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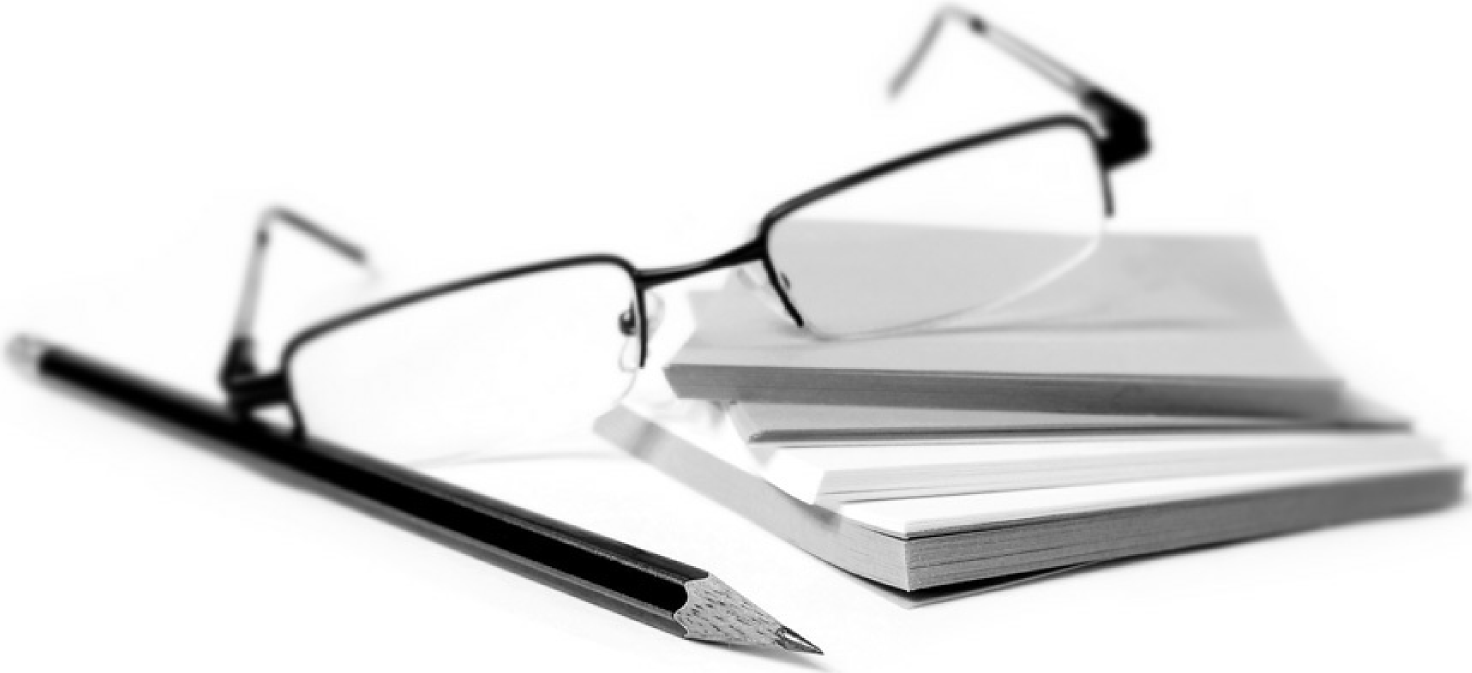
Law For Business Students

Lazar Sarna



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Introduction

Business is based on at least four (4) factors: capital, labour, materials or services and entrepreneurship. Put another way, starting up and operating a business requires financing, manpower, product and the possibility of making a profit.

The fundamental structures are: the sole proprietor (one man operation), the partnership and the corporation. Corporations are established to avoid the personal liability of the persons operating the corporation and to gain tax advantages such as low corporate tax rates. Variations of these three (3) themes include the joint venture (a mix of partnership and corporation) and the franchise (a mix of corporations, lease, licence and sale).

Legal structures and concepts not only give form to business, but also lay down guidance. This book deals with these structures and concepts in as practical a manner as possible.

1 Corporate Structure

1.1 General

A corporation is a legal person, meaning that it has all the rights and duties of a natural physical person, save for those disqualifications and disabilities arising for its incorporeal nature. This is embodied in the famous Salomon principle (based on the legal discussion *Salomon v A. Salomon & Co Ltd* [1897] AC 22, which held that the founder, shareholder or director of a corporation may be a secured creditor of the same corporation, since the corporation is a separate and distinct person.

Judgment:

The company is at law a different person altogether from the subscribers to the memorandum; and, though it may be that after incorporation the business is precisely the same as it was before, and the same persons are managers, and the same hands receive the profits, the company is not in law the agent of the subscribers or trustee for them. Nor are the subscribers as members liable, in any shape or form, except to the extent and in the manner provided by the Act. That is, I think, the declared intention of the enactment. If the view of the learned judge were sound, it would follow that no common law partnership could register as a company limited by shares without remaining subject to unlimited liability...

It has become the fashion to call companies of this class "one man companies." That is a taking nickname, but it does not help one much in the way of argument. If it is intended to convey the meaning that a company which is under the absolute control of one person is not a company legally incorporated, although the requirements of the Act of 1862 may have been complied with, it is inaccurate and misleading: if it merely means that there is a predominant partner possessing an overwhelming influence and entitled practically to the whole of the profits, there is nothing in that that I can see contrary to the true intention of the Act of 1862, or against public policy, or detrimental to the interests of creditors.

A related rule is that a shareholder cannot claim from a third party monies or rights that belong to the corporation. Damage done to the corporation can only be rectified by a claim instituted by the corporation, not its shareholders, even if the value of their shares has decreased as a result of the damages.

The legal rationale behind the *Foss v. Harbottle* rule is set out [in *Prudential Assurance Co. v. Newman Industries Ltd*. (No. 2), [1982] 1 All E.R. 354, at p. 367], as follows:

> *The rule [in Foss v. Harbottle] is the consequence of the fact that a corporation is a separate legal entity. Other consequences are limited liability and limited rights. The company is liable for its contracts and torts; the shareholder has no such liability. The company acquires causes of action for breaches of contract and for torts which damage the company. No cause of action vests in the shareholder. When the shareholder acquires a share he accepts the fact that the value of his investment follows the fortunes of the company and that he can only exercise his influence over the fortunes of the company by the exercise of his voting rights in general meeting. The law confers on him the right to ensure that the company observes the limitations of its memorandum of association and the right to ensure that other shareholders observe the rule, imposed on them by the articles of association. If it is right that the law has conferred or should in certain restricted circumstances confer further rights on a shareholder the scope and consequences of such further rights require careful consideration.*

However, there is a limit to the notion that a corporation is separate and distinct from its directors and shareholders. Most countries have laws which permit the Courts to lift the corporate veil and attach liabilities to the directors and officers in the event of fraud, tax evasion environmental pollution and other areas deemed necessary for public order.

1.2 Internal corporate structure

Incorporation begins by way of an application to a government authority for a charter or a certificate of incorporation. The basc information necessary to permit incorporation includes:

1. *Proposed name of the Corporation*
2. *The territory where the registered office is situated*
3. *The classes and any maximum number of shares that the corporation is authorized to issue*
4. *Restrictions, if any, on share transfers*
5. *Minimum and maximum number of directors*
6. *Restrictions, if any, on the business the corporation may carry on*

The corporation consists of a number of actors, namely, the shareholders, officers and directors. The shareholder is the one who places capital in the company. In return for capital, the shareholder acquires a share and indirect input in management by electing directors and ratifying decisions of the board of directors. The directors manage the company through the board of directors, which oversees operations. The board provides direction to corporate activities by appointing officers and receiving their reports of operations. The officers (president, vice-president, secretary, and treasurer) are employees of the company and direct the day-to-day activities.

An enterprise incorporates for one or two fundamental reasons: limitation of liability and tax reduction. A corporation is called 'limited' because the liability of the shareholders for the debts of the company are limited to the amount the shareholder has paid for the shares; that is, the shareholder places the investment in the share at risk but no more. The corporation therefore acts as a shield or a corporate veil, against personal liability of the shareholder. Similarly, the directors and officers are shielded from corporate liability, even though they are the ones who conceived and executed the conduct and acts of the company which may have generated the liability.

Directors and officers are not however as insulated from personal liability as shareholders. They are exceptionally liable for corporate debts if they have used the corporate entity to advance their personal purposes in a manner tantamount to fraud. There are also specific statutory rules which impose direct responsibility, such as liability for unpaid employee wages, and environmental damage claims. In these cases, it is said that the corporate veil shielding the corporate participants is lifted.

The other reason for incorporation is tax reduction which arises from the preferential tax treatment given to companies in most jurisdictions. In order to stimulate business through the vehicle which has the most capital accumulation, governments tax corporations, depending on their size and industry, at rates substantial less than personal rates. Given the tax advantage, and the relative ease of incorporating, the one-man activity is transformed into a one-man-company activity with a lower tax incidence.

Once incorporated, the corporation must be operated by physical persons who sign and transact in the name of the company. The internal structure of the corporation determines the activity and responsiveness of the company, which can influence the management of its intellectual property as a valuable asset.

The internal structure is defined by the general by-laws of the corporation. The bylaws determine the rules governing directors, shareholders, meetings, signing authority and so on.

1.3 Constitutional jurisdiction

A corporation constituted in one country or jurisdiction will be recognised by another, However, there may be restrictions on the operation of a business by that corporation in a foreign jurisdiction.

1.4 Directors defined

Depending on the corporation legislation, the director may be defined as the incorporators of the corporation, the persons named in the notice of directors submitted with the incorporating documents, and those persons elected as directors by the shareholders of the corporation. The director is a natural person, who may or may not be a shareholder, charged with the power of carrying on the business of the corporation, alone or in concert with a minimum number of co-directors, together called a board and acting as the agent or representative body of the corporate entity. The directors are subject to the election, termination and ultimate control of the shareholders, and rely upon the officers they designate to manage the business of the corporation.

Directors as a group or board are agents or mandataries of the corporation requiring no special authorization beyond that conferred by the constituting instrument or statute to act on behalf or manage the corporation. On the other hand, the individual director must be specially authorized by the board to perform representative acts.

1.5 Appointment and removal of directors

Under these jurisdictions where corporations are constituted by articles of incorporation, directors are generally appointed and removed by shareholders. The major disqualifications of directors are based on age, mental competence, solvency and residency, even though no such disqualifications generally apply to shareholders.

In most jurisdictions, no person less than eighteen years old may assume the office of director; no maximum age limit is prescribed. There has no serious attempt to challenge the age restriction on the basis of human rights legislation.

No person who has been found by a court to be of unsound mind is entitled to act as a director. Where unsoundness of mind is medically evident but not judicially determined the common law rules of agency or mandate and of consent in contracts would appear sufficient to disqualify the director. Of course, an action to disqualify the director, or disqualification raised as a collateral issue would lead to a judicial declaration as to mental competence.

The director must be a natural person, and not a moral or fictitious "person" recognized as a person by law. The office of director is personal in nature, and cannot be filled by a party that has no physical presence. By contrast, a trustee in bankruptcy under the Bankruptcy Act may be a corporate entity, even though that statute would seem to require a physical attribute.

The director while in office cannot have the status of a bankrupt. This is not a test of insolvency on an accounting basis, but a determination of a legal status. The discharge of a person from bankruptcy restores his qualifications for directorship.

In those jurisdictions where incorporation is effected by letters patent, similar requirements are not expressed, in many cases, in the statute, but in the general by-laws of the corporation. In addition, such directors must be shareholders to qualify for office.

1.6 Management

In general, the bylaws of a corporation will provide that directors assume office by way of election by the shareholders at their general meetings, in accordance with the prescription of statute and the formalities set out in the by-laws. In the absence of the holding of elections on their prescribed date, the directors then in office are not automatically disqualified or terminated; they continue in office until an election is held voluntarily or by court order.

Directors may be elected for staggered terms. Where no term is specified, a director holds office for one year. A director may also be appointed by the board of directors to fill a vacancy. In that case, the term is the balance of the term of the vacated director. A director must accept, expressly or implicitly, the office of director. Any exercise of the duties of the office of director, such as attendance at board meetings, would constitute acceptance.

Directors are removable, by death, resignation and disqualification, although the question of the appropriate avenue for removal remains to be discussed. Shareholders are entitled to remove the director by ordinary resolution at a general or special meeting. Only that category of shareholder which was entitled to elect the director is entitled to remove him, and only on a cumulative vote basis where a cumulative voting election took place. In the event of removal, the director has no remedy in damages because of the absolute right of the shareholders to vote for removal. Where however the director has also acted in another capacity, offering managerial or professional services on a contract basis, the vote for removal may also constitute a vote to unlawfully terminate that contract. A resignation is effective by sending a letter of resignation to a corporation or to the trustee in bankruptcy.

The company is managed by directors. Directors have the duty to manage the business and affairs of the corporation. Their duty is performed collegially through the board and the board speaks by way of resolution. Day-to-day management of corporate operations is performed by officers and other employees of the corporation appointed by the board. Officers are appointed to offices designated by the directors. Both officers and directors must fulfill their duties to the corporation with reasonable care, diligence and skill. In so doing, they develop or are deemed to develop an intimate knowledge of internal corporate life, both from the standpoint of decision-making as well as operations. The directors have almost innumerable powers within their right to manage. Those traditionally attributed to them with regard to the property of the corporation include:

a) see to the execution of any contracts entered into by the corporation charging all or any of the property of the corporation;
b) refer any claims to arbitration;
c) deal with any of the moneys of the corporation not immediately required for the purposes thereof in such securities and in such manner as they think fit;
d) give any employee a commission on the profits of any particular business or transaction or a share in the general profits of the corporation;
e) make and give receipts, releases and other discharges for money payable and for claims of the corporation;
f) enter into all contracts and execute and do all such acts and deeds in the name and on behalf of the corporation as they may consider expedient;
g) acquire any property, rights or privileges that the corporation is authorized to acquire, on such terms and conditions as they think fit;

h) to institute and conduct legal proceedings by and against the corporation;
i) set aside out of the profits of the corporation before declaring any dividend such sums as they think proper as a reserve fund to meet contingencies or provide for dividends, depreciation, and maintaining any of the property of the corporation;
j) pay for any property, rights, or privileges acquired by, or services rendered to the corporation in cash or in shares, bonds, debentures or other securities, and any such shares may be issued either as fully paid up, or with such amount credited as paid up thereon as may be agreed upon;
k) invest the profits as they may think fit, and from time to time deal with and vary such investments, and do dispose of all or any part of them for the benefit of the corporation. Those powers associated with decision-making and internal management include:
l) appoint or remove managers, secretaries, treasurers, officers, clerks and agents for permanent, temporary or special services, as they from time to time think fit, and to determine their powers and duties, and fix their remuneration;
m) make and repeal regulations for the management of the business of the corporation, its officers and employees;
n) provide for the management of the affairs of the corporation at home and abroad, and in particular to appoint any persons to be the attorneys or agents with such powers and upon such terms as they may think fit;
o) accept a surrender of shares or any part thereof;
p) appoint any person to accept and hold in trust any property belonging to the corporation, or in which it is interested, to execute and do all such deeds and things as may be requisite in relation to any such trust, and provide for the remuneration of any such trustee.

While the number of directors on the board may be determined by the incorporating documents, the bylaws provide procedural foundation to their activity.

The bylaws accordingly will determine that meetings of the board must be held at such place and time and on such day as any two or three directors may determine. Notice of meetings of the board is given to each director not less than so many hours before the time when the meeting is to be held. Each newly elected board may without notice hold its first meeting for the purposes of organization and the appointment of officers immediately following the meeting of shareholders at which such board was elected. At all meetings of the board every question shall be decided by a majority of the votes cast on the question; and in case of an equality of votes the chairman of the meeting shall be entitled to a second or casting vote.

In a small to medium-sized company, the smaller the board, the greater the responsiveness. The larger the board, the wider the diffusion of responsibility and greater effort in reporting, feed-back and decision-making. The directors of a start-up company usually consist of the researcher and an employer representative. As the company grows, and may be the object of a first or second round of private investment, the board will grow to encompass senior managers or employees, as well as investor representatives and a business leader.One of the main functions of the board is to approve contracts. The bylaws therefore specify that contracts, documents or instruments in writing requiring execution by the corporation must be signed by any number of officers or directors. These contracts once signed are binding upon the corporation without any further authorization or formality. The board is authorized from time to time by resolution to appoint any officer or officers or any other person or persons on behalf of the Corporation to sign and deliver either contracts, documents or instruments in writing generally or to sign either manually or by facsimile signature and deliver specific contracts, documents or instruments in writing. These provisions cover deeds, mortgages, charges, conveyances, powers of attorney, transfers and assignments of property of all kinds (including specifically but without limitation transfers and assignments of shares, warrants, bonds, debentures or other securities), proxies for shares and other securities and all paper writings.

Furthermore, banking business is transacted with those banks, trust companies or other financial institutions which the board designates, from time to time by resolution. Banking business is transacted on the by those officers and other persons the board designates by resolution and to the extent therein provided.

Given the risk to the director and officer that the corporate veil will be lifted and personal liability imposed, the bylaws stipulate that the corporation will indemnify them, a former director or officer or a person who acts or acted at the request of the corporation, as a director or officer of a body corporate of which the corporation is or was a shareholder or creditor, and their heirs and legal representatives.

The corporation may also save harmless any person who was or is a party or is threatened to be made a party to any threatened, pending or completed action, suit or proceeding, whether civil, criminal, administrative or investigative other than an action by or in the right of the corporation. This arises from the fact that he is or was an employee or agent of the corporation, or is or was serving at the request of the corporation as a director, officer, employee, agent of or participant in any other enterprise.

Indemnification only applies if the director or officer acted honestly and in good faith with a view to the best interests of the corporation and, with respect to any criminal or administrative action or proceeding that is enforced by a monetary penalty, had reasonable grounds for believing that the conduct was lawful. The termination of any action, suit or proceeding by judgment, order, settlement or conviction does not, of itself, create a presumption that the person did not act honestly and in good faith with a view to the best interests of the corporation and, with respect to any criminal or administrative action or proceeding that is enforced by a monetary penalty, had no reasonable grounds for believing that his conduct was lawful.

Furthermore, no director or officer for the time being of the corporation is not liable for the acts or defaults of any other director or officer or employee or for joining in any act for conformity or for any loss through the insufficiency or deficiency of title to any property acquired by the corporation. If any director or officer of the corporation is employed by or performs services for the corporation otherwise than as a director or officer, the fact of his being a director or officer of the corporation does not disentitle such director or officer from receiving proper remuneration for such services.

Finally, in regard to dealing with conflict of interest situations, the bylaws may provide that no director or officer is disqualified by his office from contracting with the corporation nor shall any contract or arrangement entered into by or on behalf of the corporation with any director or officer or in which any director or officer is in any way interested be liable to be voided; and the person who has such an interest is not liable to account to the corporation for any profit realized by any contract or arrangement by reason of holding that office, provided that the director or officer has made full, timely and material disclosure, and has not voted on the contract.

Many corporation statutes formally recognize as officers of a corporation, the president, vice-president, secretary and treasurer.

In each applicable jurisdiction, the officer will be so defined by the governing statute, and by designation of the by-laws or resolutions. In general, however, whatever the designation of office, the essential elements of definition include:

a) the officer is an employee of the corporation;
b) the office relates to the management, usually on a day-to-day basis, of the corporation;
c) the officer is subject to the control of the board of directors;
d) the director may assume concurrently the role of an officer;
e) the officer, as an employee is entitled to remuneration.

Officers may be appointed for terms longer then those of the directors who appoint them. Officers are removable by those who appoint them, namely the directors.

The principal officers of a corporation are:

a) ***President***

The president may also be called the chairman, or chief executive officer. His duties may include the following presiding at meetings of shareholders, supervising the co-officers, receiving and executing the instructions of the directors. The president of the company is not *ex officio* entitled to enter into any contractual arrangement with third parties unless specially authorized by the directors.

b) ***Vice-President***

The vice-president acts in the absence of the president in fulfillment of his duties. Otherwise the vice-president performs the functions assigned to him by the president.

c) ***Treasurer***

The treasurer deals with the accounts, funds and securities of the corporation.

d) ***Secretary***

The functions of the secretary are perhaps the most explicitly defined by statute and by-law; the secretary: takes and keeps minutes of shareholders' and directors' meetings; issues notices of meetings; counter-signs or signs formal corporate documents; files annual returns; maintains corporate books and registers; deals with shareholder and creditor inspection of corporate documents; receives service of proceedings, and generally acts upon the instruction of his superior officers in co-ordinating the formal aspects of the internal management of the corporation.

1.7 Shareholders

The shareholder is not personally liable for the debts of the company. This is so even if it is a one-man company where the shareholder and director are one and the same. The shareholder is an investor and does not assume responsibility for the conduct of the investment vehicle. The shareholder is not a company creditor. On the other hand, the shareholder is not the owner of the company or of its assets, but is the holder of a bundle of rights in the company. The shareholder's basic rights are to vote for directors, and receive a share of the net assets upon the liquidation of the company.

Shareholders however may be divided into classes, namely common and preferred shareholders. Preferred shares give the holder a number of different rights, which may include the right to preferential distribution of net assets upon liquidation, or a right to dividends, or a right of redemption, or a right to cumulate dividends. These rights may be acquired at the expense of a right to vote.

For the most part, the general bylaws will detail the holding of special and annual shareholder meetings, quorum, proxies, share subscriptions and share conditions.

1.7.1 Unanimous Shareholders Agreements

To protect their respective interests, and clarify how they will ensure the running of the business of the company, shareholders enter into an agreement to which all of the shareholders are party. If one shareholder is not included as a party, the agreement of course is not unanimous, and the non-signatory is not bound by it. Furthermore, the company is also a party because the parties stipulate the performance of corporate acts which the company must undertake to do.

The shareholders agreement clearly defines rules of corporate governance and other aspects of the business and contains information specific to the corporation, such as the names of all shareholders, the number and class of shares comprising the authorized capital of the company, how many shares are issued and outstanding and how many are owned by each shareholder. For example: the Corporation will at all times carry out the provisions of the Agreement; the Shareholders or their nominees will act and vote as directors to ensure that the purpose, intent and provisions of the agreement are carried out so long as they are directors of the Corporation and to the extent that they are permitted by law; the Corporation confirms its knowledge of the agreement and undertakes to carry out and be bound by its provisions to the full extent of its capacity and power to do so.

The basic premise of the corporate arrangement is that all parties know in advance what their respective shareholdings are, and what powers attach to their shares. As to governance, the parties must stipulate as to the composition of the Board of Directors, namely, that directors of the corporation are elected by vote of the shareholders, and that the names, titles and duties assigned to each officer are also clearly set out. In the same vein, the parties stipulate that an auditor has been or will be appointed the auditor [accountant] of the corporation. A clause may also be included to the effect that the shareholders may exempt the corporation from appointing an auditor in any financial year.

Aside from knowing what their powers are, shareholders are keenly aware that an oppressive majority of shareholders may use their majority position to change the direction of the company, reduce the benefits of that shareholder, and generally treat the company as their own without regard to the minority position. This may be especially true where the researcher finds himself overruled by a majority of constituents who represent the venture capital investors. It is therefore important to build into the arrangement a veto power or a absolute majority rule which will make it more difficult for the majority to acquire that status and rule in disregard of minority opinion. We would therefore expect to find clear limitations and specifications with respect to the powers of the board of directors:

These might include prescriptions concerning what constitutes an acceptable number of directors to make a decision; or a statement to the effect that no action is to be taken in the absence of the Chief Operating Officer.

Furthermore, it is advisable to build in a special rule requiring designated attendance of shareholders or directors, regardless of quorum achievement, as well as a requirement that a minimum of 68% or 75% of registered shareholders be present and vote on any of the following decisions:

i. *Changes in the articles or by-laws of the corporation*
The articles and general bylaws are the constitutional documents of the company. They determine anything from quorum and procedural matters to governance. Each shareholder entered the company on the premise that the basic constitution would serve as the ground rules for the investment vehicle. Accordingly, a measure of permanency must be assured through a conservative process of change.

ii. *Changes in the authorized or issued capital of the corporation*
One way of reducing the value of the individual share is increase the value of the authorized capital. In so doing, the board is free to issue an increased number of shares. The effect of an increase in shares is to dilute or reduce the value of the individual share; and in some cases wrest control away from a shareholding group.

For example, a company has an authorized capital of $100 and issues one hundred shares each worth $1. When the authorized capital is increased to $200, the board can issue another hundred shares, each at $1. If X buys all hundred shares, he will gain control of the company away from Y who previously held fifty-one of the first hundred shares issued.

In order to avoid the problem, a procedural barrier is erected to impede the process of dilution.

iii. *Entering into any agreement, making any offer or granting any right capable of becoming an agreement to allot or issue any shares of the Corporation*
The shareholders wish to control the allotment of the shares for the same reason they would seek to regulate the increase in authorised capital.

iv. *Any actions which may lead to or result in a material change in the nature of the business of the Corporation*
The investment in shares in a company is based not only on the management, but on the product or service. To lightly permit a change in business means that the company either no longer believes in the value of the product or service, feels it cannot attain appropriate market share, or considers another opportunity to be more lucrative.

Any action which may lead to a material change in the business of the company includes the purchase of another venture with a dissimilar product or service line; an asset sale; an invitation or solicitation for a buy-out by another company with a dissimilar product or service line; purchase or raw materials or even real estate for purposes other than the current business; a bank loan for future expansion in an unfamiliar direction; and so on.

v. *Entering into an agreement other than in the ordinary course of the Corporation's business*
The shareholders wish continuity of operations. If management wishes to enter into agreements which go beyond the ordinary course of business, this indicates the company is preparing for insolvency, or is taking a risk into new areas of business. Such agreements would include a sale or transfer of assets, settlement with a category of creditors, and so on.

vi. *Borrowing money, giving a security or making or incurring capital expenditures in excess of a specified amount in any financial year of the Corporation*
The ultimate means of restricting or regulating spending is to impose a spending or borrowing ceiling. The failure to respect the limit is grounds for removal of management; and cause for concern for the corporate lender.

vii. *Taking steps to wind-up or terminate the existence of the Corporation;*
Action toward winding-up or corporate termination is a fundamental corporate change which jeopardizes the investment of the shareholders, and consequently requires their reasoned approval.

viii. *Selling, leasing, exchanging or disposing of the entire undertaking or property or assets of the Corporation or any substantial part of it;*
Action directed toward alienating or charging or disposing of the corporate substructure is a fundamental corporate change which jeopardizes the investment of the shareholders, and consequently requires their reasoned approval.

ix. *Directly or indirectly making loans or advances to any person or giving security for or guaranteeing the debts of any person;*
A corporation other than a lending or insuring institution is not in the business of lending money or putting up security for the debts of another. This unusual action, if not for the benefit of a key client or supplier, is frequently a measure to favour an insider; and such favours destroy the balance of equity created by the share distribution. Most corporate statutes impose personal liability upon the directors who voted for loans and guarantees which render the company insolvent.

x. *Declaring or paying any dividends*
There is a time and art to declaring dividends. Dividends are a distribution of net profit to the shareholders, and as such is a return upon investment. Some shareholders may want dividends distributed, while others may prefer to use the net profits to cover operating costs, including the repayment of loans or coverage of contingencies.

xi. *Taking, holding, subscribing for or agreeing to purchase or acquire shares in the capital of any other corporation;*
The acquisition of shares in another company may mean a drive for expansion, a quest to eliminate competition, or a taking in payment of a debt. In any case, it may involve a fundamental change in the company business which must be scrutinized.

xii. *Entering into a partnership or arranging for the sharing of profits, union of interests, joint venture or reciprocal concession with any person;*
Action toward entering into a partnership or arranging for the sharing of profits, union of interests, or joint venture may mean a drive for expansion, a quest to eliminate competition, or a taking in payment of a debt. It may involve a fundamental change in the company business.

xiii. *Entering into an amalgamation, merger or consolidation with any other body corporate;*
Action toward entering into an amalgamation, merger or consolidation with any other body corporate may mean a drive for expansion, a quest to eliminate competition, or a taking in payment of a debt. It is a fundamental change in the company business.

The following conditions may apply to enable the actions listed above:

i. For actions that by law require the approval of the directors only: if all the required directors are present.
ii. For actions that by law require the approval of the shareholders: at any meeting of shareholders duly called for the purpose of considering the proposed action, a specified percentage of the votes are cast in favour of the action.

Shareholders normally agree to not sell, transfer, assign, pledge, charge, mortgage or in any other way dispose of or encumber their shares or their rights under the agreement without first complying with all its provisions. The exception is if the other Shareholders have given their prior consent.

This section also specifies the wording which is to appear on the share certificates. For instance:

> *"The shares represented by this certificate are subject to all the terms and conditions of an agreement made as of (date of signature of the Agreement) a copy of which is on file at the registered office of the Corporation."*

Provisions protecting shareholders in the event that one of their peers should become insolvent are written into this part of the agreement. They state that if one of the shareholders makes an assignment for the benefit of creditors or is the subject of any proceedings under any bankruptcy or insolvency law, the others have the automatic right to acquire his shares by paying a sum equivalent to the purchase price. This section may also include provisions in the event that a shareholder wants to pledge, charge, mortgage or otherwise encumber his shares to a bank or other financial institution for loan purposes. The provision would normally require that the lending bank or financial institution acknowledge in writing that the pledge, charge, mortgage or encumbrance of the shares will continue to be subject to all the terms and conditions of the agreement and that the acknowledgement includes all clauses prohibiting pledging, charging or mortgaging or otherwise encumbering the shares without the consent of the other shareholder.

It is expected to find the shareholders stipulating that they will not engage in business with another entity either similar to or competitive with the business carried on by the corporation without prior written consent of other shareholders. This covers activities such as carrying on business, being concerned with or interested in, advising, lending money to, guaranteeing the debts or obligations of or permitting one's name or any part thereof to be used or employed by any person engaged. The shareholders confirm that the restrictions are reasonable and valid and waive all defenses to their strict enforcement.

There are a number of precautions to be taken to ensure continuity of the corporate venture in the event of the death or bankruptcy of one of the shareholders. The remaining shareholders rarely want to deal with the heirs or trustees of the shareholder either at a board meeting or at a shareholders meeting. Accordingly, the parties agree in advance to buy-out provisions which permit the remaining shareholders to acquire the shares of the deceased or bankrupt shareholder for a predetermined price or in accordance with a fair market value assessment.

1.7.2 Buy-sell or shotgun clause

Of greatest interest is the so-called shot-gun clause which contains a clever mechanism for permitting share acquisitions. In the event one shareholder wishes to acquire the shares of another, the acquirer makes an offer to buy the target's shares at a stipulated price. The target of the offer has the choice of either accepting the offer or of turning the tables and offering to buy the acquirer's shares for the same price. This process has the effect of guaranteeing that the offer originally made is not too low, because it may serve as the price basis for the acquisition of the acquirer's shares.

In the event one shareholder wishes to sell his shares, he must first offer them to his co-shareholders, who are entitled to acquire them at fair market value in accordance with an assessment formula.

A shareholders' agreement may be declared invalid if it fundamentally interferes with the functions of the directors in the orderly management of the corporation.

1.8 Employee stock options

The expectation of high earnings in a start-up company is not limited to the administration. The employees have taken a risk in working for a start-up which may or may not be in operation by the end of the same fiscal year. To compensate for that risk, and to top off their remuneration, employees usually demand a share of the company equity. While employees are not partners in the enterprise, they do constitute a key asset of the company; and their alienation or disaffection may yield to resignations, and dissipation of corporate secrets.

The most orderly way of distributing equity to employees is through a stock option plan. The plan provides for the grant of options for the acquisition of a defined total of shares based on performance, seniority or other criteria.. Once the company is publicly listed on a stock exchange, regulation will limit the amount of shares available to employees through such a plan to a fixed percentage (in the range of 10 to 20%). The plan forms part of the individual employment agreement.

Under such a plan, the employee may exercise his option to acquire stock over a defined period of time (such as five years from the date of the grant of the option). The total number of shares available for option is defined reserved and may consist of either authorized and un-issued shares or treasury shares. In the event of any merger, reorganization, consolidation, recapitalization, stock dividend, stock split or other change in corporate structure affecting the shares, the company should make the necessary adjustments to maintain the vested rights of the employee. Since the employee is acquiring the shares at a discount, the options should not be transferable; and should be exercisable only during his lifetime.

The stock option plan should include a number of clauses such as:

a) Payment of the Option Price and any tax withholding obligation must be made by cashier's check, through electronic funds transfer or through a broker-assisted Stock Option Exercise pursuant to procedures the Committee may, in its sole discretion, establish from time to time. No shares of Stock will be delivered to the Employee until all such amounts have been paid.
b) Notwithstanding anything herein to the contrary, the Company will permit and provide for the exercise of a Stock Option without the prior payment of the Option Price and any tax withholding obligation, provided arrangements satisfactory to the Company have been made for full payment of such amounts. The Employee will be responsible for all brokerage commissions, interest and other expenses, if any.
c) The Stock Options which are awarded to an Employee will be non-forfeitable and exercisable at any time during the Exercise Period.
d) In the event of the death of a Employee during the Exercise Period, the estate of such Employee, or other person designated by the Employee, will be entitled to exercise any Stock Option awarded to Employee to the same extent as a Employee who remains in active employment with the company.
e) The adoption of the Plan will not confer upon any Employee of the Company any right to continued employment with the Company, nor will it interfere in any way with the right of the Company to terminate the employment of any of its Employees at any time in accordance with law.
f) Nothing in the Plan or in any Stock Option granted under the Plan will confer upon any Employee or his executors,

2 Corporate management

2.1 Directors' and officers' fiduciary duties

There are two distinct duties to be discharged by directors and officers in managing, or supervising the management of, the corporation:

Every director and officer of a corporation in exercising their powers and discharging their duties must

a) act honestly and in good faith with a view to the best interests of the corporation; and
b) exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.

The first duty has been referred to as the "fiduciary duty" or the "duty of loyalty". This duty requires directors and officers to act honestly and in good faith with a view to the best interests of the corporation. The second duty is commonly referred to as the "duty of care" and imposes a legal obligation upon directors and officers to be diligent in supervising and managing the corporation's affairs.

2.2 Best interests of the corporation

The statutory fiduciary duty requires directors to act honestly and in good faith *vis-à-vis* the corporation. They must respect the trust and confidence that have been reposed in them to manage the assets of the corporation in pursuit of the realization of the objects of the corporation. They must avoid conflicts of interest with the corporation and avoid abusing their position to gain personal benefit. They must maintain the confidentiality of information they acquire by virtue of their position.

The fiduciary duty owed by directors was articulated in one decision (*Canadian Aero Service Ltd. v. O'Malley*, [1974] S.C.R. 592, at pp. 609-10) where it was held that directors and officers may even have to account to the corporation for profits they make that do not come at the corporation's expense:

> *The reaping of a profit by a person at a company's expense while a director thereof is, of course, an adequate ground upon which to hold the director accountable. Yet there may be situations where a profit must be disgorged, although not gained at the expense of the company, on the ground that a director must not be allowed to use his position as such to make a profit even if it was not open to the company, as for example, by reason of legal disability, to participate in the transaction. An analogous situation, albeit not involving a director, existed for all practical purposes in the case of Phipps v. Boardman [[1967] 2 A.C. 46], which also supports the view that liability to account does not depend on proof of an actual conflict of duty and self-interest. Another, quite recent, illustration of a liability to account where the company itself had failed to obtain a business contract and hence could not be regarded as having been deprived of a business opportunity is Industrial Development Consultants Ltd. v. Cooley [[1972] 2 All E.R. 162], a judgment of a Court of first instance. There, the managing director, who was allowed to resign his position on a false assertion of ill health, subsequently got the contract for himself. That case is thus also illustrative of the situation where a director's resignation is prompted by a decision to obtain for himself the business contract denied to his company and where he does obtain it without disclosing his intention.*

2.3 Directiors' good faith reliance

Directors are and cannot be experts in all aspects of corporate finance, structure and operations, As lay people, they rely on professional advice within the company or on outsourced counsel, be it that of a lawyer, accountant, engineer, or appraiser.

In order to establish a defense of good faith reliance, the director must show reliance, and that the advice of course came from a professional.

2.4 Examples

2.4.1 Fiduciary Relationship

2.4.1.1 Director defined

A director has no responsibilities of office unless that person has assumed the role of director. In order to affix liability to a director, there must be proof of the directorship. In *Pereira v. The Queen*, the court found there was no such proof, and therefore no liability. In that case, the corporate exhibits established that it was the shareholders who must elect the directors; and the provisional shareholders must meet to elect a Board of Directors and appoint an accounting firm. However, there was no record of a shareholders' meeting where the appellant was appointed as a director. The liability directors face in assuming such a role establishes the requirement of personal knowledge by that director of his election or nomination to that role. Therefore directors must not only be elected by the shareholders but must also consent in writing to act, at which time the appointment becomes effective.

2.4.2 Nature of Fiduciary Duty

The law is laid down in *Regal (Hastings) v. Gulliver,* [1942] 1 All E.R. 378 at 381, as follows: -

> *"The respondents were in a fiduciary position and their liability to account does not depend upon proof of mala fides. The general rule of equity is that no one who has duties of a fiduciary nature to perform is allowed to enter into engagements in which he has or can have a personal interest conflicting with the interests of those whom he is bound to protect. If he holds any property so acquired as trustee, he is bound to account for it to his cestui que trust."*

A breach of trust under which a secret profit is obtained constitutes a fraud in equity against the *cestui que trust*, and it matters not whether the person guilty of the breach of trust believed that he was entitled at law to retain the profit except perhaps as to the question of whether any punitive or exemplary damages are to be granted.

2.4.2.1 Personal liability of director

There are circumstances in which the oppression remedy might be applied to find a director personally liable for the actions of a corporate defendant. When the power of the director is exercised in a fashion which causes an act or omission of the corporation which effects an unfairly prejudicial result, or a result which unfairly disregards the interests of the complainant - or which causes the business or affairs of the corporation to be conducted in a manner which has the same effect - those powers themselves have been "exercised in a manner" which is caught by the proscription of law.

The decided cases in which employees and officers of companies have been found personally liable for actions ostensibly carried out under a corporate name are fact specific. In the absence of findings of fraud, deceit, dishonesty or want of authority on the part of employees or officers, they are also rare. Those cases in which the corporate veil has been pierced usually involve transactions where the use of the corporate structure was a sham from the outset or was an afterthought to a deal which had gone sour.... In every case, however, the facts giving rise to personal liability were specifically pleaded. Absent allegations which fit within the categories described above, officers or employees of limited companies are protected from personal liability unless it can be shown that their actions are themselves tortious or exhibit a separate identity or interest from that of the company so as to make the act or conduct complained of their own.

Considering that a corporation is an inanimate piece of legal machinery incapable of thought or action, the court can only determine its legal liability by assessing the conduct of those who cause the company to act in the way that it did. This does not mean, however, that if the actions of the directing minds are found wanting, that personal liability will flow through the corporation to those who caused it to act as it did. To hold the directors personally liable, there must be some activity on their part that takes them out of the role of directing minds of the corporation.

2.4.3 Conflict of Interest

2.4.3.1 Special resolution

If all the directors of a company have an interest in a transaction the company is entering into, the transaction must be approved by a special resolution of the shareholders.

The general bylaws often have specific directives on dealing with conflict of interest situations. In one decision, the court cited the pertinent by-laws:

1. A Director who is, in any way, directly or indirectly interested in an existing or proposed contract or transaction with the Company or who holds any office or possesses any property whereby, directly or indirectly, a duty or interest might be created to conflict with his duty or interest as a Director shall declare the nature and extent of his interest in such contract or transaction or of the conflict or potential conflict with his duty and interest as a Director.
2. 15.A Director shall not vote in respect of any such contract or transaction with the Company in which he is interested and if he shall do so his vote shall not be counted, but he shall be counted in the quorum present at the meeting at which such vote is taken. The foregoing prohibitions shall not apply to

a) any such contract or transaction relating to a loan to the Company, which a Director or a specified corporation or a specified firm in which he has an interest has guaranteed or joined in guaranteeing the repayment of the loan or any part of the loan;
b) any contract or transaction made or to be made with, or for the benefit of a holding corporation or a subsidiary corporation of which a Director is a director;
c) any contract by a Director to subscribe for or underwrite shares or debentures to be issued by the Company or a subsidiary of the Company, or any contract, arrangement or transaction in which a Director is, directly or indirectly, interested if all the other Directors are also, directly or indirectly interested in the contract, arrangement or transaction;
d) determining the remuneration of the Directors;
e) purchasing and maintaining insurance to cover Directors against liability incurred by them as Directors; or
f) the indemnification of any Director by the Company.

These exceptions may from time to time be suspended or amended to any extent approved by the corporation in a general meeting, either generally or in respect of any particular contract or transaction or for any particular period.

2.4.4 Duty Owed to Shareholders

2.4.4.1 Company's assets are not those of its shareholders

A company's assets are not those of its shareholders. A director accused to appropriating corporate assets cannot be accused of appropriating assets of the shareholder. The general rule is that directors owe their fiduciary duties to the corporation only, and not to the shareholders.

Directors will not generally owe any duty of faithfulness to the shareholders or to the creditors of their companies. There are exceptions to the general rule, although in those decided cases, there was either a family relationship or a special relationship of trust and dependency between the plaintiffs and defendants where the latter were seeking to take unfair advantage of the others for personal gain or profit.

2.4.4.2 After resignation, party continued as a shareholder and director

The fact is that after his resignation, a party continued as a shareholder and director in the companies, and he was entitled to continue to participate in these capacities. His participation in these corporations, however, was thwarted by the oppression of the respondents. The evidence showed that the value of the party's shares appreciated during the period of the respondents' oppression, and his reasonable expectation, in his capacity as a shareholder, would have been to share in the increased value of his shares in the same fashion as the other shareholders.

2.4.5 Duty Owed to Employees

The concept of fiduciary duty is sufficiently broad to allow for a finding of such a duty between corporate directors and officers and the employees where warranted by the facts.

2.4.5.1 Customer lists

Where the defendant's corporate officer acknowledged that he knew that the plaintiff's former employees had taken customer lists from the plaintiff and admitted that the lists were used to target the plaintiff's customers, the court determined the defendant was vicariously liable for the conduct of its employees in using the customer lists. Equity will pursue the information into the hands of a third party who receives it with the knowledge that if it was communicated in breach of confidence and then the court will impose equitable remedies: there is no need for a fiduciary relationship.

3 Corporate responsibilities

3.1 Corporate Contracts: Corporate Agents

3.1.1 Corporate contracts / Notion of corporate agent / The court will look at what an outsider thought an agent was authorized to do / Illustration

"An "actual" authority is a legal relationship between principal and agent created by a consensual agreement to which they alone are parties. Its scope is to be ascertained by applying ordinary principles of construction of contracts, including any proper implications from the express words used, the usages of the trade, or the course of business between the parties. To this agreement the contractor is a stranger; he may be totally ignorant of the existence of any authority on the part of the agent. Nevertheless, if the agent does enter into a contract pursuant to the "actual" authority, it does create contractual rights and liabilities between the principal and the contractor. It may be that this rule relating to "undisclosed principals," which is peculiar to English law, can be rationalized as avoiding circuity of action, for the principal could in equity compel the agent to lend his name in an action to enforce the contract against the contractor, and would at common law be liable to indemnify the agent in respect of the performance of the obligations assumed by the agent under the contract.

An "apparent" or "ostensible" authority, on the other hand, is a legal relationship between the principal and the contractor created by a representation, made by the principal to the contractor, intended to be and in fact acted upon by the contractor, that the agent has authority to enter on behalf of the principal into a contract of a kind within the scope of the "apparent" authority, so as to render the principal liable to perform any obligations imposed upon him by such contract. To the relationship so created the agent is a stranger. He need not be (although he generally is) aware of the existence of the representation but he must not purport to make the agreement as principal himself. The representation, when acted upon by the contractor by entering into a contract with the agent, operates as an estoppel, preventing the principal from asserting that he is not bound by the contract. It is irrelevant whether the agent had actual authority to enter into the contract.": *Freeman and Lockyer v. Buckhurst Park Properties (Magnal) Ltd.,* [1964] 2 Q.B. 480, [1964] 1 All E.R. 630 (Eng., C

3.1.2 Corporate contracts / Corporate agent / Notion of ostensible authority illustrated

"I need not consider at length the law on the authority of an agent, actual, apparent, or ostensible. That has been done in the judgments of this court in *Freeman & Lockyer v. Buckhurst Park Properties (Mangal) Ltd*.[1]. It is there shown that actual authority may be express or implied. It is *express* when it is given by express words, such as when a board of directors passes a resolution which authorizes two of their number to sign cheques. It is *implied* when it is inferred from the conduct of the parties and the circumstances of the case, such as when the board of directors appoints one of their number to be managing director. They thereby impliedly authorize him to do all such things as fall within the usual scope of that office. Actual authority, express or implied, is binding as between the company and the agent, and also as between the company and others, whether they are within the company or outside it.

1 [1964] 2Q.B. 480; [1964] 2 W.L.R. 618; [1964] 1 A11 ER. 630, C.A.

Ostensible or apparent authority is the authority of an agent as it *appears* to others. It often coincides with actual authority. Thus, when the board appoints one of their number to be managing director, they invest him not only with implied authority, but also with ostensible authority to do all such things as fall within the usual scope of that office. Other people who see him acting as managing director are entitled to assume that he has the usual authority of a managing director. But sometimes ostensible authority exceeds actual authority. For instance, when the board appoints the managing director, they may expressly limit his authority by saying he is not to order goods worth more than £500 without the sanction of the board. In that case his *actual* authority is subject to the £500 limitation, but his *ostensible* authority includes all the usual authority of a managing director. The company is bound by his ostensible authority in his dealings with those who do not know of the limitation. He may himself do the "holding-out." Thus, if he orders goods worth £1,000 and signs himself "Managing Director for and on behalf of the company," the company is bound to the other party who does not know of the £500 limitation, see *British Thomson-Houston Co. Ltd.* v. *Federated European Bank Ltd.*[2] which was quoted for this purpose by Pearson L.J. in *Freeman & Lockyer*[3]. Even if the other party happens himself to be a director of the company, nevertheless the company may be bound by the ostensible authority.": *Hely-Hutchinson v. Brayhead Ltd.*, [1968] 1 Q. B. 549.

2 [1932] 2 K.B. 176, C.A.

3 [1964] 2 Q.B. 480, 499.

4 The business plan

4.1 Introduction

A business plan is a written explanation of the nature of the business, the structure of the activity, the identity and quality of the product or service, and the rewards of the investment opportunity of the company that wishes to commercialize the fruits of its research and development.

Once the investor has read the plan, the latter should be in an appropriate position to make a preliminary decision as to interest and investment, subject to due diligence. The representations made in the plan about the product or service must be accurate, or expressly qualified, because the investor will be placing reliance on its contents, and will consider it a matter of bad faith or unreliability if there is material deviation.

There is no standard format prescribed by law or convention, except that the business plan of course should be written. However, there are a number of things that the business plan should not be or do.

a) The plan should not make representations about product readiness, actual sales and revenues, and future markets which are tantamount to a guarantee. There is no reason to represent that the company will capture market share of 35% within three years, or that the company will be entitle to patent, if that claim is a mere expectation.
b) The business plan is a mere explanation of the business opportunity. It should not be a solicitation for sale of shares. If the plan is deemed to be an offer for shares in the company, it will be construed as an offering memorandum or prospectus, and will require compliance, conformity and registration with the securities commission having jurisdiction over the offer.

Accordingly, the plan should be careful in its language, and furthermore contain a *caveat* similar to the following text:

> *This business plan is designed to explain the business activities of the company. It is distributed on a confidential basis to those persons who have requested it. This document is not a solicitation for share subscriptions, nor an offering memorandum or prospectus, and is not to be so construed nor so relied upon.*
>
> *Before making an investment decision, investors should consider carefully the information set forth in this Business Plan.*
>
> *The business of the company is subject to the normal risks associated with the enterprise of related start-up companies, including market penetration, new product development, the competitive environment, and changes in the applicable regulatory and tax laws.*
>
> *There is no representation that there is a secondary market for the shares purchased through the investment.*

There can be no guarantee that patent rights will be obtained with respect to technologies researched and created by the company, or that third parties will not independently develop the same or superior technologies or other proprietary rights.

That will be dependent upon key scientists and managers, the loss of any of whom could have a material adverse effect on the company if it cannot take the necessary back-up measures to minimize such problems.

The company expects to incur significant development stage and marketing costs in the early phases, which will not necessarily yield off-setting revenues within the short-run. If additional financing is required, there is no assurance of such additional financing, and no obligation is imposed on first-round investors to provide such additional financing

Finally, there is no assurance that licensing, sales and distribution arrangements can be made in the course of research and development, or that commercial stage products in or entering the company product line will be commercially successful.

The contents of this document are not to be construed as investment, legal or tax advice.

4.2 Contents

A. General

The business plan, sometimes referred to as a commercial plan, should touch on all or most of the areas contained in the following checklist:

a) Product or process overview [what is it about; in what field and market]
b) Status [has it reached beyond mere theory; is there a working prototype; are there sales]
c) Title [is it encumbered; protected; available]
d) Plan of approach to market [sale; licensing]
e) Development and funding history
f) Commercial proof of principle
g) Market:
[Market analysis
Market size, market segment(s)
Value of market in dollars
Market share percentage
Competition
Market trends and competition analysis and drivers
Pricing requirements
Distribution channels
Market entry requirements
Key selling points
Product definition
User needs assessment
Requirements definition
Product line development scheme
Production factors
Product qualification/certification
Product liability exposure
Overall competitive advantage]

h) Future intellectual property
i) Royalty potential
j) Potential deal structure
k) Product or process timetable [of availability; distribution; inventory]
l) Management [identify managers and shareholders]
m) Time schedules (milestones, formal reviews, criteria for "killing" the project)
n) Technology dependencies
o) Supporting technologies
p) Competition

q) Organizational resources
r) Quality of personnel
s) Project champion (who is driving the product or process)
t) Contractor/subcontractor organizations
u) Administrative support including technology transfer
v) Funding expended, funding in place, funding needed
w) Intellectual property in place and needed, as well as ability to acquire intellectual property
x) Technology's robustness and potential spin-offs
y) Anticipated target industries for potential applications
z) Contacts and assets (e.g., vendors, users, manufacturers, technical credibility, R&D capability, regulatory drivers, availability of data) in these industries

aa. Decision-making structure
bb. Technology and product development patterns
cc. Capital formation characteristics
dd. Regulatory drivers
ee. Life cycles
ff. Market buying characteristics, requirements
gg. Industry/government relationships
hh. Pricing policies and required returns on investments
ii. Commercial deployment analysis
jj. List of existing and potential partners
kk. Partnership requirements for each application [industrial partnerships required to complete technical development and commercial deployment (types of partners, types of agreements)]
ll. Technical capability

Executive Summary

The business plan begins with an executive summary. A summary is necessary for a number of reasons: from the point of view of the author, it permits a concentration and assimilation of the ideas spread widely over a turgid document, into a few paragraphs. It distills the essential elements of the plan, and provides a ready-made script for a public verbal presentation of the same material.

From the point of view of the investor, the summary gives a bottom-line insight into the nature of the product or service and the quality of the investment. The investor, based on a quick read, can determine whether the venture falls within the investor's field of interest, and whether the structure is compatible or sufficiently defined.

If the venture falls within the biotechnology sector for example, the executive summary will say something positive about the field, often quoting from a recognized source. By way of illustration:

'What is biotechnology and why is it likely to have such a dramatic impact? Biotechnology is the application of DNA technology to the production of therapeutic and diagnostic products and processes. Pharmaceutical companies, foreseeing patent expirations, are establishing in-house biotechnology facilities and acquiring smaller biotechnology companies in a quest for new and innovative drugs.

With four hundred drugs accounting for $16 billion of drug sales scheduled to lose patent protection, acquisition of innovative advances and new therapies for a wide range of illnesses is seen as critical to this industry. As the 'Genome Project', an international effort to map all the human genes, nears completion, scientists will have detailed information about the 80,000 genes in our body. Unlocking the secrets of the genome is allowing genes to be tailored for specific tasks, such as the making of proteins that serve as hormones and other signalling molecules in the body.

Pharmaceutical companies are in a race to develop drugs for the treatment of illnesses such as cancer, arthritis, heart and infectious diseases that exploit this emerging genetic information. Gene therapy and DNA vaccination are examples of treatments based upon our growing understanding of the genetic code. We are on the threshold of a major shift in Medicine driven by our new understanding of genetics and biotechnology. A useful and up-to-date US Federal source of information about biotechnology is the National Biotechnology Information Facility, which can be accessed at http://www.nbif.org/.

It is in this market that GenX will establish itself as a significant player.'

Going from the general field to the specific place of the venture company in that field, the summary discusses the structural profile of the company, its management team and the product or service line. Accordingly:

> 'GenX will build upon the research experience and knowledge base of Dr. Henry Jones' on-going research activities in the areas of DNA, and exploit its platform of DNA technologies as it moves into the area of gene analysis, and gene therapy. GenX will deliver value through the licensing or sale of the resulting technologies and products.
>
> The quality and experience of the company's management and scientific team will be critical to the success of GenX. The company is based on the international scientific reputation and expertise of Dr. Jones, a leading biomedical researcher at the major university biotech facilities with over 20 years of laboratory experience. He is Professor of Genetics at the University of California. He is the author of a 'Citation Classic' scientific article describing a method for gene isolation that is used throughout the scientific world. Dr. Jones will provide scientific leadership as well as a suite of products and inventions from his own laboratory. Other members of the core management team are Larry Sands, attorney and active consultant to the F.D.A. and various research and biotech companies. Bob Smith is a prominent businessman with interest in a number of investment funds, who contributes strong entrepreneurial, leadership and management skills. GenX will attract leading scientists from Canada and the U.S.A. to its Scientific Advisory Board.'

The description of the products or services should be limited to identification of function and field of use, with a statement as to uniqueness, and intellectual property protection.

C. Business Strategy

The business plan describes our model company GenX as a start-up biotech company built around a portfolio of products:

> 'Some products in the portfolio are market-ready and others are near market-ready. These products are expected to generate revenue early, within one to two years. The revenues from these products will help to support GenX's Research and Development program into gene therapy pharmaceuticals.
>
> GenX's business strategy is to develop its products by focused use of its human and capital resources. Where appropriate, it will contract out to reputable university research institutes and clinical research organizations in the public and private sector.
>
> Through its Scientific Advisory Board and its extensive knowledge of available research and production facilities, GenX will select the best and most efficient means for advancing product development, certifying product reliability and marketing. Capital investment will be used to support its R&D program and to create laboratory and small-scale production facilities. Ramp-up large-scale production will be contracted out to regulated facilities. In addition, the investment will be used for market development as its products become market-ready. This will lead to expanded product offerings and available markets.

> GenX will actively pursue intellectual property protection. Its R&D laboratory will be at the Regional Biotech Centre. It is expected that technical staffing will be drawn primarily from that area, whereas professional positions will be filled by the most highly qualified personnel available.
>
> GenX will establish a Scientific Advisory Board that will include academic and industrial representatives in the fields of genetic research, clinical medicine, pathology and microbiology. On an ongoing basis, it will actively seek additional members to broaden its research expertise.'

The plan should also discuss regulatory support or intervention in the marketing of the product. Interference can have a devastating effect. In *Reach M.D. Inc. v. Pharmaceutical Manufacturers Association of Canada* 2003-05-29, C32896 (Ont. C.A.), the question was whether a trade association is liable for economic harm that it caused to a third party. In the late 1980s the appellant, Reach M.D. Inc., created and distributed to Canadian doctors and other health care professionals a humorous and popular wall calendar called "Herman M.D." Reach made money on this venture by selling advertising space in the calendar to drug companies, many of whom were members of a voluntary trade association, the Pharmaceutical Manufacturers Association of Canada ("PMAC"). In March 1990 and again in August 1990, PMAC told its members that advertising in the calendar contravened the Association's Code of Marketing Practices (the "Code"). This direction was fatal to Reach's business.

The increasing cost of prescription drugs in Canada has given rise to criticism of the marketing practices of the pharmaceutical industry. The practice of distributing service-oriented items especially came under public scrutiny. Many viewed these items as frivolous. They increased advertising costs - and thus the cost of medication - but did not add to the doctors' or patients' knowledge about medical conditions or treatment. In the wake of this criticism and scrutiny, PMAC became concerned that the government might attempt to regulate the prices and practices of its members. To avoid this, PMAC adopted a self-regulatory scheme. In February 1988, it introduced a revised Code. This Code targeted the marketing activities of PMAC members, including the distribution of service-oriented items.

A PMAC committee - the Marketing Practices Review Committee - administered the Code. Article 12.1 of the Code authorized the Committee to review and adjudicate written complaints concerning the marketing activities of PMAC members. Article 12.4 made adherence to the Committee's decisions a condition of continued membership in PMAC. Article 10.1 - critical on this appeal - stipulated that "member companies shall refrain from distributing service-oriented items".

The Committee ruled on a number of service-oriented items distributed by member companies and decided that these "single sponsored items" contravened the Code. Word then spread through the industry that the Committee might begin to apply the Code to "multi-sponsored items", such as Herman M.D. As a result of PMAC's interference, Reach obviously suffered economic loss. The Committee's August ruling caused Reach's advertising sales to plummet. Within a couple of years, Herman M.D. could no longer survive. The court found that because of the Committee's ruling, PMAC is liable to Reach for the tort of intentional interference with economic relations.

D. Corporate Structure

The investor will want to know the form in which the intellectual property has been encapsulated, whether by corporation, partnership or otherwise. The reason is simple: the investor's funds will be used to purchase equity in the intellectual property, either directly or through an intermediary entity. In most cases, the IP will be the property of a corporation.

The investor will require detailed knowledge of the share structure and management of the corporation if the investment will flow to that corporation. A sample checklist used by many investors includes the following questions:

a) is the company formally incorporated
b) where
c) examine the incorporating documents
d) have shares been issues
e) of what classes
f) who are the shareholders
g) are the shares subject to liens or charges
h) is there a unanimous shareholders agreement
i) examine the agreement
j) have options been issued or promised
k) how many and to whom
l) are there restrictions on share transfers

m) are there shot-gun or buy-out provisions
n) is there a voting trust
o) who are the directors
p) are there restrictions on the nomination and number of directors
q) does the company have title to the intellectual property
r) examine the title documents
s) is the company indebted
t) does the company owe taxes

The items are designed to determine the freedom of movement within the company of the investor and the security of the investment. In order to deal with these issues, the business plan discusses the corporate structure as follows:

> 'The corporation was formed last year to operate a biomedical and pharmaceutical enterprise for creating biomedical intellectual property and commercial products resulting therefrom.
>
> It owns the rights to a number of innovative materials used in the research and biomedical fields. In addition, the company has a number of products it has developed and created and has an interest in acquiring other products from other enterprises.
>
> The shareholdings are distributed on the following basis:
>
> Common and Preferred

50% shares	Dr. H. Jones
25% shares	Bob Smith
25% shares	Larry Sands

> The shareholders are subject to a Unanimous Shareholders Agreement that obliges new shareholders to comply with its terms.
>
> The company has engaged the accounting firm of Black and White.

The President of the company is Dr. Henry Jones. Dr. Jones has a Medical Degree and a Master's degree in Genetics from the University of California. He has over 20 years of experience in basic and applied medically related research and is the author of over 50 scientific papers (*see appendix*). He holds 2 patents and 2 additional provision patents were submitted. Dr. Jones is author of two scientific papers recognized as a 'Citation Classic', describing a method for purification used in most biotechnology laboratories in the world. His current research activities are in the development of new biotechnology techniques. He held the position of research scientist at the California Foundation and is currently Professor of Medicine and Microbiology and Immunology at the University of Pennsylvania.

The Vice-President Operations, Legal and Regulatory Affairs is Larry Sands. Mr. Sands is senior partner at the law firm of Sands Water. For the past ten years, Mr. Sands has worked with a number of technology start-up companies, including NewGene which is now a publicly-listed company. He has extensive experience in the financing of intellectual property in the bio-medical and bio-technology fields and the development of start-up companies.

The third principal of the company is Bob Smith. He has been Vice President of InvestorsFund, a multi-national mutual fund. Mr. Smith has been involved in commercial investment for the past twenty years and brings with him many years of experience and corporate contacts in the investment field.

The Board of Directors of the company consists of the following individuals:

Bob Smith	Chairman of the Board.
Dr. Henry Jones	
Larry Sands	
Two additional seats	reserved for investor representatives.

The company will establish a Scientific Advisory Board to assist management. The SAB will provide current pertinent advice on the development and scientific profile and value of existing products, and on assisting in the identification and development of new products. Compensation for members of the SAB will be established by the company

The members of the SAB, who will be appointed on the basis of their scientific competence and prestige, shall have scientific backgrounds and an interest in the company product lines.

GenX is in the start-up phase. There are no sales or revenue as of this date.'

E. Use of proceeds

The plan should state that the funds raised as a result of the investment will be used in areas directly related to operations, and to advance and refine the product. The funds will be used for recruiting research and sales staff, developing and bringing products to market and establishing facilities for production of the product line.

F. Products

The plan must describe the product or service in sufficient detail to permit a technical appreciation by the investor who has an analysis capability or facility. On the other hand, since the business plan floats from hand to hand, it should not convey secrets which are not subject to intellectual property protection.

G. *Cost of Production*

GenX is a proven product in use for over 5 year. It is chemically stable and is simple and relatively inexpensive to produce. User-friendly packaging and a high level of technical support, together with aggressive marketing, will be the key to its commercial success.

H. *Financial Projections and Statements*

The more salient part of the business plan contains the financial statements, projections and budget. These are important because they immediately translate into dollar figures the concepts earlier dealt with narratively. Since the projections demonstrate the expected revenues and expenses, they act as an actual consolidated financial statement of the venture for a hypothetical period of years.

Where the venture company is a start-up without pre-existing activity, revenue or assets, it will not have a financial statement, nor a financial statement worthy of display. Where it does have a financial statement showing results based on the commercialization of the product, it will include the statements in the business plan.

The investor will see at a glance how long it will take to realize a profit, and what the return on the investment will be, assuming all the figures materialize. The venture company will have gone through a financial soul-searching in order to arrive at revenue projections which are not out of order, and expenses which cannot thereafter be inflated: as it were, the projections commit the venture company to respect its budget and work sufficiently hard to meet the projected return.

Along with a break-out of figures over a three to five year period, this part of the business plan will contain a discussion of salient items arising from the statements and projections, and specifically: revenue, gross margins, expenses, and taxes.

Financial Projections

(Unaudited - in $000)

Income Statement	Year 1	Year 2	Year 3	Year 4	Year 5
Revenue	470	3,000	9,000	10,500	12,800
Cost of Goods Sold	250	1,350	4,000	4,200	5,100
Gross Margin	220	1,650	5,000	6,300	7,700
R&D (net of grants)	525	860	1,400	2,475	2,600
General & Admin	420	780	1,200	1,200	1,350
Amortization	165	780	780	780	780
	1110	2420	3380	4455	4730
Income (Loss)	(890)	(770)	1,620	1,845	2,970

Balance Sheet	Year 1	Year 2	Year 3	Year 4	Year 5
Cash	9,775	7,585	9,560	12,300	16,200
Accounts receivable	90	350	1,000	2,000	2,000
Inventory	50	150	470	750	1,000
	9,915	8,085	11,030	15,050	19,200
Capital assets	9,335	10,555	9,775	8,575	7,375
Total Assets	19,250	18,640	20,805	23,625	26,575
Liabilities	140	300	765	1,740	1,720
Capital	20,000	20,000	20,000	20,000	20,000
Retained earnings	(890)	(1,660)	40	1,885	4,855
Total Liabilities & Equity	19,250	18,640	20,805	23,625	26,575

1. ***Revenues***

   In the biotech model, sales in the current period show moderate growth from the earlier periods. Many biotech companies experience rapid growth only once they have reached the stage of commercialization of new products. The projected revenues ($000) by product are as follows:

	Year 1	Year 2	Year 3	Year 4	Year 5
Product 1	300	700	950	1,500	2,050
Product 2	1000	3,000	10,500	15,000	20,000
Product 3	60	120	400	400	400
Other products	40	60	400	1000	19000

2. ***Gross Margins***

   Note is made of the fact that the percentage of sales remaining after subtracting the costs of goods sold tends to be very high in the biotechnology industry, with ratios in the 30% to 40% range not uncommon. Although substantial costs are incurred during a the research and development phase, the bulk of the revenue flows through to the bottom line once those costs have been covered.

3. ***General and Administrative Expenses***

   The general and administrative expenses represent senior management salaries, marketing and other overhead expenses not directly attributable to production or R&D.

4. ***R&D Expenses***

   Sufficient R&D expenditures are critical to the success of any biotechnology company. R&D spending is unusually high for the biotechnology industry. In this model, the venture company proposes that approximately 20% of revenues be invested in research to further advance its products.

5. ***Income taxes***

   The investor may prefer to invest in partnership units rather than shares, or in a subsidiary rather than the principal company. Accordingly, the plan notes that the management will re-evaluate the legal structure and amend it to become a corporation should it become more advantageous for taxation or other reasons in the future.

6. ***Balance sheet projection assumptions***

   The balance sheet is a snapshot of a company's financial condition at a specific moment in time, yet the key is managing the liquidity of the company and the sufficiency of working capital to fully finance its research activities to the stage of full commercialization.

   Given that the start-up is a development-stage biotech firm with no substantial earnings in the early periods, the company seek three years of cash on hand to fund operations at the anticipated "burn rate," or the consumption of cash to fund the research and development ("R&D") activities.

   The initial investment sought is therefore in the range of $15,000,000 less accumulated income (loss) net of use of working capital and capital investment in land, building and equipment.

7. ***Accounts receivable***

   One month of revenue based on 30 day sales outstanding.

8. ***viiInventory***

   Inventory assumed to turn 12 times per year.

9. ***Capital assets***

   Land for $1,000,000 and building estimated at $7,500,000 plus equipment at $3,000,000, with amortization on building and equipment at 5% and 20% respectively.

10. ***Liabilities***

    One month of expenses outstanding, excluding non-cash items such as amortization.

11. ***Capital***

    Assumes full proceeds on private offering of $15,000,000 with no agent fees.

12. ***Equity***

    Accumulation of annual income (loss)

13. ***Accounting Policies***

GenX Ltd. is a development-stage biotechnology entity involved in genetic research as well as the manufacturing of developed or acquired products.

These financial statements projections have been prepared and compiled by the management in accordance with generally accepted accounting principles. The preparation of these financial statements in conformity with generally accepted accounting principles requires management to make estimates and assumptions that affect the amounts reported in the financial statements. Actual results could differ materially from these estimates.

14. ***Capital assets***

Capital assets are recorded at cost. Building and equipment are amortized 20% and 5%, straight-line respectively.

15. ***Revenue***

Revenues are recognized at the time of product shipment.

16. ***Research and development expenditures***

Research and development costs are expensed as incurred unless they meet generally accepted accounting criteria for deferral and amortization. Development costs incurred prior to the establishment of technological feasibility do not meet these criteria and accordingly are expensed as incurred. Research costs are expensed as incurred. Research and development expenses are recorded net of related government assistance or grants.

17. ***Financial Statements Projection Assumptions***

For many biotech companies, the focus is on the future earnings potential of products in development and whether the firm has sufficient resources to fully develop those products. Therefore, this is the context in which the financial business plan has been prepared for GenX.

5 Raising funds: Private placements and going public

5.1 Rainsing funds

There are a number of traditional means of raising funds for working capital, aside of course from cash flow from sales activity. They include private placements, asset sales, secured borrowing, and public placements. The start-up company usually fails for no reason other than insufficient capital. It is therefore of prime importance that an appropriate capital source and strategy be established in advance of operations.

Capital is needed to ramp-up product sales, expand facilities, engage professional administration, update equipment or purchase new technology. Unless the use of capital is targeted for a use which will increase return, as opposed to simply paying off accumulated debt, there is no incentive for an investor to make a placement.

5.1.1 Brokerage

Although the strength of management and the researcher may be in the on-going operations of the company, it is rare that they will have a talent for raising investment capital. It is therefore necessary to call upon an outside broker to beat the financial bushes for some interest. Many investment brokers simply introduce investment sources to the company, and for that reason do not require licenses to operate. Registered stock brokerage houses also perform an investment introduction service on a larger scale.

a) ***Broker's function***
A broker will undertake best efforts to identify investors, structure an investment plan, prepare a term sheet, re-package the business plan, negotiate and obtain financing commitments from *bona fide* investors in a minimum stipulated amount. Since the relationship is performance-driven, the broker should be entitled to solicit expressions of interest on a non-exclusive basis for a period of six to nine months. During the term of the brokerage, the researcher and company are prohibited from disposing or encumbering the intellectual property or the other company assets. It is understood that if funds are raised, the investors participate on an equity basis in the company and the other shareholders must then arrange their affairs in such a manner as to best reflect their respective contributions.

b) ***Investment disclosure***
Those elements which the broker will be emphasizing to investors include:

- the focus of the research and attendant resource requirements;
- the commitment of the principal researchers to the venture;
- the business plan for the purposes of attracting investment capital;
- the use of proceeds;
- the commercialization strategy;
- the proposed investor exit strategy;
- and, most importantly, the rate of return.

The broker must be entitled to use the description of the research prepared by the researcher as the basis of its business plan for submission to investors. A general model of the staging of the company's undertaking must be agreed to and adhered to so that the broker is not in the embarrassing situation of selling something that has changed without his knowledge. In this vein, the parties co-operate on a timely basis and work on open disclosure to each other of their activities.

While the broker is responsible for all reasonable costs of professional time for the preparation of the business plan and the ultimate closing, his remuneration is a combination of a percentage (8% to 15% for start-ups) of the investment, and equity or warrants in the company. Since there is a cash payment to the broker which the company can only pay out of the investment funds, the investors must be advised in advance that part of the proceeds will be used in this manner.

5.1.2 Secured borrowing

The venture raises money by borrowing, a traditional source of operational and capital funding. Lenders require security, which will usually cover inventory, accounts receivable, royalty streams from licenses and the intellectual property.

5.1.3 Asset sale

Raising capital can be achieved by the sale of a division or a part of the enterprise. The sale may take the form of an acquisition of shares or assets. The form will usually be dictated by tax considerations related to capital gains or losses, or cost base of acquisition, and so on. By the same procedure, the founders of the company may cash-out their stock, and effectively retire from the company.

The acquirer is purchasing the business of the company or division either for the purposes of expansion, resale, ramping up of technologies or elimination of competition. The aim then is to acquire directly or indirectly, all of the specified assets, and undertakings owned by vendor in respect of the operation of the business. These may include all or some of:

- *Cash* Cash, bank balances, moneys in possession of banks and other depositaries, term or time deposits and similar cash items of, owned or held by or for the account of the vendor;
- *Leases* The rights of the vendor in leases and the premises subject thereto, and the vendor's interest in all leasehold improvements and leasehold premises, and in fixtures located in, on or about such leasehold premises;
- *Inventories* The rights of the vendor in the inventories of product and accessories, including packaging;
- *Contracts and Equipment Contracts* All rights of the vendor in, to and under the supply and equipment contracts and the full benefit of all service contracts relating to any equipment or other assets covered and options to purchase;
- *Fixed Assets, Equipment* Fixed assets, machines, machinery, equipment, fixtures, furniture, furnishings, vehicles, material handling equipment, implements, parts, tools, jigs, discs, moulds, patterns and tooling owned or held by the Vendor, including any which are in storage, and other tangible property and facilities used in the business whether located in or on the premises of the vendor;
- *Goodwill of Business* The goodwill of the business, including the right of the purchaser to represent itself as carrying on the business in succession to the vendor and all right, title and interest of the vendor in respect of the name and telephone numbers of customers and any other trade names used in the business;
- *Prepaid Expenses* Prepaid expenses including without limitation, prepaid catalogue expenses, prepayments on merchandise, prepaid taxes, rents and telephone but excluding income or other taxes which are personal to the Vendor or not incurred in connection with the Business;
- *Accounts Receivable* Accounts receivable and other amounts due, owing or accruing due to the Vendor in connection with the Business, but excluding any such accounts, notes or moneys due or owning from any affiliate of the Vendor or from any present or former shareholder, director, officer or employee of the Vendor or any affiliate of the Vendor;
- *Deposits* Deposits with any public utility or any municipal, governmental or other public authority;
- *Warranty Rights* The full benefit of all warranties and warranty rights (implied, express or otherwise) against manufacturers or sellers which apply to any of the purchased assets;
- *Computer Software* Computer software related to the business;

- *Intellectual Property* Patents, trade-marks, copyright and industrial designs and other intellectual property rights and the technology that have been or are used in connection with the business or that are owned by or licensed to the vendor that are material to the Business;
- *General* Any other rights, properties and assets of the vendor used or useful in the business, of whatever nature.

In return for the consideration for the assets or shares, the vendor must be prepared to give some far-reaching warranties. These include a warranty that it had all necessary corporate power, authority and capacity to own its property and assets and to carry on the business as then conducted; that the vendor is the absolute beneficial owner of the assets, with good and marketable title thereto, free and clear of any encumbrances. The vendor must also warrant the accuracy of the financial statements shown to the vendor, upon which reliance has been placed. The subsidiary representations relate to a warranty that the vendor has not disposed of any of the assets shown in the balance sheet contained in the financial statements or suffered an operating loss of any extraordinary loss, or waived any rights of substantial value, or entered into any commitment or transaction not in the ordinary and usual course of business where such loss, rights, commitment or transaction would be material in relation to the vendor or the business. Finally, the vendor must warrant that it is the exclusive registered and beneficial owner of all rights in the intellectual property which is free and clear of any claim, option, charge or encumbrance of any kind.

In most agreements of acquisition, controlling party of the vendor is required to stay on as a consultant in order to permit the new staff to adapt. The chief scientist of the vendor may in fact become a permanent employee of the purchaser if the need and opportunity arises.

5.2 Private placements

Companies raise capital investment either through private sources or through the public market. When a solicitation of funds results in private investment, the financing is called a private placement. The private placement generally does not involve the circulation of a formal prospectus, although some form of offering memorandum detailing the investment opportunity is given to the investor. On the simplest level, any person who puts money into a venture is a private investor in a private placement. However, the finance industry generally looks to groups of up to fifty investors or groups of investors over that number, depending on the securities jurisdiction, in qualifying the process as a private placement.

a) **Offering Memorandum**
Where an offering memorandum is drafted and circulated, it does take the place of or fulfills the function of a prospectus, which is a formal and full-disclosure description of the investment. As such, it should strive to fully disclose the investment opportunity in terms of the following aspects, namely the:

- *Investment structure* The investment vehicle will either be a corporation or a form of partnership. If a partnership, the investor acquires a partnership share or unit in the structure that is managed by a managing partner. Partnerships generally permit flow-through of losses and other tax benefits to the unit holder or partner, which may be the advantage sought by the investor. The partnership also may flow-through liability, which is a risk the investor may or may not be interested in taking. It is for this reason that the offering memorandum should disclose not only the risk of doing business, but also the structural possibility that the investor may be personally liable for partnership obligations toward third parties. Profits are distributed through dividends calculated according to the number of units.

  If the structure is corporate, the investor will acquire a share, and will not risk personal liability for corporate indebtedness. On the other hand, flow-through of tax benefits to shareholders is limited, if at all possible. Profits are distributed through share dividends, which may have a unique tax treatment suitable or unsuitable to the investor's status, especially since the corporation is taxed on its profits, and the shareholder is taxed on the same profits in the form of dividends, subject to tax credits.

- *Name of the venture* The venture must have a name to identify its business, and to confirm that it, and not another entity, is the recipient of the investment. Whatever due diligence the investor has done, is predicated on the investment being placed in the appropriate shell.
- *Business of the venture* The managers of the venture must identify the business which the venture will exploit; and commit to remaining in that field of business. If the focus of the operations were to shift to another field, the risks of the investment accordingly change, as does the desirability of the investment.
- *Number of outstanding shares or units and number of shares or units available to the investor* The number of shares or units offered and outstanding multiplied by the par value of each share or unit gives the investor an idea of the value of the venture; but more importantly, it shows the investor what proportion of the venture he has been allocated.

- *Share or unit conditions* The investors want to know what they are getting for their money. A share or unit in a venture is always subject to conditions which may affect the holder's right to vote, vote for management, convert the security, buy-out others, or cash out. These conditions as well as restrictions are further detailed in the unanimous shareholders agreement or the partnership agreement.
- *Share or unit restrictions* One of the most important restrictions on the ownership of a share or unit is the inability to transfer to a third party, subject to the consent of the other share or unit holders. The effect of the restriction is to provide a measure of stability to the shareholding body, and consequently the management which it appoints. At the same time, the restriction keeps out investors who have an undesirable motive, reputation or manner as defined by the existing investors.
- *Market for the shares or units* Private shares have no ready market for resale. An investor who wishes to and can cash out would normally look to his fellow share or unit holders as potential purchasers. Beyond them, the investor will have to convince another buyer that the company is an appropriate investment risk, in spite of the lack of liquidity of the shares or units.
- *Risks* The offering memorandum should convey a disclaimer of risks going beyond the merits of the business. The text should indicate that before making an investment decision, investors should consider carefully the information set forth in the business plan. The business is subject to the normal risks associated with start-up companies, including market penetration, new product development, the competitive environment, and changes in the applicable regulatory and tax laws. There should be no representation that there is a secondary market for the units purchased through the investment.

  Furthermore, the disclaimer should say there is no guarantee that patent rights will be obtained with respect to technologies researched and created, or that third parties will not independently develop the same or superior technologies or other proprietary rights. The success of the enterprise will be dependent upon key scientists and managers, the loss of any of whom could have a material adverse effect if the company cannot take the necessary back-up measures to minimize such problems.

  As to revenue production, the text should relay that the company expects to incur significant development stage and marketing costs in the early phases, which will not necessarily yield off-setting revenues within the short-run. If additional financing is required, there is no assurance of such additional financing, and no obligation is imposed on first-round investors to provide such additional financing. Finally, there is no assurance that licensing, sales and distribution arrangements can be made in the course of research and development, or that commercial stage products in or entering the company product line will be commercially successful.

  Each investor is warned that the contents of the business plan, offering memorandum or term sheet are not to be construed as impartial investment, legal or tax advice, and each is urged too seek independent advice.

b) **Term Sheet**
The term sheet of the investment accompanies the business plan of the investment where the investor is interested to moving forward. The term sheet sets out the parameters of the investment, rather than dealing with the merits of the business operations.

We see in the sample term sheet the detail of the stock issue including the minimum number of units required for closing, the closing date, and the modalities of subscription and payment.

In essence, the term sheet is a summary of the offer made to the investor, in that it sets out the conditions and context of the investment. The contents constitute representations to the investor, which are the basis of the reliance which he places in order to enter into the deal.

6 Corporate operations

6.1 Entering the marketplace

Once the company has secured its investment financing, and acquired the right to market the product or service, it faces the ultimate test of acceptance by the marketplace. The company must be in a position to appeal to consumer needs, create an identity different from if not superior to the competition, seek consumer satisfaction even in the face of technological change, and create a corporate infrastructure of dedicated employees and management for long-term continuity.

Corporate Operations:

ISO 2000 Requirements (in Relation to ITIL V3 Processes)

For each service the Service Portfolio defines:

1. Name
2. Current status (e.g. "Pipeline", "Active (Service Catalogue)", „Retired")
3. Service Type
    1. Business Service (visible to the customer) or Infrastructure Service (invisible to the customer, used as a building block for Business Services)
    2. Internal/ external: Internally provided service or a service sourced from an external service supplier
4. Service Owner (responsibility for service provisioning)
5. Customers currently using this service
6. Contacts and procedures for signing up to the service
    1. e.g. contact details of the responsible Service Level Manager
    2. Procedure for signing up
7. Description/ desired customer outcome
    1. Business justification (value added from a business point of view)
    2. Business processes/ activities on the customer side supported by the service
    3. Desired outcome in terms of utility (example: "Field staff can access enterprise applications xxx and yyy without being constrained by location or time")
    4. Desired outcome in terms of warranty (example: "Access is facilitated worldwide in a secure and reliable manner")
8. Offerings and packages, variations
    1. e.g. different Service Level packages on offer
    2. e.g. different coverage of time zones
    3. e.g. different coverage of geographical regions
9. Costs and pricing
    1. Available pricing schemes for the service provision
    2. Rules for penalties/ charge backs

10. Dependencies
    1. Services
        1. Required Infrastructure Services (Infrastructure Services on which this service depends)
        2. Supported services (other services which depend on this service)
    2. Components/ Configuration Items (major CIs like on which this service depends)
11. Planned changes to the service (if any)
    1. References to relevant plans (e.g. Service Strategy Plan, Service Improvement Plan)
    2. Business case/ cost-benefit analysis
    3. Priority of the envisaged change
    4. Risks associated with the envisaged change
    5. Time schedule and status information
12. References to further documents
13. Glossary

6.2 Management and employees

With the rupture of relations between the spin-off and the institution where the intellectual property had been created, the company is forced to look in the marketplace for management and employees. The CEO may be the retired or active head of a competitor, and the other officers and technical people may be at another employment but are ready for a challenge.

A common mistake the promoters of a start-up often commit is to engage as senior officers and employees the individuals who left the institution with or without the principal researcher to work in private industry. Loyalty is not a guarantee nor indication of competence of an employee; and the temptation to hire or hire away the original laboratory staff is not always wise. An employee who leaves an institution, and is prepared to risk the instability of a start-up venture either has strong commitments to the science and its development or has been waiting for the opportunity to leave working conditions which may have grown sour.

Those senior or professional individuals who do leave, as well as most individuals solicited to join a new venture with little or fresh capital investment, expect not only a long-term relationship as a reward for the risk, but also an equitable stake in the enterprise so that they can grow with it. Reduced to common terms, an employee in a fresh company where the expectation is that work will be harder, longer, more demanding and less sometimes less rewarding in regard to basic remuneration, is seeking an incentive to join, remain and contribute.

There are a number of incentives which can or should be offered depending on the circumstances. There is a tendency to be generous with share give-aways, simply because the distribution of currently valueless shares or options do not impair capital or operations. Since there are a variety of different ways and blends which are both available and attractive, there is no need to instinctively offer shares in the company.

Where possible, the incentive should be based on performance standards and seniority. If shares or options are offered, they should vest gradually with years of service. If share of profits is offered, the profit should be that directly emanating from the office or division of the beneficiary. In short, the purpose of the incentive is to keep the employee fresh, creative and loyal. If the employee were to leave after a number of years, he or she will do so without forfeiting vested rights such as shares; a manager should remember that after the non-competition term for the departing employee expires, that employee may work for a competitor and still be entitled to inside information through shareholding rights of the former employer. Accordingly, incentive packages should stipulate forfeiture or reduction of acquired incentives if a certain number of years have not been attained prior to departure, or if the employee was terminated for cause.

Incentive range from short-term to long-term benefits:

Shares If shares are made available, up to 5% for employees and 5% for management should be set aside. The stock should be common non-voting shares. The share conditions should indicate that they are retractable or redeemable, permitting their re-acquisition by the company for fair market value. They should also stipulate that the shareholder because a party to the unanimous shareholders agreement by the acquisition of the shares. If at a later stage a third party wishes to make a share acquisition, the company should be in a position to assemble all of the required outstanding shares without impediment.

The ideal share incentive, from the point of view of the company, is in the form of share options which are convertible into common shares upon the happening of one of several events, including the public listing of the shares, and the take-over of the company by share or asset purchase. Upon the happening of those events, the employee becomes a shareholder with a real possibility of cashing out at the going price.

Common shares

Among the many employment incentive programs available, the employee share purchase program is most directly tied to employee identification with the financial well-being of the employer. Many questions arise as to the nature of the programs as a share distribution.

In one decision (*Pearson Finance Group Ltd. v. Takla Star Resources Ltd*, 2002 ABCA 84) the holders of the shares did not purport to give goods, land or services for these shares. They were officers of the company and they got the shares under an "employee stock option plan" of the company. Despite the word "option", they appear to have exercised the nominal options and to have made firm contracts to buy shares, for a set money price. However, the company agreed to lend them the money (also under the "option" plan).

The company apparently made bookkeeping entries to reflect this, but no cash or cheque ever issued to advance the loan, and no cash or cheque came back in the opposite direction to pay for the shares. Furthermore, the "option" plan said that loans would only last five years. The company and directors purported to extend these loans when the five years expired, but the shareholders did not ratify that. Each loan was secured against the shares of the individual concerned, but there was to be no personal recourse beyond the shares

6.3 The problem of wrongful dismissal

Employers are entitled to dismiss employees for cause. Cause is any act which fundamentally interferes with the diligent and faithful performance of an employee of the job function. Theft, absences without explanation and insubordination are prime examples of cause. Failure to establish cause will result in a damage liability on the part of the employer.

6.4 Product marketing

a) **Evaluation and Development**
The company knows its product has reached market stage on the basis of two touchstones: meeting of specifications and meeting market demand. The specifications may have been drawn originally from industry technical standards, scientific milestones and unique customer demands. The fact that the laboratory confirms that genetic material is now pure or that a chemical catalyst works at the desired temperature does not mean that the product will find a profitable place in the market.

For this reason, it is necessary to sound the market reaction in one of several ways. A test run in the market may be achieved by establishing a beta site test inside the business facilities of a prototypical customer. If the product is a pressure regulator for gases, a hospital environment or petroleum distillation plant would be a good venue for a trial application.

Establishing a beta site requires the cooperation of the host; and specifically requires a demonstration of the possible benefits to the host over the inconvenience of adapting workers and facilities to an untested product. This is done by conducting the test for as limited a period as tolerable, giving a free version of the final product to the host, and promising maintenance and assistance for the product after the test is completed.

While beta site testing necessitates the participation of the owner at the host site, another form of product evaluation places more responsibility on the host. This involves a transfer of materials or software to the host or prospect who undertakes to conduct an evaluation on the basis of the specifications for use. The host is usually someone currently in the market for the product, and is unwilling to commit to a purchase without on-site testing. Accordingly, the host must use the product solely for the purpose of evaluation and cannot allow any third party or itself to use it for any other purpose.

Any arrangement should specify that only a revocable and limited right of use is granted, and that the host cannot assert any right in the product, and trade secrets or its components.

If there are problems with the product, the owner may decide to contract out to a third party for a topping off, especially if internal resources are not equipped to take a fresh look at solutions. The developer, who has undertaken the utmost confidentiality, brings the product technically forward to meet market demand, and as can be seen below, may receive remuneration by way of flat rate payment or royalties.

b) **Licensing Arrangements**

A license is an authorization to a licensee to use the intellectual property of the licensor. The authorization is qualified as to duration, territory, type of use, and performance standards.

Licenses are granted in situations where the owner is not capable of or not willing to sell directly to the consumer. There are a number of advantages to the owner in marketing the product through licensing:

- the owner does not require a sales force to sell the product;
- the owner does not bear the administrative costs of accounting for the product sales, maintaining client lists;
- the owner does not bear costs of advertising or marketing the product;
- the owner saves time in bringing the product to the consumer in that he does not need to build from scratch a network of distributors and dealers;
- the owner does not incur the cost of maintaining the product and dealing with consumer requests;
- the owner does not incur the cost of manufacture in certain cases.
- The more the licensee does on behalf of the licensor, the more it will cost the licensor. Since the licensee is remunerated through sales profit, he has a disincentive to perform if the licensor fees are too great in relation to costs and residual profit.

The licensee may act as a distributor, or may further sub-license to an entity which does the distribution.

A desirable licensee is one who is solvent and will remain so during the term of the license. Preferably, the licensee has had experience in the field with its own products or those of other licensees. The licensee markets the product under the trade name or trademark or packaging designated or provided by the licensor. Since the territory in which the former operates may be foreign, the licensee is responsible for compliance with applicable international, national, state, regional and local laws and regulations governing its activities.

It should be noted that in law, the license is not an agency or mandate or power of attorney. The parties are not deemed to be partners or joint venturers, or employer-employee. The license permits the grantee the right to represent that it is authorized to market the product under the name and get-up under which it is sold. While the licensee in a sense may represent the product, meaning it answers to the consumer's requests for support of the product, it does not represent the licensee in the sense that it is capable of incurring liability on its behalf.

As is the case of a distributor, the license should provide for a number of crucial elements:

1. ***Term of license***
   Unless the grant of license stipulates it ends at the expiry of a fixed period, the license theoretically lasts forever. The term should reflect the start-up time necessary to get the product distributed, and to permit the recovery of costs and attainment of profit.

2. ***Limitation on product***
   The licensee is only granted the rights to a product that is defined by the grant. If there is any doubt as to the identity of the product, the licensee will naturally assume it has more product under the license than the licensor intended. If the product involves software or formulae, the license should not only refer to the trade name, but also the generic name as well but exclude all accessories as separate products, such as codes, algorithms, logic, techniques, software tools, formats, designs, concepts, methods, processes, and any related improvements, corrections, modifications, updates, enhancements and new releases. A detailed description of the product should be appended as schedule to the agreement.

3. ***Territory***

   The failure to define the territory of the license creates the presumption that the territory is the world. The territory should be restricted in order to best the region to the skills and reputation of the licensee. Furthermore, the greater the territory, the greater the profit opportunity for the licensee, and hence the greater the royalty payable to the licensor. If the territory is the world, the license, depending on other business considerations, should be non-exclusive.

4. ***Exclusivity or non-exclusivity***

   Since the licensor is dependant on the sales performance and customer relationships generated by the licensee, an exclusive license has the effect of placing all of the licensor's financial eggs in one basket.

   The argument in favour of exclusivity proposes that if the licensee must not only contend with outside competitors but also competing licensees in the same territory, there is little chance of a stellar sales performance. It is for this reason that non-exclusivity is appropriate only where the market is sufficiently wide, and the product relatively inaccessible. The royalty rate payable to the licensor will be considerably smaller in a non-exclusive arrangement.

   Where the license is non-exclusive, the licensor should reserve the right from time to time to modify the number of authorized licensees and to distribute the product directly to dealers, or customers, using its own personnel or independent sales representatives. At the same time, there should be a reservation of right at any time and without liability to the licensee, to change the product

5. ***Duties of the licensee***

   The licensee must warrant that it has and will maintain, the capacity, facilities and personnel necessary to carry out its duties, which include:

- meet the sales quota and performance standards prescribed by the agreement;
- pay the royalties due to the licensor on a timely basis;
- maintain an inventory of products sufficient to meet market demand on a reasonably timely basis;
- train and maintain a sufficient number of capable technical and sales personnel at its expense for service and support;
- market the products vigorously within the territory;
- provide written reports for every quarter or on a request basis
- on shipments by units and local currency volume,
- on the list of consumers and on forecasts of anticipated orders;

6. ***Remuneration***

   The licensor receives a royalty generally based on a sliding scale of volume as a percentage of gross revenue minus charges, namely a net amount. Charges include any national, state or local sales, use, value added or other taxes, customs duties, or similar tariffs and fees which the licensee may be required to pay or collect upon the delivery of products or upon collection of the fees.

7. ***Trademarks***

   The licensee is authorized and required to use the licensor's trademarks in connection with advertisement, promotion and distribution. This includes the use of logos, copyrights, trade secrets, trade names or designations and get-ups. Use does not entitle the licensee to any interest in any of them. Therefore, the licensee acknowledges that the licensor owns and retains all proprietary rights in all products, and that it will not at any time claim any interest in or do anything that may adversely affect the validity or enforceability of any intellectual property belonging to or licensed by the licensor.

8. ***Software Value Added Reseller***

   Another form of licensing specifically involving software is the value added reseller arrangement (VAR) by which the licensee presumably does more in commercializing the product, namely in regard to end-user contact and maintenance. Basically, the VAR becomes the communications interface between the end-user and the licensor. While the licensor may offer enhancement and error-correction services, it does so to the VAR who is then responsible for the solicitation of product license and maintenance agreements from end-users and the provision of installation, support and other services.

   The VAR supports the product by selling to end-users who are capable of paying the fees imposed under the license the maintenance agreement. The VAR must engage in marketing efforts and promotion to obtain duly executed license and maintenance agreements from potential end-users, including sales seminars, telemarketing and lead development. It must acquire, at the expense of the VAR, a demonstration system for conducting demonstrations and performance benchmarks of the products.

   The VAR not only assists end-users with the installation of the products on their systems, it also performs technical training at end-users' locations; and provides post-delivery telephone hot-line service and technical support at VAR or customer locations.

   To do so, the VAR acquires copies of the product to be distributed to end-users from the licensor, or makes copies if the VAR has acquired the source code for transfer to licensed end-users. It is rare that anything other than the object code is transferred to a licensee who is not a VAR.

9. ***Software end-user arrangements***

   The end-user of software is the customer who supports the commercial licensing structure. Since the software is highly mobile, the arrangement made with the end-user is in the form of a sale with conditions, known as an end-user license. In purchasing the software, the end-user is granted a single non-transferable and non-exclusive license of simple use. No rights to sub-license or market the software are granted.

Furthermore, there are restrictions on the internal use of the product. For example, the software may be used by only on a single CPU; the customer is not authorized to use the software on a network. Although the customer may make a copy for backup, archiving, or security, the copyright or proprietary notices in the original must be included in such copy. As well, the customer is not entitled to clone, reverse assemble, or reverse compile any part of the software or adopt any part as its own. This is confirmed by the acknowledgment of the end-user that the intellectual property in he software belongs to the licensor, and no rights other than restricted use is granted by the purchase.

10. ***License Checklist***

For both the licensor and licensee, there are a number of issues both expect to be dealt with in the license agreement. As a partial checklist, these issues include:

Payments

- Is there an initial payment, advance or signing fee?
- Is any part or all of the payment, advance or signing fee refundable?
- Is there a mechanism for determining fluctuations in royalties?
- Are the royalty payment terms tied to performance or the calendar?
- What are the amounts of the periodic payments, time of payment, lump sum or installment, financing arrangements?

Product

- Is the licensee require to purchase or manufacture product
- Is there a trial or opening inventory of product?

Credit and Financing

- Does the licensor offer credit, waiver or financing in any form, or offer help in finding financing?
- Are there any deferred balances and on what terms?
- Are there periodic royalties? If so, how much are they and how are they determined?

Reporting

- How are sales and royalties reported?
- What are bookkeeping, accounting and reporting requirements, and who assumes the cost?

Licensor's obligations

- What services are provided by the licensor?
- Are accounting/bookkeeping services included?
- How are advertising and promotion costs divided?
- Is a specified amount of working capital required of the licensee to cover operating costs until profits can be made?
- Is there provision for independent appraisal?
- Is any credit given to good will or equity for the purpose of establishing performance?

Intellectual Property

- Is there an inventory of the licensor's intellectual property (patents, trademarks and copyright)?
- Is the intellectual property identifiable and distinct, and are they clear of any possible interference or cancellation owing to any pending litigation?
- Is the life of the intellectual property coterminous with the license?
- If the licensor creates upgrades or improvements or related intellectual property, can the licensee automatically use it?
- If the licensee creates upgrades or improvements to the licensor's intellectual property, does the licensee or licensor automatically own it?

Operations

- To what extent and under what specific conditions must the licensee personally participate in operations?
- Is delegation and sub-delegation permitted?
- What degree of supervision and control does the licensor have over operations?
- What continuing management aid, training and assistance will be provided by the licensor, and are these covered by the service or royalty fee?
- Is there provision for local or national advertising?
- Who assumes the cost of advertising?

- Does the licensor provide promotional materials point-of-purchase, and at what and whose cost?
- Are sales or service quotas prescribed?
- What are the penalties for not meeting them?

Exclusivity

- Is the license exclusive to the licensee?
- If not, is the license absolutely non-exclusive?
- Is exclusivity or non-exclusivity reflected in the level of payments for the license?

Territory

- Is the license limited by territory?
- Is the territory clearly defined?
- Is the territory an exclusive one, and is it permanent or subject to reduction or modification under certain conditions?
- Does the licensee have a first refusal option as to any additional licensee in the original territory if it is not exclusive?
- Does the licensee have a contractual right to the licensor's latest products, updates or innovations? If so, at what cost?

Termination and Renewal

- Is the term of the license determined?
- Is it subject to renewal, assignment or extension?
- Is the licensor entitled to terminate the license if certain conditions have not been met, either during the term or at the expiry?
- Does the licensor have the right an option or duty to buy any or all of the licensee's equipment, furnishings, inventory, or other assets in the event of termination?
- Under what conditions can the licensee terminate the license?
- Is the licensee restricted from engaging in a similar business after termination? If so, for how many years?
- If there is a lease, does it coincide with the license term?
- Does the contract provide sufficient time for amortization of capital payments?

6.5 Auditors' professional liability

The professional liability must be determined based on the conduct of a similar professional, acting reasonably. A professional will therefore not incur liability unless he or she acts in a manner inconsistent with that of a reasonable professional.

A plaintiff must demonstrate that the auditors' fault is the logical, direct and immediate cause of the damages claimed.

The auditor's negligence will not be considered the cause of the loss if a plaintiff cannot prove actual reliance on the professional opinions: for example, when the decision to invest was made before the professional opinions were provided to him, the investments were made before the professional opinions were issued, and when the plaintiff does not prove that proper disclosure by the professionals would have changed his or her decision to invest.

7 Labour matters

7.1 Introduction

The employment contract expresses the obligation of the employee to perform the services described and any other services and functions which the employer may assign. The contract determines the term of the employment or declares that the term is indefinite. If the term is fixed, there may be an option of renewal by the employer, or a strict dictum that prohibits renewal.

In considering a share or asset acquisition, the acquirer should make provision for new and old management. A summary checklist of items should include:

1. Are old operating officers to remain ?
2. What provisions are being made for severance ?
3. What is the pension status of old management ?
4. Should severance be rolled into retirement savings plans of old management ?
5. Is old management required to continue in office or as consultants for a transitional period ?
6. If old management continues in short term, what is that term, what are its powers, and who is responsible supervisor ?
7. Have non-complete and loyalty arrangements been made concurrently with severance or continuation in transition ?

7.2 Confidentiality issues

Corporate assets must be protected from within as well as from without. Loyal employees having access to corporate secrets may turn out to be the worst nightmare of the enterprise after an untimely quarrel and termination.

7.3 Term of employment

The interesting question in law is whether an employment contract clause is valid if it states an employee cannot be dismissed, meaning that it is a contract for life.

It is possible to have a fixed term contract for the life of an employee. Lifetime employment, while legal, and in some cases even desirable, nonetheless requires even clearer articulation, given the profound financial responsibility of such a guarantee.

Salary is determined on the basis of an annual gross, as are the payment terms. There is a further definition of benefits, which come with the salary package, such as pension, health and dental group benefits, and disability insurance.

7.4 Pension and retirement issues

Funds paid or attributed as paid to a corporate employer are deemed to form part of the latter's assets and fall into the bankruptcy estate in the event of the application of bankruptcy legislation. Such funds would include employee contributions to the company private pension plan. However, to the extent such funds are keep separate and distinct from the corporate assets, and are ascertainable and identifiable, they would constitute trust funds which do not fall into the bankruptcy estate.

At least one court has expressed the view it is *less than enthused about endorsing a principle which would effectively deprive the employees of their pension monies simply because of the maladministration of their employer in its keeping of those monies.*

7.4.1 Form of employment agreement

THIS AGREEMENT made as of the _______________, day of _______________ , ____

BETWEEN: ABC INDUSTRIES LIMITED, a corporation incorporated under the laws of Canada

(hereinafter referred to as the "Company")

AND: Mr. X, of the City of ____________, in the Province of _________________

(hereinafter referred to as the "Executive")

WHEREREAS the Company desires to retain the Executive upon the terms and conditions hereinafter set forth;

AND WHEREAS the Company and the Executive have agreed that the Executive will be employed by the Company upon the said terms and conditions;

AND WHEREAS XYZ Industries Limited ("XYZ") is a wholly owned subsidiary of the Company;

AND WHEREAS the Executive will be involved in the operations of XYZ;

NOW, THEREFORE, THIS AGREEMENT WITNESSETH that in consideration of the sum of Two Dollars ($2.00), now paid by each of the parties hereto to the other, (the receipt and sufficiency of which is hereby acknowledged by each of them) and, the mutual covenants and agreements herein set forth, the parties hereto agree as follows:

1. **TERM**
   The Company hereby agrees to employ the Executive and the Executive agrees to serve the Company and its subsidiaries as a senior executive to hold such position or such offices as the President of the Company may from time to time determine, upon and subject to the terms and conditions set forth herein, for a period of one (1) year, commencing on the date hereof (the "Term"), unless notice of intention to terminate this Agreement is given in writing pursuant to Section 8 hereof.

2. **DUTIES**

Subject to the provisions of Section 1 hereof, during the Term the Executive shall:

a) use his best efforts to undertake and faithfully perform such lawful duties and exercise such powers in relation to the Company and its subsidiaries and their respective businesses as the Board of directors of the Company (the “Board”), the President or such other appropriate officer of the Company shall from time to time assign or vest in. him;
b) in the discharge of such duties and in the exercise of such powers, use his best efforts to observe and comply with all lawful resolutions, regulations and directions from time to time made or given by the President of the Company;
c) devote the whole of his time, efforts and attention during the course of his employment by the Company to the discharge of his duties hereunder, and shall faithfully serve the Company and use his utmost endeavours to promote and extend the businesses of the Company and its subsidiaries; and
d) in pursuance of his duties hereunder, use his best efforts to perform such services for the Company and its subsidiaries, and, without further remuneration, other than as provided to other executives of the Company in performing similar duties, accept such office in such subsidiary as the President of the Company may from time to time reasonably require.

The Executive shall not be required, without his consent, to relocate outside of Toronto.

3. **SALARY**

The Executive shall be paid for his services to be rendered hereunder a salary (the "Salary") in the gross amount of $155,000 per annum payable in equal bi-weekly instalments, less standard employee deductions in accordance with the Company's policies of senior executives.

4. **ADDITIONAL COMPENSATION**

Upon leaving the employment of the Company, the Executive shall be entitled to receive his permitted statutory retirement allowance comprising the years of service spent with XYZ and the time spent with XYZ and the Company. Thus, if the Executive's contract is not renewed at the end of the Term, he would receive $60,000.

5. **BENEFIT**

The Executive shall be entitled, at the cost of the Company, to participate in all of the perks and benefit plans generally available to senior executives of the Company from time to time. The Executive will not be entitled to any car allowance. The parties acknowledge that a car is required to be supplied by the Executive to perform the services required hereunder and car expenses are to be reimbursed in accordance with the Company's policy. The Company will supply the Executive with the supporting documentation required by Revenue Canada.

6. **VACATION**

During the Term, the Executive shall be entitled to four (4) weeks vacation per annum. Such vacation time shall be taken at a time or times acceptable to the Company having regard to its operations.

7. **OUT-OF-POCKET EXPENSES**

The Company shall reimburse the Executive for all reasonable out-of-pocket expenses which he may properly incur in and about the discharge of his duties hereunder on behalf of the Company according to the Company's standard policies applicable to senior executives regarding reimbursement of expenses.

8. **TERMINATION**

8.1 This Agreement and the services of the Executive pursuant hereto shall be subject to termination at any time, at the option of the Company, upon the occurrence of any of the following events which are deemed to be just cause:

a) persistent failure by the Executive to carry out its duties hereunder or to observe or perform any covenant or provision on its part to be observed or performed hereunder if such failure shall continue for a period of thirty (30) days after notice in writing has been given by the Company to the Executive describing such failure and requiring the Executive to correct the same;
b) the death of the Executive (such termination however will not affect the estate or designee from receiving the benefits due under any life insurance policy, as provided for under Section 5 hereof);
c) material contravention of Sections 9 or 10 of this Agreement;

d) inability of the Executive, by reason of illness or mental or physical disability or incapacity, to perform the duties and responsibilities required to be performed by him on behalf of the Company for an aggregate period of three (3) months in any calendar year provided that the Executive is receiving benefits under the long-term disability policy of the Company. (In the event that the Executive receives salary for any period covered by such long-term disability policy, the amount of such salary so received, subject to any required adjustment for income taxes and other levies withheld for the benefit of the Executive, shall be immediately repaid to the Company by the Executive);
e) the commission of a criminal act by the Executive or any misconduct, dishonesty or fraud committed by the Executive which is detrimental to the Company.

Upon the occurrence of any of the events set out in this Subsection 8.1, and where applicable, any notice being given under the provisions of this Subsection 8.1, this Agreement and the employment of the Executive hereunder shall be wholly terminated subject to the payment to the Executive of any salary, emoluments or other amounts owing to him as at the date of such termination.

8.2 In addition to the Company's right to terminate this Agreement pursuant to Subsection 8.1 above, this Agreement may also be terminated at any time on one month's prior written notice given by either party to the other. If the Company terminates the Executive's employment pursuant to this Subsection 8.2, the Executive shall be entitled to receive and the Company shall pay him the amount that he would otherwise have been entitled to receive pursuant to this Agreement if this Agreement has not been terminated prior to the end of the Term. If the Executive terminates this Agreement pursuant to the provisions of this Subsection 8.2, he shall be entitled to receive any salary, emoluments or other amounts owing to him as at the date of such termination.

8.3 Upon termination of his employment, the Executive shall, at the request of the Company, resign from any office held with the Company, its parent, or any of its affiliates or subsidiaries.

9. **NON-COMPETITION**

9.1 Except in the performance of his duties hereunder, the Executive shall not, prior to the termination of this Agreement and for a period of one year thereafter:

a) engage or have any interest, either directly or indirectly, in any capacity, in any business or occupation whatsoever (except as a holder of securities listed on any stock exchange or traded over-the-counter and then only so long as those securities do not represent more than five (5) percent of the issued securities of any class of any such company other than securities of the Company or any of its subsidiaries) provided that investments may be made by the Executive in investments which do not interfere with the performance of his duties hereunder and are not competitive with the business of the Company, its parent or any of its subsidiaries on the date such investments are made; or
b) solicit or hire the services of an employee of the Company or any of its subsidiaries for his own purposes or for any other person or persons, partnership, firm, association, syndicate, company or corporation engaged in or concerned with or interested in a business similar to that conducted by the Company or any of its subsidiaries.

1.2 For a period of one (1) year following the date of termination of employment with the Company, the Executive shall not, either directly or indirectly, alone or in partnership with others, solicit or do business with any "clients" of the Company or any of its subsidiaries, in competition with the Company or any of its subsidiaries. For purposes hereof, 'clients" shall be deemed to include all existing clients of the Company and its subsidiaries at the date of such termination and any persons generally known or specifically identified as potential clients by the Company as at the termination date. For purposes hereof, "competition" shall mean the provision of a good or service that is directly competitive with a good or service that the Company or any of its subsidiaries was actively providing at the date of such termination.

1.3 The Executive agrees that the covenants contained in this Section 9 and the restrictions contained herein are reasonable and valid.

10. **NON-DISCLOSURE**

10.1 Where used herein "Confidential Information" shall mean any and all of the formulations, products, designs and secret processes, trade secrets, know-how, techniques, production, processing, methods, lists which relate to the business and operations carried on by the Company or any of its subsidiaries at any time during the Term, which are treated by the Company or any of its subsidiaries as confidential and are not in the public domain.

10.2 The Executive shall not (either during the continuance of his employment or at any time thereafter):

a) disclose any Confidential Information to any person whatsoever other than for the Company's purposes of the Company or any of its subsidiaries; and
b) use for his own purposes or for any purposes other than those of the Company or any of its subsidiaries any Confidential Information that he may acquire or become privy to in relation to the business of the Company or any of its subsidiaries.

11. **ASSIGNMENT**

This agreement may not be assigned by the Executive.

12. **NOTICES**

All notices, requests, demands or other communications required or permitted to be given hereunder shall be given in writing by registered mail, postage prepaid, and addressed to the other party or delivered as follows:

To the Company at:

ABC INDUSTRIES LIMITED

____

To the Executive:
Mr. X

____

____

or such other address as may be given by either of them to the other in writing. Such communication shall be deemed to have been received on the day of delivery if delivered, or on the fifth business day after mailing if delivered by mail.

13. **GOVERNING LAW**

This Agreement shall be governed by and construed in accordance with the laws of the Province of Ontario.

14. **FURTHER ASSURANCE**

The parties hereto agree to sign and cause to be signed such further and other papers, do and perform and cause to be done and performed such further and other acts and things as may be necessary or desirable in order to evidence and give fuIl effect to this Agreement and every part hereof.

15. **SEVERABILITY**

If any Section or a portion of any Section of this Agreement is determined to be unenforceable or invalid by the decision of any court of competent jurisdiction which is not appealed or appealable, for any reason whatsoever, that unenforceability or invalidity shall not affect the enforceability or validity of the remaining portions of this Agreement and such unenforceable or invalid section or portion thereof shall be severed from the remainder of the Agreement.

16. **ENUREMENT**

The provisions of this Agreement shall enure to the benefit of and be binding upon the heirs, executors, administrators and legal representatives of the Executive and the successors and assigns of the Company, respectively.

17. **ENTIRE AGREEMENT**

This Agreement constitutes the entire agreement between the parties and supersedes any prior agreement or understanding relating to the subject matter hereof. This Agreement may only be amended by written instrument signed by both parties.

IN WITNESS WHEREOF the Company and the Executive have executed this Agreement as of the date first written above.

ABC INDUSTRIES LIMITED

Per: ______________________________ Per: ___________________________

____

Mr. X

____

Witness

8 International trade

8.1 Introduction

The modern commercial credit transaction has developed without the assistance of specific legislative provision defining, qualifying or otherwise identifying the letter of credit as a unique contract. The letter of credit is not a creature of the law in the same sense as land registration or the corporation. It goes without saying that parties to a credit transaction within any given legal jurisdiction may have certain commercial perceptions of the function of the letter of credit and their respective roles. The commercial world is understandably under the impression that the commercial perception of the various facets of the credit mechanism has a firm and supportive basis in law. Such perception, like commercial custom itself, is always developing and far from uniform.

On the other hand, the law is a force divided by tradition, jurisdiction and degrees of stagnation or innovation. The law defines the components of obligations and rights, and, to a degree, bundles them into certain contractual regimes. In those jurisdictions where legislative innovation has not developed specific rules respecting the contract of commercial credits, one is forced to rely on basic contract theory in order to flesh out legally the commercial perceptions of the letter of credit transaction. Of necessity, one is impelled to seek out elements of established contractual regimes such as, among others, sale, mandate and loan, in order to piece together a cohesive definition of the commercial credit. This exercise of legal categorization is at the same time both academic and necessary.[4] It is academic in the sense that the commercial world will continue in its ways notwithstanding legal ambiguities. For example, many issuing banks of standing will continue to honour their credits notwithstanding the theoretical defences against payment available against beneficiaries. The necessity of legal definition is evident. The extent of the obligations and rights of the parties to the transaction and the duration of those rights must be determined, as well as the validity of the claims of parties extraneous to the immediate transaction, such as assignees and trustees in bankruptcy.

4 See generally Mead, "Documentary Letters of Credit" (1922), 22 Col. L.R. 297; McCurdy, "Commercial Letters of Credit" (1922), 35 Harv. L.R. 539; Desjardins, "Précis de droit des crédits documentaires," Master's Thesis, .

The categorization of the letter of credit according to basic contract theory may produce legal results differing from commercial practice. There is little point in debating whether established commercial practice should or should not take precedence over the law where the law itself fails to recognize the specific institution of the letter of credit. The law does recognize in certain instances that the obligations of parties to a transaction may be defined by existing usage, trade and practice. Furthermore, since the law between the parties is the contract itself many letters of credit do make express reference to the incorporation of the Uniform Customs. To apply local contract rules of the jurisdiction to letters of credit not bearing reference to the Uniform Customs is understandable. However, to the extent that those local rules differ from the Uniform Customs, progress toward uniform regulation of letters of credit is impeded. But, as will be seen, the Uniform Customs itself relies heavily upon the law of the local jurisdiction in order to give full effect to its provisions. The task, therefore, of the jurist who seeks a consistent approach to the understanding of the letter of credit transaction, must balance the exigencies of the Uniform Customs, the local law and developing commercial practice, as well as conflict of laws situations.

The parties to the letter of credit are: the bank which issues the credit; the customer of the bank who requires the issuance to the beneficiary of the credit; and the latter, who is also the creditor (vendor) of the customer. One must also make mention of the advising bank, which is sometimes included in the transaction to disburse funds for the account of the issuing bank. The contractual relationship between the beneficiary and the customer often relates to the sale of goods. The relationship between the issuing bank and the advising bank may for the moment be classified as one of agency. The relationship between the customer and the issuing bank involves a loan or credit contract. The remaining link, that between the issuing bank and the beneficiary, is the subject of extensive query and controversy. In order to be appropriate, legal categorization of the letter of credit transaction must accommodate and explain the rights and obligations existing between all parties to the agreement.

8.2 Foreign trade transactions

In the import-export trade, the mechanism of the credit transaction may typically be described as follows. An importer places an order for the purchase and shipment of goods with a foreign seller. The importer has no reason either to trust or mistrust the solvency, reliability or efficiency of the foreign seller; he has no means of ascertaining whether in this specific

The practical effect of financing the underlying contract by way of letter of credit is beneficial for all parties concerned. The importer dispenses with the problem of advance payment, loss of interest while awaiting shipment, and fear of loss resulting from inadequate or late shipment. Subject to the problem of fraud and subterfuge, the importer is assured that payment will only be made if the foreign seller strictly complies with the terms of the credit. On the other side, the foreign seller, prior to shipment, has in hand a promise to pay for the shipment from a reputable foreign financial institution, or in the event of the intervention of a confirming bank, from a native bank. From the point of view of the issuer, it is paid a remuneration for the opening of the credit and retains the bills of lading and other shipping documents presented with demand of payment as security for reimbursement by the customer of the amount of credit extended and paid.

The seller as beneficiary may use the credit in several ways. He may, of course, guard it as assurance for payment if and when complete shipment is effected. He may, prior to shipment, use the credit as collateral for a loan from his own bank to carry on his business activities. He may use the credit as a backing or security for the issuance of a letter of credit as his own request in favour of his suppliers.

An exporter who does not benefit from a letter of credit must use other procedures for effecting collection on an account due by the importer. If the account of the importer is a continuing one, the exporter will either rely on cumulated credits in the account or obtain a bond or advance deposit as partial or full security for ultimate payment on the shipment. If the importer's account is not continuous, or if there is no reason to trust that the present and future shipments will be fully paid, the exporter will. simply withhold shipping and clearance documents Until the importer has made payment. The problem with this procedure is that goods arrive at their destination before the arrival of the shipping documents. The importer or exporter, depending on the contractual arrangements, will suffer the inconvenience and expense of charges for demurrage, insurance, and other charges relating to the late taking of possession. Many banks conveniently provide an international collection service which permits the expeditious remittance of documents and collection without stalling the process of shipment and delivery. The service usually requires the exporter to forward to the bank a remittance letter from the exporter enclosing bills of lading, insurance certificates, invoices and other documents relating to the shipment. The exporter also forwards a bill of exchange drawn on the importer. The collecting bank, usually chosen by the importer, receives the documentation from the exporter by airmail, and notifies the importer of the arrival of the document. In accordance with the instructions of the exporter, the documents will be released on payment by the collecting bank or released upon acceptance by the importer of the bill of exchange. Upon maturity, the collecting bank demands payment of the bill of exchange after having financed the exporter up to the date of maturity. Where explicit reference is made in the remittance letter, the collection service is subject to the various terms set out in the Uniform Rules for Collection published by the International Chamber of Commerce.[5]

It may occur that documents are forwarded by a remitting bank to the issuer with unclear instructions: the covering letter may refer to the letter of credit serial number, allude to the application of the Uniform Customs and Practice for Documentary Credits, and yet instruct the issuer to remit the documents, against payment or acceptance of a draft, to a designated party. While the issuer may be tempted to treat the remittance as a collection account, especially where the documents were sent long after the letter of credit expired, it is of course prudent to seek clarification from the remitting bank.

5 Publication 522

The "Uniform Rules for Collections" contains a number of terms which require definition, such as:

The *case of need* is the party in the importer's country named by the exporter who may assist in obtaining payment or acceptance of draft or who may be empowered by the exporter to act fully on his/her behalf.

The *documents against payment* (D/P) or documents on payment (DOP or D/P) are the documents attached to the draft drawn by the exporter and needed to obtain goods are deliverable to the importer only after payment of the draft. Similarly with the necessary changes, reference is made to documents against acceptance (D/A).

Protest is the legal action to be undertaken by the collecting bank, at the instructions of the exporter, in case the importer does not pay a sight draft, or does not accept a term draft or does not pay an accepted draft on maturity.

The *tenor* is the credit term of the draft, for example, "at sight", or "after sight" or "after date."

8.3 Domestic use

On the domestic stage, a letter of credit may prove useful in a multitude of situations. A claimant or plaintiff required to post a large amount of money as security for costs may resort to a letter of credit describing the defendant as beneficiary and payable upon production of a final judgment dismissing the suit and condemning the claimant to pay court costs.

In one decision, the court sanctioned the use of a letter of credit as security on a preservation order and interlocutory injunction in lieu of funds and a share issue, in the following terms:[6]

... should the defendant choose to deliver a letter of credit pursuant to subparagraph I (ii) then the letter of credit shall include the following terms:

i) the plaintiff ... shall be the beneficiary;
ii) the letter of credit shall remain valid until at least December 1, 2006, and it shall include a condition requiring the issuing bank to automatically extend the letter of credit for additional periods of one year at a time unless the bank notifies the plaintiff in writing at least 90 days in advance of the then-current expiry date; and
iii) the letter of credit shall be payable upon presentation to the bank of a court order requiring the defendant (or any successor in interest) to make a payment to the plaintiff, or upon presentation of a consent to payment signed by the defendant (or any successor in interest).
... should the defendant choose to issue a letter of credit pursuant to subparagraph l(ii) then the issuance of the letter of credit instead of four million common shares of the defendant shall be without prejudice to the plaintiff's right and ability to maintain his claim that he was entitled to specific performance at the trial of this action.

6 *Meade v. Nelson Resources L.W., 2005* CarswellOnt 7019 (Ont. S.C.J.), paras. 3-5.

> … should the defendant choose to issue a letter of credit pursuant to subparagraph I(ii), it shall be without prejudice to the defendant's right and ability to advance the position at trial that the letter of credit should not be called upon unless the plaintiff would have been entitled to a remedy of specific performance; provided however, this is without prejudice to the trial judge's discretion to determine whether the letter of credit should be called on and to what extent.

An example of a letter of credit used to bolster the personal guarantee of a director for a corporate debt is found in a number of instances.[7]

The letter of credit may also find use in quasi-pension matters, such as securing a large host of post-employment obligations including vacation pay.[8]

Letters of credit may play a decisive role in film financing. Where one of the requirements of a primary lender is that sales of the film in particular markets be guaranteed, a credit is used to guarantee a certain number of sales in one, or in various countries of distribution. In return for placing the credit, the applicant May be assigned the proceeds of the sales it guarantees up to the total amount drawn on the letters of credit. In addition, it might be entitled to a proportion of revenues from the films, perhaps twenty per cent of the producer's deferrals, and an equal percentage of worldwide profits. The guarantor would seek to determine that pre-sales or orders for the film made prior to its completion in the relevant market was approximately equal to the amounts that it was to guarantee, and that the pre-sales contracts are with subdistributors with good track records and unlikely to default. Presumably, the guarantor anticipates that revenues from pre-sales would come in before the letters of credit would need to be drawn on, so that the guarantor would not have to put up any money: if the credit were to be drawn upon, funds would be outstanding for only a brief while.[9]

8.4 Autonomy of the credit transaction

The obligation of the issuer to pay must be executed as long as the conditions set out in the credit are met by the beneficiary. The obligation stands irrespective of any dispute between the customer and beneficiary as to partial or full execution of the underlying contract, or between the bank and the customer.

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7 *612829 B.C. Ltd. v. Multimetro Mortgage Corp.,* 2005 CarswellBC 1016, 31 R.P.R. (4th) 199, (sub nom. *612829 B.C. Ltd. v. Hobbs & Leigh)* 212 B.C.A.C. 40, (sub nom. *612829 B.C. Ltd. v. Hobbs & Leigh)* 350 W.A.C. 40, 2005 BCCA 246 (B.C. C.A.), regarding the benefit of certain letters of credit that had been posted with the city pursuant to a development permit respecting the property. There were competing claimants to the letters of credit, and at one point the city sought an indemnity agreement from the purchaser who did not accede to this request. The purchaser took the position that it was for the vendor to assure it would have the benefit of the letters of credit. See for example *Alert Bay & District Credit Union v. Nimkish Ventures Ltd.* (1999); 1999 CarsweIlBC 677 (B.C. Master).

8 In *McLennan v. McLennan* (2003), 2003 CarswellOnt 401, 6 R.P.R.(4th) 139, 169 O.A.C. 249 (Ont. C.A.). Ramaseder, B., "Revenue Canada views on the use of letters of credit to secure post-employment obligations", (1995), 7 T. of Executive Comp. and Retirement 64; Comment, "Vacation and Severance Pay funded by an Irrevocable Letter of Credit was deductible"(1 997), 86 Journal of Taxation 138.

9 *Sports Pool Distributors Inc. v. Dangerfield,* 2008 CarswelIBC 8, 2008 BCSC 9, 12 P.P.S.A.C. (3d) 160 (B.C. S.C.)

The notion of autonomy has long been accepted as the very basis of the letter of credit system, permitting both assurance and immediacy of payment. As stated by Jenkins L.J., in *Hamzeh Malas* & *Sons* v. *Br. Imx. Indust. Ltd.:*

> We were referred to several authorities, and it seems to be plain that the opening of a confirmed letter of credit constitutes a bargain between the banker and the vendor of the goods, which imposes on the banker an absolute obligation to pay, irrespective of any dispute which there may be between the parties on the question of whether the goods are up to contract or not. An elaborate commercial system has been built up on the footing that bankers' confirmed credits are of that character, and in my judgment, it would be wrong for this court in the present case to interfere with that established practice. It has also to be remembered that a vendor of goods selling against a confirmed letter of credit is selling under the assurance that nothing will prevent him from receiving the price. That is no mean advantage when goods manufactured in one country are being sold in another. Furthermore, vendors are often reselling goods bought from third parties…..That system of financing these operations, as I see it, would break down completely if a dispute between the vendor and the purchaser were to have the effect of "freezing", if I may use the expression, the sum in respect of which the letter of credit was opened.[10]

Accordingly, the courts have refused to interfere in impeding the payment of the beneficiary by the issuer, or have refused to declare illegal such Payment where the first shipment of steel rods were below contract quality,[11] where records and cassettes shipped represented a minor percentage of titles actually ordered,[12] or where there was a dispute on financing for which the letter of credit was used as mortgage insurance.[13]

The notion of autonomy does not mean that the court must regard the letter of credit as divorced in all aspects from the underlying transaction. A letter of credit may be read, in restricted circumstances, as being conditional or in substitution of another credit.[14] The letter of credit which is ambiguous in its drafting must be interpreted by the courts not in a vacuum, but in the context of the accessory documents, including the credit application and the underlying contract. For example, one American court has determined that a letter of credit was not revocable in nature by referring to the underlying facts and contracts which led the, applicant to request the issuance of the credit.[15]

10 [1958]1 All E.R. 262 at 263-64 (C.A.). See also *Lumcorp v. CL B. C.,* [1977] C.S. 993, on the effect (of a letter of guarantee; *Uzinterimpex v. Standard Bank PLc,* [2008] EWCA Civ 819 (CA (Civ Div)); Jack, Malek & Quest, *Documentary Credits,* 3rd ed., 3.56.

11 *Ibid.*

12 *Discount Records Ltd. v. Barclays Bank,* [1975]1 All E.R. 1071 (Ch.D.).

13 *West Virginia Housing Dev. Fund v. Sroka,* 415 F.Supp. 1107 (1976). See generally *O'Meara Co. v. Nat. Park Bank of New York,* 239 N.Y. 386 (C.A. 1925); *Dulien Steel Prods. Inc. v. Bankers' Trust Co.,* 298 F.2d 836 (2nd Cit. 1962); *Bossier Bank & Trust Co. v. Union Planters Nat. Bank of Memphis, 550 F.2d 1077 (1977); Banco Espanol de Credito v. State Streets Bank & Trust Co., 385 F.2d 230 (1st Cir. 1967)*

14 *Royal Bank v. Steyr-Forsttechnik Ges M.B.H.* (February 9, 1993), Doc. Kamloops 17319 (B.C.S.C.).

15 *West Virginia Housing Dev. Fund v. Sroka, supra,* note 4.

The notion of the autonomy of the credit transaction is confirmed in the Uniform Customs, 2007 Revision, article 4:

a) A credit by its nature is a separate transaction from the sale or other contract on which it may be based. Banks are in no way concerned with or bound by such contract, even if any reference whatsoever to it is included in the credit. Consequently, the undertaking of a bank to honour, to negotiate or to fulfil any other obligation under the credit is not subject to claims or defences by the applicant resulting from its relationships with the issuing bank or the beneficiary.
A beneficiary can in no case avail itself of the contractual relationships existing between banks or between the applicant and the issuing bank.

b) An issuing bank should discourage any attempt by the applicant to include, as an integral part of the credit, copies of the underlying contract, *proforma* invoice and the like.

The U.C.C. (1995) 5-103(d): codifies the same notion of autonomy in declaring at section 5-114:

d) Rights and obligations of an issuer to a beneficiary or a nominated person under a letter of credit are independent of the existence, performance, or nonperformance of a contractor arrangement out of which the letter of credit arises or which underlies it, including contracts or arrangements between the issuer and the applicant and between the applicant and the beneficiary.[16]

ISP98 Rule 1.06 (a) and (c) define the standby as independent: accordingly, the enforcement of an issuer's obligations does not depend on:

"iv. the issuer's knowledge of performance or breach of any reimbursement agreement or underlying transaction."

A corollary of the autonomy rule is that the beneficiary of a credit cannot avail himself of the contractual relationship existing between banks or between the applicant for the credit and the issuing bank. In other words, failure of the bank to follow the instructions of the customer respecting documentation, amendment, extension or face amount cannot be invoked by the beneficiary in any action against the issuer; the credit must be read as a contract complete within itself.[17] For example, an agreement between the beneficiary and customer to delay presentation of drafts under the letter of credit is of no concern to the issuing bank as long as no consent has been given by the latter in the form of an amendment to the credit.[18]

16 See generally *Sovereign Bank v. Bellhouse, Dillon & Co.* (1911), 23 Que. K.B. 413 (C.A.); *Urquart Lindsay & Co. v. Eastern Bank Ltd.,* [1922] 1 K.B. 318 at 323.

17 Uniform Customs, 2007 Revision, art. 4a.

18 *CO-OP. Fisheries Ltd. v. CIBC.* (1969),7 D.L.R. (3d) 610 at 617 (Sask. Q.B.).