



# UNIT 2 :

## COMPANIES, PROMOTION AND INCORPORATION PROCESS

# PART A: TYPES OF COMPANIES

1. Limited and Unlimited Companies

2. Private and Public Companies

3. Domestic and Offshore Companies

4. One-Person Company

5. Small Private Company

6. Subsidiary Company

7. Dormant Company

# LIMITED AND UNLIMITED COMPANIES

- ❖ A limited company in Mauritius is a business entity where the liability of its shareholders or members is limited to their investment or the amount they have agreed to contribute to the company.
- ❖ The liability of the shareholders is limited to the unpaid amount, if any, on their shares. In case of company insolvency, the shareholders' personal assets are generally protected from the company's debts.
- ❖ There are two common types of limited companies in Mauritius:

## TWO TYPES OF LIMITED COMPANIES :

- ❖ **Private Limited Company (Ltd.):** A private limited company is denoted by "Ltd." and is commonly used for small to medium-sized businesses. It has restrictions on the transferability of its shares and typically has a limited number of shareholders (often family members or close associates). Private limited companies in Mauritius are governed by the Companies Act 2001 and must comply with legal obligations, such as filing annual financial statements and maintaining statutory records.
- ❖ **Public Limited Company (PLC):** A public limited company is denoted by "PLC" and is typically larger in scale. It can offer its shares to the public and may be listed on the Stock Exchange of Mauritius. Public limited companies in Mauritius have additional regulatory requirements compared to private limited companies, such as publishing financial statements and complying with corporate governance standards.

# UNLIMITED COMPANY

- ❖ An unlimited company in Mauritius is a business structure where the liability of its members is not limited. In an unlimited company, members are personally liable for the company's debts and obligations. This means that the personal assets of the members can be used to satisfy the company's liabilities. Unlimited companies in Mauritius are relatively uncommon and are often chosen for specific purposes, such as professional partnerships or specific industries where limited liability is not a priority.

# PRIVATE COMPANY

A private company in Mauritius is a business entity that has restrictions on the transferability of its shares and typically has a limited number of shareholders (often family members, close associates, or specific investors). Some key features of a private company in Mauritius include:

- ❖ **Limited Liability:** Shareholders' liability is limited to the unpaid amount, if any, on their shares. Personal assets of the shareholders are generally protected from the company's debts.
- ❖ **Minimum Number of Shareholders:** A private company in Mauritius must have a minimum of one shareholder and can have a maximum of 25 shareholders.

# PRIVATE COMPANY

- ❖ **Directors:** A private company must have at least one director who is ordinarily resident in Mauritius. Directors are responsible for the management and operations of the company.
- ❖ **Confidentiality:** Private companies in Mauritius benefit from a level of confidentiality as their financial statements and certain other information are not publicly accessible.
- ❖ **Less Stringent Reporting Requirements:** Private companies have fewer reporting obligations compared to public companies.

# PUBLIC COMPANY



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- A public company in Mauritius is a business entity that can offer its shares to the public and may be listed on the Stock Exchange of Mauritius. Some key features of a public company in Mauritius include:
  - ❖ **Public Offering of Shares:** Public companies can issue shares to the general public, allowing them to raise capital from a wider investor base.
  - ❖ **Listing Requirements:** If a public company is listed on the Stock Exchange of Mauritius, it must comply with additional listing requirements and corporate governance standards.

# PUBLIC COMPANY

- ❖ **Minimum Share Capital:** Public companies in Mauritius are required to have a minimum share capital as specified by the Companies Act 2001.
- ❖ **Reporting and Disclosure Obligations:** Public companies have more stringent reporting and disclosure requirements, including publishing financial statements and providing regular updates to shareholders and regulatory authorities.
- ❖ **Greater Transparency:** Public companies are subject to higher levels of transparency and accountability to protect the interests of the public shareholders and maintain investor confidence.

# DOMESTIC COMPANY

A domestic company in Mauritius is a business entity incorporated and registered within the jurisdiction of Mauritius. It is commonly known as an onshore or resident company. Some key features of domestic companies in Mauritius include:

- ❖ **Local Operations:** Domestic companies operate within Mauritius, conducting business activities and operations within the country. They may have physical offices, assets, employees, and customers located in Mauritius.
- ❖ **Compliance with Mauritian Laws:** Domestic companies in Mauritius must comply with the Companies Act 2001, which governs company formation, corporate governance, financial reporting, and other legal obligations. They are subject to the laws, regulations, and taxation policies of Mauritius.
- ❖ **Taxation:** Domestic companies in Mauritius are subject to Mauritian tax laws and are liable for corporate income tax on their profits. They must fulfill their tax obligations, including filing tax returns and paying applicable taxes to the Mauritius Revenue Authority.

# OFFSHORE COMPANY

An offshore company in Mauritius, often referred to as a Global Business Company (GBC), is a business entity that is incorporated and registered in Mauritius but conducts its business activities primarily outside of Mauritius. Some key features of offshore companies in Mauritius include:

- ❖ **International Operations:** Offshore companies in Mauritius engage in international business activities, typically outside the jurisdiction of Mauritius. They may have customers, suppliers, or investments in various countries worldwide.
- ❖ **Tax Advantages:** Mauritius offers a range of tax advantages for offshore companies. GBCs can benefit from the Global Business License regime, which provides access to Mauritius' extensive network of double taxation avoidance agreements (DTAAs) with other countries. This allows GBCs to benefit from reduced withholding tax rates or exemptions on certain types of income.

# OFFSHORE COMPANY

- ❖ **Regulatory Framework:** Offshore companies in Mauritius are governed by the Financial Services Commission (FSC) and must comply with specific regulations and requirements under the Companies Act and the Financial Services Act. They have to meet certain substance requirements to demonstrate their genuine presence and economic activity in Mauritius.
- ❖ **Privacy and Asset Protection:** Mauritius provides a level of confidentiality and privacy protection for offshore companies, allowing individuals or businesses to maintain confidentiality of their business transactions and protect their assets.

# ONE-PERSON COMPANY

- ❖ **Section 2 of the Companies Act 2001** defines a one-person company as a private company in which the only shareholder is also the sole director of the company. It does not include a company in which the only shareholder is another company.
- ❖ On application of a one-person company, **Section 23 (2) (h) of the Companies Act 2001** requires that the proposed director nominates someone to act as company secretary in the event of the death or mental incapacity of the sole shareholder and director.
- ❖ In the event of the death of the sole shareholder/director, **Section 140 (5) of the Companies Act 2001** provides that the nominated secretary will have the responsibility of calling as soon as practicable a meeting of the heirs of the deceased for the purpose of appointing a new director (s).

# SMALL PRIVATE COMPANY

- ❖ **Under Section 2 (5) of the Companies Act 2001**, a small private company is a private company whose turnover in respect of its last preceding accounting period is less than MUR 50 million.
- ❖ **Under Section 163 (1) of the Companies Act 2001**, a small private company needs not appoint a company secretary (unless it is a one-person company, in which case it will need to nominate a company secretary).
- ❖ **Section 209 of the Companies Act 2001** provides that small private companies need not appoint a qualified auditor. **Section 215 (3B) of the Companies Act 2001** provides that a small private company who has an annual turnover not exceeding MUR 20 million can file with the Registrar of Companies, a financial summary prepared on a cash basis showing a profit and loss statement only.
- ❖ **Section 223 (1B) of the Companies Act 2001** provides that a small private company with an annual turnover not exceeding MUR 20 million will not be required to file with the Registrar of Companies an annual return unless there is a change in its shareholding or in the composition of its board of directors.

# SUBSIDIARY COMPANY

❖ **Section 3 of the Companies Act 2001** defines the subsidiary company. A company is a subsidiary of another company (holding/parent company) if that holding company:

- (a) controls the composition of its board;
- (b) is in a position to exercise, or control the exercise of, more than one half the maximum number of votes that can be exercised at its meeting;
- (c) holds more than one half of the issued shares, other than shares that carry no right to participate beyond a specified amount in a distribution of either profits or capital; or
- (d) is entitled to receive more than one half of every dividend paid on issued shares,

❖ **Section 3 (6) of the Companies Act 2001** provides that a company will be deemed to be virtually wholly owned subsidiary of another company (parent company) when the parent company owns at least 90% of the voting power in that company.

❖ **Under Section 83 of the Companies Act 2001**, a subsidiary company cannot hold shares in its holding company. An issue or a transfer of shares by a holding company to its subsidiary will be void.

# DORMANT COMPANY

- ❖ A dormant company is a company which does not have any significant accounting transaction during any period. It ceases to be dormant when a significant accounting transaction occurs. **See Section 293 of the Companies Act 2001.**
- ❖ A company can declare itself a dormant company by a special resolution passed at a meeting of shareholders.
- ❖ **Section 294 (3) of the Companies Act 2001** provides that the company will need to give notice to the Registrar of Companies of the passing that resolution within 14 days of the passing of that special resolution. On receipt of that resolution, the Registrar of Companies will record the company in its register as a dormant company. A dormant company is exempted from payment of the annual registration fee.
- ❖ Where the company ceases to be dormant, it must **within 14 days** of any significant accounting transaction taking place, give notice to the Registrar of Companies that it has ceased to be dormant. The Registrar of Companies will amend its records accordingly.

## PART B : PROMOTION OF A COMPANY: A PROMOTER

- ❖ A promoter of a company refers to an individual or a group of individuals who take the initiative in forming a company and are involved in the process of its establishment.
- ❖ They are responsible for conceiving the idea, organizing the necessary resources, and undertaking the initial steps to set up the company. Here are some key aspects related to the role of a promoter:



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## PART B : PROMOTION OF A COMPANY : A PROMOTER

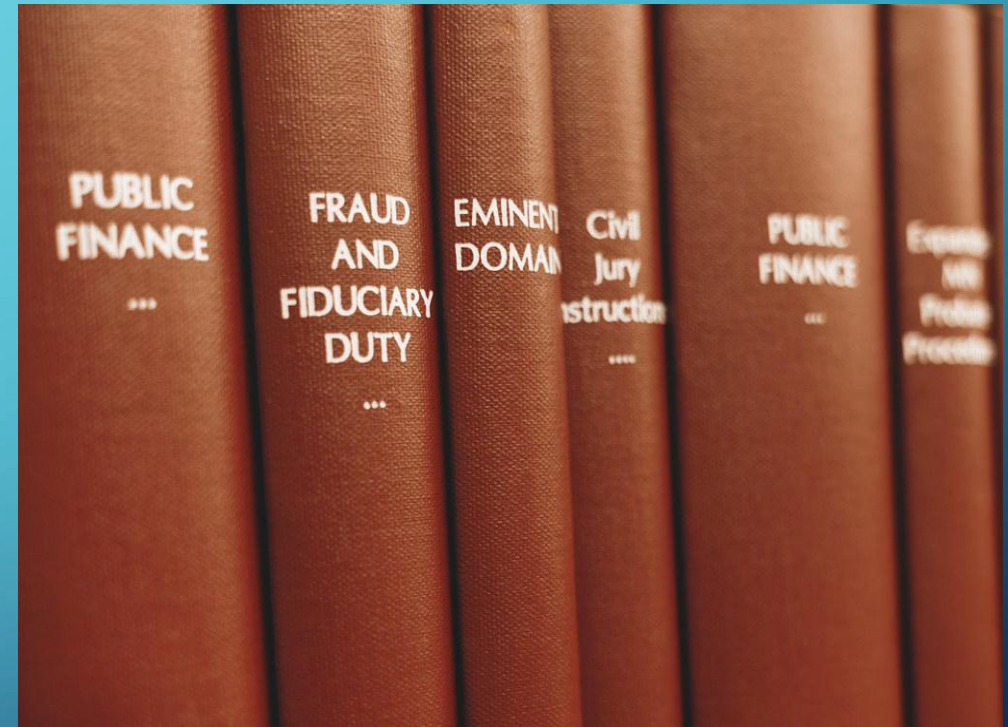
- ❖ **Identifying Business Opportunity:** Promoters are often individuals with an entrepreneurial mindset who identify a business opportunity or a market need. They conduct market research, assess the feasibility of the business idea, and determine the potential for success.
- ❖ **Conceptualizing and Planning:** Promoters develop the concept of the business, including its vision, mission, and strategic objectives. They formulate a comprehensive business plan outlining the company's goals, target market, products or services, marketing strategies, and financial projections.

# A PROMOTER

- ❖ **Securing Resources:** Promoters play a crucial role in securing the necessary resources to establish the company. This includes raising capital, acquiring funding from investors or financial institutions, and assembling a team of professionals such as lawyers, accountants, and consultants to support the establishment process.
- ❖ **Legal and Regulatory Compliance:** Promoters ensure compliance with legal and regulatory requirements associated with company formation. They work closely with legal professionals to draft and file the necessary documents, such as the Memorandum and Articles of Association, and complete the registration process with relevant government authorities.
- ❖ **Attracting Investors:** Promoters are responsible for attracting potential investors to invest in the company. They pitch the business idea, present the business plan, and negotiate terms with investors to secure funding for the initial stages of the company's operations.

# DUTIES OF A PROMOTER

- ❖ A promoter occupies a dominant position in relation to the unformed company and, to prevent that position being abused, the promoter will owe the unformed company a number of duties.
- ❖ Two broad categories of duty can be identified, namely the **fiduciary duty** and **duties imposed by statute**.



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## DUTIES OF A PROMOTER – FIDUCIARY DUTY

- ❖ As fiduciaries, promoters are expected to act in good faith, with loyalty, and in the best interests of the company and its shareholders.
- ❖ So, for example, if upon incorporation, a promoter sells to the newly formed company an asset that he acquired during the company's promotion, he will not be permitted to keep the proceeds of the sale, unless he discloses the nature of the interest and the extent of the profit made.
- ❖ Should he fail to disclose the profit, the transaction in question will be voidable and so can be rescinded by the company.

## ERLANGER V NEW SOMBRERO PHOSPHATE CO (1878) LR 3 APP CAS 1218 (HL):

### Facts

- Erlanger headed a syndicate that, for £55,000, acquired a lease to certain mining rights. The syndicate set up a company to take advantage of the mining rights.
- Five directors were appointed, but two were abroad, one was the Lord Mayor of London (and so could devote little time to the company), and the remaining two had strong links to Erlanger.
- Through one of the directors with links to Erlanger, the lease was sold to the company for £110,000. Full details of the transaction were not disclosed to the company's members.

### Held

- The contract for the sale of the lease was voidable at the company's instance.
- The directors may have known the details of the transaction, but this disclosure was insufficient as the key directors were mere puppets who, according to Lord Blackburn, had not given the transaction the 'intelligent judgment of an independent executive'.
- The company therefore rescinded the lease, and recovered the £110,000 paid.

# DUTIES AND LIABILITIES OF PROMOTER

- ❖ As fiduciaries, promoters are expected to act in good faith, with loyalty, and in the best interests of the company and its shareholders.
- ❖ So, for example, if upon incorporation, a promoter sells to the newly formed company an asset that he acquired during the company's promotion, he will not be permitted to keep the proceeds of the sale, unless he discloses the nature of the interest and the extent of the profit made.
- ❖ Should he fail to disclose the profit, the transaction in question will be voidable and so can be rescinded by the company.
- ❖ However, the right to rescind will be lost where:
  - The company affirms the contract; or
  - The company delays in exercising its right to rescind the contract

# DUTIES AND LIABILITIES OF PROMOTER

- ❖ It must be noted that where the contract has been affirmed, the company can nevertheless sue the promoter to account for the secret profit.
- ❖ Under Section 186 of the Companies Act 2001, every promoter has the following duties until the company's formation is complete and its working capital has been raised:
  - (a) to observe the utmost good faith towards the company in any transaction with it or on its behalf; and
  - (b) to compensate the company for any loss suffered by it by reason of his failure to exercise such good faith.

# PRE-INCORPORATION CONTRACTS

- ❖ A company does not come into existence until the promoters have completed the registration requirements and the Registrar of Companies (ROC) has issued a certificate of incorporation.
- ❖ Prior to this time, a company cannot be bound by contracts entered into in its name or on its behalf. In practice, however, promoters will need to contract with third parties for such things as the lease of premises, business equipment and connection to utilities so that once the certificate of incorporation is issued, the company can begin trading.
- ❖ However, the problem which arises in relation to pre-incorporation contracts is whether promoters can avoid being personally liable on such contracts notwithstanding that the company did not exist at the time when such contracts were concluded on its behalf. Quite clearly, an agent (the promoter) cannot bind a non-existent principal (the company) to contracts.

# PRE-INCORPORATION CONTRACTS

❖ Pre-incorporation contracts in company law refer to contracts entered into by promoters or individuals on behalf of a company that has not yet been incorporated. These contracts are made in anticipation of the company's formation and become binding on the company once it is incorporated. Here are some key aspects of pre-incorporation contracts:

- 1) **Nature of Pre-Incorporation Contracts:** Pre-incorporation contracts are agreements made by individuals or promoters acting on behalf of a proposed company before it comes into existence as a legal entity. The contracts may include agreements related to property purchase, lease agreements, employment contracts, vendor agreements, or any other necessary contracts to facilitate the formation and initial operations of the company.
- 2) **Promoters' Authority:** Promoters, who are individuals involved in the formation of the company, have the authority to enter into pre-incorporation contracts on behalf of the future company. They act as agents of the future company, and their actions bind the company once it is incorporated.
- 3) **There**

# PRE-INCORPORATION CONTRACTS

**3) Company's Liability:** Once the company is incorporated, it becomes bound by the pre-incorporation contracts entered into by its promoters or individuals acting on its behalf. The company assumes the rights, duties, and liabilities under these contracts, and they become enforceable against the company.

**4) Ratification of Pre-Incorporation Contracts:** After incorporation, the newly formed company has the option to ratify or adopt the pre-incorporation contracts entered into by its promoters. Ratification occurs when the company explicitly accepts the terms of the pre-incorporation contract, thereby assuming full responsibility and becoming a party to the contract.

**5) Promoters' Liability:** Until the company is incorporated and ratifies the pre-incorporation contracts, the promoters remain personally liable for any obligations or liabilities arising from these contracts. However, if the company ratifies the contracts, the liability typically shifts from the promoters to the company.

# PRE-INCORPORATION CONTRACTS

- ❖ Section 183 (2) of the Companies Act 2001 provides that a pre-incorporation contract can be ratified within such period as may be specified in the contract and where no period is so specified, then it may be ratified within a reasonable time after the incorporation of the company in the name of which, or on behalf of which, it has been made.
- ❖ The contract that is ratified is as valid and enforceable as if the company had been a party to the contract when it was made.
- ❖ If after incorporation of the company, the latter fails to ratify the pre-incorporation contract, then the promoter/third-party contract can apply to the Supreme Court of Mauritius (Bankruptcy Division) for an order for any relief as the court thinks fit (Section 185 of the Companies Act 2001).
- ❖ A promoter can also avoid personal liability if the company after incorporation, and the third party, substitute the original pre-incorporation contract with a new contract on similar terms. This process is called **novation**. In such circumstances, the liability of the promoter will be discharged. See Article 1271 of the Mauritian Civil Code.

# THE ROLE OF THE REGISTRAR OF COMPANIES

- ❖ The function of the Registrar of Companies (“ROC”) is found under Section 10 of the Companies Act 2001. The ROC has several functions and powers.
- ❖ The ROC is the ultimate regulatory body for domestic companies in Mauritius. The Registrar of Companies has the power to require compliance and has the power to inspect the records of any company and to carry out investigations.
- ❖ Companies are incorporated by filling in the prescribed forms available at the ROC. Once incorporated, the company needs to pay the annual registration fee to the Registrar of Companies.

# THE INCORPORATION PROCESS

- ❖ The first step in the incorporation of any company is the choice of the company name. The proposed name will need to be reserved.
- ❖ Once reserved, the application process can be initiated (Section 31 of the Companies Act 2001).



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# THE INCORPORATION PROCESS

- ❖ A person cannot register a company in any name he wants. There are certain prohibitions in relation to names. For instance, Section 3 of the Business and Trade Names (Prohibition) Act 1988 provides that a person cannot use the word “Authority” or “State” or “Government” or “National” etc. in its company name unless it has obtained the prior written consent of the Prime Minister.
- ❖ A person who fails to respect this provision commits an offence and is liable to a fine of at least MUR 5,000 and/or imprisonment for a term not exceeding two years.
- ❖ Section 10 (4) of the Business Registration Act 2002 prevents a person from using a business name which is identical to or so nearly resembles the name of any other business name. See also Sections 34 to 38 of the Companies Act 2001.

# THE INCORPORATION PROCESS

- ❖ Part III of the Companies Act 2001 provides for the incorporation process of a company. The essential requirements are set out under Section 21 of the Companies Act 2001. The company must have a name, at least one share (if it is to be a company limited by shares), at least one shareholder and at least one director.
- ❖ The applicant must choose the type of company to be incorporated. The application is made on a prescribed form. Each shareholder and each director must sign the relevant consent forms.
- ❖ The registered office address of the company will have to be specified. Section 187 of the Companies Act 2001 provides that the registered office is the place where the company receives all its communications and notices. It is the address for service of legal proceedings against the company.
- ❖ The company must cause its name and the registered office to be permanently displayed in a conspicuous place in legible letters on the outside of its registered office. Any change of registered office address must be notified to the Registrar of companies within the prescribed delay.

# THE INCORPORATION PROCESS

- ❖ Note that every company name must end with the word “limited” or “Ltd” or “Limitee” or “Ltee” where it is a limited company (Section 32 of the Companies Act 2001).
- ❖ This requirement can however be waived where it is proved to the satisfaction of the Registrar of Companies that the company is a limited company incorporated with the objective of promoting commerce, art, science, religion, charity or any other useful object and that it will apply its profits or income in promoting these objects (Section 33 of the Companies Act 2001).
- ❖ On incorporation, the company receives a certificate of incorporation which is conclusive evidence that the company exists (**Section 25 of the Companies Act 2001**).
- ❖ The company is assigned a unique number as its company number. Once incorporated, the company is a body separate from its shareholders and directors (**Section 26 of the Companies Act 2001**).

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