

THE APPROVED COMPANY SECRETARIES



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**A COMMENTARY ON E-SIGNATURES:
AN ELECTRONIC FORMAT FOR SIGNING DOCUMENTS**

DISSOLVING COMPANIES NEED TAX CLEARANCE

WHEN DO YOU NEED SHAREHOLDERS' APPROVAL?



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FROM THE EDITOR'S DESK

Dr. Adissayam Xavier Suseimanikam, FIACS



Warmest greetings to all and welcome to the 3rd issue of IACS newsletter for 2022. I hope all our members are staying healthy and doing well.

I am delighted to inform that IACS successfully held its 26th Annual General Meeting (AGM) on 18th June 2022 at Seri Pacific Hotel, Kuala Lumpur. Taking this opportunity, I wish to express my sincerest thanks to all members who attended and supported the AGM despite the Covid-19 pandemic. We had a fruitful time discussing on the ways to increase the membership of IACS, sharing on the latest development in the company secretarial practices as well as networking with each other.

At the AGM, members unanimously approved the amendments to the Constitution of IACS, which if approved by the Minister will allow IACS to accept all Practising Certificate (PC) holders as Ordinary members. We are pleased to inform that the Minister had approved the amendments with effect from 29th July 2022. In due course, we will contact all the Associate members who are also PC holders to upgrade as Ordinary members.

After the conclusion of the AGM, the office bearers together with the council members for the term 2022-2023 are as follows:-

President : Dr. Adissayam Xavier Suseimanikam
Vice-President : Puan Aminah Binti Hussin
Secretary : Puan. Hajjah Nolida Binti Md Hashim
Treasurer : Ms. Chin Tet Fung
Assistant Secretary : Mr. See Poh Lam
Assistant Treasurer : Ms. Ng Seok Kim
Council Members : Mr. Santiran s/o Sankaran
: Mr. V. M. Thiagarajan
: Mr. Jaleeludeen Bin Abu Baker
(co-opted on 18th June 2022)

I am most humbled and honoured to be re-elected as President for the term 2022-2023 and wish to thank all my fellow Council Members for their trust and confidence placed in me. I welcome and congratulate all the new 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 pledge to do my utmost best to serve the members, improve the membership admission and uplift the status and image of IACS.

SSM invited IACS to provide comments in relation to the proposed conditions to be imposed on Companies Limited by Guarantees (CLBGs) under Subsection 45(5) of the Companies Act 2016. This Consultative Document sets out the policies and recommendations in relation to the conditions to be complied with by all CLBGs when granted with licences under subsections 45(3) or (4) of the Companies Act 2016 ("the Act"). IACS had submitted its comments accordingly.

Apart from the above, we wish to inform our members that SSM has extended the compound reduction incentive under the Companies Act 1965 from 1st July 2022 to 31st October 2022. This initiative is one of SSM's six initiatives in helping towards the National Economic Recovery in 2022 which has been introduced since the beginning of 2022. We urge all members to make use of this opportunity to update the statutory records of your clients.

To date, IACS had successfully conducted three (3) physical seminars (in Penang, Johor and Kuantan) despite the challenges faced arising from the pandemic. Although the attendances were not satisfactory as compared to pre-pandemic times, we believe it was a good start and the numbers will slowly but surely increase. A huge thanks to all members who attended and supported the seminars.

Lastly, members are invited to write to us on any technical or operational issues and enquiries with SSM or other agencies in relation to the company law and corporate secretarial matters so that we can provide a reply or address them at the appropriate forums/meetings. In addition, members are welcome to share with IACS any ideas or strategies to increase the membership of IACS. Kindly email your issues, enquiries and ideas to us at iacsc19@yahoo.com.

Before I sign off, I wish to take this opportunity to wish all members a happy and safe Merdeka and Malaysia Day celebrations with friends and families. Continue to follow SOP and stay safe.

Thank you.



INSTITUTE OF APPROVED COMPANY SECRETARIES (387525-X)

Institute of Approved Company Secretaries (IACS) is a company limited by guarantee and not having a share capital. IACS was incorporated on 16 May 1996 with the Registrar of Companies (ROC).

IACS Council for 2022/2023:-

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Secretary : Pn. Hajjah Nolida Binti Md Hashim
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Contributions of Article

The Council would like to invite members to contribute articles and news, which may be of interest to company secretaries for publication. However, the Council reserves the right to edit articles for clarity purposes or it shall at its absolute discretion not publish any or all articles or news received from contributors. A fee will be paid for contributions approved by the Board.

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A COMMENTARY ON E-SIGNATURES: AN ELECTRONIC FORMAT FOR SIGNING DOCUMENTS

By
Dr. Cheah Foo Seong FCIS, FIPA, MBA, LL.M, LL.D

Introduction

Electronic signature laws were established in Australia in 1999 by Electronic Transactions Act 1999. According to the law, almost all documents can be signed using eSignatures. There is a minimum set of requirements and very clear enforceability for eSignature in Australia. “*Transaction*” includes:

- (a) any transaction in the nature of a contract, agreement or other arrangement; and
- (b) any statement, declaration, demand, notice or request, including an offer and the acceptance of an offer, that the parties are required to make or choose to make in connection with the formation or performance of a contract, agreement or other arrangement; and
- (c) any transaction of a non-commercial nature.

An electronic signature can be defined as a signature used on an electronic document, that is intended to be a signature. An electronic signature may simply be a text on an email.

A digital signature, by comparison, is a type of electronic signature, and uses technology that sits underneath the signature containing hidden data. This hidden data is a more trusted and secure way to verify a signature, which is important given that electronic contracts can be challenged on validity of a signature.

The use of electronic signatures is nowadays a viable form of signature to the traditional wet-ink signature that has long been used for signifying documents in all sorts of commercial transactions. In a digital age where the use of technology and electronic devices is ever increasing, many businesses have adopted or are considering adopting electronic signature and digital signature for signing off documents. In Malaysia, there are two statutes governing and regulating e-signature in Malaysia, namely Digital Signature Act 1997 (“DSA 1997”) and the Electronic Commerce Act 2006 (“ECA 2006”).

Digital Signature Act 1997 (“DSA 1997”)

Under Digital Signature Act, section 2 defines “digital signature “ as a transformation of a message using an asymmetric cryptosystem (which provide a secured key pair) such that a person having the initial message and the signer’s public key can accurately determine:

- (a) whether the transformation was created using the private key that corresponds to the signer’s public key; and
- (b) whether the message has been altered since the transformation was made.

Digital signature involves verification vide a digital certificate issued by the licensed Certification Authority (“CA”). Presently, there are four recognised licensed Certification Authorities in Malaysia, namely Pos Digicert Sdn Bhd, MSC Trustgate.Com Sdn Bhd, Telekom Applied Business Sdn Bhd and Raffcomm Technologies Sdn Bhd.

A digital signature is an electronic signature used to verify the identity of the sender/signer of a message and also to ensure the correctness and validity of information in electronic transactions. The use of recognised digital signature can fulfil the requirements of confidentiality, identity authentication and integrity of an information.

Section 62(1) of the DSA 1997 provides that where a rule of law requires a signature or provides for certain consequences in the absence of a signature, that rule shall be satisfied where:-

- (a) that digital signature is verified by reference to the public key listed in a valid certificate issued by a licensed Certification Authority;
- (b) that digital signature was affixed by the signer with the intention of signing the message; and
- (c) the recipient has no knowledge or notice that the signer :-
 - (i) has breached a duty as a subscriber; or
 - (ii) does not rightfully hold the private key used to affix the digital signature.

Section 62(2) further states that notwithstanding any written law to the contrary:-

- (a) a document signed with a digital signature in accordance with DSA 1997 shall be as legally binding as a document signed with a handwritten signature, an affixed thumb-print or any other mark; and
- (b) a digital signature created in accordance with the DSA 1997 shall be deemed to be a legally binding signature.

Section 64(1) emphasised that a message shall be as valid, enforceable and effective as if had been written on paper if (i.e. digitally signed document deemed to be written document) if:-

- (a) it bears in its entirety a digital signature; and
- (b) that digital signature is verified by the public key listed in a certificate which:
 - (i) was issued by a CA and
 - (ii) was valid at the time the digital signature was created.

Section 65(1) provides that a copy of a digital signed message shall be as valid, enforceable and effective as the original of the message unless it is evident that the signer designated an instance of the digitally signed message to be a unique original, in which case only that instance constitutes the valid, enforceable and effective message.

Electronic Commerce Act 2006 (“ECA 2006”)

Electronic signature (“E-Signature”) is defined in section 5 of the ECA 2006 as “any letter, character, number, sound or any other symbol or any combination thereof created in an electronic form adopted by a person as a signature”. Section 9 provides that where any law requires a signature of a person on a document, the requirement of the law is fulfilled if the document is in the form of an electronic message (i.e. short messaging service (“SMS”), email, instant messages) by an electronic signature which:-

- (a) is attached to or is logically associated with the electronic message;
- (b) adequately identifies the person and adequately indicates the person’s approval of the information to which the signature relates; and
- (c) is as reliable as is appropriate given the purpose for which, and the circumstances in which, the signature is required. An electronic signature is reliable if:-
 - (i) the means of creating the electronic signature is linked to and under the control of that person only;
 - (ii) any alteration made to the electronic signature after the time of signing is detectable; and
 - (iii) any alteration made to that document after the time of signing is detectable. Company secretaries should be mindful in the management of documents approved via email/WhatsApp and other mode of electronic approval instead of the traditional wet-ink signature.

In the Federal Court’s case of *Yam Kong Seng & Anor v Yee Weng Kai* [2014] 6 CLJ 285, it was held that the legal requirement for an electronic signature pursuant to section 9 of the ECA 2006 is fulfilled in the form of a SMS where the sender is adequately identified i.e. the registered owner of the telephone number from which the SMS was sent. The Court further held that signatures need not be written and would be sufficient if there is any mark which identifies the act of the party or some distinguishing features peculiar to the person.

This case had interpreted broadly section 5 of the ECA 2006. Unlike digital signatures, where the DSA 1997 is silent as to what specific types of transaction it is applicable to, electronic signatures on the other hand, are applicable to any commercial transactions so long as the requirements under the ECA 2006 are fulfilled.

It must be noted that the following are four types of transactions or documents which are explicitly excluded from the application of electronic signatures under section 2 of the ECA 2006:-

- (i) Powers of Attorney;
- (ii) The creation of Wills and Codicils;
- (iii) The creation of Trusts; and
- (iv) Negotiable Instruments (such as bills of exchange and cheques).

It must also be noted that under section 16 of the ECA 2006 service of documents such as notices of default, notices of demand, notices to show cause, notices of repossession, any notices required to be served prior to commencing a legal proceeding and any originating process, pleading, affidavit or other documents required to be served pursuant to a legal proceeding cannot be effected by service or delivery through electronic means.

Government's Initiative

In order to support the e-government initiatives, the Electronic Government Activities Act 2007 ("EGAA 2007") was also enacted. EGAA 2007 is an Act to provide for legal recognition of electronic messages in dealings between the Government and the public, the use of the electronic messages is to fulfil legal requirements and to enable and facilitate the dealings through the use of electronic means and other matters connected therewith. The EGAA 2007 states that it is not mandatory for a person to use, provide or accept any electronic message in dealings with the Government unless the person consents to the using, providing or accepting of the electronic message in dealings with the Government.

The Minister¹ may issue Information Technology Instructions which may include:

- (a) information technology standards;
- (b) the criteria for the electronic signature and appropriate seal for the purpose for which they are used;
- (c) the process of recording the time and acknowledgment of receipt of the electronic message;
- (d) security measures against any unauthorised access;
- (e) disaster recovery procedures;
- (f) accessibility rules for electronic government services and forms;
- (g) management and maintenance of the electronic message;
- (h) methods relating to data entry and verification of the electronic message;
- (i) guidelines for the payment and receipt of money; and
- (j) any other matters as may be required from time to time.

Electronic Government Activities Act 2007 (EGAA 2007)

The EGAA 2007 also provides that:-

- (a) non-compliance with any of the Information Technology Instructions shall not affect the validity or enforceability of the activities, which are undertaken electronically pursuant to the EGAA 2007; and
- (b) any information shall not be denied legal effect, validity or enforceability on the ground that it is wholly or partly in an electronic form.

¹ "Minister" means the Minister charged with the responsibility for leading the changes in modernizing the Malaysian public service administration;
"relevant Minister" means the Minister charged with the responsibility for the administration of the designated Act.

Limitations of Electronic Signature Under the Companies Act 2016

The word “signature” is not defined in the Companies Act 2016. Hence it is acceptable as customary practice that a “signature” can be in the form of an “electronic signature”. In the execution of documents, section 66(2) (a) of the Companies Act 2016 can be easily fulfilled by at least two authorised officers to sign on behalf of the company, if they affix their electronic signatures on a document. In the case of a sole director, the said director may affix his or her electronic signature in the presence of a witness who attests the signature. However, it is unclear whether the attestation via video conferencing is acceptable under that provision. The adoption of electronic signatures may be desirable to reduce turnaround time and ensure business efficacy. This will depend on the constitution of the company, and may be permitted for director or shareholder resolutions. Nonetheless, electronic signatures would not be acceptable for documents that are required to be submitted in hard copy to the authorities such as the Companies Commission of Malaysia and the Land Office.

Practical Considerations of E-Signature on Other Documents

The following points are worth considering where e-signature system is implemented to protect and safeguard the authenticity of e-documents:-

1. Authentication –

E-Signature is a symbol affixed onto an e-document and could only be identified by the owner of the E-signature or witnessing the execution of the documents via video and visual link (as defined by the Australian New South Wales Regulation). E-signature is defined as “technology that enables continuous and contemporaneous audio and visual communication between persons at different places, including video conferencing”.

E-documents can be witnessed via video conferencing technology such as Skype, WhatsApp, FaceTime and Zoom. The authenticity of the E-Signature may be questionable in court even though the documents had been signed electronically and admitted as evidence.

2. Standard Operating Procedure –

A company should have a standard operating procedure for E-Signature that prescribes the process flow of E-Signature; the authorised person who has the authority to affix the E-Signature; recording via Register of E-Signature; and the right of accessibility and storage of electronically signed documents. This would provide additional help to increase the enforceability of documents signed electronically. The process could reduce the potential risk of the execution of documents via E-Signature being disputed, risk of signatory fraud, unauthorised signature and non-compliance.

3. Real time audit trail –

The e-signature system should incorporate additional features that will enable a clear audit trail on recording and saving all data changes in order to manage the E-Signature in real time efficiently for future verification and investigation, if necessary.

Digital Signature Risks

There are certain risk of fraud and authenticity of an electronically signed document. In the cyber world there are criminals carrying out all sorts of activities to extract, copy or duplicate information for their personal gains, if the technology is compromised or hacked leading to potential high risks of the digital signature being stolen. It is therefore imperative to adopt additional processes to verify identity, such as passwords and verification codes to be used via mobile phone or text verification method.

Conclusion & Disclaimer

This article is not meant to be a legal advice, but to be read as a commentary on existing legislations relating to electronic signatures, digital certificates and provides information on how such electronic signatures and digital certificates can be used under the current existing laws, together with any risks involved. This article is a personal view of the writer and does not represent the views of the Institute of Approved Company Secretaries.

DISSOLVING COMPANIES NEED TAX CLEARANCE

By Choong Hui Yan

B.Acc(Hons)(Malaya), ACCA(UK), Licensed Secretary

The COVID-19 pandemic has changed the world, and some effects will be permanent. Old businesses change, new businesses emerge and many cease permanently. The cessation of business by a company usually requires dissolution. Either way to dissolve a company, striking-off or winding-up, tax clearance application is a must.

Tax Clearance

To clarify, the application to dissolve a company is to be made to Companies Commission of Malaysia (CCM), while tax clearance application is to be made to Inland Revenue Board of Malaysia (IRB). CCM will rely on the tax clearance letter issued by IRB to further process the application of dissolution.

The purpose of tax clearance is to ensure the company to be dissolved is with no outstanding tax owing to IRB. Meanwhile, it also served as a formal procedure to cancel the income tax identity (C number) and tax employment identity (E number).

Under normal circumstances, tax clearance letter will be issued by IRB within 14 days from tax clearance application date, showing no outstanding tax by the dissolving company. Such tax clearance letter issued does not officially cancel the C and E numbers of the dissolving company. It only explains that at the point of application, the company does not have outstanding tax owing to IRB.

After the company dissolved, proof of dissolution from CCM needs to be served to IRB to further process for C and E number cancellation. Details will be discussed in later section. The dissolved company then does not need to make annual tax filings, i.e. tax instalment notices (CP204), tax return (C form) and return form of employer (E form).

Application Procedures

Tax clearance application has to submit to the designated tax branch of the dissolving company. The application must be composed of the following:-

- i. CP7(C)[2021] form for winding-up company; or
- ii. CP7[2020] form for company to be struck-off,

supported by

- a. C form of latest year of assessment;
- b. Tax computation for latest year of assessment; and
- c. E form of latest year of remuneration

If the latest year of assessment is too close to application date, C form, tax computation and E form of immediate preceding year of assessment will need to be furnished. Other additional document may be requested by tax officer upon processing.

The application can be made by either company director, tax agent or liquidator. Due to the uncertainties of tax status of dissolving company, it is always advisable to submit tax clearance application as early as the company resolves for dissolution.

No Tax Clearance Letter

There may be circumstances where tax clearance letter is not issued within 14 days from application. They are usually caused by the following:-

- with outstanding tax unpaid, i.e. unsettled J or JA notices;
- with outstanding monthly tax deduction (PCB) unpaid;
- with outstanding tax compounds or penalties unpaid;
- unresolved tax civil and criminal proceedings;
- unsettled tax audit or investigation; or
- non-submission of tax returns, either C or E forms.

The dissolving company must resolve these issues in order to proceed for dissolution. Outstanding tax by the company can be held liable on the company directors in pursuant to section 75A of the Income Tax Act 1967.

Cancellation of Income Tax Identities – C and E numbers

After the tax clearance letter obtained, the dissolving company may proceed for dissolution procedures with CCM.

After that, to complete the cancellation of tax identities, there are further document to be furnished

to IRB. For example, companies dissolved by way of striking-off will need to furnish the form of *Section 550 Application to strike off company under the Companies Act 2016* to IRB and notify IRB upon struck-off where CCM publishes the names of the struck-off companies in the Federal Gazette.

As for companies dissolved by way of winding-up, the required forms by IRB would be *Section 439(2) (a) Notice of resolution, Section 443 Declaration of solvency, Section 513(1) Notice of appointment and address of liquidator, Section 514(1) Liquidator's account of receipts and payments and statements of the position in the winding up and Section 459(3),(4) Return by liquidator relating to final meeting and final accounts. Form of Section 440(1) Statutory declaration*

of inability of company to continue business, and that meetings of the company and its creditors have been summoned will be needed if the company is wound-up by creditors.

Upon receiving of these, IRB will then issue letter of cancellation of income tax identities.

Company with tax clearance letter but failed to dissolve the company is still liable to submit annual tax filings on time. Company secretaries who are involved in company dissolution must be well aware of the tax clearance and tax identities cancellation processes as these are value-added services to clients. Risks of tax penalties or compounds during the dissolution processes can be reduced.



COMPANIES ACT 2016 EDUCATIONAL SERIES

SERIES 8

The Companies Act 2016 (CA 2016) was enforced on 31 January 2017 with various policy improvements to repeal the Companies Act 1965. Do you know what are the improvements that have been implemented?

DO YOU KNOW?

DECOUPLING OF THE SUBMISSION OF ANNUAL RETURN AND FINANCIAL STATEMENTS

The requirement to submit the Annual Return is based on the anniversary date of a company's incorporation, while the submission date of the Financial Statements shall not be later than 7 months from the date of its financial year end.



WHEN DO YOU NEED SHAREHOLDERS' APPROVAL?

By Sean Tan Yang Wei (Senior Associate) &
Abigail Nimbalker (Associate)
Messrs. Thomas Philip

If you are a director of a company or a shareholder in one, you would have noticed that there are certain instances which require the approval of shareholders. Under the Companies Act 2016, the following actions taken by the company, or its directors require shareholder approval:

- a. Section 75: Allotment of shares in the company, granting of rights to subscribe for shares and converting any security into shares
- b. Section 223: Disposal by directors of company's undertaking or property
- c. Section 228: Transactions with directors, substantial shareholders or connected persons

In this article, we examine the scope of the required shareholders' approval as well as the recent Court of Appeal decision of *Concrete Parade Sdn Bhd v Apex Equity Holdings Bhd & Ors* [2021] MLJU 1540 which appears to have further strengthened the position of shareholders in such decisions.

Section 75: Allotment of shares in the Company, granting of rights to subscribe for shares and converting security of shares

"75. (1) Unless the prior approval by way of resolution by the company has been obtained, the directors of a company shall not exercise any power –

- a. To allot shares in the company;
- b. To grant rights to subscribe for shares in the company;
- c. To convert any security into shares in the company; or
- d. To allot shares under an agreement or option or offer."

From the reading of section 75, it is rather clear that the approval of shareholders is mandatory if a director seeks to allot shares, grant rights to subscribe for shares, and even to convert security of shares (*Rayston Resources Sdn Bhd v LGB Engineering Sdn Bhd & Ors* [2020] 7 MLJ 627).

Failure to obtain shareholders' approval may cause any issuance of shares made or about to be made void (*WTK Realty Sdn Bhd v The Personal Representative of the Estate of Wong Kie Nai (deceased) & Anor* [2015] MLJU 351).

Section 223: Disposal by directors of company's undertaking or property

Under section 223, a director requires the approval of shareholders when entering into an arrangement or transaction of a substantial asset or when such an arrangement or transaction is being carried into effect. In this regard, section 223(1) provides that:

"223. (1) Notwithstanding anything in the constitution, the directors shall not enter or carry into effect any arrangement or transaction for:

- a. The acquisition of an undertaking or property of a substantial value; or

b. The disposal of a substantial portion of the company's undertaking or property unless:

i. The entering into the arrangement or transaction is made subject to the approval of the company by way of a resolution; or

ii. The carrying into effect of the arrangement or transaction has been approved by the company by way of a resolution."

From the reading of section 223(1)(b), the word 'or' seems to connote that as long either limb (i) or (ii) is satisfied, section 223(1)(b) is deemed to be complied with. In other words, the substantial transaction would be valid if shareholders approval is obtained either:

a. Before the entering into an arrangement/transaction; or

b. Before the execution of an arrangement/transaction.

However, the recent Court of Appeal case of *Concrete Parade Sdn Bhd v Apex Equity Holdings Bhd & Ors* [2021] MLJU 1540 has now construed section 223 in a manner which the word 'or' is read as 'and'. This means that in order to comply with section 223, a company entering into an arrangement/transaction will have to ensure that:

a. the entry into arrangement/transaction is made subject to shareholders' approval; and

b. the implementation/carrying into effect of the arrangement/transaction also receives the prior approval of shareholders.

The Court of Appeal in *Concrete Parade* therefore concluded that following another Court of Appeal decision of *Pioneer Haven Sdn Bhd v Ho Hup Construction Co Bhd & Anor and Other Appeals* [2012] 3 MLJ 616, directors have an incumbent duty to inform and obtain approval from shareholders of any intention to both "enter into" and "carry into effect" an acquisition or disposal of substantial assets. This is to ensure that companies are prohibited from parting with any of its substantial assets without approval of the shareholders.

As for the interpretation of 'substantial' under section 223, section 223(3) essentially provides that a substantial transaction includes transactions where:

a. The value of the transaction exceeds 25% of the total assets of the company;

b. The net profits of the transaction, after deducting all charges except taxation and excluding extraordinary items, attributed to it amounts to more than 25% of the total net profit of this company; or

c. The value of the transaction exceeds 25% of the issued share capital of the company.

The Federal Court decision of *Tan Chee Hoe & Sdn Bhd v Code Focus Sdn Bhd* [2014] 3 MLJ 301, also affirms the position that the approval of shareholders is a mandatory statutory requirement which must be complied with. If directors fail to obtain shareholders' approval for transactions which are governed by this section, they could be made liable in criminal proceedings. This is set out in section 223(7) which provides:

"Any 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 not exceeding three million ringgit or to both."

Section 228: Transactions with directors, shareholders or connected persons

Section 228 imposes a requirement for shareholders' approval to be obtained for certain transactions involving directors of substantial shareholders. If approval is not obtained by way of a special resolution, the transaction would be deemed void (see *Bellini Resources (M) Sdn Bhd v Mohamad Zaini Md Taha* [2020] 1 LNS).

“228. (1) Subject to subsection (2) and section 229, a company shall not enter or carry into effect any arrangement or transaction where a director or a substantial shareholder of the company or its holding company, or its subsidiary, or a person connected with a director or substantial shareholder-

a. Acquires or is to acquire shares or non-cash assets of the requisite value, from the company; or

b. Disposes of or is to dispose of shares or non-cash assets of the requisite value, to the company,

Unless –

a. The entering into the arrangement or transaction is made subject to the approval of shareholders at a general meeting; or

b. The carrying into effect of the arrangement or transaction had been approved by shareholders at a general meeting.”

However, unlike in stringent position in *Concrete Parade*, the High Court in *Kam Thai Eng Linda & Anor v Kam Woon Wah & Ors* [2020] 1 LNS 2124, held that section 228 only requires shareholders' approval before an agreement or transaction is carried out/executed and not before the arrangement or transaction is entered into.

Analysis: Does the balance tip in favour of shareholders or directors?

It is clear that the above sections were drafted to keep companies or directors accountable to their shareholders. This is to ensure that major decisions made by the directors involving substantial assets and shares are made in the best interest of the company's shareholders. There have been multiple instances in which directors have abused their powers in a rather cunning manner, such as in the case of *Howard Smith v Ampol Petroleum Ltd and others* [1974] AC 821 where the directors sought to allot shares in a manner which altered the majority shareholding in favour of the directors themselves.

It is therefore of no surprise that the balance is tipped in favour of shareholders as it is the shareholders who stand to suffer greatly if the powers of directors in such major transactions are unchecked.

On the other hand, do these stringent rules stifle the day-to-day business administrations or suffocate directors by forcing them to obtain shareholders approval for every single transaction? Not likely.

The provisions under the Companies Act 2016 clearly regulate substantial transactions and issues of shareholding – issues which would directly impact the interests of shareholders. No such restrictions are placed when it comes to everyday decisions of a company.

All this means is that directors must be more cautious and aware of the legal position pertaining to shareholders' approval in such transactions. The legal positions of sections 75, 223 and 228 are all intended to act as a safeguard against the generally wide powers of directors.

This article was originally published on Thomas Philip website www.thomasphilip.com.my on 3rd October 2021 and reproduced with permission of the writers.

FAQS ON COMPANIES ACT 2016 AND TRANSITIONAL ISSUES

PART C

INCORPORATION

1. Can a single member/single director company be incorporated as a public company?

Answer:

No, a single member/single director company can only be incorporated as a private company. Although a public company can be incorporated with only a single member, the minimum requirement for directors of a public company is two.

2. Can a single member/director can also be the secretary of the company?

Answer:

Yes, a person who is a single director (who is also the single member) can act as the secretary of the company. However, the Companies Act 2016 prohibits acts in dual capacity i.e. where the act is required to be done by both a director and a secretary, that act must be executed by two different persons.

3. Under the new Act can a foreigner in Malaysia i.e non-citizens /non- residents be allowed to form a company as sole shareholder/director?

Answer:

A foreigner can form a company as the sole shareholder. However, if he also wants to be the sole director of the company, he has to fulfil the requirement under section 196(4) Companies Act 2016, in that he must ordinarily reside in Malaysia, by having a principal place of residence in Malaysia.

4. Can we incorporate a company by single corporate body since the new Companies Act 2016 allows for a single member and director?

Answer:

Yes.

5. For directorship under the new Companies Act, why does the residential status still being required?

Answer:

Under the Companies Act 2016, section 196(4) provides the requirement for a director that he must ordinarily reside in Malaysia by having a principal place of residence in Malaysia. This requirement is only applicable to the minimum number of directors (in the case of a private company, at least one. In the case of a public company, at least two).

6. Can companies switch between having a single director to multiple directors and back again anytime they like?

Answer:

Yes, provided there are no restrictions as contained in the constitution of the company and to follow the requirements as stipulated in the Companies Act 2016.

7. What will happened to a company if a single director who is also the single shareholder passed away?

Answer:

In the event a single director who is also the single shareholder passed away, the company secretary has the duty under section 209(3) to call a meeting of next of kin for the purposes of appointing a new director. If the next of kin failed to appoint a director within 6 months of the death of the director, the Registrar may direct the company to be struck off the register.

8. What is the definition of “next of kin” referred to under section 209(3)?**Answer:**

The “next of kin” referred to under section 209(3) is not defined in the Companies Act 2016. However, for the purposes of the section, a Practice Note will be issued to address the definition.

9. What are the differences between a private limited company, sole proprietor and limited liabilities to run a business?**Answer:**

Besides limited liability status, a company is required to fully comply with the provisions of the Companies Act 2016. The Companies Act provides a more structured approach which codifying the requirements of establishing, managing and dissolving a company. Such requirements include the keeping, preparing and auditing of its financial statements and other corporate governance provisions (disclosures, rules of conflict, reporting, etc.) contained in the Companies Act 2016.

Therefore, running a business as a company can be said to be more credible because of such assurance which is required under the law.

10. The Companies Act 2016 introduces a super form for incorporation. What is actually the super form?**Answer:**

The super form is an electronic template which will replace the various form currently required for incorporation process (i.e. Form 6, Form 48A and M&A under the previous Companies Act 1965). The form is accessible through the MyCoID 2016 Portal.

Section 14 of the Companies Act 2016 provides for the incorporation process. Amongst others, a person is required to provide a set of information as follows:

- Name of proposed company;
- Status of private or public company;
- Nature of business;
- Proposed registered address; and
- Details of the proposed directors, members & company secretary.

11. Can a company submit the Memorandum & Articles of Association (M&A) at the point of incorporation?**Answer:**

In general, a company is only allowed to submit its Constitution after incorporation. The company may adopt a Constitution by way of a special resolution and lodge the Constitution with SSM within 30 days after it is adopted by the company.

Under section 38 of the Companies Act 2016, a company limited by guarantee (‘CLBG’) must submit its Constitution at the point of incorporation.

12. Can a company secretary be appointed at the point of incorporation?**Answer:**

The appointment of a company secretary at the point of incorporation is optional. Under section 236 of the Companies Act 2016, the Board must appoint a company secretary within 30 days from the date of incorporation of a company.

PRESS RELEASES FROM COMPANIES COMMISSION OF MALAYSIA (SSM)

Joint Issuance Of Reference Note To Provide Guidance On Beneficial Ownership Reporting Requirements Of Companies Commission Of Malaysia And Bank Negara Malaysia

Kuala Lumpur, 31 March 2022 - Companies Commission of Malaysia (SSM) and Bank Negara Malaysia (BNM) today issued a joint reference note entitled 'Requirements of BNM and SSM on Beneficial Ownership of Legal Persons' (Joint Reference Note) as part of its initiatives to assist the stakeholders by providing clarity on the 'Guideline for the Reporting Framework for Beneficial Ownership of Legal Persons' (SSM's Guideline) issued by SSM on 1 March 2020 and the revised 'Anti-Money Laundering, Countering Financing of Terrorism and Targeted Financial Sanctions for DNFBPs and Non-Bank Financial Institutions Policy Document issued by Bank Negara Malaysia' (BNM's Policy Document) issued by BNM on 31 December 2019.

The main objective of the issuance of the Joint Reference Note is to provide clarity and guidance on the similarities and differences between the obligations on beneficial ownership reporting of company secretaries under the SSM's Guideline and the obligations of company secretaries as reporting institutions under the BNM's Policy Document.

The Joint Reference Note is divided into three parts. Part A is on the introduction and objective of the Joint Reference Note (Overview), Part B is an overview of the beneficial ownership requirements in illustration format (Joint Illustrative Reference Note) and Part C (Appendices) is on the requirements of the SSM's Guideline in comparison to the BNM's Policy Document such as the applicability, definition of beneficial owner, reporting requirements, record keeping and exemptions from the reporting requirements which are in table format for ease of reference.

The two documents issued by SSM and BNM have strengthened the reporting transparency of beneficial ownership in Malaysia and with the issuance of this Joint Reference Note, the stakeholders will have a better understanding in compliance with the beneficial ownership reporting framework.

The Joint Reference Note could be accessed at SSM's official website www.ssm.com.my

SURUHANJAYA SYARIKAT MALAYSIA
31 MARCH 2022

Syarikat Didakwa Atas Kegagalan Menyerah Simpan Penyata Tahunan Di Bawah Akta Syarikat 2016

Kuala Lumpur, 7 Jun 2022 – Sebuah syarikat berhad menurut saham telah dituduh di Mahkamah Sesyen Jenayah (12) Kuala Lumpur pada 27 Mei 2022 di bawah Seksyen 68(9) Akta Syarikat 2016 kerana gagal menyerahsimpan Penyata Tahunan bagi tahun takwim 2019 sebagaimana yang dikehendaki di bawah Seksyen 68(1) akta yang sama.

Berdasarkan kepada kertas pertuduhan, Syarikat Eyeball Technology Sdn. Bhd. yang diwakili oleh salah seorang pengarah, Masjumaayah Md Masudur Rahman mengaku tidak bersalah sebaik pertuduhan dibacakan.

Hakim Emelia Kaswati Mohamad Khalid telah menetapkan tarikh sebutan semula kes bagi serahan dokumen oleh pihak pendakwaan pada 17 Jun 2022.

Sekiranya disabitkan kesalahan, syarikat berkenaan boleh didenda tidak melebihi RM50,000 dan dalam hal suatu kesalahan yang berterusan, didenda selanjutnya tidak melebihi RM1,000 bagi setiap hari kesalahan itu berterusan selepas sabitan.

Pendakwaan dikendalikan oleh Pegawai Pendakwa SSM, Muhammad Akmal Azmi manakala tertuduh tidak diwakili peguam.

Tindakan pendakwaan yang diambil terhadap syarikat di atas kegagalan mematuhi kehendak asas Akta Syarikat 2016 merupakan satu peringatan kepada orang awam bahawa kesalahan seperti ini dipandang serius oleh SSM. SSM tidak akan teragak-agak untuk mengambil sebarang tindakan penguatkuasaan sekiranya berlaku pelanggaran bawah peruntukan undang-undang yang dikawalselia oleh SSM demi menjaga kepentingan awam, serta memastikan maklumat yang disimpan dalam daftar SSM adalah maklumat terkini yang bukan sahaja diperlukan oleh komuniti korporat tetapi juga bagi sektor awam.

Seksyen 68 (1) Akta Syarikat 2016 memperuntukkan sesebuah syarikat untuk menyerahsimpan penyata tahunan bagi setiap tahun takwim tidak lewat daripada tiga puluh hari dari tarikh ulang tahun pemerbadannya dan kegagalan sesebuah syarikat mematuhi peruntukan tersebut akan menyebabkan syarikat tersebut didakwa di bawah Seksyen 68(9) akta yang sama.

DIKELUARKAN OLEH: SURUHANJAYA SYARIKAT MALAYSIA
TARIKH: 7 JUN 2022

SSM Lanjut Insentif Pengurangan Kompaun Di Bawah Akta Syarikat 1965

Kuala Lumpur, 30 Jun 2022 – Suruhanjaya Syarikat Malaysia (SSM) telah melanjutkan insentif pengurangan kompaun di bawah Akta Syarikat 1965 bermula 1 Julai 2022 hingga 31 Oktober 2022.

Di bawah insentif ini, syarikat dan pengarah syarikat layak mendapat pengurangan 90 peratus dari nilai asal kompaun bagi semua kompaun yang telah ditawarkan di bawah Akta Syarikat 1965.

Sebelum ini, insentif berkenaan telah dilaksanakan selama empat bulan bermula 1 Mac 2022 dan tamat pada 30 Jun 2022.

Semakan status kompaun boleh dilakukan melalui emel ke ar_compliance@ssm.com.my atau hadir di mana-mana pejabat SSM di seluruh Malaysia.

Semakan kompaun juga boleh dilakukan secara atas talian melalui pautan e-Kompaun atau di portal EzBiz Online di pautan.

Untuk maklumat lanjut, sila hubungi Pusat Panggilan SSM di talian 03-77214000 atau emel kepada enquiry@ssm.com.my.

DIKELUARKAN OLEH: SURUHANJAYA SYARIKAT MALAYSIA
TARIKH: 30 JUN 2022

Source: SSM website www.ssm.com.my

BOOKS FOR SALE

| Title of Book | List Price (RM) | IACS Members Price (RM) | | |
|--|-----------------|--------------------------|-------------------------------|-------------------------------|
| | | Self-collect (KL Office) | With Shipping (West Malaysia) | With Shipping (East Malaysia) |
| 1. Tax Appeals in Malaysia : Law and Procedure <i>(Delivered in DUO)</i> | 300.00 | 240.00 | 255.00 | 280.00 |
| 2. Essential Company Law in Malaysia: Navigating the Companies Act 2016 Second Edition <i>(Delivered in DUO)</i> | 220.00 | 175.00 | 190.00 | 195.00 |

If interested to purchase, kindly call IACS office at 03-40513787/40510033 or email to iacstraining@yahoo.com to get a copy of the order form.

IACS TRAINING CALENDAR 2022

| No | Date | Locations | Topic/s | Speaker | CPE Points |
|----|----------------------|---------------------------------------|--|----------------------------------|------------|
| 1 | 05/09/2022, Monday | Promenade Hotel, Kota Kinabalu, Sabah | Annual Compliance Matters, Accounts & Auditors Case Studies | Kenneth Foo | 8 |
| 2 | 13/09/2022, Tuesday | Zoom Webinar | Practice Of Company Meetings And Related Issues | Jessica Liew | 4 |
| 3 | 20/09/2022, Tuesday | AC Hotel by Marriot Kuala Lumpur | Case Studies on AML/CTF, Directors and Conflicts of Interest | Kenneth Foo | 8 |
| 4 | 26/09/2022, Monday | Palm Seremban Hotel, Negeri Sembilan | Case Studies on Shares | Kenneth Foo | 8 |
| 5 | 07/10/2022, Friday | Melaka | Analysis and Case Studies on Beneficial Ownership of Legal Persons | Kenneth Foo | 8 |
| 6 | 14/10/2022, Friday | Zoom Webinar | SSM's Guidelines, Practice Notes & Practice Directive | Kenneth Foo | 4 |
| 7 | 20/10/2022, Thursday | Sibu, Sarawak | In The Loop With The Practice And Impact Of The Companies Act 2016 | Jessica Liew | 8 |
| 8 | 17/11/2022, Thursday | Zoom Webinar | Company Secretary As Governance Professional | Prof. Dr. Zubaidah Zainal Abidin | 4 |

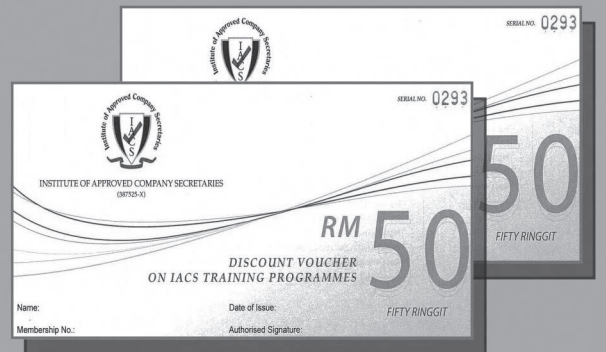
The organiser reserves the right to change the date, topic, venue or to cancel the programme.



MEMBER - GET - MEMBER PROGRAMME

1st March 2022 - 31st December 2022

| Category of membership | IACS Training Discount Voucher |
|------------------------|--------------------------------|
| Ordinary & Associate | RM 100.00 |
| Graduate & Student | RM 50.00 |



INTRODUCE PROSPECTIVE MEMBERS AND BE REWARDED WITH UP TO RM 100 DISCOUNT VOUCHER ON IACS TRAINING PROGRAMMES

TERMS & CONDITIONS

1. This Member - Get - Member Programme (MGM) is only open to IACS Members.
2. The programme period is from 1st March 2022 to 31st December 2022.
3. IACS training voucher of RM 50.00 is applicable to webinars only and RM 100.00 to physical seminars.
4. Being an IACS Member, you may introduce prospective members by filling up the MGM Referral Form stating your contact and membership details with all referred prospective members' details.
5. The participating member will be rewarded with the voucher once the prospective member's application is successful.
6. IACS reserves the right to change, amend and revise the MGM Programme from time to time without prior notice.

MGM REFERRAL FORM

INTRODUCER DETAILS:

Member's Name: _____

Membership No : _____

I/C No : _____

Contact No : _____

Email : _____

REFERRED PROSPECTIVE MEMBER'S DETAILS

| Name | Membership Category | Contact No | Email |
|------|---------------------|------------|-------|
| | | | |
| | | | |
| | | | |

You may call Ms. Rajeah to obtain a copy of the Membership Application Form or for any further enquiry.

Institute of Approved Company Secretaries

Suite C19, 1st Floor, Plaza Pekeliling, No. 2, Jalan Tun Razak, 50400 Kuala Lumpur

Tel: 03-40513787 / 03-40510033 Fax: 03-40511133 Website: www.iacs.org.my Email: iaccs19@yahoo.com

EVENT HIGHLIGHTS

IACS 26th Annual General Meeting in Seri Pacific Hotel Kuala Lumpur on 18th June 2022



IACS CPD Seminar in Johor Bahru on 10th June 2022

The seminar was held at Trove Johor Bahru. The speaker was Mr. Kenneth Foo and the topic of the seminar was *"Case Studies on Shares"*



IACS CPD Seminar in Penang on 19th May 2022

The seminar was held at Hotel JEN Penang Georgetown by Shangri-La. The speaker was Mr. Kenneth Foo and the topic of the seminar was *"Annual Compliance Matters, Accounts & Auditors Case Studies"*



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



1) IACS

INSTITUTE OF APPROVED COMPANY SECRETARIES (IACS) was incorporated on 16 May, 1996 with the Registry of Companies [now known as the Companies Commission of Malaysia] under the Companies Act, 1965. IACS is a company limited by guarantee and not having a share capital.

2) OBJECTIVES OF IACS

The objects for which IACS is established are:-

- To co-ordinate and co-operate with all the regulating authorities in enhancing the professionalism of company secretaries.
- 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.
- 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.
- 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.
- 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.
- To afford opportunities for social contact amongst members.
- 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:-

- Fellow Member – FIACS
- Ordinary Member – MIACS
- Honorary Member – HIACS
- Associate Member – AIACS
- Graduate Member – GIACS
- Student Member

5) GUIDELINES FOR MEMBERSHIP APPLICATION

- Membership of IACS is by application on the prescribed form.
- 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.
- 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 by any other Company Secretary (applicable to Ordinary & Fellow members).
 - Copies of other certificates of qualifications or membership in relevant associations / bodies (if available)
 - Two driving licence-size photographs.
 - The registration fee and annual subscription shall be such sums as the Council may from time to time prescribe.
- 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 Member is entitled to use the distinguishing letters as indicated in para 4 after his/her name.
- 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.
- 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.