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 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 CA2016 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 the provisions, the AC stated in the M&A may be deemed as one of the convenants to be observed by the company and its members. The company may alter or amend its authorised share capital as it deemds 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.