THE APPROVED COMPANY SECRETARIES

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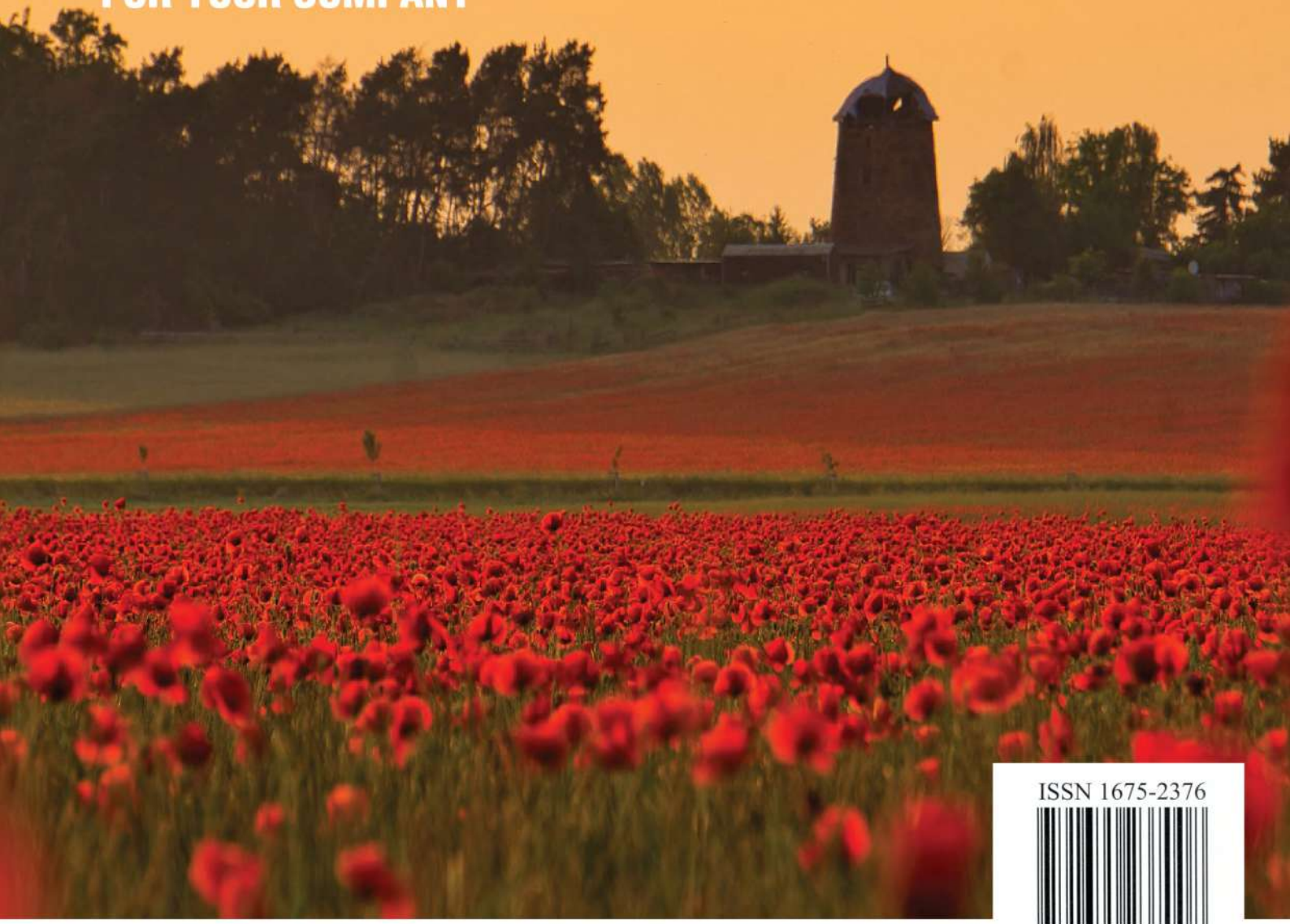
REGISTERING A BUSINESS MODEL BY USING INTEREST SCHEMES TO DO BUSINESS

RESIGNATION OF COMPANY SECRETARY - TIPPING POINTS AND PROCEDURAL COMPLIANCE

WHY A TAILORED CONSTITUTION IS IMPORTANT FOR YOUR COMPANY



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FROM THE EDITOR'S DESK

Dr. Adissayam Xavier Suseimanikam, *FIACS*

Warmest greetings to all and welcome to the 2nd issue of the IACS newsletter for 2023.

I am delighted to inform that IACS had successfully held its 27th Annual General Meeting (AGM) on 17th June 2023 at Seri Pacific Hotel, Kuala Lumpur. I would like to take this opportunity to extend my sincere gratitude to all members who supported and attended the AGM. We had a productive and enjoyable time sharing on the latest development in the company secretarial practice as well as networking with each other.

We had also successfully launched our inaugural book publication entitled "IACS Digest (Series 1)" during the AGM. Members present at the AGM were given a complimentary copy of the book each and we will mail to those members who were not present at the AGM. Members who wish to have additional copies of the book may purchase it at RM15.00 per copy (while stocks last). We are already receiving great response for the book from both members and non-members alike, immediately after the launch. Please contact the Secretariat at 03-4051 3787 to get a copy of the Order Form.

After the conclusion of the AGM, the line-up of Council Members for the term 2023-2024 is as follows:-

President	: Mr. See Poh Lam
Vice-President	: Dr. Adissayam Xavier Suseimanikam (Immediate Past President)
Secretary	: Mr. Jaleeludeen Bin Abu Baker
Treasurer	: Ms. Chin Tet Fung
Assistant Secretary	: Pn. Hajjah Nolida Binti Md Hashim
Assistant Treasurer	: Mr. V. M. Thiagarajan
Council Members	: Mr. Santiran s/o Sankaran Pn. Aminah Binti Hussin

As the Immediate Past President, I welcome and congratulate all the newly elected office bearers, members of the Council and Chairpersons of the various committees/boards on their respective elections/appointments. I also wish to thank all the outgoing committee/board members for their support, insights and contributions to enhance the workings of the committees/boards. I envision IACS flourishing to a greater height under Mr. See Poh Lam's strong leadership as I pass the baton to the newly elected President.

Last but not least, members are encouraged to write to us about any technical or other operational issues as well as enquiries with SSM or other agencies regarding the company law and other corporate secretarial matters so that we may respond or discuss them at the proper forums or meetings.

We thank you for your continuous unwavering support. Take care and stay safe

Thank you.

IACS NEW MEMBERS

We would like to welcome the following new members:-

IACS No.	Names	Membership Category	State
A 2639	Mr. Tsen Thau Yu	Associate	Sabah
A 2640	Ms. Chung Ming Yi	Associate	Sarawak
M 2641	Mr. Koh Kok Tong	Ordinary	Johor
M 2642	Ms. Goh Bih Yen	Ordinary	Pahang

In the meantime, we take this opportunity to thank you for the support given to the Institute. We look forward to your active participation in all activities of IACS for the development of the company secretarial profession.

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INSTITUTE OF APPROVED COMPANY SECRETARIES (387525-X)

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REGISTERING A BUSINESS MODEL BY USING INTEREST SCHEMES TO DO BUSINESS

By
Dr. Cheah Foo Seong, FCIS, FIPA, MBA, LLM, LLD

Introduction

The Interest Schemes Act 2016 was enacted to support the Companies Act 2016 in providing another business model for doing businesses for a Small and Medium Enterprises (SME). In this type of business structure, the investor buys a portion of the business not called "share" but known as "an interest holder of the scheme".

In view of the wide reach and huge potential of interest as a basis of any innovative business scheme which is open for exploitation by irresponsible quarters to cause public to contribute money in unregulated environment, the provisions under Division 5 Part IV of the now repealed Companies Act 1965 have been revised, enhanced and regenerated in the form of Interest Schemes Act 2016.

The Interest Schemes Act 2016 (Act 778) was gazetted on 15 September 2016 and came into force on 31 January 2017. The Interest Schemes Act 2016 framework provides for a complete and comprehensive legal framework for interest schemes in Malaysia. Interest Scheme involves the pooling of a financial contribution from the public in exchange for an interest in a particular scheme.

Characteristics

The schemes mentioned in the Act is explained in the following manner:

There are three types of schemes provided by the Act, namely:-

(a) An investment scheme;
(b) Recreational membership scheme;
(c) Time-sharing scheme; or
(d) A combination of such schemes.

(a) A scheme is an investment scheme if the interest holder does not have day-to-day control over the operation of the scheme, whether or not the interest holder has the right to be consulted or to give direction and that—

(i) the interest holder contributes money or money's worth as a consideration to acquire a right or interest to profits, assets or realisation of any financial or business undertaking of the scheme, whether the right or interest are actual, prospective or contingent and are enforceable or not; or

(ii) the contribution by the interest holder is pooled or used in common enterprise, to produce financial benefits, or benefits consisting of rights or interests in property for which the interest holder is led to expect profits, rent or interest from the efforts of the promoter of the enterprise or a third party.

(b) A scheme is a recreational membership scheme if—

(i) in substance and irrespective of the form, the scheme involves the investment of money in or under such circumstances that an interest holder acquires or may acquire an interest or right in respect of property which under or in accordance with the terms of investment will or may, at the option of the investor, be used or employed in common with any other interest or right in respect of property acquired in or under like circumstances and includes an entitlement to a right to use or enjoy any sport, recreational, holiday or other related facilities for a consideration; and

(ii) the scheme is to operate for a duration of not less than twelve months whether or not on a recurring basis.

(c) A scheme is a time-sharing scheme if—

(i) an interest holder is or may become entitled to use, occupy or possess for two or more periods during the period for which the scheme, whether in Malaysia or elsewhere is to operate, property to which the scheme relates; and

(ii) the scheme is to operate for a period of not less than three years.

(d) A scheme referred to in any one of the above mentioned may be in the form of a Shariah compliant scheme.

Essential Requirements

A scheme may be registered as a premium scheme, a small scheme or a foreign scheme.

An application for the registration of a premium scheme may be made by a management company provided that the management company—

(a) is a public company limited by shares incorporated under the Companies Act 2016 or corresponding previous written law;

(b) specifies in its constitution that the management of interest scheme is one of its main objects; and

(c) meets the minimum amount of paid-up capital as determined by the Commission.

The Registrar shall have the power to impose any other conditions as he thinks fit for the purpose of registration of the premium scheme.

An application for the registration of a foreign scheme may be made by a foreign company registered under Division 1 of Part V of the Companies Act 2016 provided that the foreign company—

(a) is a public company limited by shares at its country of origin;

(b) specifies in its constitution that the management of the interest scheme is one of its main objects;

(c) meets the minimum amount of paid-up capital as determined by the Commission; and

(d) has been given the recognition or power to offer or proposed to offer interests to the public at its country of origin by the authority responsible for regulating schemes relating to interests.

The Registrar shall have the power to impose any other conditions as he thinks fit for the purpose of registration of the foreign scheme.

Application for registration of a scheme by a management company

A management company[1] may apply to the Registrar in the manner as determined by the Registrar for the registration of one or more schemes. An application to register a scheme shall be made to the Registrar by providing the following information:

(a) the name of the management company;

(b) the names and addresses of the directors, secretary and auditor of the management company;

(c) if the scheme or part of the scheme is managed by a third party, the names and addresses of the third party;

(d) the names and addresses of the trustees appointed by the management company;

(e) in the case of a foreign scheme, the names and addresses of the foreign company, its directors and agents in Malaysia as referred to in Division 1 of Part V of the Companies Act 2016 and the trustees appointed by the management company;

(f) the amount proposed to be raised by the scheme; and

(g) any other information as the Registrar may require.

The application shall be accompanied with a prescribed fee and the following documents:

(a) in the case of a premium scheme—

  (i) a copy of the constitution of the management company;

  (ii) a prospectus; and (iii) a trust deed;

(b) in the case of a small scheme—

  (i) a copy of the constitution of the management company;

  (ii) a product disclosure statement; and

  (iii) a contractual agreement; or

(c) in the case of a foreign scheme—

  (i) a copy of certificate of incorporation of the foreign company at its country of origin or such other equivalent document;

  (ii) a copy of the constitution of the management company;

  (iii) a copy of the approval or registration by the relevant authority at its country of origin authorising the foreign company to offer interests under a scheme;

  (iv) a copy of a prospectus and an approved trust deed, or such other similar document in the country of origin;

  (v) a prospectus; and

  (vi) a trust deed.

1 Section 2 of ISA 2016 defines a "management company", in relation to any interests issued or proposed to be issued or any deed that relates to any interests issued or proposed to be issued, means a company incorporated under the Companies Act 2016 or corresponding previous written law by or on behalf of which the interests have been or are proposed to be issued

In considering the application made, the Registrar may direct the management company to furnish other document or further information or clarification.

In relation to an application made under this section, the Registrar may—

(a) require the management company to appear before the Registrar for personal representation;

(b) direct the management company to compensate any person who have purchased any interest in the scheme prior to the application; or

(c) restrain the management company from carrying on the following activities, including, but not limited to, activities which were carried on prior to the application:

(i) promoting any interest relating to a scheme to members of the public;

(ii) dealing or generating interest in its products or offering of products;

(iii) printing, publishing or distributing or causing to be printed, published or distributed, written materials promoting interest schemes;

(iv) making any recommendation or offering advice, whether orally or in writing, to any person in relation to a product or a decision by a person regarding whether or not to invest in a product; or

(v) inducing, soliciting, collecting or receiving money from a person in relation to the scheme.

The Registrar may approve or refuse the application if he is not satisfied with the particulars or other information furnished under the provisions of this Act.

The management company must pass the profit test, which is an uninterrupted profit after tax of a minimum of four years preceding the date of application, for registration of the scheme. It must also have evidence of an operating history and management capability, which is at least five years of good track record in the same nature of business as the proposed schemes.

The roles and responsibilities of the trustee, includes requiring it to immediately report to the Registrar if the scheme's operator does not comply with the provisions of the Act.

The regulations also state in detail how a separate trust account is to be put in place by the operator to be maintained and controlled by the trustee to protect the investors' money. The registrar has the power to stop the trustee from operating a trust account or appointing a new person to administer it in certain circumstances.

Certificate of authorization

Upon approval of the application, the Registrar shall enter the particulars of the scheme in the register and—

(a) issue a certificate of authorization; and
(b) allocate an authorization number, to the management company in respect of the scheme.

In issuing a certificate of authorization, the Registrar shall have the power to impose any terms and conditions as he thinks fit.

The certificate of authorization issued under this section shall be conclusive evidence that the requirements of the Interest Schemes Act 2016 in respect of registration have been complied with and that the scheme is registered under the Act.

Some examples of Interest Schemes in operation

In Malaysia, managed investment schemes cover a wide variety of arrangements and underlying assets. Some examples of managed investment schemes include:

- computer renting and leasing,
- swiftlet farming and arowana breeding,
- property and palm oil.
- horse-breeding and horse racing schemes;
- time-sharing schemes;
- golf clubs and recreational membership scheme

Conclusion

Interest scheme involves the pooling of a financial contribution from the public in exchange for an interest in a particular scheme. While the traditional means of business involve exchanging money with outright ownership of property or rights, by virtue of being dynamic, business continues to evolve. Thus, business creativity has created new classes of assets and this include "interest", which connotes that a right obtained by the purchasing public may be temporary, fractional or not outright. There can be many forms of interest and only limited by the boundary of creative business minds.

For the public genuinely intending to diversify their investment portfolios to meet their unique investment goals, interest scheme offers another option to the investing public by participating in a different asset class investment platform subject to careful consideration of the potential benefits against the risks involved.

For companies especially the Small and Medium Enterprises (SMEs), depending on their business strategies, interest scheme offers them an alternative method of funding their business growth beyond the traditional financing options.

RESIGNATION OF COMPANY SECRETARY - TIPPING POINTS AND PROCEDURAL COMPLIANCE

By Choong Hui Yan
B.Acc(Hons)(Malaya), ACCA (UK), Licensed Secretary

Introduction

Company secretary is a noble profession with crucial, irreplaceable roles for each company, innately due to the Companies Act 2016 ("the Act"). The key duties of company secretary are to:-

(i) act as an official liaison between Companies Commission of Malaysia (SSM) and company;

(ii) coordinate various administrative and compliance filings under the Act;

(iii) advise board of directors on duties and responsibilities prescribed by the Act;

(iv) remind members on rights and responsibilities as per the Act; and

(v) act impartially in resolving conflicts between shareholders and/ or directors.

The office of secretary for each company shall not be left vacant for more than 30 days in pursuant to section 240.

Appointment

In general, company secretary is appointed even before company incorporation to advise and assist in name search and reservation, pre-incorporation resolutions, declaration of promoters and directors, and then the company registration. Such appointment is always on contractual basis, affirmed by the law case of Goh Kim Ewe & Anor Cheng Ah Ching & Ors [2016] MLJU 940, where the High Court held that the relationship between company secretary and company is only contractually established, and the company secretary will never owe fiduciary duties towards the company or directors.

The appointment will be made official via the notification of section 58 and 236(2) to SSM in relation to appointment of the first company secretary. When the company is incorporated by promoters, a company secretary must be appointed within 30 days from the company incorporation [s 236(2)].

An effective appointment requires contractual terms offered by company and an acceptance from the company secretary via written consent. When no specific timeframe prescribed for tenure, such tenure of appointment is always perpetual until the company initiates termination or resignation by the company secretary. There may be circumstances where such appointment is with specific tenure, expressly stated in the company constitution or contractual terms.

Termination

With the appointment by the company, the company secretary is an 'officer' of the company with name documented in the register of directors, managers and secretaries [s 57]. The freedom of contract and flexibility to exit from the company is governed and enshrined under the sections 237 and 239 of the Act.

Termination initiated by company can be made by section 239 where board of directors can remove a company secretary via circular written resolutions, subject to company constitution or contractual terms. Such changes then need to notify SSM through notification of section 58 in relation to change in the register of directors, managers and secretaries. Notification of section 58 can be served by either outgoing or incoming company secretary (new).

If it is to be served by incoming company secretary (new), reassignment of company secretary must be served and approved by SSM before notification of section 58.

Resignation by company secretary on the other hand, may not at all time can notify SSM via notification of section 58. Company secretary may resign due to the following:-

(a) end of tenure as per company constitution or contractual terms [s 237(1)];

(b) board of directors unable to be contacted after various attempts [s 237(2)];

(c) breach of contractual terms by the company, particularly non-payment of secretarial fees or company taking no action in meeting claims made by company secretary;

(d) change of board of directors or dispute between directors or shareholders which then causes the company secretary unable to discharge duties or obligations; or

(e) ethical standards being compromised or professionalism being severely impacted giving no other alternative but to resign from office.

When specific timeframe is set in company constitution or contract for the terms of appointment, the company secretary may resign by serving resignation notice to board of directors upon expiry of tenure [s 237(1)]. If there is incoming company secretary (new), such resignation can be notified to SSM via notification of section 58. It is however if the resigning company secretary is uncertain on whether there is incoming company secretary (new), such resignation has to notify SSM by lodging a copy of the notice served to the board of directors, accompanied by a declaration of section 237(3)(a). The resigning secretary will officially cease office on the expiry of tenure specified in company constitution or contractual terms, or expiry of 30 days after the date of notice served to the board of directors under subsection 237(1).

When none of the board of directors can be communicated after various attempts even at last known residential addresses, the company secretary may resign from office under subsection 237(2). Such resignation will have no chance to notify SSM via notification of section 58, but notice of section 237(2) in relation to intention to vacate the office of secretary. Such notice of section 237(2) has to be lodged together with proofs that none of the board of directors can be communicated. The most valid proof is returned notices served to last known addresses of the board of directors through courier services. The resigning secretary will officially cease office on the expiry of 30 days after the date of notice section 237(2) served to SSM.

In the absence of lodgement of notification of section 58 to SSM in relation to change in the register of directors, managers and secretaries, the company secretary's name will remain in the register of SSM and reflected in corporate profile available at MyData. The resigning company secretary must at all times keep the notification of section 237(1) together with declaration of section 237(3)(a), or notification of section 237(2) served to SSM as proof of discharged. These notifications are publicly available at MyData but subject to fees.

Conclusion

Company secretary is now licensed with practicing certificate [s 241] and subject to strict compliance requirement under the Act. Thus, the resignation procedures and effects must be well understood to manage claims from non-performing company, or to avoid unnecessary compounds from SSM arisen from the non-performing company.

Company secretary must act promptly to resign from the company if any of (a) to (e) takes place, especially if ethical standards or professionalism being compromised.

WHY A TAILORED CONSTITUTION IS IMPORTANT FOR YOUR COMPANY

By Shawn Ho and Tiffany Chin
Messrs. Donovan & Ho

A Company Constitution ("constitution") is vital for a company, no matter big or small, because the default rules found in the **Companies Act 2016** ("CA 2016") will automatically apply without a constitution. "Replaceable Rules" are the provisions provided in CA 2016 that may be incorporated into a constitution. These rules are customisable and modifiable depending on what suits the company best.

There are currently 62 identifiable replaceable rules that can be divided into "presumptive provisions" and "optional provisions". However, these replaceable rules are scattered across the CA 2016, making it potentially difficult to locate.

Presumptive provisions & Optional provisions

Presumptive provisions do not require an active opt-in on the part of the company. Meaning, these clauses will operate by default in accordance with the CA 2016 and can be amended. Presumptive provisions commonly employ phrases like "*unless otherwise stated in the constitution*" or "*subject to the constitution*" to indicate that the provision shall apply by default, unless the constitution provides otherwise.

Optional provisions, on the other hand, will apply only if the company chooses to expressly adopt them in the constitution. Companies that seek to incorporate these provisions must explicitly state them in the constitution, as the CA 2016 does not recognise them by default. By illustration, a constitution may dictate a fixed duration in which the company may be wound up voluntarily, in accordance with **section 465 CA 2016**.

What happens if your company does not have a Constitution?

Without a constitution, the relevant provisions of the CA 2016 will act as the default constitution for all companies pursuant to **section 31(3) CA 2016**. In the context of replaceable rules, not adopting a constitution means that companies will miss the boat on adapting a tailored constitution most suitable for their nature of business. As the internal management and governance of each company comes with its own nuances and shareholder dynamics, it is hardly realistic to suggest that the CA 2016 provides a one-size-fits-all solution to all possible scenarios that may arise from the management and governance of the company.

This may lead to some hiccups as elaborated below:

1. It makes it harder to interpret the rules governing the company. These rules are significantly more difficult to locate because the CA 2016 is extremely lengthy and contains a lot more provisions. These rules are scattered throughout the CA 2016 making it difficult to locate them for different situations. With a written constitution, it's far easier to locate the rules for the different situations or scenarios which a company may from time to time face.
2. There are times when the founders of the company find that the default rules in the CA 2016 are inappropriate for their company, or worse, may even have unintended adverse consequences on the company. By the time an issue has arisen, it may be too late as a dispute or an ongoing lawsuit could have commenced between the shareholders. Having a customized constitution would help to avoid this.

Some examples of default rules that founders may wish to modify are illustrated as follows:

Quorum

The CA 2016 provides for Board Proceedings by default in the Third Schedule. Some founders may find the provisions not appropriate for their administration and may wish to customize the default provisions. One example may be the quorum at directors' meetings, where founders may want to customize the constitution such that a particular class of director or directors (representing certain shareholders) must be present in order for the quorum to be met.

Pre-emptive rights

The CA 2016 also applies its own default rules for pre-emptive rights. This means shares must first be issued to shareholders on a pro-rata basis to maintain the existing shareholding proportions, after which the directors can dispose of the unsubscribed shares in their discretion.

In this situation, some founders/shareholders may want to ensure that the shares are offered to them or specific individuals first (rather than on a pro-rata basis), before being offered or disposed of by the directors. (section 85 of CA 2016).

Variation of Rights

Section 91(5) of CA 2016 also deems further issuance of preference shares as a "variation of rights". This means that the approval from the existing class of preference shareholders must be obtained before a new issuance of preference shares, and also allows a certain percentage of the preference shareholders to go to Court to invalidate the new issuance of preference shares. Founders who need to raise capital in subsequent rounds may face some difficulty in this scenario.

Power of Interested Directors to Vote

The default rule under section 222 of CA 2016 does not bar directors of private companies (except for private companies which are subsidiaries of public companies) from voting in transactions and agreements where they are personally interested in as long as their interest has been declared. Some founders/shareholders may be uncomfortable with this and want to incorporate stricter provisions in the constitution to exclude them from voting in such matters.

The Board's Right to Approve Directors' Fees

The default rule under section 230 of CA 2016 allows the Board to approve directors' fees in private companies (except for private companies which are subsidiaries of public companies). Shareholders or founders may be uncomfortable with this arrangement and may want to ensure that this approval is done by shareholders.

What if your company has an existing Memorandum and Articles of Association ("M&A") which was drafted before CA 2016 was in force?

Potential conflicts between Memorandum and Articles of Association ("M&A") and CA 2016 could lead to disputes between shareholders and lawsuits due to the inconsistencies.

In the **Fourth Schedule** of the **Companies Act 1965** ("Old Act"), we can find a table comprising of internal management rules ("Table A"). The regulations in Table A are a good reference for specimen clauses, available for companies to cherry-pick to include in their M&A. While some of these Table A clauses have already been incorporated into the **CA 2016** itself, several provisions have been amended and the CA 2016 requires companies to update some of these provisions. Hence, companies should review their Articles of Association and decide the next step forward to reduce the possibility of disputes between members of the company.

What should your company do now?

1. Companies limited by shares incorporated prior to 2016
    - These companies were statutorily required to adopt a M&A prior to 2016. Companies may amend and update the Table A provisions in their M&A to be aligned with the CA 2016; or
    - Revoke the M&A and operate without a constitution. This would mean that all the default rules of the CA 2016 would apply with no tailoring or modifications made to suit the management and governance of the company. The founders/shareholders may not be aware of the implications of such default rules and this may lead to a difficult situation or a conflict later when it is discovered; or
    - Revoke the M&A and adopt a new constitution in line with the CA 2016. This is probably the best and cleanest option.
2. Newer companies incorporated after the enactment of the CA 2016
    - The most strategic choice is to have a constitution tailored to their needs; or
    - Companies may also choose to operate without a constitution. This would mean that all the default rules of the CA 2016 would apply with no tailoring or modifications made to suit the management and governance of the company. The founders/shareholders may not be aware of the implications of such default rules and this may lead to a difficult situation or a conflict later when it is discovered.

In a nutshell

The Constitution of a company is an extremely important document. It provides the structure for the management and governance of the company. Although the CA 2016 has default rules applicable where the company has no Constitution, it would be risky to just rely on the default rules without considering the implications of the default rules on their specific company. The ability to tailor the Constitution of a company is an important consideration for founders, investors and shareholders. It provides the flexibility to adopt a Constitution which they feel is optimal for their specific company. It is submitted that

founders and shareholders should take advantage of this flexibility and have a tailored Constitution which provides the best framework for the management and governance of their company.

This article was originally published on Donovan & Ho website www.dnh.com.my on 5th January 2022 and reproduced with permission of the writers.

CORPORATE RESCUE MECHANISMS IN MALAYSIA: PART 2 - WHAT IS A JUDICIAL MANAGEMENT ORDER?

By Sean Tan Yang Wei (Principal Associate)
& Valerie Seaw Ja Hui (Pupil), Messrs. Thomas Philip

See Part 1 of our series for an introduction to what a Judicial Management Order entails.

A Judicial Management Order **("JMO")** must be obtained from Court and in order to do so, there are several factors and requirements which need to be met in order to be successful in the application. This article will focus on the factors considered by the Court when evaluating a JMO application.

Is the Company Precluded from Applying for a JMO?

First and foremost, one must ascertain whether the target company of a JMO is eligible to be placed under judicial management. The Companies Act 2016 **("CA 2016")** prohibits certain types of companies from being placed under judicial management, namely:

a. A company which is a licenced institution, or an operator of a designated payment system regulated under the laws enforced by the Central Bank of Malaysia [s 403(a) CA 2016];

b. A company subject to the Capital Markets and Services Act 2007 [s 403(b) CA 2016]; and

c. A company already in liquidation [s 405(6) CA 2016].

Such companies are not allowed to be placed under judicial management and any application would be dismissed by the Court. The recent High Court decision of *Re Scomi Group Bhd* [2022] 7 MLJ 620 held that s 403(b) CA 2016 applies to all companies whose shares are quoted on a stock market of a stock exchange. However, this provision may be subject to an amendment in the near future [1].

The Secured Creditor's Veto

It should also be noted that secured creditors who are entitled to appoint receivers or receivers and managers over the whole or part of the company's assets (usually debenture holders) have the power to veto or scupper any application for judicial management. This is provided for under s 409 (read together with s 408(1)(b)(ii) CA 2016) which states that the Court shall dismiss a JMO application if the same is opposed by a debenture holder[2].

Unsecured creditors on the other hand enjoy no such veto power. They are however entitled to intervene[3] and raise their opposition at such proceedings for the consideration of the Court.

Who Can File the Application for a JMO?

Under the CA 2016, an application for a JMO can be filed by the following parties:

a. members or shareholder of the company in the name of company;

b. directors of the company; or

c. a creditor or several creditors of the company (including contingent and prospective creditors).

Contingent Creditor *– a creditor to whom a debt may be owed to by the company upon the occurrence of an event*

Prospective Creditor *– a creditor whose debt has been proven but is not immediately payable*

While all parties above are allowed to file an application for a JMO, it ought to be noted that there are slightly different requirements that must be met by each type of applicant. For instance, resolutions would have to be passed before shareholders or the directors of the company file an application for a JMO. A creditor's application on the other hand does not require majority support from the creditors of the company.

Other than the different requirements, an applicant should be mindful of the quality and quantity of supporting evidence expected from them. For instance, higher quality and/or more evidence would be expected when the applicant is the company itself, than if it were a creditor whose access to information would be comparatively limited (*Re Biaxis (M) Sdn Bhd* [2022] 7 MLJ 443).

Factors Considered When Allowing or Disallowing an Application for a JMO

If the preconditions above are satisfied, the Court would consider the tests set out under s 405 of the CA 2016. s 405(1) CA 2016, which sets out 2 main limbs, namely:

(a) the Court is satisfied that the company is or will be unable to pay its debts **("1st Limb")**; and

(b) the Court considers that the making of the order would be likely to achieve one or more of the following purposes:

1. the survival of the company, or the whole or part of its undertaking as a going concern;
2. the approval under s 366 of a compromise or arrangement between the company and any such persons as are mentioned in that section;
3. a more advantageous realisation of the company's assets would be effected that on a winding up.

("2nd Limb")

1st Limb: "Is or will be unable to pay its debt"

The First Limb revolves around the company's ability to service its debts. The party who is seeking a JMO must provide cogent evidence that can satisfactorily prove that the company is or will be unable to pay its debts.

The Court will not only assess the overall liabilities of the company against its assets but will also consider whether the company has enough cash in hand to pay its debts as and when they become due. If a company is unable to pay its creditors (or debt) on time, the Court will presume that the company is unable to pay its debts and is therefore considered commercially insolvent. This test is also widely known as the "commercial or cash flow insolvency test".

2nd Limb: the Statutory Purposes

If the Court is satisfied that the company in question is or will be unable to pay its debts, the Court will then move to consider whether the making of a JMO would achieve one or more of the purposes set out under Section 405(1)(b) of the Companies Act 2016, namely:

a. The survival of the company, or the whole or part of its undertaking as a going concern.
b. The approval under s 366 of a compromise or arrangement between the company and any such persons as are mentioned in that section; or
c. A more advantageous realisation of the company's assets would be effected than on a winding up.

Here, the Court will examine the evidence presented to determine if there is a real prospect that the one or more of the stated purposes is achievable if an order for JM is made. Mere assertions that the purposes of the JM could be met, such as the likelihood of financing or rehabilitation, without the same being backed by proper evidence would be insufficient[4].

The Court of Appeal in *CIMB Islamic Bank Bhd v Wellcom Communications (NS) Sdn Bhd & Anor* [2019] 4 CLJ 1 also stated that, *"the court's consideration at all stages, that is to say from the date the application is filed and from the date of the order, if any is given, must be based on strict proof and evidence and not merely surmise and conjecture"*.

The Courts have also held that the filing of an affidavit of the judicial manager candidate, while not mandatory, would be useful to support such applications as the Court would be better equipped to assess and examine the viability of the proposal to rescue the company or to achieve the statutory purposes[5].

Conclusion

It is necessary to understand the requirements of a JMO application to better understand and evaluate the prospects of success. However, the law governing the judicial management mechanism in Malaysia is still developing and is expected to receive further amendments from Parliament in the near future.

Stay tuned for the next part of this series where we will delve into the effects of a JMO on the company in question.

[1] SSM's Consultative Document on Proposed Companies (Amendment) Bill 2020

[2] Leadmont Development Sdn Bhd v Infra Segi Sdn Bhd & Anor [2018] 10 CLJ 412

[3] Goldpage Assets Sdn Bhd v Unique Mix Sdn Bhd [2020] MLJU 723 and Capital City Property Sdn Bhd v Achwell Property Sdn Bhd [2021] MLJU 749

[4] Goldpage Assets Sdn Bhd v Gan Kam Seng & Ors [2021] 9 MLJ 618

[5] Federal Power Sdn Bhd v Dara Consultant Sdn Bhd [2021] MLJU 2114

This article was originally published on Thomas Philip website www.thomasphilip.com.my on 17th February 2023 and reproduced with permission of the writers.

FAQS ON COMPANIES ACT 2016 AND TRANSITIONAL ISSUES

PART A — ENFORCEMENT DATE OF THE COMPANIES ACT 2016 AND TRANSITIONAL ISSUES

1. Please clarify if the entire Companies Act 2016 will be effected on 31 January 2017 or only the six services in MyCoid 2016 will be effected on 31 January 2017?

Answer:

Once enforced on 31 January 2017, all provisions in the Companies Act 2016 will take effect except section 241 and Division 8 of Part III. The six services under MyCoID is to facilitate the incorporation of companies under the new Act and related matters.

2. What is the procedure for filing Annual Returns for companies having AGMs prior to the commencement of the Companies Act 2016?

Answer:

(a) For companies having AGM before 31 January 2017, the companies are required to submit the AR in accordance with the requirements under the Companies Act 1965.

(b) With the exception of companies having the anniversary of the incorporation date on 31 January 2017, companies with anniversary of incorporation in January 2017 are not required to submit the Annual Return in 2017 as the Companies Act 2016 has yet to take effect. Such companies' first submission of Annual Return in compliance with the new Act will only happen in 2018.

3. With the decoupling of Financial Statements and Annual Returns submission, what will happen to the Financial Statements which have not been finalized and filed to Companies Commission Malaysia for previous years?

Answer:

Companies are still required to fully comply with the provisions under section 169 of the Companies Act 1965 in line with the transitional provision under subsection 620(4) of the Companies Act 2016.

Transitional Provisions Relating to Abolition of Nominal Value

4. Is a company which has no Share Premium account or Capital Redemption Reserve required to submit notification under subsection 618(8) or (9) with the Registrar? ***(updated on 31 January 2019)***

Answer:

Such companies may submit such notification. If no notification is submitted the Registrar will invoke subsection 618(10) of the Companies Act 2016 at the end of the period referred to under subsection 618(8).

5. What is the period for lodging this notification? ***(updated on 7 March 2019)***

Answer:

Pursuant to subsection 618(8), a company is required to submit the notice at any time before–

(a) the date it is required to lodge its annual return after the end of the period referred to under subsection 618(3); or

(b) the expiry of 180 days after the end of the period referred to under subsection 618(3), whichever is the earlier.

However, it is advisable for a company to adhere to the following lodgement timeline provided the lodgement of the notice is in compliance with the requirements stated in subsection 618(8) of the CA 2016.

Anniversary Date	Lodgement Period
Company having anniversary date on or before 30 June 2019	31 January 2019 till 30 April 2019
Company having anniversary date on or after 1 July 2019	2 May 2019 till 31 July 2019

6. If a company has an amount standing to the credit of its share premium account and/or capital redemption reserve as at 30 January 2019, can the company lodge its annual return before submitting the notification under section 618(8) of the CA 2016 to the Registrar? ***(updated on 7 March 2019)***

Answer:

No. The company is required to submit the notification under section 618(8) of the CA 2016 before submitting the annual return to the Registrar if the company has share premium and/or capital redemption reserve (CRR) balances as at 30 January 2019.

7. If a company does not have any amount standing to the credit of its share premium account and/or capital redemption reserve as at 30 January 2019 or never had these accounts, can the company lodge its annual return without submitting the notification under section 618(8) of the CA 2016 to the Registrar? ***(updated on 7 March 2019)***

Answer:

Yes. The company has the following options:

1. Submit the notification of its share capital pursuant to section 618 of the CA 2016 before lodging its annual return to the Registrar; or

2. Do not submit the notification of its share capital pursuant to section 618 of the CA 2016 to the Registrar. However, if the company chooses not to submit the notification pursuant to subsection 618(8) of the CA 2016, Registrar will invoke subsection 618(10) of the CA 2016 after the expiry of the 180 days period as stated in subsection 618(8) of the CA 2016.

The annual return can be submitted and it must at all times comply with the time period for submitting the annual return to the Registrar under section 68 of the CA 2016.

8. What is the value of the shares to be included in the annual return (AR) lodgement? ***(updated on 7 March 2019)***

Answer:

If the anniversary of a company's incorporation date falls on or before 30 January 2019, the value of the shares to be disclosed in the AR should not include share premium and/or capital redemption reserve amount.

If the anniversary of its incorporation date of a company falls on or after 31 January 2019, the value of the shares in the AR should be inclusive of the share premium and/or capital redemption reserve.

9. What information should the company provide on its Equity Structure as at 30 January 2019? ***(updated on 7 March 2019)***

Answer:

The company is required to provide information on its share premium and/or capital redemption reserve ("CRR") accounts (wherever applicable) during the 24 months period as follows:

NO	TERMINOLOGY	REMARKS
1	Balance as at 30 January 2019 (RM)	This is the balance as at 30 January 2019 pertaining to the unutilised share premium and/or CRR after deducting all utilization during the 24 months period ending 30 Jan 2019. If the company never had any share premium/CRR account or has *fully utilised* its share premium and/or CRR during the 24 months period, please state "NIL".
2	Utilised as at 30 January 2019 (RM)	The information should be reflective of the amount of share premium and/or CRR *utilised* during the 24 months period from 31 Jan 2017 to 30 Jan 2019. If the company never had any share premium/CRR account or has *never utilised* its share premium and/or CRR amount during the 24 months period, please state "NIL".

10. Is there a deadline or 'cut-off date' for the submission of documents regarding the company's share capital adjustment under subsection 618(8) or (9) (Notice of Share Capital)? ***(updated on 10 March 2023)***

Answer:

Yes, pursuant to subsection 618(8), a company may file with the Registrar a notice of its share capital—

(a) at any time before—

i. the date on which the company is required to submit its annual return after the end of the period mentioned under subsection (3); or

ii. The expiry of 180 days after the end of the period mentioned under subsection (3),

whichever is earlier; or

(a) in such longer period as the Registrar may allow, if he thinks fit in the circumstances of the case.

The last day to submit is 31 December 2021 as permitted by Registrar. However, if there is a need for the company to make any amendments to the register at SSM after that date, the company may consider to make amendments to the SSM register through section 602 of CA 2016.

11. If as a result of the omission, and a company intends to make a submission under the requirements of subsection 618(8) or (9), ie Notice of Share Capital after 31 December 2021, what are the documents that need to be submitted together with section 602 Form? ***(updated on 10 March 2023)***

Answer:

The company requires to submit the following documents:

(a) Section 602(1)(c) – select "by reason of an omission or misdescription it has been duly completed";

(b) Annexure Statement by Company On Its Share Capital (include the attachment "annexure section 618(8) / (9) (Notice of Share Capital)";

(c) Statutory Declaration.

12. Filing under section 602 requires the submission of documents with a registration fee. Will the fee charged under section 602 also apply to the filing requirements of subsection 618(8) or (9) (Notice of Share Capital)? ***(updated on 10 March 2023)***

Answer:

Yes, a fee of RM300 is applicable for application to rectify the register under section 602.

Source: SSM website www.ssm.com.my. Updated as at 10 March 2023

PRESS RELEASES FROM COMPANIES COMMISSION OF MALAYSIA (SSM)

Individu Mengaku Bersalah Atas Pertuduhan Membenarkan Penyataan Palsu Diserahsimpan

Johor Bahru, 29 Mac 2023 – Seorang individu telah disabitkan kesalahan dan dikenakan hukuman denda oleh Hakim Mahkamah Sesyen Jenayah 3, Johor Bahru atas pertuduhan memalsukan perlantikan pengarah dan pemegang saham syarikat TCW Hardware Sdn Bhd.

Berdasarkan kepada fakta kes Lean Woon Chong, 51, telah membenarkan satu pernyataan palsu diserahsimpan oleh setiausaha syarikat kepada Suruhanjaya Syarikat Malaysia (SSM) berkenaan perlantikan Ong Pei Tong sebagai pengarah bagi syarikat TCW Hardware Sdn Bhd pada tahun 2018. Susulan daripada perlantikan tersebut, tertuduh telah memindahkan saham secara palsu kepada pengarah terbabit dalam tahun yang sama. Kedua-dua kesalahan ini telah dilakukan di atas arahan tertuduh tanpa kebenaran dan pengetahuan pengarah yang dilantik.

Tertuduh di dalam kes ini telah membuat pengakuan bersalah dan dikenakan hukuman denda sebanyak RM20,000 bagi setiap pertuduhan. Sekiranya gagal membayar denda tersebut, hukuman penjara selama 20 bulan boleh dikenakan ke atas tertuduh. Selain daripada itu, mahkamah turut memerintahkan agar tertuduh membayar kos pendakwaan berjumlah RM15,000 kepada SSM. Denda berjumlah RM40,000 didapati telah dibayar oleh tertuduh pada hari yang sama.

Seksyen 591(2)(a) Akta Syarikat 2016 memperuntukkan tiap-tiap orang yang dalam apa-apa penyata, laporan, perakuan, penyata kewangan atau dokumen lain yang dikehendaki oleh Akta Syarikat 2016 membuat atau membenarkan supaya dibuat suatu pernyataan yang palsu dalam apa-apa butir material dengan mengetahuinya sebagai palsu telah melakukan suatu kesalahan dan boleh, apabila disabitkan, dipenjarakan selama tempoh tidak melebihi 10 tahun atau didenda tidak melebihi RM3 juta atau kedua-duanya.

Pendakwaan dikendalikan oleh Pegawai Pendakwa SSM, Nurul Husna Mohd Yusof manakala tertuduh tidak diwakili oleh peguam.

Sabitan seumpama ini merupakan satu peringatan kepada orang awam bahawa tindakan pendakwaan akan diambil terhadap mana-mana individu yang didapati memberikan pernyataan, maklumat atau laporan palsu atau mengelirukan kepada SSM. Kesalahan yang melibatkan penyalahgunaan identiti individu lain merupakan suatu kesalahan berat yang perlu dipandang serius.

SSM sentiasa konsisten dalam mengawal selia pematuhan peruntukan undang-undang yang ditadbir di samping memastikan komuniti korporat peka terhadap tanggungjawab serta etika perniagaan.

DIKELUARKAN OLEH: SURUHANJAYA SYARIKAT MALAYSIA
TARIKH: 29 MAC 2023

Sebuah Syarikat Dan Dua Ahli Lembaga Pengarah Mengaku Bersalah Bagi Kesalahan Gagal Serah Simpan Penyata Tahunan

Melaka, 16 Mac 2023 – Sebuah syarikat dan dua orang ahli Lembaga Pengarah telah disabitkan di Mahkamah Majistret 3, Melaka Tengah, Melaka terhadap pertuduhan di bawah Seksyen 68(1) Akta Syarikat 2016 berikutan kegagalan menyerah simpan penyata tahunan kepada SSM bagi tahun takwim 2020 syarikat tersebut.

R Bee Sdn. Bhd, Tan Tian Cher dan Rajan Monickoraja yang tidak diwakili peguam pada hari perbicaraan tersebut, telah menukar pengakuan kepada bersalah sebaik sahaja pertuduhan pindaan dibuat oleh pihak pendakwaan yang dikendalikan oleh barisan pegawai pendakwa SSM, Zaharah Abu, Suhana Razali, Fazarul Ezhar Mohd Mokhtar dan Mohd Fairuz Othman.

Setelah menimbang rayuan mitigasi dan hujahan pemberat kedua-dua pihak, Majistret Puan Nabilah Nizam telah menjatuhkan hukuman denda RM2,000 atau dua bulan penjara jika gagal bayar kepada syarikat R Bee Sdn. Bhd. Tertuduh kedua dan ketiga pula masing-masing dihukum denda RM1,500 atau satu bulan penjara jika gagal bayar. Ketiga-tiga tertuduh telah menjelaskan kesemua denda pada hari yang sama.

Menurut Seksyen 68(1) Akta Syarikat 2016, suatu syarikat hendaklah menyerah simpan kepada pendaftar suatu penyata tahunan bagi setiap tahun kalendar tidak lewat daripada 30 hari dari tarikh ulang tahun pemerbadanannya. Kegagalan mematuhi kehendak undang-undang tersebut merupakan suatu kesalahan yang boleh dihukum di bawah Seksyen 68(9) Akta yang sama yang membawa hukuman denda tidak melebihi RM50,000 dan dalam hal suatu kesalahan yang berterusan, RM1,000 bagi setiap hari kesalahan itu berterusan selepas sabitan.

SSM berharap sabitan seumpama ini menjadi satu bentuk peringatan kepada orang awam bahawa tindakan perundangan akan diambil sekiranya berlaku pelanggaran undang-undang yang dikawalselia oleh SSM termasuklah kesalahan ketidakpatuhan menyerah simpan penyata tahunan dan lain-lain dokumen berkanun yang dikehendaki oleh undang-undang. Ini bagi memastikan tadbir urus korporat dan pematuhan undang-undang syarikat sentiasa diamalkan oleh warga korporat dan komuniti perniagaan di Malaysia.

DIKELUARKAN OLEH: SURUHANJAYA SYARIKAT MALAYSIA
TARIKH: 16 MAC 2023

Source: SSM Website www.ssm.com.my

TECHNICAL ENQUIRY

Question:-

Scenario:
a) Company incorporated under Companies Act 1965
b) Company is running a Medical Center
c) There are 2 directors:-
- A with medical practicing
- B is not a doctor

A wants to resign, B is taking a long time to find a replacement who must be a practicing doctor.

Section 122(6) of the Companies Act 1965 states:-

Section 122(6) of the CA 1965 essentially says that "… a director of a company shall not resign or vacate his office if, by his resignation or vacation from office, the number of the directors of the company is reduced below the minimum number required ……"

I have forwarded the above Section to A and explained to him but he is not happy that his resignation is not being effected and is threatening to send a legal letter to the Company Secretary for not lodging his resignation with SSM

Answer:-

The Technical Advisory Board advises the following:-

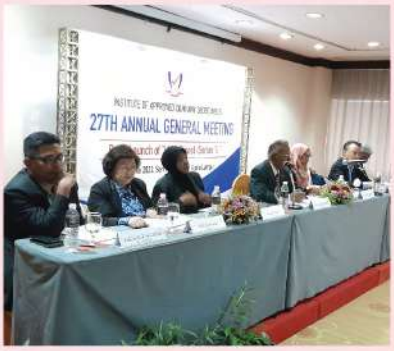
(i) Check for any requirements for licensing
(ii) Constitutional requirement for minimum 2 persons as Director
(iii) Make known to them under CA 2016, SSM will not accept notification if company cannot comply with the minimum number of directors, as per Constitution. Company Secretary is not responsible for company internal structuring, but can only advise. In addition, Company Secretary takes direction from Board of Directors and can only act accordingly. The resigning director should know the requirements of CA 1965/2016.

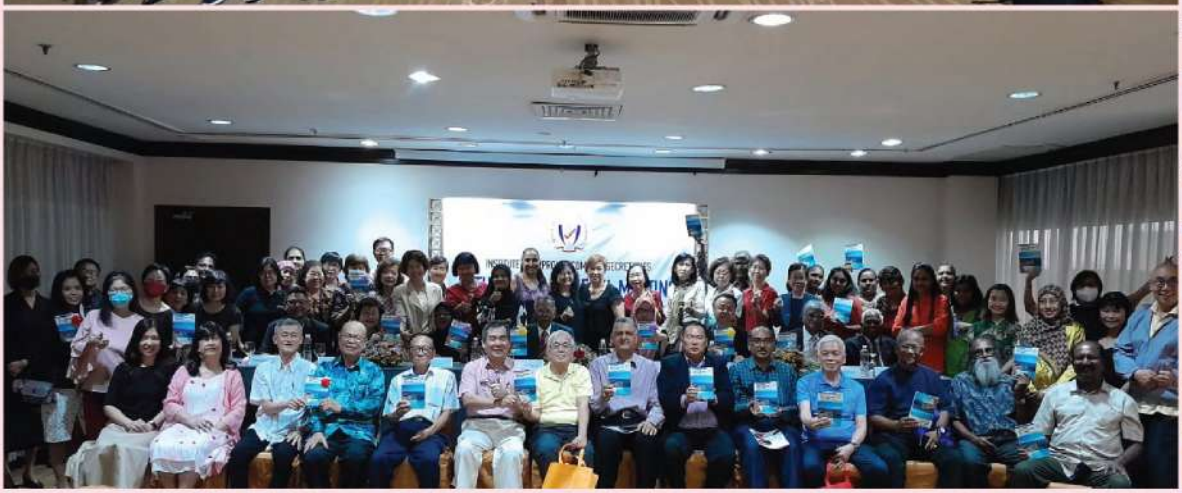
Disclaimer

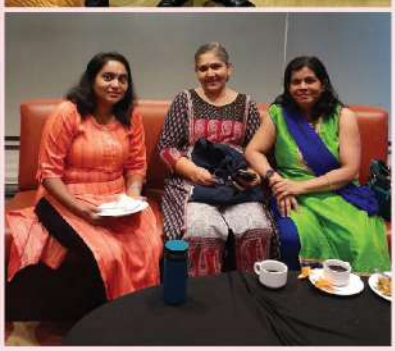
Please be informed that any advices and answers given are without any legal obligations and liabilities on the part of IACS. The advices and answers are given as a general guide only and not be treated or acted upon as a legal opinion or advice by any individual or corporations. For further enquiries, members should contact or liaise directly with an advocates and solicitors who is practicing on the said field.

EVENT HIGHLIGHTS

IACS 27th Annual General Meeting and book launch of IACS Digest (Series 1) held on 17th June 2023 at Seri Pacific Hotel Kuala Lumpur







How to become a member of Institute of Approved Company Secretaries?

1) IACS

INSTITUTE OF APPROVED COMPANY SECRETARIES (IACS) was incorporated in Malaysia on 16 May, 1996 as a company limited by guarantee and not having a share capital under the Companies Act.

2) OBJECTIVES OF IACS

The objects for which IACS is established are:-

a) To co-ordinate and co-operate with all the regulating authorities in enhancing the professionalism of company secretaries.

b) To provide an avenue for company secretaries to get together to improve and advance their interest and professional status and to provide a vehicle for regulating the conduct and professional ethics of company secretaries.

c) To conduct seminars, conferences and meetings for the presentation of papers and delivery of lectures, and for the acquisition and dissemination by other means of information connected with the profession of company secretaryship and other related corporate practice.

d) To form a library for the use of members and to collect, collate and publish information of service and/or interest to members of the profession and to establish and maintain libraries and collection of documents, papers, research materials and other effects.

e) To submit either independently or jointly with other representations, etc; to the relevant authorities pertaining to any legislation either enacted or otherwise for the purpose of promoting the position of members or the professional conduct of company secretaries.

f) To afford opportunities for social contact amongst members.

g) To print and publish newsletters, periodicals, books or otherwise that are desirable for the benefits of members and the public with the approval of the authority concerned.

3) MANAGEMENT OF IACS

The Management of IACS is vested in the Council (the Board of Directors). The powers of the Council are governed by the provisions of the Constitution of IACS and the Companies Act 2016.

4) CATEGORIES OF MEMBERSHIP AND THEIR DISTINGUISHING LETTERS

The composition of membership of the Institute shall be classified as follows:-

(a) Fellow Member – FIACS
(b) Ordinary Member – MIACS
(c) Honorary Member – HIACS
(d) Associate Member – AIACS
(e) Graduate Member – GIACS
(f) Student Member

5) GUIDELINES FOR MEMBERSHIP APPLICATION

(a) Membership of IACS is by application on the prescribed form.

(b) The subscribers to the Constitution and such other persons as shall be admitted to membership in accordance with the provisions hereinafter contained shall, subject as provided by these present, be Members of the Institute.

(c) All applications shall be accompanied by the following:-

- Certified copy of valid Company Secretary Licence issued by CCM under Section 20G of the Companies Commission of Malaysia Act 2001 or Practising Certificate issued by the Registrar under Section 241 of the Companies Act 2016 by any other Company Secretary or Auditors or Commissioner for Oaths (applicable to Ordinary members only)
- Copies of other certificates of qualifications or membership in relevant associations/ bodies (if available). For Associate, Graduate and Student members, the copies of certificates must be certified by any other Company Secretary or Auditors or Commissioner for Oaths
- Two driving licence-size photographs.
- Photocopy of National Registration Identity Card.
- The registration fee and annual subscription shall be such sums as the Council may from time to time prescribe.

(d) The respective registration fee and annual subscription for the time being are as follows:

CATEGORY OF MEMBERSHIP	REGISTRATION FEE	ANNUAL SUBSCRIPTION
FELLOW	RM 150.00	RM 250.00
ORDINARY	RM 150.00	RM 200.00
ASSOCIATE	RM 100.00	RM 150.00
GRADUATE	RM 100.00	RM 150.00
STUDENT	RM 50.00	RM 50.00

**** Members applying for upgrading to Fellow/Ordinary Members are required to pay a sum of RM170.00 being registration fee (RM150.00) and nominal upgrading fee (RM20.00).***

6) PRIVILEGES AND RULES OF MEMBERSHIP

(a) A Member is entitled to use the distinguishing letters as indicated in para 4 after his/her name.

(b) Members shall be entitled to:-

- Receive notices and circulars of IACS pertaining to latest news relating to Secretarial Practices from CCM and other regulatory bodies.
- Attend IACS' general meetings.
- Vote at IACS' general meetings (applicable to Ordinary & Fellow Members)
- Receive a Certificate and I.D. of Membership.
- Participate in seminars, schemes and privileged to enjoy reduced fee and other benefits.

(c) All Members shall adhere to the provisions of the Constitution, the Code of Ethics and regulations in force and any amendments or changes thereof by the Institute.