A decorative graphic on the left side of the cover, consisting of a 3x3 grid of squares. The top-left square is green, the top-middle is light blue, and the top-right is red. The middle-left square is red, the middle-middle is light blue, and the middle-right is green. The bottom-left square is green, the bottom-middle is light blue, and the bottom-right is red.

HANDBOOK OF COMPANY LAW

A Simplified Version

Polytechnic Series

Azelawati Che Husain
Siti Suhaila Jusoh
Wan Mashitah Yusof

KD2079 .H36 2018



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Sembilan

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BUKU INI DISUMBANGKAN OLEH

POLITEKNIK PORT DICKSON

Azelawati Che Husain
Siti Suhaila Jusoh
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88125000

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BUKU INI DISUMBANGKAN OLEH

PERPUSTAKAAN KOTA KINABALU

Perpustakaan
Kota Kinabalu

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PREFACE

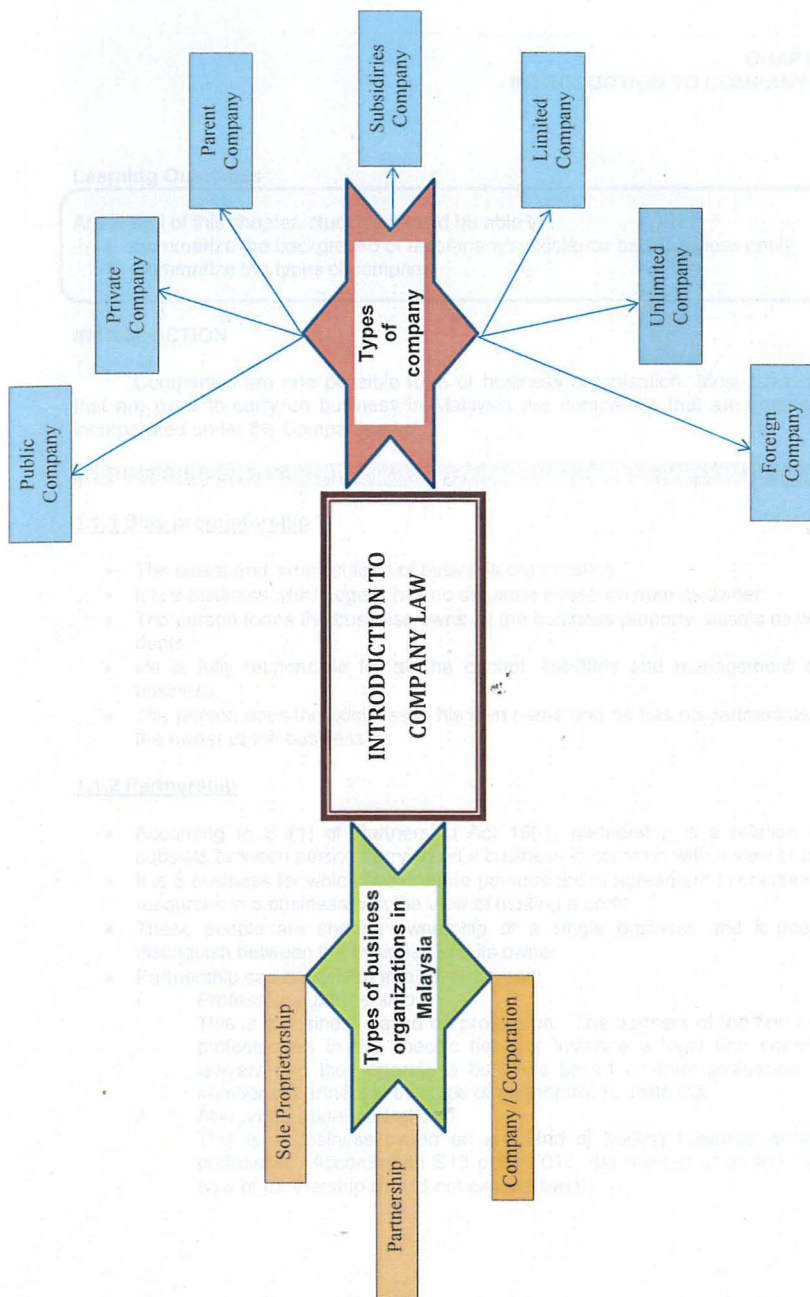
This simplified version of Company Law handbook is written based on the author's experience in teaching Company Law course to Accounting students in polytechnics. The content is prepared in a simple and understandable manner according to the syllabus for polytechnics students.

There are seven chapters as displayed in the table of contents of this handbook. Each chapter is presented in a simple and easy to understand format as it comes with diagrams and sample of question to emphasize the points. The purpose is to help and guide students in understanding the terms and remember the main point for each chapter.

Students are encouraged to use this handbook with the lecturer's guidance and as supplementary notes to the recommended textbooks as well as other references suggested by the lecturer. Any feedback and suggestion is welcomed to improve the quality of this handbook in the future. Hopefully this handbook could assist the reader especially students as an alternative reference sources to enhance knowledge in company law.

Thank you.

Azelawati binti Che Husain
Siti Suhaila binti Jusoh
Wan Mashitah binti Yusof



PREFACE

A booklet of the Government of India, New Delhi, 1954, entitled "The Indian Constitution" is a valuable and accessible source of information on the subject. It is a booklet of the Government of India, New Delhi, 1954, entitled "The Indian Constitution" is a valuable and accessible source of information on the subject.

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Learning Outcomes

At the end of this chapter, students should be able to :

1. Summarize the background of a company's existence as a business entity
2. Summarize the types of company

INTRODUCTION

Companies are one possible form of business organisation. Most corporations that are used to carry on business in Malaysia are companies that are corporations incorporated under the Companies Act.

1.1 BUSINESS ENTITY

1.1.1 Sole proprietorship

- The oldest and simplest form of business organization.
- It is a business which legally has no separate existence from its owner.
- The person forms the business owns all the business property, assets as well as debts.
- He is fully responsible for all the control, liabilities and management of the business.
- The person does the business in his own name and he has no partners as he is the owner of the business.

1.1.2 Partnership

- According to S3(1) of Partnership Act 1961, partnership is a relation which subsists between person carrying on a business in common with a view of profit.
- It is a business for which two or more persons are in agreement to combine their resources in a business with the view of making a profit.
- These people are sharing ownership of a single business and it does not distinguish between the business and its owner.
- Partnership can be divided into several types:
 - Professional partnership*
This is a business based on profession. The partners of the firm are the professionals in the specific field for instance a legal firm consists of lawyers and they operate a business based on their profession. The number of partners in this type of partnership is unlimited.
 - Non professional partnership*
This is a business based on any kind of trading business except for profession. According to S13 of CA2016, the number of partners in this type of partnership should not exceed twenty.

CHAPTER 1 INTRODUCTION TO COMPANY LAW

1.3 Corporation/ Company

- According to S3 of CA2016, a corporation means any body corporate, formed or incorporated or existing within Malaysia or outside Malaysia and includes foreign company. Company is an artificial legal entity with the attributes of perpetual succession, having a common seal, the ability to own property and having capacity of suing and being sued. Due to having separate legal entity, no shareholder of a company is personally liable for the debts, obligations or acts of the corporation.

TYPES OF COMPANIES

1.1 Public Company

A public company within the meaning of the Act is a company other than a private company. S2(1).

A public company is not affected by the restrictions, limitations and prohibitions as laid down in S43. In other words, a public company may offer its shares and debentures to members of the public.

1.2 Private Company

A private company is defined under S2 as:

- i. Any company which immediately prior to the commencement of the Act was a private company under the repealed written law.
- ii. Any company converted into a private company by virtue of S43.
- iii. Any company converted into a private company

For a company to be registered as a private company under S43, it must have a share capital and its memorandum or articles must contain the following restrictions, limitations and prohibitions:

- i. Restricting the right to transfer its share.
- ii. Limiting its members to not more than fifty members.
- iii. Prohibiting any invitation to the public to subscribe for any shares.
- iv. Prohibiting any invitation to the public to deposit money with the company.

A private company must have the word "Pte Ltd" at the end of its name.

A private company which defaulted in complying with the prohibition specified in S43 may by the order of court or notice of the Registrar ceased to be a private company.

CHAPTER 1
INTRODUCTION TO COMPANY LAW

5. When the court or the Registrar determines that the company has ceased to be a private company, that company shall then:
 - i. Be a public company
 - ii. Change its name by omitting the word "Sdn"
 - iv. Lodge with the registrar necessary documents such as a statement in lieu of prospectus, a statutory declaration and the order of the Court
6. The company that ceased to be a private company and has become a public company is unable to be converted to a private company without the leave of the Court.
7. A private company can either be:
 - i. Exempt private company
 - ii. Non-exempt private company
8. Exempt private company is a company in which
 - i. its shares has no beneficial interest held directly or indirectly by any corporation
 - ii. number of members of the company is not more than fifty members
 - iii. it is exempted from the necessity of filing its balance sheet and profit and loss account with its annual return at the Registry of the Companies
 - iv. able to make loans to its directors

Conversion from public to private company

1. A public company having a share capital may convert to a private company by passing special resolution:
 - i. determining to convert to a private company and specifying an appropriate alteration to its name, and
 - ii. altering the provisions of its memorandum or articles to impose those restrictions, limitations and prohibitions referred to S43
2. A copy of the special resolution must be lodged with the Registrar

1.2.3 Parent Company

1. S5A corporation is a holding company if it:
 - i. controls the composition of the board of directors of another corporations
 - ii. controls more than half of the voting power of the other corporations
 - iii. holds more than half of the issued capital of the other corporations
2. A corporation is deemed an ultimate holding company of another corporation if:
 - i. S4 the other corporation is a subsidiary of that holding company
 - ii. the other corporation is not itself a subsidiary of any corporation

1.2.4 Subsidiary Company

A corporation shall be deemed to be a wholly owned subsidiary of another corporation if the only member of the first mentioned corporation is:

- i. the second-mentioned corporation
- ii. the nominee of the second-mentioned corporation

1.2.5 Limited Company

Limited company means limited liability. The limited liability refers to the liability of the members and not the liability of the company. The company will always be liable to full extent of its debts.

1.2.6 Unlimited Company

1. This company is formed on the principle of having no limit on the liability of its members.
2. The members are liable to contribute to the assets of the company to an unlimited amount towards the payment of the debts and the liabilities of the company in the event of winding up.

1.2.7 Foreign Company

1. Foreign company is defined as S2
 - i. a company, corporation, society, association or other body incorporated outside Malaysia
 - ii. an incorporated society association or other body which:
 - a. under the law of its place of origin may sue or be sued or hold property in the name of the secretary or other officer of the body or association duly appointed for that purpose
 - b. which does not have its head office or principal place of business in Malaysia
2. S562 foreign company which has a place or is carrying on business within Malaysia is required to be registered with the Registrar by lodging these documents:
 - i. a certified copy of the certificate of its incorporation or registration in its place of incorporation.
 - ii. a certified copy of its charter, statute or memorandum and articles or other instruments constituting or defining its constitution.
 - iii. a list of its directors containing similar particulars with respect to its director.
 - iv. Where the list includes director's residents in Malaysia who are members of the local board of directors, a memorandum duly executed by or on behalf of the foreign company stating the powers of the local directors.

CHAPTER 1
INTRODUCTION TO COMPANY LAW

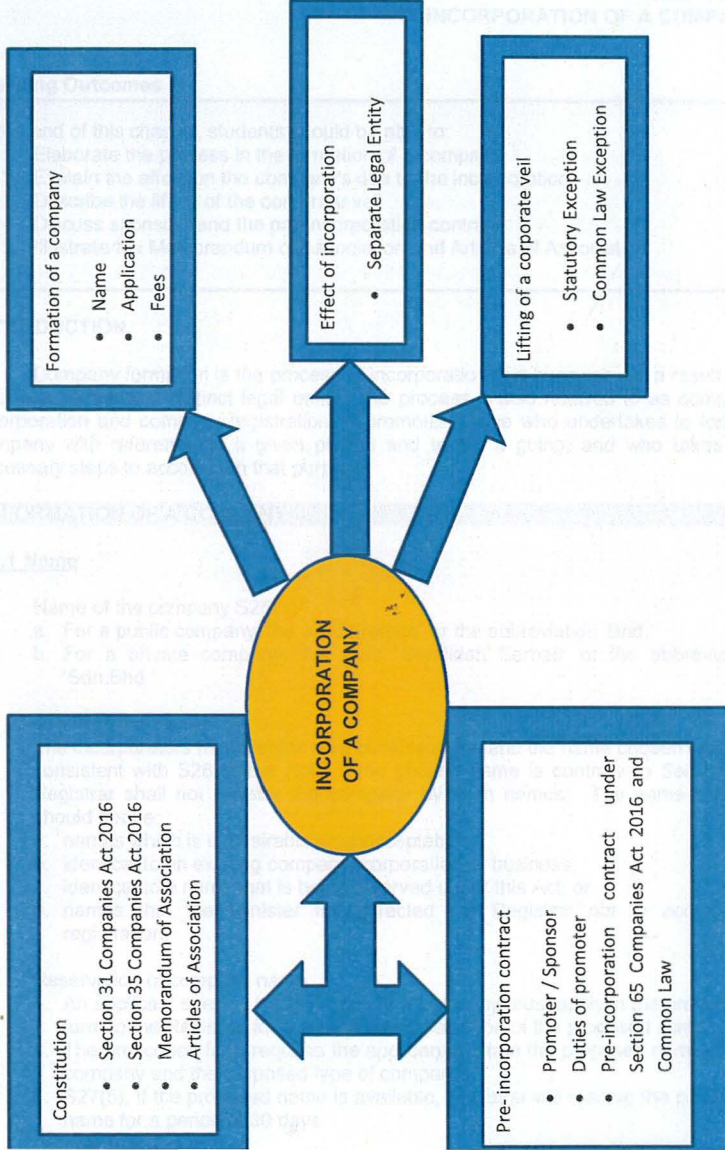
QUESTION

1. List FIVE (5) types of companies in Malaysia
2. Distinguish FOUR(4) difference between Private company and Public Company
3. Explain briefly the characteristics of Sole Proprietorship
4. Explain types of Partnership

Unlimited Company

This company is formed on the principle of having no limit on the liability of its members

The members are liable to contribute to the assets of the company to an unlimited amount towards the payment of the debts and the liabilities of the company to the extent of sharing up.



Learning Outcomes

At the end of this chapter, students should be able to:

1. Elaborate the process in the formation of a company
2. Explain the effect on the company's due to the incorporation
3. Describe the lifting of the corporate veil
4. Discuss sponsors and the pre-incorporation contract
5. Illustrate the Memorandum of Association and Articles of Association

INTRODUCTION

Company formation is the process of incorporation of a business. As a result, the business becomes a distinct legal entity. The process is also referred to as company incorporation and company registration. A promoter is one who undertakes to form a company with reference to a given project and to set it going, and who takes the necessary steps to accomplish that purpose.

2.1 FORMATION OF A COMPANY

2.1.1 Name

1. Name of the company S25(1)
 - a. For a public company, the word 'Berhad' or the abbreviation 'Bhd.'
 - b. For a private company, the word 'Sendirian Berhad' or the abbreviation 'Sdn.Bhd.'
2. Availability of name:

The incorporators must decide on a suitable name and the name chosen must be consistent with S26 of the Act. If the chosen name is contrary to Sec.26 the Registrar shall not register the company by such names. The name chosen should not be:

 - a. names which is undesirable or unacceptable;
 - b. identical to an existing company, corporation or business;
 - c. identical to a name that is being reserved under this Act; or
 - d. names that the Minister has directed the Registrar not to accept for registration.
3. Reservation of company name
 - a. An applicant seeking incorporation of a company must apply in the prescribed form to the Registrar for a search and reservation of the proposed name.
 - b. The prescribed form requires the applicant to state the proposed name of the company and the proposed type of company.
 - c. S27(5), If the proposed name is available, Registrar will reserve the proposed name for a period of 30 days.

4. Change of name

A company may change its name through a few procedures according to Sec.28

- a. Resolve to change its name through special resolution.
- b. Notify the Registrar within 30 days from the date of special resolution.
- c. If Registrar satisfied, Registrar shall:
 - a. Enter the new name of the company
 - b. Issue a notice of registration of the new name
 - d. It shall take effect from the date the notice of registration of new name has been issued
- e. Change of company name will not affect any previous court action imposed against the company.

2.1.2 Application For Incorporation

According to S14, the application for incorporation shall include a statement by every person who desires to form a company containing the following particulars of the proposed company:

- a. the name of the proposed company
- b. the status of whether the company is private or public
- c. the nature of business
- d. the proposed address
- e. the name, identification, nationality, and the ordinary place of residence of every person who is to be a members
- f. the name, identification, nationality, and the ordinary place of residence of every person who is to be a director
- g. the name, identification, nationality, and the ordinary place of residence of the secretary (if any)
- h. the details of class and number of shares to be taken by member(if company limited by share)
- i. the amount up to which the member undertakes to contribute to the assets of the company during winding up (if company limited by guarantee)
- j. any other information as the Registrar may require

2.1.3 Payment of fees

- The amount of fees to be paid can be referred to the table of fees stated in the Second Schedule of the Companies Act 2016.
- When the registrar is satisfied that all the necessary requirements under the Act have been fulfilled, he shall certify under his hand and seal that the company is incorporated on and from the date specified in the certificate.

2.2 EFFECT ON THE COMPANY'S DUE TO THE INCORPORATION

2.2.1 Separate Legal Entity (A veil of incorporation)

1. Once incorporated, the most prominent characteristic of a company is that it becomes a body corporate in which it may stand on its own.
2. In the eye of law, the company is described as an artificial person or legal person which having its own legal capacity to enjoy rights, assumes obligations, incurs liabilities and performs duties independently.
3. A company after incorporation is having its own legal entity distinct from the persons comprises it.
4. Concept of separate legal entity of a company was first established in the case of **Solomon v A Solomon & Co. Ltd.** This case was about Solomon who ran the business of boot and shoe manufacturing as a sole trader. He then converted the business into limited company. The members were himself, his wife and his children. The company purchased the business for £39,000 which was an excessive price. As a result, Solomon held 20,000 shares and his wife and children held one share each. Unfortunately, the company went into liquidation. The assets were insufficient to discharge the debts that the company owed to the unsecured creditor. The liquidator sued Solomon contended that the company was a sham and that the 'company' was in fact only Solomon himself under another name. The court held that Solomon and the company were having distinct entity in which the company had a legal existence of its own.
5. As a body corporate, a company shall have the several consequences that flow from it. These are:
 - a. The company is having power to hold land
 - b. The company is having right of suing and being sued
 - c. The liability of the members to contribute to the assets of the company is limited
 - d. The company is having perpetual succession

a. *Ability to hold property.*

A company is capable to hold property in its own name.

- * The property belongs to the company itself and not to the individual shareholder.

- * The shareholders have no direct proprietary right to the corporate property.

- * *Case : Macaura v Northern Assurance Co. Ltd*

Macaura sold his land and timber to a company received all the fully paid shares of the company as a consideration of it. Earlier, Macaura insured the timber against loss by the fire in his own name. When he sold the timber, he did not transfer the insurance policy to the company. The timber unfortunately destroyed in a fire and Macaura put in a claim. The insurance company refused to pay arguing that Macaura had no insurable interest in the timber. The court agreed with the insurance company, he has not just sold the timber, but any interest attached to the timber and this including the insurance policy. Thus, the timber and the insurance policy became the property of the company.

b. *Right of suing and being sued*

- * Company is entitled to sue and being sued in its own name.

- * Only the company can maintain an action to enforce its legal right and the members have no right to do it on the company's behalf.

- * *Case : Foss v Harbottle*

An action was brought by the shareholders against the directors of the company alleging them on misappropriated the company's property. The action was dismissed by the court due to wrong plaintiff. As a legal person, the right of suing is given to the company only through its proper organ and not the other person.

c. *Liability of the members*

- * Any debts incurred will be the responsibility of the company to discharge it and the members of the company are not as such liable for its debts.

- * Members' liability to discharge the debts is limited either by share or by guarantee.

- * Their contribution to settle the debts only exist when the company is in the event of winding up.

- * *Case : Re Application by Yee Yut Ee*

The High Court quashed the award made by the Industrial Arbitration Court that ordered Yee to be personally liable to pay the retrenchment benefits. The court held that it was erroneous in law to order Yee, the director to be liable for the debts of a company as the law treated the controllers and the company as separate persons and hence should not be liable for the debts incurred by the company

d. *Perpetual Succession*

- * The company upon incorporation is everlasting and immortal.
- * It may last until it is properly wound up by due process of law. The company survives though there is no longer human being in it or no business to run.
- * Case : *Re Noel Tedman Holdings Pty Ltd*
The company was still survived though all shareholders and directors died. The change of hand of shareholdings does not change the identity of the company due to having perpetual succession

2.3 LIFTING OF THE CORPORATE VEIL**2.3.1 Separate Legal Entity and Its Exceptions**

1. Also referred to as "a veil of incorporation".
2. The existence of the veil is to shield the shareholders and the members from personal liability for the debts of the company. Officers and directors of a corporation as well as other employees are generally not to be held liable for the losses of the corporation.
3. The company is fully responsible to its legal obligation and can sue and be sued.
4. Sometimes there exists a situation where the concept of separate legal entity is ignored. It is called "Lifting the Veil of Incorporation".
5. Lifting or piercing the corporate veil is a legal decision where a shareholder of a corporation is held personally liable for the debts of the corporation despite the general principle that these persons are immune from suits in contract or tort that otherwise would only hold the corporation liable.
6. In 'lifting the veil of incorporation, the law can go behind the corporate veil based upon two exceptional grounds :
 - a. statutes - known as *statutory exception*
 - b. case law – known as *judicial exception*

CHAPTER 2 INCORPORATION OF A COMPANY

3.2 Lifting the veil by Statutory Exception

provisions where the officers or members of the company may be criminally or civilly liable:

provision 1

- If a company carries on a business while the number of members is reduced below two, the remainder member is jointly and severally liable with the company for the payment of the debts after six months the number is so reduced.
- The provision is applicable subject to the following conditions:
 - i. the member who remains after six months the number is so reduced is liable to the debts and not to the one who left the company.
 - ii. the member is liable if he is cognizant of the fact that the company is carrying on the business with only one member.
 - iii. the person is liable to the debts contracted after six months and while he was a member.

provision 2

- Prohibits the company from giving financial assistance in relating to its shares. Any officer of the company who involves in giving whether directly or indirectly by means of a loan, guarantee, security or otherwise, any financial assistance regarding the purchase or subscription made by any person for shares in the company shall be guilty of an offence against the Act and not the company.
- The person who has been convicted may be ordered by the court to pay compensation to the company or other person who has suffered loss or damage as a result of the contravention of that section.

provision 3

- Provides the circumstances pertaining to the publication of company's name. Every company's name must appear in legible Romanized letters on its documents. The officer of a company or any person on its behalf shall be guilty of an offence against this Act or liable to the holder of the company's instruments or order for the amount due if:
 - i. he uses or authorizes the use of any seal of the company whereon the name of the company does not so appear.
 - ii. he issues or authorizes the issue of any business letter, statement of account, invoice or official notice or publication of the company wherein the name of the company is not so mentioned.
 - iii. he signs, issues or authorized to be signed or issued on behalf of the company any bill of exchange, promissory note, cheques or other negotiable instrument or any endorsement, order, receipt or letter of credit wherein the name of the company is not so mentioned.

CHAPTER 2 INCORPORATION OF A COMPANY

Provision 4

- Imposed liability on the officer of the company in relation to the contracting of company's debts.
- The officer is guilty of an offence against the Act and personally responsible without any limitation of liability for the payment of the whole debts or any part of it if:
 - i. he was knowingly a party to the contracting of a debts of a company
 - ii. the debts were contracted at the time where there is not reasonable and probable ground of expectation that the company is being able to pay it.

Provision 5

- Concept is also ignored when the business of the company has been carried on fraudulently.
- Provides that where the person carried on the business of the company with intent to defraud the creditors of the company or for the fraudulent purpose, the court may declare the person who carried on the business in that manner shall be personally responsible for all or any of the debts of the company without limitations.

Provision 6

- Imposed the liability upon every director or manager of a company who willfully pays or permits to be paid any dividend not out of the profits.
- The persons shall be guilty of an offence against this Act and shall also be liable to the creditors of the company for the amount of the debts due whenever the dividends paid have exceeded the profits.

2.3.3 Lifting the veil at Common Law/ Judicial Exception

The justification of lifting up the veil by the court is based upon many reasons such as follows:

- i. where the company is a sham or mere facade
- ii. where the company is effectively just the agent or alter ego of its members or controllers
- iii. where the company is engaged in fraud trading or other criminal wrongdoing
- iv. where permitted by statute (e.g as been found in Act)

1. Where the company is a sham or mere facade

- Case: *Gifford Motor Co Ltd v Horne*

The ex-director breached the agreement he made with the plaintiff when he set up a rival business through a company which he controlled. The plaintiff sought for the injunction against the company as well as against the controller. The court ignored the separateness of the company's entity by extending the injunction to the company and asked the company as well as the controller to abide with the court order. This is because the defendant setting a business which was merely a cloak or sham or device for enabling him to continue to commit breach of agreement with the plaintiff.

2. Where the company is effectively just the agent or alter ego of its members or controllers

- Case: *Hotel Jaya Puri Bhd v National Union of Hotel, Bar & Restaurant Workers & Anor*

The worker of the Restaurant asked for compensation from the hotel when the Restaurant was closed down claiming that they were also the employees of the hotel. The hotel was wholly owned subsidiary of Hotel on whose premise the restaurant was situated. The court found that although technically the Restaurant and Hotel were separate entities but in reality the two companies were functioning one such that as the employee of the Restaurant was in reality an employee of the hotel.

3. where the company is engaged in fraud trading or other criminal wrongdoing

- Case: *Re Darby*

The court lifted the corporate veil where the company was used as a vehicle or mechanism for committing fraud. In this case, a few undischarged bankrupts incorporated a company in the Channel Islands called 'City'. They later promoted another company in England known as 'Quarries'. City sold a quarrying license to Quarries at a higher price. When Quarries went into liquidation, the liquidator sought to make Darby liable to account for the profit. Darby argued that in law, he and the company were different persons. The court refused to accept the defense because the company set up by him was just a 'dummy company' for the purpose of enabling him to perpetrate a fraud.

- Case: *Tesco Supermarket v Natrass*

The company which owned a chain supermarket has displayed a large advertisement stating a certain particular item was on sale at a reduced price. After the discount selling items have been sold, a shop assistant displayed the same items but with no discount price. The manager did not know about this and still remained the advertisement of the discount selling items. The company was later charged for making a false or misleading statement relating to the price of goods under the Trade Descriptions Act 1968. To see the mind and will of the company, the court has to lift up the veil by looking at the mind and will of the manager which was considered as the directing mind of the company.

The court found the manager could not be identified as the directing mind and will of the company because he did not have the necessary responsibility or controls of the company's operations. The one committing the offence is the employee.

2.4 SPONSORS AND PRE-INCORPORATION CONTRACT

2.4.1 Sponsors / Promoters

1. The company obviously does not come into existence spontaneously without the assistance of someone. The persons who are involved in promoting the company are called promoters.
2. Definition of promoter is given in the case *Twycross v Grant*. Promoter is one who undertakes to form a company with the reference to a given project and to set it going, and who takes the necessary steps to accomplish that purpose.
3. Promoters are persons who do all the steps for the formation of a company like giving instruction for the preparation of memorandum and articles, preparation of prospectus, obtain the directors and negotiate any contracts on behalf of the company with the third party.
4. A person may become a promoter:
 - i. Due to obtaining profit in the formation of a company although no active part is taken in the operation of it.
 - ii. If he subsequently helps in raising the capital.

A company may also be a promoter by forming another company.

5. Duties of a promoter:
 - i. *A promoter stands in a fiduciary relationship towards the company and therefore he must not make any secret profits out of the promotion*
 - * A fiduciary relationship which exists between the promoter and the company requires the former to act with good faith and loyalty.
 - * The promoters must act solely in the interest of the company and must not allow his own self interests to dictate his behaviour in any way that might conflict with the company's best interest.
 - * Promoters are required to make full disclosure to the company of all material facts that may affect the company. Material includes

profits and contracts that he or she may make or secure from acting as promoter. Profits that are secured without disclosure amounted to breach of duty of promoter.

- * Material also includes commission promised to be paid by the third party.

- * Disclosure of material facts must be made to either an independent board of directors or the existing and intended shareholders.

- * The disclosure of all the material facts involving the promoter and the company must be made in full and frank. If partial disclosure is made, that would not discharge him from the duty.

- * A promoter who had made a full and fair disclosure of everything material in relation to the dealing or transaction in which he acts is entitled to keep his profits.

ii. *A promoter is responsible to the misstatement in the prospectus issued on behalf of the company.*

- * as a promoter is a party involved in the preparation of prospectus, a criminal liability might be imposed upon a promoter if the prospectus issued contains untrue statement.

6. Remedies For Breach of Duties:

i. *Rescission of the contract*

- * When it involves purchasing the property of the promoter, the company may rescind the contract and recover the purchase money paid.

- * Contract may also be rescinded if the promoter secured an undisclosed profit with the company.

- * Case: *Erlanger v New Sombrero Phosphate Co*

- * The right to rescind the contract may be lost if:

- i. the company has affirmed the contract after having discovered the truth.

- ii. the parties involved in the contract cannot be restored to their original position.

- iii. third parties have acquired rights for the value under the contract. (Third party bought property in the contract)

ii. *Recovery of secret profits*

- * The company may recover the secret profits that the promoters have made.

iii. *Sue for damages*

- * Company may sue for damages for the non disclosure of material facts to the company which amount to deceive.

2.4.2 Pre-Incorporation Contract

1. S65, a contract or transactions that are made by a company before its incorporation can be ratified after its incorporation. It means the pre-incorporation contract is valid and bound under CA2016.
2. Under Common Law, the pre-incorporation contract is not valid and company did not bound to the contract. Refer case *Cosmic Insurance Corporation Ltd vs Khoo Chiang Poh*.

2.5 MEMORANDUM OF ASSOCIATION AND ARTICLES OF ASSOCIATION

2.5.1 Constitution Of The Company

1. S31 CA2016
 - A Company other than company limited by guarantee may or may not have a constitution.
 - The rights, powers, duties and obligations which set out in the constitution will bound the company, each directors and each members.
2. Contents of the constitution S35 CA2016
 - The objects of the company
 - The capacity, rights, powers, or privileges of the company
 - Matters contemplated by this Act
 - Any other matters as the company wishes to include
3. Company may alter or amend constitution according to S36 CA2016.

2.5.2 Memorandum of Association

1. In the case of a company registered under the corresponding previous written law, is the memorandum and articles of association as originally registered or as altered in accordance with the corresponding previous written law.
2. This is the primary document, generally regulates the company's activities with the outside world, such as the company's objects and powers. It defines the important structure and the powers of the company. This document is considered as the external face of the company.
3. It enables any person who deals with the company to know the permitted range of the business of company.

CHAPTER 2 INCORPORATION OF A COMPANY

4. The memorandum of every company shall state:

- i. The name of the company
- ii. The objects of the company
 - contains the business or activity that the company could engage including its legal power.
- iii. The amount of share capital that the company proposes to be registered in the case of a company having share capital and the division of it into shares of a fixed amount
- iv. The liability of the members for a limited company that is either by share or by guarantee
- v. If the company is unlimited company, that the liability of the members is unlimited.
- vi. The full names, addresses, occupations of the subscribers and the number of shares taken by them.

5. Doctrine of Ultra Vires

- i. Any contract entered by the company must be within the powers and objects laid down in the memorandum of the company. If the activity of the company falls outside the company's capacity, it is said to be *Ultra Vires*.
- ii. Status of the contract made under Doctrine of Ultra Vires can be viewed from 2 angles:

Common Law:

- a. Any ultra vires contract is not valid.

Case : *Ashbury Railway Carriage & Iron Co. Ltd. V Riche*

The object for which the company is established are to make and sell, or lend in hire railway carriage and all kinds of railway plant. Riche had obtained a concession from the government to make a railway. The directors of the company entered into contract with Riche to take over the concession. The company repudiated the contract as being ultra vires and Riche brought an action against the company to recover damages for breach of the contract. Court held : the contract was not within the objects clause, it was ultra vires and wholly void.

- b. Company cannot be prosecuted based on an ultra vires contract.
Case : *Re Jon Beauforte*

- c. Company cannot sue other parties to an ultra vires contract.

- d. Outsiders cannot use the excuse that he did not know about the company's objective

Companies Act 2016

No act or purported act of a company, no conveyance shall be invalid by reason only of the fact that the company was without capacity or power to do the act.

Exceptions:

1. The member of the company, debenture holders secured by floating charge and the trustees may bring a proceeding against the company to restrain the act of ultra vires from been executed

Case: *Hawkesbury Development Co Ltd v Landmark Finance Pte Ltd (1969)*

2. If the ultra vires transaction is done on behalf of the company by an officer or agent of the company under any authority, a proceeding can be taken against them by the company or by any member of the company. The officer includes the present or former officer of the company who has caused the company to enter into ultra vires act breaches his duty to the company.
3. The Minister in charge with the company may also relied upon the lack of capacity or power of the company in doing such act as ground for him in a petition to wind up a company.

2.5.3 Alteration of Memorandum

1. The memorandum may be altered to the extent and in the manner provided by the Act only. The clauses can be altered are:

a. Name

- * The name of a company will have a special value to the company itself.
- * The name of a company need to comply with S27
- * Limited public company must include the word "Berhad"
- * Private company must include "Sendirian Berhad"

b. Object

- * expressly requires the objects clause of a company to be stated in the memorandum of the company.
- * The object clause of a company is the reference to its business activities.

c. Liability of the members

- * state the limited liability of the members of the company.

d. capital of the company

- * the capital is the property of the company
- * Capital in a company are movable property, transferable or immovable property

2. Procedures of alteration of memorandum:

- a. The company proposes to alter memorandum may pass special resolution.
- b. Alteration of object and capital clauses is subject to confirmation by the court. Without confirmation, these 2 clauses cannot be changed.
- c. A copy of the special resolution and also the confirmation by the court will need to be submitted to the Registrar before any alteration can take effect.

2.5.4 Articles of Association

1. Articles set out regulations for the internal matters of a company, e.g the division powers between the board of directors and members/ shareholders in general meeting.
2. Articles must be:
 - i. printed
 - ii. divided into numbered paragraphs
 - iii. signed by each subscriber to the memorandum in the presence of at least one witness

2.5.5 Alteration of Articles

1. A company may alter its Articles by special resolution.
2. Despite the articles are freely altered, it is subject to a few restrictions. The restrictions are:
 - a. The alteration of articles is subject to the conditions in the memorandum. Therefore, if the memorandum prohibits the alteration or imposed further requirements for the alteration, then the company may have no ability or restrict ability to alter its articles.
 - b. In the case of private company, the prohibitions and the restrictions stated in S43 of the Act must be kept intact. Any alteration to such provisions and caused the company to default in complying with such prohibitions may render the Court to order the company ceased to be a private company.
 - c. Any alteration that requires the members to incur more liability such as to subscribe or take more shares than the number held at the date of the alterations or to increase the liability to contribute to the share capital or to pay money to the company, shall have no effect to the members unless they consented to it in writing.
 - d. In the case the company with various classes of capital, the alteration regard the variation of the rights of the holder of the various classes of capital is subject to the consent of any specified proportion of the holders of that class of shares or the sanction of a resolution passed at a separate meeting of the holders of those shares. If 10% of the holder of the issued shares of that class applies to the court for cancellation, the variation or abrogation shall not have the effect until it is confirmed by the court.

- e. In certain circumstances, a shareholder or debenture holder may apply to the court for oppression remedy. The court has the power to make some kind of order for instance order for the company to amend its article. Therefore, the company shall make amendments to the feature ordered by the court only.
- f. Alteration must be made for the benefit of the company.

2.5.6 Constitution Of The Company

1. S31 CA2016
 - A Company other than company limited by guarantee may or may not have a constitution.
 - The rights, powers, duties and obligations which set out in the constitution will bound the company, each directors and each members.
2. Contents of the constitution S35 CA2016
 - The objects of the company
 - The capacity, rights, powers, or privileges of the company
 - Matters contemplated by this Act
 - Any other matters as the company wishes to include
3. Company may alter or amend constitution according to S36 CA2016.

2.5.7 The Effects Of The Constitutions

1. The memorandum and the articles when registered bind the company and the members.
2. The memorandum and articles in law constitute a contract between the company and its members and among the members inter se. Below are the contract:
 - i. *Contractual effect between the company and the members*
All the parties to the contract are bound to comply with the provisions of the memorandum and articles. Each member is bound to the company and therefore the company may have the right to take action against the members when the members failed to comply with it.
Case: Hickman v Kent
Hickman, a member brought an action to the court when a dispute arose between the members and the company. The court held that the provisions of the articles were binding on the members as the articles amounted to a contract between the company and member.

ii. *Contractual effect among the members*

A member may have a right to enforce the articles against another member on the provisions which effect members in their capacity as members.

Case: *Rayfield v Hands*

A member intending to transfer his shares should inform the directors who will take the shares equally between them at a fair value. The plaintiff who was a member, informed the defendants (directors) but they refused to take the shares. The court held that the defendants were bound to buy the plaintiff's shares. The articles constituted contract between the plaintiff as a member and the defendants, not in capacity as a directors but as members of the company.

iii. *Effect of M & A to the outsider*

The memorandum and articles do not constitute a contract as regards the outsider. The outsiders are not party to the contracts and therefore the provisions of the memorandum and articles are not binding upon them.

Case: *Raffles Hotel Ltd. v Malayan Banking Bhd*

The court held that the provisions of the memorandum and articles could not be enforced by the outsider as these documents did not constitute contracts between the company and outsider.

QUESTION

1. List **FIVE (5)** documents required to be submitted to Registrar of Company in the formation of a company within three months from the date of approval of the company's name.
2. List **FIVE (5)** fiduciaries duties of a promoter as stated in the case of Twycross vs Grant.
3. Explain the effect of Memorandum of Association and Articles of Association as in Section 33(1) Companies Act 1965.
4. Discuss **FOUR(4)** effects due to incorporation of a company with reference to the relevant cases.
5. Discuss the ultra vires doctrine and its relationship with object clause in memorandum of association (MOA)

The memorandum and articles in law constitute a contract between the company and its members and among the members inter se. Below are the contract:

Contractual effect between the company and the members

All the parties to the contract are bound to comply with the provisions of the memorandum and articles. Each member is bound to the company and therefore the company may have the right to take action against the members when the members failed to comply with it.

Case: Hickman v Kent

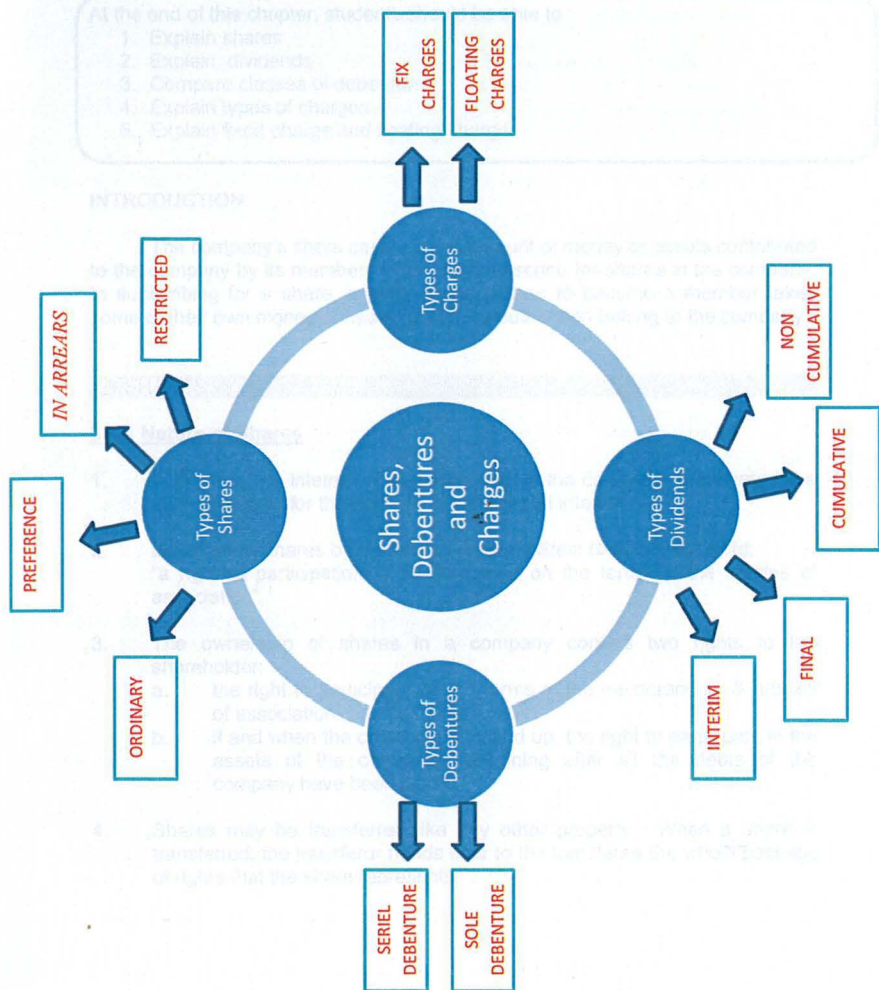
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Learning Outcomes

At the end of this chapter, students should be able to:

1. Explain shares
2. Explain dividends
3. Compare classes of debentures
4. Explain types of charges
5. Explain fixed charge and floating charge

INTRODUCTION



Learning Outcomes

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INTRODUCTION

The company's share capital is the amount of money or assets contributed to the company by its members when they subscribe for shares in the company. In subscribing for a share, a person who wishes to become a member takes some of their own money or assets and contributed then belong to the company.

3.1 SHARES

3.1.1 Nature of Shares

1. A share is the interest of a shareholder in the company, measured by a sum of money, for the purpose of liability and interest.
2. Definition of shares by *Borland's Trustee v Steel Brothers & Co Ltd*:
"a right of participation in the company on the terms of the articles of association"
3. The ownership of shares in a company confers two rights to the shareholder:
 - a. the right to participate on the terms of the memorandum & articles of association.
 - b. if and when the company is wound up, the right to participate in the assets of the company, remaining after all the debts of the company have been paid.
4. Shares may be transferred like any other property. When a share is transferred, the transferor hands over to the transferee the whole package of rights that the share represents.

3.1.2 Classes Of Shares

1) Preference Shares

- i. S72 defines preference share as a share which does not entitle the holder to vote at a general meeting or participate beyond a specified amount in the distribution, whether by way of dividend, or on redemption, in a winding up, or otherwise.
- ii Often give the holder greater rights than those who holds ordinary shares.
- iii Advantages of preference shares:
 - a. Restricted associated risks.
 - b. Should the company fall into financial problems, preference shareholders receive the full value of their share capital before any money is made available to holders of ordinary shares.
 - c. Shareholders receive fixed dividend. This can be a disadvantage though, since holders of preference shares will not benefit from any increase in dividend.
- iv Types of preference shares:
 - *Redeemable shares*
A company reserves the right to be able to buy shares back from the shareholder at a later time. A date for buying these shares back does not have to be pre-determined.
 - *Cumulative preference shares*
Dividend must be paid to the holder no matter how much or little money a business makes. Dividends that cannot be paid for 1 year are carried over to the following year or years.
 - *Non cumulative preference shares*
Entitle the holder to a dividend at a fixed rate only in the years where a dividend is declared and paid.
 - *Convertible preference shares*
These shares usually a right to a preferred, fixed dividend for a particular term and then allow for or require conversion to ordinary shares at the end of the term.

2) Ordinary Shares

- Shareholders are entitled to vote in many company matters.
- Receives dividend if the company earns money.
- Shareholders are paid after any obligation to debt are paid and preferred shares have been paid their dividends.

3) In arrears Shares

- Known as promoter shares.
- Issued only for promoters or the person that has been contributed in setting up the company.
- This shareholder entitles to repayment of dividend after ordinary shares and preference shares have been paid.

4) Restricted Shares

- Reserved for company employees, particularly high-ranking officers and executives.
- Usually used as incentives to attract executives and keep current ones. The executives do not have to pay for the shares which means the shares do not count as taxable income.
- Shares carry the restrictions that prevent the holder from selling or trading them without permission. The restrictions can be lifted in the event that the holding executive is able to meet pre-determined goals with the company. An example would be if an executive stays with the company for a certain number of years after being issued the stock. After this time has passed, some companies may offer to buy the stock back, which is a benefit to the shareholder seeing as they did not have to pay for the shares when they were first issued.

3.1.3 Issuance Of Shares

Issue of shares at a discount:

1. a company to issue shares at a discount subject to certain conditions:
 - a. the shares must be of a class already issued; therefore a company's first issue of shares may never be discounted.
 - b. there must be a resolution passed by a general meeting specifying the maximum rate of discount.
 - c. at least one year must elapse since the date on which the company was entitled to commence business.
 - d. the issue must be confirmed by an order of court.

Issue of shares at a premium:

1. A company may issue shares at premium. If a company does so, the premium must be reflected in a "share premium account"
2. The share premium account may be used in the manner
 - a. in paying up bonus shares to be issued to the members.
 - b. in paying up the unpaid balance on shares previously issued.
 - c. in paying up shares to be issued as dividends to members.
 - d. in the case of an insurance company, by appropriation or transfer to any statutory fund maintained pursuant to any law relating to insurance.
 - e. in writing off the preliminary expenses of the company or the expenses of any issue of shares (including commission, brokerage, discount, duties, fees or taxes)
 - f. in providing for the premium payable on redemption of redeemable preference shares.

3.1.4 Share Certificate

1. S97 Shares have no physical existence. A share certificate is not a share; it is merely *prima facie* evidence that the person named in the certificate is the owner of the share in question.
2. S98(1) share certificate must be issued to the holder of shares within 60 days of an allotment or within 1 month of a transfer.

3. If a company does not do so, the person entitled to the certificate may :
 - a. serve a notice on the company requiring it to make good the default.
 - b. if the notice is not complied within 10 days after the service of the notice, an application may be made to court for an order directing the company or any officer to make good the default.
4. Each share must normally be distinguished by an appropriate number indicated in the certificate.
5. S98(1) Details appearing in the certificate:
 - a. name of the company and the authority under which the company is constituted to be inserted in a newspaper circulating in a place
 - b. the class of shares
 - c. value of the shares

3.2 DIVIDEND

A dividend is the distribution of profits to a company's shareholders. It represents the return on the shareholder's investment in the company. It is paid out of company's assets legally available for dividend.

3.2.1 Differences between dividend and interest

1. Dividend can only be declared out of the assets legally available for dividend but interest is paid out of company's assets.
2. Interest is payable to debenture holders but dividend is paid to the shareholders.

3.2.2 Types of dividend

1. Interim dividend
2. Final dividend
3. Cumulative dividend
4. Non cumulative dividend

3.2.3 Rules of paying dividend

1. *Dividends must be paid out of profit*

In order for the company to pay dividends, the profits must exist at the time the dividends are declared.

Case : *Marra Developments Ltd vs BW Rofe Pty Ltd*

The company has declared dividends out of profits available. After declaration, the company did not immediately pay it to the shareholders but instead revalued its assets. Subsequently at the first half year of its calendar year, the accounts of the company showed a considerable loss. The shareholders later sued the company for payment of the declared dividend. The company argued that dividend could no longer be paid as profits were no more available. The court held that once the company had declared dividends out of profits available at the time, the company was bound with it and it becomes debts due.

2. *Dividends may be paid out of circulating capital*

Circulating capital is a portion of the subscribed capital of the company intended to be used temporarily parted with and circulated in business, in the form of money, goods or other assets and which or the proceeds of which are intended to return to the company with an increment. In other words, circulating capitals refer to the assets which a company deals with in the normal course of its business such as trading stock.

Case : *Lee vs Neuchatel Asphalte Co*

The company was formed to acquire and mine mineral deposits. The property was of a wasting nature, in that portions of the property would lose its value and when exploited. The court authorized the payment of dividend although there is a decline in the value of the company's assets. When there is an increase in circulating capital, the increase is considered as profits and this amount could be distributed as dividend.

3. *Dividends may be paid out of unrealized profits from fixed assets*

It is common practice of account to revalue its fixed assets periodically. This is to ensure that the accounts prepared is complying with the accounting standards.

Case : *Dimbula Valley (Ceylon) Tea Co. Ltd vs Laurie*

The court allowed it to be used so long as the surplus on capital results from a valuation made in good faith by competent valuers and is not likely to be liable to short term fluctuations.

4. *Dividends may be paid out of realized profits on sale of capital assets*

Case : *Lubbock vs British Bank of South America*

The company sold some of its assets and made gain. The accounts of the company showed that there was a surplus over liabilities. The court held that the surplus was not capital which required to be kept intact by the company but profits which were available for distribution for dividends to shareholders.

5. *Dividends may be paid from revenue profits without first making good the loss of fixed capital*

There is no obligation for the company to apply its revenue profits to make up losses in its loss capital. This is because the company is not the debtor to the capital and therefore although the assets are of less value than the original capital, the company is not obliged to make them up to that value.

Case : *Lee vs Neuchatel Asphalte Co*

A shareholder brought an action to restrain the company from paying dividends on the grounds that there was a loss in its capital and therefore the priority must be on the loss capital before a dividend can be paid. The court however rejected the argument and held that there is no principle that a company had to replace lost capital before dividends could be paid.

6. *Dividends cannot be paid from profits of subsidiaries*

Due to principle of separate legal entity, subsidiary of another company is treated separately. Therefore company in a group of a company is not allowed to declare dividends out of profits available by other company in the same group.

Case : *Industrial Equity Ltd vs Blackburn*

Industrial Equity proposed to declare a dividend out of the profits of a company called Minerva Centre which was in the same group with it. The profits disclosed in the profit and loss account of it, is insufficient to meet the payment of dividend declared. Therefore Industrial Equity sought to pay dividends in the form of shares of the Minerva on the ground that the profits of a group as a whole should be treated as effectively being the profits of the holding company. It was held by the court that the profits had to be those of the company declaring the dividends.

7. *Dividends may be paid out of profits of any year without first making good the losses of previous years*

There is no law which requires the company to make good all losses incurred in previous years before dividend can be declared. This is because each of the accounting period is treated in isolation and not part of a continuous process.

Case : *Ammonia Soda Co vs Chamberlain*

The company gained trading profits and declared dividends. The shareholders brought an action claiming that the dividends has been paid

CHAPTER 3 SHARES, DEBENTURES AND CHARGERS

out of capital as the earlier losses had first to be made good before it could be said there was a profit. The court rejected the argument and held that the dividends were paid out of profits and not out of capital and there were no obligation on the part of the company to replace a capital loss before declaring dividends.

3.2.4 Types of payment of dividend

- Cash
- Specific Assets
- Debentures
- Stock of Debentures

3.3 DEBENTURES

1. A company may raise finance by borrowing. A company's borrowing powers are usually to be exercised by the board of directors. A company may finance its operations by the issue of debt securities in the form of debentures. Public companies may borrow from the public, a means of financing that is generally not available on other forms of business organization.

2. Definition of debentures:

Levy vs Abercorris Slate and Slab Co

A document which either creates a debt or acknowledges it, and any document which fulfills either of these conditions is a debenture.

3. S2 : Debenture under the Act includes debenture stock, bonds, notes and any other securities of a corporation whether constituting a charge on the assets of the corporation or not.

3.3.1 Registration of debentures

1. A company which issues debentures must keep a registrar of holders of the debentures.
2. the register must be kept at the registered office of the company or at some other place in Malaysia.

CHAPTER 3 SHARES, DEBENTURES AND CHARGERS

3.3.2 Rights of debenture holders

1. Holder of debenture has the same right as a member of the company to restrain an ultra vires act. Thus, if a company proposes to enter into transaction not authorized by its memorandum and association, a debenture holder may apply to court to have the transaction restrained.
2. Debenture holders are entitled to notice of any meeting where it proposed to alter the objects clauses in the memorandum of association. Persons holding not less than 5% of the nominal value of the company's debentures may apply to court to cancel a proposed alteration of the company's objects.
3. Debenture holders may petition the court for relief if their interests are disregarded or if they are oppressed, discriminated against or otherwise prejudiced. This is a statutory recognition of the fact that the debenture holders have a keen interest in the way that the company is run.

3.3.3 Trustee for debentures holders

1. Every company which offers debentures to the public for subscription or purchase must appoint a trustee corporation as trustee for the debentures holders. The trustee for the debenture holders is meant to be a watchdog to look after their interest.
2. The borrowing company must not allot any of those debentures until a trustee corporation has been appointed and has consented to act as trustee.

3.3.4 Duties of trustee

The duties of trustee are set out in S177 of the Act. The trustee must:

- a Exercise reasonable diligence to ascertain whether or not the assets of the borrowing corporation and any of its guarantor corporations are likely to be or become sufficient to discharge the principal debt.
- b Satisfy that the content of the prospectus offering the debentures are consistent with the terms of the debenture.
- c Ensure that the borrowing corporation complies with the registration requirements in respect of the charges.

CHAPTER 3 SHARES, DEBENTURES AND CHARGERS

- d. Exercise reasonable diligence to ascertain whether the borrowing corporation and any of its guarantor corporations have committed any breach of the covenants, terms and provisions.

3.3.5 Differences between debentures and shares

1. Debenture holders are creditors of the company but shareholders are members of the company.
2. As creditors of the company, they receive interest on their loans, whereas shareholders receive dividends for their shares.
3. Debenture holders are entitled to receive interest whether or not the company is profitable and the payment may be made out of capital but the dividends paid to the shareholders are subject to the profits available by the company and must not be paid out of capital.
4. Debentures may be easily issued at a discount but the shares generally must be issued at its nominal value and may only be issued at discount if the strict procedure of Act has been complied with.

3.3.6 Sole Debentures and serial Debentures

- Sole Debentures: Is a document that ensure loan which made between bank or financial institution with company
- Serial Debentures: Is debentures that published to public. Company invite public to buy debenture or accept money deposit or loan from money accession date.

3.4 CHARGES

A mortgage and any agreement to give or execute a charge or mortgage whether upon demand or otherwise.

A charge is a security interest in property that is created by contract; it transfer neither title nor possession

If the company defaults under the terms of the agreement between it and the creditor for example, it fails to repay the money, the creditor will generally have the right to sell those assets and retain the proceeds up to the amount of the loan.

3.4.1 Fixed and floating charges

Fixed charges

1. Where a company provides security over its assets in favour of a lender, it may provide either a fixed or a floating charge.
2. A fixed charge is one that is intended by the parties to attach to a specific item of the property (such as land or a piece of equipment) in such a way that the company cannot dispose of the property.
3. It attaches to a specified asset. If the asset is transferred, the charge generally follows it.

Floating charges

1. A floating charge is intended by the parties to cover a class of property, present and future, but not to attach to specific items.
2. A floating charge enables the company to give security over property such as stock in trade and inventory that are constantly flowing into and out.
3. It is contemplated that until some future step is taken by or on behalf of those interested in the charge, the company may carry on its business in a usual way as far as concerns the particular class of assets in question.
4. Crystallization of floating charges:
The charge only becomes fixed when an event occurs which crystallizes it. This may occur in one of the several ways:
 - a. If the company goes into liquidation, all floating charges automatically crystallize.
 - b. The appointment of the receiver by the court or by a creditor under a power contained in the debenture.
 - c. Steps taken by the creditor to enforce or take possession of the security.
 - d. Cessation of company's business.
 - e. Upon the creditor's option. The debenture may be drafted as to give to the holder the option to convert the floating charge into a specific charge by giving notice to the company.
 - f. Upon the happening of a specified event.

3.4.2 Registration of charges

1. Where a company creates certain types of charges over its property, it must register these charges with the Registry Of Companies within 30 days of its creation.
2. If a charge is not registered, it becomes void against liquidator and any creditor of the company. The charge is unsecured if the company goes into liquidation.
3. To register the charges, all the documents and particulars required for the registration of charges must be lodged by the company or by any person interested in the documents. Upon completion of documents, the registrar will issue a certificate.
4. If there is default in complying with in registering the charges, the company and every officer of the company who is in default shall be guilty of an offence.
5. The company is required to maintain a register of all their charges and it has to be available for inspection by members and creditors of the company.

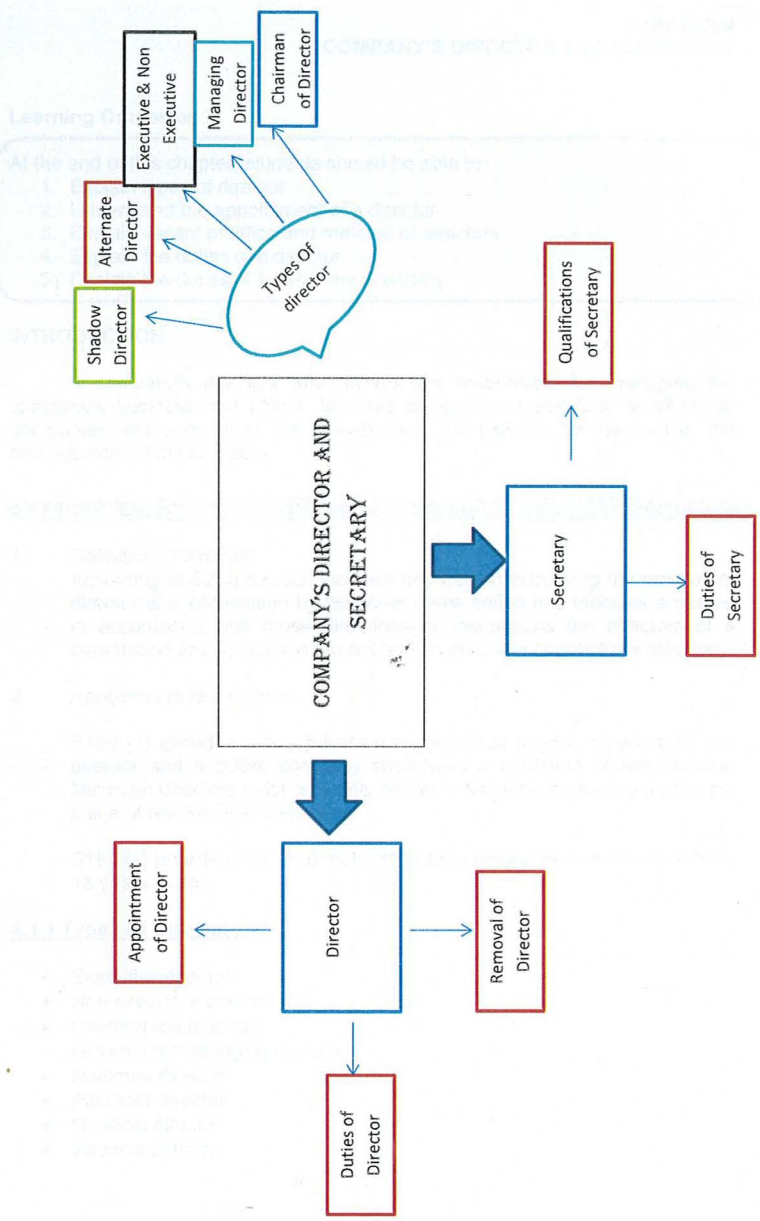
3.4.3 Priorities among charges

1. A legal charge prevails over an equitable charge unless the equitable charge was first and the legal charges knew of the prior charge.
2. Between two equitable charges, the first in time prevails where equities are equal.
3. The registered charges of fixed take priority according to their date of creation.
4. The rule of first in time prevails does not apply to in a case of a floating charge. When the company has created a charge over the whole of its undertaking, the second floating charge created over the same property would take priority after the first floating charge unless the terms of the prior charge allowed the company to create subsequent charges with an equal or higher priority.
5. If the second charge created is a fixed, it ranks ahead of floating charge as long as it was given before the floating charge crystallized.

CHAPTER 3 SHARES, DEBENTURES AND CHARGERS

QUESTION

1. What is the meaning of shares?
2. List types of shares.
3. Explain the difference between ordinary shares and preference shares.
4. Define dividend
5. Explain the difference between sole debenture and serial debenture



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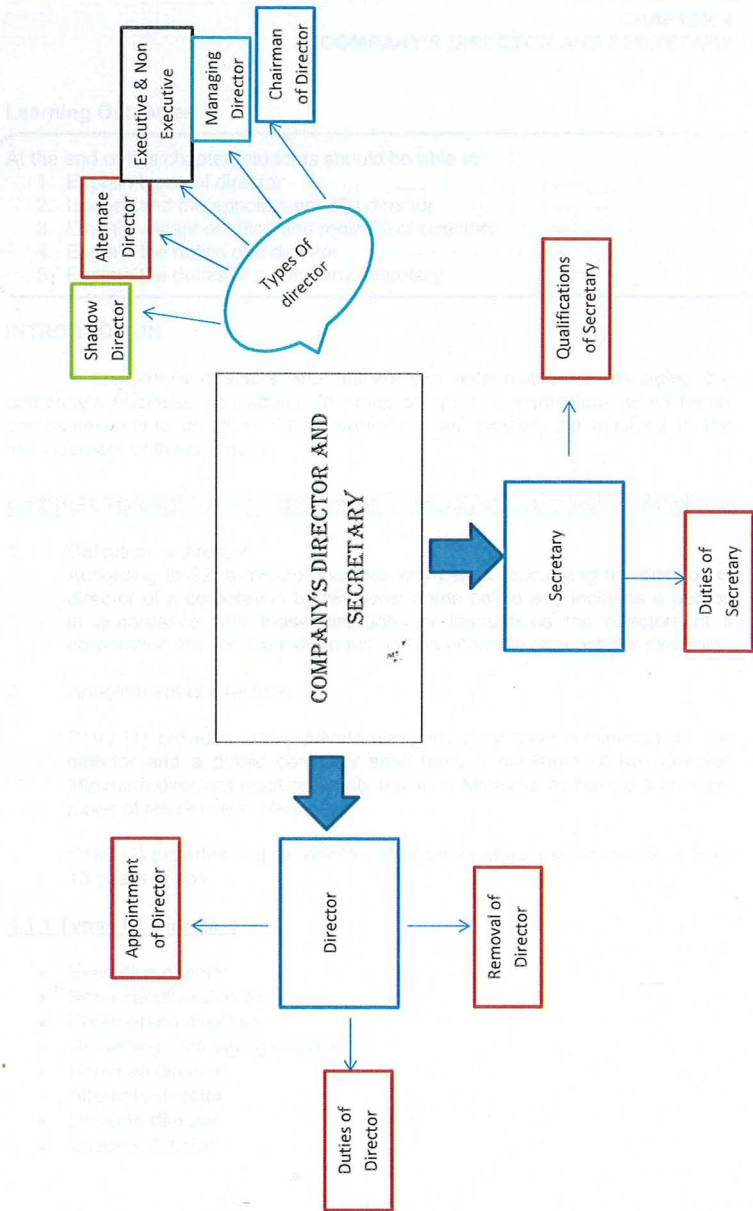
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5. Explain the difference between sole debenture and serial debenture



3.4.2 Registration of charges

1. Where a company creates certain types of charges over its property, it must register these charges with the Registry Of Companies within 30 days of its creation.
2. If a charge is not registered, it becomes void against liquidator and any creditor of the company. The charge is unsecured if the company goes into liquidation.
3. To register the charges, all the documents and particulars required for the registration of charges must be lodged by the company or by any person interested in the documents. Upon completion of documents, the registrar will issue a certificate.
4. If there is default in complying with in registering the charges, the company and every officer of the company who is in default shall be guilty of an offence.
5. The company is required to maintain a register of all their charges and it has to be available for inspection by members and creditors of the company.

3.4.3 Priorities among charges

1. A legal charge prevails over an equitable charge unless the equitable charge was first and the legal charges knew of the prior charge.
2. Between two equitable charges, the first in time prevails where equities are equal.
3. The registered charges of fixed take priority according to their date of creation.
4. The rule of first in time prevails does not apply to in a case of a floating charge. When the company has created a charge over the whole of its undertaking, the second floating charge created over the same property would take priority after the first floating charge unless the terms of the prior charge allowed the company to create subsequent charges with an equal or higher priority.
5. If the second charge created is a fixed, it ranks ahead of floating charge as long as it was given before the floating charge crystallized.

CHAPTER 3 SHARES, DEBENTURES AND CHARGERS

QUESTION

1. What is the meaning of shares?
2. List types of shares.
3. Explain the difference between ordinary shares and preference shares.
4. Define dividend
5. Explain the difference between sole debenture and serial debenture

Learning Outcomes

At the end of this chapter, students should be able to :

1. Explain types of director
2. Understand the appointment of a director
3. Explain vacant of office and removal of directors
4. Explain the duties of a director
5. Explain the duties of a company secretary

INTRODUCTION

A company's directors and officers are responsible for managing the company's business and affairs. In small companies, particularly small family companies, some or all of the shareholders will typically be involved in the management of the company.

4.1 DIRECTOR

1. Definition of director:

According to S2, a director includes any person occupying the position of director of a corporation by whatever name called and includes a person in accordance with those directions or instructions the directors of a corporation are accustomed to act and an alternate or substitute directors.

2. Appointment of directors:

S196 (1) provides that a private company shall have a minimum of one director and a public company shall have a minimum of two director. Minimum directors must ordinarily reside in Malaysia by having a principal place of residence in Malaysia.

S196 (2) provides that "A director shall be a natural person who is at least 18 years of age.

4.1.1 Types Of Directors

- Executive director
- Non executive director
- Chairperson directors
- Governing / managing director
- Nominee director
- Alternate director
- De facto director
- Shadow director

4.2 APPOINTMENT OF A DIRECTOR

Directors are elected by :

- a. company's members in the annual general meeting or
- b. Article of association may provide that a certain person or body will have the power to appoint the directors. However, such an article will not be enforceable by a person who is not a member of the company.

4.2.1 Persons Disqualified From Being A Director

S198 (1) A person shall not hold office as a director of a company, if the person:

- a) is an undischarged bankrupt
- b) has been convicted of an offence relating to the promotion, formation or management of a company
- c) has been convicted of an offence involving bribery, fraud or dishonesty
- d) has been convicted of an offence under section 213, 217, 218, 228, and 539, or
- e) as been disqualified by the Court under section 199.

4.3 VACATION OF DIRECTOR'S OFFICE

S208 (1) The office of a director of a company shall be vacated if the person holding that office:

- a) resigns
- b) has retired
- c) is removed from office
- d) becomes disqualified
- e) becomes of unsound mind
- f) dies, or
- g) otherwise vacates his office in accordance with the constitution of the company.

4.3.1 Functions of board

S211(1) The business and affairs of a company shall be managed by, or under the direction of the Board.

S211(2) The board has all the powers necessary for managing and for directing and supervising the management of the business and affairs of the company subject to any modifications, exception or limitation contained in this Act or in the constitution of the company.

4.4 DUTIES OF DIRECTOR

4.4.1 Fiduciary Duties

- a. A director must act in what he honestly considers to be the company's interests, and not in the interests of some other person or body.
- b. A director must not place himself in a position where his duty to the company and his personal interests may conflict.
- c. A director must employ the powers and assets that he is entrusted with for the proper purposes, and not for any collateral purpose.

- d. the phrase 'act honestly' in has been defined in the case of *Marchesi v Barnes Keogh* as follows :

To 'act honestly' refers to acting bona fide in the interests of the company in the performance of the functions attaching to the office of director.

- e. Directors must exercise their discretion in what they consider is the interests of the company.

Case referred to : *Re W & M Roith Ltd*

Roith was the controlling spirit of what is commonly referred to as 'one-man company'. He owned the majority of the company's shares and ran the company's business. He was one of the three directors. Roith wanted to make provision for his wife after his death. He therefore entered into a contract with the company, under which his wife would be paid a pension if he died. Of course, there was no problem in having his agreement adopted by the company, as he controlled it. Roth duly died. His executors put in a claim for the widow's pension. The liquidator of the company rejected the claim. The court held that the liquidator was right to do so. The reason was this : when the directors of the company agreed to make the contract they were not considering the interest of the company. Roith considered the interests of his wife, a perfectly laudable sentiment, but in law an impermissible factor to consider when exercising a director's power.

4.4.2 Duty To Be Skillful

Although there are *dicta* in some cases to the effect that a person who accepts directorship impliedly warrants that he has reasonable skill for the post, the rule is that a director does not have to possess any skill for the job and the fact that he is skillful is not a breach of his duty to the company. The classic statement of a director's duty in this respect remains that of Romer J in *Re City Equitable Fire Insurance Co Ltd*. "A director need not exhibit in the performance of his duties a greater degree of skill than may reasonably be expected from a person of his knowledge and experience".

Thus, a company (and its members) cannot complain if its directors are unskillful, unqualified or downright incompetent. The general rule has been that as long as directors act honestly and within the powers conferred on them, they are not liable for any errors of judgment. However, if the director possesses any special qualifications, eg as a lawyer or accountant, he is expected to use the skill for the company. He is expected to show a reasonable amount of skill, commensurate with this qualifications and experience.

4.4.3 The Duty and Standard of Care

It may be unfair to expect an unqualified person to show much skill in the performance of his duties as a director. There is no excuse, however, for a person who accepts a director's post, not to be careful. Neville J said, in *Re Brazilian Rubber Plantations and Estates Ltd*, (A director) is not, I think bound to take any definite part in the conduct of the company's business, but so far as he does undertake it he must use reasonable care in its dispatch. Such reasonable care must, I think, be measured by the care an ordinary man might be expected to take in the same circumstances on his own behalf. He is clearly, I think, not responsible for damages occasioned by errors of judgment.

A director should take as much care in the affairs of his company as he would reasonably take in his own affairs. However, in each case, the position of a director concerned in the company's organizational set up, the nature of company's business and the director's qualifications and experience must be considered in deciding whether or not he has in fact lived up to the standard required of him.

CHAPTER 4 COMPANY'S DIRECTOR AND SECRETARY

The following general principles may be gleaned from the cases:

- i. A director must take the trouble to discover what his rights and obligations are under the articles of association and at law.
A director cannot accept a directorship and the emoluments that go with it and plead that he knew nothing of the provisions of the Companies Act or the memorandum and articles of association.
- ii. Directors may delegate their powers and trust to their delegates, in the absence of circumstances that would excite the suspicion of a reasonable man.
A director must of necessity trust the officers of the company to perform properly and honestly the duties allocated to them. As Lindley MR put it in *Re National Bank Of Wales*. "*Business cannot be carried upon principles of distrust. Men in responsible positions must be trusted by those above them, as well as by those below them, until there is reason to distrust them. We agree that care and prudence do not involve distrust; but for a director acting honestly himself to be held legally liable for negligence, in trusting the officers under him not to conceal from him what they ought to report to him, appears to us to be laying too heavy a burden on honest businessmen*".
- iii. A director is generally not responsible for the acts or omissions of his co directors even if he did not attend board meetings.
A director is not liable for things done in his absence from board meetings. If, however, he has authorized the act or acquiesced in it, he may be held to be liable.

4.4.4 The Duty To Be Diligent

A director must exercise 'reasonable diligence' in performing the duties of his office. Again, what is reasonable may vary according to the type of director.

Case referred to is *Re Forest of Dean Coal Mining Co.*

(Directors) are bound, no doubt, to use reasonable diligence having regard to their position, though probably an ordinary director, who only attends at the board occasionally, cannot to be expected to devote as much time and attention to the business as the sole managing partner of an ordinary partnership, but they are bound to use fair and reasonable diligence in the management of company's affairs, and to act honestly.

Guidelines to duty to be diligent :

1. In the early years, the court has taken a fairly lenient view of the requirement of diligence. In *Marquis of Butes*, a director who attended board meeting once in 20 years was held not liable because the director was not bound to attend all the meetings as he may attend if he was reasonably able to do so. However, in the case *Re Denham & Co*, the director is held liable due to his failure in attending the board meeting for 4 years.
2. Directors will not be responsible for all the decisions made and actions taken in the meeting that he did not attend.

4.4.5 Statutory Duties

S213(1) A director of a company shall at all times exercise his powers in accordance with this act, for a proper purpose and in good faith in the best interest of the company.

(2) A director of a company shall exercise reasonable care, skill and diligence with-

- a) The knowledge, skill and experience which may reasonably be expected of a director having the same responsibilities; and
- b) Any additional knowledge, skill and experience which the director in fact has.

(3) A director who contravenes this section commits an offence and shall, on conviction, be liable to imprisonment for a term not exceeding five years or to a fine exceeding three million ringgit or to both.

4.5 COMPANY SECRETARY

In accordance with S235 every company registered with CCM must appoint a company secretary. The company secretary plays a vital role in the governance and administration of company's affairs. The company secretary is primarily responsible to the Board, the company and the shareholders. The core responsibility of the company secretary is to the Board of directors in providing the necessary support system to ensure they have proper access to information required to manage the company in accordance with the principle of good corporate governance.

4.5.1 Qualification For Company Secretary

- i. S235 states that every company shall have one or more secretaries each of whom shall be natural person of full age who has his principle or any place residence in Malaysia.
- ii. S236(1) requires the name of the first secretary to be named in the Article of Association of a newly formed company. A person cannot act as a secretary of a company unless :
 - a. he is a member of a professional body or any other bodies, which has been prescribed by Minister of Domestic Trade and Consumer Affairs by notification published in the Gazette; or
 - b. he is licensed by the CCM in line with S139B of the Act.

4.5.2 Disqualification As Company Secretary

S238 of the Act, a person is disqualified to act as secretary if :

- a) He is an undischarged bankrupt
- b) He is convicted whether in or outside Malaysia of any offence.
- c) He ceased to be a holder of a practicing certificate

4.5.3 Removal of Secretary

S239: The board may remove a secretary from his office in accordance with the terms of appointment or the constitution.

4.5.4 Duties of Company Secretary

Board Meetings

- i. facilitating the smooth operation of the company's formal decision making and reporting machinery.
- ii. organizing board and board committees meetings (audit, remuneration committees, etc)
- iii. formulating meeting agendas with the chairman and/ or chief executive and advising management on content and organization of memoranda or presentations for the meeting
- iv. collecting, organizing and distributing such information, documents or other papers required for the meeting
- v. ensuring that all meetings are minuted and that the minute books are maintained with certified copies of the minutes and that all board committees are properly constituted and provided with clear terms of reference

CHAPTER 4 COMPANY'S DIRECTOR AND SECRETARY

General Meetings

- i. ensuring that an annual general meeting is held in accordance with the requirements of the Companies Act and the Company's Article of Association
- ii. obtaining internal and external agreement to all documentation for circulation to shareholders
- iii. preparing and issuing notices of meetings and distributing proxy forms
- iv. assist to prepare directors for any shareholders questions and helping them create briefing materials
- v. overseeing the preparations for security arrangements
- vi. ensuring the proxy forms are correctly processed and that the voting is carried out accurately

Constitution

- i. ensuring that the company complies with its memorandum and AOA
- ii. drafting and incorporating amendments in accordance with correct procedures

Statutory Registers

Maintaining the following statutory registers :

- a. members
- b. company charges
- c. directors and secretary
- d. director's interest in shares and debentures
- e. interest in voting shares
- f. debenture holders

Statutory Returns

Filing information with the CCM to report certain changes regarding the company or to comply with requirements for periodic filing such as :

- a. annual returns
- b. audited annual financial statements and reports related thereto

Shareholders and Share Capital

- i. communicating with the shareholders on issues pertaining to their rights, such as rights issues and capitalization issues
- ii. arranging payment of dividends
- iii. handling share transfers and other matters affecting shareholdings
- iv. dealing with any queries and requests from shareholders
- v. monitoring the movements on the register of members so as to identify any apparent 'stake building' in the company's shares by potential takeover bidders

CHAPTER 4
COMPANY'S DIRECTOR AND SECRETARY

QUESTION

1. Define director
2. List types of director
3. Explain duties of director
4. Explain qualification of director and secretary

Company Meetings

Requirements for valid meeting

- Notice of meeting
- Quorums
- Resolutions
- Proxy
- Voting
- Chairman
- Minutes of General Meeting

Types

Directors Meeting

- BOD Meeting

Shareholders Meeting

- Statutory Meeting
- Annual General Meeting
- Extra Ordinary General Meeting

Learning Outcomes

At the end of this chapter, students should be able to:

1. Identify types of company meetings
2. Discuss the requirements of a valid meeting

INTRODUCTION

Meeting is a gathering of two or more persons called to receive a report, take a decision or otherwise take some lawful action. A meeting generally contemplates an interchange between two or more persons or requires a plurality of persons

5.1 TYPES OF COMPANY MEETINGS

Meetings are divided into 2 types:

- i. Meetings for the shareholders
- ii. Meetings for the directors

5.1.1 Meetings For The Shareholders

There are 4 types of meeting:

- i. Statutory meeting
- ii. Annual General Meeting
- iii. Extraordinary Meeting
- iv. Class Meeting

• Statutory Meeting

1. Only public companies need to hold a statutory meeting.
2. Meeting is held only once, at the beginning of the company's life.
3. Every public company must hold its statutory meeting not less than one month and not more than three months after the date on which it is entitled to commence business.
4. The directors are responsible for convening the statutory meeting; any director who fails to take all reasonable steps to ensure that the statutory meeting is held is guilty of an offence.

5. At least seven days before the meeting is held, the directors of the company are required to forward a 'statutory report', certified by at least two directors, to every member of the company and lodge a copy of the report with the Registrar. The report must be certified by at least two directors and shall state the following matters:
 - a. The total numbers of shares allotted, whether they are paid or partly paid and the consideration received for the allotment.
 - b. The total amount of cash received by the company as to the shares allotted.
 - c. An abstract of the receipts and payments of the company, the balance in hand and the estimated amount of the preliminary expenses.
 - d. The names and addresses of the directors, trustees for debenture holders, auditors, managers and secretaries.
 - e. Particulars of any contract, the modification of which is to be submitted at the statutory meeting for approval.
6. At the meeting, the members present may discuss any matter relating to the formation of the company or arising out of the statutory report
7. The failure to hold the statutory meeting or lodge the statutory report is a ground upon which a petition to wind the company up may be presented

• **Annual General Meeting**

1. Every **public company** must hold an annual general meeting once every calendar year according to S340 (1).
2. Exceptionally, a company need not hold an annual general meeting in the year of its incorporation or the following year, as long as its first annual general meeting is held within 18 months of its incorporation (S340(3)).
3. AGM shall be held within 6 months of the financial year end (S340(2)(a) and not more than 15 months may elapse between general meetings, subject to the Registrar's power to extend this time limit (S340(2)(b)).
4. If the company is not able to hold its AGM within the prescribed time due to any special reason, the company may apply to the ROC for the extension of time (S304 (4))

5. The responsibility of convening the annual general meeting usually rests with the directors; however, the court may, on the application of any member, order the annual general meeting to be called (S340(5)). This is an important right, as a member cannot usually require any other meetings to be called unless he controls a substantial fraction of the votes in the company. Thus the annual general meeting is the only certain opportunity that a member will have to meet and query the directors on matters pertaining to the running of the company.
6. The Act prescribes that certain matters must be done at the annual general meeting:
 - a) The laying of audited financial statements and the reports of the directors and auditors
 - b) The election of directors in place of those retiring
 - c) The appointment and the fixing of the fee of directors
 - d) Any resolution or other business of which notice is given in accordance with the Act or the constitution
7. If the company fails to hold its AGM within the time prescribed by CA2016 and the ROC, the company itself and every officer of the company shall be guilty of an offence under S340(6).
8. The board of directors usually convenes the AGM by passing director's remuneration. The company secretary will prepare the meeting needs and send notices to members
9. Notice of at least 21 days before AGM must be given to members (S316(2)) but company's constitution may provide a longer period
10. If AGM not being held, any member may apply to the court for an order to call for an AGM (S340(5))
11. Application to the court may be made by a director, a member or a personal representative of a member (S314)

• **Extraordinary General Meetings (EGM)**

1. Any general meeting other than the annual general meeting is an extraordinary general meeting
2. The agenda of an EGM will usually constitute special businesses, which are urgent and cannot be delayed until the next AGM
3. Applies to both public and private company

Parties that can convene the meeting:

i. **Members**

Two or more members holding not less than one-tenth of the company's issued share capital (S310(b))

Where the company does not have a share capital, not less than 5% of the members may call a general meeting.

The directors must convene a general meeting if required to do so by requisition. A requisition is a written notice to the directors requiring that a meeting be called. The directors must convene a meeting to be held as soon as practicable within two months after the receipt of the requisition by the company. If the directors do not convene a meeting within 21 days after receipt of the requisition, the requisitionists may convene the meeting themselves. Any reasonable expenses incurred by the requisitionists in calling the meeting are to be paid by the company.

- ii. **Directors** usually convenes the members' meeting (S310(a)). It does so by passing a directors' resolution. The company secretary will then prepare the meeting requirements and send notices to the members

- iii. **Court** may order a meeting to be called, if it is impracticable to call a meeting in accordance with the Act or the Articles (S314)

Case: *El Sombrero Ltd.*

The shareholding of the company was divided as follows: the applicant, 900 shares; two respondents, 50 shares each. The respondents were the directors of the company. The articles provided that the quorum should be two. The applicant twice requisitioned meetings, but the respondent deliberately absented themselves so that no quorum was present. The applicant sought an order of court that one person should be deemed to constitute a quorum. The court granted the application.

• **Class Meetings**

1. On occasion, it may be necessary to call a meeting only of a certain class of members and not a general meeting of all the members of a company.
2. For instance, this might occur in the case of a variation of class rights or in the case of a compromise or arrangement.

5.1.2 Meetings For Directors

• **Board Meetings**

1. Meetings are usually provided for in the articles of association.
2. Notice of board meetings should be given in accordance with the articles of association.
3. Notice of board meetings should be given in accordance with the articles of association. If notice is not given to some directors, the meeting may be declared to be invalid and the resolution passed set aside. If no notice is given to some of the directors, the proceedings are void.

5.2 REQUIREMENTS OF A VALID MEETING

5.2.1 Notice Of Meetings

1. Notice must be given by the company to certain parties S321(1)
 - i. every member who is entitled to attend and speak at the meetings;
 - ii. the company's auditor
 - iii. company's director
2. Types of notice :
 - i. Ordinary notice – must be given at least 14 days before a meeting
 - ii. Special notice – must be given at least 21 days before a meeting
 - iii. Special notice of ordinary resolution – must be given at least 14 days before a meeting

3. Method –

- Shall be in writing
- Where the notice is in hard copy, S319(2)(a) requires it to be sent to a member by post or personally
- Where the notice is in an electronic form, S319(b), notice shall be given by sending to the electronic address supplied or publishing it on a website

4. Content –

- Concerns a meeting of members
- The place, date and time of the meeting
- General nature of the business of the meeting

The annual general meeting may be called at a short notice only with the unanimous consent of all the members entitled to attend and vote. Any other meeting may be called at short notice, but only with the agreement of members holding at least 95% in nominal value of the company's voting shares or, in the case of a company without a share capital, 95% of the total voting rights of all the members at that meeting.

5. The common law rule was that the defect in notice might invalidate a meeting. The defect, irregularity and deficiency of notice does not invalidate a 'proceeding' unless substantial injustice is caused. Accidental omission to give notice of a meeting to any member does not invalidate any meeting unless the court declares the proceedings at the meeting to be void.
6. The notice calling a meeting must contain sufficient information to enable a prudent member to decide whether or not he will attend the meeting. At the very least, the text of the resolutions sought to be passed must be set out. The failure to do so may invalidate the proceedings at the meeting.
7. The notice and accompanying circulars should be sufficiently clear so that the members may get a fair and reasonable information of what is actually proposed to be done. Explanatory circular is necessary since in most cases, voting is done by proxy.
8. In all notices calling meetings of a company or of a class of members, there must be a statement of a member's right to appoint a proxy to attend and vote on his behalf.

Special Notice of Ordinary Resolutions

- Members who wish to propose a resolution at a meeting are required to give special notice of that resolution to the company. For instance when it is desired to remove a director of a public company or to remove the company's auditors before their term of office expires.
- The members who are proposing the resolution must give notice to the company at least 28 days before the meeting. The reason for this is to allow the persons who are to be removed, time to prepare for their defences.
- The company then gives notice of the resolution to its members at the same time and in the same manner as it gives notice of the meeting or, if that is not possible, in a separate notice at least 14 days before the meeting.
- The following circumstances required ordinary resolution with special notice:
 - The removal of a director before the expiration of his term of office (S206(3))
 - The removal of an auditor at a general meeting (S277(1))
 - The appointment of an auditor in place of an outgoing auditor (S280(2))

Meeting	Resolution	Minimum Notice
AGM		21 days
EGM		14 days
	Special resolution	21 days
	Ordinary resolution	14 days

5.2.2 Quorums

- Is the minimum number of members who must be present at the meeting. There must be at least two members personally present at a meeting or by proxy unless a higher number is specified in the constitution (S328(2))
- A quorum need only be present at the commencement of a meeting, and not throughout. The lack of a quorum at a meeting does not invalidate the meeting unless the court is of the opinion that substantial injustice has been caused.

Case : Re Salvage Engineers

The company had only two shareholders, Keet and Raper, both of whom were directors. Raper left the country, stating that he would not return, and appointed Keet as his proxy. An extraordinary general meeting was called, attended by Keet representing himself and as proxy for Raper. This 'meeting' passed a

special resolution that the company would be wound up. Raper subsequently changed his mind and returned. He sought to have the resolution to wind up the company set aside. Ong J set aside the resolution on the ground that there had been no proper meeting of the company.

3. It is necessary for at least two members to be present throughout the meeting, even though a quorum was present at the commencement of the meeting.
4. It is possible, however, for the articles to provide that one member may constitute a meeting. In the absence of articles allowing one member meeting, the general rule applies.
5. The meeting should be adjourned if the number of attendees present at the meeting falls below the quorum because if the meeting proceeds without any quorum, the meeting is invalid

5.2.3 Resolutions

1. A resolution can be defined as a decision or an expression of opinion or intention by a meeting.
2. Types of resolution:
 - i. Ordinary resolution
 - ii. Special resolution
3. Ordinary resolution is one passed by a simple majority of the votes of the members entitled to vote either voting in person or by proxy at the meeting
4. Special resolution is one passed by majority votes of not less than three fourths at the general meeting and a notice of not less than twenty one days specifying the intention to propose the resolution as a special resolution has been duly given.
5. Special resolutions are required for the matter specified by the Act or Articles for instance alteration of objects, alteration of articles, the change of name, alteration of share capital, etc
6. Any resolution passed at the boards meeting or general meetings must be registered by lodging with the Registrar a printed copy of it within one month after the passing or making it.

	Minimum Notice	Minimum Votes Required
Ordinary Resolution	14 days	More than 50%
Special Resolution	21 days	75%

5.2.4 Proxy

1. According to S334(1), a member of a company entitled to attend and vote at a meeting of the company, or at a meeting of any class of members of the company, shall be entitled to appoint another person or persons (whether a member or not) as his proxy to attend and vote instead of the member at the meeting.
2. A proxy also have the same right as the member to speak at the meeting, but unless the articles otherwise provide:
 - i. a proxy shall not be entitled to vote except on a poll
 - ii. a member shall not be entitled to appoint person who is not a member as his proxy unless the person is an advocate, an approved company auditor or a person approved by the Registrar in a particular case
 - iii. a member shall not be entitled to appoint more than two proxies to attend and vote at the same meeting
3. S335(1): In every notice calling a meeting of a company, there shall appear with reasonable prominence a statement as to the rights of the member to appoint proxies to attend and vote instead of member.

5.2.5 Voting

1. Voting may be by a show of hands or on a poll, i.e a written ballot.
2. According to S330(1)(a):
 - i. In the case of a company with a share capital, each member is entitled to one vote on a show of hands.
 - ii. On a poll, each member shall have one vote in respect of each share held by him and where all or part of the share capital consists of stock or units of stock, each member shall have one vote in respect of the stocks or units of stock held by him
3. A poll may be demanded by:
 - i. any five or more members having the right to vote at the meeting
 - ii. a member or members representing at least 10% of the total voting rights of all the members at the meeting
 - iii. a member or members holding voting shares on which are paid up in aggregate not less than 10% of the total amount paid up on all the shares conferring the right to vote at the meeting.

5.2.6 Chairman and Conduct of Meeting

1. The board of directors will chair the meeting unless the company's constitution provide otherwise.
2. If he is unwilling to act or not present within 15 minutes after the time scheduled, the members present will elect one of the members to chair the meeting
3. The chairman's job includes:
 - i. to ensure that the meeting is properly run and that order is maintained.
 - ii. given a casting vote by the articles; he has no automatic casting vote.
 - iii. he has no right to adjourn a meeting at his pleasure

5.2.7 Minutes of General Meeting

1. Every company must keep and maintain a book for the minutes of its general meeting. It is called a minute book.
2. According to S341 (1) (b), every company shall cause:
 - i. minutes of all proceedings of general meetings and of meetings of its directors and of its managers (if any) to be entered in books kept for that purpose within fourteen days of the date upon which the relevant meeting was held.
 - ii. Those minutes to be signed by the chairman of the meeting at which the proceedings were had or by the chairman of the next succeeding meeting.
3. Sec342 provides that the books containing the minutes of proceedings of any general meeting shall be kept by the company at the registered office of the company, and shall be open to the inspection of any member without charge.
4. S 342(2) The documents must be kept for seven years and shall be made available for inspection by any member of the company (Sec342(3))
5. The minutes which have been signed by the chairman of that meeting or by the chairman of the next meeting shall be evidence that:
 - The meeting has been duly held and convened
 - The proceedings have been duly held
 - All appointments at the meeting are valid

QUESTION

1. List **FOUR (4)** types of meeting for the shareholders
2. Briefly explain the matters must be done at the annual general meeting.
3. Explain the effect of Memorandum of Association and Articles of Association as in Section 33(1) Companies Act 1965.
4. Discuss **THREE(3)** parties that should receive notice of meeting.
5. Discuss the chairman's job
6. Discuss the importance of minutes of meeting

Learning Outcomes

At the end of this chapter

1. Elaborate the professional responsibilities
2. Explain the termination of an auditor's rights
3. Discuss the procedure for a compulsory auditor

INTRODUCTION

Auditors are persons who are entrusted with the responsibility of examining the accounts followed by the auditor's report. The auditor's report is a statement of the auditor's opinion on the accounts of the company. The auditor's report is a statement of the auditor's opinion on the accounts of the company. The auditor's report is a statement of the auditor's opinion on the accounts of the company.

Appointment of an auditor

- Private Co
- Public Co

Qualification & Disqualification of an auditor

Rights & Powers of an auditor

ACCOUNTS, REPORTS & AUDIT

Termination of an auditor

- Removal
- Resignation

Accounts

- Financial statement
- Director's responsibility

1.1.1 Appointment of an auditor

1. First auditor
 - 5267 CA 2016
 - 5271 CA 2016
2. Subsequent auditor
 - 5289 CA 2016
 - The auditor who holds the office of auditor shall be deemed to be re-appointed if he is not re-appointed by the members of the company within the period of 90 days from the date of the expiry of his term of office.

Learning Outcomes

At the end of this chapter, students should be able to:

1. Elaborate the procedures for the appointment of an auditor, their rights and responsibilities
2. Explain the termination and resignation procedure for a company auditor
3. Discuss the profit and loss account, balance sheet and consolidated accounts illustrate the Memorandum of Association and Articles of Association

INTRODUCTION

Auditor is a person who are doing examination or inspection of various books accounts followed by physical checking of inventory to make sure that all departments are following documented system of recording transaction. It is done to ascertain the accuracy of financial statements provided by the organization.

Audit can be done internally by employees or heads of particular department and externally by an outside firm or an independent auditor. The idea is to check and verify the accounts by an independent authority to ensure that all books of accounts are done in a fair manner and there is no misrepresentation or fraud that is being conducted.

6.1 APPOINTMENT, RIGHTS AND RESPONSIBILITIES OF AN AUDITOR

6.1.1 Appointment of an auditor

1. First auditor

- S267 CA 2016 :Private – Hold the position until 30 days financial statement issued.
- S271 CA 2016 :Public – Hold the position until annual general meeting held

2. Subsequent auditor

- S269 CA 2016 :Private Company

The auditor who holds office immediately before the vacancy shall be deemed to be re-appointed:

- (a) Appoint by board of director.
- (b) Constitution require actual re-appointment.
- (c) Prevented by the member under section 270.
- (d) Member have resolve, he not be re-appointment.

• **S273 CA 2016 :Public Company**

Shall hold office in accordance with the terms of his appointment:

- (a) Does not take office until the previous auditor has ceased to hold office unless he is the first auditor.
- (b) Ceased to hold office at the conclusion of the annual general meeting next following his appointment.

6.1.2 Qualification of an auditor

S263 CA 2016

- Obtain approval from the Minister charged with responsibility for finance.
- A person to be an approved company auditor to any person or body charged with the responsibility for the registration or control of accountant in Malaysia. (S263(5))
- He is a member of, and registered as a chartered accountant with, the Malaysian Institute of Accountant (MIA). (S263(7)).

6.1.3 Disqualification of an auditor

S264

A person shall not prepare for on behalf of a company, any report required by this act to be prepared by an approved company auditor if he is not approved company auditor

A company shall not appoint a person or a firm as an auditor unless prior to the appointment -

- that person has consented in writing to act as the auditor or :-
- in the case of firm , at least one partner of the firm has consented in writing

The person cannot be an auditor if:

- He is indebted to the company or its related corporation for an amount exceeding RM25,000 – S264(1)(c)(ii).
- He is an officer of the company (S264(1)(c)(iii)(A)) or its related corporation (subsection (2)).
- His spouse is an officer of the company (S264(1)(c)(iii)(A)) or its related corporation (subsection (2)).
- He is a partner, employer or employee of an officer of the company (S264(1)(c)(iii)(B)) or its related corporation (subsection (2)).

- He is a partner or employee of an employee of an officer of the company (S264(1)(c)(iii)(C)) or its related corporation (subsection (2)).
- He is shareholder of a corporation whose employee is an officer of the company (S264(1)(c)(iii)(D) or its related corporation (subsection (2)).
- His spouse is a shareholder of a corporation whose employee is an officer of the company (S264(1)(e)(iii)(D) or its related corporation (subsection (2)).
- He is responsible for the keeping of the register of members or this register of debenture holders of the company (S264(1)(c)(iv).
- He is the partner, employer or employee of a person responsible for, the keeping of the register of members or the register of debenture holders of the company (S264(1)(c)(iv).
- He is and undischarged bankrupt within or outside Malaysia except with leave of the court (S264(1)(c)(v).
- He has been convicted of any offence involving fraud or dishonesty punishable with imprisonment for three months or more (S264(1)(c)(vi)).

NOTES: officer is defined in section 2(1) to include a director, secretary or employee, a receiver and manager as well as a liquidator of the corporation.

6.1.4 Common law duties

It is important for the auditor to exercise reasonable care and skill when performing his work.

In *Re Kingston Colton Mill* (1896) , Lopes LJ said " it is the duty of an auditor to bring to bear on the work he has to perform that skill, care and caution which a reasonably competent, careful and cautious auditor would use. What is reasonable skill, care, caution must depend on the particular circumstances of each case " .

An auditor shall apply the prevalent and generally accepted auditing standards which are applied by an ordinary auditor in his course of work.

Right and Powers of an auditor

- S266(1) – Every auditor of a company shall report to the members on the financial statements.
- S266(2) – True and fair view. Free from any defect or irregularity in the financial statement.
- S266(3) – An auditor of a company shall have a duty to form an opinion.
- S266(4) – An auditor of a company has a right of access at all reasonable times to the accounting and other record.
- S266(5) – Is entitled to require from any officer or auditor of any subsidiary included in the consolidated financial statements.
- S266(6) – The auditor's report shall be attached to or endorsed on the financial statements.

6.2 TERMINATION AND RESIGNATION PROCEDURE FOR A COMPANY AUDITOR

6.2.1 Termination procedure for a company auditor

1. Removal of auditor from office - S276(1)

The members of a company may remove an auditor from office at any time

- a) By ordinary resolution at a general meeting; and
- b) In accordance with S277

2. Procedure for removal

- **Special notice** - The shareholders who intends to remove the auditor, shall give 14 days notice to the company, informing his intention to remove the auditor by passing a resolution in the general meeting.
- Special notice shall be required for a resolution to remove an auditor from office at a general meeting of a company.
- **S277(2)** Upon receipt of the special notice of such an intended resolution, the company shall immediately send a copy of the notice to the auditor proposed to be removed and the Registrar

- **S277(3)** The auditor may make a representation in writing not exceeding a reasonable length to the company within seven days from the receipt of the special notice and may request that prior to the meeting at which the resolution is to be considered, a copy of the representation be circulated by the company to every member of the company to whom notice of the meeting is sent.
- **S277(4)** Upon request of the auditor referred to in subsection (3), the company shall send a copy of the representation to every member of the company to whom notice of the meeting is sent.
- **S277(5)** If a copy of the representation is not sent as required under subsection (4), the auditor may, without prejudice to his right to be heard orally, require that the representation be read out at the meeting.
- **S277(6)** A copy of the representation need not be circulated and the representation need not be read at the meeting if, on the application either of the company or of any other person claiming to be aggrieved, the court is satisfied that the auditor in using this section to secure needless publicity or the matter is defamatory or some other grounds that the Court thinks reasonable.
- **Communication to the retiring auditor** - The company on receipt of such notice, should send a copy to the retiring auditor.
- **Representation by retiring auditor** - The retiring auditor can make a written representation, not exceeding a reasonable length, to the company, regarding his proposed removal and he may also request the company to circulate his representation to the members.
- **Right to attend the members** - The auditor who is proposed to be removed has an inherent rights to attend the general meeting and he can also make an oral statements at the meeting as to his proposed removal
- **Not to abuse the right** - The above privileges are extended to the auditor to protect his independence and to prevent his unjust removal.

6.2.2. Resignation of auditor

- **S281(1)** An auditor of a company may resign his office by giving a notice in writing to that effect to the company at its registered office.
- **S281(2)** A notice of resignation under subsection (1) shall bring the auditor's term of office to an end after twenty-one days from which the notice is given or from the date as may be specified in the notice.
- **S282 (1)** Where an auditor resigns his office, the company shall send a copy of the notice to the Register within seven days from the receiving of a notice of resignation.
- **S282 (2)** The company and every officer who contravene this section commit an offence.
- **S283 Rights of resigning auditor of a public company**

(1) The notice of resignation of an auditor of a public company is accompanied with a statement of the circumstances.

(2) The auditor may give the notice of resignation referred to in Section 281 together with a signed requisition calling on the directors of the company to immediately convene a general meeting for the purposes of receiving and consider with his resignation.

(3) The auditor may request the company to circulate a statement in writing not exceeding a reasonable length of the circumstances connected with the auditor's resignation :

(a) before the meeting convened on auditor's requisition

(b) before any general meeting on which the position of the auditor expired or at which it is proposed to fill the vacancy caused by his resignation.

(4) The company shall state the fact that the statement referred to in subsection (3) has been made in any notice of the meeting send a copy of the statement to every member of the company.

(5) The directors shall hold the general meeting required under this section within twenty-eight days from the date of the receipt of the notice:

(6) If a copy of the statement referred to in subsection (4) is not sent as the default of the company, the auditor may prejudice to his right to be heard orally at the meeting.

(7) A copy of a statement don't be sent and the statement need not be read out at the meeting, the Court is satisfied that the auditor is using this section to secure needless publicity

(8) The Court may order the company's costs on such an application to be paid in whole or in part by the auditor.

(9) An auditor who has resigned has not withstanding his resignation the rights conferred by s285 in relation to any general meeting of the company as mentioned in paragraph (3)(a) or (b).

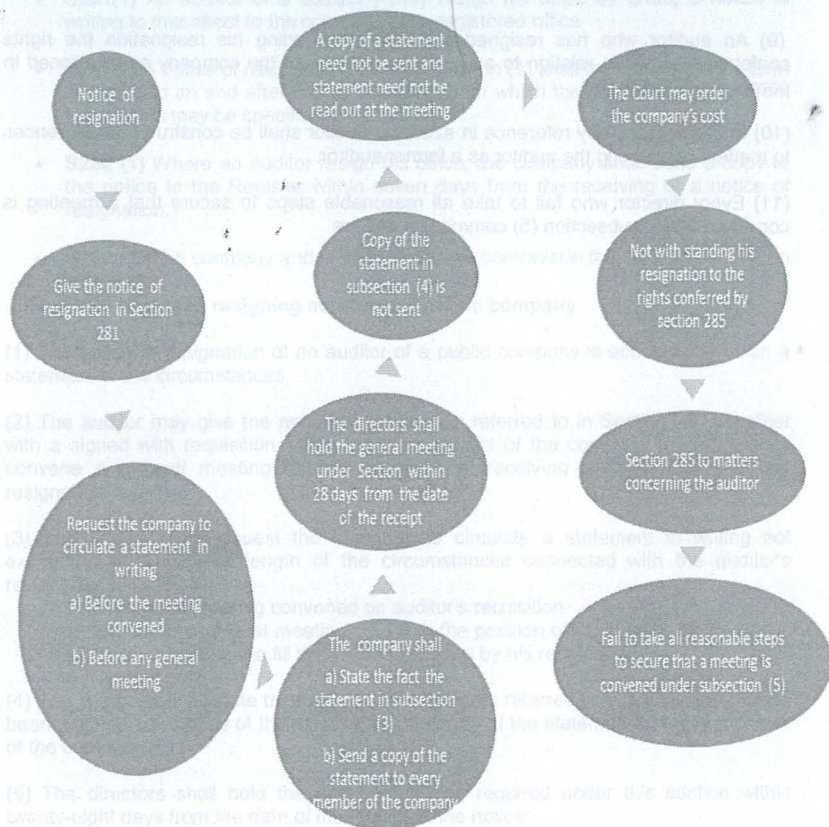
(10) In this section, any reference in s285, an auditor shall be construed as references to matters concerning the auditor as a former auditor.

(11) Every director who fail to take all reasonable steps to secure that a meeting is convened under subsection (5) commits an offence

6.1.2 DIRECTORS' RESPONSIBILITIES

- S246 provides that the directors of a company are jointly and severally responsible for the preparation of the accounts.
- S247(2) states that the directors of a company are responsible for the preparation of the accounts.
- The directors are responsible for the preparation of the accounts and for the preparation of the accounts.
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Right Of Resigning Auditor Of A Public Company



6.2.3 S274. Fixing of auditor's remuneration

(1) The remuneration of an auditor's appointed :

- by the members of a company shall be fixed by the members on ordinary resolution.
- by the Board shall be fixed by the Board or the company.
- by the Registrar shall be fixed either by the Registrar / Board and if not so fixed by the company.

6.3 PROFIT AND LOSS ACCOUNT, BALANCE SHEET AND CONSOLIDATED ACCOUNTS

6.3.1 FINANCIAL STATEMENTS

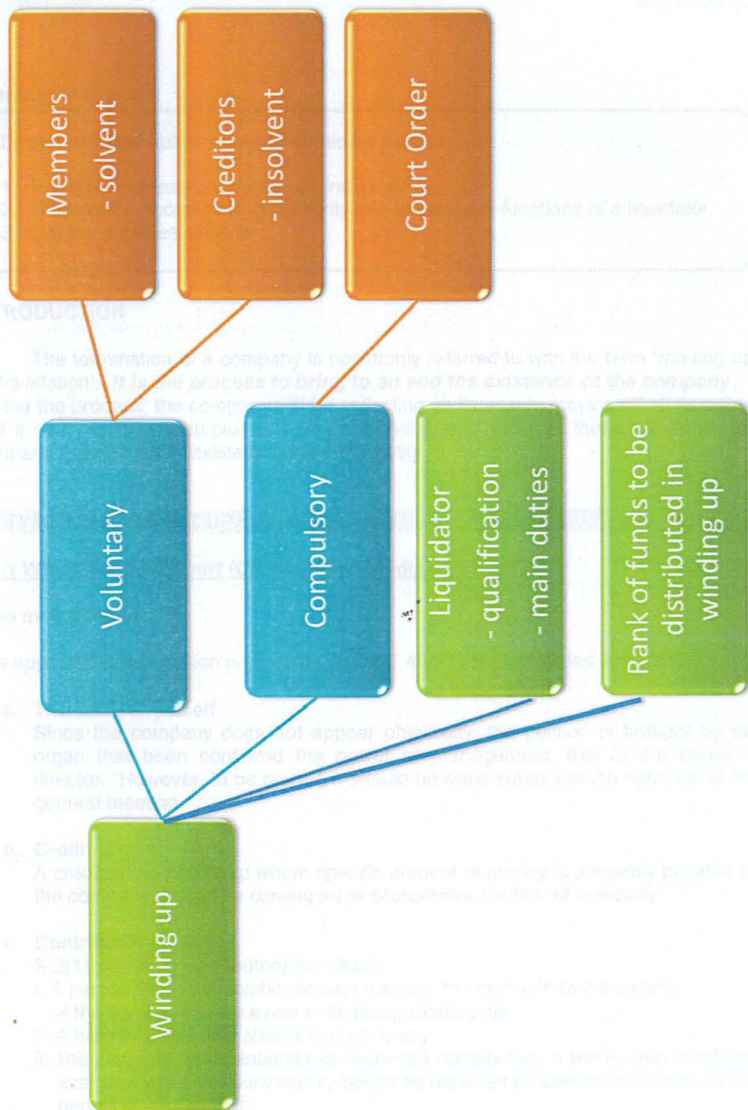
- S259 requires a company to lodge its financial statements and reports with the ROC
- For private company, it must be done within 30 days from the day the accounts are circulated to the members. The accounts must be circulated to the members within six months from the end of its financial year
- For public company, the accounts must be lodged with the ROC within 30 days from its AGM.
- The accounting records should be kept in a manner to ensure they are conveniently and properly audited and must be kept at least seven years after the completion of the transaction.
- Efficient and accurate book keeping is also important and thus S245(2) requires the company, directors and managers to ensure the appropriate entries are made in the relevant records within 60 days of the completion of the transaction.
- The accounts of a company must give a true and fair view of the following:
 - The financial position of the company as at the end of the financial year,
 - The financial performance of the company for the financial year

6.3.2 DIRECTORS' RESPONSIBILITY

- S248 provides that it is the responsibility of the directors to prepare the accounts
- S248(2) also requires the accounts to be audited before they are sent to the members
- The timeframe given to the directors (private & public company) is as follows:
 - The first set of accounts must be prepared within 18 months from the date of its incorporation
 - The subsequent ones within six months of its financial year end

QUESTION

1. List **qualification** to be an auditor
2. List **disqualification** to be an auditor.
3. Explain the procedure to remove the an auditor
4. Why financial statements are importance to the company?
5. Discuss the directors' responsibility towards the preparation of company's account



Learning Outcomes

At the end of this chapter, students should be able to:

1. Explain compulsory and voluntary winding up
2. Discuss the acceptance of authority and the primary functions of a liquidator
3. List the priorities of debts

INTRODUCTION

The termination of a company is commonly referred to with the term 'winding up' or 'liquidation'. ***It is the process to bring to an end the existence of the company.*** During the process, the company will be collecting all its assets, paying off all its debts, and if any distributing surplus assets to its members. After all these are done, the company is no longer in existence as a legal entity.

7.1 TYPES OF WINDING UP

7.1.1 Winding Up by Court (Compulsory Winding Up)

Who may petition

The applicant of the petition is provided under S 464(1) of Companies Act 2016:

- a. The company itself**
Since the company does not appear physically, the petition is brought by the organ that been conferred the power of management, that is the board of director. However, to be proper, it should be done subject to the approval of the general meeting
- b. Creditor**
A creditor is a person to whom specific amount of money is presently payable by the company. It can be contingent or prospective creditor of company.
- c. Contributory**
S 2(1) defines a contributory to include:
 - i. A person liable as member or past member to contribute to the assets of the company in the event of its being winding up.
 - ii. A holder of fully paid shares in a company
 - iii. The personal representatives of deceased contributory or the trustee or official assignee when the contributory becomes bankrupt or assigns his estate for the benefit of his creditor.

Both types of contributory are liable to contribute to the assets of the company to an amount sufficient for payment of its debts and liabilities.

According to S465(1), a contributory may not present a petition on any grounds specified in (a), (b), (d), (e) or (i) unless:

- i. The number of members of the company is reduced below two or
- ii. the shares have been held by the contributor for at least six months during the eighteen months before the presentation of the petition.

d. The liquidator

The minister who is charged with the responsibility of companies may present petition for the winding up on one of the following specified grounds:

- i. The company is default in lodging the statutory report
- ii. The company is default in holding statutory meeting
- iii. The number of members is reduced below two
- iv. A report has been made by the inspector in respect of a declared company

e. The Minister

f. Bank Negara Malaysia

- i. When the Minister of Finance has made an order under S 24(1) of Banking and Financial Institution Act 1989 in the case of a company which is a licensed institution, a schedule institution
- ii. For a non scheduled institution, the Minister of Finance has made an order under S 93(1) of the Act
- iii. In the case of a company which is licensed under the Insurance Act 1996

g. The registrar

h. Malaysia Deposit Insurance Corporation

Grounds of Petition

The applicant listed above must establish one of the grounds provided in S 465 (1) when applying for an order of winding up. The court however, may use its discretion whether or not to grant an order. The grounds are:

• S465(1)(a)

The company has by special resolution resolved that it would be wound up by the court.

• S465(1)(b)

The company has defaulted in lodging the statutory declaration under subsection 190(3)

• S465(1)(c)

The company does not commence business within a year from its incorporation or suspends its business for a whole year.

• S465(1)(d)

The company has no member

• S465(1)(e)

The company is unable to pay its debts. S 466(1) defines the inability to pay debts as:

i. S466(1)(a)

The company is indebted in a sum exceeding the amount as may be prescribed by the Minister and a creditor by assignment or otherwise has served a notice of demand, by himself or his agent, requiring the company to pay the sum due by leaving the notice at the registered office of the company, and the company has for 21 days after the service of the demand neglected to pay the sum or to secure or compound for it to the satisfaction of the creditor.

ii. S 466(1)(b)

Execution or other process issued on a judgment, decree or order of any court in favour of a creditor of the company is return unsatisfied in whole or in part.

iii. S 466(1)(c)

It is proved to the satisfaction of the Court that the company is unable to pay its debts and in determining whether a company is unable to pay its debts the Court shall take into account the contingent and prospective liabilities of the company

- S 465 (1)(f)

The directors have acted in the affairs of the company in their own interest rather than in the interest of the members as a whole or in any other manner which appears to be unfair or unjust to other members.

- S 465 (1)(g)

When the period, if any, fixed for the duration of the company by the constitution expires or the event, if any, occurs on the occurrence of which the constitution provide that the company is to be dissolved

- S 465 (1)(h)

When the court feels that it is 'just and equitable' for the company to be wound up.

The common grounds where the court may grant an order of winding on just and equitable are:

- i. Where the main object of the company cannot be achieved or has been departed from (loss of the company's substratum)
Loss of substratum occurs when the company has abandoned the business that the incorporators have agreed among themselves that it should do, whatever the object clauses may provide.

Case : Re German Date Coffee Co

The company was incorporated for the purpose of manufacturing a coffee substitute out of dates. In order to do this, it was the first object of the company to acquire a German patent. It turned out that the German Empire would not grant the patent to the company. It was held that the company had been set up with the aim of working a specific patent and that once that failed, the shareholders were entitled to say that they were not interested in carrying on any other business. The company was accordingly wound up.

- ii. Where the company's business has been carried out in a fraudulent manner
A person who puts his money into a company has a right to expect that the business of the company will be carried on properly and not in fraud of somebody else. Where the business of a company is carried on fraudulently and the shareholders have been misled into investing in the company, the shareholders may have the company wound up in order to get their money back.

Case : Thomas Edward Brinsmead & Sons Ltd

John Brinsmead & Sons were noted piano makers. Three employees of the firm set up the company to manufacture pianos. These were passed off as the products of the firm. John obtained an injunction against the company restraining it from using the name Brinsmead. It was held by Vaughan Williams J that the company was formed for the purpose of defrauding John Brinsmead & Sons. The shareholders of the company, who had been misled into believing

that the company had the right to use the name and goodwill of Brinsmead, were entitled to refuse to continue in a business which was a fraud. In view of the frauds that had been committed and to protect the interests of the innocent shareholders, the company was wound up.

- iii. Where minority members have been oppressed or treated unfairly and by controlling members and have justifiably lost confidence in the management.

Case : Loch v John Blackwood

The directors representing the majority had refused to call meetings, submit accounts or recommend a dividend. He minority had lost confidence in the management and suspected that the majority were trying to force them to sell their shares at undervalue. The court apparently granted the petition of winding up of the company.

- iv. Where the company is in reality no more than an incorporated partnership and the members can no longer work in association with one another.

Case : Re Yenidje Tobacco Co Ltd

The court ordered the company to be wound up when the directors of the company were no longer able to work together. The inability to communicate with each other among the directors has caused the deadlock in the management.

- v. Where the petitioner has been deliberately excluded from management of the company in contravention of an understanding that he will be allowed to participate in managing the company.

Case : Ebrahimi v Westbourne Galleries Ltd

Two men were the shareholders and directors of a company with equal rights of management and voting power. After sometime they become very hostile to each other and disagreed about appointment of staff and other matters. Despite this, the company made a substantial profits. The court however held that as the mutual confidence had been lost among the directors, the company should be

- S 465 (1)(i) Licence under the Financial Service Act 2013 has been revoked
- S 465 (1)(j) The company has carried on a licensed business without being duly licensed or taken deposits in Malaysia in contravention of the Financial Services Act 2013
- S 465 (1)(k) The company is being used for unlawful purposed
- S 465 (1)(l) The Minister has made a declaration under section 590

7.1.2 Voluntary Winding Up

According to S432(2) – A voluntary winding up may be effected by a resolution either:

(a) By a **members' voluntary winding up** where the **company is solvent** and the **liquidator is appointed by the members** at the members' meeting;

The procedure for members voluntary winding up

- i. A meeting of the company must be called to pass a resolution for winding up. This resolution must be a special resolution, unless the time fixed for the duration of the company has expired, in which case an ordinary resolution will do. S276
- ii. Before the notices of the meeting are sent out, the majority of the directors may make a *declaration of solvency* in accordance with S293(1).
- iii. If the declaration of solvency is made, the winding up proceeds as a members' voluntary winding up, and the members get to appoint the liquidator. S258(1).
- iv. If the declaration of solvency is not made, the winding up proceeds as a creditors' voluntary winding up. A meeting of the creditors must be summoned for the same day as the company's meeting, or for the following day. S260(1). The creditors will then choose the liquidator. S261(1).
- v. In either case, the winding is deemed to commence at the time of the passing of the resolution for voluntary winding up.

Declaration of Solvency

Directors of company may make a declaration of solvency in accordance with S 443. If they do so, the winding up proceeds as a members' voluntary winding up. If they do not, it will be a creditors' winding up.

The declaration of solvency is a written declaration to the effect that the directors have made an inquiry into the affairs of the company and have formed the opinion that the company will be able to pay its debts in full within 12 months after the commencement of the winding up.

To be effective, the declaration must comply with three requirements:

- i. it must be made at a directors' meeting.
- ii. it must be made not earlier than five weeks before the passing of the resolution for the voluntary winding up of the company; and
- iii. it must be lodged with the Registrar before the date on which the notices of the meeting called to pass the resolution for winding up are sent out.

The declaration must be accompanied by a statement of affairs of the company showing:

- i. the assets of the company and the amount expected to be realized from the liquidation of assets
- ii. the liabilities of the company
- iii. the estimated expenses of the winding up

If it turns out that the declaration is wrongly made and that the company's debts will not be paid in full within the stated period, 2 effects follows:

- iv. The directors who made the statement may be guilty of an offence unless they can show that they had reasonable grounds for making the declaration of solvency.
- v. The creditors may apply to have the liquidator appointed by the members removed and replace with their own nominee.

(b) By a **creditors' voluntary winding up** where the **company is insolvent** and the **liquidator is appointed by the creditors** at the creditors' meeting

Where the company cannot carry on its business by reason of its liabilities

- i. If a company cannot carry on its business by reason of its liabilities, the directors may make a **statutory declaration** to that effect and must appoint a provisional liquidator.
- ii. Meetings of the company and its creditors must have been summoned for a date within one month of the making of the declaration. S449(2)
- iii. At the meeting of the company, the resolution for voluntary winding up is passed and a qualified person nominated to be the liquidator.
- iv. The creditors' meeting will be held on the same day as the members' meeting or on the following day. S449(1)
At this meeting the creditors may choose a liquidator, and if their choice is different from that of the company, the creditors' choice prevails. S450(2)
- v. The winding up is deemed to have commenced on the date that the statutory declaration that the company cannot continue its business is lodged with the Registrar.

Effect of voluntary winding up (S442)

1. The company shall cease to carry its business from the commencement of the winding up except so far as is required in the opinion of the liquidator for the beneficial winding up.
2. The corporate state and corporate powers of the company shall continue until it dissolved
3. Any transfer of shares and any alteration in the status of members made after the commencement of the winding up is void.

7.2 LIQUIDATOR AND THEIR DUTIES

7.2.1 Liquidator

Who can be appointed as a liquidator

- a member from the panel of professional firms of chartered accountants, advocates, company secretaries, cost and work accountants which the central government may constitute
- body corporate approved by central government
- whole time or part time officer appointed by the central government

Main duties of a liquidator

1. To wind up the company, to distribute assets to the creditors and the remaining assets, if any, will be distributed to members.
2. Powers of directors will be suspended and all business will be taken over by the liquidator.
3. Liquidators are responsible to make sure the company properly dissolved.
4. Investigate to determine the property owned by the company.
5. Take control of the company's property (liquidate the company property/sell to get cash)
6. Investigate the company's background and accounts to make sure that no misconduct has occurred in the company.

7. Implement the prosecution of the directors and officers of companies were found guilty.
8. Taking proper action for the benefit of assets and ensure that creditors and the winding contributor / investor shares optimum benefit.
9. Divide the result of company property by creditors in applying its pro-rata basis
10. Return the excess revenue after debt paid in applying contributor to the creditor.

7.3 RANK OF FUNDS TO BE DISTRIBUTED IN WINDING UP

According to the S527, Companies Act 2016, in a winding up there shall be paid in priority to all other unsecured debts:

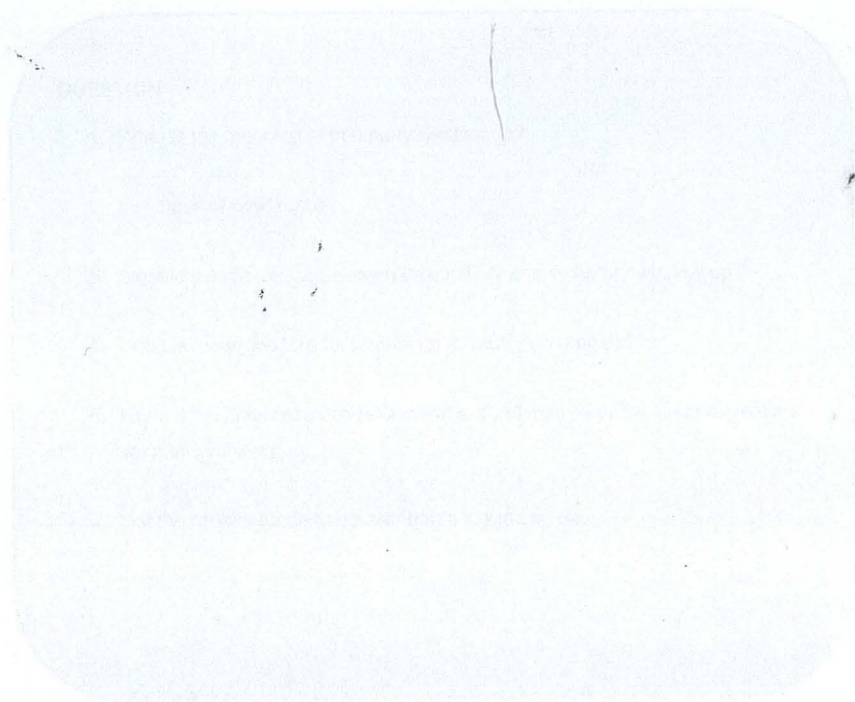
- Firstly, the cost and expenses of winding up including the taxed cost of petitioner payable under S468, the remuneration of a liquidator and the cost of any audit carried out under S514.
- Secondly, all wages and salary, whether or not earned wholly or in part by way of commission, including any amount payable by way of allowance or reimbursement under any contract of employment or award or agreement regulating conditions of employment, of any employee not exceeding fifteen thousand ringgit or such other amount as may be prescribed whether for time or piecework in respect of services rendered by him to the company within the period of four months before the commencement of the winding up.
- Thirdly, all amounts due in respect of worker's compensation under any written law relating to worker's compensation accrued before the commencement of winding up
- Fourthly, all remuneration payable to any employee in respect of vacation leave, or in case of his death to any person in his right, accrued in respect of any period before the commencement of the winding up
- Fifthly, all amount due in respect of contributions payable during the twelve months next before the commencement of the winding up by the company as the employer (including social security contribution, superannuation or provident funds –retirement benefit)
- Sixthly, the amount of all federal tax assessed under any written law before the date of the commencement of the winding up or assessed at any time before the time fixed for the providing of debts has expired.

QUESTION

1. What is the meaning of company winding up?
2. List types of winding up
3. Explain the difference between compulsory and voluntary winding up?
4. What is the procedure for members voluntary winding up?
5. Explain the difference between members' voluntary winding up and creditors' voluntary winding up.
6. List the rank of funds to be distributed in winding up.

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CHAPTER 7
WINDING UP



**TARIKH DIPULANGKAN
(DATE DUE)**

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