

# THE APPROVED COMPANY SECRETARIES



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**A COMMENTARY ON WHETHER A MINOR HAS CAPACITY TO  
HOLD SHARE IN PRIVATE COMPANY**

**DIGITALIZED FOR COMPLIANCE  
– E-INVOICING IN MALAYSIA**

**RAISING FUNDS FROM THE PUBLIC AS A PRIVATE  
COMPANY IN MALAYSIA (PART 1)**



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# FROM THE EDITOR'S DESK

Dr. Adissayam Xavier Suseimanikam, FIACS



Warmest greetings to all and welcome to the 3<sup>rd</sup> issue of the IACS newsletter for 2023.

Firstly, we wish to inform our members that the Inland Revenue Board (LHDN) will discontinue the usage of adhesive stamps (Revenue Stamps) and postal franking machines as a method of stamping documents/agreements from 1st January 2024. Duty payers are allowed to use the Revenue Stamps for stamping of documents/agreement until 31<sup>st</sup> December 2023 and are advised to fully utilize the balance of the Revenue Stamps in their possession. Any unused Revenue Stamps are not allowed for refund or be exchanged for cash.

The application for stamping and payment of stamp duty can be performed online via Stamp Duty Assessment and Payment System (STAMPS) portal at <https://stamps.hasil.gov.my/stamps/> without being present at the stamp duty counter.

In addition to the above, kindly be advised that the electronic invoicing or e-invoicing system will be implemented in the first half of 2024. The key purpose is to facilitate tax collection and administrative management, eliminate shadow economy and encourage digitalization among businesses. We have featured an article entitled "*Digitalized for Compliance – E-invoicing in Malaysia*" in this newsletter to enhance member's awareness and knowledge. You may also refer to the LHDN website at <https://www.hasil.gov.my/en/legislation/guidelines/> for the guidelines on e-invoicing.

Last but not least, I wish to bring to your kind attention of the privileges and benefits which we are offering to our members. Among others:-

- (1) Member-Get-Member programme - members who introduce prospective members to IACS will be rewarded with up to RM100.00 IACS Training Discount Voucher;
- (2) MSIG Group Professional Indemnity Insurance coverage, which was specially designed to protect and safeguard your interest in your professional capacity as a company secretary;
- (3) Participate in IACS seminars/webinars at reduced fee. This will facilitate your CPE requirements for the renewal of your Company Secretary Licence/Practising Certificate;
- (4) Reply to technical enquiry - members are encouraged to write to us on 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.

Members are encouraged to take full advantage of the aforementioned benefits.

We thank you for your continuous support and participation in all the activities of IACS. Take care and stay safe.

Thank you.



**INSTITUTE OF APPROVED COMPANY SECRETARIES**  
[199601015175 (387525-X)]

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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 WHETHER A MINOR HAS CAPACITY TO HOLD SHARE IN PRIVATE COMPANY

By  
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## Introduction

A shareholder of a private company is normally a natural person or a corporate body, which is an artificial person. The Companies Act 2016 however, does not statutorily describe as to whether an infant or minor (age below 18 years) has the capacity to hold shares in a company. However, contract law nevertheless states that a minor has no capacity to enter into contract. For example, section 11 of Contract Act 1950 (Act 136) states that:

“Every person is competent to contract who is of the age of majority according to the law to which he is subject, and who is of sound mind, and is not disqualified from contracting by any law to which he is subject.”

## How a person can become a shareholder

A person can become a shareholder, normally in the following manner:-

- (a) By applying and subscribing or paying for the shares offered for acquisition in the market place, or privately;
- (b) By way of a transfer between a seller of the shares and the buyer or transferee who buys the shares;
- (c) By way of transmission of shares of a deceased shareholders under a Probate or Letter of Administration issued by the Court

## Can a Minor be a shareholder?

In a private company, a minor can hold shares, even though the age is below the age of majority. There are many reasons which supports the statement, amongst which are the following:

- (i) There is no expressed prohibition in any written law that a minor cannot hold shares, except that he has no capacity to enter into contract;
- (ii) Even if there is a contract, in particular for shares that are not fully paid up, the parent would pay for the balance in a private company, which would very likely to be owned by the parent;
- (iii) If there is a transmission to the Minor as a beneficiary, it is supported by the Probate or Letter of Administration which are court orders, and there is no payment to be made; and
- (iv) If one makes a search at the Companies Commission of Malaysia (SSM) on company's records on shareholdings of some private companies, you may find names of minors holding fully paid-up shares.

According to the **Indian Contract Act, 1872** a contractual capacity of minor was tested to check who are eligible to enter the contract. According to the rules of this act, a minor is not eligible to buy or hold any shares in a company. However, he can become a shareholder if he receives the share under his name as a gift or they are transferred to him. In both these cases, the minor can hold shares under the guidance of his guardian till he reaches the age of **18 years**.

In Australia, minors are not considered to have legal capacity. This is the primary reason why they are not able to enter into contracts (with some limited exceptions). This can create difficulties where minors are the registered owners of company shares (or units in a unit trust), including:

- The minor is not bound by the company's constitution, which is a form of contract;
- Minors are unlikely to be able to enter a binding contract to sell or transfer shares;
- Minors cannot vote at meetings of shareholders nor make a binding proxy to enable a vote at company meetings;
- The contract to acquire the shares may not be valid;
- Minors may not be able to open bank accounts, resulting in difficulties cashing a dividend payment;
- Minors may not be able to enforce the company constitution against other shareholders or directors;
- Minors cannot enter into legally binding shareholder agreements;
- The Corporations Act 2001 requires that shareholders provide their consent to becoming a shareholder, which minors are not legally able to do; and
- Minors can repudiate the allotment of shares at any time during their minority or before they ratify the allotment on turning 18 years old.

Also, for any contract involving a minor to be binding, it must be legally ratified or affirmed once they turn 18 years old. In the absence of ratification or affirmation, the contract remains unenforceable even after the minor acquires legal capacity.

## Conclusion

It is evident that for private companies, and for a limited exception, a minor can hold shares as long as the parent is behind supporting this if there is any unpaid balance towards the shares. However, in the case of listed public companies, the rules or constitution may expressly state that minors are prohibited because of their incapacity to enter into contracts. Thus, the question of whether a minor can hold shares can be rationalized with the following principles:-

- (a) Is there any expressed prohibition in any written laws?;
- (b) Does the constitution prohibits or restricts a minor holding shares?;
- (c) Very likely that a privately owned company permits a minor to hold shares, because the parent is supporting him.

However, this view is restricted on a case by case basis, specifically for a privately controlled company and should not be applied on a broad and general basis because a minor has no capacity to enter into contract.



# DIGITALIZED FOR COMPLIANCE – E-INVOICING IN MALAYSIA

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

The Inland Revenue Board of Malaysia (IRB) has on the 22 May 2023 first formally announced on their plans for the implementation of e-invoicing in Malaysia. The key purpose is to facilitate tax collection and administrative management, eliminate shadow economy and encourage digitalization among businesses.

## E-invoice

E-invoice does not refer to invoicing in portable document format (PDF), Excel or Word files, but it is a digital representation of a transaction between suppliers and customers in Extensible Markup Language (XML) or JavaScript Object Notation (JSON) formats that transmit through IRB platforms, MyInvois portal or Application Programming Interface (API).

Such e-invoice before validated, can be cancelled or rejected by either supplier or customer within 3 days (72 hours), but must with valid reasons. Yet, validated e-invoice can be amended through new e-invoice of debit note, credit note or even refund note.

Only accepted and validated e-invoice data will be finally kept at the database of IRB. Suppliers and customers, including IRB will be able to generate reports on e-invoicing listing to facilitate business financial reporting and also tax audit.

## The implementation of e-invoicing

E-invoicing is the process of transmission of e-invoices between suppliers and customers, with continuous monitoring and control by IRB. All sales and purchases of businesses can be retrieved by both businesses and IRB on timely basis.

It is the main proof of incomes earned and expenses spent for all businesses. Even purchases or subscription from overseas suppliers require input into the e-invoicing platforms, MyInvois or API through self-invoicing method.

The e-invoicing is made mandatory for all businesses, but implemented by phases. The timeline for each business depends on their annual turnover of year of assessment 2022, which are as follows:-

| Annual turnover                                     | Implementation date |
|---|---------------------|
| > RM100 million                                     | 1 June 2024         |
| > RM50 million, ≤ RM100 million                     | 1 January 2025      |
| > RM25 million, ≤ RM50 million                      | 1 January 2026      |
| ≤ RM25 million<br>(all businesses + non-businesses) | 1 January 2027      |

### **To be implemented across the country**

The e-invoicing is mandated for all businesses, regardless of business-to-business (B2B), business-to-consumer (B2C) and business-to-government (B2G). In addition, IRB does highlight that specific non-business transactions will be required to comply to e-invoicing requirements also.

The introduction of e-invoicing can effectively eliminate the problems of missing invoices or fraudulent invoices among B2B and B2G transactions, but it may have limitations on B2C transactions or shadow economy. The e-invoices are generally not needed by end consumers to support tax or claim purposes, and thus they have no interaction with customers in the IRB platforms, merely uploaded by the suppliers to prove on incomes. It is however, when Malaysia goes into cashless era, such limitations may be resolved.

### **Benefits of e-invoicing**

The e-invoicing operation is leak-proof for tax collections among B2B and B2G transactions. It also reduces the time and resources involved in tax audit, where IRB officers can access the incomes and expenses details tax audit targets (businesses), while businesses do not need to separately find and furnish the documentation of past records. Concurrently, the e-invoicing databases of IRB also share out the burden of businesses to retain transaction records for at least 7 years in pursuant to Paragraph 82(1)(a) of the Income Tax Act 1967.

For business perspective, it improves awareness of businesses on record keeping and tax compliance, especially for small enterprises. With better financial record keeping, the financial data can be utilized for managerial use, decision making and planning. Most businesses will have to go digitalized to comply with e-invoicing requirements and thus reducing human errors, printing or postage and improving efficiency. It is however, it may be cost burdening for some businesses to go digital.

The interaction between suppliers and customers at e-invoicing platforms can reduce billing and collection processing time as they are real time and with time limitation of 3 days (72 hours) before validation. It can also reduce errors of mismatched on outstanding balances which is now manual and only checked periodically by requesting statement of accounts.

All these also lead to higher accuracy on financial and tax reporting.

### **Be ready for e-invoicing**

E-invoicing is a real-time process for both suppliers and customers. Each business must have sufficient manpower to comply with the requirement and interact with suppliers or customers at e-invoicing platforms. In the meantime, investment on digitalized and information technology (IT) gadgets is a must.

All businesses are now urged to review their business processes and plan to fit in the e-invoicing practices to avoid last-minute preparation which might lead to unnecessary business disruption or non-compliance penalties.



# RAISING FUNDS FROM THE PUBLIC AS A PRIVATE COMPANY IN MALAYSIA (PART 1)

By

Shawn Ho (Partner) & Tan Wen Min (Associate)  
Messrs. Donovan & Ho

It is common for start-ups to incorporate a private company limited by shares and offering equity in its company in exchange for funding provided by investors, family and/or friends. The question that usually follows from this is whether can a private company limited by shares offer its shares to the public, which is the focus of this article.

## General prohibition against raising funds from the public

The general rule in Malaysia is that private companies cannot offer shares or debentures to the public, cannot allot such securities with the intent to offer them to the public, or invite the public to deposit money with the company. If an offer of shares is made to the public within six months after allotment or agreement to allot, it is assumed to be a violation of the general rule unless proven otherwise. The company and every officer who contravenes this rule is liable to imprisonment for a term not exceeding 5 years or to a fine not exceeding RM3,000,000 or to both.

Furthermore, section 596 of the Companies Act 2016 states that it is illegal for a person to go from place to place (which includes digital spaces!) either offering shares for subscription or purchase to the public or any member of the public, or seeking or receiving offers to subscribe for or to purchase shares from the public or any member of the public, unless the offer is for subscription or purchase or invitation to subscribe for or purchase or recommendation to which the Capital Markets and Services Act 2007 ("CMSA") applies. Anyone who violates this section or encourages or causes someone else to violate it, will be committing an offense and upon conviction, will be subject to a maximum prison term of 5 years or a fine of up to RM3,000,000 or both.

## Some non-exhaustive examples of shares being "offered to the public" include:

- Initial Public Offerings (IPOs): when a company first sells shares to the public to raise capital. In Malaysia, these include the Main Market, ACE Market, LEAP Market and MESDAQ.
- Follow-on Public Offerings (FPOs): when a company that is already publicly traded offers additional shares to the public.
- Licensed crowdfunding platforms: when shares of a company are offered to the public through online platforms that allow individuals to invest small amounts of money in exchange for shares of a company.

## What is NOT an offer to the public?

According to sections 43 and 44 of the Companies Act 2016, an offer of shares or debentures of a company is not considered an offer to the public if it meets one of the following criteria:

- The offer is not intended to result in the shares or debentures becoming available to persons other than those receiving the offer; or
- The offer is a private matter between the person making the offer and the person receiving the offer.

In other words, an offer of shares or debentures is not considered as an offer to the public if it is not targeted to the general public, but rather a private deal between the parties involved.

## So, what exactly is a private deal or a private concern?

Section 44(3) of the Companies Act 2016 further explains that an offer is considered a 'private concern'

between the person receiving the offer and the person making the offer if it is made to someone who is already connected with the company (ie, existing members, employee, debenture holder, trustee, family member), OR to subscribe for securities under an employees' share scheme and the rights can only be renounced to another person already connected with the company.

In other words, if the offer is made to a person who already has a connection with the company and the rights can only be transferred to another person who is already connected with the company. Alternatively, if the offer is for an employee share scheme and the rights can only be transferred to another person who is entitled to hold securities under the scheme or to a person already connected with the company, the offer is considered as private concern.

### How can a private company limited by shares make an offer to the public lawfully?

Section 43(3) of the Companies Act 2016 provides that a company would not violate the default rule that prohibits private companies from offering shares or debentures to the public if:

1. it acts in good faith in accordance with the arrangements under which it is to convert to a public company before the shares or debentures are allotted;
2. as part of the terms of the offer it undertakes to convert to a public company within a specified period, and that undertaking is complied with; or
3. the offer is made in accordance with the arrangements as prescribed by the Securities Commission ("SC") to any person on a stock market, derivatives market, exempt stock market or exempt derivatives market that is approved, registered or regulated under CMSA.

As such, aside from converting a private company (being a "**Sendirian Berhad**") into a public company (also known as a "**Berhad**"), a founder of a private company limited by shares that wishes to raise funds via offering its shares to the public can explore the 2 existing fundraising platforms which are prescribed and licensed by the SC pursuant to the CMSA. These

include both equity crowdfunding ("**ECF**") platforms and peer-to-peer ("**P2P**") financing platforms.

Also, since a private company is limited to a maximum of 50 members only, it is not uncommon for private companies wanting to raise funds from more than 50 investors, to explore the possibility of incorporating multiple private companies as special purpose investment vehicles. This endeavour may seem easy to set up, but can be quite tricky to manage thereafter. Hence, apart from being mindful of not contravening the prohibition of offering securities to public, the legal and constituent documents that govern the company, the special purpose companies, the investors and the founders need to be structured carefully.

### Key Takeaway Points

Hence, if you are a founder of a private company limited by shares looking to raise funds from the public OR from a sizeable number of investors, do be mindful of the restrictions of making "offers to the public" that apply under the Companies Act 2016 to avoid penalty, persecution and potentially breaching any securities laws in Malaysia.

To summarize, the 3 main ways to do so apart from through the IPO route are:

- Incorporating a Berhad company or converting a private company into a Berhad company. However, a Berhad company comes with more administrative and legal requirements and it would be prudent to understand such requirements upfront.
- The other option would be to consider the ECF and P2P platforms that are licensed by the SC.
- Using multiple private companies as special purpose investment vehicles which can admit a maximum of 50 members each.

It is also advisable to first understand or seek legal advice on what actions actually amounts to an "offer to the public" and understand the practical do's and don'ts when raising funds and how it should be done.

*This article was originally published on Donovan & Ho website [www.dnh.com.my](http://www.dnh.com.my) on 21<sup>st</sup> March 2023 and reproduced with permission of the writers.*

## CORPORATE RESCUE MECHANISMS IN MALAYSIA: PART 3 – THE EFFECT OF JUDICIAL MANAGEMENT ORDER (JMO)

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

In this article, we will explore the post-grant events following a Judicial Management Order (JMO) and delve into the roles and responsibilities of the Judicial Manager during the effective period of the JMO. Read Part 1 & Part 2 of our series for an Introduction to a JMO and How to Apply for a JMO.

### The Effect of a JMO

Sections 410 and 411 of the Companies Act 2016 (“CA 2016”) provides that once a Judicial Management Order (JMO) is allowed: (1) no winding-up resolutions or orders, dismissal of winding-up applications, (2) no proceedings or execution without court permission, and (3) no share transfers or member status changes without court approval etc. These provisions aim to provide a protective framework during the period of judicial management, preserving the company’s status quo and preventing legal actions that could further disrupt its affairs.

Apart from the above, a major effect of the JMO is the change of the company’s ‘shipmaster’ or ‘commander’. Prior to the JMO, the directors held full control over business operations and management. However, once the JMO is in force, the directors of the company become *functus officio*, and the control of the company’s affairs, business and properties will be vested in the Judicial Manager.<sup>[1]</sup> The Judicial Manager is responsible for exercising and performing all powers and duties imposed on the directors by the CA 2016 or by the company’s constitution, while the directors no longer hold such authority.<sup>[2]</sup>

As an example, in *Ganda Selat Sdn Bhd v MPDT Capital Bhd* [2022] 10 MLJ 776, the court deemed a Joint Venture Agreement entered into by the directors during the JMO period null and void as the directors lacked legal capacity to bind the company while under the administration of the Judicial Manager.

### The Role and Duties of a Judicial Manager Upon Obtaining the JMO

The duties of a Judicial Manager are well laid out in the Companies Act 2016 (“CA 2016”) and/or common law. Among others, some of the said duties are summarised as below:

#### Section 414:

The Judicial Manager shall take into his custody or under his control all the affairs, business and the property to which the company is or appears to be entitled.

#### Section 420:

Judicial Manager is obligated to formulate a restructuring proposal, within 60 days of the JMO or any longer period which the court deems fit and allowed. The said proposal shall be subsequently sent to the Registrar of the Companies, all creditors of the company and all members of the company and be published in one widely circulated newspaper in the national language and in the English Language.

#### Section 421:

Following from the submission of such a proposal, the Judicial Manager must convene creditors’ meeting to vote on the said proposal of the Judicial Manager. The proposal is deemed approved if the same receives support from 75% of the total value of creditors whose claims have been accepted by the judicial manager, present and voting at the meeting either in person or by proxy. From thereon, such proposal shall be binding on all creditors of the company regardless.<sup>[3]</sup>

However, the CA 2016 does not provide specific guidelines on how such meeting must be conducted and the number of such meetings can be called. In such cases, it may be advisable for the Judicial

Manager to seek for the court's direction and/or order by an application if necessary i.e. when the Judicial Manager decides to convene such meeting by virtual means or other technology.[4]

#### Section 423:

Upon the approval of the proposal and the sanction of the Court, all affairs, business and property of the company shall be managed by the Judicial Manager in accordance with the approved statement of proposal.

If any substantial revision of an approved proposal is to be made, such a revised proposal must be sent to the creditors, and members of the company and the approval of the same must be retaken.

#### **Duration & Extension of the JMO**

In cases where the Judicial Manager is unable to fulfil their duties within the stipulated 6-month period of the JMO[5], the Judicial Manager can apply to the court for an extension of up to 6 months. This application must be made 30 days prior to the expiry of the existing JMO[6] and is subject to the conditions outlined in Sections 404 and 405 (as discussed in Part 2).

Historically, extensions of the JMO have been granted when deemed necessary, especially if it is needed to provide the Judicial Manager with sufficient time to prepare the Statement of Proposal, allow creditors to submit their Proof of Debt, and afford creditors ample time to consider the proposal[7]. It serves as a practical approach to accommodate the complexities of the judicial management process and to promote fair and informed decision-making.

#### **What if the Judicial Manager Breaches Their Duties?**

The Judicial Manager wields significant authority and control over the company, albeit with court supervision. However, this extensive power also poses a risk of potential abuse, leading to unfair prejudice against the company's creditors and/or members of the

company.

Examples of breaches of duties by the Judicial Manager may include failing to implement the approved Statement of Proposal, unreasonably rejecting Proof of Debt, or managing the company in a way that prejudices the interests of creditors or members representing at least 25% of claims.

In such cases, a creditor and/or member of the company may apply to the court for an order on the ground of unfair prejudice[8], seeking the reliefs stated pursuant to Section 425 of the CA 2016, namely: to regulate the future management of the company's affairs, business and property, require the Judicial Manager to refrain from doing or continuing an act or an omission complained of; require the summon of the creditors meeting to consider such matters and/or discharge the JMO and make such consequential provision as the Court thinks fit.

Additionally, if a transfer or payment is made with the intention to give such creditors a preference over other creditors, a creditor or member can apply to the court to void or nullify such transactions.[9]

#### **Conclusion**

To sum it up, when a JMO is granted, significant changes will affect the company and everyone involved. The Judicial Manager takes charge and calls the shots ahead of the directors. Strict compliance with the CA 2016 is crucial for the successful execution of the JMO and the company's rehabilitation. However, if the Judicial Manager fails to fulfil their duties or breaches their obligations, affected parties have the right to seek relief from the court.

It's all about finding that sweet spot—giving the Judicial Manager enough power to fulfil their role while keeping them accountable. Transparency and fairness are the names of the game throughout this corporate rescue journey.

[1] Section 405(3) of CA 2016

[2] Section 414(2) of CA 2016

[3] Section 421 (3) of CA 2016

[4] Capital City Property sdn Bhd v Achwell Property Sdn Bhd [2020] 1 LNS 2111

[5] Re Gold Coast Morib International Resort Sdn Bhd and another case [2021] 1 LNS 204

[6] Rule 37(1) of the Companies (Corporate Rescue Mechanisms) Rules 2018

[7] Capital City Property Sdn Bhd v Achwell Property Sdn Bhd [2020] 1 LNS 2111

[8] Section 425 of CA 2016

[9] Section 426 of CA 2016

## FAQS ON COMPANIES ACT 2016 AND TRANSITIONAL ISSUES

### PART B

### CONSTITUTION (MEMORANDUM & ARTICLES OF ASSOCIATION)

**1. What happens to existing companies with memorandum & articles of association which were incorporated under Companies Act 1965?**

**Answer:**

Under section 619(3) of the Companies Act 2016, for existing companies already registered under the previous law, their M&A remains valid and enforceable under the Companies Act 2016, unless otherwise resolved by the company. The company may decide whether to revoke entirely the Constitution or amend certain clauses.

If the existing company decides to revoke the existing M&A and NOT to have a specific constitution, the company must pass a resolution to that effect. In that scenario, under section 31(3) of the Companies Act 2016, the company, each director and member shall have the rights, powers, duties and obligations as set out in the Companies Act 2016.

Similarly, a company must also pass a resolution to amend any part of its constitution should the company wish to harmonise its constitution with the provisions of the Companies Act 2016. For example, a private company may want to amend provisions relating to minimum directorships from current 2 to 1.

**2. Since M&A is optional, if an existing public company intends to do away it's M&A, what is the procedure? Is shareholders' approval required? To notify SSM and other regulators such as BNM for FI?**

**Answer:**

Except for a company limited by guarantee, a public company has the option of whether to have a constitution or not. As such, in cases where an existing public company (other than a company limited by guarantee) opts to do away with its constitution, it must obtain approval from its shareholders.

The company is required to notify SSM of its decision. It is advisable for public companies which are subject to the requirements of other written laws to observe such requirements, including the resolution for doing away with the constitution or informing the respective regulators/authorities as the case may be.

**3. With no constitution how can the public be assured when dealing with companies. Companies can start new businesses anytime.**

**Answer:**

Although a company is not required to have a constitution, it is still required to notify the Registrar of its nature of business or when there is a change to the company's nature of business. This information will be publicly available.

- 4. Since object clauses are now less significant, can we abolish the Memorandum of Association and adopt only the Articles of Association?**

**Answer:**

Yes, a company may adopt partially of its existing Memorandum of Association or Articles of Association as its constitution. Such adoption must be approved by the members.

- 5. What is the procedure applicable for existing companies to contract out from its Memorandum and Articles of Association?**

**Answer:**

Under the general transitional provisions (section 619(3)) existing companies may contract out from its Memorandum and Articles of Association by passing a resolution to that effect.

- 6. If a company is incorporated without a constitution, how is the majority of signatories to a resolution being determined?**

**Answer:**

In cases where a company does not have a constitution, the company may rely on the following:

- (a) Passing a resolution of members/shareholders – sections 290 to 296; and
- (b) Passing a resolution of board – paragraphs 9-12 of the Third Schedule of the Companies Act 2016.

- 7. If a company opted to adopt a constitution, does the constitution need to be lodged?**

**Answer:**

Yes, the constitution must be lodged with the Registrar. Similarly, any amendment/alteration to the constitution must also be lodged.

- 8. If a company opts to have constitution post incorporation, does it need to be stamped? Alternatively, if a company adopts a constitution for the very first time in any time during the life of a company, do we need to stamp the constitution at least once?**

**Answer:**

A company which opts to adopt a constitution will need to stamp the constitution. The e-stamping service is available through the MyCoID 2016 Portal.

- 9. Can a company pursuant to section 36 amend, abolish or alter its constitution, all under a single resolution? *(updated on 9 June 2017)***

**Answer:**

A company must pass a separate resolution each, for the following exercise:

- (a) amend its constitution;
- (b) abolish its constitution; or
- (c) alter its M&A or constitution by simultaneously replacing them entirely with a new constitution.

**10. Can the date of adoption differ from the date of resolution for the purpose of adopting a constitution under section 32? (updated on 9 June 2017)**

**Answer:**

The date of adoption shall be the date of resolution. Any dates other than the date of resolution will be disregarded.

**11. What is the procedure if a company intends to abolish its existing M&A and will only adopt a new constitution at a later date? (updated on 9 June 2017)**

**Answer:**

The company is required to pass a resolution to abolish the M&A pursuant to section 36. Once the company is ready to adopt a new constitution, it must then pass a resolution under section 32. The date of adoption shall be the date of resolution.

**12. Does the company need to stamp its new constitution:**

- (i) if the company adopts a new constitution after it has abolished its existing M&A;  
or
- (ii) if the company replaces simultaneously its existing M&A with an entirely new constitution? (updated on 19 June 2017)

**Answer:**

Unless the company intends to replace simultaneously its existing M&A to an entirely new constitution, the company needs to stamp the new constitution upon its adoption.

**13. A private company's Constitution states that the company must have at least 2 directors. In view of the requirements under the Companies Act 2016 that allow a company to have a minimum of one director, what is the minimum number of directors a private company must maintain and must the directors be ordinarily residing in Malaysia by having a principal place of residence in Malaysia? (updated on 26 October 2017)**

**Answer:**

Subsection 196(1) of the Companies Act 2016 states that a private company shall have a minimum one director. In addition, subsection 196(4) of the CA 2016 imposes that the minimum number of director shall ordinarily reside in Malaysia by having a principal place of residence in Malaysia.

In cases where the Constitution of a private company requires the minimum number of directors to be more than one, the company must comply with the requirement stated in the constitution. However, for the purposes of complying with subsection 196(4), it is sufficient that at least one of the directors must have his principal place of residence in Malaysia.

**14. For amendments of clauses in a company's constitution, is there any requirement for the company to prepare the entire constitution for purpose of the changes pursuant to section 36 of the Companies Act 2016? (updated on 10 March 2023)**

**Answer:**

Yes, the company is required to prepare a full set of the constitution which has been amended and should attach it together with section 36 Form for the purpose of altering or amending its constitution under section 36 of the Companies Act 2016.

**15. The company intends to make changes to the nature of its business. Should the company apply and lodge under section 36 to give effect to the changes? *(updated on 10 March 2023)***

**Answer:**

No. The company must lodge the application according to PD2/2017 within 14 days of the changes made to the nature of its business.

**16. Must the authorised share capital be stated in the constitution through section 36 for a company that has increased its authorised share capital? Can a company which has an existing Memorandum & Articles of Association (M&A) increase its authorised share capital? *(updated on 10 March 2023)***

**Answer:**

Under the Companies Act 2016, the requirements on authorised capital (AC) has been repealed. However, if the company has adopted an existing M&A as their Constitution with AC as one of the provisions, the AC stated in the M&A may be deemed as one of the covenants to be observed by the company and its members. The company may alter or amend its authorised share capital as it deems fit unless otherwise stated in the M&A. There is no provision under the CA 2016 that prevents the company to alter or amend its authorised share capital.

*Source: SSM website [www.ssm.com.my](http://www.ssm.com.my). Updated as at 10<sup>th</sup> March 2023*

## PRESS RELEASES FROM COMPANIES COMMISSION OF MALAYSIA

### Pengarah Syarikat Mengaku Bersalah Atas Pertuduhan Memalsukan Dokumen Pindah Milik Saham

**Bangi, 30 Mei 2023** – Seorang pengarah syarikat telah disabitkan dengan satu kesalahan di bawah Seksyen 364(2) Akta Syarikat 1965 kerana memalsukan dokumen pindah milik saham di dalam syarikat SNR Technology Sdn Bhd.

Berdasarkan kepada fakta kes, pada 3 Disember 2018, Noorshahrin Mohamed telah membuat aduan bahawa sahamnya di dalam SNR Technology Sdn Bhd telah dipindah milik kepada Mohd Rizal Rusli tanpa pengetahuan dan kebenaran beliau.

Dakwaan pengadu ini kemudiannya disahkan dengan hasil laporan kimia mendapati tandatangan yang diturunkan di atas nama pengadu di dalam Borang 32A bertarikh 10 November 2016 adalah berbeza sama sekali dengan sampel-sampel tandatangan pengadu yang lain. Fakta ini selari dengan pendapat saksi pakar yang merumuskan bahawa tandatangan di atas nama pengadu di dalam Borang 32A bukannya diturunkan oleh pengadu.

Semasa prosiding perbicaraan, saksi pendakwaan yang kedua iaitu Mohd Fazli Johari mengesahkan bahawa beliau yang menurunkan tandatangan di atas nama pengadu di dalam Borang 32A bertarikh 10 November 2016 selepas diarahkan oleh tertuduh yang memaklumkan kepada beliau bahawa pengadu telahpun bersetuju.

Tertuduh di dalam kes ini telah membuat pengakuan bersalah pada 15 Mei 2023 dan dikenakan hukuman denda sebanyak RM25,000 bagi pertuduhan tersebut melalui rundingan akuan. Sekiranya gagal membayar

denda tersebut, hukuman penjara selama enam bulan boleh dikenakan ke atas tertuduh. Tertuduh telah membuat bayaran denda tersebut pada hari yang sama.

Seksyen 364(2) Akta Syarikat 1965 memperuntukkan bahawa setiap orang yang dalam mana-mana penyata atau lain-lain dokumen yang dikehendaki oleh Akta ini, membuat atau memberi kuasa untuk membuat suatu pernyataan palsu atau keliru dalam mana-mana keterangan material dengan mengetahui ia palsu atau keliru, adalah melakukan suatu kesalahan di bawah Akta ini. Jika disabitkan kesalahan, tertuduh boleh dikenakan hukuman penjara 10 tahun atau denda RM250,000 atau kedua-duanya.

Pendakwaan dikendalikan oleh Pegawai Pendakwa SSM, Amir Sharifuddin Hashim, Nurul Nabila Azmi dan Farieza Hazreen Salehuddin manakala tertuduh diwakili oleh peguam Dato' Muhammad Hifdzi Hamzah.

Sabitkan seumpama ini merupakan satu peringatan kepada orang awam bahawa tindakan perundangan akan diambil sekiranya berlaku kesalahan di bawah peruntukan undang-undang yang dikawalselia oleh SSM termasuklah pemalsuan dokumen pindah milik saham. Ini bagi memastikan sikap tadbir urus korporat sentiasa diamalkan oleh warga korporat dan komuniti perniagaan di Malaysia.

**DIKELUARKAN OLEH: SURUHANJAYA SYARIKAT MALAYSIA**

**TARIKH: 30 MEI 2023**

### **SSM Anjur Persidangan Kebangsaan 2023, Beri Pendedahan Tentang Pencegahan Pengubahan Wang Haram Dan Pembanterasannya Pembiayaan Keganasan**

**Kuala Lumpur, 25 Julai 2023** – Suruhanjaya Syarikat Malaysia (SSM) hari ini menganjurkan Persidangan Kebangsaan SSM atau SSM National Conference 2023 (SSMNC2023) secara dalam talian dengan rekod penyertaan tertinggi seramai 3,000 orang.

SSMNC2023 yang membawa tema 'Shared Responsibility In Strengthening AML/CFT Compliance: Risks, Challenges and Collaborations' bertujuan memberikan pendedahan kepada pengarah syarikat, setiausaha syarikat, akauntan, juruaudit, peguam dan badan-badan korporat mengenai pencegahan pengubahan wang haram dan pembanterasannya pembiayaan keganasan (AML/CFT).

Dalam ucapan perasmian Allahyarham YB Datuk Seri Salahuddin Ayub, Menteri Perdagangan Dalam Negeri dan Kos Sara Hidup yang dibacakan oleh Tuan Ahmad Sabki Yusof, Pengerusi SSM menyatakan bahawa tema yang dipilih oleh SSM pada tahun ini amat bersesuaian bagi menangani ancaman dan trend terkini mempergunakan entiti korporat jenayah kewangan.

Tambah beliau, persidangan ini adalah salah satu platform dalam memerangi jenayah kewangan yang merupakan tanggungjawab bersama dalam usaha melindungi sistem kewangan di Malaysia.

Sementara itu, Datuk Nor Azimah Abdul Aziz, Ketua Pegawai Eksekutif SSM berkata, sebagai sebuah badan kawal selia dan tadbir urus korporat, SSM sentiasa menyokong agenda negara dalam memerangi pengubahan wang haram dan pembiayaan keganasan.

Tambahnya, dalam penyediaan Malaysia ke arah penilaian bersama Financial Action Task Force (FATF) pada tahun 2024 hingga 2025, SSM telah memperkenalkan pelbagai inisiatif termasuk mengeluarkan garis panduan bertajuk Guideline For The Reporting Framework For Beneficial Ownership Of Legal Persons dan mengeluarkan kertas konsultatif bagi libat-urus dalam mencadangkan pindaan-pindaan kepada Akta Syarikat 2016 dan Akta Perkongsian Liabiliti Terhad 2012 ke arah memperkukuhkan kerangka pelaporan pemunya benefisial.

Pada tahun ini, SSMNC mengetengahkan 11 sesi plenari dengan tajuk-tajuk yang menarik bagi perbincangan bersama 48 ahli-ahli panel terdiri daripada kalangan pengamal sektor korporat yang mempunyai kepakaran dan pengalaman luas dalam pelbagai bidang.

Antara topik yang dibincangkan termasuk “Preventing Money Laundering and Terrorism Financing-Malaysia’s Risk Map”, “Stepping Up the Game. Leveraging on Emerging Technology to Fight Corruption”, “Be Scam Aware”, “Prevention and Good Practice in NPO Sector against Money Laundering & Terrorism Financing” dan “Enhancement to the Corporate Rehabilitation Framework”.

Persidangan SSMNC2023 ini turut dihadiri oleh YB Senator Puan Hajah Fuziah Salleh, Timbalan Menteri KPDN dan YBhg. Datuk Azman Mohd Yusof, Ketua Setiausaha KPDN.

Untuk maklumat lanjut, sila hubungi Pusat Panggilan SSM melalui talian 03-7721 4000 atau emel ke enquiry@ssm.com.my.

**DIKELUARKAN OLEH: SURUHANJAYA SYARIKAT MALAYSIA**

**TARIKH: 25 JULAI 2023**

*Source: SSM website [www.ssm.com.my](http://www.ssm.com.my)*

## IACS NEW MEMBERS

We would like to welcome the following new members:-

| IACS No. | Names              | Membership Category | State        |
|----------|--------------------|---------------------|--------------|
| M 2643   | Ms. Lim Pey Lin    | Ordinary            | Melaka       |
| M 2644   | Ms. Chan Pui Sze   | Ordinary            | Selangor     |
| M 2645   | Mr. Liaw Choan Kim | Ordinary            | Kuala Lumpur |
| M 2646   | Ms. Lee Choi Hoong | Ordinary            | Selangor     |

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.

## BOOKS FOR SALE

|  | Book Price<br>(RM) | Self-collect<br>(IACS Office) | With Shipping –<br><b>Add RM10</b><br>(West Malaysia) | With Shipping–<br><b>Add RM15</b><br>(East Malaysia) |
|--|--------------------|-------------------------------|---|--|
| <b>The Approved Company Secretaries Digest: Series 1</b><br><br>A Practical Companion for the Approved Company Secretary | <b>15.00</b>       | <b>15.00</b>                  | <b>25.00</b>  | <b>30.00</b>   |

If you are interested to purchase, kindly call IACS office at 03-40513787/40510033 or email to [iacstraining@yahoo.com](mailto:iacstraining@yahoo.com) to get a copy of the order form.

### IACS TRAINING CALENDAR: October – December 2023

| No | Date       | Locations                           | Topic/s   | Speaker                    | CPE Points |
|----|------------|-------------------------------------|---|----------------------------|------------|
| 1  | 05/10/2023 | Zoom Webinar                        | Managing Effective Meetings – Virtual and Hybrid and Physical Meetings                        | Jessica Liew               | 4          |
| 2  | 20/10/2023 | JEN Penang Georgetown by Shangri-La | Beneficial Ownership of Legal Persons – Compliance with the BO Framework of Bank Negara & SSM | Kenneth Foo                | 8          |
| 3  | 26/10/2023 | Zoom Webinar                        | Constitution - Benefits of Adopting One and How to Draft It                                   | Kenneth Foo                | 4          |
| 4  | 08/11/2023 | Johor Bahru, Johor                  | Capital Maintenance – An In-Depth Case Study Session On Shares                                | Kenneth Foo                | 8          |
| 5  | 17/11/2023 | Zoom Webinar                        | TBC   | Kenneth Foo                | 4          |
| 6  | 28/11/2023 | Zoom Webinar                        | Director's Behavior and Boardroom Dynamics  | Dr. Zubaidah Zainal Abidin | 4          |
| 7  | 01/12/2023 | Zoom Webinar                        | Foreign Companies And Representative Office   | Jessica Liew               | 4          |
| 8  | 07/12/2023 | Kuala Lumpur                        | Beneficial Ownership of Legal Persons – Compliance with the BO Framework of Bank Negara & SSM | Kenneth Foo                | 8          |

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

# EVENT HIGHLIGHTS

## **Technical Focus Group Meeting No. 01/2023**

The meeting was held on 30th May 2023 at Bangunan MAICSA. The Technical Focus Group was established for the purpose of studying and proposing the concept, mechanism, and laws governing the digital/electronic signature framework with regard to the lodgement of statutory documents with SSM as well as to look into other areas of concerns as and when it arises.



## **IACS CPD Seminar in Melaka on 7th July 2023**

The seminar was held at Swiss-Garden Hotel, Melaka. The speaker was Mr. Kenneth Foo and the topic of the seminar was *"Capital Maintenance – An In-depth Case Study Session on Shares"*.



# 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:-

- 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 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.

- 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.