Supplement to

MALAYSIA COMPANY LAW: PRINCIPLES AND PRACTICES

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This supplement is an addendum updating the first edition of Malaysia Company Law: Principles and Practices. It provides a concise yet helpful explanation of the differences between the former Companies Act 1965 and the Companies Act 2016, which came into operation on 31 January 2017.

INTRODUCTION

The Companies Act 2016 and Companies Regulations 2017 have come into force effective 31 January 2017. All of the provisions of the Companies Act 2016 came into force on 31 January 2017 except for those pertaining to:

- the registration of practising company secretaries with the Registrar of Companies (s 241), and
- corporate rescue mechanisms on corporate voluntary arrangement and judicial management (Div 8 of Part III).

The Companies Act 2016 was passed by Parliament in May 2016, received Royal Assent on 31 August 2016, and subsequently gazetted on 15 September 2016.

The Companies Act 2016 is the result of a comprehensive law reform programme established by the Companies Commission of Malaysia (Suruhanjaya Syarikat Malaysia, “SSM”) which was conducted by the Corporate Law Reform Committee (CLRC) between 2004 and 2008. This was followed by the establishment of the Accounting Issues Consultative Committee in 2012. In 2013, the Companies Commission released an exposure draft, ie Companies Bill 2013. After a period of public consultation, the Companies Bill 2015 was presented to Parliament and was passed as the Companies Act 2016.

The Companies Act 2016 enacts fundamentally significant changes to company law in Malaysia. It introduces new concepts in relation to incorporation, capital allocation decisions secured creditors’ rights, reporting requirements, corporate governance and rescue mechanisms. It is also a restatement of existing rules.

The major changes are summarised below in this Supplement:

(A) Company Formation and Administration
(B) Legal Framework for Managing and Altering Share Capital Structure
(C) Governance Framework
(D) Changes to the Law on Meetings
(E) Directors’ Duties and Rights
(F) Reporting and Auditing Requirements
(G) Corporate Rescue, Rehabilitation and Reorganisation.

Unless stated otherwise, all legislative provisions relate to the Companies Act 2016.
A1 INCORPORATING A COMPANY

A1.1 The incorporation process is simplified by the use of one incorporation form where an application must be made to the Registrar containing details such as the company’s name, whether it is a private or public company, nature of business, address of registered office, details of the member, details of directors, details of company secretary, details of class and number of shares to be taken by the members or the liability that the member agrees to undertake upon winding up if the company is a company limited by guarantee and other details as may be required by the Registrar.

A1.2 The application must be accompanied by a statement of each promoter or director regarding his consent, and that he is not disqualified.

A1.3 The certificate of incorporation is no longer required under the Companies Act 2016. SSM will no longer issue the certificate of incorporation. Instead, a notice of registration is conclusive evidence of a company being incorporated.

A1.4 A company is incorporated from the date of incorporation stated in the notice of registration and is a legal person separate from its members, continues in existence until removed from the register, and has all the powers of a body corporate.

A2 COMPANIES LIMITED BY GUARANTEES (CLBG)

A2.1 A CLBG can only be incorporated as a public company. It can carry out the following non-profit making activities:
   (a) providing recreation or amusement
   (b) promoting commerce and industry
   (c) promoting art
   (d) promoting science
   (e) promoting religion
   (f) promoting charity
   (g) promoting pension or superannuation schemes, or
   (h) promoting any other object useful for the community or country.

A2.2 A CLBG is also prohibited from paying any dividends to its members. If there is a winding up and there are assets, these can only be transferred to another body which has objects clause similar to that of a CLBG or for the promotion of charity.

A3 SINGLE MEMBER/SOLE DIRECTOR COMPANY AND ITS IMPLICATIONS

A3.1 A company can be incorporated with a single member who can be either an individual or another company.

A3.2 A company may be incorporated as a private company with a single director who must be resident in Malaysia (s 196). That sole director may also be the sole member.

A3.3 The sole director or the last remaining director of the company cannot resign or vacate his office (s 196) until that director has called a meeting of members to receive the notice of the resignation and to appoint one or more new directors (s 209).
A3.4 The secretary must call a meeting of the next of kin, other personal representatives or a meeting of members if the sole director or the last remaining director of the company [s 209(3)]:
(a) dies
(b) becomes disqualified
(c) becomes of unsound mind, or
(d) vacate office in accordance with the constitution of the company.

A3.5 Where the sole director dies and a director is not appointed within six months of his death, the Registrar may direct the company to be struck off [s 209(5)].

A3.6 For a company with a single director, the company executes a document by that sole director signing the document in the presence of a witness who attests the signature (s 64 and s 66).

A3.7 A company with a single member may enter into any contract that is in the ordinary course of the company's business with the sole member. However, if it is not a contract which is in the ordinary course of the company's business, the terms of the contract must be recorded in the minutes of the meeting of the directors that is convened immediately after that contract is made, unless the contract is in writing (s 234).

A3.8 Decisions of a company with a sole member may be made by way of a written resolution. Where any decision of the company is made which may be taken at a meeting of members or has effect as if it had been agreed at a meeting of members, the sole member must provide the company with details of that decision unless the decision is made by way of a written resolution. Failure by the member to do so will not affect the validity of the decision taken (s 344).

A4 THE COMPANY'S CONSTITUTION

A4.1 A company is no longer required to have the Memorandum of Association and Articles of Association for registration purposes. A company can also operate without any constitution.

A4.2 In place of Memorandum of Association and Articles of Association, a company may choose to have a single document, to be referred to as the company's constitution. If the company chooses to have a constitution, the constitution shall comprise a single document containing the basic information about the company and any other matters regarding the company's internal management. Thus, a constitution is optional for companies limited by shares.

A4.3 Certain provisions of the Companies Act 2016 may be modified by a company by providing for different rules in its constitution. However, any provision in the constitution that contravenes the Companies Act 2016 is invalid.

A4.4 A company may adopt a constitution after its registration by passing a special resolution (s 32).

A4.5 For an existing company, the existing Memorandum of Association and Articles of Association will become the company's constitution unless the company resolves otherwise [s 619(3)]. An ordinary resolution is required in this situation.

A4.6 A company limited by guarantee must have a constitution. The constitution must contain the following information (s 38):
(a) that the company is a company limited by guarantee
(b) the objects of the company
(c) the capacity, rights, powers and privileges of the company
(d) the number of members with which the company proposed to be incorporated
(e) matters contemplated by this Act to be included in the constitution, and  
(f) any other matter that the company wishes to include in its constitution.

A5   LEGAL EFFECT OF THE CONSTITUTION

A5.1 Under the *Companies Act 2016*, the constitution which is adopted by a company is binding on [s 32(3)]:
(a) the company  
(b) its directors, and  
(c) its members.  
This resolves the uncertainty as to whether these documents also operate to bind the company and its officers and directors, which was not clearly dealt with under the *Companies Act 1965*.

A5.2 For a company limited by shares that chooses to have a constitution, the company, its directors and shareholders are bound by the rights, powers, duties and obligations stated under the *Companies Act 2016*, except to the extent that such provisions are modified by the constitution and such modifications are permitted and do not contravene the *Companies Act 2016*.

A5.3 If a company has no constitution, the rights, powers, duties and obligations of:
- the company  
- each of its directors, and  
- shareholders  
  as set out under the *Companies Act 2016* automatically applies [s 31(2) and (3)].

A6    AMENDING THE CONSTITUTION

A6.1 A company may amend its constitution by passing a special resolution, unless the constitution prohibits any amendment (s 36).

A6.2 The court is also able to make an order for the constitution to be amended where the court is satisfied that it is not practicable to amend the constitution following the procedure stated under the *Companies Act 2016* or in the constitution itself (s 37). The application for the order from the court may be made by a director or any member of the company.

A7    CORPORATE CAPACITY AND THE OBJECTS CLAUSE

A7.1 Companies have the full capacity of a natural person under the *Companies Act 2016* [s 21(1)]. Thus, the objects clause will no longer be required for companies limited by shares.

A7.2 The objects clause(s) sets out the purpose(s) for which a company is incorporated. The clause typically deals with the kinds of business that the company intends to conduct. Since companies have the full capacity of a natural person under the *Companies Act 2016*, the doctrine of *ultra vires* is no longer relevant. However, discussion as to the effect of an *ultra vires* transaction is still relevant for companies that choose to have the objects clause, or for companies limited by guarantee which must have the objects clause.

A7.3 A company limited by shares may decide to limit its objects.

A7.4 A company limited by guarantee, however, must have the objects clause in the constitution. The *Companies Act 2016* also provides that only a company limited by guarantee can be incorporated to achieve the following objectives:  
(a) providing recreation or amusement
(b) promoting commerce and industry
(c) promoting art
(d) promoting science
(e) promoting religion
(f) promoting charity
(g) promoting pension or superannuation schemes, or
(h) promoting any other object useful for the community or country.

A7.5 For companies that choose to have the objects clause, or for companies limited by
guarantee that must have the objects clause, the Companies Act 2016 provides that the
company shall be restricted from carrying on any business or activity which is not within
those objects [s 35(2)].

A7.6 The objects clause relates to the capacity of a company to enter into transactions. Under
s 20 of the Companies Act 2016, a transaction which falls outside the objects clause is an
ultra vires transaction but is not invalid merely because of the company’s lack of capacity.
Also, under s 20 of the Companies Act 2016, the fact that the transaction is an ultra vires
transaction may be relied on by a member to bring an action to restrain the company from
entering into the transaction. However, it is not clear whether the position under the
former s 20 of the Companies Act 1965 regarding the enforceability of an ultra vires
transaction vis-a-vis third parties is retained.

A8 THE USE OF THE COMMON SEAL

A8.1 A company may choose whether to have a common seal. A company that chooses not to
have a common seal can still enter into a contract.

A9 CONTRACTING WITH A COMPANY AND EXECUTION OF DOCUMENTS

A9.1 A company can make a contract through:
- a person acting under the company’s express or implied authority, or
- on behalf of the company, orally by a person acting under the company’s express or
  implied authority.

A9.2 A company may execute a document by:
- affixing of its common seal, subject to the conditions or limitations in the constitution,
  or
- by signing the document.

A9.3 The document is validly executed if signed by (s 64 and s 66):
- at least two authorised officers, one of whom shall be a director. The authorised officer
  may be:
  (a) a director of the company
  (b) a secretary of the company, or
  (c) any other person, approved by the Board.
- in the case of a sole director, by that director in the presence of a witness who attests
  the signature.

A9.4 A company may empower any person to execute deeds or other documents on its behalf.

A9.5 A document requiring authentication by the company may be signed by an authorised
officer.
A10  PRE-INCORPORATION CONTRACTS

A10.1 A pre-incorporation contract is binding on the company if the company ratifies it after its incorporation.

A10.2 Prior to ratification, the person entering into the contract on behalf of the soon-to-be incorporated company will be personally liable for the contract [s 65(1)].

A10.3 The Companies Act 2016, unlike the Companies Act 1965, does not contain a provision dealing with an agreement to exclude a promoter from being liable for the pre-incorporation contract if it is not ratified by the company.

A11  SHARE CERTIFICATE (s 97–s 99; s 104; and s 105–s 107)

A11.1 A company is not required to issue a share certificate unless a shareholder applies for it or if this is required by the constitution.

A11.2 If a shareholder applies for the share certificate to be issued, the company has 60 days from the date of the application to send the share certificate to the shareholder. The share certificate must contain the following information:
   (a) the company's name
   (b) the class of shares held by the shareholder, and
   (c) the number of shares held by him.

A11.3 The company must replace any share certificate which is lost or destroyed if the owner applies for a new share certificate.

A12  REGISTER OF MEMBERS AS EVIDENCE OF TITLE (s 101–s 102)

A12.1 The Companies Act 2016 provides that when a person's name is put in the register of members, this is prima facie evidence of title to the shares. The share certificate is no longer evidence of title to the shares, unlike the position under the Companies Act 1965.

A12.2 The registered shareholder is the only person entitled to:
   (a) exercise the right to vote attaching to the share
   (b) receive notices
   (c) receive a distribution in respect of the share, if any, and
   (d) exercise the other rights and powers attached to the share.

   These rights are subject to other provisions in the Companies Act 2016 dealing with rights of shareholders and the exercise of voting power.

A12.3 The company secretary has the duty to ensure that the register of members is properly kept and maintained regularly, and all the particulars on issuance and transfer of shares are entered into the register.

A13  RECTIFICATION OF REGISTER OF MEMBERS

A13.1 The person whose name has been wrongly entered into or omitted from, the register of members, may apply to the court to:
   (a) order the company to rectify the register of members
   (b) order compensation to be paid by the company or an officer who has caused the error or omission for any loss sustained, or
   (c) obtain both rectification and compensation.
A14  TRANSFER OF SHARES

A14.1 A shareholder who wants to transfer his shares must do so by using a duly executed and stamped instrument of transfer. This is the same position as the Companies Act 1965.

A14.2 The company must register the transfer within 30 days from the receipt of the instrument of transfer. The company may refuse to do so in the following situations:

(a) where the constitution permits the directors to refuse or delay registration for reasons stated

(b) the directors passed a resolution to refuse or delay the registration of the transfer within 30 days from the receipt of the instrument of transfer, and the resolution sets out in full the reasons for refusing or delaying the registration

(c) the notice of the resolution — and in the case of a public company, including the reasons referred to in paragraph (b) — is sent to the transferor and to the transferee within seven days of the resolution being passed, or

(d) if the shareholder fails to pay the company an amount due in respect of those shares, unless the constitution provides otherwise.

A14.3 The court has the power to order for the transfer to be registered by the company where there is no well-founded reasons for the refusal.

A15  TRANSMISSION OF SHARES

A15.1 If shares are transmitted to a person by operation of law, the person will be registered as a member if he notifies the company in writing of his wish to be registered as shareholder.

A15.2 The person may elect for the shares to be registered in another person's name.

A15.3 If a member dies, the person entitled to the title to the shares is the legal personal representative. In the case of a joint holder, it is the survivor.

A16  A COMPANY MAY REQUIRE DISCLOSURE OF BENEFICIAL INTEREST IN VOTING SHARES

A16.1 The power to require disclosure of beneficial interests in voting shares has been extended to be exercisable by any company. Under the Companies Act 1965, this was only exercisable for a public-listed company (PLC).

(B) LEGAL FRAMEWORK FOR MANAGING AND ALTERING SHARE CAPITAL STRUCTURE

B1  CONSEQUENCES OF THE MOVE TO A NO PAR VALUE (NPV) ENVIRONMENT

B1.1 The Companies Act 2016 introduces the no par value (NPV) environment. Section 74 of the Companies Act 2016 provides that all shares issued before or upon the commencement of the Companies Act 2016 shall have NPV.

B1.2 In a NPV environment, shares are issued at a price to be determined by the directors. This NPV regime replaces the regime under the Companies Act 1965 that requires a company to determine the par value or the nominal value of its shares. Previously, under the Companies Act 1965, the company must state its authorised share capital and minimum/nominal/par value for each share, and the number of shares issued by the company must not exceed its authorised share capital. Under the Companies Act 2016, a newly incorporated company is
not required to state its authorised share capital or the nominal value of its shares; these concepts are no longer applicable. Consequently, shares issued at a discount, shares issued at a premium, and the share premium account have become redundant.

B1.3 Existing companies which may still have funds in their share premium accounts are given a certain time frame to utilise the amount in the share premium account (s 618).

B1.4 During the transition period, the amount in the share premium account must be utilised, after which, the amount will be part of the company's subscribed capital and cannot be used except in accordance with the Companies Act 2016. The transition period is a 24-month period to enable companies to utilise any amounts outstanding in its existing share premium account.

B1.5 During the transition period, the amount remaining in the share premium account can be used for the following purposes:

(a) provide for the premium payable on redemption of debentures or redeemable preference shares previously issued
(b) write off —
   • the preliminary expenses of the company incurred prior to the NPV regime, or
   • the expenses incurred, or commissions or brokerages paid or discounts allowed, before or upon the commencement of the NPV regime, for any duty, fee or tax payable on or in connection with any issue of shares of the company
(c) pay up, under an agreement made before the commencement of the NPV regime, shares which were unissued before that date and which are to be issued upon that date to members of the company as fully paid bonus shares
(d) pay up, in whole or in part, the balance unpaid on shares issued before the commencement of NPV regime to members of the company, or
(e) pay dividends declared before the commencement of the NPV regime, if such dividends are satisfied by the issue of shares to members of the company.

B1.6 The company may also use the amount outstanding to the credit of its capital redemption reserve account to pay up shares which were unissued before the NPV regime and which are to be issued to members of the company as fully paid bonus shares.

B2 TREATMENT OF PARTLY PAID SHARES

B2.1 The Companies Act 2016 retains the law under the Companies Act 1965 that allows a company to issue shares as partly paid. The rules under the former Table A of Companies Act 1965 are now stated in the Companies Act 2016 under s 82 and s 83. These provisions deal with the procedure for calls to be made, the consequences of non-payment, and the procedure for forfeiture of the shares.

B2.2 Because of the NPV environment, s 618(6) provides that the shareholders remain liable in respect of money unpaid on shares for shares issued prior to the Companies Act 2016, whether for the premium or the nominal value of the shares. The amount unpaid shall be the difference between the price of issue, excluding the premium, and the amount paid on the shares.

B2.3 Subject to the constitution, where the shares are not fully paid up, the company is entitled to a lien over [s 111(1)]:

(a) the shares, and
(b) any dividend payment on the shares.

B2.4 The company may also sell the shares in any manner that the directors consider appropriate [s 111(2)]. The directors also have the discretion to refuse to register a transfer of shares over which the company has a lien, unless the constitution provides otherwise.
B3 POWER TO ISSUE SHARES

B3.1 The power to issue shares is exercisable by the directors but the prior approval of the shareholders by way of a resolution of the company must be obtained before the directors can allot shares.

B3.2 Section 75 of the Companies Act 2016 also requires the prior approval of the shareholders be obtained before the directors can exercise the following powers:

(a) to grant rights to subscribe for the shares
(b) to convert any security into shares of the company, or
(c) to allot shares under an agreement or option or offer.

B3.3 The approval may be given with or without conditions and may be confined to a specific exercise of the power or may apply to the exercise of that power generally. The general meeting reserves the power to revoke or vary any approval previously given [s 76(4)].

B3.4 For a public company, this approval expires at the earlier of:

(a) the conclusion of the next annual general meeting after the approval was given, or
(b) the expiration of the period within which the next annual general meeting is required by law to be held.

B3.5 For a private company, the approval is valid for not more than 12 months after the approval is given. This requires the authority to be renewed annually.

B4 PRE-EMPTION RIGHTS CLAUSE

B4.1 Any new shares to be issued by a company must first be offered to existing shareholders in a manner that will maintain the relative voting and distribution rights of those shareholders (s 85).

B4.2 This is subject to the constitution, which may provide differently.

B4.3 A pre-emption rights clause is intended to prevent the dilution of existing shareholdings by giving the existing shareholders the right to subscribe for new shares to maintain their shareholding proportionately. A pre-emption rights clause serves to protect existing shareholders’ voting power by entitling them to participate in the issuance of new shares and gives them the option whether or not they want to participate in the issuance of new shares.

B5 TYPES/CLASSES OF SHARES AND THEIR RIGHTS

B5.1 A company may issue shares with different rights. This power is subject to the constitution (s 69). The shares are in the same class if the rights attached to the shares are identical in all respects [s 89(1)].

B5.2 Where a company issues shares with different rights, the constitution must state that the company's share capital is divided into different classes of shares and what are the voting rights of each class of shares[s 90(1)]. Subject to the constitution, a company may also issue shares with:

(a) special, limited or conditional voting rights [s 69(d)], or
(b) no voting rights.

B5.3 Non-voting shares must be described as such in the share certificate, prospectus or directors’ report[s 90(2)]. However, this rule does not apply to preference shares [s 90(2)].
B5.4 A company cannot allot any shares as preference shares or convert issued shares into preference shares unless this is provided for by the constitution [s 91(4)].

B5.5 Section 71 of the Companies Act 2016 provides that a company share, other than preference shares, confers on the shareholder the following rights:
(a) the right to attend, participate and speak at a meeting
(b) the right to vote on a show of hands on any resolution of the company
(c) the right to one vote for each share on a poll on any resolution of the company
(d) the right to an equal share in the distribution of the surplus assets of the company, or
(e) the right to an equal share in dividends.

B5.6 Section 91(4) of the Companies Act 2016 requires that preference shareholders' rights must be expressly provided in the constitution in relation to:
(a) repayment of capital
(b) participation in surplus assets and profits
(c) cumulative or non-cumulative dividends
(d) voting, and
(e) priority of payment of capital and dividend in relation to other shares or other classes of preference shares.

B5.7 Preference shareholders have the right to vote on a variation of their class rights (s 91–s 96).

B5.8 The Bursa Malaysia Listing Requirements (BMLR) also requires a public-listed company to provide in its constitution that preference shareholders have the right to vote:
(a) on a proposal to reduce the company's share capital, and
(b) on a proposal for the disposal of the whole of the company's property, business and undertaking.

B5.9 Preference shareholders do not normally have voting rights. Historically, under s 148(2) of the Companies Act 1965, preference shareholders' right to vote is exercisable under limited circumstances:
(a) when their dividends are in arrears and unpaid
(b) upon any resolution for the winding-up of the company, or
(c) upon any resolution which varies the rights attached to such shares.

Under the Companies Act 2016, it is not clear if preference shareholders have the right to vote on a winding up and when their preference dividends are in arrears.

It is possible for the constitution to stipulate instances where preference shareholders can vote, including the circumstances that were dealt with by the former s 148(2)(a) and (c) of the Companies Act 1965 relating to arrears in preferential dividends and upon winding up, as well as to ensure a public-listed company complies with the BMLR.

Procedure for variation of class rights

B5.10 The Companies Act 2016 retains the rules of the Companies Act 1965 which provide for the variation of the rights of shareholders by:
(a) cancelling or abrogating the right attached to the shares
(b) altering or changing existing rights
(c) the issue of new preference shares ranking equally with existing preference shares, unless the constitution or the terms of issue of the existing preference shares authorises the company to issue new preference shares with the same rights as existing preference shares, or
(d) amending the provision in the constitution that relates to how class rights are to be
varied \([s 339(6)(a)]\), by inserting a provision in the constitution that relates to how class rights are to be varied \([s 339(6)(a)]\) and any abrogation of existing provision \([s 339(6)(b)]\).

The issue of new shares, other than new preference shares, is not a variation of existing shareholders' rights. This follows the common law which lays down the principle that the issue of new shares is not considered as a variation of existing shareholders' rights because the voting rights do not change. The \textit{Companies Act 1965} at Article 5 of Table A provides that the issue of any shares could be considered as a variation provided this is expressly stated in the constitution. Since Table A has been superseded, the \textit{Companies Act 2016} reiterates the common law position.

B5.11 There are two ways to vary class rights:

(a) By following the procedure as stated in the constitution for varying class rights. The constitution can thus provide for a higher voting percentage than what is stated under the \textit{Companies Act 2016}.

(b) With the consent of the class of shareholders. The consent is to be obtained through either:
- written consent representing at least 75% of the total voting rights of holders of shares in the class, or
- a special resolution passed at a separate general meeting of holders of shares in the class sanctioning the variation \([s 91(2)]\).

B5.12 A company may also entrench the class rights or make it unalterable by including such a provision in the constitution.

B5.13 After the class rights are varied, the company must inform each shareholder in that class regarding the variation. A written notice must be given within 14 days of the variation.

B5.14 Variation in class rights may be challenged in the following ways:

(a) Any shareholder representing not less than 10% of shares of that class can challenge the variation.

(b) Application to the court to set aside the resolution must be made within one month of the resolution.

The challenge can be made even if those challenging the variation have originally voted in favour of the variation.

B5.15 Where the variation is not challenged, the variation takes effect 30 days after it is made, i.e., after the resolution is passed.

B5.16 The provisions in the \textit{Companies Act 2016} relating to meetings procedure also apply to class meetings. However, there are several provisions dealing specifically with quorum and the right to demand for a poll during a class meeting \((s 339)\).

(a) For a meeting of a class of shares:
- the quorum for a class meeting is two persons present holding at least 1/3 of the number of issued shares of that class, excluding any shares held as treasury shares
- for an adjourned meeting, one person present holding shares of that class unless the constitution states otherwise.

(b) For a meeting of a class of members:
- the quorum for a class meeting is two persons of the class present, in person or by proxy, who together hold at least 1/3 of the voting rights of that class
- for an adjourned meeting, one person present holding shares of that class unless the constitution states otherwise.
(c) Any holder of shares of that class or any member present in person or by proxy may demand for a poll.

B6 INTRODUCTION OF THE SOLVENCY TEST AND THE SOLVENCY STATEMENT

B6.1 The Companies Act 2016 introduces the solvency statement (s 113) and the solvency test (s 112). Several transactions involving the company’s capital can only be carried out if the company complies with the solvency test, which must be made by way of a solvency statement.

B6.2 The solvency statement is a statement made by each director that they have formed an opinion that the company satisfies the solvency test in relation to the transaction. The directors’ opinion must be:
(a) based on the directors’ inquiry into the company's state of affairs and prospects, and
(b) must take into account all of the company’s liabilities including contingent liabilities.

B6.3 The solvency statement is to be:
(a) made in a manner determined by the Registrar, and
(b) signed by each director making the statement with the director’s name and must be dated.

B6.4 (a) For a reduction of capital and redemption of redeemable preference shares, the solvency statement must be made by all directors.
(b) For share buybacks and giving of financial assistance, the solvency statement must be made by a majority of directors.

B6.5 The solvency test operates on the basis that the company must make sure that it has sufficient funds to pay off its debts to its creditors. The Companies Act 2016 requires the solvency test to be complied with in relation to:
(a) redemption of redeemable preference shares
(b) reduction of capital, and
(c) giving of financial assistance.

B6.6 For these transactions, the solvency test is to ensure that:
(a) Immediately after the transaction, there is no ground for the company to be unable to pay off its debts.
(b) EITHER:
   • if the intention is to wind up the company within 12 months of the transaction date, the company will be able to pay its debts in full within 12 months after commencement of winding up, OR
   • in other cases, the company will be able to pay off its debts as they fall due during the 12 months from the transaction date.
(c) The asset of the company is more than the liability of the company at the date of the transaction.

B6.7 For a share buyback, the solvency test is a two-pronged test, as follows [s 112(2)(a) & (b); s 112(3)(a) & (b)]:
(a) the company will not become insolvent and its capital is not impaired at the date of the solvency statement. A company shall be deemed to be solvent if it is able to meet its debts when they become due without any substantial disposition of assets outside the ordinary course of business, restructuring its debts, externally forced revision of its operations, or other similar actions. The company’s capital is impaired if the value of its net assets is less than the aggregate amount of all shares of the company after the share buyback, and
(b) the company must remain solvent during the six months after the date of declaration, ie the solvency statement.

B6.8 Penalty for contravention: A director who makes the solvency statement without having reasonable grounds for the opinion commits a criminal offence and could be liable on conviction to imprisonment not exceeding five years or to a fine not exceeding RM500,000 or both (s 114).

B7 CHANGES TO THE PROHIBITION ON GIVING OF FINANCIAL ASSISTANCE (s 123–s 126)

B7.1 The Companies Act 2016 introduces a more flexible regime in relation to a company giving financial assistance to a person who acquires the company’s shares. Historically, under the Companies Act 1965:

(a) a company is prohibited from financially assisting a person for the purpose of or in connection with a purchase or subscription of the company’s shares

(b) a subsidiary company is prohibited from financially assisting a person for the purpose of or in connection with a purchase or subscription of its holding company’s shares.

B7.2 Case law under the former Companies Act 1965 that provides guidance to determine whether a transaction is a financial assistance transaction is still relevant.

B7.3 The Companies Act 2016 clarifies that there is financial assistance when a company reduces or discharges any liability of a person who has acquired shares in the company or in its holding company where the liability has been incurred for the purpose of the acquisition of the shares.

B7.4 The Companies Act 2016 allows financial assistance to be given by companies other than a public-listed company provided:

(a) the assistance does not exceed 10% of shareholders’ funds. This means that the aggregate amount of the financial assistance and any other financial assistance that has not been repaid does not exceed 10% of the issue of shares and reserves of the company (ie shareholders’ funds) based on the most recent financial statements

(b) a special resolution is passed by shareholders

(c) the company fulfils the solvency test. The board must pass a board resolution by at least majority votes before the assistance can be given. The directors who approved the assistance must make a solvency statement.

(d) the company receives fair value in connection with the giving of financial assistance, and

(e) the financial assistance is given not more than 12 months after the day the solvency statement was made.

B7.5 The directors are required to make a solvency statement that they have formed an opinion that the company satisfies the solvency test in relation to the giving of the financial assistance. Since the solvency statement must be made by all the directors, there must be unanimous agreement from the board regarding the company’s ability to comply with the solvency test.

B7.6 Effect of a contravention:

(a) criminal liability on the officer involved in the contravention

(b) if convicted, the person may be ordered to compensate the company or any other person who has suffered loss or damage as a result of the contravention

(c) the company is criminally liable for the contravention.
B7.7 The Companies Act 2016 retains the position under the Companies Act 1965 in that the company or any other person can recover the amount of any loan made thereunder or any amount for which it becomes liable. The validity and enforceability of the financial assistance and any contract or transaction connected to the financial assistance is not affected merely due to the contravention.

B8 CHANGES TO SHARE BUYBACK

B8.1 A significant change to the share buyback rules introduced by the Companies Act 2016 relates to allowing a public-listed company to carry out an off-market purchase of its shares. Under the Companies Act 2016, a public-listed company may buyback its own shares if it is so authorised by its constitution, either

(a) through the stock exchange in accordance with the rules of the stock exchange, or
(b) buy back its own shares otherwise than through a stock exchange if the purchase is:
   • permitted under the relevant rules of the stock exchange, and
   • made in accordance with such requirements as may be determined by the stock exchange.

B8.2 A majority of the directors must make a solvency declaration before the company can buy back its shares. This is similar to the requirement under the Companies Act 1965. The solvency statement must be made by a majority of the directors and these directors must make a declaration that:

(a) it is necessary for the company to buy back its shares
(b) the share buyback is made in good faith and in the best interest of the company.

B8.3 The solvency statement must be:

(a) signed by each director who makes the statement and must be dated
(b) made in a manner determined by the Registrar.

B8.4 The solvency statement for a share buyback is a statement made by each director that they have formed an opinion that the company satisfies the solvency test in relation to the transaction. The directors’ opinion must be:

(a) based on the directors’ inquiry into the company’s state of affairs and prospects, and
(b) must take into account all of the company’s liabilities including contingent liabilities.

B8.5 For a share buyback, the solvency test is a two-pronged test — see B6.7.

B8.6 The BMLR requires that if any director, whether or not that director signed the declaration, is of the opinion that it is likely that the listed corporation will not remain solvent at the time of the relevant purchase(s), the director must immediately notify the board of directors of the listed corporation in writing and lodge a copy of such notice with the Exchange. The giving of such notice will revoke the validity of the earlier solvency declaration.

Clarification on the treatment and use of shares bought back and treasury share

B8.7 The directors may resolve to:

(a) cancel the shares — shares that are bought back are deemed to have been cancelled unless they are held as treasury shares
(b) keep them as treasury shares, or
(c) retain a part as treasury shares and cancel the other part.

B8.8 When the Companies Act 1965 introduced the share buyback provision, it allowed a company to hold the shares bought back in “treasury”, ie as treasury shares. The Companies
Act 2016 provides further clarification for the treatment of these treasury shares, in that treasury shares:
(a) do not have voting rights
(b) do not have the right to receive dividends or any other distributions including any distribution of assets upon the winding up of a company [s 127(8)]
(c) cannot be counted in calculating the number of shares or percentage in relation to [s 127(9)] —
   (i) substantial shareholding
   (ii) takeovers
   (iii) notices
   (iv) the requisitioning of meetings
   (v) quorum for a meeting, and
   (vi) the voting result.

B8.9 Treasury shares may be used for the following:
(a) distributed as share dividends
(b) resold any of the treasury shares through stock exchange
(c) transferred for the purpose or under an employee share scheme
(d) used as consideration for the company’s purchase
(e) cancelled in part or entirely
(f) be transferred for use for other purpose that the Minister may prescribe.

B8.10 Where the shares or treasury shares are cancelled:
(a) the costs of cancellation shall be applied in reducing the profits otherwise available for the payment of dividends
(b) the company’s issued share capital is reduced accordingly. However, this does not mean that there is a reduction of capital under the Companies Act 2016.

B9 CHANGES TO REDEMPTION OF REDEEMABLE PREFERENCE SHARES

B9.1 If authorised by the company’s constitution, a company may issue preference shares which are redeemable at a future date and redeemable at the company’s option.

B9.2 In line with the introduction of the solvency test, the Companies Act 2016 provides that the redemption of the redeemable preference shares may be funded by:
(a) profits
(b) fresh issue of shares, or
(c) capital of company. Redemption out of the capital of the company is subject to:
   (i) all directors have made a solvency statement, and
   (ii) company lodging the solvency statement with the Registrar.

B9.3 The preference shares to be redeemed must also have been fully paid for.

B10 REDUCTION OF CAPITAL – THE “SOLVENCY TEST” PROCEDURE

B10.1 The Companies Act 2016 introduces an alternative to the existing capital reduction procedure under the Companies Act 1965. Under the Companies Act 2016, a company may reduce its share capital by:
(a) a court sanctioned procedure (s 116)
(b) a solvency test procedure (s 117).
B10.2 This changes the law under the *Companies Act 1965* which allows a reduction of capital only if it is confirmed by the court. The *Companies Act 2016* retains this court sanctioned procedure but introduces an alternative capital reduction procedure based on a solvency test. Since the procedure for court sanctioned reduction of capital is still the same as the procedure laid down under the *Companies Act 1965*, the following discussion focuses on the reduction by way of a solvency test.

B10.3 Under s 117 of the *Companies Act 2016*, private or public companies have the option to undertake capital reduction without resorting to the court sanction process via the provision of a solvency statement.

B10.4 The solvency statement procedure is as follows:

(a) the board to make a solvency statement

- for a private company, the board makes a solvency statement in accordance with s 112 and s 113, which is to be made within 14 days ending with the date of the resolution
- for a public company, the board makes a solvency statement in accordance with s 112 and s 113, to be made within 21 days ending with the date of the resolution

(b) pass a special resolution to reduce its capital

- if the special resolution is to be passed by way of a written resolution, every copy of the resolution must be accompanied by the solvency statement [s 117(5)(a)]
- if the special resolution is to be passed at a general meeting, the solvency statement must be made available for inspection by any member throughout the meeting [s 117(5)(c) and (6)(a)]

(c) send a notice to the Director General of Inland Revenue Board and the Registrar within seven days of the resolution being passed

(d) await any objection from the company’s creditors for a period of six weeks from the date of the resolution. The company must make the solvency statement available for inspection by its creditors for six weeks after the date of the resolution [s 117(5)(c) and (6)(b)]

(e) if no objection is received from any of the company’s creditors after six weeks, the relevant documents may be lodged with the Registrar before the end of eight weeks from the date of the resolution [s 119(1)]

(f) the capital reduction takes effect when the Registrar records the information lodged in the appropriate register [s 119(3)].

B10.5 The *Companies Act 2016* envisages three ways for a company to reduce its capital:

(a) by extinguishing or reducing the liability on any of its shares in respect of share capital not paid up

(b) cancel any paid up capital not represented by available assets

(c) by paying off any paid up share capital which is in excess of the needs of the company.

B10.6 Section 117(4) states that if the reduction is by way of cancellation of any paid up share capital that is lost or not represented by available assets, the company need not comply with the solvency requirements.

B10.7 A director making a statement under s 119(2)(a), which relates to the dismissal of a creditor’s application, commits an offence if the statement is:

- false, or
- not believed by the said director to be true.

On conviction, the director will be liable to imprisonment for a term not exceeding five years, or to a fine not exceeding RM3 million, or to both.
B11  CHANGES TO DIVIDENDS RULES

B11.1  Section 131 states that dividends can be paid out of available profits only if the company is solvent.

B11.2  Section 132(3) of the Companies Act 2016 introduces a trading solvency test and defines solvency as the company's ability to pay its debts as and when it becomes due within 12 months immediately after the distribution of profits to shareholders is made. Under the Companies Act 1965, there is uncertainty as to what amounts to "availability of profits" due to the lack of statutory definition for the term "available profits". Case law states that the company has available profits if the company is solvent. Solvency is determined by looking at the company's ability to pay off its debts as it falls due (trading solvency) and/or where its assets are more than its liability (balance sheet solvency) [see Chip Thye Enterprise Pty Ltd (in liq) v Phay Gi Mo and Ors (2004) MSCLC 97; Hilton International Ltd (in liq) v Hilton & Anor (1988) 4 NZCLC 64,721]. The Companies Act 2016 prioritises the use of the trading solvency test for dividends distribution.

B11.3  The Companies Act 2016 repeals the rule under the Companies Act 1965 that states that dividends are payable by using the amount in the share premium account.

B11.4  Although dividends must be declared before they are distributed, this must first be authorised by the company's directors. They may do so at any time and in such amount as they consider appropriate, if they are satisfied that the company will be solvent immediately after payment.

B11.5  A new rule is introduced which requires the directors to take all necessary steps to prevent a distribution from being made if after distribution is authorised, the directors cease to be satisfied on reasonable grounds that the company will be solvent immediately after the distribution is made.

B11.6  Under the Companies Act 2016, there is enhancement of the right to recover unlawfully distributed dividends:

(a) a director who knowingly pays or permits to be paid dividends not from profits is personally liable to compensate the company to the extent by which the dividends exceed the profits [s 133(2)]

(b) if the company recovers the whole amount from a director, the director is entitled to recover contribution from any other person who has been found liable who has directed or consented to the payment [s 133(3)].

B11.7  The company may also recover from any shareholder who received the dividends, except where the shareholder:

(a) has received such distribution in good faith, and

(b) has no knowledge that the company did not satisfy the solvency test.

The amount of contribution paid to the shareholder is the amount which exceeds the value of any distribution that could have properly been made.
(C) GOVERNANCE FRAMEWORK

C1 DIVISION OF POWER BETWEEN THE BOARD AND SHAREHOLDERS

C1.1 During a shareholders’ meeting, the chairperson of a meeting of members of a company must give the members at the meeting a reasonable opportunity to question, discuss, comment, or make recommendations on the management of the company [s 195(1)].

C1.2 Any recommendations made to the board relating to the management of the company is binding:
   (a) if the constitution provides that there is a right to make recommendation, or
   (b) the general meeting passes a special resolution to instruct the board to do or refrain from doing something,
   provided that the recommendation is in the best interests of the company [s 195(2) and (3)].

C1.3 This changes the traditional position regarding the division of powers between the board of directors and the general meeting, which prohibited the general meeting from interfering with the directors’ exercise of power to manage the affairs and business of the company unless the company’s articles give such power to the shareholders.

C1.4 The power of the general meeting to make binding resolutions on the board is subject to other provisions of the Companies Act 2016 that relate to meetings procedures.

(D) CHANGES TO THE LAW ON MEETINGS

D1 CONVENING A MEETING

D1.1 The Companies Act 2016 provides that a meeting may be convened by the following:
   (a) board of directors [s 310(a)]
   (b) by any member [s 310(b)]
      Such member must hold at least 10% of the issued share capital of the company or a lower per centum as specified in the constitution; or if the company has no share capital, by at least 5% in the number of the members
   (c) by the directors when requested by members (s 311)
   (d) by the court (s 314).

D1.2 Under s 311, the directors shall call for a meeting of members once the company has received requisition to do so from:
   (a) members representing at least 10% of the paid up capital of the company carrying the right of voting at meetings of members of the company, excluding any paid up capital held as treasury shares, or
   (b) in the case of a company not having a share capital, members who represent at least 5% of the total voting rights of all members having a right of voting at meetings of members.

D1.3 When a request is made by members who fulfil the shareholding or membership requirement, the directors must:
   (a) convene a meeting within 14 days from the date of the requisition
   (b) hold the meeting on a date not later than 28 days after the date of the notice to convene the meeting.
D1.4 The resolution that may be moved at this meeting must not be a resolution that:
(a) if passed, would be ineffective whether by reason of inconsistency with any written law or the constitution
(b) is defamatory of any person
(c) is frivolous or vexatious, or
(d) if passed, would not be in the best interests of the company.

D1.5 Members may convene a meeting at the company’s expense if they had made a request to the directors to convene a meeting under s 311 and the directors have failed to do so. However, to do so, the resolution to be moved at a meeting must not be a resolution that:
(a) if passed, would be ineffective whether by reason of inconsistency with any written law or the constitution
(b) is defamatory of any person
(c) is frivolous or vexatious, or
(d) if passed, would not be in the best interests of the company.

D2 POWER OF MEMBERS TO REQUEST FOR CIRCULATION OF STATEMENTS OR RESOLUTIONS
D2.1 The threshold for members to circulate statements by members or to give notice of resolutions:
(a) has been reduced from 5% to 2.5 % of paid up capital, or
(b) has been reduced from 100 members to 50 members.

For a company limited by guarantee, the threshold is members representing not less than 2.5% of the total voting rights of all members having the right to vote.

D2.2 However, the Companies Act 2016 enables members holding at least 5% of paid up capital of a private company to request directors to hold a physical meeting where:
(a) it has been more than 12 months since the holding of a meeting which is requisitioned by members under s 311, and
(b) the proposed resolution is not defamatory, frivolous or vexatious, or would not be in the company’s best interests.

D2.3 The time frame to make the request is:
(a) in the case of requisitions requiring notice of resolution, at least 28 days before the meeting. This has changed from not less than six weeks before the meeting under the Companies Act 1965.
(b) in the case of any other statement, at least seven days before the meeting.

D2.4 The members making the requisition must bear the expenses incurred by the company in complying with the request for circulation of the statement unless the company resolves otherwise.

D2.5 The company is not required to comply with the request unless there is deposited with or tendered to the company, not later than one week before the meeting, a sum reasonably sufficient to meet the company’s expenses in doing so.

D3 ANNUAL GENERAL MEETING (AGM) OF PUBLIC COMPANY
D3.1 A public company is required to hold an AGM in every calendar year. The Companies Act 2016 requires that the AGM must consider the following matters:
(a) the laying of audited financial statements and the reports of directors and auditors
(b) election of directors in place of those retiring
(c) appointment and fixing of directors’ fees.

D3.2 Under the Companies Act 2016, the AGM must be held:
(a) within six months of the company’s financial year end, and
(b) not more than 15 months after the last preceding AGM.

D4 ANNUAL GENERAL MEETING OF PRIVATE COMPANY

D4.1 For private companies, the AGM is optional. This is a major change from the Companies Act 1965 where it is mandatory for all companies to hold an AGM.

D4.2 However, the Companies Act 2016 enables members holding at least 5% of paid up capital of a private company to request the directors to hold a physical meeting where:
(a) it has been more than 12 months since the holding of a meeting which is requisitioned by members under s 311, and
(b) the proposed resolution is not defamatory, frivolous or vexatious, or would not be in the company’s best interests.

D4.3 For a private company, matters which are normally considered at an AGM will be dealt with in the following manner:
(a) accounts are to be circulated within six months of the financial year-end and lodged with SSM within a month from circulation
(b) auditors may be appointed first by the board, and then to be approved by members through an ordinary resolution (simple majority)
(c) the retirement and election of directors can be decided by the members by way of written resolution.

D5 PROCEDURE FOR PASSING A WRITTEN RESOLUTION

D5.1 One of the changes introduced under the Companies Act 2016 relates to the use of the written resolution. The changes are as follows:
(a) the written resolution can only be used by a private company and may be proposed by the board or any member
(b) the written resolution cannot be used to pass a resolution to remove a director before the expiration of his term of office
(c) the written resolution cannot be used to pass a resolution to remove an auditor before the expiration of his term of office
(d) the voting percentage to pass a resolution by way of a written resolution procedure depends on the type of resolution required to pass the “subject matter” of the resolution as required by the Act. (Note that this changes the rule under the Companies Act 1965 which requires unanimous consent.)
(e) the effective date of the resolution is when the required majority of eligible members have signified their consent.

D5.2 The Companies Act 2016 also specifies the method for signifying consent:
(a) the company receives an authenticated statement which identifies the resolution and indicates its members’ agreement
(b) unless the constitution provides differently, a time frame of 28 days beginning from date of circulation is given for the members to signify their consent. If the consent is given after the time lapses, the consent is ineffective.
(c) the consent may be in hard copy or electronic form. However, under s 308, if the company provides its email address, the company is deemed to agree that correspondence is to that address unless stated otherwise.

D6 QUORUM AND VOTING

D6.1 Where a member appoints more than one representative or proxy, they shall be counted as one member for the purpose of quorum (s 328).

D6.2 Joint holders of shares in a company are treated as one shareholder. The voting by the joint holders of shares in a company is not valid if the joint holders do not exercise their vote in the same way (s 295). This changes the position under the Companies Act 1965 where Article 55 of Table A provides that the vote of the most senior joint holder who casts a vote shall be accepted to the exclusion of the votes of the other joint holders, and that seniority shall be determined by the order in which the names of the joint holders appear in the register of members.

D6.3 A member who is a body corporate may appoint more than one corporate representative but they must exercise any power in the same way for the power to be treated as exercised in that way. If the representatives do not exercise the power in the same way, the power is treated as not exercised. Thus, for the power to be exercised, their votes must be cast in the same manner.

D6.4 A proxy may vote on a show of hands if he is the only proxy appointed by a member. If there is more than one proxy appointed, they can only vote on a poll. However, if the company is a public-listed company, the voting entitlement of the proxy depends on the listing requirements.

D7 APPOINTMENT AND REMOVAL OF PROXY

D7.1 Where a member appoints more than one proxy, the appointment is invalid if the member does not specify the proportions of his holding which are to be represented by each proxy.

D7.2 The restriction in the Companies Act 1965 relating to who may be appointed as proxy has been removed. The Companies Act 2016 provides that a member can appoint any person as his proxy.

D7.3 A proxy may be appointed as chair at a meeting of members unless prohibited by the constitution.

D7.4 There is a new provision which governs the termination of a person’s appointment as proxy. Although the proxy’s appointment may be terminated, such termination must be received before the commencement of meeting. While this is similar to Article 62 of Table A, s 338 clarifies that the termination of the proxy will have no effect on quorum, validity of proxy’s act if he is the chairperson, validity of a poll demanded by him and validity of his exercise of voting rights, unless received before the commencement of meeting.

D8 CHAIRMAN OF MEETINGS

D8.1 The chairman of the board shall be the chairperson, unless the constitution specifies who shall be the chairperson. This is similar to Article 51 of Table A, under the Companies Act 1965.

D8.2 A proxy may be appointed as chairman unless prohibited by the company’s constitution.
D9 COMPANY SECRETARIES (s 235–s 242)

D9.1 A company must have a company secretary who must be a citizen or permanent resident of Malaysia. The company secretary must be a member of a professional body recognised by SSM or a person licensed by SSM and must not be disqualified from holding the post.

D9.2 A new registration system is established for company secretaries. This register is to be kept by the Registrar and is to include the personal details of a company secretary. The Registrar is to issue a practising certificate. Existing company secretaries who are not registered under the Companies Act 2016 can only hold the post for not more than 12 months or any longer period that the Registrar may allow.

D9.3 The appointment of a company secretary must be made by the board of directors within 30 days from the date of a company’s incorporation. The board has the power to remove the company secretary. The office must not be left vacant for more than 30 days at any one time.

D9.4 A company secretary may resign from office by giving notice to the board of directors. However, the company secretary may notify the Registrar of his intent to resign if none of the directors can be communicated at the last known residential address.

D9.5 The effective date of the resignation is at the expiry of 30 days from the date of notice of resignation, or the period specified in the constitution or terms of appointment or the date of notice to the Registrar.

(E) DIRECTORS’ DUTIES AND RIGHTS

E1 DIRECTORS – DEFINITION AND QUALIFICATIONS

E1.1 The definition of a director has been changed to include “a person in accordance with whose directions or instructions the majority of the directors of a corporation are accustomed to act”.

E1.2 A public company must have at least two directors who must be resident in Malaysia, ie have his principal or only place of residence in Malaysia (s 196). Such director(s) cannot resign or vacate office if this will cause the number of the company’s directors to fall below two.

E1.3 For a private company, there must be at least one director who must be resident in Malaysia, ie have his principal or only place of residence in Malaysia.

E1.4 Directors must be at least 18 years of age.

E1.5 The circumstances that disqualify a person from being appointed as a director is enhanced. These circumstances now include:
(a) contravention of his duties as a director, and
(b) habitual contravention of the Companies Act 2016.

E1.6 The Registrar has the power to remove the disqualified person’s name from the register kept by the Registrar for that purpose.

E1.7 The following have been removed by the Companies Act 2016:
(a) the age limit of 70 years for directors of public companies and its subsidiaries
(b) the time frame to obtain share qualification if the constitution requires the directors to own minimum shareholding for being appointed.
E2  DIRECTOR’S REMUNERATION

E2.1  Public company

(a) The fees and any benefits payable to directors of a public company and a public-listed company and its subsidiaries including compensation for loss of office must be approved by the general meeting.

(b) Section 230 replaces the provisions in Table A of Companies Act 1965 that provide for remuneration to be determined by the general meeting from time to time.

(c) The service contract (including amendments) of a director of a public company must be kept for inspection at the company’s registered office. It can be inspected by members who hold at least 5% of the total paid up of share capital of the company or at least 10% of members for a CLBG.

(d) A director’s “service contract” is a contract under which:

(i) a director of the company undertakes personally to perform services (as director or otherwise) for a public company or its subsidiary, or

(ii) services that a director of the public company undertakes personally to perform (as director or otherwise) are made available by a third party to a public company or its subsidiary.

E2.2  Private company

(a) The fees and any benefits payable to a director are to be determined by the board of directors.

(b) The details must be recorded in the minutes of the board meeting and shareholders must be informed of the approval within 14 days from the date of approval.

(c) Shareholders holding at least 10% of the voting rights of the company may request that a director’s remuneration be subject to shareholders’ approval if they view the remuneration determined by the board of directors as being unfair. The approval by shareholders may be made by way of written resolution or an ordinary resolution at a general meeting.

(d) The payment shall then be a debt owed by the director.

E3  PROCEDURE FOR BOARD MEETINGS

E3.1 The Third Schedule replaces the provisions in Table A of Companies Act 1965 relating to the procedure for board meetings. In general, the Third Schedule retains the provisions in Table A of Companies Act 1965.

E3.2 There is a new rule relating to the directors’ written resolution which must be signed or assented to by all directors. This replaces Article 90 of Table A which provides that the written resolution must be signed by all the directors for the time being entitled to receive notice of a meeting of the directors.

E3.3 Regarding notice to directors, it must be sent to every director in Malaysia and must include the time, date, place and agenda. If there is irregularity in the notice of a meeting, it is waived if all directors entitled to receive notice of the meeting attend the meeting without objection to the irregularity.

E3.4 There are clearer rules relating to committees of the board.
E4  EXEMPTION AND INDEMNIFICATION OF DIRECTORS' LIABILITY

E4.1 The *Companies Act 2016* retains the following rules under the *Companies Act 1965*:

(a) any contract by which a company exempts or indemnifies any of its officers including a director or its auditor from any liability in respect of any negligence, default, breach of duty or breach of trust towards the company is void

(b) a company is prohibited from indemnifying the directors for costs incurred in defending or settling any claims or proceedings in relation to the above liability.

E4.2 A company is allowed to indemnify an officer, a director or an auditor for any costs in legal proceedings only if:

(a) the director is found not liable

(b) the director is acquitted

(c) granted relief by the court, or

(d) where proceedings are discontinued or not pursued.

E4.3 A company is allowed to indemnify an officer, a director or an auditor against any liability and costs of civil proceedings in relation to liability to a third party for any act or omission done in their capacity as the officer or auditor of the company. However, the indemnity cannot be given for:

(a) a fine in criminal proceedings

(b) penalty imposed by regulatory authority

(c) defending criminal proceedings where he is convicted

(d) defending civil proceedings where judgment is made against him.

E4.4 A company may purchase insurance for its directors against any civil liability and costs incurred by the person in his capacity as a director. The company must obtain the prior approval of its board for the insurance. The insurance cannot be used in relation to criminal proceedings or in relation to duties owed towards the company.

E5  DUTIES OF DIRECTORS

E5.1 The *Companies Act 2016* retains the law under the *Companies Act 1965* relating to directors’ duties specifically:

(a) to act in the best interests of the company and exercise powers for a proper purpose

(b) not to make improper use of position, information, property or corporate information or to compete with the company

(c) duty of care, skill and diligence

(d) to disclose any interest in contracts involving the company to the board

(e) to disclose any interest in shares and shareholding in the company.

E5.2 The *Companies Act 2016* retains the prohibition that a director of a public company or a subsidiary of a public company must not vote on or participate in the discussion at the board meeting involving a transaction or an issue where he has an interest.

E6  SUBSTANTIAL PROPERTY TRANSACTION INVOLVING DIRECTORS, SUBSTANTIAL SHAREHOLDERS OR CONNECTED PERSONS

E6.1 The rules regarding transactions involving directors, substantial shareholders or connected persons are enhanced and clarified.

E6.2 Substantial property transaction is defined as any disposal or acquisition of shares or non-cash assets which is of a certain value as determined by the *Companies Act 2016*.

E6.3 The company is prohibited from:
(a) entering into an arrangement unless it is made subject to shareholders’ approval at general meeting
(b) carrying into effect the arrangement unless it has been approved by shareholders at general meeting.

E6.4 The transaction requires the prior approval of the company, or if the transaction is in favour of a director, substantial shareholder or connected persons of the company’s holding company, the prior approval of the holding company. For an unlisted subsidiary whose holding company is a PLC, the directors of the PLC must obtain the approval of the holding company’s shareholders.

E6.5 The requirement that the transaction must be approved by disinterested shareholders under the Companies Act 1965 has been amended to apply to a public company. A private company need not obtain disinterested shareholders’ votes.

E6.6 The effect of contravention of substantial property transactions are:

(a) the transaction is void
(b) any interested person or director who knowingly authorises the transaction is to account to the company for any gain which the person makes
(c) any interested person or director who knowingly authorises the transaction is accountable to the company and is liable jointly and severally for any loss or damage resulting from the transaction
(d) any interested person in whose favour the transaction was entered into or carried into effect and who knows that such arrangement or transaction contravenes the section is criminally liable
(e) any director who knowingly authorises the transaction is criminally liable
(f) the company may be restrained from entering or from carrying into effect the arrangement.

E7 DISPOSAL OR ACQUISITION OF ASSETS OF A SUBSTANTIAL VALUE

E7.1 The rules regarding transactions involving disposal or acquisition by a company of assets of a substantial value are enhanced and clarified.

E7.2 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.

E7.3 The above transaction is void unless:

(a) the entering into the arrangement or transaction is made subject to the approval of shareholders at a general meeting
(b) the carrying into effect of the arrangement or transaction has been approved by shareholders at a general meeting, or
(c) it was in the favour of any person dealing with the company for valuable consideration and was without actual notice of the contravention.

E8 LOANS TO DIRECTORS OR PERSONS CONNECTED TO DIRECTOR

E8.1 The rules regarding loans, guarantee or security to directors or persons connected to directors are enhanced and clarified.

E8.2 The Companies Act 2016 retains the requirement for prior approval of certain loans, guarantees or securities under the Companies Act 1965. However, if prior approval is not obtained, the company may authorise the loan:
E8.3 The *Companies Act 2016* also introduces a provision stating that if a transaction is not authorised by the company, the liability must be repaid in the following manner:

- after six months from the conclusion of the AGM, for a public company
- after 12 months from the transaction, for a private company.

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### F1 FINANCIAL STATEMENTS

**F1.1** The *Companies Act 2016* uses the term “financial statements”, which has the same definition as that used in the approved accounting standards issued or approved by the Malaysian Accounting Standards Board under the *Financial Reporting Act 1997*. The term “financial statements” replaces the terms “profit and loss accounts” and “balance sheets”, which were used to refer to the company’s accounts that must be laid before the Annual General Meeting (AGM) under the *Companies Act 1965*.

**F1.2** Instead of the requirement to lay the accounts before a meeting of members under the *Companies Act 1965*, s 256 of the *Companies Act 2016* requires the financial statements and reports to be circulated to:

- (a) every member of the company
- (b) every person who is entitled to receive the notice of general meeting. Section 321 states that the notice must be sent to every member, director and auditor of the company
- (c) every auditor
- (d) every debenture holder upon their request.

**F1.3** For a public company, the financial statements and reports must be circulated at least 21 days before the date of its AGM. A shorter period of circulation is permitted if all members entitled to attend and vote at the AGM agree to it.

**F1.4** For a private company, the financial statements and reports must be circulated within six months of its financial year end.

**F1.5** The format of financial statements as stipulated in s 169 and the Ninth Schedule of the *Companies Act 1965*, which set out the contents of a profit and loss account and a balance sheet, has been condensed into s 249 of the *Companies Act 2016*.

**F1.6** The financial statements must be approved by the board and accompanied by a statutory declaration by the director or person primarily in charge of the financial management of the company.

**F1.7** The financial statements must still be audited but audit exemption may be given by SSM.

**F1.8** A directors’ report is still required to be prepared to accompany the financial statements, and the Fifth Schedule of the *Companies Act 2016* lists the contents of the directors’ report. The contents of the directors’ report as provided in the Fifth Schedule are similar to that stipulated in s 169 of the *Companies Act 1965*.

**F1.9** The *Companies Act 2016* introduces a business review that is optional, which may be included in the directors’ report. The contents of a business review is also found in the Fifth Schedule of the *Companies Act 2016*. 
F2 LODGEMENT OF ANNUAL RETURNS AND FINANCIAL STATEMENTS WITH THE REGISTRAR

F2.1 There is no requirement to submit the annual returns and financial statements together.

F2.2 The annual return must be lodged within 30 days of the company's anniversary date, ie the date of incorporation. If there is no change in the annual return, the company must submit a "no-change" annual return.

F2.3 A company may be struck off the Register if it fails to submit an annual return for more than three years consecutively.

F2.4 The financial statements of a public company must be lodged within 30 days of the AGM.

F2.5 The financial statements of a private company must be lodged within 30 days from the time the financial statements were circulated to its members.

F2.6 An exempt private company may, in lieu of the financial statements and reports, submit a certificate annually relating to its status as an exempt private for each financial year. This certificate must be lodged within 30 days from the date the financial reports and statements are circulated to its members.

F3 AUDITORS (s 262–s 287)

F3.1 The Companies Act 2016 differentiates the appointment of the auditor for a private company from that of a public company mainly because an AGM is no longer mandatory for private companies.

F3.2 The Companies Act 2016 requires all companies to be audited but audit exemption may be given and is being considered by SSM.

F3.3 All companies are required to have an auditor for each financial year of the company.

F3.4 The Companies Act 2016 introduces a register of firms of auditors which is kept by the Registrar. New audit firms must notify the Registrar of its name, firm number, address and other prescribed information within one month of its commencement of business.

F3.5 The Companies Act 2016 retains the powers, rights and duties of auditors given under the Companies Act 1965.

F3.6 Auditors are required to attend general meetings where the financial statements are laid before the meeting. This changes the rule under the Companies Act 1965 whereby auditors are entitled to attend AGMs but not required to do so. For a private company, the auditor must attend the meeting if notice is given to the auditor regarding the intention to move a resolution requiring the auditor to be present.

F3.7 An auditor who fails to attend commits an offence unless:
   (a) the auditor is prevented by circumstances beyond his control from attending the meeting
   (b) the auditor arranges for another auditor with knowledge of the audit to attend and carry out the duties of the auditor at the meeting. If the auditor is a partner of a firm, the person attending the meeting in place of the designated auditor must be a partner of that firm
   (c) the auditor arranges for an agent authorised by the auditor in writing to attend and carry out the duties of the auditor at the meeting.
Auditors for private companies

F3.8 The appointment is to be made by:
- For newly incorporated companies: by the board of directors at least 30 days before the end of the period for the submission of the first financial statements to the Registrar.
- To fill a casual vacancy: by the board.
- For each financial year: by the members by passing an ordinary resolution.
- If the board fails to appoint the auditor: by the members.
- Upon the application in writing from any member of the company and if the private company fails to appoint an auditor: by the Registrar.

F3.9 The auditor ceases to hold office 30 days after the circulation of the financial statements to the members unless he is reappointed. However, if no auditor is appointed, the outgoing auditor is deemed to hold office unless:
(a) he was appointed by the board
(b) the constitution require actual re-appointment
(c) the deemed re-appointment is prevented by the members representing at least 5% of total voting rights of all members who are entitled to vote on the appointment of an auditor
(d) the members have resolved that he should not be reappointed.

F3.10 If a company wishes to appoint an auditor by way of a written resolution, a copy of the written resolution must be sent to the incoming auditor and the outgoing auditor.

Auditors for public companies

F3.11 The appointment is to be made by:
- Before the first AGM: by the board of directors.
- To fill in a casual vacancy: by the board.
- For each financial year: by the members passing an ordinary resolution at the AGM.
- If the board fails to appoint the auditor: by the members
- Upon an application in writing from any member of the company and if the private company fails to appoint an auditor: by the Registrar.

F3.12 Unless the auditor is reappointed, he ceases to hold office at the conclusion of the next AGM following his appointment.

Removal of auditor

F3.13 Members may remove an auditor by passing an ordinary resolution where special notice of the resolution must be given. This is the way to remove an auditor before his terms expires.

F3.14 A copy of the notice is to be sent to the auditor concerned. The auditor is entitled to make representations, which are to be circulated to the members unless the representations are received too late. If the representations are not circulated, the auditor may require his representations to be read out during the meeting.

F3.15 The Registrar must be notified within 14 days if a resolution is passed to remove an auditor.
Resignation of auditor

F3.16 An auditor may resign by giving a notice in writing sent to the company's registered office. The resignation takes effect after 21 days from the notice or on the date specified in the notice. This changes the position under the Companies Act 1965 that resignation takes effect only upon the appointment of a new auditor and that a sole auditor cannot resign until a new auditor is appointed.

F3.17 The company must inform the Registrar of the auditor's resignation. For public-listed companies, the Bursa Malaysia Listing Requirements (BMLR) require the listed company to inform the Exchange and forward a copy of any written representations or written explanations of the resignation at the same time the copies of such representations/explanations are submitted to the Registrar under the Companies Act 2016 (para 15.22, BMLR).

F3.18 For public companies, the auditor has the right to send a statement regarding his resignation with a requisition notice for the directors to convene a general meeting to receive and consider his explanation of the circumstances connected with his resignation. The meeting must be held within 28 days from the date of the receipt of the requisition.

F3.19 The auditor who has made written representation regarding his resignation must submit a copy of that representation to the Registrar and to the Stock Exchange.

(G) CORPORATE RESCUE, REHABILITATION AND REORGANISATION

G1 SCHEME OF ARRANGEMENTS

G1.1 The Companies Act 2016 introduced several new features to schemes of arrangement. An arrangement is defined as including a reorganisation of the share capital of a company by the consolidation of shares of different classes or by the division of shares into different classes or by both these methods.

G1.2 Section 366(3) provides that a compromise or scheme of arrangement becomes binding if 75% in value of creditors present and voting approves, and the court grants approval. This replaces s 176(3) of the Companies Act 1965 that requires the support of 50% majority in number.

G1.3 An approved liquidator is required to assess the viability of the scheme and this liquidator's report is to be tabled at the creditors'/members' meeting.

G1.4 There is a new three-month period set for a restraining order, which may be extended by the court if the company applies for extension. However, the court cannot extend the restraining order for more than nine months.

G1.5 A restraining order cannot be applied against:
   (a) any action or proceeding to be taken against company by the Registrar or the Securities Commission
   (b) any action or proceeding against any person including the guarantor of the company but does not exclude the company that applied for the restraining order.

G1.6 The rights of a director appointed by court are enhanced to include access to accounting records and other records. The director is also entitled to inquire from any officer of the company any information and explanation as required by his duty.
Receivers or receivers and managers

G.1.7 The Companies Act 2016 provides that a receiver or receiver and manager may be appointed:

(a) under any instrument that confers on a debenture holder or charge holder the power to appoint a receiver or receiver and manager

(b) under any instrument that creates a charge in respect of property and undertaking of a company that confers on the charge holder the power to appoint a receiver or a receiver and manager, or

(c) by the court.

G.1.8 A receiver or receiver and manager shall have the powers set out in the Sixth Schedule which stipulates the matters that can be exercised with and without court’s involvement. This Schedule is subject to the instrument or order of the court by or under which the appointment is made.

G.1.9 The Companies Act 2016 retains the provision in the Companies Act 1965 relating to the liability of receiver or receiver and manager for debts incurred by him in entering into possession of any assets of the company for the purpose of enforcing any charge. However, s 381 also provides that he will be personally liable for contracts entered into by him unless the instrument appointing him expressly excludes liability.

G1.10 The Companies Act 2016 also provides that after the commencement of winding up:

(a) a receiver may continue to act as a receiver and exercise all the powers of a receiver in respect of property or assets secured under the debenture appointing the receiver, and

(b) a receiver and manager may continue to act as a receiver as referred to in paragraph (a) and a receiver and manager may exercise all the powers of a receiver and manager for the purpose of carrying on the business of the company provided that the receiver and manager obtains consent from the liquidator or if the liquidator withholds his consent, the consent of the court.

G1.11 A receiver or receiver and manager acts as the agent of the company. A debt or liability incurred by a company through the acts of a receiver or receiver and manager who is acting as the agent of the company is not a cost, charge or expense of liquidation.

G1.12 The company is required to submit a statement of affairs to the receiver or receiver and manager and the company, and each director is required to provide information to the receiver or receiver and manager.

G2 JUDICIAL MANAGEMENT (JM)

G2.1 This is a court supervised rescue plan. It is not available to:

(a) licensed institutions under laws enforced by the Central Bank of Malaysia (Bank Negara Malaysia), and

(b) companies subject to the Capital Markets and Services Act 2007.

G2.2 A JM can be initiated when the company is unable to pay its debts or will be unable to pay its debts, and if there is reasonable probability:

(a) of rehabilitating the company or preserving all or part of its business as a going concern

(b) that the interest of creditors would be better served than by resorting to a winding-up.

This means that the scheme is based on a reasonable probability of rehabilitating an insolvent company as a going concern.
G2.3 The company or its creditors may apply to the court to place the management of the company in the hands of an independent and qualified Judicial Manager. This is a qualified Insolvency Practitioner who is not an auditor of the company. The court has the discretion whether or not to accept the nomination of the Insolvency Practitioner.

G2.4 The Judicial Manager will prepare a viable restructuring plan which must be approved by a majority of 75% in value of creditors present and voting at a creditors’ meeting. Once approved by the creditors and sanctioned by the court, the restructuring plan will be implemented.

G2.5 A moratorium of 180 days is given once the order for JM is granted. Amongst the effects of the moratorium are that the company cannot be wound-up, no receiver can be appointed, no security can be enforced and no shares can be transferred.

G2.6 It may be said that the JM process is creditor driven and will usually be used in situations where the creditors believe that the company needs to be independently managed instead of retaining the existing management.

G3 CORPORATE VOLUNTARY ARRANGEMENT (CVA)

G3.1 The CVA allows the directors of a company to prepare and propose a scheme to creditors. It is not available to:

(a) a public company
(b) licensed institutions under laws enforced by the Central Bank of Malaysia (Bank Negara Malaysia)
(c) companies subject to the Capital Markets and Services Act 2007, and
(d) a company which creates a charge over its properties or undertakings.

The CVA is also not available to a company which is already under JM or a company which is being wound up.

G3.2 The scheme is supervised and implemented by a qualified insolvency practitioner. The CVA is initiated by the directors of the company where a proposal is presented to its creditors. The proposal includes the nomination of an Insolvency Practitioner, called a nominee.

G3.4 The company may apply for a moratorium of between 28 days and 60 days during which the company cannot be wound-up, no Judicial Manager can be appointed, no security can be enforced, no shares can be transferred, etc.

G3.5 However, a secured creditor may appoint a receiver to deal with the charged property of a company during the moratorium.

G3.6 Any restructuring scheme must be approved by a simple majority of shareholders and at least a majority of 75% in value of creditors present and voting at a creditor’s meeting. Once approved, it is binding on all creditors including dissenting creditors. The CVA cannot be modified during the meeting.

G3.7 However, any secured creditor’s right to enforce its security is secured and the creditor’s concurrence is needed.

G4 WINDING UP

G4.1 In general, the Companies Act 2016 retains the legal framework under the Companies Act 1965 that relates to how a company may be wound up. Some rules have been restated while others have been amended.
G4.2 Under s 443, a declaration of solvency is required before a company may commence a members’ voluntary winding up. The majority of the directors must:

(a) make a written declaration that they have made an inquiry into the company’s affairs, and

(b) at a board meeting, have formed an opinion that the company is able to pay off its debts in full within a period not exceeding 12 months after the commencement of winding up.

G4.3 Under s 441, winding up commences:

(a) at the date the appointment of the interim liquidator is lodged with the Registrar, where an interim liquidator is appointed before the resolution to wind up is passed, or

(b) at the passing of a resolution to voluntary wind up the company.

G4.3 The amount for which a creditor may apply to wind up the company due to inability to pay its debts is set at RM500 under the Companies Act 1965. The provision has been changed to enable the Registrar to specify the amount. The Corporate Law Reform Committee (CLRC) suggested that the figure be increased upwards.

G4.4 There is a statutory time period to file the petition to wind up a company due to the company’s inability to pay its debts, which is within six months from the expiry date of the demand made. The company has 21 days after the service of the demand to pay the sum or to secure or compound it to the satisfaction of the creditor.

G4.5 Any person who is a member of a recognised professional body may apply to be an approved liquidator. This expands the category of persons who can act as liquidator as under the Companies Act 1965, the person must be an approved auditor.

G4.6 The Companies Act 2016 provides that the time of commencement of a compulsory winding up has been changed from the presentation of the petition to wind up the company to the time the order to wind up the company is made by the court.

G4.7 The amendment is made to provide clarity and deletes the “relation back date”. Under the Companies Act 1965, the commencement of a compulsory winding up relates back to the date the presentation of the order to wind up the company is made if an order to wind up is subsequently made. This “relation back date” is intended to protect the company and its creditors against any dissipation of the company’s assets between the time of the petition and the winding up order.

G4.8 Consequential changes are made to ensure that the company’s and the creditors’ interests are not adversely affected.

G4.9 The court has the power to restrain proceedings against the company at any time after the presentation of the petition and before a winding order is made (s 470).

G4.10 Any disposition of property of a company including any transfer of shares or alteration of the status of a member made after the presentation of petition to wind up the company is void unless permitted by the court (s 472).

G4.11 For undue preference transaction (ie the transaction is in favour of any creditor), the transaction is undue preference in the event the company is wound up on a petition presented within six months from the date of the making of the transaction.

G4.12 The Companies Act 2016 introduces a list of exempt dispositions under the Twelfth Schedule, ie powers to be exercised without authorisation and powers that can be exercised with the court’s approval or the approval of the committee of inspection.

G4.13 In relation to priority for payment of debts, the amount of wages and salary of employees to be entitled to be paid in priority is increased from RM1,500 to RM15,000.
G4.14 In relation to priority for payment of debt, the *Companies Act 2016* introduces the rights and duties of secured creditors (s 524) and the rights and duties of unsecured creditors (s 525).

G4.15 The court has the power to terminate a winding up on the application of the liquidator, any creditor or contributory. Under the *Companies Act 1965*, the winding up can only be stayed but not terminated.