MALAYSIA'S NEW COMPANY LAW

V. G. VENTURINI

(Continued from the last issue)

16. *Meetings and proceedings*

The Act re-introduces the provisions of the existing legislation [203] governing "the statutory meeting" and the "statutory report." A minor addition is a provision enabling the company at the statutory meeting to appoint by ordinary resolution a committee or committees of inquiry and at any adjourned meeting by special resolution approve the winding up of the company if notwithstanding any other provision of the Act at least seven days notice of intention to propose the resolution has been given to every member of the company.[204]

Section 143 adopts Section 131 of the United Kingdom Companies Act, 1948, providing that a company shall in each calendar year, hold an annual general meeting specified as such in the notices convening it, and not more than fifteen months must elapse between one annual general meeting and the next. But it suffices if the first annual meeting is held within eighteen months of formation even though this is not in the first or second year of incorporation. Penalties are imposed for default on which the Court on the application of any member may call a meeting.[205]

In addition to the power given to directors under Table A to call an extraordinary meeting, the present law provides [206] that the directors must convene such a meeting on the requisition of holders of not less than one-tenth of the paid up capital carrying voting rights. If they fail to do so the requisitionists, or any of them representing more than half of their total voting rights, may themselves convene the meeting, and their reasonable expenses shall be paid by the company and recovered from the fees of defaulting directors. Section 144 of the Act retains all these provisions.[207]

Further, the Act introduces the provisions of Section 135 of the United Kingdom Companies Act, 1948, providing for the Court on its own motion or on application by either a director or a member,

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[203] Ma., s. 114; Sa., s. 114; Sin., s. 114; Sar., s. 112.
[204] Act, s. 142; Aust., s. 135; U.K., s. 130.
[205] Act, s. 143; Ma., s. 113; Sa., s. 113; Sin., s. 11; Sar., s. 111; Aust., s. 136; U.K., s. 131.
[206] Ma., s. 115; Sa., s. 115; Sin., s. 115; Sar., s. 113.
[207] Act, s. 144; Aust., s. 137; U.K., s. 132.

to order a meeting to be convened if for any reason it is impracticable to call a meeting in any manner in which meetings may be called.[208]

Section 145 requires at least seven days notice to be given for a meeting of a company or of a class of members. In the case of an annual general meeting, short notice can be waived if all the members entitled to attend and vote agree; in the case of any other meeting, this must be approved by a majority which holds in nominal value not less than ninety-five per cent of the shares with the right to attend and vote. "The accidental omission to give notice of a meeting to, or the non-receipt of a meeting by, any member shall not invalidate proceedings at a meeting." [209]

Section 149 is an important provision introducing votes by proxy, adopting substantially the provisions of Section 136 of the United Kingdom Companies Act, 1948. Members of a company are given a right to attend and vote by a proxy who need not be a member. Unless the articles otherwise provide, a proxy shall not be entitled to appoint more than two proxies to attend and vote at the same meeting and where he appoints two proxies he must specify the proportions of his holdings to be represented by each proxy. If he fails to do this the appointment of the proxies will be a nullity.

Shareholders must be informed of their rights to appoint proxies in the notice of the meeting. Moreover, if proxies are solicited at the company's expense the invitation must be sent to all members entitled to attend and vote; the board cannot invite only those from whom they expect a favorable support.[210]

Section 148 is a new provision not found in the Australian uniform legislation or in the United Kingdom legislation. This section governs members' rights at meetings. Subject to the provisions in the articles suspending the rights of preference of share holders to attend and vote at a meeting of a company, every member shall, notwithstanding any other provision in the memorandum or articles, have a right to attend and vote on any resolution before the meeting. However, this is also subject to an express provision in the articles that a shareholder is not entitled to vote if he has not paid for all calls made by the company in respect of shares held by him.[221]

Provisions relating to quorums and appointment of a chairman of the meeting are substantially similar to those contained in Section

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[208] Act, s. 150; Aust., s. 142.
[209] Act, s. 145; Aust., s. 139; U.K., s. 137.
[210] Act, s. 149; Aust., s. 141; U.K., s 136.
[211] Act, s. 148.

139 of the United Kingdom Companies Act, 1948.[212] So too are the provisions relating to ordinary and special resolutions. However, extra-ordinary resolutions are no longer provided for, these being treated as special resolutions.[213]

Section 146 adopts the provisions of Section 137 of the United Kingdom Companies Act, 1948, governing articles containing members' right to demand a poll. This section provides that articles which seek to exclude the right to demand a poll on any question, other than the election of a chairman or the adjournment of a meeting, shall be void. Nor should they make ineffective a demand by not less than five members having a right to vote, or by members representing not less than one-tenth of the total voting rights or holding shares having a right to vote on which a sum has been paid up equal to not less than one-tenth of the total sum paid up on all the shares conferring that right. Further, a proxy may demand or join in demanding a poll.[214]

17. *Accounts and audit*

Statutory provision for disclosure of financial affairs of a company is not the sole means of effective protection of investors' or creditors' interests. Supervision of a company's financial affairs by conscientious auditors is an equally if not more potent weapon whereby dishonest directors are brought to book.

To what extent auditors are given statutory booking to carry out this heavy responsibility this is now to be considered.

Auditors are usually appointed by the company and initially the directors of the company may appoint the auditors. When so appointed they may hold office until the first annual general meeting. However, the company in a general meeting may remove them from office before the annual general meeting. If the directors fail to appoint, the company in a general meeting may do so. All appointments other than the initial appointment are to be made by the company in a general meeting. In this respect, therefore, the independence of auditors from the control or influence of directors is insured. The directors may however fill any casual vacancies. If the company itself fails to appoint, the Registrar may, on the application of any member, make the appointment.[215]

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[212] Act, s. 147; Aust., s. 140.

[213] Act, s. 152; Ma., s. 118; Sa., s. 118; Sin., s. 118; Sar., s. 116; Aust., s. 144; U.K., s. 141.

[214] Act, s. 146; Aust., s. 139.

[215] Act, s. 172(1), (2), (3) and (10); Ma., s. 132; Sa., s. 132; Sin., s. 132; Sar., s. 131; Aust., s. 165 (1), (2), (3) and (10); U.K., ss. 159 and 160.

The existing legislation contains no provision for removal of auditors. In the Act, Section 172 provides that an auditor may be removed from office by the company in a general meeting provided special notice is given to the auditor concerned and a copy of it is lodged with the Registrar. The auditor whose appointment is sought to be revoked may make representations and such representations are to be circulated to all members to whom notice of the meeting is sent. A successor may be appointed at the meeting convened to discuss the removal of the auditor provided a resolution to this effect is passed by not less than three-fourths of the members entitled to vote. If no successor is appointed at the meeting, the company may still appoint one at an adjourned meeting provided that the nominee's name must be submitted at least ten days before the adjourned meeting is scheduled to be held.

Once an auditor is removed, the Registrar must be informed, and if the company fails to appoint a successor at an adjourned meeting convened for that purpose, the Registrar may himself appoint a successor. This successor will hold office until the next annual general meeting of the company.[216]

An auditor may resign from his office only if he is not a sole auditor of the company or he had given notice of his intended resignation and his resignation is accepted at a general meeting called to consider it. He may not resign in any other instance.[217]

Any person may apply to the Minister charged with the responsibility for finance to be approved as a company auditor.[218] Upon such application being received the Minister may "if he is satisfied that the applicant is of good character and competent to perform the duties of an auditor... approve the applicant as an auditor." In considering the suitability of the applicant, the Minister must therefore apply what in the realm of constitutional law is called "subjective test," and presumably, if an applicant whose application is rejected by the Minister seeks to challenge the Minister's decision, the courts will apply the same principles to the test as applied in constitutional law cases.[219]

The Minister may, however, delegate all or any of his powers under Section 8 to any person or a body of persons charged with the responsibility for the registration or control of accountants in

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[216] Act. 172(4), (5), (6), (7), (8) and (9); Aust., s. 165(4), (5), (6), (7), (8) and (9); U.K., ss. 159 and 160.

[217] Act, s. 172(14); Aust., s. 165(14); U.K., ss. 159 and 160.

[218] Act, s. 8(1); Ma., s. 134; Sa., s. 134; Sin., s. 134; Sar., s.131; Aust., s. 8(1).

[219] Vide *Nakkuda Ali v. Jayaratne* [1951] A.C. 66; *Liversidge v.* [1942] A.C. 206.

Malaysia. While a delegation of the Minister's power under this section to a body of persons such as the Society of Accountants is justifiable on the ground that such a Society is perhaps the most appropriate body to decide whether a person is competent to perform the duties of an auditor or otherwise, the fact that it is also to be vested with the power to decide whether a person is "of good character" is perhaps a source of danger, particularly when it is remembered that in making such a decision the body must apply the subjective test.

Under the Act, "any person who is dissatisfied with the decision of the Minister . . . or of any person or body of persons to whom the Minister has delegated all or any of his powers under this section may appeal to the Yang di-Pertuan Agong who may in his discretion confirm, reverse or vary such decision.[220] This provision attempts, albeit unsatisfactorily, to offset any accusation of denial of natural justice.

Certain persons apart from those who are not approved company auditors are specifically excluded by the proposed uniform Act from being qualified to be appointed as auditors. These persons "who shall not knowingly consent to be appointed or act as an auditor of a company" include persons who are indebted to a company or a related company to the extent of two thousand five hundred dollars, officers of a company or their partners, employers and employees, or partners or employees of an employee of an officer.[221]

Under the present law bodies corporate are prohibited from being appointed as company auditors.[222] No such provision is made in the proposed uniform Act. However, by a new provision only those firms all the partners of which are residents in Malaysia and are each an approved company auditor are permitted to be appointed as company auditors.[223]

The statutory duties of a company auditor are laid down in Section 174 of the Act:

"Every auditor of a company shall report to the members as to every balance sheet and profit and loss account (including every consolidated balance sheet and profit and loss account) laid before the company in a general meeting during the tenure of his office . . . that "in his opinion"—

(i) the balance sheet and profit and loss account are properly drawn up in accordance with the provisions of the Act

220 Act, s. 8(7) and (8); Aust., s. 8(7) and (8).
221 Act, s. 9; Ma., s. 133; Sa., s. 133; Sin., s. 133: Sar., s. 140; Aust., s. 9.
222 Ma., s. 270; Sa., s. 270; Sin., s. 170; Sar., s. 271.
223 Act, s. 9(4); Aust., s. 9(4).

so as to give a true and fair view of the state of the company's affairs;

(ii) the accounting and other records (including registers) examined by him are properly kept;

(iii) the director's report which is submitted together with the balance sheet and profit and loss account, in so far as it deals with matters examined by him, gives a true and fair view of such matters.

In addition he must in his report state the following:

(i) if he has not obtained all the information and explanations that he required, all particulars of such information and explanations;

(ii) if, in his opinion, proper accounting and other records (including registers) have not been kept by the company or the returns submitted from branches not visited by the auditor are inadequate, all such particulars;

(iii) if, in his opinion, according to the best information and the explanations given to him and as shown by the accounting and other records of the company the profit and loss account and the balance sheet are not in agreement with the company's accounts or are not properly drawn up so as to give a true and fair view of the results of the business of the company for the period of accounting or that the balance sheet and the profit and loss account are not in accordance with the provisions of the Act, all and particulars;

(iv) if, in his opinion, and according to the best information and explanations given him, the director's report does not give the information required by the Act, such particulars."

To insure that the auditor may properly carry out his work, the Act entitles him to have a right of access at all times to the accounting and other records (including registers) of the company and to require from the officers of the company or of a related corporation all such information and explanations as he may require. Further, he is entitled to attend all general meetings of the company and to receive all notices, circulars and other communications which are sent to members of the company.

Failure to provide the auditor with the information or to allow him access to the accounts renders the officer concerned liable to a fine of two hundred and fifty dollars.[224]

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[224] Act, s. 174; Ma., s. 135; Sa., s. 135; Sin., s. 135; Sar., s. 141; Aust., s. 167; U.K., s. 162.

While it is laudable that the Act should give the auditor such wide powers it is perhaps necessary to point out that such powers may be used either way, i.e., for or against the members' interests. This is because within his sphere of duty the auditor's discretion in deciding whether particular information or explanations given are sufficient to meet the requirements of the Act is not fettered by objective standards.

An auditor, if appointed by the company in a general meeting, shall receive such remuneration as may be fixed by the company in a general meeting, or if so authorized by the members at the last preceding annual general meeting, by the directors.[225] If he is appointed by the directors or by the Registrar his remuneration may be fixed by the directors or the Registrar respectively. A less wary company in a general meeting may therefore find itself putting an auditor in a situation of being at the mercy of the directors!

Section 173 provides that if a notice is sent either by at least five per cent of the total number of members or holders in aggregate of not less than five per cent in nominal value of the company's share capital, requiring the company to disclose particulars of any remuneration paid to an auditor of the company or his partner, employer or employee, in respect of services other than auditing services rendered to the company, the company shall prepare a statement containing such particulars, forward a copy of it to every member entitled to notice of a general meeting and lay such statement before the company in a general meeting. Failure to comply with this provision renders the company and every director in default and liable to a fine of two thousand five hundred dollars.[226]

Section 175 imposes on an auditor of a borrowing corporation the duty to report in writing to a trustee for debenture holders, particulars of any matter which the auditor in the performance of his duties as auditor becomes aware of and which in his opinion is relevant to the exercise and performance of a trustee for debenture holders.[227]

18. *Take-over offers and remedy in case of oppression*

New, at least in Malaysia, are the provisions concerning take-over offers contained in s. 179.

Section 179(1) provides: "In this section and in the Tenth Schedule—

[225] Act, s. 172(16); Aust., s. 165(15).
[226] Act, s. 173; Aust., s. 166.
[227] Act, s. 175; Aust., s. 167A.

"Offeree corporation", in relation to a take-over scheme or a take-over offer, means the corporation to shares in which the scheme or offer relates.

"Offeror corporation", in relation to a take-over scheme or a take-over offer, means the corporation or proposed corporation by or on behalf of which any take-over offer under the scheme, or the take-over offer, is made or to be made.

"Take-over offer" means an offer or proposed offer for the acquisition of shares under a take-over scheme.

"Take-over scheme" means a scheme involving the making of offers for the acquisition by or on behalf of a corporation or on behalf of a proposed corporation—

(a) of all the shares in another corporation or of all the shares of a particular class in another corporation; or
(b) of any shares in another corporation which (together with shares, if any, already held beneficially by the first-mentioned corporation or by any other corporation that is deemed by virtue of Section 6 to be related to that corporation) carry the right to exercise, or control the exercise of, not less than one-third of the voting power at any general meeting of the other corporation."

By sub-section (2), "A take-over offer shall not be made unless—

(a) the offeror corporation has, not earlier than twenty-eight days, and not later than fourteen days, before the offer is made, given or caused to be given to the offeree corporation notice in writing of the take-over scheme containing particulars of the terms of the take-over offers to be made under the scheme, together with a statement that complies with the requirements set out in Part B of the Tenth Schedule; and
(b) the offer complies with the requirements set out in Part A of that Schedule and there is attached to the offer—
  (i) a copy of the statement given or caused to be given by the offeror corporation to the offeree corporation in pursuance of paragraph (a) of this sub-section; and
  (ii) if the offeree corporation gives or causes to be given to the offeror corporation a statement in pursuance of paragraph (a) of sub-section (3) of this section or in pursuance of any corresponding enactment of another country—a copy of that statement."

By sub-section (3), "Where an offeree corporation receives a notice and statement given in pursuance of sub-section (2) of this section or in pursuance of any corresponding enactment of another country, the offeree corporation shall either—

(a) give or cause to be given to the offeror corporation, within fourteen days after the receipt of the notice and statement, a statement in writing that complies with the requirements set out in Part C of the Tenth Schedule; or

(b) give or cause to be given to each holder of shares in the offeree corporation to which the take-over scheme relates, within fourteen days after take-over offers are first made to shareholders under the take-over scheme, such a statement in writing."

Sub-section (4) states: "A statement given or caused to be given by an offeree corporation in pursuance of sub-section (3) of this section may contain such information in addition to that required by Part C of the Tenth Schedule as the directors of the offeree corporation think fit," and, by sub-section (5), "Where take-over offers are made under a take-over scheme, the offeror corporation shall forwith give notice in writing to the offeree corporation that offers have been made under the scheme and of the date of the offers."

Where a take-over offer is made in contravention of this section or an offeror corporation fails to comply with sub-section (5) of this section, the offeror corporation, and every officer of the corporation who is in default, shall be guilty of an offense against this Act, and, where an offeree corporation fails to comply with sub-section (3) of this section, the offeree corporation, and every officer of that corporation who is in default, shall be guilty of an offense against this Act.

The provisions of Sections 46 and 47 are to apply to and in relation to a statement given by an offeror corporation to an offeree corporation in pursuance of paragraph (a) of sub-section (2) of this section, and to any copy of such a statement, as if—

(a) each reference in those sections to a prospectus were a reference to such a statement or a copy of such a statement;

(b) the reference in sub-section (1) of Section 46 to persons who subscribe for or purchase any shares or debentures were a reference to a person who accepts a take-over offer; and

(c) each reference in those sections to the allotment or sale of shares or debentures were a reference to the acceptance of a take-over offer.

Sub-section (8) provides: "Regulations may be made varying the requirements set out in any part of the Tenth Schedule, either by omitting or altering any such requirement or by adding additional requirements and any reference in this section to the requirements of a part of the Tenth Schedule shall be read as a reference to those requirements as so varied from time to time."

By sub-section (9), "Regulations may be made making provision for and in relation to the granting of exemption from all or any of the provisions of this section or the requirements set out in the Tenth Schedule."

Regulations may be made requiring the lodging with the Registrar or a Stock Exchange, or both, of—

(a) copies of any notice or statement given in pursuance of this section; or

(b) notice in the prescribed form and containing such particulars as are prescribed for the giving of such a notice or statement.[228]

Section 180 contains a new provision, borrowed from the United Kingdom Act of 1948 [229] (as supplemented by the code on take-over bids published in 1959 by the Executive Committee of the Issuing Houses Association under the title "Notes on Amalgamation of British Businesses" and by regulations approved by the Board of Trade under the Prevention of Fraud (Investment) Act, 1958),[230] and followed also by the Australian uniform legislation.[231]

The provision governs the power to acquire shares of shareholders dissenting from the scheme or contract approved by majority.

What normally occurs here is that one company (called the transferee company) makes a request to the directors of another (called the transferor company) to forward an offer to their shareholders to purchase their shares at a specified price, the offer being expressed as being conditional on acceptance by holders of ninety per cent of the shares. If accepted by the stated proportion it becomes unconditional, the acceptors becoming bound to transfer their holdings for the agreed consideration. This leaves a small number of dissentient members who are left as a minority. What Section

[228] Act, s. 179; Aust., s. 184.
[229] U.K., s. 209.
[230] Licensed Dealers (Conduct of Business) Rules, 1960, (S.I. 1960 N.O. 1216).
[231] Aust., s. 185.

180 seeks to do is to empower the transferee company to compulsorily acquire the shares of the dissentient minority and at the same time give the minority a right to change their minds and compel the transferee company to buy them out after all.

"If under any scheme or contract an offer to acquire the whole or any class of shares has been accepted within four months by nine-tenths in value of the shares affected, the transferee company can, within a further two months, give notice to any dissentient minority shareholder that it wishes to acquire his shares. The transferee company is then entitled and bound to acquire his shares on the same terms unless the court, on the application of the dissentient shareholder within one month, thinks fit to order otherwise. Provisions are made for executing transfers on behalf of recalcitrant members.

If, however, the transferee company decides not to exercise this power of compulsory acquisition but to leave the dissentient minority to face what may come their way, the latter are given a further opportunity to extricate themselves. Notice must be given to them that nine-tenths of the shares have been acquired, and they or any of them can within three months serve a counter notice requiring the transferee company to acquire their shares. These shares must then be bought on the same terms or on such other terms as may be agreed or as the court thinks fit to order." [232]

Insofar as the provision enables the bidding company compulsorily to acquire the shares in the company which is to be taken over, it is exceptional since the power of expropriation of a shareholder is enforceable only if granted *ab initio* in the articles of association.[233]

"A barefaced attempt to evade that fundamental rule of company law which forbids the majority of shareholders, unless the articles so provide, to expropriate a minority"—to say it with the words of Harman L.J.[234]—was perpetrated *In re Bugle Press Ltd.*[235]

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[232] *Vide* Gower, *op. cit.*, 562.

[233] *Sidebottom v. Kershaw, Leese & Co.* [1920] 1 Ch. 154. In this case a private trading company, in which the majority of the shares were held by the directors, passed a special resolution to alter its articles by introducing a power for the directors to require any shareholder who competed with the company's business to transfer his shares, at their full value, to nominees of the directors. The court held that the company had the power, under s. 13 of the Companies (Consolidation) Act (8 Edw. 7. c. 69) to introduce into its altered articles of association anything that might have been included in its original articles, provided that the alteration was made *bona fide* for the benefit of the company as a whole, and held—furthermore—that a power to expel a shareholder by buying him out was valid only if a provision for this purpose was contained in the original articles of association.

[234] *Vide* footnote (235) *infra* at 287-288.

[235] [1961] 1 Ch. 270.

Of the three shareholders in a publishing company with an issued share capital of 10,000 shares of £1 each, the two majority shareholders each held 4,500 and the remaining 1,000 shares. In 1958, the majority shareholders promoted and caused to be incorporated a transferee company to the memorandum of which they were the sole subscribers, and of which they each held 50 of the 100 issued shares. The transferee company did not carry on business, but on July 14, 1959, it made an offer to all three shareholders for their shares at £10 for each share. The offer was based on a valuation made by independent valuers of the fair price for the transferor company's share capital at £100,000. In the letter making the offer it was stated that the majority shareholders would accept. The minority shareholder refused the offer. The transferee gave notice of intention to exercise the statutory power of compulsory acquisition under Section 209 of the Companies Act, 1948, and the minority shareholder sought a declaration under the section that the transferee company was neither entitled nor bound to acquire his shares on the terms offered, notwithstanding the approval of nine-tenths of the shareholders. The minority shareholder filed evidence to show that the offer was below the value of his shares. The transferee company filed no evidence to support the valuation or to show the nature of the instructions given to the valuers or to give details of the information on which it was based.

Buckley J. held that in the circumstances the onus of showing that the price was fair was on the transferee company and, as they had not discharged the onus, the minority shareholder was entitled to the declaration sought. The transferee company appealed. In appeal, the House of Lords held that the minority shareholder had shown that there were special circumstances why the court should, in the exercise of the discretion conferred by Section 209 of the Act of 1948, "order otherwise" than to sanction the expropriation of the minority holding. Although the transferee company was in law distinct from its only two shareholders, in substance it was the same as the majority shareholding in the transferor company. In such circumstances, unless good reasons in the interest of the company were shown making expropriation of the minority interest desirable, the court should "order otherwise".

The same philosophy was expounded by the House of Lords in the cases *Lyle & Scott Ltd. v. Scott's Trustees* and *Same v. British Investment Trust Ltd.* which were decided with the same judgment,[236] and which involved a take-over of a private company. By Article 9 of the articles of association of this company "no regis-

[236][1959] A.C. 763.

tered shareholder of more than one per centum of the issued ordinary share capital of the company shall, without the consent of the directors, be entitled to transfer any ordinary share for a nominal consideration or by way of security and no transfer of ordinary shares by such a shareholder shall take place for an onerous consideration so long as any other ordinary shareholder is willing to purchase the same at a price which shall be ascertained by agreement between the intending transferor and the directors and, failing agreement, at a price to be fixed by the auditor of the company... Any such ordinary shareholder who is desirous of transferring his ordinary shares shall inform the secretary in writing of the number of ordinary shares which he desires to transfer..."

By Article 7 the directors might in their absolute discretion, without assigning any reason, decline to register any transfer of any share.

The registered holders of ordinary shares in the company (being more than one per cent of the issued ordinary share capital) entered into an agreement with a third party under which they received and retained £3 for each £1 share binding themselves (*inter alia*) to vote as he desired, so as to put him as fully in control of the company as they could without registering transfers of the shares. The company sought declarator that these shareholders were bound to implement the terms of Article 9 and decree ordaining them forthwith to do so. The House of Lords, reversing a decision of the First Division of the Court of Session,[237] held that the admitted actions of the shareholders were such that it could be inferred that they were "desirous of transferring" their shares within the meaning of Article 9. A shareholder who has agreed to sell his shares and has received and retains the price must be deemed to be desirous of transferring them; otherwise the purpose of the article would be defeated and accordingly, the shareholders are bound to implement Article 9.

Remedy in case of an oppression, or "squeeze-out", is supplied by Section 181, which is patterned after Section 210 of the English Act of 1948 and Section 186 of the Australian Uniform Bill.

"Section 181(1): Any member or holder of a debenture of a company or, in the case of a declared company under Part IX, the Minister, may apply to the Court for an order in this section on the ground—

(a) that the affairs of the company are being conducted or the powers of the directors are being exercised in a man-

[237] [1958] S.C. 230.

ner oppressive to one or more of the members or holders of debentures including himself or in disregard of his or their interests as members, shareholders or holders of debentures of the company; or

(b) that some act of the company has been done or is threatened or that some resolution of the members, holders of debentures or any class of them has been passed or is proposed which unfairly discriminates against or is otherwise prejudicial to one or more of the members or holders of debentures (including himself).

(2) If on such application the Court is of the opinion that either of such grounds is established the Court may, with the view to bringing to an end or remedying the matters complained of, make such order as it thinks fit and without prejudice to the generality of the foregoing the Order may—

(a) direct or prohibit any act or cancel or vary any transaction or resolution;

(b) regulate the conduct of the affairs of the company in the future;

(c) provide for the purchase of the shares or debentures of the company by either members or holders of debentures of the company or by the company itself;

(d) in the case of a purchase of shares by the company provide for a reduction accordingly of the company's capital; or

(e) provide that the company be wound up.

(3) Where an order that the company be wound up is made pursuant to paragraph (e) of sub-section (2) of this section the provisions of this Act relating to winding up of a company shall, with such adaptations as are necessary, apply as if the order had been made upon a petition duly presented to the Court by the company.

(4) Where an order under this section makes any alteration in or addition to any company's memorandum or articles, then, notwithstanding anything in any other provision of this Act, but subject to the provisions of the order, the company concerned shall not have power without the leave of the Court to make any further alteration in addition to the memorandum or articles inconsistent with the provisions of the order; but subject to the foregoing promises of this sub-section the alteration or additions made by the order shall be of the same effect as if duly made by resolution of the company.

(5) An office copy of any order made under this section shall be lodged by the applicant with the Registrar within fourteen days after the making of the order.

Penalty: Two hundred and fifty dollars. Default penalty." [238]

The effectiveness of the parallel English provision was challenged in the case of *Scottish Co-operative Wholesale Society Ltd. v. Meyer and Another*.[239] In 1946 a cooperative wholesale society formed a subsidiary company to enable it to participate in the manufacture and sale of rayon materials and get licenses to manufacture rayon cloth, the production of which was then controlled and remained controlled until 1952. The two respondents were appointed joint managing directors of the company, which, so long as cotton control lasted, was dependent on their skill, knowledge and experience and on their connections with the trade, and, because of these, licenses were granted. The company's capital consisted of 25,000 shares of £1 each, 7,900 of which were issued. The respondents acquired 3,450 and 450 respectively, and the society acquired 4,000, appointing as directors three nominees who were also members of its own board. The company traded successfully for several years and earned substantial profits. In 1951 the society sought to purchase from the respondent their shares at less than their true start of value but the suggestoin was rejected. The society dropped the attempt but adopted a policy of transferring the company's business to a new department within its own organization, thereby forcing down the value of the company's shares. The nominee directors, though aware of this policy, did not inform the respondents but promoted the society's plans. In consequence, the company's business came virtually to a standstill and the value of its shares was greatly reduced. In 1953 the respondents presented a petition under Section 210 for an order on the society to purchase the whole of their shares at a price based on their previous value or such other price as the court might think fit. It was common ground that at the date of the petition it was just and equitable that the company should be wound up. The House of Lords held that the society had acted towards the minority shareholders of the company in an oppressive manner, and that this conduct through the nominee directors of the company, who were also directors of the society, amounted to conduct of the affairs of the company, since the transactions of the two could not be separated. The inaction of the nominee directors amounted to a breach of their duties.

Viscount Simonds in his speech said that, when a subsidiary company is formed with an independent minority of shareholders, the parent company is under an obligation to conduct its own affairs so as to deal fairly with its subsidiary. It was held, further, that the

[238] Act. s. 181; Aust., s. 186; U.K., s. 210.
[239] [1959] A.C. 324.

respondents were entitled to the relief sought, since the purchase of the shares by the society would bring to an end the matters complained of, namely, the oppression. The making of a winding-up order would unfairly prejudice the minority shareholders.

The observations of Viscount Simonds in the previous case were applied *In re H.R. Harmer Ltd.*[240] In 1947 Harmer formed a private limited company to acquire the business of philatelic auctioneers and valuers which he had founded and which was subsequently carried on by himself and two of his sons. Harmer was chairman and a life director of the company, and the sons were also life directors. Harmer was also governing director, but the company's articles of association contained no provision conferring any powers on the governing director or restricting the powers of the other directors, and a director appointed to the office of managing director, or manager, was not liable to have his tenure of office as managing director, or manager, determined by a resolution of the company in a general meeting. The quorum of directors was two. The disposition of the shareholding of the company and the rights attached to the various classes of shares were such that, although the sons and their wives had the major beneficial interest in the equity of the company, Harmer and his wife had the majority of votes and were in a position to procure the passing of extraordinary and special resolutions as well as ordinary resolutions, it being assumed that Mrs. Harmer would always vote in accordance with her husband's wishes.

In 1957 the sons presented a petition for relief under Section 210 of the Companies Act, 1948. The petitioners alleged, *inter alia*, that notwithstanding the incorporation of the company and its acquisition from Harmer of the business, Harmer had continued to regard the business of the company as though it was still his own absolute property, and to ignore the interests of the shareholders, the wishes of his co-directors, and resolutions of the board of directors. Harmer asserted that he was entitled to adopt this attitude towards the company and its members and directors by virtue of his shareholding and that of his wife, in the knowledge that his wife was likely always to exercise her voting rights as he directed. He also asserted (contrary to the fact) that he was so entitled by virtue of his being named as governing director in the articles of association.

It was common ground that at the date of the petition it was just and equitable that the company should be wound up.

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[240] [1959] 1 W.L.R. 62.

Roxburgh J. accepted the sons' evidence and submissions and granted relief under the section, which provided, *inter alia,* that Harmer should not interfere in the affairs of the company otherwise than in accordance with valid decisions of the board.

Dismissing the appeal, the Court of Appeals held that Harmer's conduct in relation to members of the company (including the petitioners) was "burdensome, harsh and wrongful," and, accordingly, was oppressive within the meaning of Section 210.

The development of the legislation for the protection of the minority shareholder in Great Britain (aid—through the reform—in Australia, and now in Malaysia) is favorably commented upon by Professor O'Neal:[241]

"No State in the United States has legislation similar to Section 210 of the United Kingdom Companies Act, 1948. At the same time, American businessmen and their legal advisers have been exceedingly resourceful in developing techniques for oppressing minority owners.

In the United States, oppression of a minority shareholder is most likely to occur in the context of a squeeze-out. By "squeeze-out"—that term is commonly used in America—is meant the use of strategic position, management powers, or legal device by some owners in a business enterprise to eliminate other owners. The term also covers oppressive action to reduce the participation of some owners or to deprive them unfairly of income or advantages.

The findings and recommendations of a recent study of squeeze-outs in the United States[242] may be of interest to British readers. The study discusses the underlying causes of squeeze-plays, the various squeeze-out techniques, arrangements for avoiding dissension and squeeze-plays and possible modification of legal controls to give greater protection to minority shareholders."

19. *Investigations*

Provisions on investigations are based almost entirely on the Australian model. They apply to "declared companies". A "declared company" means a company or foreign company which the Yang di-Pertuan Agong has by proclamation declared to be a company to which this Part [Part IX] applies."

"The Yang di-Pertuan Agong may by proclamation declare that a company or foreign company is a company to which this Part applies if he is satisfied—

[241] O'Neal, "Squeeze-outs in American Corporations" [1962] J. Bus. Law 210.

[242] O'Neal and Derwin, *Expulsion or Oppression of Business Associates: "Squeeze-Outs" is Small Enterprises* (Durham, 1962) pp. xii, 263.

(a) that a *prima facie* case has been established that, for the protection of the public, the holders of interests to which the provisions of Division 5 of Part IV apply or the shareholders or creditors of the company or foreign company, it is desirable that the affairs of the company or foreign company should be investigated under this Part;
(b) that it is in the public interest that allegations of fraud, misfeasance or other misconduct by persons who are or have been concerned with the formation or management of the company or foreign company should be investigated;
(c) that for any other reason it is in the public interest that the affairs of the company or foreign company should be investigated under this Part; or
(d) in a case of a foreign company, that the appropriate authority of another country has requested that a declaration be made in pursuance of this section in respect of the company." [243]

The expenses of and incidental to an investigation of a declared company shall be defrayed in the first instance out of moneys provided by Parliament, but where the Minister is of the opinion that such expenses should be paid by the company or by any person who requested the appointment of the investigator the Minister may by notice published in the *Gazette* direct that the expenses be so paid.[244]

Appointment of investigators is to be made by the Minister on the application of, in the case of a company (not being a banking corporation) having a share capital, not less than two hundred members or members holding not less than one-tenth of the shares issued, or, holders of debentures holding not less than one-fifth in nominal value of debentures issued. In the case of a company not having a share capital, the application must be made by at least one-fifth of the members; in the case of a banking corporation having a share capital, application must be made by members holding not less than one-third of the shares issued.

In support of their application, the applicants must give evidence as to the reason for and their motives in, making such an application. In order that the application should be made *bona fide*, the Minister is empowered to require the applicants to give security to such amount as he thinks fit for payment of the costs of the investigation.[245]

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[243] Act, s. 195; Aust., s. 172(2) and (3).
[244] Act, s. 196; Aust., s. 173.
[245] Act, s. 197; Ha., s. 138; Sa., s. 138; Sin., s. 138; Sar., s. 142; Aust., s. 169.

An inspector appointed by the Minister may, and if so directed, shall make interim reports to the Minister and on the conclusion of the investigation the inspector shall report his opinion on or in relation to the affairs that he has been appointed to investigate together with the facts upon which his opinion is based to the Minister, who shall forward a copy of the report to the registered office of the company and a further copy to the applicants if so requested. If the Minister is of the opinion that it is necessary in the public interest so to do he may cause the report to be printed and published.

If the report discloses that a criminal offense has been committed, the Minister may institute a prosecution against all officers and agents of the defaulting company. If any fraud, misfeasance or any other misconduct perpetrated is discovered as a result of the investigation the Minister may himself bring proceedings in the name of the company against the defaulters, provided that it is in the public interest to do so.[246]

Section 199 retains the provisions of the present legislation [247] empowering a company, other than a declared company, to appoint by special resolution one or more inspectors to investigate its affairs. The inspector shall report to such persons and in such manner as the company in a general meeting directs. The appointment of company-inspectors ceases when the company whose affairs are being investigated becomes a declared company.[248]

If the inspector is of the opinion that the affairs of a related corporation need also to be investigated he is empowered to conduct such an investigation. In order that he may carry out his duties without obstruction by those who have cause to resent the investigation, the Act empowers the inspector to compel the production of all relevant books and documents and to examine under oath or affirmation, all officers, and agents of the company whose affairs are being investigated. If the officers and agents refuse to answer any question put to them by the inspector the latter may certify to this fact and upon inquiry being made into this case by the Court, the officer or agent who has refused to answer the question may be punished as if he has been guilty of contempt of the Court.

Section 200(6) and (7) are most interesting. These sub-sections provide that any person or former officers or former agents of the company may refuse to answer any question put to him or them by the inspector on the ground that to do so might tend to in-

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[246] Act. s. 198; Ma., ss. 138, 139; Sa., ss. 138, 139; Sin., ss. 138, 139; Sar., ss. 142, 143; Aust., s. 169.

[247] Ma., s. 140; Sa., s. 140; Sin., s. 140; Sar., s. 144.

[248] Act. s. 199; Aust., s. 170.

criminate him or them. In the case of the latter officers and agents, if they claim that the answer they are required to give might incriminate them and but for this sub-section they would have been entitled to refuse to answer, the answers shall not be used in any subsequent criminal proceedings except in a charge made against them for making a false statement committed by them in answer to that question.[249]

Section 204 suspends all proceedings by or against a declared company on any contract, bills of exchange or promissory notes on and after the appointment of an inspector until the expiration of three months after the inspector has presented his final report, unless leave to proceed with the action has been granted by the Minister. Any action or proceeding which is commenced or proceeded with in contravention of this section shall be void and of no effect.[250]

The Minister may, after the report has been presented to him, petition the Court for the winding up of the company or in the case of a foreign company, for the winding up of the affairs of the company so far as the assets of the company within Malaysia are concerned and such a petition shall operate as if a petition has been made, in the case of the former, by the company, or in the case of the latter, by the contributories or creditors of the foreign company upon the liquidation of the company in the place in which it was incorporated.[251]

Section 207 empowers the Minister "where it appears to him that there is good reason to do so," to appoint one or more imspectors to investigate and report on the membership of any corporation (whether or not it is a declared company) and otherwise with respect to the corporation for the purpose of determining the true persons who are or have been financially interested in the success or failure (real or apparent) of the corporation or are able to control or materially influence the policy of the corporation.[252]

Section 208 empowers the Minister for the same reasons to appoint inspectors to investigate and report on the ownership of any shares in or debentures of a corporation or on the circumstances under which a person acquired or disposed of or became entitled to acquire or dispose of any shares in or debentures of a corporation.[253]

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[249] Act, s. 200; Aust., s. 171.
[250] Act, s. 204; Aust., s. 174.
[251] Act, s. 205; Aust., s. 175.
[252] Act, s. 207; Aust., s. 177; U.K., s. 172.
[253] Act, s. 208; Aust., s. 178; U.K., s. 173.

Wide powers are conferred on the Minister by Section 209 empowering him to "freeze" all transfers and issues of or payments on sums due on, shares of a corporation whose officers and agents have by their unwillingness to assist in the investigation of its affairs thereby caused difficulty in finding out the relevant facts about any shares (whether issued or to be issued).[254]

20. *Holding and subsidiary companies*

As far as holding and subsidiary companies are concerned, the Act has taken advantage of and adopted the recommendations of the Cohen Committee.[255]

The Act defines a corporation to be deemed a subsidiary of another corporation if (a) that other corporation controls the composition of the board of directors of the first-mentioned corporation and more than half of the voting power of the first-mentioned corporation, or holds more than half of the issued share capital of the first-mentioned corporation (excluding any part thereof which carries no right to participate beyond a specified amount in a distribution of either profits or capital), or (b) the first-mentioned corporation is a subsidiary of any corporation which is that other corporation's subsidiary.[256]

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[254] Act, s. 209; Aust., s. 179; U.K., s. 174.

[255] Cmnd. 6659/1945 para. 115 ff.

[256] Act, s. 5(1).

Vide also subsections (2), (3), (4).

"(2) For the purposes of sub-section (1) of this section, the composition of a corporation's board of directors shall be deemed to be controlled by another corporation if that other corporation by the exercise of some power exercisable by it without the consent or concurrence of any other person can appoint or remove all or a majority of the directors, and for the purposes of this provision that other corporation shall be deemed to have power to make such an appointment if—

(a) a person cannot be appointed as a director without the exercise in his favor by that other corporation of such a power; or

(b) a person's appointment as a director follows necessarily from his being a director or other officer of that other corporation.

(3) In determining whether one corporation is a subsidiary of another corporation—

(a) any share held or power exercisable by that other corporation in a fiduciary capacity shall be treated as not held or exercisable by it;

(b) subject to paragraphs (c) and (d) of this sub-section, any share held or power exercisable—

(i) by any person as a nominee for that other corporation (except where that other corporation is concerned only in a fiduciary capacity); or

(ii) by, or by a nominee for, a subsidiary of that other corporation, not being a subsidiary which is concerned only in a fiduciary capacity shall be treated as held or exercisable by that other corporation;

(c) any share held or power exercisable by any person by virtue of the provisions of any debentures of the first-mentioned corporation or of a trust deed for securing any issue of such debentures shall be disregarded; and

(d) any share held or power exercisable by, or by a nominee for, that

The provision, otherwise similar to that of the Ordinances to be replaced,[257] defines as subsidiary a subsidiary of a subsidiary.[258]

Where a corporation (a) is the holding company of another corporation, (b) is a subsidiary of another corporation, or (c) is a subsidiary of the holding company of another corporation, that first-mentioned corporation and that other corporation shall for the purposes of the Act be deemed to be related to each other.[259]

A corporation cannot be a member of a company which is its holding company, and any allotment or transfer of shares in a company to its subsidiary shall be void.[260] A subsidiary which is, at the commencement of the Act, a member of its holding company may continue to be a member thereof but without being allowed to vote at the meeting of its holding company.[261]

Under Section 67, and except as is otherwise expressly provided by the Act, no company shall give, whether directly or indirectly and whether by means of a loan guarantee or the provision of security or otherwise, any financial assistance for the purpose of or in connection with a purchase or subscription made or to be made by any person of or for any shares in the company or, where the company is a subsidiary, in its holding company or in any way purchase, deal in, or lend money of its own shares.[262]

A company cannot, if it issues interests other than shares, debentures, etc. invest in or lend to a company (other than banking corporation) which is by virtue of Section 6 deemed to be a related company.[263]

The Act requires that every company keep a register showing with respect to each director of the company the number and description and, in the case of debentures, the amount, of any shares

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other corporation or its subsidiary (not being held or exercisable as mentioned in paragraph (c) of this sub-section) shall be treated as not held or exercisable by that other corporation if the ordinary business of that other corporation or its subsidiary, as the case may be, includes the lending of money and the shares are held or power is exercisable as aforesaid by way of security only for the purposes of a transaction entered into in the ordinary course of that business.

(4) A reference in this Act to the holding company of a company or other corporation shall be read as a reference to a corporation of which that last-mentioned company or corporation is a subsidiary." Act, s. 5; Aust., s. 5.

257 Ma., s. 128; Sa., s. 128; Sin., s. 128; Sar., s. 126.

258 Act, s. 5(1)(b).

259 Act, s. 6; Aust., s. 6(5).

260 Act, s. 17(1); Aust., s. 17; U.K., s. 27.

261 Act, s. 17(3); Aust., s. 17; U.K., s. 27.

262 Act, s. 67(1); Ma., ss. 47, 48; Sa., ss. 47, 48; Sin., ss. 47, 48; Sar., s 48; Aust., s. 67; U.K., s. 54.

263 Act, s. 88(1)(d); Aust., s. 80(1)(d).

in or debentures of the company or a corporation that is deemed to be related to that company by virtue of Section 6 which are held by or in trust for him or of which he has any right to become the holder (whether on payment or not) or in which he has, directly or indirectly, any beneficial interest but the register need not include shares in any corporation which is the wholly-owned subsidiary of another corporation.[264]

It shall not be lawful (a) for a company to make to any director any payment by way of compensation for loss of office as an officer of that company or of a subsidiary of that company or as consideration for or in connection with his retirement from any such office, or (b) for any payment to be made to any director of a company in connection with the transfer of the whole or any part of the undertaking or property of the company unless particulars with respect to the proposed payment (including the amount thereof) have been disclosed to the members of the company and the proposal has been approved by the company in a general meeting. When any such payments has been unlawfully made the amount received by the director shall be deemed to have been received by him in trust for the company.[265]

In the case of a director in one or more subsidiaries of the same holding company it shall be sufficient in order to comply with the Act, insofar as registration of directors, managers and secretaries is concerned that it be disclosed that the person is the holder of one or more directorships in that group of companies and the group of the holding company with the addition of the word "Group".[266]

If an inspector appointed to investigate the affairs of a company thinks it necessary for the purposes of the investigation to investigate also the affairs of any other corporation which is or has at any relevant time been deemed to be or to have been related to that company, by virtue of Section 6 he shall have power so to do, and he shall report on the affairs of the other corporation so far as he thinks the results of the investigation thereof are relevant to the investigation of the affairs of the company.[267]

Annexed to the profit and loss account of every holding company, shall be (a) a separate profit and loss account for each subsidiary of the company, (b) a consolidated profit and loss account of the holding company and of its subsidiaries eliminating all inter-

[264] Act, s. 134(1); Ma., s. 147; Sa., s. 147; Sin., s. 147; Sar., s. 151; Aust., s. 126; U.K., s. 195.

[265] Act, s. 137(1); Ma., s. 152; Sa., s. 152; Sin., s. 152; Sar., s. 156; Aust., s. 129; U.K., ss. 191 to 194.

[266] Act, s. 141(3); Aust., s. 134(2)(c); U.K., s. 200.

[267] Act, s. 200(1); Aust., s. 171.

company transactions, or (c) a consolidated profit and loss account of the holding company and of some of its subsidiaries eliminating all inter-company transactions and a separate profit and loss account for each subsidiary the accounts of which are not included in the consolidated profit and loss account; but in any such case the directors shall disclose by way of note on the consolidated profit and loss account their reasons for not causing the accounts of such one or more subsidiaries to be consolidated.[268]

Either in the profit and loss account of the holding company or in any document annexed thereto there shall be clearly stated (by way of note or otherwise) the name and place of incorporation of each subsidiary to which that profit and loss account or other document relates.[269]

There shall be annexed to the balance-sheet of every holding company (a) a balance-sheet of each subsidiary of the company, (b) a consolidated balance-sheet of the holding company and of its subsidiaries eliminating all inter-company balances, or (c) a consolidated balance-sheet of the holding company and of some of its subsidiaries eliminating all inter-company balances and a separate balance-sheet for each subsidiary the assets and liabilities of which are not included in the consolidated balance-sheet; but in any such case the directors shall disclose by way of note on the consolidated balance-sheet their reasons for not causing the assets and liabilities of such one or more subsidiaries to be consolidated.[270]

The above mentioned profit and loss accounts and balance-sheets shall be in the same form as the profit and loss account and balance-sheet of the holding company and shall be accompanied by the auditor's report thereon.[271]

In the case of a subsidiary company incorporated in a country outside Malaysia whether it has or has not established a place of business in Malaysia, which is a country which has been declared by the Minister by notice published in the *Gazette* to be a country to which this provision applies, it shall be sufficient if the separate profit and loss account or balance-sheet (as the case requires) of such subsidiary company is in such form and is so reported upon by auditors and contains such particulars and includes such documents (if any) as the company is required to make out and lay

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[268] Act, Ninth Schedule, art. 4(1); Aust., Eighth Schedule, art. 4(1); U.K., Eighth Schedule, Part II.

[269] Act, Ninth Schedule, art. 4(2); Aust., Eighth Schedule, art. 4(2); U.K., Eighth Schedule, Part II.

[270] Act, Ninth Schedule, art. 4(3); Aust., Eighth Schedule, art. 4(3); U.K., Eighth Schedule, Part II.

[271] Act, Ninth Schedule, art. 4(4); Aust., Eighth Schedule, art. 4(4); U.K., Eighth Schedule, Part II.

before the company in a general meeting by the law for the time being applicable to such company in the place where it is incorporated.[272]

If the auditor's report on the balance-sheet or profit and loss account of a subsidiary company is qualified in any way, the separate balance-sheet of the subsidiary company or the consolidated ballance-sheet of the holding company (as the case may be) shall contain particulars in the manner in which the report is qualified.[273]

There shall be shown under separate headings in the balance-sheet of every subsidiary company the amounts owed by the subsidiary to its holding company and to corporations which are by virtue of Section 6 deemed to be related to it, the amounts owed by such holding company and by such corporations to it, and the extent of its holding of shares in its holding company and in such corporations.[274]

Finally, the Act provides that the provisions of Art. 4 of the Ninth Schedule shall not apply to a subsidiary which would not be a subsidiary but for the operation of sub-paragraph (i) or (ii) of paragraph (a) of sub-section (1) of Section 6 (rectius [275] Section 5).[276]

21. *Investment companies*

New provisions are introduced by the Act with the aim of controlling the borrowing and investing activities of investment companies.

The Yang di-Pertuan Agong may by proclamation published in the *Gazette* declare to be an investment company [277] any corporation which is engaged primarily in the business of investment in marketable securities for the purpose of revenue and for profit and not for the purpose of exercising control, and the Yang di-Pertuan Agong may by like proclamation revoke any proclamation declaring a corporation to be an investment company.[278]

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[272] Act, Ninth Schedule, art. 4(5); Aust., Eighth Schedule, art. 4(5); U.K., Eighth Schedule, Part II.

[273] Act, Ninth Schedule, art. 4(6); Aust., Eighth Schedule, art. 4(6); U.K., Eighth Schedule, Part II.

[274] Act, Ninth Schedule, art. 4(7); Aust., Eighth Schedule, art. 4(7); U.K., Eighth Schedule, Part II.

[275] There is obviously a mistake due to the similarity of these provisions with those of the Australian Uniform Bill. As for the reference, *vide* text at footnote (256), *supra*.

[276] Act, Ninth Schedule, art. 4(8); Aust., Eighth Schedule, Art. 4(8); U.K., Eighth Schedule, Part II.

[277] Defined in s. 319(1) as meaning "a corporation (not being a private company) for the time being declared by proclamation of the Yang di-Pertuan Agong to be an investment company."

[278] Act, s. 319(2); Aust., s. 334(2).

An investment company shall not borrow an amount if that amount, or the sum of that amount and amounts previously borrowed by it and not repaid exceeds an amount equivalent to fifty per centum of its net tangible assets,[279] nor shall an investment company borrow an amount otherwise than by the issue of debentures[280] if that amount, or the sum of that amount and amounts previously borrowed by it otherwise than by the issue of debentures and not repaid, exceeds an amount equivalent to twenty-five per centum of its net tangible assets.[281]

An investment company shall not invest an amount in a corporation if that amount, or the sum of that amount and amounts previously invested by it in that corporation and still so invested exceeds an amount equivalent to ten per centum of the net tangible assets of the investment company, nor shall an investment company invest an amount in the ordinary shares of a corporation if that amount, or the sum of that amount and amounts previously invested by it in the ordinary shares of that corporation and still so invested exceeds an amount equivalent to five per centum of the subscribed ordinary share capital of the corporation.[282]

An investment company shall not underwrite any issue of authorized securities[283] to an amount that, when added to the amount or amounts, if any, to which it has previously underwritten a current issue or issues of other authorized securities (not being an amount or amounts in respect of which the underwriting obligation has been discharged, exceeds an amount equivalent to forty per centum of its net tangible assets[284] nor shall an investment company underwrite any issue of non-authorized securities[285] to an amount that, when added to the amount or amounts, if any, to which it has previously underwritten a current issue or shares of other non-authorized securities (not being an amount or amounts in respect of which the underwriting obligation has been discharged), exceeds

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[279] Defined in s. 319(1) as meaning "tangible assets at book values less total liabilities at book values and less any aggregate amount by which the book value of the marketable securities held by the corporation exceeds their market value."

[280] These "debentures" do not include debentures (a) that are redeemable, except at the option of the borrower exercised not earlier than two and one half years after the date of issue of the debenture, within less than five years after that date, or (b) that are issued to a bank as security for an overdraft. Act, s. 320(3).

[281] Act, s. 320(2); Aust., s. 335(2).

[282] Act, s. 321; Aust., s. 336.

[283] "In this section "authorized securities" means securities in which, by any written law trustees are authorized to invest trust funds in their hand." Act, s. 322(5); Aust., s. 337(5).

[284] Act, s. 322(1); Aust., s. 337(1).

[285] "In this section "non-authorized securities" means securities other than "authorized securities.", Act, s. 322(5); Aust., s. 337.

an amount equivalent to twenty per centum of its net tangible assets.[286]

Where (a) an investment company has underwritten any issue of securities and, in relation to the underwriting, has not contravened the above mentioned provisions and (b) the investment company, as a result of the underwriting, invests in a corporation, being an investment contrary to Section 321, the investment company shall be deemed not to have contravened a provision of that section by reason of so investing in the corporation if, at the expiration of twelve months after so investing, (c) the amount invested by it in the corporation does not exceed an amount equivalent to ten per centum of the net tangible assets of the investment company, and (d) it does not hold more than five per centum of the subscribed ordinary share capital of the corporation.[287]

The above mentioned provisions extend to and in relation to sub-underwriting as if the sub-underwriting were underwriting.[288]

An investment company shall not issue a prospectus or permit a prospectus to be issued on its behalf unless the prospectus specifies (a) the type of security in which it is among the objects of the company to invest, and (b) whether it is among the objects of the company to invest within Malaysia or outside or both.[289]

After the expiration of three months after an investment company had been declared to be an investment company, the investment company shall not borrow or invest any money, or underwrite or sub-underwrite any issue of securities, unless the articles of the company specify the matters referred to above.[290]

The Act forbids an investment company to purchase or, after the expiration of three years after it is declared to be an investment company, to hold any shares in or debentures of (a) any other investment company, or (b) any corporation incorporated outside Malaysia which is engaged primarily in the business of investment in marketable securities for the purpose of revenue and for profit and not for the purpose of exercising control and which is specified by proclamation of the Yang di-Pertuan Agong.[291]

An investment company shall not for the purpose of profit buy or sell or deal in any raw materials or manufactured goods, whether in existence or not, otherwise than by investing in companies trading

[286] Act, s. 322(2); Aust., s. 337(2).
[287] Act, s. 322(3); Aust., s. 337(3).
[288] Act, s. 322(4); Aust., s. 337(4).
[289] Act, s. 323(1); Aust., s. 338(1).
[290] Act, s. 323(2); Aust., s. 338(2).
[291] Act, s. 324; Aust., s. 339.

in such materials or goods.[292] The above-said provision shall not apply to or in relation to (a) any buying, selling or dealing by an investment company in pursuance of a contract entered into by the investment company before it was declared to be an investment company, or (b) the investment company before it was so declared.[293]

An investment company shall state under separate headings in every balance-sheet of the investment company, in addition to any other matters required to be stated therein (a) the investments of the company in any securities which are not government, municipal and other public debentures stock of bonds, issued by subsidiaries of the company, shares or debentures of companies (not being subsidiaries of the company) which are quoted, listed or dealt in on any prescribed stock exchange in Malaysia or elsewhere; and other investments in companies,[284] and (b) the manner in which the investments of the company have been valued.[295]

Attached to every balance-sheet shall be (a) a complete list of all purchases and sales of securities by the company during the period to which the accounts relate together with a statement of the total amount of brokerage paid or charged by the company during that period and the proportion thereof paid to any stock or share broker, or any employee or nominee of any stock or share broker, who is an officer of the company, and (b) a complete list of all the investments of the company as the date of the balance-sheet showing the descriptions and quantities of such investments.[296]

In addition to any other matters required to be shown therein, an investment company shall show, separately in the profit and loss account, income from underwriting (including sub-underwriting).[297]

The net profits and losses of an investment company from the purchase and sale of securities shall be respectively credited and debited by the company to a reserve account to be kept by it and to be called the "investment fluctuation reserve." [298]

The investment fluctuation reserve shall not be available for the payment of dividends,[299] but may be used for the payment of income tax payable in respect of profits made on the sale of securities.[300]

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[292] Act, s. 325(1); Aust., s. 340(1).
[293] Act, s. 325(2); Aust., s. 340(2).
[294] Act. Ninth Schedule, Art. 2(1)(h); Aust., Ninth Schedule, Art. 2(1)(h).
[295] Act, s. 326(1); Aust., s. 341(1).
[296] Act, s. 326(2); Aust., s. 341(2).
[297] Act, s. 326(3); Aust., s. 341(3).
[298] Act, s. 327(1); Aust., s. 342(1).
[299] Act, s. 327(2); Aust., s. 342(2).
[300] Act, s. 327(3); Aust., s. 342(3).

If default is made by an investment company in complying with the provisions of the Act the company and every officer of it who is in default shall be guilty of an offense against the Act and upon conviction, punished with imprisonment for two years or with a fine of five thousand dollars; default penalty: five hundred dollars.[301] However, no transaction entered into by the company shall be invalid by reason only of such default.[302]

22. *Foreign companies*

The Act applies to a foreign company only if it has a place of business or is carrying on business [303] within Malaysia.[304]

A new provision reads as follows: "subject to and in accordance with any written law a foreign company registered under this Division shall have power to hold land in Malaysia." [305]

Section 332 prescribes the duty of a foreign company having place of business in Malaysia to lodge with the Registrar,

"(a) a certified copy of the certificate of its incorporation or registration in its place of incorporation or origin or a document of similar effect;

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[301] Act, s. 329(1); Aust., s. 343(1).

[302] Act, s. 328(2); Aust., s. 343(2).

[303] As defined in s. 330(1) of the Act:

"Carrying on business" includes establishing or using a share transfer or share registration office or administering, managing or otherwise dealing with property situated in Malaysia as an agent, legal personal representative, or trustee, whether by servants or agents or otherwise, and "to carry on business" has a corresponding meaning." But *vide* a so:

"(2) Notwithstanding sub-section (1) of this section, a foreign company shall not be regarded as carrying on business within Malaysia for the reason only that within Malaysia it—

(a) is or becomes a party to any action or suit or any administrative or arbitration proceeding or effects settlement of an action suit or proceeding or of any claim or dispute;
(b) holds meetings of its directors or shareholders or carries on other activities concerning its internal affairs;
(c) maintains any bank account;
(d) effects any sale through an independent contractor;
(e) solicits or procures any order which becomes a binding contract only if such order is accepted outside the State;
(f) creates evidence of any debt, or creates a charge on real or personal property;
(g) secures or collects any of its debts or enforces its rights in regard to any securities relating to such debts;
(h) conducts an isolated transaction that is completed within a period of thirty-one days but not being one of a number of similar transactions repeated from time to time; or
(i) invests any of its funds or holds any property." Act, s. 330. *Vide* also Aust., s. 344.

[304] Act, s. 329; Ma., s. 300; Sa., s. 300; Sin., s. 300; Sar., s. 306; Aust., s. 344; U.K., s. 406.

[305] Act, s. 331; Aust., s. 345.

(b) a certified copy of its charter statute or memorandum and articles or other instrument constituting or defining its constitution;

(c) a list of its directors containing similar particulars with respect to its directors as are by this Act required to be contained in the register of the directors, managers and secretaries of a company incorporated under this Act;

(d) where the list includes directors resident in Malaysia who are members of the local board of directors a memorandum duly executed by or on behalf of the foreign company stating the powers of the local directors;

(e) a memorandum of appointment or power of attorney under the seal of the foreign company or executed on its behalf in such manner as to be binding on the company and, in either case, verified in the prescribed manner, stating the name and address of one or more persons resident in Malaysia, not including a foreign company, authorized to accept on its behalf service of process and any notices required to be served on the company;

(f) notice of the situation of its registered office in Malaysia, and unless the office is open and accessible to the public during ordinary business hours on each day (weekly and public holidays excepted), the days and hours during which it is open and accessible to the public;

(g) a statutory declaration in the prescribed form made by the agent of the company." [306]

Provided that it does not take a name which, in the opinion of the Registrar is undesirable or is a name, or a name of a kind, that the Minister charged with responsibility for companies has directed the Registrar not to accept for registration,[307] the Registrar shall register the company by registering the above mentioned documents.

Where a memorandum of appointment or power of attorney lodged with the Registrar in pursuance of paragraph (e) above is executed by a person on behalf of the company, a copy of the deed or document by which that person is authorized to execute the memorandum of appointment or power of attorney, verified by statutory declaration in the prescribed manner shall be lodged with the

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[306] Act, s. 332(1); Ma., s. 301; Sa., s. 301; Sin., s. 301; Sar., s. 307; Aust., s. 346(1); U.K., 407.

[307] *Vide* text at footnote (221), *infra*.

Registrar and the copy shall for all purposes be regarded as an original.[308]

Sub-section (3) of Section 332 contains a provision for the transitional period whereby the duty of registration shall apply to a foreign company which was not registered under the repealed Act (rectius [309] Ordinances) but which, immediately before the date of commencement of the Act, had a place of business or was carrying on business within Malaysia and, on that date, has a place of business or is carrying on business within Malaysia, as if it established that place of business or commenced to carry on that business on that date.[310]

A foreign company shall have a registered office within Malaysia to which all communications and notices may be addressed and which shall be open and accessible to the public for not less than three hours between the hours of nine o'clock in the morning and five o'clock in the evening each day, weekly and public holidays excepted.[311]

A foreign company or its agent may lodge with the Registrar a notice in writing stating that the agent has ceased to be the agent or will cease to be the agent on a date specified in the notice, and the agent in respect of whom the notice has been lodged shall cease to be an agent on the expiration of a period of twenty-one days after the date of lodging of the notice or on the date of the appointment of another agent the memorandum of which appointment has been lodged as provided hereinafter, whichever is the earlier, but if the notice states a date on which he is to so cease and the date is later than the expiration of that period, then on that date. Where an agent ceases to be the agent and the company is then without an agent in Malaysia, if the company continues to carry on business or has a place of business in Malaysia it shall, within twenty-one days after the agent ceases to be such, appoint an agent. On the appointment of a new agent the company shall lodge a memorandum of the appointment and a statutory declaration as required [312] and, if not already lodged [313] a copy of the deed or document or power of attorney referred to in above verified in accordance with the law.[314]

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[308] Act, s. 332(2); Ma., s. 301; Sa., s. 301; Sin., s. 301; Sar., s. 307; Aust., s. 346(2); U.K., s. 407.

[309] There is obviously a mistake due to the similarity of this provision with that of the Australian Uniform Bill.

[310] Act, s. 332(3); Ma., s. 301; Sa., s. 301; Sin., s. 301; Sar., s. 307; Aust., s. 346(3); U.K., s. 407.

[311] Act, s. 333(1); Aust., s. 346(4).

[312] *Vide* text at footnote (306), *supra*.

[313] *Vide* text at footnote (308), *supra*.

[314] Act, s. 333(2)-(6); Aust., s. 346(5)-(8).

On the registration of a foreign company under the Act or the lodging with the Registrar of particulars of a change or alteration in a matter referred to hereinafter [315] the Registrar shall issue a certificate in the prescribed form under his hand and seal which certificate shall be *prima facie* evidence in all courts of the particulars mentioned in the certificate.[316]

Section 335 [317] repeats and supplements the contents of the repealed Ordinances [318] insofar as the registration of alterations is concerned.

Section 336(1) prescribes the duty for a foreign company to file with the Registrar within two months of its annual general meeting, a copy of its balance-sheet made up to the end of its last financial year in such form and containing such particulars and accompanied by copies of such documents as the company is required to annex, attach or send with its balance-sheet by the law for the time being applicable to that company in the place of its incorporation or origin, together with a statutory declaration in the prescribed form verifying that the copies are true copies of the documents so required.[319] It provides, furthermore, that the Registrar may, if he is of the opinion that the balance-sheet and other documents referred to in the preceeding paragraphs do not sufficiently disclose the company's financial position, require the company to lodge a balance-sheet within such period, in such form and containing such particulars and to annex thereto such documents as the Registrar by notice in writing to the company requires. This provision does not authorize the Registrar to require a balance-sheet to contain any particulars or the company to annex, attach or to send any documents that would not be required to be furnished if the company were a public company incorporated under the Act. The company shall comply with the requirements set out in the notice.[320]

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[315] *Vide* paras. (c), (d), or (f) s. 335 of the Act. *Vide* text at footnote (317). *infra.*

[316] Act, s. 334(1); Aust., s. 346(9); *vide* also the following sub-section:

"(2) Nothing in this section shall require a foreign company which was registered under the repealed Act (*rectius* Ordinances) immediately before the commencement of this Act as a foreign company to register pursuant to this section but such a company shall in the case of any company to which paragraphs (d) and (f) of sub-section (1) of Section 332 applies within one month after the commencement of this Act, lodge with the Registrar a memorandum duly executed by or on behalf of the foreign company stating the powers of local directors." Act, s. 334(2); Aust., s. 346(10).

[317] Act, s. 335; Aust., s. 347; U.K., s. 409.

[318] Ma., s. 302; Sa., s. 302; Sin., s. 302; Sar., s. 309.

[319] Act, s. 335(1); Ma., s. 303; Sa., s. 303; Sin., s. 303; Sar., s. 310; Aust., s. 348(1); U.K., s. 410.

[320] Act, s. 336(2) and (3); Ma., s. 303; Sa., s. 303; Sin., s. 303; Sar., s. 310; Aust., s. 348(2) and (3); U.K., s. 410.

If a foreign company is not required by the law of the place of its incorporation or origin to hold an annual general meeting and prepare a balance-sheet, the company shall prepare and lodge with the Registrar a balance-sheet within such period, in such form and containing such particulars and to annex thereto such documents as the company would have been required to prepare if the company were a public company incorporated under the Act.[321]

Provisions as to the fee payable on registration of a foreign company because of establishment of a share register in Malaysia [322] are laid down in Section 337.[323]

The obligation for a foreign company to state the name, whether it is limited, and the name of the country where it is incorporated is dealt with in Section 338.[324]

Any document required to be served on a foreign company shall be sufficiently served (a) if addressed to the foreign company and left at or sent by post to its registered office in Malaysia, (b) if addressed to an agent of the company and left at or sent by post to his registered address, or (c) in the case of a foreign company which has ceased to maintain a place of business in Malaysia if addressed to the foreign company and left at or sent by post to its registered office in the place of its incorporation.[325]

The remaining provisions of Part XI of the Act dealing with foreign companies refer to the duty to give notice to the Registrar of cessation of business,[326] to restriction on use of certain names,[327] to the duty to keep the branch register [328] for the purpose of registering shares [329] of members resident in Malaysia [330] and of remov-

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[321] Act, s. 336(4); Ma., s. 308; Sa., s. 303; Sin., s. 303; Sar., s. 303; Aust., s. 348(4); U.K., s. 410.

[322] Act, ss. 342, 343, 344, 345, 346, 347, 348; Aust., ss. 354, 355, 356, 357, 358, 359, 360.

[323] Act, s. 337: Aust., s. 349. *Vide*: items 18 and 19 of the Second Schedule annexed to the Act.

[324] Act., s. 338; Ma., s. 304; Sa., s. 304; Sin., s. 304; Sar., s. 311; Aust., s. 350; U.K., s. 411.

[325] Act, s. 339; Ma., s. 305; Sa., s. 305; Sin., s. 305; Sar., s. 312; Aust., s. 351: U.K., s. 412.

[326] Act, s. 340; Ma., s. 306; Sa., s. 306; Sin., s. 306; Sar., s. 313; Aust., s. 352; U.K., s. 413(2).

[327] Act, s. 341; Aust., s. 353.

[328] Act, s. 342; Aust., s. 354; *Vide* also Act, s. 347.

> "A branch register shall be *prima facie* evidence of any matters by this Division directed or authorized to be inserted therein." Aust., s. 359.

[329] *Vide* also Act, s. 348:

> "A certificate under the seal of a foreign company specifying any shares held by any member of that company and registered in the branch register shall be *prima facie* evidence if the title of the member to the shares and the registration of the shares in the branch register." Aust., s. 360.

ing them,[331] to the index of members, inspection and closing of branch registers,[332] to the application of provisions of the Act relating to transfer of shares,[333] and to the penalties, in case of default to comply with the provisions of the Part.[334]

Since, according to the Act, "corporation means any body corporate formed or incorporated within Malaysia or outside Malaysia and includes any foreign company," [335] sections of the Act where the word corporation, rather than company, is used, also apply to foreign companies.[336]

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[330] Act, s. 343; Aust., s. 355.

[331] Act, s. 344: Aust., s. 356.

[332] "Sections 158, 159 and 160 shall, with such adoptations as are necessary, apply respectively to the index of persons holding shares in a branch register and to the inspection and the closing of the register." Act, s. 345; Aust., s. 357.

[333] "Sections 103, 104, sub-section (1) of Section 105, sub-sections (1) and (3) of Section 107 and Section 162 shall apply with necessary adaptations with respect to the transfer of shares on and the rectification of the branch register of a foreign company." Act, s. 346; Aust., s. 358.

[334] Act, s. 349; Ma., s. 307; Sa., s. 307; Sin., s. 307; Sar., s. 314; Aust., s. 361: Victoria, s. 302.

[335] And the definition thus continues: "but does not include—

(a) any body corporate that is incorporated within Malaysia and is by notice of the Minister published in the *Gazette* declared to be a public authority or an instrumentality or agency of the Government of Malaysia or of any State or to be a body corporate which is not incorporated for commercial purposes;

(b) any corporation sole;

(c) any society registered under any written law relating to co-operative societies; or

(d) any trade union registered under any written law as a trade union." Act, s. 4: *vide* also: Ma., ss. 2, 161, 308, 320, 321; Sa., ss. 2, 161, 308, 317; Sin., ss. 2, 161, 308, 320, 321; Sa., ss. 2, 164, 315; Aust., s. 5; U.K., ss. 154 and 455.

[336] *Vide* Act, s. 6, on the definition of corporations related to each others; ss. 7, 11, 12 and 13 (Part II—ADMINISTRATION OF ACT); s. 17, on membership of holding company; ss. 37 to 47 (Part IV—SHARES, DEBENTURES AND CHARGES, Division 1—PROSPECTUSES); ss. 74 to 82 (Part IV—SHARES DEBENTURES AND CHARGES Division 4—DEBENTURES); ss. 84 to 97 (Part IV—SHARES, DEBENTURES AND CHARGES, Division 5—INTERESTS OTHER THAN SHARES, DEBENTURES ETC.); ss. 125 and 130 (Part V—MANAGEMENT AND ADMINISTRATION, Division 2—DIRECTORS AND OFFICERS); s. 147(3), (4), (5), on quorum, chairman, voting, etc., at meetings; s. 163, on limitation of liability of trustee, etc., registered as owner of shares: s. 175, on the duties of auditors to trustee for debenture holders; s. 179, on take-over offers; ss. 182, 186, 187 and 190 (Part VIII—RECEIVERS AND MANAGERS); ss. 200(2), (3), (4), (5), 207, 208 and 210 (Part IX—INVESTIGATIONS). (The provisions on investigations (ss. 193 to 210) apply also to foreign companies, unless otherwise indicated); ss. 319 to 328 (Part IX—VARIOUS TYPES OF COMPANIES, ETC., Division 1—INVESTMENT COMPANIES); ss. 359 and 360, on inspection of registers and translations of instruments; ss. 363, 364 and 366 (Part XII—GENERAL, Division 2—OFFENSES).