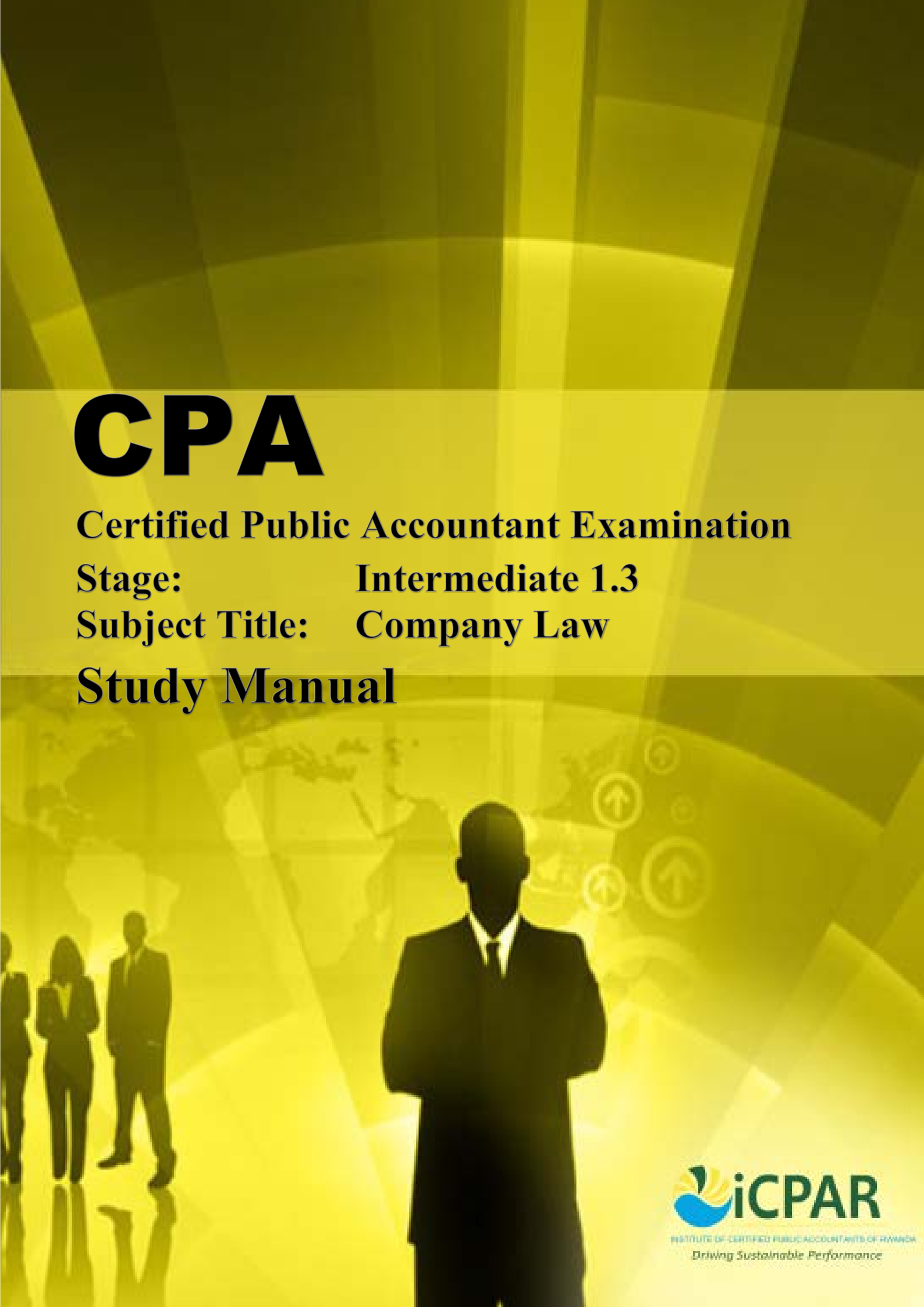
CPA

Certified Public Accountant Examination

Stage: Intermediate 1.3

Subject Title: Company Law

Study Manual



ICPAR
INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS OF RWANDA
Driving Sustainable Performance

INSIDE COVER - BLANK

INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS OF RWANDA

Intermediate 1.3

I1.3 Company Law

First Edition 2012

This study manual has been fully revised and updated

in accordance with the current syllabus.

It has been developed in consultation with experienced lecturers.

BLANK

CONTENTS

INTRODUCTION TO THE COURSE

Stage: Intermediate Level
Subject Title: I1.3 – Company Law

Aim
This subject aims to ensure that students understand the key aspects of business and commercial law to business organisations and recognise issues that require the advice of a legal professional. In addition they must understand, apply and advise on the regulatory and governance requirements applicable to business organisations.

Company Law as an Integral Part of the Syllabus.
The legal principles learnt in this subject will be relevant to students throughout their professional accountancy studies. In particular this subject is an integral component for the study of *Financial reporting, Managerial Finance, Auditing, Advanced Financial reporting, Advanced Corporate Finance* and *Audit Practice & Assurance Services.*

Learning Outcomes
On successful completion of this subject students should be able to:-

- Understand how to form a company
- Distinguish between companies and other business organisations
- Understand appointment of Directors, Secretary, Auditor
- Understand Company Accounts
- Understand procedures to be applied to Corporate Insolvency
- Understand a apply alternative procedures to winding up

Syllabus:

1. Company Law

- Nature & Classification of Companies
- Forms of business organisations
- Distinction between companies and other business organisations
- Law relating to other business organisations such as co-operative societies

2. Registration of a Company

- Memorandum and Articles of Association
- Promoters
- Legal consequences of incorporation

3. Share Capital

- Types of Share Capital
- Raising Share Capital
- Variation of shareholders rights
- Prospectuses
- Alteration, maintenance and reduction of capital
- The acquisition and redemption by a company of its own shares
- Financial assistance by a company for purchase of its own shares
- Dividends

4. Debt Capital

- Debentures
- Charges
- Registration of charges
- Remedies for debenture holders
- Borrowing powers of a company

5. Membership of a company

- Ways of becoming a member
- Register of members
- Rights and liabilities of members
- Termination of membership

6. Shares

- Classes of shares
- Issue and Allotment
- Transfer and transmission
- Mortgage of Shares
- Share Warrant

7. Meetings

- Classification of Meetings
- Notice of Meetings
- Agenda
- Proxies
- Quorum
- Proceedings at the meeting
- Resolutions
- Minutes

8. Directors

- Appointment of directors
- Qualification, disqualification and removal of directors
- Powers and duties of directors
- Compensation for loss of office
- Loans to directors
- Register of directors
- Disclosure of directors' interests in contracts
- The Turquand's rule
- Investor Protection
- Insider Dealing

9. The Secretary

- Qualification, Appointment and removal
- Position and duties
- Liability of a secretary
- Removal of a secretary
- Register of directors and secretary

10. Auditors

- Qualification, appointment and removal
- Remuneration of auditors
- Powers and duties
- Vacation of office

11. Company Accounts, Audit and Inspection

- Form and content of accounts
- Books of account
- Group Accounts
- Directors' report
- Auditor's report
- Investigation by the registrar
- Appointment and powers of inspectors
- Inspector's report

12. Corporate Insolvency

- Winding up by court
- Voluntary winding up
- Liquidators: Appointment and duties
- Release of liquidators
- Offences relating to liquidation

13. Alternatives to winding up

- Reconstruction
- Amalgamation
- Mergers and takeover
- Schemes of arrangement
- Rights of shareholders
- Rights of creditors

Study Unit 1

Nature and Classification of Companies

Contents

COMPANY LAW

The expression “company law” may be defined as a branch of law governing the companies. It deals with all aspects relating to companies, such as incorporation of companies, allotment of shares and share capital, memberships in companies, borrowing by companies, management and administration of companies, winding up of companies. Thus, the company law is that law which exclusively deals with all matters relating to companies.

A. DEFINITION OF COMPANY

In Rwanda, commercial companies are governed by the N°07/2009 of 27/04/2009 relating to companies.

The concept of commercial company is defined on article 2, 12° of company law as a corporate body composed of one or more persons for making profit. Thus, is legal sense, a company is one which is formed and registered under the companies’ law aforementioned.

It may be noted that legally, a company is regarded as a person, which has rights and duties at law. However it is not a natural person as human beings are. It is only a legal or artificial person, recognized by the law. Since, the company is created by the law *i.e* by registration under the law, it is known as a legal person, and as it has no body, no soul or conscience, no physical existence except in the eyes of law.

According to the legal definition of the company under Rwandan law, it is evident from this definition that the contractual character is not more compulsory for companies. Article 3 of the law goes on to say that a company is a legal entity which is made up with one physical person or corporate person for commercial purposes and after filling in a form thereto related and basing up on the provisions of this Law. The company shall be formed by filling in the form attached herewith as Appendix I.

In addition article 2, 16° defines a corporation by eliminating all categories of persons which are not regarded by this as body corporate, they include:
a) a statutory corporation;
b) a sole proprietorship;
c) a registered co-operative society;
d) a trade union;
e) a registered organization;

At the face of the above list, one sum up the list of exclusion as follows: the first element corresponds to a government company which may be a trader such as RECO RWASCO or ONATRACOM. The second category excluded from corporation merely because the trader in this category is a real person (not a group of individuals putting together their credit and assets). The last three categories are rather civil society organizations.

The contractual conception of the company prevailed for a long time. It has been followed then by another tendency that considered the company like a mixture of both the notions of contract and moral person to some extent depending on the type of companies. The present conception has the tendency to become gradually a combination of two notions but with a predominance of the institutional conception of a company.

B. THE COMPANY AS CONTRACT

Insofar as a company is a contract, it supposes a minimum of two parties and thus complies with general conditions of validity of the contracts with regard to its incorporation: consent of the parties, capacity to inter into agreement, actual object and legal cause.

However, besides the above conditions common to all contract, a company contract has particular conditions. The mere contractual explanation is indeed insufficient insofar as the legislator regulates in an imperative way conditions to create a commercial company.

In the same way a company legally comes into existence after its compliance with an administrative formality of registration with the Office of the Registrar General (art.4).

As with regard to company contract, the shareholders agree to put in together the values, goods or how know in order to share the profits.

The content of this agreement governs the functioning of the company. There is no company contract unless there is a combination of the following elements:

- The shares from one or several shareholders;
- The vocation of all to the profits;
- The *affectio societatis*.

C. SHARES

In order to contribute to the formation of a share capital of the company, every shareholder must commit to make a share and is debtor of the share that he vowed to give. He owes to the company a guarantee similar to that of the seller in case of eviction. The share differs from a sale in that in return to the good of which it property transferred, a shareholder doesn't receive a price, but titles representing the share capital of the company which is the beneficiary of shares. Besides, to the difference of the sale that is a commutative contract, the share has an uncertain character because even though a shareholder knows the value of that he brings, he ignores the value of the share that he receives in return.

The company contract implies therefore putting together shares by each of the contracting parties. The share indeed, is the good which is transferred to the company by the shareholder in trade of which he is entitled some shares. In other words, it is good that the shareholder commits to put at the disposal of a company for a common exploitation. The notion of shares is instrumental to the constitution of a company, especially when it comes to corporations, where without share the whole idea of a company lacks substance. Article 31 of company law states Share capital shall mean all the shares received whether paid or not. The same article refers to other types of shares other than in cash without précising whether they are physical or know how as it was the case in the previous law.
A contract involving shares implies two kinds of successive contract:

- the commitment to issue a share: the subscription
- the actual performance of the obligation which entails the dispossession of share to the profit of company: fulfillment.

In principle, the proportion of share capital which must be availed at the time of the subscription and that of the date of the calls for the outstanding is determined by articles of association. In return for his contribution, the shareholder gets some shares. Article 77 of company law provides, any shares created or issued after the commencement of this Law may either be of par value or of no par value.

1. The share par value

The share is said to be paid in cash or par value when the contribution is nothing other than money; which is the most usual and simplest of the shares.

2. The share no par value

It consists in a contribution of a physical or incorporeal good. In other words, it is any share apart from those paid in money or in industry. The rule is that any goods that are legally in trade may be object of a share.

D. VOCATION TO PROFITS SHARING

The company is constituted to achieve profits which will be thereafter shared between members. Thus, the decisive criterion is not the search of profits but the sharing of profits between members. It is this criterion that distinguishes a company from an association. With the latter, profits are not shared between the members.

The term profit has three possible significances:

- to begin with, it has been considered as a way of making money or a positive gain;
- then profit their benefit when there is an economy out of an expense;
- finally the profit is any pecuniary or material gain that is added to the fortune of the shareholders.

The profits and the modes of payment depend on the contractual will of the shareholders. The shareholders can adopt in the articles of association modes of distribution, but when the articles of association are mute, distribution of profits is proportionate to shares held by every shareholder.

Indeed, their profits should be measured against the involvement in investment. Also shareholders commit to contribute to losses.

E. AFFECTIO SOCIETATIS

Two essential elements at stake are estate sharing and vocation to the profits, it is necessary to add an intentional element which is in Latin "*affectio societatis* ".

This notion is multiform, as it is subject to several doctrinal definitions. The least common denominator is the will of all shareholders to collaborate, on an equal footing to the success of the common enterprise; this common will must not exist at the time of the creation of the company only, but must also continue during the whole social life. The *affectio societatis* is often strong in small size company but inexistent in the immense majority of companies ranked in stock market.

In short, the *affectio societatis* must be understood as the shareholders desire to unite in order to collaborate to the common enterprise success without any subordination to one another while accepting common risks. Some authors estimate that *affectio societatis* is of no value, since the contract of company requires the consent. It is therefore obvious that this contract implies the intention to create a company. The *affectio societatis* is however more of a feeling than a legal concept.

F. COMPANY AS INSTITUTION

Once formed, a company must appear as, a living organism, oriented toward a profit meant for its shareholders.

In order to achieve that, the company is provided with organs to allow it decide without requiring its shareholders consensus.

What is evident is that the company contract doesn't have for main effect to create the subjective rights and obligations, but rather create that of its shareholders and issues rules to such group. It is that organization that is referred to as an institution.

The institutional theory is enshrined by the law, since article 2, 12 of company law defines a company as being a legal entity.

It is necessary to underline however that neither of these two theories, contractual or institutional, is satisfactory enough in itself to exclude the other. This is how the legislator took into consideration both aspects.

G. FORMS OF BUSINESS ORGANISATION

Civil law distinguishes in the first place between a combination of individuals for the purpose of profit and a combination for some other purpose. The business association is termed a company, whereas any other combination is termed an association.

COMMERCIAL ACTIVITIES

General notions (Generalities)

The Decree of August 2nd, 1913 on Traders and the Proof of Commercial Agreements uses the expression "commercial activities" without defining it. It is almost impossible to have a unique notion of lucrative (commercial) activity because of the diversity of its forms.

Although it is next to impossible to enlist all possible commercial activities, the decree of 1913 has attempted an exhaustive list of what might be regarded as commercial activities under Rwandan law.

It is important to bear in mind that this list must not be interpreted strictly for two reasons:

Commercial activities are both changing and limitless and

The Decree law that is being referred to was enacted more than 85 years ago.

All commercial activities present a common character; they are made in order to gain a profit. The spirit of lucre must characterise the commercial operation. Without this, the activity is not commercial.

Enumeration of commercial activities

According to the provisions of article 2 of the decree of August 2nd, 1913, commercial activities can be divided into three broad categories:

- Commercial activities by nature;
- Commercial activities by form;
- Commercial activities by relation or by the theory of accessory.
- Very often, mixed commercial activities are considered but they do not constitute another category; they are merely a modality of commercial activities. They are activities, which present commercial character for one of the parties.

COMMERCIAL ACTIVITIES BY NATURE

Some activities are commercial even when they are isolated and others must be repeated (theory of enterprise or "venture").

Definition of a commercial organisation

The commercial company is a legal person which is the result of a contract ofseveral persons who agree to contribute their assets in cash, in kind or in the form of services to an activity for the purpose of sharing profits or benefits or losses arising there from.

H. DISTINCTION BETWEEN COMPANIES AND OTHER BUSINESS ORGANISATIONS

Rwanda law recognizes five types of commercial companies:

1. General partnership;
2. Limited partnership;
3. Partnership limited by shares;
4. Private limited company:
5. Public limited company.

These commercial companies are commonly separated into two groups: partnership or companies where the liability is not limited and a company or partnership who's liability is limited by shares. The former includes the companies of the first, second and fourth types, in which, in principle, the interests of the participants are neither assignable nor heritable, The rationale for the interest of the participants not being assignable nor heritable is that the personality of the participants is of paramount importance. The organisation with shares, on the other hand, which comprise, the third and fifth types, fulfil the same functions as the public limited company.

The company being the result of a contract comprising several persons, a couple i.e., husband and wife may by themselves or in association with other persons be partners in the same company and take part together or not in the management of the company. However a husband and wife may not be partners in the same partnership or private company in which they shall be jointly and severally liable without limit for the debts of the organisation.

I. LEGAL STATUS OF COMPANIES

Every company shall be a public company unless it is stated in its application for incorporation that it is a private company.

Type 5 above – a Public Limited Company shall be:

1. a company limited by shares;

2. a company limited by guarantee;

3. a company limited by both shares and guarantee;

A company limited by shares and by guarantee may be public or private. However, a company limited only by guarantee or an unlimited company shall not be public.

Where the liability of the shareholders of a company is limited, the registered name of the company shall end with the word "Limited" or the abbreviation "Ltd".

PRIVATE LIMITED COMPANY

The private limited company must have at least two members and a maximum of 100 members, Employed or formerly employed not included *(Article 8).* The minimum capital required is 500.000frw and the capital must be entirely subscribed and paid up. The capital shall be divided into equal shares whose face value shall not be less than 1000 Frw.

The public are not invited to be shareholders, no prospectus is to be issued

Company name: The company's name may either be one descriptive of its business or one composed of the names of one or more of its members, In either case the name must be immediately followed by the words Limited.

Limited Liability: As the name suggests the liability of members is limited to the amount of their contributions.

Management: Management is insured by a Board of Directors (BoD) or managers. It is by the law that on the BoD, there must be a minimum of 3 up to a maximum of 12 directors.

Transferability of shares: Shares cannot be offered to the public., except the articles of association provide otherwise. Shares may be freely transferred between shareholders, the spouse of the transfer, the deceased shareholder orthird party as prescribed by the articles of association.

Dissolution: The death, bankruptcy, incapacity or retirement of a member does not involve the dissolution of the company unless the articles of association so provide.

PUBLIC LIMITED COMPANY:

According to Article 7 of Law 7/2009 - " Every company shall be a public company unless it is stated in its application for incorporation that it is a private company".

In order that a public limited company is validly constituted there must be a minimum of seven members. There are two types of public limited companies: a public limited company that does not offer its shares to the public and one that offers its shares to the public. In the former case the minimum share capital required is 100.000.000frw while 200.000.000 frw is required in the latter.

Company Name: It is forbidden for the name of a shareholder to appear in the company name. The name of the company must be followed by Limited or Ltd.

Liability: As the name suggests the liability of the shareholders is limited to the amount of their contributions.

The incorporation procedure for a company that offers its shares to the public requires the completion of a series of acts. Drawing up and publication of the draft articles of association in the Official Gazette (OG), publication of the prospectus, subscription of the share capital and payment for shares. In the second place, there must be a statutory meeting of the shareholders with a notary attending. This meeting (i.e. statutory or constituent meeting applies to both types of limited company) must appoint not less than three and not more than twelve persons, adopt the Memorandum of Association and, if there are to any, the articles of association. It must also appoint one or more auditors whose function is to watch over the accounts in the shareholders' interest.

The acceptance of their office by the directors and auditors marks the birth of the company. But it is still essential for the details of the company to be registered with the Office of the Registrar General before the company can start doing business. The company must also comply with publication requirements.

It is a condition of valid incorporation that where the share contribution is in kind this must be entirely paid up at the time the company goes operational while where the contribution is cash 1/3 must be paid up when the company goes operational and the balance within two years of the company's existence

THE LEGAL STATUS OF COMMERCIAL COMPANIES

When commercial companies have been constituted they are required in law) to register with the Office of the Registrar General before commencing any commercial activity in Rwanda. Upon registration a commercial company acquires legal personality. This is to say that it is treated as an entity separate and distinct from that of its owners. Hence it is capable of enjoying rights and of being subject to duties which are not the same as those enjoyed or borne by its members except to the extent and in the manner provided by law. The consequences of legal personality are that the commercial company possesses

- a name;
- domicile;
- nationality;
- patrimony.
- One or more shares
- Limited or Unlimited liability
- One or more diretcors
- A business occupation – *Memorandum and Articles of Association*

1. The company has a name

All commercial companies must have a name. Commercial companies of which the liability of its partners is unlimited i.e. partnerships (general and limited partnerships) have a firm name which comprises the names of all the partners or of some of them. As regards commercial companies having shares the name of the company must be followed Limited or Ltd. Note that although the owners of a commercial company are at liberty to choose a name for their company, the name must not be identical or too similar to the name of an already registered company.

2. The company has a domicile

A commercial company also has a domicile, which is distinct from that of its individual members. The domicile is the place where the commercial company has its principal place of business i.e. its registered office. The registered office is the place where the company has, principally, its legal, administrative, financial and technical office as opposed to where it merely does business (irrespective of its importance and the presence of a secondary administrative or ex[ploitation unit).

The distinction between the registered office and the exploitation office is important for it is the registered office that determines the territorial competence of the court, in the event where someone institutes proceedings against the company, the place where an action in bankruptcy can be instituted, including the nationality of the company.

3. The company has a nationality

A commercial company has a nationality, which is determined by the laws of the country, which regulates its organisation and functioning (definition of powers of management, procedure of shareholders meetings, rules as to liquidation etc.).

4. The commercial company has a patrimony

The commercial company has a patrimony, which is constituted by its assets and liabilities distinct from that of its members. Although the members of the company make a contribution which constitute the patrimony of the company they do not have ownership rights over company property, all they have during the life time of the company is a right to a claim during the distribution of the assets of the company. Note that the patrimony of a company serves as security to its creditors.

5. The commercial company acts through its legal representatives

Although the commercial company possesses a legal personality, as it is not a human being, it cannot act for itself.

It is represented in its daily activities by human beings - managers. It is through these persons that the company can acquire and dispose of property, institute legal proceedings as well as defend an action against the company However, the company is liable for the wrongful acts committed by its legal representative as far as civil matters are concerned.

THE DISAPPEARANCE OF LEGAL PERSONALITY

When a commercial company acquires a legal personality the personality does not persist for life i.e., it is not permanent, some day it will end. The disappearance of legal personality is the consequence of dissolution of the company, which entails the dissolution and distribution of its patrimony among shareholders (partners).

1. Causes of Disappearance

The causes of disappearance are of two types, the one is applicable to all commercial companies; the other relates to individual partners and is restricted to those companies in which the personality of the participant is fundamental.

a) General Causes

There are four general causes:

1. A commercial company established for a certain and defined period of time dissolves at the end of that period in the absence of a resolution extending its life.

2. A decision taken by the shareholders (partners) to dissolve the company before the time agreed upon.
3. Loss of the object or impossibility of performance
4. If the object has been attained

b) Peculiar causes

The causes peculiar to an individual do not apply to all commercial companies. They relate exclusively to partnerships. Accordingly the death, incapacity or insolvency of a partner will result in dissolution.

However in practice, partnership agreements usually contain a provision (clause) making it possible for the partnership to continue doing business not withstanding any of the above causes that may lead to its dissolution.

A partnership cannot be dissolved by the unilateral will of one partner except if he acts in good faith. The last cause for dissolution, which is applicable to all types of commercial companies, is the dissolution for just cause. Here dissolution may be requested by an individual shareholder or partner. The just cause is left to the appreciation of the court. Some of the factors, which may be considered as just cause, include failure by a partner to respect his obligations, permanent disability of a partner, antagonism that makes it impossible for the partners to work together etc.

Note that the regular transformation of a commercial company from one form into another shall not entail the creation of a new legal entity. The same shall apply to an extension of the existence of a company or any other amendment of its Articles of Association (partnership Agreement) with formalities of publication both at the time of constitution (formation) to any amendment of its Articles of Association (partnership Agreement)

COMMERCIAL LAW

INTRODUCTION

Law is a social science: it has to provide for the changing needs of a developing Community and consequently is inseparably bound up within the community it has to serve. For a thorough understanding of the law, it is essential to have knowledge not only of the community in which it functions, but also of its history and of the factors, which led to its origin and development. This is one of the reasons why every study of the law includes a study of the history of the law. Another reason is that a knowledge of legal history helps in evaluating probable trends of future development.

Rwandan commercial law, unlike for example most European continental legal systems, is not codified (that is recorded in one comprehensive piece of legislation) a knowledge of the law applying in the Republic is based on Roman-Germanic law. This means that our system finds its roots in Roman as well as in Germanic law. Although Rwandan commercial law is based on Romanic law, we shall not analyse the Romanic law instead, we shall concentrate on basic principles of Rwandan commercial law.

Commercial law or business law is in essence part of private law and regulates legal relationships, which are commonly found in commercial life.

DEFINITION

The term Commercial law known as Mercantile Law may be defined as that branch of law, which comprises laws concerning trade, industry and commerce. It is an ever-growing branch of law with the changing circumstances of trade and commerce.

With the increasing complexities of the modern business world, the scope of commercial law has enormously widened. It is generally understood to include the laws relating to contracts, sale of goods, partnership, companies, negotiable Instruments, insurance, insolvency, carriage of goods, and arbitration.

The commerce is the exchange of merchandises or services especially on a large scale: buying and selling. Commercial law can be defined as a body (*corpus*) of judicial rules relating to the commerce. This means that it is the law which governs traders and commercial related activities.

Commercial rules only apply to a determined category of persons, traders, for activities performed in case of their professional activity; To different transactions (operations) or activities to which the legislator has attributed a commercial character.

The commercial law is part of private/civil law which regulates matters between individuals. It is a branch of civil law that deals exclusively with the juridical implications of commercial activities either among traders themselves or between traders and their customers. The commercial law is thus a special law distinct from the civil law which constitutes its basis: some provisions (articles) apply where the commercial law or commercial usages do not settle a case.

Commercial activities are primarily governed by a collection of several laws[1] dealing with different aspects of commercial law. It is important to keep in mind that commercial law is neither autonomous nor self sufficient (i.e. it must not be understood that commercial law provides answers and deals with every aspect of commercial and industrial activities), but applies within the general scope of civil law.

Business law is different from commercial law. Business law, may be defined as a branch of private law which by derogation from civil law, regulates in a specific manner activities of production, distribution and services.

Business law is seen by a majority as being more extensive than commercial law, which was traditionally perceived as the private law of commerce. Business law encompasses questions which are under public law (intervention of the state in the economy) such as tax law, labour law etc. Business law also encroaches into civil law, notably in the protection of consumers. In addition, business law applies not only to traders, but also applies to non-traders such as farmer and members of the liberal profession.

NECESSITY OF COMMERCIAL LAW

The exercise of commerce cannot always follow rules of the private law because:

It requires conditions of:

- *Promptness*: the speed of commercial operations and their frequent repetition require a minimum of formalities that is not necessary in private law:
- *Credit (or loan)*: hence the creation of documents allowing the raising of debts (credits);
- *Guarantee*: with regards to the importance of credit the guarantee of debts must be provided. In this case, dispositions of commercial law will have to be more rigorous (hash) than those of civil law.
- Its proper institutions require a particular regulation. Here, we should notice that till now the institution of commercial tribunal does not exist in Rwanda.
- It uses certain practices which require a certain control.

[1] Such as:

- The Decree of August 2nd, 1913 relating to Traders and the Proof of commercial agreements;
- The Decree of April 24th, 1924 relating to Marriage Settlements of Traders.

- It was thus necessary to have a commercial law adapted to the needs and usages of commerce.

In addition to the above, commercial law facilitates planning. This function of law is very important as business is concerned, e.g. contract and sales law. In making the courts available to enforce contracts, the legal system ensures that the parties to the contract will either carry out their promises or be liable for damages. For example, through contracts, a manufacturing company can count on either receiving the raw materials and machinery it has ordered or else getting money from the contracting supplier to cover the extra expense of buying substitutes.

Commercial law is also used as an instrument to promote social justice. For example, tax laws seek not only to raise revenue for government expenditure but also to redistribute wealth by imposing a higher income tax on wealthy people. The antitrust laws seek to prevent certain practices that might reduce competition and thus increase prices. Similarly, consumer laws among others seek to prohibit the sale of unsafe products.

SOURCES OF COMMERCIAL LAW

The Rwandan law consists of a number sources. Some sources are authoritative while others merely have persuasive authority. Actually, the sources of commercial law are the same as the sources of other aspects of Rwandan law. The sources of Rwandan commercial law, in the order in which they are usually consulted, are the followings:

In order i.e.

- legislation (written law),
- custom,
- the general principles of law and equity,
- courts' decisions (case law) and
- scholarly opinions (doctrine).

STATUTE LAW OR COMMERCIAL LEGISLATION

Legislation is the making of law by competent authority. Today, legislation is the most important source of the law. The law is to be found in statutes enacted by parliament and provincial legislatures.

With Rwandan Commercial law, there is no commercial code in Rwanda. In 1967, there was an attempt, which resulted in a draft of commercial code. However, until now the process of elaboration of a commercial code stagnates. The commercial legislation is made up of scattered legal instruments (texts), which have been introduced in Rwandan law during the Belgian mandate and trusteeship. It is really time for the legislator to enact rules and regulations, which take into account the evolution of commercial profession.

However with all the attempts mentioned above, Legislation may be defined as the setting down of binding rules of law in a formalised way, by an authority, such as that vested in Parliament, or subordinate, such as that vested in administrative authorities.

Parliament may pass any law, subject to the constitution. It may also pass laws allowing other bodies to make certain laws for certain purposes. In this way, Parliament gives administrative authorities the capacity to pass regulations called subordinate or delegated legislation because they are subject to the laws passed by Parliament. If there is any conflict between the law passed by Parliament and any subordinate legislation, the law passed by Parliament will prevail.

Legislation consists of the Civil Code and statutes (law voted by Parliament) together with provisions of legislative acts of subordinate authorities, such as presidential decree and that of other administrative authorities. These constitute the primary source of business law.

CIVIL (PRIVATE) LAWS

As said above, commercial law is not self-sufficient. It does not contain a complete regulation of all aspects of commercial and industrial activities. The civil law must apply to commercial matters as long as an express disposition does not exclude it. If it happens that there is a conflict between the civil law and the commercial law the latter is applied (*Specialia generalibus derogant*) *special things derogate from the general one.*

CUSTOMS, THE GENERAL PRINCIPLES OF LAW AND EQUITY

Certain rules of conducts are observed because it has become customary in a particular group of people to respect such usages. Customary law does not consist of written rules, but develops from the habits of the community and is carried down from generation to generation.

In modern communities where the rate of development is very rapid, custom has less opportunity to develop into law. Once the need for a particular legal rule arises, the legislature simply steps in and lays down such a rule. Yet, even today it may still happen that custom develops into law.

In order for the custom to be recognised as a customary rule:

- It must be reasonable
- It must have existed for a long time
- It must be generally recognised and observed by the community
- The contents of the customary rule must be certain and clear.

It is generally understood that in matters not provided for in the existing law, Rwandan tribunals and courts have to apply local customs and general principles of law and equity. Furthermore, article 98 of the Rwandan Constitution of 1991 calls for the application of customs provided the custom in question meets certain conditions. These conditions are:

- An existing law has not modified it:
- It does not contradict the Constitution and/or any other laws, rules and regulations:
- It is not against public order and good morality.

Article 201 of the 2003 Rwandan constitution also recognises the applicability of customary law. Article 201(3) states that " unwritten customary law remains applicable as long as it has not been replaced by written laws, is not inconsistent with the constitution, laws and regulations, and does not violate human rights, prejudice public or offend public decency and morals".

Customs generated by trade activities may provide the legal basis for matters not covered by the legislation. For example, certain usages within a particular type of trade can become part of the expectations of those engaged in trading activities. The same might apply on some simple activities of buying and selling.

There are two types of customs: contractual customs and binding customs.

Contractual customs are not mandatory; they may be discarded by agreement of the parties. For this reason, it is said that they derive their authority from the theory of contractual freedom. Accordingly, if the parties have not expressly excluded a custom, they are deemed to have adopted it. Note that a custom will supplement a contract when the law is silent on a point.

Binding customs are those that do not depend on the law or the free will of the contracting parties because they are mandatory in character. We find these customs in commercial law as opposed to civil law. A binding custom supplements the law. For instance, there is a presumption of joint liability of creditors as opposed to the Civil Code which provides that there is no presumption of joint liability of creditors.

INTERNATIONAL CONVENTIONS

The implications of international conventions on commercial law have been compounded by recent developments and increasing interdependence in international commercial activities. Some might even argue that the result of these developments might have had same or uniform (unified) international law. The implications of international conventions on Rwandan commercial law are both direct and indirect.

Direct implication happens when a convention or an agreement becomes part of domestic law or provides the basis for domestic law of similar content (e.g. the decree of December 10th, 1951 which deals with cheques and the decree of July 28th, 1934 which deals with the bill of exchange the promissory note and protests). The content of both laws are based on the Geneva Conventions of June 7th, 1930 and of March 19th, 1931, which deals with cheques and bills of exchange.

Indirect implication of international conventions can be found in the adoption of Rwanda of the Vienna Convention on the International Sale of Goods of April 1980, which deals primarily with external trade relations.

CASE LAW (JURISPRUDENCE) OR DECIDED CASES

The courts and tribunals through their traditional role of judicial interpretation of laws, represent a significant source for both the understanding and application of commercial law rules. It is through this role that different areas of the law are clarified and resolved.

By decided cases we mean a judicial determination of an issue of law in a uniform and consistent manner, such that it has a declaratory force (persuasive weight) in any other case. It does not establish rules of law which are binding in a formal sense, they only possess persuasive authority.

SCHOLAR OPINIONS (DOCTRINE)

Although the doctrine is not considered as a formal source of law it can be consulted in order to create new concepts or to suggest some solutions, which can be followed by the jurisprudence or the legislator.

Doctrine has to do with the opinions of academic lawyers to be found in textbooks, learned journals and the notes to cases reported in law reports. It depends on its capacity to persuade the judges and through them legal practitioners; and its persuasiveness depends, not only on the prestige of the individual academic lawyer, but also on the extent to which the individual judge is willing to be persuaded.

USAGES OR MERCANTILE PRACTICES

The importance of commercial usages comes from the fact that the commercial law must adapt itself to new concepts and the world of business create some relations between professionals and those relations become sometimes habits or usages. The commercial custom and practice can be regarded as one of the essential sources of commercial law.

J. COMPANIES MORAL PERSONALITY

The object of this part is to shed light on the notion of companies' legal personality, show the government position concerning recognition of company moral personality, as well as determine its attributes.

GENERAL NOTIONS ON MORAL PERSONALITY

The legal technique assigns the status of recipients of right to an entity created by man aiming at the realization of different interests to those of natural persons who enliven it. Even though the moral personality is man's work, its conditions of existence can only be determined by the law.

The moral personality likewise the natural personality is nothing else than the faculty to become a recipient of rights and obligations. It consists therefore in assigning to a group of people or goods legal personality.

The modern doctrine considers the notion of moral person as a mere technique devised by jurists in order to succeed in achieving some desirable results only. A moral person has no actual will of its own, but people lend it the will of its organs. The moral person however is entitled to rights and assumes liability as in the case of natural persons despite the existence of its members.

STATE'S POSITION CONCERNING RECOGNITION OF COMPANIES' MORAL PERSONALITY

States are free to recognize or refuse moral personality to such group so that its propensity to granting or refusal differs from a State to the other.

ATTRIBUTES OF THE MORAL PERSONALITY

Legal persons of companies like natural persons stems from several features that one can legally group in two points:

- Anything that serves to identify a company as compared to other companies (a name, an address, a commercial activity, etc.)

- Patrimonial autonomy and the legal capacity of companies.

BLANK

Study Unit 2

Registration of Companies

Contents

The partnership agreement, Memorandum of Association or Articles of Association must be drawn up and or signed by a notary or witness – *see Appendix 1.*. From the foregoing it is evident that the contract establishing the commercial company must be in writing. The nullity must be pronounced by a court. Where nullity of the company has been pronounced it produces effects as from the date the nullity was pronounced. Accordingly it puts an end to the execution of the contract but does not have retroactive effect. Note that as soon as the nullity has been pronounced by the courts the commercial company shall be dissolved immediately and liquidation shall follow.

The decision pronouncing the annulment of the company is required to be published in the Official Gazette (OG) as well as in one or several newspapers designated by judge. The essence of the publication is to notify all those who may be personally affected by the information (publication). The categories of persons who may be interested in the publication are: the shareholders (partners), creditors of the company and the personal creditors of the shareholders. Note that the cost of publication of the court's decision is the responsibility of the company and in case of need by the promoters.

However neither the company nor its members may rely on a nullity as against third parties until the 30th day subsequent to the publication of the decision of the court in the OG, except where the company can establish that the 3rd party knew that the company had been annulled by a decision of the court.

A. PUBLIC LIMITED COMPANY

A public limited company shall be a company formed by natural persons or corporate bodies in which the liability is limited to the amount of their contribution in the capital of the company and the company shares are represented by negotiable instruments called shares. The number of shareholders in the public limited company must not be inferior to seven.

A public limited company shall be known by a company name, which shall immediately be preceded or followed by the words "public limited company" abbreviated Limited or Ltd. It is forbidden for the name of the shareholders to appear in the company name. This may be explained by the fact that the identity of the shareholders will be changing just as often as the company shares change hands.

B. FORMATION OF THE PUBLIC LIMITED COMPANY

In order for the public limited company to be validly formed it must satisfy both substantive and procedural requirements.

C. SUBSTANTIVE REQUIREMENTS

The substantive requirements correspond to the general conditions of validity of a contract: Consent, capacity, object and purpose; requirements common to all companies: shares must be in cash or in kind; participation of each shareholder in the profits and losses of the company; and to the conditions of validity peculiar to the public limited company: number of shareholders, nominal (face) value of shares and the paying up of shares.

The Memorandum of Association and the Articles of Association, if any, should contain the following information - *See Appendix I*

1. a description of the promoters
2. The name of the company
3. The company does/does not have articles of association
4. The address of the registered office and the exploitation office
5. The person to be managing director
6. The object (s)
7. The amount of subscribed capital
8. The amount of paid up capital
9. A table showing the name and details of each subscriber/promoter, the number of shares subscribed and a signature

The articles of association may also include

1. For each category of shares, the number, nominal or face value, their nature (cash, kind) and the rights attached thereto:
2. A description of each contribution in kind, the value attributed to such share and the mode of evaluation; if the contribution is in the form of a building the conveyance for valuable consideration it has been subjected to for
3. The modalities for the distribution of profits
4. The manner of appointment and number of organs charged with the administration and control of the company:
5. The rules relating to the holding of general meetings;
6. The duration of the company
7. The beginning and end of the financial or accounting year
8. The estimated cost of the formation of the company;
9. The cause and special benefits given to the promoters.
10. The authority limits of the Directors (Managers)

D. PROCEDURAL REQUIREMENTS

As regards procedural requirements the formation of the public limited company results from the completion of a series of formalities. The rules applicable to the formalities of formation depend on whether the limited company is offering its shares to the public or not.

A company is said to be offering its shares to the public if its shares are listed on the stock exchange or the shares are deposited with a bank or financial institution for publicity purposes.

The procedural requirements concern:

- Drawing up and publication of the draft memorandum of association in the Official Gazette
- Publication of the prospectus
- Subscription of share capital
- Payment for shares.

E. OFFICE OF THE REGISTRAR GENERAL (ORG)

Drawing up and submitting the Memorandum of Association and, if any, the Articles of Association to the Office of the Registrar General (ORG)

As per Article 14, an application for registration of a company shall be sent or delivered to the Registrar General, and shall be :

1. in the prescribed form;
2. accompanied by :
    a) a memorandum of association *See Appendix I of this manual*
    b) the articles of association, if any;

The promoters have the obligation to ensure that the draft memorandum and articles of association are in writing and witnessed or authenticated (notarised) which should be published in the Official Gazette.

The rationale for the publication of the draft articles of association is to provide prospective subscribers with information concerning the characteristics of the proposed corporation. Note that the publication of the draft articles of association does not exonerate the company from subsequently publishing the articles of association in the OG as soon as the formalities for the formation of the company have been completed i.e. when the company is born.

Publication of the draft articles of association serves an important purpose. It renders it difficult for the promoter or founding member to alter the original draft articles of association during the period of formation.

F. MEMORANDUM & ARTICLES OF ASSOCIATION

The constitution of a commercial company consists of one or two documents, namely:

1. The memorandum of association which contains the most important provisions setting out the sort of activities which the company can carry on. It is of interest to the outsiders who wish to deal with the company.

2. Also articles of association in some instance are necessary to outsiders since they contain the powers of the directors.

A memorandum of association for a company limited by guarantee shall indicate that liability is limited. A memorandum of association for a company limited by guarantee shall also state that every member shall undertake to contribute to the assets of the company in the event of its being wound up.

For the case of a company with share capital, the memorandum of association shall state the following:

1. the amount of share capital;

2. the number of shares making the share capital unless where the company is an unlimited company;

3. the full name and the number of shares of every shareholder.

See Appendix I for the forms of Memorandum of Association

Any company may have or may not have articles of association. *Article 54*

Where a company has articles of association, the rights, powers, duties, and obligations of the company, the Board of directors, each director, and of each shareholder of the company shall be those set out in this Law except to the extent that they are restricted, limited or modified by the constitution of the company in accordance with the Law.

Where a company does not have articles of association, the rights, powers, duties, and obligations of the company, the Board of directors, each director, and of each shareholder of the company shall be those set out in the Law No. 7/2009 of 27/04/2009 Relating to Companies.

Articles of association of a company shall :

1. be a document signed by the applicant for registration of the company;
2. be a document that is adopted by company shareholders as its articles of association.

Articles of association contain rules governing the internal management of the company such as the appointment of directors and the powers of the board, the rights of different classes of shareholders and the holding of meetings of the company.

The limited company carries on business under a company name, which may be either one descriptive of its business or if a private company composed of the names of one or more of its members. In either case the name must always be followed by the words " limited company" abbreviated Ltd .

Requirement for publicity

There is also the requirement for publicity, which is common to other commercial company: registration in the ORG and publication of the articles of association in the Official Gazette.

Substantive Requirement

In addition to the procedural requirements the law also prescribes certain substantive requirements, which are specific to the limited company.

1) Objects of the Company

In the first place the limited company should not be constituted to undertake an illegal business. In as much as the objects of the limited company must be lawful. There are certain businesses, which cannot be undertaken through the instrumentality of a limited company because of the inadequate guarantees which this type of business entity offers. The businesses are: insurance, banking, savings bank or issuance of debentures.

2) Conditions relating to Shareholders

For private limited companies there must be a minimum of two and a maximum of 100 shareholders who may be natural persons or corporate bodies in order that a private limited company is validly constituted. This number excludes employees or former employees

In a public company there must be a minimum of

In addition the shareholder must give his consent to become a shareholder either in person or through his agent. The shareholder must also posse's legal capacity. As such in principle, minors and persons who suffer from incapacity are excluded from the membership of a private limited company.

3) Conditions relating to the Capital and shareholding

The law prescribes that the share capital of a private limited company shall

be at least 500,000 RWF and that the share capital must be entirely subscribed and paid up. The capital shall be divided into equal share whose face value shall not be less than 1000 RWF.

Each share confers an equal right to the distribution of profit as well as the bonus subsequent to liquidation. A certificate is issued to represent the shares, which constitute evidence of ownership. It follows that there is only one type of share in the limited company viz., registered shares (that exclude bearer shares and warrants).

4) Conditions relating to duration

The articles of association can define the duration of the company. In practice the duration is usually not too short because an extension of the life of the company implies the payment of a new registration tax. It has become fashionable for the duration of the company to be fixed at 99 years.

On the other hand if the duration of the company is indefinite, then, any shareholder may at his pleasure call for the dissolution of the company after notifying the other shareholders.

G. PROMOTERS

A promoter is a person who takes the preliminary steps to the founding or organization of a company. He finds people who are willing to finance it - buy shares, lend money. Contracts must be made for building or leasing space, buying or renting equipment, advertising and whatever else is required for the early operation of the business.

Any company wishing to offer shares shall issue a prospectus**. It will be issued by a promoter.**

A prospectus is a notice, circular, advertisement or request inviting applications or offers from the public to subscribe for or purchase, a share in or debenture of a company or proposed company;

No person shall have the right to issue, circulate or distribute any form of application for shares or debentures unless :

1. the form is accompanied by a prospectus whose date of publication is a date within the period of six months immediately preceding the date on which the form was issued, circulated or distributed;
2. a copy of the prospectus and particulars of the issue, circulation or distribution shall have been lodged with the Registrar General ;

3. the company or proposed company undertakes, in its prospectus that it will, within two (2) months after receiving the money, issue to that person a document to acknowledge receipt of the money. *Articlwe 65*

Every company shall keep a copy of every share application form at its registered office within seven (7) days after the prospectus is lodged and shall keep every such copy, for a period of at least six (6) months after the lodging of the prospectus, for the inspection by company's members and creditors.

Where a company has accepted any money as a deposit or loan, it shall within 2 months after the acceptance of the money, issue to that person a document which acknowledges or evidences or constitutes an acknowledgement of the indebtedness of the company in respect of that deposit or loan.

Every advertisement which is issued, circulated or distributed and which offers or calls attention to an offer or intended offer of shares in, or debentures of a company or proposed company to the public for subscription or purchase, shall be treated as a prospectus if it contains the following:

1. the number and description of the shares or debentures concerned;

2. the name and date of registration of the company and its paid-up share capital;

3. a concise statement of the main objective and main business of the company;

4. the names, addresses and description of -

    a) the directors or proposed directors;

    b) the brokers or underwriters to the issue;

    c) the debenture holders' representatives;

5. the name of the stock exchange, if any, of which the brokers or underwriters to the issue are members;

6. particulars of the opening and closing dates of the offer and the time and place where copies of the prospectus and forms of application for the shares or debentures may be obtained;

7. statements with respect to the sale price of shares, the yield there from or other benefits received or likely to be received by holders of shares, in relation to an authorised mutual fund.

Every prospectus shall comply with the form and content prescribed by instructions of the Registrar General

The prospectus shall :

1. be printed in type of a font size approved by the Registrar General;

2. be dated and that date shall, unless the contrary is proved, be taken as the date of issue of the prospectus;

3. be signed by every director or person named in the prospectus as a proposed director, or by his or her agent authorised in writing;

4. state that a copy has been lodged with the Registrar General

5. and also state immediately after that statement that the Registrar General assumes no responsibility as to its contents.

COMMITMENTS MADE ON BEHALF OF A COMPANY UNDER FORMATION

Acts done and commitments entered into by the founder (promoters) on behalf of the company, under formation are required to be taken over by the company prior to its registration

In the register of commercial companies similarly acts done or commitments entered into on behalf of the company during its formation may also be taken over by the company after its registration in the RC. However, if the acts and commitments are not taken over by the company within two (2) months from the date of its registration, the persons who made them (promoters) shall have unlimited liability for the obligations they entail. Similarly, if company is not constituted within two years from the date the obligation was contracted, the promoters shall be personally liable. Once ratified contracts concluded by promoters are considered as having been signed originally by the commercial company.

H. LEGAL CONSEQUENCES OF INCORPORATION

Every company shall always have a registered office in Rwanda to which all communications and notices may be addressed and which shall constitute the address for service of legal proceedings on the company.

The Board of Directors of a company may, at any time, change the registered office of the company. The change of the registered office shall be notified to the Registrar General.

A company shall keep at its registered office the following records:

1. the memorandum and articles of association;

2. minutes of all meetings and resolutions of shareholders within the last ten (10) years;

3. an interests register for directors;

4. minutes of all meetings and resolutions of directors and directors‟ committees within the last ten (10) years;

5. certificates given by directors under this Law within the last ten (10) years;

6. the full names and addresses of the current directors;

7. copies of all written communications to all shareholders or all holders of the same class of shares during the last ten (10) years, including annual reports;

8. copies of all financial statements ,for the last ten (10) years completed accounting periods;

9. the accounting records for the last ten (10) years;

10. the shares register;

11. the copies of instruments creating or evidencing charges required to be registered under this Law.

The documents for the company’s current and previous financial years shall be kept at the company’s registered office. Other documents for the previous years may be kept in any other place and notice of which shall be given to the Registrar General.

I. CONSTITUENT ORDINARY MEETING

The final stage in the formation process is the holding of a constituent ordinary meeting.

Where there are articles of association all the promoters/founding members shall participate in signing the articles of association either in person or through their authorized agents. A constituent ordinary meeting grouping all the promoters or their nominees must be held. This meeting shall appoint not less than 3 and not more than 12 persons to be directors or ratify their appointment by the articles of association; it must also appoint one or more auditors whose function is to watch over the accounts in the interest of shareholders. The acceptance of their office by the directors and auditors marks the birth of the company. But it is still important for the legal validity of that birth that the company shall be entered in the ORG.. Finally the principal documents must be published in the official gazette.

Note that as far as the private limited company that does not offer its shares to the public is concerned only some of the procedural requirements examined above are applicable: drawing up of an authenticated articles of association (not draft articles) payment for shares and the holding of a constituent ordinary meeting.

As regards a public limited company that offers its shares to the public, the business of the constituent ordinary meeting comprises:

1. Verification of the substantive requirements for the formation of the company;

2. Adoption of the final text of the articles of association, which it shall amend by special resolution of all the members being the subscribers and promoters;

3. Approval of the evaluation of shares in kind and the benefits given to the promoters which it shall be amended by a majority of the votes attached to the shares subscribed by the subscribers present excluding promoters;

4. Appointment of the organs of administration (directors) and control (auditors) and fix their remuneration;

5. A vote on the final formation of the company requiring a majority of the votes attached to the shares subscribed by the subscribers present excluding promoters.

The acceptance of their office by the directors and auditors marks the birth of the company. As it is the case with other commercial companies there must be registered in the ORG;

The memorandum and articles of association and minutes of the constituent ordinary meeting and a list of shareholders must be filed with the registrar of the CIF within whose jurisdiction the company proposes to establish its registered office. Finally the principal documents must be published in the Official Gazette.

The promoters are, notwithstanding any clause to the contrary jointly and severally liable towards third parties:

1. For the eventual difference between the share capital and the minimum capital as well as that part of the share capital which shall not be validly subscribed, they shall be deem to be the subscribers for that part;

2. The effective payment for shares in accordance with the law;

3. Liable to pay damages which is the consequence of either the nullity of the company or inaccuracy in the wording of the articles of association or overvaluation of any shares in kind or insufficiency of capital;

J. THE MAIN DIFFERENCES BETWEEN A PRIVATE AND A PUBLIC COMPANY

1. *Purpose:* public company and private companies fulfill different economic purposes. The purpose of a public company is to raise capital from the public to run the enterprise. This ability to offer shares to the public is now the only advantage of a public company. The purpose of a private company is to confer separate legal personality on the business of a sole trader or partnership.

2. *Issue of capital:* A private company may not raise capital by issuing its securities to the public. There is no restriction on the offer of securities by a public company. A public company must, however, issue a prospectus (a document which gives minimum essential information to potential members).

3. *Transferability of shares:* the shares of a public company are freely transferable. A private company will, in contrast, wish to remain under the control of the family or partners concerned. Its articles will therefore contain a clause restricting the right to transfer shares.

Study Unit 3
Share Capital

Contents

A. SUBSCRIPTION OF SHARE CAPITAL

Subscription is the acceptance by the subscriber of the offer to subscribe for shares made by the promoters or their agents (usually a bank). By subscribing the subscriber promises to take up the number of shares subscribed. The shares may be paid for in cash or in kind, but never in the form of services, because the capital of a company is conceived as a security (collateral) to creditors of the company who can never proceed against shareholders personally for the debts of the corporation beyond their investment. The exception is where the company has unlimited liability – see 3.23 below

Note that by virtue of subscription promoters are bound to either constitute the company or reimburse the amount of subscription if the company is not constituted within six months from the date the proposed company account was opened at a bank.

For their part, subscribers may not withdraw their subscription; they must honour their promise to take up shares. The option open to a subscriber who no longer desires to become a shareholder is for him to assign (transfer) his undertaking (promise) to take up shares

B. PAYMENT OF SHARES

a) Share Capital

The share capital of the public limited company varies depending on whether the company is offering its shares to the public or not. For a company that does not offer its shares to the public the minimum capitalization requirement is 100 million RWF and 200 million RWF for a company that offers its shares to the public.

b) Payment for Shares

To subscribe is a promise to make payments for the shares subscribed. The shares have to be paid for so as to ensure that the company is born. If the shares are to be paid for in cash, at least 1/3 of the amount representing the share capital must be paid up and the remainder within two years from the birth of the company. Payment may be effected in cash, certified cheque or Treasury bill.

Note that payment in cash is required to be lodged in a special account opened at a bank in the name of the company being formed. The organs of management of a company cannot draw from this account except the notary who was present during the constituent ordinary meeting informs the bank in writing that the articles of association have been adopted.

On the other hand, if payment is to be effected in kind then all the shares representing the share capital in kind must be entirely paid up. The evaluation of the shares in kind is admissible after corroboration by experts appointed by the promoters. In addition, within 6 months from the date of birth of the company the manager and auditors are required, on pain of their joint and several liabilities, to verify the evaluation of the payments in kind. Should the verification reveal an over valuation the managers and auditors shall without prejudice to whatever action that may be taken against the defaulting shareholders, proceed to adjust the share capital and a suppression of the redundant shares

Note that as long as the verification has not been undertaken by the manages and auditors, the shares cannot be negotiated (transferred)

C. TYPES OF SHARE CAPITAL

Ordinary shares

Debentures

COMPANY SECURITIES

One of the major reasons that promoters select the corporate form of business is the variety of funding sources available to the public limited companies. An important source of financing is the sale of company securities. A security is evidence of a debt or property (ownership), such as a share, or debenture. The basic legal distinction between them is that a share constitutes the holder a member of the company whereas the debenture holder is a creditor of the company but not a member of it.

SHARES

Rights in a company are represented by negotiable instruments called shares. A share may be defined as "the interest of a shareholder in the company measured by a sum of money, for the purpose of liability in the first place, and of interest in the second, but also consisting of a series of natural covenants entered into by all the shareholders inter se". The contract contained in the articles of association is one of the original incidents of the share.

A share is not a sum of money… but is an interest measured by a sum of money and made up of various rights contained in the contract, including the rights to a sum of money of a more or less amount".

The shares of each shareholder represent a fraction of the share capital of the company. Certain rights are attached to these shares, they are:

1. The right to vote during general meetings (annual or special);
2. Right to dividends;
3. Rights to return of capital on a winding up i.e., liquidation (or authorized reduction of capital.

a) Right to vote:

A shareholder has a right to attend meetings and to vote. The right to vote attached to shares must be proportional to the fraction of capital it represents – 1 share = 1 vote. Nevertheless, the right to vote attached to shares whose contribution is in kind is suspended if the shares have not been entirely paid up.

b) Right to dividend

If at the end of a financial year shows an excess of profit over losses, this excess constitutes profits for the financial year and is available for distribution to the partners/shareholders as dividends proportional to the capital it represents. Once distributed, dividends, corresponding to the profits realized by the company, are finally vested in the shareholders. As such, if in a subsequent financial year the company does not make profits, the creditors of the company cannot compel the shareholders to restore to the company the sums as dividends, which were paid in accordance with the law.

However, if profits are not realized at the end of the financial year, the company is not competent to pay dividends. The payment of fictitious dividends amounts to a reduction of the share capital of the company. We stated earlier that the capital of a company constitutes a security (collateral) to company creditors. Accordingly, if fictitious dividends are distributed to shareholders creditors have a right to protect their interest by requesting the court to nullify the distribution and compel the shareholders to restore to the company the sums paid as dividends in violation of the law.

c) Right to return of capital on liquidation (or authorised reduction of capital)

The liquidation of a company requires the distribution of losses or the surplus of liquidation as the case may be to the shareholders. In the case of an authorised reduction of capital shareholders are entitled to part of the capital to the extent of the reduction.

Types of Share Contributions

Contributions to the capital of a company may be made in cash or in kind. If the contribution is in the form of cash at least 1/3 of the amount due must be paid at the time of the formation of the company and the balance within two (2) years from the date the company is formed. If the contribution is in kind it must be entirely paid up at the time of formation of the company.

Negotiability of shares

Negotiability of shares means the transfer of shares. We stated that shares are negotiable instruments issued by the company in return for the contribution of the shareholder to the capital of the company. In principle, shares issued by a public limited company are freely transferable. The procedure to be followed depends on the nature of the share is whether it is a registered share or bearer share

a) Registered shares

The registered share is represented by registration in the register of shareholders maintained by the company at the registered office (headquarters). Upon registration the director issues a certificate to the member (shareholder) certifying that he is the holder of a specified number of shares (giving their distinguishing numbers if they have them and stating the extent to which they are paid up). The purpose of this is to give the shareholder some document, which he can use as evidence of his title. It also provides the company on a check on the identity of the registered holder and the company will not normally register any dealing unless the certificate is produced.

Note that the holder's legal rights depend not on the certificate but upon entry in the register, and the certificate is merely a declaration by the company stating what these rights are and affording prima face evidence of them.

Registration may be made by the party himself or a director and the certificate should be delivered within one month of registration. A certified copy of the registrations in the register is required to be deposited by the directors within one month of registration at the ORG.

Negotiation of registered shares shall be effected by transfer on the registers of the company, the holder's rights resulting from the single registration on the company's register.

b) Bearer shares

In contradistinction to a registered share is the bearer share. It is represented by a piece of paper paginated and detached from a counterfoil book carrying a number of indications but the most important characteristic is the absence of a name. A least two directors must sign the paper.

The holder's rights depend on the mere possession of the paper. Consequently, negotiation is by simple delivery of bearer shares. The bearer of the share shall be deemed to be the owner. Dividends, if any are due and payable, are paid on physical presentation of the bearer share at the company's registered offices to the person holding the bearer share. Because the bearer share has no name, the owner cannot be notified of any meetings or when dividends are due.

c) Restrictions on the transfer of shares

Although shares (registered or bearer) are freely transferable, they can only be transferred after the company has acquired legal personality i.e., after registration in the Commercial Register. Furthermore, the articles of association may low down certain limitations to the transfer of shares, e.g., transfer to the company's competitors or a certain class of persons.

Note that if a company allows bearer shares the holder is at liability to convert his bearer shares into registered shares and vice-versa

D. RAISING SHARE CAPITAL

DIFFERENT TYPES OF CONTRIBUTIONS

In order to qualify as a shareholder of a company each partner must contribute to the capital of the company. In return for their contribution the partner shall receive shares issued by the company.

A partner may contribute to the company:

1. Money, as a contribution in cash;

2. Rights on moveable or immovable tangible or intangible property, as a contribution in kind:

3. Services as a supply of labour.

1) <u>Contributions in cash</u>

Contribution in cash is required to be effected by the partner (shareholder) transferring to the company the ownership of the amount of money that he has pledged to contribute. The date of payment depends on the type of company. For partnerships, the partnership agreement may stipulate the time within which payment (contributions) is to be effected. As regards the SARL i.e., private limited company contributions in cash must be fully paid up at the time of the formation of the company. Cash contributions are said to be fully paid up when the company has acquired ownership and the contributions are fully and finally paid up.

As regards the SA, i.e., public limited company a minimum of 1/3 of the contribution is required to be paid up at the time of formation of the company and the balance within 2 years from the day the company is formed.

Note that in case of delay in payment, the balance due to the company shall automatically bear interest at the official rate from the date payment became due.

Contributions for shares not in the form of cash

From Article 31

Where a share is issued for consideration other than cash, the Board of directors shall determine the cash value of that consideration for the purposes of sub-paragraphs 1° or 2° of paragraph 2 of this article.
Where a share involves an obligation other than the obligation to pay, and that such obligation is met by the shareholder:

1. the Board of directors shall determine the cash value, if any, of that performance;

2. the cash value of that performance shall be deemed to be a call which has been paid on the share for the purposes of sub-paragraphs 1° or 2°of paragraph 2 of this article.

2) Contributions in kind

Contributions in kind is made by the transfer of the property or rights to use the property contributed and the effective conveyance to the company of the property to which those rights are attached. It is mandatory for contributions in kind to be fully paid up at the time of formation of the company.

Where the contribution is in the form of property the contributor shall stand warranty (security) for the company as a vendor for the buyer.

However the risk of the property passes to the company on the day of the transfer. On the other hand if contribution is in the form of a mere right to use the property contributed i.e., the contribution is in the form of a leasehold, the contributor shall guarantee the company undisturbed use of the property contributed, like a lesser for lessee. However, the risk of the property remains with the shareholder (partner).

3) Contribution in the form of services

Contribution may also be in the form of services. Where contribution is in the form of services the contributor is obliged to render services in the form of labour to the company. In the absence of a provision or clause as to the time frame within which such services is to be rendered, the presumption is that the services will be supplied during the life time of the company. Article 31 sub para 2 may be read as to imply that the service in lieu of cash payment has been performed.

Previously, thecontribution in the form of services could only be made to companies whose shareholders (partners) had unlimited liability. Thus, contribution in the form of services is available to partnerships and not to “companies”. The rationale for the exclusion of companies

may be explained by two factors. The one, is that, since share contributions are required to be entirely paid up either at birth or within two years of the existence of the company, contributions in the form of services cannot satisfy this requirement. Secondly, the capital of a company is conceived as security (collateral) to creditors of the company, as such, services cannot serve as security.

Note that a shareholder's (partner's) contribution may be in the form of aclaim. In the event where the contribution is in the form of aclaim all that is required of the contributor is to establish the existence of the debt and not the solvency of the debtor

Subject to the constitution of the company, different classes of shares may be issued in a company. *Article 76*
Shares in a company may :

1 be redeemable;
2 confer preferential rights to distributions of share capital or income;
3 confer special, limited, or conditional voting rights;
4 not confer voting rights.

E. VARIATION OF SHAREHOLDERS' RIGHTS

Any existing company may at any time, convert any class of shares of the company into shares of no par value provided that seventy five per cent (75%) of shareholders vote for the resolution. Notice of the terms of the conversion is given to the Registrar General for registration within forteen (14) days of the approval of the conversion.

The shares converted shall not affect the rights and liabilities attached to such shares. In particular, such conversion shall not affect:

1 any unpaid liability on such shares;
2 the rights of the holders of the shares in respect of dividends, voting or repayment on winding up or a reduction of share capital.

F. RIGHTS AND OBLIGATIONS OF THE SHAREHOLDERS

RIGHTS OR POWERS OF THE SHAREHOLDERS

The law chose the expression powers instead of rights. This difference in terminology doesn't present a big interest especially as the rights and the powers are synonymous.

Articles 140 to 142 of the law articulate responsibilities of the shareholders in these terms.

The powers conferred to the shareholders of a company shall be exercised :

1. at a meeting of shareholders;
2. by a resolution of shareholders in lieu of a meeting;
3. by a unanimous resolution;
4. by a unanimous shareholder agreement.

The power conferred to shareholders may be exercised by an ordinary resolution. An ordinary resolution shall be a resolution that is approved by a simple majority of the votes of those shareholders entitled to vote and voting on the matter which is the subject of the resolution.

The shareholders exercise a power to:

1. adopt articles of association , if it has , to alter or to revoke them ;
2. approve a major transaction;
3. approve an amalgamation of the company;
4. put the company into liquidation;

Such power shall be exercised by special resolution.

With regard to the modification of the rights, the article 149 provides: Where the share capital of a company is divided into different classes of shares, a company shall not take any action which varies the rights attached to a class of shares unless that variation is approved by a special resolution.

Where the variation of rights attached to a class of shares is approved and the company becomes entitled to take the action concerned, the holder of a share of that class, who did not consent to or cast any votes in favor of the resolution for the variation, may apply to the Court for an order against acts that are prejudicial to a shareholder, or may require the company to purchase those shares.

"When the share capital of a company is distributed in different categories of Shares, the company cannot take any Share that modifies the rights bound to a category of Shares, unless this modification is approved by special resolution.

Note wording of article 146, Where the Board of directors agrees to the purchase of the shares by the company, it shall, within seven (7) days of issuing the notice:

1. state a fair and reasonable price for the shares to be acquired;

2. give written notice of the price to the shareholder.

It is important to note that article 156 talks about rights of shareholders to the dividends in these terms: " The shareholders, who are entitled to receive dividends, exercise pre-emptive rights to acquire shares or any other right or receive any other benefit under this Law or the article of association, shall be required to attend a meeting on the date fixed by the Board of Directors".

The shareholders of a company may, by unanimous resolution or by unanimous shareholder agreement, approve any payment, provision, benefit, assistance or any other distribution provided that there are reasonable grounds to believe that, after the distribution, the company is likely to satisfy its solvency test (art.209).

A company shall make available for inspection by a shareholder of the company or by a person authorized in writing by a shareholder any documents of the company, except those documents regarded as confidential for the company if they suspect any misdeeds by managers. This should be by written notice of intention to inspect the records served to the company (art. 270).

OBLIGATIONS OR "LIABILITIES" OF SHAREHOLDERS

Liability of shareholders is addressed by articles 137 to 139. Indeed, article 137 limits the liability of the shareholders, the article 138 talks about liability for call, whereas article 139 exempts shareholders from some liabilities in case of alteration of articles of association.

In fact, according to the article 137, a shareholder shall not be liable for an obligation of the company by reason only of being a shareholder. The liability of a shareholder shall be limited to:

1. any amount unpaid on a share held by the shareholder;

2. any liability to repay a distribution received by the shareholder to the extent that the distribution is recoverable;

3. any liability expressly provided for in the constitution of the company.

Regarding liabilities for call, article 138 states that Where a share renders its holder liable to calls, or otherwise imposes a liability on its holder, that liability shall attach to the holder of the share for the time being, and not to a prior holder of the share, whether or not the liability became enforceable before the share was registered in the name of the current holder.

In case a shareholder has not agreed in writing to be bound by the alteration Article 139, makes it clear that he shall not be bound by an alteration of the constitution of a company which:

1. requires the shareholder to acquire or hold more shares in the company than the number held on the date the alteration is made;

2. increases the liability of the shareholder in the company.

Relevant Rules of General assemblies of shareholders

The shareholders have the right and the duty to sit at the general assemblies (ordinary or extraordinary).

Annual general assembly

The general meeting of shareholders is annually convened by the Board of directors as per article 151 of the law which adds the following precisions: not more than once in each year; not later than 6 months after the balance sheet date of the company; and not later than fifteen (15) months after the previous annual meeting.

A company may not hold its first annual meeting in the calendar year of its incorporation but shall hold that meeting within eighteen (18) months of its incorporation. The company shall hold the meeting on the date on which it is called to be held.

The business to be transacted at an annual meeting shall deal with the consideration and approval of the financial statements, the receiving of any auditor's report, the consideration of the annual report, the appointment of any directors, the appointment of any auditor and other issues as may be deemed necessary by the annual meeting (art. 152).

In the same vein article 153 adds, where the financial statements are not approved at the annual meeting, they shall be presented at a further special meeting called by the Board of Directors within ninety (90) days.

Special meeting of shareholders

According to article 154, a special meeting of shareholders entitled to vote on an issue put before it where : 1° it is called by the Board of Directors or a person who is authorized by the constitution to call the meeting; 2° it shall be called by the Board of Directors on the written request of shareholders holding shares carrying together at least 50 per cent of the voting rights .

Proceedings at the meeting

The provisions specified in an order of the Registrar General shall govern the proceedings at meetings of shareholders of a company except to the extent that the constitution of the company provides otherwise (art. 155).

G. PROSPECTUSES

PUBLICATION OF THE PROSPECTUS

An invitation to subscribers is evidenced by a prospectus signed by all the promoters. A prospectus may be defined as a document published by a corporation or by persons acting as its agents or setting forth the nature and objects of an issue of shares, debentures, or other securities created by the company, the investment or risk characteristics of the security and inviting the public to subscribe to the issue. The prospectus must contain:

a) The draft memorandum of association and reference to the fact that it has been published in the OG,
b) The place and date of the constituent ordinary meeting;
c) The subscription rate (prices) for shares;
d) The date marking the beginning and end of issuance of shares; and
e) The subscription office

H. ALTERATION, MAITENANCE AND REDUCTION OF SHARE CAPITAL

VARIATION OF CAPITAL

A company may by ordinary resolution:

1 divide or subdivide its shares into shares of a smaller amount if the proportion between the amount paid, and the amount, if any, unpaid on each reduced share remains the same as it was in the case of the share from which the reduced share is derived;
2 consolidate into shares of a larger amount than its existing shares.

Where shares are consolidated, the amount paid and any unpaid liability thereon, any fixed sum by way of dividend or repayment to which such shares are entitled, shall also be increased. *Article 88*

Where a company has altered its share capital, it shall within fifteen (15) days of the date of the alteration file a notice to that effect with the Registrar General

Notwithstanding the provisions of the articles of association, where a company issues shares which rank equally with, or in priority to existing shares as to voting or distribution rights, those shares shall be offered to the holders of existing shares in a manner which would, maintain the relative voting and distribution rights of those shareholders. An offer shall remain open for acceptance for a period, which shall not be more than fifteen (15) days. *Article 92*

Since the amount of capital is mandatory fixed by the memorandum of association any increase or reduction of capital necessitates an amendment of the memorandum of association.

a) Increase of Capital

The share capital of a company may be increased by issuing new shares, incorporation of reserves into the capital or by conversion of debentures into shares.

i. Increase of capital by issuing new shares

If the increase in capital is by issuing new shares the shares may be paid for in cash or in kind. Note that a company may not be allowed to increase its share capital if the outstanding capital has not been entirely paid up. The sanction for this restriction is the nullity of the increase. Nevertheless, this restriction does not apply if the increase results in the issuance of new shares in kind.

Shares shall carry a pre-emptive right of subscription of increases in capital. Accordingly, shareholders shall in proportion to their shares, have a pre-emptive right of subscription for shares issued for an increase in capital. This right is lost after the time limit allowed for the exercise of this right. Similarly, a shareholder may renounce the exercise of his pre-emptive right.

The formalities to be followed when issuing new shares is identical to that during the formation of the company: publication of prospectus, subscription and paying up of shares.

ii. Increase of capital by incorporating reserves

This increase is effected by the simple transfer of the reserve account to the capital account. All that is required is a decision of the special meeting. Two methods may be employed to give effect to this increase following a decision by special resolution at the special meeting:

- By increasing the nominal (face) value of shares:
- By issuing new shares and allocate them gratuitously to existing shareholders in proportion to the amount of their shares.

iii. *Increase in Capital by Converting Debentures into Shares*

As earlier stated, an increase in the capital of a company may be the result of the acceptance by the company creditors to transform their status from that of creditors to shareholders. If there is an agreement between the company and its shareholders, the agreement is given life by a decision of the extraordinary general meeting.

b) **Reduction of Capital**

A reduction of capital is usually justified by losses. The registered capital of a company may be reduced by decreasing either the face value or the number of shares.

The decision to reduce the share capital is within the competence of the special meeting of shareholders and must be resolved by special resolution where there is a 75% majority. This resolution may delegate all the powers to the BOD or managing director as the case may be, to effect the reduction.

The draft instrument of the reduction of capital shall be communicated to the auditor before the date of the special meeting, which shall authorize the reduction of capital.

The auditor is required to table before the special meeting a report in which he shall set out his assessment of the reasons for and condition of the reduction of capital.

Since a reduction of capital reduces the security (collateral) of the creditors the law empowers the creditors of the company to object to the reduction of the capital where it is not justified by losses.

The time limit for lodging an objection by creditors to the reduction of capital shall be 30 days from the date of depositing at the registry of the court of the minutes of proceedings, which ordered or authorized the reduction of capital.

Where the objection is admitted, the capital reduction procedure shall be suspended until the claims are reimbursed or guarantees are provided for creditors where the company offers such guarantees and where they are considered adequate.

Article 101 gives details conditions and these include the sub paragraph

A company shall not take any action:
1. to extinguish or reduce a liability in respect of an amount unpaid on a share;
2. to reduce its share capital for any purpose unless there are reasonable grounds on which the directors may determine that, immediately after the taking of such action, the company will be able to satisfy the solvency test.

I. THE ACQUISITION AND REDEMPTION BY A COMPANY OF ITS OWN SHARES

A company may request buy back from the shareholders its own shares where the Board of Directors is satisfied that:

1. the acquisition is in the best interests of the company;

2. the terms of the offer or agreement and the consideration to be paid for the shares are fair and reasonable to the company;

3. in case where the offer is not made to, or the agreement is not entered into with all shareholders, the offer or the agreement, is fair to those shareholders to whom the offer is not made, or with whom no agreement is entered into;

4. shareholders to whom the offer is made have available to them any information which is material to an assessment of the value of the shares;

5. the company shall immediately after the acquisition satisfy the solvency test. *Article 105*

Any offer by a company to purchase or otherwise acquire its own shares on a stock exchange shall be made in accordance with such conditions as prescribed above.

Before an offer is made by a Company to acquire its own shares, it shall send to all its shareholders a public notice requesting the repurchase of its own shares.

Purchased shares or those shares redeemed by the company shall, immediately upon purchase, be struck off the company's register. Shares shall become the property of the company as of the date on which it has the power to use the rights linked with such shares. *Article 107*

A company may hold its own shares but no rights must be accorded to these shares

Share holders have a right of objection to the purchase of shares by the company not withstanding the resolution was a special rresolution and required a 75%majority who attended the special meeting.

J. FINANCIAL ASSISSTANCE BY A COMPANY FOR THE PURCHASE OF ITS OWN SHARES

A company shall not give financial assistance to acquire its own shares, except where the Board of Directors has previously resolved that:

1. giving the assistance is in the interests of the company;

2. the terms and conditions on which the assistance is given are fair and reasonable to the company and to any shareholders not receiving that assistance;

3. immediately after giving the assistance, the company shall satisfy the solvency test. *Article 114*

A company shall not provide financial assistance exceeding ten per cent (10%) of its share capital.

K. DIVIDENDS

Dividends can only be paid out of profits.
Dividends to one class of shares can only differ between shareholders where there is an outstanding liability by the shareholder in respect of those shares – *Article 102*

The Board of Directors may issue shares to any shareholder who has agreed to accept the issue of shares, in lieu of a proposed dividend provided that:

1. the right to receive shares, in lieu of the proposed dividend or proposed future dividends has been offered to all shareholders of the same class on the same terms;

2. all shareholders elected to receive the shares in lieu of the proposed dividend, their relative voting or distribution rights, or both, would be maintained;

3. the shareholders to whom the right is offered are afforded a reasonable opportunity of accepting it.

Study Unit 4
Debt Capital

Contents

Debt capital is generally represented by Debentures.

A. DEBENTURES

Public limited companies have the power to borrow money necessary for their operations by issuing debt securities (debentures). Unlike shares debentures do not create an ownership interest in the company. They create a debtor- creditor relationship. Accordingly, the company's obligated to pay a periodic interest charge as well as the balance of the debt on maturity date.

A debenture is a negotiable instrument constituting a long -term debt. Debenture is the term applied not to the indebtedness itself but to the document evidencing it. It is normally, but not necessarily, secured by a charge over company property.

CONDITIONS OF ISSUE OF DEBENTURES

Public limited companies shall not be allowed to issue debentures except if they have existed for three years and have drawn up three balance sheets duly approved by the general meeting of shareholders.

Furthermore, the issue of debenture is not allowed for companies whose capital is not paid up.

In addition, the amount of debentures issued by the company cannot be superior to the company's share capital. Note that the company, which issues debentures, is allowed to reduce its share capital only to the extent of the reimbursements effected on the debentures.

NEGOTIABILITY OF DEBENTURES

Like shares, debentures are negotiable instruments, which can easily be transferred. The procedure to be followed depends on the type of debenture i.e., whether it is a registered debenture or bearer debenture.

REGISTERED DEBENTURE

Much the same as registered shares, debenturesare represented by registration in a register of debenture holders. Following registration a certificate is issued certifying that he is a holder of a certain number of debentures.

Note that the holder's legal rights depend not on the certificate but upon entry in the register. The certificate merely states what these rights are and constitutes evidence of these rights. Registration may be made by the party himself or any of the directors.

Transfer of registered debenture is effected by the transfer in the register of the company, the holders rights resulting from registration on the company's register of debenture holders.

BEARER DEBENTURES

Bearer debentures are represented by a piece of paper paginated and detached from a counterfoil book carrying a number of indications but the most important characteristics is the absence of a name. The paper must be signed by two directors.

The holder's rights depend on the mere possession of the paper; consequently, negotiation is by the simple delivery of bearer debentures. The bearer of such a debenture shall be deemed to be the owner.

GROUP OF DEBENTURE HOLDERS

Holders of debentures issued at the same time shall as of right be grouped together to defend their interests.

A representative of debenture holders shall represent the group, according to the decision taken by the general meeting of debenture holders.

The following may not be chosen to represent the group:

- Organs of the company;
- A parent or relation up to the fourth degree;
- An agent or intermediary of the company.

GENERAL MEETING OF DEBENTUREHOLDERS

The general meeting of debenture holders of the same group may meet as required by law. The law recognizes two types of meetings: annual meeting and special meeting.

Annual Meeting

The annual meeting is one convened to do the following acts:

- Appoint and dismiss the representative of debenture holders:
- Determine the emoluments of the trustee, in case of any disagreement the emoluments shall be fixed by the Court of First Instance:
- Vote the discharge of the representative of debenture holders:
- Deliberate on measures aimed at defending the interests of debenture holders and the execution of the contract with the company as well as the expenses concerning the execution of the decisions.

Special Meeting

The special meeting has the following business:

- A modification or suppression of the security;
- The extension or suppression of one or more maturity dates of interest payment, the reduction of the interest rate and modalities of payment;
- The extension or suppression of one or several amortization schedules, modification of the amount of amortization and the modalities of payment;
- The substitution of debentures by the shares of the company or of the debentures or shares of another company.

Notice of Meetings of debentures

A meeting of debenture holders may be convened by any of the following persons:

- By the directors of the company;
- The representative of debenture holders;
- Debenture holders having at least 1/3 of the debentures
- At least eight (8) days before the holding of the meeting every debenture holder must be notified of such meeting. The notice convening the meeting shall contain the agenda of the meeting.

Attendance

The following shall attend meetings of debenture holders with a right to vote: holders of registered debentures and holders of bearer debentures. On the other hand the representative of debenture holders and agents of the company provided they are not debenture holders, may attend the meeting with a consultative voice only.

Quorum and decisions

The quorum required for annual meeting of debenture holders is 1/ 2 of the debentures and decisions are taken by a simple majority of those voting. As regards a special meeting the quorum is 1/2 for the first meeting and ¼ for the second meeting. In either case decisions will be taken by ¾ of those voting.

Note that the decisions of the extraordinary general meeting shall be valid if they are taken in view of a recent financial situation verified by the auditors and upon a report of the board of directors justifying the measures proposed.

B. CHARGES

The present section is about issue of obligations on the one hand, and on the other hand, the registration of the liabilities.

1. Introduction

The debenture may be defined as a certificate of loan issued by the company, which creates or acknowledges an indebtedness of the company. The companies have to borrow the money for their extension or developments. The loan requirements may not be met by single money-lender. The loan may have to be split into several units. The most usual form of borrowing by a company in this way is by the issue of debentures. By the issue of debentures, the public is invited to lend money for a fixed period at a declared rate of interest to be paid on such money *e.g;* a company requires one million Rwandan francs. It may be divided into one hundred thousand units of RFW 1,000 each. A money-lender may purchase as many units as he please. The company will then issue certificate for the units purchased by a lender. A debenture is, therefore, a document issued by a company as an evidence of a debt due from the company, with or without a charge on the assets of the company. The Rwandan companies' law defines the debenture under article 2. 17º as 'a written acknowledgement of indebtedness issued by a company in respect of a loan made to it or to any other person or money deposited with the company or any other person or the existing indebtedness of the company or any other person whether constituting a charge on any of the assets of the company or not'.

2. Relevant provisions of the law in relation with the issue of debentures

The law provides for some requirements in relation to issuing of the debentures depending on whether or not they are of a same class.

Indeed, article 157, says that where a company issues or agrees to issue debentures of the same class to more than 25 persons, or to any one or more persons with a view to the debentures or any of them being offered for sale to more than twenty (25) persons, the company shall before issuing any of the debentures :

1. sign under its name and unique number;
2. and procure the signature to the deed by a person qualified to act as a debenture holders' representative.

Article 158, sheds more lights by clarifying that a debenture shall not be deemed to be of the same class where:

1. they do not rank equally for repayment when any security created by the debenture is enforced or the company is wound up;
2. different rights attach to them in respect of:

    a) the rate of, or dates for payment of interest;

    b) the dates when, or the installments by which, the principal of the debentures shall be repaid, unless the difference is solely that the class of debentures shall be repaid during a stated period of time and particular debentures shall be selected by the company for repayment at different dates during that period by drawings, ballot or otherwise;

    c) any right to subscribe for or convert the debentures into shares or other debentures of the company or any other company or corporation;

    d) the powers of the debenture holders to realize any security.

Where a company has given a debenture to secure advances on a current account, the debenture shall not be deemed to have been redeemed by reason that the account of the company with the debenture holder has ceased to be in debit while the debenture remains unsatisfied (article 163).

C. REGISTRATION OF CHARGES

Article 160 of the law provides that every company which issues debentures shall keep at its head office a register of debenture holders which shall contain the names and addresses of the debenture holders and the amount of debentures held by them.

Let's note that the register shall be open to the inspection of a shareholder (art.161). Concerning the content of the register of debenture holder, it must contain their names and addresses as well as the amount of the debentures they hold (art. 160).

Where a company has given a debenture to secure advances on a current account, the debenture shall not be deemed to have been redeemed by reason that the account of the company with the debenture holder has ceased to be in debit while the debenture remains unsatisfied.

Similarly, where a company has decided to issue debentures and to secure their payment by a mortgage or floating charge, the inscription of such mortgage or floating charge shall be valid when kept in the relevant register.

Finally, the company shall, within thirty (30) days after the date on which the security is provided, with the Registrar General a statement of the particulars of all securities provided. The particulars required to be given in the statement are the following:

1. the date of its provision;
2. the amount secured by the charge;
3. a description sufficient to identify the property charged;
4. the name of the person entitled to the charge.

D. REMEDIES FOR DEBENTURE HOLDERS

Article 277 states that an investigation by the OGR can be instituted where debenture holders holding not less than one-fifth (1/5) in nominal value of the issued debentures make an application to the OGR.

E. COMPARISON BETWEEN A SHARE-HOLDER AND A DEBENTURE HOLDER

	Share-holder	**Debenture-holder**
1	He is the member and joint owner of the company	He is simply a creditor of the company who has given some loan to the company
2	He has a right to vote at the meetings of the company	He has no right to vote at any meeting of the company.
3	He is entitled to get dividends only out of profits. The rate of dividends is not fixed. It varies from year to year depending upon the profits of the company.	He is entitled to fixed rate of interest whether there are profits or not.
4	He has full right to control company`s affairs. In fact, the ultimate destiny of the company is in the hands of shareholders	He has no right to interfere with the business of the company. However, in case of company`s default in paying their debts, he may enforce their security.
5	He cannot be paid back so long as the company is a going concern	He can be paid back unless he is perpetual debenture-holder.
6	He does not have any charge over the assets of the company	He generally has a charge over the assets of the company
7	In case of winding up of the company, he is paid after satisfying all other claims	In case of winding up, a secured debenture-holder is paid prior to the share-holder.

BLANK

Study Unit 5

Membership of a Company

Contents

The member ship of a company is through the ownership of shares.

A. BECOMING A MEMBER

The shres can be purchased if a promoter invites a prospective member through a private invitation – for a private company – or through the public advertisement of the prospectus for a public limited company.

B. REGISTER OF MEMBERS

The company shall maintain a register of shareholders and of debenture holders and this shall be kept at the registered office or elsewhere as notified to or agreed with the ORG .
These registers should be available for inspection by the members.
The register shall record the shares and their holders.
The format of this register shall be determined by the Registrar General.

C. RIGHTS, OBLIGATIONS AND LIABILITIES OF MEMBERS

Rights and Obligations of Shareholders

The term shareholder is employed loosely to designate the participants (owners) in all types of commercial companies A company shall issue shares in return for the shareholder's contribution. Such shares shall represent the shareholder's rights and shall be referred to as 'shares'.

Company shares are personal property and shall confer on their holders the following rights and obligations:

1. A right to a share of company profits whenever they are distributed;
2. A right to the company's net assets when shared following the dissolution of the company or where the company's share capital is effectively reduced;
3. The obligation to share in the company's losses to the limit of the par value of the shares held
4. The right to participate in and vote on the collective decision of the shareholders.

And every company shall issue to a shareholder, on request, a statement that sets out:

1. the class of shares held by the shareholder,
2. the total number of shares of that class issued by the company and the number of shares of that class held by the shareholder;
3. the rights, privileges, conditions and limitations, including restrictions on transfer, attaching to the shares held by the shareholder;
4. the rights, privileges, conditions and limitations attaching to the classes of shares other than those held by the shareholder.

Note that the quota (portion) of each shareholder in the profits and losses is within the exception of General and Limited partnerships proportional to his or her contribution. This, notwithstanding the partnership deed may provide for the distribution of profits and losses based on the proportion of a partners share contribution. In addition, any clause, which attributes to one or some of the shareholders all the profits, is void. Similarly, any clause, which immunise one or some of the shareholders against the losses, is void. Note that it is unlawful to be paid dividends if a company does not make profits. Further more, the share of a partner's dividends whose contribution is in the form of services is equivalent to that of a partner who has the least contribution in cash or in kind. However, the partnership agreement may vary this requirement.

In the event where several persons are co-owners of a share, the company is at liberty to suspend the rights conferred on thei holders, until such a time that the co-owners can designate a joint representative. However, the co-owners remain jointly and severally liable for the obligations attached to the shares. On the other hand where a share is an object of a usufruct the company has a right to suspend the rights attached to the share(s) until such a time that the bare owner and the usufructuary designate a joint representative. However both the bare owner and the usufructuary remain jointly and severally liable for the obligations attached to the shares.

Usufruct: The right to use and enjoy the profits and advantages of something belonging to another as long as the property is not damaged or altered in any way.

Further, where a share is given as a collateral (security) the owner continues to exercise the rights attached to the shares. In addition the eventual payment of any outstanding contribution is the responsibility of the owner.

D. TERMINATION OF MEMBERSHIP

Membership is ended when the share is sold and the register is updated with the name of the new member who has acquired or purchased those shares or when the company has re-acquitred the sahares and the register has been accordingly updated

Membership is also ended when the company is dissolved or officially put into liquidation

BLANK

Study Unit 6
Shares

Contents

A. CLASSES OF SHARES

Shares in a company may :

1. be redeemable;
2. confer preferential rights to distributions of share capital or income;
3. confer special, limited, or conditional voting rights;
4. not confer voting rights.

B. ISSUE AND ALLOTMENT

Upon registration of the company any person named in the application for registration as a shareholder shall be deemed to have been issued with the number of shares specified in the application. *Article 84*

From Article 86 The terms of issuing shares approved by the Board of Directors shall be:

1. consistent with the articles of association of the company, and to the extent that they are not so consistent, shall be invalid and of no effect;
2. deemed to form part of its constitution and may be amended in accordance with this Law.

Within fifteen (15) days of the issue of shares under this Law, the company shall give notice to the Registrar General certifying:

a) the number of shares issued;
b) the amount of the consideration for which the shares have been issued, its value as determined by the Board of Directors;
c) the amount of the company's share capital following the issue of the shares;
d) and deliver to the Registrar General a copy of any terms of issue approved.

C. TRANSFER AND TRANSMISSION

Shares in public companies are deemed to be transferable subject to any limitation or restriction on the transfer of shares in the Articles of Association

D. SHARE WARRANT

A warrant is a document giving the holder the right to buy shares at a fixed price at a given future date.

Warrants are different from Bearer Shares

A Bearer share is an equity security that is wholly owned by whoever holds the physical stock certificate. The issuing firm neither registers the owner of the stock, nor does it track transfers of ownership. The company disperses dividends to bearer shares when a physical coupon is presented to the firm.

Because the share is not registered to any authority, transferring the ownership of the stock involves only delivering the physical document.

Bearer shares lack the regulation and control of common shares because ownership is never recorded. Similar to bearer bonds, these shares are often international securities.

BLANK

Study Unit 7
Meetings

Contents

A. CLASSIFICATION OF MEETINGS

There are 3 types of meeting

1. The Constituent meeting
2. The Annual Meeting (historically known as the Annual General Meeting or AGM)
3. Special Meeting of Shareholders (historically known as an Extra-ordinary General Meeting or EGM)

CONSTITUENT ORDINARY MEETING

The final stage in the formation process is the holding of a constituent ordinary meeting.

If the company is not offering it shares to the public the memorandum and articles of association must be authenticated. In addition all the promoters shall participate in signing the memorandum and articles of association either in person or through their authorized agents. A constituent ordinary meeting grouping all the promoters or their nominees and members must be held. This meeting shall appoint not less than 3 and not more than 12 persons to be directors or ratify their appointment by the articles of association; it must also appoint one or more auditors whose function is to watch over the accounts in the interest of shareholders. The acceptance of their office by the directors and auditors marks the birth of the company. But it is still important for the legal validity of that birth that the company shall be entered in the ORG. This is done by filing copies of the articles of association, the minutes of the constituent ordinary meeting and the list of shareholders. Finally the principal documents must be published in the official gazette.

Note that as far as the limited company that does not offer its shares to the public is concerned only some of the procedural requirements examined above is applicable: drawing up of an authenticated articles of association (not draft articles) payment for shares and the holding of a constituent ordinary meeting.

As regards a public limited company that offers its shares to the public, the business of the constituent ordinary meeting, which must be held in the presence of a notary, comprises:

1. Verification of the substantive requirements for the formation of the company;
2. Adoption of the final text of the memorandum and articles of association, is by special resolution.
3. Approval of the evaluation of shares in kind and the benefits given to the promoters which it shall amend by a majority of the votes attached to the shares subscribed by the subscribers present excluding promoters
4. Appointment of the organs of administration (directors) and control (auditors) as well as fix their remuneration;
5. A vote on the final formation of the company requiring a majority of the votes attached to the shares subscribed by the subscribers present excluding promoters.

The acceptance of their office by the directors and auditors marks the birth of the company. As it is the case with other commercial companies these must be registered in the ORG; the articles of association and minutes of the constituent ordinary meeting and a list of shareholders must also be filed with the registrar of the CIF within whose jurisdiction the company proposes to establish its registered office. Finally the principal documents must be published in the official Gazette.

The promoters are, notwithstanding any clause to the contrary jointly and severally liable towards third parties:

1. For the eventual difference between the share capital and the minimum capital as well as that part of the share capital which shall not be validly subscribed, they shall be deem to be the subscribers for that part;
2. The effective payment for shares in accordance with the law;
3. Liable to pay damages which is the consequence of either the nullity of the company or inaccuracy in the wording of the memorandum of association or overvaluation of any shares in kind or insufficiency of capital;

The Annual Meeting of Shareholders

The Board of directors shall call an annual meeting of shareholders to be held :

1. not more than once in each year;
2. not later than 6 months after the balance sheet date of the company;
3. not later than fifteen (15) months after the previous annual meeting.

A company may not hold its first annual meeting in the calendar year of its incorporation but shall hold that meeting within eighteen (18) months of its incorporation. The company shall hold the meeting on the date on which it is called to be held.

A special meeting of shareholders

A special meeting of shareholders can be called by the Board of Directors or a person who is authorised by the constitution to call the meeting;
Also a special meeting can be called by the Board of Directors on the written request of shareholders holding shares carrying together at least 50 per cent of the voting rights .

B. NOTICE OF MEETING

A copy of the annual report shall be sent to every shareholder of the company not less than 15 days before the date fixed for holding the annual meeting of the shareholders.

C. AGENDA

The business to be transacted at an annual meeting shall deal with:

1. the consideration and approval of the financial statements;
2. the receiving of any auditor's report;
3. the consideration of the annual report;
4. the appointment of any directors;
5. the appointment of any auditor;
6. other issues as may be deemed necessary by the annual meeting.

The business of a special meeting will depend on the reasons given by the diretcors or by the shareholders requesting the meeting.

D. PROXIES

A Proxy is a person appointed by a shareholder to vote on his or her behalf at shareholders' meetings either according to instructions or, where specific instructions are not given, as the Proxy sees fit.

A proxy votes carries the same number votes as if the shareholder had attended the meeting in person.

E. QUORUM

The Articles of Association states the quorum for meetings but where there is no such statement, a quorum is usually taken as 1/ 2 of shares and decisions are taken by a simple majority of those voting.

As regards special meeting the quorum is 1/2 for the first meeting and ¼ for the second meeting. In either case decisions will be taken by ¾ of those voting.

F. PROCEEDINGS AT THE MEETING

The provisions specified in an order of the Registrar General shall govern the proceedings at meetings of shareholders of a company except to the extent that the constitution of the company provides otherwise.

G. RESOLUTIONS

The powers conferred to the shareholders of a company shall be exercised :

1. at a meeting of shareholders;
2. by a resolution of shareholders in lieu of a meeting;
3. by a unanimous resolution;
4. by a unanimous shareholder agreement.

The power conferred to shareholders may be exercised by an ordinary resolution. An ordinary resolution shall be a resolution that is approved by a simple majority of the votes of those shareholders entitled to vote and voting on the matter which is the subject of the resolution. *Article 141*

Where the shareholders exercise a power to :

1. adopt articles of association , if it has , to alter or to revoke them ;
2. approve a major transaction;
3. approve an amalgamation of the company;
4. put the company into liquidation;

Such power shall be exercised by special resolution.

A special resolution shall only be rescinded by a special resolution.

At any general meeting at which a special resolution is passed, the chairperson shall make a declaration as to whether such a resolution is so passed. The special resolution shall be passed upon the majority vote of three quarters (3/4) of shareholders who voted.

An **ordinary resolution** shall be a resolution that is approved by a simple majority of the votes of those shareholders entitled to vote and voting on the matter which is the subject of the resolution.

A **special resolution** is a resolution approved by a majority of seventy five per cent (75%) of the votes of those shareholders entitled to vote and who have voted on the issue under consideration. The articles of association may require a majority of more than seventy five per cent (75%);

A **unanimous resolution**: a resolution which has the assent of every shareholder entitled to vote on the matter.

H. MINUTES

The minutes of all meetings and resolutions of shareholders within the last ten (10) years shall be kept at Head Office;.

Study Unit 8
Directors

Contents

A. MANAGEMENT OF COMPANIES

Although all the shareholders have equal rights in the company it is obvious that they cannot together participate in its management except where there are a few (two or three) shareholders. They are, therefore, obliged to entrust the management to one of their numbers or a few as necessity requires. It is not every shareholder who is competent to manage a company. As regards partnerships management is usually the preserve of active partners who are personally liable for the debts of the partnership. For their part limited liability companies are frequently managed by administrators.

The organs of administration are adorned with all the powers necessary for the achievement of the objects of the company and to represent the company at law. Although the law gives the organs of management enormous power for the management of the company these powers may be curtailed by the Arts, of Ass. While these restrictions of powers may be valid among shareholders they do not produce any effects vis-a-vis third parties even where they have been published. In other words, these restrictions cannot be set up by the company to oppose the interests of third parties.

In addition the Arts of Ass may delegate all the powers of management to one or several persons acting alone or jointly. Note that the clause delegating powers of management may be in yoked after 30 days following its publication in the official gazette except the company can establish that the third party had knowledge of such delegation of powers of management.

The company is linked to third parties through the acts of its representatives (managers) even where the acts undertaken by management go beyond the objects of the company, except the company can prove that the third party knew or ought to have known that the act was ultra-vires the company. Note that mere publication of the Art Ass does not constitute proof of such knowledge.

When an organ of the company fails to perform the functions entrusted to it by law or to act in the interest of the company a shareholder may after unsuccessful attempts to get it perform its duties petition the Court of First Instance to designate (appoint) an ad-hoc agent.

THE ORGANISATION AND FUNCTIONING OF PUBLIC LIMITED COMPANIES

The shareholders are the owners of the company. They can affect the way the business is run through their power to elect directors and amend the articles of association. They do not, however have the power to make management decisions. That power is given to the directors by the articles of association.

The functioning of the public limited company is the prerogative of three organs:

- The board of directors
- The general meeting of shareholders
- The committee of auditors.

Board of Directors

The public limited company is administered by a board of directors comprising not less than three (3) and not more than twelve (12) members. Members of the board of directors may be natural persons or third parties.

B. APPOINTMENT OF DIRECTORS

The first directors may be appointed by the articles of association or by the constituent general meeting. During the existence of the company, the directors shall be appointed by the ordinary general meeting.

The term of office of directors shall not exceed six years but they are eligible for re-election.

Note that following the appointment of directors the company cannot execute a contract of employment with the directors. Should a contract of employment be concluded with a director the same shall automatically come to an end the day the director assumes duty. This may be explained by the fact that directors are not considered in law to be employees of the company, but as the company's agent. It is for this reason that a general meeting can at any time dismiss the directors.

Vacancies

In the event of any vacancy on the board the remaining directors and auditors are given the powers to appoint an interim director to fill the vacancy. The appointment by the board of directors and auditors of the interim director shall be submitted to the next annual meeting for

ratification. Should the annual meeting refuse to ratify the appointment the decision or acts of the incomplete board shall nevertheless remain valid.

Powers and Duties of Board of Directors

The board is adorned with all the powers necessary for the attainment of the objects of the company as well as its representation at law. However, the articles of association may restrict the powers of the board. While these restrictions may be valid between shareholders they cannot be set up by the corporation against third parties even if they were published.

Directors do not have the powers to bind the company individually as it's the case with partnerships having several managers. They can only bind the company acting collectively i.e., to say there is collective management as far as the public limited company is concerned. Decisions are taken by simple majority of those present as long as the majority of board members are personally present.

The company is linked to third parties through the acts of its directors even where the acts undertaken by the directors go beyond the objects of the company except the company can establish that the third party knew or ought to have known that the act was ultra vires the company. The publication of the articles of association does not constitute proof of such knowledge.

Although the management of the company has been entrusted to the board of directors, in practice, the board generally serves as adviser to the management rather than as business decision makers. In the result the powers of management is usually delegated to a managing director or general manager. Even in the event where the powers of management have been delegated the board is still required to formulate the general policy of the company as well as supervise its execution.

Remuneration

The annual meeting may freely grant the directors, as remuneration for their activities a fixed annual duty allowance. The board of directors may also grant its member special remuneration for the mission and tasks entrusted to them or authorizes the reimbursement of travel and subsistence costs and expenses incurred in the interest of the company.

Appointment of Directors

They are appointed by the shareholders at the Annual Meeting or at Special Meetings if such a meeting is called.

If any director is appointed by the Board or the management of the company, his or her appointment must be ratified at the next annual meeting.

C. QUALIFICATION, DISQUALIFICATION AND REMOVAL OF DIRECTORS

CIVIL AND CRIMINAL LIABILITY OF DIRECTORS

As far as civil liability is concerned members of the board are jointly and severally liable to the company for any wrongs (tort) committed by them in the execution of their functions even if they had partitioned their responsibilities. Their liability is appreciated within the context of the law of agency.

Nevertheless, board members may be exonerated from liability for wrong committed in the exercise of their functions if they can establish that the fault in question cannot be attributed to them, provided they had disclosed this wrong doing to the general meeting as soon as they became aware of the same.

Furthermore, in the event of delegation of powers approved by a general meeting and duly published, the managers who are not part of the unauthorized delegation of powers are liable on the general policies or the failure to supervise its execution.

The right of action against directors belongs to the general meeting. The general meeting shall (may) designate one or several agents charged with instituting proceedings in the company's interest against the directors.

Similarly, shareholders representing 1/10 of the share capital and who did not vote during the discharge of the directors may appoint an agent to institute proceedings in the company's interest against the directors. Note that the withdrawal of one or more of the said shareholders in the course of the action shall have no effect on the continuation of the action. In the event where the action succeeds the shareholders shall receive a refund of the expenses of the action; if it fails the shareholders will bear the expenses of the action.

As regards criminal liability, the managing director or general manager shall be jointly and severally liable to the company or third parties either for offences against laws and regulations concerning companies or for violation of the provisions of the articles of association. Note that no decision of the general meeting may extinguish an action against the directors or managing director or general manager for an offence committed in the performance of their duties.

Dismissal of Directors

Shareholders may dismiss a director during the annual meeting for a legitimate cause. For instance, a director who has failed to or is unable to attend and participate in directors meetings or who has acted contrary to the interest of the company can be removed for a legitimate caused. Before being removed for just cause, the director must be given notice and a hearing. If a director is removed without just cause he will be entitled to damages.

Note that if a director was appointed by the annual meeting, then the decision removing the director shall be taken by shareholders representing more than ½ of the share capital. On the other hand if the appointment is by the articles of association then a vote representing ¾ of the share capital shall be mandatory given that an amendment of the articles of association shall be required during a special meeting

D. POWERS AND DUTIES OF DIRECTORS

CONTRACTS CONCLUDED BETWEEN THE COMPANY AND THE DIRECTOR

1- Contracts prohibited between directors and the company

Directors are forbidden to contract whatsoever loans from the company or for the company to guarantee a loan on their behalf except the transaction for which the loan is meant is not part of the object of the company and provided it is submitted to normal conditions. Normal conditions mean conditions that are applied, for similar agreements not only by the company in question, but also by the other companies in the same sector of activity.

2-Contracts submitted to authorization and control

Directors cannot without the authorization of the general meeting carry out either for their own benefit or for the benefit of others any activity, which is similar to that of the company.

The same shall apply to agreements indirectly involving a director or in which he dealt with the company through a third party. The director shall be bound to inform the board of directors as soon as he is aware of an agreement subject to authorization. He shall not take part in the voting on the authorization applied for. Note that all such agreements i.e., those authorized by the board must be submitted for the approval of the ordinary general meeting.

E. REMUNERATION OR COMPANSATION FOR LOSS OF OFFICE

The company shall by ordinary resolution approve the remuneration of the directors and any benefit payable to the directors, including any compensation to a director for loss of employment or to a former director. The Board of Dirctors may determine the terms of any service contract with a managing director or other executive director. The directors may be paid all travelling, hotel and other expenses properly incurred by them in attending any meetings of the Board or in connection with the business of the company. *Article 206*

Decisions that may be approved by the Board of Directors instead of the meeting of shareholders
The Board of Directors may, instead of the meeting of shareholders of a company and where it is provided for by the Law, approve:

1. the payment of remuneration or the provision of other benefits by the company to a director;
2. the payment by the company to a director or former director of compensation for loss of office.

Any shareholder who considers that the payment was not fair to the company and who holds at least ten per cent (10%) of the company‟s voting share capital, may, within one month of knowledge of that payment request the Board to reconsider these payments or request the Board to call a meeting of shareholders to approve or reject the payment by way of ordinary resolution. When the payment is not approved, it shall constitute a debt payable by the directors to the company. *Article 207*

F. LOANS TO DIRECTORS

A company may make a loan to a director but it must be approved by the meeting of shareholders of the company in so far as its application concern of the Board of Directors.;

A loan which was granted which is not in compliance with the Articles of Association or is not approved by the shareholders in meeting shall be cancelled shall be paid back .

G. REGISTER OF DIRECTORS

The list of Directors shall be lodged the with Office of the Registrar General and if thereare any changes appointments ,resignations or terminations, the ORG must be informed.

H. DISCLOSURE OF DIRECTORS' INTERESTS IN CONTRACTS

A director of a company may have an interest in a transaction that company is interested in where:

1. It can be shown that he / she may benefit from it financially
2. has relationship with any other person concerned with the transaction;
3. is amember of the Board of Directors, an employee or attorney of the person concerned with the transaction or
4. that can be interested in it and that is other than:
   a) a direct subsidiary company;
   b) a subsidiary company;
   c) a subsidiary of another subsidiary company;
5. is the parent, the child or the spouse of another party to the transaction and who may have financial interest in it;
6. is to some extent directly or indirectly interested in the transaction.

A director of a company shall, forthwith after becoming aware of the fact that he/she is interested in a transaction or proposed transaction with the company, cause to be entered in the interests register and disclose to the Board of Directors the company:

1. where the monetary value of the director‟s interest is able to be quantified, the nature and monetary value of that interest
2. where the monetary value of the director‟s interest cannot be quantified, the nature and extent of that interest.

A transaction entered into by the company in which a director of the company is interested may be avoided by the company at any time before the expiration of six (6) months after the transaction is disclosed to all the shareholders. A transaction shall not be avoided where the company receives fair value under it. The question as to whether a company receives a fair value under a transaction shall be determined on the basis of the information known to the company and to the interested director at the time the transaction is entered into.

I. THE TURQUAND'S RULE

No presumption of knowledge of articles of association.
A person is not affected by, or deemed to have notice or knowledge of the contents of articles of association of, or any other document relating to a company merely because:

1. the articles of association or that document is registered in a register kept by the Registrar General;
2. the articles of association or that document are available for inspection at an office of the company.

Article 35 of Law 7/2009.. relating to Companies

This stems from The Turquand Rule:

Royal British Bank v Turquand (1856) 6 E&B 327 is a UK company law case that held people transacting with companies are entitled to assume that internal company rules are complied with, even if they are not. This "indoor management rule" or the "Rule in Turquand's Case" is applicable in most of the common law world. It originally mitigated the harshness of the constructive notice doctrine, and in the UK it is now supplemented by the Companies Act 2006 sections 39-41.

BLANK

Study Unit 9

The Secretary

Contents

A. THE COMPANY SECRETARY

Any company, other than a small private company shall have one or more employees who shall be designated as Company Secretary
Article 219 as modified by Law 14/2010 of 07/05/2010

The Company Secretary to replace the Employee of a company

The 2009 companies' law had scattered provisions on employees of a company. The article 219 stated out the duties of that company's employee in these words:

"Any company, other than a small private company shall have one or more employee whose duties shall be the following:

1. *to advice members of the Board of Directors on their duties and powers;*

2. *to inform members of the Board of Directors about all the necessary regulations or those which may affect the meetings of shareholders and of the Board of Directors, reports thereof and their submission to different relevant organs provided for by the Law as well as the impact of failure to comply with such regulations;*

3. *to make sure minutes of the meetings of shareholders or the Board of Directors are well prepared and registers provided for by the articles of association are accurately kept;*

4. *to make sure annual balance sheet and other types of required documents are submitted to the registrar general as provided for by this Law;*

5. *to make sure copies of annual balance sheet and activity reports where necessary are submitted to all those provided for by this Law*".

Article 220 mentioned that an office of that employee shall not be left vacant for three (3) months. The name of such an employee shall be notified to the Registrar General. The company shall, within thirty (30) days, notify to the Registrar General whether the appointed employee resigned or was removed from office.

These provisions have since been amended. Art. 219 for example replaced the term "employee" with company "Secretary" and that article was amended as follows in the May 2010 amendments:

The duties of the Company Secretary

Article 219 of Law n° 07/2009 of 27/04/2009 relating to companies as modified and complemented by the May 2010 amendment states the duties of the Company Secretary as follows:
"Any company, other than a small private company shall have a Company Secretary whose duties shall be the following:

1. *to advice members of the Board of Directors on their responsibilities and powers;*

2. *to inform members of the Board of Directors about all the necessary regulations or those which may affect the meetings of shareholders and of the Board of Directors, reports thereof and submission of all company documents required by the law to relevant organs as well as consequences due to the failure to comply with such regulations;*

3. *to ensure that minutes of the meetings of shareholders or the Board of Directors are well prepared and that registers provided for by the articles of association are accurately kept;*

4. *to make sure annual balance sheet and other types of required documents are submitted to the Registrar General as provided for by this Law;*

5. *to ensure that copies of annual balance sheet and activity reports are transmitted to relevant destinations n accordance with this Law and to any person as provided by the law".*

He / she is responsible for keeping registers of directors and shareholders and of directors' interests and keeping the Office of the Registrar General informed as required by law.

B. QUALIFICATION, APPOINTMENT AND REMOVAL

Whilst there are no rules as to qualification, appointment or removal, the office holder should be a person of suitable standing and hold a properly drawn up contract with the company.

C. LIABILITY OF A SECRATARY

Acts of the secretary in accordance with the agreement bind the company.

D. REMOVAL OF A SECRATARY

The Company Secretary is an employee and the relevant laws apply.
But in addition to this the office of the Company Secretary shall not be left vacant for three (3) months .
The name of such an employee shall be notified to the Registrar General.
The company shall, within thirty (30) days, notify to the Registrar General whether the appointed employee resigned or was removed from office.

E. REGISTER OF DIRECTORS AND SECRATARY

The Company Secretary must keep the ORG informed as required by law.

Study Unit 10
Auditors

Contents

ORGANS OF CONTROL

The directors render accounts of their management, once each year, before the annual meeting of shareholders.

They present the statement of accounts for the year under review. In order to control the authenticity of these figures it is necessary that persons having competence in accounting can verify the figures. This mission is entrusted to auditors.

A. QUALIFICATION, APPOINTMENT AND REMOVAL

A company shall, at each annual meeting, appoint an auditor.

The appointment of the company is ensured by auditors who may be natural persons or a corporate body. In addition they may be shareholders or third parties.

The appointment of auditors is the prerogative of the annual meeting of shareholders and never by the articles of association. The first auditors are appointed by the constituent general meeting. During the existence of the company, the auditors are appointed by the annual meeting. The term of office of the auditors shall not exceed six years, but they are eligible for re-election.

Note that shareholders representing 1/5 of the capital may appoint an auditor of their choice. In the event of any vacancy the President of the Court of First instance may appoint, upon a request by the directors or any interested parties, an interim auditor. The final appointment of an auditor will be made during the next general meeting.

In order to guarantee the independence of the auditors, the legislator has disqualified a category of persons from being appointed auditors. They are:

1. The directors;
2. The spouses and parents or relations to the fourth degree, directors of a company they control either directly or indirectly:
3. Employees of the company or former employees who have been working for the company within the last three years.

Qualifications of an auditor No person shall be appointed or act as auditor of a company, other than a small private company, unless he/she possesses qualifications of, or equivalent to those of any institution or association of chartered accountants.

Where at that annual meeting, the company fails to appoint an auditor during that annual meeting or the post continues to fall vacant for a one month period, the Registrar General shall have the powers to have the company appoint its auditor within thirty (30) days. *Article 238*

B. REMUNERATION

The salary and other expenses for the auditor shall be determined at the annual meeting of shareholders or the Board of Directors where the constitution so provides.

An auditing firm may be appointed to be the auditor of a company where :

1. at least one member of the firm is ordinarily resident in Rwanda;
2. all or some of the partners including the partner who is ordinarily resident in Rwanda are qualified for appointment as an auditor ;
3. is indebted to the company;
4. the firm is not
   a) one of the companys shareholders,
   b) member of the Board of Directors,
   c) does not work for the company or for its subsidiary;

C. POWERS AND DUTIES OF AUDITORS

Auditors are clothed with infinite powers for the control of all the operations of the company. Accordingly they can verify the regularity of all the accounting documents and the correctness of the information, which the directors have given to the shareholders. They have the power of investigation and can require officers to give necessary explanations. In the exercise of their functions they may seek the assistance of experts at their own cost. The auditors may convene a meeting of shareholders if the directors fail to convene it.

D. LIABILITY OF AUDITORS

The liability of auditors for acts committed in the exercise of their functions of control, as well as any eventual action against them is determined by the same rules applicable to the liability of directors.

E. DISMISSAL OF AUDITORS

An auditor of a company shall be automatically reappointed at an annual meeting of the company unless :

1. the company passes a resolution at the annual meeting appointing another person to replace the auditor;
2. a small private company passes a resolution that no auditor shall be appointed;
3. the auditor has given notice to the company that he/she does not wish to be reappointed.

Resignation

Where an auditor gives the Board of Directors of a company written notice that he/she does not wish to be reappointed, the Board shall, if requested to do so by that auditor :

1. distribute to all shareholders and to the Registrar General, at the expense of the company, a written statement of the auditor‟s reasons for his/her wish not to be reappointed;
2. permit the auditor or his/her representative to explain at a shareholders‟ meeting the reasons for his/her wish not to be reappointed. *Article 244*

An auditor may resign prior to the annual meeting of the company. This shall, after receiving the notification thereof, call on the Board of Directors to a special meeting to receive the auditor‟s notice of resignation. The auditor shall provide a written report which gives to him/her representative the opportunity to give an explanation why he/she does not wish to be re-appointed as auditor. Also during that meeting, the Board of Directors or the meeting of shareholders shall appoint of a new auditor. *Article 245*

Study Unit 11

Company Accounts, Audit and Inspection

Contents

Members of the Board of directors shall provide such information and explanations as are necessary for auditing process to be conducted.

A. FORM AND CONTENT OF ACCOUNTS

.The Financial statements will include a balance sheet (Statement of Financial Position) as at the year end and a profit and loss statement (Income Statement)for the period ending the at the balance sheet date.

The financial statements shall, in the case of companies which are required to comply with the International Accounting Standards, also include:

1. a statement of changes in equity between its last two balance sheet dates;
2. a cash flow statement.

And in the case of a company not trading for profit, be an income and expenditure statement for the company in relation to the accounting period ending at the financial statement date;

B. BOOKS OF ACCOUNT

The accounting records shall contain:

1. receipts and expenses with their accounting documents;
2. a record of the assets and liabilities of the company;
3. where the company‟s business involves dealing in goods:
   a) a record of bought and sold goods, those who bought them and related invoices;
   b) a record of stock held and its variation;
4. where the company‟s business involves providing services, a record of services provided and relevant invoices

C. GROUP ACCOUNTS

The Board of Directors of every company shall ensure that, within three (3) months following the end of a financial year, a set of audited accounts shall be submitted to the ORG.

For groups of companies consolidated statements must be prepared in addition to the individual statements. For companies which are required to meet International Accounting Standards, must comprise a consolidated balance sheet and a consolidated income statement.

D. DIRECTORS' REPORT

The Board of Directors of every company shall, within six (6) months after the company's financial statement date, prepare an annual report on the affairs of the company during the accounting period ending on that date.

A copy of the annual report shall be sent to every shareholder of the company not less than fifteen (15) days before the date fixed for holding the annual meeting of the shareholders.

The annual report for a company shall be in writing and be dated and shall:

1. describe the state of the company's affairs and give details especially of any change during the accounting period in:
   a) the nature of the business of the company or any of its subsidiaries;
   b) the classes of business in which the company has an interest, whether as a shareholder of another company or otherwise;

2. include financial statements for the accounting period and any group financial statements for the accounting period completed and signed

3. include the auditor's report where this is required

4. state particulars of entries in the interests register made during the accounting period;

5. state the amount which represents the total of the remuneration and benefits by:
   a) executive directors of the company
   b) the non-executive directors of the company;

6. state the total amount of donations made by the company and other subsidiaries during the accounting period;

7. state the names of the persons holding office as directors of the company as at the end of the accounting period and the names of any persons who ceased to hold office as directors of the company during the accounting period;

8. state the amounts payable by the company to the person or firm holding office as auditor of the company as audit fees and, as a separate item, fees payable by the company for other services provided by that person or firm;

9. be signed on behalf of the Board of Directors by two directors of the company or, where the company has only one director, by that director;

10. disclose related party transactions and full information about the nature and extent of the conflict of interest;

E. AUDITOR'S REPORT

The auditor of a company shall prepare an auditing report and submit it to the company's shareholders.

It shall state the following:

1. the work done by the auditor;
2. the scope and limitations of the audit;
3. the proof that there is no relationship, no interests and debt which the auditor has in the company;
4. whether the auditor has obtained all information and explanations he/she needed;
5. whether, proper accounting records have been well kept by the company;
6. whether, in the auditor's opinion, the financial statements give a true and fair view of the matters to which they relate, and where they do not, shortcomings are identified;
7. whether, the financial statements comply with the international accounting standards;
8. the auditor‟s opinion and problems that are linked with the company's management;
9. the auditor makes recommendations with regard to the identified problems.

F. INVESTIGATION BY THE REGISTRAR GENERAL

An investigation can be called where the Minister in charge of companies is satisfied that:

1. for the protection of the public, the shareholders or creditors of a company, it is desirable that the affairs of a company should be investigated;
2. it is in the public interest that the affairs of a company should be investigated;
3. in the case of a foreign company, the appropriate authority of another country had requested that an investigation be made under this article in respect of the company;

He/she shall inform the Registrar General of the recommendation that there should be an investigation into the business of a local company or of a foreign company having its branch in Rwanda.

The Registrar General may without recommendation from the Minister of companies institute an investigation:

1. in the case of a company having a share capital, on the application of:
   a) one shareholder or a group of shareholders holding at least one-tenth (1/10) of the issued shares;
   b) debenture holders holding not less than one-fifth (1/5) in nominal value of the issued debentures;

2. in the case of a company limited by guarantee, on the application of not less than one-fifth (1/5) in number of the persons on the share register;

3. where he/she considers that the appointment of an inspector is necessary to safeguard the interests of shareholders or debenture shareholders or is necessary in the public interest, require an inspector to investigate the affairs of a company or such aspects of the affairs of a company as are specified in the instrument of appointment and in the case of a debenture agency deed, the conduct of the debenture holders' representative, and to make a report on his/her investigation in such form and manner as the Registrar General may direct.

.

G. APPOINTMENT AND POWERS OF INSPECTORS

An inspector of the business of a company shall be appointed by the Registrar General.

The powers of an inspector shall extend to the investigation of any circumstances which suggest the existence of an arrangement or understanding which, though not legally binding, is or was observed or likely to be observed in practice and which is relevant to the purposes of his/her investigation. *See Article 286*

Every person concerned shall give to the inspector all assistance in connection with the investigation which he/she is reasonably able to give for the investigation to be smoothly carried out.

H. INSPECTOR’S REPORT

A copy of the inspector's report shall be forwarded to the Registrar General, to the registered office of the company and to those who requested for it.

The Registrar General may, where he/she is of the opinion that it is necessary in the public interest to do so, ask the body that requested the investigation to cause the report to be published.

Where an inspector’s report suggests that any qualified auditor :

1. has been guilty of misconduct;
2. has conducted an audit in a manner that is not appropriate;

the Registrar General shall refer that matter to competent authorities for necessary action.

Study Unit 12

Corporate Insolvency

Contents

A. THE DISAPPEARANCE OF LEGAL PERSONALITY

When a commercial company acquires legal personality the personality does not persist for life i.e., it is not permanent, it will some day end. The disappearance of legal personality is the consequence of dissolution of the company, which entails the dissolution and distribution of its patrimony among shareholders (partners).

Causes of Disappearance

The causes of disappearance are of two types, the one is applicable to all commercial companies; the other relates to individual partners and is restricted to those companies in which the personality of the participant is fundamental.

a) General Causes

There are four general causes:

1. A commercial company established for a certain period of time dissolves at the end of that period in the absence of a resolution extending its life.
2. A decision taken by the shareholders (partners) to dissolve the company before the time agreed upon.
3. Loss of the object or impossibility of performance
4. If the object has been attained

b) Peculiar causes

The causes peculiar to individuals do not apply to all commercial companies, they relate exclusively to partnerships. Accordingly the death, incapacity or insolvency of a partner will lead to the dissolution.

However in practice, partnership agreements usually contain a provision (clause) making it possible for the partnership to continue doing business not withstanding any of the above causes that may lead to its dissolution.

A partnership cannot be dissolved by the unilateral will of a partner except if he acts in good faith. The last cause for dissolution, which is applicable to all types of commercial companies, is the dissolution for just cause. Here dissolution may be requested by an individual shareholder or partner. The just cause is left to the appreciation of the court. Some of the factors, which may be considered as just cause, include failure by a partner to respect his obligations, permanent disability of a partner, antagonism that makes it impossible for the partners to work together etc.

Note that the regular transformation of a limited company from one form into another shall not entail the creation of a new legal entity. The same shall apply to an extension of the

existence of a company or any other amendment of its Articles of Association (partnership Agreement) with formalities of publication both at the time of constitution (formation) to any amendment of its Articles of Association (partnership Agreement)

Dissolution of a Company

The dissolution of a company is the termination of its legal existence. Among the causes of dissolution of companies we may allude to the factors which are general and which apply to all types of commercial companies and those which that are unique to certain forms of commercial companies.

a) Causes Common to dissolution of all types of Companies

The factors that may occasion the dissolution of a company are:

1. The expiry of the period for which it was formed;
2. The realisation of the object or where the realisation of the object has become impossible;
3. On the decision of the shareholders under the conditions provided for amending the Articles of Association:
4. Upon a decision of the court at the request of a shareholder for a misunderstanding between shareholders hampering the normal functioning of the company:
5. Where all the shares are united in the hands of a single shareholder / when all the shares are held by one person;
6. Bankruptcy;

Expiry of the term (Exfluxion of time): If the articles of association provided for definite life (term) the company automatically terminates at the end of the designated time. However, the life of a company constituted for a fixed period may be extended by a decision of the shareholders in conformity with the condition provided for amending the Articles of Association. In the event where it is deemed necessary to prolong the life of the company, the managers (directors) are required to submit the question of prolongation to the shareholders at least six months before the expiry date.

Where a company is established for an indefinite period, then, a shareholder may if acting in good faith signifies his intention to withdraw from the company by giving the company six months' notice. Should that come to pass the other shareholders are required to reimburse the dissenting shareholder the equivalent of his assets having regard to the situation of the company as at the time of withdrawal provided that he does not elect to dissolve the company

Note that where a company is established for an indefinite period the company is a company at will. Such a company may be dissolved at any time by any shareholder. All that is necessary is for a shareholder to notify the other shareholders.

Realisation of the object or where realization of the object becomes impossible.

A company that is formed for a certain objective such as to acquire a certain plot of ground and then to develop and sell residential lots dissolves when that objective is reached. Similarly where a company is formed for a certain objective and the realization of the object becomes impossible the company may be dissolved. Impossibility of achieving the objects may be the result of exhaustion of minerals, withdrawal of administrative concession nationalization etc.

On the decision of the shareholders.

Since a company is created as a result of the decision of the shareholders the shareholders can at any time decide to terminate the life of the company in accordance with the conditions provided for amending the Articles of Association

Upon a decision of the court.

A company may also be dissolved upon a decision of the court at the request of a shareholder for a serious misunderstanding between the shareholders, which leads to a malfunctioning of the company.

Where all the shares are united in the hands of a single shareholder.

When all the shares are held by one person this person can alone decide to dissolve the company. The person could be not only an individual but another company.

The bankruptcy of accompany is another factor that conduces to the dissolution of accompany. A company is said to be bankruptcy if it is unable to pay its debts as they are, or become due. Both bankruptcy and judicial administration are procedures controlled by the court.

LIQUIDATION OF COMPANIES

Liquidation of a company is the process whereby its life is ended and its property administered for the benefit of its creditors and members. Upon liquidation of a company, a liquidator is appointed and he takes control of the company, collects its assets, pays its debts and finally distributes any surplus among the members in accordance with their rights.

There are two types of liquidation: compulsory liquidation under an order of court and voluntary liquidation under a resolution of the company.

A company shall be under liquidation as soon as it is dissolved for any reason except by merger. The words "in liquidation" shall be added to the name of the company including letters, invoices and various publication of the said company.

The legal personality of the company shall continue to exist for liquidation purposes until the liquidation procedure is completed.

When a decision ordering the liquidation of the company has been taken the powers of the board of directors, managing directors or the managers shall end (be suspended) and the liquidator will assume their functions. The managing directors or managers are required as at the date of dissolution to establish a balance sheet, profits and loss account and a report, which shall be submitted to the auditors (if any) for verification and to the shareholders for approval.

The liquidator(s) are, in default of their designation by the articles of association appointed by the annual meeting. Note that one or more liquidators shall be appointed:

1. Unanimously by the partners in case of a general partnership;
2. Unanimously by the active partners and by the majority in capital in case of a limited partnership and limited partnership by shares;
3. By the majority capital of shareholders in case of private limited company
4. Under the quorum and majority conditions provided for a special meeting in case of a public limited company .

As seen before, every company shall be considered to be a commercial company.

It is therefore of paramount importance to discuss some matters relating to commercial activities, persons who carry out such activities (traders), and any other relevant matter that might fall within commercial sphere.

B. WINDING UP BY THE COURTS

Upon a decision of the court

A company may also be dissolved upon a decision of the court at the request of a shareholder for a serious misunderstanding between the shareholders, which leads to a malfunctioning of the company.

C. VOLUNTARY WINDING UP

On the decision of the shareholders

Since a company is created as a result of the decision of the shareholders the shareholders can at any time decide to terminate the life of the company in accordance with the conditions provided for amending the Articles of Association (i.e. in principle the unanimous decision of the partners (partnership) and the special majority for companies (SARL and SA).

D. LIQUIDATORS: APPOINTMENT AND DUTIES

Note that a liquidator may be chosen from among the shareholders or third parties. In addition, the liquidator may be a corporate body.

However, where the shareholders are unable to appoint a liquidator within three month of the dissolution of the company he may be designated by a court decision at the request of any interested party. In default, the managers or directors of the company at the time or moment of dissolution shall, in relation to the third parties, assume any obligation and liabilities of the liquidators.

Note that in case of nullity e.g. where the Articles of Association does not take the form of a notarial act it is only the court that is competent to appoint liquidators.

The liquidators are clothed with the widest powers possible to realize the act of liquidation as well as to represent the company i.e., legal proceedings (liquidation proceedings). However, the liquidator cannot without the consent of the shareholders (under condition for amending the articles of association) or authorization of the court, as the case may be, sell real estate, borrow give secured debts, transfer the assets of the company by private contract), assign or transfer the assets of the company to another company or stay the execution of a judgment.

Note that the effect of liquidation is to create concurrent rights between creditors of the company. As such, no cancellation of sale of movable property can be allowed against the interest of creditors.

The liquidator is empowered to pay creditors. Where the sums allotted to creditors have not been paid out, they shall be deposited in an account opened at the National Bank of Rwanda.

After paying off the creditors the balance available will then be shared among shareholders and any property that cannot be shared conveniently shall be handed over to the shareholders jointly.

In the course of performing his duties the liquidator is required to use the care and skill required of a paid agent. The liquidator is liable to the company as well as third parties for the actionable wrong resulting from any errors made by him in the exercise of his duties.

Each year the liquidator is required to submit to the general meeting a financial statement, profit and losses account as well as a written report in which he shall give an account of the liquidation exercise during the year together with reasons hampering the closure of liquidation. Nonetheless, the general meeting of shareholders or the court may at any time request the liquidator to submit a written report containing the state of the liquidation exercise and the reason hindering the closure of liquidation.

E. RELEASE OF LIQUIDATORS

At the close of liquidation it is mandatory for the liquidator to establish a written report on the liquidation exercise, which shall be submitted to the general meeting, failing this, to the auditors.

The shareholders shall take a decision on the final accounts, the discharge of the liquidator and auditors in respect of the performance of their duties. The discharge will be valid if and only if the report and profit and loss account do not contain errors or omissions.

The foregoing notwithstanding the court may at the request of any interested party pronounce the termination of liquidation once the liquidation exercise has been concluded. This, it will do after hearing the liquidator.

Notwithstanding the end of liquidation the court may order the reopening of liquidation at the request of any interested party:

1. If the decision pronouncing the end of liquidation was actuated by a fraud on his rights;
2. if the liquidators have not shared all that accrued to the company in liquidation

To make known his status of shareholder or creditor.

Should liquidation be reopened the former liquidators will be reinstated, if need be, they may be replaced.

PRESCRIPTION OR LIMITATION OF TIME

Prescription relates to the extinction of rights by lapse of time i.e. the time within which if an action is not instituted in court, the plaintiff's right of action is lost.

All actions against the company shall lapse after 10years from the date the right of action accrued. However, the following acts shall be barred after 5years:

1. all actions against the promoters of a company starting from the date of publication of the memorandum of association;
2. all actions against shareholders starting from the date of publication of their retirement or dissolution of the company;
3. All actions against the organs of the company for acts committed in the exercise of their functions starting from the date of such acts or if it was concealed by fraud from the date of discovery;
4. All actions against a company in liquidation from the date of publication of the closure of liquidation;
5. all actions for the restitution of dividends unjustly paid from the date of distribution;
6. all actions for the payment of dividends or for the reimbursement of part thereof, from the date it became due.

Study Unit 13
Alternatives to Winding Up

Contents

A. RECONSTRUCTION

Transformation, Merger and Cessation

The transformation of a company is the operation whereby a company changes its legal form by decision of its partners. The transformation of the company does not result in the creation of a new corporate body. The act of transformation amounts to an amendment of the Articles of Association (PA) which is subject to the publication formalities seen above. Nevertheless, if the transformation of a company has the effect of increasing the commitment of a shareholder in which the shareholders liability is limited to their contributions into one in which their liability is unlimited the consent of the shareholder in question is required.

Transformation does not destroy the rights of creditors of the company. Accordingly creditors shall maintain their rights over the company prior to such transformation In addition the creditors may within three months from the date of publication of the act of amendment petition the court to nullify the transformation if they fail to obtain sufficient guarantee from the company.

For its part a merger is the operation whereby two or more companies merge to form a single company either by creating a new company or by one company acquiring the other (s). All the companies involved in the merger operation are each required to take and publish the decision in accordance with the rules regulating amendment of import aspects affecting the company in default in accordance with the requirements for constituting a new company.

A merger entails the dissolution without liquidation of the disappearing company and the universal transfer to the beneficiary company of their assets and liabilities in the state in which they are on the date of wrapping up of the operation.

Note that third parties (creditors) shall maintain their rights over the company prior to the merger. Furthermore, they may request the court within three months from the date of publication of the act of merger to declare the merger void if the fail to receive adequate guarantee from the company.

In addition a company may either alone or together with other companies create a new company by the partial transfer of its assets to the new company. Note that the decision transferring part of the assets of the company is taken and published in accordance with the rules to be observed when amending important aspects of the company. In default the rules regulating the reduction of the capital of the company must be strictly followed.

B. AMALGAMATION, MERGERS AND TAKE-OVERS

The transformation of a company is the operation whereby a company changes its legal form by decision of its partners. The transformation of the company does not result in the creation of a new corporate body. The act of transformation amounts to an amendment of the Articles of Association (PA) which is subject to the publication formalities seen above. Nevertheless, if the transformation of a company has the effect of increasing the commitment of a shareholder in which the shareholders liability is limited to their contributions into one in which their liability is unlimited the consent of the shareholder in question is required.

For its part a merger is the operation whereby two or more companies merge to form a single company either by creating a new company or by one company acquiring the other (s). All the companies involved in the merger operation are each required to take and publish the decision in accordance with the rules regulating amendment of import aspects affecting the company in default in accordance with the requirements for constituting a new company.

A merger entails the dissolution without liquidation of the disappearing company and the universal transfer to the beneficiary company of their assets and liabilities in the state in which they are on the date of wrapping up of the operation.

Note that third parties (creditors) shall maintain their rights over the company prior to the merger. Furthermore, they may request the court of the act of merger to declare the merger void if the fail to receive adequate guarantee from the company.

C. SCHEMES OF ARRANGEMENT

The transformation of a company is the operation whereby a company changes its legal form by decision of its partners. The transformation of the company does not result in the creation of a new corporate body. The act of transformation amounts to an amendment of the Articles of Association (PA) which is subject to the publication formalities seen above. Nevertheless, if the transformation of a company has the effect of increasing the commitment of a shareholder in which the shareholders liability is limited to their contributions into one in which their liability is unlimited the consent of the shareholder in question is required.

In addition a company may either alone or together with other companies create a new company by the partial transfer of its assets to the new company. Note that the decision transferring part of the assets of the company is taken and published in accordance with the rules to be observed when amending important aspects of the company. In default the rules regulating the reduction of the capital of the company must be strictly followed.

D. RIGHTS OF SHAREHOLDERS

The rights of shareholders are safeguarded through Article 142 which states that a major transaction of amalgamation can only be approved by a special resolution at a meeting of the shareholders.

A special resolution can only be approved by a majority of 75% of the votes of those shareholders entitled to vote and who have voted on the issue under consideration.

E. RIGHTS OF CREDITORS

Transformation does not destroy the rights of creditors of the company Accordingly creditors shall maintain their rights over the company prior to such transformation.

In addition the creditors may petition the court to nullify the transformation if they fail to obtain sufficient guarantee from the company.

Study Unit 14
Foreign Companies

Contents

This chapter deals with general notions on foreign company, obligations incurred by them as well as some provisions regarding the end of activities of a foreign company.

A. DEFINITION

A foreign company is a company incorporated outside of Rwanda and that has some of its activities in Rwanda by:

1. establishing a share transfer office or a share registration office in Rwanda;
2. administering, managing or dealing with property in Rwanda as an agent, personal representative or trustee, whether through its employees or an agent or in any other manner.

A foreign company has to be registered by the Registrar General. Where it is established that its name is confusing as far as companies inside the country are concerned, he/she shall require the name to be changed.

B. REGISTRATION OF FOREIGN COMPANIES

Every foreign company shall, before starting business file the following with the Registrar General :

1. a duly authenticated copy of its articles of association and the certificate of its registration delivered by the registration officer;
2. a duly authenticated copy of its certificate of incorporation, articles of association, memorandum of association depending on where it was established and any other instrument constituting or defining its being established;
3. a list of its directors residing in Rwanda;
4. a memorandum of or power of attorney to represent the company in Rwanda;
5. notice of its registered office in Rwanda;
6. a declaration made by the authorized agents of the company.

Where a foreign company has complied with the provisions of the law, the Registrar General shall register the company and shall issue a certificate thereof in the prescribed form.

C. OBLIGATIONS APPLICABLE TO FOREIGN COMPANIES

The law sets out obligations related to foreign companies, notably:

- Obligation to file with the Registrar General a court order (art. 328);
- Obligation by the Registrar General to approve changes (article 329);
- Obligation of a foreign company to deposit to the Registrar General has copy of a Balance Sheet (art. 330);
- Obligation to comply with requirements to local companies Rwanda of (art. 331);
- Obligation to comply with international accounting standards (art. 332);
- Obligation to give Notice by a foreign company of particulars of its business in Rwanda (art. 333);
- Obligation to keep at the head office, branch registers (art. 334);
- Filing with the Registrar General a notice as to a place where the register is kept (art. 335 and 336);
- etc.

D. CESSATION OF FOREIGN COMPANY ACTIVITIES

In the terms of the article 340, where a foreign company ceases to have a place of business or to carry on business in Rwanda, it shall, within seven (7) days of the date of the cessation, file with the Registrar General a notice to that effect, and as from the day on which the notice is filed, its obligation to file any document other than a document that ought to have been filed shall cease to operate, and the Registrar General shall within three (3) months after the filing of the notice remove the name of the company from the register.

Article 341 adds by saying that Where a foreign company goes into liquidation or is dissolved in its place of incorporation or origin:

1. an authorized agent in Rwanda shall, upon commencement of the liquidation, file with the Registrar General a notice to that effect;
2. the liquidator of a dissolved company shall have the powers of a liquidator for Rwanda.

The article 342 gives the procedure to follow by the liquidator in these terms, A liquidator of a foreign company appointed by the Court or a person exercising the powers and functions of such a liquidator shall:

1. before any distribution of the foreign company's assets is made, by advertisement in a newspaper circulating generally in each country where the foreign company had been carrying on business and where no liquidator has been appointed , invite all creditors to make their claims against the foreign company within a reasonable time before the distribution;
2. not, without leave of the Court, pay out any creditor to the exclusion of any other creditor.

Where a foreign company has been wound up so far as its assets in Rwanda are concerned and there is no liquidator for the place of its incorporation or origin, the liquidator may apply to the Court for directions as to the disposal of the net amount recovered (article 343).

Finally to the terms of the article 344 of the law says, On receipt of a notice from an authorized agent in charge of liquidation or dissolution of the company, the Registrar General shall remove the name of the company from the register.

Where the Registrar General has reasonable cause to believe that a foreign company has ceased to carry on business in Rwanda, shall remove it from the register of companies in accordance with the Law.

Study Unit 15
Dormant Company

Contents

A. DORMANT COMPANY

Article 346 and 347 give this definition, a company shall be a dormant company for any period during which no significant accounting transaction occurs in relation to the company. Where a company has:

1. been dormant from the time of its formation;
2. has been dormant since the end of its previous accounting period; and is not required to prepare accounts for that period, by a special resolution passed at a meeting of shareholders, such company declare itself a dormant company.

A company shall not declare itself to be a dormant company where it is a company formed for the business of banking or insurance.
The company shall, within fifteen (15) days of the passing of the special resolution declaring itself to be a dormant company gives notice to the Registrar General of that resolution (art. 349).

Where a company which has declared itself to be a dormant company ceases to be dormant, a notice thereto shall be given to the Registrar General by that company (art.350).

It is worth mentioning exemption for dormant companies as envisaged by article 351 saying that any company, which is registered as being a dormant company, shall be exempted from the requirement of having its accounts audited and from the payment of any prescribed fee as is relevant to its situation.

Study Unit 16

Removal from Register of Companies and Penalties

Contents

The present chapter approaches the removal of a company from register of companies as well as the penalties.

A. REMOVAL FROM REGISTRAR COMPANIES

Before speaking of actual removal from register, the law distinguishes a companies based on whether or not they have passed the solvency test. It is however difficult to establish.

B. SOLVENCY AND COMPANY'S INABILITY TO PAY

According to the wording of article 352, a company shall satisfy the solvency test where:

1. the company is able to pay its debts as they become due in the normal course of business;
2. the value of the company's income is greater than the sum of the value of its liabilities and the company's share capital.

A company shall be considered to be unable to pay its debts where:

1. a creditor to whom the company is indebted in a sum exceeding twenty thousand Rwanda francs (20,000 Rwf), has served at the registered office a demand under his/her hand or under the hand of his/her Lawfully authorized agent requiring the company to pay the sum due, and the company has for three weeks thereafter neglected to pay the sum or to secure it to the reasonable satisfaction of the creditor;
2. execution or other process issued on a judgment or order of any Court in favor of a creditor of the company is returned unsatisfied;
3. it is proved to the satisfaction of the Court that the company is unable to pay its debts, having regard to its existing, contingent and prospective liabilities.

C. PERTINENT PROVISIONS IN RELATION TO THE REMOVAL FROM THE REGISTER OF COMPANIES

A company shall be removed from the register of companies when a notice, signed by the Registrar General states that the company is removed from the register (art. 354).

Concerning reasons for removal from the register of companies article 355 specifies that The Registrar General shall remove a company from the register of companies where :

1. the company is an amalgamating company, other than an amalgamated company, on the day on which the Registrar General issues a certificate of amalgamation;
2. the Registrar General is satisfied that the company has ceased to carry on business.

However article 357 provides for possible objections in the following manner:

Where a notice is given of an intention to remove a company from the register, any person may deliver to the Registrar General, not later than the date specified in the notice, an objection to the removal on grounds that :

1. the company is still carrying on business or there is other reason for it to continue in existence;
2. the company is a party to legal proceedings;
3. the company is in receivership or liquidation, or both;
4. a person is a creditor or a shareholder, or a person who has an undischarged claim against the company;
5. the person believes that there exists, and intends to pursue, a right of action against the company;
6. for any other reason, it would not be just and equitable to remove the company from the register.

The proceeding of removal of a company from the register by the Registrar General are subject to prior assessment of objections as put by article 358, the Registrar General shall not proceed with the removal unless he/ she is satisfied that :

1. the objection has been withdrawn;
2. any facts on which the objection is based are not, or are no longer, correct;
3. the objection is frivolous or vexatious. The Registrar General shall give notice to the person objecting that his/her objection is receivable or not and provide grounds therefor.

The property of a company which is removed from the register includes leasehold rights and all other rights vested in or held on behalf of or on trust for the company prior to its removal but does not include property held by the former company on trust for any other person (art. 359).

Finally article 360 states that the removal of a company from the register of companies shall not affect the liability of any former director or shareholder of the company or any other person in respect of any act or omission that took place before the company was removed from the register and that liability continues and may be enforced as if the company had not been removed from the register.

D. PENAL PROVISIONS

Articles 361 to 376 give a whole range of the penal provisions mainly consisting in fine up to 10 millions Rwandan Francs, notwithstanding the existing penal Code provisions.

Those penalties are applied notably in the following cases:

- where a company fails to comply with the Law as to getting registered in the relevant
- register of companies is concerned (art. 361);
- where a company fails to keep the books required (art. 362);
- where a company fails or delays to provide the Registrar General with the documents that are required (art. 363);
- recidivism (art. 364);
- false or misleading notice (art. 365);
- deliberate submission of false document (art. 366);
- fraudulent us and destruction of company's property (art. 367);
- falsification of the records (art. 368);
- use of a fraudulent document (art.369);
- fraudulent exercise of the commercial activities (art. 370);
- fraudulent acts (art. 371);
- Etc.

Study Unit 17
Accounting Records and Audit

Contents

A. DEFINITION

By audit, one should understand a mission of investigating entrusted to a professional (named auditor sometimes) by a person in quest of information on a concerned operation or on a situation of an enterprise that consists depending on the agreement in verifying the conformity of the operation or the situation under study to the rules of the law in general or those of a determined sector, it can also aim at assessing the risks of the initiative or the activity considered or even its degree of efficiency and eventually draw a report to the assignor.

Some provisions related to the auditors

These provisions hinge on the appointment, fees and expenses, resignation of an auditor, etc.

Concerning an auditor's nomination article 238 specifies that a company shall, at each annual meeting, appoints an auditor. Where at that annual meeting, the company fails to appoint an auditor during that annual meeting or the post continues to fall vacant for a one month period, the Registrar General shall have the powers to have the company appoint its auditor within thirty (30) days.

When during a yearly assembly of the company, no auditor is named or takes back to his/her/its station and that the station remains vacant since one month, the Registrar General is authorized to order to the company to name a auditor within (30) days at most.

An auditor of a company shall be automatically reappointed at an annual meeting of the company unless:

1. the company passes a resolution at the annual meeting appointing another person to replace the auditor;
2. a small private company passes a resolution that no auditor shall be appointed;
3. the auditor has given notice to the company that he/she does not wish to be reappointed.

Where an auditor gives the Board of Directors of a company written notice that he/she does not wish to be reappointed, the Board shall, if requested to do so by that auditor :

1. distribute to all shareholders and to the Registrar General, at the expense of the company, a written statement of the auditor's reasons for his/her wish not to be reappointed;
2. permit the auditor or his/her representative to explain at a shareholders' meeting the reasons for his/her wish not to be reappointed.

Regarding an auditor's qualification, article 242 says that no person shall be appointed or act as auditor of a company, other than a small private company, unless he/she possesses qualifications of, or equivalent to those of any institution or association of chartered accountants.

It is worth highlighting that Small private companies need not to appoint an auditor according to article 251 of the law. Where a small private company decides to appoint an auditor, the provisions of this Law shall apply.

Where at, or before the time required for the holding of the annual meeting of a small private company, notice is given to the Board of Directors of the company, signed by a shareholder who holds at least five per cent (5%) of the shares of the company, the company shall appoint an auditor. Such resolution shall cease to have effect at the next annual meeting, and the auditor shall thereupon be re-appointed unless the shareholders by unanimous resolution agree not to appoint the auditor.

With regard to fees and auditor's expenses, they are determined by the meeting of the shareholders or by the Board of directors when it is specified by the articles of association of the company.

Where from a report of an inspector it appears that any qualified auditor:

1. has been guilty of misconduct;
2. has conducted an audit in a manner that is not appropriate;

the Registrar General shall refer that matter to competent authorities for necessary action.

Concerning an auditor's resignation, an auditor may resign prior to the annual meeting of the company. This shall, after receiving the notification thereof, call on the Board of Directors to a special meeting to receive the auditor's notice of resignation. The auditor shall provide a written report which gives to him/her representative the opportunity to give an explanation why he/she does not wish to be re appointed as auditor. Also during that meeting, the Board of Directors or the meeting of shareholders shall appoint of a new auditor (article 245).

Where from a report of an inspector it appears to the Registrar General that in the management and administration of a company, there is a shareholder who, by virtue of his/her company, shares and voting rights deriving from the classes of such shares and other benefits, alters the decisions that were taken through the vote, causes mismanagement for him/her to maintain control and where the latter helps him/her to unfairly discriminate other shareholders, the Registrar General may lodge a case before the Court following this Law.

Auditing report

According to the article 241 of the law, an auditing report required to be signed on behalf of a firm appointed as auditor of a company, by a member of the firm who is a qualified auditor.

Article 247 says that the auditor of a company shall prepare an auditing report and submit it to the company's shareholders. The auditor's report shall state the following:

1. the work done by the auditor;
2. the scope and limitations of the audit;
3. the proof that there is no relationship, no interests and debt which the auditor has in the company;
4. whether the auditor has obtained all information and explanations he/she needed;
5. whether, proper accounting records have been well kept by the company;
6. whether, in the auditor's opinion, the financial statements give a true and fair view of the matters to which they relate, and where they do not, shortcomings are identified;
7. whether, the financial statements comply with the international accounting standards;
8. the auditor's opinion and problems that are linked with the company's management;
9. the auditor makes recommendations with regard to the identified problems.

Article 250 lays down modalities for submitting auditor's report in these words, where the auditor of a company completes his/her report, he/she submits it to the company in a period not exceeding seven (7) days and reserve a copy of the same for the debenture holders or their representatives.

B. FINANCIAL STATEMENT AND ANNUAL REPORT

Financial Statement

The Board of Directors of every company shall ensure that, within three (3) months following the end of a financial statement the audit is made and signed by at least one representative of the company. Such an audit shall be submitted to the Registrar General (article 253).

The financial statements of a company shall comply with international standards. Members of the Board of directors shall provide such information and explanations as are necessary for auditing process to be conducted (art. 254).

Concerning registration of the financial statement, all company, with the exception of the small private companies, must insure that in the thirty (30) days that follow the date required for the signature of the financial states of the company and the financial states of the whole group, the copies of these financial states accompanied by a copy of the audit report on these financial states are deposited to the office of the Registrar General for registration.

With regard to the content of the financial statement, article 266 states that the consolidated financial statements shall, in the case of companies which are required to comply with the International Accounting Standards, contain:

1. a consolidated balance sheet for the group as at that balance sheet date;
2. a consolidated income statement;

Annual report

The Board of Directors of every company shall, within six (6) months after the company's financial statement date, prepare an annual report on the affairs of the company during the accounting period (article 267 of the law) ending on that date.

The Board of Directors of a company shall cause a copy of the annual report to be sent to every shareholder of the company not less than fifteen (15) days before the date fixed for holding the annual meeting of the shareholders.

Concerning the format, every annual report for a company shall be in writing and be dated and shall:

1. describe, so far as the Board believes is material for the shareholders to have an appreciation of the state of the company's affairs and is not harmful to the business of the company or of any of its subsidiaries, especially any change during the accounting period in:
   a) the nature of the business of the company or any of its subsidiaries;
   b) the classes of business in which the company has an interest, whether as a shareholder of another company or otherwise;

2. include financial statements for the accounting period and any group financial statements for the accounting period completed and signed in accordance with this Law;

3. where an auditor's report is required in relation to the financial statements or group financial statements, included in the report, include that auditor's report;

4. state particulars of entries in the interests register made during the accounting period;

5. state the amount which represents the total of the remuneration and benefits received by or due and receivable from the company and any related corporation by:
   a) executive directors of a company engaged in the full time employment of the company and its related corporations, including all bonuses and commissions received by them as employees;
   b) separate statement, the non-executive directors of the company;

6. state the total amount of donations made by the company and other subsidiaries during the accounting period;

7. state the names of the persons holding office as directors of the company as at the end of the accounting period and the names of any persons who ceased to hold office as directors of the company during the accounting period;

8. state the amounts payable by the company to the person or firm holding office as auditor of the company as audit fees and, as a separate item, fees payable by the company for other services provided by that person or firm;

9. be signed on behalf of the Board of Directors by two (2) directors of the company or, where the company has only one director, by that director;

10. disclose related party transactions and full information about the nature and extent of the conflict of interest;

11. any other details that are necessary for the report to be well understood.

A Company whose subsidiary companies is located outside Rwanda shall also comply with the provisions of this article within eight (8) weeks after the dates contained therein.

C. MANDATORY INVESTIGATION

Besides the inspection of the documents of a company made by the Shareholder(s), the law set out a series of provisions related to the inspection of the activities of a company and that is made by the inspector.

Mandatory investigation and appointment of an inspector

Where the Minister in charge of companies is satisfied that:

1. for the protection of the public, the shareholders or creditors of a company, it is desirable that the affairs of a company should be investigated;
2. it is in the public interest that the affairs of a company should be investigated;
3. in the case of a foreign company, the appropriate authority of another country had requested that an investigation be made under this article in respect of the company; he/she shall issue the instructions to the Registrar General as to investigating into the business of a local company or of a foreign company having its branch in Rwanda (article 274).

An inspector of the business of a company shall be appointed by the Registrar General and have the power to investigate the business of a company.
The appointed inspector should be a qualified, skilled and experienced professional manager. This expert shall prepare a report according to the format required by the Registrar General (art. 175).

However, the article 283 allows a company, with the exception of a declared company can, to appoint an inspector by ordinary resolution, to investigate its business.

In the same vein, article 294 provides that a foreign company with subsidiary companies in Rwanda may appoint inspectors for such subsidiary companies and the Registrar General shall be notified thereof.

Expenses and operating cost of the inspection of a declared company are paid by the office of the Registrar General.

An inspection cannot be ordered by the Minister, in this case the article 277 The Registrar General may :

1. in the case of a company having a share capital, on the application of:
   a) one shareholder or a group of shareholders holding at least one-tenth (1/10) of the issued shares;
   b) debenture holders holding not less than one-fifth (1/5) in nominal value of the issued debentures;
2. in the case of a company limited by guarantee, on the application of not less than one-fifth (1/5) in number of the persons on the share register;
3. where he/she considers that the appointment of an inspector is necessary to safeguard the interests of shareholders or debenture shareholders or is necessary in the public interest, require an inspector to investigate the affairs of a company or such aspects of the affairs of a company as are specified in the instrument of appointment and in the case of a debenture agency deed, the conduct of the debenture holders' representative, and to make a report on his/her investigation in such form and manner as the Registrar General may direct.

Publication or submission of copies of the reports

The Registrar General may, where he/she is of the opinion that it is necessary in the public interest to do so, ask the organ that requested for the investigation to cause the report to be published (art. 280).

A copy of the inspector's report shall be forwarded to the Registrar General, at the registered office of the company and to those who requested for it. (art. 279).

On the conclusion of the investigation, the inspector shall report his/her opinion in such manner and to such persons as the company’s general assembly indicated (art. 284).

Procedure and powers of the inspector

Every person concerned shall, if required to do so by the inspector, produce to the latter every book in his/her custody, control or possession and give to the inspector all assistance in connection with the investigation which he/she is reasonably able to give for the investigation to be smoothly carried out (art. 287).

An inspector may by written notice require any person concerned to appear for examination on oath in relation to the business of a subsidiary and the notice may require the production of every book in the custody, control or possession of the person concerned (art.288).

Where an inspector requires the production of a book in the custody, control or possession of a person concerned, he/she:

1. may take possession of those books;
2. may retain those books for such time as he/she considers necessary for the purpose of the accomplishment of his/her mission;
3. shall, where those books are in his/her possession, permit the company to have access, at all reasonable times to the book.

D. AMALGAMATION OF COMPANIES

It first fit to give the definition and types of amalgamation before speaking of the procedure of the amalgamation.

Definition and types of amalgamation

The term amalgamation has not been defined in the Companies Act, though this voluminous piece of legislation contains 44 definitions in Article 2. The terms amalgamation and merger are synonyms and the term '*amalgamation*', as per Concise Oxford Dictionary, Tenth Edition, means, *'to combine or unite to form one organization or structure'*.

There is amalgamation when a company is absorbed by another one that subsists alone or when two companies disappear to constitute a new company. It is therefore a legal operation that consists in bringing together several companies in one company.

According to article 295 of the law, two (2) or more companies may amalgamate and continue as one company, which may be one of the amalgamating companies or may be a new company.

Article 49 para.1 of the law of 1988 provided: "The amalgamation of two or several companies may be either by the absorption of one or several companies by another, either by the constitution of a new company ".

The amalgamation is characterized at a time by:

- a dissolution of the company absorbed that disappears as moral person.
- a transfer of the universality of properties of the absorbed company to the absorbing company or the new company emerging from the amalgamation.

PRELIMINARY PROCEDURE OF THE AMALGAMATION

Amalgamation proposal

As put by article 296, an amalgamation proposal shall set out the terms of the amalgamation, and in particular:

1. the name of the amalgamated company where it is the same as the name of one of the amalgamating companies;

2. the registered office of the amalgamated company;

3. the full name or names and address or addresses of directors of the amalgamated company;

4. the address for registered office of the amalgamated company;

5. the share structure of the amalgamated company, specifying :
   a) the number of shares of the company;
   b) the rights, privileges, limitations and conditions attached to each share of the company;

6. the manner in which the shares of each amalgamating company are to be converted into shares of the amalgamated company;

7. the consideration that the holders of those shares are to receive instead of shares of the amalgamated company;

8. any payment to be made to a shareholder or a director of the new amalgamated company;

9. details of any arrangement necessary to complete the amalgamation and to provide for the subsequent management and operation of the amalgamated company;

10. a copy of the proposed constitution of the amalgamated company;

11. the date on which the amalgamation proposal will be effective.

Concerning the resolution for amalgamation, article 297 disposes that the Board of Directors of each amalgamated company shall resolve that in its opinion, the amalgamation is in the best interest of the company and it is satisfied on reasonable grounds that the amalgamated company shall, immediately after the amalgamation becomes effective, satisfy the solvency test.

The directors who vote in favor of a resolution of amalgamation under this article shall sign a certificate stating that the amalgamation will benefit the company and the latter will satisfy the solvency test.

The Board of Directors of each amalgamating company shall send to each shareholder of the company, not less than thirty (30) days before the amalgamation is proposed to take effect :

1. a copy of the amalgamation proposal;
2. copies of the certificates given by the directors of each Board;
3. a summary of the principal provisions of the articles of association of the amalgamating company, if it has one;
4. a statement that a copy of the constitution of the amalgamated company shall be supplied to any shareholder who requests it;
5. a statement setting out the rights of shareholders of each company;
6. a statement of any material interests of the directors, whether in that capacity or otherwise;
7. such further information and explanation as

The amalgamation proposal shall be approved by the shareholders of each amalgamating company and any other interested parties by special resolution (art. 300)

The company’s creditors must not be caught by surprise as article 301 provides that the Board of Directors of each amalgamating company shall, not less than thirty (30) days before the amalgamation is proposed to take effect, give written notice of the proposed amalgamation to every creditor of the company.

Article 302 determines types of documents needed for the registration of amalgamation in these words, For the purpose of effecting an amalgamation, the following documents shall be delivered to the Registrar General for registration:

1. the approved amalgamation proposal;
2. a certificate that is signed by the Board of Directors of each amalgamating company;
3. a certificate signed by the Board of Directors of the new company resulting from the amalgamation;
4. the proof that the amalgamation will not jeopardize the interest of those creditors of amalgamating companies;
5. a document in the prescribed form, signed by each of the persons whose name is indicated in the amalgamation proposal as a director or employee of the amalgamated company consenting to act as a director or employee of the company.

Regarding the issue of certificate of amalgamation, articles 303 and 304 give the following precisions: On receipt of the application for amalgamation, the Registrar General shall forthwith :

1. where the amalgamated company has the same name as one of the amalgamating companies, issue a certificate of amalgamation;
2. enter the particulars of the company on the register;
3. issue a certificate of amalgamation;
4. issue a certificate of incorporation.

An amalgamation shall be effective on the date shown in the certificate of amalgamation.

Effects of the amalgamation

The absorbing company (or the new company) is going to acquire the assets of the absorbed company that will disappear (art. 305). It thus inherits the rights and liabilities of the absorbed companies (art. 307). The absorbed companies stop existing; they are however supposed to exist for the purpose of the possible nullity actions, for the period of proceeding until the court's decision becomes definitive. The shareholders of the absorbed companies become shareholders of the absorbing company according to the modes specified in the project of amalgamation. The third parties keep all rights that they possessed before the amalgamation.

E. ALTERATION OF THE NATURE OF COMPANIES

This section undertakes to explain the notion of the transformation of a company and the types of transformation.

Notion of the transformation of a company

If the law of 1988 on commercial companies laid down in its article 48, the principle of the transformation of a commercial company in its terms: "every company can adopt another form without losing its legal personality"; the new law is content with giving some situations of alteration or transformation of a company.

In a general manner, it essentially sounds like a modification of the articles of association that allows the company to adapt its structure to new needs. It allows the enterprise that grows to choose a form that facilitates a more complex management or to appeal more comfortably on new shareholders. It also occurs in order to benefit from fiscal advantages recognized to such type of company.

The transformation can be imposed to the shareholders like a necessary condition to the survival of the company. It intervenes every time a company complies no more with the requirements of current form. To avoid the dissolution, the company must upgrade its status, or otherwise transform.

Thus, in the terms of the new law related to companies a company limited by shares may be converted to a company limited by guarantee. In the same way a limited company turn into to unlimited one and vice-versa.

Types of transformation

1. Transformation of a company limited by shares to a company limited by guarantee

According to article 318 of the law company limited by shares may be converted to a company limited by guarantee when:

1. there is no unpaid shares;
2. all its members agree in writing to the conversion and to the voluntary surrender to the company for cancellation of all the shares held by them immediately before the conversion;
3. a new articles of association appropriate to a company limited by guarantee is filed; The new articles of association of the company limited by guarantee shall be filed to the Registrar General for registration.

The conversion of a company shall –

1. take effect on the issue of the certificate;
2. operate so that all shares are deemed to have been validly surrendered and cancelled;
3. have effect so that every member who has not agreed to contribute to the share capital of the company shall cease to be a member;
4. not affect any right or obligation of the company except as otherwise provided in this section or render defective any proceedings by or against the company.

2. Transformation of a limited company to unlimited company

Article 320 disposes that a limited company may convert to an unlimited company by passing a special resolution to that effect and by making any necessary amendments to its constitution and filing with the Registrar General a copy of the resolution.

3. Transformation of an unlimited company to limited company

In the terms of the article 321 of the law, an unlimited company may convert to an limited company by passing a unanimous resolution to that effect and filing with the Registrar General a copy of the resolution.

Appendix I

I Forms to be completed when a company is registered with the Office of the Registrar General

-A-

FORM OF MEMORANDUM OF ASSOCIATION OF A COMPANY LIMITED BY SHARES (ART. 14)

1) The name of the company is "…… limited (insert name of company)."

2) The category of the company is Private / Public.

3) The company has the articles of association/ doesn't have articles of association.

4) The registered office of the company will be ……...

5) The shareholders resolved that Mr./Mrs./Miss: …… will be the first Managing Director of the Company.

6) The objects for which the company is established are …… ……..…… …..... .....

7) The liability of the members is limited.

8) The share capital of the company is …….. (Insert the amount of share capital) divided into …… shares of …… Rwandan francs

WE, the several persons whose names and addresses are subscribed, desire to be formed into a company, under this memorandum of association, and we respectively agree to take the number of shares in the capital of the company set opposite our respective names

N°	**Names, postal addresses and occupations of subscribers**	**Number of shares subscribed**	**Signature of subscribers**
1.			

No	Names, postal addresses and occupations of subscribers	Number of shares subscribed	Signature of subscribers
2.			
3.			
4.			
5.			
	Total shares taken		

(*if more than 5, please attach a list of shareholders on separate paper*)

Date:
……..

Witness: ..... Signature: .....

-B-

FORM OF MEMORANDUM OF ASSOCIATION OF A COMPANY LIMITED BY GUARANTEE (ART. 14)

1) The proposed name of the company is "…… limited (insert name of company)."

2) The category of the company is Private.

3) The company has the articles of association/ doesn't have articles of association.

4) The registered office of the company will be situated …..……

5) The shareholders resolved that Mr./Mrs./Miss: …… will be the first Managing Director of the Company.

6) The objects for which the company is established are ……
……..……
…..... .....

7) The liability of the members is limited.

8) Every member of the company undertakes to contribute to the assets of the company in the event of its being wound up.

WE, the several persons whose names and addresses are subscribed, are desire to be formed into a company, under this memorandum of association.

N^{o}	**Names, postal addresses and occupations of subscribers**	**Amount of guarantee**	**Signature of subscribers**
1.			
2.			
3.			
4.			
5.			

(*if more than 5, please attach a list of shareholders on separate paper*)

Date: ……

Witness: ..... Signature: .....

- C-

MEMORANDUM OF ASSOCIATION OF A COMPANY LIMITED BOTH BY SHARES AND BY GUARANTEE (ART. 14)

1) The proposed name of the company is "…… limited (insert name of company)."

2) The category of the company is Private / Public.

3) The company has the articles of association/ doesn't have articles of association.

4) The registered office of the company will be situated …..……

5) The shareholders resolved that Mr./Mrs./Miss: …… will be the first Managing Director of the Company.

6) The objects for which the company is established are ……
……..……
…..... .....

7) The liability of the members is limited.

8) The share capital of the company is …….. (Insert the amount of share capital) divided into …… shares of …… Rwandan francs

No	**Names, postal addresses and occupations of subscribers**	**Number of shares subscribed**	**Amount of guarantee**	**Signature of subscribers**
1.				
2.				
3.				
4.				
5.				
	Total shares taken			

9) Every member of the company undertakes to contribute to the assets of the company in the event of its being wound up.

WE, the several persons whose names and addresses are subscribed, are desire to be formed into a company, under this memorandum of association.

(*if more than 5, please attach a list of shareholders on separate paper*)

Date: ……

Witness: ..... Signature: .....

-D-

MEMORANDUM OF ASSOCIATION OF AN UNLIMITED COMPANY (ART. 14)

1) The proposed name of the company is "…… limited (insert name of company)."

2) The category of the company is Private.

3) The company has the articles of association/ doesn't have articles of association.

4) The registered office of the company will be situated …..……

5) The shareholders resolved that Mr./Mrs./Miss: …… will be the first Managing Director of the Company.

6) The objects for which the company is established are ……
……..……
…..
.....

7) The liability of the members is unlimited.

8) The share capital of the company is …….. (Insert the amount of share capital) divided into …… shares of …… Rwandan francs

WE, the several persons whose names are subscribed, desire to be formed into a company, under this memorandum of association, and we respectively agree to take the number of shares in the capital of the company set opposite our respective names.

N°	**Names, postal addresses and occupations of subscribers**	**Number of shares subscribed**	**Signature of subscribers**
1.			
2.			
3.			
4.			

5.			
	Total shares taken		

(*if more than 5, please attach a list of shareholders on separate paper*)

Date:

……..

Witness: .....

..... Signature: .....