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Business Law

<i>Group Members:</i>	<i>Cheryl Chan</i>	<i>1051102156</i>
	<i>Mageswari a/p Chandra Babu</i>	<i>1051100209</i>
	<i>Suriani bt. Md. Yusop</i>	<i>1041105407</i>
	<i>Noor Syalini bt. Yusof</i>	<i>1041109972</i>
	<i>Azniza bt. Rohani</i>	<i>1041104003</i>
	<i>Nina Fatimah</i>	<i>1031196233</i>
	<i>Nor Suzeana Sudin</i>	<i>1051108746</i>
	<i>Arefeh Verdinejad</i>	<i>1041110149</i>
	<i>Subashini a/p P.Maniam</i>	<i>1051107716</i>

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QUESTION 1

Private Company Limited by Share

This type of company limited by shares is the most popular form of company that allow owner to have a separate form of legal entity between the Company and the owner¹. The Company is owned and invests by its shareholders. The shareholders of the company can be either an individual shareholders or corporate shareholders whereas; the operation and management of the company are managed by the Board of Directors appointed by shareholders. In our case right now, Lan and Lin is consider under corporate shareholders seems both of them would like to incorporate a company together.

A private limited company is one which by its articles restricts the right to transfer its shares .The transfer may be subject to the approval of the directors. Then it limits the number of its members to fifty and the minimum being two. Rather than that, it prohibits any invitation to the public to subscribe for any shares in or debentures of the company and to deposit money with the company for fixed periods or payable at call.

Procedure in the Formation of a Private Company Limited by Shares

Name search and reservation process

The other important thing that the party who forms the company needs to take consideration is the name of the company. Before incorporating a company, a name search must be conducted by making an application to the Registrar for the availability of the proposed name. If the Registrar is satisfied as to the legitimacy of the application, the name will be automatically reserved for a period of three months. There has also been argued that the present reservation period of 3 months may need to be revised to provide for a shorter period. Amongst other comparable jurisdictions, Malaysia has the longest period of reservation.² Within this period of time, no one else can incorporate a company under the reserved name. The name reservation process provides a means to minimise the duplication of names where there could be issues related to passing-off or similar liability.

¹ For more details information refer to the Section 14(2) of the Companies Act 1965.

² This period is longer compare to other country's period like Australia and Singapore with 2 months, and New Zealand with 20 working days.

Another aspect involving the name reservation process is the reliance on the Registrar's approval or refusal of the proposed name. Such reliance has resulted in the Registrar being made a party to civil actions in relation to passing-off actions. This is because of the perception that since the Registrar has the discretion to approve or refuse the name applied for; he is giving an assurance that nobody else has been using the name. Notwithstanding, the Registrar should still be empowered to direct a company to change its name on certain grounds after its incorporation.

In the case of Lan and Lin who want to incorporate a company of their growing wholesale business, they decide to name their company with 'Fair Store (Malaysia) Sdn. Bhd'. Since their company is private limited by share, then the word 'Sdn. Bhd.' must be followed after the name of the company. Since their company have abide by the regulation and there is no other problem regarding the selected name, then the name of the company should be accepted.

The **Companies Act 1965** is the principal legislation governing the formation and operation of companies in Malaysia. The Act enables an association of persons to form various types of corporate organization known as registered company. In addition to protecting the right and interests of shareholders in particular and investors in general, this Act also provides facilities for the incorporation of companies, its constitution, its relation with members and creditors, management and winding-up.

We as a licensed company secretary will give the and Lan and Lin must follow all this Steps/Procedures to register a Private Company Limited by shares:-

1) The Registrar of Companies Malaysia or ROC enforces and administers the Companies Act 1965. Every company intending to carry on business in Malaysia must register with Registrar of Companies before conducting any business activity. ROC will make conducting a search on the availability of the proposed name with the Registrar of Companies (ROC). This first step in the registration process is to ensure that the **proposed name** is available for registration as a company.

Lan and Lin can search ROC's Names Index by using ROC online computer facility to check whether your proposed name is identical to another name already registered. A search of company names can be carried out at any ROC offices or can be done online. If the name is available, you may apply the name using the Form 13A and lodge it with the prescribed fee of RM30-00.

2) If the application is approved, the name will be reserved (protected) for a **period of three months**. Even if ROC approves the reservation of a name, or subsequent registration of a company's name, it does not mean that exempt from action taken by another person or corporation with a similar registered name. It is responsibility to be aware of any problems that might arise from names already registered which are similar to, or likely to be confused with, the name Lan and Lin register.

3) **Pre-incorporation documentation**³ to be completed for submission to the ROC as follows :-

(i) **Form 48A** - Statutory declaration by directors/promoters. Statutory Declaration by a director or promoter before appointment. The director or promoter declares under oath that he/she is not a bankrupt and he/she has not been convicted of an offence and sentenced by the Court. This declaration should be signed in front of anyone of the following persons of authority such as Commissioner of Oaths, President of the Sessions Court, Magistrate and those empowered under the Statutory Declaration Act 1960

(ii) **Form 6** - Declaration of compliance. This declaration states that all the requirements of the Companies Act 1965 have been complied with. It must be signed by the company secretary who handles the registration and is named in the Memorandum and Articles of Association.

³ ____ (n.d) Registration Procedures[WWW Document] Available from <http://www.gov.my/MYGOV/BI/Directory/Business/BusinessByLifeCycle/StartBusiness/RegisteringYourBusiness/RegistrationOfLocalCompanies/RegistrationProcedure>

(iii) **Form 48F** – Declaration by a person before appointment as secretary

The appointment of a company secretary is subject to the companies Act 1965 and the person to be named as the secretary of a company has to execute a Form 48F (Declaration by a person before appointment as secretary) before he is appointed.

(iv) **Memorandum and Articles of Association**

The Memorandum of Association documents the company's name, the objects, the amount of its authorized capital (if any) proposed for registration and its division into shares of a fixed amount. The Articles of Association also describes the regulations governing the internal management of the affairs of the company and the conduct of its business.

Memorandum of every company should be stated and divided into numbered, paragraphs and dated. For the other requirements of the memorandum, it shall state the name of company and the objects of the company. For a company limited by shares, the liability of the members is limited and also limited to the amount. In addition, if any of unpaid on the shares respectively held by them.

4) Proposed company must also prepare the following for registration:-

-Registered Office (must be in Malaysia)

In this case, Lan and Lin wanted to build one company by named “Fair Store(Malaysia) Sdn.Bhd”, so they must performed and registered office in Malaysia not somewhere outside from Malaysia. If any happen or some problems, they will get a faster responses and resolve that problems and will get helping from our country.

*Section 18 of Companies Act 1965 ⁴

- **Authorised Share Capital (minimum - RM100, 000/-)**

Registration fees for Share Capital:

Authorised Share Capital (RM)	Fees (RM)
Up to 100,000	1,000
100,001 – 500,000	3,000
500,001 – 1 million	5,000
1,000,001 – 5 million	8,000
5,000,001 – 10 million	10,000
10,000,001 – 25 million	20,000
25,000,001 – 50 million	40,000
50,000,001 – 100 million	50,000
100,000,001 and above	70,000

- **Paid-up Capital (minimum - RM2/-)**

- **Capital duty payable to the ROC (minimum- RM1, 000/-)**

Subscribers to the Memorandum/Articles of Association (minimum two)

At least two or more promoters shall sign the Memorandum and Articles of Association in front of a witness

- **First Directors (minimum two, who must be natural persons and have residential address in Malaysia)**

- **Secretary (must be a natural person and have residential address in Malaysia)**

- **Duration required - normally no longer than two months, if the choice of name does not require any consent from relevant authorities.**

Once properly registered, ROC issues Certificate of Incorporation of Private

⁴ _____(n.d) Section 18. Requirements as to Memorandum [WWW Document] Available from http://www.kpdnhep.gov.my/index.cgi?action=pub&pub=akta_210

Company (Form 9) ⁵

ROC will usually require two weeks to approve and issue the Certificate of Incorporation. In other words, the company can be incorporated within four weeks and the company can commence business immediately with the Certificate.

Incorporation of company

In section 16 of Companies Act 1965 ⁶, there are several Act stated in this section. The first Act is a registration and incorporation where someone desiring the incorporation of a company shall lodge the memorandum and articles. For any of the proposed company with the Registrar together with the other documents required to be lodged by or under this Act. The Registrar on payment of the appropriate fees shall subject to this Act register the company by registering the memorandum and articles. Rather than that, for statutory declaration Act, the person named in the articles as the first secretary of the company shall lodge with the Registrar a declaration in the prescribed form stating that all or any of the requirements of this Act have been complied with and containing such information as may be prescribed and the Registrar may accept such a declaration as sufficient evidence of compliance. In certificate of incorporation, the registration of the memorandum the Registrar shall certify under his hand and seal that the company is on and from the date specified in the certificate incorporated and that company is a company limited by shares.

QUESTION 2a

⁵ _____(n.d) **FORMATION PROCEDURES OF A MALAYSIAN COMPANY**[WWW Document] Available from <http://iss2.etax.com.my/vld/secretarialvld.nsf/1e14d11dedab1008482569dc0039a83a/e73bed725959033148256a180013cee9?OpenDocument>

⁶ _____(n.d) **Section 16.Registration and Incorporation** [WWW Document] Available from http://www.kpdnhep.gov.my/index.cgi?action=pub&pub=akta_208

Based on the situation given, there is no valid contract. Ng cannot sue Azmi because there is no agreement between both parties. The rule of law state that an offer is required by statute to be in writing (brochure) the acceptance must also be in writing order for the offer to become a contract binding on both parties.

Acceptance has no effect until it is communicated to the offeror. Acceptance like the offer must be given in clear terms. It must be a positive act, for instance, Ng cannot assume that when Azmi say he will think about reducing the price, it means that Azmi will sell the car to Ng. Ng cannot sue Azmi for a breach of contract⁷ because Ng have not pay any deposit. So, the offer to sell the car is considered not valid. In addition to that, both parties are still in a state of negotiation and no agreement was formed. Besides that, Azmi did not engage in a bilateral contract⁸ which means that Azmi did not state that he will promise to sell the car to Ng if Ng promise to pay RM39 000. Azmi has the rights to sell the car to anyone that is willing to accept the terms that he had fixed. The ownership of the car is still with Azmi. Due to that, Ng does not have the right to sue Azmi for a breach of contract.

In this case an offer or proposal is necessary for the formation of an agreement between Ng and Azmi. Section 2 (a) of the Contract Act 1950 states that when one person signifies to another his willingness to do or to abstain from doing anything with view to obtaining the assent of that other to the act or abstinence. Here Azmi is the offerer whom had offered to sell a car at RM 39 000. Basically an offer is something which is capable of being converted into an agreement by its acceptance. In this case Ng did not totally accept the offer made by Azmi where he had demanded to reduce the car price in which Azmi had mentioned that he will think about it first and later inform Ng through email. In this case there was a lack of offer and acceptance, the purported selling and buying was declared *void ab inotio* that is the agreement was void from the beginning. The communication of this offer was complete when it comes to the

⁷ Breach of contract is a legal concept in which a binding agreement or bargained-for exchange is not honored by one or more of the parties to the contract by non-performance or interference with the other party's performance.

⁸ In a bilateral contract, the offeror is asking for a return promise.

knowledge of the person to whom it was made- section 4 (1). In this case the communication was complete between Ng and Azmi when Ng got to know that the price could not be reduced. The offer made by Azmi is defined as 'Expressed' as it only done orally. The evidence indicates that the parties did not intend to be immediately bound. Since Azmi said he will 'think of it', the term indicates that it is indefinite and so there is no legal contract between the two parties. Ng is not eligible to sue Azmi, where the parties enter into a formal document the intention to create legal relationship is obvious. But when all that happen is quite casual conversation through telephone, it is very much more difficult to infer that the parties are really contemplating entering into any legal relationship. It is true negotiations ensued but the evidence before me indicate that the parties do not intend to be immediately bound or in Latin, there is no present *Animus Contrahendi*, what passed only was a negotiation from beginning to end.

The communication of a proposal is complete when it comes to the knowledge of the person to whom it is made-section 4(1), Contracts Act 1950. This means that an offer or proposal is effective once it is communicated to the offeree by the offerer. The communication of an offer or proposal is deemed to have been made by any act or omission of the party proposing by which he intends to communicate the proposal or which has the effect of communicating it- Section 3, Contract Act 1950. As mentioned earlier, a proposal made in words (Oral or Written) is said to be expressed if a proposal is made other than in words (e.g. by conduct), it is said to be implied- Section 9, contract act 1950.

Besides that, there is also lack of intention. When Ng asked to reduce the price of the offer, Azmi hesitated by saying that he will think about it. This shows that he has lack of intention to sell the car to Ng. The lack of intention refers to the case of *Yap Eng Thong & Anor v. Faber Union Ltd.*⁹ and *Guha Majunder v. Donough.*¹⁰ Furthermore, acceptance must be absolute and unqualified so that there is complete consensus. If the parties are still negotiating, an agreement is not yet formed- *Lau Brothers & Co. v. China Pacific Navigation Co. Ltd*

⁹ Ibid

¹⁰ (1974) 2 M.L.J 114

here are four remedies for breach of contract that can make Ng to sue Azmi. Firstly, if Azmi and Ng made a contract and Azmi breaks the contract made between them, Ng may claim damages from Azmi who breached the contract under section 74 of the Contracts Act 1950. Example of case for the damages was 'Associated Metal Smelters Ltd. v Tham Chew Toh.

Secondly, let say Azmi promised to sell his car to Ng and Ng promised to buy it for RM 34,000 but later Azmi refused to fulfill the contract. Then Ng can sue Azmi for specific performance under section 21 of the Specific Relief Act 1950. Example of case for specific performance was Yeo Long Seng v Lucky Park (PTY.) Ltd.

Thirdly, if Azmi made a contract to sell his car to Ng and after few days Azmi made another contract with another party to sell the same car. Then Ng can sue Azmi and here court will grant interlocutory injunction requiring Azmi not to transfer the ownership of the car to third party. Example of case was Broome (Selangor) Rubber Plantation.

Lastly, in case that Ng already pay RM 5000 as a deposit to Azmi for the car, then Ng can sue Azmi to recover on a quantum meruit where can claim payment for what he has done under the contract. Example of case was Planche v Cloburn (1831).

So as a conclusion, Azmi cannot be sued by Ng because Azmi never promise anything yet to Ng about selling his car.

QUESTION 2b

For the case B, as we all can see there is already an agreement between Nirmala and Azmi since Nirmala already paid the deposit to Azmi. So that means, the contract between Azmi and Nirmala is valid. But there is also some added in the contract that Nirmala would like the colour to change to orange, Azmi ask for the extra cost, and Nirmala also agree to pay RM43000 and she will get the car in orange color. From what already mention in the above we can conclude that this agreement is under term of certainty because there is no doubt in the contract as both of them already state it clearly what the contract requires to be done in their agreement, so that's mean the contract between Azmi and Nirmala is valid As for the misunderstanding of the instruction that was given to the painter is none of Nirmala business. It is between Azmi and the painter. But when Azmi asked Nirmala to pay only the first amount which is RM39000 and she still refuse, Azmi has the rights to sue Nirmala for 'breach of contract'.

This breach of contract can be include as a minor breach, a partial breach or an immaterial breach, which occur when the non-breaching party is not entitled to an order for performance of its obligations, but only to collect the actual amount of their damages. That remedy for breach contract that implied is Damages, as written in, Section 74 of the Contracts Act 1950 sets out the provision for such compensation. Damages are intended to compensate the innocent party for the loss that he has suffered as a result of the breach of contract. In order to establish an entitlement to substantial damages for breach of contract the injured party must establish the actual loss has been caused by the breach, the type of loss is recognised as giving an entitlement to compensation, the loss is not too remote and the quantification of damages to the required level of proof. A breach of contract can be established even if there is no actual loss. In that case there will only be an entitlement to nominal damages.

In this case, although Azmi breached the literal terms of the contract, Nirmala can only recover the amount of her damage. In this case we can say that the amount that she can refuse to pay is the extra amount paid to the painter for changing the color. Nirmala still should pay the amount for the first agreement before she want to change the color which is RM39 000, since no damages were inflicted.

REFERENCE

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