COMPANY LAW

Companies Act 1957

It is an act to provide for the incorporation and registration of companies in Brunei, to control and regulate the relation between members of a company and its creditors and the company and between the company and its creditors and the public, to provide for the conditions under which companies incorporated outside Brunei may carry on business in Brunei and generally to control the functioning within Brunei of companies registered locally or carrying on businesses within Brunei. The Companies Act is enacted on 1st January 1957. this applies to every company registered in Brunei irrespective of the place or places where the business of such company may be carried on.

Rules and Fees (General Rules)

1) The Chief Justice may, with the occurrence of His Majesty make general rules for carrying into effect the objects of this Act so far as relates to the winding up of companies, and also rules for the purposes of this Act generally, including rules as to costs.
2) Minister of Law with the approval of His Majesty The Sultan and Yang Di-Pertuan:
    a) the manner in which applications by persons desirous of being placed upon the authorized list of auditors shall be made;
    b) the examination of such applications and if thought fit of applicants by an Advisory Board;

c) the establishment of an Advisory Board to advise Minister of Finance in elation to such applications and also as to whether the name of any person on the authorized list should be removed therefrom;

d) anything which may require to be prescribed, and

e) carrying this Act into effect.

3) All rules made under this section shall be judicially noticed, and shall have effect as if enacted by this Act.

4) There Shall be paid in respect of proceedings under this Act, where no fee is otherwise fixed, such fees as the Chief Justice may, with the sanction of His Majesty direct, and he may direct by whom and in what manner the same are to be collected and accounted for.

Memorandum and Articles of Association

Two of the most important documents are the Memorandum and Articles of Association, which have to be filed with the Registrar for the purposes of incorporating a company. The Memorandum sets out the company structure and aims; and the Articles are the regulations by which the company is governed. Both of these documents are available under the Companies Act of every countries in this world because these are the main necessity in order to start a business.

The Memorandum of every company incorporated after the commencement of this Act must state a) the name of the company, with "Berhad" or the abbreviation "Bhd." as the last word of the name in the case of a company limited by shares or by guarantee; b) in the case of a private limited company, the name of the company with the word "Sendirian" or the abbreviation "Sdn." As part of its name, inserted immediately before the word "Berhad" or before the abbreviation "Bhd" or, in the case of a private unlimited company, at the end of its name; c) the objects of the company. The Memorandum of a company limited by shares or by guarantee must also state that the liability of its members is limited.

The Memorandum of a company limited by guarantee must also state that each member undertakes to contribute to the assets of the company in the event of its being wound up while he is a member, or within one year after he ceases to be a member, for payment of the debts and liabilities of the company contracted before he ceases to be a member, and of the costs, charges and expenses of winding up and for adjustment of the rights of the contributories among themselves, such amount as may be required, not exceeding a specified amount. A company may not later the conditions contained in its Memorandum except in the cases, in the mode and to the extent for which express provision is made in this Act.

In UK, every company Memorandum must contain the six clauses: a) name; b) registered office; c) objects; d) limitation and liability; e) capital; and f) association. The basic rules are that the last word of a private company's name must be "Limited". This warns persons who deal with companies that they will not have access to the private funds of the members to satisfy their debts. "Limited" may be abbreviated to "Ltd". A partnership name must not end with the word "Limited". Private companies limited by guarantee may apply to dispense with the word "Limited" if their objects are to promote, prohibit the payment of dividends.

Another important document is the Articles of Association. These are the internal regulations of the company. They deal with, for example, the issue and transfer of shares, directors' powers, procedure at meetings, the payment of dividends and the secretary. Every company must have Articles. There may in the case of a company limited by shares and there shall in the case of a company limited by guarantee or unlimited, be registered with the Memorandum, Articles of Association signed by the subscribers to the memorandum and prescribing regulations for the company. In the case of an unlimited company or a company limited by guarantee, the Articles, if the company has not a share capital, must state the number of members with which the company proposes to be registered. Where a company not having a share capital has increased the number of its members beyond the registered number, it shall, within 15 days after the increase was resolved on or took place, give to the Registrar notice of the increase, and the Registrar shall record the increase. If default is made in complying with this subsection, the company and every officer of the company who is in default shall be liable to a default fine.

Articles must : a) be printed; b) be divided into paragraphs numbered consecutively; c) bear the same stamp as if they were contained in a deed; d) be signed by each subscriber of the Memorandum of Association in the presence of at least one witness who must attest the signature.

Minority Protection

Concerning whether the Company Law in Brunei should be updated or not, yes, it needs updating. There are several important sections in the Companies Act that has not been included in the Brunei Laws yet. One of them is Minority Protection. There are two factors that affect the ability of minority shareholders to enforce the rights of a company in respect of harm the company has suffered:

- The principle of majority rule. The majority rule acknowledges that a company is governed by the will of the majority of the shareholders. The court will not allow minority shareholders to start litigation in respect of an issue to which the majority shareholde rs can subsequently grant their approval (Foss v. Harbottle). If the thing complained of is a thing which in substance the majority of the company is entitled to do regularly or if something has been done illegally which the majority is entitled to do lega lly, there is no use in having the matter litigated.
- The concept of *locus standi* whereby a company which has suffered harm is the only party capable of beginning proceedings to seek redress for that harm. Action by the company may be through directors acting under a general power of management or at the request of the company in general meeting through powers conferred by the Articles of Association.

> If the actions of the directors constitute a wrong to the company, it is generally the company that should take the action against them. It is therefore for the company, in effect the majority, to say whether proceedings will be taken or whether the directors' acts will be condoned. It is not available to a single shareholder to complain of a breach of the Artic les. Such litigation ought to be in the name of the company. This is a result of the separate legal personality of the company.

<u>The Rule In Foss v. Harbottle</u>

This results from the concept that a company has an independent legal personality separate from i ts shareholders. The rule states that only the company can sue in respect of wrongs done to it.

In Foss v. Harbottle, two shareholders of a company complained to the court that the company's assets were improperly applied. The shareholders failed in their action. The court said that it would not interfere in the affairs of the company as the acts were capable of confirmation and ratification by the majority of the shareholders in general meeting. The proper course of action for tose bringing the action would have been to obtain the authority of the general meeting to bring an action in the company's name. Hence, a complaint of wrong done to the company or an action to enforce the rights of the company has to be brought by the company (in effect, the majorit y of the shareholders) and not by the individual shareholders. This principle cannot stifle an objection that the act complained was *ultra vires* or illegal, such as acts cannot be retrospectively ratified by the majority. The principle is sometimes referred to as the proper plaintiff aspect of the rule in Foss v. Harbottle.

The rule embraces a related principle that an individual shareholder cannot bring an action in the courts to complain of an irregularity as in the conduct of the company's affairs where the irregularity is one that can be cured by a majority in general meeting.

Exceptions to the rule in Foss v. Harbottle

It is clear that the rule in Foss v. Harbottle may operate greatly to the disadvantage of minority shareholders. If, however, the rule is exploited by a majority to the obvious prejudice of minority shareholders, the courts may refuse to apply it. The circumstances in which application of the rule would be inappropriate. However, for all practical purposes, it is possible to list the objection by minority shareholders to an act of the majority as follows:

- The activity objected to is ultra vires or illegal (Foss v. Harbottle)
- The activity undertaken must be sanctioned by a special resolution
- The activity is an infringement of personal rights of shareholders
- The activity amounts to a fraud on the minority shareholder
- The activity is oppressive to minority shareholders.

Modes of action against company

The courts have identified exceptions to the rule in Foss v. Harbottle, a minority who wishes to bring an action must select the appropriate procedure. There are three ways in which a minority can bring an action. Firstly, personal action. It is brought by somebody who has been wronged , and wishes to recover on his own behalf. Such an action may be used by a shareholder to restrain a company from undertaking an ultra vires act. It is also appropriate for enforcement of the contractual rights which are conferred upon a shareholder under the Articles of Association. A personal action is therefore brought by the shareholder against the company. This is illustrated by the case of Pender v. Lushington where a minority shareholder sought to have a resolution passed at a meeting of shareholders. An amendment to the resolution was proposed to which he objected. His votes were ignored by the chairman. The shareholder brought an action to prevent the company acting on the amended resolution. The court held that the shareholder was entitled to have his votes counted and that he could constitute legal proceedings to compel observance of his rights. If, however, a shareholder objects to a breach of the Articles which amounts to a technical irregularity in the company's procedures, it is unlikely that the court would interfere. Thus, in the above case example, had the shareholders' votes been irrelevant to the outcome of the vote, his application would have been refused in view of an overwhelming majority.

Another course of action is the representative actions. This is appropriate where a shareholder brings an action on behalf of both himself and other persons, to enforce their collective personal rights. The relief sought will therefore be beneficial to all those persons represented by the plaintiff. Any judgment obtained in respect of a representative action binds all persons so represented. The function of this procedure is obviously to prevent duplicity of actions in respect of the same issue. And the third action that can be brought by a minority shareholder is the derivative actions. A derivative action can be used to enforce the rights of the company against majority shareholders. However, a derivative action cannot be brought by a shareholder who participated in the wrongdoing. Judgment is given in favour of the company. The individual plaintiff or applica nt does not, therefore, directly benefit if the action is successful. The company must be joined in the action, and may be ordered to indemnify the shareholder who acted on its behalf for his legal costs in the action if it is a reasonable and prudent cour se to take in the circumstances. If the company asks the court to strike out a derivative action, prior to commencement of proceedings, the action will be allowed to continue only if allegations in the statement of claim justify a derivative action and a *prima facie* case is provided.