



# Importance of Legal Advice to Small Medium Enterprise (SME)

Presented by: Mr. Brandon Hong

# Importance of Legal Advice to Small Medium Enterprise (SME)

Presented by: Mr. Brandon Hong

copyrights of  
J.M. Chong, Vincent Chee & Co. 2018

A decorative horizontal bar consisting of a thick teal line at the top, followed by a white line, and then three thin teal lines at the bottom, extending across the width of the slide.

# Presentation Outline

## Part 1 Starting a business

- Types of business models
- Benefits of hiring a lawyer when starting a business

## Part 2 Small Medium Enterprise

- Definition of an SME
- Incentives for SMEs

## Part 3 Importance of legal advice to SMEs

- Human resource and trade secrets management
- Compliance and regulatory
- Intellectual property protection
- Alternative dispute resolution
- Achieving and Meeting Financial Requirements
- Debt recovery

# Part 1

## Starting a Business

Question: What kind of business model should you choose?

Types of business models:

- Sole proprietorship
- Partnership
- Limited liability partnership
- Private limited company



# Sole Proprietorship

(One owner)

## Advantages

- Cheap, easy to set up
- All profits goes to the owner
- No separate tax return file is needed
- Full control over business

## Disadvantages

- Unlimited liability which extends to the personal assets of the sole proprietor
- Not a separate legal entity
- No business succession

# Partnership

(2 or more persons but not exceeding 20 persons)

## Advantages

- Wider capital base compare to sole proprietorship
- No need to file separate tax return file

## Disadvantages

- Unlimited liability
- Not a separate legal entity
- Profit is divided as specified in the partnership agreement
- No full control over business

# Limited Liability Partnership

(Combination of Partnership and Company)

## Advantages

- Partners have limited liability in relation to the company's loss
- Separate legal entity

## Disadvantages

- Financial accounts need to be submitted to Companies house for public record
- Profit cannot be retained in shares, no flexibility to hold over profit to a future tax year
- LLP needs at least 2 members, if one leaves the LLP is dissolved

# Private Limited Company

(One or multiple owner(s), not more than 50 members)

## Advantages

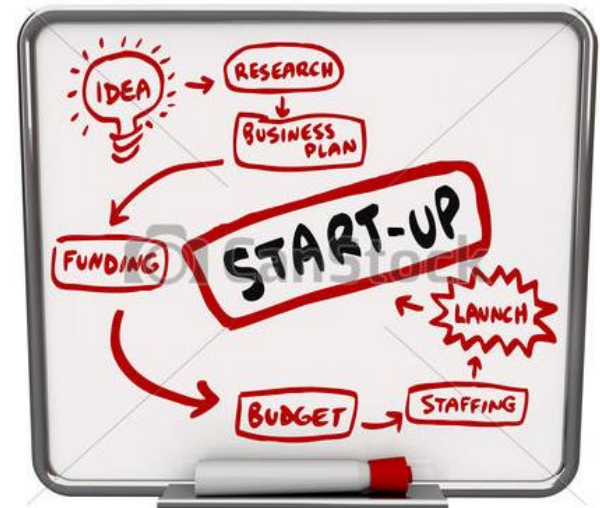
- Separate legal identity and personal wealth protection
- Continuous existence
- Transferable ownership
- Better access to capital
- Limited liability of shareholders

## Disadvantages

- Complexity of running
- Compliance requirements
- Costly for short term ventures (one-off investments)
- Cost of maintaining its existence

# Benefits of hiring a lawyer when starting a business

- Advice on business model best suited for the particular venture.
- Paperwork and procedural expertise
- Advice on compliance of legal requirements
- Review of corporate and secretarial documents applicable to the business model.



## Part 2

# Small Medium Businesses (SME)

Question: What kind of business is considered as SME?

Answer:

SMEs are companies registered with the Companies Commission of Malaysia and can be categorized/defined into three different categories, namely, micro, small and medium.

The definition of SME in Malaysia depends on the industry in question and will generally take into consideration the sales turnover or the number of full-time employees.

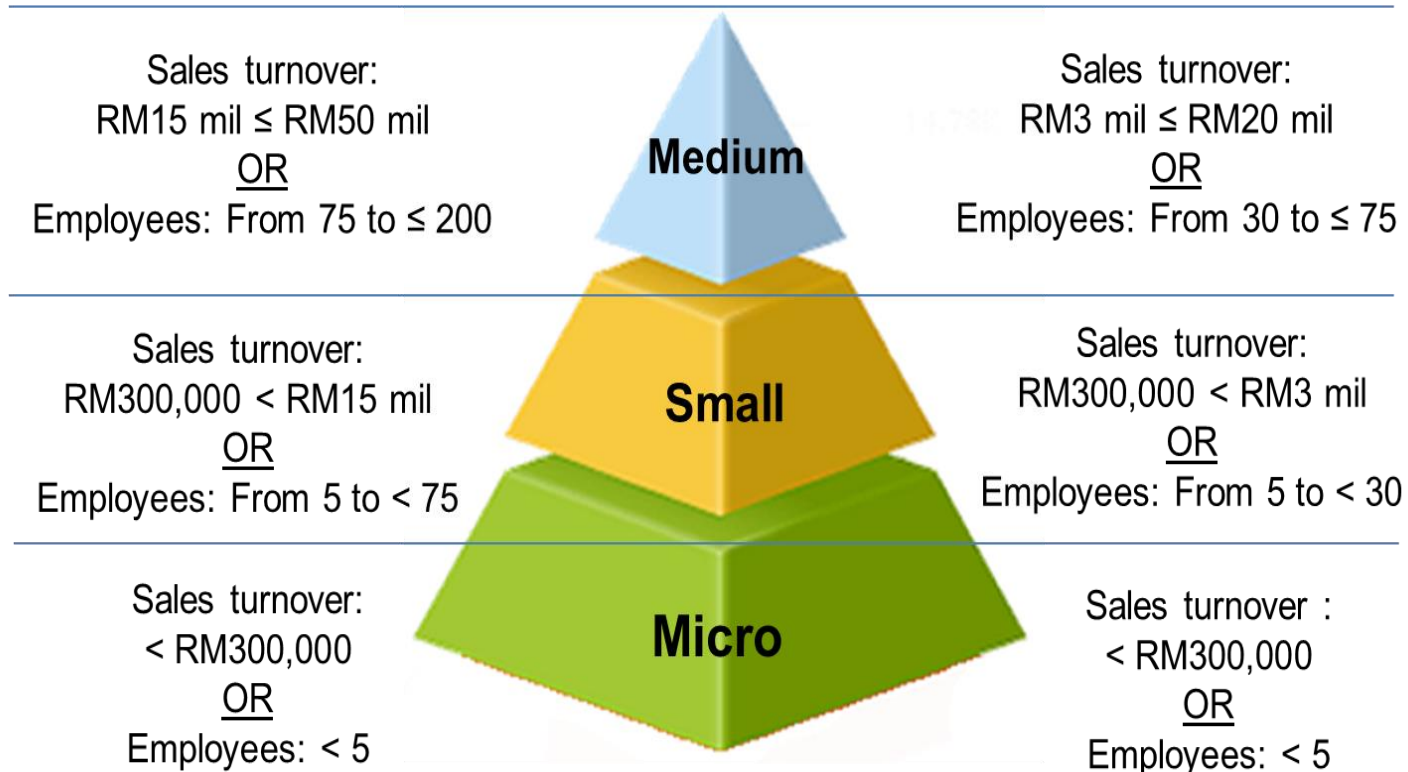


**See chart on  
next slide**

# Chart for SME categorization

## Manufacturing

## Services and Other Sectors



# Companies that are NOT SME

- Entities that are public-listed on the main board
- Subsidiaries of:-
  - public listed companies on the main board;
  - multinational corporations (MNCs)
  - Government-linked companies (GLCs);
  - Syarikat Menteri Kewangan Diperbadankan (MKDs); and
  - State-owned enterprises

# Fun facts about SMEs

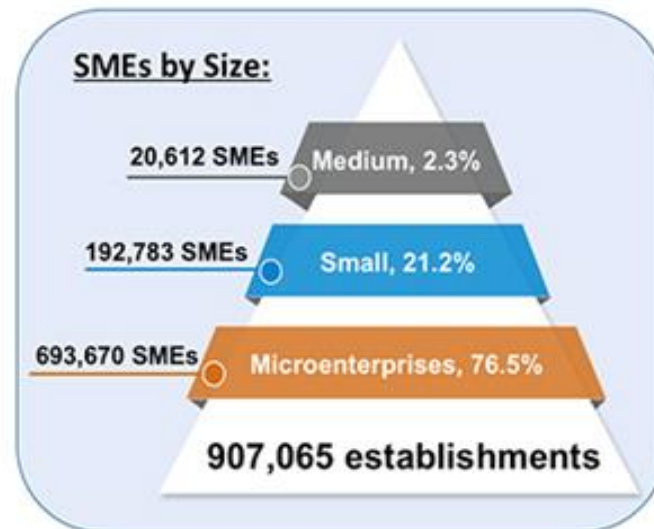
Fact 1:

SME Corporation Malaysia is a Central Coordinating Agency (chaired by the Prime Minister) under the Ministry of International Trade and Industry Malaysia responsible to formulate overall policies and strategies for SMEs and to coordinate the implementation of SME development programs across all related ministries and agencies.

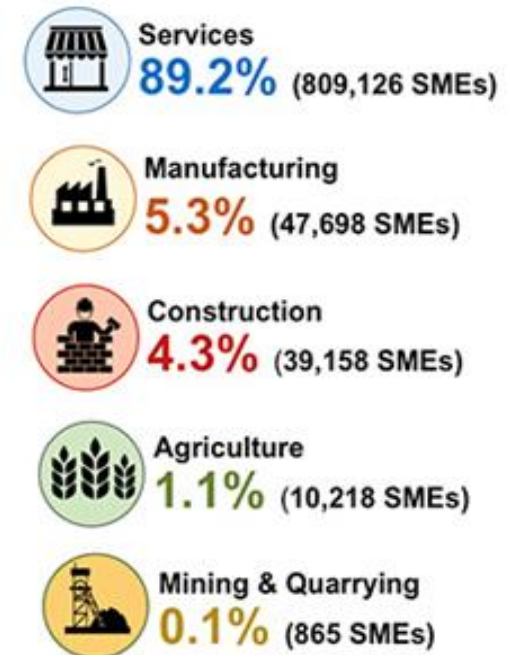
Fact 2:

SMEs are the backbone of the Malaysian economy.

**98.5%**  
business establishments  
in Malaysia are SMEs  
...cut across all sizes & sectors



**SMEs by Sector:**



# Incentives for SMEs

Question: What are the incentives that SMEs are entitled to?

In general, SMEs are entitled to, *inter alia*,:-

- Corporate tax reduction
- Tax incentives
- Stamp duty reductions/exemptions
- Financial Assistance (e.g. grants, soft loan..etc)
- Annual budget incentives



# Reduced Corporate Tax Rate

- Generally, the chargeable income for non-SME companies are subjected to the tax rate of 24%.
- For SMEs, the first RM500,000 of the chargeable income will be subjected to the tax rate of only 18%. For the remaining chargeable income exceeding RM500,000 the tax rate will be at 24%.
- Note: to be eligible the SME must be a company resident in Malaysia which has a paid up capital of ordinary shares of RM2.5 million or less at the beginning of the basis period of a YA provided.

# Tax Incentives

- Pioneer Status
- Investment Tax Allowance
- Reinvestment Allowance
- Accelerated Capital Allowance
- Industrial Building Allowance



<http://www.smecorp.gov.my/index.php/en/resources/2015-12-21-11-07-06/handbook/book/62/Array>

## ... Tax Incentives

- Pioneer Status (“PS”)
  - Benefit: 70-100% off on company’s statutory income (“SI”).  
*(Income after deduction of allowable expenses (ie: payment for wages, rental of business premise) and capital allowances ie: assets used in the business)*  
*(Note that the percentage of exemption will vary depending on the type of activities/sectors).*
  - PS may be granted to all companies participating in a promoted activity and the power to determine any promoted activities lies with MITI. Currently the list of sectors includes, inter alia, manufacturing, agricultural, hotel, tourism, R&D and technical or vocational training
  - Period: 5-10 years.
  - Regulatory body: Malaysian Investment Development Authority & Inland Revenue Board & Ministry of International Trade & Industry

## ... Tax Incentives

- Investment Tax Allowance (“ITA”)
  - Alternative to PS (mutually exclusive from PS).
  - Benefit: 60-100% off on qualifying capital expenditure (QCE) incurred such as factory, plant, machinery, etc.  
(Note that the percentage of allowance will vary depending on the type of activities/sectors).
  - For projects with longer gestation period and high capital expenditure, it would be more beneficial to opt for Investment Tax Allowance.
  - Period: within 5-10 years from the date the first QCE is incurred.
  - Regulatory body: Malaysian Investment Development Authority & Inland Revenue Board

# ... Tax Incentives

- Investment Tax Allowance (“ITA”)

## INVESTMENT TAX ALLOWANCE (ITA)

### Eligibility

As an alternative to pioneer status, a company intending to carry on a FAPP can apply for approval for ITA. If a company's application is approved, it will be entitled to the incentive for a period of five years from the date of the approval, which may be backdated.

With the consent of the Minister of International Trade and Industry, a company granted approval for ITA is allowed to surrender its approval retrospectively, so as to enjoy reinvestment allowance under Schedule 7A, Income Tax Act 1967, or for any other reason, but not so as to enjoy pioneer status. Reinvestment allowance is not available to a company enjoying pioneer status or investment tax allowance.

### Exempt and non-exempt income

ITA is a capital expenditure-based incentive which is given by way of an exemption of income. Income is computed in the normal way down to statutory income level, at which point the eligibility for exemption can be determined. Normal capital allowances may also be claimed but there is no compulsion to do so. Loss relief is also given in the normal way. Unlike pioneer status, there is no requirement to offset losses against exempt income.

ITA is a 'once only' allowance which is given at the standard rate of 60% (or higher rate where eligible) of qualifying capital expenditure for the basis period in which the capital expenditure is incurred. Eligibility lasts for five years from the date of approval. The allowance is used to exempt statutory income, with a limit of 70% on that income (or higher rate where eligible). Any allowance not used may be carried forward indefinitely. Where the 70% restriction applies, the balance of 30%, as under pioneer status, becomes liable to tax. As in the case of pioneer status, exempted income can be used for the payment of exempt dividends.

Capital expenditure in relation to manufacturing refers to capital expenditure incurred on a factory or on any plant and machinery used in Malaysia in connection with, and for the purposes of, the promoted activity or product. It does not include buildings used as living accommodation or plant and machinery, where such buildings, plant and machinery are provided wholly or partly for the use of a director or an individual who is a member of the management, administrative or clerical staff.

### EXAMPLE 3

Topside Gdn Bhd commenced business as a manufacturer of steel construction equipment on 1 July 2006, the date from which its FAPP was given approval for ITA. Accounts are made up each year to 30 June and the details for the business for the first two years are follows:

Year to 30 June	2007 RM	2008 RM
Adjusted income/(loss)	(100,000)	1,000,000
Loan interest received	2,000	3,000
Approved donation	1,000	5,000
Capital expenditure:		
Factory building	500,000	
Plant and machinery for manufacturing	750,000	
Crane for heavy lifting		200,000
Four-wheel drive for use of factory manager		160,000
The capital allowances are:	320,000	200,000

The total income and the exempt amount can be calculated as follows:

Year of assessment	2007 RM	2008 RM
Adjusted income	-	1,000,000
Capital allowances (RM320,000 + RM200,000)		(520,000)
Statutory business income		480,000
Less exemption for ITA RM870,000 (RM750,000 + RM120,000)		(336,000)
Aggregate statutory income		144,000
Unabsorbed business loss b/f (RM100,000 - RM2,000)		98,000
		46,000
Loan interest	2,000	3,000
Aggregate income	2,000	49,000
Current year business loss (RM100,000)	(2,000)	-
Approved donation (RM5,000 limited to 7% of aggregate income)		(3,430)
Total income		45,570
Exempt account		336,000
Reinvestment allowance carried forward (RM750,000 + RM120,000 - RM336,000)		534,000

### ITA workings

Year of assessment	2007	2008
Factory building	500,000	
Plant and machinery for manufacture	750,000	
Crane for heavy lifting		200,000
Four-wheel drive for use of factory manager - not eligible		
	1,250,000	200,000
ITA at 60%	750,000	120,000

This is QCE

# ... Tax Incentives

 <small>MALAYSIAN INVESTMENT DEVELOPMENT AUTHORITY</small>	<b>IK/JA-1</b> <small>(21.10.2013)</small>	<a href="http://www.mida.gov.my">www.mida.gov.my</a>
---	---	--

**APPLICATION FOR INCENTIVE AND/OR EXPATRIATE POSTS  
FOR A SMALL-SCALE MANUFACTURING COMPANY**

+	(I) Type of application (Please tick (✓) where relevant):	
	(a) Incentive	
	(i) Pioneer Status	<input type="checkbox"/>
	or	
	(ii) Investment Tax Allowance	<input type="checkbox"/>
	and/or	
	(b) Expatriate Posts	<input type="checkbox"/>

(II)	Proposed products/activities	HS tariff code	Proposed factory location	Incentive/Grant Approved By Other Government Agencies

<http://www.mida.gov.my/home/forms-&-guidelines-for-manufacturing-sector/posts/>

## ... Tax Incentives

- Reinvestment Allowance (“RA”)
  - Specifically for companies engaged in manufacturing or selected agricultural activities that reinvest for the purposes of expansion, modernisation or diversification of its existing business.
  - Benefit: 60%-70% off on qualifying capital expenditure (QCE) incurred by the company.
  - Period: 15 years (Any unutilised allowance can be carried forward to subsequent years until it is fully utilised).
  - Regulatory body: Inland Revenue Board

## ... Tax Incentives

- Accelerated Capital Allowance (“ACA”)
  - Given to companies that reinvest in the manufacture of promoted products after benefitting RA for 15 years.
  - Benefit: ACA provides a special allowance, where the capital expenditure is written off within three years, i.e. an initial allowance of 40% and an annual allowance of 20%.
  - Regulatory body: Inland Revenue Board

## ... Tax Incentives

- Industrial Building Allowance (“IBA”)
  - Specifically for expenditure on construction or purchase of a building for manufacturing, agriculture, mining, etc.
  - Benefit: Initial allowance of 10% and an annual allowance of 3%.
  - Period: 30 years.
  - Regulatory body: Inland Revenue Board

# Stamp Duty Exemptions

- Generally, the stamp duty payable for loan agreements is 0.5%.
- For SMEs obtaining a loan, the following stamp duty rates will apply:-

<b>LOAN (RM)</b>	<b>STAMP DUTY RATE</b>
Up to RM250,000.000	0.05%
Between RM250,001.00 to RM1,000,000.00	0.25%
RM1,000,001.00 onwards	0.5%

# Financial Assistance

- Grant for business start ups for the (manufacturing and services sector) – RM40,000.
- Grant for product and process improvement (manufacturing and services sector) – RM500,000.
- Grant for certificate and quality management system (manufacturing and services sector) – RM250,000.
- Rehabilitation fund for small businesses (all sectors) – RM1.5 million.
- Soft loan scheme for factory relocation (industrial sector) – RM50,000 to RM1 million.
- SME Emergency Fund for the refurbishment of premises due to disasters – RM100,00 in a hybrid manner of grant and loan.

<http://www.smecorp.gov.my/index.php/en/resources/2015-12-21-11-07-06/handbook/book/18-sme-handbook/5-handbook>



# Annual Budget Incentives

The following are some of the sums allocated by the Malaysian Government in its 2018 budget as a move to assist SMEs:-

- RM200 million soft loans, grants and training programs for SME under SME Corp
- RM82 million for the development of halal industries
- RM50 million SME loans through Koperasi Jayadiri Malaysia Bhd
- RM100 million in loans to enhance automation of local furniture production for export

etc.....

# Part 3

## Importance of Legal Advice to SMEs

Question: Why is it important for SMEs to seek legal advice?

Answer:

To prevent unnecessary expenditure that may be incurred through disputes or regulatory infringements.



# Question: When will legal advice be required?

Answer:

Situations where legal advice will be required varies but will generally fall into one or more of the following categories:-

- A. Human resource and trade secret management
- B. Regulatory and compliance
- C. Intellectual property protection
- D. Alternative dispute resolution
- E. Achieving and Meeting Financial Requirements
- F. Debt recovery

# A. Human Resource and Trade Secret Management

Question: How can lawyers assist SMEs with regards to Human Resource and Trade Secret Management?

Answer:

Lawyers will be able to assist in the drafting and reviewing of agreements such as employee contract/handbook.

Lawyers will also be able to provide SMEs with non-disclosure agreements or confidentiality agreements to protect their trade secrets.



## B. Regulatory and Compliance

Question: Why is it important to observe and comply with the necessary rules and regulations?

Answer: There are rules and regulations governing each industry and breach of such rules may result in either a fine or imprisonment.

Example:

In certain industries such as manufacturing, specific license is mandatory for emitting waste into the atmosphere ie: license to install air pollution control equipment.

S22(1) Environmental Quality Act (“EQA”) 1974: No person shall, unless licensed, emit or discharge any environmentally hazardous substances, pollutants or wastes into the atmosphere.

S22(3) EQA 1974: Penalty for atmospheric pollution is max. RM100k or jail term of up to 5 years or both pursuant to s22 EQA 1974

## ... Regulatory and Compliance

Question: Other than prevention of breach, what else can a lawyer do to assist a business in terms of compliance and regulatory?

Answer:

Aside from prevention of breach, lawyers will be able to provide legal advice to keep a business updated with the latest changes to the relevant laws and regulations (eg: Companies Act 2016)



## **... Regulatory and Compliance**

Changes to the Companies Act 2016 include:

- Unlimited capacity
- Formation of single member company
- Simplification of incorporation documents
- MOA & AOA to Constitution
- Execution of documents
- No par value

# Unlimited capacity- s21 CA 2016

- A company has unlimited capacity to carry on or undertake any business or activity unless it is limited by its constitution

# Single Member Company/ Single Director For Private Companies

CA 1965	CA 2016	REASONING
<input type="checkbox"/> Two (2) Members/ Directors to form a Company	<input type="checkbox"/> A <b>Private Company</b> can be incorporated with a <b>single Director (1)</b> and that single Director may also be the <b>single (1) member.</b>  <input type="checkbox"/> A <b>Public Company</b> must have at least 2 Directors	Allows for a <b>SINGLE MEMBER Company</b> for <b>Private Companies.</b>  Ease of carrying out business with minimum entry requirement. <b>[Source: SSM]</b>

# Secretary No Longer Needed For Incorporation & Simplification Of Incorporation Documents

CA 1965	CA 2016
<ul style="list-style-type: none"><li>❑ Form 6, copy of M&amp;A, Form 48A required for incorporation.</li></ul>	<ul style="list-style-type: none"><li>❑ Incorporation done through submitting of ONE <b>statement/Super form</b> with the particulars i.e. Name, private/public registered office, class &amp; number of shares, etc. [s14(3) 2016]</li><li>❑ <b>AND</b> a statement by promoter or Director confirming consent and eligibility i.e. not disqualified [s14(4) CA 2016]</li></ul>
<ul style="list-style-type: none"><li>❑ Incorporation done through Company Secretary</li></ul>	<ul style="list-style-type: none"><li>❑ <b>NOT MANDATORY</b> to appoint Secretary or have M&amp;A (constitution) at point of incorporation. [s14(3)(g) CA 2016]</li><li>❑ However, Secretary needs to be appointed within 30 days from incorporation. [s 236 CA 2016]</li></ul>

## SSM FAQ Section C Question 10:

### ***The Companies Act 2016 introduces a super form for incorporation. What actually is the super form?***

- The super form is an electronic template which will replace the various forms currently required for incorporation process (i.e. Form 6, Form 48A and M&A 7 under the previous Companies Act 1965). The form is accessible through the MyCoID 2016 Portal.
- Section 14 of the Companies Act 2016 provides for the incorporation process. Amongst others, a person is required to provide the following information:-
  - Name of proposed company;
  - Status of private or public company;
  - Nature of business;
  - Proposed registered address; and
  - Details of the proposed directors, members & company secretary

**COMPANIES ACT 2016**  
**Section 14**  
**APPLICATION FOR REGISTRATION OF A COMPANY**

PARTICULARS OF COMPANY	
Proposed company name	
Lodging Reference No	
Purpose	
Company Type	
Sub Type	
<b>General nature of business</b>	
	<b>MSIC Code</b>
1	
2	
3	
Business Description	
Registered Address	
Email	
Office No	
Fax number	
Business Address	
Email	
Office No	

[http://www.ssm.com.my/sites/default/files/companies\\_act\\_2016/incorp\\_superform.pdf](http://www.ssm.com.my/sites/default/files/companies_act_2016/incorp_superform.pdf)

Lodger Information	
Name	
NRIC	
Prescribed body	
License No/Membership No	
Address	
Phone No.	
Email	

# EVIDENCE OF REGISTRATION/INCORPORATION

CA 1965	CA 2016	REASONING
<ul style="list-style-type: none"><li>❑ Certificate of incorporation is conclusive evidence [s16(4) CA 1965]</li></ul>	<ul style="list-style-type: none"><li>❑ Notice of registration is conclusive evidence of incorporation of Company. [s19 CA 2016]</li><li>❑ Purchase of certificate of incorporation is <b>OPTIONAL</b>.</li></ul>	Ease of carrying out business with minimum entry requirement. <b><u>[Source: SSM]</u></b>

# MOA & AOA to Constitution

CA 1965	CA 2016	REASONING
<ul style="list-style-type: none"><li>❑ Company <b>MUST</b> have memorandum of association (“MOA”) &amp; articles of association (“AOA”).</li></ul>	<ul style="list-style-type: none"><li>❑ <b>MOA and AOA</b> now collectively known as “<b>Constitution</b>”</li><li>❑ <b>OPTIONAL</b> for Company whether or not to have a Constitution <b><u>AFTER</u></b> incorporation. <b>[s31 CA 2016]</b></li><li>❑ <b>UNLESS</b> it is a company limited by guarantee (constitution must be submitted at point of incorporation) <b>[s 38 CA 2016]</b></li></ul>	<p>Ease of carrying out business with minimum entry requirement. <b>[Source: SSM]</b></p> <p><b>*NOTE:</b> For Companies incorporated under the old CA 1965, their MOA &amp; AOA shall form the constitution [s34(c) CA 2016]</p>

# Constitution For Newly Registered Companies

- MOA and AOA replaced by **single** document called Constitution.  
[s 31 CA 2016]
- Company after registration, has **choice** to have or not to have a Constitution. (except for Companies Limited by Guarantee)
- A company wishing to adopt a Constitution after registration may do so by passing a **special resolution**.  
[s 32 CA 2016]
- If the Company decides not to adopt a constitution the company, each director and member shall have the rights, powers, duties and obligations as set out in Companies Act 2016.  
[s 31(3) CA 2016]

# Constitution For Existing Companies

- For an existing Company, the existing MOA and AOA will automatically form Constitution unless Company resolves otherwise.  
**[s 619(3) CA 2016]**
- Existing company which decides to revoke existing MOA & AOA, must pass a resolution to that effect. In such event, the company, each director and member shall have the rights, powers, duties and obligations as set out in Companies Act 2016.  
**[s 619(3) CA 2016]**
- If Company decides to maintain existing MOA and AOA as Constitution, it may want to amend any part of the Constitution to comply with provisions of the Companies Act 2016.
  - Any provisions of the Constitution which contravenes the provisions of the Companies Act 2016 has no effect.  
**[s 32(1) CA 2016]**

SSM FAQ Section B Question 3:

***With no constitution how can the public be assured when dealing with companies. Companies can start new businesses anytime.***

Answer:

- Although a company is not required to have a constitution, it is still required to notify the Registrar of its nature of business or when there is a change to the company's nature of business. This information will be publicly available.

SSM FAQ Section B Question 2:

***Since M&A is optional, if an existing public company intends to do away its M&A, what is the procedure? Is shareholders' approval required? To notify SSM and other regulators such as BNM for FI?***

**Answer:**

- Except for a company limited by guarantee, a public company has the option of whether to have a constitution or not. As such, in cases where an existing public company (other than a company limited by guarantee) opts to do away with its constitution, it must obtain approval from its shareholders.
- The company is required to notify SSM of its decision. It is advisable for public companies which are subject to the requirements of other written laws to observe such requirements, including the resolution for doing away with the constitution or informing the respective regulators/authorities as the case may be

SSM FAQ Section B Question 7 :

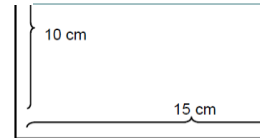
***If a company opted to adopt a constitution, does the constitution need to be lodged?***

**Answer:**

- Yes, the constitution must be lodged with the Registrar. Similarly, any amendment/alteration to the constitution must also be lodged.

Company No.

--	--



J.M. CHONG, VINCENT  
CHEE & CO

**COMPANIES ACT 2016**

**Section 36**

**NOTIFICATION OF ALTERATION OR AMENDMENT TO CONSTITUTION**

\_\_\_\_\_ (Company Name)

**PARTICULARS OF AMENDMENTS**

- Date of special resolution : \_\_\_\_\_
- Amendments made to clauses: (State the :  
Clauses and attach a copy of Constitution\*/ :  
Memorandum of Association\* and / or Articles of :  
Association\* as amended) :
- Abolition of Memorandum of Association : \_\_\_\_\_
- Abolition of Articles of Association : \_\_\_\_\_

**Declaration:**

I confirm that the facts and information stated in this document are true and to the best of my knowledge.

**Signed:**

\_\_\_\_\_  
(Secretary)

Name : \_\_\_\_\_  
License no/ Membership No. : \_\_\_\_\_  
SSM Practicing Certificate No. : \_\_\_\_\_  
Date : \_\_\_\_\_

**Attention:**

It is an offence under section 591 of the Companies Act 2016 to make or authorize the making of a statement that a person knows is false or misleading and that person may be liable, upon conviction, to imprisonment for a term not exceeding ten years or to a fine not exceeding RM3million or to both.

\* Strike out whichever is inapplicable

**LODGER INFORMATION**

Name : \_\_\_\_\_  
NRIC No : \_\_\_\_\_  
Address : \_\_\_\_\_  
Phone No : \_\_\_\_\_  
Email : \_\_\_\_\_

J.M. CHONG, VINCENT CHEE & CO

SSM FAQ Section B Question 5:

***What is the procedure applicable for existing companies to contract out from its Memorandum and Articles of Association?***

**Answer:**

- Under the general transitional provisions (section 619(3)) existing companies may contract out from its Memorandum and Articles of Association by passing a resolution to that effect.

SSM FAQ Section B Question 6:

***If a company is incorporated without a constitution, how is the majority of signatories to a resolution being determined?***

**Answer:**

- In cases where a company does not a constitution, the company may rely on the following:
  - (a) Passing a resolution of members/shareholders – sections 290 to 296; and
  - (b) Passing a resolution of board – paragraphs 9 – 12 of the Third Schedule of the Companies Act 2016.

SSM FAQ Section B Question 8:

***If a company opts to have constitution post incorporation, does it need to be stamped? Alternatively, if a company adopts a constitution for the very first time in any time during the life of a company, do we need to stamp the constitution at least once?***

**Answer:**

- A company which opts to adopt a constitution will need to stamp the constitution. The e-stamping service is available through the MyCoID 2016 Portal.

# Execution of Documents

CA 1965	CA 2016	REASONING
<input type="checkbox"/> Common seal is mandatory	<input type="checkbox"/> Common seal is OPTIONAL [s 61 CA 2016]	Easier conducting of business
<input type="checkbox"/> Execution of documents are usually through:-  <input type="checkbox"/> affixing common seal <b>AND</b> countersigned by a person authorised to do so. <b>[Table A Reg 96]</b>	<input type="checkbox"/> Execution of documents by any of the following methods:-  <input type="checkbox"/> Affixing Common Seal <b>OR</b>  <input type="checkbox"/> Signed by 2 authorised officers one of which must be a Director [ <i>authorised officer being Director, Secretary or any other person approved by the Board</i> ]  <input type="checkbox"/> In the case of a single Director, by that Director and witnessed [s 66 CA 2016]	Affixing Common Seal is optional for ease of conducting business
	A <b>contract</b> may be made by:- (a) the Company in writing under common seal (b) on behalf of the company in writing by an expressly or impliedly authorised person (c) On behalf of the company orally by any expressly or impliedly authorised person [s 64 CA 2016]	
	A document is validly executed as a <b>deed</b> if:- (a) It is duly executed by the company; and (b) It is delivered as a deed [s 67 CA 2016]	

SSM FAQ Section G Question 1:

***Q: With common seal requirement being optional, do you think conflict between 2 teams in boardroom would become more rampant i.e 2 directors may sign off a transaction without the Board's approval?***

**ANSWER:**

- The fact that common seal requirement is optional under the law is irrelevant as the directors still have a duty to act within their proper authority.
- Sections 210 – 234 of the Companies Act 2016 provide for directors' duties and responsibilities. Directors who breach these requirements may face civil and/or criminal enforcement actions.

SSM FAQ Section G Question 2:

***Q: If a company opts not to have common seal, would other Government authorities, for example the Land Office still requires the company to use common seal during registration?***

**Answer:**

- The fact that the company opted not to have a common seal does not override the provisions of such requirement under any other written laws. As such, the company may adopt a common seal when it becomes necessary to comply with the requirements of other written laws, for example when dealing with the Land Office.

## SSM FAQ Section G Question 3:

### ***What is the ambit and scope of section 66 with regards to the execution of document?***

#### **Answer:**

- Section 66 should be read in totality to which the scope is intended to cover the execution of documents which are required under any written law/regulations or agreement to be executed under common seal.
- This means that where there is a requirement under any written law/regulations or agreement requiring the documents to be executed by affixing the common seal, the company the following option:
  - (a) by affixing the common seal in accordance with the conditions or limitations in the constitution; OR
  - (b) by signature in accordance with section 66 i.e. signed by two authorized officers, one of whom must be a director or in the case of a single director, by that director in the presence of a witness.
- **Any document which is executed without a common seal but in accordance with section 66 would have the same effect as if it was executed under the common seal.**

# MOVE FROM PAR VALUE TO



# NO PAR VALUE OF SHARES



## ... No Par Value

- Section 74 provides that ALL shares issued before or upon the commencement of the Companies shall have No Par Value

# ... No Par Value

CA 1965	CA 2016
<ul style="list-style-type: none"><li>❑ Company must determine NOMINAL value of shares [s 18(1)(c) CA 1965]</li></ul>	<ul style="list-style-type: none"><li>❑ Directors determine what price shares are issued at.</li></ul>
<ul style="list-style-type: none"><li>❑ Company must state its authorised share capital and minimum/nominal/par value for each share and the number of shares issued by the Company must not exceed authorised share capital.</li></ul>	<ul style="list-style-type: none"><li>❑ Old concepts no longer applicable: Company not required to state authorised share capital or nominal value of shares.</li><li>❑ Shares issued at premium and share premium has become redundant.</li></ul>
<ul style="list-style-type: none"><li>❑ Money paid for shares which purchase price are higher than par value go into share premium account.</li></ul>	<ul style="list-style-type: none"><li>❑ Share premium account concept no longer applicable.</li></ul>

# Reason behind No Par Value

- Nominal or Par Value which is valued at the time of incorporation does not reflect true value of company which has changed over time since incorporation and is based on its current financial situation.
- The value attached to shares does not provide any protection to shareholders.
- The shareholders rights attached to the shares such as right to speak, vote receive dividends depends on the **number of shares held** and **NOT** on the par or nominal value of shares when it was first purchased.

# Saving provisions for existing contracts to allow for smooth transition

- Existing contracts, constitutions, trust deeds or other documents entered into before the commencement date which uses the par value (“**par value documents**”) shall remain in effect, and the Act provides deeming provisions for references made in the par value documents for transition into the no par value regime.
- i.e. a reference to the par or nominal value of a share (issued before CA 2016) shall be a reference to the par or nominal value of the shares immediately before CA 2016, and reference to share premium shall be construed as a reference to any residual share capital in relation to the share.

[s 618(7) CA 2016]

- Despite this, companies should consider amending their constitution to reflect the abolition of par value and related concepts to avoid confusion and reviewing their existing contracts to determine whether other consequential amendments should be made.

# C. Intellectual Property Protection

## Infringement of Trade Mark



*St. John Ambulans Malaysia v PJ Uniform Sdn Bhd*  
[2014] 1 LNS 1534

Trade mark infringement pursuant to Section 38 of the Trade Marks Act 1976 and common law passing off the St. John emblem used on uniform clothing

# ... Intellectual Property Protection

## **Background:**

St. John Ambulans Malaysia – registered its SJAM emblem with the Intellectual Property Corporation of Malaysia with Certificate No. 2010017565 on 9<sup>th</sup> July, 2011.

PJ Uniform Sdn. Bhd. – A company involved in the business of manufacture, sales, supply and retail of uniform clothing. Imprinted a close resemblance of the registered SJAM emblem on its retailed T-shirt clothing (unauthorized use).

## **Judgment:**

Court held that St. John Ambulans Malaysia is the common law proprietor of the SJAM emblem and ordered an perpetual injunction prohibiting and restraining PJ Uniform to print or use in any manner the SJAM emblem trade mark or resembling it on or relating to articles of clothing, shoes and headgear.

## D. Alternative Dispute Resolution

Question: What is Alternative Dispute Resolution (ADR)?

Answer:

The use of methods such as mediation, arbitration or negotiation to resolve a dispute without the need to go to court.

Question: How can lawyers assist SMEs in ADR?

Answer:

As going to court is known to be costly, time consuming and damaging to both SME's reputation and its relationship with other parties, lawyers can assist the SME in choosing an alternative method for dispute resolution.

Common types of ADR include:

- Negotiation
- Mediation
- Arbitration

# ... Alternative Dispute Resolution

## Negotiation

Negotiation is a process where the parties that are in dispute meet in good faith to discuss their dispute with the goal of coming to a mutually agreeable resolution.



# ... Alternative Dispute Resolution

## Mediation

Mediation is a process where the disputing parties meet with a neutral person who facilitates the discussion of their disagreement and the negotiation of a compromise. The main goal of the mediator is not to judge which party is "right" or "wrong," but to encourage and help the parties to communicate about their differences so that a mutually-agreeable solution can be reached.



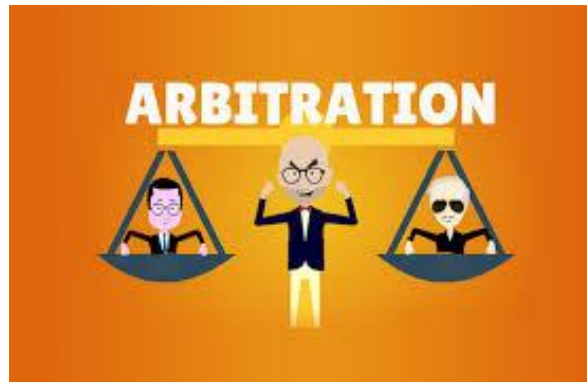
# ... Alternative Dispute Resolution

## Arbitration

Arbitration is a process where the disputing parties meet with a third party who hears the case as presented by the parties in dispute and make a decision or award in the same way as a Judge would. The third party will usually be a person that has knowledge or skill in the particular area of dispute.

Note:

In most cases, arbitration will stem from arbitration clauses that is inserted into contracts to make it compulsory for the contracting parties to engage in arbitration prior to any court appearances.



# E. Achieving and Meeting Financial Requirements

Question: How can lawyers assist SMEs in achieving modes of financing?

Answer:

Lawyers will be able to assist by way of review and advice on ways in achieving or meeting the company's financing requirements, facilitate and assist in preparation of the financing documents.

Common types of alternative modes of financing available to SMEs include:

- Equity financing
- Debt financing
- Peer-to-peer financing

# ... Achieving and Meeting Financial Requirements

## Equity financing

Equity financing is a process where money is raised by selling shares of the business to willing investors. In most cases, the investors will invest into a company via equity in order to obtain a percentage of its proceeds.

As SMEs will worry of losing control over their own business, Lawyers will be able to assist SMEs in drafting shareholder agreements to govern such transactions and to prevent full control to be given to the investors.

# ... Achieving and Meeting Financial Requirements

## Debt Financing

Debt financing is the conventional way of financing where a company borrows a sum of money from the bank or an authorised money lender to run the business.

In this instance, lawyers will come into place to assist in preparing the relevant loan agreements.



# ... Achieving and Meeting Financial Requirements

## Peer-to-peer financing

Peer-to-peer financing is introduced in May 2016 and is a method of financing that enables SMEs to borrow money via an online platform regulated by the Securities Commission of Malaysia without the use of a bank.

Lawyers will be able to assist SMEs in vetting through and arranging its application documents prior to submission.

## F. Debt Recovery

Question: How can lawyers assist an SMEs on debt recovery?

Answer:

Debt recovery is a process to recover / seek payment of debt from individuals, businesses or companies in the event of refusal or delays in payment of debts.

Lawyers can assist an SME in recovering its debts through court proceedings.



# ... Debt Recovery

## Court proceedings

Court proceedings debt recovery is a process whereby a lawyer can assist an SME to initiate a legal action against a debtor to seek payment, failing which a court proceeding can commence.

The court in these situations may grant the following orders to assist in debt recovery:

- Winding up order; and/or
- Bankruptcy order; and/or
- Garnishee order; and/or
- Writ of seizure and sale





# THE END

---

copyrights of  
J.M. Chong, Vincent Chee & Co.

Prepared by:

Brandon Hong Cho Yaw

Dennis Ng Cin Yan

Joanne Ng Kai Shin

Elaine Koh Yee Ling

Ong Zhao Di