

- ***Setting up a Company-***

- The main difference between the Limited Liability Company and the partnership en nom collectif and en commandite, is the concept of limited liability.
- **Article 67 of the Companies Act states that :**
- ***“A company is formed by means of a capital divided into shares held by its members. The members’ liability is limited to the amount, if any, unpaid on the shares respectively held by each of them”.***
- **A company may be set up for any lawful purpose.**
- **The general rule is that the company must be set up by at least 2 persons;**

- **The Companies Act provides for an exception to this general rule – that a company may be set up by one member if it is registered as a Single Member Company (SMC).**
- **For a company to be registered there must be the formation of the memorandum of association subscribed by at least 2 persons.**
- **The Memorandum of Association deals with the external aspects of the Constitution of the company, while the Articles of Association are concerned with the internal organisation of the company which is primarily of interest to its own members and officers.**

- **There is a sine qua non condition for the drawing up of the Memorandum, but there is no legal requirement to draw up the Articles of Association, since in default, the Articles laid down in the First Schedule to the Companies Act shall apply.**
- **This memorandum is delivered to the Registrar of Companies and the Registrar issues a Certificate of Registration as evidence that the requirements of the Act have been complied with.**

- **Article 69 of the Companies Act lays down the contents for a valid memorandum:**
 - a) Name of the Company – it is important that the name is not similar or identical to that of another company already registered since that would create confusion and unfair competition would ensue. The Registrar is required to ascertain that the name of the company is correct.**
 - b) Registered Office;**
 - c) Objects of the Company and its limitations;**
 - d) Status of the Company – whether public or private;**

- e) Share Capital – the amount of authorised and issued share capital of the company which must be divided into shares of a fixed amount;**
- f) Management and Administration of the Company – name and residential address of each subscriber and director;**
- g) Legal and Judicial Representation of the Company;**
- h) Name and Residence of the Company Secretary;**
- i) Extraordinary Resolution;**
- j) Term, if any, fixed for the duration of the company**

Shares

- **A share is a share of the capital of the company.**
- **A share in a company is an expression of a proprietary relationship – the shareholder is the proportionate owner of the company, but he does not own the company's assets which belong to the company as a separate and independent legal entity.**
- **A share is by law considered a movable thing and is deemed to be so for the whole duration of the company.**

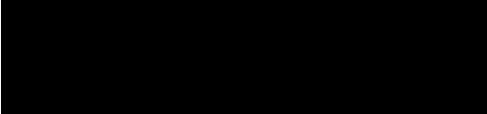
- **The memorandum endorses share capital clauses which must state:**
 - a) **The amount of share capital with which the company proposes to be registered;**
 - b) **The division of the share capital into shares of a fixed amount;**
 - c) **The number of shares taken by each of the subscribers and the division into different classes of shares;**
 - d) **Amount paid up in respect of each share;**
 - e) **Names and addresses of subscribers and amounts received;**

Minimum Share capital

- **In a private company, at least 2 subscribers must subscribe to an authorised share capital of at least Lm500 with at least 20% of the nominal value of the shares paid up;**
- **In a public company, 2 subscribers must subscribe with the minimum capital being Lm20,000 and at least 25% of the nominal value of the shares paid up;**
- **What is to be the amount of share capital of a company, concerns solely the promoters who will take into consideration the sum required to start a new business and to provide a working capital.**

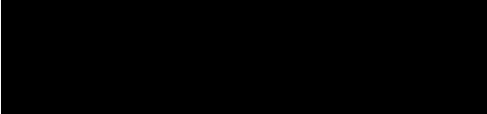
Capital

- **The term capital has several meanings when used in relation to the company:**
 - 1) Nominal (Authorised) Capital: the total amount of capital which the company is authorised to issue by memorandum;**
 - 2) Issued Capital: is that part of the nominal capital actually taken up by the shareholders: further issues of capital are made as required because the company need not issue all the nominal capital at once;**

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- 3) Paid-Up Capital: amount of issued capital which has been paid up by the shareholders;**
 - 4) Unpaid Capital: is that part of the issued capital which has not been paid up the shareholders and may be called up at any time by the company, in accordance with the provisions of the article.**

Articles of Association

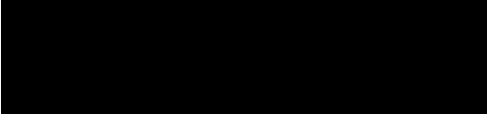
- **The Articles prescribe regulations for the company and the model regulations found in the Act provide for the following subjects:**
 - ❖ **Share capital and variation of rights;**
 - ❖ **Calls on shares;**
 - ❖ **Transfer and transmission of shares;**
 - ❖ **Forfeiture or surrender of shares;**
 - ❖ **Conversion of shares into stock;**
 - ❖ **General Meetings;**
 - ❖ **Notice of the General Meetings;**

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- ❖ **Proceedings at General Meetings;**
 - ❖ **Withdrawal of demand for poll;**
 - ❖ **Votes of Members;**
 - ❖ **Directors;**
 - ❖ **Powers and Duties of Directors;**
 - ❖ **Rotation of Directors, etc.**

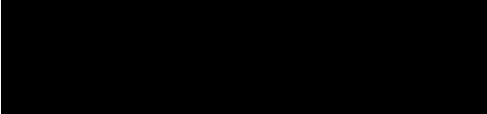
- **The Act does not require the insertion of certain definite matters as is required in the memorandum. The Articles of Association are subordinate to the provisions of the Act and if there is any inconsistency between the Articles and the Act, the Act prevails and the Articles are void to the extent of the inconsistency.**

Directors and their duties

- **A company is a juridical person and so it cannot act by itself but requires certain persons to be responsible for the management of the company. These persons are the directors.**
- **The first directors of the company are appointed by the Memorandum of association. The Memorandum must state the name and residence of the first director/s, or where a director is a body corporate, it must state the name and registered address or principal office of the body corporate.**

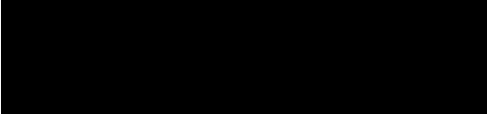
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- **Subsequent directors are appointed by ordinary resolution of the company in the general meeting, provided that the M&A does not provide otherwise.**
 - **A private company must at least have one director, whilst a public company must at least have 2 directors.**
 - **Directors have the duty to exercise and not to misuse the powers conferred upon them;**

- **A director has the duty to act in the best interests of the company honestly and in good faith.**
- **They have the duty to promote the well-being of the company and this makes them responsible for the general governance of the company, its proper administration, management and the general supervision of its affairs. Directors are obliged to act with care, diligence and skill.**
- **Directors are prohibited from making secret profits or personal gain out of their position of directors of the company without the consent of the company.**

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- **Directors are prohibited from putting themselves in a position in which their personal interests may conflict with those of the company;**
 - **They are also prohibited from using any property, information or opportunity of the company for their own benefit or for that of third parties and from obtaining any benefit from their position, unless authorised to do so by company in general meeting or by the memorandum or articles of association of the company;**

Powers of Directors

- **The directors may exercise all powers of the company provided such powers are not required to be exercised by the company.**
- **Provided the M&A do not provide otherwise, the directors of a company are empowered to do specific acts:**
 - **Borrow money on behalf of the company;**
 - **Guarantee obligations to any third party;**

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- **Hypothecate or charge the company's undertakings, property and uncalled capital;**
 - **Issue debentures, debenture stock and other securities.**
 - **Anything done by the Board of directors or by any director in excess of the powers conferred on them, will be binding on the company, provided that the act done does not exceed the powers given to the Board of Directors or to any director under the provision of this Act.**
 - **The director owes a fiduciary obligation towards the company.**

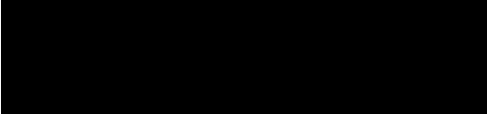
Company Secretary

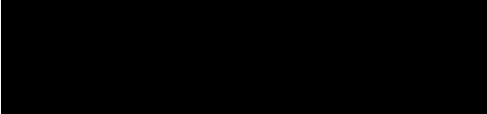
- **The Company Secretary is considered as an officer of the company.**
- **Every company must have a company secretary and he must be an individual and not a body corporate, except in case of investment companies with fixed and variable share capitals.**

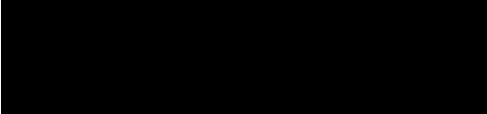
- **The Act empowers the company to appoint more than 1 company secretary and both the private and public companies must state the name and address of the first company secretary.**
- **No special qualifications are required of the company secretary, but the directors need to ensure that the company secretary is an *individual with the requisite knowledge and experience to carry out the functions of company secretary.***

Powers and Duties of the Company Secretary

- **There are no specific powers given by the Act to the Company Secretary.**
- **He has no power to participate in the management of the company's affairs, e.g. he cannot call meetings of members or register transfer of shares without the Board's authority.**
- **The only power given to the secretary is that which empowers him to sign any document or proceeding requiring authentication by a company.**

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- **On the appointment of the liquidator all the powers of the secretary cease.**
 - **He may be personally be liable to penalties committed by a company for failure to file resolutions, returns, notices etc within the time prescribed by the Act;**

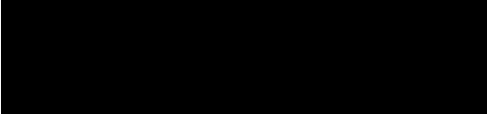
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- He also takes care of the company's register of members and register of debentures;
 - Ensures that all statutory forms, copies of resolutions and returns are prepared and delivered to Registrar within the prescribed time limit;
 - Formulates agendas;
 - Attends general meetings and board meetings;
 - Reads minutes to the meeting;

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- **Sends proper notices of general meetings and of the annual general meeting to members and auditors;**
 - **Keeps minutes of directors' meetings and general meetings;**
 - **Distributes copies of the company's accounts and other documents to members and debenture holders;**
 - **Keeping a copy of the M&A up to date.**

Alteration of the Memorandum and Articles

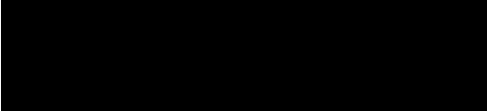
- **A company is empowered to alter or add to its memorandum or articles of association by means of an extraordinary resolution.**
- **Where the alteration consists of a change in the registered office of the company, it may be effected by a resolution of the directors specifying the date of change.**

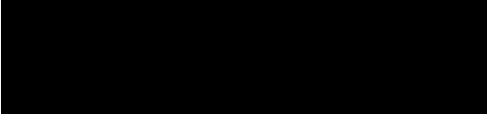
- **Every time that the M&A are altered, the directors and the company secretary are required to file with the Registrar, within 14 days after the passing of the resolution, a printed copy of the amendment together with a revised and updated copy of the memorandum and articles. The revised copy should incorporate the amendment including all changes that would have occurred prior to amendment.**

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- **In the event of a discrepancy between the text of the updated M&A and the text of the original M&A, the latter text together with the resolutions, prevail.**
 - **Annually the company has to deliver to the Registry of Companies, the Financial Statements and the Annual Return.**
 - **Moreover, it has to deliver the VAT Return to the Commissioner of Inland Revenue.**

Dissolution

- **Dissolution and winding up of companies are not the same thing.**
- **Dissolution happens at one particular moment in time when the winding up process is initiated.**

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- **After dissolution, the liquidator will be appointed and he will search the assets of the partnership, pay any liabilities of the partnership and then if there's anything left, he will distribute the assets amongst the partners.**
 - **The shareholders have a choice between voluntary liquidation and liquidation by the court.**



- **In the case of winding up by the Court itself, this can take place where a company has suspended the carrying on of its business for an uninterrupted period of 24 months; and where the company is unable to pay its debts/insolvent. Here the *Court may* dissolve the company.**

- **Once the court has decided that it is going to dissolve the company on one of these 2 grounds, then the court must carry out the liquidation process.**

Setting up a Commercial Partnership

- **In both partnership en commandite and en nom collectif, the deed of partnership must be delivered, together with the prescribed fees to the Registrar of Companies. The Registrar shall examine the deed and if he finds that it complies with the requirements of the law, the Registrar will register it and will issue a certificate of registration.**
- **From the date of the certificate, the partnership comes into existence and becomes capable to start a business.**

Deed of partnership

The deed of partnership must state:

- **name, surname and residence of each of the parties;**
- **partnership name;**
- **registered office of the partnership;**

- **objects of partnership and the nature of the business;**
- **contribution of each of the partners;**
- **the period, if any, fixed for the duration of the partnership.**
- **The deed of the partnership also contains other clauses such as the administration and the representation of the partnership, the death of a partner, the admission of new partners, the shares of the partners in profits, losses etc.**

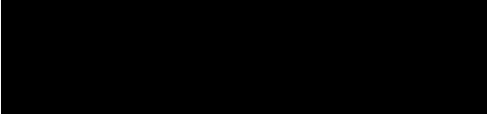
- In the case of a partnership en commandite, the deed has to specify who are the general partners and the limited partners. In the absence of such a clause, the partnership resolves itself into a partnership en nom collectif.
- *Any alteration or addition* to the deed of partnership may only be made with the *unanimous consent* of the partners. This rule shall apply as long as the deed of partnership does not provide otherwise.

- **In so far as the deed of partnership does not otherwise provide, the administration and representation of the partnership vests in each of the partners severally.**
- **Certain ordinary acts of administration may be executed by the partner alone and such acts would bind the partnership even if the partnership does not derive any benefit.**
- **A partnership may only be bound in favour of third parties by a partner acting under the partnership's name and having the representation of the company.**

Rights of Partners

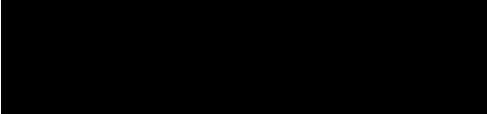
Unless the deed of partnership provides otherwise, every partner is entitled to:

- **take part in the management of the business,**
- **inspect the partnership's accounting books and records and**
- **supervise and control the partnership's affairs;**
- **The partner has also the right to maintain an action against the partnership for sums and obligations disbursed by him on behalf or on account of the partnership;**

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- **The right to share in the profits of the partnership;**
 - **Attend and vote at meetings of the partnership;**
 - **In a partnership en commandite, unless the deed of partnership otherwise provides, changes in the deed of partnership which deprive limited partners of any of their rights shall require unanimous consent of all general and limited partners.**

Duties of Partners

- **The partner has to give his contribution to the partnership in the prescribed time;**
- **A partner may not make use of the partnership's property or funds for his own private advantage, without the consent of the other partners;**

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- **A partner is liable for any damages caused to the partnership through his own fault;**
 - **A partner may not carry on business on his own account or on account of others or be a partner with unlimited liability in another partnership – if without the consent of the partners and if in competition with the partnership.**

Dissolution of a Partnership

- **Both a partnership en nom collectif and en commandite are dissolved where:**
 - a) the period for its duration expires;**
 - b) all partners agree;**
 - c) partnership is adjudged bankrupt;**

- d) if the number of partners is reduced below 2 and remains so for a period more than 6 months;**
- e) if in the opinion of the court, there exist grounds of sufficient gravity to warrant dissolution;**
- Within 14 days from the dissolution, the partners representing the commercial partnership shall deliver to the Registrar for registration a notice of the dissolution. If the partnership is adjudged bankrupt or is dissolved by order of the courts, the notice of dissolution is given by the Registrar of the Courts.**

- **[The Procedure for Dissolution can be of 2 types: - Voluntary Dissolution and Court Ordered Dissolution.**
- **In the case of a Court ordered dissolution or in the case in which a partnership is adjudged bankrupt by the Court, notice of this judgment must be given to the Registrar of the Superior Courts so that he will notify the Registrar of Companies.]**