Removal of Company Directors in Malaysia: Section 128 of the Companies Act 1965 and Associated Case Law Revisited[1]

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I. Introduction

One of the potent powers of the members of a public[4] company in Malaysia is their ability to remove the directors of their company by an ordinary resolution. The potency of the power may be demonstrated by the fact that the power extends to removing a director appointed to represent the interests of a particular class of shareholders or debenture holders (although such a removal shall not take effect until the successor of the removed director has been appointed).[5] The functional utility of the power is not restricted to removing dishonest and incompetent directors. Indeed there is no requirement in the Companies Act 1965 or in case law for those seeking to remove a director of a public company by a resolution at a general meeting to give reasons for their proposed resolution; neither can a director demand the reasons for his removal.[6] The power of removal is important as it is a weapon of members against recalcitrant directors who act in disregard of members' aspirations as to how the company should be managed. In this context, it is usual for modern companies to have a regulation in their articles of association designed to make management the sole domain of the board, and consequently, to make it difficult for members to challenge board decisions.[7]

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4 The expression is defined in section 4, the definition section of the Companies Act 1965 of Malaysia.

5 Section 128(1) Companies Act 1965.

6 Although he is given an opportunity to mount a defence against his removal before, and at the time of, the meeting called to remove him (s 128(3) of the Act). On the issue whether the director must be informed of the grounds of the intended resolution and whether a failure to do so will conflict with the rules of natural justice, see part 7(d) and the case of *Indian Corridor Sdn Bhd* v *Golden Plus Holdings Bhd* [2008] 3 MLJ 653.

7 Most companies in the common law jurisdictions adopt a regulation similar to regulation 73 of Table A (the model set of articles of association in the Fourth Schedule of the Companies Act 1965) in their respective articles of association The article reads as follows: ' The business of the company shall be managed by the directors who may pay all expenses incurred in promoting and registering the company, and may exercise all such powers of the company as are not, by the act or by these regulations, required to be exercised by the company in general meeting, subject, nevertheless, to any of these regulations, to the provisions of the act, and to such regulations, being not inconsistent with the aforesaid regulations or provisions, as may be prescribed by the company in general meeting; but no regulation made by the company in general meeting shall invalidate any prior act of the directors which would have been valid if that regulation had not been made'.

English legislation on companies did not provide a statutory right to members for the removal of the directors of a company until 1948.[8] The innovative step was taken by section 184 of the Companies Act 1948, which, subject to certain requirements, allowed members to remove a director by ordinary resolution, notwithstanding anything in the company's articles of association or in any contract between the company and the director. The new provision removed the shelter for directors which the articles or service contracts[9] hitherto provided for directors.[10] Until 1948 the removal of directors of a public company, as well as a private company, was governed by provisions in the company's articles, which may contain clauses to protect their tenure or to entrench their position. In *Imperial Hydropathic Hotel Co, Blackpool* v *Hampson*[11] decided in 1883 the Court of Appeal of England decided that if the articles did not contain a power of removal the court would not assume an inherent power to do so.[12] This in effect meant that in such a situation, a director could continue in office until the end of his term of office. In practice such clauses[13] tied the hands of disgruntled members, even if they could garner enough support to pass an ordinary resolution, for an alteration of the articles to delete or add provisions could only be achieved by a three-fourths majority passing a special resolution.

Malaysia's Companies Act 1965 is based on the Uniform Companies Act of Australia 1961 but as with all statutes dealing with companies in the common law world,

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The contents of article 73 have generated controversy for decades and this controversy is well documented in academic literature. However, English and Malaysian courts have held that regulations similar to regulation 73 give the power of management to the directors and that the members in general meeting are not entitled to exercise them or interfere with their exercise by the board. See: *Automatic Self –Cleansing Filter Syndicate Co Ltd* v *Cunninghame* [1906] 2 Ch 34 (CA); *Quin & Axtens Ltd* v *Salmon* [1909] AC 442 (HL); *John Shaw & Sons (Salford) Ltd* v *Shaw* [1935] 2 KB 113 (CA); *Breckland Group Holdings Ltd* v *London & Suffolk Properties Ltd* [1989] BCLC 100; *Dato Mak Kok & Ors* v *See Keng Leong & Ors* (1990) 1 MSCLC 90, 357; *Pilot Cargo* v *Adinas Tours and Travel Sdn Bhd* [2002] 2 AMR 1732. The regulation confers a benefit on the company and its board of directors in that it prevents undue interference with management by members, particularly by vexatious individuals Its defect is that it vests too much power in the hands of the board.

8 This novel step was taken in response to the Cohen Committee Report 1945 (Cmnd 6659).

9 They could still obtain damages for breach of contract if they were removed in breach of their contracts, a right recognized by case law and in Malaysia today by section 128(7).

10 Significantly s 184 of the 1948 Act applied to both public and *private* companies T his is still the position in England. See: s 152 Companies Act 2006 of England.

11 (1882) 23 Ch D 1.

12 Today *private* companies in Malaysia still enjoy considerable freedom in imposing restrictions in their articles on the removal of their directors But where articles are silent on the subject of removal, the legal position is subject to section 30(2) of the Malaysian Companies Act 1965 which applies to companies limited by shares after the commencement of the Act. The section provides that in respect of companies limited by shares 'so far as the articles do not exclude or modify' the regulations contained in Table A (the model set of articles provided by the Act in its Fourth Schedule) will apply. Table A regulation 69 contains a power to remove a director by an ordinary resolution of the general meeting. However, the wording of Table A regulation 69 may prompt an argument that it does not apply to a private company. The opening words are: ' Subject to section 128…'. One may argue that these words make the regulations applicable only to a company mentioned in section 128, which is a public company.
It may also be noted that where a private company has excluded Table A, the rule in the *Imperial Hydropathic Hotel* case (see note 8 above) will apply.

13 Such clauses are still possible in the case of private companies in Malaysia. Further it is possible for a private company to place such clauses in the memorandum of association and make them immutable by declaring them to be unalterable by making use of s 21(1A) of the Companies Act 1965.

its legislative ancestor is English legislation on companies, particularly the Companies Act 1869. The first legislation on companies enacted in the Straits Settlements and the Federated Malay States in the nineteenth century was based on the English Act of 1862.

In Malaysia there was no provision to remove directors in the legislation that preceded 1965.[14] Today, the Malaysian provision on the removal of a director of a public company is found in section 128 of the Companies Act 1965. Section 128 is based on s 120 of the Uniform Companies Act 1961 of Australia. Section 128(1) reads:

> A public company may by ordinary resolution remove a director before the expiration of his period of office, notwithstanding anything in its articles or memorandum or in any agreement between it and him but where any director so removed was appointed to represent the interests of any particular class of shareholders[15] or debenture holders the resolution to remove him shall not take effect until his successor has been appointed.

This article aims to revisit s 128 and associated case law with the objective of assessing the strengths and weaknesses of the aforesaid Malaysian position on removal of directors and also to highlight what the writers consider to be areas of doubt and controversy.

II. Restrictions in the Memorandum, Articles and Contracts

It can be seen that section 128(1) makes ineffective any attempt by the company in its memorandum and articles to restrict the power of the members to remove a director. The inclusion of the word memorandum is particularly important after the addition of section 21(1A) to the Companies Act 1965 in 1996 by the Companies (Amendment) Act 1996 (Act A949). One effect of section 21(1A) is that if a provision which could lawfully have been contained in the article is instead included in the memorandum and declared to be unalterable, the provision thereupon becomes unassailable. Section 128 will render futile any attempt by the company to entrench the tenure of a director by inserting a tenure clause in the memorandum and declaring that clause to be unalterable.

It is also pertinent at this point to refer to the rule (derived from the wording of section 33(1) of the Act)[16] that provisions in the memorandum or the articles are capable of creating a contract between a member and his company[17] and between one member

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[14] It is of interest to note that Table A of the legislation that preceded the 1965 Act of Malaysia contained a regulation that allowed members to remove a director by extraordinary resolution A brief historical survey on this subject may be obtained from the judgment of Suffian FJ in the Federal Court case of *Solaiappan & Ors* v *Lim Yoke Fan & Ors* [1968] 2 MLJ 21.

[15] The use of the word 'shareholder' and not the expression 'member' makes this part of section 128 inapplicable to companies limited by guarantee or to companies incorporated without a share capital.

[16] For a full discussion see Davies, PL, Prentice DD & Gower LCB, *Gower's Principles of Modern Company Law* (London: Sweet & Maxwell, 6th ed, 1997) at pp 115-122, Chapter 6; LS Sealy, *Cases and Materials in Company Law* (London: Butterworths, 2001) Chapter 3; Farrar, JH, Furey, NE and Hannigan, BM, *Farrar's Company Law*, (London: Butterworths, 3rd ed) at Chapter 11.

[17] *Hickman* v *Kent or Romney Marsh Sheep-breeders Association* {1915] 1 Ch 881 ; *Pender* v *Lushington* (1877) 6 Ch D 70; *Wood* v *Odessa Waterworks Co* (1889) 42 Ch D 636.

and another member.[18] But the traditional view is that provisions in the articles or the memorandum purporting to give contractual rights to a director in his capacity as a *director* and not in his capacity as a member do not bind the company[19].

Similarly provisions in service contracts which circumscribe the freedom of the members of a public company cannot prevent a director from being removed. Clauses imposing limits on the freedom of members, although ineffective against members, do not make a service contract void or voidable. But as will be seen in part 3 of this article both statute[20] and case law[21] recognise the right of a director to seek damages if his removal is a breach of a contract between him and the company. This is so even though his removal from office was effected by members exercising their statutory rights under the Companies Act 1965.

III. Compensation for the Removed Director

A removal by members acting under section 128 may be an expensive affair in the case of a full-time salaried director (called by whatever name)[22] with a lucrative service contract. Section 128(7) states that the power of removal under section 128 shall not be taken as depriving a removed director of 'compensation or damages'. Thus, although a director of a public company cannot ensure for himself security of tenure, he may by contract secure for himself a service contract which will give him substantial damages if he is removed under s 128. This fact may work to the detriment of the members in Malaysia because they have no control over the contents of directors' contracts. In addition section 137 of the Act, which prohibits payment to directors for loss of office without the approval of members in a general meeting, contains exceptions which may act to the detriment of the company in a situation where a director has entered into a contract which contains lucrative terms for his benefit. The general rule contained in section 137(1) that a company is prohibited

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18 The leading Malaysian authority is *Wong Kim Fatt* v *Leong & Co Sdn Bhd* [1976] 1 MLJ 140, which was a drastic application of the rule that articles create a contract between members i*nter se.*

19 *Beattie v E &.F Beattie Ltd* [1938] Ch 708; *Eley* v *The Positive Government Security Life Assurance Co Ltd* (1875-76) LR 1 Ex D 88; *Hickman* v *Kent or Romney Marsh Sheepbreeder's Association* [1915] 1 Ch 881; *Malayan Banking Ltd* v *Raffles Hotel Ltd* [1966] 1 MLJ 206. The harshness of this rule has been somewhat mitigated in a number of English cases where the court was able to construe a term of an article conferring rights on a director as creating a separate implied contract and thus indirectly allow the director to enforce the articles See for example *Swabey* v *Port Darwin Gold Mining Co* (1889) 1 Meg 385*; Re New British Iron Co ex p Beckwith* [1898] 1 Ch 324. See Farrar (supra n 13) at p 125.

20 Section 128(7) expressly preserves the right of the director to seek compensation or damages but, adds with caution, that this must not be construed as derogating from any power to remove a director under section 128.

21 *Schindler* v *Northern Raincoat Co Ltd* [1960] 1 WLR 1038; *Southern Foundries* v *Shirlaw* [1940] AC 701**;** *Taupo Totara Timber Co v Rowe* [1978] AC 537 (a Privy Council appeal case from New Zealand) and *RHB Capital Bhd v Tan Sri Dato' Abdul Rashid bin Haji Mohamed Hussain* [2006] 4 MLJ 80 (although the case involved a resignation and not a removal).

22 An example will be where he or she is appointed as managing director or as chief executive officer. Where a managing director is appointed by a board resolution (such a power exists under regulation 91 of Table A), and the resolution is silent on his term of office or the resolution is silent on the requirement of notice of termination he may be removed without the company having to pay damages (see *Read* v *Astoria Garage (Streatham) Ltd* [1952] Ch 637.

from making 'any payment by way of compensation for loss of office as an officer'[23] is subject to five exceptions in section 137(5). Of the exceptions which allow payment to made without disclosure to members and without their approval, the most relevant to the present discussion are section 137(5)(c) and section 137(5)(e). Section 137(5)(c) deals with 'any bona fide payment by way of damages for breach of contract'. Section 137(5)(e) concerns 'any payment to a director pursuant to an agreement made between the company and him before he became a director of the company as the consideration or part of the consideration for the director agreeing to serve the company as a director'. In Malaysia members have no means by which they may inspect director's contracts with the company to determine the amounts payable under a contract between the director and the company. There is no statutory requirement in Malaysia that directors' service contracts must be lodged with the company's registered office or that material details must be entered in the company's register of directors, managers and secretaries which a company is required to maintain under section 141 of the Companies Act 1965.[24] This omission is unfortunate as disclosure would enable members to evaluate the cost of removing a director. It is regretted this omission was not addressed when many provisions relating to directors in the Companies Act was extensively amended by the Companies (Amendment) Act 2007.[25]

It is to be noted that the Listing Rules of the Bursa Malaysia also do not contain any requirement for the disclosure of directors' remuneration. On the other hand, the Malaysian Code on Corporate Governance states that details of directors' remuneration ought to be shown on the company's annual accounts**.** [26]

IV. Suspension Pending Removal

A vital question connected to the issue of removal is whether the director concerned may be suspended from his position by the board pending the outcome of the meeting called to remove him. There are two Malaysian cases on this matter, *viz*, *Fong Poh Yoke*

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[23] The use of the words 'as an officer' in s 137(1) may cause a difficulty in the interpretation of the section B y virtue of the definition of the word 'officer' in section 4, the definition section of the Act, the term 'officer' includes, '(a) any director, secretary or employee of the corporation'. In *RHB Capital Bhd v Tan Sri Dato Abdul Rashid bin Haji Mohamed Hussain* [2006] 4 MLJ 80, 110 the High Court appeared to take the view (obiter) that the inclusion of the words had some bearing on the construction of the section (at p110 of the judgment). Further, s 137(5) which provides five exceptions to the general rule speaks of 'payments to any director of a company by way of compensation for loss of office' omits the word 'as an officer'.

[24] In the U.K.s 420 of the Companies Act 2006 now requires directors of a quoted company to prepare a Directors' Remuneration Report for each financial year of the company. Under s 422 of the said Act such report must be signed on behalf of the board by a director or secretary, and under s 423 of that Act the company has a duty to circulate copies of annual accounts and reports (which includes Directors' Remuneration Reports) to, *inter alia,* every member of the company.

[25] The amendments are dealt with in Sujata Balan and ST Lingam**, '**The Effects of the Companies (Amendment) Act 2007 on Directors' in Malaysia: Some Observations' (2008) 5(2) December *Asia Law Review* 115.

[26] See para B (iii) of Part 1 of the Code. See also para 15.26 of the Listing Requirements of Bursa Malaysia which requires all listed companies to state in their annual reports, *inter alia*, how they have applied the principles set out in part 1 of the Malaysian Code on Corporate Governance.

& Ors v *The Central Construction Co(M) Sdn Bhd*[27] and *Jerry Ngiam Swee Beng* v *Abdul Rahman bin Mohd Rashid & Anor and Other Actions*.[28]

In *Fong Poh Yoke*'s case, one L was a director of the defendant company. He was suspended from his office by a resolution of the board of directors of the defendant company. The board did so on the ground that L had become a Singapore citizen and had changed his residential status, and had failed to inform the company of these events. L and four other plaintiffs obtained an *ex parte* injunction restraining the defendant company from acting on the resolution. At the *inter partes* hearing, the learned High Court judge set aside the *ex parte* injunction. His Lordship was of the view that L had practised deception and that 'the full venom of the law' should be brought to bear on him.[29] The learned judge was also of the view that the board of the instant company had the power to suspend L under article 75 of the articles of association of the company. Article 75 was a verbatim equivalent of article 73 of Table A.[30] His Lordship was of the view that the power to suspend was included under the term, 'exercise all such powers of the company' in the articles.[31] The learned judge said that in his judgment, the power to suspend a director was vested in the directors themselves 'as that power had not been expressly taken out by the articles of the defendant'.

It is hard to assess the weight that may be attached to this decision. It is difficult to agree with the learned judge's construction that the power to suspend a director was included in article 75 of the instant company.

This article also submits, with respect, that the fact that the articles are silent on the power of suspension does not mean that it has been impliedly included in the articles.

A renowned writer and leading practitioner on Malaysian company law, Datuk Loh Siew Cheang, has criticised the decision in *Fong Poh Yoke* in an article bearing the title, *Power to Suspend Directors: A New Corporate weapon of the Majority?*[32] The learned writer comments, 'The ramifications of the decision in *Fong Poh Yoke* are very serious. It has the potential of arming majority directors and the interest they represent with an extremely powerful weapon to silence or to get rid of opposite views of minority directors in a summary way. In this regard, in the absence of special provisions to the contrary in the articles, a company is entitled to the collective wisdom and contribution of all its directors in the conduct and management of companies…'. The learned writer 'doubts whether a power of suspension is necessary or is required at all for the proper functioning of companies'. After a careful examination of the statutory provisions and associated case law, Dato' Loh concludes as follows, 'Companies do not have this jurisdiction. This jurisdiction belongs to the court. As a statutory creature, the relationship between a company and its directors cannot be equated with the relationship between a master and

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27 [1998] 4 CLJ Supp 112.
28 [2003] 6 MLJ 448.
29 See page 135 of the judgment.
30 The text of article 73 of Table A is reproduced in n4 supra.
31 See page 140 of the judgment.
32 Loh, Siew Cheang, 'Power to Suspend Directors: A New Corporate weapon of the Majority?' [1999] 3 MLJ xxxiii; [1999] 3 MLJA 33.

servant at common law where the former has the power to suspend the latter in certain circumstances.'[33]

Dato' Loh's article was referred to in the second case, *Jerry Ngiam Swee Beng* v *Abdul Rahman bin Mohd Rashid & Anor and Other Actions.* This case involved a company where A and B were the only shareholders and directors. Following a deadlock in the management of the company, A presented a petition to wind up the company, which was granted by the court. Subsequently, B successfully obtained a stay of the winding up order and resumed control of the company. B proceeded to convene a series of board meetings at which one Wan Amin was purportedly appointed as an additional director and A was suspended from his office as director. A appealed against the stay of the winding up order. He also applied to the High Court to nullify the purported board meetings mentioned above and his suspension as a director. Counter applications were made by B.

The High Court dismissed all the applications of both parties on the ground that any order made in favour of one party would be prejudicial to the other party. The court was of the opinion that under the circumstances the only just and equitable solution was to wind up the company. However, that matter was already under appeal.

On the issue of the purported suspension of A as a director the court expressed its opinion that a board of directors was not clothed with any power to suspend a director under the Companies Act 1965.

These cases prompt an important question, namely, whether the Companies Act 1965 should be amended to give directors power to suspend a fellow director pending a proposed removal of the director by exercise of the members' power under s 128. As will be seen, the removal of a director under section 128 can take some time and is subject to elaborate procedure. Meanwhile the director, with the knowledge that he is going to be removed, will remain in office. In some cases this may be undesirable as the director will have an opportunity to disrupt, or cause damage to, the company's functions. Pending removal, he would be entitled to attend board meetings and this may be an embarrassment for the other directors on the board, particularly if the said directors are involved in the proposal to remove him from office. Therefore a power given to the board to suspend a director is not entirely without merit. No doubt there is a likelihood that such a power may be abused. But the benefits of the power appear to outweigh its disadvantages. This article recommends that the Act be amended to give such a power to the board provided that the special notice required to remove the director under s.128 has already been lodged with the company.

It is also pertinent to point out that the fact that the company at present does not have the power to suspend a director does not mean that it is prevented from applying for an interim injunction to restrain a director from acting as a director pending removal as a director. It is submitted that where there is evidence that a director about to be removed is acting or is likely to act to the company's detriment, an interim injunction is indeed warranted. Further, where the director concerned has a service (employment) contract it

33 *Ibid*, at p xlvi.

may be possible to suspend him from his salaried position where such a suspension is in accordance with his service agreement with the company.[34]

V. Undated Letters of Resignation

An allied question is whether the board can short-circuit the removal process by obtaining an undated letter of resignation, which may, in the future be dated and placed before the board. Such a situation occurred in the case of *Khoo Choon Yam* v *Gan Miew Chee & Ors.*[35] Abdul Mohamad J held that such a letter, even if signed by the director concerned, was bad in law and was null and void because such a resignation under such circumstances would be a resignation under compulsion. While the reasoning in this decision does have its merits, it is interesting to note the comments of Dato' Loh who takes the view that the decision would be somewhat harsh in the absence of evidence that the majority directors or the company effected the resignation in bad faith or for some ulterior purpose. [36]

One cannot but agree that there may be occasions when the use of such pre-signed undated letters may be useful or indeed necessary to preserve harmony and prevent unwarranted interference into the proper running of the company by vexatious or incompetent directors. Nevertheless, it seems to run foul of the principle of justice and fairness, if at the point of appointment as a director, the director concerned can legally be allowed to sign away his rights and duties as a director and place himself at the mercy of the unscrupulous majority who may find him to be a growing nuisance just because he questions the propriety of the intentions or decisions of the majority. Further, such a letter, it may be argued, could also amount to a breach of the directors' duty not to fetter their discretion[37]. Thus it is the opinion of the writers of this article that *Khoo*'s case has been rightly decided on principle.

VI. Disqualification from, and Vacation of, the Office of Director

The Companies Act 1965, in a number of situations disqualifies persons from acting as directors. For example, s 124 states that where the articles require a director to satisfy a certain share qualification, then that director must obtain the said qualification within two months of appointment or such shorter period as is stated in its articles of association. Failure to do so will result in the office of the director becoming vacant. [38] In addition,

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[34] A case where this issue became relevant is *Dato' HM Shah & Ors v Dato' Abdullah Bin Ahmad* [1991] 1 MLJ 91.

[35] [2000] 2 CLJ 788.

[36] Loh, Siew Cheang, *Corporate Powers and Corporate Accountability* (Butterworths, 2nd ed) at p 85.

[37] See for example, *Boulting* v *Association of Cinematograph, Television and Allied Technicians* [1963] 2 QB 606, where Lord Denning MR said, at p 626: 'It seems to me that no one, who has duties of a fiduciary nature to discharge, can be allowed to enter into an agreement by which he binds himself to disregard those duties or to act inconsistently with them. No stipulation is lawful by which he agrees to carry out his duties in accordance with the instructions with another rather than on his own conscientious judgment; or by which he agrees to subordinate the interests of those whom he must protect to the interests of someone else'.

[38] Other statutory instances include s 125 which relates to disqualification by reason of bankruptcy, s 129 which relates to disqualification by reason of attaining the age of 70 in the case of public companies and subsidiaries of public companies and s 130 which relates to disqualification by reason of being convicted of certain offences.

articles may provide for other situations where a director may be compelled to vacate his office. Table A article 72 lists eight instances.[39]

Several questions arise in relation to vacation of office of a director of a public company. One of these relates to a recalcitrant director who refuses to vacate his office although one of the grounds which compel him to do so either under the Act or the articles has arisen. Neither the Act nor Table A deals with this situation.[40] It is submitted that the remedy in such a situation is to apply for a declaration that the director had vacated his office and/or for a prohibitory injunction[41] to restrain the director from acting as a director.

Where a director is required to vacate his office under the Act or the articles as in Table A, it is clear that he is not being 'removed' in the sense of s.128. It is equally clear that as a general principle, a company may enlarge the number of instances under its articles to compel a director to vacate his office. Thus a company which has adopted Table A may add on to the eight instances listed therein. A pertinent question is whether there are limits to this general power to insert instances into the articles in relation to vacation of office by directors. It is submitted that the answer to this question is significant because the power to compel a director to vacate his office appears to offer an additional means to remove a director from his office. Some additional instances may be added in the interest of the company and its members. An example of a power to compel a director to vacate his office which may be valid is a regulation which provides that a director who has suffered permanent physical incapacity that may affect the performance of his duties as a director shall vacate his office.

Some additional instances in the case of a public company would appear to be in conflict with s 128 of the Act. An example is a regulation which provides that a director must vacate his office if called upon to do so by a unanimous request of his fellow directors. It is submitted that such a regulation will be invalid as it conflicts with s.128(8).[42] In some cases the answer as to the validity of a regulation requiring a director to vacate his office may be less obvious. An example will be a regulation in the articles of a public company which provides that a director will be required to vacate his office

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39 The eight instances are if the director: (a)c eases to be a director by virtue of the Act; (b) becomes bankrupt or makes any arrangement or composition with his creditors generally; (c) becomes prohibited from being a director by reason of any order made under the Act; (d) becomes of unsound mind or a person whose person or estate is liable to be dealt with in any way under the law relating to mental disorder; (e) resigns his office by notice in writing to the company; (f) for more than six months is absent without permission of the directors from meetings of the directors held during that period; (f) without the consent of the company in general meeting holds any other office of profit under the company except that of managing director or manager; or (f) is directly or indirectly interested in any contract with the company and fails to declare the nature of his interest in the manner required by the Act.

40 In some cases he will commit a criminal offence if he continues to act as director. See for instance, s 125.

41 If the director refuses to comply with the injunction, committal proceedings for contempt of Court may be commenced against him under Order 52 of the Rules of the High Court 1980.
See *Tien Ik Sdn Bhd & Others* v *Kuok Khoon Hwong Peter* [1992] 2 MLJ 689, a case involving a private company where a declaration that a respondent director had vacated his office was applied for, in addition to another application for an order that the director be restrained from acting or holding himself out as a director.

42 This subsection states that a director of a public company shall not be removed by, or be required to vacate his office by reason of, any resolution, request or notice of the directors or any of them notwithstanding anything in the articles or any agreement.

if called upon by a petition or request signed by members who together hold more than a specified proportion of the paid-up capital of the company. A possible argument is that such a petition or request (although emanating from members) removes the protection afforded by s.128, for it will conflict with s.128(2) and (3) which together provide that a copy of the special notice of the intended resolution to remove a director must be sent forthwith to the director, that the director is entitled to make representations against his removal and that the director shall be entitled to be heard on the resolution at the meeting at which it is to be passed. A counter argument is that the protection in s 128 only applies where *a resolution to remove a director at a general meeting* is proposed and not in the circumstance given in the illustration.[43] Support for this view can be gleaned from the *Tien Ik Sdn Bhd & Others* v *Kuok Khoon Hwong Peter*.[44] In this case, regulation 85(f) of the company's articles provided that the office of the director shall become vacant if the director, 'shall be required to resign his office by notice in writing lodged at the office signed by the holder or holders of not less than three fourths in nominal value of the issued shares of the company'.

The Supreme Court in discussing the interaction between s 128(2) and the aforesaid article 85(f) had this to say:[45]

> Since s 128(2) deals with the removal of a director by a resolution at a meeting of the company, the irrefragable conclusion is that art 85(f) falls outside the scope of this section.

The view expressed in *Tien Ik* is *dictum*. In addition the company involved in that case was a private company. This article respectfully submits that this opinion of the Supreme Court, appears to be in conflict with the protection for the imperilled director intended by Parliament. However, one may justify the view expressed in this case based on the present somewhat unhappy wording of s 128(2). Section 128(2) states that special notice shall be required of any resolution to remove a director and that, 'the company shall forthwith send a copy thereof to the director concerned'. Section 128(3) states that a director may make representations in writing 'where notice is given pursuant to subsection (2)'. It is possible to interpret these provisions to mean that the requirements of notice to the director and his rights of representation only apply where a resolution to remove him is proposed. However, this article respectfully disagrees with this interpretation and offers the opinion that an article similar to article 85(f) if included in the articles of association of a public company would take away the protection afforded to a director in the sense that he can be removed without an opportunity to be heard.

To enhance the protection of the director and to achieve certainty it is suggested that s 128 be amended to make it clear that where it is proposed to remove a director of a

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[43] As to whether members may remove a director of a public company by a circular resolution, see part 7(c) of this article.

[44] [1992] 2 MLJ 689 discussed in part 7(b) of this article. The case involved a private company but the Supreme Court embarked on expressing its views on the interaction between s 128 and the articles of the company concerned.

[45] *Ibid* at p 707.

public company from his office, the procedure in s 128(2) and s 128(3) must be followed and that a request from members requiring a director of a public company to vacate his office without complying with the requirements of s 128 shall be invalid.

VII. Procedural Safeguards Where s 128 Applies

> Section 128 (2) provides as follows:
> Notwithstanding anything to the contrary in the memorandum or articles of the company, special notice shall be required of any resolution to remove a director or to appoint some person in place of a director so removed at the meeting at which he is removed, and on receipt of notice of an intended resolution to remove a director the company shall forthwith send a copy thereof to the director concerned, and the director (whether or not he is a member of the company) shall be entitled to be heard on the resolution at the meeting.

The members seeking to remove a director must give 'special notice' of the intended resolution to the company.[46] Section 153 provides that where a resolution requires special notice, the resolution shall not be effective unless notice of the intention to move the resolution has been given to the company not less than twenty-eight days before the meeting at which it is to be moved. The reason for this long notice is to give the company and the director who is to be removed sufficient time to carry out their respective functions connected to the proposed removal.[47]

A. The Solaiappan Case

An important issue in relation to the removal of directors of a public company is whether articles may provide a form of notice which is different from the special notice required by s 128(2). The former Federal Court decision in *Solaiappan & Ors* v *Lim Yoke Fan &*

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[46] It is often forgotten that the company is not compelled to call an extraordinary general meeting on receipt of the special notice from members unless a duty is imposed by the Act or by the articles. Most articles of association will give the board the right or discretion to call an extraordinary general meeting. For instance see Table A, art 44 which gives such a right to any director. However ss 144(1) and 145(1) allow members to requisition or convene or call an extra ordinary general meeting if they satisfy the requirements of the provisions. Under s 144(1) the requisitioning members must hold not less than one tenth of such paid-up capital which carries the right of voting at general meetings or, in the case of a company not having a share capital, of members representing not less than one tenth of the total voting rights at a general meeting of the company. Under s 145(1), two or more members holding not less than one-tenth of the issued share capital or, if the company has not a share capital, not less than five percent in number of the members of the company or such lesser number as is provided by the articles may call a meeting of the company. In the case of *Indian Corridor Sdn Bhd & Anor* v *Golden Plus Holdings Bhd* [2008] 3 MLJ 653 ,the decision of the High Court Shah Alam, that s145 cannot be used by members to remove a director, and that they should proceed under s144 was overruled by the Court of Appeal.
Needless to say, even if the requisitionists are able to convene a meeting they must garner enough votes to pass an ordinary resolution to remove a director.

[47] The company has to send forthwith a copy of the notice to the director concerned and that director may prepare his representation against removal, which he can require the company to forward to members together with the notice of the meeting called to remove him.

Ors[48] which considered this issue is often misunderstood by commentators as it is seldom realised that the case was decided before s 128(2) was amended in 1969.[49] In this case, article 74 of a of a public company permitted its general meeting to remove a director without stating whether a special notice was required of the resolution to remove the director.[50] A question considered by the Federal Court in this case was whether articles which provide a different form of procedure for the removal of directors from that set out in 128(2) could co-exist with the provisions of s 128(2) as it was worded at the time of the decision, *ie* as follows:[51]

> Special notice shall be required of any resolution to remove a director *under this section*[52] or to appoint some person in place of a director so removed at the meeting at which he is removed, and on receipt of notice of an intended resolution to remove a director *under this section*[53] the company shall forthwith send a copy thereof to the director concerned, and the director (whether or not he is a member of the company) shall be entitled to be heard on the resolution at the meeting.

Both Suffian and Macintyre FJJ took the view that article 74 stated above could co-exist with the provisions of s 128. Both judges laid emphasis on the use of the words, 'under the section' in s 128(2). Suffian FJ said, ' The special notice required section 128(2) and section 153 is required only if power to remove is exercised under the section…No such special notice is required if power to remove is exercised under the articles.'[54] On the same issue, Macintyre FJ said:[55]

> It was urged on behalf of the respondents that the phrase 'notwithstanding anything in its memorandum or articles of association' in section 128(1) of the Act was intended to indicate that the section superseded the articles of association. It was further contended that if it was the object of the legislature to allow this section to co-exist with the relevant articles of association then the phrase used would have been: 'subject to the memorandum or articles of association'. Attractive as this argument may be, it cannot be denied that the use of that phrase could also imply the provision of an alternate method to remove directors apart from the existing provisions in the articles of association. This seems to be the more logical interpretation of the phrase in view of the repeated reference in sub-section (2) of section 128, to the removal of a director, 'under this section'.

The actual decision in *Solaiappan*'s case turned on the construction of articles 47 and 49 of the company's articles of association. The said articles read as follows:

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48 [1968] 2 MLJ 21.
49 By the Companies (Amendment) Act 1969 (Act A21).
50 The article read, 'The company in general meeting may from time to time alter the qualification and number of the directors and may remove any director and may appoint another person in his stead.'
51 *Ibid* at p 28.
52 Emphasis added.
53 Emphasis added.
54 At p 24 of the judgment.
55 At p 27 of the judgment.

47. Seven clear days' notice at least of every general meeting,… shall be given to the members...
49. Any member entitled to be present and vote at any meeting of the company may submit any resolution to such meeting provided that at least three days before the day appointed for the meeting, he shall have served upon the company a notice in writing signed by him containing the words of the proposed resolution and stating his intention to submit the same.

Relying on article 49 a member gave three days' notice of an intended resolution to remove the existing directors in a meeting that was already called by the company after the company had given 7 days' notice under article 47. Subsequently, a resolution was passed removing the directors. The Federal Court held that the removal was void because a notice given under the three days' notice provision in article 49 must be in relation to a matter which was 'ancillary or subsidiary' and which could properly be brought under the terms of the main notice convening the meeting.[56]

Soon after *Solaiappan*'s case, s 128(2) was amended by the Companies (Amendment) Act 1969(Act A21) to remove the words, 'under the section'. The intention of the amendment appears to be, to nullify the view expressed that articles providing a different procedure could co-exist with the procedure under s 128(2). Unfortunately, the amendment has not settled all doubts surrounding s 128(2) and the provision continues to raise controversies. This article submits that s 128 should be amended once again to resolve once and for all these controversies. The proposed amendment should make it clear that where a public company intends to remove a director, it is mandatory for it to follow the procedure in s 128(2). That the present wording of s128(2) has not removed all doubts as to its application is reflected in the former Supreme Court case of *Tien Ik Sdn Bhd & Ors* v *Kuok Khoon Hwong Pete*r.[57]

B. The Tien Ik Sdn Bhd Case Revisited

This case involved a number of parties and their applications to the court and this proliferation adds to the difficulty in discerning its facts. For the purpose of this article the brief facts are as follows:

A was a director of T Sdn Bhd, a private company and also of a number of related private companies. Resolutions were passed by the board of T Sdn Bhd and a number of associated companies to the effect that T had ceased to be a director. The board resolution

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[56] Both Suffian and Macintyre FJJ cited with approval Jessel MR'S statement in *Imperial Hydropathic Hotel Co Blackpool* v *Hampson* ((1883) 23 Ch D 1at p 9), a case involving articles similar to articles 47 and 49 in the instant case) as follows :

> '...it was suggested that 3 days' notice given of a resolution by a shareholder would do instead of the notice specified in clause 45. In my opinion, it would not. The notice given by clause 45 is to be given to every shareholder. The notice given by clause 46 is only to be left at the registered office of the Company; the one is 7 days' notice, and the other is 3 days' notice. It is plain to me that the notice to be given under clause 46 is something ancillary or subsidiary, which could be properly brought under the terms of the notice convening the meeting, and therefore the resolution passed at the first meeting was passed on a bad notice.'

[57] [1992] 2 MLJ 689.

appears to have been based on article 85(f) of the company, which provided, *inter alia*, that the office of director shall become vacant if he is 'required to resign his office by notice in writing lodged at the office signed by the holder or holders of not less than three-fourths in nominal value of the issued shares of the company'. T Sdn Bhd and a number of plaintiffs applied to the High Court for an interim injunction to restrain A from acting or holding himself out as director. The application was dismissed. One of the grounds relied upon by the High Court judge was expressed in the following words:

> Removal of directors is governed by s 128 of the Companies Act 1965('the Act'). Under the provision special notice is required of any resolution to remove a director. In the present case, no such notice was given as required under s 128 of the Act. The meeting is therefore bad in law and the resolution would not be valid. The purported resolution to remove the defendant as the executive director is not valid and has no effect.

Subsequently the Supreme Court reversed the trial judge's decision not to grant an interim injunction on various grounds, one of which was that the learned judge had given undue weight to irrelevant considerations. The Supreme Court also held that the board had acted properly under the terms of article 84(f) of the company's articles of association. It also made observations, *obiter*, on the relevance of s 128 to the removal of A in the instant case by a board resolution. In the words of the Supreme Court:[58]

> Counsel for the appellants submitted that s 128(2) did not apply to a private company as is the case here, quoting the footnote at p 383 of Wallace and Young *Australian Company Law and Practice* which says that unlike the English provision which applies to all companies it only applies to public companies, and that in any case the decision of *Solaiappan* v *Lim Yoke Fan* applied to the present case.[59]
>
> On a proper construction of s 128(2), we do not agree that it applies to the removal of a director by notice under art 85(f) under which the respondent was required to vacate his office as director of the two companies but may apply to cases where the director is removed by a company by a resolution. Section 128(2) was drafted in clear and categorical language[60] and is intended in our view to apply to a case of the removal of a director by a resolution at the meeting of the company at which he is removed. It is clearly applicable in the case of the removal of the respondent as executive director and/or chairman of TIE, TIC, TI and Giltspur Holdings Sdn Bhd which is the subject matter of Originating Summons No D1-24-41-89. For the purpose of convenience, s 128(2) is hereby reproduced:
>
> > Notwithstanding anything to the contrary in the memorandum or articles of the company special notice shall be required of any resolution to remove a director or to appoint some person in place of a director so removed at the meeting

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58 *Ibid* at p 707.

59 It is respectfully submitted that it would have been useful if the judgment had elaborated how and why Solaiappan applied to the case.

60 This article respectfully dissents with this observation as this article attempts to show.

> at which he is removed, and on receipt of notice of an intended resolution to remove a director the company shall forthwith send a copy thereof to the director concerned, and the director (whether or not he is a member of the company) shall be entitled to be heard on the resolution at the meeting.

It is difficult to interpret this passage from the judgment of the Supreme Court. This article presumes that the Supreme Court's aforesaid views were probably based on the following presumed grounds although the grounds were not explicitly stated:

(a) S 128(2) may be read disjunctively from 128(1).
(b) S 128(2), unlike s 128(1), does not expressly state that its operation is restricted to public companies or that its contents do not apply to private companies.
(c) In view of (a) and (b) above, the phrase, 'any resolution to remove a director' in s 128(2) should also include a resolution to remove a director of a private company.

With respect, it is submitted that such an interpretation of s 128(2) would be against the spirit and intendment of s 128 read as a whole. In addition it will impose a burden on members of a private company who wish to remove a director. However, *Tien Ik*, being a Supreme Court decision carries some weight, although the above observations appear to have been made *obiter*.[61] To avoid future controversy, this article suggests that the words, 'of a public company' should be added immediately after the words, 'director' in that part of s 128(2) which refers to 'any resolution to remove a director'.

C. May A Director be Removed by a Circular Resolution?

A relevant question in respect of a removal of a director of a public company is whether the procedure for a circular resolution under s 152A can be used. Briefly, this section provides that 'Notwithstanding anything to the contrary in this Act or in the articles of the company', a written resolution signed by all members shall be treated as a resolution duly signed duly passed at a general meeting. It is submitted that this procedure, wide as it may seem[62], cannot be used to remove a director of a public company under s 128 for it is clear from the language used in s 128 that special notice must be given of the intended resolution, that a meeting must be held and that the director is entitled to defend himself against the resolution. [63]

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[61] The Court stated, at p 707, that the irrefragable conclusion was that article 85(f) fell outside the scope of s 128(2) as s 128(2) only applied where a director was removed by a resolution.

[62] It has been held that even a special resolution can be passed by adopting the procedure under this section See: *Cane* v J*ones* [1980]1 WLR1451.

[63] See Kang, Shew Meng, *Handbook on Company Secretarial Practice in Malaysia* (Selangor: Lexis Nexis, 4th ed, 2005). In the U.K., written resolutions were permitted *for private companies only* under s 381A of the English Companies Act 1985, except in two situations, *viz*, removal of a director and removal of an auditor before the expiration of their terms of office. This position is now reflected in s 288 of the UK Companies Act 2006. Subsections (2) (a) and (b) of s 288 expressly retain the two exceptions.
A difficulty in Malaysia is that both s 128 and s 152A use the same expression: 'Notwithstanding anything to the contrary in this Act or in the articles'. A moot point is whether the words, 'notwithstanding anything to the contrary in this Act' indicate that s 152A overrides the requirements of s 128. This article submits that the intention of the legislature in s 128 is to safeguard the interest of the director and that the section should prevail over s 152A. This difficulty may be averted if s 152A expressly provides that the written resolution procedure does not apply to removal of directors under s 128.

D. Chinks in the Directors' Armour

1. *Grounds need not be given*

An important question is whether notice of the intended resolution to remove a director under s 128 must set out the grounds on which the director's removal was being sought. In *Indian Corridor Sdn Bhd & Anor* v *Golden Plus Holdings Bhd*[64] the trial judge answered this question in the affirmative, and that the rules of natural justice required the director to be informed of the grounds of his removal.[65] On appeal, the Court of Appeal disagreed with this view.

Whilst the *Indian Corridor* case may appear to be somewhat harsh to a director of a public company, this article supports the decision in that case because giving grounds may unduly fetter the right of members to remove directors.

2. *No penalty imposed on the company if a director's representation is not sent before the meeting*

It was noted that on receipt of a notice of an intended resolution to remove a director, the company must forthwith send a copy to the director concerned and that the director may elect to make representations and require the said representations to be sent to every member entitled to notice of the meeting where the resolution will be tabled. To protect the director who is to be removed, section 128(3) makes it clear that a company is not excused from sending the representations to members merely because notice of the intended meeting had already been given. If the representations are not sent either because they were received too late or because of the company's default, the director can require that the representations be read out at the meeting concerned, without prejudice to his right to be heard orally at the meeting. This article submits that the impact of the representations will be lost if it is not sent before the meeting. The Act imposes no penalty on the company if it fails to send the representations which were received in time to be sent. What these writers fear is that a company may deliberately choose not to send the representations so as to lessen its impact. The reading out of the representations at the meeting may not be as effective as sending the representations to members before the meeting is held. Early transmission of the representations will give members more time to mull over the representations and also aid the director if he wishes to go on a campaign to garner support against his removal.

3. *When is a director's representation of 'reasonable length'?*

Section 128(3) states that the representations must not exceed a 'reasonable length'. The implication of these words is that the company need not send the representations if it exceeds a reasonable length. This article submits that the word reasonable is ambiguous and it is feared that a company may be tempted to use this ambiguity to its advantage. This article also suggests that the Act be amended to indicate the maximum number of words that may be used.

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64 [2008] 3 MLJ 653.

65 Reference was made to *Kanda* v *Government of Malaysia* [1962] MLJ 169, a case involving dismissal of a public servant, which the Court of Appeal considered was totally irrelevant.

4. *Section 128(4) may sometimes act adversely to a director's interest*

In addition, under s 128(4), where the company alleges that the representations contain defamatory matter it may apply to the court for an order that the representations need not be sent and need not be read out at the meeting. The section provides that the court may make such an order if it is satisfied that the director was abusing the protection afforded by the section to secure, 'needless publicity for defamatory matter'[66]. Significantly, it appears that the court may make such an order not because the representations contain defamatory matter but because the representations are aimed to secure needless publicity for defamatory matter. A major problem for the director is that any application to the court by the company may take time and there is a risk that the resolution to remove him may be tabled at a meeting before the court application is heard. It is submitted that greater protection will be afforded to the director if the Act is amended to provide that the intended resolution to remove the director shall not be tabled until the court application is heard and decided.

Another unusual feature is that where the court makes an order against the sending of the representations it may, 'order the company's costs on an application to be paid in whole or in part by the director, *notwithstanding that he is not a party to the application*'[67]. It is probable that the words emphasised were inserted to cater for an *ex parte* application of the company. The provision may be justified in cases where the director has blatantly abused his privilege of making representations by including material which is clearly defamatory, but an unhappy feature is that the subsection allows the court to make an order against the director's representations when he is not cited as a party and to compel him to pay costs when he is not a party to the application.

VIII. Conclusion

In enacting section 128 the legislature appears to have manifested a twofold intention. The first is to give members of a public company a somewhat potent power to remove a director by an ordinary resolution in a general meeting. The potency of this power is reflected by the fact that the power is not subject to restrictions in the articles or the memorandum of the company or in any contract entered into by the director with the company. Further, no reason need be given of the proposal either to the company or the director threatened with removal. The power is subject to a dampening element. Where the director has a lucrative service contract, his removal may result in the company having to pay substantial damages. Regrettably, there is no provision in the Companies Act 1965 compelling disclosure of the remuneration of the full time salaried directors. The disclosure may be useful to members who wish to remove a director for such knowledge may enable them to evaluate whether it is worth removing him or to patiently await his retirement.

The second intention of s 128 appears to be to provide safeguards to a director of a public company who faces the prospect of removal. Section 128(2) attempts to ensure

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66 With respect, the wording of the section is not entirely satisfactory. The wording suggests that the court may make such an order not because the representations contained defamatory matter, but because the representations are aimed to secure needless publicity for defamatory matter.

67 Our emphasis.

that he is given adequate notice of the proposal to remove him and a right not only to make representations prior to the meeting but also a right to be heard at the meeting called to remove him. These rights are of great significance. It is important for a director to be heard before removal for he may be removed for the wrong reasons, for example, where the proposal to remove him is by a disgruntled section of the members whose personal nest the director has refused to feather. Unfortunately, s 128 does not state in express terms that it is mandatory to use the procedure set out in the section where it is proposed to remove a director of a public company from his office. Neither is a penalty imposed upon the company if it fails to circulate his representation or if it fails to give him an opportunity to defend himself at the meeting called to remove him.

The absence of mandatory provisions had prompted the argument (as in the *Solaiappan* and the *Tien Ik* cases) that an alternative procedure in the articles that does not require compliance with s 128(2) may not be invalid and may be used. The *Tien Ik* case does cause some anxiety for it supports the view that a director may be compelled to vacate his office through the exercise of a power given by the articles[68] to members holding a certain portion of the share capital which may be exercised to effect a de facto removal of a director without complying with the procedure in s 128. Although the Act was amended in 1969 to address a shortcoming as illuminated in the *Solaiappan* case, this article advocates further amendment for greater clarity. It is suggested that s 128(1) be amended to make it clear that where it is proposed to remove a director of a public company from his office, the procedure in s 128(2) and s 128(3) must be followed and in addition, that a request[69] from members requiring a director of a public company to vacate his office shall be invalid. The current lack of clarity regarding these matters may result in wasteful litigation.

Another controversial issue emerges from the *Tien Ik* case. It was noted that the Federal Court in that case expressed the view that s128 also applied to removal of directors of private companies. This article has stated that the application of s 128 should be restricted to the removal of directors of a public company and its extension to private companies will cast a burden on the members of a private company. For this reason this article has suggested that the words, 'of a public company' should be added immediately after the word, 'director' in that part of s 128(2) which refers to 'any resolution to remove a director'.

Finally, it may be noted that although the power of the members under s 128 appears somewhat formidable, it has a deceptive but unavoidable feature. The power is difficult to exercise in a large public company as it may be arduous to garner enough support to have a resolution passed at a meeting called to remove a director. Indeed in a large public company members may find that they do not have enough support to even requisition that a meeting be convened for the purpose of removing a director.

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[68] The relevant article in the *Tien Ik* case (article 85 (f)) provided, *inter alia*, that the office of director shall become vacant if a director is 'required to resign his office by notice in writing lodged at the office signed by the holder or holders of not less than three-fourths in nominal value of the issued shares of the company'.

[69] This amendment is proposed to counter the decision in the *Tien Ik* case that the procedure in s 128(2) was intended to apply only to a case of the removal of a director by a resolution at a meeting of the company.a

The Role of Auditors in the Banking Sector*

Loganathan Krishnan**

Abstract

The term 'auditor' originates from the expression 'auditor', which in Latin means 'to listen'. Nevertheless when one scrutinises the duties of auditors, he will realise that auditors do not merely listen. They examine companies' accounts and submit reports. These duties have augmented over recent years due to changing corporate atmosphere enveloping the business world including the banking sector. Thus this study reassesses auditors' duties as there are specific laws governing auditors in the banking sector. The study examines whether the laws are adequate in ensuring that auditors are effective watchdogs. A comparative study is also carried out to investigate auditors' duties in the non-banking sector. Essentially corporate law must ensure the interests of all stakeholders are well balanced with the challenging role of auditors.

I. Introduction

This study attempts to examine the current state of law governing auditors' role in the banking sector. It will unearth whether comprehensible legal principles have been developed by case law and statutory provisions are adequate, in specifically dealing with issues governing auditors' duties and obligations. Essentially, the study raises the underlying problems governing auditors' duties and obligations. The study then proceeds to raise significant issues as to whether auditors are able to play their role as effective watchdogs for the purposes of the legitimate interests of stockholders and stakeholders.

II. Background of Study

There is a need to clarify the rules pertaining to the duties and obligations of auditors due to the spate of financial scandals.[1] At the Malaysian forefront there are cases such as Transmile Group Bhd, Ocean Capital Bhd, Megan Media Holdings Bhd, Southern Bank Bhd (SBB) and Bank Bumiputra Malaysia Bhd. The last two cases are directly related to auditors as regards to the banking sector. Financial scandals have always been

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[1] Tomasic, R, 'Auditors and the Reporting of Illegality and Financial Fraud' (1992) 20 *Australian Business Law Review* 198.