

BUSINESS ASSOCIATIONS LAW

TOPIC 1: INTRODUCTION

What is Business Associations Law?

This is the field of law concerning companies and other business organizations. This includes corporations, partnerships and other associations which usually carry on some form of economic or charitable activity.

FORMS OF DOING BUSINESS

There are mainly three forms of doing Business

1. Sole Proprietorship
2. Partnership
 - i. General Partnerships
 - ii. Limited Partnerships
3. Corporation/Company

Origin of Business Associations Law

The law of business organizations originally derived from the common law of England, but has evolved significantly in the 20th century. In common law countries today, the most commonly addressed forms are:

- Corporation
- Limited company
- Unlimited company

- Limited liability partnership
- Limited partnership
- Not-for-profit corporation
- Company limited by guarantee

The above types of business associations were later narrowed down into three major forms namely;

- a) Sole proprietorship
- b) Partnerships
- c) Companies/corporations

Qn: What are the Laws governing Business Associations?

TOPIC 2: Sole Proprietorships

The **sole proprietorship** is the simplest business form under which one can operate a business. The **sole proprietorship** is not a legal entity. It simply refers to a person who owns the business and is personally responsible for its debts. Because the business and the person are one and the same, the sole proprietorship brings with it three key implications.

A Sole Proprietorship, is legally responsible;

1. To complete all contracts entered into by the business.
2. For any torts committed in the course of undertaking business activities, including being vicariously liable for the torts of employees.

3. For the income/losses of the business for tax purposes

Advantages and Disadvantages of Sole proprietorship

a) Advantages

- An individual proprietor owns and manages the business and is responsible for all business transactions.
- The owner is also personally responsible for all debts and liabilities incurred by the business.
- A sole proprietor can own the business for any duration of time and sell it when he or she sees fit. As owner, a sole proprietor can even pass a business down to his or her heirs.
- A sole proprietor has complete control and decision-making power over the business.
- Sale or transfer can take place at the discretion of the sole proprietor.
- No corporate tax payments
- Minimal legal costs to forming a sole proprietorship
- Few formal business requirements

Disadvantages

- The sole proprietor of the business can be held personally liable for the debts and obligations of the business. Additionally, this risk extends to any liabilities incurred as a result of acts committed by employees of the

company.

- All responsibilities and business decisions fall on the shoulders of the sole proprietor.
- Investors won't usually invest in sole proprietorship.

Thus, the main disadvantage of the sole proprietorship has **unlimited personal liability**, which means that third parties are entitled to take the sole proprietor's personal assets, as well as the assets of the business, to satisfy the business's obligations.

On the other hand, a sole proprietorship is easy to form and has few legal requirements.

TOPIC 3: PARTNERSHIPS

PART IX of LCA

A partnership is a joint business enterprise carried on for profit. S. 190 of the LCA
Sharing of profits is an essential element of a partnership, as evidenced by the
phrase **with a view of profit**. However, merely sharing profits does not by itself
prove that a partnership exists but would be used in connection with other factors.

Is every a Relationship a Partnership?

**S. 191 of the LCA provides for Factors besides sharing of profits that suggest the
existence of a partnership:**

- Contribution of property or labor to the enterprise
- Guarantee of partnership debts
- Joint ownership of property
- Participation in management, including having signing authority for contracts and bank accounts, and access to information about the business
- Holding oneself out as a partner, or allowing others to do so.

Formation and Management of a Partnership

1. The Need for a Written Agreement

Although there is no requirement that a partnership agreement be in writing, there are several advantages:

- i) it may avoid future disagreements,
- ii) readily proved in court,
- iii) may point out potential trouble spots,
- iv) facilitates allocation of tax burdens among themselves,
- v) resolves death or retirement issues,
- vi) clarifies whether investments are lent rather than contributed,
- vii) satisfies the statute of frauds where real estate is involved

2. Sharing Profits and Losses

Partners may share profits and losses in any way they agree, and they may agree to share losses in a different way than they share profits. - In absence of an agreement the default rule in the Contract Act is that partners share profits equally, and that losses are shared in the same proportion as profits are shared.

A personal creditor of a partner cannot attach or seize partnership assets. -

Any partner may be called on by a creditor at any time to pay a specific partnership debt. In the case of **Richert v. Handley** Together, Richert and Handley engaged in a logging enterprise. When the venture lost money, a dispute arose as to how the venture's receipts and losses were to be allocated. Held: In absence of an express agreement to the contrary, each partner is liable for a partnership's losses in an amount proportionate to his share of its profits.

3. Management

Absent an agreement to the contrary, partners in a partnership have equal rights to participate in the management of the business. - The default rule is that if there is a vote taken on specific matters, each partner has one vote and the majority decision controls in the absence of an agreement to the contrary. - The partnership agreement may create classes of partners with different voting and financial rights. - Partners have apparent and actual authority to bind the partnership to obligations relating to the business of the partnership. Thus, a partner may bind the partnership on obligations he or she was not authorized to create. In **National Biscuit Co. v. Stroud**, Stroud advised National Biscuit that he would not be responsible for any bread which the company sold to his partner. Nevertheless, National Biscuit continued to make deliveries. Held: The acts of a partner, if performed on behalf of the partnership and within the scope of its business, are binding upon all copartners.

All partners are jointly and severally liable for the acts and obligations of the partnership. In **Smith v. Dixon**, Smith, manager of a partnership consisting of his family members, agreed to sell land to Dixon. The other members of the partnership later refused to convey the property. Held: The acts of a partner are binding upon the partnership if he acted within the scope, or apparent scope, of his authority.

In **Rouse v. Pollard**, the defendant, a partner in a prestigious law firm promised to invest Mrs. Rouse's money for her but in fact converted it to his own use. Held: Partners are liable for the acts of their copartners only if those acts are within the scope of the partnership's business.

Types of Partners

Active partner:

A person who takes active interest in the conduct and management of the business of the firm is known as active or managing partner.

He carries on business on behalf of the other partners. If he wants to retire, he has to give a public notice of his retirement; otherwise he will continue to be liable for the acts of the firm.

2. Sleeping or dormant partner:

A sleeping partner is a partner who 'sleeps', that is, he does not take active part in the management of the business. Such a partner only contributes to the share capital of the firm, is bound by the activities of other partners, and shares the profits and losses of the business. A sleeping partner, unlike an active partner, is not required to give a public notice of his retirement. As such, he will not be liable to third parties for the acts done after his retirement.

3. Nominal partner:

A nominal partner is one who does not have any real interest in the business but lends his name to the firm, without any capital contributions, and doesn't share the profits of the business. He also does not usually have a voice in the management of the business of the firm, but he is liable to outsiders as an actual partner.

Sleeping vs. Nominal Partners:

It may be clarified that a nominal partner is not the same as a sleeping partner. A sleeping partner contributes capital shares profits and losses, but is not known to the outsiders.

A nominal partner, on the contrary, is admitted with the purpose of taking advantage of his name or reputation. As such, he is known to the outsiders, although he does not share the profits of the firm nor does he take part in its management. Nonetheless, both are liable to third parties for the acts of the firm.

4. Partner by estoppel or holding out:

If a person, by his words or conduct, holds out to another that he is a partner, he will be stopped from denying that he is not a partner. The person who thus becomes liable to third parties to pay the debts of the firm is known as a holding out partner.

There are two essential conditions for the principle of holding out : (a) the person to be held out must have made the representation, by words written or spoken or by conduct, that he was a partner ; and (b) the other party must prove that he had knowledge of the representation and acted on it, for instance, gave the credit.

5. Partner in profits only:

When a partner agrees with the others that he would only share the profits of the firm and would not be liable for its losses, he is in own as partner in profits only.

6. Minor as a partner:

A partnership is created by an agreement. And if a partner is incapable of entering into a contract, he cannot become a partner. Thus, at the time of creation of a firm a minor (i.e., a person who has not attained the age of 18 years) cannot be one of the parties to the contract. But under section 30 of the Indian Partnership Act, 1932, a minor 'can be admitted to the benefits of partnership', with the consent of

all partners. A minor partner is entitled to his share of profits and to have access to the accounts of the firm for purposes of inspection and copy.

He, however, cannot file a suit against the partners of the firm for his share of profit and property as long as he remains with the firm. His liability in the firm will be limited to the extent of his share in the firm, and his private property cannot be attached by creditors.

On his attaining majority, he has to decide within six months whether he will become regular partner or withdraw from partnership. The choice in either case is to be intimated through a public notice, failing which he will be treated to have decided to continue as partner, and he becomes personally liable like other partners for all the debts and obligations of the firm from the date of his admission to its benefits (and not from the date of his attaining the age of majority). He also becomes entitled to file a suit against other partners for his share of profit and property.

7. Other partners:

In partnership firms, several other types of partners are also found, namely, secret partner who does not want to disclose his relationship with the firm to the general public. Outgoing partner, who retires voluntarily without causing dissolution of the firm, limited partner who is liable only up to the value of his capital contributions in the firm, and the like.

However, the moment public comes to know of it he becomes liable to them for meeting debts of the firm. Usually, an outgoing partner is liable for all debts and obligations as are incurred before his retirement. A limited partner is found in limited partnership only and not in general partnership.

General Partnerships

A general partnership must have two or more persons engaged in a business for profit. All partners enter into partnership by either oral or written agreement that must cover all terms of the parties' business relationship. Partnerships are quite flexible; a great variety of control and management structures are available by agreement.

Partners are jointly and severally liable for all legal and financial obligations of the partnership and for all wrongful acts of any partner acting in the ordinary course of partnership business. Partnership income is taxed as personal income to the partners.

In **Roach v. Mead**, the plaintiff contended he was not vicariously liable for the negligent acts of his partner, Mead, because such acts were outside the scope of the partnership's business. Held: Each partner is responsible to third parties for the acts of the other partner when such could reasonably have been thought by the third party to fall within the purpose of the partnership

Limited liability partnership (LLP)

A **limited liability partnership (LLP)** is a special form of partnership for certain professions, such as lawyers and accountants.

This is a partnership in which some or all partners (depending on the jurisdiction) have limited liabilities. It therefore exhibits elements of partnerships and corporations. In an LLP, one partner is not responsible or liable for another partner's misconduct or negligence. This is an important difference from the traditional unlimited partnership, in which each partner has joint and several liability. In an LLP, some partners have a form of limited liability similar to that of the shareholders of a corporation. In some countries, an LLP must also have at least one thing called as a "general partner" with unlimited liability.

Legal Implications of Partnerships

Partners have both obligations and rights pursuant to either statutes and/or a partnership agreement.

Partnership Liability

A partner is personally liable for:

1. Debts and obligations of the partnership incurred while he or she is a partner;
2. Negligence and other torts perpetrated by any of the partners acting in the ordinary course of the partnership business; and
3. Misapplication of trust funds placed in the care of the partnership.

Each partner becomes the **agent** of the other partners. Therefore, actions taken by one partner bind all of the partners. Although partners may wish to restrict authority by an internal agreement, such restrictions are only binding on third parties who have actual notice of the restrictions. As well, each partner owes a **fiduciary duty** to the other partners, i.e., a duty to act honestly and in good faith with a view to the best interests of the partnership.

Another key feature of a partnership is **joint and several liability**, which means that each partner is individually as well as collectively responsible for the entire debt.

ASSIGNMENT:

- a)* Are the rights and duties of partners static or dynamic? (5 marks)
- b)* What are the general rights and duties of the partners? (5 marks)

Termination of Partnership

A good partnership agreement will make express provision for what is to happen on the retirement or death of a partner, including what will justify termination, how much notice a partner must give when leaving the partnership, whether the partnership will continue with the remaining members, how the retiring partner's

share is to be valued, and how continuing partners will buy out the share of a deceased or retired partner.

In the absence of express agreement, the *Partnerships Act* specifies rules governing termination. In particular, the Act allows for termination in a number of ways: **ss. 212-215 of the LCA**

1. Expiration of a fixed term, if there was one;
2. Notice by a partner to the others;
3. Death, bankruptcy, or insolvency of any partner;
4. Charge or assignment of a partner's interest;
5. Application to the court by one or more partners under certain circumstances (e.g., partner becomes incompetent or incapable, acts prejudicial to the business, or breaches the partnership agreement); or
6. Agreement of the partners.

TOPIC 4: COMPANIES

A Company Is a separate legal entity created for carrying on business.

A Company is an artificial person, having a continuous existence different from the existence of its owners. The owners of the Company are known as shareholders who contribute to the establishment of the entity.

A Company has powers and liabilities distinct from its owners. As such, it is responsible for its own debts.

A Company may enter into contracts, sue, and be sued. It can commit torts, such as negligence, or crimes.

Requirements for Setting up a Business in Tanzania

This is followed by creation of a business entity and obtaining relevant licenses and approvals. In particular this Course highlights the procedure for company registration, and registration with tax authorities as per the requirement of the Law.

(a) Company Registration

All companies operating in Tanzania, whatever their legal form, must register with the Business Registration and Licensing Agency (BRELA), which is under the Ministry of Industries and Trade. The first step is to obtain name clearance from BRELA. Generally, the following documents are required in the process of forming a company:

- Name of the company (which must be cleared by the Registrar of Companies).
- The address of the registered office in Tanzania;
- Names, residential addresses and nationalities of the first subscribers and directors (at least two).
- Memorandum of Association (stating in details the objects of the company)

and Articles of Association (stating in detail the management structure and processes). At least two copies of each document must be filed;

- Filing a prescribed form to make a declaration that a company has complied with the requirements of the Tanzanian company law; and
- Payment of the filing fee, registration fee and the stamp duty.

b) Registration with Tax Authorities

Once a company has been incorporated by the Registrar of Companies, the company is required to register with the nearest Tanzania Revenue Authority (TRA) office. The first document that must be issued by TRA is Tax Identification Number (TIN). Normally, Tax Identification Number is issued within three days. Once the Tax Identification Number has been issued, the tax file will be opened. Once a file number has been issued, the company is expected to complete provisional tax return forms. These have to be submitted within three months of the initial accounting date. The company must estimate its profits for the first year and make quarterly provisional tax payments. Once a file number is issued, TRA will issue an Income Tax Clearance Certificate, which can be used to obtain the general business license.

If the turnover of the business is Tanzanian Shillings Forty Million, the business must register for Value Added Tax. VAT is charged at 20%. In order to be registered for VAT, the applicant must fill the application form obtained from Tanzania Revenue Authority (Value Added Tax Department). The filled form must be returned with the copies of the following documents:

- Certificate of incorporation or certificate of compliance (in case of a company) or certificate of registration or extract (in case of partnership or sole traders);
- Memorandum and Articles of Association showing among other things that the objectives of the company allow it to do the business which the license is being applied for;

- Proof of Tanzania citizenship e.g. photocopy of passport, birth certificate, or in case of a non-citizen, resident permit Class A (showing the holder to be the investor in that company/business);
- In case the shareholders of the company are non-residents and don't have a resident permit, a Powers of Attorney to a citizen/resident must be submitted;
- Proof by the applicant having a suitable business premises for the business applied. Proof that can be submitted includes title deed, tenancy agreements, receipt of rent or property tax payment);
- Tax identification number (TIN) issued by Tanzania Revenue Authority;
- Income Tax Clearance Certificate issued Tanzania Revenue Authority (Income Tax Department);
- Business license issued by the Ministry of Industries or local authority under the Business Licensing Act; and
- Three photos of the applicant or one of the resident directors of the company or local representative.

FORMS OF A COMPANY

Characteristics of a Company

A company as an entity has many distinct features which together make it a unique organization. The essential characteristics of a company are following:

Separate Legal Entity:

Under Incorporation law, a company becomes a separate legal entity as compared to its members. The company is distinct and different from its members in law. It has its own seal and its own name, its assets and liabilities are separate and distinct from those of its members. It is capable of owning

property, incurring debt, and borrowing money, employing people, having a bank account, entering into contracts and suing and being sued separately.

Limited Liability:

The liability of the members of the company is limited to contribution to the assets of the company up to the face value of shares held by him. A member is liable to pay only the uncalled money due on shares held by him. If the assets of the firm are not sufficient to pay the liabilities of the firm, the creditors can force the partners to make good the deficit from their personal assets. This cannot be done in the case of a company once the members have paid all their dues towards the shares held by them in the company.

Perpetual Succession:

A company does not cease to exist unless it is specifically wound up or the task for which it was formed has been completed. Membership of a company may keep on changing from time to time but that does not affect life of the company. Insolvency or Death of member does not affect the existence of the company.

Separate Property:

A company is a distinct legal entity. The company's property is its own. A member cannot claim to be owner of the company's property during the existence of the company.

Transferability of Shares:

Shares in a company are freely transferable, subject to certain conditions, such that no share-holder is permanently or necessarily wedded to a company. When a member transfers his shares to another person, the transferee steps into the shoes of the transferor and acquires all the rights of the transferor in respect of

those shares.

Common Seal:

A company is an artificial person and does not have a physical presence. Thus, it acts through its Board of Directors for carrying out its activities and entering into various agreements. Such contracts must be under the seal of the company. The common seal is the official signature of the company. The name of the company must be engraved on the common seal. Any document not bearing the seal of the company may not be accepted as authentic and may not have any legal force.

Capacity to sue and being sued:

A company can sue or be sued in its own name as distinct from its members.

Separate Management:

A company is administered and managed by its managerial personnel i.e. the Board of Directors. The shareholders are simply the holders of the shares in the company and need not be necessarily the managers of the company.

One Share-One Vote:

The principle of voting in a company is one share-one vote i.e. if a person has 10 shares, he has 10 votes in the company. This is in direct distinction to the voting principle of a co-operative society where the "One Member - One Vote" principle applies i.e. irrespective of the number of shares held, one member has only one vote.

TYPES OF A COMPANY

There are various types of company that can be formed in different jurisdictions, but the most common forms of company are:

- *A company limited by guarantee.* Commonly used where companies are formed for non-commercial purposes, such as clubs or charities. The members guarantee the payment of certain (usually nominal) amounts if the company goes into insolvent liquidation, but otherwise they have no economic rights in relation to the company.
- *A company limited by guarantee with a share capital.* A hybrid entity, usually used where the company is formed for non-commercial purposes, but the activities of the company are partly funded by investors who expect a return.
- *A company limited by shares.* The most common form of company used for business ventures.
- *An unlimited company* either with or without a share capital. This is a hybrid company, a company similar to its limited company (Ltd.) counterpart but where the members or shareholders do not benefit from limited liability should the company ever go into formal liquidation.

There are, however, many specific categories of corporations and other business organizations which may be formed in various countries and jurisdictions throughout the world.

CAN ONE SHAREHOLDER BECOME A COMPANY IN TANZANIA?

From common law perspectives, a company has been known as an association of persons with common agenda to carry on certain business. The word Company as we have seen means a companion or an association of persons with an object of carrying on certain business. From this standpoint, one may argue that there cannot be a company formed by one person.

However, due to challenges in our business society, it is no longer necessary, in several jurisdictions, for a company to be an association of two or more persons. Today in Tanzania, as it is in the UK, USA, China, Pakistan and India, a company maybe formed by one person.

A person therefore, may associate with himself to form a limited liability company same like a company with two or more persons.

THE POSITION IN TANZANIA

Company law in Tanzania is a product of common law of England. The prevailing company law system was introduced in Tanzania in 1932 by the adoption of the Companies Ordinance Cap.212 which was repealed and replaced by the Companies Act, Act No. 12 of 2002.

In 2012, the Companies Act. No. 12 was amended to introduce, as an addition to the existing company setup, a new one shareholder company. The amendment was brought in by the Business Law (Miscellaneous Amendments) Act No. 3 of 2012 whereby its sections 18 extends the meaning of the word company by amending section 3 of the Companies Act, to include a “single shareholder company formed by an individual”.

The amending law also introduced a new Section 26A to the Companies Act whose subsection (1) provides that a limited liability single shareholder company shall be formed by one member. It is by virtue of this section company set up, structure and management considered to have been modified.

WHAT ARE THE FACTORS BEHIND THIS IMPROVEMENT?

The Minister for trade affairs presented the Bill to include one shareholder Company to the Parliament in 2011. He gave the reason that, the government wanted to encourage corporatization of business and entrepreneurship.

Another reason was to enable business persons who wanted to venture into corporate world singularly to be able to do so. Therefore, the passing off the amendments to the companies Act, brought hope for budding entrepreneurs.

WHO MAY SET – UP A ONE SHAREHOLDER COMPANY?

Any person who is of the age of majority, who is not declared bankruptcy or disqualified director may set up a one Shareholder Company. Currently, it is not a requirement that a person setting up the company must be a citizen or resident in Tanzania. Therefore, this is an opportunity for national and foreigner entrepreneurs who prefer to work alone or do not require business partners to set up their corporations in Tanzania.

The process of setting up a one shareholder company is still considered the same as for a private limited company unless otherwise modified by long waited regulations to regulate the business of one Shareholder Company.

CAN A ONE SHAREHOLDER COMPANY BE CHANGED TO AN ORDINARY PRIVATE LIMITED LIABILITY COMPANY WITH MULTIPLE SHAREHOLDERS?

By virtue of section 26A (3) of the Companies Act Cap.212 R.E 2002, a single Shareholder Company may be changed to an Ordinary Limited liability Company by admission of new Shareholders. After the number of shareholders has been increased from one to two or more, the company shall cease to be a single Shareholder Company.

The Company is then required to notify the Registrar of such changes.

WHAT IS THE PRIMARY ADVANTAGE OF ONE SHAREHOLDER COMPANY?

One Shareholder company is a hybrid structure where it combines most of the benefits of sole proprietorship and a company form of business. It has only one person as a member who will act in the capacity of a director as well as a shareholder. Thus it does away with the hassles of finding the right kind of co-partners for starting a business as a registered entity. The best part is that legal and financial liability is limited to company and not the member.

CHALLENGES IN TANZANIA

The Companies Act Cap.212 R.E 2002 is silent in many areas which are vital to the management and administration of a single Shareholder Company. Section 26A (5) empowers the Minister responsible for trade to make regulations and rules concerning setting up, management and administration of a one Shareholder Company. Note that under Section 26A (5) of the Companies Act, Cap 212 R.E 2002, The Minister Responsible for Trade Affairs is given power to make regulations for set up and management of a Single Shareholder Company.

It is important to note that the said subsection does not oblige the minister to make those regulations. The word used in the statute is “MAY” make regulations. This means that regulations are made “at the will” of the Minister.

The Companies Act Cap 212 was amended on 15th June, 2012 when the President assented the Business Laws (Miscellaneous Amendments) Bill. It is almost three years now no regulations have been made and there are no indicators as to when they will be made available. In the absence of these regulations it is still impractical to establish a single Shareholder Company in Tanzania. Thus, the objectives of the amendments cannot be realized.

Important issues to be addressed in the regulations (Articles) of a single

Shareholder Company

These matters are as follows:-

- i) What will happen if the founding Shareholder dies or is mentally incapacitated? In the absence of regulations to this effect means that the continual existence (perpetual succession) of the company will depend on the life of its founding shareholder. This will be a great departure from one of the grand principles of company law. The position in India is that since the company is owned by a single person, he must nominate someone to take charge of it in case of his death or inability. This is a condition precedent for registration. The nominee must give his consent in writing which has to be filed with the Registrar at the time of filing an application for registration of the company. On demise of the original shareholders/director the nominee director will manage the affairs of the company till the date of transmission of shares to legal heirs of the demised member.
- ii) How does a shareholder appoint director(s) of the company? Can he appoint himself a director to the company? If so how? Is he required to file resolutions with the Registrar or not? These questions are supposed to be answered by the regulations governing one shareholder company.
- iii) Another disturbing issue is whether a single shareholder company is still obliged to hold Annual General Meetings. In other countries such as India, the law grant exemptions to such companies from holding AGMs, though records and documents are to be maintained.
- iv) Whether it is still reasonable to allow every person to establish a company without defining the limits in terms of number of companies one person may establish? Or without defining the limit of capital requirements. These are vital matters to be addressed by regulations

otherwise there will be loopholes that may be used by individual persons to avoid or even evade tax. The position in other countries has been made very clear. For example in China, one person is allowed to apply for opening a limited company with a minimum capital of 1,000,000 Yuan and a person is barred from opening a second company of the same kind.

Memorandum of Association

The memorandum of association is the main document by which the registration of a company is achieved and the provisions contained within the memorandum will prevail over any conflicting provisions contained in the articles of association. The memorandum of association has five compulsory clauses:

- The name clause;
- The object's clause;
- The liability clause;
- The capital clause; and
- The subscription clause.

Alteration of the Memorandum of Association

Under S. 6 of the CA, The memorandum of a company may not be altered, except in cases for which the method and extent is provided for under S 8 of the CA.

Articles of Association

The articles of association binds a company with its members and contains a company's internal rules and regulations. The provisions contained in Table A of the First Schedule of the CA apply to companies unless they are altered or excluded by the articles of association. The model articles contained in Table A are inappropriate for many private companies and the majority of companies will adopt a modified version of Table A as their articles.

Alteration of the Articles of Association

The articles may be amended by the passing of a special resolution of the company. A company has a positive power to alter its articles but there are four notable restrictions on the members' right to alter a company's articles by special resolution:

- Where the alteration is contrary to law;
- Where an additional liability is imposed on the members;
- Where class rights are altered; and
- Where the articles have been amended and the members did not act bona

fide and in the interests of the company as a whole.

MANAGEMENT AND ADMINISTRATION OF A COMPANY (CHAPTER VII of the Companies Act)

Company management refers to the rules governing the organization and management of the *business and affairs* of a Company in order to meet its internal objectives and external responsibilities. This definition refers to the two distinct types of Company activities as per the CA

- a) The *affairs*: the internal arrangements among those responsible for running a Company such as the directors, officers, and shareholders.
- b) The *business*: the external relations between a Company and those who deal with it as a business enterprise that is its customers, suppliers, and employees—as well as relations with government regulators and society as a whole.

Every company, public or private, limited or unlimited is managed by a Director or directors appointed by the shareholders. Under S. 181 of the CA directors of the Company, the directors of a company have all the powers necessary for managing, and for directing and supervising the management of, the business and affairs of a company granted to them under the Articles of Association of a Company.

Every Company must have at least two (2) Directors as provided for under S. 186 of the CA.

Role /Functions of Directors

To issue shares.

To declare dividends – the directors determine how much profit to retain in the Company and how much to distribute as dividends.

To adopt by-laws governing the daily affairs of the Company.

To call meetings of the shareholders, at least once per year.

To delegate responsibilities and (except those outlined above) and appoint officers.

Duty of Directors

1. Duty of directors to act in good faith and in best interests of company (S.182)
2. Director's to have regard to interests of employees (S. 183)
3. Powers to be exercised for proper purpose (S. 184)
4. Directors' duty of care (S. 185)
5. Duty of directors to disclose age (S. 195)
6. Duty of director to disclose payment for loss of office etc. made in connection with transfer of shares in company (S. 203)
7. Duty to disclose interests in contracts (S. 209)
8. General duty to make disclosure for purposes (S. 208)

Secretary

Every Company must have a secretary as established under S. 187 of the CA.

Every appointed secretary must possess knowledge and experience to hold the office of the secretary of a Public Company.

Appointment and Removal of Directors

In a public company, directors are appointed through a motion that has been agreed by individual votes as required under S. 192 of the CA.

Under S.193, a company may by ordinary resolution remove a director before the expiration of his period of office, notwithstanding anything in its articles or in any agreement between it and him.

Read on the removal procedures under S. 193 (2-6) of the CA.

Corporate Financing

Corporations are financed in one of two ways: equity or debt. **Equity** financing refers to “what shareholders have invested in the corporation in return for shares,” while **debt** financing “consists of loans that have been made to the corporation.” The distinction between a **share** and a **bond** (or debenture) can become blurred as more features are attached to corporate securities.

Difference between Equity and Debt Financing

Equity Financing

Shares represent ownership interests. Shareholders have a claim to the residual value of the corporation after all debts and other claims have been paid.

Dividends are a repayment of capital. They are paid out of after-tax profits and thus are not tax-deductible by the corporation.

If dividend payments are not made, shareholders may have no remedy.

On dissolution of a Company, at least

Debt Financing

Bonds represent debt.

Bondholders have a claim for a fixed amount (principal and interest).

Interest on debt is deducted in arriving at the taxable income of the corporation.

If debt is not repaid, the creditor can sue for breach of contract and even force the corporation into bankruptcy.

Holders of bonds secured by property or

one class of shareholders will receive property that remains after all other claims have been paid.

assets in general are entitled to be paid out ahead of general creditors on dissolution of a Company

WINDING UP OF THE COMPANY

In Tanzania a company incorporated or registered under the Companies Act may be dissolved or deregistered in different ways and for different reasons. One reason for closing down a business may be financial difficulties. The process of closing down a company and having it deregistered is called 'winding up'.

Winding up can be defined as the process of settling down accounts and liquidating assets in anticipation of dissolution of a partnership or a Company.

There are different ways of dissolving or winding up a company as Regulated under the Companies Act and the Companies Insolvency Rules of 2004. S.267 of the Act provides for the following modes;-

- i) Voluntary mode which can be initiated by the member of the company
- ii) By court

Voluntary winding up

This is initiated by the owner shareholders of the company. So, the members will need to have a special resolution to the effect of winding up the company voluntarily. This is preceded by a resolution of directors who recommend to the shareholders for the company to be wound up voluntarily.

In addition, the directors must make a declaration that the company has enough assets to clear all the liabilities. This is called declaration of solvency and has to

be made and filed thirty (30) days before the shareholders make a special resolution to wind up the company as provided under Section 338 of the Act

General reasons or grounds for voluntarily winding up a company:

1. When the company which was formed to operate for a specific time and such duration has passed. This is common where at the time of its incorporation, shareholders state in the Articles of Association that the company will operate for a certain specific time.
2. When there is an occurrence of the event which was stated in the Articles of Association that upon occurrence of that event the company shall be wound up.
3. When the company by using a special resolution decides for its dissolution.
4. When the company after assessment of its affairs resolves that due to the liabilities it cannot continue with business and therefore it has to end.

Process of voluntary dissolution

This is deemed to have commenced or starts when the members resolve for the dissolution and not when the declaration of solvency was made by the directors much as it is the declaration which starts. It is important to note that in a declaration of solvency the directors state that after making an inquiry or assessment of the affairs of the company, the firm is capable of paying its debts in full within twelve months from the day when dissolution commences. Based on the assurance from the directors the meeting of the shareholders follows within thirty days resolving the dissolution of the company. It is in that meeting the shareholders appoint a competent liquidator who will wind up the affairs and handle distribution of the assets of the company. The meeting may also agree on

the remuneration of the liquidator.

Once the liquidator is appointed all the directors' powers cease and liquidator is required to immediately notify the Registrar of Companies and summon the creditors meeting, if any. The notice has to be given to the creditors not less than seven days before the date of the meeting and it has to state time and venue of the meeting. The notice is required to be advertised in the Gazette and widely circulating newspapers in Tanzania.

Having been appointed, the liquidator is required to manage the affairs of the company in accordance with the law up to an end of its winding up. The liquidator is required to collect the assets of the company if any and discharge the liabilities which the company may have. Immediately after the winding up the liquidator is required to prepare accounts of the winding up, stating the conduct of the whole procedure of the dissolution, how the property of the company have been disposed of, and after such account reporting the liquidator has to call a general meeting for the purpose of presenting the said accounts.

The notice of the meeting has to be by way of an advertisement in the Gazette and in widely circulating newspapers in Tanzania at least thirty days before the actual date of meeting. The notice has to show the time of the meeting, venue, and purpose of the meeting. After such a meeting the liquidator has to deliver to the Registrar of Companies a copy of the accounts and also file the returns of the meeting and the date on which was held.

Having received the returns of the meeting the Registrar of Companies has to register them and after expiration of ninety days (from the date of registration), the company is deemed to be wound up or dissolved.

The only exception is when the Court upon application by either an interested party or liquidator extends the date at which the dissolution of the company is to take effect as the Court deems fit.

Winding up by Court

The jurisdiction to wind up a Company is expressly vested to the High court under S.275 of the CA. however, after giving such an order, if the High court deems fit may delegate the proceedings of the company dissolution to the Resident magistrate Court as so provided under S.276 of the CA. upon such delegation, the Resident magistrate Court will have all the jurisdiction to hear the matter concerning company dissolution.

Reasons a court may wind up a Company (as per S.279 of CA)

A company may be wound up by the court if:-

- a) the company has by special resolution resolved that the company be wound up by the court;
- b) the company does not commence its business within a year from its incorporation or suspends its business for a whole year;
- c) the number of members falls below two;
- d) the company is unable to pay its debts
- e) the court is of the opinion that it is just and equitable that the company should be wound up;
- f) If a company that is incorporated outside Tanzania and carrying on business in Tanzania and winding up proceedings have been commenced in respect of it in the country of its incorporation or in any other country in which it has established a place of business.

S. 280 provides that a Company may be considered unable to pay its debts where;

-

- a) A creditor has served on the company, by leaving a written demand

requiring the company to pay the sum so due and the company has for twenty-one days thereafter neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor

- b) if execution or other process issued on a judgment, decree or order of any court in favour of a creditor of the company is returned unsatisfied in whole or in part
- c) if it is proved to the satisfaction of the court that the company is unable to pay its debts as they fall due; or
- d) If it is proved to the satisfaction of the court that the value of the company's assets is less than the amount of its liabilities