Company Directors' Responsibilities

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All companies are required to have at least two directors who each has his principal or only place of residence within Malaysia. The directors manage the company's business in accordance with the company's Articles of Association and the law.

Who can be a director?

A person has to satisfy the following requirements to become a director:

- Must be a natural person
- Must be at least 18 years old
- Must not be someone who has been disqualified from being a director
- Any person over the age of 70 cannot be appointed as a director of a public company or its subsidiaries unless his appointment is approved by at least 75% of shareholders at general meeting

Before a person can be appointed as a director, he must:

- Make a statutory declaration on the prescribed Form 48A declaring that he has not contravened sections 25 and 130 of the Companies Act, 1965 (the Act)
- Consent to the appointment

Normally, a person becomes a director by being appointed to the board by the members of the company. Section 4 of the Act states that a "director"

> "includes any person occupying the position of director of corporation by whatever name called and includes a person in accordance with whose instructions the directors of a corporation are accustomed to act or as an alternate or substitute director."

Some companies will not necessarily use the designation "director". Companies limited by guarantee call their equivalent officers "governors", "trustees", or the like. Sometimes, titles like "chief executive officer" or "managing director" are used.

These persons are directors of the company if they occupy such a position and functions likewise in the company.

A company must lodge Form 48A with the Commission when it appoints a person as director. This is required by sections 123(1) and (4) of the Act. However, a person may still be considered a director even if his name does not appear in Form 48A, because of the definition given under section 4 of the Act.

This means that it is possible for a person who has not been appointed by members of the company to be considered as a director. The person, however, must be one who occupies the position of a director.

A person who is not appointed a director by members may also be considered as such if the directors of the company are accustomed to act according to the person's instructions.

Who is an associate director?

Although the Act itself contains no reference to the appointment of an "associate director", the appointment is authorised under Article 94 of Table A. The associate director's powers, duties and remuneration may be fixed, changed or cancelled by the board. He need not obtain

shareholding qualification and does not have to attend or vote at board of directors' meetings except by the invitation and consent of the board.

Who can appoint directors?

1. Appointment in a newly incorporated company

The names of at least two directors are required for incorporation of a company. These names are usually given by the person who incorporates the company. These directors, however, are deemed to have automatically retired at the first annual general meeting of the company. They can be reappointed as directors by the shareholders at the general meeting.

It is a statutory obligation that the first directors be named in the company's memorandum or articles of association [section122(3)].

2. Appointment of subsequent directors by shareholders

Directors are generally appointed at the general meeting of the company. It is normal practice to appoint a director by an ordinary resolution.

Except in the case of a private company, the appointment of directors of a public company must be voted individually. The members cannot pass one resolution for the appointment of all directors. A motion for the appointment of two or more persons as directors of a public company by one resolution is void [section 126(2)]. However, the directors may be appointed by one resolution if there is prior unanimous agreement of shareholders to vote for the appointment of all the directors by one resolution [section126(1)].

There is nothing in the articles to prevent appointment of directors by a particular class of shareholders, by debentures holders or, indeed by third parties.

The company may also, from time to time, by ordinary resolution passed at a general meeting increase or reduce the number of directors. The company may also determine in which rotation the increased or reduced number is to go out of office.

3. Appointment of subsequent directors by board of directors

The board of directors can also appoint a person to fill a casual vacancy between annual general meetings, according to the articles [section 128(5)]. Casual vacancy of the board of directors occurs due to death or bankruptcy of a director. A provision in Table A also gives the board power to appoint additional directors up to the number fixed by the articles [Regulation 68 of Table A].

Sometimes the articles allow a director to appoint an alternate or substitute director to act for him at any meeting which he is unable to attend, or to act for him during his inability to act as a director [section 138(2)]. The person appointed as alternate or substitute director is placed in the same position as any other director. However, in counting the statutory minimum number of directors of a company, the alternate or substitute directors are not counted [section 122 (1A)].

A director of a public company may assign his office to another person if this is permitted by its articles or by an agreement between the company and any person empowering a director to assign his office. Such assignment of office requires a special resolution of the company [section 138(i)].

Can a director retire or resign from office?

1. Retirement of directors

The first directors appointed upon incorporation of the company will hold office as director until the first annual general meeting where they automatically resign. They can be reappointed. Some company's articles require directors to retire by rotation. The regulation on rotation of directors in a private company can be omitted to avoid the formality of routine retirement and re-election. This can happen because there is no legal requirement for directors to retire by rotation.

If the company's articles have a provision for retirement by rotation, the provision will specify the method of determining which one of the directors will have to retire. The normal provision (section 65) is as follows:

> "The directors to retire in every year shall be those who have been longest in office since their last election, but as between persons who became directors on the same day those to retire shall (unless they otherwise agree among themselves) be determined by lot."

It is also common for the Articles of Association to provide that a managing director be not required to comply with the provision on retirement by rotation, or that he shall not, while holding that office be taken into account in determining the rotation of retirement of directors. His appointment shall be automatically determined if he ceases from any cause to be a director.

2. Resignation of a director

A director may resign by tendering his resignation in writing to the board. Regulation 72 of Table A provides for the method of resignation. Since a director's consent is required before he may be appointed as a director, he cannot be forced to continue to serve the company if he wishes to resign.

However, a director cannot resign or vacate his office if, by his resignation or vacation from office the number of directors of the company is reduced to below two. Any purported resignation or vacation from office in this situation is deemed to be invalid. However, the prohibition from resigning if the number of directors fall below two does not apply where a person has not obtained his share qualification or if he has been disqualified under the Companies Act or any other written law [section 122(7)].

DISQUALIFICATION

There are statutory provisions restraining certain persons from managing companies. These persons are disqualified from taking part or being involved in the management of a company.

1. Disqualification under section 130

The disqualified person under section 130 is not allowed to be appointed as director or remains as director, without the leave of the Court. The persons who are disqualified are:

- A person who is convicted for any offence in connection with the promotion, formation or management of a corporation

- A person who is convicted for any fraud or dishonesty punishable on conviction with imprisonment for three months or more
- A person who is convicted of any offence involving

  ☞ Section 132 - breach of duty and making improper use of company's information
  ☞ Section 132A - dealing by officers in securities
  ☞ Section 303 - not keeping proper accounts

The disqualification period will be for a period of five years after conviction or after release from prison.

The person must apply to the court if he wishes to be appointed as director or remain as a director of a company. Failure to obtain leave of court is an offence. There is no automatic vacation from office unless the company's Articles of Association provides so [Table A, Fourth Schedule, Art 72].

2. Disqualification for being a bankrupt

A person may also be disqualified if he is an undischarged bankrupt [section 125], except where the Court grants leave.

3. Disqualification for being a director of insolvent companies

A person may be disqualified, where the court is satisfied that he has been a director of a company which has become insolvent and a director of some other companies that have gone into liquidation within five years of the insolvency of the first company. Also, that his conduct as a director of any of those companies makes him unfit to be concerned with the management of a company [section130A].

Before a director's conduct may be considered unfit, he must be a director or has been a director of two insolvent companies and that the second company becomes insolvent within five years of the first company going into liquidation.
The disqualification must not be more than 5 years.

4. Failure to obtain shareholding qualification

Sometimes directors are required to hold qualification shares. If he does not, or if after so obtaining it he ceases at any time to hold his qualification, his office is automatically vacated [section 124(3)]. A director who vacates his office by virtue of failing to obtain his qualification shares shall not be capable of being appointed until he has obtained his qualification [section 124(4)].

5. Disqualification due to Articles of Association

The company's Articles of Association may provide for automatic disqualification from office. The provisions may be found in Table A, Fourth Schedule, Art 72, as follows:

- Becomes bankrupt or makes any arrangement or composition with his creditors generally
- Becomes prohibited from being a director by reason of any order made under the Act
- Becomes of unsound mind or a person whose person or estate is liable to be dealt with in any away under the law relating to mental disorder
- Resigns his office by notice in writing to the company

- For more than six months is absent without permission of the directors from meetings of the directors held during that period
- Without consent of the company in general meeting holds any other office of profit under the company except that of managing director or manager
- Is directly or indirectly interested in any contract or proposed contract with the company and fails to declare the nature of his interest in manner required by the Act.

Can a director be removed?

Shareholders of a public company may remove any of the directors by an ordinary resolution before the expiry of the period of office. The removal however does not affect the director's right to compensation for breach of contract if there is a contract of employment between the director and the company. The right of shareholders of a public company to remove a director exists notwithstanding anything in the memorandum or articles or in any agreement with the company.

However, where any director so removed was appointed to represent the interest of a particular class of shareholders or debenture holders, the resolution to remove him is not effective until his successor has been appointed [section 128(1)].

A special notice is required for any resolution to remove a director of a public company or to appoint some person in place of a director so removed. On receipt of notice of an intended resolution to remove a director, the company must send a copy to the director concerned and the director shall be entitled to be heard on the resolution at the meeting [section 128(2)].

Where a special notice is given, the director to be removed can make representation in writing to the company (a right to protest removal). And any notice of the resolution to the members of the company, must state the fact that the representation has been made and send a copy of the representation to every member of the company. If the representation is received too late or because of the company's default, the director can require that the representation be read out at the meeting [section 128(8)].

THE POWERS AND DUTIES OF COMPANY DIRECTORS

The relationship between the board of directors and its shareholders is specified by the Companies Act 1965 and the Articles of Association. There are provisions of the Companies Act 1965 which are very clear on shareholders' powers by requiring specific transactions to be carried out only with shareholders' approval. Some examples are alteration of Articles, issue of new shares, reduction of capital etc. These powers are reserved to the shareholders and directors cannot exercise these powers.

However, it clearly could not be practicable for day-to-day administration for the company in general meeting to exercise all the powers of the company especially a private or a public company with large number of shareholders. Hence, the Articles provide for a board of directors and will state that powers are to be performed by the board. Generally, the power to administer the company's business, which includes power to borrow, mortgage or charge company's property or issue debentures, is reserved for the board of directors [Regulation 73, Table A]. However, it is also possible to grant the directors very limited powers of management while reserving the important policy decisions to the general meeting.

Notwithstanding the provisions of the memorandum or articles, certain powers reserved under the Act are to be exercised only by the members in general meeting, by ordinary resolution or special resolution. This is primarily to avoid abuses and to protect the company or its members as well as creditors of the company.

The powers that are reserved for members only by the Act are as follows:

- General alteration of the memorandum and/or articles
- Rules relating to share capital for example issue new shares, issue shares at discount, alteration of share capital, reduction of share capital, variation or abrogation of rights of class of shareholders
- Transactions involving company's asset or property, for example acquisition and disposal of company's undertaking or property [section 132C], substantial property transactions involving directors [section 132E]
- Appointment of auditor and/or removal of auditor
- Compromise with creditors and members
- Application to wind up the company by Court or to voluntarily wind up the company; appointment of liquidator

How do Boards operate?

Directors normally act collectively as a board and the articles give them extensive powers to manage the companies' affairs. The Articles also provide the directors with power to sub-delegate their powers to individual directors, manager, or to others. The directors' powers may also be regulated by shareholders agreement.

The board must act within the powers of the company and within the powers given to them under the memorandum and articles of association.

Delegation may be made to:

- A committee of the board
- An individual or any other person that the board thinks is competent for example an expert or legal adviser
- An employee or officer of the company for example a managing director

In the exercise of their powers, the Act provides that a director must act honestly and use reasonable diligence at all times [section 132(1)]. If something is done honestly, it is considered to be done in good faith. There must be total absence of any intention to seek an unfair advantage for himself or persons connected to him or to defraud the company.

The duty to act honestly includes the duty to act in the best interest of the company and to avoid conflict of interest. The director must not put himself in a position where his duty and interest conflict. Thus, a director must not misuse his powers to gain advantage for himself or persons connected to him at the expense of the company. The director must not misuse company's assets and property entrusted to him for improper purpose.

Apart from the above, a director is also obliged to disclose the interest he has in any transaction involving the company to the board of directors and the shareholders at general meeting. Failure to disclose to the board is an offence under the Companies Act 1965. Failure to disclose to the shareholders at general meeting will enable the company to set aside the contract or to obtain an account of profit from the director.

A director must also exercise the care and skill expected of a person of his experience and be diligent in managing the company's affairs. Thus there is no such thing as a passive director. A director who is passive by not being involved in the company's management has breached his duty of care, skill and diligence.

These duties, except those expressly limited to directors, apply equally to any officers of the company who are authorized to act on its behalf and particularly to those acting in managerial capacity.

BASIC STATUTORY OBLIGATIONS OF A COMPANY UNDER THE COMPANIES ACT 1965

The various obligations of companies and their officers can be found in the Companies Act 1965 and the Companies Regulations 1966, Companies (Winding Up) Rules 1972.

Failure to comply may render the company and/or its officers liable to prosecution, punishable by certain fine or imprisonment or both.

Every director of a company has a responsibility to ensure that certain statutory documents are lodged with the Registrar.

The documents are:

- Accounts
- Annual returns
- Notice of change of directors, managers and secretaries or changes of their details
- Notice of change of registered office

What are directors' responsibilities relating to accounts?

Every company and the directors and managers must keep such accounting and other records that would enable true and fair profit and loss accounts and balance sheet to be prepared from time to time [section 167]. This obligation is applicable to all types of companies.

These accounts must be prepared in accordance with Malaysian Accounting Standards.

The responsibility of the Board is to ensure that the accounts are laid or tabled before shareholders at the annual general meeting.

The accounts must be laid before the company at its annual general meeting, in case of the first account, within eighteen (18) months after the company's incorporation, and subsequently once in every calendar year at intervals of not more than fifteen months. The accounts must be made up for the period since the preceding account to a date not more than six months before the date of annual general meeting.

The accounts shall include:

- A profit and loss account; and
- A balance sheet as at the date to which the profit and loss account is made-up; and
- A directors' report; and
- An auditor's report; and
- Notes to the accounts; and
- Group accounts (if applicable)

What are directors' responsibilities relating to annual returns?

A company must lodge an annual return for each year. This annual return must be in accordance with the Eighth Schedule of the Companies Act 1965. The annual return must be lodged within one month after the annual general meeting of the company.

This return must include:

- A copy, certified by a director, manager or secretary of the company, to be a true copy of the accounts which have been audited by the company's auditors; and
- A certified copy of the report of the auditors;
- Companies with an "exempt-private" status at the date of the return, may include with the annual return a certificate of an exempt private company signed by the director, the secretary and the auditor of the company, instead of the copy of accounts of the company

Directors may be prosecuted for not filing these documents or for late filing of these documents. If convicted, directors may be liable to a fine. If there has been conviction, directors may also be disqualified from being directors or taking part in the management of a company.

If the accounts and/or annual returns are delivered late the company will be charged with penalty for late filing.

APPOINTMENT OF AUDITOR

If an auditor is to be appointed before the first Annual General Meeting of the company, the appointment can be made by the directors or by resolution at a general meeting of the company [section 172 (1)].

This auditor will hold office until the conclusion of the first Annual General Meeting when the company will make a new appointment.

New appointment of auditor is to be made by the company at each Annual general Meeting [section 172 (2)].

When must the annual general meeting be held?

A company is required to hold its first annual general meeting within 18 months of its incorporation.

The subsequent annual general meeting must be held once in every calendar year and not more than fifteen (15) months after the holding of the last preceding annual general meeting [143 (1)].

However, if the company holds its first AGM within 18 months after the date of its incorporation, the company need not hold an annual general meeting for the year of incorporation or the following year.

This means that if X Sdn Bhd is incorporated in January 2000, its first annual general meeting must be held latest by July 2001. No other annual general meeting will need to be held for 2000 or 2001. However, the next annual general meeting for 2002 must be held latest by October 2002.

If a company is incorporated in June 2000, its first annual general meeting must be held latest by December 2001. No other annual general meeting need to be held for 2000 and 2001. However the next annual general meeting for 2002 must be held latest by December 2002. This is because the subsequent AGM must be held at least once in every calendar year and not more than 15 months from the last preceding annual general meeting.

What are directors' responsibilities relating to particulars of directors, managers and secretaries and changes of particulars?

Within one month after a company is incorporated, a company is required to lodge Form 49 (Return Giving Particulars In Register Of Directors, Managers And Secretaries And Changes Of Particulars) containing details of its directors, managers and secretaries [section 141(6)].

A company must have one or more secretaries who is a member of a prescribed body [MIA, MACPA, MAICSA, MAC, BAR COUNCIL etc.] or a holder of a secretary license issued by the Commission. The office of the secretary can be vacant only for one month.

Whenever there is any change in the officers of the company or their prescribed particulars, details of the change must be lodged by using Form 49 within one month of the change.

If the company fails to lodge Form 49 within the time required, the company and every officer of the company who is in default (the directors and company secretary) is guilty of an offence and is liable to be fined.

ESTABLISHING A REGISTERED OFFICE

Every company must have a registered office within Malaysia to which all communications and notices may be addressed (section 119).

The registered office must be established from the day on which the company begins to carry on business or as from the 14 days after the date of its incorporation, whichever is the earlier.

Where the company has given to the Commission notice of the company's office hours under section 120, the office must be opened to the public for at least three (3) hours during ordinary business day, Saturdays, weekly and public holidays exempted.

No notice is required if the office is open to the public for at least five (5) hours during ordinary business day, Saturday, weekly and public holidays exempted.

Notice of the situation of the registered office or the change of the place of your registered office must be lodged with the Commission within one month after the date of incorporation or of any such change. The notice must be in Form 44 (Notice of Situation Of Registered Office And Office Hours And Particulars Of Change).

DISPLAY OF COMPANY NAME AND NUMBER

Under the Companies Act 1965, the company's name must be stated in certain places, on its business letters and stationery. The company's name must be displayed in a prominent position in romanised letters on the outside of every office or place in which the company carries out its business. In the case of registered office, the words "Pejabat Yang Didaftarkan" must also appear [section 121(3)].

When registered, a company is allocated a six-digit number plus an alphabet digit identifying number known as Company Number.

The company name, in legible romanised letters and the company number must appear on [section 121(1)]:

- Its seal; and
- All business letters, statements of accounts, invoices, official notices, publications, bills of exchange, promissory notes, endorsements, cheques, orders, receipts and letters of credit of or purporting to be issued or signed by or on behalf of the company.

CHANGE COMPANY NAME

Where a company has changed its name, the former name of the company shall also appear beneath its present name for a period of not less than twelve (12) months from the date of the change on [section 121 (1A)]

- All business letters,
- Statements of accounts, invoices,
- Official notices, publications,
- Bills of exchange, promissory notes, endorsements, cheques, orders, receipts and letters of credit of or purporting to be issued or signed by or on behalf of the company

Is there any specific format for documents lodged with registrar?

A document which is lodged must comply with the following requirements:

- The document should be on paper of medium weight and good quality and of international A4 size only
- The document should be clearly printed or typewritten
- The document should be endorsed with the name, address and telephone number of the person who lodges the document at the end of each document; and
- The document should be endorsed on the upper left-hand corner of every page with the Company Number

If the document is a prescribed form as set out in the Companies Regulation 1966 (CR 1966), the directions prescribed in the form must be followed.

When must the fees for lodgement be paid?

Some documents must be lodged with the payment of prescribed fees.

The prescribed fees must be paid at the time the document is lodged.

This includes the late filing fees [Second Schedule of the Companies Act 1965]. No late filing fee is payable if a document is lodged within the time prescribed for lodgement.

The document is considered not lodged if it is submitted without a fee [Regulation 6 (3) of the CR 1966].

What information is required to be lodged in relation to allotment of shares?

If a company allots shares, it must lodge details of allotment in Form 24 (Return Of Allotment Of Shares) within one month of making the allotment [section 54(1)J].

If shares are allotted to the subscribers to the company's memorandum of association, the shares are considered allotted on the date of incorporation of the company.

BOOKS AND REGISTERS

A company is required to keep the following Books and Registers

- Register of Options [section 68A]
- Register of Substantial Shareholders [section 69L]
- Register of Debenture holders [section 70]
- Register of Charges [section 115]
- Register of Directors' Shareholdings [section 134]
- Register of Directors, Managers and Secretaries [section 141 (5)]
- Minutes of all proceedings of general meetings and of meetings of its directors [section 157]
- Register of Members [section 160 (2)];
- Such accounting and other records as will correctly explain the transactions and financial position of the company [section 167]

Registers and Books must be kept at the registered office of the company. Register of Options and Register of Members and Index may be kept at some other office within Malaysia, if you notify The SSM on form 53 (Notice Of Place Where Register Of Members And Index Kept, Or Of Change In That Place) or any change thereof.

The accounting records may be kept at such other place within Malaysia, as the directors think fit and must at all times be open to inspection by the directors [section 167(3)].

DETAILS OF CHARGES

Details of charges created by the company must be sent to the Registrar. Registrable charges are set out in section 108 (3) the Act. If a charge is not lodged within 30 days after the charge is created, it shall be void against a liquidator.

A charge will not be registered if Form 34 (Statement of Particulars To Be Lodged With Charge) is not lodged within 30 days after the creation of the charge, unless it is accompanied with a Court order extending the time for registration.

If a company acquires property subject to a registrable charge, details of the charge of Form 34 must be lodged within 30 days after the acquisition is completed [section 110 (1)].

If a person other than the original charge becomes the holder of the charge, that person must lodge Form 40A (Notice Of Assignment Of Charge) within 30 days after he becomes the holder of the charge [section 112A (1)].

Where there is a variation in terms of the charge which will increase the amount of the debts or increase the liabilities secured by the charge; or will prohibit or restrict the creation of subsequent charges on the property, the company must lodge Form 40B (Notice Of Variation In Terms Of Charge) setting out details of the variation within 30 days after the variation occurs.

Where a charge is wholly or partially satisfied or the property charged is released or no longer forms part of the undertaking or property of the company, the company must lodge Form 41 (Memorandum Of Satisfaction Of Registered Charge) or Form 42 (Memorandum Where Property Or Undertaking Is Released From Registered Charge Or Has Ceased To Form Part Of Company Property Or Undertaking) within 14 days after the payment, satisfaction, release or cessation referred to above.