

## HKCGI Company Law Guidance Note (Eleventh Issue) – Re-domiciliation Regime for Hong Kong

### Introduction

In 2019, the Institute submitted a proposal to the Financial Services and the Treasury Bureau (FSTB) to call for a re-domiciliation regime in Hong Kong<sup>1</sup>. Some businesses have historically used tax-neutral entities in offshore jurisdictions for confidentiality, flexibility, and cost minimisation. However, these advantages are diminishing with the implementation of tax transparency and economic substance requirements. Increasingly, entities are considering and/or reverting to jurisdictions with economic substance in their business operations, management and/or control.

Therefore, some offshore entities are considering re-establishing in Hong Kong and not simply registering

themselves with a place of business in Hong Kong. However, for an offshore entity seeking to change its originating jurisdiction to Hong Kong, it must resort to winding up with the transfer of business and assets to a new Hong Kong entity or entering into a court-sanctioned scheme of arrangement. These methods are costly and disruptive to an entity's operations (or the group of which it is a part). They can also have significant tax and other commercial implications.

The Institute identified that a 're-domiciliation' regime, where an offshore entity can continue (that is, convert) itself into a Hong Kong company, may be a useful solution. Some jurisdictions, such as Bermuda, the British Virgin Islands, the Cayman Islands, and recently Singapore, have implemented or have historically

1 <https://www.hkcg.org.hk/thought-leadership/submission-detail/2394>

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had, as part of their companies' legislation, a re-domiciliation or continuation regimes. The process allows for the retention of the corporate identity and track record in the originating jurisdiction since its initial incorporation or establishment. The overseas entity would then re-domicile (or continue) in much the same way that individuals can emigrate between different countries.

A re-domiciliation regime in Hong Kong could also facilitate the growth of accounting, trust, company service provider services, as well as the legal and banking sectors. Additionally, this will complement the Greater Bay Area (GBA) initiative and attract multinational companies seeking market access to China and the rest of Asia.

Following the Institute's call, Hong Kong has established re-domiciliation regimes for Open-Ended Fund Companies (OFCs) and Limited Partnership Funds (LPFs). The Institute is delighted that under the Budget Speech (2023-2024), the Financial Secretary has stated that to attract enterprises, 'Hong Kong will introduce a mechanism to provide facilitation for companies domiciled overseas for re-domiciliation to Hong Kong'<sup>2</sup>. The FSTB plans to develop the relevant legislation for submission to the Legislative Council between 2023 and 2024.

### What this means for governance professionals

The governance professional needs to be aware of the potential for re-domiciliation as a solution to address and alleviate the impact of economic substance requirements.

In fact, as part of senior management, governance professionals might need to raise the issue as to whether confidentiality, flexibility, cost minimisation or other relevant issues traditionally associated with using offshore entities continue to hold with offshore entities in their group because of the increasing

economic substance requirements being applied in offshore jurisdictions. Also, the ongoing difficulty for offshore entities to open and/or maintain bank accounts in Hong Kong must be considered.

If the determination is that for certain entities, the onshore/offshore decision is in favour of them being onshore in Hong Kong for regulatory compliance, cost or other reasons (for example, the need for establishing an account in Hong Kong), then a re-domiciliation would be a practical solution. Yet, there might be other situations. For example, an offshore entity might be preferred for complying with offshore requirements and/or structured finance transactions. There is no one size fits all. Nevertheless, the governance professional should know the broad parameters of the re-domiciliation regime for effective communication with relevant internal stakeholders. This is the main purpose of this guidance note.

### Proposed re-domiciliation regime

Under Hong Kong's proposed re-domiciliation regime<sup>3</sup>, the Registrar of Companies will administer the process and review applications based on specific criteria. Factors taken into account include:

- Whether the applicant overseas entity's status in its originating overseas jurisdiction aligns with the corresponding corporate status in Hong Kong.
- Compliance with legal requirements in the originating overseas jurisdiction for the re-domiciliation (or continuation).
- The applicant's overseas entity's financial year-end.
- Compliance with requirements for the re-domiciliation or continuation into Hong Kong

<sup>2</sup> <https://www.budget.gov.hk/2023/eng/hq.html>

<sup>3</sup> Please see FSTB's 'Public Consultation on Proposed Company Re-domiciliation Regime in Hong Kong' [https://www.fstb.gov.hk/fsb/en/publication/consult/doc/Public%20consultation%20paper%20\(e\)\\_for%20issue.pdf](https://www.fstb.gov.hk/fsb/en/publication/consult/doc/Public%20consultation%20paper%20(e)_for%20issue.pdf)

as a local company under the Hong Kong Companies Ordinance in its to be amended format (e.g., company name requirements).

- Approval of the re-domiciliation or continuation of the overseas entity by the requisite majority of members as specified under the company law requirements of its originating jurisdiction or as per the overseas entity's constitutional documents.
- The applicant's overseas entity's ability to meet its financial obligations for the subsequent 12 months.

### Approval Conditions

To be granted approval by the Registrar of Companies under the re-domiciliation regime upon effectiveness, it is expected that several conditions should be met. These include the following:

- Ensuring that the re-domiciled company will not be used for unlawful purposes or endanger national security.
- The application is made in good faith without the intention to defraud creditors.
- The absence of liquidation or winding-up proceedings.
- There are no ongoing or pending arrangements with other parties.

The Registrar of Companies will reserve the right to impose additional conditions based on the specific circumstances of each case.

### Economic Substance Test and Tax Matters

Unlike certain other jurisdictions, the proposed regime in Hong Kong does not include an economic substance test for overseas applicant entities. Transitional tax

matters, such as a fair deduction for trading stock, bad debts, impairment losses on financial assets, and depreciation, will be addressed by the Inland Revenue Department in line with the Institute's call for tax guidance and certainty.

### Application Process

Companies seeking re-domiciliation to Hong Kong are expected to complete an application form and submit various supporting documents set out in the Appendix. These will include:

- Statutory documents.
- The company's latest audited financial statements.
- A certified copy of the members' resolution approving the re-domiciliation or continuation.
- Statements or certificates from directors confirming compliance with re-domiciliation requirements.

### De-registration Requirement

Upon approval of the re-domiciliation application, the overseas applicant entity must provide evidence of its de-registration in its originating jurisdiction (e.g. a certificate of discontinuance or equivalent) within 60 days of its registration for re-domiciliation in Hong Kong. Failure to do so will result in the revocation of the application and termination of the re-domiciliation process. Once re-domiciled, the overseas entity will have the same rights and obligations as locally incorporated companies. Also, it must comply with relevant provisions of the Hong Kong Companies Ordinance. If the overseas entity requires licenses to conduct specific businesses in Hong Kong, separate applications for those licenses will be necessary.

## Institute's submission

The Institute has submitted that for the re-domiciliation regime to run smoothly:

- It is best to translate the requirements to documentary ones and be clear about what legal opinions and/or support documents would be required.
- The importance of having a company secretary for any re-domiciled entity, as required under the Companies Ordinance, even though it may not be compulsory in certain jurisdictions.
- The proposed use of statutory solvency declarations instead of audited financial statements.
- The establishment of a special task force to facilitate entities seeking re-domiciliation to open bank accounts.
- The flexibility in extending the sixty-day de-registration period.

- A proposed trial to allow for reservation of company names for re-domiciling entities.
- The passing of a special resolution beforehand to authorise the application<sup>4</sup>.

These submissions are intended to enhance the proposed re-domiciliation regime.

## Conclusion

A re-domiciliation or continuance regime is a powerful tool to circumvent economic substance requirements extant in many other jurisdictions by bringing businesses back to Hong Kong, where there is a pre-existing nexus. The governance professional must therefore be aware of the proposed regime. As and when the re-domiciliation regime is enacted, the Institute will consider issuing further guidance.

Overall, the Institute believes the proposed re-domiciliation regime will align with Hong Kong's role as a super-connector and help attract business opportunities and talent to Hong Kong.

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4 <https://www.hkcgilaw.com/hk/thought-leadership/submission-detail/2429>

## Appendix

- Completed application form, which includes:
  - Place of incorporation of the company
  - Name of the company in its place of incorporation at the time of application
  - Whether the company has registered as a registered non-Hong Kong company under Part 16 of CO
  - Proposed name of the intended company
  - Address of the place which is to be the registered office of the intended company
  - Name and any other particulars in respect of each person who is to be a director and company secretary of the intended company;
  - (Other than an intended company that is a company limited by guarantee) Details of the share capital and members of the intended company
  - In case of an intended company that is a company limited by guarantee, the number of members.
- Certified copy of the certificate of incorporation (or a document of similar effect) issued to the company under the law of its original place of incorporation.

- Certified copy of the charter, statute, constitution or memorandum or articles or other instrument constituting or defining the company's constitution in its original place of incorporation.
- Copy of the articles of association that the company proposes to adopt.
- The latest audited financial statements of the company as of a date no more than three months prior to the Application Date.
- Certified copy of the special resolution authorising the transfer of incorporation.
- Statements and Consent to Act signed by each proposed director (to be included in the application form).
- Statement/certificate issued by directors (can be included in the application form) confirming that all the requirements for registration in respect of re-domiciliation of the company under the CO will, on the re-domiciliation date, be met in relation to the intended company.
- Statement/certificate issued by directors (can be included in the application form) confirming that the company has complied with the requirements of the law of its place of incorporation in relation to the transfer.
- Statement/certificate issued by directors (can be included in the application form) that as soon as practicable after the re-domiciliation date of the company, the company, which has become a re-domiciled company, must take all reasonable steps to procure its de-registration in its place of incorporation.
- Notice to Business Registration Office (IRBR1) and the prescribed business registration fee and levy.
- Application fees.
- After approval of the application by the Companies Registry, a document evidencing that the company has been deregistered in its place of incorporation within 60 days after the date of registration.
- If any of the documents required to be submitted to the Companies Registry is not in English or Chinese, a certified translation of such document in English or Chinese.