers of any liability already incurred.

For transitional and saving provisions, see Overview to s 333.

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347. Rectification of registered particulars

(1) The Court may, on application by the company or registered non-Hong Kong company or by a person interested in the charge, order that—

(a) an omission or misstatement of any particular in any of the following be rectified—

(i) a statement of the particulars of a charge, or any accompanying instrument, delivered for registration under—

(A) Division 2 or 3;

(B) section 80 or 82 of the predecessor Ordinance, or that section by virtue of section 91 of that Ordinance, having a continuing effect under section 63(4)(a), 64(4)(a), 65(4) or 66(4) of Schedule 11; or

(C) section 91(5) of the predecessor Ordinance having a continuing effect under section 67(4) of Schedule 11;

(ii) a statement of the particulars of an issue of debentures, or a statement of the particulars of commission, allowance or discount, delivered for registration under—

(A) Division 4;

(B) section 80 or 82 of the predecessor Ordinance, or that section by virtue of section 91 of that Ordinance, having a continuing effect under section 63(4)(a), 64(4)(a), 65(4) or 66(4) of Schedule 11; or

(C) section 91(5) of the predecessor Ordinance having a continuing effect under section 67(4) of Schedule 11;

(iii) a notification, or any accompanying instrument, under section 345;

(iv) a memorandum under section 85 of the predecessor Ordinance; or

(b) an omission or misstatement of any of the following be rectified—

(i) any particular with respect to a charge delivered for registration before the commencement date of this section under section 80, 82 or 91(5) of the predecessor Ordinance;

(ii) any particular with respect to a charge delivered for registration under section 80, 82 or 91(5) of the predecessor Ordinance having a continuing effect under section 63(2), 64(2), 65(2), 66(2) or 67(2) of Schedule 11.

(2) The Court may make an order under subsection (1) on any terms and conditions that the Court thinks just and expedient.

(3) The Court must not make an order unless the Court is satisfied that—

(a) the omission or misstatement—

(i) was accidental;

(ii) was due to inadvertence or to some other sufficient cause; or

(iii) is not of a nature to prejudice the position of creditors or members of the company or registered non-Hong Kong company; or

(b) it is just and equitable to grant the relief on other grounds.

(4) The Court may make an order to rectify an omission or misstatement of any particular in any accompanying instrument mentioned in subsection (1)(a)(i) or (iii) to the extent as permitted by common law rules and equitable principles.

[347.01] History

This section is derived ss 86 and 91(1) and (5) of the former Companies Ordinance (Cap 32).

For equivalent provisions:

1. UK: Companies Act 2006, s 873;
2. Australia: Corporations Act 2001, s 274;
3. Singapore: Companies Act (Chapter 50), s 137.

[347.02] Overview

Under the former Companies Ordinance (Cap 32), the Court's power to rectify registered particulars was included in s 86 with extension of time for registration. In Cap 622, the rectification of registered particulars is given a separate section.

The circumstances in which the Court may make an order are the same as under s 346.

Application to the Court is made by originating summons: RHC O 102 r 2(1).

[347.03] Rectification of accompanying instrument

Section 347(1)(a)(i) also provides that the Court may order rectification of an omission or misstatement of any particular in any accompanying instrument delivered for registration. The accompanying instrument is the copy of the instrument (if any) creating or evidencing the charge that is required to be delivered

to the Registrar for registration together with the statement of the particulars of the charge: see ss 335, 336, 338, 339. Rectification of the charge instrument is provided for in s 347 since a copy of the instrument is now registered on the register of charges. This ensures that where there is any correction of the particulars of the charge on the register, there can also be correction of the charge instrument to ensure that the details on the register are consistent.

Section 347(4) provides that the court may order rectification of the charge instrument under s 347 only to the extent as permitted by common law rules and equitable principles. Accordingly, the general law rules on rectification of contractual documents apply. (On the scope of rectification under the general law, see eg *Agip SpA v Navigazione Alta Italia SpA* [1984] 1 Lloyd's Rep 353). Section 347 does not create a new cause of action or provide a new ground for rectification of the original instrument, but instead provides a procedure for correcting an original document to the extent that it does not reflect the true agreement of the parties, or, in other words, a summary procedure for rectification of an instrument creating or evidencing a charge. (*Re Capital Sino Investments Ltd* [2015] 1 HKLRD 818; [2015] 1 HKC 563).

Rectification under s 347 includes rectification of the original instrument (and not only the copy delivered for registration), and ordinarily the parties to the instrument must be joined as parties to the application for rectification. (*Re Capital Sino Investments Ltd* (above)).

Division 6

Notice to Registrar of Enforcement of Security

348. Notice of appointment of receiver or manager

(1) If a person obtains an order for the appointment of a receiver or manager of the property of a company or the charged property of a registered non-Hong Kong company, or appoints such a receiver or manager under the powers contained in an instrument, the person must, within 7 days after the date of the order or of the appointment under those powers, deliver a statement of that fact to the Registrar for registration.

(2) A statement under subsection (1) must include—

(a) the name and address of the person appointed as receiver or manager; and

(b) the number of that person's identity card, or if that person does not have an identity card, the number and issuing country of any passport held by that person.

(3) A statement under subsection (1)—

(a) must be in the specified form; and

(b) must be accompanied by the prescribed fee.

(4) If a person contravenes subsection (1), the person commits an offence and is liable to a fine at level 3 and, in the case of a continuing offence, to a further fine of $ 300 for each day during which the offence continues.

[348.01] History

This section is derived ss 87(1) and 91(1) and (2) of the former Companies Ordinance (Cap 32).

For equivalent provisions:

1. UK: Companies Act 2006, s 871;
2. Australia: Corporations Act 2001, s 427;
3. Singapore: Companies Act (Chapter 50), s 221(1) and (2).

[348.02] Overview

The section is similar to s 87 of the former Companies Ordinance (Cap 32), save that it does not cover a mortgagee entering into possession (which is now in a separate section s 349). It provides that within 7 days of a receiver or manager being appointed a statement must be delivered to the Registrar and that on payment of the required fee, notice will be entered in the register of charges. The statement must be in the specified form (NM5) and include the name, address and identity card number (in the absence of such a number, the number and issuing country of any passport held). The fee is $ 40: see Companies (Fees) Regulation (Cap 622K), Sch 4 Part 1 Item 3(c).

For definition of manager, see s 333(1).

If any person fails to notify the Registrar of the appointment of a receiver or manager, he is liable to a level 3 fine (ie HK$ 0 to HK$ 10,000) and for continued default to a daily fine of $ 300.

For transitional and saving provisions, see Overview to s 333.

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349. Notice of mortgagee entering into possession of property

(1) If a person enters into possession of the property of a company, or the charged property of a registered non-Hong Kong company, as mortgagee, the person must, within 7 days after the date of entering into possession, deliver a statement of that fact to the Registrar for registration.

(2) A statement under subsection (1) must include—

(a) if the person is a natural person—

(i) the person's name and address; and

(ii) the number of the person's identity card, or if the person does not have an identity card, the number and issuing country of any passport held by the person; or

(b) if the person is a body corporate, its name and the address of its registered or principal office.

(3) A statement under subsection (1)—

(a) must be in the specified form; and

(b) must be accompanied by the prescribed fee.

(4) If a person contravenes subsection (1), the person commits an offence and is liable to a fine at level 3 and, in the case of a continuing offence, to a further fine of $ 300 for each day during which the offence continues.

[349.01] History

This section is derived ss 87(2), (3), (6), (7) and 91(1) and (2) of the former Companies Ordinance (Cap 32).

The subsections dealing with a mortgagee in possession were added to the section in the 1984 amendments following a recommendation of the Companies Law Revision Committee's Report on Company Law, 1973, para 4.10. That recommendation followed a similar recommendation in the Report of the Jenkins Committee, 1962, para 306(k), (because, instead of appointing a receiver, a chargee might go into possession himself) which does not appear to have been picked up in other Common Law jurisdictions. There does not appear to be any equivalent provision in the UK, Australia or Singapore.

[349.02] Overview

The specified form for the statement is NM3. The fee for the notice is $ 40: see Companies (Fees) Regulation (Cap 622K), Sch 4, Part 1, Item 3(c).

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

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350. Notice of cessation of appointment of receiver or manager or mortgagee going out of possession of property, etc

(1) This section applies to—

(a) a person—

(i) whose particulars are required to be included in a statement delivered to the Registrar under section 348(1); or

(ii) whose particulars were, before the commencement date of section 348, required to be included in a notice delivered to the Registrar under section 87(1) of the predecessor Ordinance; and

(b) a person—

(i) whose particulars are required to be included in a statement delivered to the Registrar under section 349(1); or

(ii) whose particulars were, before the commencement date of section 349, required to be included in a notice delivered to the Registrar under section 87(2) of the predecessor Ordinance.

(2) If the person mentioned in subsection (1)(a) ceases to act as receiver or manager, the person must, within 7 days after the date of the cessation, deliver a statement of the cessation to the Registrar for registration.

(3) If the person mentioned in subsection (1)(b) goes out of possession of the property or charged property, the person must, within 7 days after going out of possession, deliver a statement of that fact to the Registrar for registration.

(4) If there is any change to the particulars of the person included in the statement or notice, the person must, within 15 days after the date of the change, deliver a statement of that change to the Registrar for registration.

(5) Subsection (4) does not apply if—

(a) in the case of a person mentioned in subsection (1)(a)—

(i) the person has ceased to act as receiver or manager; and

(ii) the person has delivered a statement of the cessation to the Registrar under subsection (2) or has, before the commencement date of section 348, given notice of the cessation under section 87(4) of the predecessor Ordinance; or

(b) in the case of a person mentioned in subsection (1)(b)—

(i) the person has gone out of possession of the property or charged property; and

(ii) the person has delivered a statement of that fact to the Registrar under subsection (3) or has, before the commencement date of section 349, given notice of that fact under section 87(4) of the predecessor Ordinance.

(6) A statement under subsection (2), (3) or (4) must be in the specified form.

(7) If a person contravenes subsection (2), (3) or (4), the person commits an offence and is liable to a fine at level 3 and, in the case of a continuing offence, to a further fine of $ 300 for each day during which the offence continues.

[350.01] History

This section is derived ss 87(4) and 91(1) and (2) of the former Companies Ordinance (Cap 32).

For equivalent provisions:

1. UK: Companies Act 2006, s 871(2);
2. Australia: Corporations Act 2001, s 427(4);
3. Singapore: Companies Act (Chapter 50), s 221(2).

[350.02] Overview

The section applies where notice of appointment of receiver or manager or of a mortgagee entering into possession of the property of a company or the charged property of a non-Hong Kong company and where a similar notice was given under the former Companies Ordinance (Cap 32) prior to 3 March 2014 and the receiver or manager has ceased to act or the mortgagee has gone out of possession. In that event the receiver, manager or mortgagee must deliver a statement of the cessation or going out of possession. The statement must be in the specified form. (Ie, NM4 for notice of mortgagee going out of possession and NM6 for notice of cessation of appointment of receiver or manager). There is no fee. Note that subs (4) requires that, if there is any change to the particulars of the person included in the statement or notice (presumably this refers to the statement or notice given under ss 348 and 349), a statement of that change must be given to the Registrar in Form NM7.

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

For transitional and saving provisions see Overview to s 333.

Company's and Registered Non-Hong Kong Company's Records and Register of Charges

351. Obligation to keep copies of instruments creating charges

(1) A company must keep at its registered office, or at a place prescribed by regulations made under section 657—

(a) a copy of every instrument creating a charge required to be registered by the company under this Part; and

(b) a copy of every instrument creating a charge required to be registered by the company under Part III of the predecessor Ordinance.

(2) A registered non-Hong Kong company must keep at its principal place of business in Hong Kong, or at a place prescribed by regulations made under section 356—

(a) a copy of every instrument creating a charge required to be registered by the company under this Part; and

(b) a copy of every instrument creating a charge required to be registered by the company under Part III of the predecessor Ordinance.

(3) Where—

(a) a series of debentures is issued by a company or registered non-Hong Kong company;

(b) the debentures contain a charge required to be registered by the company or registered non-Hong Kong company under this Part or under Part III of the predecessor Ordinance; and

(c) the terms of the debentures are the same,

the company or registered non-Hong Kong company is to be regarded as having complied with subsection (1) or (2) in relation to the debentures if it keeps a copy of one of the debentures in accordance with that subsection.

(4) A company or registered non-Hong Kong company—

(a) must, within 15 days after a copy of an instrument mentioned in subsection (1) or (2) is first kept at a place, notify the Registrar of the place; and

(b) must, within 15 days after there is a change in the place where a copy of such an instrument is kept, notify the Registrar of the change.

(5) A notification under subsection (4)(a) or (b) must be in the specified form.

(6) Subsection (4)(a) does not require a company or registered non-Hong Kong company to notify the Registrar of the place at which a copy of an instrument is kept—

(a) if, in the case of a copy that came into existence on or after the commencement date of this section, it has at all times been kept at the company's registered office, or the registered non-Hong Kong company's principal place of business in Hong Kong; or

(b) if—

(i) immediately before that commencement date, the company or registered non-Hong Kong company kept a copy of the instrument for the purposes of section 88 of the predecessor Ordinance; and

(ii) on and after that commencement date, that copy is kept for the purposes of subsection (1) or (2) at the place at which it was kept immediately before that commencement date.

(7) If subsection (1), (2) or (4) is contravened, the company or registered non-Hong Kong company, and every responsible person of the company or registered non-Hong Kong company, commit an offence, and each is liable to a fine at level 4 and, in the case of a continuing offence, to a further fine of $ 700 for each day during which the offence continues.

[351.01] History

This section is derived ss 88(1) and 91 of the former Companies Ordinance (Cap 32).

For equivalent provisions:

1. UK: Companies Act 2006, s 875;
2. Australia: Corporations Act 2001, s 271;
3. Singapore: Companies Act (Chapter 50), s 138.

[351.02] Overview

The section covers both local companies and registered non-Hong Kong companies. Under the former CO, s 88 applied to local companies and by s 91 the provisions in Part III of the former CO Registration of Charges was applied to non-Hong Kong companies.

A company must keep a copy of every instrument creating a charge required to be registered at the Companies Register.

The regulations made under ss 356 (in relation to company charges) and 657 (in relation to company records generally) are the Company Records (Inspection and Provision of Copies) Regulation (Cap 622I). The place prescribed is a place in Hong Kong.

For contravention, for 'responsible person', see s 3. A level 4 fine is HK$ 0 to HK$ 25,000.

For transitional and saving provisions, see Overview to s 333.

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352. Obligation of company to keep register of charges

(1) A company must keep a register of charges—

(a) at the company's registered office; or

(b) at a place prescribed by regulations made under section 657.

(2) A company—

(a) must enter in its register of charges—

(i) every charge specifically affecting property of the company; and

(ii) every floating charge on the whole or part of the company's property or undertaking; and

(b) must enter in its register of charges the following particulars in respect of every charge specified in paragraph (a)(i) and (ii)—

(i) the amount secured by the charge;

(ii) a description of the property charged;

(iii) except in the case of securities to bearer, the names of the persons entitled to the charge.

(3) If a company contravenes subsection (1) or (2), the company, and every responsible person of the company, commit an offence, and each is liable to a fine at level 4 and, in the case of a continuing offence, to a further fine of $ 700 for each day during which the offence continues.

(4) If an officer of the company knowingly and wilfully authorizes or permits the omission of an entry required to be made under subsection (2), the officer commits an offence and is liable to a fine at level 5.

[352.01] History

This section is derived ss 89(1), (2), (4) and (5) of the former Companies Ordinance (Cap 32).

For equivalent provisions:

1. UK: Companies Act 2006, s 891;
2. Australia: Corporations Act 2001, s 271;
3. Singapore: Companies Act (Chapter 50), s 138.

[352.02] Overview

A company must keep a register of charges. The charges in this context are wider than that referred to under the earlier Divisions of Part 8, which deal with specified charges as defined in s 334.

For the location of the register see subs (1)(a) and (b). The regulations made under s 657 are the Company Records (Inspection and Provision of Copies) Regulation (Cap 622I).

While it may be kept at the company's registered office or at some other office of the company, in practice, the work is often entrusted to professional registrars and the register is kept at their offices. The Registrar of Companies must be informed of its location and of any change in its location: see s 354. The specified form is Form NR2.

If a company fails to keep a register of charges, or to enter in the register the required particulars, or is in breach of the provisions concerning its location, the company and every responsible person (see s 3) is liable to a level 4 fine (ie, HK$ 0 to HK$ 25,000).

Furthermore, an officer of the company who knowingly and wilfully authorises or permits the omission of any entry required by this section is liable to a level 5 fine (ie HK$ 0 to HK$ 50,000).

For transitional and saving provisions, see Overview to s 333.

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353. Obligation of registered non-Hong Kong company to keep register of charges

(1) A registered non-Hong Kong company must keep a register of charges—

(a) at the company's principal place of business in Hong Kong; or

(b) at a place prescribed by regulations made under section 356.

(2) A registered non-Hong Kong company—

(a) must enter in its register of charges—

(i) every charge created by the company on property in Hong Kong of the company; and

(ii) every charge on property in Hong Kong that is acquired by the company; and

(b) must enter in its register of charges the following particulars in respect of every charge specified in paragraph (a)(i) and (ii)—

(i) the amount secured by the charge;

(ii) a description of the property charged;

(iii) except in the case of securities to bearer, the names of the persons entitled to the charge.

(3) Subsection (2) does not apply to a charge on property if the property was not in Hong Kong when the charge was created by, or the property was acquired by, the registered non-Hong Kong company.

(4) If a registered non-Hong Kong company contravenes subsection (1) or (2), the company, and every responsible person of the company, commit an offence, and each is liable to a fine at level 4 and, in the case of a continuing offence, to a further fine of $ 700 for each day during which the offence continues.

(5) If an officer of the registered non-Hong Kong company knowingly and wilfully authorizes or permits the omission of an entry required to be made under subsection (2), the officer commits an offence and is liable to a fine at level 5.

[353.01] History

This section is derived ss 89(1), (2) and 91(1), (3) and (6) of the former Companies Ordinance (Cap 32).

For an equivalent provision see (UK) Companies Act 2006, s 1052 and (UK) Overseas Companies (Execution of Documents and Registration of Charges) Regulations 2009.

[353.02] Overview

A registered non-Hong Kong company must keep a register of charges generally (not just specified charges). The regulations referred to in subs (1)(b) are the Company Records (Inspection and Provision of Copies) Regulation (Cap 622I). The place prescribed is a place in Hong Kong.

The obligation to register does not apply to a charge on property if the property

was not in Hong Kong when the charge was created by, or the property was acquired by, the registered non-Hong Kong company: subs (3).

On contravention, for 'responsible person' see s 3. A level 4 fine is HK$ 0 to HK$ 25,000. If an officer of the registered non-Hong Kong company knowingly and wilfully authorises or permits the omission of an entry required to be made under subs (2), the officer omits an offence and is liable to a level 5 fine, ie HK$ 0 to HK$ 50,000.

For transitional and saving provisions, see Overview to s 333.

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354. Notification of place where register of charges is kept

(1) A company or registered non-Hong Kong company must notify the Registrar of the place at which the register of charges is kept. The notice must be in the specified form and delivered to the Registrar for registration within 15 days after the register is first kept at that place.

(2) A company or registered non-Hong Kong company must notify the Registrar of any change (other than a change of the address of the company's registered office or registered non-Hong Kong company's principal place of business in Hong Kong) in the place at which the register of charges is kept. The notice must be in the specified form and delivered to the Registrar for registration within 15 days after the change.

(3) Subsection (1) does not require a company or registered non-Hong Kong company to notify the Registrar of the place at which the register of charges is kept—

(a) if, in the case of a register that came into existence on or after the commencement date of this section, it has at all times been kept at—

(i) the company's registered office; or

(ii) the registered non-Hong Kong company's principal place of business in Hong Kong; or

(b) if—

(i) immediately before that commencement date, the company or registered non-Hong Kong company kept a register for the purposes of section 89 of the predecessor Ordinance; and

(ii) on and after that commencement date, that register is kept as a register of charges for the purposes of section 352(1) or 353(1) at the

place at which it was kept immediately before that commencement date.

(4) If subsection (1) or (2) is contravened, the company or registered non-Hong Kong company, and every responsible person of the company or registered non-Hong Kong company, commit an offence, and each is liable to a fine at level 4 and, in the case of a continuing offence, to a further fine of $ 700 for each day during which the offence continues.

[354.01] History

This section is derived ss 89(3) and (4) and 91(1) and (3)(a) of the former Companies Ordinance (Cap 32).

For an equivalent provision, see UK Companies Act 2006, s 877(3).

[354.02] Overview

The specified form for notification is NR2.

Notification is not required in the circumstances mentioned in subs (3).

On contravention, for responsible person, see s 3. A level 4 fine is HK$ 0 to HK$ 25,000.

For transitional and saving provisions, see Overview to s 333.

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355. Right to inspect

(1) A member or creditor of a company is entitled, on request made in the prescribed manner and without charge, to inspect, in accordance with regulations made under section 657—

(a) the copies kept by the company under section 351(1); and

(b) the register of charges kept by the company under section 352(1).

(2) A member or creditor of a registered non-Hong Kong company is entitled, on request made in the prescribed manner and without charge, to inspect, in accordance with regulations made under section 356—

(a) the copies kept by the company under section 351(2); and

(b) the register of charges kept by the company under section 353(1).

(3) Any other person is entitled, on request made in the prescribed manner and on payment of a prescribed fee, to inspect, in accordance with regulations made under section 356 or 657—

(a) the copies kept by a company or registered non-Hong Kong company under section 351(1)(a) or (2)(a); and

(b) the register of charges kept by a company or registered non-Hong Kong company under section 352(1) or 353(1).

(4) In this section—

prescribed (訂明) means prescribed by regulations made under section 356 or 657.

[355.01] History

This section is derived ss 90(1) and 91(1) of the former Companies Ordinance (Cap 32).

For equivalent provisions:

1. UK: Companies Act 2006, s 877, 1136 and the Companies (Company Records) Regulations 2008;
2. Australia: Corporations Act 2001, s 271, 271(3) and (4);
3. Singapore: Companies Act (Chapter 50), s 138(3) and (3A).

[355.02] Overview

The right to inspect applies to copies of instruments kept by the company under s 351(1) and (2) and to entries in the company's register of charges kept under s 352(1) and (2).

A member or creditor is entitled to inspection, on request made in the prescribed manner and without charge, in accordance with the regulations made under s 356. The regulations made under s 356 are the Company Records (Inspection and Provision of Copies) Regulation (Cap 622I). The Regulation prescribes in rather more detail than previously the procedure for inspection and requests and provision of copies.

Any other person is entitled to inspection on request made in the prescribed manner and on payment of the prescribed fee in accordance with regulations made under s 356 or s 657. The regulations referred to are the Company Records (Inspection and Provision of Copies) Regulation (Cap 622I) as mentioned above. Although the Regulation has a Part on the provision of copies this only applies where the provision in the Ordinance includes a right to the provision of copies. Although some commentators have suggested that the availability of the right to inspect the instruments of charge required to be registered with the Companies Registry under

Part 8 may lead to inferred notice of the terms of the charge, (see comment on this in the Overview to s 335) as the doctrine of constructive notice was developed in the context of public documents which were required to be filed in the Companies Registry, a public registry, it is doubtful whether the ability to inspect the copies of instruments creating charges registered in the Companies Registry assists subsequent lenders.

For transitional and saving provisions, see Overview to s 333.

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356. Financial Secretary may make regulations for purposes of this Division

(1) The Financial Secretary may make regulations—

(a) prescribing a place at which—

(i) copies of instruments creating charges are to be kept by a registered non-Hong Kong company under section 351; or

(ii) a register of charges is to be kept by a registered non-Hong Kong company under section 353;

(b) providing for the obligations of a registered non-Hong Kong company to make the copies and the register available for inspection under section 355;

(c) prescribing the fees for the purposes of section 355(3); and

(d) prescribing any other thing that is required or permitted to be prescribed under this Division in respect of those copies and that register.

(2) Regulations made under subsection (1)(a) may—

(a) prescribe a place other than the registered non-Hong Kong company's principal place of business in Hong Kong;

(b) prescribe a place—

(i) by reference to the place at which the registered non-Hong Kong company keeps any other records; or

(ii) in any other way;

(c) provide that section 351 or 353 is not complied with by keeping the copies, or the register of charges, at a place prescribed in the regulations unless conditions prescribed in the regulations are met; and

(d) prescribe more than one place for the purpose specified in subsection (1)(a)(i) or (ii).

(3) Regulations made under subsection (1)(b) may—

(a) make provision as to the time, duration and manner of inspection;

(b) prescribe the manner in which a request for inspection is to be made; and

(c) define what may be required of the registered non-Hong Kong company as regards the nature, extent and manner of extracting or presenting any information for the purposes of inspection.

(4) Regulations made under subsection (1) may provide that—

(a) if a registered non-Hong Kong company contravenes any of the regulations, an offence is committed by—

(i) the company; and

(ii) every responsible person of the company;

(b) a person who commits an offence mentioned in paragraph (a) is liable to a fine not exceeding level 5 and, in the case of a continuing offence, to a further fine not exceeding $ 1,000 for each day during which the offence continues;

(c) the Court may, in prescribed circumstances—

(i) by order compel an immediate inspection of the copies and the register of charges; and

(ii) make any order as to the time, duration and manner of inspection; and

(d) if the copies, or the register of charges, are kept at the office of a person other than the registered non-Hong Kong company concerned, an order mentioned in paragraph (c) may be made against that other person and that other person's officers and other employees.

(5) Nothing in any provision of this Ordinance or in the regulations made under this section is to be construed as preventing a registered non-Hong Kong company—

(a) from providing more extensive facilities than are required by the regulations; or

(b) if a fee may be charged, from charging a lesser fee than that prescribed or none at all.

[356.01] History

This section is new.

[356.02] Overview

This section is the authority for the Financial Secretary to make regulations about the matters specified. The Company Records (Inspection and Provision of Copies) Regulation (Cap 622I) has been made under this section.

PART 9

ACCOUNTS AND AUDIT

Division 1

Preliminary

357. Interpretation

(1) In this Part—

annual consolidated financial statements (周年綜合財務報表) means the consolidated statements required to be prepared under section 379(2);

annual financial statements (周年財務報表) means the statements required to be prepared under section 379(1);

auditor's report (核數師報告) means the report required to be prepared under section 405;

directors' report (董事報告) means—

(a) the report required to be prepared under section 388(1); or

(b) the consolidated report required to be prepared under section 388(2);

financial statements (財務報表) means annual financial statements or annual consolidated financial statements;

Regulation (《規例》) means the regulations made under sections 451 and 452;

summary financial report (財務摘要報告) means a financial report prepared under section 439.

(2) In this Part, a reference to the reporting documents for a financial year is a reference to all of the following—

(a) the financial statements for the financial year;

(b) the directors' report for the financial year;

(c) the auditor's report on those financial statements.

(3) For the purposes of this Part, a body corporate is a wholly

owned subsidiary of another body corporate if it has only the following as members—

(a) that other body corporate;

(b) a wholly owned subsidiary of that other body corporate;

(c) a nominee of that other body corporate or such a wholly owned subsidiary.

[357.01] History

This section is a new provision. Save for 'summary financial report', the words defined were not provided for under s 2 of the former Companies Ordinance (Cap 32).

[357.02] Overview

The definition of 'summary financial report' differs from that in s 2 of the former Companies Ordinance. The previous provision covered reports for listed companies which complied with s 141CF(1). The new provision provides for that which is specifically prepared for the purpose of s 439. Section 439 provides that the directors may prepare a financial report in summary form. The section applies to all types of companies.

Subsection (3) in relation to a body corporate being a wholly owned subsidiary of another body corporate is derived from s 124(3) of the former Companies Ordinance (Cap 32).

The Regulation means the regulations made under ss 451 and 452.

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358. Application in relation to financial year beginning on or after commencement date of relevant provision etc

(1) Each of the following sections applies in relation to a financial year beginning on or after the commencement date of that section—

(a) section 359;

(b) section 379;

(c) section 388;

(d) section 389;

(e) section 429;

(f) section 430;

(g) section 439.

(2) Each of the following sections applies in relation to

accounting records for a financial year beginning on or after the commencement date of that section—

(a) section 373;

(b) section 374;

(c) section 376;

(d) section 377.

(3) Each of the following sections applies in relation to financial statements for a financial year beginning on or after the commencement date of that section—

(a) section 380;

(b) section 381;

(c) section 382;

(d) section 383;

(e) section 436;

(f) section 449.

(4) Section 387 applies in relation to a statement of financial position for a financial year beginning on or after the commencement date of that section.

(5) Each of the following sections applies in relation to a directors' report for a financial year beginning on or after the commencement date of that section—

(a) section 390;

(b) section 391.

(6) Each of the following sections applies in relation to an appointment of an auditor for a financial year beginning on or after the commencement date of that section—

(a) section 394;

(b) section 395;

(c) section 396;

(d) section 398;

(e) section 399.

(7) Each of the following sections applies in relation to a person appointed as auditor for a financial year beginning on or after the commencement date of that section—

(a) section 402;

(b) section 403;

(c) section 404.

(8) Section 411 applies in relation to a general meeting of which

[685.02] Overview

The effective date of amalgamation is the date specified in the certificate of amalgamation issued under s 685(3): subs (1), (2).

On the date of amalgamation, each amalgamating company will cease to exist and the new amalgamated company will take on all benefits and will be subject to all liabilities of the amalgamating companies: subs (3). But the amalgamating company will not be struck from the register, cf *Singapore JX Holdings Inc & Anor v Singapore Airlines Ltd* [2016] SGHC 212. In a situation where two or more of the amalgamating companies have floating charges subsisting over their respective assets in favour of different security holders, there will be a question of priorities between the competing security holders over the assets of the amalgamated company, which may result in unfairness between the security holders. For this reason, the security holders are required to give their written consent to the amalgamation under ss 680(2)(d)(ii) and 681(2)(d)(ii).

On or after the date of the amalgamation, legal proceedings by or against the amalgamating companies may be continued by or against the new company, whereas convictions, orders, judgments, rulings and agreements concerning the amalgamating companies may be enforced by or against the new company: subs (4).

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686. Court may intervene in amalgamation proposal in certain cases

(1) If the Court is satisfied that giving effect to an amalgamation proposal would unfairly prejudice a member or creditor of an amalgamating company or a person to whom an amalgamating company is under an obligation, it may, on application by the member, creditor or person made before the date on which the amalgamation becomes effective, make any order it thinks fit in relation to the amalgamation proposal.

(2) Without limiting subsection (1), the Court may make an order—

(a) directing that effect must not be given to the amalgamation proposal;

(b) modifying the amalgamation proposal in the manner specified in the order; or

(c) directing the amalgamating company or its directors to reconsider the amalgamation proposal or any part of that proposal.

(3) Without limiting subsection (1), the Court may also make an order directing the amalgamated company, or any other party to the proceedings, to purchase shares of a member of an

amalgamating company who would be unfairly prejudiced by the amalgamation proposal.

(4) On making an application for the purposes of subsection (1), the applicant must deliver to the Registrar for registration a notice of the application in the specified form.

(5) If the Registrar receives a notice under subsection (4), he or she must withhold registration of the documents mentioned in section 684(1) unless the Court otherwise directs or the application is dismissed by the Court or is withdrawn.

(6) If an order is made under this section, every company in relation to which the order is made must deliver an office copy of the order to the Registrar for registration within 7 days after the order is made.

(7) If a company contravenes subsection (6), the company, and every responsible person of the company, commit an offence, and each is liable to a fine at level 3 and, in the case of a continuing offence, to a further fine of $300 for each day during which the offence continues.

[686.01] History

This is a new section. It is derived from s 226 of the New Zealand Companies Act 1993; and the Singapore Companies Act (Chapter 50), s 215H.

There are no equivalent provisions in the UK or Australia.

[686.02] Overview

This section gives the Court jurisdiction to make orders in relation to the amalgamation proposal where it is satisfied that an amalgamation proposal may be unfairly prejudicial to a member or creditor of an amalgamating company or a person to whom the amalgamating company is under an obligation.

An application to the Court may be made by the creditor, member or person to whom the company is under an obligation and must be made before the date on which the amalgamation becomes effective: subs (1). The application is made by originating summons: RHC Ord 102, r 2(1), (2). On making an application to the Court, ie issue of the originating summons, the applicant must deliver to the Registrar for registration notice of the application to the Court in the specified form: subs (4). The specified form is Form NAMA6 'Notice of Application to Court to Intervene in Amalgamation Proposal'. Upon receiving the said notice, the Registrar must withhold registration of documents submitted under s 681(4), unless otherwise directed by the Court or unless the application is dismissed or withdrawn: subs (5). The Court may make any order it deems fit including, not giving effect to the amalgamation, varying the proposal, directing that parties reconsider the proposal or part thereof: subs (2). It may also order the buy-out of

the shares of the unfairly prejudiced party in the amalgamating company: subs (3). An office copy of any order made by the Court under this section must be delivered by the company concerned to the Registrar within 7 days of the date of the order: subs (6). On contravention, for 'responsible person' see s 3. A level 3 fine is a maximum fine of HK$10,000 (Sch 8, Criminal Procedure Ordinance (Cap 221)) together with a daily fine of HK$300 for each day the offence continues: subs (7).

Division 4

Compulsory Acquisition after Takeover Offer

Subdivision 1

Preliminary

687. Interpretation

In this Division—

nominee (代名人), in relation to a company that is a member of a group of companies, includes a nominee on behalf of another company that is a member of the group.

[687.01] History

This is a new section. It is derived from s 168(3)(a) of the former Companies Ordinance (Cap 32)

There is no equivalent provision elsewhere.

[687.02] Overview

The section restates the provision from which it is derived.

688. Application of Division to convertible securities and debentures

(1) This Division applies in relation to debentures of a company that are convertible into shares in the company, or to securities of a company that are convertible into, or entitle the holder to subscribe for, shares in the company, as if those debentures or securities were shares of a separate class of the company. A reference to a holder of shares, and to shares being allotted, is to be read accordingly.

(2) In this Division, a reference to 90% in number of the shares of any class is—

(a) in the case of securities mentioned in subsection (1), a reference to 90% of the number of those securities; and

(b) in the case of debentures mentioned in subsection (1), a reference to 90% of the total amount payable on those debentures.

[688.01] History

Subsection (1) is derived from s 168(2) of the former Companies Ordinance (Cap 32). Subsection (2) is derived from the Ninth Schedule of the former CO (Cap 32).

[688.02] Overview

The section applies the provisions of Division 4 to convertibles securities and debentures.

689. Takeover offer

(1) For the purposes of this Division, an offer to acquire shares in a company is a takeover offer if—

(a) it is an offer to acquire all the shares, or all the shares of any class, in the company, except those that, at the date of the offer, are held by the offeror; and

(b) the terms of the offer are the same—

(i) where the offer does not relate to shares of different classes, in relation to all the shares to which the offer relates; or

(ii) where the offer relates to shares of different classes, in relation to all the shares of each class to which the offer relates.

(2) In subsection (1)—

shares (股份) means shares that have been allotted on the date of the offer.

(3) In subsection (1)(a), a reference to shares that are held by an offeror—

(a) includes shares that the offeror has contracted,

unconditionally or subject to conditions being satisfied, to acquire; but

(b) excludes shares that are the subject of a contract—

(i) entered into by the offeror with a holder of shares in the company in order to secure that the holder will accept the offer when it is made; and

(ii) entered into for no consideration and by deed, for consideration of negligible value, or for consideration consisting of a promise by the offeror to make the offer.

(4) For the purposes of subsection (1)(b), even though, in relation to all the shares, or all the shares of a class of shares, to which an offer relates, there is a difference in the value of consideration offered for the shares allotted earlier as against the value of consideration offered for those allotted later, the terms of the offer are to be regarded as the same in relation to all the shares concerned if—

(a) shares carry an entitlement to a particular dividend that other shares of the same class, by reason of being allotted at a different time, do not carry;

(b) the difference in value of consideration merely reflects that difference in entitlement to dividend; and

(c) but for the difference in the value of consideration, the terms of the offer would be the same in relation to all the shares concerned.

(5) For the purposes of subsection (1)(b), even though, in relation to all the shares, or all the shares of a class of shares, to which an offer relates, there is a difference in the form of consideration offered, the terms of the offer are to be regarded as the same in relation to all the shares concerned if—

(a) the law of a place outside Hong Kong precludes an offer of consideration in the form specified in the terms of the offer, or precludes it except after compliance by the offeror with conditions with which the offeror is unable to comply or that the offeror regards as unduly onerous;

(b) consideration in another form is offered to a person to whom an offer of consideration in the specified form is so precluded;

(c) the person is able to receive consideration in that

other form that is of substantially equivalent value; and

(d) but for the difference in the form of consideration, the terms of the offer would be the same in relation to all the shares concerned.

(6) Despite subsection (1), a takeover offer may include, among the shares to which it relates, shares that will be allotted after the date of the offer but before a date specified in the offer.

[689.01] History

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

For equivalent provisions:

1. UK: Companies Act 2006, ss 974 to 976;
2. Australia: Corporations Act 2001, s 414;
3. Singapore: Companies Act (Cap 50), s 215.

[689.02] Overview

This section clarifies the definition of 'takeover offer' and provides a definition for 'shares held by an offeror', which was not previously dealt with in the former Companies Ordinance (Cap 32).

Subsection (1) sets out the definition of a takeover offer. It must be an offer to acquire all the shares (or shares of any class) in the company except those that, at the date of the offer, are held by the offeror. In relation to all the shares to which the offer relates (or all the shares of the class to which the offer relates), the terms of the offer must be the same. For the meaning of 'shares to which the offer relates', see subs (6) and s 691.

Under subsection (3), 'shares that are held by an offeror' include shares that the offeror has contracted, unconditionally or conditionally to acquire, but exclude shares that are subject to a contract which is intended to secure that the holder of the shares will accept the offer when it is made and entered into for no consideration and by deed, for consideration of negligible value, or for consideration consisting of a promise by the offeror to make the offer.

[689.03] Transitional and saving arrangements

Note that pursuant to s 123 of Sch 11 to this Ordinance, where an acquisition offer is made before the commencement of this Division, s 168(1) to (3) and the Ninth Schedule of the former Companies Ordinance (Cap 32), will apply.

690. Non-communication etc does not prevent offer from being takeover offer

(1) Even though an offer to acquire shares is not communicated to a holder of shares, that does not prevent the offer from being a takeover offer for the purposes of this Division if—

(a) no Hong Kong address for the holder is registered in the company's register of members;

(b) the offer was not communicated to the holder in order not to contravene the law of a place outside Hong Kong; and

(c) either—

(i) the offer is published in the Gazette; or

(ii) the offer can be inspected, or a copy of it obtained, at a place in Hong Kong or on a website, and a notice is published in the Gazette specifying the address of that place or website.

(2) It is not to be inferred from subsection (1) that an offer that is not communicated to a holder of shares cannot be a takeover offer for the purposes of this Division unless the conditions specified in paragraphs (a), and (c) of that subsection are satisfied.

(3) Even though it is impossible or more difficult for a person, by reason of the law of a place outside Hong Kong, to accept an offer to acquire shares, that does not prevent the offer from being a takeover offer for the purposes of this Division.

(4) It is not to be inferred from subsection (3) that an offer that is impossible, or more difficult, for certain persons to accept cannot be a takeover offer for the purposes of this Division unless the reason for the impossibility or difficulty is the one mentioned in that subsection.

[690.01] History

This is a new section. It is derived from s 978 of the UK Companies Act 2006.

[690.02] Overview

Notwithstanding that an offer is not communicated to a holder of shares, it may still be considered a takeover offer if the conditions set out in subs (1)(a) to (c) are fulfilled.

691. Shares to which takeover offer relates

(1) For the purposes of this Division, if, after a takeover offer is made but before the end of the offer period, the offeror acquires, or contracts unconditionally to acquire, any of the shares to which the offer relates but does not do so by virtue of acceptances of the offer, those shares are not to be regarded as shares to which the offer relates. This subsection has effect subject to subsection (2).

(2) For the purposes of this Division, those shares are to be regarded as shares to which the takeover offer relates, and the offeror is to be regarded as having acquired or contracted to acquire them by virtue of acceptances of that offer, if—

(a) the value of the consideration for which the shares are acquired, or contracted to be acquired, at the time of the acquisition or contract, does not exceed the value of the consideration specified in the terms of that offer; or

(b) those terms are subsequently revised so that when the revision is announced, the value of the consideration for which the shares are acquired, or contracted to be acquired, at the time of the acquisition or contract, no longer exceeds the value of the consideration specified in those terms.

(3) For the purposes of this Division, shares that an associate of the offeror, or a nominee on the offeror's behalf, holds, or has contracted, unconditionally or subject to conditions being satisfied, to acquire, whether at the date of the takeover offer or subsequently, are not to be regarded as shares to which that offer relates, even if that offer extends to those shares. This subsection has effect subject to subsection (4).

(4) For the purposes of this Division, where, after a takeover offer is made but before the end of the offer period, an associate of the offeror, or a nominee on the offeror's behalf, acquires, or contracts unconditionally to acquire, any of the shares to which the offer relates, the shares are to be regarded as shares to which the offer relates if—

(a) the value of the consideration for which the shares are acquired, or contracted to be acquired, at the time of the acquisition or contract, does not exceed the value of the consideration specified in the terms of the offer; or

(b) those terms are subsequently revised so that when

the revision is announced, the value of the consideration for which the shares are acquired, or contracted to be acquired, at the time of the acquisition or contract, no longer exceeds the value of the consideration specified in those terms.

[691.01] History

This is a new section. It is derived from ss 977 and 979 of the UK Companies Act 2006.

[691.02] Overview

This section sets out the definition of 'shares to which the offer relates', which was not previously considered under the former CO (Cap 32). Such shares may include the following:

1. Shares which the offeror acquires or contracted to acquire other than by virtue of acceptances of the offer during the offer period unless the acquisition consideration exceeds the consideration specified in the terms of the offer: subs (2); and
2. Shares which the offeror acquires or contracted to acquire other than by virtue of acceptances of the offer during the offer period unless the acquisition consideration exceeds the consideration specified in the terms of the offer: subs (2); and

Shares that are allotted after the date of the offer but before a date specified in the offer can also be shares to which the offer relates: s 689(6).

For 'associate', see s 667. For 'nominee', see s 687.

692. Revised offer not to be regarded as fresh offer

For the purposes of this Division, a revision of the terms of an offer to acquire shares is not to be regarded as the making of a fresh offer if—

(a) the terms of the offer make provision for—

(i) their revision; and

(ii) acceptances on the previous terms to be treated as acceptances on the revised terms; and

(b) the revision is made in accordance with that provision.

[692.01] History

This is a new section added by this Ordinance. It is derived from s 974(7) of the UK Companies Act 2006.

[692.02] Overview

Under the former Companies Ordinance (Cap 32), there was no provision on revised offers to provide for unexpected changes of circumstances after the making of an offer. As a result, an offeror who wished to revise his offer had to make a fresh takeover offer and address the acceptances received under the old offer. Section 692 allows a revision of the terms of the offer without the need for a fresh offer if the terms of the original offer make provision for their revision and treat existing acceptances as acceptances on the revised terms.

Subdivision 2

'Squeeze-out'

693. Offeror may give notice to buy out minority shareholders

(1) If, in the case of a takeover offer that does not relate to shares of different classes, the offeror has, by virtue of acceptances of the offer, acquired, or contracted unconditionally to acquire, at least 90% in number of the shares to which the offer relates, the offeror may give notice to the holder of any other shares to which the offer relates that the offeror desires to acquire those shares.

(2) If, in the case of a takeover offer that relates to shares of different classes, the offeror has, by virtue of acceptances of the offer, acquired, or contracted unconditionally to acquire, at least 90% in number of the shares of any class to which the offer relates, the offeror may give notice to the holder of any other shares of that class to which the offer relates that the offeror desires to acquire those shares.

(3) If, in the case of a takeover offer that does not relate to shares of different classes, the offeror has, by virtue of acceptances of the offer, acquired, or contracted unconditionally to acquire, less than 90% in number of the shares to which the offer relates, the offeror may apply to the Court for an order authorizing the offeror to give notice to the holder of any other shares to which the offer relates that the offeror desires to acquire those shares.

(4) If, in the case of a takeover offer that relates to shares of

different classes, the offeror has, by virtue of acceptances of the offer, acquired, or contracted unconditionally to acquire, less than 90% in number of the shares of any class to which the offer relates, the offeror may apply to the Court for an order authorizing the offeror to give notice to the holder of any other shares of that class to which the offer relates that the offeror desires to acquire those shares.

(5) The Court may, on application under subsection (3) or (4), make the order if it is satisfied that—

(a) after reasonable enquiry, the offeror has been unable to trace one or more of the persons holding shares to which the takeover offer relates;

(b) had the person, or all those persons, accepted the takeover offer, the offeror would have, by virtue of acceptances of that offer, acquired, or contracted unconditionally to acquire, at least 90% in number of the shares, or the shares of any class, to which that offer relates; and

(c) the consideration offered is fair and reasonable.

(6) The Court must not make the order unless it is satisfied that it is just and equitable to do so having regard to all the circumstances and, in particular, to the number of holders of shares who have been traced but who have not accepted the takeover offer.

(7) If the Court makes an order authorizing the offeror to give notice to the holder of any shares, the offeror may give notice to that holder.

[693.01] History

This section is derived from the Ninth Schedule, Part 1, paras 1 and 2 of the former Companies Ordinance (Cap 32).

For equivalent provisions:

1. UK: UK Companies Act 2006, s 979;
2. Australia: Corporation Act 2001, s 414;
3. Singapore: Companies Act (Chapter 50), s 215.

[693.02] Overview

This section provides a mechanism for an offeror in a takeover offer to give notice to the remaining shareholders to which the offer relates of its intention to purchase

the remaining shares. This and the following sections in Subdivision 2 facilitate a takeover. Where nine-tenths have accepted the takeover offer, the dissentient minority may be forced to sell to the offeror.

Where the offeror has acquired more than the 90% threshold of the shares to which the offer relates, it may give notice to the remaining shareholders that the offeror desires to acquire their shares: subss (1), (2). For requirements of the notice, see s 694.

Under the former Companies Ordinance (Cap 32), there was no procedure for an offeror to apply for a court order authorising the giving of squeeze out notices for those takeover offers which failed to achieve the relevant threshold for giving of such notices, because of untraceable shareholders related to the offer. Subsections (3) to (7) provide for the mechanism which will apply if the offeror has been unable to trace the relevant shareholders after reasonable enquiry. The consideration offered must be fair and reasonable and the Court may not make an order unless it considers that it is just and equitable to do so having regard, in particular, to the number of shareholders who have been traced but have not accepted the offer.

The Court will only make such order where the offeror had been unable to locate one or more shareholders to which the offer relates and had such shareholders accepted the takeover offer, the offeror would have acquired at least the 90% threshold of the shares: subs (5).

For claim form and witness statement in support (which can be adapted) see (UK) 8(6) *Atkin's Court Forms*, 2nd edn (2010 Issue), pp 861–866.

For the meaning of 'shares to which the offer relates', see s 691.

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694. Notice to minority shareholders

(1) A notice to a holder of shares under section 693—

(a) must be given in the specified form; and

(b) must be given to the holder before whichever is the earlier of the following—

(i) the end of the period of 3 months beginning on the day after the end of the offer period of the takeover offer;

(ii) the end of the period of 6 months beginning on the date of the takeover offer.

(2) The notice must be given to the holder of shares—

(a) by delivering it personally to that holder in Hong Kong;

(b) by sending it by registered post to that holder to—

(i) an address of that holder in Hong Kong registered in the books of the company; or

(ii) if there is no such address, an address in Hong Kong supplied by that holder to the company for the giving of notice to that holder; or

(c) in the manner directed by the Registrar on an application made under subsection (3).

(3) An offeror may apply to the Registrar for directions regarding the manner in which the notice is to be given to a holder of shares if—

(a) there is no address of the holder in Hong Kong registered in the books of the company; and

(b) the holder has not supplied to the company an address in Hong Kong for the giving of notice to the holder.

(4) If the takeover offer gives the holder of shares a choice of consideration, the notice—

(a) must give particulars of the choices;

(b) must state that the holder may, within 2 months after the date of the notice, indicate the holder's choice by a letter sent to the offeror at an address specified in the notice; and

(c) must state which consideration specified in the offer will apply if the holder does not indicate a choice.

(5) If the takeover offer provides that the holder of shares is to receive shares in or debentures of the offeror, with an option to receive some other consideration to be provided by a third party instead, the offeror may indicate in the notice that the terms of the takeover offer include the option.

(6) If the offeror does not indicate in the notice that the terms of the takeover offer include the option, the offeror may offer in the notice a corresponding option to receive some other consideration to be provided by the offeror.

(7) For the purposes of subsection (5), consideration is to be regarded as being provided by a third party if it is made available to the offeror on terms that it is to be used by the offeror as consideration for the takeover offer.

[694.01] History

This section is derived from the Ninth Schedule, Part 1 of the former Companies Ordinance (Cap 32); and the UK Companies Act 2006, ss 980(1), (2) and 981(3), (4).

For equivalent provisions:

1. Australia: Corporation Act 2001, s 414;
2. Singapore: Companies Act (Chapter 50), s 215.

[694.02] Overview

The section provides the procedure and requirements for the offeror to give notice to buy out minority shareholders in a takeover offer.

The specified form for the notice is Form NRE1.

The notice must be given by personal delivery or registered post or in the manner as directed by the Registrar if directions are sought: subss (2) and (3).

For the contents of notice see subss (4) to (7).

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695. Offeror's right to buy out minority shareholders

(1) This section applies if a notice is given under section 693 to the holder of any shares.

(2) Unless the Court makes an order under subsection (3), the offeror is entitled and bound to acquire the shares on the terms of the takeover offer.

(3) The Court may, on application by the holder made within 2 months after the date on which the notice was given, order that—

(a) the offeror is not entitled and bound to acquire the shares; or

(b) the offeror is entitled and bound to acquire the shares on the terms specified in the order.

(4) For the purposes of subsection (2)—

(a) if the takeover offer falls within section 694(4), the terms of the takeover offer are to be regarded as including the particulars and statements included in the notice for the purposes of that section;

(b) if the takeover offer falls within section 694(5), the terms of the takeover offer are to be regarded as not including the option unless the offeror indicates otherwise in the notice; and

(c) if, within 2 months after the date of the notice, the holder of the shares, by a letter sent to the offeror at an address specified in the notice, exercises the corresponding option offered under section 694(6),

[697.01] History

This section is derived from the Ninth Schedule, Part 1 para 7 of the former Companies Ordinance (Cap 32); and the UK Companies Act 2006, s 981(7).

698. Company must hold consideration paid by offeror on trust

(1) On receiving any consideration under section 696(3)(b) in respect of any shares, the company must hold the consideration on trust for the person who, before the offeror acquired the shares, was entitled to them.

(2) If the consideration consists of any money, the company must deposit the money into a separate interest-bearing bank account.

(3) The company must not pay out or deliver the consideration to any person claiming to be entitled to it unless the person produces to the company—

(a) the share certificate or other evidence of title to the shares; or

(b) an indemnity to the company's satisfaction.

[698.01] History

This section is derived from the Ninth Schedule, Part 1 para 8 of the former Companies Ordinance (Cap 32); and the UK Companies Act 2006, ss 981(9) and 982(2), (3).

[698.02] Overview

The consideration paid by the offeror to the company for the buy out shares under s 696 is held on trust for the company for the dissenting shareholders: subs (1). Where this consists of money, it must be held in a separate, interest bearing account: subs (2). A dissenting shareholder wishing to collect his consideration for the buy out shares must first produce to the company, the share certificate or other evidence showing title to the shares or alternatively an indemnity to the company's satisfaction: subs (3).

699. Provisions supplementary to section 698

(1) This section applies if—

(a) the person entitled to the consideration held on trust under section 698(1) cannot be found;

(b) the company has made reasonable enquiries at reasonable intervals to find that person; and

(c) 12 years have elapsed since the consideration was received, or the company is wound up.

(2) The company, or if the company is wound up, the liquidator, must sell—

(a) any consideration other than cash; and

(b) any benefit other than cash that has accrued from the consideration.

(3) The company, or if the company is wound up, the liquidator, must pay into court a sum representing—

(a) the consideration so far as it is cash;

(b) the proceeds of any sale under subsection (2); and

(c) any interest, dividend or other benefit that has accrued from the consideration.

(4) The trust terminates on the payment being made under subsection (3).

(5) The expenses of the following may be paid out of the consideration held on trust—

(a) the enquiries mentioned in subsection (1)(b);

(b) the sale mentioned in subsection (2);

(c) the proceedings relating to the payment into court mentioned in subsection (3).

[699.01] History

This is a new section. It is derived from the UK Companies Act 2006, s 982(4), (5), (7) and (9).

[699.02] Overview

The section deals with a situation where the persons entitled to receive consideration held on trust for the holders of the buy out shares cannot be located, after reasonable and regular enquiries by the company, after a period of 12 years since payment of the consideration or where the company is wound up: subs (1).

In such a situation, the non-cash consideration and any benefit must be sold by the company or its liquidators and the proceeds of sale and cash consideration and any accrued benefit being paid into Court, upon which the trust is terminated: subs (4). Expenses identified in subs (5) may be settled out of the consideration.

Subdivision 3

'Sell-out'

700. Offeror may be required to buy out minority shareholders

(1) If, in the case of a takeover offer that does not relate to shares of different classes—

(a) the offeror has, by virtue of acceptances of the offer, acquired, or contracted unconditionally to acquire, some but not all of the shares to which the offer relates; and

(b) at any time before the end of the offer period, the shares in the company controlled by the offeror represent at least 90% in number of the shares in the company,

the holder of any shares to which the offer relates who has not accepted the offer before the end of that period may, by a letter addressed to the offeror, require the offeror to acquire those shares.

(2) If, in the case of a takeover offer that relates to shares of different classes—

(a) the offeror has, by virtue of acceptances of the offer, acquired, or contracted unconditionally to acquire, some but not all of the shares of any class to which the offer relates; and

(b) at any time before the end of the offer period, the shares in the company controlled by the offeror represent at least 90% in number of the shares of that class,

the holder of any shares of that class to which the offer relates who has not accepted the offer before the end of that period may, by a letter addressed to the offeror, require the offeror to acquire those shares.

(3) Rights given to the holder of any shares by this section to require an offeror to acquire the shares are only exercisable within 3 months after whichever is the later of the following—

(a) the end of the offer period;

(b) the date of the notice given to the holder under section 701.

(4) If the takeover offer gives the holder of shares a choice of consideration, that holder may indicate the holder's choice in the letter requiring the offeror to acquire the shares.

(5) In this section, a reference to shares controlled by an offeror is a reference to—

(a) shares that are held by the offeror, by an associate of the offeror or by a nominee on the offeror's behalf;

(b) shares that the offeror has, by virtue of acceptances of the takeover offer, acquired or contracted unconditionally to acquire; or

(c) other shares that the offeror, an associate of the offeror, or a nominee on the offeror's behalf, has acquired, or has contracted, unconditionally or subject to conditions being satisfied, to acquire.

[700.01] History

This section is derived from the Ninth Schedule, Part 2 paras 9 and 10 of the former Companies Ordinance (Cap 32); and the UK Companies Act 2006, ss 983 to 985.

[700.02] Overview

The section provides a mechanism for minority shareholders in a takeover offer to require the offeror to purchase their remaining shares, where specified conditions are met.

The threshold for triggering the right of a shareholder to require the offeror to buy his shares is set out in subs (1). The right only arises where the shares 'controlled' by the offeror represent at least 90% in number of the shares in the company: subs (1)(b). For the meaning of 'controlled' by the offeror, see subs (5).

The rights of the minority shareholder to be bought out will expire 3 months after:

1. the date on which the offer period ends; or
2. the date of the notice given under s 701, whichever period is later: subs (3).

For 'shares to which the offer relates', see s 691. For 'associate', see s 667. For 'nominee', see s 687.

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701. Offeror must notify minority shareholders of right to be bought out

(1) If the holder of any shares is entitled under section 700 to require an offeror to acquire the shares, the offeror must give notice to the holder of—

(a) the holder's rights under that section; and