

Establishment of School Incorporated Management Committee (IMC)

Background

The Education (Amendment) Ordinance 2004 has been passed by the Legislative Council and became effective as of 1 January 2005. The Education (Amendment) Ordinance 2004 amended the Education Ordinance (Cap. 279) and introduced a requirement for certain schools in Hong Kong to establish an Incorporated Management Committee ("IMC") within a period of 5 years.

As a matter of law, a "school" and a "school management committee" have no legal existence save that they are a group of people carrying out educational objectives. A school and a school management committee cannot enter into contracts by themselves, hold property or sue or be sued. In the past, the Education and Manpower Bureau ("EMB") had introduced school management committees in the form of companies limited by guarantee under the Companies Ordinance (Cap.32). The introduction of IMCs gives rise to new legal implications.

Why establish an IMC?

In short, because this is a statutory requirement. All aided schools in Hong Kong are required to establish an IMC within a period of 5 years, while DSS (direct subsidy scheme) schools and certain specified schools may also do so by giving notice to the EMB. Schools which establish an IMC will receive at least a HK\$700,000 subsidy from the government. The establishment of IMCs will also provide better protection for IMC schools and IMC managers.

Protection enjoyed by IMC schools and managers

IMC is a corporation akin to a company established under the Companies Ordinance (Cap.32). IMC has the legal personality, the limited liability and the capacity to hold property and to enter into contractual relationships. The liability of an IMC is separate from the IMC managers and the sponsoring body.

Further, the Education Ordinance as amended provides that an IMC manager acting in good faith shall not incur any civil liability and no civil proceedings shall be brought against him in respect of the performance of his duties. It is also understood that the government has taken out an insurance policy to indemnify the liability of IMCs and IMC managers from any claims against their acts in carrying out their duties.



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Differentiation of school assets before the establishment

Schools, having no legal existence, have no capacity to hold property and thus "school assets" are generally owned by the managers for the school. Upon the establishment of an IMC, the school's accounts become that of the IMC and the "school assets" shall become the IMC's assets. It is therefore vital for the existing school managers and the sponsoring body to determine whether they own any of the "school assets" before establishing an IMC.

From the legal perspective, the process involves the differentiation of assets and transfer of rights and liabilities among the school managers, the sponsoring body and the creditors of the school. Given the potential conflicting interests among the parties in respect of the assets, the process must be taken with caution, failing which litigation may ensue and jeopardize the future operation of the school.

Drafting of IMC constitution

One of the steps to establish an IMC is to submit a draft IMC constitution to the EMB for approval. The IMC constitution, like the memorandum and articles of association of a company established under the Companies Ordinance (Cap.32), sets out the provisions governing the internal management and administration of the IMC. The EMB provides a sample constitution for adoption, although it contains fairly limited provisions. For the avoidance of doubt, an IMC constitution should at least set out in detail the power of the IMC, the sponsoring body and the various managers, as well as the parties and the procedure for decision making. The IMC constitution must be carefully drafted as it not only constitutes the primary source of the rules for the management of the IMC, but also the basis on which the Inland Revenue Department ("IRD") determines whether the IMC can attain tax exemption status under s.88 of the Inland Revenue Ordinance.

Application for tax exemption under s.88 of the Inland Revenue Ordinance

IMCs, being organisations for advancement of education, are eligible to apply for tax exemption under s. 88 of the Inland Revenue Ordinance (Cap.112). An exempted IMC is entitled to exemption from profits tax, stamp duty, estate duty and business registration. Allowance is also granted for donations of money made to the exempted IMC. Given the attractiveness of such tax privileges, the IRD adopts a strict approach in determining whether an IMC can attain the tax exemption status under s.88 of the Inland Revenue Ordinance. The application process involves careful drafting of the IMC constitution and legal analysis of the charitable nature of each particular school.

Composition of IMC

Traditionally a school management committee invariably consists of most, if not all, representatives appointed by the school sponsoring body. The Education Ordinance as amended now provides that the composition of an IMC shall include the participation of school teachers, parents, alumni and independent parties. The Ordinance provides for the minimum percentage and number of a certain type of IMC managers to be nominated and, depending on the circumstances of each school, the nomination is to be done by way of appointment or election. It is important to comply with the Ordinance while striking a balance of interest among the parties.

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Malcolm's practice focuses on commercial litigation with an emphasis on insolvency, international trade, clubs and associations, education institutions, banking and regulatory work. He acts for large multinational corporations to medium to small sized companies, school sponsoring bodies, accountancy firms and banking institutions.

Receiving a BA, Jurisprudence from Keble College, Oxford University in 1976, Malcolm was admitted in England and Wales in 1980 and Hong Kong in 1982. Malcolm joined SHL as a partner in 1989 and became a partner in SH in 1994.

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