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Kenny's Guide

to Company and Trust Law

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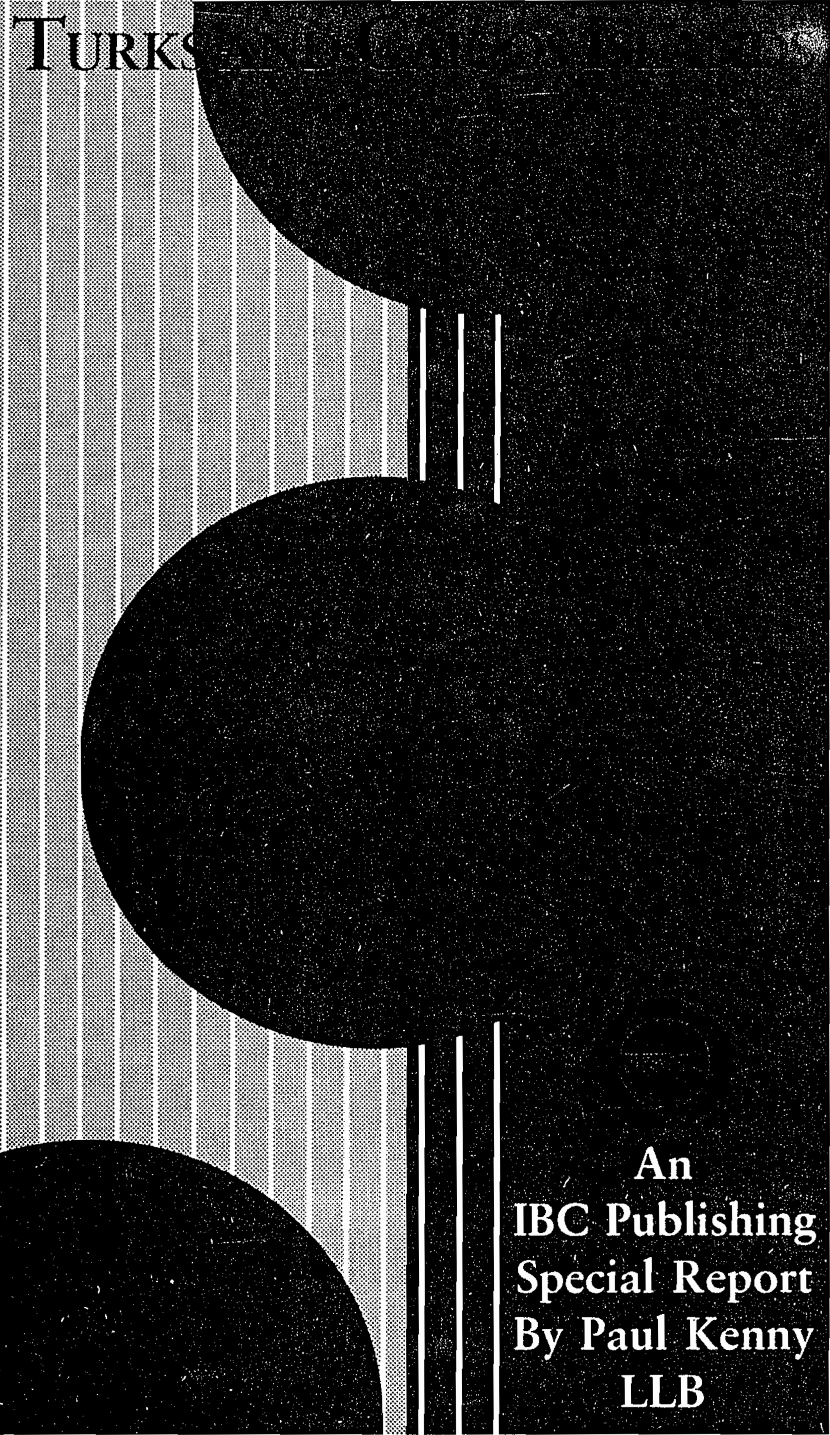

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As exempted companies are the entities predominantly used in Turks and Caicos by international tax planners, they are the only type of company dealt with in this report in any great detail. Information concerning ordinary companies, which do not have all the privileges of exempted companies, can be found in para. 4.1 *below*. Ordinary companies are in fact incorporated under the same ordinance, the Companies Ordinance 1981, as exempted companies.

1.9.2 TRUSTS

Turks and Caicos has recently enacted an ultra-modern and innovative piece of trust legislation called the Trust Ordinance 1990. Previously, trusts have more or less been based upon English common law and Turks and Caicos has not been regarded as a particularly attractive jurisdiction in which to settle a trust. It is widely anticipated that this legislation will make Turks and Caicos a premier jurisdiction in which to settle trusts (especially asset protection trusts) and the Trust Ordinance 1990 is therefore the basis of Part II of this book.

NB: Turks and Caicos also has comprehensive legislation concerning banking companies and insurance companies and is also used as a situs for investment funds; however, these matters are beyond the scope of this work.

CHAPTER TWELVE

EXISTENCE AND DURATION OF A TRUST

12.1 DEFINITION

A trust can be simply defined as a situation whereby a person known as the trustee holds property which belongs to another person (or for a purpose) known as the beneficiary.

In essence, a trust is therefore a situation which exists when a trustee holds the legal title to property in the circumstances just described. The Trust Ordinance therefore defines the existence of a trust as follows:

- **a.** A trust exists where a trustee holds or has vested in him, or is deemed to hold or have vested in him, property which does not form or which has ceased to form part of his estate;
- **b.** For the benefit of a beneficiary; or
- **c.** For any purpose which is not for the benefit only of the trustee; or
- **d.** For persons and purposes mentioned in a) and b) respectively *[TO § 3]*.

Note that TO § 3 is in essence similar to Art. 2 of the Hague Convention on Trusts *[see para. 15.7 below]* which deals with the international recognized definition of a trust.

12.2 ESSENTIAL ELEMENTS

The following essential elements for the existence of a trust can be drawn from TO § 3:

- A trustee;
- Beneficiaries *[see TO § 9]*;
- Trust property *[see TO § 8]* vested or deemed to be vested in the trustees.

As in UK law, what makes the relationship that exists constitute the existence of a trust is the special relationship between the trustee who has the property vested in him and the beneficiaries. TO § 3 mentions that the property vested in the trustee does not form part of the trustee's estate and that it is held for the benefit of the beneficiary or for any purpose which is not for the benefit only of the trustee, *ie* the trustee is vested with property but does not beneficially own that property himself; it is owned by another person — the beneficiary.

12.3 CREATION — WHO MAY SETTLE

Again, as in UK law, there are no particular formalities under Turks and Caicos law for the creation of a trust. A trust may come into existence in any manner and, without prejudice to the generality of this, the trust may come into

existence by oral declaration, an instrument in writing (including a will) or by conduct *[TO § 7]*.

As in other jurisdictions, it is usual for the trust to be recorded into a written document called a "trust instrument" or "trust deed" (the former is a preferred term) whereby the rights and duties of the parties and distribution of the trust assets are clearly defined. Questions concerning the capacity of the settlor will be judged according to the laws of Turks and Caicos *[TO § 13(1)(I)]*.

Any person of sound mind and of the age of majority may therefore settle a Turks and Caicos trust. A corporation may also settle a trust, although the powers of a corporation to settle a trust must be adjudged according to the laws of the jurisdiction in which the corporation is registered *[TO § 13(1)(C)]*.

Note that, there would seem to be nothing to prohibit unincorporated associations or other entities, such as Liechtenstein Anstalts, being settlors to Turks and Caicos trusts.

12.4 FORMALITIES

12.4.1 *INTER VIVOS*

There are no particular formalities in Turks and Caicos law for the creation of an *inter vivos* trust *[TO § 7 and para. 12.3 above]*.

12.4.2 TESTAMENTARY

A testamentary trust, which is a trust taking effect upon the death of a person, by its very nature can only be attested to in writing, *ie* a will valid according to the laws of the testator's place of death/domicile.

The Trust Ordinance concedes that, for a testamentary trust to be validly created in Turks and Caicos, the trust or disposition must be valid according to the laws of the testator's domicile *[TO § 13(1)(F)]*.

12.5 REGISTRATION AND DISCLOSURE

There are no requirements — nor is it possible — to register a Turks and Caicos trust. In addition, there is no requirement to disclose the existence of the trust to the authorities in Turks and Caicos.

NB: In this regard, reference is also made to the heavy penalties imposed under the Confidential Relations Ordinance 1979 for the disclosure of confidential information *[see para. 1.6 above]*.

12.6 DURATION

There is no limit to the permitted duration of a Turks and Caicos trust, which may be fixed by the terms of the instrument creating the trust *[TO § 14(1)]*. The English common law rule known as the "rule against perpetuities" (which consist of a very complex body of rules concerning the permitted length of time during which trustees may accumulate trust income) and the rule prohibiting trusts of perpetual duration do not apply to Turks and Caicos trusts *[TO § 14(2) and (3)]*.

Accordingly, the trust may endure for a fixed maximum period or may be of perpetual duration, and the trustees may accumulate income during the whole of the trust period if so desired.

This may seem to be somewhat of a sweeping and radical move in international trust law since, under UK rules of common law, it was felt wrong as a matter of public policy that trusts should be permitted to endure perpetually. The rationale behind this being that property should not be tied up for generations of descendants and thereby stunting economic growth.

The British rule against perpetuities states that trusts may continue for a period of 21 years after the death of a person named in the trust at the time of its creation. Similarly, there are complex rules preventing trustees from accumulating income for long periods without making distributions from the trust.

This UK common law idea has therefore been more or less copied (without any particular logic) by UK common law jurisdictions throughout the world. In the Isle of Man, for example, under the Trustee Act 1961, trusts may endure for a maximum permitted period of 80 years. Likewise, in Jersey, which has a purely statutory trust law, there is a maximum permitted period of 100 years and the Cayman Islands have a maximum permitted period of 100 years if the trust is registered and registration and annual fees are paid to the Cayman government.

Turks and Caicos, to use an English phrase, have driven a "coach and horses" through these concepts and, in a most sensible move, do not inhibit the permitted length of a trust or accumulations of income and do not require registration or registration fees for the privilege of doing so.

The rule against perpetuities was in fact originally aimed at the typical UK "strict settlement" whereby rich landowners would tie up their land for future generations. It was therefore a valid argument 100 years ago that large tracts of land should not be permitted to be tied up for generation after generation in rural England, although times have now somewhat changed and, with modern discretionary trusts, it seems unlikely that such problems would arise nowadays.

CHAPTER FIFTEEN

THE PROPER LAW OF A TRUST

15.1 IMPORTANCE OF ISSUE — EFFECT OF CHOICE OF PROPER LAW

The choice of proper law of the trust is of fundamental importance since the proper law governs the validity, administration and constitution of a trust *[TO § 4(1)]*.

The proper law of a trust will govern the following (which is not exhaustive):

- The appointment, resignation and removal of trustees, the capacity to act as a trustee and the devolution of the office of trustee;
- The rights and duties of the trustees among themselves;
- The rights of trustees to delegate their duties and powers, powers of trustees to dispose of trust assets or to acquire new assets;
- Powers of investment;
- Restrictions upon the duration of the trust and powers to accumulate;
- The relationship between the trustees and beneficiaries, including the personal liabilities of the trustees and beneficiaries;
- The variation of the terms of the trust;
- The distribution of the trust assets; and
- The duty of the trustees to account for the administration of the trust *[see also TO § 13(1) and para. 15.4 below]*.

If the chosen law is Turks and Caicos law, all of the provisions of the Trust Ordinance and applicable UK common law and rules of equity will apply in relation to the trust.

15.2 REQUIREMENTS TO GIVE EFFECT TO CHOICE OF PROPER LAW

The overriding indication of the chosen law of the trust is the law chosen by the settlor to be the applicable law or the choice expressed or implied in the terms of the trust *[TO § 4(1)(A)]*. If no such choice is ascertainable, the chosen law is the law with which the trust had its closet connection at the time the trust was created *[TO § 4(1)(B)]*.

When ascertaining the law with which the trust has the closest connection at the time it was created, reference shall be made in particular to:

- The place of administration of the trust designated by the settlor;

- The situs of the assets of the trust;
- The place of residence or business of the trustees; and
- The objects of the trust and the place where they are to be fulfilled *[TO § 4(1)(B)(2)]*.

Note that, in relation to the applicable law of the trust, this criteria nearly mirrors Arts. 6 and 7 of the Hague Convention on Trusts, which allows for the international recognition of trusts. This will enable Turks and Caicos trusts to be more readily recognized in jurisdictions where there is no domestic trust concepts, if that jurisdiction is a signatory to the Hague Convention *[see para. 15.7 below]*.

There may be different laws applicable to the same trust in that TO § 4(3) allows for a severable aspect of a trust to be governed by a law different from that applicable to some other aspect of the trust. Consequently, provided the aspect in question is severable, it would be possible to draft a Turks and Caicos trust whereby some aspects of the trust were governed by Turks and Caicos law and some aspects governed by the law of a foreign jurisdiction.

15.3 CHANGING THE PROPER LAW

The terms of a trust may provide for the proper law of the trust, or the law governing a severable aspect, to be changed from the law of Turks and Caicos to the law of another jurisdiction, but in order to be valid, the terms of the trust must also provide that:

- the change cannot invalidate any other terms of the trust, any purpose of the trust or any interest of a beneficiary; and
- the change is consistent with the intention of the settlor *[TO § 40]*.

It is therefore apparent from the *above* that the laws of the jurisdiction to which the trust is to be transferred must be very similar to the laws of Turks and Caicos, since a change cannot invalidate any other terms of the trust or any other purpose of the trust or interest of a beneficiary. It would therefore be wise to be cautious in that a Turks and Caicos trust with a perpetual duration could not, for example, change its proper law to that of the Isle of Man, since under Manx law (and that of most jurisdictions) perpetual trusts are not permitted.

Note, however, that, in the *above* circumstances, TO § 14(1), which provides for the duration of a trust, does allow for an instrument varying in terms of a trust electing its duration. It would therefore be possible to change the proper law of the trust and at the same time select a new perpetuity period.

In addition, the change should be consistent with the intention of the settlor. This is an interesting concept to introduce in that there is some debate in UK common law whether a change of the proper law of a trust is valid. It was decided in the UK case of *The Duke of Marlborough V*, AG(1)[1945), Ch 78, that it was possible to change the proper law of a trust with the consent of the beneficiaries of that trust. It therefore appears that the legislators of Turks and Caicos have followed UK common law concepts and made the proviso that it should be the intention of the settlor to allow the change to occur.

It therefore seems wise that in the trust instrument, or in a separate instrument, it is made the settlor's express wish that the proper law of the trust be changed

in certain circumstances, *eg*, political upheaval, or at the option of the trustees. It would always be preferable if, when the proper law of the trust was changed, an instrument to that effect was made to which the settlor is a party and therefore grants his consent.

There are no specific provisions for a trust whose proper law is not Turks and Caicos law to make its proper law that of Turks and Caicos. It is the author's opinion that a foreign trust can change its proper law to that of Turks and Caicos, if the same is allowed in the foreign law.

15.4 CONFLICT WITH FOREIGN LAWS

All questions arising in regard to a trust, if a trust is governed by Turks and Caicos law, or regarding any disposition of property upon a trust, including the following:

- the capacity of the settlor;
- the validity of the trust or the interpretation or effect thereof;
- administration of the trust including questions as to the powers, obligations, liabilities and rights of trustees, their appointment and removal; or
- the existence and extent of powers conferred or retained including powers of variation or revocation and validity of any exercise thereof;

are to be determined according to the laws of Turks and Caicos *without reference to the laws of any other jurisdiction* with which the trust or disposition may be connected *[TO § 13(1)]*.

It is therefore apparent that if a conflict of the laws in relation to the trust should occur with the laws of a foreign jurisdiction — even if the trust is connected with that foreign jurisdiction — the laws of Turks and Caicos will be applicable without reference to the laws of that foreign jurisdiction.

NB: A cautionary comment, however, should be made in that, if assets, trustees or beneficiaries of a Turks and Caicos trust are situated in a foreign jurisdiction, it would be possible for the courts of that foreign jurisdiction to hold that certain aspects of the trust may be governed by the laws of that foreign jurisdiction. The success that such proceedings may have in a matter in relation to a Turks and Caicos trust in a foreign jurisdiction will, of course, depend upon whether the party can enforce his or her claim *[see paras. 15.5 and 15.6 below]*.

It is recognized that not all aspects of the trust can be effectively governed by Turks and Caicos law, and the provisions in TO § 13(1) concerning conflicts with foreign laws are subject to the following:

- It does not validate any disposition of property not owned by the settlor or subject to a power on behalf of the settlor nor does it affect the recognition of the foreign laws in determining whether the property is owned by this settlor;
- It is subject to any express terms in the trust;
- It does not affect the capacity of a corporation or affect the recognition of the laws of its place of incorporation;

- It does not affect the foreign laws concerning the formalities for any disposition of any property;
- It does not validate the disposition of real property situated in a foreign jurisdiction invalid according to the laws of that foreign jurisdiction; and
- It does not validate any testamentary trust or disposition invalid according to the law of the testator's domicile *[TO § 13(1)(A)–(F)]*.

The situation therefore is that all matters in relation to the trust will be decided in a Turks and Caicos court according to Turks and Caicos law, but matters which are rightly a province of a foreign jurisdiction will be decided according to the laws of that foreign jurisdiction.

The main issue normally to be decided by a court is whether the trust is valid. If the settlor is from a foreign jurisdiction, the provisions of his or her domestic law might not accept the trust concept.

Specific provision is made that no trust governed by the laws of Turks and Caicos is void, voidable, liable to be set aside or defective in any fashion, nor can the capacity of any settlor be questioned by reason that the laws of any foreign jurisdiction prohibit or do not recognize any concept of a trust *[TO § 13(2)(A)]*.

Turks and Caicos courts would accept jurisdiction where:

- the trust is a Turks and Caicos trust;
- the trustee of a foreign trust is a resident of the islands;
- any trust property of a foreign trust is situated in the islands; or
- administration of any trust property is carried on in Turks and Caicos *[TO § 5]*.

Section 5 succinctly states the position in private international law, and which would be applicable in other jurisdictions as well, in that a court could not have jurisdiction over the trust itself (nor the beneficiaries or settlor) unless some aspects of that trust are situated in the jurisdiction where litigation is contemplated.

15.5 FORCED HEIRSHIP AND CIVIL LAW ISSUES

It is expressly provided that no trust, the proper law of which is that of Turks and Caicos, is void, voidable, liable to be set aside or defective in any fashion, nor is the capacity of any settlor to be questioned, by reason that the trust or disposition avoids or defeats rights, claims or interests inferred by foreign law on any person by reason of a personal relationship to the settlor, or by way of heirship rights, provides or contravenes any rule of foreign law or any foreign judicial or administrative order or action intended to recognize, protect, enforce or effect any such rights, claims or interest *[TO § 13(2)(B)]*.

Section 13(2)(B) is aimed at a situation which exists in the civil law (and other jurisdictions) whereby a person's property upon that person's death may have to devolve to certain persons (which can cause injustice), *eg*, to one's oldest son. The provision is also aimed at situations involving countries with so-called community of property laws.

In relation to a Turks and Caicos trust, it therefore appears that any civil law concept of forced heirship or community of property law will be totally disregarded in assessing the validity of the trust or any other matters in relation to it.

15.6 ASSET PROTECTION TRUSTS

After a perusal of legislative provisions in competing jurisdictions, such as the Cayman Islands and Gibraltar, it is the author's opinion that Turks and Caicos probably has the most far-reaching and simple provisions in the area of asset protection trusts, and it will be interesting to note the outcome of any future litigation in this area.

TO § 61 provides that, if an individual (as opposed to a corporation) makes a settlement upon a Turks and Caicos trust, and the individual is not insolvent when the disposition is made and the settlor does not become insolvent by reason of the disposition, that disposition shall not be voidable at the instance of any creditor of the settlor.

Being "insolvent" is further defined in TO § 2(1) as being "subject to liabilities, whether actual, contingent or prospective, of which the value exceeds that of the assets available to meet such liabilities as they become due." The words "contingent or prospective" are perhaps a saving grace to TO § 61 since, in the vast majority of offshore and onshore jurisdictions, a transfer to a trust can be set aside if the settlor was in contemplation of becoming insolvent when the disposition was made.

Note, however, that the test which one can take from the Trust Ordinance, *ie* being subject to contingent or prospective liabilities the value of which exceeds one's assets, is more favourable than the tests adopted, for example, in the UK under which trusts can be set aside if a settlor was not in contemplation of becoming insolvent but subsequently becomes insolvent at a later stage.

It would therefore still be advisable to follow the common practice of having an accountant, auditor or chartered accountant issue a statement to the effect that the settlor is solvent, and future insolvency is not anticipated in view of any future contingent or prospective liabilities, prior to a trust being established for the protection of assets.

NB: Expert advice should be obtained, especially in the United States, where there are federal fraudulent conveyance laws and different state laws to consider. *See also*, para. 13.2.1 *above* in relation to protective trusts (to protect primarily non-settlor beneficiaries) and TO § 34.

15.7 THE HAGUE CONVENTION ON TRUSTS

The Convention of the Law Applicable to Trusts and on Their Recognition was concluded in the Hague, The Netherlands on 10 January 1985 and is known as the Hague Convention on Trusts. This has been incorporated in full into the domestic laws of many jurisdictions, including the UK and the Isle of Man. The Convention deals with the international recognition of trusts and the international recognition of the law applicable to trusts.

It is anticipated that the terms of the Convention will be ratified by most major countries in the near future.

Turks and Caicos has not adopted the terms of the Hague Convention into its trust law, but have more or less adopted two key articles: Art. 2 (via TO § 3), which deals with the existence of a trust; and Art. 7 (via TO § 4), which deals with the applicable law in relation to a trust.

Turks and Caicos have thereby adopted the two key articles which will allow for, firstly, the international recognition of the accepted definition for the existence of a trust, and secondly, the internationally recognized definition of the law applicable to a trust. Turks and Caicos trusts should therefore be recognized internationally and also recognized as having the proper law as being that of Turks and Caicos.

All other matters which are similarly dealt with in the Hague Convention, such as forced heirship issues and asset protection issues, are covered by different provisions under domestic Turks and Caicos law (primarily in TO §§13 and 61).

COMPANIES ORDINANCE, 1981 (No.11 of 1981.)
ARRANGEMENT OF SECTIONS.

PART I

Introduction.

Section.

1. Short title.
2. Interpretation.
3. Registrar.

PART II

Constitution and Incorporation of Companies and Associations Under this Ordinance.

4. Mode of forming company.
5. Mode of limiting liability of members.
6. Memorandum of Association of a company limited by shares.
7. Memorandum of Association of a company limited by guarantee.
8. Objects of Memorandum of Association may be altered by special resolution.
9. Location of Registered Office may be changed.
10. Memorandum of Association of an unlimited company.
11. Signature and effect of Memorandum of Association.
12. Power of company limited by shares to alter its share capital.
13. Special resolution for reduction of share capital.
14. Application to Court for confirming order; objections by Creditors.
15. Order confirming reduction and powers of Court on making such order.
16. Registration of order and minute of reduction.
17. Liability of members in respect of reduced shares.
18. Penalty for concealment of names of creditors.
18A. Every company to have at least one director and a secretary.
19. Articles prescribing Regulations for companies.
20. Regulations required in case of unlimited company or company limited by guarantee.
21. Adoption and application of Table A or B.
22. Printing, stamping and signature of articles.
23. Alteration of articles by special resolution.
24. Adoption and effect of Articles of Association.
25. Registration.
26. Certificate of Incorporation.

(a) subject to the provisions hereinafter contained, any such director, whether past or present shall, in addition to his liability (if any), to contribute as an ordinary member, be liable to contribute as if he were at the date of the commencement of such winding up a member of an unlimited company;

(b) no contribution required from any past director who has ceased to hold such office for a period of one year or upward prior to the commencement of such winding up, shall exceed the amount (if any) which he is liable to contribute as an ordinary member of the company;

(c) no contribution required from any past director in respect of any debt or liability of the company contracted after the time at which he ceased to hold such office shall exceed the amount (if any) which he is liable to contribute as an ordinary member of the company;

(d) subject to the provisions contained in the regulations of the company, no contribution required from any director shall exceed the amount (if any) which he is liable to contribute as an ordinary member, unless the Court thinks it necessary to require such contribution in order to satisfy the debts and liabilities of the company and the costs, charges and expenses of the winding up.

Power of directors to bind company.

77A. (1) In favour of a person dealing with a company in good faith, any transaction decided upon by the directors is deemed to be one which it is within the capacity of the company to enter into, and the power of the directors to bind the company is deemed to be free of any limitation under the memorandum or articles.

(2) A party to a transaction so decided on is not bound to enquire as to the capacity of the company to enter into it or as to any such limitation on the powers of the directors, and is presumed to have acted in good faith unless the contrary is proved.

Association not for profit.

Circumstances in which the Registrar may licence a company to be registered without "limited" in its name.

78. (1) Where any association is about to be formed as a limited company, if it is proved to the satisfaction of the Registrar that it is to be formed for the purpose of promoting commerce, art, science, religion, charity or any other useful object, and that it is the intention of such association to apply the profits (if any) or other income of the association in promoting its objects, and to prohibit the payment of

any dividend to the members of the association, the Registrar may by licence under his hand direct such association to be registered with limited liability without the addition of the word "limited" or the abbreviation "Ltd" to its name, and such association may be registered accordingly, and upon registration shall enjoy all the privileges and be subject to all the obligations by this Ordinance imposed on companies, except that none of the provisions of this Ordinance that require a company to use the word "limited" or the abbreviation "Ltd" as any part of its name, or to publish its name, or to send a list of its members, directors or secretary to the Registrar, shall apply to an association so registered.

(2) The licence aforesaid may be granted upon such conditions and subject to such regulations as the Registrar may think fit to impose, and such conditions and regulations shall be binding on the association, and shall be inserted or endorsed on the memorandum and articles of association.

Contracts.

Common seal and how contracts may be made.

79. (1) Every company registered under the provisions of this Ordinance shall have a common seal upon which its name is engraved in legible letters.

(2) Contracts on behalf of any company may be made as follows —

(a) any contract which, if made between private persons, would be by law required to be in writing, and, if made according to English law, to be under seal, may be made on behalf of the company in writing under the common seal of the company;

(b) any contract which, if made between private persons, would be by law required to be in writing and signed by the parties to be charged therewith may be made on behalf of the company in writing, signed by any person acting under the express or implied authority of the company;

(c) any contract which, if made between private persons, would by law be valid although made by parol only and not reduced into writing may be made by parol on behalf of the company by any person acting under the express or implied authority of the company.

(3) Any contract made according to this section may be varied or discharged in the same manner in which it is authorised by this section to be made.

(4) All contracts made according to this section shall be effectual in law and shall be binding upon the company and its successors and all