

UUMILC 2017
9th UUM INTERNATIONAL LEGAL CONFERENCE

**THE NOVEL LAWS ON SHAREHOLDERS' MEETINGS
AFFECTING MINORITY SHAREHOLDERS IN MALAYSIA**

Chen Thim Wai (a)*, Ruzita Azmi (b)

*Corresponding author

(a) School of Law, Universiti Utara Malaysia, Sintok, Kedah, Malaysia, thimwchen@yahoo.com

(b) Associate Professor, School of Law, Universiti Utara Malaysia, Sintok, Kedah, Malaysia/UUM Kuala Lumpur,
zita@uum.edu.my

Abstract

The purpose of this paper is to examine the potential impact of “Written Resolution” and “No Annual General Meeting” concepts on the minority shareholders in a private company. It surveys the state of the law on shareholders’ meeting as a form of corporate governance before the new concepts were introduced by the Companies Act 2016 on 31st January 2017 and compares it with the latter. This paper argues that the new concepts should not have been introduced without any protective measures being provided for the minority shareholders in a private company as a matter of good corporate governance. In this respect, references will be made to similar law on the new concepts and safeguards introduced in the Singapore Companies Act and other similar laws in the Commonwealth countries such as Australia. This paper seeks to identify protective measures for law reform purposes. It will also explore potential practical measures being employed and potential problems faced by private companies registered before the coming into force of the Companies Act 2016, where the annual general meetings are part of its corporate governance system.

© 2018 Published by Future Academy www.FutureAcademy.org.UK

Keywords: Companies Act 2016, minority shareholders, no annual general meeting, private companies, written resolutions.



1. Introduction

In Malaysia, the Companies Act 2016 (“CA 2016”), was gazetted on 15th September 2016 and, save for the corporate rescue provisions on judicial management and corporate voluntary arrangement together with the provision on registration of company secretaries, came into force on 31st January 2017. It represents a comprehensive overhaul of its company law by repealing the Companies Act 1965 (“CA 1965”) and introduces novel areas of law for private companies in the form of “written resolutions” and “No Annual General Meeting” (“No AGM”) concepts which have a large bearing on the law on shareholders’ meetings. Shareholders are one of two organs of a company, the other one being the directors, the decisions of which become that of the company which is in law, a separate legal entity. In *Continental Tyre & Rubber Co (Great Britain) Ltd v Daimler Co Ltd* (1915) 1 KB 893, p. 916, it is said that a company has ‘neither body, parts nor passions... Apart from its corporators, it can have neither thoughts, wishes, nor ‘intentions, for it has no other mind than the minds of the corporators’. The decisions of a company in general are resolved and made by the directors at board meetings and by the shareholders at an annual general meeting (“AGM”) and general meetings. The Singapore Court of Appeal in *Gabriel Peter & Partners (suing as a firm) v Wee Chong Jin & Ors* (1998) 1 SLR 374, p. 385, observed that: “It is a fundamental concept in company law that the company acts through its organ. The two organs of the company are the board of directors and the members of the company in general meeting. The acts of the two organs are deemed to be acts by the company itself. The decisions of the members are expressed through resolutions passed in general meeting. Similarly, decisions of the board of directors are reflected in the resolutions of the board. A board resolution is passed by a simple majority of the directors present at the board meeting”. Under section 143 of CA 1965, all companies, private and public companies limited by shares, are required to hold AGMs: i. the first one must be held within 18 months of its incorporation; ii. Subsequent AGM must be held once in every calendar year; and iii. Each subsequent AGM must be held not more than 15 months after the last preceding AGM. The importance of having an AGM, especially to the minority shareholders, lies in the type of business being conducted as laid down by the law in sections 169 and 172 of CA 1965 and model article 46 in the 4th Schedule of CA 1965 (“Table A”), which are as follows: i. the laying of the audited financial statements of the company as well as the directors’ report on the performance of the company; ii. Declaration of dividends to be paid to the shareholders; iii. Election of directors in place of those retiring; and iv. The appointment and fixing of the remuneration of the auditors. The basis for the company having an AGM was explained by Holland J in the New Zealand case, *In the matter of The South British Insurance Company Ltd* (1980) ACLC 34419, p. 34421: “An Annual Meeting of the shareholders of a company is an important event. Not only is there a statutory obligation on the company to call such a meeting, it contracts with its shareholders by its articles of Association that it will do so. It is the one occasion in the year when the shareholders have a right to meet the Directors or their representatives and to question them on the company’s accounts, the Directors’ Report and the company’s position and prospects. In addition they have a right to vote on, and if appropriate discuss, resolutions as to dividends and the election of Directors”. The explanation of Holland J was premised on the situation where the shareholders are not the directors of the company and thus, would not be in a position to gain access to information regarding the audited financial statements

and performance of the company including those of the directors. In many private companies, in practice, not all shareholders are directors of the companies, especially those who are in the minority.

2. Problem Statement

While the directors are given powers to run and manage the companies, their appointment and removal are ironically, subject to the wishes of shareholders. In a private company, the controlling shareholders would invariably appoint themselves as directors and leave the minority shareholders in a different camp stranded without a say in the management of the company. The ability of a company to function and operate is based on the majority rule and a shareholder's power to vote is not a fiduciary power and therefore a shareholder owes no duty to anyone on the exercise of his power to vote (*Tuan Haji Ishak Bin Ismail & Ors v Leong Hup Holdings Bhd*, (1996) 1 MLJ 661, p. 696; *Paidiah Genganaidu v The Lower Perak Syndicate Sdn Bhd & Ors*, (1974) 1 MLJ 220, p. 221). This is the crux of the problem faced by a minority shareholder in a private company. The principle of majority rule rests on superiority in shareholdings rather than on the superiority in physical numbers. However it is more accurate to ascribe to the superior group as having 'control' in the company even though they may not have the 51% shares since the shareholders in the opposing group may not be united. The concept of 'control' was accepted by Edgar Joseph Jr (as he then was) in *Tan Guan Eng v Ng Kweng Hee* [1992] 1 MLJ 487, p. 499, to "embrace a broad spectrum of positions within a company and that control could arise as the result of indifference or apathy". It is recognised that in Malaysia, the substantial shareholder usually controls the company through his or her involvement in the board and/or management (Mohd Sulaiman & Rachagan, 2017, pp. 216-217). The shareholders' meetings provide opportunities for the shareholders to meet and debate issues with a view to passing resolutions which form the basis of the decisions of companies. The manner in which the fate of any proposed resolution is decided depends on the votes cast by the shareholders at the meeting. The framework of the law generally provides each shareholder with one vote per share and the outcome of the voting process is determined by a majority of the shareholders who are eligible to vote, as observed by the Federal Court in *Paidiah Genganaidu v The Lower Perak Syndicate Sdn Bhd & Ors* (1974) 1 MLJ 220, p. 221: "What is beneficial to the company as a whole is usually a matter for the shareholders to decide. Largely it is a matter of opinion. Where opinions differ, as might well be the case here, the opinion of the majority must, of course prevail. This is because the minority have by their contract with the company agreed to submit to the will of the majority". The position of minority shareholders are vulnerable and it is through meetings with access to information on the audited financial statements of the company and the accountability of the directors in answering questions that their interests may have some protection, given that very little protection is left without having to resort to court for the remedies provided under statute such as oppression proceedings. Raja (2014, p. 163), regarded the majority rule as creating an opportunity to oppress minority shareholders. While Talbot (2013, p. 167) in her writings opined that one of the key areas in company law for corporate governance is minority shareholders' protection and noted (2013, p.42) that the doctrine of ultra vires used to have potential significance to deliver corporate governance for the minority shareholders but it has been removed which is a sign of further erosion of the protection afforded to minority shareholders. In Malaysia, section 21 of the CA 2016 grants companies with unlimited capacity to carry on or

undertake any business or activity thus making redundant the doctrine of ultra vires. Thus, any further erosion of minority shareholders' protection is a setback for corporate governance.

3. Research Questions

The CA 2016 was passed based on recommendations made by the Corporate Law Reform Committee ("CLRC") (Abdul Aziz, 2012), which was established by SSM (Companies Commission of Malaysia) on 17th December 2003 to undertake the task of company law reform, which resulted in several reports being published, in the form of twelve Consultative Documents. Other than those reports, 'no comprehensive study has been undertaken on the Act [CA 1965] since its enactment in 1965 (Joshi, 2016). On the matters pertaining to the law on shareholders meeting, the CLRC came up with a detailed study in the form of Consultative Document No. 3 (2006). The Consultative Document No.3 relates to the shareholder engagement process, particularly in the area of shareholders meetings and other avenues to facilitate shareholders engagement. The principal issues covered by the study include the process of shareholders meeting such as the calling of a meeting, rights of shareholders in the meeting process and appointment of proxies. Due to the common company law ancestry as shared with the UK, Australia, New Zealand and Singapore, the CLRC in conducting its study referred to the changes made in the company law in those countries with particular reference to the recommendations made in their respective company law reform reports. Although the law on shareholders' meetings in Malaysia has been discussed in local literature (Salim & Ong, 2009) with references to the Consultative Document No.3 however certain issues such as "Written Resolution" and "No AGM" were not mentioned but it is now part of the law in the CA 2016. Thus, local material on the concepts of "Written Resolutions" and "No AGM" are seriously lacking. Accordingly, the research question that arises from this paper is whether the "Written Resolutions" and the "No AGM" concepts will reduce the rights of minority shareholders in private companies.

4. Purpose of the Study

Companies are generally of two types, private and public. Under section 2 of the CA 2016, private company means either a company which was incorporated as a private company under this Act or a company incorporated as a private company under the CA 1965. A common feature of a private company under the CA 2016 in section 42 and the CA 1965 in section 15, is that the limit of its membership is set at not more than fifty shareholders. The CA 2016 changes the present law on shareholders' meetings with the introduction of 'Written Resolutions' and 'No AGM' for private companies only, even though the membership can reach a maximum of fifty shareholders. Those changes brought about are significant in that statistically about 99 per cent of the total local companies registered per year with the Malaysian Companies Registry are private companies. The Annual Report of *Suruhanjaya Syarikat Malaysia* ("SSM") (Companies Commission of Malaysia) (2014, p. 182) provided the following statistics set out in Table 1. The aim of this paper is to examine the potential impact of "Written Resolutions" and "No AGM" concepts on the rights of minority shareholders in a private company.

Table 01. Statistics on Private Companies incorporated in Malaysia.

Year	Total New Companies Incorporated (Local)	Private Companies Incorporated (Local)	Private Companies Incorporated (Local) in percentage
2012	45,366	45,249	99
2013	46,249	46,157	99
2014	49,144	49,040	99

5. Research Methods

The methodology employed in this paper is doctrinal – “doctrinal research” is described as a core legal research method which involves “research into the law and legal concepts” (Hutchinson and Duncan, 2012, p. 85). The approach taken is based on evaluating the provisions contained in the CA 2016 by reference to case reports, wordings in the particular provisions in the Act and their interpretation as well as legal literature including but not limited to books, journals and law reform reports or consultation documents. The methods used in this paper are a historical and comparative study of similar company laws in other Commonwealth countries such as the UK, Singapore and Australia. This is done for obvious reasons that the changes made by the CA 2016 have been made after a study was conducted on the various law reform reports completed in those countries accompanied by resulting changes in their company law legislation. An examination of the CA 2016 using the comparative method will show whether the particular provisions such as the “written resolution” and “no AGM” are suitable for private companies and the minority shareholders in Malaysia. In the process of the examination, it will address the concerns of the law reformers in other countries on the use of similar provisions. The historical method gives an understanding of the position and the rationale in having an AGM and will provide a platform to evaluate the drastic change made to eliminate altogether the obligatory requirement of AGMs for private companies, more so without any safeguards for the minority shareholders.

6. Findings

6.1. Written Resolution

Under the CA 1965, a resolution may be passed by shareholders without any physical attendance at a proposed meeting only if it was signed unanimously by all the shareholders who are entitled to receive notice of, and to attend and vote at general meetings according to section 152A. The genesis of section 152A is the unanimous consent common law principle enunciated by Buckley J in the English case of *Re Duomatic* (1969) 2 Ch 365 (“*Re Duomatic Rule*”). The principle is that where all shareholders who are entitled to attend and vote at a general meeting of the company, assent to a matter outside of a general meeting then that assent amounts to a binding resolution of the company since no shareholder is being prejudiced. Under the CA 2016, the law on Written Resolutions of private companies is provided in Subdivision 2 of the Act, particularly in section 306 as to when a proposed Written Resolution without a meeting, is passed. The significant change from the law in *Re Duomatic Rule* and section 152A of the CA 1965, is that the resolution is passed when the required majority (simple majority for an ordinary resolution or seventy-five per cent for a special resolution) of members who are eligible to vote, have signified their agreement to it. The adoption of the Written Resolution method of passing resolutions

obviates the need for meetings for shareholders in private companies. This sweeping change in the law ignores the established rights of shareholders in two important aspects and which very much form part of the growing importance of corporate governance:

- i. Right to vote; the right of a shareholder to vote on any resolution at any shareholders' meeting has been observed as a fundamental right by Edgar Joseph Jr J (as he then was) in *Lim Hean Pin v Thean Seng Co Sdn Bhd & Ors* (1992) 2 MLJ 10 at p. 34 and section 148(1) of the CA 1965.
- ii. Right to attend, speak and participate at meetings: the right to attend at the shareholders' meetings and to speak on any resolution before the meeting is another right which was entrenched in section 148(1) of the CA 1965. In *Tan Chong Teik & Gan Seong Chin @ Gan Chin & 5 Ors* (2014) 1 AMCR 605 at p. 615, Lee Swee Seng JC (as he then was) observed that a shareholder possesses a right to have a reasonable opportunity to speak at a general meeting which is the common law laid down in the English case of *Wall v London and Northern Assets Corporation* (1898) 2 Ch 469. The importance of this right becomes more evident in the case of a speaker who is in the minority who must be given the opportunity to exercise his right to speak for a reasonable time. For it is on such an occasion when the minority shareholder possesses the opportunity to voice out his view on any resolution proposed by the controlling shareholders and in the process affect the outcome of the proposed resolution by persuading less committed shareholder to vote against it. The Written Resolution which need not be unanimous and may be passed by a simple majority in the case of an ordinary resolution or by seventy-five per cent vote for a special resolution effectively render a minority shareholder muted and downgrade the value of his shares as compared to that held by the majority or controlling shareholders. Although the Written Resolution enables decisions to be made expeditiously, the CLRC has noted in its report (Consultative Document No. 3, 2006, p. 36) that the new procedure weakens the position of shareholders in the minority. In recognising the danger of having this new procedure, the CLRC in 2006 proposed a protective measure similar to the provisions in the Singapore Companies Act (Companies Act 2006, Cap 50, s 184D) where dissenting shareholder(s) having at least five per cent of the ordinary shares are allowed to demand in writing that the company convene a general meeting to debate on the proposed Written Resolution (Consultative Document No. 3, 2006, p. 38). The protective measure provision is triggered once a shareholder or shareholders with the requisite shareholdings within seven days of receipt of the proposed Written Resolution give notice to the company to convene a meeting for that resolution. At the same time, most importantly, the resolution is invalid even though in the meantime, it has complied with the "Written Resolutions" provisions necessary to pass the resolution. However, nowhere in the CA 2016 is that recommended protective measure to be found. The draftsman of the CA 2016 has ignored the fact that a private company is not necessarily a small company but it is able to accommodate up to fifty shareholders with divergent interests and views. By omitting the protective measure which was recommended by the CLRC, the interests of the minority shareholders are sacrificed for the sake of expediency and ease of doing business by a private company. Alternatively, the written resolution procedure should be limited to small private companies with a membership not exceeding five. It is often in private companies of this size

that the shareholders are also its directors (Abdul Samat and Mohd Ali, 2015, p. 769). Thus, such shareholders who are also directors are in a better position to look after themselves as compared to the bigger private companies where not all of its shareholders are directors as well.

6.2. No AGM

The CA 2016 only requires public companies to hold AGM by section 340. There is no requirement for AGMs to be held by private companies and it is left to the discretion of the shareholders to include the AGM requirement in the company's constitution. For private companies registered under the CA 2016, the directors or controlling shareholders will not want to burden themselves by introducing an AGM requirement. On the other hand, for companies registered before the CA 2016, the controlling shareholders will want to remove the existing AGM requirement from the company's constitution by amending it and it is facilitated by the new concept of "Written Resolutions" which can be passed with seventy-five per cent of the shareholders voting in favour of a special resolution for the constitutional amendment. The introduction of the "No AGM" law for private companies follows that of the UK Companies Act 2006. The minority shareholders are then left with general meetings under section 311 of the CA 2016, whereby with at least 10% of the paid up capital and being eligible to vote, they may requisition the directors to call for a meeting. Where more than 12 months has elapsed since the previous requisitioned meeting, then the required shareholdings of the requisitioning shareholders drops down to at least 5%. However, this represents a similar law under the CA 1965 and does not compensate the loss of AGM for the minority shareholders in private companies. The importance of an AGM can be seen from the perspective of a minority shareholder who is not involved in management. These are the type of scenarios where the private companies are not of the small type in which every shareholder is a director. A common requirement of an AGM is for the directors to lay the audited financial statements before the shareholders who are then allowed to query the directors – the only moment when the directors are present at an annual meeting for such a purpose (Abdul Samat & Mohd Ali, 2015, p. 769). The AGM can therefore be regarded as an accountability mechanism and a form of corporate governance. The required details as stipulated in the statute as to what are included in the audited financial statements further enhance the value of the AGM as a place where the directors are obliged to defend their position on the performance of the company to those shareholders who are not directors or in any way involved in management, a matter of accountability (Chen, 2014; Cordery, 2005; Abdul Samat & Mohd Ali, 2015). Although, sections 257 and 258 of the CA 2016 require the company to circulate the financial statements within six months of its financial year end, yet the directors do not have to face the minority shareholders at a meeting unless it is called by shareholders with the requisite shareholdings. In this instance, the objective of having good corporate governance is defeated and the protection of the interest of minority shareholder interest is further eroded (Saez and Riano, 2013). The CA 2016 was drafted in the present form despite the recommendation by the CLRC that a shareholder be given the power to request that the company convenes an AGM in a particular year if private companies are not required to hold any AGMs (Consultative Document No. 3, 2006, p. 23). The recommendation was made after the positions of several countries on similar laws were studied, notably the UK, Singapore and Australia. Both the UK and Australia have taken the route to abolish the requirement of holding AGMs for private companies. At the

same time, the law in both countries provided that a private company is not required to have a private secretary (Companies Act of 2006, s 270 (the UK); Corporations Act of 2001, s 204A (Australia)), which amount to a drastic step in further erosion of protective measures to the minority shareholders who may need advice on company law regulations by reference to the company secretary. The circumstances and culture in both countries may have decided the ultimate course of action taken in adopting those rather drastic laws. In Malaysia, it opted not to follow the law regarding company secretary in private companies but chose to follow the “No AGM” law. It has been observed by Rachagan and Satkunasingam (2009) that in contrast to the western countries, the culture of the society in Malaysia is non-litigious with the affected minority shareholders being reluctant to take their grievances to court. Singapore, on the other hand, on the matter of AGM in private companies, opted to make it compulsory to convene it but the requirement may be dispensed with by passing a unanimous resolution to that effect (Companies Act 2006, Cap 50, s 175A (Singapore)). As a protection for minority shareholders, the law provided that, even after the lawful dispensation of the AGM, any shareholder may have it restored for a particular year by giving appropriate and timely notice to the company (Companies Act 2006, Cap 50, s 175A (4) (Singapore)). Given the important place of an AGM in corporate governance especially when it concerns minority shareholders in a private company where not all shareholders are directors, the Singapore model is preferred. The AGM can only be dispensed with by a unanimous decision of the shareholders after all the role of AGM is to protect the interest of the lesser involved shareholders. The Singapore model places importance on AGM by giving a sole shareholder to restore it in any particular year and obviously this takes into account the eventuality of any changes in the shareholders after the AGM was dispensed with by an unanimous decision so that the new shareholder’s interest can be protected with the revival of the AGM. The problems felt by the absence of an AGM in private companies is magnified when relationships between the shareholders deteriorate. On such occasions, the accountability of the directors is material to the minority shareholders since they are not sitting on the board of directors. It is observed by Davies and Worthington (2016, p. 404) that relations between the shareholders in small companies often deteriorate. Kosmin and Roberts (2008) also question the wisdom over the dispensation of the AGM requirement with concerns that the minority shareholders would be deprived of the opportunity to utilise the AGM as an accountability tool. The problem is compounded by the lack of marketability of the shares in a private company, thus restricting the exit opportunities for the minority shareholders (Keay, 2014).

6.3. Potential Practical Problems faced by Minority shareholders

6.3.1. Written Resolutions

With the introduction of the Written Resolution procedure, the meeting formalities need not be followed even when unanimity of consent as in the *Re Duomatic Rule* is absent. Instead, for resolutions in a private company to be passed, the Written Resolution procedure, in the view of the author, only requires the resolution to be circulated and signed:

- i. in the case of an ordinary resolution, by members representing a simple majority of the total voting rights of eligible members, by virtue of sections 291 (1)(b); 293 (1)(a)(i); 298 (1) CA 2016. Ordinary resolution for written resolution is defined in section 291 (1)(b) CA 2016 as a

resolution passed by a simple majority of half of such members who are entitled to vote on a written resolution.

- ii. in the case of a special resolution, by members representing not less seventy-five per centum of the total voting rights of eligible members by virtue of sections 292 (1)(b); 293 (1)(a)(i); 298 (1) CA 2016. Special resolution for written resolution is defined in section 292 (1)(b) CA 2016 as a resolution of which a notice of not less than twenty-one days has been given and passed by a majority of not less than seventy-five per centum of such members who are entitled to vote on a written resolution.

The above phrase, “total voting rights of eligible members”, although not appearing explicitly in the provisions governing written resolutions unlike the corresponding provisions in the UK Companies Act 2006, however, the phrase adopted by the author can be inferred from the combined reading of the relevant provisions in section 293 (1) CA 2016 which provides for one vote for one share and section 298 of CA 2016 which allows the eligible member to receive the written resolution as being the member who is entitled to vote on the resolution on the circulation date. As for special resolution, an additional requirement as imposed by section 292 (1) CA 2016 is that a notice of the resolution, of not less than twenty-one days has been given.

6.3.1.1. Limitations on use of written resolution and Circulation of written resolution proposed by the directors [section 301 CA 2016]

The only situations where the use of written resolution are prohibited are in relation to a removal of a director (section 297 (2)(a) CA 2016) or an auditor (section 297 (2)(b) CA 2016) before the term of appointment has expired. The rationale for such prohibitions is that special notice must be given to the director (section 206 (3) CA 2016) or auditor (section 277 (1) CA 2016) in such cases of proposed removal and a physical meeting must be consequently held. The CA 2016 requires the proposed written resolution to be circulated to the shareholders but the directors is given the option of circulating the written resolution in the manner set out in section 300 of the CA 2016, unless it is otherwise provided in the constitution, either by sending a hard copy either by hand or by post, or by transmitting it in electronic form. Although the circulation of the written resolution is to be done “at the same time”, however that is qualified by the words, “so far as practically in the manner specified under section 300”. This therefore allows flexibility in the circulation of the written resolution which is an advantage to the directors proposing it by choosing the supporting shareholders as the early recipients. The other aspects of the law on written resolution provides that: a written resolution can be passed by sufficiently gathering the required majority signatures of eligible members (section 306 (4) CA 2016); a member’s agreement to a written signature, once signified, shall not be revoked (section 306 (3) CA 2016); the only statutory punishment for any person who contravenes the requirement on circulation of written resolution including the furnishing of an accompanying statement with information on the procedure to be followed and the validity date for passing the resolution, in section 301 CA 2016, is that he is liable to a fine not exceeding RM Ten Thousand (RM10,000.00); and the validity of the written resolution is not affected by a failure to comply with section 301 CA 2016 on the circulation of written resolution and/or the furnishing the accompanying statement. Given that the validity of the written resolution is unaffected by any non-

compliance of the law, the directors may decide to accept the risk of being slapped with a statutory fine by pushing through a controversial proposal to members who are aligned with them and/or who are apathetic or indifferent, before the written resolution proposal even reaches the minority members who are strongly opposed to the proposal, which represents a further erosion of their rights.

6.3.2. No AGM

While the private companies registered on or after 31st January 2017 (the date of coming into force of the CA 2017) will not be required to hold any AGM, however for those private companies registered before the 31st January 2017 where AGM is part of its articles of association (now known as the “Constitution”) a different fate awaits the minority shareholders. The CA 1965 by section 143 and model article 43 in in the Fourth Schedule, CA 1965 (“Table A”) requires all companies incorporated by shares to hold an AGM. The business to be transacted at an AGM as set out in the CA 1965 are as follows: the laying of audited accounts including the directors’ report by section 169; and the appointment of auditors by section 172. Where model article 46 of Table A, CA 1965 was adopted in the articles of association (which is often the case by way of default), then other types of business will be transacted as ordinary business at the AGM. Model article 46 reads as follows: “All business shall be special that is transacted at an extraordinary general meeting, and also all that is transacted at an annual general meeting, with the exception of declaring a dividend, the consideration of the accounts, balance sheets, and the report of the directors and auditors, the election of directors in the place of those retiring, and the appointment and fixing of the remuneration of the auditors”. Thus, the following businesses are regarded as an AGM type of transactions: dividend declaration; consideration of the company accounts and report of the directors and auditors; election of directors to replace those retiring; and appointment and fixing of the remuneration of the auditors. In the light of the type of business being conducted at an AGM, it can be said that an AGM serves the important role of an accountability mechanism which is the right of the minority shareholders, who are not involved in the management of the company, to secure accountability from the directors.

6.3.2.1. Private companies, AGM and the CA 2016.

The CA 2016 has done away with the memorandum and articles of association [M & A]. In its place, newly incorporated companies has the option of just relying on the provisions in the CA 2016 [where some of the model articles in the Table A of the CA 1965 are replicated in whole or in part and are replaceable] or adopting a constitution for the purpose of an internal management document. However, by section 32 (2), the constitution has no effect to the extent that it contravenes or is inconsistent with the CA 2016. For the companies incorporated before the CA 2016, its M & A are retained unless its articles are in conflict with the CA 2016 pursuant to sections 32(2), 34 (c), 619 (3) and 620 (4). This means that if model articles 43 and 46 in Table A or similar articles were part of the company’s M & A, then they remain as clauses in its constitution. Those clause are not in conflict with the CA 2016 since there is no statutory prohibition on the holding of AGMs for private companies.

6.3.2.2. Revocation of the AGM requirement

The private companies where the AGM requirement in model articles 43 and 46 or similar articles appear in its constitution [formerly the M & A] if it wished to revoke or remove this requirement, then it has to amend its constitution by special resolution [unless the constitution itself prohibits the amendment due to section 36 (1), CA 2016]. Special resolution is defined to mean a resolution of which notice of not less than twenty-one days has been given and passed by a majority of not less than seventy-five per centum of members voting at a meeting or in the case of private companies by written resolution pursuant to sections 292 (1) and 297 (1), CA 2016. For written resolutions proposed by directors, the procedures to be followed are found in sections 298, 299, 300 and 301, CA 2016. There are basically three (3) options in which the private companies could proceed to revoke or remove the AGM clause in its constitution: i. under the CA 2016, special resolution by written resolution; or ii. Under the CA 2016, special resolution by a meeting; or iii. Unanimous approval of shareholders at a meeting or under the *Re Duomatic Rule* which ruled that the formalities of notices of meeting and holding a meeting can be waived by the unanimous consent of all shareholders. The third option is without doubt the safest as it would rule out any complaint on the disregard of interests of the minority shareholders who have the expectation of exercising their rights at an AGM as required in the company's constitution [formerly the M & A]. However, the probable situation is that the controlling shareholders/directors will obviously opt for the first option, the use of "Written Resolution" which offers the ease of effecting the revocation of the existing AGM clause in its constitution. While the first and second options are allowed under the CA 2016, however the directors/controlling shareholders and their professional advisers need to bear in mind the interests and expectations of the minority shareholders in respect of their rights and interest in an AGM which may ground an action for oppression under section 346, which replicates that of the oppression provision in section 181, CA 1965. Oppression of minority shareholders may take different forms which include the disregarding of their interest and expectation or such act or resolution passed which discriminates or is prejudicial to them. Although the CA 2016 did not provide for private companies to hold an AGM however it recognises the continuation of the past law by allowing the M & A of companies incorporated before the CA 2016, to be retained as its constitution, thus the requirement for an AGM remains as valid and binding for those private companies. The caution given by the CLRC in regard to the revocation or the removal of AGM for private companies, must be appreciated and noted, more so if there is to be a dispensation with the requirement for the holding of an AGM for those private companies which have adopted model articles 43 and 46 or similar articles: "Nonetheless, there are concerns that there may be a need to protect the interests of minority shareholders in private companies since some members of private companies might not be involved in management. Thus, it is necessary to emphasise that any proposal to dispense with the requirement for the holding of an AGM should be coupled with an appropriate mechanism to protect the interests of minority shareholders." (Consultative Document No. 3, 2006, p. 22, para 2.7).

7. Conclusion

Both the new concepts of law introduced by the CA 2016, "Written Resolutions" and "No AGM" may be useful for small private companies with five or so shareholders. In such small sized companies,

the shareholders are also acting as directors or have roles to play in its management. Since they are directly involved in the decision-making process of the companies, they are in a better position to have access to all the relevant documents or the personnel in the company. In the larger private companies, it would be unwieldy to accommodate all shareholders onto the board of directors with the consequence of only a handful of shareholders serving the board of directors. For these companies, the minority shareholders' position are considerably weakened by those two new law concepts which have found favour in the western countries such as the UK and Australia. On the matter of using the UK company law model as a point of reference, it is noteworthy to reproduce these comments made on the UK company law in the New Zealand Law Commission report of 1989, which preferred the Canadian company law model as a reference to reform its company law (Patfield, 1995, p. 208): "With United Kingdom company law now increasingly influenced by European law, it no longer provides an obvious model for us." Similarly, in Singapore, the amendments to the Companies Act have relied less on the UK company law developments and are more of a product to suit the local conditions (Wang, 2014, pp. 28 & 31). It has been noted that additional factors accounting for the difference in the corporate laws in other Commonwealth countries such as Australia and India as compared with that in the UK include the differences in the political and cultural make-up of each country (Anderson et al., 2012, p. 200). The Singapore model has tempered the drastic nature of the two new types of law, in the case of "Written Resolutions" by allowing a single shareholder or shareholders with at least five per cent of the total voting rights of the shareholders to timely demand for a meeting where debates will ensue on the appropriateness of passing the proposed resolution with the earlier passed written resolution being invalid after the demand is made. In the other case of "No AGM", a single shareholder, is empowered to have an AGM called in a particular year even after AGMs are previously dispensed with by unanimous consent. The Singapore model has balanced the interests of all shareholders by requiring a unanimous resolution for dispensation of AGMs. Further, the decisions on whether AGMs are to be dispensed with, should be left to the shareholders rather than have it abolished, recognizing the importance of the AGM as an accountability mechanism. The Singapore model is more appropriate to be adopted in Malaysia since it has taken into account the interests of both the majority/controlling and minority shareholders bearing in mind the need for good corporate governance to restrict the hands of controlling shareholders in emerging countries such as Malaysia (Uzma, 2016, p. 304). Therefore, the potential impact of the novel law of "Written Resolutions" and "No AGM" is a further erosion of the rights of minority shareholders in private companies and these concerns should be addressed at future law reforms. The law reformers need not look far for a solution, after all those safeguards were proposed by the CLRC, which was adopted from the Singapore model.

References

- Abdul Aziz, N.A. (2012). Managing corporate risk and achieving internal control through statutory compliance. *Journal of Financial Crime*, 20(1), 25-38.
- Abdul Samat, N. H., & Mohd. Ali, H. (2015). A legal perspective of shareholders' meeting in the globalised and interconnected business environment. *Procedia-Social and Behavioral Sciences*, 172, 762-769.
- A Consultative Document on Engagement with Shareholders No. 3. (2006). Retrieved 1 January 2017 from https://www.ssm.com.my/files/clrc/consultation_documents/cd3.pdf

- Anderson, H., Welsh, M., Ramsay, I., & Gahan, P. (2012). The evolution of shareholder and creditor protection in Australia: An international comparison. *International & Comparative Law Quarterly*, 61(1), 171-207.
- Chen, T. W. (2014). *The law on shareholders' meetings—AGM and EGM*. Petaling Jaya: LexisNexis.
- Cordery, C. J. (2005). *The Annual General Meeting as an accountability mechanism*. Retrieved on 29 August 2017 from <https://www.victoria.ac.nz/sacl/centres-and-institutes/eagtr/working-papers/WP23.pdf>
- Davies, P., & Worthington, S. (2016). *Gower's principles of modern company law* (10th ed). London: Sweet & Maxwell.
- Hutchinson, T., & Duncan, N. (2012). *Defining and describing what we do: Doctrinal legal research*. *Deakin L. Rev.*, 17, 83.
- Joshi, A. (2016). *An insight to corporate law reform in Malaysia*. Retrieved on 8 September 2016 from www.ssm.com.my/en/clrc/articles/CLRC_Art_1
- Keay, A. R. (2014). An assessment of private enforcement actions for directors' breaches of duty. *Civil Justice Quarterly*, 33(1), 76-92.
- Kosmin, L., QC, L. K., & Roberts, C. (2008). *Company meetings: Law, practice and procedure*. Oceana Publications.
- Mohd-Sulaiman, A. N., & Rachagan, S. (2017). Shareholder primacy, controlling shareholders and Malaysia's Companies Act 2016. *Journal of Corporate Law Studies*, 17(1), 203-224.
- Patfield, F. M. (Ed.). (1995). *Perspectives on company law: 1*. London: Kluwer Law International.
- Rachagan, S., & Satkunasingam, E. (2009). Improving corporate governance of SMEs in emerging economies: A Malaysian experience. *Journal of Enterprise Information Management*, 22(4), 468-484.
- Raja, K. (2014). Majority shareholders' control of minority shareholders' use and abuse of power: A judicial treatment. *International Company and Commercial Law Review*, 25(5), 162-185.
- Saez, M. I., & Riano, D. (2013). Corporate governance and the shareholders' meeting: voting and litigation. *European Business Organization Law Review (EBOR)*, 14(3), 343-399.
- Salim, M. R., & Ong, Y. S. (2009). *The law on shareholders' meetings in Malaysia*.
- Talbot, L. (2013). *Progressive corporate governance for the 21st century*. Routledge.
- The Annual Report 2014 of Suruhanjaya Syarikat Malaysia (SSM)* [Companies Commission of Malaysia]. Retrieved on 1 January 2017 from http://www.ssm.com.my/sites/default/files/annual_report/SSM%20annrep%202014_FA_eng_0.pdf
- Uzma, S. H. (2016). Embedding corporate governance and corporate social responsibility in emerging countries. *International Journal of Law and Management*, 58(3), 299-316.
- Wang, J. Y. (2014). Making Singapore company law more singaporean—a critical examination of the recent revision of the companies act in the light of comparative law. *Asian Bus. Law.*, 14, 15.