PARTNERSHIP LAW & LIMITED LIABILITY PARTNERSHIP

MGM3352

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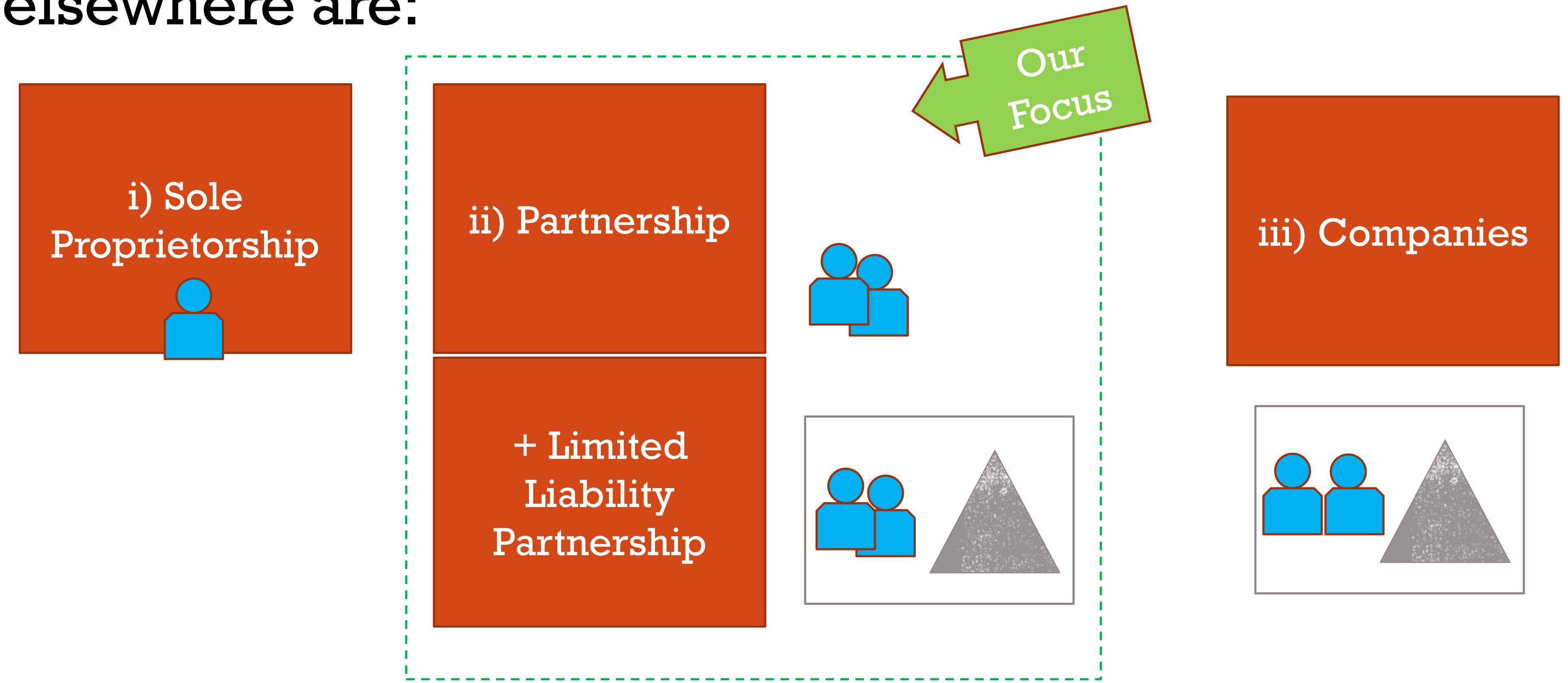
INTRODUCTION

- The most common business structures in Malaysia & elsewhere are:



Partnership under the Partnership Act 1961 (conventional partnership)

PARTNERSHIP CONTRACT

- S. 3(1) of the Partnership Act 1961:

"Relation which subsists between persons carrying on business in common with a view of profit"

- *Persons*
- *A business*
- *carried in common:*
- *with a view of profit*

- PA 1961 is based on the English PA 1890
- S.47(1) of the PA: "the rules of equity & of common law applicable in partnership shall continue in force, except so far as they are inconsistent with the express provisions of the Act."
- Foundation: basic ground rules of contract law & general principles of agency (SMNA, 1996)

CHARACTERISTICS OF PARTNERSHIP

i- Persons

Normal person;

Legal persons

ii-Number of partners

Min. number is 2 person.

Not >20: s.47(2) PA &

s.13 of Companies Act 2016

What if > than 20 for normal firms?

-Tan Teck Hee v Cheng Tian Peng: 25 partners

-Tan Ching Cheang v Estate & Trust Agencies Ltd: reduced no. to 20.

-Shim Fatt v Leila Road Bus Co: >20 partners

= a VOID partnership

Prohibition for unincorporated associations, *etc.*

13. No association or partnership consisting of more than twenty persons shall be formed for the purpose of carrying on any business for profit, unless it is incorporated as a company under this Act, or is formed under any other written laws.

ii-Business (s.2): every trade, occupation or profession

- **ongoing** : *Keith Spicer v Mansell: No p's if not yet in business but preparing towards having a business eg opening bank acc; ordering goods*

- **repetitive**: *Smith v Anderson*

- **in common**: Badeley v Consolidated Bank: if <u>one person carries on a business</u> & <u>share a profit</u> of that business with another, prima facie, there are two partners

  : Chooi Siew Cheong v Lucky Height Dvlpm Sdn. Bhd.

- **other than those listed under s.3(2)**

Soh Hood Beng v Khoo Chye Neo: a loan scheme for members who takes turn & must contribute to the scheme is not a business.

iii- With a view of profit

Re Spanish Prospecting Co. Ltd

“Profit is net profit after deducting expenses”

WHAT ABOUT JOINT VENTURE (JV) AGREEMENT?

- Not all JV agreements a partnership agreement
- *Chooi Siew Cheong v Lucky Height Development Sdn. Bhd*.[1995] FC: a joint venture agreement entered into between a landowner and a housing developer. Held: there was no partnership because each party intended a wholly separate business, there was no business in common with a view of profit.
- *Aw Yong Wai Choo v Arief Trading Sdn Bhd [1992]*: H/C held that s. 3(1) of PA 1961 was proven. A partnership existed between an owner of a piece of land & the developer engaged to carry on the business of housing development on the land, incl. sales of houses there.

RULES FOR DETERMINING EXISTENCE OF A PARTNERSHIP

Aw Yong Wai Choo v Arief Trading Sdn. Bhd.

Fact: S&P between P and D, a housing developer. D failed to complete the project & entered a joint venture agreement with the Perak State Dvlpm Corp whereby PSDC completed the project.

Question: whether D & PSDC were partners?

"To find the existence of such relationship, the court must find <u>the real intention</u> of the parties. The real intention is <u>not necessarily the express intention</u> of the parties so that even if the parties express the fact that there is a partnership, the court <u>may decide to the contrary</u> after the court consider all relevant factors taken together.

*…**s.4**… rules could not be exhaustive…"*

RULES FOR DETERMINING EXISTENCE OF A PARTNERSHIP

Section 4 of PA: Partnership does not necessarily exists if it involves:

a) Joint tenancy, tenancy in common, joint / common property, part ownership… as to anything so held or owned, whether the tenants or owners do or do not share any profits made by the use thereof

French v Styring ; Coope v Eyre

b) Sharing of gross returns

Lyons v Knowles

c) Sharing of profits of business: "prima facie evidence" that he is a partner in the business, but the receipt of such a share, or of a payment contingent on or varying with the profits of a business, does not of itself make him a partner in the business; and in particular:

i- Repayment of the loan itself out of profits **compare with iv.*

Badeley v Consolidated Bank

RULES FOR DETERMINING EXISTENCE OF A PARTNERSHIP

ii- Remuneration to servant / agent

Chua Ka Seng v Boonchai Sompolpong: Held: R not a partner because on the totality of the evidence & proper inference to be drawn, he was only a salaried partner.

[held out to the world as being a partner; but in partnership it is important to know whether a salaried partner is truly classified as a mere employee or as a partner]

iii- Payment of annuity to widow / child of deceased

IRC v Lebus's Trustees

RULES FOR DETERMINING EXISTENCE OF A PARTNERSHIP

iv- Repayment of interest on a loan out of profits.

Re Young;

Pooley v Driver: loan agreement with the "lender" contained a covenant by the admitted partners that they would observe all the covenants in their own partnership agreement. In effect this gave an equal right with the partners to enforce the partnership agreement. The partnership agreement itself provided strong evidence against this being a loan. There was combined evidence of profit-sharing & control. Held: this was a clear case of p's & the parties intended to be partners.

v- Payment to seller of goodwill of business

Pratt v Strick

FORMATION OF PARTNERSHIP

- No formalities & the general rules of formation of contract applies.
- *Dr. Ranjan Sinha v Dr. P.C. Herman:* The relations exists **orally**, **in writing** or **through course of conduct**.
- Effects of unwritten agreement :

Rights, liability & termination of partnership are subject to the PA except if there is written document that stated otherwise.

PARTNERS & PARTNERSHIP FIRM

"s.6. Persons who have entered into partnership with one another are, for the purposes of this Act, called collectively a firm, and the name under which their business is carried on is called the firm name."

- Partnership firm is not a legal entity
- Legal proceedings can be made by & against a partnership firm.
- Although not a legal entity, a partnership firm can sue & be sued in the name of the firm (Order 77 rule 1 of the Rules of Court 2012)

DURATION OF PARTNERSHIP

~ ***Partnership at will*** = duration not for fixed term. Effect: partnership can be ended at any time by one partner giving notice (s.28(1))to his other partners to that effect.

~ ***Partnership for fixed term***: can only be ended according to the agreement / express provisions of the PA 1961 (eg death, bankruptcy of a partner) or by court order.

TYPE OF PARTNERS

~ No categories in PA, but generally known 4 types:

i) A general partner: a partner in the fullest sense.

ii) An active partner: actively participates in the management of the business. Known to the world as a partner.

iii) A dormant/sleeping partner: not taking active part in management. Still liable as a partner.

Osman b. Hj. Mohamed Usop v Chan Kang Swi

iv) A quasi-partner: in fact not partner but is liable for debts of partnership as a consequence of 'holding out'.

CAPACITY

- **Minor** : s. 11, s.12 CA & Age of Majority Act 1971

  : PA 1961 silent on this matter

  Goode v Harrison [1821]

  Lovell & Christmas v Beauchamp[1984]

  William Jacks & Co. (Malaya) Ltd. v Chan & Yong Trading

- **Insane** : *Imperial Loan Co. v Stone* : binding in every respect as if he is sane unless he can prove that the other partner knew him to be incapable of understanding what he was about

PARTNERS & 3RD PARTIES

s. 7 : every partner is an agent of the partnership firm & an agent of his other partners for any act done by the partner in <u>carrying on in the usual way business of the kind carried on by the firm</u>

- 1. The act was done <u>in the usual way business of the kind</u> carried on by the firm

~ 3rd party able to assume that a partner in that particular kind of business dealing with him has authority to act

i.e implied authority.

In trading or non-trading business, every partner have implied authorities to:

- *Dore v Wilkinson*: Sell the firm's goods & chattels
- *Bond v Gibson:* Purchase on firm's behalf goods normally used in the firm's business
- *Porter v Taylor*: Receive payment of firm's debts & give receipts for them
- *Beckham v Drake:* Engage & dismiss workers

-Additionally, for <u>trading business</u> (in business of buying & selling goods (*Higgins v Beauchamp*)) a partner has implied authority to:

Chettinad Bank v Chop Haw Lee & Chop Lee Chan: accept, make & issue negotiable instruments in firm's name

Lane v Williams: borrow $ on firm's credit

Tomlinson v Broadsmith: instruct solicitor in the event of legal action against the firm for a trade debt

Mercantile Credit v Garrod

- <u>Non-trading business</u>

  Includes the firms of solicitors, auctioneers, cinema owners, quarry workers, money-lenders.

iii) **Acts never within usual authority**

a) execute a deed, unless his authority is expressly conferred by deed

b) give a guarantee in the firm name unless a trade custom to that effect is proved

c) Submit a dispute to arbitration

d) Accept property, eg fully paid up shares in a company in lieu of $ to satisfy debt due to the firm

e) Make his partners into partners with other persons in another business; or

f) Authorizes a 3rd person to make use of the firm's name in legal or other proceedings.

<u>Acts binding the firm & all partners</u>

- Act done as a partner & not in his own account (S.7)

  Re Brigg v Co.

- S.8 PA: The firm & all partners are bound by an act / instrument relating to the firm's business & done / executed in the firm's name/ in any manner, <u>done by a partner or not</u>, with intention to bind the firm

~ Act under actual & apparent authority binds the firm

Firm and other partners are not bound if:

- S.9 PA: Partner using credit of firm for private purpose, the firm is not bound unless he is in fact specially authorizes by the other partners.

  ~ + individual partner may face personal liability

- 3rd party knows a partner contravene an agreed restriction of power to bind the firm (s.10)

Mercantile Credit v Garrod: firm bound

LIABILITIES OF PARTNERS AND FIRMS

i- **s. 11 : debts & obligations of the firm ,**

: while he is a partner ~ jointly liable

: after his death ~ his estate is severally liable in so far as they remain unsatisfied subject to prior payment of his separate debts

Bagel v Miller

Guiness Anchor Mktg Sdn Bhd v Chellam Joe Vetha Thya Singh [1999] 7 CLJ 329

LIABILITIES OF PARTNERS AND FIRMS

*s. 14. Every partner is **liable jointly with his co-partners and also severally for everything for which the firm while he is a partner therein** becomes liable under **section 12 or 13**.*

ii- **s.12:** wrongful act / omission..in the ordinary course of the business of the firm/ with the authority of his co-partners .

~ firm jointly liable (to the same extent)

Hamlyn v Houston

iii- criminal liability : upon proof

Chung Shin Kian & Ors v PP

LIABILITIES OF PARTNERS AND FIRMS

iv- **s.13**: misapplication of money / property received for or in custody of the firm : firm is liable to make good the loss

~ act in actual /apparent authority

Blair v Bromley

Guthrie Property Development Holding Bhd v Baharuddin Hj Ali & Ors [2011]

v- **s.15** : improper employment of trust property for partnership purpose: other partner is not liable, unless he has a notice of a breach of trust, & 3Rd party can also recover the $ in possession / control of the firm.

Ex Parte Heaton, Jacobs v Morris

vi- **s.16**: Person represented as a partner by holding out is liable as a partner that 3rp party who believe such representation.

Tower Cabinet Co Ltd v Ingram

LIABILITIES OF PARTNERS AND FIRMS

vii- s.19:

~ Incoming partner is not liable for debts /obligations incurred before he becomes a partner

~ Retired /outgoing partner still liable for debts /obligations incurred before his retirement; but

he can be discharged from his liability via <u>a novation agreement</u> (between him & the new partner)

Retirement requires reasonable notice to 3rd parties: *Re Siew Inn Steamship Co. Ex Parte Ho Hong Bank Ltd*

PARTNERS & EACH OTHER

s.21 AP: The mutual rights & duties of partners, whether ascertained by agreement / defined by the Act, <u>may be varied by consent of all partners</u>, & such consent may be either express / inferred from a course of dealing

Cruikshank v Sutherland

"for there to be a dealing, it must be proved that there is uniform practice"

A partnership can regulate themselves based on their contract

PARTNERS & EACH OTHER

- Foundation:

- mutual faith and trust

- Partnership is a *uberrimae fidei* relationship & in fiduciary position towards each other

s.30, 31 & 32 : Honesty & full disclosure ~ uberrimae fidei.

R v Lee Siong Kiat

Vasu Devan v V.A. Nair

s.30 : render true accounts & full info

Law v Law

Maddeford v Austwick

s.31 : unauthorised personal profit

Bently v Craven

Clegg v Fishwick

Paathirana v Ariya Pathirana

s.32 : conflict of duty & interest

Aas v Benham

Glassington v Thwaites

Gibson v Tyree

RULES ON PARTNERS' RELATIONSHIP: S.26

Tan Eng Choong v Foo Kai Yuen: The mutual rights and duties of the partners **may be set out in a partnership agreement or deed** and **if not are as provided in Part IV** of the Partnership Act 1961.

Subject to partnership agreement:

(a) share equally in capital & profits, & contribute equally towards losses

(b) firm must indemnify every partner in respect of payments made and personal liabilities incurred by him—

- (i) in the ordinary and proper conduct of the business of the firm; or
- (ii) in or about anything necessarily done for the preservation of the business or property of the firm;

RULES ON PARTNERS' RELATIONSHIP: S.26

(c) a partner making, for the purposes of the partnership, any actual payment or advance beyond the amount of capital which he has agreed to subscribe, is entitled to interest at the rate of 8% per annum from the date of the payment or advance;

(d) a partner is not entitled, before the ascertainment of profits, to interest on the capital subscribed by him;

(e) every partner may take part in the management of the partnership business;

(f) no partner shall be entitled to remuneration for acting in the partnership business;

RULES ON PARTNERS' RELATIONSHIP: S.26

(g) *no person may be introduced as a partner without the* consent of all existing partners;

(h) *any difference arising as to ordinary matters connected* with the partnership business may be decided by a majority of the partners, but no change may be made in the nature of the partnership business without the consent of all existing partners; and

(i) *the partnership books are to be kept at the place of business* of the partnership (or the principal place, if there are more places than one) and every partner may, when he thinks fit, have access to and inspect and copy any of them.

EXPELLING PARTNERS: S.27

"No majority of the partners can expel any partner unless power to do so has been conferred by express agreement between the partners"

:no expulsion without express agreement.

: expulsion may or may not involve a dissolution.

If A & B expels C, partnership continues;

If A expels his sole partner B that is in effect a dissolution.

Re A Soli. Arbitration; Barnes v Young: unlawful expulsion because failed to inform him the cause of complaint & to allow him tio answer allegation. P's agreement said matters should go to arbitration.

Carmicheal v Evans; Green v Howell – in bona fide: there was flagrant breaches of the agreement.

Blisset v Daniel – in mala fide: expulsion clause was exercised by the majority in order to obtain the other partner's share at a discount.Held: the power was improperly exercised.

- S.28: retirement from partnership at will

  Abbot v Abbot – partnership at will?
  (no fixed term)

  Moss v Elphick

s.34 (1) (c): undefined time – give notice of his intention to dissolve the partnership.

- s.29: partnership for a fixed term is continued over, continuance on old terms presumed.
- s.33: assignment by any partner of his share in the partnership : define rights of assignee

PARTNERSHIP PROPERTY :S.22-24

- Question of partnership or personal property.

Question of fact :
s.22 (1) – "*All property and rights and interests in property originally*
brought into the partnership stock or acquired, whether by purchase or otherwise, on account of the firm or for the purposes and in the course of the partnership business…"

i. Source (*Miles v Clarke)*

ii. Purpose obtained & ways of handling : "..*must be held and applied by the partners exclusively for the purposes of the partnership and in accordance with the partnership agreement.*"

Gian Singh v Devraj Nahar

- s.23 : **Property bought with partnership money is deemed to have been bought on account of the firm, unless contrary intention appears**

  Ponnukon v Jebaratnam

PARTNERSHIP PROPERTY :S.22-24

Exceptions:

a) s.22 (2) only as co-owners of land

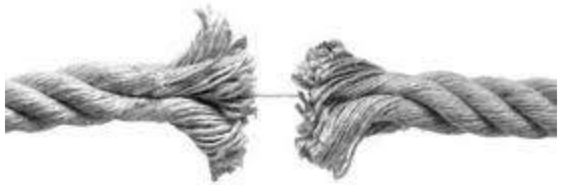
b) s.24 : **Conversion into personal estate of land held as partnership property** i. *Waterer v Waterer* – becomes firm's property due to substantial use as firm's land

ii. Davis v Davis: personal property

c) Expressly agreed as personal property

Ratna Ammal & Anor v Tan Chow Soo: trademark as personal property

DISSOLUTION & WINDING UP



Ways: refer to agreement, if any. In lieu thereof, refer to the PA except if it falls under s.36

a) Agreement

s.34 (1)- 'subject to any agreement…'

a) fixed term - expiration of that term

b) single adventure/undertaking- termination of it

c) undefined time- any partner giving notice of his intention to dissolve

Moss v Elphick

Clifford v Timms

DISSOLUTION & WINDING UP

b) Bankruptcy, Death or Charge

s.35:

(1): Death: -McLeod v Dawling
-Lee Choo Yam Holding

: Bankruptcy: dissolve at the date of proceeding

(2): partners may opt to dissolve if any partner suffers his share of the partnership property to be charged under this Act for his separate debt.

DISSOLUTION & WINDING UP

c) Against the law.

s.36: automatically, despite the existence of agreement to the contrary

e.g: i) provisions of law that prohibit the business

ii) illegal purpose

iii) exceed number > 20 : s.47(2)

iv) partner becomes enemy alien (due to war) *R v Kupffer*

v) no capacity or license to do business

Hill v Clifford

DISSOLUTION & WINDING UP

d) Dissolution by court

s.37 : court's discretionary power (+ request by any partners)

(a) insane - complete & permanent in nature

Jones v Noy

(b) Permanent incapacity

Whitwell v Arthur

(c) Prejudicial conduct that affect the carrying on of business

Clifford v Timms; Carmicheal v Evans; Pearce v Foster

DISSOLUTION & WINDING UP

(d) Wilful or persistent breach…. that it is not reasonably practicable for the other partner or partners to carry on the business in partnership with him

Harrison v Tennat; Cheeseman v Price; Anonymous

(e) Loss-making business

Jennings v Baddeley

(f) Just & equitable relief in the court's opinion

i. personal antagonism: refused to communicatewith each other

ii. mala fide & fraud

iii. Lack of confident in management & administration of business

Re Yenidje Tobacco Co. Ltd.

Ting Tien Kwang & Ors v Kong Sung Seng & Co.

ADDITIONAL PROVISIONS UNDER SS. 543-548 OF THE COMPANIES ACT 2016 FOR WINDING UP BY COURTS

- Partnership >5 members falls under "unregistered company", which:
  - principal place of business in Malaysia
  - cannot wound up voluntarily &
  - may be wound up if dissolved/ no more place of business / operating business in Malaysia +unable to pay its debt + Court agrees for it to be wound up + it is used for unlawful/prejudicial purposes/ incompatible with peace, welfare, security, public interest, public order, good order & morality in Malaysia.

NOTICE OF DISSOLUTION

1) Notify the registrar

2) Notify the client (usual client= specific notice)

3) Advertise to public : *Re Chop Yew Siong*

4) Gazette it : s.38(2) *'An advertisement in the Federal Gazette as to a firm whose principal place of business is in Peninsular Malaysia, in the Sabah Gazette as to a firm whose principal place of business is in Sabah, and in the Sarawak Gazette as to a firm whose principal place of business is in Sarawak, **shall be notice as to persons who had no dealings with the firm before** the date of the dissolution or change so advertise'*

LIMITED LIABILITY PARTNERSHIP (LLP)

LLP Act 2012 (Act 743)

LIMITED LIABILITY PARTNERSHIP (LLP)

- Combines the characteristics of a company & a conventional partnership.
- This business structure is designed:

-For all lawful business purpose with a view to make profit.

~May also be formed by professionals [lawyers, chartered accountants & company secretaries]

- Support start-ups, small & medium enterprises to grow their business without worrying too much on personal liabilities, personal assets & strict compliance requirements.

DEFINITION

- “conventional partnership” means a partnership registered under the Registration of Businesses Act 1956 [*Act 197*] and a partnership established by two or more persons for the purposes of carrying on any professional practice;
- “limited liability partnership” means a limited liability partnership registered under section 11 or a foreign limited liability partnership registered under section 45;
- “limited liability partnership agreement”, in relation to a limited liability partnership, means a written agreement between the partners of the limited liability partnership or between the limited liability partnership and its partners which determines the mutual rights and duties of the partners among themselves and their rights and duties in relation to the limited liability partnership;

- Features:

1. Protection of limited liability to partners as enjoyed by company's shareholders.
2. Flexible internal business regulation as conventional partnership.
3. Debts & obligations of LLP will be borne by LLP's asset, not that of its partners.
4. LLP has legal status of a body corporate: capable of suing & being sued in its own name; holding assets & doing such other acts & things in its name as body corporate may lawfully do or suffer.
5. Flexible formation, maintenance & termination

- **S. 4.** The provisions of the Partnership Act 1961 [*Act 135*], and the rules of equity and of common law applicable to partnerships, shall not be applicable to a limited liability partnership registered under this Act.

- S.6: Subject to s. 7 & 8, any two or more persons, consisting of, wholly or partly, individuals or bodies corporate, associated for carrying on any lawful business with a view to profit may form a limited liability partnership in accordance with the terms of the limited liability partnership agreement.

Section 3 of LLP Act 2012 – separate legal personality & capacity:

(1) A limited liability partnership is a body corporate and shall have legal personality separate from that of its partners.

(2) A limited liability partnership shall have perpetual succession.

(3) Any change in the partners of a limited liability partnership shall not affect the existence, rights or liabilities of the limited liability partnership.

(4) A limited liability partnership shall have unlimited capacity and shall be capable of-

- **(a)suing and being sued;**
- **(b)acquiring, owning, holding and developing or disposing of property; and**
- **(c)doing and suffering such other acts and things as bodies corporate may lawfully do and suffer**

Refer to the LLP Act for;

- Carrying business with less than minimum partners (s.7)
- LLP Agreement (s.9)
- Limited liability of partners, ie management of a LLP (s.21-27)

  -**S. 23.** (1) Every partner of a limited liability partnership is the agent of the limited liability partnership.
- Conversion from conventional partnership to LLP (s.30)

Q & A