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Hong Kong Business Associations Notes

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1. INTRODUCTION

A. HOW TO USE CONVERSION NOTES

The Hong Kong Business Associations Notes are formatted into a step-by-step guide, which you can use as a checklist in your exams to ensure that every element of the exam question is answered. You may find the Table of Contents to be a quick and useful overview of the law to be applied. You should also answer the exam question using the ILAC method, which will ensure your answer is comprehensive.

Issue State the legal issue relevant to the problem

Law Identify the relevant case law and legislation

Analysis Analyse and apply the law to the legal issue. This is the most important part, so ensure your legal analysis is very thorough.

Conclusion Form a conclusion based on your analysis and application of the law, giving some practical advice to the hypothetical client.

It is very important to spend time perfecting your analysis section, as this is the part that examiners are most interested in.



Do not worry if you reach the correct conclusion (there often isn't one clear answer) – examiners will give more weight to your legal analysis, and sometimes may even reward answers that propose an innovative and unconventional answer!

B. ABBREVIATIONS AND LEGISLATION

The Hong Kong Business Associations Notes will refer frequently to the following using abbreviations.

New CO	Companies Ordinance (Cap. 622)
Old CO	Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap. 32)
PO	Partnership Ordinance (Cap. 38)
BO	Bankruptcy Ordinance (Cap. 155)
BRO	Business Registration Ordinance (Cap. 310)
Articles	Articles of Association
Memorandum	Memorandum of Association
Model Articles	Companies (Model Articles) Notice (Cap.622H)

2. SOLE PROPRIETORSHIP

- A sole proprietorship (or a sole trader) is a business whereby an individual operates the business on his own account in his capacity as an individual, rather than by way of incorporating a company for forming a partnership with another individual.
- The sole proprietor will need to register as a business under the BRO and obtain a business registration certificate.
- A sole proprietor is personally liable and is not protected by limited liability (unlike with a company).

3. PARTNERSHIPS

A. NATURE OF PARTNERSHIPS

i. LEGAL STATUS

- A partnership is formed between two or more individuals as partners, who are joint owners.
- Each partner is personally liable for the partnership's obligations and liabilities (s 11 PO) and they are not protected by limited liability (unlike with a company). Such liability is joint and several (s 14 PO).
 - o Note that the Limited Partnerships Ordinance (Cap. 37) (**LPO**) allows for limited partnerships to be formed. Liability of a limited partner is limited to the amount of capital contributed to the firm at the time that limited partner joined the limited partnership (s 3(2) LPO). Restrictions on limited partnerships include:
 - Limited partners cannot manage the firm and cannot bind the other partners (s 5(1) LPO)
 - At least one partner must have unlimited liability (i.e. the general partner) (s 3(2) LPO)
- The partnership is not a separate legal person from its partners.

ii. FORMATION

- A partnership may be formed by contract – e.g. by each partner entering into a partnership agreement establishing the partnership. In considering whether a partnership exists, the court will consider, objectively, whether the parties intended to form a partnership (*Smith v Anderson* (1880) 15 Ch D 247; *Cox v Hickman* (1860) 8 HL Cas 268).
- Section 3(1) PO – “Partnership is the relation which subsists between persons carrying on a business in common with a view of profit” – this must exist in order for a partnership to arise.
 - o Partners must be carrying on a business together as partners – this is an essential requirement of s 3(1) of the PO and is supported by *Keith Spicer Ltd v Mansell* [1970] 1 All ER 462.
 - o The business must be carried on in common (i.e. one business rather than separate businesses)
- Factors in determining whether persons are in “partnership” (s 4 PO):
 - o joint or part ownership does not of itself create a partnership;



- sharing of gross returns does not of itself create a partnership;
- receipt by a person of a share of profits of a business is prima facie evidence that he is a partner unless there is an arrangement otherwise.
- *Chan Sau-kut v Gray and Iron Construction & Engineering Co. [1986] 1 HKLR 84* – court held that the following clauses in the contract were sufficient to give rise to a partnership:
 - Recital clause confirming parties wished to co-operate (i.e. business in common)
 - All parties would observe the terms of the project contract (i.e. joint obligations)
 - Establishment of a joint bank account (i.e. joint ownership)
 - Provisions for meetings and joint management
- The partnership is required to register as a business under the BRO and obtain a business registration certificate.

B. RIGHTS AND DUTIES OF THE PARTNERS

i. AMONG THE PARTNERS

The rights and duties of the partners as against each other will depend upon the PO and construction of the partnership agreement.

1) Rights and obligations

Subject to any contrary agreement in the partnership agreement, s 26 PO sets out the rights and obligations of the partners:

- all the partners are entitled to share equally in profits and contribute equally to losses;
- partnership must indemnify every partner in respect of payments and personal liabilities incurred in the ordinary course of the partnership's business;
- a partner making, for the purposes of the partnership, any actual payment or advance beyond the amount of capital which he has agreed to subscribe, is entitled to interest at the rate of 8% per annum;
- no interest is payable to a partner on the partnership capital contributed by them;
- every partner may take part in the management of the partnership business;
- remuneration is not payable to a partner for acting in the partnership business;
- all partners must consent to the appointment of a new partner; and
- any disputes as to ordinary partnership matters may be decided by a majority of the partners, but no change may be made in the nature of the partnership business without the consent of all existing partners.

2) Fiduciary duties of partners

- Partners owe fiduciary duties to each other, including under the PO.
 - Every partner must account to the firm for any benefit derived by him, without the consent of the other partners, from any transaction concerning the partnership or from any use by him of the partnership property, name, or business connection (s 31 PO)
 - If a partner, without the consent of the other partners, carries on any business of the same nature as and competing with that of the firm, he must account for and pay over to the firm all profits made by him in that business (s 32 PO)
 - *Kao Lee & Yip v Koo Hoi Yan Donald [2003] 2 HKC 113* – fiduciary duties include the duty to not place himself in a position where his or anyone else's interest would or may conflict with duties owed to the partnership, and the duty not to make a profit from his position.

ii. LIABILITIES OF PARTNERS TO THIRD PARTIES

1) Authority/liability of partners in contract

- Section 7 of the PO provides that every partner is an agent of the firm and his other partners for the purpose of the business of the partnership, and the acts of a partner in the normal course of business can bind the firm and the partners (i.e. if that partner has apparent or ostensible authority)



- o unless the partner actually does not have authority to so bind the partnership (i.e. lack of actual authority) and the contract counterparty is aware of that fact.
- A partner has apparent authority to act in the normal course of business of the firm even if that act is outside the actual authority given to him pursuant to the partnership agreement (*Mercantile Credit Co Ltd v Garrod* [1962] 3 All ER 1103).
- An agent who purports to contract on behalf of the principal without authority may be personally liable for damages to the contract counterparty, for breach of warranty of authority (*Collen v. Wright* (1857) 120 ER 241).

2) Credit contracts and holding out

- Everyone who, by words spoken or written or by conduct, represents himself, or who knowingly suffers himself to be represented, as a partner in a particular firm is liable as a partner to any one who has, on the faith of any such representation, given credit to the firm, whether the representation has or has not been made or communicated to the person so giving credit by or with the knowledge of the apparent partner making the representation or suffering it to be made (Section 16 of the PO).

3) Liability in tort

- Section 12 of the PO provides that the firm is liable therefor to the same extent as the partner for any wrongful act or omission of any partner acting in the ordinary course of the business of the firm or with the authority of his co-partners, which has caused loss or injury to any person.

C. DISSOLUTION

Under s 34 of the PO, subject to any contrary agreement, a partnership is dissolved:

- (a) if entered into for a fixed term, by the expiration of that term; or
- (b) if entered into for a single adventure or undertaking, by the termination of that adventure or undertaking; or
- (c) if entered into for an undefined time, by any partner giving notice to the other or others of his intention to dissolve the partnership.

Other than as set out in s 34 PO, a partnership can be dissolved:

- by bankruptcy, death, or charge (s 35 PO);
- any event occurs which makes it unlawful for the business of the firm to be carried on or for the members of the firm to carry it on in partnership (s 36 PO);
- by application to the court by a partner (s 37 PO).

4. COMPANIES

Why use companies?

- Limited liability
 - o Advantages
 - ◆ encourages passive investment
 - ◆ lower burden of monitoring
 - ◆ impersonalises shares for liquidity
 - ◆ encourages risk taking
 - o Disadvantages
 - ◆ moral hazard – limited liability companies externalise the risks onto third parties, such as creditors and tort claimants
- Perpetual succession – a company has no temporal limit on its existence, and is unaffected by underlying changes in membership
- Financing
 - o Unincorporated forms of business organization are denied the corporate advantages of the power to create a floating charge over its assets or to make a public issue of its shares.
- However, note that the cost, formality and continuing reporting obligations are much more complicated for companies.



A. FORMATION

i. INCORPORATION AND REGISTRATION

- Companies are formed through the process of incorporation. The requirements of incorporation are set out in the Ordinance.

1) Old CO

- Under the Old CO, a company is required to have both (a) Articles of Association and (b) Memorandum of Association when it is incorporated (sections 4 and 9 of the Old CO).
 - o Section 4(1) of the Old CO provides that any one or more persons may, for any lawful purpose, by signing his or their name or names on a Memorandum of Association (which must be printed in the English or Chinese language) and otherwise complying with the requirements in respect of registration, form an incorporated company, with or without limited liability.
 - o Section 15 of the Old CO further provides that a duly completed incorporation form shall be delivered to the Registrar for registration together with copies of the Memorandum and Articles, if any, certified to be a true copy of the original by a founder member.
 - o Section 11 of the Old CO provides that Articles of Association may adopt all or any of the regulations contained in Table A. In the case of a company limited by shares and registered after the commencement of this Ordinance, if Articles are not registered, or, if Articles are registered, in so far as the Articles do not exclude or modify the regulations contained in Table A, those regulations shall, so far as applicable, be the regulations of the company in the same manner and to the same extent as if they were contained in duly registered Articles.
 - o Requirements with respect to the content of the Memorandum are set out in section 5 of the Old CO which provides, amongst others, that the Memorandum of every company limited by shares or by guarantee must state the name of the company.

2) New CO

- Under the New CO, an incorporated company is only required to have Articles of Association (sections 75 and 98 of the New CO). There is no longer a need for a Memorandum of Association (this was previously required under the Old CO).
 - o Section 67 of the New CO provides that a company may only be formed for a lawful purpose and that any one or more persons may form a company by—
 - (a) each founding shareholder/member signing the Articles of the company intended to be formed; and
 - (b) delivering to the Registrar for registration—
 - (i) an incorporation form in the specified form; and
 - (ii) a copy of the Articles.
 - o A certificate of incorporation will thereafter be issued.
 - o Sections 81 to 85 of the New CO govern the information that must be included in the Articles such as company name. The Articles must contain the following provisions:
 - ◆ the company name (s 81 New CO)
 - ◆ whether the liability of the members is limited or unlimited (s 83 and 84 New CO)
 - ◆ details as to the initial share capital and maximum number of shares (s 85 New CO)
 - o Section 79 of the New CO provides that a company may adopt as its Articles any or all of the provisions of the model Articles prescribed for the type of company to which it belongs.
 - o Apart from the above, the Model Articles will apply to companies to the extent that the company's Articles do not displace the Model Articles (s 80 New CO).
 - ◆ Section 80 of the New CO provides that if the company's registered Articles do not prescribe any regulations for the company, on the incorporation of a limited company, the Model Articles that are prescribed for the type of company to which the company belongs and that are for the time being in force, so far as applicable, form part of the company's Articles in the same manner, and to the same extent, as if those Model Articles had been registered as the company's Articles.
 - ◆ If the company's registered Articles prescribe any regulations for the company, the Model Articles that are prescribed for the type of company to which the company belongs applies in so far as the Articles do not exclude or modify the Model Articles (section 80(3) of the New CO).
- Apart from the process of incorporation as detailed by the CO, a company must also be registered.



- This is because it is compulsory that every person carrying on business in Hong Kong be registered pursuant to section 5 of the BRO. In this connection, companies incorporated pursuant to the Companies Ordinance is deemed to be a person carrying on business and must therefore be registered (sections 2(1A) and 5(2) of the BRO).

ii. PROBLEMS RELATING TO INCORPORATION

- Directors and Secretaries:
 - A private company must have at least one director (section 454(1) New CO and section 153A (1) Old CO).
 - Every company shall have a secretary who (a) if an individual, ordinarily reside in Hong Kong; (b) if a body corporate, have its registered office or a place of business in Hong Kong (section 474 New CO and 154(1) Old CO).
 - A director of a company may be a company secretary of the company. However, the director of a private company having only one director must not also be a company secretary of the company. Furthermore, no private company having only one director may have as company secretary of the company a body corporate the sole director of which is the sole director of the private company (section 475 New CO and section 154 Old CO).
- Eligible members:
 - Section 28A of the Old CO provides that a body corporate cannot be a member of a company which is its holding company, and any allotment or transfer of shares in a company to its subsidiary shall be void.
 - Similarly section 113 of the New CO provides that a body corporate cannot be a member of a company of which the body corporate is a subsidiary; and any allotment or transfer of shares in a company to a body corporate that is a subsidiary of the company is void.
 - ◆ A body corporate is a subsidiary of another body corporate if that other body corporate is a holding company of it (section 15 of the New CO). A body corporate is a holding company of another body corporate if (a) it controls the composition of that other body corporate's board of directors; (b) it controls more than half of the voting rights in that other body corporate; or (c) it holds more than half of that other body corporate's issued share capital (section 13(1) of the New CO).
- Administrative matters:
 - A company must have a registered office in Hong Kong to which all communications and notices may be addressed (section 658 New CO and section 92 Old CO).
 - It used to be compulsory for a company to have a metallic common seal (section 93(1)(b) of the Old CO) but this is not optional (section 123 of the New CO).
 - A company must keep in the English or Chinese language a register of members (section 627 New CO and section 90 Old CO), a register of directors (section 641 New CO and section 158 Old CO) and register of company secretaries (section 648 New CO and section 158 Old CO).

iii. TYPES OF COMPANIES

- Only the following companies may be formed under the New CO:
 - a public company limited by shares;
 - a private company limited by shares;
 - a public unlimited company with a share capital;
 - a private unlimited company with a share capital;
 - a company limited by guarantee without a share capital.
- The New CO has abolished the following types of companies which used to be available under the Old CO:
 - unlimited companies without share capital; and
 - companies limited by guarantee with share capital (see section 4(4) of the Old CO).
 - ◆ However, such pre-existing companies formed under the Old CO can continue to operate under the New CO.



We hope you have enjoyed this short preview of the Hong Kong Business Associations Notes.

Don't forget to check out the Law Study Tips we have on our website at www.PCLLConversion.com!