

DIRECTORS LAW AND COMPLIANCE CERTIFICATE SESSION II

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GENERAL FUNCTIONS AND RESPONSIBILITIES OF DIRECTORS.

1 | Statutory Provisions

1. Company Registers
2. Changes in Share Capital
3. Changes to the MAs
- 1.4 Annual and Periodic Duties

2 | Meetings

- 2.1 The Annual General Meeting
2. Extraordinary General Meetings
3. Board Meetings

1

Duties Imposed by Statutory Provisions

GENERAL FUNCTIONS AND RESPONSIBILITIES OF DIRECTORS

1 | Statutory Provisions

1.1 Company Registers

1.1 Register of members

The company is required to maintain a register of members, a register of debenture holders, and a beneficial owners register.

Details to be included:

- _ Personal Details (name / address / identity or registration number/ and date at which each person is to be entered in the register as a member)
- _ Notice of Pledges
- _ Statement of Holdings
- _ Statement of Transfers
- _ Consideration Amount

GENERAL FUNCTIONS AND RESPONSIBILITIES OF DIRECTORS

1 | Statutory Provisions

1.2 Changes
in the Share
Capital

1.2 Duties in relation to changes in share capital

- Issue of Shares for a consideration other than cash.

Report (Sec.73 Report) to be drawn up before the shares are issued by one or more experts independent of the company and is to be delivered to Registrar for approval before shares are issued.

- Increase in Issued Share Capital
- Generally decided by ordinary resolution of the company, unless the MAs require a higher percentage than that normally required for an ordinary resolution.
- The MAs may permit the general meeting to authorise, by ordinary resolution, the Board of Directors to issue shares up to a maximum amount as specified in the MAs. If this power is not conferred to the general meeting in the MAs, it may still be executed by the same general meeting by means of an extraordinary resolution.

Duties in relation to changes in share capital

- Offering Shares on a Pre-Emptive basis

Whenever shares of a public company are proposed to be allotted for consideration in cash, those shares are to be offered on a pre-emptive basis to shareholders in proportion to the SC held by them. Copy of any offer of subscription on a pre-emptive basis indicating the period within which the right is to be exercised to be delivered to Registrar for registration.

- Return of Allotments

Whenever a company makes any allotment of shares, it is obliged to deliver a **Form H** to the Registrar within **one month**, stating the number and nominal amount of the shares comprised in the allotment, the names and addresses of the allottees and the amount paid and due on each share, whether on account of the nominal value or by way of premiums.

Duties in relation to changes in share capital

- Redemption of Preference Shares

Whenever preference shares are redeemed, a notice of redemption should be delivered by the company to the Registrar for registration **within 14 days** after the date of redemption – **Form T1**.

- Delivery of Notice of Transfer or Transmission of Shares

In the case of a transfer/transmission causa mortis of shares, **within 14 days** from the date on which a transfer of any shares is registered with the company, a notice needs to be transmitted to the Registrar – **Form T**.

Delivery of Notice of change of Beneficial Ownership – Form B02.

Duties in relation to changes in share capital

- **Pledging of Securities**

Whenever securities in a company are pledged, notice of the pledge should be delivered by the pledgor or the pledgee to the Registrar for registration **within 14 days** from the granting of the pledge.

- **Single Member Companies**

When a company becomes a single member company through the inter vivos acquisition or causa mortis transmission of all its shares to one person, the company must deliver a notice to the Registrar **within 14 days** – Form I. When a company ceases to be a single member company, a **Form I (1)** is to be delivered to the Registrar within 14 days.

- **Issue of Share Certificates**

Share certificates are to be delivered to the entitled person:

- **Within 2 months** from the allotment of any of its shares or debentures; or
- **Within 2 months** from the date on which a transfer of any such shares or debentures is registered with the company; or
- **Within 1 month** from the date of transmission causa mortis.

GENERAL FUNCTIONS AND RESPONSIBILITIES OF DIRECTORS

1 | Statutory Provisions

1.3 Changes to the M&As

1.3 Duties in relation to amendments to the Memorandum or Articles of Association

Duty of directors and company secretary to deliver a copy of the resolution effecting the change to the Registrar **within 14 days**.

Along with this, there should be delivered a revised and updated copy of the memorandum and articles, as amended by the resolution, and incorporating any other changes that have been made to date where official Registry forms were used - ex. changes to directors, registered office, or transmission of shares.

No amendments will take place until the documents are delivered.

Changes not requiring a change in MA

- Change in registered office – Form Q
- Changes in the Officers of a Company - Where there is a change of directors or company secretary or persons vested with the representation, Form K must be sent to the Registrar for Registration.

GENERAL FUNCTIONS AND RESPONSIBILITIES OF DIRECTORS

1 | Statutory Provisions

1.4 Annual and Periodic Duties

1.4 Annual and periodic duties

- Accounts

Profit and loss account, balance sheet and notes to the accounts

- Directors' Report

To be prepared in respect of each accounting period. Should be approved by the board of directors and signed on behalf of the board by two directors of the company. A copy should be circulated to every member and debenture holder and to every person entitled to receive notice of a general meetings.

Annual and periodic duties

Listed companies

1. Annual financial report

- annual financial statements with auditor's report and director's report;
- statement of responsibility;
- report by the **directors** and the auditors on the compliance with the Code of Good Corporate Governance;
- details of material contracts

Annual and periodic duties

2. **Half-yearly report** (covers the first 6 months of each financial year)

- _ condensed set of financial statements;
- _ interim director's report;
- _ If the half-yearly report is not audited, a statement to that effect must be included.

**the obligation to publish the half-yearly report does not apply to credit institutions which do not have shares admitted on the Malta Stock Exchange.*

Annual and periodic duties

Annual Return

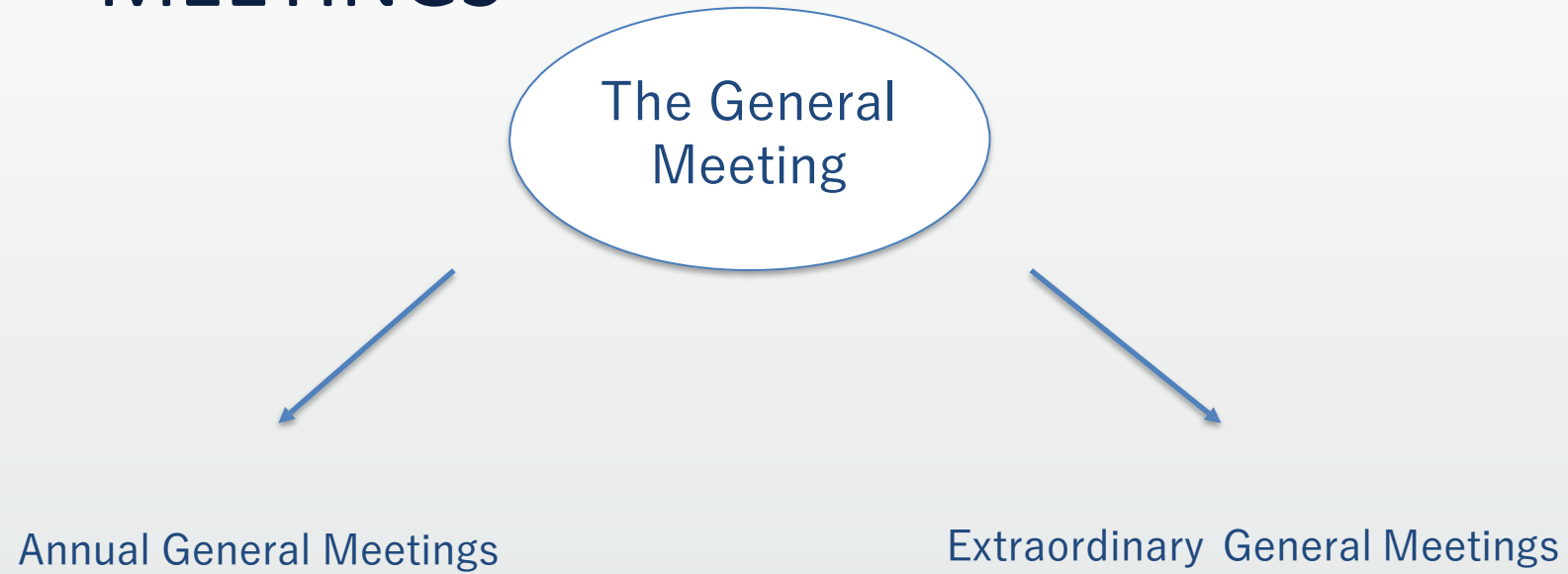
- _ To be signed by at least one director or the company secretary
- _ Delivered **within 42 days of every anniversary** of the company's registration
- _ Filed with Registrar on a **yearly basis**
- _ Form is set out in Seventh Schedule to Companies Act



2

Duties in relation to Meetings

MEETINGS



GENERAL FUNCTIONS AND RESPONSIBILITIES OF DIRECTORS

2 | Meetings

2.1 The Annual General Meeting

THE AGM

Article 128 Companies Act - every company is required to hold an AGM; this is the only mandatory meeting.

Provides the Opportunity:

- To discuss affairs of the company; and
- For directors to be accountable to shareholders by presenting companies' accounts, directors' report and the annual audit.

Business Transacted at the AGM

Unless the AoA otherwise provide, the ordinary business of an annual general meetings is to:

1. declare dividends;
2. consider the accounts, balance sheets and the reports of directors and auditors;
3. elect directors in place of those retiring; and
4. appoint and fix the remuneration of auditors.

GENERAL FUNCTIONS AND RESPONSIBILITIES OF DIRECTORS

2 | Meetings

2.2 Extraordinary
General Meetings

Extraordinary general meetings (EGMs)

- The CA provides that general meetings other than the AGMs are EGMs.
- Several matters which require consideration and decision at an EGM, (or alternatively at an AGM as special business). These matters include:
 1. alterations to the M&As;
 2. the conversion, amalgamation or division of the company;
 3. the dissolution of the company;
 4. the filing of a company recovery application and
 5. any matter which the Board may, in terms of law or in terms of the memorandum and articles of association, refer to the meeting, amongst others.

Who convenes an EGM?

1. Directors (at any time but they must do so on serious loss of capital);
2. The Court (on its own motion or on demand of a director or member);
3. At the request of the resigning auditor for the purposes of explaining the reason for his resignation; or
4. On requisition by the members

GENERAL FUNCTIONS AND RESPONSIBILITIES OF DIRECTORS

2 | Meetings

2.3 Board Meetings

Board Meetings

Convening of board meeting

No rule in the CA. The model articles provide that the directors may summon a board meeting at any time. The company secretary must summon a board meeting on the requisition of directors. Meetings may also take place through audio visual conference.

Addressee of notice

Notice must be given to all directors.

Board Meetings

Documents to be circulated

All documents pertaining to the business to be transacted should be circulated within a reasonable time prior to the meeting in order to allow for proper preparation.

Quorum

A quorum must be present. This is determined by the AoA. The model articles provide that the quorum is 2 directors, unless the company has only one director.

Board Meetings

Voting

No rule in the CA. The AoA would typically state that this is by majority vote.

Chairman

Chairman (either appointed as chairman of the board or for a specific meeting) typically has a casting vote. This prevents situations of deadlock.

Minutes

Minutes must be taken for each board meeting. They need not be signed by all the directors – the signature of the chairman is evidence that the proceedings took place in accordance with the minutes.

ROLES AND RESPONSIBILITIES OF DIRECTORS DURING INSOLVENCY



When is a company deemed insolvent?

A company is deemed to be insolvent at law when it has failed either the “cash-flow” test or the “balance sheet” test.

However director duties also arise prior to insolvency in a number of scenarios:

- (i) where the company is “doubtfully solvent”, where the company is “nearly insolvent” and if a contemplated payment or other course of action would jeopardise the company’s solvency;
- (ii) where the company is imminently likely to become insolvent;
- (iii) where there is no reasonable prospect that the company could avoid going into insolvent liquidation;

Cash-Flow Test vs. Balance-Sheet Test

Out of all the previous scenarios, only these two tests are defined in the CA.

1. Cash-Flow test: where a debt due by the company has remained unsatisfied in whole or in part after twenty-four weeks from the enforcement of an executive title;
2. Balance-Sheet test: where it is shown to the satisfaction of the court that the company is unable to pay its debts, account being taken also of contingent and prospective liabilities of the company.

Special Duties in the context of Insolvency

1. Duty to convene a general meeting of the company whenever (i) the company is unable to pay its debts and (ii) where there is a serious loss of capital of public companies;
2. Duty to consider creditor's interests;
3. The general duty of care and skill;
4. Duty of listed companies to issue a company announcement.

INSTANCES OF PERSONAL LIABILITY

1. Breach of general duties under the CA;
2. Liability for administrative fines under the CA;
3. Liability for administrative fines under specific legislation other than the Companies Act;
4. Liability in a company insolvency scenario;
5. Criminal liability.

PERSONAL LIABILITY AND INDEMNIFICATION OF DIRECTORS

ARTICLE 147 OF THE COMPANIES ACT

- Establishes the personal liability of directors which shall be joint and several.
- However provides that where a particular duty has been entrusted to one or more of the directors, only such director or directors shall be liable in damages.

Article 148

Any provision, whether contained in the memorandum or articles of a company or in any contract with a company or otherwise for exempting any officer of the company or any person engaged by the company as auditor from, or indemnifying him against, any liability which by virtue of any rule of law would in the absence thereof have been attached to him in respect of negligence, default or breach of duty or otherwise of which he may be guilty in relation to the company shall be void

Breach of Administrative Duties

- Failure to comply with administrative duties previously mentioned may lead to the imposition of fines both on the company and the directors personally.
- Liability emanates from article 427(4) of the Companies Act which explicitly states that directors and the company are jointly and severally liable for payment of any administrative penalty.
- Justification / rationale for liability is based on article 150 of the Companies Act which states that anything liable to be done by the company is liable to be done by its officers.
- Arkitett Mariello Spiteri vs Registrar of Companies

DEFENCES

- A director shall not be liable for the acts of his co-directors if he proves either:
 - 📖 that *he did not know* of the breach of duty before or at the time of its occurrence and that on becoming aware of it after its occurrence he signified forthwith to the co-directors his dissent in writing; or
 - 📖 that, knowing that the co-directors intended to commit a breach
 - of duty, he *took all reasonable steps to prevent it*.

LIABILITY IN THE EVENT OF INSOLVENCY

Of particular importance are the
offences of:

Wrongful trading

Fraudulent trading



FRAUDULENT TRADING

Article 315 of the Companies Act

Defines fraudulent trading as acts carried out during the winding up of a company with the intent to defraud the creditors of the company. This renders any persons who were aware of such actions personally liable, without any limitation of liability for any of the debts and liabilities of the company.



WRONGFUL TRADING

- **Article 316 of the Companies Act**
- Applies where a company has been dissolved and is insolvent and it appears that a person who was a director of the company knew, or ought to have known prior to the dissolution of the company that there was no reasonable prospect that the company would avoid being dissolved due to its insolvency.

INSTANCES OF PERSONAL LIABILITY

- **Criminal Offences under the Companies Act**
 - Misapplication or retention of company's property;
 - Concealing company's property and falsifying records;
 - Fraud by officers of companies being wound up;
 - Fraud by officers of companies subsequently wound up;
 - Failure by an insolvent company to keep proper accounting records.
-
- **Other Criminal Offences apply under the Criminal Code and other legislation.**

MITIGATING THE RISK OF PERSONAL LIABILITY: SUGGESTED WAY FORWARD

- Consider carefully whether you should accept the appointment as a director;
- a director should insist that the board is made up individuals
- with a variety of skills;
- Avoid being a 'rubber-stamp';
- Seek professional advice where required;
- Engage full-time legal in-house counsel especially in large
- companies;
- Organise regular training on relevant subject-matters.
- Make sure that any dissent is noted in the minutes

Liability of NEDs

- No distinction is legally made between non-executive and executive directors. Therefore, prima facie they do have equal chances of liability as other directors.
- Taking the law as it is, one concludes that their duties and liabilities are the same regardless of whether they have a managerial or a supervisory role, and be they independent or otherwise.

IL-PULIZIJA vs XUEREB, BUSUTTIL, ELLUL VINCENTI AND GAUCI [2001]

Facts: Xuereb was an executive director whilst others were all NEDS and were charged with involuntary homicide of a worker on a construction site.

Decide: Court held that there must be a link between the way the director acted on the board and the involuntary homicide they were being accused of. The NEDS could not be held liable within the given circumstances.



THE PRICE CLUB CASE

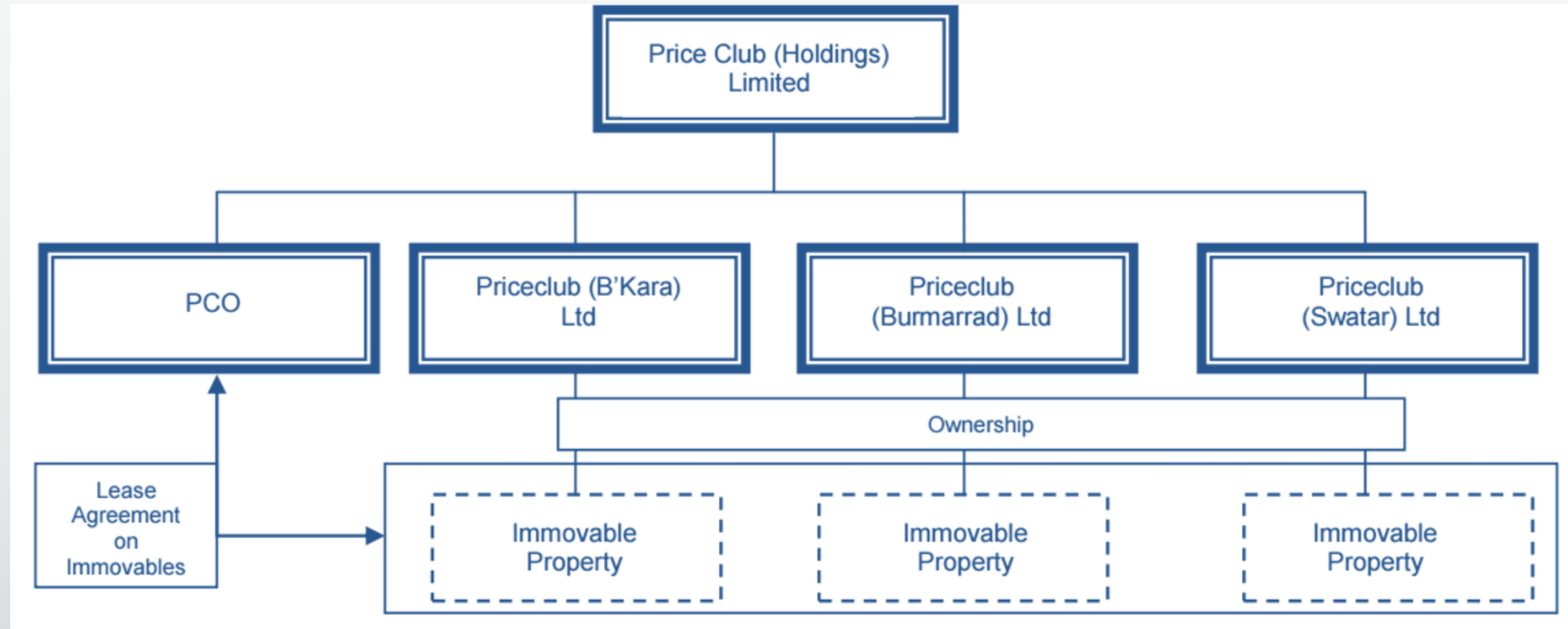
BORG CARDONA AS LIQUIDATOR OF PRICECLUB OPERATORS LTD VS ZAMMIT, GAUCI AND FINO

This case was one of the several cases filed in the Price Club saga, where the liquidator of Priceclub Operators Ltd (PCO) filed legal proceedings against ex-directors of PCO Mr Zammit, Mr Gauci and Mr Fino – for wrongful and/or fraudulent trading under the Companies Act provisions. Priceclub operated eight supermarkets and stopped trading in 2001.

The issue was whether the ex-directors should be held personally and unlimitedly responsible for all PCO's debts in solidum.

Court ruled for the plaintiff.

PRICE CLUB STRUCTURE



Thinly capitalised company

- Company commenced business with an operating deficit and without sufficient capital base.
- The initial capital of PCO was that of LM101,000 which was never increased over time.
- Given the considerable debts inherited by the company, the lack of realisable assets held by the company and its projected ongoing expenditure, it can be said that the company commenced its business on the brink of insolvency.
- On the basis of the above, the court inferred intention to have company financed by its trade creditors.

Manner in which company was managed

- Did not act prudently or honestly and did not have the necessary competence.
- Serious short comings in IT and operational aspects.
- Given their lack of expertise and knowledge of the difficulties of the company, directors should have ensured that the company be built on stronger financial foundations.
- Notwithstanding that a loss was being made for the purchase of Priceclub, and notwithstanding that the capital was not sufficient, they continued to make further investments at the expense of creditors.

Dishonesty towards creditors

- Creditors were not given a true picture of the financial position of the company
- The directors made positive statements about the group in the accounts which were not correct. Creditors were assured that there was a temporary cash flow problem which was remediable.
- In the meantime, the directors negotiated longer credit terms with trade suppliers instead of funding it through additional share capital.

Considerations

- Responsibility of Directors
- A director could not avoid responsibility on the pretext that he did not appreciate the true situation of the company or that he relied on advice of others.
- It was not excusable for a director to plead that he was a 'non- executive director' and/or a minority shareholder.
- Fraudulent trading test – extends to situation whereby a person realised or could have realised at the time the debts were incurred that there was no good reason for thinking that funds would be available to pay the debt in question when it became due or shortly thereafter.

FIRST HALL

Declared that all three defendants acted with the intention to defraud PCO's creditors and were thus jointly and severally liable for all PCO's debts and obligations without limitation, as a result of fraudulent trading.

COURT OF APPEAL

Confirmed the decision of the First Hall and said that the directors were obliged to provide the operating company, PCO with tangible assets, as security for its creditors to ensure that the company had a chance to succeed. The directors did not safeguard the interests of PCO's creditors.

Removal of Directors

Grounds for Removal of a Director

- Typically outlined in the Articles of Association
- Can include:
 - Voluntary resignation
 - Removal by shareholders via special resolution

Disqualification reasons (e.g., insolvency, breach of duties)

Removal Process - Disqualification

- Grounds for disqualification (e.g., criminal conviction, insolvency)
- Court-ordered removal or disqualification
- Procedure for disqualification

Removal Process - Disqualification

- Notice to the director
- Board and shareholder meetings
- Filing requirements with the Registrar of Companies
- Record-keeping

Removal Process by Shareholders

- Procedure:
 - Notice requirement (typically 28 days' notice)
 - Special resolution (75% approval typically required)
 - Filing of resolution with the Registrar of Companies

- By Ordinary resolution
- Article 140(1) CA:

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

Notice for Removal of a Director

- Special notice is required
- Article 140(2):

"Special notice is required of a resolution to remove a director under this article or to appoint somebody instead of a director so removed at the meeting at which he is removed."

Exceptions to Notifying Members

- A. Court order
- B. Article 140(5): "If a copy of the representations is not sent as aforesaid because it was received too late or because of the company's default, the director may (without prejudice to his right to be heard orally) require that the representations shall be read out at the meeting."

Content of Notice

Clear statement of intention to remove director
Reasons for proposed removal (best practice)
Any proposal for replacement director

Director's Right to be Heard

- Opportunity to make representations

Article 140(3):

"On receipt of notice of an intended resolution to remove a director under this article, the company shall forthwith send a copy thereof to the director concerned, and the director, whether or not he is a member of the company, shall be entitled to be heard on the resolution at the meeting."

Written Representations

- Director's right to submit written representations
- Company's obligation to notify members
- Article 140(4):

"Where notice is given of an intended resolution to remove a director under this article and the director concerned makes with respect thereto representations in writing to the company (not exceeding a reasonable length) and requests their notification to members of the company, the company shall, unless the representations are received by it too late for it to do so - (a) in any notice of the resolution given to members of the company state the fact of the representations having been made; and (b) send a copy of the representations to every member of the company to whom notice of the meeting is sent (whether before or after receipt of the representations by the company)."

Protection Against Abuse

- Court's power to order against circulation or reading of director's representations. The court can exercise this power if it is satisfied that the rights conferred by Article 140 are being abused to secure needless publicity for defamatory matter.
- Article 140(6):

"Copies of the representations need not be sent out and the representations need not be read out at the meeting if, on the application either of the company or of any other person who claims to be aggrieved, the court is satisfied that the rights conferred by this article are being abused to secure needless publicity for defamatory matter; and the court may order the company's costs on an application under this article to be paid in whole or in part by the director, notwithstanding that he is not a party to the application."

Aims to balance the director's right to be heard and defend their position against the company's and other stakeholders' rights to be protected from defamatory or needlessly damaging statements.

Vacancy

- Article 140(7):

"A vacancy created by the removal of a director under this article, if not filled at the meeting at which he is removed, may be filled as a casual vacancy."

Reappointment of Removed Director

- Restrictions on reappointment
 - Any limitation in the Articles of Association
 - Best practices for reappointment considerations (e.g. assess reasons for original removal and whether they have been addressed, director's evaluation of qualifications and experience, potential impact on company governance and stakeholder relationships, etc.); and
 - Potential Shareholder reactions (e.g. valuable skills or experience of director, issues for removal of the director haven't been adequately addressed, reappointment is seen as going against good governance practices, lack of board renewal, etc.)

CA does not explicitly restrict reappointment of removed directors, these practical considerations are crucial for maintaining good corporate governance and shareholder relations. The decision to reappoint a previously removed director should be made carefully, with full consideration of legal, governance, and stakeholder implications.

Amendments to the CSP Act 2025

Changes to the CSP Act

Major Changes

- Act X of 2025
 - Updates to definitions
 - Changes to authorization and registration requirements.
 - New notification requirements for restricted company service providers.
 - Clarifications on the Authority's powers.

Changes to the Definitions

- "Authorised Person": Now explicitly defined as authorized by the Authority.
- "By way of business" definition added
- "Company Services": Defined to include formation of entities, acting as director/secretary, providing registered office, etc.
- "Company Service Provider": Defined, distinguishing from "limited company service provider."
- Introduction of "Involvements," "Limited Company Service Provider," and "Notified Person" definitions.
- "Registered Person" and "Restricted Company Service Provider" definitions added

Authorisation and Registration

- Individuals acting as a company service provider (director and/or company secretary) by way of business must be **registered** (3A.2). These individuals are now being referred to as **Limited company service providers** and may hold up to 10 involvements.
- Individuals offering such services on a non-commercial basis (i.e., without holding themselves out as doing so by way of business) are subject to a new **notification** requirement established by Article 3B (1) of the Act. These individuals are referred to as **Restricted Company Service Providers** and can hold up to 5 involvements, across a maximum of 2 groups.
Authority's Power: The Authority can request information from applicants (3A.3).
- Register of Notified Persons: The Authority must maintain a register (3A.4).
- Transitional Provisions: Those acting as restricted company service providers before this act must notify the Authority within 2 months i.e. 16th July 2025.

Notification Requirement

- Requirement: Any person acting as a restricted company service provider must notify the Authority (3B.1).
- Timing: Notification within 14 days of starting the position (3B.2a).
- Fee: Accompanied by a non-refundable fee (3B.2b).

Authority's Powers – Refusal, Cancellation, and Conditions

- Expanded Powers: The Authority has the power to refuse or grant authorization/registration (Article 5).
- Grounds for Cancellation: Includes contravention of the Act, failure to comply with obligations, or circumstances that would have prevented granting authorization (Article 6).
- Actions After Cancellation: Persons whose authorization is cancelled must transfer services to another authorized person within 60 days (Article 7).

Other Amendments

- **Article 8:** Clarifies what constitutes "company service providers."
- **Article 11:** Authority can require a person providing company services to cease providing such services under this Act.
- **Article 14:** Clarifies "company service providers" to "persons providing company services."
- **Article 17:** Amends provisions related to MFSA Act.

Updating of the Guidance Note on the Application of the Company Service Providers Act

The MFSA has revised its Guidance Note on the Application of the CSP Act, notably refining the interpretation of “by way of business”, offering more clarity for individuals unsure of whether their activities fall within scope.

New Rulebook for Limited Company Service Providers

- New rulebook has been issued for **Limited Company Service Providers**, recognising the limited scope of their services. This rulebook outlines tailored compliance obligations, governance expectations, and risk awareness requirements.

Amendments to the Company Service Providers (Exemption) Regulations (Subsidiary Legislation 529.02)

- LN 90 of 2025 has repealed the exemption for VFA Agents due to the repeal of the Virtual Financial Assets Act. The exemption for directors or company secretaries of MFSA-regulated entities has been extended to also cover services provided to their immediate holding companies.

CONCLUDING REMARKS

- The key to good corporate governance is to perceive it as something more than a simple compliance-driven exercise of a tick-box nature, but one that can really add value to the organisation.
- It is about creating a robust system of management that is built on trust and clarity of the expectations of the management and the functions of the board – a system which secures the adequate supply of information in a timely manner to the decision-makers that would enable them to make the right decision at the right time.

Thank you

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