

Hong Kong Company Law

Chartered Governance Qualifying Programme

Syllabus

The Hong Kong Chartered Governance Institute

Chartered Governance Qualifying Programme

Hong Kong Company Law

Part One Programme

Total study time: 200 hours

Introduction

The aim of this module is to provide a thorough grounding in, and knowledge and understanding of, the legal framework governing certain business organisations, with particular focus on the registered company. Where appropriate, the module covers relevant corporate governance topics and the relationship between company law and corporate governance.

Learning outcomes

After successful completion of this module you should be able to:

1. Demonstrate an understanding of the legal framework within which commercial organisations operate, their business structures and corporate personality.
2. Demonstrate an understanding of the roles and statutory duties of directors, as well as the composition and structure of the board.
3. Demonstrate an understanding of the internal rules and the external regulatory environment which companies are subject to regarding membership.
4. Apply relevant legislation, case law and best practice recommendations to legal and governance issues arising in complex scenarios relating to shares, capital maintenance and loans.
5. Apply appropriate judgement when presenting advice on structural and legal issues in a relevant form (corporate restructuring).

Module content

Section A: Sources of law, business structures and company formation <i>20% - 40 learning hours</i>	
LO.1: Demonstrate an understanding of the legal framework within which commercial organisations operate, their business structures and corporate personality	
Topic area	Learning areas
Sources of company law and governance	<ul style="list-style-type: none"> • The importance of legislation as a source of company law • The Companies Ordinance (Cap 622): <ul style="list-style-type: none"> • The structure, importance and evolution of the Companies Ordinance • Other notable related legislation including: <ul style="list-style-type: none"> • The Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap 32) • The Securities and Futures Ordinance (Cap 571) • The role of subordinate legislation, including: <ul style="list-style-type: none"> • establishing detailed rules • amending existing legislation • bringing primary law into force • The Listing Rules, the Code on Takeovers and Mergers and Share Buy-backs • Financial Services & Treasury Bureau • Official Receiver's Office, Companies Registry • The importance of case law as a source of company law • The importance of the constitution as a source of company law: <ul style="list-style-type: none"> • the relationship between company legislation and the company's constitution • The importance of contracts as a source of company law: <ul style="list-style-type: none"> • special rules relating to companies entering into contracts • Corporate governance codes and reports: <ul style="list-style-type: none"> • the relationship between company law and corporate governance • the role of company law and corporate governance reports • the role of Appendix 14 Corporate Governance Code and Corporate Governance Report of SEHK Listing Rules • International corporate governance principles, e.g. the G20/OECD Principles of Corporate Governance • Corporate governance and unlisted companies

Topic area	Learning areas
Business structures	<ul style="list-style-type: none"> • Sole proprietorships: <ul style="list-style-type: none"> • formation and operation • finance • dissolution • Partnerships: <ul style="list-style-type: none"> • ordinary partnerships: <ul style="list-style-type: none"> - the relationship between partners - the relationship between the partners and third parties - dissolution • Limited partnerships: <ul style="list-style-type: none"> • private fund limited partnerships • Limited Partnership Fund • Limited liability partnerships: <ul style="list-style-type: none"> • comparison of liability position • Companies, including classification of companies: <ul style="list-style-type: none"> • registered and unregistered companies • public and private companies • limited and unlimited companies • parent, holding, and subsidiary companies • Open-ended Fund Company • Share capital • Non-Hong Kong companies • Small companies • Charitable institutions as companies limited by guarantee • Re-registration
Incorporation and corporate personality	<ul style="list-style-type: none"> • Promotion and pre-incorporation contracts: <ul style="list-style-type: none"> • promotion of the company: <ul style="list-style-type: none"> - duties of a promoter • pre-incorporation contracts: <ul style="list-style-type: none"> - agreements to the contrary - binding the company • Incorporation of a registered company: <ul style="list-style-type: none"> • role of the Companies Registry and the Registrar of companies • the articles of association • application for registration and accompanying documentation: <ul style="list-style-type: none"> - proposed name of the company • submission and registration: <ul style="list-style-type: none"> - certificate of incorporation - business registration certificate

Topic area	Learning areas
<p>Incorporation and corporate personality (<i>cont.</i>)</p>	<ul style="list-style-type: none"> • Corporate personality: <ul style="list-style-type: none"> • distinguishing between legal and natural persons, and persons and individuals • the company as a person: <ul style="list-style-type: none"> - nationality, domicile, and residence - perpetual succession - contractual capacity - ownership of assets - distinction between a company and its business - commencing and defending legal proceedings - 'human' rights • Salomon v A Salomon & Co Ltd • Consequences of corporate personality, including: <ul style="list-style-type: none"> • disregarding corporate personality under statute • disregarding corporate personality under the common law, including: <ul style="list-style-type: none"> - piercing the corporate veil prior to Petrodel Resources Ltd v Prest - the modern approach to piercing the veil as established in Petrodel Resources Ltd v Prest • when courts can disregard corporate personality • use of conventional legal principles (e.g. establishing a duty of care) • Circumventing corporate personality via contract • Corporate liability: <ul style="list-style-type: none"> • personal liability: <ul style="list-style-type: none"> - civil liability - criminal liability • strict liability • vicarious liability • attribution: <ul style="list-style-type: none"> - attribution as a defence
<p>Legally binding the company</p>	<ul style="list-style-type: none"> • How companies enter into contracts, including: <ul style="list-style-type: none"> • optional use of the common seal • execution of documents • Constitution of a company: <ul style="list-style-type: none"> • defining the constitution of the company • Articles of association, including: <ul style="list-style-type: none"> • content of the articles • model articles

Topic area	Learning areas
<p>Legally binding the company (cont.)</p>	<ul style="list-style-type: none"> • class rights • interpretation of the articles • amending the articles • Constitution as a contract: <ul style="list-style-type: none"> • Contract under section 86 of the Companies Ordinance: <ul style="list-style-type: none"> - enforcing the section 86 contract - outsiders and outsider rights - internal irregularities • shareholders' agreements: <ul style="list-style-type: none"> - enforcement • Agency and the authority of agents: <ul style="list-style-type: none"> • ratification of an agent's acts • actual authority of an agent: <ul style="list-style-type: none"> - express actual authority - implied actual authority • apparent authority of an agent: <ul style="list-style-type: none"> - representation - reliance - alteration of position • Board authority: <ul style="list-style-type: none"> • section 117 of the Companies Ordinance • rule in Turquand's case

Section B: The board of directors	
<i>25% - 50 learning hours</i>	
LO.2: Demonstrate an understanding of the roles and statutory duties of directors, as well as the composition and structure of the board	
Topic area	Learning areas
Board of directors	<ul style="list-style-type: none"> • Defining a director • Legal status of a director • Types of director: <ul style="list-style-type: none"> • de facto and de jure directors • shadow directors • executive and non-executive directors • alternate directors • nominee directors • reserve directors • managing directors • Specific board roles: <ul style="list-style-type: none"> • splitting the roles of CEO and chairperson • Appointment of directors: <ul style="list-style-type: none"> • who is and is not eligible to act as a director • appointment process • the register of directors • defective appointments • directors' service contracts • Directors' remuneration: <ul style="list-style-type: none"> • directors' entitlement to remuneration • determination of directors' remuneration: <ul style="list-style-type: none"> - role and composition of the remuneration committee - how directors are remunerated • disclosure requirements relating to remuneration • members' rights to vote on directors' remuneration • Board structure and composition: <ul style="list-style-type: none"> • board structure and size: <ul style="list-style-type: none"> - unitary and two-tier boards • the role of board committees • board composition: <ul style="list-style-type: none"> - the split between executive and non-executive directors - board diversity • Vacation of office: <ul style="list-style-type: none"> • resignation of a director

Topic area	Learning areas
Board of directors (<i>cont.</i>)	<ul style="list-style-type: none"> • vacation in accordance with the articles: <ul style="list-style-type: none"> - retirement by rotation • Removal of a director: <ul style="list-style-type: none"> • removal under section 462 of Companies Ordinance • removal under the articles • Disqualification of a director: <ul style="list-style-type: none"> • the grounds for disqualification including: <ul style="list-style-type: none"> - conviction of an indictable offence - persistent breaches of company legislation - fraud or breach of duty during winding up - summary convictions relating to company legislation - conviction of certain offences abroad - unfitness in an insolvent company - expedient in the public interest - breach of competition law - participation in fraudulent trading - bankruptcy • Disqualification orders • Applying for leave to act whilst disqualified
Role of the board	<ul style="list-style-type: none"> • General functions of the board • Managerial powers of the board: <ul style="list-style-type: none"> • division of powers between the board and the members • delegation of powers • Rules relating to board meetings: <ul style="list-style-type: none"> • calling a meeting and notice • establishing a quorum • board decisions • minutes of meetings • Company secretary: <ul style="list-style-type: none"> • legal status of the company secretary • appointment and qualifications • role and powers: <ul style="list-style-type: none"> - authority of the company secretary as an agent
Directors' duties	<ul style="list-style-type: none"> • General directors' duties: <ul style="list-style-type: none"> • scope of general duties: <ul style="list-style-type: none"> - duty to act in good faith for the benefit of the company as a whole - duty to use powers for a proper purpose for the benefit of members as a whole

Topic area	Learning areas
Directors' duties (<i>cont.</i>)	<ul style="list-style-type: none"> - duty not to delegate powers except with proper authorisation and duty to exercise independent judgment - duty to exercise care, skill and diligence - duty to avoid conflicts between personal interests and interests of the company - duty not to enter into transactions in which the directors have an interest except in compliance with the requirements of the law - duty not to gain advantage from use of position as a director - duty not to make unauthorised use of company's property or information - duty not to accept personal benefit from third parties conferred because of position as a director - duty to observe the company's constitution and resolutions - duty to keep accounting records • Remedies for breach of duties • Partial codification of directors' duties • Avoiding liability for breach of the general duties, including: <ul style="list-style-type: none"> • obtaining consent, approval or authorisation of the members • exclusion and indemnity provisions • directors' insurance • relief from liability: <ul style="list-style-type: none"> - ratification under section 473 of the Companies Ordinance - relief from the court • Transactions requiring member approval: <ul style="list-style-type: none"> • service contracts • loans, quasi-loans, and credit transactions: <ul style="list-style-type: none"> - exceptions - consequences of contravention • remuneration and payments for loss of office

Section C: Membership of a company

10% – 20 learning hours

LO.3: Demonstrate an understanding of the internal rules and the external regulatory environment which companies are subject to regarding membership

Topic area	Learning areas
Membership	<ul style="list-style-type: none"> • Defining membership: <ul style="list-style-type: none"> • becoming a member under section 112 of the Companies Ordinance • distinguishing between members and shareholders • restrictions on membership: <ul style="list-style-type: none"> - minors - unincorporated associations - companies as members • Register of members: <ul style="list-style-type: none"> • legal status and content <ul style="list-style-type: none"> - requirement to keep a register of members - information that must be included in the register • Inspection of the register • Transparency and membership: <ul style="list-style-type: none"> • inquiring into share ownership • legal and beneficial ownership of shares, and the issue of transparency • register of people with significant control (PSC register) • Termination of membership: <ul style="list-style-type: none"> • ways in which a person’s membership can be terminated, including: <ul style="list-style-type: none"> - death of a member - transfer, transmission, forfeiture, and surrendering of shares - where a contract to purchase shares is rescinded or declared void - where the articles specify that membership should terminate - where a member is declared bankrupt
Company meetings and decision-making	<ul style="list-style-type: none"> • How public and private companies make decisions • Resolutions, and the unanimous assent rule • Rules relating to general meetings: <ul style="list-style-type: none"> • calling a meeting • notice: <ul style="list-style-type: none"> - electronic communication • quorum

Topic area	Learning areas
Company meetings and decision-making (<i>cont.</i>)	<ul style="list-style-type: none"> • voting: <ul style="list-style-type: none"> - voting by proxy - corporate representatives • annual general meetings • adjourning a meeting • records of meetings and resolutions • class meetings • member engagement: <ul style="list-style-type: none"> - electronic meetings
Members' remedies	<ul style="list-style-type: none"> • Personal, representative, and corporate actions: <ul style="list-style-type: none"> • relationship between personal and corporate actions: <ul style="list-style-type: none"> - 'no reflective loss' principle • Derivative claim: <ul style="list-style-type: none"> • rule in Foss v Harbottle • common law derivative action • statutory derivative claim • causes of action • costs • Unfair prejudice remedy: <ul style="list-style-type: none"> • petitioners and respondents: <ul style="list-style-type: none"> - who may petition the court - against whom may a petition be brought • unfairly prejudicial conduct: <ul style="list-style-type: none"> - the company's affairs - actual or proposed act or omission - when conduct is unfairly prejudicial • interests of members: <ul style="list-style-type: none"> - member <i>qua</i> member - equitable considerations • remedies: <ul style="list-style-type: none"> - share purchase orders - winding up - order for inspection - remedies under section 729 • Petition for winding up: <ul style="list-style-type: none"> • who can apply • just and equitable: <ul style="list-style-type: none"> - quasi partnerships and equitable considerations • relationship with other remedies: <ul style="list-style-type: none"> - winding up and the unfair prejudice remedy

Section D: Capital and corporate transparency	
25% - 50 learning hours	
LO.4: Apply relevant legislation, case law and best practice recommendations to legal and governance issues arising in complex scenarios relating to shares, capital maintenance and loans	
Topic area	Learning areas
Shares and share capital	<ul style="list-style-type: none"> • What is a share: <ul style="list-style-type: none"> • legal definition of a share • share as a thing in action • nature of a share • Terms used to describe share capital: <ul style="list-style-type: none"> • issued share capital • paid-up share capital • called-up and uncalled share capital • Allotment and issue of shares: <ul style="list-style-type: none"> • authority to allot shares • pre-emption rights • payment for shares: <ul style="list-style-type: none"> - means of payment • share certificates • Offering shares to the public: <ul style="list-style-type: none"> • The Stock Exchange of Hong Kong • types of public offer and stock exchanges • listing: <ul style="list-style-type: none"> - the listing process - continuing obligations • prospectus: <ul style="list-style-type: none"> - obligation to publish a prospectus - content of a prospectus - approval and publication of a prospectus - liability for untrue or misleading statements and omissions • underwriting and commissions • Classes of share: <ul style="list-style-type: none"> • ordinary and preference shares • variation of class rights: <ul style="list-style-type: none"> - how to vary class rights - right of objection

Topic area	Learning areas
Shares and share capital (<i>cont.</i>)	<ul style="list-style-type: none"> • Transfer and transmission of shares: <ul style="list-style-type: none"> • transfer of shares • transmission of shares, including <ul style="list-style-type: none"> - transmission upon the death of a shareholder - transmission upon the bankruptcy of a shareholder
Capital maintenance rules	<ul style="list-style-type: none"> • Definition of the doctrine of capital maintenance • Alteration of share capital: <ul style="list-style-type: none"> • reduction of share capital: <ul style="list-style-type: none"> - special resolution and court confirmation - special resolution and solvency statement • Acquisition of own shares: <ul style="list-style-type: none"> • redeemable shares • purchase of own shares: <ul style="list-style-type: none"> - authorisation - payment and cancellation • acquisition of shares out of capital • Financial assistance to acquire shares: <ul style="list-style-type: none"> • financial assistance • prohibited financial assistance • exceptions to the general prohibition • consequences of providing prohibited financial assistance • Distributions: <ul style="list-style-type: none"> • rules relating to distributions: <ul style="list-style-type: none"> - dividends • profits available for distribution: <ul style="list-style-type: none"> - accumulated profits and losses - realised profits and losses - net asset rules • reference to relevant accounts • payment of a dividend • consequences of payment of an unlawful distribution: <ul style="list-style-type: none"> - liability of the directors - liability of the members
Loan capital	<ul style="list-style-type: none"> • Sources of loan capital: <ul style="list-style-type: none"> • debentures • Power to borrow • Security: <ul style="list-style-type: none"> • types of security • Charges: <ul style="list-style-type: none"> • fixed charges

Topic area	Learning areas
Loan capital (cont.)	<ul style="list-style-type: none"> • floating charges: <ul style="list-style-type: none"> - crystallisation • determining the type of charge: <ul style="list-style-type: none"> - charges over changing assets • registration of charges: <ul style="list-style-type: none"> - the effects of registration - the effects of non-registration
Corporate transparency	<ul style="list-style-type: none"> • Statutory registers • Annual accounts and reports: <ul style="list-style-type: none"> • obligation to keep accounts • annual accounts: <ul style="list-style-type: none"> - individual company accounts - group accounts • annual reports: <ul style="list-style-type: none"> - directors' report, including corporate governance statement - auditor's report - directors' remuneration report • Auditors: <ul style="list-style-type: none"> • appointment: <ul style="list-style-type: none"> - eligibility requirements and prohibitions - appointing and re-appointing an auditor of a private company - appointing an auditor of a public company - remuneration • duties and rights: <ul style="list-style-type: none"> - powers of investigation • auditor liability: <ul style="list-style-type: none"> - contractual liability - tort liability - criminal liability • vacation of office: <ul style="list-style-type: none"> - resignation - removal - replacement - rotation • Periodic financial reporting • Confirmation statement • Liability limitation agreements

Topic area	Learning areas
Market abuse	<ul style="list-style-type: none"> • Insider dealing: <ul style="list-style-type: none"> • offences: <ul style="list-style-type: none"> - dealing in price-affected securities - encouraging another person to deal - disclosing inside information • information as an insider: <ul style="list-style-type: none"> - inside sources • defences • penalties • Insider dealing offences under the Securities and Futures Ordinance: <ul style="list-style-type: none"> • insiders and inside information • criminal and civil liabilities • defences • penalties and sanctions

Section E: Corporate restructuring, rescue, and liquidation	
20% – 40 learning hours	
LO.5: Apply appropriate judgement when presenting advice on structural and legal issues in a relevant form (corporate restructuring)	
Topic area	Learning areas
Corporate restructuring and takeovers	<ul style="list-style-type: none"> • Schemes of reconstruction: <ul style="list-style-type: none"> • dissenting from the scheme • Schemes of arrangement: <ul style="list-style-type: none"> • procedure: <ul style="list-style-type: none"> - the application to summon meetings - approval of the scheme - court sanction • the effects of a scheme • Takeovers, including: <ul style="list-style-type: none"> • legal framework of takeover regulation • Takeovers and Mergers Panel • codes on takeovers and mergers and share buy-backs: <ul style="list-style-type: none"> - scope of the codes - general principles - rules - sanctions and compensation • takeover process: <ul style="list-style-type: none"> - defensive action • minority shareholder protection: <ul style="list-style-type: none"> - mandatory offer - sell out rights • squeeze-out rights
Receivership	<ul style="list-style-type: none"> • Receivership: <ul style="list-style-type: none"> • receiver's powers and duties
Liquidation and dissolution	<ul style="list-style-type: none"> • Circumstances under which a company becomes insolvent • Liquidation: <ul style="list-style-type: none"> • voluntary winding up • members' and creditors' voluntary winding up • winding up by the court (compulsory winding up): <ul style="list-style-type: none"> - grounds for a winding up petition - effects of winding up • Role of the liquidator: <ul style="list-style-type: none"> • distribution of assets: <ul style="list-style-type: none"> - the <i>pari passu</i> principle - the order of distribution - liquidation expenses

Topic area	Learning areas
Liquidation and dissolution (cont.)	<ul style="list-style-type: none"> - preferential debts - debts secured by floating charge - unsecured debts - deferred debts - members • Malpractice before and during liquidation: <ul style="list-style-type: none"> • offences of fraud and deception • summary remedy • fraudulent trading • Adjustment of prior transactions, including: <ul style="list-style-type: none"> • transactions at an undervalue • unfair preferences • extortionate credit transactions • avoidance of certain floating charges • Dissolution • De-registration • Dormant company • Restoration: <ul style="list-style-type: none"> • corporate rescue

- End -

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