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Dissolution of Companies and Partnerships:

A comparative study between Saudi law and English law in
the light of Islamic law

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Declaration

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Abstract

Companies and partnerships are the backbone of business and constitute most types of business structures. They help foster economic growth, boost employment in countries and generate tax income for governments. Therefore, the survival of companies and partnerships coupled with increases in their numbers is considered an indicator of strength and stability of a country. Conversely, dissolution of companies and partnerships is a negative indicator because countries and societies lose all these advantages thereby. The legal consequences of dissolution of a company are the termination of the company, with its legal entity coming to an end and its removal from Companies House Register. The company name is then available for usage by a new company. This thesis aims to show the importance of addressing the causes of dissolution of companies and partnerships in the law of Saudi Arabia, in Islamic Law (with which Saudi law must comply), and in English law, one of the oldest and most important legal systems in existence. This aim will be achieved through the exploration and analysis of these causes. Critique will be made of some of these causes and suggestions for law reform and alternative methods of dissolution of companies and partnerships. This takes into account two aspects. Firstly, that law reform should be comprehensive, which means that it should include all causes of dissolution of both companies and partnerships; secondly, that law reform should encourage the continuance of business wherever possible. Additionally, this thesis aims to clarify the meaning of “companies” and “partnerships” and to distinguish between them as far as possible, as the distinction is not always clear as in the case of quasi-partnerships. Moreover this thesis will demonstrate the meaning of dissolution in Saudi law and English law

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Chapter 1 Introduction

1.1 Introduction & Background of companies and partnerships

The purpose of studying companies and partnerships in this thesis is to determine the nature of their dissolution and its effect upon them. A brief look at the history of companies and partnerships will provide a better understanding of how legislation can improve their position in the light of the high number of company dissolutions. The rising number of dissolutions in KSA is of great concern, this being mainly due to a lack of legislation to cope with company law in the modern context of international commerce. This is especially needed for viable businesses which wish to continue trading but are being forced to end prematurely by the law. This is because the default position in the Saudi Companies Law 2015 is that a partnership dissolves once any cause of partnership dissolution occurs. The suddenness of the immediate effect of death or withdrawal of partner and of notices served for dissolution causes significant distress to the partners. Automatic dissolution is disruptive and is not favourable for business. Therefore, if the law is reformed to make the default position the continuance of the partnership even if changes among partners occur, there will be no negative effect upon those viable businesses which wish to continue trading but are being forced to end prematurely by the law¹.

¹ More details in 1.4.2.1 Dissolution regulation is insufficient in Saudi Arabia. Also, see 6.1.3 Weakness in the drafting of the Saudi Companies Law 2010. Furthermore, 6.1.4 A legal gap in Saudi Companies Law 2015.

Historically, State recognition and regulation of companies and partnerships date back to Ancient Rome. Roman law recognised a variety of corporate bodies, such as the *Universitas* and the *Collegium*². The term "corporation" itself derives from the Latin *corporare*, which means to 'form into a body'³. Whilst the term 'corporate' is ancient, the degree and content of its regulation has varied according to the development of communities and their needs up to the point of achieving the meaning of the term as we understand it today. In this thesis the author will focus on three sets of law: Islamic, English and Saudi law⁴. A brief background to each of these laws now follows.

1.1.1 Background of companies and partnerships in Islamic Law

Islamic Law began in 609 CE and regulates the entirety of human interaction, including transactions and partnerships which are especially focused upon. In this early era of Islam, during the lifetime of the Prophet Muhammad and during the lifetime of his companions, there were no specific provisions made about dissolution of companies and partnerships as economic life was less complex. After this era Islamic laws of partnership and causes of its dissolution have been discussed widely by the scholars of Islam; thousands of volumes and books of *fiqh* (Islamic jurisdiction) bulge with their detail. The books of those scholars have made some of the greatest and lasting contributions to the legal world. However, even in the era post-dating the Prophet and his companions the contribution of Islamic scholars has not covered provisions of company and its dissolution in the manner in which we understand it today.

² William Livesey Burdick, The Principles of Roman Law and their Relation to Modern Law. (USA: The Lawbook Exchange Ltd. 1sted, 2004), 280-282.

³ The Online Etymology Dictionary Accessed at: <<http://www.etymonline.com/index.php?term=corporate>> Accessed on 21 January 2014.

⁴ I will explain later the reasons of choosing these three laws in page 18 of this thesis.

Nowadays, Islamic law is considered one of the three most important legal systems worldwide, along with Civil Law and Common Law⁵. Islamic law has received much attention, not only in Muslim countries but also in Western countries in both the public and political spheres. For example, in an interview with the Daily Telegraph, The former Archbishop of Canterbury - the head of Church of England - stated that adopting elements of the *Sharia* law into the UK's court system was "unavoidable"⁶. Former Lord Chief Justice Lord Phillips gave his backing to the use of Islamic courts to deal with family, marital and financial disputes⁷. *Sharia* court decisions in matters of arbitration can be enforced in County Courts or the High Court under the Arbitration Act 1996⁸. The expectations of the head of Church of England were true; former PM David Cameron later announced that Islamic law compliant bonds – *sukuk* - would be launched in Britain in adherence to Islamic law. He stated that he had wanted London to be a great capital of Islamic finance in the Western world and stand alongside Dubai as one of the great capitals of Islamic finance anywhere in the world⁹. Practically, one of the effects of a *sukuk* which was used to finance the

⁵ Powell, E., and Mitchell, S., [The International Court Of Justice and the World's Three Legal Systems] *The Journal of Politics*, (2007), Vol. 69, No. 2: (pp.397-415), at pp 398-399, Accessed at: [http://www.jstor.org.ezproxy.lancs.ac.uk/stable/10.1111/j.1468-](http://www.jstor.org.ezproxy.lancs.ac.uk/stable/10.1111/j.1468-2508.2007.00539.x?seq=1#page_scan_tab_contents)

2508.2007.00539.x?seq=1#page_scan_tab_contents, Accessed on: 09.09.2016

⁶ What did the Archbishop actually say? Williams, R., Archbishop of Canterbury website Accessed at: <http://rowanwilliams.archbishopofcanterbury.org/articles.php/1135/sharia-law-what-did-the-archbishop-actually-say>, Accessed on: 18.09.2016

⁷ The feisty baroness defending 'voiceless' Muslim women, Stanford, P., *The Telegraph* newspaper, Accessed at: <http://www.telegraph.co.uk/women/womens-politics/10778554/The-feisty-baroness-defending-voiceless-Muslim-women.html>, Accessed on: 09.09.2016

⁸ Islamic sharia courts in Britain are now 'legally binding', Hickley, M, *Mail* online news, Accessed at: <http://www.dailymail.co.uk/news/article-1055764/Islamic-sharia-courts-Britain-legally-binding.html>, Accessed on: 18.09.2016

⁹ Cameron unveils Islamic bond plan, *BBC news*, Accessed at: <http://www.bbc.co.uk/news/business-24722440>, Accessed on: 18.09.2016

Department of Health building in Whitehall was that due to Islamic law alcohol could not be consumed by MPs meeting there¹⁰.

Moreover, school children are currently taught about early Islamic civilisation¹¹. Even the Chief Rabbi of Great Britain and the Commonwealth announced in 2016 that all Jewish schools should teach Islam¹². Additionally, the UK academic institutions such as University of London (SOAS)¹³, Cambridge¹⁴, Oxford¹⁵, Durham¹⁶, Birmingham¹⁷, Aberdeen¹⁸ and Warwick¹⁹ universities offer a range of specialist courses and qualifications in Islamic law. The situation in the United States²⁰ and Canada²¹ is not much different from the situation in the UK. All of these facts show the importance of Islamic law and demonstrate that Islamic law plays a role in world legal systems. This has led the author to make Islamic law part of this thesis on the dissolution of companies and partnerships.

Any discussion on companies and their dissolution cannot avoid raising the issue of legal personality and limited liability as the most significant elements of

¹⁰ Sharia law may stop MPs drinking, Dathn,M, Mailonline, Accessed at: <http://www.dailymail.co.uk/news/article3422642/MPs-moved-Westminster-barred-drinking-Sharia-law.html>, Accessed on:18.09.2016

¹¹ Schools teach Islamic history, Tominey, C., Daily Express newspaper website, Accessed at: <http://www.express.co.uk/news/uk/648075/Schools-teach-Islamic-history-ignore-British>, Accessed on: 18.09.2016

¹² Office of the Chief Rabbi website, Accessed at: <http://chiefrabbi.org/jewish-schools-islam/>, Accessed on: 09.09.2016.

¹³ SOAS University of London website, Accessed at: <https://www.soas.ac.uk/law/programmes/ma/maisllaw/>, Accessed on: 10.09.2016

¹⁴ University of Cambridge website, Accessed at: <http://www.cis.cam.ac.uk/>, Accessed on:10.09.2016

¹⁵ Oxford University website, Accessed at: <https://global.oup.com/academic/content/series/o/oxford-islamic-legal-studies-oisls/?cc=gb&lang=en&>, Accessed on:10.09.2016

¹⁶ Durham University website, Accessed at: <https://www.dur.ac.uk/ilm/>, Accessed on:10.09.2016

¹⁷ University of Birmingham website, Accessed at: <http://www.birmingham.ac.uk/postgraduate/courses/combined/thr/islamic-studies.aspx>, Accessed on:10.09.2016

¹⁸ University of Aberdeen website, Accessed at:<http://www.abdn.ac.uk/library/collections/subjects-az/law/islam/>, Accessed on: 10.09.2016

¹⁹ University of Warwick, Accessed at: <http://www2.warwick.ac.uk/newsandevents/pressreleases/ne10000002072/>, Accessed on: 10.09.2016

²⁰ Sharia Law in America website, Accessed at: <http://www.billionbibles.org/sharia/america-sharia-law.html>, Accessed on: 18.09.2016

²¹ Sharia Law in Canada website, Accessed at: <http://www.billionbibles.org/sharia/canada-sharia-law.html>, Accessed on 18.09.2016

the company. Classical Islamic law recognises legal personality in the form of the *waqf*²², *bayt al-mal*²³ and *masjid*²⁴. These legal terms were developed in Islamic countries through the ages. Since these forms of fictitious legal personality are acceptable to Islamic law, it should follow that the modern business corporation is also acceptable to Islamic law²⁵. Additionally, classical Islamic law also began to recognise the concept of limited liability 1300 years ago. This is clearly apparent from *sharikat almodaraba*, a situation in which two or more persons provide finance to the business whilst at least one other provides entrepreneurship and management of the venture. The venture may be a trade, an industry or a service and is intended to be profit-making, where profit is shared in agreed proportion. Any loss incurred by the business is borne only by the financiers in proportion to their share in the total capital²⁶. This means that the provider of entrepreneurship and management has limited liability in the case of the company losing financially or in the case of insolvency.

Thus, the general concepts of corporation, legal personality and limited liability are recognised by classical Islamic law. However, they were perceived differently from English law because the concept of corporation had not yet emerged in those days and so jurists (*fuqaha*) had no reason to describe its legal components. Now that the concept of corporation has emerged, the International

²² Literally: Endowments.

²³ *Bayt al-mal* is an Arabic term that is translated as "House of money". It is a financial institution, responsible for dealing with the revenues and all other economical matters of the state and which served as the treasury.

²⁴ *Masjid* refers here to the mosque as a public institution, possessing elements of a public corporation in relation to the collection and management of public funds such as charity.

²⁵ Hafeez, M., [An Analysis of Corporate Entity and Limited Liability in Islamic and Western Perspectives of Corporate Governance], International Journal of Business, Economics and Law, Vol. 2, Issue 3 (June) ISSN 2289-155, Accessed at: <http://ijbel.com/wp-content/uploads/2014/07/An-Analysis-of-Corporate-Entity-and-Limited-Liability-in-Islamic-and-Western-Perspectives-of-Corporate-Governance-Dr.-Malik-M.-Hafeez.pdf>, Accessed on: 27.11.2015.

²⁶ Saleem, S., [Role of Islamic Banks in Economic Development], p.67, Accessed at: <http://www.iefpedia.com/english/wp-content/uploads/2009/11/Role-of-Islamic-banks-in-economic-development..pdf>, Accessed on: 27.11.2015

Islamic *Fiqh* Academy²⁷ has issued a statement and conducted research about the modern corporate as a joint-stock company, a limited company or as a limited liability partnership. The *Fiqh* Academy has recognised them along with the concept of companies as having legal personality in Resolution No. 130 (4/14) on January 2003²⁸ and has published dozen of articles about companies and partnerships and their dissolution²⁹.

1.1.2 Background of companies and partnerships in English Law

Partnerships have a long history in English law. They were already in use in medieval times in Europe and in the Middle East. Partnership legislation has steadily progressed, starting with the debate for the Registration of Partnerships and continuing with numerous attempts to promote a Partnership Law Reform Bill in the 1880s, which resulted in the Partnership Act 1890³⁰ which contains several sections on dissolution of partnerships.

English law has recognised the company as an artificial definite corporate personality as early as 1553 when the Russia Company was formed³¹ and several companies were established by government such as the British East India Company in 1600, and the South Sea Company in 1711 to undertake trade

²⁷ The International Islamic Fiqh Academy (IIFA) is an international body of Muslim experts on subjects of both religious and secular knowledge. Besides traditional Islamic sciences, the IIFA seeks to advance knowledge in the realms of culture, science, and economics. The IIFA based in Jeddah, Saudi Arabia, was created in 1981 and contains 61 experts from 43 Islamic countries. IIFA website at: <http://www.iifa-aiifi.org/>, Accessed on 17.01.2017.

²⁸ International *Fiqh* Academy Resolution # 130 (14/4) of the Islamic *Fiqh* Academy in its meeting (14) dated 16 January 2003 in Doha, Qatar, Accessed at: <http://www.fiqhacademy.org.sa/qararat/14-4.htm>, Accessed on 21.10.2015.

²⁹ For a selection of articles by the *Fiqh* Academy please refer to International *Fiqh* Academy magazine, No.2 Vol. 14, 2004

³⁰ No later change was made in the partnership law until the Limited Partnerships Act 1907 came into force, see: Glick, D., The Movement for Partnership Law Reform 1830 – 1907 (University of Lancaster, PhD Thesis, 1990), pp.4,11

³¹ Todd, G., [Some Aspects of Joint Stock Companies], *The Economic History Review*, Oct.1932, Vol.a4, Issue no.1, (pp.46-71) at p.46, Accessed at: <http://onlinelibrary.wiley.com/doi/10.1111/j.1468-0289.1932.tb00840.x/abstract>, Accessed on 14.09.2016

with the Spanish South American colonies³². However, the first Act of Parliament passed in company legislation was the Royal Exchange and London Assurance Corporation Act 1719 or, as it is known, the “Bubble” Act 1719. After 1719 English law recognised the corporation but only in use by government³³. The Bubble Act was repealed in 1825³⁴. In 1844 it became possible for ordinary people through a simple registration procedure to incorporate a company when the Joint Stock Companies Act 1844 came into force³⁵. However, the liability was not limited. In 1855 limited liability was introduced by the Limited Liability Act 1855³⁶. Since then, several dozen pieces of legislation in company law have taken place up to the current Companies Act 2006 which itself has been amended on several occasions.

In 1897 a landmark occurred with *Salomon v Salomon & Co Ltd*³⁷. It would be hard to write an academic piece discussing companies and partnerships and their dissolution without highlighting this case which established the principle of separate legal personality and limited liability. This happened when the House of Lords overturned a Court of Appeal decision and asserted that the assets of

³² Lezcano Navarro, J.M., Piercing the Corporate Veil in Latin American Jurisprudence: A Comparison with the Anglo-American Method, (London: Routledge, 1st ed, 2016), p.6, Accessed at: https://books.google.co.uk/books?id=X7s0CwAAQBAJ&printsec=frontcover&source=gbs_ge_summary_r&cad=0#v=onepage&q&f=false, Accessed on: 29.06.2017;

Also: Wild, C., Weinstein, S., Smith and Keenan's Company Law, (London: Pearson, 15th ed, 2011), p.3

³³ Ibid

³⁴ Harris, R., [Political economy, interest groups, legal institutions, and the repeal of Bubble Act in 1825], *The Economic History Review*, 1997, Vol. L4, (pp.675-696), Accessed at: <http://web.b.ebscohost.com.ezproxy.lancs.ac.uk/ehost/pdfviewer/pdfviewer?vid=1&sid=d9ce4c9a-772b-4078-b59b-99f566230c34%40sessionmgr102>, Accessed on: 28.05.2017

³⁵ Rix M.S. [Company Law: 1844 and today] *The Economic Journal* Vol. 55 No. 218/219 pp.242-260 Accessed at: https://www.jstor.org/stable/2226083?seq=1#page_scan_tab_contents, Accessed on: 14.9.2016

³⁶ Lezcano Navarro, J.M., Piercing the Corporate Veil in Latin American Jurisprudence: A Comparison with the Anglo-American Method, (London: Routledge, 1st ed, 2016), p.6 Accessed at: https://books.google.co.uk/books?id=X7s0CwAAQBAJ&printsec=frontcover&source=gbs_ge_summary_r&cad=0#v=onepage&q&f=false, Accessed on: 29.06.2017; Also: Wild, C., Weinstein, S., Smith and Keenan's Company Law, (London: Pearson, 15th ed, 2011), p.3

³⁷ *Broderip v Salomon* [1897] A.C.22

the company were protected from creditors even though the shareholders were artificially appointed³⁸.

1.1.3 Background of companies and partnerships in Saudi Law

Before the final process of uniting and founding the Kingdom of Saudi Arabia by the late King Abdulaziz Al-Saud in 1932, economic life was less complicated. Communities were relatively small and dependent upon the generosity of nature. Although there was no codified and comprehensive commercial law to regulate trading activities, companies and dissolutions, well-established trading customs were the reference and guiding lines.

Due to the political stability after the unification of the country and exploration of oil, businesses in Saudi Arabia on both large and small scales started to expand rapidly. As a result, dozens of pieces of codified legislation were linked to trade, especially about companies and partnerships and their dissolution. In 1930 codified commercial law containing 633 articles, known as the Regulations for the Commercial Court (RCC) was first introduced into Saudi law; these originated in the French legal system. Some claim that the Ottoman Empire, which used to control the region, is the true source of the system

³⁸The main point emerging from this case and relevant here is that so long as a company is validly constituted, it is irrelevant if the shareholders are “mere dummies” *Broderip v Salomon* [1897] A.C.22 at 35. This has had a far-reaching effect as companies potentially could be used as a corporate veil to provide cover for fraudulent behaviour. Therefore, company law speaks of “piercing the corporate veil” to see what intentions lie beneath the surface of the constitution of a company. Thus, the element of good faith has to be considered when applying the principle of *Salomon*. Munby J in the Family Division of the High Court limited the piercing of the corporate veil by a court by way of six principles mentioned in *Ben Hashem v Ali Shayif* [2008] EWHC 2380 (Fam) at 159-164. The court in *Petrodel Resources Ltd v Prest* [2013] UKSC 34 para 25 followed the decision in *Ben Hashem* in applying the six limiting principles. Hence it is appropriate to conclude with the words of *Mujih E.*, [*Piercing the corporate veil as a remedy of last resort after Prest v Petrodel Resources Ltd: inching towards abolition?*] *Comp. Law*, 2016, Vol.37, No.2, pp. (39-50), at 43 who points out that: “Despite its merits, the veil piercing rule attenuates the effectiveness of limited liability”. *Mujih* also comments in *Piercing the corporate veil: where is the reverse gear?* [L.Q.R, 2017, NO.133 (Apr), pp.(332-337) that the Supreme Court in *Prest* failed to distinguish forward piercing and backward piercing, resulting in a lack of clarity in the courts which are piercing the veil less and less.

adopted by the Gulf States.³⁹ The reasoning for this claim is that Saudi law provides for many types of corporate institution that do not exist in French civil-law jurisdictions and that it does not contain exact provisions of French company law⁴⁰. What is agreed is that Saudi law has used Egyptian law as a basis for law enactment. Egyptian legal scholars created the French/Egyptian model which refined and adapted the French commercial system after the Ottoman modifications as a basis for Saudi law enactment⁴¹. Despite this, Saudi law does not correspond exactly to the Egyptian model. This is because Saudi lawmakers have selected what they believed would both fit closely the Saudi commercial environment and also not contradict *Sharia* law (Islamic jurisprudence) which establishes the general principles for every aspect of law including companies, partnerships and their dissolution. Thus, Saudi Companies Law and dissolution of companies under that law has developed under a number of successive and overlapping influences (French, Ottoman, Egyptian, and *Sharia*) which have modified its provisions and its operation. Saudi law has been influenced by these three systems of law which do not necessarily treat Islamic *Sharia* law always as applicable. Some laws from those systems have been transplanted into Saudi law. Therefore, Saudi law and Islamic *Sharia* law are not synonymous, and areas of conflict occur where they do not match⁴².

Despite the poor drafting of the RCC, it was thorough and covered a wide range of commercial dealings. One of the main shortcomings of the RCC was its

³⁹ Burgoyne, J, Specific Problems and Unique Aspects of Doing Businesses in Saudi Arabia, cited in: El Sheikh, F, The Legal Regime of Foreign Private Investment In Sudan and Saudi Arabia, (UK, Cambridge, University Press, 1st ed, 2003), p.76

⁴⁰ Almadani, M., The reform of minority shareholder protection in Saudi Arabia and Dubai in private companies. (University of Leeds, PhD Thesis, 2011) Accessed at: <http://etheses.whiterose.ac.uk/3354/>, Accessed on 18.09.2016. Also, Aljabr, M., The Commercial Law in Saudi Arabia, (Riyadh: King Fahd Library, 4th ed, 1996), p.6-9

⁴¹ Commercial Law in the Middle East, Lewis, R., & Mallat, C., Centre of Islamic & Middle Eastern Law, Accessed at: <http://www.soas.ac.uk/Centres/Isalamiclaw/IMaterials.html>, Accessed on: 18.09.2016

⁴² For examples of conflict between Islamic and Saudi law see p.46.

shallow regulation of company law and dissolution which led to the adoption of laws of other countries in order to fill the gaps that were not covered. Thus, misapplications and contradictions occurred because of the imported laws. In response to the need for detailed and controlling rules, a sweeping reform to the Companies Law took place in 1965 when the Saudi government announced the new Companies Law. At that time, the new Law was a dramatic development towards the business environment which the country strongly needed. This Law contains 233 sections divided into fifteen parts. It regulates the various subjects of companies' affairs, such as formation of companies, transformation and integration, dissolution and liquidation. This Law abolished many statutes that were inconsistent with it, such as sections 11-17 of the Commercial Court Regulation. The Companies Law 1965 was amended seven times as per Royal Decree: in 1967, 1982, 1985, 1987, 1992, 1998 and 1999⁴³. Even though the Law stresses the consistency of the Law with Islamic teachings, there are still some articles that expressly disagree with the mainstream of the Islamic law which is the constitution of the country. Such disagreement can be found, for example, in Article 103 where the issue of preferred shares is allowed while under the Islamic rules shares of the corporation's members must not be differentiated in value or rights from each other. Also, article 116 permits the issue of debentures which in reality involves the payment of interest (usury) in addition to the principal amount whereas the payment of pre-determined return is undoubtedly prohibited by the Islamic law. However, the Companies Law 1965 survived the strong opposition and the constant critics against it mainly from the Islamic scholars. Most notably, anything mentioned in the new

⁴³ Aljabr, M., The Commercial Law in Saudi Arabia, (Riyadh: King Fahd Library, 4th ed, 1996), p.21

Companies Law on dissolution is consistent with *Sharia* law. However, the amount of material on dissolution is insufficient to cover all its aspects⁴⁴.

On 9 November 2015, the Kingdom of Saudi Arabia's Council of Ministers approved the long awaited new Companies' Law. In the new law several changes have been made in respect of a Limited Liability Partnership (LLP) and in respect of a Joint Stock Company (JSC). The Companies Law 2015 now expressly defines a "holding company" and a one member company⁴⁵. Finally, whereas the main statute is the Companies Law 2015, companies and partnerships and their dissolution in Saudi Arabia are now governed by a number of pieces of legislation⁴⁶.

Sentiments in the KSA government are that improvements to the law on companies and partnerships and their dissolution are needed; this motivated the granting of many scholarships to students to go abroad and study this area of law. The purpose of the grants made was the funding of research towards improving the functioning of companies in line with both *Sharia* law and the common law system. Thus, clear progress is being made in KSA against a background of insufficient provision in legislation, and towards a world class

⁴⁴ More details in 1.4.2.1 and 1.4.2.2

⁴⁵ 'The new Saudi companies law and its implications for KSA companies, Holman Fenwick website, January 2016 Accessed at: <http://www.hfw.com/The-new-Saudi-companies-law-January-2016>, Accessed on: 23.01.2017; Also: Saudi Arabia: New Companies Law 2015 Approved, Jones Day website, Accessed at: <http://www.jonesday.com/files/Publication/c0baced4-45d8-426d-9514-bf1e2036ab5c/Presentation/PublicationAttachment/730a6d8a-b310-40e7-b4d5e5904416cbc9/Saudi%20Arabia%20New%20Companies%20Law%202015.pdf>, Accessed on: 23.01.2017

⁴⁶Such as Corporate Governance Regulations, Consultative Assembly of Saudi Arabia, The Commercial Court Law 1970, Settlement That Preventing from Bankruptcy Law 1996 and Arbitration Law 2012. Further pieces of legislation impacting upon the newly amended Companies Law are: Prudential Rules, The Resolution of Securities Disputes Proceedings Regulations, Anti-Money Laundering and Counter-Terrorist Financing Rules, Merger and Acquisition Regulations, Investment Funds Regulations, Real Estate Investment Funds Regulations, Securities Business Regulations, Authorised Persons Regulations.

effective model for companies and partnerships which is also Islamic law compliant.

1.2 Scope of the thesis

When reflecting on the causation of dissolution of business structures, the following main structures stand out: companies, general partnership, limited partnership⁴⁷ (LP) or limited liability partnership⁴⁸ (LLP). It is noteworthy that business structures are linked to either personal factors or commercial factors. The best example which is most linked to personal factors is general partnership, while companies are a clear example of commercial factors that predominate. Hence, the author will not touch upon the causes of dissolution of the LP or LLP because the causation of dissolution of LP and LLP is linked either to personal factors, which in this thesis are dealt with through general partnership, or linked to commercial factors which are dealt with through companies. Thus, to avoid repetition and possible confusion, the scope of this thesis will be limited to addressing the causes of dissolution of general partnerships and of companies only.

1.3 Differences between companies and partnerships

Before talking about the differences between companies and partnerships the meaning of companies and partnerships in Islamic law, Saudi law, and English law should be identified.

⁴⁷ It is a form of partnership similar to a general partnership, except that where a general partnership must have at least two general partners, a limited partnership must have at least one general partner and at least one limited partner

⁴⁸ As in section 1 of the LLP Act 2000, the LLP is a body corporate with legal personality separate from that of its members and a limited liability partnership has unlimited capacity

1.3.1 The meaning of companies and partnerships in Islamic Law

In Islamic law the word *sharikat* refers to participation in a business of any type which includes corporations, companies, and partnerships. Classical Islamic law addresses in a general manner the provisions of corporation and in detail the provisions of partnership. *Sharikat* as a legal term is differentiated into *sharikat al-milk*⁴⁹ (non-contractual) and *sharikat al-uqud* (contractual), neither of which is mentioned expressly, either in the Holy *Quran*, or in the *Sunnah*. However, when these types of *sharikat* emerged, Muslim scholars engaged in *ijtihad*, which are scholarly efforts to demonstrate the rule of Islamic law concerning those types of *sharikat*. *Ijtihad* refers specifically to those efforts made by scholars in a decision-making process to rule on new, emerging issues by relying on interpretations of the principles present in the Holy *Quran* and the *Sunnah*. This means that the *sharia* law is flexible and suitable for application at any time and in any place by the *ijtihad* of jurists. As a result, when the concept of corporation emerged, the International Islamic Fiqh Academy issued a statement and conducted research on the modern corporate as a joint-stock company, a limited company and a limited liability partnership and recognised them along with the concept of companies as having legal personality. Islamic law uses the word *sharikat* for company, corporation, and partnership. The provisions of *sharikat* are subject to the partners' agreement based upon the dicta of Prophet Mohammed: "Muslims are committed to their conditions..."⁵⁰ This means that *pacta sunt servanda* and any participation in a business of any

⁴⁹ This type of *sharikat* is usually created by way of inheritance, wills, or other situations where two or more persons come to hold an asset in common.

⁵⁰ Jami at-Tirmidhi, The Chapters On Judgements From The Messenger of Allah Vol. 3, Book 13, Hadith 1352, Accessed at: <http://sunnah.com/tirmidhi/15/32>, Accessed on: 12.11.2015

type whether company or partnership is subject to the partners' terms and agreement. To sum up, the word *sharikat* (companies and partnerships) in Islamic law refer to participation in a business of any type which includes corporations, *sharikat al-uqud* (contractual) partnership and company and *sharikat al-milk* (non-contractual)⁵¹. However, it is not like Saudi law; the term *sharikah* cannot be used to describe a one-member company because it is owned by only one person and there are no participants.

1.3.2 The meaning of companies and partnerships in Saudi Law

Scanning the Companies Law 2015 as the main source of legislation governing companies and partnerships in Saudi Arabia shows that the Companies Law 2015 uses the Arabic word *sharikat* (companies) for both companies and partnerships. In fact, the Saudi law does not divide business entities expressly into companies and partnership as English law does. Types of business in Saudi law can be categorised into the following entities according to how they form: *sharikat al-ashkhas* (companies of persons) based upon personal consideration and the identities of their partners. In this type of *sharikat*, the contract of association is of significant importance: the *sharikat al-ashkhas* and its partners are interdependent. Thus, if one died or was declared bankrupt this *sharikat* would terminate. The second business entity in Saudi law is *sharikat al-amwal* (companies of capital) which forms on the basis of contributions of capital by its members. This *sharikat* operates independently of its members, is not controlled by a contract and therefore remains unaffected by the status of the members or any change in it.

⁵¹ This type of *sharikat* is usually created by way of inheritance, wills, or other situations where two or more persons come to hold an asset in common.

From these explanations of both *sharikat al-ashkhas* and *sharikat al-amwal* we can say that *sharikat al-ashkhas* are understood in English law as partnerships⁵² and *sharikat al-amwal* are understood in English law as companies and corporations⁵³. To sum up, the word *sharikat* in Saudi law refers to companies, corporations, one-member companies⁵⁴ and partnerships.

1.3.3 The meaning of companies and partnerships in English Law

In English law, it is common to distinguish between company and partnership; “company” referring to an artificial person and corporate body, invisible, intangible, created by or under law, with a discrete legal entity, perpetual succession and a common seal. It is not affected by the death, insanity or insolvency of an individual member⁵⁵. Section 1 of Companies Act 2006 states that: “company” means a company formed and registered under Companies Act 2006. Additionally, Companies House⁵⁶ has defined the company as “a legal entity with a separate identity from those who own or run it”. However, the distinction between companies and partnerships is not always clear. The quasi-partnership company in English Law is an example of this. This idea was confirmed in *Ebrahimi v Westbourne Galleries Ltd*⁵⁷.

The word “company” originally implied persons coming together for a common purpose but does not always contain certain legal meaning; even an association

⁵² There is a slight difference between partnership in English law and Saudi law. The characters of a partnership in Saudi law are the same as in Scottish law. A partnership in Saudi Arabia and Scotland is a legal entity separate from its members. However, a partnership in England is not a legal entity separate from its members.

⁵³ This point is not awareness from many students have background from Arab countries.

⁵⁴ Companies Law 2015, Article 55

⁵⁵ [A company is A Form of Business Organization], Law Teacher website, Accessed at: <https://www.lawteacher.net/free-law-essays/business-law/a-company-is-a-form-law-essays.php>, Accessed on: 10.09.2017

⁵⁶ Incorporation and names, Companies House website, July 2016, p.4, Accessed at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/541069/GP1_Incorporation_and_Names_July_2016_v6_1-ver0.1.pdf, Accessed on: 18.10.2016

⁵⁷ *Ebrahimi v Westbourne Galleries Ltd*. [1973] A.C. 360

that is formed, whether to make profits or not, and whether or not it is legal person, might be referred to as a company. The term “company” can also refer to a big corporation with the legal status of a person, or to a partnership organization or other association⁵⁸. A company is formed under a particular national company law. All companies must be established in accordance with relevant national company law because companies are traditionally subject to control by national sovereignty⁵⁹.

Some Western countries, especially continental countries, treat a company under national company law as an entity which does not only refer to a large corporation with legal person status, but also as a partnership organization or other association. For example, the French Civil Code states that a company is an enterprise formed by more than two persons through an agreement under which all the parties of the agreement are required to make their investments in the form of property or skills and all the parties share the profits and interests generated by the operation⁶⁰. In the United States, the Delaware General Corporation Law provides for the name of the corporation, which shall contain one of the words “association, company, corporation, club, foundation, fund, incorporated, institute, society, union, syndicate, or limited”⁶¹, which means that the use of the terms company, corporation, partnership or other association is interchangeable⁶².

⁵⁸ Minkang G., Understanding Chinese Company Law, (Hong Kong: Hong Kong University Press, 2nd ed., 2010) p.17, Accessed at: <https://books.google.co.uk/books?id=xoAzzE78uUQC&pg=PA163&dq=company+definition&hl=en&sa=X&ved=0ahUKEwinuOf8XMAhUGJcAKHQfCDBc4ChDoAQgbMAA#v=onepage&q=company%20definition&f=false>, Accessed on: 18.10.2016,

⁵⁹ Ibid p.19

⁶⁰ Ibid

⁶¹ Title 8, section 102(a)(1). Accessed at: <https://icis.corp.delaware.gov/Ecorp/Disclaimer.aspx>

⁶² Minkang G., Understanding Chinese Company Law, (Hong Kong: Hong Kong University Press, 2nd ed., 2010) p.18, Accessed at:

Linguistically, in contrast with the definition in English law of a company, the word “company” is not confined to a corporation but includes sole proprietorships and all associations formed and organised to carry on a business such as sole proprietorships, partnerships, limited liability companies, corporations and publicly limited companies⁶³. In the free dictionary⁶⁴, the company is defined as “any formal business entity for profit which may be a corporation, a partnership, association or individual proprietorship” This means that in common law jurisdictions, differences exist between a company and corporation.

When we move to the term “partnership” we see that it defined in the Partnership Act 1890 section 1 as the *relationship* which “subsists between persons carrying on a business in common with a view of profit” using an unincorporated body. This definition is general and vague and consequently has generated litigation. The vagueness in the statutory definition has led to a discrepancy between positions taken in case law. In *Wise v Perpetual Trustee Co.*⁶⁵ intention to make a profit was enough for there to be a partnership, but subscriptions to a club fell short of that. However, in *Dutia v Goldof*⁶⁶ the court stated that merely having an economic interest is insufficient to constitute a partnership. Furthermore, in *Samarkand Films Partnership No.3 v Revenue and Commissioners*⁶⁷ the court insisted on a need for investors to have a clear

<https://books.google.co.uk/books?id=xoAzzE78uUQC&pg=PA163&dq=company+definition&hl=en&sa=X&ved=0ahUKewinuOf8XMAhUGJcAKHQfCDBc4ChDoAQgbMAA#v=onepage&q=company%20definition&f=false>, Accessed on: 18.10.2016,

⁶³ Girvin, S., Frisby, S., Hudson, A., *Charlesworth’s Company Law*, (London: Sweet & Maxwell, 18th ed, 2010.) p.30; Also, Business Dictionary website, update January 2017 by WebFinance Inc., Accessed at:

<http://www.businessdictionary.com/definition/company.html#ixzz496lxcyd4>, Accessed on: 23.01.2017

⁶⁴ The Free Dictionary website, Accessed at: <http://legal-dictionary.thefreedictionary.com/company>, Accessed on: 17.09.2016

⁶⁵ [1903] AC 139 at 149

⁶⁶ [2016] EWHC 547 (Ch) at 6, 30

⁶⁷ [2012] S.F.T.D. 1

expectation of their profit for a partnership to exist⁶⁸. Lindley⁶⁹ points out that as partnerships share principles of contract there must be a clearly binding agreement between partners before recognising a partnership in law. In *William v Dodd*⁷⁰ the courts expressly mentions the need for a binding contractual relationship. Finally, in *Geary v Rankine*⁷¹ the business accounts showed the non-sharing of profits; this was regarded as evidence that a partnership did not exist⁷². Thus, it appears that the courts have over-interpreted the statutory definition of partnerships and have made it harder to achieve a partnership than what the statute originally intended.

To sum up, in England, culturally and legally, the term “company” is confined to a corporation and to the one-member company. However, linguistically a company includes any formal business entity for profit. This may include associatios, corporations, individual proprietorships and partnerships.

At this point, the meaning of the term “company” in Islamic law, Saudi law and English law can be summed up in two points. Firstly, the one-member company is considered a company in both English law and Saudi law. However, it is not considered a company in Islamic law. This matter of the one-member company leads us to clarify the lack of its formulation in the Companies Law 2015. Article 2 defines a company as “a **contract** under which **two or more persons** undertake to participate in an enterprise for profit, by contributing a share in the form of money, work, or both money and work, with a view to dividing any profits (realized) or losses (incurred) as a result of such enterprise”. This

⁶⁸ *Ibid* at 225

⁶⁹ l’Anson Banks, R and Jeff, S. *Lindley & Banks on Partnership*, (London: Sweet & Maxwell, 3rd supplement to 19th ed, 2017), p.6

⁷⁰ [2012] EWHC 3727 (Ch)

⁷¹ [2012] 2 F.C.R. 461 (CA)

⁷² *Ibid* at 12

definition is not accurate in suggesting that the Companies Law 2015 recognizes one-member companies in Article (55). A one-member company is not a contract and also does not contain two or more persons. Therefore, Article (2) of the Companies Law 2015 which states the definition of companies, should be reformulated as: “The Company is a separate legal entity set up by one person or more carrying on a business in common with a view to profit; whether it shares money, work or both of them”⁷³.

Secondly, Islamic law is the broadest law of these three laws in using the term company. The term company in Islamic law refers to participation in a business of any type which includes corporations and *sharikat al-uqud* (contractual) partnerships, *sharikat al-milk* (non-contractual)⁷⁴. Then the Saudi law is wider than English law in using the term company. The term company in Saudi law only includes corporations and partnerships. The narrowest law in using term of company is English law which definition of company is mostly confined to corporations. The adaptation in this thesis in the meaning of company is the common view of English law that using the term “company” as an artificial person, limited liability, and corporate body and using a partnership as an unincorporated body. The reasons for that are:

- 1- Consideration for the environment in which the thesis was written.

⁷³ The default legal position in Saudi law is that a partnership or company will dissolve if there are less than two partners or members. However, there is one exception in limited circumstances to transfer the company or partnership to a one-member company for a maximum of one year and if the capital is worth at least five million Saudi Riyals or more. More details in p.202

⁷⁴ This type of *sharikat* is usually created by ways of inheritance, wills, or other situations where two or more persons come to hold an asset in common.

- 2- *Sharikat* (company) in Saudi law is divided into *sharikat al-amwal* (companies of capital) and *sharikat al-ashkhas* (Companies of persons) which is a partnership. Therefore, the characteristic of partnership can be fit with *sharikat al-ashkhas* (Companies of persons).
- 3- The adaptation of this view does not contradict the principles of *sharia* law.

1.3.4 Distinction between company and partnership

Following the brief historical background above of English, Islamic and Saudi laws in terms of the meanings of company and partnership, a discussion of the strong links between partnership and company now follows. The modern company has its roots in partnership law. This can be traced from the way in which partnerships developed over time, eventually producing the entity we know as a company as discussed⁷⁵. Therefore, at this stage it is suitable to clarify the main differences between company and partnership in English law, which essentially can be divided into three main categories.

Firstly, companies operate as a separate, freestanding legal entity, an artificial person with its own identity. This stands in contrast to the partnership amongst whose members all property of the partnership belongs to individuals⁷⁶. Thus, companies differ crucially on their legal status. Secondly, companies are incorporated, meaning that they go through a process of registration. Until the business has been incorporated at Companies House, it cannot operate as a

⁷⁵ In 1.1.3

⁷⁶ Large partnerships might have the partnership property held under a partnership trust deed which holds the property on trust for use by the partners.

business under Companies Act 2006⁷⁷. By contrast, partnerships are unincorporated, and thus the partners unencumbered except by the terms of the agreement of the partners. The third and final major feature of companies in their distinction from partnerships is limited liability. Companies are able to make contracts and incur debts. Liability for them will not transfer to company members, but will remain with the company itself. Thus, members of the company will not be liable. By contrast, a partnership cannot act on its own behalf. Therefore, debts incurred by partners make all the partners liable, jointly and severally.

A comprehensive analysis offered by Minkang⁷⁸ outlines further differences, concerning formalities and termination. Companies operate at a higher level of business accountability; they must be compliant with formalities such as incorporation and registration with attendant fees due, as well as demonstrate a greater degree of transparency through information disclosure, all of which do not apply to partnerships. Partnerships are remarkably democratic in nature, in that the partnership agreement between the partners gives the partners flexibility to agree about anything they want⁷⁹. It is this element that leads us to conclude like Twomey⁸⁰ who determines that in the case of partnership dissolution occurs first followed only thereafter by winding up. Namely, that the state of mutual agreement and not the law is what determines continuance or termination. As

⁷⁷ Incorporation and names, Companies House website, July 2016, p.4, Accessed at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/541069/GP1_Incorporation_and_Names_July_2016_v6_1-ver0.1.pdf, Accessed on: 18.10.2016

⁷⁸ Minkang G, Understanding Chinese Company Law, (Hong Kong: Hong Kong University Press, 2nd ed., 2010), Accessed at: <https://books.google.co.uk/books?id=xoAzzE78uUQC&pg=PA163&dq=company+definition&hl=en&sa=X&ved=0ahUKewinuOfit8XMAhUGJcAKHQfCDBc4ChDoAQgbMAA#v=onepage&q=company%20definition&f=false>, Accessed on: 19.09.2016

⁷⁹ More details about partnership agreement in 2,6 Contracting out of partnership dissolution

⁸⁰ Twomey M, Partnership Law (London: Butterworths, 1st ed, 2000), p.572

the judge in *Chahal v Mahal*⁸¹ conceded, a partnership is predominantly concerned with dissolution first, even when its assets have been transferred to a company. By contrast, winding up of companies occurs before dissolution. This is to ensure the correct distribution of assets to shareholders before dissolution occurs⁸².

Practically speaking, partnerships have the advantage of being easier to set up, sharing start-up costs and providing an equal share in management, profits and assets. Although there is a possibility of conflict between partners, this can equally happen in companies between shareholders and directors. Therefore, the main disadvantage in setting up a partnership is the unlimited nature of liability, which includes liability for the actions of any partner⁸³.

Companies provide for a greater stability in the transferability of ownership of assets within the incorporated entity, and ensure a continued existence that will not be interrupted by the actions of an individual partner, even if illegal in nature. This means that if member A sells his shares to B, the company will still carry on and run the business and there would be no need to dissolve the company. This is not the case in partnerships; if partner A sells his shares to B the partnership will dissolve unless all the partners have agreed otherwise. However, unlike partnerships, companies are closely regulated and expensive to set up, records are required and proof of residency and citizenship of directors is

⁸¹ *Chahal v Mahal* [2005] EWCA Civ 898 2005, at 27

⁸² The Formations Company website, 2016, Accessed at:

<https://www.theformationscompany.com/difference-between-dissolve-liquidate>, Accessed on: 05.07.2017

⁸³ The Company Warehouse website, [Advantages and Disadvantages of Partnership], 01 March 2010, Accessed at: <https://www.thecompanywarehouse.co.uk/blog/advantages-and-disadvantages-of-partnership> Accessed on: 27.02.2018

required⁸⁴. Therefore, the single most influential factor is the extent of liability conferred upon the partners from which members of a company usually take free.

As a final point, there is no difference between the characteristics of a company in Saudi and English law, although there are differences in partnership law. First, as mentioned above, partnerships in English law are unincorporated, whereas partnerships in KSA are incorporated. Second, the partnership in English law has no legal personality, whereas in KSA it has legal personality, as is the situation in Scotland⁸⁵.

1.4 The meaning of dissolution and Importance of research into dissolution

1.4.1 The meaning of dissolution

Neither the Saudi Companies Law 1965 nor the Companies Law 2015 defined the words “dissolution of companies”. However, *Aljabr*⁸⁶ defined dissolution as “dissolving the legal ligament that was gathering partners or shareholders”. Similarly, neither the Partnership Act 1890 nor the Companies Act 2006 provides definition of “dissolution”. The Free Dictionary⁸⁷ defines the dissolution of a company as “the termination of its existence as a legal entity. This might occur pursuant to statute, the surrender or expiration of its charter, legal proceedings, or bankruptcy”. The Free Dictionary to which I referred in the English legal context more accurately describes dissolution than *Aljabr*'s definition to which I referred for the Saudi legal definition. According to

⁸⁴ Government of Canada website, Canada Business Network, 4th August 2016, Accessed at: <http://www.canadabusiness.ca/eng/page/2853/>, Accessed on: 19.09.2016

⁸⁵ Law Commission Report, Consultation Paper 159 ‘Partnership Law: A Joint Consultation Paper’, London: The Stationery Office, 2003, p.8.

⁸⁶ Aljabr, M., *The Commercial Law in Saudi Arabia*, (Riyadh: King Fahd Library, 4th ed, 1996), p.217

⁸⁷ The Free Dictionary website, Accessed at: <http://legal-dictionary.thefreedictionary.com/dissolution>, Accessed on: 27.04.2017

Aljabr's definition, it is possible for the company or the partnership to survive in law even after the ligament connecting the partners dissolves. For example, it is possible that one partner dissolves the legal ligament or bond with the other partners in the partnership but that the partnership or the company continues to exist. However the definition in the Free Dictionary describes dissolution more accurately as it sees dissolution as bringing to an end the company or the partnership in its totality.

1.4.2 Difference between the dissolution of partnerships and companies

Following the discussion on the meaning of dissolution, it is appropriate to address the difference between the dissolution of partnerships and dissolution companies. One of the essential practical differences between the dissolution of partnership and the dissolution of companies is that there is no limited liability in partnerships. All of the partners in a partnership have unlimited liability, which means that the partners are equally responsible for the entire debts of the business. In contrast, a company is a separate entity with limited liability being enjoyed by its shareholders. Shareholders in a company are not personally liable for any of the debts of the company, other than for the amount already invested in the company and for any unpaid amount on their shares in the company. Furthermore, companies are incorporated meaning that they go through a process of registration at Companies House. Companies have to file their documents, returns, reports, balance sheet, profit and loss account etc. with the Registrar. Therefore, companies need a lot of procedures for dissolution of companies and for their removal from the Companies House register. By contrast, partnerships are unincorporated. Therefore, in the case of dissolution of

partnerships, there is less procedure involved. Partnerships need not prepare and file such documents to effect any removal from the Companies House register as they are not entered on the register in the first place. Additionally, subject to contrary agreement, partnerships dissolve automatically and immediately once any of the causes of dissolution of partnerships occurs. Thus, partnerships are predominantly concerned with dissolution first, By contrast, winding up of companies occurs before the final act of dissolution. Once liquidation is done, the company is dissolved automatically three months later⁸⁸. The reasons behind dissolution taking effect after a three-month period in both compulsory and voluntary winding up are discussed in *Re Working Project Ltd*⁸⁹. In the judge's opinion, the period allows not only for a waiting period to ensure there are no other assets that may turn up, but also to examine whether liquidation is over and that there is no further dispute. Additionally, this is to ensure the correct distribution of assets to shareholders before dissolution occurs⁹⁰. Finally and most importantly, is that partnership firms are not separate legal entities from the partners who comprise the firm. Partnership dissolutions are most linked to personal factors. Therefore, death, bankruptcy and changing partners in the partnerships will lead to partnership dissolution. However, companies operate as separate freestanding legal entities, and as an artificial person with their own identity. Company dissolutions are linked to commercial factors so these situations do not affect companies. On this point, English law on partnerships follows the "aggregate" model, namely, that the partnership is the sum of its partners and not a separate legal entity. Therefore, the partnership can neither

⁸⁸ Insolvency Act 1986, s 201(2)

⁸⁹ *Re Working Project Ltd*, [1995] B.C.C. 197

⁹⁰ The Formations Company website, 2016, Accessed at:

<https://www.theformationscompany.com/difference-between-dissolve-liquidate>, Accessed on: 10.02.2018

own property, nor hold rights, nor assume obligations, and it cannot sue or be sued. Additionally, as it is not an entity, a partnership cannot form part of another, separate partnership. These disadvantages can be removed by reform of English law to regard partnerships as legal entities. The legal entities approach is already adopted in Saudi law⁹¹, Scottish law and the United States⁹². The Law Commission has recommended the legal entity approach to partnerships for England. The Report claims⁹³ that by adopting the aggregate approach, English law hinders the continuity of partnership. The commercial reality is that a partnership will change over time. Commercial clients would prefer not to see changes in partnership lead to their dissolution and replacement by new partnerships. Legal remedies would be required to put right past wrongs resulting from the changes in partnerships liable to occur under the aggregate system. A conversion over of partnerships to legal entity status would shrink the gap between the legal characterisation and commercial perception of the partnership. It is a matter of surprise that the Law Commission report on such a fundamental reworking of partnerships with practical outcomes to support the continuity of business has not yet been legislated by Parliament.

1.4.3 Importance of research into dissolution

There are many advantages when companies and partnerships are born or set up. They help foster economic growth, boost employment in countries, tax income for governments and bring in money for the treasury. Additionally, companies and partnerships may have influence politically. Companies with strong ties to

⁹¹ Companies Law 2015 Articles. 14

⁹² Partnership Law: Joint Report of the Law Commission and the Scottish Law Commission (Law Com No. 283 Scottish Law Com No. 192, 2003, Cm 6015) p.6, 18, 42 and 46

⁹³ Ibid

communities can assist political activities by funding and organising campaigns for lobbying, letter-writing and influence legislators. All of these advantages show how companies and partnerships are important. The death of companies and partnerships means the loss of these advantages. Additionally, there are legal consequences of dissolution that the property of company become bona vacantia and the assets of the partnership will be sold to pay the debts of the partnership.⁹⁴

Therefore, exploring and analysing the causes of dissolution of companies and partnerships is very important to reduce the number of dissolutions.

Moreover, the importance of this research appears significant abroad. The great change in Saudi Arabia by adopting Vision 2030⁹⁵ has aimed at moving the Saudi economy beyond oil. One of the most important aims mentioned in the KSA National Transformation Program 2020⁹⁶ achieves the aim of the Vision 2030 by creating an attractive environment for international investors and enhance their confidence in Saudi economy. This plan parallels Brexit due to which Britain is looking to put into place alternative new deals. The shared vision of KSA and the UK makes clear the growth trend between the UK and KSA. Also these two countries will work together more and will be more likely to go into more partnerships. Therefore, it is important those two countries understand each other. It is important that Saudi policymakers and business people understand what role in English law has in dissolution. Equally, it is important that the British understand what the position in KSA is. This thesis is

⁹⁴ More details in 2.5 Consequences of dissolution of partnership and 3.4 Consequences of dissolution of companies.

⁹⁵ For more details about Saudi Arabia's Vision for 2030, Accessed at :<http://vision2030.gov.sa/en/node>, Accessed on: 28.06.2017

⁹⁶ National Transformation program 2020, Accessed at: http://vision2030.gov.sa/sites/default/files/NTP_En.pdf, Accessed on: 28.06.2017

a part of improving understanding between the two countries. Despite the importance of this area of law, there is a lack of research in this area. Furthermore, in Saudi Arabia the regulation of dissolution is insufficient.

1.4.3.1 Dissolution regulation is insufficient in Saudi Arabia.

Unlike in jurisdictions where there are detailed laws stipulating the method and process by which companies and partnerships can be dissolved, in Saudi Arabia, the law has provided very limited clarity with regard to the procedure. In fact, there are only five articles totalling around 751 words to describe the laws involved in dissolution.⁹⁷ These words are the only words that control and regulate companies when their owners attempt to dissolve the company and partnership. Without any doubt, these five articles do not enough to cover all dissolution matters. There are many questions that do not have answers. Thus, partners, legal experts, judges, and others must fill in the gaps. To clarify how the Saudi dissolution rules are insufficient, there are some points which are not covered by the Companies Act in Saudi Arabia that show that dissolution of companies and partnerships in Saudi Arabia regulation is insufficient, in other words there are lacunae in this area of legislation. Therefore there is a need for further reform regarding the dissolution of companies and partnerships in the KSA. The author will take two issues as examples and other issues will come up during the thesis.

The first issue which is not covered in Saudi law concerns whether or not Saudi Companies Law recognises a partnership at will⁹⁸. The second issue concerns Article 203 of the Companies Act 2015 which states that as soon as dissolution

⁹⁷ Articles 15, 35, 147, 148, 156, and 180 of Saudi Companies Law 1965

⁹⁸ For full discussion and suggestions see 6.1.3 in Conclusion

occurs, the company enters the phase of liquidation. The company retains legal personality to the extent necessary for the liquidation and until the liquidation ends. This Article implies that merger, as a cause of dissolution, will lead the company or partnership to liquidation. However, in practice, merger does not and should not lead to liquidation as this will interfere with the transfer of company or partnership assets⁹⁹.

Both issues are not covered in the Companies Law 2015 or in any legislation in Saudi Arabia. Therefore, regulation for the dissolution of companies and partnerships in Saudi Arabia could benefit from considering application of elements of other legal systems to achieve exemplary proposal for reform of the causes of dissolution of companies and partnerships¹⁰⁰.

1.4.3.2 Lack of research and literature review in this area of legal activity

Despite the importance of dissolution of companies and partnerships, few academics have discussed this issue. In order to find material related to my topic, this thesis has referred to many libraries, study centres, and databases in Saudi Arabia and the United Kingdom. There are very few sources addressing aspects of causes of dissolution of companies and partnerships in general, and no sources on the interrelation between Western, Saudi and Islamic legal systems.

Therefore, it is likely that this thesis is the first study and detailed analysis of the causes of dissolution of companies and partnerships in a comparative study between Saudi Arabian law and English law in light of Islamic law.

⁹⁹ Ibid

¹⁰⁰ In 6.5.Proposal for reform of the causes of dissolution of companies and partnerships

1.5 Overview of dissolution of companies in the KSA Companies Law 1965 and 2015

Change in the law has knocked repeatedly on the door of companies and partnership with regards to the causes of their dissolution. The following table will show most of the differences between Companies Laws of 1965 and 2015 with regards to the causes of dissolution of companies and partnerships.

Companies Law 1965	Companies Law 2015
Article 15 “With due regard to the causes of dissolution particular to each kind of companies, a company shall be dissolved for any of the following reasons...”	Article 16 “With due regard to the causes of dissolution particular to each kind of companies, a company shall be dissolved for any of the following reasons...”
Article 15(1) “...Expiration of the term fixed for the company or partnership...”	Article 16 (a) “...Expiration of the term fixed for the company or partnership, unless it is expanded according to the provisions of this law... ”

The differences in the Companies Law 1965 and 2015 point to a newly emerging flexibility, namely, that the expiration of the specified term is not the final point in the life of a company or of a partnership. Rather, there is room under the Companies Law 2015 for the longer life of the company or partnership. This might be as a result of an agreement between the partners to extend the life of the company beyond the expiration date.

Article 15(2) “...Realization of the object for which the company was established, or the impossibility of realizing such object...”	Article 16 (b) “...Realization of the object for which the company was established, or the impossibility of realizing such object...”
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The lack of any change in the law points to a fundamental need to see the company as contingent upon the intentions of the persons who formed it. The importance of their intentions is immutable in terms of the definition of the association as a company. Hence there is here a continuation in insistence upon achievement of the purpose for which the company was originally founded. There is, in this regard, no flexibility whatsoever.

Article 15 (3) “...Transfer of all shares or stocks to one partner...”	Article 16 (c) “...Transfer of all shares or stocks to one partner, unless the partner or shareholder desires to continue this company or partnership according to the provisions of this law... ”
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Whereas previously in the Companies Law 1965 a transfer of stocks to one partner dissolved the partnership or company, the Companies Law 2015 contains flexibility in this regard. Individual election to transfer to a one-man company or partnership (LLP) is made possible by the Companies Law 2015 and endowed with the statutory provision to do so. Additionally, a transfer to a one-man company may also be achieved by shareholders, a party not mentioned in the Companies Law 1965.

Article 15 (4) “...Loss of all the company’s or partnership funds, or the major part thereof, so the remainder cannot be effectively utilized...”	Deleted
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Provision of the article 15 (4) of the Companies Law 1965 for both companies and partnerships. This article is deleted in the new Companies Law 2015 and the provisions for companies regarding loss company’s funds are mentioned in article 149 of the Companies Law 2015. The lower limits for the company

leading to dissolution will be discussed later. With regards to partnership, the new Companies Law 2015 contains greater flexibility, in that even the loss of all its funds does not lead to dissolution.

<p>Article 15 (5) “...Agreement of the partners or shareholders to dissolve the company before the expiry of its term, unless the contract stipulates otherwise...”</p>	<p>Article 16 (d) “... Agreement of the partners or shareholders to dissolve the partnership or company before the expiry of its term ...”</p>
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The omission of the stipulation of contract in the Companies Law 2015 indicates greater flexibility in the new law. This means that the partnership or company is at liberty to dissolve even in spite of the existence of a contract which prevents dissolution before the expiration of an agreed term. The greater flexibility in the new Companies Law 2015 over the old Companies Law lies in the continuing agreement of the partners or shareholders to carry on or cease business, not in a contract signed at the time of a historic agreement.

<p>Article 15 (6) “...Merger of the company or partnership into another...”</p>	<p>Article 16 (e) “...Merger of the company or partnership into another...”</p>
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Although there is no change in the aspect of merger, there is a discussion on the matter of merger as a cause of dissolution in chapter five of this thesis.

<p>Article 15 (7) “...Issuance of a decision by the Commission for the Settlement of Commercial Companies’ Disputes to dissolve the company upon the request of one of the parties concerned and for serious</p>	<p>Article 16 (f) Issuance a final judicial decision to dissolve the company or partnership by request from one of the parties or stakeholders. Any conditions that have forbidden this right are</p>
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reasons that justify such a step..."	invalid.
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Three key differences highlight the existence of a greater flexibility in the new law. Firstly, that there is no need for serious reasons to dissolve a company. Second, that the judicial decision is no longer subject to appeal, thus cutting down the concern that it will take longer than absolutely necessary to give effect to the will of the shareholders. Finally that no prior agreements have any bearing whatsoever on the right of a stakeholder to ask for a judicial review of the company.

<p>Article 147 “If the company has dissolved due to the transfer of all its shares to one shareholder, this shareholder shall be responsible for the debts of the company within the limits of its assets. If one year passed from the decline of the number of the shareholders to below the minimum stipulated in Article (48), any interested party may request the expiration of the company.”</p>	<p>Article 149 “If all shares have transferred to one shareholder does not fill the conditions in Article (55) from this law, only the company will be responsible for its debts. At the same time the shareholder must reconcile the condition of the company to fit with the provisions of this law or transfer the company into LLP in one year or the company will dissolve by the force of the law.”</p>
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The change in the law is that a shareholder to whom all shares have been passed now has the opportunity to become a one-member company. Previously, this was not the case; the company, after the passage of one year, would dissolve. Now, under the new law, the company can continue in the form of a one-member company if it fulfils the conditions in Article 55. This shows that under the new law there is greater flexibility for the continuation of the life of the company.

<p>Article 148 “If the company losses amounted to contribute three-quarters of the capital ... the</p>	<p>Article 149 “If the company losses amounted to contribute half of the capital ... the company dissolve...”</p>
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company dissolve...”	
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The new law affords a greater protection to the shareholders from abuse by the board. Whereas previously there could be a loss of three-quarters of the capital before dissolution, now only a loss of half of the capital will trigger dissolution.

In summary, the significant difference between the old and new law is that there is now a greater flexibility in the law. This flexibility enables the continuance of the life of the company and partnership. Equally, there is also a greater concern for the financial protection of the shareholders from the board. This recent development in law points to a rise in consciousness in KSA of the need to strike a balance between the liabilities of shareholders which may affect the increase in both partnerships and companies.

1.6 The aim and objective of this thesis

The primary aim of this study is to investigate the laws regulating the causes of dissolution of companies and partnerships in the KSA, and to assess whether they have achieved their purposes. A secondary aim is to determine whether or not the need for further reform in legislation of dissolution of companies and partnerships and, if such reform is indicated, how it might be achieved in a way that reflects the needs of a state in the modern world yet remains consistent with Islamic law. To achieve these aims, the dissolution legislation in the KSA will be compared with the current English legislation. The study has the following objectives:

- To critically evaluate the current legal regulation of the dissolution of companies and partnerships in England and the KSA;

- To recommend reform of the KSA law regarding the dissolution of companies and partnerships;
- To consider whether Islamic law can be interpreted in a way that allows adoption of the most desirable provisions of English law; and
- To create a new legislative framework for causes of dissolution of companies and partnerships in the KSA.

1.7 Research Question and Hypothesis:

The study will primarily concentrate on critically evaluating the current legal regulation of dissolution of companies and partnerships in the KSA. The specific focus of the intended analysis is reflected in the working research question:

“To what extent is the current law governing the regulation of dissolution of companies and partnerships in the KSA sufficient and well-organised?”

Following on from the research question, the working hypothesis for this study is: the current legal regulation of the dissolution of companies and partnerships in the KSA would be enhanced by the incorporation of certain provisions of English law. Beyond the immediate scope of the hypothesis, this thesis will consider the laws of both England and the KSA in depth and has determined how best to use English law as a basis for reforming the law of the KSA. Incorporation of English law into the law of the KSA has reflected the religious, cultural, social and legal context of the KSA.

1.8 Research Methodology

The thesis will require the application of doctrinal and comparative legal analysis method. This will involve deductive research; by this I mean: a critical review of the law and of relevant literature on the basis of the working hypothesis earlier proposed¹⁰¹. The doctrinal and comparative legal analyses will consist of both primary and secondary research. The primary research will involve a critical analysis of legislation and case law in England and the Kingdom of Saudi Arabia KSA¹⁰². The secondary research will comprise a critical analysis of academic journal articles, books and essays in edited collections.

The legal system in the KSA is based upon traditional Islamic law. According to the Basic Regulation of Governance of the KSA, the Saudi government has the power to issue laws, international treaties, agreements, concessions and amendments by Royal Decree¹⁰³, provided that these do not conflict with established principles of Islamic Law¹⁰⁴. Therefore, with regards to Islamic law, this research will concern itself with the prescriptions of the Qur'an and of the Hadith and their interpretations and commentaries in classical manuals of Islamic law. The research examines and analyses the classical legal manuals of four Sunni schools of law (*madhihib*), in particular those sections offering specific treatment of the dissolution of companies and partnerships.

¹⁰¹ In 1.7 the working hypothesis reads: The current legal regulation of the dissolution of companies and partnerships in the KSA would be enhanced by the incorporation of certain provisions of English law.

¹⁰² It is crucial to note that KSA not being common law jurisdictions, have no case law that can be referred to for guidance on future cases and to provide reasons why judges reach particular decisions. In this respect, they are unlike the UK, where case law has a very significant role to play. Therefore, this research, when covering KSA, will rely, in the main, on the study of the statutory company law, relevant regulations, legal texts and academic literature. See: Hamd Allah, H., Saudi Commercial law, (Cairo: Annahdah, 1st ed, 2003), p.23

¹⁰³ Basic Regulation of Governance, Article 70

¹⁰⁴ Ibid, Article 67

The author also consulted resources containing the legal opinions (*fatawa*) of jurists (*ulama*). These opinions offer valuable legal thoughts on the matter of dissolution of companies and partnerships in Islamic law. Furthermore, they enable the researcher to appreciate the classical concept of dissolution in addition to resources written by modern Muslim commentators. The opinion of the classicists is especially important because they are regarded as being more reliable than the more modern commentators.

The relevant information and materials will be identified by a systematic search of databases, such as Westlaw, LexisNexis, BAILII, World LII and Hein Online. It will be supplemented by searches of relevant leading journals. The structured keyword searches will include the following terms: 'dissolution', 'liquidation', 'insolvency', 'wind up', 'regulation', 'UK', 'Saudi Arabia', 'case law' and 'Islamic law'. The sources used will be mainly in English, but classical and modern resources in Arabic will also be used.

1.9 The inherent dangers of comparative research

The methodology of this thesis is doctrinal comparative legal analysis. The main aim of the thesis is to achieve the improvement of legislation concerning causes of dissolution of companies and partnerships in KSA. A comparative approach to other legislation is one of the best ways to improve any legislation. The comparative aspect in this thesis will be mainly between English law and Saudi law. The purpose will be to examine the transplanting of useful points of law from English law into Saudi law with full consideration for Islamic law as a red line which must not be crossed. This approach is well-

known as legal transplants. The reference to this term is first found in *Legal Transplants* by Watson¹⁰⁵ who coined the term “legal transplant”¹⁰⁶.

There are advantages in seeking the improvement of a legal system by comparing it to other systems. One advantage in comparative law and legal transplant is mutual benefit. Where two legal systems have mutually desired outcomes, such as entering into a contract, it is especially useful to transplant legal ideas¹⁰⁷. Also, comparing laws across jurisdictions increases understanding of both systems, illustrating better how each system works by considering each system, one in the light of the other¹⁰⁸.

Another advantage in transplanting legal ideas across jurisdictions is receptiveness and flexibility to new ideas and concepts¹⁰⁹ which in turn benefit commerce and the citizen. This is especially useful to address problems of cross-border commerce and to respond to the demands of local industry. The importance of openness and flexibility to change is especially healthy for legal systems, as lawmakers respond positively to demands from domestic industry to flexibly provide for their demands¹¹⁰.

Finally, comparative law expands the professional experience of the jurist, especially due to the unsystematic nature of its study and research. Unsystematic knowledge is good for law reform. This is true even if laws contrast sharply in

¹⁰⁵ Watson, A., *Legal Transplants: An Approach to Comparative Law*, (Edinburgh: Scottish Academic Press, 1st ed, 1974)

¹⁰⁶ Von Wallendael, K., *Legal Transplants: Profitable Borrowing or Harmful Dependency?* (Revolutions Research Centre 2014), p.75, Accessed at: http://revjournal.org/wpcontent/uploads/sg/04_wallendael_SG.pdf, Accessed on: 20.09.2016

¹⁰⁷ Garoupa N and Ogus A, [A Strategic of Interpretation of Legal Transplants], *J. Legal Stud.* Vol.35, 2006 (pp.339-364) at 341

¹⁰⁸ Samuel, G., *An introduction to Comparative Law Theory and Method* (Oregon: Oxford and Oregon, 1st ed, 2014), pp.17-18

¹⁰⁹ Garoupa N and Ogus A, [A Strategic of Interpretation of Legal Transplants], *J. Legal Stud.* Vol.35, 2006 (pp.339-364) at 344

¹¹⁰ *Ibid*, p.340

their effect. Thus, if a law is bad in its original context, it may be good in the jurisdiction into which it is transplanted¹¹¹. Even if the incoming law has the opposite effect of what that law had in its original jurisdiction, it can benefit the receiving jurisdiction¹¹².

However, there are inherent dangers in comparative research¹¹³. The most common danger is the language barrier. The linguistics of law implies the contrasting of meaning. Even terms which appear very close to each other are not identical. The French words ‘contrat’, ‘domicile’ and ‘notaire’ are not equal to the English words contract, domicile or notary public. Hence, no reliance should be placed upon linguistic similarity. Quite to the contrary, language is perhaps the single most important barrier to successful transplantation, as it threatens the very essence of understanding legal terms¹¹⁴. To illustrate, Almadani¹¹⁵ does not recognise the distinction between the terms ‘companies’ and ‘partnerships’ in Saudi law. Almadani mentions the provisions of partnership in Saudi law as provisions of company. Therefore, the conclusion of his thesis is inaccurate.

Another danger emerges from legal transplanting from a community of different belief as this presents the disadvantage of conflict of fundamental values. One example of lack of awareness in legal transplantation is from French law into Saudi Arabia via Egyptian law. Despite Saudi Arabian law stressing the

¹¹¹ Watson, A., Legal Transplants: An Approach to Comparative Law, (Edinburgh: Scottish Academic Press, 1st ed, 1974), p.17

¹¹² Ibid, p.20

¹¹³ LeGrand famously disagreed with Watson, maintaining that legal transplantation was impossible due to cultural barriers. For more detail on this topic see Salim. M., Lawton. P., [The Law in a Post-Colonial State: The Shareholders’ Oppression Remedy in Malaysia], *Global Jurist Frontiers*, Vol.8, No.1, 2008, Article 3.

¹¹⁴ Ibid, pp.11-12

¹¹⁵ Almadani, M., The reform of minority shareholder protection in Saudi Arabia and Dubai in private companies. (University of Leeds, PhD Thesis, 2011)

consistency of its law with Islamic teachings, there are still some articles in Companies Law that expressly disagree with the mainstream of the Islamic law which is the constitution of the country. Such disagreement can be found, for example, in article 103 of the Companies Law 1965 where the issue of preferred shares is allowed, while under the Islamic rules shares of the corporation's members must not be differentiated in value or rights from each other. Also, article 116 of the Companies Law 1965 permits the issue of debentures which in reality involves the payment of interest (usury) in addition to the principal amount whereas the payment of pre-determined return is undoubtedly prohibited by the Islamic law. However, it can also present an opportunity for scholars to find ways round the contradictions between the faith or belief and the imported laws. The only impasse might be when there is a “clash of absolutes”¹¹⁶: when the incoming rule clearly and unequivocally contradicts an express provision in the receiving jurisdiction.

Additionally, different legal systems and environments may cause the failure of legal transplantation. A clear example of this in the UK is the debate over whether or not UK law should be codified¹¹⁷. The recent major debate over staying in the European Union, since the referendum on 23rd June 2016, means that we are further away from any civil codification of law than ever before, and therefore also unlikely to engage in any formative legal transplanting from Europe.

The impact of differentiation in legal and local culture, nature of citizenship and notions of governance between the country of export of law and the country of

¹¹⁶ Cotterrell, R., *Law, Culture and Society* (London: Ashgate, 1st ed, 2006), pp 121-4

¹¹⁷ Samuel, G., *A Short Introduction to the Common Law* (London: Elgar, 1st ed, 2013), p.79

import of law can be negative. For example, the Fourteenth Amendment of the United States Constitution forbids the conferral of any special status based upon gender¹¹⁸. The adoption of the Fourteenth Amendment and introduction of gender-based equality in KSA would be inconceivable, whether on legal or cultural grounds. By the same token, governance in the West is predominantly democratic, whilst in Middle Eastern countries regimes are mostly non-democratic. Wholesale import by legal transplant from a democratic culture would adversely affect a non-democratic culture.

In the light of the aforementioned advantages of legal transplantation and bearing in mind the dangers, it is worth considering Xanthaki who comments that modern comparative legal drafters engage in a particular process when drafting law. Quoting Thornton¹¹⁹, Xanthaki points out the five stages in the process of drafting. They are: understanding and analysing the proposal, designing the law; composing, developing and verifying the draft¹²⁰. Xanthaki omits mention of adaptation, which considers all the relevant factors to the receiving jurisdiction, including belief and culture. Therefore, comparative legal researchers must have a working awareness of language and linguistics, knowledge of belief, value systems and culture of both jurisdictions to be sure of the best result for successful legal transplantation. Additionally, legal transplantation should be managed by panels containing experts in four fields: language, beliefs, culture or social science and subject-specific expertise.

¹¹⁸ Del Duca L.F. and Levasseur A.A, [Impact of Legal Culture and Legal Transplants on the Evolution of the U.S. Legal System], *Am. J. Comp. L.* 2010, Vol.58, No.1 (pp.1-29), at p.28

¹¹⁹ Thornton G, *Legislative Drafting* (London: Butterworths, 4th ed, 1996), p.128 quoted in Xanthaki, H., [Legal Transplants in Legislation: Defusing the Trap], *ICLQ*, 2008, Vol.57, (pp.659-673), p.664

¹²⁰ Xanthaki, H., [Legal Transplants in Legislation: Defusing the Trap], *ICLQ*, 2008, Vol.57, (pp.659-673) at p.664

Chapter 2 Causes of Dissolution of Partnership in English Law

2.1 Introduction

The aim of this chapter is to explore the causes of partnership dissolution in English law and to critique the legal treatment of some of these causes. There will also be a focus on alternative methods for dissolutions of partnerships. The term “partnership” is usually used to denote a general partnership which is defined as a relation between two persons “carrying on business in common with view of profit”¹²¹. Partnership in English law is governed primarily by the Partnership Act 1890 and also by discrete provisions in the Insolvency Act 1986 and Mental Capacity Act 2005. One of the significant areas in partnership is dissolution of partnership and its causes. Section 1 of the Partnership Act 1890 defines a partnership as a "relation" between partners. Since the relationship changes when the partners change, the partnership then dissolves¹²².

Pragmatically there are two concepts of dissolution in partnership. The first concept is a general dissolution which may be described as a change in the membership of the partnership which leads the cessation of business and the winding up of the firm. The second concept is a technical dissolution which may be described as a change in the membership of the partnership which does not necessarily lead to the cessation of business and the winding up of the firm. This division of these concepts is implied from the Partnership Act 1890 in different sections. Section 42 shows technical dissolution, such as when the business of the firm continues uninterrupted, in spite of an intervening dissolution due to the departure of a partner from the partnership. Section 44 illustrates a general

¹²¹ PA 1890 s.1(1)

¹²² Berry, E., [The criminal liability of partnerships and partners: increasing the divergence between English and Scottish partnership law?], *Journal of Business Law*, Vol.7, (2014), (PP.585-607) at 594.

dissolution, where the dissolution marks not only the end of a particular legal relation between partners but also brings on the end of business with a distribution of assets. However, technical and general dissolution are both clear in section 31(2) which clearly delineates how assignees receive the share of profits due to them¹²³.

Partnership may be dissolved by court order, by arbitration award or even without involving a court or arbitration. In this chapter we will discuss the main instances in which a partnership may be dissolved under three main headings: Voluntary Causes of Dissolution of Partnership, Non-Voluntary Causes of Dissolution of Partnership and Causes of Dissolution of Partnership by the Court and Arbitration.

2.2 Voluntary Causes of Dissolution of Partnership

2.2.1 Fixed term agreements: duration and expiry

The proposed duration of partnership may correspond either to a fixed period of time limiting the length of the partnership and mentioned in the partnership agreement or to the duration of the lives¹²⁴ of the partners entering into the partnership¹²⁵. The latter can extend the business beyond retirement and make the business more profitable but also introduce uncertainty in the absence of agreement to the contrary - that the death of any partner will dissolve the firm¹²⁶. A fixed term partnership agreement must always stipulate the duration of the agreement such as including the clause which says that the business will

¹²³ Twomey, M., Partnership Law, (Dublin: Butterworths, 1st ed, 2000), pp 569-570

¹²⁴ I will discuss the implications of the death of a partner in detail in 2.3.2

¹²⁵ R. C. Banks, Lindley & Banks on Partnership, (London: Sweet & Maxwell, 19th ed, 2010), p.210

¹²⁶ Blackett-Ord M., Partnership Law, (Sussex: Tottel, 3rd ed, 2007), p.347

continue for as long as it remains profitable¹²⁷. The advantage would be to extend the business to the limits of its viability. The disadvantage is that the partners are duty bound to continue simply because there is a possibility of future profitability, unless they unanimously agree to change the terms. In *Handyside v Campbell*¹²⁸ the judge was unwilling to declare unprofitability as a dissolution cause unless there was a “practical impossibility” of profit and would not attribute loss as grounds for dissolution unless there were “special circumstances” to which the loss can be attributed. This approach sets an onerous responsibility on the partners to persevere with the continuance of a business even under very trying circumstances, imposing a narrow interpretation of the meaning of “loss” under section 35(e) of the Partnership Act 1890. By contrast, if the period of the partnership is fixed with a term of years in the partnership agreement, the partnership may be dissolved when the fixed term comes to an end by settlement or liquidation of the partnership affairs¹²⁹.

A partnership can continue after the expiry of that term, without any express new agreement, as a partnership at will¹³⁰. In that case, the rights and duties of the partners remain the same as they were before the expiration of the term¹³¹. The principle of continuing partnership was already the position in case law¹³² before the Partnership Act 1890 as long as there is a business continues on the same lines as the previous business¹³³. In *Neilson v Mossend Iron Company* Earl Selborne stated that as long as the same business carries on beyond the fixed

¹²⁷Millman, D., Flanagan, T., *Modern Partnership Law* (London: Croom Helm, 1st ed, 1983), p.40, footnote 5: *Wilson v Kirkcaldie* (1895) 13 NZLR 286

¹²⁸*Handyside v Campbell* (1901) 17 TLR 623

¹²⁹PA1890 s 27(2)

¹³⁰PA1890 divides partnerships into those entered into for a fixed term and others. The latter are known as partnerships at will. Morse G., *Partnership Law*, (Oxford: Oxford University Press, 7th ed, 2010), p50.

¹³¹PA1890 s 27(1)

¹³²*Neilson, Junior v Mossend Iron Company* and Others House of Lords (1886) 11 App. Cas.298

¹³³PA1890 s 27(2)

term of partnership, the old terms will continue to apply in the new partnership¹³⁴.

In a partnership for a fixed term, a partner normally has no right to retire until the expiry of the agreement unless his co-partners agree to the terms of his departure¹³⁵. Gibson L.J. at the appeal stage of *Hurst v Bryk*¹³⁶ stated that: “The defendants in agreeing between themselves to terminate the practice of the firm without Mr. Hurst's concurrence on 31 October 1990 were in my judgment in fundamental breach of that agreement”. During the term of agreement, the rights and duties of individual partners may be varied by mutual consent of all partners¹³⁷. If, however, a partner wishes to retire without obtaining mutual consent, the partner can apply to the court to dissolve the firm under section 35 of the Partnership Act 1890¹³⁸. Retiring from a fixed term agreement without a court procedure would be considered a breach of contract.

There is authority to suggest that a fixed term partnership will end automatically on admittance of a new partner which in *Firth v Armslake*¹³⁹ dissolved the former fixed term partnership and created a new partnership at will. This current position in the law may potentially be damaging for the stability of fixed term partnerships. Perhaps partnerships should be only be regarded by law to be dissolved after being properly applied for under section 35. Otherwise, they should be allowed to continue to exist in their fixed state, undisturbed by the mere admittance of a new partner¹⁴⁰. However, it is better to avoid the

¹³⁴ *Neilson, Junior v Mossend Iron Company and Others House of Lords* (1886) 11 App. Cas.298 para 303

¹³⁵ R. C. Banks, *Lindley & Banks on Partnership*, (London: Sweet & Maxwell, 19th ed, 2010), p.839.

¹³⁶ *Hurst v Bryk* [1999] Ch. 1, para 9

¹³⁷ PA 1890 s. 19

¹³⁸ R. C. Banks, *Lindley & Banks on Partnership*, (London: Sweet & Maxwell, 19th ed, 2010), p.839

¹³⁹ *Firth v Armslake* (1964) 108 Sols Jo 198

¹⁴⁰ More details about consequences of dissolution in 2.5 Consequences of dissolution of partnership.

complexity of having to apply to court. Partners can make a contrary agreement to continue the existing partnership even if a new partner is admitted, relying on section 19 of the Partnership Act 1890 which states that partners may vary the partnership agreement by unanimous consent, either express or implied¹⁴¹.

As a general note, if the duration of partnership is not fixed in the partnership agreement, there is a risk that a partnership at will may arise. This means that whereas a fixed term partnership would require all partners to unanimously agree on dissolution, an individual partner in a partnership at will, need only give notice to the other partners and the partnership will dissolve. However, the remaining partners may regroup themselves into a new partnership¹⁴².

When analysing the difference between fixed term partnership and partnership at will, various pros and cons of each type of partnership arise. Fixed term contracts provide security for partners, as there is clarity in the terms binding the partnership, and an assurance that the business is continuing according to set terms¹⁴³. Furthermore, a partner wishing to retire early may do so by resorting to section 35. Fixed term partnerships benefit from stability in that one partner cannot ever exercise an option to dissolve the partnership.

However, there are also drawbacks to fixed term partnerships. In a partnership for a fixed term, a partner normally has no right to retire until the expiry of the agreement unless his co-partners agree the terms of his departure¹⁴⁴. Also, there is a false sense of security in the creation of a fixed term partnership. The terms of agreement bind partners to act together. However, an illegal act by one of

¹⁴¹ In 2.6 further details of Contracting out of partnership dissolution

¹⁴² *Nissar Ahmed v Rahima* [1970] 1 MLJ 512 quoting *Abbott v. Abbott* [1936] 3 All E.R. 823

¹⁴³ Additionally, under section 19 Partnership Act 1890 the partners may vary the partnership agreement between them to provide the same reassurance that the firm will continue. In 2.6 further details of Contracting out of partnership dissolution

¹⁴⁴ *Hurst v Bryk* [1999] Ch. 1 para 9; Banks R. C., *Lindley & Banks on Partnership*, (London: Sweet & Maxwell, 19th ed, 2010), p.839

them can dissolve the entire partnership, even though the others are unaware of this; for example, in the case of the non-renewal of registration of one partner with the Law Society. Additionally, the retirement of a partner without court procedure or the admittance of a new partner will automatically dissolve the partnership, causing a new partnership at will to form¹⁴⁵.

A partnership at will gives to the partners exiting a fixed term partnership the opportunity to carry on with the business of the pre-existing fixed term agreement and has the following characteristics: flexibility as to when to bring the partnership to an end; there is no need for the unanimous consent of all partners to dissolve it; and that it takes only one partner need start the process to dissolve the partnership. The main advantage in this is the increase in flexibility to carry on business and the non-necessity for court procedure in undisputed situations. However, there are also disadvantages to a partnership at will. Firstly, in the absence of guiding legislation, court proceedings may be lengthier. The case for partnership dissolution will be decided by the judge at his discretion on the merits of the case only, and so there is no certainty at law that dissolution can be achieved.

In conclusion, there is a degree of flexibility in partnerships at will. However, this flexibility also reduces the stability of the partnership. Therefore, a partnership agreement should explicitly declare the duration of the partnership and the point at which it expires. Fixed term agreements would be preferable for the stability of the partnership, declaring both the new duration of term and what the terms will be once the agreement comes to end. Alternatively, there can be

¹⁴⁵ *Firth v Armlake* (1964) 108 Sols Jo 198

under section 19 Partnership Act 1890 an agreement that partnership continues and will therefore not be determined at will¹⁴⁶.

2.2.2 Termination of single adventure

According to section 32(b) the law states that, in the absence of alternative terms agreed, a partnership entered into for a single venture will dissolve when it terminates, without the need for a formal dissolution. Nonetheless, the termination of a single agreed venture does not necessarily bring the business as a whole to an end. In *Lindern Trawler Managers v WHJ Trawlers*¹⁴⁷, one member of the firm (WHJ) agreed with the plaintiff that the latter provide management services to the firm. Later, the firm refused to pay management charges incurred. The court held that the partnership between the parties existed at that time for a single venture only, namely, the exploitation of certain fishing rights pending the setting up of a company to take over those rights. The plaintiff's claim for recovery of charges was upheld, as the business carried out under the agreement set up under the now dissolved partnership passed onto the new company.

If partners wish to avoid the express clause terminating an agreement they may come to an alternative agreement, if the varying agreement predates the event which brings the termination of the agreement and the agreement is unanimous. For example, if A agrees with B to build a structure, and later they wish to continue their partnership beyond the construction, they must make the necessary changes to the agreement prior to the finish of the construction. An

¹⁴⁶ In 2.6 further details of Contracting out of partnership dissolution

¹⁴⁷ *Lindern Trawlers Managers v WHJ Trawlers* [1949] 83 LI L Rep 131

agreement after that terminating event would come too late to prevent termination of the agreement.

There is a possibility of continuation of a partnership after finishing the single transaction, and the business continues. This continuation will be considered as an implied agreement between partners. The continuance is presumed by section 27(2) which states that: “A continuance of the business...is presumed to be a continuance of the partnership”¹⁴⁸. In that case, the rights and duties of the partners remain the same as they were before the expiration of the term. The partnership will be known as a partnership at will, and the rights and duties of the partners remain the same as before so long as the business conducted is the same in nature as before¹⁴⁹.

The continuation of business beyond a single transaction is somewhat linked to the legal phenomenon of “accidental partnerships”. An accidental partnership occurs when after the end of a fixed term of partnership, business in common continues without expressly agreeing on a partnership. Remarkably, such partnership arises even if the partners’ express declaration is to the contrary. Statute provides for “holding out”, namely, the carrying on of business by conduct, whether by written or spoken word or by conduct¹⁵⁰ irrespective of the subjective opinion of a partner’s own actions; it is a question of law, based upon the facts of the case, not the intentions of the individual. In *Weiner v Harris*¹⁵¹, the judges concurred that words used to express intention to not form a partnership would not decide whether or not there was a partnership. Fletcher

¹⁴⁸ PA1890 s. 27(2)

¹⁴⁹ Ibid s.27(1)

¹⁵⁰ PA1890 s.14(1)

¹⁵¹ *Weiner v Harris* [1910] 1KB 285

Moulton LJ stated: “We are not ruled by the words disclaiming the existence of a partnership”¹⁵². Similarly, the effect of conducting business creates partnership even unconsciously¹⁵³. The nature of the resulting partnership is beyond ‘accidental’; it is not some unfortunate mistake, but design of the law, and not of the partners and therefore ‘constructive’ in nature¹⁵⁴.

In both continuation of business beyond a single transaction and accidental partnerships a business subsists without express terms, although this is only a formal matter, as the continuance of business will in any case create a new partnership at will, whatever they express about their relationship as partners. Thus, a business can and will continue at law beyond the dissolution of a fixed-term partnership under a new, implied or “accidental” partnership, if the partners’ actions show that there is a business in continuing, active existence.

In summary, when there is evidence that business is continuing to proceed independently of the termination of an agreed venture to operate in a new framework such as company to which the business transfers, or a new partnership at will. Alternatively, a partnership will arise constructively as a result of the conduct of partners at any time, irrespective of their individual intentions of association.

2.2.3 Dissolution by the unanimous agreement of partners

The unanimous agreement of partners to dissolve a partnership is required in the case of a fixed term partnership but not in the case of a partnership at will and a feature which distinguishes the two from each other.

¹⁵² *Ibid*, at 293

¹⁵³ Morse G., *Partnership Law*, (Oxford: Oxford University Press, 7th ed, 2010), p.47

¹⁵⁴ Milman, D., [Partnerships (1): Problems with Identification], *The Company Lawyer*, Vol.4, 1983 (pp.199-205), at 199

Partnership at will can be unilaterally dissolved by one of the partners giving notice,¹⁵⁵ as confirmed by section 26 of the Partnership Act 1890¹⁵⁶.

The unanimous request to dissolve a fixed term partnership is a variation of the partnership agreement and is governed both by the Partnership Act 1890 and by the terms set out in the partnership agreement, especially section 19 which sets out how the rights and duties of partners may be varied by the express or inferred consent of all the partners. This section shows that variation of agreements can be achieved either expressly or impliedly¹⁵⁷. Implied agreement may occur not by declaring the end of a partnership but the result of an act which is taken at law to be equivalent to it. In the case of *Watts v Hart*¹⁵⁸ the submission of end of year accounts to the Inland Revenue was taken to indicate that the partnership was at an end prompting the inspector to treat the business of the partnership to have ceased¹⁵⁹.

Thus, the dissolution of a partnership by the unanimous agreement of partners is a consequence of the fact that a partnership is a voluntary association which depends upon there being a continuing contractual relationship between the partners. If there is no express agreement to end the partnership, then it can occur impliedly, which The Law Commissions Report refers to as “default rules” which are applied when there is no agreement to the contrary¹⁶⁰.

¹⁵⁵ It will be treated in the following point 2.2.4

¹⁵⁶ Milman D and Flanagan, T., *Modern Partnership Law* (London: Croom Helm, 1983), p.41

¹⁵⁷ Blackett-Ord M., *Partnership Law*, 3rd ed. (Sussex : Tottel, 3rd ed, 2007) p112

¹⁵⁸ *Watts and others (trading as A A Watts) v Hart (Inspector of Taxes)* [1984] STC 548

¹⁵⁹ *Ibid*, at 553

¹⁶⁰ Partnership Law: Joint Report of the Law Commission and the Scottish Law Commission (Law Com No. 283 Scottish Law Com No. 192, 2003, Cm 6015) p.24

2.2.4 Dissolution of partnership by Notice

Section 32(c) states that, Subject the partners' agreement, any partner can give notice to dissolve a partnership if it is for "an undefined time"; these words refers to a partnership at will and distinguishes it from a fixed term contract¹⁶¹, although the process of dissolution of either form of partnership is similar¹⁶². The dissolution of partnership by notice in section 32(c) is also mentioned in section 26(1) which sets out that a partner determines the length of a partnership by giving notice of intention to dissolve, but notice must be given to all other partners¹⁶³. The unanimous serving of notice to dissolve can only be withdrawn by unanimous consent and affects partnerships, companies and trade societies equally. In *Glossop v Glossop*¹⁶⁴, the judge ruled that a resigning managing director was not able to withdraw his resignation once the board directors had met and accepted his resignation. As Neville J. stated, the director could no longer change his mind and withdraw his resignation "without the consent of the company"¹⁶⁵.

For practical, administrative purposes of referring to the decision to dissolve in further communications in court¹⁶⁶ it is preferable, although not required at law, to give notice to dissolve in writing, although it may also be given orally¹⁶⁷ or inferred. As Nicholls LJ stated in *Toogood v Farrell*¹⁶⁸, notice given in writing avoids consequences such as lengthy and costly processes or "to avoid

¹⁶¹ We mentioned the difference between fixed term partnership and partnership at will in 2.2.1.

¹⁶² Blackett-Ord M., *Partnership Law*, (Sussex : Tottel, 3rd ed, 2007), p.352

¹⁶³ Prime T., Scanlan G., *The Law of Partnership*, (London: Butterworths, 1st ed, 1995), p.266; PA 1890 s.26.

¹⁶⁴ [1907] 2 Ch. 370

¹⁶⁵ *Glossop v Glossop* [1907] 2 Ch. 370

¹⁶⁶ Banks, R. C., *Lindley & Banks on Partnership*, (London: Sweet & Maxwell, 19th ed, 2010), p.805

¹⁶⁷ *Toogood v Farrell* [1988] 2 EGLR 233

¹⁶⁸ *Ibid*

disputes...where the oral announcements relied upon were not even made formally at a partners' meeting"¹⁶⁹. Dissolution can also be inferred without formal notice such as the incorporation of a firm, change in the partnership which effectively dissolves it. In *Chahal v Mahal*¹⁷⁰ Neuberger LJ held that the transfer of all the assets and operations of a partnership to a company may result in dissolution of the partnership by agreement, on the ground that that is the proper inference to draw from all the circumstances"¹⁷¹. In *Bothe v Amos*¹⁷² the court held that a wife pregnant from an adulterous relationship was entitled to her share of a business with her husband, but only up to the point at which she left the matrimonial home. Thus, her adulterous relationship was seen to be "conduct" which brought not only the marriage but also the business partnership to an end. Megaw LJ reasoned that the wife had brought to an end the joint business and that the partnership was effectively ended by the wife's conduct which "was a voluntary abrogation by her of the essential obligation which she had undertaken by the agreement...What the husband carried on thereafter was a different business"¹⁷³. This means that whereas formal notice is the usual requirement, the finality of certain behaviours associated with the termination of an interpersonal relationship between partners coincides with and even determines the termination of the business relationship between those partners.

According to section 32 of the Partnership Act 1890 the date of dissolution of a partnership is either the date that the notice is received by the other partners¹⁷⁴, or, if specified in the notice, at a later date. Before the Partnership Act 1890, the

¹⁶⁹ *Ibid* at 237

¹⁷⁰ *Chahal v Mahal* [2005] EWCA Civ 898 2005

¹⁷¹ *Ibid*, para 28

¹⁷² *Bothe v Amos* [1976] Fam. 46

¹⁷³ *Ibid*, at 57

¹⁷⁴ PA1890 s.32

courts expressed reservations about the immediacy of the effect of notice. In *Crawshay v Maule*¹⁷⁵ Lord Chancellor Eldon stated that “the doctrine, that death or notice ends a partnership, has been called unreasonable...much remains to be considered before it can be approved”¹⁷⁶. This means that before the Partnership Act 1890 there may have been a need to weigh up consequences for the termination of a partnership – either by notice served or as the result of the death of a partner - before allowing the dissolution to take effect. However, under the Partnership Act 1890, which supersedes prior case law, the effect of notice served to dissolve a partnership has immediate effect on a partnership at will. The words indicating dissolution as taking place “as from” notice given in section 32 indicate that there is no amount of time which needs to be set aside to examine the consequences of a dissolution prior to it taking legal effect. However, the partners can either bring to an end or agree to continue the existence of the partnership relying on section 19 Partnership Act 1890 to vary the partnership agreement¹⁷⁷.

One could go further and say that the serving of notice to all partners is the actual cause of the dissolution. In *Firth v Amslake*¹⁷⁸ a partnership was dissolved “by virtue of” the notice given,¹⁷⁹ which indicates that dissolution occurs instantaneously. However, if after communicating notice to all partners it then comes to light that one partner died before the communication was complete, the notice is held to have no effect. In that case, dissolution will occur due to the death of the partner under section 33 of the Partnership Act 1890¹⁸⁰, effectively

¹⁷⁵ *Crawshay v Maule* (1818) 1 Swan 495

¹⁷⁶ *Ibid*, at 508 - 509

¹⁷⁷ In 2.6 further details of Contracting out of partnership dissolution

¹⁷⁸ *Firth v Amslake* (1964) 108 SJ 198

¹⁷⁹ *Ibid*, at 199

¹⁸⁰ We will discuss the death of a partner in 2.3.2

meaning that notice is superseded¹⁸¹ by another, earlier event. In *McLeod v Dowling*, Russell J held that even though McLeod had posted a notice in writing to his solicitor-partner Dowling, the notice did not take effect because Dowling did not receive the notice until the morning after it was posted to him, by which time McLeod had died. Thus notice was deemed to not have been communicated to all partners, as the notice to dissolve was interrupted by the intervening event of McLeod's death. Only receipt of notice with all partners alive at the time of receipt would have complied with section 32(c).

Therefore, where a partnership is entered into for an undefined time, one partner may dissolve the partnership by fully informing all partners either orally or in writing. Notice must be received by all partners without the interruption of a superseding event. Alternatively, dissolution may be inferred from circumstances. Once given and accepted, notice cannot be withdrawn without the consent of all the partners. Dissolution of a partnership takes place on the date of the notice or at a later date if specified in the notice.

It is worth noting that the suddenness of the immediate effect of notice given can cause significant distress to the parties to which notice is served. The Law Commissions Report has suggested that it would be advisable to implement rules to enable the withdrawal of a partner without causing dissolution of the entire partnership. The Report states that flexibility would not be compromised by these rules¹⁸². In fact, this approach would improve flexibility by reducing crises in the event of serving of notice of withdrawal and would present a great

¹⁸¹ *McLeod v Dowling* (1927) 43 T.L.R. 655

¹⁸² Partnership Law: Joint Report of the Law Commission and the Scottish Law Commission (Law Com No. 283 Scottish Law Com No. 192, 2003, Cm 6015), p.111

advantage for the continuity of business, to both individual partners and to businesses in general.

It is however possible that relief from potential distress to parties served notice may already be available in existing law. Thurston has said that the Partnership Act 1890 is one of the most durable and efficacious pieces of legislation in English law¹⁸³ and has a broad scope designed to accommodate different emerging situations in partnerships. It could be that section 32 of the Act could serve as a magic formula to avoid chaos at the time of the dissolution of a partnership. The phrase “...subject to any agreement between the partners...”¹⁸⁴ could be used to imply a period of time during which partners have the opportunity to resign from the partnership before dissolution takes place. Therefore, it can be suggested that a partnership agreement explicitly declare that if any partner wishes to dissolve the partnership, he must inform other partners 90 days before dissolution takes place to avoid a sudden dissolution which may cause crisis or distress for other partners. This concept has already been operating for over a decade in the United States under section 801(4) of the Revised Uniform Partnership Act (RUPA) 1997. Section 801(4) allows 90 days grace after notice given to the partners to “cure” insubstantial or innocent regulatory violations. The 90-day period can also serve as sufficient time for the partnership to prepare itself for its post-expulsion existence. However, the partners can write a clause into the partnership agreement stating that if it suits

¹⁸³ Thurston J.P., [Partnership Act 1890: time for reform?] J.B.L., (1988), (pp.155-159), at 159

¹⁸⁴ PA 1890, s. 32

the circumstances and all partners agree, the single partner leaving the partnership can do so immediately¹⁸⁵.

A final point: notice served in bad faith, even in a partnership for an undefined time, is not good notice. In *Walters v Bingham*¹⁸⁶, the judge ruled that: "...notice of dissolution served in bad faith by one party is invalid..."¹⁸⁷Tudor¹⁸⁸ outlines several premises for good faith. Dissolution by notice and good faith should mean that the partner who wishes to dissolve the partnership is not doing so to incur an unfair advantage or profit which he ought to share with his partner. For example, if enters into a partnership to invest and on finding a good investment, pulls out of the partnership so that he can buy the stock and enjoy the profit on his own. He therefore concludes that notice to dissolve should be not only in good faith, but also at a suitable time which is fair to the other partner. Good faith is no less than a matter at law, and academics and judges have pointed out that any steps taken to exclude a member or in any way alter the partnership should be done in good faith. For example, Barron¹⁸⁹ points out that the trust and good faith stands "at the heart" of the partnership relationship, listing disclosure of secret profit as an example of acting in good faith towards the other partners. The relationship between partners is much more than just a contract – it is a personal relationship, on which the partnership rises and falls. As Berry points out, a relationship of mutual trust and good faith gives rise to the sharing amongst partners the individual liability for both and criminal

¹⁸⁵ In 2.6 further details of Contracting out of partnership dissolution.

¹⁸⁶ *Walters v Bingham*, [1988] F.T.L.R. 260

¹⁸⁷ In *Walters v Bingham* (supra) the notice was served to hide the partner's fraud.

¹⁸⁸ Tudor, O.D., *Pothier on Partnership*, (London: Butterworths, 1st ed, 1854), p. 109

¹⁸⁹ Barron. M., [Partnership Law Reform: a review of the main changes] *The Company Lawyer*, Vol.25, No.10, (pp.293-297) 2004, p.8 paras 296-7

matters¹⁹⁰. Jackson¹⁹¹ suggests that partnership charter can provide, as a separate document from the partnership agreement a non-binding set of standards and rules of conduct which underpin business practice of the firm.

Recently, English courts have refocused the requirement for good faith more narrowly to require honesty and integrity in contracts where there is a special relationship, or “relational” contract¹⁹². Critics of this trend point out that as a consequence of this development, English law will lack certainty as it will be unclear as to what constitutes a breach in commercial cases. Furthermore, implied terms of honesty in contracts will need guidance from court decisions abroad as there is no guidance at this time on how to apply these new standards¹⁹³. The English courts have adopted more demanding standards of good faith in commercial cases. In partnerships good faith between the partners is required at the highest degree. Thus if one partner is negotiating to purchase the interest of another partner he must disclose all material facts or else risk court action. This is an exception to the general rule that silence does not amount to misrepresentation. Between partners silence is actionable.

2.2.5 Charging order on a partner’s share

A charging order is an order of court on the defaulting partner debtor’s assets¹⁹⁴ which is made to enforce a judgment¹⁹⁵ against the partner debtor. A court issuing a charging order on the share of a partner in a partnership can

¹⁹⁰ Berry, E., [The criminal liability of partnerships and partners] J.B.L, Vol.7, 2014, (pp.585-607), at 597

¹⁹¹ Jackson, S., [Good faith in construction - will it make a difference and is it worth the trouble] Const. L.J., Vol. 23, No.6 2007 (pp.420-435), at 423

¹⁹² *D&G Cars Ltd v Essex Police Authority* [2015] EWHC 226 (QB)

¹⁹³ Alexandra Whiston-Dew, ‘A question of faith’, Law Society Gazette 2015, 112(17), p.27

¹⁹⁴ Her Majesty’s Revenue Collection, [Debt Management and Banking Manual], Accessed at: <http://www.hmrc.gov.uk/manuals/dmbmanual/DMBM667320.htm>, Accessed on 15.10.2014

¹⁹⁵ Charging Orders Act 1979, s.1(1)

cause dissolution and holds him liable for debt¹⁹⁶. The order prevents the debtor from selling the charged assets without first paying the judgment debt. Section 33(2) states that dissolution is a voluntary option for the co-partners if the debtor partner's share is for a separate debt. This means that the option to dissolve may only be taken under the Partnership Act 1890 unanimously and not under any other legislation¹⁹⁷. Morse¹⁹⁸ comments that there is no authority on the requirement for unanimity and that it contracts with the right of a single partner to dissolve the firm under section 32(c) or section 26¹⁹⁹.

An option to dissolve must be taken at a reasonable time for the business; every partner must have knowledge that it is being exercised; and once exercised, it cannot be withdrawn²⁰⁰. The date of dissolution is taken to be the date on which the option is exercised²⁰¹. This point is not mentioned in the Act but appears to be beyond argument²⁰². Before the Partnership Act 1890, the effect of a charging order (or writ of execution as it was formerly known) was extreme. A writ would generate the seizure of partnership assets and the shutting down of the place of business while this took place. This interference to the business caused the non-debtor partners to suffer substantial financial losses and often paralysed the firm's business²⁰³. Following the Partnership Act 1890 the effect upon the partners was more moderate. Section 23(1) of the Act states that only if a writ of execution is issued against the firm could it have effect on partnership

¹⁹⁶ *Scarf v Jardine*, (1882) 7 App. Cas 345 Blackburn LJ at 359

¹⁹⁷ Blackett-Ord M., *Partnership Law*, (Sussex: Tottel, 3rd ed, 2007), p. 358 see footnote 3

¹⁹⁸ Morse G., *Partnership Law* (Oxford: Oxford University Press, 7th ed. 2010), p.228

¹⁹⁹ *Ibid*, p.227

²⁰⁰ Per Blackburn J in *Scarf v Jardine* (1882) 7 App. Cas. 345 para 360: "...where there is a right to elect the party is not bound to elect at once; he may wait and think which way he will exercise his election, so long as he can do so without injuring other persons, and accordingly in that particular case it was held that he had not lost his right to elect by a reasonable waiting under rather peculiar circumstances; but when he has once fully elected it is final."

²⁰¹ Prime T., Scanlan G., *The Law of Partnership*, (London: Butterworths, 1st ed, 1995), p. 264

²⁰² R. C. Banks, *Lindley & Banks on Partnership*,. (London: Sweet & Maxwell, 19th ed, 2010), p.812

²⁰³ Milman D and Flanagan, T., *Modern Partnership Law* (London: Croom Helm, 1983), p.82

assets. The only recourse for the creditor after the Partnership Act 1890 under section 23(2) is by an order being made against the partner's interest in the partnership property and profits or against any other money due to him from the partnership.

In *Brown v Hutchinson*²⁰⁴ the judge clarified that a charging order has “no immediate effect on the co-partners at all” beyond an equitable charge over the debtor partner's interest and it does “not harass or affect the other partners in the least”,²⁰⁵ since the co-partners are protected by an injunction against the creditors receiving anything from them. The effect of this charge is not to provide any money other than what the co-partners hand over to the receiver, instead of handing it to the debtor partner.

Nonetheless, court protection for innocent co-partners from the debtor's liability is limited. Solvent co-partners can get rid of the judgment debtor, but this would involve either the dissolution of the firm or a pay-off to the receivership to settle the account with the third-part claimant who made the charging order. Under the Partnership Act 1890, dissolution is the only alternative to pay-off. Thus, while the innocent co-partners may not be said to be “harassed”, it is simply not true to say that they are unaffected “in the least”.

Other measures, perhaps controversial, but more effective in the interests of avoiding dissolution have been considered by commentators. Markson discusses the possibility of reducing the debtor partner's share in the name of protecting the interests of the partnership. This might be achieved by paying agreed salaries to partners, and possibly excluding the share of the debtor partner.

²⁰⁴ *Brown v Hutchinson* [1895] 1 QB 737

²⁰⁵ *Ibid.*, at 739

Markson²⁰⁶ points out that the only objection to this method will be the question of whether it would be fraudulent to act in this way in the particular circumstances of the case.

For a more equitable outcome, I suggest in conclusion that there needs to be a change in the law. This could be in the form of an amendment to the Partnership Act 1890 which would provide for creditors to receive compensation proportionate to the share that would be paid out to the debtor creditor on the occasion of his departure from the firm e.g. on retirement, but no more a sum than would minimally allow the partnership to continue to survive in the direction of the remaining partners. This measure would equitably protect the interests of all parties concerned, including the debtor, who also deserves a fair share on departure from the business, whatever the circumstances of his departure. Alternatively, the law could adopt the measures which the Law Commissions²⁰⁷ has proposed that there should be a provision available to the other partners to expel a partner by unanimous vote rather than dissolving the partnership. This could prove a useful instrument to protect partnerships from resulting from the imposition of a charging order on the shares, assets or property of a partner whose debts are called in.

2.3 Non-voluntary Causes of Dissolution of Partnership

2.3.1 Two persons: minimum requirements for a partnership

There must be at least two or more partners to either set up a partnership or to continue an already existing partnership or else it will dissolve. This is

²⁰⁶ Markson H. E., [Partnership: Equitable Execution] Solicitors' Journal Vol.125 (1981), pp.109-112

²⁰⁷ Partnership Law: Joint Report of the Law Commission and the Scottish Law Commission (Law Com No. 283 Scottish Law Com No. 192, 2003, Cm 6015), p.133

presumed by section 1(1) of the Partnership Act 1890 which uses the phrase "subsists between persons", which implies that a partnership must contain at least two persons. "Persons" refers not only to individuals, but to groups of people, as stated in the Interpretation Act 1978: "'Person' includes a body of persons corporate or unincorporated"²⁰⁸. The insufficiency of a sole partner is an important focus in *Hurst v Bryk*²⁰⁹ where it was stated that: "there cannot be a partnership consisting of one member: a partnership must have at least two partners"²¹⁰. It was therefore decided that a sole successor partner in a dissolving partnership could not inherit the obligation of debts from former partners.

As a general principle, if a business is run by one or more persons on behalf of themselves and others, a partnership may be held to exist. This presumes that a partner is a partner only if they act in their designated role (*Cox v Hickman*)²¹¹ and that a partner acts as a full partner in the business not as a third party (*Holme v Hammond*). In *Cox v Hickman*²¹², the appellants' claim that they had not acted in their designated role as trustees or indeed had resigned from doing so after only six weeks was upheld by the House of Lords and no partnership was held to have existed²¹³. The House of Lords held that no partnership was created by the deed drawn up by the trustees and that

²⁰⁸ Interpretation Act 1978 s5 Schedule 1

²⁰⁹ *Hurst v Bryk* [1999] Ch. 1

²¹⁰ *Ibid*, at 10

²¹¹ *Cox and Wheatcroft v Hickman* (1860) 268 11 E.R. para.431

²¹² *Ibid*

²¹³ However if a person did act in their designated role, however passive, such as that of a sleeping partner in a business venture, then a partnership may indeed be recognised by a court.

consequently the appellants “C[ox] and W[heatcroft] could not be sued on the bills as partners in the company”²¹⁴.

However, if a person or persons carry on a business as a third party, or on behalf of a third party, but not as fully participant and empowered to carry out the business, then there is mere association among the persons but no partnership. In *Holme v Hammond*²¹⁵ the judge stated that the liability of a partner depended upon “having constituted his supposed partners his agents in the transaction”²¹⁶. This means that it is not enough to be in mere association alone with a partner to an agreement but that one must be shown to be the agent of the other, acting on other’s behalf.

In conclusion, as long as these conditions are satisfied and there are a minimum of two associated persons fulfilling those conditions, a partnership will be held to exist between two persons “in common”. Automatic dissolution on reduction of the number of partners to below two can present a serious problem to a business which is in full flow and needs to continue to operate. Therefore, it would be most helpful for English law to adopt the following proposals to help save partnerships under threat. In 2000, the Joint consultation paper²¹⁷ proposed that partnerships be able to survive as one-partner firms for a period of time, until a new partner could be sought, and thereby deem a continuance of partnership to have occurred from after the last partner but one. The Joint consultation paper suggests that a period of grace of 90 days should be implemented to allow the sole remaining partner to find a new partner and if this

²¹⁴ *Cox and Wheatcroft v Hickman* (1860) 268 11 E.R. at 431

²¹⁵ *Holme v Hammond* (1871 - 72) L.R. 7 Ex.218

²¹⁶ *Ibid*, at 225

²¹⁷ Commission and the Scottish Law Commission (2000) Partnership Law: A Consultation Paper. London: The Stationery Office, Joint Report of the Law Commission no. 159, Scottish Law Commission no. 111.

proves a success, the partnership could be deemed to have continued. However, it would be wise to implement special measures to avoid the abuse of periods of grace such as finding a new partner only temporarily “for the sole purpose of activating the special continuance rule”²¹⁸. Following the consultation, the final Law Commissions Report²¹⁹ has ignored these valuable suggestions. It is unfortunate that the law has not progressed on this point since the turn of the century as it would certainly help businesses to survive the inevitable situation of a sole partner being left to continue a business after withdrawal or death in a two-partner situation.

2.3.2 Death of a partner

Death is regarded as an event which is reasonable, in the eyes of the law, to bring to a partnership to an end. The death of one partner causes the dissolution of a partnership as section 33(1) states that all partnerships dissolve when one partner dies and the date of dissolution of the partnership is the date of death of the partner²²⁰. In *Gillepsie v Hamilton*²²¹ the judge commented that even a fixed term partnership is thus dissolved²²². The rule of dissolution on the occasion of death is thus said to be strictly applied, except if there are very specific provisions²²³ in the agreement that the business could continue beyond the death of a partner, among the surviving partners “either alone or in partnership with the personal representatives of the deceased partner”²²⁴.

²¹⁸ Ibid, para. 6.62

²¹⁹ Partnership Law: Joint Report of the Law Commission and the Scottish Law Commission (Law Com No. 283 Scottish Law Com No. 192, 2003, Cm 6015)

²²⁰ PA1890 s.43

²²¹ *Gillepsie v Hamilton* (1818) 3 Madd 251

²²² *Ibid*, at 254

²²³ Therefore, a specific clause might look like this: ‘This partnership will continue under any and all circumstances’. This should suffice to avoid dissolution due to the death or bankruptcy of a partner.

²²⁴ Hardy Ivamy E.R., Underhill’s Principles of the Law of Partnership (London: Butterworths, 1986), p.80

Thus, the partnership will only continue in the case of the death of a partner if there was evidence showing that the dead partner had intended for the business to continue, even beyond his death. In *Wallace v Wallace's Trustees*²²⁵ A and B were partners in a legal practice for a five year period. B died at the end of the five year period. B's heir claimed a share of proceeds from new business conducted by A under the terms of business already started under the partnership between A and B. The judge dismissed the claim, stating that: "there was nothing averred to show that the partners had consented to a continuance of the business after that date, and accordingly...a continuance of the partnership after that date could not be inferred"²²⁶. This means that at the point of the death of a partner, the surviving partner would continue on his own, and any new business generated by the practice would be entirely his to take unless there had been a clear stipulation explicitly stating to the contrary. Whereas this is the case in a partnership such as a legal firm supplying services, where there is original investment money in an enterprise, the consequences for sharing out profit for business conducted after the death of a partner may change. In *Yates v Finn*²²⁷, the defendant had assumed control of the claimant's original capital investment into a company manufacturing lamps. The judge ruled that the defendant, Finn, could only take the profit for what he had earned after the death of his partner proportionate to the investment which he had made in the original enterprise. The judge stated that: "after making a proper allowance to B. for managing the business, the profits earned since A.'s death must be divided between A.'s representatives and B., according to the proportion

²²⁵ *Wallace v Wallace's Trustees* (1906)13 S.L.T

²²⁶ *Ibid*, at 844

²²⁷ *Yates v Finn* (1880) 13 Ch. D

in which the partners were entitled to the capital employed in the business”²²⁸. This means that profits would be expected to be shared out not in simple division of what remains but in relation to entitlement from previous investment. In conclusion, the death of a partner has two effects; firstly, that the heir succeeds to the share of the deceased and to the debts by which he was bound. However, he does not take the place of the deceased as a partner to conduct new business. Secondly, there is dissolution even among the surviving partners²²⁹ unless there can be a stipulation in the partnership agreement to replace the dead partner which avoids the need for dissolution among the surviving partners²³⁰.

A possible theory behind the need for dissolution in the event of the death of a partner is that the business partnership itself under English law is not what is cancelled. Rather it is the dissolution of community which happens due to the death of one partner²³¹. For this reason, provided there is evidence to show that there is an express stipulation in the contract to hold together the surviving partners with the heir, the partnership should continue to exist. Partnership is dissolved at law not because of the clinical event of death, but because that death ruptures the community which allows a partnership to continue. This distinction could prove very useful in discussing the legitimacy of the dissolution of partnerships in traditional systems of law, such as Islamic law. Finally, it is strongly suggested that to avoid dissolution, a partnership agreement should always include a clause of ‘immediate reconstitution’, explicitly declaring that the partnership will not dissolve on the death of a

²²⁸ *Ibid*, at 839

²²⁹ Tudor, O.D., *Pothier on Partnership*, (London: Butterworths, 1st ed, 1854), p. 107

²³⁰ PA1890, s. 33(1)

²³¹ Tudor, O.D., *Pothier on Partnership*, (London: Butterworths, 1st ed, 1854), p.105

partner. Furthermore the agreement should also provide for the manner in which his share should be bought out, in exactly the same way as if he had retired.

2.3.3 Bankruptcy of a partner: circumstances and consequences

Bankruptcy of even one partner causes dissolution under section 33(1) of the Partnership Act 1890. Section 278 of the Insolvency Act 1986 states that the bankruptcy of the debtor takes place on the day upon which the order for bankruptcy is made. The date of dissolution will be the same date of the debtor's bankruptcy²³².

Meanwhile, the bankruptcy of one partner will expose the other partners to legal action by third parties, as all partners are both joint and severally liable. Therefore, as Twomey states that dissolving the partnership may be the only way to terminate the liability of the other partners²³³. Furthermore, expelling bankrupt partners can cause reputational damage to the firm, and this is avoided by dissolution. For this reason, goodwill can be considered an asset²³⁴ in calculating the value of the bankrupt partner's share in the partnership, enabling a bankrupt partner to leave with dignity.

Thus, dissolution by the bankruptcy of one partner under section 33(1) has two main effects: the first regards knowledge of the bankruptcy; it requires no notice to be given to the other partners and is said to take place "without notice"²³⁵. The second effect is that the other partners have joint liability to discharge the debts of the partnership. Nonetheless, as Milman and Flanagan²³⁶ explain, the

²³² Prime T., Scanlan G., *The Law of Partnership*, (London: Butterworths, 1st ed, 1995), p.263

²³³ Twomey, M., *Partnership Law*, (Dublin: Butterworths, 1st ed, 2000), p.570

²³⁴ Moye, J., *The Law of Business Organizations*, (London: Cengage, 2004), p.73

²³⁵ Blackett-Ord M., *Partnership Law*, (Sussex : Tottel, 3rd ed, 2007), p.357

²³⁶ Milman D and Flanagan, T., *Modern Partnership Law* (London: Croom Helm, 1983), p.141

insolvency of one partner does not mean that the other partners must also be declared bankrupt. In *Mills v Bennet*, the court agreed that if one partner transacted business and then closed down business and stopped payments to creditors, there would be no conclusion from this that the other partners of the same business were declaring themselves bankrupt²³⁷.

2.3.4 Dissolution by illegality of partnership

Section 34 of the Partnership Act 1890 legislates on dissolution caused by virtue of the illegality of partnership. This means that any event which makes it unlawful, either for the partners to continue the business of the firm, or for the partnership itself to continue, will dissolve the partnership²³⁸. A partnership may be illegal if one partner is classed as an alien enemy. This means that he is either resident in a country which is at war with the United Kingdom or carrying on business there, whatever his nationality.²³⁹ This does not include a foreign national from a country at war with, but resident in the United Kingdom; such an enemy alien, once registered as such, is effectively an “alien friend”²⁴⁰.

No partnership can be formed for an illegal purpose. An enterprise which started out as legal and is subsequently prescribed as illegal will also fall under this section²⁴¹. The illegality of the partnership may appear slight in the eyes of a layman, although its consequences are drastic and it will dissolve the whole partnership automatically. In *Hudgell Yeates v & Co. v Watson*²⁴² a solicitor simply forgot to renew his licence to practice. As the judge in the Court of

²³⁷ *Mills v Bennet* (1814) 2 Maule and Selwyn 556

²³⁸ Morse G., *Partnership Law*. (Oxford: Oxford University Press, 7th ed, 2010), p.231

²³⁹ R. C. Banks, *Lindley & Banks on Partnership*, (London: Sweet & Maxwell, 19th ed, 2010), P.64

²⁴⁰ *Porter v Freudenberg* [1915], 1 KB 857, at 873

²⁴¹ Prime T., Scanlan G., *The Law of Partnership*, (London: Butterworths, 1st ed, 1995), p.265

²⁴² *Hudgell Yeates v & Co. v Watson* [1978] 2 All ER 363

Appeal ruled: “...by virtue of section 34 of the Partnership Act 1890 the lapse of S.'s practising certificate was an event which automatically dissolved the existing partnership”²⁴³. As Waller LJ explained, in all situations of illegality “knowledge or otherwise of partners does not affect the dissolution. It takes place by force of law”²⁴⁴. Thus, there is no need for a court order for dissolution; it happens automatically by operation of the law alone²⁴⁵. Blackett-Ord²⁴⁶ points out that once the illegality is resolved, the firm can reconstitute itself. However, this would require the consent of all continuing partners. Lindley²⁴⁷ suggests that, under section 34, if a firm is carrying on more than one business, the prospect of dissolution may be avoided and the firm can effectively reconstitute itself and continue to operate. However, this would depend on the degree to which the firm remains viable to operate. What is not entirely clear is whether the business remaining to the firm to conduct need be its main business²⁴⁸ or if it need only be a “major aspect”²⁴⁹ of its business. I would suggest that the most important element is the firm’s income, and that it is sufficient to make it sustainable for the business to continue even without the disqualified partner.

To conclude this section we can say that, the effect of illegality is that dissolution is automatic and takes place even without knowledge of the other partners. The agreement and knowledge of all partners is required to accept back a partner in default of correct registration into a partnership. An illegal action such as failure to renew will dissolve a partnership even where there is no

²⁴³ *Ibid*, at 452

²⁴⁴ *Ibid*, at 467

²⁴⁵ Blackett-Ord M., *Partnership Law*, (Sussex: Tottel, 3rd ed, 2007), p.82

²⁴⁶ *Ibid*

²⁴⁷ R. C. Banks, *Lindley & Banks on Partnership*, (London: Sweet & Maxwell, 19th ed, 2010), p.813

²⁴⁸ *Ibid*, p.813 footnote 204

²⁴⁹ Prime T., Scanlan G., *The Law of Partnership*. (London: Butterworths, 1st ed, 1995), p.265

knowledge of the illegality. One suggestion that has been made to avoid dissolution in the case of illegality where one partner has failed to ensure his status as a qualified partner is to include an express clause in the partnership agreement that “the unqualified partner should be deemed to have retired from the partnership on the date of dissolution.”²⁵⁰ Another more radical suggestion made by the Law Commissions Report is to reform section 34 to say that only the relationship between that partner and the others, and not to dissolve the partnership as regards all the partners²⁵¹. This means that in the case of one partner failing to renew a licence to practise, that partner will simply drop out of the partnership in a manner similar to that of an expelled partner. The remaining partners would continue in the partnership undisturbed. Were the law to amend section 34 thus, there would be no need to manufacture a clause for inclusion in the partnership agreement. There is a case precedent for the notion that a solicitor who fails to renew a licence drops out of a partnership. In *Hudgell Yeates & Co. v Watson*²⁵² the judge observed that: “The effect of a failure to take out or renew a practising certificate in due time is therefore to withdraw the capacity to act as a practising solicitor until the certificate is again in force...Where there are two or more partners the partnership would in practice recommence without the unqualified person”²⁵³ Although reforming section 34 appears to be a very good way forward, it does not go far enough. It is also necessary to allow for the automatic re-entry into the old partnership of the

²⁵⁰ R. C. Banks, *Lindley & Banks on Partnership*, (London: Sweet & Maxwell, 19th ed, 2010), p.814 footnote 212

²⁵¹ Commission and the Scottish Law Commission (2000) *Partnership Law: A Consultation Paper*. London: The Stationery Office, Joint Report of the Law Commission no. 159, Scottish Law Commission no. 111. P.298, para 6.27. This proposal has not been adopted in the final report. *Partnership Law: Joint Report of the Law Commission and the Scottish Law Commission* (Law Com No. 283 Scottish Law Com No. 192, 2003, Cm 6015), p.141.

²⁵² *Hudgell Yeates & Co. v Watson* [1978] Q.B. 451

²⁵³ *Ibid*, at 455

temporarily defaulting partner. The collegiate consent of the other partners to continue working with their partner in default was never in question, they always freely gave it. It is only a matter of strict legal compliance that the partnership was dissolved, and this happened without the element of knowledge present. Therefore, should the defaulting partner remember to renew his licence within a reasonable period of time, such as three months, the old partnership should be automatically restored. If the renewal has not been done within three months, the partnership dissolves. This temporarily ceasing to be a partner encourages the partner to fix his legal state in this period, and if not, the partnership will dissolve. This would afford sufficient incentive to behave legally with the minimum disruption to the partnership.

2.3.5 Cessation of business

The author of Lindley describes a cessation of business under the section which discusses causes of dissolution of partnership, thus: “if the partners agree a permanent cessation of all forms of business, this must take effect as an agreement to dissolve since, in the absence of business, no partnership can exist within the meaning of the Partnership Act 1890”²⁵⁴. Lindley may have derived this from the very definition of partnership in section 1 of the Act which speaks of a partnership as “the relation which subsists between persons carrying on a business in common with a view of profit”. According to Lindley it is the cessation of business which is the technical reason for dissolution; he states: “in the absence of a business no partnership can exist

²⁵⁴ R. C. Banks, Lindley & Banks on Partnership, (London: Sweet & Maxwell, 19th ed, 2010), pp.814

within the meaning of the Partnership Act 1890”²⁵⁵. Lindley himself notes that there is a problem with his approach, namely that there are cases which demonstrate that cessation of business under the partnership will not be deemed to have dissolved the partnership, as the business could carry on in another framework. Indeed, the business and the partnership are regarded as two separate entities which operate independently of each other. At first glance, it seems that under the Act, provided there is business to carry on in some form, then the business and not the actual partnership itself determines whether or not there has been a cessation of business. The indirectness of the link between cessation of business and dissolution of partnership may be the reason why most authorities do not mention cessation of business as a cause of dissolution of a partnership. As Blackett-Ord states: “The cessation of the business does not put an end to the partnership, which continues until it is dissolved...Dissolution can be by consent, if genuinely reached..”²⁵⁶ Thus, it is not the fact of cessation of business but the agreement to a permanent cessation of business which would bring about the cessation of the partnership.

Case law supports this criticism of Lindley’s view; the cessation of business under the original partnership does not itself bring about dissolution. For instance, if the business of a partnership was continued through a company, then the existence of the partnership may persist beyond its fixed term. In *Rosenberg v Nazarov*²⁵⁷ the court was satisfied that the partnership against which the claim was brought still existed, since the business of the partnership was being sustained other viable means, namely, the two companies carrying on the

²⁵⁵ Ibid

²⁵⁶ Blackett-Ord. M., Partnership Law, (Sussex : Tottel, 3rd ed, 2007), p.104 para.7.5

²⁵⁷ *Rosenberg v Nazarov* [2008] EWHC 812 (Ch) points 6,12

business of the partnership. This means that although the partnership itself was not carrying on the business of the partnership, the partnership did not dissolve as its business was being carried on by other means. In *Dyment v Boyden*²⁵⁸ partnership is differentiated from the business itself in the following way: “The legal structure of the operation was...the freehold...vested in...three co-venturers...in equal shares, but the actual business was to be operated through the vehicle of the company”²⁵⁹. This means that the partnership was seen as the framework which holds in the relation between the parties, but that the actual business of the partnership was carried by an appropriate “vehicle”. This means that the partnership exists even without being the carrier for the business of the partnership, and therefore only an agreement to end that partnership will be a direct cause of its dissolution. This does not mean that the business and partnership are not linked – it merely suggests that they can operate independently without causing direct legal effect upon each other.

2.4 Causes of Dissolution of Partnership by the Court and Arbitration

A court²⁶⁰ can order the general dissolution of a partnership as a whole, but not in part²⁶¹, because, as section 25 of the Partnership Act 1890 states, not even a majority of partners can expel any partner unless the partnership agreement expressly says that it cannot. Dissolution effectively expels not only that partner but the entire partnership even without the knowledge of the other

²⁵⁸ *Dyment v Boyden* [2004] B.C.C 946.

²⁵⁹ *Ibid*, at 947

²⁶⁰ Depending upon the amount of the claim and the complexity of the case, the court will either be the County Court (for claims less than £30,000) or the High Court. In cases of a vulnerable individual coming under the Mental Capacity Act 2005, the case must be first dealt with in a special court with senior status, which is the Court of Protection. See Berry, E., *Partnership and LLP Law*, (London: Wildy, 1st ed, 2010), p.94.

²⁶¹ Blackett-Ord M., *Partnership Law*, (Sussex : Tottel, 3rd ed, 2007), p377

partners. In the case of *Hudgell Yeates v Watson*²⁶² a solicitor forgot to renew his practising certificate without the knowledge of the other partners. In that case a new partnership was deemed to arise amongst the remaining partners through the continuing conduct of those remaining partners²⁶³. A court order will be made if the partnership is either of fixed term or purpose or if it is a partnership at will which has an agreed notice period²⁶⁴. If all partners agree to bring the partnership to an end²⁶⁵ before the expiration of term, the involvement of the court will not be necessary²⁶⁶. However, if one or more partners wish to dissolve early, the dissolution may take place via arbitration, whereby dissolution is awarded by the arbitrator. Alternatively, the dissolution can take place by the court without involving arbitration.

The freedom to award dissolution via arbitration is based upon sections 32 and 33 of the Partnership Act 1890 which clarifies that dissolution can be “subject to any agreement” between partners. Therefore if the partners have agreed to refer all matters in dispute to arbitration, the arbitrator can dissolve the partnership with all the powers that the court would usually have²⁶⁷. However, the court will not automatically grant the parties permission to proceed to arbitration. There will first be a stay of action under the Arbitration Act 1996²⁶⁸ and matters will then proceed to arbitration once the court is satisfied that there are neither

²⁶² *Hudgell Yeates & Co. v Watson* [1978] QB 451

²⁶³ *Ibid.*, at 452

²⁶⁴ The need for dissolution by the court is due to the existence of a binding agreement between the partners which they do not have the power to dissolve.

²⁶⁵ As mentioned earlier in point 2.2.3 concerning dissolution by the unanimous agreement of partners.

²⁶⁶ Berry, E., *Partnership and LLP Law*, (London: Wildy, 1st ed, 2010), p.105

²⁶⁷ Hardy Ivamy, E.R., *Underhill's Principles of the Law of Partnership*, (London: Butterworths, 12th ed, 1986) pp.84-85.

²⁶⁸ Arbitration Act 1996, s.9

serious criminal acts involved nor is the stay of action sought simply to delay matters²⁶⁹.

Dissolution is governed by the Partnership Act 1890²⁷⁰ and the Mental Capacity Act 2005²⁷¹ and is a remedy awarded by the court on a discretionary basis. The words “may...grant dissolution” in Section 35 of the Partnership Act 1890 implies that there is no obligation upon the judge to dissolve. The application to court to dissolve can be made either by a partner or by someone representing his interest, such as his assignee, mortgagee or personal representative. In the case of mental incapacity, an application for dissolution will be made by the Court of Protection.

The status of partner to be eligible to apply for dissolution depends on his role in that relationship²⁷². Garry²⁷³ argues that it would be necessary for there to be reliance²⁷⁴ upon the partner to be thus classified. For example, the mere receipt of salary or the sharing of gross returns is not enough to make someone a partner. Thus, an outsider to the partnership, even with an interest in the profits may not apply²⁷⁵. However, a partner with no financial interest in the business, such as a sleeping partner can apply for dissolution but is unclear as to whether the application would succeed. In the case of *Stekel v Ellice*²⁷⁶ the applicant received a fixed salary but he had no rights or liabilities in the firm itself and so was refused by the court. The reason for this is that the term “partner” is not a

²⁶⁹ Prime T., Scanlan G., The Law of Partnership, (London: Butterworths, 1st ed, 1995), p.230, Footnote 2

²⁷⁰ PA 1890, s.35

²⁷¹ Mental Capacity Act 2005, s.18(1)(e)

²⁷² Twomey, M., Partnership Law, (Dublin: Butterworths, 1st ed, 2000), p.623

²⁷³ Garry, P., [Getting a hold on partners], Law Society Gazette, 2005 No. 102 Issue 46, p. 24

²⁷⁴ For example, reliance upon the partner for matters of financial liability for the business itself. A two-man firm where one of the partners has been co-opted simply to obtain a mortgage will not be seen as a partnership at law: see *Nationwide Building Society v Lewis*, [1998] Ch 482

²⁷⁵ Blackett-Ord M., Partnership Law, (Sussex: Tottel, 3rd ed, 2007), p.369

²⁷⁶ *Stekel v Ellice*, [1973] 1 W.L.R., 191

mere label²⁷⁷, but a class of person who, on the facts of the case, can be said to be a partner by the “substance of his relationship” to the others in the partnership.

The date of dissolution is not determined by section 35 of the Partnership Act 1890 and is presumed to be the date of the order given by the judge, unless the judge specified otherwise in his judgment²⁷⁸. Alternatively, dissolution may have occurred on a specific date notice was given or some formal step towards dissolution on behalf of partner was taken by order of the Court of Protection²⁷⁹. In *Besch v Frolich*, the court chose a date for dissolution for the partners five years earlier than the date of the filing of the bill²⁸⁰. In a later case, *Lyon v Tweddell*²⁸¹, the court followed *Besch v Frolich* but on the facts of the case held that unless there was a distinct breach by a partner, the date of the judgment will be that of dissolution.

In this section we will discuss the main instances in which a partnership may be dissolved by a court order. Each of these will be analysed in turn under the following headings: incapacity of a partner, prejudicial conduct, misconduct relate to the business, partnership carried on at a loss and finally, dissolution on just and equitable grounds.

2.4.1 Incapacity of a partner

A partner can apply to the court to dissolve the partnership if another partner has become incapable to perform as a partner in the partnership

²⁷⁷ *Ibid*, at 199

²⁷⁸ R. C. Banks, *Lindley & Banks on Partnership*, (London: Sweet & Maxwell, 19th ed, 2010), p.836

²⁷⁹ *Ibid*, p.825, at 24-67

²⁸⁰ *Besch v Frolich* (1842) 41 ER (597)

²⁸¹ *Lyon v Tweddell* (1881) 17 Ch. D. 529

business²⁸². Incapacity would include both physical and non-physical causes. Incapacity refers to inability to perform, either under the Mental Capacity Act 2005, or due to another reason, such as professional disqualification. Incapacity must be permanent as stated in section 35(b)²⁸³. However, a temporary medical condition, or one which is expected to improve, is not permanent. However, as Sir John Romilly, MR, pointed out in *Whitwell v Arthur*²⁸⁴, recovery from ill-health can occur, and so incapacity must be evaluated on a case-by-case basis. Accordingly, a judge may either close the case, or as in *Whitwell*, refrain from dissolving the partnership but order a stay of proceedings²⁸⁵ to avoid the possibility of a fresh suit. A further characteristic of the permanent incapacity is that that partner must be active in the business and not a dormant partner. Thus, the likelihood of an order for dissolution would also depend on how active the partner is and how it would influence the business of the firm²⁸⁶.

Permanent capacity may be partial, the partner being unable to discharge some of his duties -permanently. Partial capacity may be caused from either mental or physical incapacity²⁸⁷ and is assessed objectively in the light of one's mental or physical state, not upon the subjective opinion of his colleagues or some reduction of work output. As Langdale MR set out in *Sadler v Lee*²⁸⁸, an affliction which does not prevent the partner from continuing to work is not enough to serve as grounds for dissolution. It must be an incapacity which prevents performance, however partial. Otherwise, the partner's responsibility

²⁸² PA 1890 s.35(b), Mental Capacity Act 2005 s.18(1)(g)

²⁸³ Twomey, M., *Partnership Law*, (Dublin: Butterworths, 1st ed, 2000), p.633

²⁸⁴ *Whitwell v Arthur* (1865) 35 Beav 140

²⁸⁵ *Ibid*, at 141

²⁸⁶ Morse G., *Partnership Law* (Oxford: Oxford University Press, 7th ed, 2010), p.236

²⁸⁷ R. C. Banks, *Lindley & Banks on Partnership*, (London: Sweet & Maxwell, 19th ed, 2010), p.826

²⁸⁸ *Sadler v Lee* [1843] 6 Beav para 324

continues and the partnership cannot be dissolved on these grounds²⁸⁹. Concerning the degree of incapacity deemed sufficient by the courts to warrant dissolution, there is a difference of attitude over time in the courts. In older cases, permanence of incapacity was the overriding factor in the courts determining grounds for dissolution. The modern trend in cases is to assess whether the incapacity is sufficient to warrant dissolution²⁹⁰. Incapacity could be either A) non-physical, such as mental incapacity or B) physical incapacity of any kind.

A) Non-physical incapacity: mental incapacity

Mental incapacity is defined in statute²⁹¹ as the inability of person to make a decision because the mind or brain is impaired or its functioning disturbed. The mental incapacity of a patient is assessed according to the behaviour or circumstances of a person, if they have been diagnosed with a condition which affects the way their mind or brain works²⁹². All persons are presumed to have capacity unless otherwise established²⁹³. Assumptions must not be made as to the capacity of a person to not have mental capacity for any superficial reason unrelated to an established condition²⁹⁴.

Section 18(e) of the Mental Capacity Act 2005 shows that mental incapacity is one of the causes of dissolution of a partnership, whereby the effect of the court's decision will be to dissolve a partnership of which the patient is a

²⁸⁹ *Ibid*, at 331

²⁹⁰ Blackett-Ord M., Partnership Law, (Sussex: Tottel, 3rd ed, 2007), p.375

²⁹¹ Mental Capacity Act 2005 s.2(1)

²⁹² Bartlett, P., Blackstone's Guide to the Mental Capacity Act 2005, (Oxford: Blackstone, 2nd ed, 2008), p.314

²⁹³ Mental Capacity Act 2005 s.1(2)

²⁹⁴ *Ibid*, s.2(3)

member. In *Jones v Lloyd*²⁹⁵, a case dated before the Court of Protection was given the powers to make orders for dissolution in 1959 which demonstrates that pre-Act that the mental incapacity of a partner was grounds for dissolution.

Where the Mental Capacity Act 2005 does not provide for dissolution, the judges may resort to order dissolution under Partnership Act 1890 section 35(f) “just and equitable” grounds²⁹⁶. This approach could accommodate a rising number of cases arising from a modern trend accepting that insufficient capacity is enough to justify dissolution of a partnership.

The power of court to make an order of dissolution of a partnership in these circumstances is given to the Court of Protection²⁹⁷, which will represent and protect the interests of a patient who suffers an impairment or disturbance of the mind or the brain²⁹⁸. If a professional assessor caring for the person concerned has a reasonable belief that the person in his care lacks the capacity to agree to actions or decisions, then an order for dissolution of the partnership of which the patient is a member can be made²⁹⁹. If an application for dissolution under section 18(1)(g) of the Mental Capacity Act 2005 failed due to there being unresolved financial matters, an order could be sought from under section 35(b) of the Partnership Act 1890³⁰⁰.

In the case of mental incapacity, the partner himself under section 18(1)(g) will not be able to petition court for dissolution, as a person suffering from an impairment of or disturbance to the mind or brain cannot be allowed to represent

²⁹⁵ [1874] L.R. 18 Eq 265

²⁹⁶ R. C. Banks, *Lindley & Banks on Partnership*, (London: Sweet & Maxwell, 19th ed, 2010), p. 826

²⁹⁷ Mental Capacity Act 2005 s.45(1)

²⁹⁸ *Ibid.*, ss.2(1) and 3

²⁹⁹ Bartlett, P., *Blackstone's Guide to the Mental Capacity Act 2005*, (Oxford: Blackstone, 2nd ed, 2008), p.315

³⁰⁰ R. C. Banks, *Lindley & Banks on Partnership*, (London: Sweet & Maxwell, 19th ed, 2010), p.824

himself in court³⁰¹. Therefore, the Court of Protection awards a lasting power of attorney to a donee to manage property, assets and welfare³⁰². Either the Court of Protection itself or any other innocent co-partner or co-partners of the patient are at liberty to petition for dissolution.

B) Physical incapacity

Section 35(b) of the Partnership Act 1890 gives the right to partners to apply to the court to dissolve a partnership when one partner becomes permanently incapacitated³⁰³ not mentally, i.e. physically from performing his part of the partnership contract³⁰⁴. Thus, physical incapacity would require evidence that the inability to perform duties or work is permanent, and that the medical condition is not temporary. In the case of *Whitwell v Arthur*, the application for dissolution was deemed reasonable but the improved condition of the patient both before and during the hearing showed that there was a need to prove that the condition of paralysis was permanent³⁰⁵. In this case, medical evidence was expected to show further improvement of the patient³⁰⁶. Therefore, Lindley suggests that unless it is clear that the condition is permanent, there should be an allowance for time to show whether the condition has stabilised before presuming permanence, and that medical evidence would almost always be required to show this³⁰⁷.

Under section 35(b), any partner other than the patient may apply for dissolution. It is easily understood why a mental health patient cannot represent

³⁰¹ Twomey, M., *Partnership Law*, (Dublin: Butterworths, 1st ed, 2000), p.632

³⁰² R. C. Banks, *Lindley & Banks on Partnership*, (London: Sweet & Maxwell, 19th ed, 2010), p.820

³⁰³ The matter of permanent incapacity has been dealt with above under “Permanently Incapable of Performing Duties”.

³⁰⁴ PA 1890 s.35(b)

³⁰⁵ *Whitwell v Arthur* (1865) 35 Beav 140

³⁰⁶ *Ibid*, at 141

³⁰⁷ R. C. Banks, *Lindley & Banks on Partnership*, (London: Sweet & Maxwell, 19th ed, 2010), p.826

himself before the court but not why this should equally apply to a patient suffering physical incapacity. Twomey suggests that the logic for refusing the patient suffering physical disability at work from petitioning for dissolution is rooted in a Victorian mentality which places the fault for the incapacity with the patient. Thus, the law views the patient as having been guilty of wilful breach, by reason of being incapacitated. For example, a person who becomes blind will be viewed in the same manner as someone who is found guilty of misconduct. A partner who has acted recklessly in business and even with wilful neglect may petition for dissolution - but not a disabled person³⁰⁸. On this point the law appears to be manifestly unjust. In spite of legislation such as the Equality Act 2010³⁰⁹ the law on partnership has not been updated to ensure that 'fair and reasonable steps' must be taken to ensure the fair and non-discriminatory treatment of people with physical disability. It is surprising that no effort has as yet been made to try to close this obvious conflict in the law.

To conclude this section, there are two types of incapacity: physical and mental. In this author's opinion the court should dissolve a partnership when another partner becomes physically incapacitated. The court will recognise the right to dissolve in this situation to be invoked when the partnership requires physical labour. An example of a partnership requiring physical labour is where two or more partners share labour and earnings, contribute skills but no capital; they jointly undertake services to customers and distribute payment in agreed proportion. By contrast, if the partnership does not require physical labour, the

³⁰⁸ Twomey, M., Partnership Law, (Dublin: Butterworths, 1st ed, 2000), p.632.

³⁰⁹ Equality Act 2010 s.20

court should not dissolve the partnership if one partner became physically incapable.

However, the court should dissolve a partnership if one partner has mental incapacity. The reason for this is that each partner is an agent for the other. Therefore, if a partner is suffering a defect of reason and he cannot do anything for the partnership, the court should dissolve by their discretion. Failure to dissolve would expose the partner still enjoying capacity to the risk of liability for the acts of a partner who lacks full reasoning ability.

2.4.2 Prejudicial conduct

Misconduct by a partner which is prejudicial to the carrying on of business is grounds for any innocent partner to sue for dissolution of the partnership³¹⁰. The application can be made by any partner innocent of any misconduct, similar to the manner in which applications are made in section 35(b) and (d)³¹¹. Under section 35(c) the misconduct need not relate to the business itself. There does not need to be any evidence of actual loss of earnings or for there to have been publicity of the misconduct to show this. In all cases however, proof of the conduct itself is required³¹².

In court, an objective test is applied to ascertain whether or not there has been misconduct prejudicial to the business. As already mentioned, is irrelevant whether or not the conduct, whether criminal or immoral, was related in its nature to the business³¹³. For the court, it is enough to be able to determine whether a client on hearing of the misconduct would have moved away from the

³¹⁰ PA 1890 s.35(c)

³¹¹ Ibid

³¹² Morse G., Partnership Law, (Oxford: Oxford University Press, 7th ed, 2010), p. 236

³¹³ Prime T., Scanlan G., The Law of Partnership, (London: Butterworths, 1st ed, 1995), p.268

business. Under section 35(c), the court will assess whether the guilty partner calculated by means of his conduct to damage the fortunes of the partnership³¹⁴.

Misconduct implies an intention to cause harm, although this may be strictly construed. A narrow definition of intentional misconduct is any act which is deliberately designed to cause harm, and is the understanding adopted by Twomey³¹⁵. However, Lindley³¹⁶ adopts a much broader view: anything which might be regarded as likely to cause damage, similar to the tort of negligence which is defined as the disregard for potential injury. In *Turner v Shearer*³¹⁷, whether or not the defendant had a calculated intention to deceive when he wore articles of clothing of a police officer was held to be immaterial. By passing himself off as a police officer he had by conduct “calculated to deceive” which was held to be enough to contravene section 52 of the Police Act 1964³¹⁸.

Certain types of misconduct may not damage the actual business but nonetheless damage the integrity of the partnership. In *Essell v Hayward*³¹⁹ a partner had a right to dissolve *instantly* (“at once”)³²⁰ a solicitors’ partnership when one of the two partners had embezzled funds. In the case of *Carmichael v Evans*³²¹, the court disallowed an injunction against an application for dissolution of a drapery company to proceed where the appellant partner had boarded a train without a valid ticket³²². The appellant in *Carmichael* certainly did not intend or calculate

³¹⁴ Morse G., *Partnership Law* (Oxford: Oxford University Press, 7th ed, 2010), p.236

³¹⁵ Twomey, M., *Partnership Law*. (Dublin: Butterworths, 1st ed, 2000), p.633

³¹⁶ R. C. Banks, *Lindley & Banks on Partnership*, (London: Sweet & Maxwell, 19th ed, 2010), p.828-9

³¹⁷ *Turner v Shearer* [1972] 1 W.L.R. 1387

³¹⁸ This legislation is no longer in force but the same provisions are transferred to the Police Act 1996 s.90(1)

³¹⁹ *Essell v Hayward*, (1886) 30 Beav 158

³²⁰ *Ibid*, at 159

³²¹ *Carmichael v Evans*, [1904] 1 Ch 486

³²² *Ibid*, at 488

to damage the business. By contrast, a House of Lords case *Clifford v Timms*³²³ affirmed that professional misconduct was to be directly relevant to the relevant professional standards of conduct. Immoral behaviour would be viewed as a cause for misconduct only if it adversely affects the professional reputation of the partnership to which he belongs³²⁴. Criminal activity would be viewed with greater severity.

2.4.3 Persistent or wilful breach of the partnership agreement

At first glance of section 35(d) appears to list breach or repudiation of the partnership agreement and other forms of misconduct relating to the business as two different causes for dissolution. Accordingly, Prime and Scanlan³²⁵ list breach of agreement and other misconduct as “two separate grounds” for which dissolution maybe sought. By contrast, Lindley³²⁶ views the references to breach and to misconduct as “two wholly separate limbs” of the one ground for dissolution. Similarly, Twomey³²⁷ states that section 35(d): “may be divided into two limbs”. Morse³²⁸ and other authorities³²⁹ do not address this particular point when discussing section 35(d). It can be argued that there are in fact not two separate limbs in 35(d), and that the separate mention of breach from other forms of misconduct is simply in order for the Act to introduce a

³²³ [1908] A.C. 12

³²⁴ Prime, T., Scanlan G., *The Law of Partnership*, (London: Butterworths, 1st ed, 1995), p.268

³²⁵ *Ibid*, p.269

³²⁶ R. C. Banks, *Lindley & Banks on Partnership*, (London: Sweet & Maxwell, 19th ed, 2010), p.829

³²⁷ Twomey, M., *Partnership Law*, (Dublin: Butterworths, 1st ed, 2000), p.634

³²⁸ Morse, G., *Partnership Law*, (Oxford: Oxford University Press, 7th ed, 2010), p.237

³²⁹ Ivamy, H., *Underhill’s Principles of the Law of Partnership*, (London:Butterworths, 12th ed, 1986), p.83; Berry, E., *Partnership and LLP Law*, (London: Wildy, 1st ed, 2010), p.105; Blackett-Ord M., *Partnership Law*, (Sussex : Tottel, 3rd ed, 2007), P.376-379

special provision in the case of breach of contract, namely, that breach of contract needs to be either wilful³³⁰ or persistent to be recognised as misconduct.

The degree of misconduct must be established as being more than a petty squabble. For there to be grounds for dissolution, the disagreement between the partners must be significant enough to make it impossible for them to place confidence in each other. In the case of *Cheesman v Price*³³¹, the persistent non-entry of monies into joint accounts -seventeen times - was a breach of the partnership agreement and was held by the court to be injurious to the business and creating a “want of confidence”³³² between the partners. This means that under section 35(d), to be persistent, a breach must be more than one or two occasions, which could be explained as an oversight.

Indeed, if the misconduct is trivial, it will not merit dissolution as in the case of *Goodman v Whitcomb*³³³. In this case, the Lord Chancellor ruled that it was not the business of the court to interfere each time there was a case of differences in temperament between partners. Such differences were “trifling” and insufficient as grounds for the court to award dissolution³³⁴.

Nonetheless, if the root cause of the argument between the partners was trifling but developed into a greater hostility, this would be considered as sufficient grounds for dissolution. For example, in the case of *Leary v Shout*³³⁵ where an offensive manner of behaviour itself could be taken to be a trifling concern, but the ensuing non-communication, except in writing between the partners who

³³⁰ At the end of this section there will follow a discussion on the meaning of what is “wilful” at law under the heading “Wilful breach”.

³³¹ (1865) 35 Beav 142

³³² *Cheesman v Price* (1865) 35 Beav 142, at 146

³³³ (1820) 37 E.R. 492

³³⁴ *Goodman v Whitcomb* 37 E.R. 492, at 493-4

³³⁵ (1864) 33 Beav 582

were brokers by trade made further continuance of the partnership pointless, thus meriting dissolution.

In some circumstances the courts will recognise that the behaviour of a partner has caused a loss and will allow for a remedy in the form of a claim for damages resulting from that loss. For a claim to succeed in the courts, it should be made under section 35(d). However, if the innocent party terminates the partnership on mutual terms, there will be no remedy to seek damages later under this subsection. In the case of *Golstein v Bishop*³³⁶ the court noted that there had been a mutual agreement to dissolve the solicitor's partnership between the parties. It transpired that the dissolution had been due to the repeated aggressive behaviour of the respondent, for which reason the appellant was claiming damages arising from early termination of partnership contract. The judge held that since the dissolution had been made by mutual agreement, there could be no application now for damages to be awarded for early termination of the partnership under section 35(d), and so the appeal failed. Buckley³³⁷ points out that the law sees it as necessary to award compensation to a party who, as a result of suffering intolerable behaviour was caused "to agree to the dissolution of the partnership earlier than would have otherwise occurred". It can therefore be argued that the failure to compensate *Golstein* is a failure at law to uphold the equitable principle preventing the wrongdoer from gaining advantage from his own actions. In contrast to *Golstein* where no compensation for loss was awarded because there had been a mutual agreement to dissolve the partnership,

³³⁶ *Golstein v Bishop* [2014] EWCA Civ 10

³³⁷ Buckley, S., [Partnerships – when differences of opinion become legal], *Solicitors' Journal*, 19 August 2014, Vol.158, No.33, pp.12-13

in an ongoing case earlier this year the courts ruled in *Campbell v Campbell*³³⁸ that loss suffered by a partner in a partnership which had been dissolved owing to a breakdown in relations between them was compensable. In *Campbell*, the claim was allowed on grounds that there had been a breach of duty by one partner towards the other for several reasons: to inform the other either voluntarily or on request as to the existence or activity of companies which formed part of the assets of the partnership; thereby preventing the other partner from knowing about his interests in those companies; removing the other partner as a director of an asset company and attempting to remove him from the same as a shareholder. The judge gave an order for those companies as partnership assets to be wound up, for accounts to be drawn up and for the value of the businesses to be equally divided, for the compensation for any loss suffered due to accounts not having been informed and business value shared, to be awarded to the claimant.

Under section 35(d), “wilful” breach is a particular type of misconduct³³⁹ dissimilar to calculated behaviour to damage under 35(c), which is intentional and deliberate behaviour. In law, the term “wilful” may refer to reckless acts and need not be deliberate³⁴⁰. The material difference between breach of partnership agreement and other forms of misconduct in 35(d) is that breach of contract requires some element of awareness of risk of damage, whereas any other forms of misconduct relating to the business need not contain any element of awareness of risk of damage to the business as a result of the defendant’s misconduct. Before moving to the point of who can seek dissolution on grounds

³³⁸ *Campbell v Campbell* [2017] EWHC 182 (Ch)

³³⁹ Twomey, M., *Partnership Law*, (Dublin: Butterworths, 1st ed, 2000), pp.634-5

³⁴⁰ *Ronson International Ltd. v Patrick*, [2006] EWCA Civ 421

of misconduct relating to the business, this thesis contends that misconduct relating to the business is a reasonable cause for the court to dissolve a partnership. This is so provided that the misconduct is not trivial and is more than a petty squabble. For there to be grounds for dissolution, the disagreement between the partners must be significant enough to make it impossible for them to place confidence in each other or to be injurious to the business.

A partner seeking dissolution under section 35(d) must be anyone other than the partner guilty of misconduct.³⁴¹ However, in cases of arguments it will be difficult to be sure who, at the point of filing for dissolution, is truly an innocent party, since they have all been partly to blame. Therefore, Twomey points out, that there is a solution in cases of internal feuding in a partnership - to apply for dissolution under section 35(f)³⁴². The general reason principle for the need for a partner to be innocent of all misconduct is also one of equity: that one must come with clean hands and free of all guilt of the same misconduct, thus not to “take advantage of his own wrong”³⁴³.

The other facet of 35(d) is breach of contract. Whether or not acceptance of repudiation of contract can come under 35(d) is a matter of debate. This issue was tested in *Hurst v Bryk*³⁴⁴ which is therefore a seminal authority and requires some analysis. The facts of the case were that partners of a solicitors’ firm sought to dissolve by unanimous agreement. However, one partner, Hurst, the plaintiff in this case, refused to agree to dissolution. Hurst then argued that the action of the other partners to opt for dissolution was a repudiatory breach of the

³⁴¹ PA 1890 s. 35(d)

³⁴² Twomey, M., *Partnership Law*, (Dublin: Butterworths, 1st ed, 2000), p.635

³⁴³ The principle of equity that the applicant seeking dissolution needs to come with clean hands is expressed by Romilly M.R. in *Harrison v Tennant* (1856) 21 Beavan 482, at 494 – here in the case of a defendant resisting dissolution.

³⁴⁴ [2002] 1 A.C. 185

partnership deed³⁴⁵. On this basis, the plaintiff sued for damages for breach and argued that he had no obligation in respect of partnership liabilities accruing after the date of dissolution. The court at first instance dismissed his claim, and held that all partners were jointly liable for debts incurred by the firm while they were partners. The plaintiff appealed, and the decision of the lower court was affirmed by the Court of Appeal, which commented that joint liability was unaffected by the wrongful conduct of the partners who had proceeded to dissolve the partnership without the plaintiff. The plaintiff then appealed to the House of Lords which upheld the decision of the lower courts.

The House of Lords' decision in *Hurst v Bryk* established the following important points. Firstly, that partnership is more than a contract; it is a personal relationship between the partners³⁴⁶. Secondly, losses are inevitable as a consequence of dissolution; liabilities continue to accrue pending completion, and only loss of income from other sources may be compensated³⁴⁷. We can deduce from this that a remedy such as compensation awarded to one partner will cause other innocent partners loss in a knock-on effect³⁴⁸. This is especially awkward where the relationship between partners is more than just commercial; there is a personal element in it³⁴⁹. The third and main point emerging from *Hurst v Bryk* is the matter of whether repudiation should be admissible as grounds for dissolution under the Partnership Act 1890.

³⁴⁵The court in *Flanagan v Lionhurst Investment Partners LLP* [2015] EWHC 2171 (Ch) held that *Hurst v Bryk* does not apply in LLP law. Repudiatory breach is a cause of dissolution of general partnership as in *Hurst v Bryk* but not a cause of dissolution of LLP as in *Flanagan v Lionhurst* because "partnership has no separate corporate existence, whereas an LLP does" *Flanagan* at 187. The Court of Appeal has confirmed ([2017] EWCA Civ 985 para 6) that the LLP has a corporate character and not that of a partnership.

³⁴⁶ *Hurst v Bryk*, [2002] 1 A.C.185, at 194

³⁴⁷ *Ibid*, at 199

³⁴⁸ Milman, D., [Partnership law: recent developments and proposed reform], *Company Law Newsletter*, 2004, 21/22, pp.1-5

³⁴⁹ Partington D., [Partnership Actions: new light on old problems], *Solicitors Journal*, 30 June 2000, Vol.144, part,2, pp. 606-7

Jacobson³⁵⁰ contends that their lordships in *Hurst v Bryk* failed to recognise that partnership law arose as a species of contract law. His main point is that there is “no obvious inconsistency”³⁵¹ between the contractual doctrine and section 35(d) of the Partnership Act 1890. Thus, the courts would not be creating new law by recognising repudiation as grounds for dissolution. In fact, the lower courts in *Hurst v Bryk* agreed to recognise repudiation as grounds for dissolution³⁵², but Millett LJ refused to recognise repudiatory breach as grounds for dissolution. The central question treated in the Lords’ in *Hurst v Bryk* is as follows: if there is acceptance of a repudiatory breach of contract, will this dissolve the partnership? The Lords left this point open; The Law Commissions Report took this to mean that in the case of acceptance of repudiatory breach, Millett LJ saw the partnership contract at an end but that there was no automatic dissolution of the partnership itself³⁵³. The judge in *Mullins v Laughton*³⁵⁴ criticised the interpretation of the Law Commissions of Lord Millett’s judgment and commented that even in a case that repudiation of contract is accepted, this does not mean that the partnership is brought to an end automatically; that is done by the court³⁵⁵. It is worth noting that even the judge in *Mullins* seemed confused about exactly what Millett LJ meant by his indecision³⁵⁶. This is evident from the judge’s own non-committal statement as to whether a partnership can be dissolved on the basis of accepted repudiation, citing instead alternative grounds for its dissolution: “If I am wrong, and a partnership can be

³⁵⁰ Jacobson, L., [Separate ways], Solicitor’s Journal, 18 Oct 2011, Vol, 155, No.39, pp. 14-15

³⁵¹ Ibid, p.15

³⁵² *Hurst v Bryk* [1999] Ch. 1, at 9

³⁵³ Partnership Law: Joint Report of the Law Commission and the Scottish Law Commission (Law Com No. 283 Scottish Law Com No. 192, 2003, Cm 6015), p.135

³⁵⁴ *Mullins v Laughton* (2003) Ch. 250

³⁵⁵ *Ibid*, at 272

³⁵⁶ *Ibid*, at 273

dissolved by an accepted repudiation, then I am of the view that...was dissolved in the present case by virtue of....conduct...”³⁵⁷. This means that that the High Court in *Mullins* was unable to ascertain anything from the decision in *Hurst v Bryk* due to the vagueness of Lord Millett’s words, and relied instead on misconduct under 35(d). In conclusion, there is no reason why contractual law should not be entirely relevant to the Partnership Act 1890, with the result that repudiatory breach of contract should be regarded as a cause of dissolution.

2.4.4 Partnership carried on at a loss.

Section 1 of the Partnership Act 1890 states that only a partnership set up with a view to profit will exist at law. The natural consequence is that if the partnership does not achieve profit, it is redundant. Therefore, section 35(e) of the Partnership Act 1890 states that the court may dissolve a partnership when its business can only be carried on “at a loss”³⁵⁸. There are two points to explain in relation to loss. 1) The cause of the loss of profit: loss may be due either to external factors or inherent features of the business. 2) Point to explain is assessing the time of loss: whether it is immediate or in the future.

1) The cause of loss may be the result of failure by partners to rescue the business with additional capital. In the case of *Jennings v Baddeley*³⁵⁹, there were difficulties in obtaining the necessary financial investment to keep a mining business in operation³⁶⁰. Nonetheless, the court found that it was sufficient to dissolve the partnership on these grounds, as outgoing expenses made the business non-profitable.

³⁵⁷ *Ibid*, at 273

³⁵⁸ PA 1890 s.35(e)

³⁵⁹ (1856) 3 K & J 78

³⁶⁰ *Jennings v Baddeley*, (1856) 3 K & J 78 at 85

In other cases, the courts have taken a narrower view of unprofitability. In *Re Suburban Hotel Co*³⁶¹ the court decided that since a hotel was inherently an unprofitable business, an order for dissolution would be made. In *Handyside v Campbell*³⁶² the judge said that loss would need to be “traced to any inherent defect in the business”³⁶³ to merit dissolution and since there was not impossibility of profit an order for dissolution was not made.

2) The time at which loss occurs is the second factor to consider. Carrying on a business “at a loss” means that the business sustains such losses as to make it impracticable to continue to operate³⁶⁴ either now or in the future, such as in the case of continuing debt. In the aforementioned case of *Handyside v Campbell*³⁶⁵ dissolution was not ordered by the court because, in absence of an inherent defect in the business, there was prospect to pay for debts in the future. This means that if there is a change in circumstances likely to negatively affect profit-making, the court may order dissolution even while the business is solvent³⁶⁶.

There are two requirements for the dissolution of a partnership due to loss. The first requirement is to provide proof of operation at loss. In *Wilson v Church*³⁶⁷, Cotton LJ objected to the decision reached by a justice of the lower court on the basis that that not enough evidence had been admitted to properly consider the case³⁶⁸. The second requirement is that the loss should be permanent. The requirement that loss of profit be permanent is deduced from section 35(e), that

³⁶¹ (1867) 2 Ch App 737

³⁶² (1901) 17 Times Law Report 623

³⁶³ *Handyside v Campbell* (1901) 17 TLR 623 at 624

³⁶⁴ There is only one case of Canadian authority on this point, referred to in Blackett-Ord, p.380

³⁶⁵ (1901) 17 TLR 623, at 623-4

³⁶⁶ Morse G., *Partnership Law*, (Oxford: Oxford University Press, 7th ed, 2010), p.237

³⁶⁷ (1879) 13 Ch. D. 1

³⁶⁸ *Wilson v Church* (1879) 13 Ch. D. 1, at 61

there is dissolution where business carries on “only” at a loss, which implies that a partnership is not dissolved simply because of temporarily loss, but only where the loss is permanent³⁶⁹. This is expressed clearly in old case law in *Jennings v Baddeley*³⁷⁰, where the judge said in his winding up statement that “where profit is no longer possible the Court will decree a dissolution”³⁷¹.

An application to the court under 35(e) can be made by any partner; unlike 35(b), (c) and (d) which clearly state that only an innocent partner may petition. Remarkably, this implies that even the partner responsible for the loss can petition for dissolution in the case of the business operating permanently at a loss. The logical basis for statute allowing even a reckless partner to petition for dissolution is the presumption at law that no person would usually want to cause themselves loss. Therefore, the law would not prevent even a partner who had knowingly caused loss from petitioning for dissolution³⁷².

In conclusion, it is reasonable to dissolve the partnership through the court if the partnership carries on at a loss permanently. Permanent loss means losing money up to the point of risking bankruptcy unless the partners agreed to continue a loss-making business, unless there might be tax advantages for some of the partners. However, if the partnership is making a loss temporarily or it is possible that it will be profitable and recover in the future, then the court should not dissolve the partnership.

³⁶⁹ Twomey, M., Partnership Law, (Dublin: Butterworths, 1st ed, 2000), p.638

³⁷⁰ (1856) 3 K & J 78

³⁷¹ *Jennings v Baddeley*, (1856) 3 K & J 78 at 80

³⁷² Twomey, M., Partnership Law, (Dublin: Butterworths, 1st ed, 2000), p.638

2.4.5 Dissolution on just and equitable grounds

The Partnership Act 1890 gives the court a wide jurisdiction under section 35(f) to dissolve a partnership at its discretion under what is “just and equitable”. In *Atwood v Maude*³⁷³, the court commented that where a working relationship requires a significant degree of “mutual confidence”³⁷⁴, there should be a remedy to dissolve the company on the grounds of what is just and equitable if there is a loss of mutual trust between the partners. Implicit in the Act is that 35(f) is usually only used as grounds for dissolution when (b), (c) and (d) cannot apply³⁷⁵. Situations which might be included under section 35(f) are other than those mentioned in section 35(b), (c) and (d) include: i) uncooperative behaviour, ii) loss of confidence or iii) wrongful exclusion of a partner all examples of what might make a case come under section 35(f):

i) The court will be likely to examine the uncooperative conduct of the partners. The court will decide irrespective of blame, or whether the partnership was solvent at the time, whether or not to dissolve the partnership. In *Re Yenidje Tobacco Company Ltd*³⁷⁶, the court held that partners who refused to meet made the business unworkable and the court gave the order to dissolve the partnership. One example was a secretary who refused to enter a resolution of the firm into the minutes.³⁷⁷ Similarly, in *Khurll v Poulter*³⁷⁸, the defendant’s conduct was deemed to make the business, a property development company, unworkable.

³⁷³ *Atwood v Maude* (1867-68) L.R. 3 Ch. App.369

³⁷⁴ *Ibid*, at 373

³⁷⁵ Hardy Ivamy, E.R., Underhill’s Principles of the Law of Partnership, (London: Butterworths, 12th ed, 1986), p.84

³⁷⁶ [1916] 2 Ch 426

³⁷⁷ *Re Yenidje Tobacco Company Ltd* [1916] 2 Ch 426 at 428

³⁷⁸ Unreported. Accessed through Lexis, Publisher citation: [2003] All ER (D) 117

The breakdown cannot be the result of a passive situation: there needs to be conduct of some kind which has led to the breakdown.

ii) Loss of confidence between partners may develop even when there is no uncooperativeness at work but there is a breakdown of mutual trust. This can happen as a result of the mental illness of a partner, and need not involve any hostility³⁷⁹. There must be evidence of the loss of confidence for a petition for dissolution to succeed. The judge in *Lauffer v Barking*³⁸⁰ remarked that a defendant's submissions concerning whether the partnership is unworkable depends upon the evidence upon which the defendant relies being accepted³⁸¹. The evidence is not linked to who is to blame; in *Harrison v Tennant*³⁸², neither of the partners was held to be free of blame³⁸³. Furthermore, the conflict between the partners need not be extreme to become unworkable³⁸⁴. In *Lie v Mohile*³⁸⁵, the appellant contended that he wanted the defendant expelled, as he would have the advantage of taking the tenancy of the work premises for himself. The partners, GPs in a two-man practice, had only been communicating on medical matters by e-mail and were not coping well administratively under the strain of the non-communication between them. On the facts of the case, there was no place for the appellant to make a claim for repudiation of contract when, at the time of the appeal, the correct mechanism to use was dissolution on the basis of section 35(f)³⁸⁶.

³⁷⁹ *Besch v Frolich* (1842) 1 Phillips 172, at 173

³⁸⁰ [2009] EWHC 2360 (QB)

³⁸¹ *Lauffer v Barking* [2009] EWHC 2360 (QB) at para 48

³⁸² (1856) 21 Beavan 482

³⁸³ *Harrison v Tennant* (1856) 21 Beavan 482, at 496

³⁸⁴ Blackett-Ord M., *Partnership Law*, (Sussex : Tottel, 3rd ed, 2007), p.382.

³⁸⁵ *Lie v Mohile* [2015] EWHC 200 (Ch)

³⁸⁶ *Ibid*, at 37

iii) The wrongful exclusion of a partner may prompt a court to order immediate dissolution. In *Thakrar v Vadera*³⁸⁷ the act of serving notice on another partner, effectively expelling him from the partnership constituted conduct meriting dissolution. In *Re Davis & Collett Ltd*³⁸⁸ the circumstances were less extreme. The judge commented in his ruling that ejecting a partner from his room and thus treated him as a person irrelevant to the company's management³⁸⁹ warranted dissolution of the firm on just and equitable grounds.

Any partner may apply for dissolution under 35(f) unless the petitioner seeks to gain unduly from an ulterior motive. In *J.E. Cade & Son Ltd.*,³⁹⁰ the court refused a petition on just and equitable grounds when the petitioner would gain a greater protection of interests thereby³⁹¹. Similarly, a petitioner guilty of misconduct will not usually to be allowed to petition under 35(f) based on the principle in equity that one who seeks an equitable remedy must come with clean hands³⁹². However, an equitable remedy will only be refused to a petitioner who is the sole partner guilty of the misconduct which has brought about the breakdown in relations. In *Golstein v Bishop*³⁹³ the judges declared *per curiam*³⁹⁴ that some cases are better brought for equitable remedy. In *Golstein v Bishop* the sole party guilty of misconduct was the defendant. Thus, the judges' statement does not contradict the equitable principle of coming with clean hands before the court for an equitable remedy. Whereas the equitable principle of coming with clean hands will prevent the application for a judgment

³⁸⁷ Unreported. 31.3.1999, as quoted in R. C. Banks, *Lindley & Banks on Partnership*, (London: Sweet & Maxwell, 19th ed, 2010), p.835

³⁸⁸ [1935] Ch 692

³⁸⁹ *Re Davis & Collett Ltd* [1935] Ch 692, at 702

³⁹⁰ [1991] BCC 360

³⁹¹ *J.E. Cade & Son Ltd.* [1991] BCC 360, at 361

³⁹² Blackett-Ord M., *Partnership Law*, (Sussex: Tottel, 3rd ed, 2007), p. 382, para 17.25 footnote no. 1

³⁹³ [2014] Ch 455

³⁹⁴ *Golstein v Bishop* [2014] Ch. 455 at 456

under 35(f), there are no consistent standards to help determine which cases deserve to be heard under that subsection; this is left to the mind of the individual judge who cannot be held out as an expert at all in every type of case requiring the exercise of discretion³⁹⁵. Therefore, in the opinion of this author, specific standards are needed to guide courts in deciding which cases should be heard under 35(f) and how far discretion can be taken in particular circumstances, especially due to the fluid nature of discretionary decisions. As judges apply and interpret, but cannot make new law, it would fall to Parliament to legislate for the setting of those standards through the issuance of a statutory instrument. All that would be required is the mirroring of the principles exercised by judges in equity, whose principles arise out of common law, when applying discretion in other areas, such as decisions under 35(f), so that discretion is not, in relation to equity, “open-ended” as critics have pointed out³⁹⁶. Naturally, the imposition of rules for discretion by Parliament would seriously interfere in the freedom of judges to apply that discretion. Therefore, the challenge will lie in how to extract guiding principles from a very widely and imprecisely principled body of common law such as discretionary decisions based on just and equitable considerations. Perhaps some broad categories not dissimilar to that which already exists in the form of maxims in equity will suffice to provide similar guidelines to reign in discretion from being open-ended, and endow judicial discretion with a framework which is neither rigid not fluid, but flexible. The proposal in this thesis for standard rules limiting the

³⁹⁵ Matthias Klatt [Taking Rights Less Seriously: A Structural Analysis of Judicial Discretion], *Ratio Juris*, Vol.20, No.4, December 2007 (pp.506-529), at p.527.

³⁹⁶ Neil Guthrie, [Equity isn't just the exercise of judicial discretion], August 13 2013, Lexology, Accessed at: <http://www.lexology.com/library/detail.aspx?g=ad0e8390-58d1-42d7-8daf-f65faf0528f0>, Accessed on: 27.05.2015

application of court discretion will endow the legal process leading to dissolution with greater clarity as to its probable outcome³⁹⁷.

A final point for consideration under this heading is that the various subsections of section 35(b) to (e) seem to overlap. For instance, the case of *Baring v Dix*³⁹⁸ dissolution could, on the facts of the case, occur under section 35(f) rather than section 35(e). Contrast how Lindley³⁹⁹ presumes *Baring v Dix*⁴⁰⁰ to be a case of dissolution only under section 35(e) while Milman and Flanagan⁴⁰¹ consider how the same case could have come under section 35(f). A problem with this is that the court will consider the grounds for dissolution was brought. The court will dismiss the case if the claimant asks the court to dissolve a partnership if he has chosen incorrect subsection in section 35 of Partnership Act 1890 even if the claimant has right to dissolve the partnership under this section but under different subsection. This exactly what happened in the decision in *Moore v Moore*⁴⁰² where to the claimant brought a claim to dissolve a partnership between him and his father under section 35(c), (b) or (f). Simon Monty QC pointed out that on the facts of the case the partnership was for the joint lives of the partners and could not be dissolved in respect to the reasons for dissolution brought by the claimant. However, he pointed out that had the claimant brought his claim for dissolution on grounds of incapacity, he would have made an order for its dissolution⁴⁰³. This would have been achieved under the Mental Capacity Act 2005 section 18(e). Thus, a petition to dissolve brought under a subsection

³⁹⁷ The matter of standards for court discretion is only briefly highlighted here as analysis in any further depth is outside the scope of this thesis and would be more appropriate to revisit in a future study, as pointed out in my concluding chapter 6.4

³⁹⁸ (1786) 1 Cox 213

³⁹⁹ R. C. Banks, *Lindley & Banks on Partnership*, (London: Sweet & Maxwell, 19th ed, 2010), p.832.

⁴⁰⁰ (1786) 1 Cox 213

⁴⁰¹ Milman, D., and Flanagan, T., *Modern Partnership Law*, (London: Croom Helm, 1983), p.122

⁴⁰² [2016] EWHC 2202 (Ch)

⁴⁰³ *Moore v Moore* [2016] EWHC 2202 (Ch), at 192

may result, on a technicality, in an unfavourable outcome, waste a time, make courts busy and prolong litigation. Especially that distinguish of differences between subsections is subjective and it may mislead specialists experts so what do you think about others. Therefore, it would be far better were all the subsections under section 35 merged into one paragraph and include mental incapacity, thus:

Section 35(a) When a partner becomes permanently incapable, or guilty of misconduct; breach of partnership agreement or whether the business can only be carried on at loss, or whenever there are any circumstances have arisen which, in the opinion of the Court, render it just and equitable that the partnership be dissolved;

(b) Any partner can petition to dissolve the partnership unless the petitioner is the partner in breach of the agreement and is solely the guilty party in respect of the misconduct complained of.

A further advantage in redrafting the law is that a merged section would give a greater choice of alternatives to the judge to use at his discretion to remedy the situation before him.

2.5 Consequences of dissolution of partnerships

Partnership dissolution may be caused in numerous ways as mentioned above, some of which are voluntary and others non-voluntary and some are triggered through the court. While dissolution itself is a technical concept of little inherent interest its consequences, if not properly anticipated and controlled, may be devastating and can include the destructive liquidation of a valuable business, this section surveys the consequences of dissolution of partnership. The Partnership Act

1890 presents many legal consequences for the dissolution of a partnership⁴⁰⁴. Dissolution of a partnership gives rise to entitlement of each partner to their interests in the property of the firm⁴⁰⁵. Debts and liabilities are calculated and the surplus after deduction is what is due the partners. For this reason, any partner may apply to court to secure their share⁴⁰⁶. Therefore, one consequence of dissolution is the possibility of court action being taken by a partner to realise his share in the partnership business. Therefore, and as a consequence of dissolution, accounts are drawn up and a procedure applied to pay, in a set order, the creditors of the firm, then proportionally the partners out of the residue, first out of profits then out of the assets of the firm, and if these are not sufficient, then from their own money⁴⁰⁷.

Obligations to customers pre-existing dissolution must be carried out after dissolution⁴⁰⁸. Therefore it is vital that a partner protects himself after dissolution by giving notice to all existing customers to avoid any liability after the dissolution. If a former partner fails to notify customers of the partnership that he is no longer a partner, he could be held liable under the Partnership Act 1890 for any obligations incurred by the partnership after his departure⁴⁰⁹.

Dissolution of a partnership can result in negative consequences and cause disadvantages upon public and private economic, nationally and globally especially if the dissolution was unintended. This is because partnerships are the backbone of business, help foster economic growth, boost employment in countries and increase tax income for governments. All of these advantages show how companies are important. Therefore, the consequences of dissolution of companies mean the loss

⁴⁰⁴ PA 1890 ss.39-44

⁴⁰⁵ PA 1890 s.42

⁴⁰⁶ PA 1890 s.39

⁴⁰⁷ PA 1890 s.44

⁴⁰⁸ PA1890 s.38

⁴⁰⁹ Terry Gorry & Co. Solicitors 'Partnership Law in Ireland – What You Should Know' 25 September 2009 Accessed at: <https://businessandlegal.ie/tag/dissolution-of-partnership> Accessed on: 09.02.2018

of these manifold advantages⁴¹⁰. However, the negative consequences of dissolution do not always occur; on many occasion dissolution has positive consequences. Dissolution can be the best medicine and treatment if there is loss of confidence between partners or uncooperative behaviour of the partners. If the partners refuse to meet and thereby make the business unworkable, it is better that the court gives the order to dissolve the partnership. Similarly, if the partnership only carries on at a loss, and is inherently an unprofitable business, an order for dissolution would be better. Additionally, dissolution could protect innocent co-partners from the debtor's liability. Solvent co-partners can get rid of the judgment debtor by dissolution of the firm⁴¹¹. Meanwhile, dissolution of partnership may protect other partners from exposure to legal action by third parties if one partner gets bankrupt, as all partners are both joint and severally liable. Therefore, as Twomey states, dissolving the partnership may be the only way to terminate the liability of the other partners⁴¹². Furthermore, expelling bankrupt partners can cause reputational damage to the firm, and this is avoided by dissolution⁴¹³. In conclusion, dissolution is a double-edged sword. Although dissolution has many negative effects upon the public, economic and employment sectors, in many cases it can be the best treatment for fundamental problems within the firm. Therefore, a partnership agreement should be drawn up to achieve a positive outcome on reaching dissolution.

⁴¹⁰ In 2.5 more details about economic consequences of dissolution

⁴¹¹ More details on page 64.

⁴¹² Twomey, M., Partnership Law, (Dublin: Butterworths, 1st ed, 2000), p.570

⁴¹³ More details on page 71.

2.6 Contracting out of partnership dissolution

The above dissection and analysis of the causes of dissolution of partnerships in English law shows that partnership is a voluntary association which depends upon there being a continuing contractual relationship between partners. Creating a partnership is very easy; it is achieved by agreeing to go into business with another person. The ease with which a partnership is created is so great that it is possible to create a partnership without even realising, because no formal documents are necessary. The legal phenomenon of creating a partnership without realising that this has happened is known as an “accidental partnerships”⁴¹⁴. An accidental partnership occurs when, after the end of a fixed term of partnership, business in common continues without expressly agreeing on a partnership. Remarkably, such partnership arises even if the partners’ express declaration is to the contrary. Statute provides for “holding out”, namely, the carrying on of business not only by written or spoken word but even by conduct⁴¹⁵, irrespective of the subjective opinion of a partner’s own actions. It is a question of law, based upon the facts of the case, not the intentions of the individual which dictate whether there is a partnership in existence or not. In *Weiner v Harris*⁴¹⁶, the judges concurred that words used to express intention to not form a partnership would not decide whether or not there was a partnership. Fletcher Moulton LJ stated: “We are not ruled by the words disclaiming the existence of a partnership”⁴¹⁷. Similarly, the effect of conducting business creates partnership even unconsciously⁴¹⁸. The nature of the resulting

⁴¹⁴ Milman, D., [Partnerships (1): Problems with Identification], *The Company Lawyer*, Vol.4, 1983 (pp.199-205), at 199

⁴¹⁵ PA 1890 s.14(1)

⁴¹⁶ *Weiner v Harris* [1910] 1KB 285

⁴¹⁷ *Ibid.*, at 293

⁴¹⁸ Morse G., *Partnership Law*, (Oxford: Oxford University Press, 7th ed, 2010), p.47

partnership is beyond ‘accidental’; it is not some unfortunate mistake, but design of the law, and not of the partners and therefore ‘constructive’ in nature⁴¹⁹.

This shows how establishing partnership is easy. However, creating a partnership without a set of rules could have a negative impact on the partnership and may lead to dissolution.

Therefore, a partnership deed is very important to protect the partnership, govern how the partnership will be managed, clearly define the rights and obligations of the partners and determine rules of engagement should a disagreement arise among the parties. A well-written partnership deed will reduce the risk of misunderstandings and disputes between the owners. A partnership deed is known as partnership agreement or articles of partnership. A partnership deed can be defined as a document containing all the regulations according to which mutual rights, duties and liabilities of the partners in the conduct and management of the affairs of the firm are determined. Hence, it contains the terms and conditions of the partnership. The partnership agreement is helpful in preventing and resolving disputes among the partners⁴²⁰. The scope of the document of the partnership deed can be as wide or as narrow as the partners’ desire. It is preferred that the partnership deed be comprehensive and include all aspects of relationship between the partners to minimize dispute, avoid misunderstandings and unnecessary litigations in future.

As this thesis is about causes of dissolution, the focusing in this section is about the partnership deed and the causes of dissolution. Bearing this in mind, it is preferable although not a legal requirement to have a written partnership agreement in place to

⁴¹⁹ Milman, D., [Partnerships (1): Problems with Identification], *The Company Lawyer*, Vol.4, 1983 (pp.199-205), at 199

⁴²⁰ Thapa, S., Business Organizations ‘Meaning and Contents of Partnership Deed’ 2 April 2010, Accessed at: <http://organizationinnepal.blogspot.co.uk/2010/04/meaning-and-contents-of-partnership.html> Accessed on: 13.02.2018

avoid governing by the Partnership Act 1890; agree on important issues in advance; protect the Business of the partnership, avoid any issue that could disrupt the continuance of the partnership and avoid unwanted dissolution by death, bankruptcy, withdrawal, incapacity of a partner or any change among partners of the partnership. As Nicholls LJ stated in *Toogood v Farrell*⁴²¹, writing avoids consequences such as lengthy and costly processes or “to avoid disputes...where the oral announcements relied upon were not even made formally at a partners' meeting”⁴²². Additionally, without a partnership agreement one is at a disadvantage, as the terms of a business arrangement will automatically be governed by the Partnership Act 1890⁴²³. Although the Partnership Act 1890 is almost unprecedented in having served its purpose for over a century, this is doubtless due to the great degree of flexibility of the Act and is a credit to the foresight and skill of its drafters. However, there is a lack of good drafting in the approach of the Partnership Act 1890 in sections relating causes of dissolution of partnerships. The default position in the Partnership Act 1890 is that a partnership dissolves once any cause of dissolution of partnership occurs. The suddenness of the immediate effect of the death or the withdrawal of a partner causes significant distress to the parties. Automatic dissolution adds to the distress and is not favourable for business. Therefore, these sections relating to causes of dissolution in the Partnership Act 1890 should be reformed to make the default position in Partnership Act that the partnership continues to run even if a change of partners occurs. The Law Commission Report has suggested that it would be advisable to implement rules to enable the withdrawal of a partner without causing dissolution of the entire

⁴²¹ *Toogood v Farrell* [1988] 2 EGLR 233

⁴²² *Ibid* at 237

⁴²³ Gelbergs LLP website ‘5 reasons why it’s important to have a written partnership agreement’ 22 July 2013 Accessed at: <http://gelbergs.co.uk/?q=blogs/partnership-agreements> Accessed on: 13.02.2018

partnership. The Report states that flexibility would not be compromised by these rules⁴²⁴. Pending reform, the flexibility of the Partnership Act 1890 can be used; Thurston has said that the Partnership Act 1890 is one of the most durable and efficacious pieces of legislation in English law⁴²⁵ and has a broad scope designed to accommodate different emerging situations in partnerships. It could be that sections 19 and 32 of the Act could serve as a magic formula to avoid chaos at the time of the dissolution of a partnership. Section 19 of the Partnership Act 1890 states a seminal states that: "The mutual rights and duties of partners, whether ascertained by agreement or defined by this Act, may be varied by the consent of all the partners, and such consent may be either express or inferred from a course of dealing". This means that automatic dissolution is avoided even by non-express agreement. Therefore, the partnership deed can survive dissolution due to a change in the partnership simply by included a clause in the deed.

Pending law reform, under sections 32 or section 19 of the Partnership Act 1890, partnerships can change the default position in the Partnership Act 1890 in relation to all dissolution provisions. This means that the partners can vary the conditions under which their partnership can be dissolved. As a final point, The Law Commission has stressed the central importance of the flexibility of a partnership agreement. For this reason, the Commission has refrained from preparing a model partnership agreement. Instead, the Report recommends the inclusion of the key elements which acts as the constitution governing the partnership and the relation

⁴²⁴ Partnership Law: Joint Report of the Law Commission and the Scottish Law Commission (Law Com No. 283 Scottish Law Com No. 192, 2003, Cm 6015), p.111

⁴²⁵ Thurston J.P., [Partnership Act 1890: time for reform?] J.B.L., (1988), (pp.155-159), at 159

between the partners, and the inclusion of certain mechanisms, for amendment of its terms, voting and winding up⁴²⁶.

To conclude, it is very important that wherever possible, business partners write a partnership deed to include workable alternatives and to avoid dissolution. The flexibility of the Partnership Act 1890 allows for partners to take greater control of the future of their businesses, and they should be encouraged to do so. It is impractical to write a general model partnership agreement as partnerships are all different. Nonetheless, partnership agreements should contain a clause as standard to preserve the continuity of the partnership wherever possible and a clause to avoid dissolution due to any change among the partners.

2.7 Summary

The Partnership Act 1890 is almost unprecedented in having served its purpose for over a century. This is doubtless due to the great degree of flexibility and is a credit to the foresight and skill of its drafters. The Act is flexible, broadly accommodating what the partners can write into their partnership agreement and also regarding the partnership at will: a voluntary and informal unincorporated association of relationship between the partners. Partnerships can terminate by implication drawn from certain behaviours and follows the “default rules”. Conceptually, the unanimous agreement of partners required for dissolution arises from the unity of purpose in the voluntariness of association of the partnership.

Nonetheless, there are aspects of the Partnership Act 1890 which would benefit from law reform. The suddenness of immediate effect of death or withdrawal of

⁴²⁶ Partnership Law: Joint Report of the Law Commission and the Scottish Law Commission (Law Com No. 283 Scottish Law Com No. 192, 2003, Cm 6015), p. 243 para13.40

partner and notices served for dissolution causes significant distress to the parties. Automatic dissolution adds to distress and is not favourable for business. A possible solution is the addition of a provision in statute that dissolution only takes effect after 90 days in the cases. This has already been operating for over a decade in the United States under section 801(4) of the Revised Uniform Partnership Act (RUPA) 1997. Section 801(4) allows 90 days after notice given to the partners to “cure” insubstantial or innocent regulatory violations.

Similarly, in the case of a charging order on a partner’s share there should be a change in the law to ensure proportionate compensation for creditors. Alternatively, the law could adopt the measures which the Law Commissions has proposed, namely to expel a partner by unanimous vote rather than dissolving the partnership, thereby protecting the debtor’s share on departure from the business. To avoid bankruptcy, use of the IVA is the most likely way of benefitting debtors, creditors, partners and the reputation of the partnership’s business as alternatives to dissolution. Dissolutions which occur as a result of illegal action by a partner can be avoided by that partner dropping out so that the old partnership can continue undisturbed. This measure can be equally applied in the case of physical or mental incapacity, especially as it is unjust to equal partners suffering ill-health with partners found guilty of misconduct. Finally, all the subsections under section 35 could be reduced by merging them all into one paragraph.

Good faith between partners is not mentioned in the Partnership Act 1890 as an express condition of validity of partnership. Nonetheless, it stands “at the heart”

of the partnership relationship⁴²⁷ as the partnership will rise or fall on whether there is good faith subsisting between the partners. Thus, good faith carries the onus of mutual liability in both civil and criminal matters⁴²⁸. Therefore, a partnership charter can, as a separate document from the partnership agreement provide a non-binding set of standards and rules of conduct to improve relations between partners which underpin business practice of the firm⁴²⁹.

Thurston⁴³⁰ observes that the Partnership Act 1890 is one of the most “durable and efficacious” pieces of legislation in English law, accommodating different emerging situations in partnerships. Perhaps this is due the phrase in section 32: “...subject to any agreement between the partners.” Pending law reform, through the use of this phrase, partners could make agreements amongst themselves for the continuance of business which avoid dissolution. One may conclude this chapter by saying that it will be beneficial, wherever possible, for business to apply reforms which seek workable alternatives to dissolution. Those reforms may require legislation, although the flexibility of the Partnership Act 1890 allows for partners to take greater control of the future of their businesses, and they should be encouraged to do so.

There are several practical problems which arise on the dissolution of a firm. The first disadvantage triggered by dissolution is the interruption to the flow of business. For example, a professional firm such as a solicitor may not be able to take on new clients, and will only be able to finish work with existing clients, until a new firm is created. Also, the sale of a business facing dissolution

⁴²⁷ Barron. M., [Partnership Law Reform: a review of the main changes] *The Company Lawyer*, Vol.25, No.10, (pp.293-297), 2004, p.8 paras 296-7

⁴²⁸ Berry, E., [The criminal liability of partnerships and partners], *J.B.L.*, Vol.7, 2014, (pp.585-607), at 597

⁴²⁹ Jackson, S., [Good faith in construction - will it make a difference and is it worth the trouble?] *Const. L.J.* 2007, Vol.23, No.6 (pp.420-435), at 423

⁴³⁰ Thurston J.P., [Partnership Act 1890: time for reform?], *J B L* 1988, Mar, (pp.155-159), at 159

becomes a practical impossibility. This would seriously impact upon a firm under offer of purchase in part or in whole⁴³¹. Furthermore, the termination of contracts may lead to unfair dismissal claims or redundancy payouts. On the dissolution of the firm an employee may claim for unfair dismissal against the firm unless the move over to a new business ensures his employment rights under The Transfer of Undertakings (Protection of Employment Regulations) 2006⁴³². Additionally, partners will still have the right, even after dissolution, to withdraw from bank in overdraft even after dissolution against the assets of the firm – creating new liabilities for the partners. Thus, the process of dissolution of partnerships is open-ended with regards to liabilities for the firm⁴³³. Finally, dissolutions of partnerships impact on tax revenue; the more dissolutions the greater the decrease of revenue from taxes.

⁴³¹ R. C. Banks, Lindley & Banks on Partnership, (London: Sweet & Maxwell, 19th ed, 2010), p.843

⁴³² *Ibid*, p.843; Blackett-Ord M., Partnership Law, (Sussex: Tottel, 3rd ed, 2007), pp.402-3

⁴³³ *Ibid*, p.404

Chapter 3 Dissolution of Companies in English Law

3.1 Introduction

One of the significant areas in company law is dissolution of companies. The matter of dissolution of companies is significant because dissolution terminates the business, thereby bringing to an end the life of the company. Dissolution of a company means that it is no longer able to have assets, property and liabilities and the rights and obligations which arise from the contracts of employment of the company is at an end. Additionally, the properties of company become *bona vacantia*⁴³⁴. Despite its significance, this issue has attracted limited scholarly attention. The causes of dissolution of company and its consequences⁴³⁵ are very important issue worthy of research. Therefore, the aim of this chapter will be to explore the causes of corporate dissolution in English law and suggest some alternative methods for dissolutions of companies for law reform purposes.

One of the challenges considered in the corporate context is that the issues arising in cases of dissolution of companies are not the same as the issues in partnerships. Causes of dissolution of partnership are outlined in specific sections of the Partnership Act 1890. To the contrary, the causes of dissolution of companies are not combined under a single section or sections containing causes of dissolution. Those causes are sporadically mentioned in the minutiae of several pieces of legislation. The primary statute is the Companies Act 2006 and the matter is also addressed discrete provisions in the Insolvency Act 1986. In this context of this study we also note; The Companies (Mergers and Divisions of Public Companies) (Amendment) Regulations 2008 (IS),

⁴³⁴ More details in 3.4 Consequences of dissolution of companies.

⁴³⁵ Ibid

Companies (Cross-Border Mergers) Regulations 2007 (IS) as amended, the Small Business, Enterprise and Employment Act 2015, Enterprise Act 2002 and also the new EU Consolidated Company Law Directive 2017/1132. This eclectic approach towards the causes of dissolution of companies in terms of specific sections makes the study of causes of companies' dissolution more difficult since it is necessary in practice to identify causes of corporate dissolution. To identify causes of companies' dissolution we will discuss the main instances in which a company may be dissolved in this chapter which can be made by court order or by the Registrar of Companies House.

3.2 Causes of Dissolution of Companies

3.2.1 Liquidation

Liquidation is a method of preparing for the dissolving of a company by selling off its assets and satisfying the creditors from the proceeds of the sale⁴³⁶. The Insolvency Act 1986 offers two separate forms of winding up procedure, namely, voluntary winding up⁴³⁷ and compulsory winding up, also known as winding up by the court⁴³⁸. The focus of this section is the part played by the winding up of a company towards its dissolution. This is described as “the act of removing an incorporated company from the Companies House Register”⁴³⁹. Thus, dissolution is one of the effects of the winding up of a company. Procedurally, dissolution of a company is the final stage of its winding up. This

⁴³⁶The Online Business Dictionary, Accessed at: <http://www.businessdictionary.com/definition/winding-up.html#ixzz3WWk76MY1>, Accessed on: 07/04/2015.

⁴³⁷ Ironically, the voluntary winding up of a company under Insolvency Act 1986 can take place even when the company is solvent by Member Voluntary Liquidation (MVL) .

⁴³⁸ Insolvency Act 1986, s73

⁴³⁹ Companies House, [Statistical release: Incorporated companies in the United Kingdom - April 2015', May 2015] p.13, Accessed at:

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/430077/Incorporated_Companies_in_the_UK_April_2015_P1.pdf, Accessed on: 07/06/2015

stands in contrast to partnerships, which are first dissolved and are wound up afterwards.

When a company is wound up, the final accounts are prepared and a report submitted to the Registrar of Companies as part of the liquidation process. Usually, after a waiting period of three months the company is deemed dissolved⁴⁴⁰. This means that dissolution is the result of continued non-trading simply by the passage of time. However, there are specific situations which require distinct types of dissolution, three of which appear in succession in the Insolvency Act 1986; they are: voluntary winding up, compulsory winding up and early dissolution. In general terms, where there is money to finish the term of a business⁴⁴¹, voluntary winding up is appropriate to use; if there are not enough liquid assets to pay off creditors, it may be necessary for a court to impose compulsory liquidation. Where there are no assets to disburse from or liquidate, early dissolution is the only option.

Voluntary winding up requires the liquidator to send in the final account and return it to the Registrar of Companies⁴⁴². Once this is done, the company is dissolved automatically three months later⁴⁴³ unless an application for deferral succeeds⁴⁴⁴. Voluntary winding up is flexible in that members may pass a resolution and make it conditional on the agreement of the court even before such agreement is received⁴⁴⁵. Thus, voluntary winding up is a useful option for companies wishing to save money on the more expensive alternative of compulsory winding up.

⁴⁴⁰ Lowry, J., ; Reisberg, A., *Pettet's Company Law*, (London: Pearson, 4th ed, 2012), p.561

⁴⁴¹ A solvent company which wishes to close uses an MVL (Members' Voluntary Liquidation)

⁴⁴² Insolvency Act 1986 s 201(1)

⁴⁴³ *Ibid*, s 201(2)

⁴⁴⁴ *Ibid*, s 201(3); deferral may be applied for by any interested person.

⁴⁴⁵ *Re Nordittrak (UK) Ltd.*, [2000] 1 W.L.R. 343

Compulsory winding up⁴⁴⁶ is the path to dissolution where one of two scenarios is reached. Either, once the creditors have had their final meeting, and the liquidator vacates his position, a notice of this is sent in to the registrar of companies⁴⁴⁷ and three months later, dissolution takes effect⁴⁴⁸. Or, if a court's official receiver sends a notice in to the registrar of companies confirming that winding up has completed⁴⁴⁹, dissolution occurs three months later⁴⁵⁰.

The reasons behind dissolution taking effect after a three-month period in both compulsory and voluntary winding up is mentioned in *Re Working Project Ltd*⁴⁵¹. In the judge's opinion, the period allows not only for a waiting period to ensure there are no other assets that may turn up, but also to examine whether liquidation is over and that there is no further dispute. During this period, the company is alive even after the last return of that company is submitted by the liquidator. As the judge in *Re Working Project* stated "there is a distinction between the winding up of the company's affairs and the winding up of the company itself."⁴⁵² Thus, the company is only dead on dissolution and can only be successfully revived through either a court order or an administrative order⁴⁵³. In contrast to both voluntary and compulsory winding up, where the period of liquidation extends up to the point of dissolution itself, there is statutory provision for early dissolution. Early dissolution is used to remedy a situation in which the financial situation of the company is hopeless⁴⁵⁴.

⁴⁴⁶ Insolvency Act 1986 s 205

⁴⁴⁷ Ibid, s 205(1)(a)

⁴⁴⁸ Ibid, s 205(2)

⁴⁴⁹ Ibid, s 205(1)(b)

⁴⁵⁰ Ibid, s 205(2)

⁴⁵¹ *Re Working Project Ltd*, [1995] B.C.C. 197

⁴⁵² Carnwath J in *Re Working Project Ltd*, [1995] B.C.C. 197, at 201-2

⁴⁵³ The matter of orders made for revival of a company will be discussed in detail later in this chapter

⁴⁵⁴ Insolvency Act 1986 s 202

There is, however, an even more flexible alternative which reduces the disadvantage of dissolution by winding up. When the Enterprise Act 2002 came into effect in 2003, it reformed the legal area of exits from administration by introducing a softer alternative to all previously existing arrangement, that of the administration procedure, which is governed by para.84 of Sch.B1 to the Insolvency Act 1986. Administration as a means to avoid liquidation and therefore dissolution has achieved a better result for the company's creditors as a whole than would be likely if the company were wound up.

Administration maximises the value of property available and makes a distribution to one or more secured or preferential creditors. Also, it buys time for an insolvent company or for a company that is likely to become insolvent, placing the company under the control of an Insolvency Practitioner and the protection of the Court⁴⁵⁵ to look into ways for the company to try to avoid liquidation. The administrators appointed to oversee the administration use the time available to them to maximise the value of assets available to increase the chances of rescuing the company through restructure of the company. Similarly, the company can revert to business as usual if the debtors achieve a Company Voluntary Arrangement or a compromise with the creditors⁴⁵⁶; or that the court may give permission for the distribution of assets even to unsecured and non-preferential creditors during administration⁴⁵⁷.

If, however, administration is not effective, the company will exit administration with the result of bringing the life of the company to an end. This can happen in

⁴⁵⁵ Stones & Co. Licensed Insolvency Practitioners website, Company Voluntary Arrangement, Accessed at: <http://www.stonesandco.co.uk/administration.html> Accessed on: 04.11.2015

⁴⁵⁶ Insolvency Act 1986 Part I, Schedule B.1 para.49(3)(a) and (b) (amended) which refers to section 895 in part 26 of the CA 2006

⁴⁵⁷ Insolvency Act 1986 Schedule B1 para.65(3)

a number of different ways; either through an application from the administrator to end administration because he feels that the administration is not effective⁴⁵⁸, or that there is an application to end administration in the public interest: the company will then face liquidation⁴⁵⁹.

In contrast to these two voluntary applications by an administrator to exit administration, a compulsory exit from administration can take place if there is a need for a liquidator to conduct a thorough investigation on the finances of the company. *Re Hellas Telecommunications*⁴⁶⁰ involved huge losses made in a short amount of time, prompting most of the unsecured creditors to ask for an investigation to be held. The judge agreed and commented: “Where such huge losses are suffered...the court is bound to be sympathetic to the plea of unsecured creditors who ask for its affairs to be examined very thoroughly, including in a liquidation if they are dissatisfied with the examination conducted by administrators...”⁴⁶¹ The dissatisfaction with the administration need not call into question the honesty of the administrators, such as whether or not they may have a conflict of interests, merely that the creditors require a liquidator to take over from the administrators and conduct a thorough review of the situation. Finally, a further non-voluntary move from administration to dissolution is if there is no property or assets for the administrators to liquidate. In this case, it will be obligatory for the company to move directly from administration to dissolution without an interim stage of winding up⁴⁶².

⁴⁵⁸ Ibid, para.79

⁴⁵⁹ Ibid, para.82

⁴⁶⁰ [2011] EWHC 3176 (Ch)

⁴⁶¹ Ibid, at para.92

⁴⁶² Insolvency Act 1986 Schedule B1 para.84

What is understood by “no assets” can be viewed as two approaches to administration. One is that there have never been any assets at all; therefore the company proceeds from administration to dissolution. This is the narrow view, expressed by Blackburne J in *Re Ballast Ltd*⁴⁶³: “...paragraph 84 presupposes, there is no property which might permit a distribution to creditors (by which I understand no property available at any time during the administration which might permit a distribution to creditors, including, apparently, secured creditors)...”⁴⁶⁴ The wider view of what is meant by “no assets” is that there is no further need for assets to be distributed amongst creditors. At that point, an exit from the administration of the company is appropriate. This approach was adopted the following year in *GHE Realisations Ltd*⁴⁶⁵ which widened the limited premise for exiting administration⁴⁶⁶. Of the two approaches, the courts have been keen to preserve the wider approach.

Although there are no statistics to back up the trend on the individual point of dissolution as an exit from administration, it is clear that generally, the courts have maintained the administration procedure as a popular alternative to dissolution by winding up, but only to a limited degree.

There has been nearly 13% increase in administrations compared to the same quarter in 2016 bringing the total number of administrations to 357⁴⁶⁷. The reason for the limited popularity of administration may be one or more of the following reasons: first, the cost of administration is generally high. As such,

⁴⁶³ *Re Ballast Plc*, [2005] 1 W.L.R. 1928

⁴⁶⁴ *Ibid*, at 1935

⁴⁶⁵ [2006] 1 W.L.R. 287

⁴⁶⁶ *GHE Realisations Ltd.*, [2006] 1 W.L.R. 287, at 294

⁴⁶⁷ Companies House Gov, The Insolvency Service, Insolvency Statistics – January – March 2017 (Q1 2017), p.5, Accessed at:

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/611370/Q1_2017_statistics_release_-_commentary.pdf, Accessed on: 07/06/2015

administration will normally only be suitable for larger companies⁴⁶⁸. Second, once an administrator is appointed the directors lose the power to run the company. Furthermore, the directors are still personally liable to pay the firm's debts out of their own pocket⁴⁶⁹. Finally, if the administration starts with a court order - as opposed to outside of the court - the court has a discretionary power to award an order, and there is a risk that the court may decide not to proceed with administration. However, the courts have been flexible on this point, suggesting that so long as "there is a real prospect that one or more of the stated purposes would be achieved" an administration order would be made⁴⁷⁰. This would put creditors, rather than the company's administrator in charge of the disbursement of assets. Thus, exits from administration as a result of successful reorganising of the company are limited by court discretion. This means that most exits from administration are a negative result for the company, leading to its dissolution.

The matter of courts' discretion and its impact on the life of a company is a subject for further critique. It is worth mentioning that the Insolvency Act 1986 gave the court a broad discretion to wind up solvent companies on grounds that it is just and equitable⁴⁷¹. Section 122(1)(g) states that if "the court is of the opinion that it is just and equitable that the company should be wound up" then the court will proceed to do so. In *Re Fuerta Ltd*⁴⁷² an Irish case, the non-filing of tax return files was the only premise which justified its winding up on just and equitable grounds. In his ruling, Charleton J. stated that even though the

⁴⁶⁸ Company Debt Advice website, [Administration Advantages and Disadvantages], Accessed at: <http://companydebtadvice.co.uk/self-help-guides/administration/administration-advantages-and-disadvantages/>, Accessed on: 04.03.2016

⁴⁶⁹ Company Rescue website [Administration versus CVA? What's best for our company?], Accessed at: <http://www.companyrescue.co.uk/cva-company-voluntary-arrangement/administration-or-cva>, Accessed on: 02/06/2015

⁴⁷⁰ Vinelott J in *Re Primlaks (UK) Ltd.*, (1989) 5 B.C.C. 710, at 716

⁴⁷¹ Insolvency Act 1986, s122(g)

⁴⁷² *Re Fuerta Ltd* [2014] B.C.C. 281

usual elements of deadlock and business failure were not present, “the court should not trammel its own jurisdiction...through reference to authorities that merely exemplified the jurisdiction”⁴⁷³. Thus, where the court sees that a serious impediment in relation to a company cannot be otherwise remedied, the court has the freedom to exercise its discretion beyond normal horizons. This is so even when the impediment is no more than an administrative irregularity which is unrelated to the viability of the business itself, as in *Fuerta*.

The decision of the Irish court in *Fuerta* introduces uncertainty on how widely section 122(1)(g) may be applied. The concern is that the discretion to wind up on just and equitable grounds may be applied inappropriately to resolve complications arising from administrative formalities, rather than to remedy non-viability of the business on economic or managerial grounds. Thus, the wider application of section 122(1)(g) may also contradict the legislative intention of Parliament. Currently, there are no specific guidelines identifying standards for discretion⁴⁷⁴. Ideally, there should be standards set by Parliament in a Statutory Instrument to regulate or even limit how far a court’s discretion can impact upon the life of a company. The final point in this section is that it is worth noting that liquidation is a process that leads ultimately to dissolution of a company. Dissolution is the final stage, at the end of liquidation. There can be no companies’ liquidation without prior dissolution. Therefore, the causes of companies’ liquidation mentioned in sections 122 and 221 in the Insolvency Act 1986 are also indirectly causes of dissolution of companies.

⁴⁷³ *Ibid*, at 283

⁴⁷⁴ As mentioned in Chapter two in relation to the need for guidelines for judicial discretion

3.2.2 Merger

Merger or amalgamation is an annexation of companies for economic or financial reasons. This merger can occur either domestically, or as a cross-border merger. Domestic mergers take place when the assets and liabilities of one or more companies are transferred to a new entity⁴⁷⁵. They may take one of two forms, either: a) where the assets and liabilities of at least one company are transferred over to another public company or b) where the liabilities and assets of two or more public companies are transferred to a third, new company⁴⁷⁶. Thus, a domestic merger involves two or more companies being brought under the umbrella of one company.

The absorbing company under which the other companies are brought may either be a new company to absorb both companies, or one absorbs the other. For example, Daimler-Benz and Chrysler ceased to exist when the two firms merged, and a new company, Daimler Chrysler, was created⁴⁷⁷. In this case, both former companies joined to form a third company. In both examples of merger, one or more companies will no longer exist and the company which does not exist is dissolved. In this way, merger is a cause of dissolution of companies.

Usually, mergers are brought into effect by application to the court under section 900 of the Companies Act 2006. However, the simplest way of doing a merger is a voluntary wind-up under section 110 of the Insolvency Act 1986. This is done without the involvement of the courts. A merger under this

⁴⁷⁵ CA 2006 s.904

⁴⁷⁶ CA 2006 s.904(1) ; Note that in 904(1)(b), transferee companies may or may not be public company.

⁴⁷⁷ McClure, B., [The Basics of Mergers and Acquisitions], Investopedia, 2010, Accessed at: <http://i.investopedia.com/inv/pdf/tutorials/ma.pdf>, Accessed on: 16.3.2015.

subsection achieves the transfer of all property, liabilities and assets without making any changes to the rights of creditors. Provided that the company is solvent, a voluntary winding up of the transferor company can take place, for which purpose power is given by special resolution of the directors to an authority or to a liquidator, the authority of the court being unnecessary⁴⁷⁸. At the point of the merger taking place the merging companies dissolve their former status without requiring a winding-up procedure⁴⁷⁹. This means that merger leads directly to dissolution. This characteristic of merger applies both to domestic and cross border mergers, the latter being governed by European Union legislation through Directive 2005/56. This Directive provides a framework for mergers which reduce costs and administration⁴⁸⁰. The United Kingdom implemented the Directive in the Companies (Cross-Border Mergers) Regulations 2007 (SI 2007/2974). This Regulation defined three types of cross border merger: by absorption, formation of a new company – as with domestic mergers - or through absorption of a wholly-owned subsidiary⁴⁸¹. In 2017 the EU Consolidated Company Law Directive 2017/1132 has had the effect of harmonising six former directives including directives on mergers and cross-border mergers which are covered in the new Directive in Articles 86-95. The overall aim of the new 2017 Directive is not to introduce any substantive reforms but to harmonise policies of Member States, identify common strategies

⁴⁷⁸ Girvin, S. *et al*, Charlesworth's, Company Law, (Sweet & Maxwell, 18th ed, 2010), pp.768-769.

⁴⁷⁹ CA 2006 s 900, Companies (Cross-Border Mergers) Regulation 2007/2974, s 2(2)(e)

⁴⁸⁰ Directive 2005/56/EC of The European Parliament And Of The Council,(1), Accessed at: <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32005L0056&from=EN>, Accessed on: 05.05.2017

⁴⁸¹ Companies (Cross-Border Mergers) Regulation 2007/2974, s 2(1)

and assist the solving of problems thereby strengthening the European Union and its common interests.⁴⁸²

A Company and a wholly-owned subsidiary undergo absorption differently. In cross-border merger by absorption, the transferee company absorbs one or more transferor companies. One of the two companies must be a UK company and the other in the European Economic Area (EEA)⁴⁸³. By contrast, a cross border merger by absorption of a wholly-owned subsidiary means that there is a transferor company which is held by an existing transferee company, whether the transferor company or the transferee company is a UK company or an EEA company⁴⁸⁴. There is a particular benefit to a company moving cross-border in the framework of the absorption of a wholly-owned subsidiary. This was the subject of a recent case in which the parent company moved from The Netherlands to the UK, where the 100% wholly owned subsidiary company was registered. The judge in *Nielsen Holdings Plc*⁴⁸⁵ confirmed that he had unfettered discretion to approve the merger even when the only reason for the company to do this was to avoid the effect of an international treaty between the U.S.A. and The Netherlands limiting the Dutch company's business expansion. The third type of cross-border merger is a merger by formation of a new company which means there are two or more transferor companies, at least two of which are each governed by the law of a different EEA State⁴⁸⁶.

It is worth noting that following a Statutory Instrument (SI), once a cross-border merger has complied with all the requirements, no UK court can declare a

⁴⁸² Lain, Hugo Ester 'New Directive for European Company Statute' available at Vila Abogados website, Accessed at: <https://vila.es/en/blog/new-directive-european-company-statute/>, Accessed on: 04.09.2017

⁴⁸³ Ibid, s.2(2)

⁴⁸⁴ Ibid, s.2(3)

⁴⁸⁵ [2015] EWHC 2966 (Ch)

⁴⁸⁶ The Companies (Cross-Border Mergers) Regulation 2007/2974 s 2(4)

merger null and void. This statutory instrument came into force on 6th April 2015. Thus, UK law is now fully compliant with EU law on this matter⁴⁸⁷.

As a consequence of merger, the transferor and the transferee company cease to exist and are dissolved. The assets, property and liabilities of the transferor companies transfer over to the transferee company. Furthermore, the rights and obligations which arise from the contracts of employment of the transferor companies are transferred to the transferee company. Additionally, the transferor companies cease to exist and dissolve without winding up⁴⁸⁸. Finally, when companies merge by absorption or by formation of a new company, only the assets and the liabilities of the transferor companies move across to the another entity. Thus, any part of the transferor company 'B' owned by the transferee company 'A' moves as a transferor from its own company 'A' and not from any share it owns in 'B' as a transferee from that company⁴⁸⁹.

Mergers are a double-edged sword as there both advantages and disadvantages which result from them worthy of consideration early in the merger process. One advantage is that mergers can increase the company's profitability, but if a merger is not carefully planned, it can fail, as was the case in the BMW-Rover merger where BMW failed to accurately assess the sheer size of the merger attempted⁴⁹⁰. Another advantage of a merger is consolidation into one entity, which brings with several benefits: increasing their bargaining power, reducing the reliance of one company on another; minimising the number of companies'

⁴⁸⁷ Companies (Cross-Border Mergers) (Amendment) Regulations 2015 SI 2015/180, Accessed at: <http://www.legislation.gov.uk/ukxi/2015/180/contents/made>, Accessed on: 29.10.2015.

⁴⁸⁸ The Companies (Cross-Border Mergers) Regulations 2007, s 2(1)(b); CA 2006 s.900

⁴⁸⁹ Ibid, s 17(1), CA s.900

⁴⁹⁰ The Guardian, [How brash BMW ran Rover to catastrophe], 26th March 2000, Accessed at: <http://www.theguardian.com/business/2000/mar/26/rover.observerbusiness>, Accessed on: 12.02.2015

competition and increasing the merging companies' power in the market⁴⁹¹. In addition, mergers also enhance production, distribution and market expansion⁴⁹². Mergers also work globally to improve the domestic economy. In the European Union, the option of cross-border mergers, for example, has increased middle-sized companies to international level⁴⁹³.

Diversification resulting from mergers benefits not only the companies but also the consumers as it gives greater choice and satisfaction from purchases⁴⁹⁴; for example, two car manufacturers combining two designs into one. Merging companies also increase their intellectual capital and pool skills and know-how, facilitating a strategy for infrastructure, processes and capital⁴⁹⁵. Financially, there are specific benefits resulting from mergers which affect taxation; section 139(3) of the Taxation of Chargeable Gains Act 1992 indicates that Corporation Tax applies only once. This means that where there are arrangements in place to provide relief from double taxation, a company cannot be charged the same tax twice in those countries. However, a disadvantage of mergers is that collusion and monopolies artificially keep prices high and reduce competition⁴⁹⁶. Furthermore, as a result of monopolies created by mergers, mergers could create a situation where consumers have less choice, presenting consumers with less value for money⁴⁹⁷. Finally, mergers may lead to job losses, as the number of jobs in the transferee or new company will almost invariably be less than the

⁴⁹¹ Farrell, J., and Shapiro, C. Scale [Economies and Synergies Horizontal Mergers Analysis], *International Law Journal*, (2002), Vol.68, (pp.685-710), p.686

⁴⁹² Sherman, A. J., *Merger and Acquisition from A to Z*, (New York: AMACOM, 1st ed, 1998), p.10

⁴⁹³ Gavin, B., *The European Union and Globalisation: Towards Global Democratic Governance*, (Cheltenham: Elgar, 1st ed, 2001)

⁴⁹⁴ Sherman, A. J., *Merger and Acquisition from A to Z*, (New York: AMACOM, 1st ed, 1998), p.249

⁴⁹⁵ Bruning, I., *Managing The Integration of Marketing and Sales in Mergers*. (Cranfield University, Unpublished PhD Thesis, 2005), p.15

⁴⁹⁶ Schlossberg, R.S., *Mergers and Acquisitions: Understanding the Antitrust Issues*, (Chicago: American Bar Association, 3rd ed, 2008), p.205

⁴⁹⁷ Weinberg, M., [The Price Effects of Horizontal Mergers]. *Journal of Competition Law and Economics*, Vol.4, No.2, (2008), (pp.433-447), at p.446

sum of the jobs available from transferor and transferee companies before the merger took place⁴⁹⁸.

Bearing in mind the nature of both the advantages and disadvantages of mergers, it is interesting to note that both cross-border and domestic mergers have fallen to record lows. The Office for National Statistics (ONS) reports that in the fourth quarter of 2016 there were 106 successful domestic and cross-border acquisitions and mergers involving UK companies, down from 140 in the same quarter of the previous year⁴⁹⁹. Of the total number of 106 mergers in the fourth quarter of 2016, approximately half (56) were domestic mergers, the other half (50) cross-border mergers⁵⁰⁰.

There are internal and external causes for the phenomenon of mergers reducing in popularity⁵⁰¹. Internal causes include ignorance of crucial information; until they are under the same commercial roof two parties to a merger are unable to share certain types of confidential information which remains protected until the merger actually forms. The parties must also share a common vision and implement due diligence to work successfully in a new merged entity. Sometimes, due to poor resourcing and governance and weak leadership, mergers fail to form in the first place. However, there are external reasons that have caused the number of mergers over the last four decades to fall. Primarily,

⁴⁹⁸ The employment effects of mergers and acquisitions in commerce, Report for discussion, International Labour Organisation, Geneva [2003], p.33

⁴⁹⁹ Companies House Gov, Official for National Statistics 08 March 2016 [Mergers and Acquisitions involving UK companies: Oct: to Dec 2015], p.5 Accessed at: <https://www.ons.gov.uk/businessindustryandtrade/changestobusiness/mergersandacquisitionsbulletins/mergersandacquisitionsinvolvingukcompanies/quarter4octobertodecember,2015>, Accessed on: 05.06.2017

⁵⁰⁰ Companies House Gov, Official for National Statistics 07 March 2017 [Mergers and Acquisitions involving UK companies: Oct to Dec 2016], p.5 Accessed at: <https://www.ons.gov.uk/businessindustryandtrade/changestobusiness/mergersandacquisitions/bulletins/mergersandacquisitionsinvolvingukcompanies/octtodec,2016>, Accessed on: 05.06.2017

⁵⁰¹ Paul J Siegenthaler, [Ten Reasons Mergers and Acquisitions fail], The Daily Telegraph, 3 August 2010, Accessed at: <http://www.telegraph.co.uk/finance/businessclub/7924100/Ten-reasons-mergers-and-acquisitions-fail.html>, Accessed on: 25.06.2015

this is due to a perceptible fall in direct foreign investment in UK domestic companies⁵⁰². In particular, the banking crisis has impacted on domestic investment since 2007. This is clear from official statistics which show a sharp drop in mergers from late 2007 onward. There appears to have been little recovery in the economy since that period⁵⁰³.

In the context of dissolution, the most important feature of merger is that it may be the cause of the death of a company involved in the merger and therefore of its dissolution. Once a merger takes effect, at least one of companies must terminate its existence as a result of the dissolution that the merger brings about. Possibly both of companies dissolve if the merged entity is completely new.

The termination of a company due to a merger holds both advantages and disadvantages which should be weighed up before opting for dissolution. However, it seems that the classification of mergers into merger by absorption and merger by formation of new company is redundant as in both forms of merger one transferee company absorbs one or more transferor companies.

3.2.3 Demerger

In parallel to mergers, demergers are also a frequent cause of dissolution of companies⁵⁰⁴. A demerger – also referred to as a division - is a form of business reorganisation which involves the split of one company into a number

⁵⁰² Bruce, A., Editing by Evans, C., [UK third-quarter domestic mergers fall to lowest since records began – ONS], Reuters Business News Tuesday 2nd December 2014, Accessed at: <http://uk.reuters.com/article/2014/12/02/uk-britain-economy-m-a-idUKKCN0JG12F20141202> Accessed on : 25.06.2015

⁵⁰³ Official for National Statistics 02 Jun 2015, [Mergers and Acquisitions involving UK companies, Quarter 1 January to March 2015] p.2

⁵⁰⁴ Lexis-Nexis, [Demergers – An overview], Accessed at: <http://www.lexisnexis.com/uk/lexispsl/corporate/document/391387/5B16-3N61-F186-H4XB-00000-00/Demergers%E2%80%94overview>, Accessed on: 16.3.15

of transferee companies⁵⁰⁵. The statutory definition of a division is that a demerger involves the division of the undertaking, property and liabilities which are divided among two or more companies⁵⁰⁶. When a demerger takes place, the demerged company is dissolved by the passing of a special resolution of the shareholders who receive shares in the new companies formed. The allotment of new shares to shareholders in the new companies is made once the old company has been dissolved⁵⁰⁷.

Demergers usually take place in a court-based process, and the Companies Act 2006 Part 27 treats the topic of demergers with the involvement of the courts and lists the provisions and requirements as being the same as those needed for mergers. However there is also an option to carry out a demerger without the involvement of the court. This is achieved under section 110(3)(a) by a voluntary act of the members; this option is called reconstruction.

Division of a company can have the practical effect of raising cash quickly by “asset-stripping”; sometimes the value of a business is greater when it is smaller than before but separate⁵⁰⁸. Generally, the reorganisation of a company in a demerger may be initiated by its members to improve business performance by concentrating skills of its workers; better team working; to survive competition or to benefit from better tax arrangements by relocating to another country. Domestic demergers give rise to tax relief in the case of demergers and must be

⁵⁰⁵ Girvin, S. et al, Charlesworth's, Company Law, (Sweet & Maxwell, 18th ed, 2010), p.762

⁵⁰⁶ CA s. 919

⁵⁰⁷ Lexis-Nexis, [Demergers – An overview], Accessed at <http://www.lexisnexis.com/uk/lexispsl/corporate/document/391387/5B16-3N61-F186-H4XB-00000-00/Demergers%E2%80%9494overview>, Accessed on: 16.3.15

⁵⁰⁸ Girvin, S. et al, Charlesworth's, Company Law, (Sweet & Maxwell, 18th ed, 2010), pp.761-3

sought in advance⁵⁰⁹. Cross-border demergers have benefited from a common system of taxation since 1990 under EU law, which means that tax relief and exemption for demergers will carry over between Member States⁵¹⁰. Demergers in the UK are few in number but high in company value. Whereas mergers are measured in the millions, demergers account for billions. In the fourth quarter of 2016, there were inward disposals of seven companies worth £2.6 billion⁵¹¹. Information about outward disposals has been suppressed probably due to the post-Brexit situation⁵¹².

A concluding observation is that demergers have the effect of bringing about the termination of a corporate entity. When company AB divides into company A and company B and has transferred its assets and liabilities into those companies, company AB does not exist anymore and dissolves.

Once the assets and liabilities have passed from one company to two or more other companies, the original transferor company dies a death. Whereas it is usually beneficial to avoid dissolution and keep a company trading, this is not always so. Demerging of a company can have the practical and positive consequences of raising cash quickly by “asset-stripping”; sometimes the value of a business is greater when it is smaller than before, but split⁵¹³.

⁵⁰⁹ B. Philips, P. Gajda, [Practice Guide: taxation of demergers], Tax Journal, Issue 1190, 25 October 2013, Accessed at: <http://www.taxjournal.com/tj/articles/practice-guide-taxation-demergers-24102013>, Accessed on 16.3.2015

⁵¹⁰ The Council Directive 90/434/EEC of the Council of the European Union, Articles 5, 10, Accessed at: <http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31990L0434:en:HTML>, Accessed on: 16.3.15

⁵¹¹ Companies House Gov, Official for National Statistics 08 March 2016 [Mergers and Acquisitions involving UK companies: Oct to Dec 2015], p.11, Accessed at: <https://www.ons.gov.uk/businessindustryandtrade/changestobusiness/mergersandacquisitions/bulletins/mergersandacquisitionsinvolvingukcompanies/quarter4octobertodecember2015>, Accessed on: 05.06.2017

⁵¹² Ibid, P. 17

⁵¹³ Girvin, S. *et al*, Charlesworth's, Company Law, (Sweet & Maxwell, 18th ed, 2010), pp.761-3

3.2.4 Striking off

Striking off is one of many ways in which a company can, as a legal entity, be brought to an end and thus to dissolution. Striking off a company is the legal act of the removal of a company from the official Companies House register⁵¹⁴. The company name is then available for incorporation by a new company⁵¹⁵. Provisions for and causes of the striking off of companies are contained on Part 31 of the Companies Act 2006. The difference between dissolution and striking off is that dissolution is the end of the life of the company while striking off is a process leading towards the end of the life of a company. These causes can thus also be considered as causes of dissolution of companies for which the procedure is striking off.

The first of two possible causes of striking off is when a company is neither trading nor in operation, for example, it is not processing any documents, responding to mail or communicating accounts to Companies House for over a six month period, or that there is no functioning liquidator following a winding up. Striking off by the Registrar of Companies⁵¹⁶ at Companies House is referred to as compulsory, mandatory⁵¹⁷ or forced strike off⁵¹⁸. If as many as two communications sent to the company enquiring of its status are unreturned, the registrar may decide to strike off the company⁵¹⁹. In that case, the registrar will publicly notify of the striking off. However, the liquidator may be able to

⁵¹⁴ Saudi Law does not recognise administrative striking off.

⁵¹⁵ UK Data Company Information website, [Company Status-Striking Off and Dissolution], (2016), Accessed at: <http://ukdata.com/help/credit-reports-documents/status-strike-off-dissolution>, Accessed on: 22.06.2015

⁵¹⁶ CA 2006, s.1000

⁵¹⁷ Lexis Nexis online database [Striking off, dissolution and restoration - glossary of terms], Accessed at: <https://www.lexisnexis.com/uk/lexispsl/corporate/document/391388/5D84-X5Y1-F187-N4WW-00000-00/Striking%20off,%20dissolution%20and%20restoration—glossary%20of%20terms>, Accessed on: 22.06.2015

⁵¹⁸ Taylor, P., [Top Ten Tips on striking off your company], Fox Williams website 03.April.2014, Accessed at: <http://www.foxwilliams.com/news/864>, Accessed on: 22.06.2015

⁵¹⁹ CA 2006, s.1000 3(b)

prevent dissolution within the three-month notice period by showing some evidence of activity by the company⁵²⁰.

The second cause of striking off is when a company has ceased trading, either because the company is no longer needed or when active directors want to retire and there is no-one to take over. Alternatively the company itself may be a subsidiary that is no longer needed, or it may be that the company was set up to exploit an idea that simply did not work⁵²¹. This cause of striking off is voluntary⁵²² and the application must be made on the company's behalf by its directors or by a majority of them⁵²³.

There are several conditions that must be fulfilled to ensure that the striking off will succeed. Firstly, the company should remain dormant and not have changed in any way in the three months leading up to striking off and there must be no further purpose to the company⁵²⁴. Second, the company should not have sold off assets just prior to ceasing trading or engaged in any activity other than what will assist concluding the affairs the company⁵²⁵. Third, share capital should be reduced and returned to shareholders and all bank accounts closed.

Since it is of paramount importance to pay off all creditors before considering the option of striking off, if there is any outstanding business between the company and creditors concerning arrangements, no application may be made

⁵²⁰ Ibid, s.1001

⁵²¹ Harrison, H., [Strike off and dissolution],(2008), Duport Companies House Made Easy website, Accessed at: <http://www.duport.co.uk/guides/company-structure/dissolution.php>, Accessed on: 22.06.2015; See also: Companies House, [Strike Off, dissolution and restoration], May 2015, p.5 Accessed at: <https://www.gov.uk/government/publications/company-strike-off-dissolution-and-restoration/strike-off-dissolution-and-restoration>, Accessed on: 22.06.2015

⁵²² CA 2006, s.1003

⁵²³ Ibid, s.1003(2)(a)

⁵²⁴ KRE Corporate Recovery website, [Members Voluntary Liquidation v Striking Off], Accessed at: <http://kreco.co.uk/members-voluntary-liquidation-v-striking-off/>, Accessed on: 05.05.2017.

⁵²⁵ CA 2006, s.1004(1)

until the matter has reached a conclusion⁵²⁶. This is true even when the unfinished business is supervised by the court⁵²⁷. In the case of agreements with creditors not being reached, liquidation is the alternative to striking off as the method to reach dissolution⁵²⁸. Thus, striking off is an option exercised strictly on condition of company solvency; it is only due to the company's solvency that there is no presence of a liquidator.

In addition to the required conditions for striking off, a company has an obligation to inform all current and prospective interested parties of the impending dissolution by circulating a copy of the application for striking off. This obligation runs until the company's dissolution or until it withdraws the application⁵²⁹. All shareholders, employees, creditors actual and contingent and any directors not party to the application must be informed, as must any manager or trustee of any of the company's pension funds⁵³⁰. To avoid any risk to the striking off, the company must all inform government offices such as HMRC, the Department of Work and Pensions and the Department of Social Security⁵³¹ as well as any other interested parties of any outstanding or prospective liabilities linked to the striking off⁵³².

Conversely, a company must withdraw its application if it carries on business, changes its name or engaging in any activity outside of what will facilitate the

⁵²⁶ Ibid, s.1005

⁵²⁷ Ibid, s.1005(1)(a)

⁵²⁸ Saunders, I., [The Striking Off and Restoration of Companies], Wilder Coe Ltd, Accessed at: http://www.wildercoe.co.uk/pdf/striking_off.pdf, Accessed on: 22.06.2015

⁵²⁹ Companies House, [Strike Off, dissolution and restoration], May 2015, p.7, Accessed at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/429205/GP4_Strike_off__dissolution__restoration_v3_8-ver0.1-4.pdf, Accessed on: 23.06.2015

⁵³⁰ CA 2006, s.1006(1)

⁵³¹ Harrison, H., [Strike off and dissolution], (2008), Duport Companies House Made Easy website, Accessed at: <http://www.duport.co.uk/guides/company-structure/dissolution.php>, Accessed on: 23.06.2015.

⁵³² Companies House, [Strike Off, dissolution and restoration], May 2015, p.7 Accessed at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/429205/GP4_Strike_off__dissolution__restoration_v3_8-ver0.1-4.pdf, Accessed on: 23.06.2015

application for striking off⁵³³. Similarly, delegated legislation allows directors to withdraw their application voluntarily⁵³⁴ if the directors find that an asset has not been dealt with prior to the making of the application such as the sudden find of an asset which prompts a change of mind amongst petitioners. Additionally, if the directors receive a notice of a potential objection being registered against their application to strike off, they may take the initiative to withdraw their application⁵³⁵.

In the absence of statutory provisions on the matter, Companies House states that any interested party wishing to make an objection to the application for striking off must do so in writing. Supporting evidence for the application must be sent by the applicant to the Registrar of Companies. Grounds for objection include any administrative or legal irregularity which calls the integrity of the application or the company into question. Objections may be made during the three month post-strike off period, right up to the point of dissolution⁵³⁶.

Dissolution by striking off has effect both upon property and liability. For example, property can become *bona vacantia*⁵³⁷ as an effect of dissolution, capable of collecting interests in land, liquid assets and rights to benefits and licences⁵³⁸. This happens when the Crown, after having taken legal title to the property, then disclaims its title to allow the company to be restored to the

⁵³³ CA 2006, s.1009

⁵³⁴ Companies House, [Strike Off, dissolution and restoration], May 2015, p.8, Accessed at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/429205/GP4_Strike_off__dissolution__restoration_v3_8-ver0.1-4.pdf, Accessed on: 23.06.2015

⁵³⁵ Lexis Nexis database, [Voluntary striking off and dissolution], Accessed at: <http://www.lexisnexis.com/uk/lexispsl/corporate/document/391388/55KY-3J51-F187-N0NJ-00000-00/Voluntary%20striking%20off%20and%20dissolution>, Accessed on: 23.06.2015

⁵³⁶ Companies House, [Strike Off, dissolution and restoration], May 2015, p.9 Accessed at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/429205/GP4_Strike_off__dissolution__restoration_v3_8-ver0.1-4.pdf, Accessed on: 23.06.2015

⁵³⁷ CA 2006 s.1012

⁵³⁸ Government Legal Department, [Policy Paper: Bona vacantia dissolved companies (BVC1)], published on 6 Dec 2013, Accessed at: <https://www.gov.uk/government/publications/bona-vacantia-dissolved-companies-bvc1/bona-vacantia-dissolved-companies-bvc1>, Accessed on: 23.06.2015

Register so that third parties to then pursue their claim in the property. In *Fivestar Properties Ltd*⁵³⁹ the court held that by disclaiming a property the Crown was not extinguishing the property's freehold; rather, the Crown was retaining its "ultimate right"⁵⁴⁰ to the property to allow for restoration of the company to the Register and subsequent claims to be made by interested parties. The legal logic behind this is that all citizens are ultimately an inferior tenant; if the freehold interest is extinguished, the land reverts to the Crown⁵⁴¹.

The position in English law is contrasted in a Scottish case, *ELB Securities Ltd v Alan Love*⁵⁴² in which the court stated that the effect of the Crown disclaiming a property was to bring an end both "all the company's rights in the property" as at that stage the property is neither the company's nor the Crown's⁵⁴³. A further effect is that an interested third party such as a creditor or tenant "would be entitled to apply to the court to have the property transferred to them"⁵⁴⁴. This is not likely to be the case under English law because although legal title may be given up by the Crown to allow for restoration, the Crown does not divest itself of its interests in the property to the extent of extinguishing its right to the property.

It is worth noting that in spite of the Treasury Solicitor not claiming *bona vacantia* for the Crown, moves by companies to distribute such assets among creditors after striking off are illegal⁵⁴⁵. Therefore, company directors must

⁵³⁹ [2015] EWHC 2782 (Ch)

⁵⁴⁰ Peter Bailey, [Real Property – Insolvency, Insolvency Daily] Updates 13/10/2015, Accessed at: <http://www.lawtel.com/MyLawtel/Documents /AC0147936>

⁵⁴¹ *Fivestar Properties Ltd*, [2015] EWHC 2782 (Ch), para 12

⁵⁴² *ELB Securities Ltd v Alan Love, Prestwick Hotels Ltd.*, [2015] CSIH 67

⁵⁴³ *Ibid*, at 24

⁵⁴⁴ *Ibid*, at 24

⁵⁴⁵ RossMartin website [Striking off a company], Accessed at:

<http://www.rossmartin.co.uk/companies/ceasing-trading/112-striking-off-a-company#overviewfaqs>, Accessed on: 23.06.2015

ensure that the company has complied with all the pre-dissolution requirements including the distribution of assets to shareholders and interested parties to be sure not to lose those assets. However, any assets which vest in the company even a moment before actual dissolution, namely, the striking off of the company from the register, are still in the control of the directors. In *Phillips v RSPB*⁵⁴⁶ the court ruled that a gift could be made of an asset which had vested in a charity which had already been removed from the register of charities because it had not yet been struck off from the register of companies at Companies House. Cooke J reasoned that “until that happened, it continued to have corporate legal personality and could, in principle at least, have been re-activated and continued to deal with its assets in accordance with its objects⁵⁴⁷.” Therefore, any asset is in company control until the moment of striking off from the register of Companies House.

One further effect of striking off is that past contracts associated with the life of the company comes to an end. In *Contract Facilities*⁵⁴⁸ an application was made to reopen a contract which had, by the time of the striking off of the company, been fulfilled. However, the judge stated that: “Restoration would not revive an application which had been determined....The restoration to the register resurrects the company, but I do not think that it can also resurrect a contract that has come to an end”⁵⁴⁹. This means that events which have come to an end cannot be revived if they have been properly fulfilled. However, if the company is restored, any contract which was unfinished by the time of striking off and before restoration will also be reopened, as Weeks J asserted that “it is

⁵⁴⁶ *Phillips v Royal Society for the Protection of Birds and Others* [2012] EWHC 618 (Ch)

⁵⁴⁷ *Ibid*, at 23

⁵⁴⁸ *Contract Facilities Ltd v Rees* [2002] EWHC 2939 (QB)

⁵⁴⁹ *Ibid*, at 76,77

retrospectively validated at that point of time”⁵⁵⁰. However, any other application linked to the company which has been determined cannot be retrospectively revived together with the company itself.

Surely, there are of course a number of disadvantages with striking off which include objections by interested parties, linked legal action of any kind including applications to restore the company and administrative errors which could hold up the dissolution of the company or prevent it altogether⁵⁵¹; the non-sharing of information with interested parties is a criminal offence and can give rise to fines⁵⁵². Perhaps the most serious disadvantage of all is the risk of overlooked assets becoming *bona vacantia*. This means that all property unaccounted for by the company reverts to Crown possession⁵⁵³. Thus, directors expose themselves to a significant degree of liability by entering into an application for striking off.

There are no official statistics to show that striking off accounts for the majority of dissolutions. However, one can deduce the latest statistics for March 2017 from the Office for National Statistics and Companies House that the total number of companies that were struck off the register was 105,279. This figure is arrived at by subtracting from the number of companies which have dissolved (108,919)⁵⁵⁴ those companies which have been liquidated (3,529)⁵⁵⁵, merged (106) or demerged (7). This demonstrates overwhelmingly that the well-

⁵⁵⁰ *Ibid*, at 76

⁵⁵¹ Strike off your Company website, Accessed at: http://strikeoffyourcompany.co.uk/?gclid=CjwKEAjw2ImsBRCnjq70n_amv14SJACHXijNUzkuBvO_MkuriAXdEkJ7-prDSyI8bEVuyg_45tRd5xoC_fw_wcB, Accessed on: 22.06.2015

⁵⁵² CA 2006 ss.1006(6),1007(4)

⁵⁵³ CA 2006 s.1012

⁵⁵⁴ Companies House Gov, [Official Statistics Incorporated Companies in the UK: Jan – March 2017] 27 April 2017, Accessed at: <https://www.gov.uk/government/publications/incorporated-companies-in-the-uk-january-to-march-2017/incorporated-companies-in-the-uk-january-to-march-2017>, Accessed on: 06.06.2017

⁵⁵⁵ Companies House Gov, Insolvency Service [Insolvency Statistics-January to March 2017 (Q1 2017)], p.6, Accessed at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/611370/Q1_2017_statistics_release_-_commentary.pdf, Accessed on: 05.06.2017

travelled route (96%) to company dissolution is striking off. This appears to indicate that the majority of companies requiring dissolution are insolvent; with no assets to liquidate, the only step to take is to end the company's life by striking it off.

3.3 Revival and Restoration of Companies

The dissolution of a company has some disadvantages. The dissolution of a company is the last step in the life of a company. Therefore, when a company is dissolved, it cannot act further. Furthermore, it cannot lay claim to its assets or to its property from *bona vacantia* and cannot sue others to get back debts owed. Similarly, others cannot do any action against a company while it is in dissolution, as it is legally dead. Dissolution can happen even when some rights still remain to the company or others have rights in the company. Although restoration is not a cause of dissolution, it has strong links to dissolution in that it is a possible consequence thereof. Therefore, it is reasonable to end this chapter with discussion of restoration, as restoration is a logical answer to the question of how a company can take its rights back after dissolution or how others can have their rights against a company revived after dissolution. The answer of this is clear in English Law.

English Law does not determine dissolution as the final word in the life of a company without possibility of restoration. In some circumstances, it may be necessary to reverse dissolution by one of two methods now available under the Companies Act 2006. However, this is a dilemma and a legal gap in Saudi law. The main aim of this thesis is to improve dissolution legislations in the KSA. Therefore, the section on restoration in this thesis highlights the need for

provision of restoration in KSA regulation, achieved by the incorporation of certain provisions similar to English law.

Before the provisions of the Companies Act 2006 came into effect the only one way to restore a company to the Register after dissolution was by court order. After the Companies Act 2006, a further method was introduced, that of administrative restoration⁵⁵⁶. This procedure enables an application to be made to the Registrar at Companies House to restore a company without a court order⁵⁵⁷. This method reverses the state of a defunct company to active without resorting to court, thus ensuring a quick and low cost process⁵⁵⁸.

However, there are certain conditions limiting who may apply for administrative restoration. One of those conditions is that the persons who may apply can only be a former director or member of a company⁵⁵⁹. Secondly, at the point of dissolution, the company was no longer carrying on any business or appearing to do so⁵⁶⁰. Thirdly, the company qualifies only for administrative restoration if it was struck off the Registrar of Companies and thereby dissolved. Furthermore, no more than six years should have passed since dissolution at the time the Registrar receives the application for restoration⁵⁶¹. In addition, the Crown or Duchy⁵⁶² must authorise in writing a company restoration which affects a right or a property which is *bona vacantia*, meaning - held on trust for the Crown. Finally, the company needs to have delivered all documents necessary to bring the company up to date and have paid any outstanding late

⁵⁵⁶ CA 2006 s.1024

⁵⁵⁷ Technical Manual, Administrative restoration to the register Chapter 38 Part 8, UK Government website [www.gov.uk](https://www.insolvencydirect.bis.gov.uk/TechnicalManual/Ch37-48/chapter38/part8/part_8.htm), Accessed at: https://www.insolvencydirect.bis.gov.uk/TechnicalManual/Ch37-48/chapter38/part8/part_8.htm, Accessed on: 08/10/2015

⁵⁵⁸ CA 2006 s.1024(3)

⁵⁵⁹ Ibid, s.1024(3)

⁵⁶⁰ Ibid, s 1025(2)

⁵⁶¹ Ibid, s.1024(4)

⁵⁶² Ibid, s.1025(6)

filing penalties⁵⁶³.

One possible pre-restoration concern is the imposition of court fines, if non-compliance with company law triggered the striking off of the company. In *Re Moses and Cohen*⁵⁶⁴, the court restored the company to the Register and discussed whether any fines incurred “ought to be allowed to pass without further notice”⁵⁶⁵. The court concluded that the imposition of a fine could not be held as a condition for restoration to the Register.

The second method, under section 1029 of the Companies Act 2006 is that the applicant seeks a court order to restore a company to the Register at Companies House. An application to the court for restoration of a company may be made at any time as long as the court is satisfied that it is just that the company be restored to the Register⁵⁶⁶. In *Barclays Bank Plc v Registrar of Companies*⁵⁶⁷, the court conceded that although the number of cases in which it would be considered just to order the restoration of a company to the register was “extremely limited”⁵⁶⁸, nonetheless if a creditor was “adversely affected”⁵⁶⁹ by the dissolution of a company the court may grant standing to the creditor to petition a restoration of the company to the Register.

The application to the court is needed wherever the conditions for administrative restoration⁵⁷⁰ are not fulfilled, or that the applicant was neither a former director nor a member of the company. Application can be made by a wide-ranging group of persons who appear to the court to have an interest for a court order to

⁵⁶³ *Ibid*, 2006 s.1025(5)(a)

⁵⁶⁴ [1957] 1 WLR 1007

⁵⁶⁵ *Re Moses and Cohen Ltd.* [1957] 1 WLR 1007, at 1009

⁵⁶⁶ CA 2006 s.1031

⁵⁶⁷ [2015] EWHC 3140 (Ch)

⁵⁶⁸ *Barclays Bank Plc v Registrar of Companies* [2015] EWHC 3140 (Ch), at 19

⁵⁶⁹ *Ibid*, at 23

⁵⁷⁰ CA 2006 s.1030

be made for the dissolution of the company to be declared void. Section 1029 of the Companies Act 2006 lists several categories of persons who may submit the application to the court for restoration. They can be divided into three categories: firstly, anyone who has a legal or contractual right, responsibility or interest in relation to the company or land belonging to it⁵⁷¹. The interest of an applicant must be a direct interest affecting him whereby his rights would be adversely affected by litigation. In *Pablo Star*⁵⁷², the Registrar ordered a restoration of a company ‘P’ pending action against the Welsh Tourist Board, on condition that the company refrain from further business meanwhile. When the restored company breached those conditions, a third party consisting of government ministers asked the Registrar to be joined as a party to proceedings, arguing that the Registrar had been misled. On appeal by P, the court disallowed the joinder stating that: “It is...for the Registrar to raise with the court issues of breach...it is not in my view for anyone else to raise it with the court”.⁵⁷³ Furthermore, the court confirmed that the liabilities of the Welsh Ministers were unaffected by P’s actions and this therefore rendered them irrelevant as an interested party⁵⁷⁴. The outcome of this case is that the court considered government ministers to be third parties with no interest and thus referred to as “anyone else”. The second category includes former members, directors, liquidators or creditors at the time of the company’s dissolution⁵⁷⁵, and thirdly, the Secretary of State⁵⁷⁶. It is noteworthy that the court will consider an application for restoration to the Register of a company even if it is unclear

⁵⁷¹ Ibid, s.1029(2)(c)–(g),(k)

⁵⁷² *Pablo Star* [2016] EWHC 2640 (Ch)

⁵⁷³ Ibid, at 50

⁵⁷⁴ Ibid, at 45

⁵⁷⁵ CA 2006 s.1029(2)(b),(h)–(j)

⁵⁷⁶ Ibid, s.1029(2)(a)

whether or not there are sufficient assets left to recover⁵⁷⁷. For a court to positively consider restoration to the Register, it is enough that there is some evidence of either company records meriting examination or third parties who may be willing to assist in the compensation of “a very substantial creditor”⁵⁷⁸.

In the situation of administrative restoration, once the restoration has taken place, there is a three-year window in which an application can be made to restore any person to the position they were in before dissolution. Any such application must be made within three years of the restoration⁵⁷⁹.

The general effect of restoration for either administrative or court processes is to restore the company to existence as if no intervening dissolution had ever taken place. No penalties are served against the company for interim non-delivery of accounts and all persons involved are put in the same position they were before dissolution⁵⁸⁰. However in certain specific situations the position to which the parties return after restoration may not be the position that they were in on the eve of the company’s dissolution. In *County Leasing*⁵⁸¹ the court upheld an appeal to disallow a claim made for misrepresentation against another party. Although the claim had been started just before dissolution of the company, it was held that even had dissolution not occurred, there would have been insufficient time to complete the claim before the limitation date expired. Thus, it appears that contrary to a literal reading of statute, case law has opened up the possibility for claims to be heard retrospectively, referring to a time during which the company was legally dead. This may be what is alluded to by the

⁵⁷⁷ *Barclays Bank Plc v Registrar of Companies* [2015] EWHC 3140 (Ch), at 34

⁵⁷⁸ *Ibid*, at 35

⁵⁷⁹ CA 2006 s.1028(4)

⁵⁸⁰ *Ibid* s.1028 (1)-(3) relating to administrative restoration corresponds to s.1032(1) – (3) which relates to court ordered restoration.

⁵⁸¹ *County Leasing Asset Management Ltd et al* [2015] EWCA Civ 1251

language of statute in 1032(3), which says that “The court may give such directions and make such provision as seems just for placing the company and all other persons in the same position (as nearly as may be) as if the company had not been dissolved or struck off the register.” This means that the position returned to need not be the one immediately prior to the dissolution, but to the same state the company may have been in had dissolution not occurred, thus taking into account the period of dissolution itself and anything that might have happened during that time, even if this is only hypothetical. The words “as seems just”⁵⁸² refers to the discretion that the court can use, and the wideness of that discretion applying to hypothetical situations is implied in the words “as nearly as may be”⁵⁸³. The extent to which discretion may be applied by the court was alluded to in the case as being relevant only in “exceptional circumstances”⁵⁸⁴. However, under certain circumstances restoration is ordered by the courts, but only if there is a definite purpose to the restoration. In the Court of Appeal case *County Leasing Management Ltd v Hawkes*⁵⁸⁵ the appellants succeeded against an order given by court discretion for a limitation direction. The appeal, as Briggs LJ pointed out, succeeded because: “Putting the Company and all interested parties in the position which they would have enjoyed if there had been no dissolution would not, probably, have led to these claims being pursued in time”⁵⁸⁶. Therefore, ideally, there should be standards set by Parliament in a Statutory Instrument to regulate how far a court’s discretion can impact upon the life of a company. In addition, further effects of

⁵⁸² CA 2006, s.1032(3)

⁵⁸³ *Ibid*, s.1032(3)

⁵⁸⁴ *County Leasing Asset Management Ltd et al* [2015] EWCA Civ 1251, at 34

⁵⁸⁵ *Ibid*

⁵⁸⁶ *Ibid*, at 47

court orders include changes to company records and the awarding of payments for cost ordered by the court, as well as requirements arising from *bona vacantia*⁵⁸⁷ to request the return of any funds and any other assets they may be holding that belonged to the Company.

A company can be restored to the Register if there is an interest to the company itself such as to recover assets which are *bona vacantia* or to carry on a business. In *Re Moses and Cohen*, there were serious breaches by the directors, included failing to make the appropriate returns to the Registrar. The court nonetheless restored the company to the Register so that it could carry on business⁵⁸⁸. Furthermore, a company can be restored for a claim for damages for personal injury⁵⁸⁹ or to benefit a third party interest. In *Re Blenheim Leisure (Restaurants) Ltd*⁵⁹⁰ the court allowed an appeal to restore a company to allow the continuance of a contract of sub-tenancy. The court insisted that it “take into account the rights of third parties that may be directly affected” and that it was “desirable that the appellants be added so that the Court can be fully informed of their rights and take into account before deciding whether it is just for restoration to be ordered.”⁵⁹¹ This means that a landlord is recognised as a third party due to the existence of a tenancy agreement creating grounds which in the eyes of the court is just to require restoration. However, a tenant cannot argue for the renewal of a lease at the expense of another third party with a charge on the property⁵⁹².

⁵⁸⁷ CA 2006 s.1032(4)

⁵⁸⁸ *Re Moses and Cohen Ltd.* [1957] 1 WLR 1007, at 1008

⁵⁸⁹ CA 2006 s.1030

⁵⁹⁰ [2000] B.C.C. 554

⁵⁹¹ *Re Blenheim Leisure (Restaurants) Ltd* [2000] B.C.C. 554, at 573, 574

⁵⁹² *Fivestar Properties Ltd.*, [2015] EWHC 2782 (Ch), at 23

Another example of restoration to benefit a third party is *Joddrell v Peakton*⁵⁹³. The respondent was a third party who had asked to restore the company to obtain compensation for industrial injury: “The respondent claimed to have suffered noise induced hearing loss attributable to his employment by the company...had been struck off the Register of Companies and dissolved...”⁵⁹⁴ The claim of industrial injury triggered a chain of decisions. In spite of an initial dismissal of the claim by the district judge, both the circuit judge and the Court of Appeal upheld the decision of the lower court to restore the company to the Register and award a claim for loss of hearing. Similarly, *Davy v Pickering*⁵⁹⁵ is a case of restoration of a company for the benefit of a third party. Davy (D) and Pickering (P) were co-directors in a company. P was also a financial advisor and so D asked him for investment advice which D took, to his detriment. P applied successfully to strike off the company, and subsequently the limitation period ran out for D, a third party, to claim against the company. Therefore, D applied for it to be restored under Companies Act 2006 section 1032 and for the limitation period to retroactively stop running from the point of striking off. On appeal⁵⁹⁶ the court interpreted its discretion on whether it seemed “just”⁵⁹⁷ to restore a company to require evidence that the applicant, but for the dissolution, would have been likely to have brought proceedings, not simply that as a matter of speculation, he might have done so. Evidence of such likelihood was required to establish a clear causal link between the dissolution and the applicant’s inability to take proceedings out against the company, and that it was less likely

⁵⁹³ *Joddrell v Peakton* [2013] B.C.C. 112

⁵⁹⁴ *Ibid*

⁵⁹⁵ *Davy v Pickering* [2015] EWHC 380 (Ch)

⁵⁹⁶ *Davy v Pickering* [2017] EWCA Civ 30

⁵⁹⁷ CA 2006 s. 1032(3): “The court may give such directions and make such provision as seems just for placing the company and all other persons in the same position (as nearly as may be) as if the company had not been dissolved or struck off the register.”

that he would have been prevented from doing so due to the limitation clause⁵⁹⁸. The Court of Appeal affirmed the requirement for restoration of a company to depend on a causal link that ensured that applications for restoration were not mere speculation⁵⁹⁹. Thus, the court in principle accepted the applicant's position but rejected it in the specific circumstances that there was no clear causal link between the dissolution and his inability to take legal action. In so deciding, the court in *Davy* changed the position at law as established previously in *Regent*. In *Regent*⁶⁰⁰ it was deemed sufficient for a third party to be "directly affected"⁶⁰¹ to apply for restoration. As such, a third party would attain a priority equal to a company to be heard by a court as an applicant for a company restoration⁶⁰². By contrast, the court in *Davy* changed this requirement that being directly affected by the striking off was not enough to apply for restoration. Only if the applicant could show evidence of having wanted to take proceedings against a company would he be regarded by the court as a third party with a natural right to be heard in application to restore that company.

Whatever the reason justifying company restoration by a court, no party with an interest can add their claim when that claim is unconnected to the purpose of restoration. In *Walker v NatWest Bank*,⁶⁰³ a bank managing a loan between two companies miss-sold interest-bearing products to one of the companies which subsequently dissolved. When that company was restored by the court in

⁵⁹⁸ Adams G., St John's Chambers website, [*Davy v Pickering* [2017]: what now for claimants?] April 2017, p.2, Accessed on: <http://www.stjohnschambers.co.uk/dashboard/wp-content/uploads/Case-Note-Davy-v-Pickering-Guy-Adams-04-2017.pdf>, Accessed on: 05.06.2017

⁵⁹⁹ Clyde & Co. website [Limitation Period – *Pickering v Davy* (Court of Appeal)] January 24 2017, Accessed at: <https://www.clydeco.com/blog/insurance-hub/article/limitation-period-pickering-v-davy-court-of-appeal>, Accessed on: 05.06.2017

⁶⁰⁰ *Regent Leisuretime Ltd. v NatWest Finance Ltd.*[2003] EWCA Civ 391

⁶⁰¹ *Ibid.*, at 602

⁶⁰² *Ibid.*, at 603

⁶⁰³ *Walker v NatWest Bank Ltd* [2016] EWHC 315 (Ch)

anticipation of interest owed by the bank to be repaid, the administrators of the company claimed their unpaid wages and expenses from the pre-dissolution period. However, the court was not inclined to allow any pay-out from sums recovered from the bank to the claimant company's former administrators. The judge in *Walker* pointed out: "There is nothing...to suggest that the bank may be obliged to pay anyone other than the company itself after restoration, or its authorised representative such as a liquidator if it is then wound up."⁶⁰⁴ Thus, for a post-restoration compensation to be made to an interested party it must be the result of the action for which the restoration was made.

Restoration to the Register is not only the restoration to life of a dead company, but the deletion of any period of its death from company law. Thus the company has advantages in its restoration such as retaining the same name unless another company has meanwhile set up with same or similar name. However, the Registrar of Companies could restore the company using its unique company number and allocate fourteen days to company to change its name⁶⁰⁵. Restoring a company is better than setting up a new company, as a new company will legally be a separate company due its own unique number which cannot be changed. Hence, if one sets up a new company even with the same name as before, this will not restore the original company. Instead, the assets of the original company will remain *bona vacantia* and the new company will start a completely new life without those assets. Restoration of a company is the only way to recover property or assets from the Crown⁶⁰⁶.

⁶⁰⁴ *Ibid*, per Cooke J, at 14

⁶⁰⁵ CA 2006 s.1033

⁶⁰⁶ Gov.uk website (2017), [Guidance: Apply for a repayment after restoration of a company], 2017, Accessed, at: <https://www.gov.uk/guidance/apply-for-a-repayment-after-a-company-has-been-restored-to-the-register-cb4>, Accessed on:08.05.2017

However, costs of restoration can be quite high; a fee is due to the Treasury Solicitor, another fee to Companies House and significantly the penalty and registration fees payable to Companies House for late accounts and failure to send annual returns which may remain from the original company. Although overdue accounts are no more than six months late the penalty is £1,500. If two or more years of accounts were not filed, the total costs for late filing, together with the costs of preparing these - if the company was active at the time - plus the annual return fees will be significant. Therefore, it may be preferable to avoid restoration but simply set up a new company with the same or different name. Restoration will thus be a cheaper and quicker solution in some, but not all cases⁶⁰⁷.

Thus, although restoration presents advantages of being quicker and cheaper than setting up a new company, there has been a decrease in restorations to the Register over the last two years. In 2013/14 were 533,032 new incorporations and 5,177 restorations to the register, whereas in 2014/15 were 585,741 new incorporations and 5,502 restorations to the register. The number of restorations dropped by 325 from 2013-14⁶⁰⁸ to 2014-15⁶⁰⁹. This represents a percentage fall from 0.97% to 0.94% which is 0.03% of restorations of companies against the incorporation of new companies, a drop which is statistically insignificant.

3.4 Consequences of dissolution of companies

Dissolution of companies has causes, mentioned above, and also effects and consequences. The consequences of dissolution impact legally,

⁶⁰⁷ Company Law Solutions website, [Company restoration], Accessed at:

<https://www.companylawsolutions.co.uk/other-services/company-restoration>, Accessed on: 08.10.2015

⁶⁰⁸ Companies House, Annual Report 2013-14

⁶⁰⁹ Ibid, 2014-15

economically and socially. The legal consequences of dissolution of companies are the bringing to an end of the life of the company. When a company ceases to exist it is neither able to have assets, property or liabilities, nor rights and obligations which arise when a contract of employment with the company is at an end. Additional consequences are that the company terminates and its legal entity comes to an end and that it is removed from the Companies House Register⁶¹⁰. The company name is then available for adoption by a new company⁶¹¹.

A significant legal consequence of dissolution is mentioned in section 1012 of the Companies Act 2006: that the property of a company becomes *bona vacantia*⁶¹², capable of encompassing interests in land, liquid assets and rights to benefits and licences⁶¹³. This happens when the Crown, after having taken legal title to the property, then disclaims its title to allow the company to be restored to the Register so that third parties can then pursue their claim to the property. In *Fivestar Properties Ltd*⁶¹⁴ the court held that by disclaiming a property the Crown was not extinguishing the property's freehold; rather, the Crown was retaining its "ultimate right"⁶¹⁵ to the property to allow for restoration of the company to the Register and subsequent claims to be made by interested parties.

⁶¹⁰ Companies House, ['Statistical release: Incorporated companies in the United Kingdom - April 2015', May 2015] p.13, Accessed at:

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/430077/Incorporated_Companies_in_the_UK_April_2015_P1.pdf, Accessed on: 07/06/2015

⁶¹¹ UK Data Company Information website, [Company Status-Striking Off and Dissolution], (2016), Accessed at: <http://ukdata.com/help/credit-reports-documents/status-strike-off-dissolution>, Accessed on: 22.06.2015

⁶¹² CA 2006 s.1012

⁶¹³ Government Legal Department, [Policy Paper: Bona vacantia dissolved companies (BVC1)], published on 6 Dec 2013, Accessed at: <https://www.gov.uk/government/publications/bona-vacantia-dissolved-companies-bvc1/bona-vacantia-dissolved-companies-bvc1>, Accessed on: 23.06.2015

⁶¹⁴ [2015] EWHC 2782 (Ch)

⁶¹⁵ Peter Bailey, [Real Property – Insolvency, Insolvency Daily] Updates 13/10/2015, Accessed at: <http://www.lawtel.com/MyLawtel/Documents/AC0147936>

The legal logic behind this is that all citizens are ultimately an inferior tenant; if the freehold interest is extinguished, the land reverts to the Crown⁶¹⁶.

One further legal consequence of dissolution is that past contracts associated with the company come to an end. In *Contract Facilities*⁶¹⁷ an application was made to reopen a contract which had, by the time of the striking off of the company, been fulfilled. However, the judge stated that: “Restoration would not revive an application which had been determined....The restoration to the register resurrects the company, but I do not think that it can also resurrect a contract that has come to an end”⁶¹⁸. This means that events which have come to an end cannot be revived if they have been properly fulfilled. However, if the company is restored, any contract which was unfinished by the time of striking off and before restoration will also be reopened, as Weeks J asserted that “it is retrospectively validated at that point of time”⁶¹⁹. However, any other application linked to the company which has been determined cannot be retrospectively revived together with the company itself.

In addition to legal consequences of dissolution, economic consequences have a significant impact on society. Dissolution of a company can result in negative economic consequences and cause disadvantages to public and private economic sectors, nationally and globally. This is because companies are the backbone of business, help foster economic growth, boost employment in countries and increase tax income for governments. All of these advantages show how companies are important to the economy. Therefore, the consequences of dissolution of companies mean the loss of these advantages. A recent example

⁶¹⁶ *Fivestar Properties Ltd*, [2015] EWHC 2782 (Ch), para 12

⁶¹⁷ *Contract Facilities Ltd v Rees* [2002] EWHC 2939 (QB)

⁶¹⁸ *Ibid*, at 76,77

⁶¹⁹ *Ibid*, at 76

of negative impact of company instability is the collapse of Carillion. The result of Carillion losing on big contracts has resulted in the immediate lay-off of staff in many sectors of industry and the services: health, defence and transport. Thousands of firms dependent on Carillion are at risk and thousands of employees at risk of unemployment⁶²⁰.

Although dissolution of company clearly has negative consequences, on many occasions it has positive consequences. Dissolution can be the best medicine and treatment if there is loss of confidence between members or uncooperative behaviour of the members. In *Re Yenidje Tobacco Company Ltd*⁶²¹, the court held that members who refused to meet made the business unworkable and the court gave the order to dissolve the company. In addition, if the company only carried on at loss, it could dissolve, as was the case in *Re Suburban Hotel Co*⁶²² where the court decided that since a hotel was inherently an unprofitable business an order for dissolution would be made. Moreover, dissolution by merger has many advantages and brings several benefits the economy: it can increase a company's power, reduce the reliance of one company on another; minimise the number of companies' competitors and maximise the merging companies' power in the market⁶²³. In addition, mergers as a cause of dissolution also enhance production, distribution and market expansion⁶²⁴. Mergers also work globally to improve the domestic economy. In the European Union, the option of cross-border mergers, for example, has increased middle-

⁶²⁰ BBC News website Accessed at: <http://www.bbc.co.uk/news/business-42687032> Accessed on: 13.02.2018

⁶²¹ [1916] 2 Ch 426

⁶²² (1867) 2 Ch App 737

⁶²³ Farrell, J., and Shapiro, C. Scale [Economies and Synergies Horizontal Mergers Analysis], International Law Journal, (2002), Vol.68, (pp.685-710), p.686

⁶²⁴ Sherman, A. J., Merger and Acquisition from A to Z, (New York: AMACOM, 1st ed, 1998), p.10

sized companies to become global operations⁶²⁵. Another example of the advantages of dissolution is demerging. The division or demerging of a company can have the practical and positive consequences of raising cash quickly by “asset-stripping”; sometimes the value of a business is greater when it is smaller than before, but split⁶²⁶. Generally, the reorganisation of a company in a demerger may be initiated by its members to improve business performance by concentrating the skills of its workers and better team-working, thus surviving competition. In conclusion, dissolution has both positive and negative consequences. Therefore, legislators and policymakers should take note and consider these advantages and disadvantages when drafting legislation and drawing up policy documents.

3.5 Summary

There are various causes of dissolution of companies in English Law governed by several pieces of legislation. Dissolution of companies is not the same as dissolution of partnerships. Causes of dissolution of partnerships are referred to in specific sections of Partnership Act 1890 as causes of dissolution. This list of combined causes of dissolution of partnerships under specific sections in the Partnership Act 1890 makes the study of causes of dissolution easier and clearer than causes of dissolution of companies. This is the result of the fact that to identify the causes of dissolution of companies, one is required to search across several pieces of legislation.

⁶²⁵ Gavin, B., *The European Union and Globalisation: Towards Global Democratic Governance*, (Cheltenham: Elgar, 1st ed, 2001)

⁶²⁶ Girvin, S. *et al*, *Charlesworth's, Company Law*, (Sweet & Maxwell, 18th ed, 2010), pp.761-3

Since companies operate as separate legal entities, the causes for dissolution are linked to commercial factors. In contrast, the causes for dissolution of partnerships include personal factors. Finally, dissolution is the final stage of the winding up of a company. Partnerships, by contrast, first dissolve and then wind up. It is noteworthy that there are fewer causes for dissolution of companies than of partnerships. This is due to the differences between companies and partnerships being administrative rather than substantive⁶²⁷.

As mentioned above⁶²⁸, the overwhelming number of company striking offs may reflect the great number of companies insolvent at the point of dissolution, there may also be significant advantages available to companies through dissolution by striking off. Unlike voluntary liquidations, strike offs are not time-bound and there are no penalties for settling liabilities within a prescribed period. Furthermore, all the company's assets remain in the directors' full control until the moment of striking off⁶²⁹. Finally, striking off is low cost and bears no stigma associated with other insolvency procedures⁶³⁰.

Although used in only a small number of dissolutions, the administration procedure is one of the best ways to buy time for an insolvent company or for a company that is likely to become insolvent to maximise the value of assets available and to increase the chances of rescuing the company through restructure of the company. A very important point to consider is that there are no specific guidelines identifying standards for court discretion. Ideally, there should be standards set by Parliament in a Statutory Instrument to regulate or

⁶²⁷ In 1.4.2 further details of Difference between the dissolution of partnerships and companies

⁶²⁸ In 3.2.4

⁶²⁹ *Phillips v Royal Society for the Protection of Birds and Others* [2012] EWHC 618 (Ch)

⁶³⁰ KRE Corporate Recovery website, [Members Voluntary Liquidation v Striking Off], Accessed at: <http://kreco.co.uk/members-voluntary-liquidation-v-striking-off/>, Accessed on: 23.06.2015

even limit how far a court's discretion can impact upon the life of a company. The concern over wide discretion which is given by legislation to the courts is that may be misused to resolve complications arising from administrative formalities, rather than to remedy non-viability of the business on economic or managerial grounds.

In conclusion, in this author's opinion, we can divide the causes of dissolution of companies into **three** categories. **Firstly**, the procedures arising from causes of dissolution which may lead compulsorily to dissolution, namely, merger and demerger. In merger and demerger dissolution is unavoidable. Therefore, English law is correct in recognising merger and demerger as causes of dissolution. The mechanism of merger leads to dissolution compulsorily by itself. **Secondly**, the administrative causes of dissolution. This is when a company is neither trading nor in operation, or when a company is no longer needed. Additionally, administrative basis for dissolution includes when active directors want to retire and there is no-one take over. All of these causes of dissolution of company are reasonable. The natural consequence is that if the company does not achieve profit, it is redundant and should dissolve. Also it is good that English law considers that a company neither trading nor in operation, or when a company is no longer needed ought to be dissolved. Moreover, it is a reasonable cause of dissolution when active directors want to retire and there is no-one to take over. The active directors are the backbone of the company; if the backbone is gone, surely, the company will go on at a loss and collapse. Therefore, it is better to dissolve it and divide its shares rather than leave it alive to go on at a loss. **The final category**, the economic causes of dissolution. This is when a company is insolvent. Dissolution of an insolvent company can

sometimes be the best option. At this stage it is very important to highlight the relationship between dissolution and insolvency. Dissolution is the end of the existence of a firm. Insolvency is the situation where an entity cannot raise enough cash to meet its obligations, or to pay debts as they become due for payment. The relationship between dissolution and insolvency is that the insolvency can be an indirect cause of dissolution by triggering liquidation which is a route to dissolution. On other occasions a company could be solvent and still go into dissolution for different reasons. This can happen when a company is no longer needed or when active directors want to retire and there is no-one to take over. Also, in the cases of demerger or merger, when one or more companies will no longer exist and the company which does not exist is dissolved although it is solvent. Moreover, solvency of the company is a condition for dissolution through striking off to succeed. This is because it is of paramount importance to pay off all creditors before considering the option of striking off. If there is any outstanding business between the company and the creditors concerning arrangements, no application may be made until the matter has reached a conclusion⁶³¹. This is true even when the unfinished business is supervised by the court⁶³². In the case of agreements with creditors not being reached, liquidation is the alternative to striking off as the method to reach dissolution⁶³³. Thus, striking off is an option exercised strictly on condition of company solvency; it is only due to the company's solvency that there is no presence of a liquidator.

⁶³¹ CA 2006, s.1005

⁶³² Ibid, s.1005(1)(a)

⁶³³ Saunders, I., [The Striking Off and Restoration of Companies], Wilder Coe Ltd, Accessed at: http://www.wildercoe.co.uk/pdf/striking_off.pdf, Accessed on: 22.06.2015

Since the causes of dissolution of company in English law are appropriate to their circumstances, as either compulsory, administrative or economic in nature, all the causes of dissolution of company in English law are reasonable causes for dissolution.

The main conclusion of this chapter is that to make life easier for lawyers, jurists and researchers in the field of law, reform to current legislation should include the incorporation into statute of the recognised causes of dissolution. In a fashion similar to both the Partnership Act 1890 and to the Limited Liability Company Act in the U.S⁶³⁴, the Companies Act 2006 would benefit from a listing of causes of company dissolution. Therefore we have included below a preamble to Part 31: Dissolution and restoration to the register as an example of how the causes of dissolution of companies might be listed in statute:

Chapter 1: Causes of dissolution of companies.

1000 /1.A company and its affairs are dissolved upon whichever of the following first occur:

- a- Insolvency;*
- b- A merger;*
- c- A demerger;*
- d- Subject to provisions of striking off, when a company is neither trading nor in operation, for example, it is not processing any documents, responding to mail or communicating accounts to Companies House for over a six month period, or that there is no functioning liquidator following a winding up;*

⁶³⁴ Chapter 18 subchapter VIII section 801, Accessed at: <http://delcode.delaware.gov/title6/c018/index.shtml>, Accessed on 15.10.2015

e- Subject to provisions of striking off, when a company is no longer needed or when active directors want to retire and there is no-one to take over.

f- Dissolution by the court.

Chapter 4 Causes of Dissolution of *Sharikat* (Partnership) in Islamic Law

4.1 Introduction

The word used for partnership in the Arabic language and Islamic law is “*sharikat*”. However, *sharikat* is a generic term that refers to participation in a business of any type. This includes businesses which are *sharikat al-milk* (non-contractual)⁶³⁵, *sharikat al-uqud* (contractual)⁶³⁶ and companies⁶³⁷. However, *sharikat* as a technical term in classical Islamic law can be either a generic term that means participation of any type such as *sharikat al-milk* or a legal term such as *sharikat al-uqud*. To identify the specific form intended, it is the practice of jurists to qualify this term.

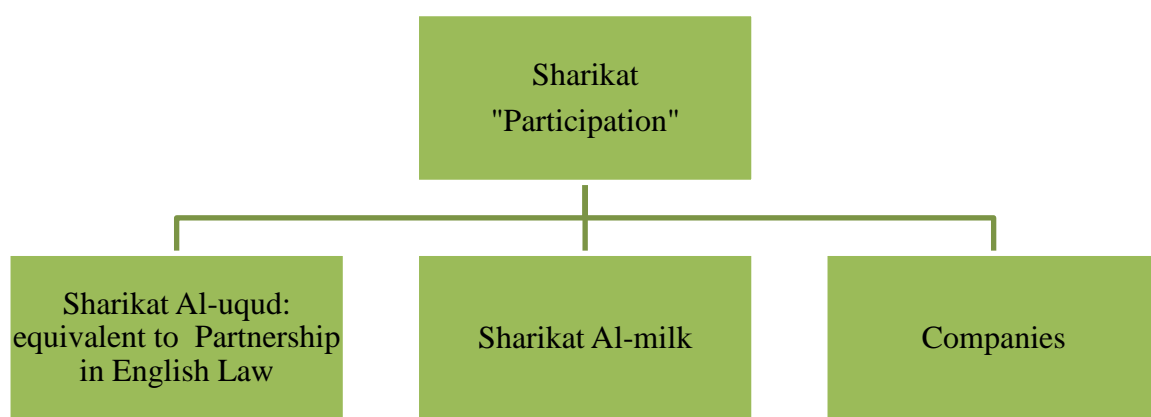
When classical jurists use the word *sharikat* in their sources to mean co-ownership, the usage of that word is a qualified term referring to co-ownership, usually through inheritance, wills, or other situations where two or more persons hold an asset in common. Thus, the joint ownership arises from the fact of the parties holding the benefit in common. The legal situation between the parties involved is known as “*khalt*” in Arabic, literally “mixed”, referring to the mixture or combinations of ownership that exists between the parties. However, when the jurists want to indicate that the basis of participation is a contract

⁶³⁵This type of *sharikat* is usually created by way of inheritance, wills, or other situations where two or more persons come to hold an asset in common.

⁶³⁶It is divided into five kinds, namely; *sharikat al-inan*, *sharikat al-wojooah*, *sharikat al-mufawadhah*, *sharikat al-mudarabah* and *sharikat al-a'maal*.

⁶³⁷Gulf-Law.com website, [Companies in Islamic (*Shariah*) Law], Accessed at: http://www.gulf-law.com/uaecolaw_shariah.html Accessed on: 26.11.2015

between two or more persons, the term is qualified as *sharikat al-uqud* (contractual) which is divided into five kinds: ; *sharikat al-inan*, *sharikat al-wojoo*, *sharikat al-mufawadhah*, *sharikat al-mudarabah* and *sharikat al-a'maal*⁶³⁸. This type of *sharikat* is understood in English law as a partnership⁶³⁹. Therefore, the term partnership in this chapter refers to the concept of Islamic law which is known as *sharikat al-uqud*.



Partnership which is *sharikat al-uqud* in Islamic law is defined by each of the four major Islamic Schools⁶⁴⁰, listed here in historical order. The *Hanafiyya*⁶⁴¹ scholars define partnership as a contract made between partners on both capital

⁶³⁸ Bilal, G. [Business Organisations under Islamic Law], Proceedings of the Third Harvard University Forum on Islamic Finance: Local Challenges, Global Opportunities, (pp.83-89), Cambridge, Massachusetts: Harvard University, 1999, Accessed at: http://ifpprogram.com/login/view_pdf/?file=Business%20Organizations%20under%20Islamic%20Law.pdf&type=Project_Publication, Accessed on: 21.10.2015; Investment and Finance website, 2005, Accessed at: <http://investment-and-finance.net/islamic-finance/s/sharikat-al-milk.html>, Accessed on: 21.10.2015; Investment and Finance website Accessed at: <http://investment-and-finance.net/islamic-finance/s/sharikat-al-aqd.html>, Accessed on: 14.02.2016; Bin Borhan, J., [Conducts of Partners in al-Sharikah al-Mufawadah: An Analysis from Hanafi's Classical Sources], SEMINAR EKONOMI ISLAM PERINGKAT KEBANGSAAN 2009 (National Islamic Economic Seminar, Malaysia, 2009), Accessed at: <http://www.kantakji.com/media/163528/file624.pdf>, Accessed on:14.02.2016

⁶³⁹ Nyazee. I., *Islamic Law of Business Organization Corporations*, (India, Adam Publishers & Distributors, 1st ed, 2010), pp.19-22.

⁶⁴⁰ There are four schools of Islamic teaching, with distinct methods of how to interpret Scriptural and non-Scriptural law. They are: *Hanafiyya*, *Malikiyya*, *Shafiyya* and *Hanbaliyya*. These schools of interpretation developed between the 8th and 9th centuries C.E.

⁶⁴¹ The *Hanafiyya* are the earliest of the four Islamic schools of jurisprudence and was formed in Iraq by Imam Abu *Hanifa* (699-767 C.E.)

and profit whilst *Malikiyya*⁶⁴² scholars define partnership as contract between two or more owners of wealth for the purposes of carrying out joint trade. Alternatively, it may be a contract for shared labour and profits. The *Shafiyya*⁶⁴³ scholars detail the definition of partnership beyond the purpose of the contract as a conferral of a right in to two or more people making the partnership common. The scholars of the *Hanbaliyya*⁶⁴⁴ define partnership in the most limited terms, without reference to contract, or conferral of right, merely as “the coming together of two or more people in disposal or acting”⁶⁴⁵. All these definitions revolve around one central meaning, adopted in the official standards of *Shariah* of the Accounting and Auditing Organization for Islamic Financial Institutions (AAOIFI)⁶⁴⁶ as “an agreement between two or more parties to combine their assets, labour or liabilities for the purpose of making profits”⁶⁴⁷. The main characteristics of partnership in Islamic law are its unlimited liability and that the partnership is not a legal entity set apart from the partners constituting it. Those are the same characteristics of a partnership in English law. Consequently, it is clear that classical Islamic law recognises the concept of partnership. Jurists (*fuqaha*) mention the concept of partnership (*shirakat*) in their books as understood in English law.

⁶⁴² The second school of law in order of time was the one founded in *Madinah* by Imam *Malik bin Anas* (711-795 C.E.)

⁶⁴³ This school was founded by Imam *Shafi* in Egypt, (767-820 C.E.)

⁶⁴⁴ This school was founded by Imam *Ahmed bin Hanbal* in Iraq, (780–855 C.E.)

⁶⁴⁵ Kharofa, J., [Partnership – Definition any Types], Concepts in Islamic Economics and Finance (2006), Accessed at: <https://cief.wordpress.com/2006/03/04/partnership-definition-and-types/>, Accessed on: 21.10.2015

⁶⁴⁶ For more information about the AAOIFI, available at: <http://aaoifi.com/?lang=en>

⁶⁴⁷ Islamic Banking Department: State Bank of Pakistan, [Adoption of AAOIFI Shariah Standards: Case of Pakistan, *Sharika (Mousharaka)* and Modern Cooperation], Islamic Banking Bulletin, April-June 2013, p.14, Accessed at: <http://www.sbp.org.pk/ibd/bulletin/2013/ibb-june-2013.pdf>, Accessed on: 21.10.2015

It should be noted that *sharikat* as a legal term and its differentiation into *sharikat al-milk* (non-contractual)⁶⁴⁸ and *sharikat al-uqud* (contractual) is mentioned neither in the Holy *Quran*⁶⁴⁹, nor in the *Sunnah*⁶⁵⁰ nor in the *Ijma*⁶⁵¹ which are the main three sources of Islamic law. However, when these types of partnership emerged Muslim scholars made efforts based on the fourth and fifth source of Islamic law sources, *Ijtihad*⁶⁵² and *Qiyas*⁶⁵³ to demonstrate the rule of Islamic law about them. *Ijtihad* means independent reasoning or the utmost effort an individual can make in exerting him or herself. *Ijtihad* is recognised as a personal effort of decision-making process in Islamic law. However, *ijtihad* requires a thorough knowledge of theology and revealed texts and legal theory⁶⁵⁴ which is an exceptional capacity for legal reasoning; thorough knowledge of period classical Arabic to interpret the general principles present in the Holy *Quran* and the *Sunnah* to set down rules. *Ijtihad* is invoked to prohibit or allow something on the basis of whether or not it serves the common good or public welfare⁶⁵⁵. *Qiyas* means “the application to a new problem of the

⁶⁴⁸ This type of *sharikat* is usually created by way of inheritance, wills, or other situations where two or more persons come to hold an asset in common.

⁶⁴⁹ The first authentic origin of Islamic Law is the Holy Quran which is the Word of God according to the Muslim religion.

⁶⁵⁰ After the Quran itself, *Sunnah* is the second source of Islamic Law. *Sunnah* [lit. “the way”] is also referred to as *Hadith* [lit. “the saying”]. *Sunnah* includes the actions of the Prophet Mohamed whilst the *Hadith* is the written record of the *Sunnah*. The *Sunnah* of the Prophet includes the deeds, utterances and implied approval. The Quran treats the broad principles and instructions of the religion, rarely going into any detail. The details were generally demonstrated by the Prophet by his actions or verbal explanation recorded in the *Hadith*

⁶⁵¹ *Ijma* constitutes the third source of Muslim Law. *Ijma* is the consensus of opinion of the companions of the Prophet Mohammed - PBUH- or of the Muslim jurists on an issue of law

⁶⁵² Literally: “exertion”, refers to independent effort made in thinking about the law. See: Al-Qadri, M, [Ijtihad and Mujtahid], The Codification of Islamic Law, Trinidad: Hajj Mohammed Ibrahim, 1950.p1, Accessed at: <http://muslimcanada.org/ijtihadmujtahid.pdf>, Accessed on: 21.10.2015

⁶⁵³ Reasoning based upon extrapolation of the law through the use of analogy. For a definition of *Qiyas*, see: Okan, E, [The sources and schools of Islamic jurisprudence], American Journal of Social Management Science, 2012, Vol. 3, No.3, (pp.106-111), at p,107, Accessed at:

<http://www.scihub.org/AJSMS/PDF/2012/3/AJSMS-3-3-106-111.pdf> Accessed on: 21.10.2015

⁶⁵⁴ Which called *usul al-fiqh*

⁶⁵⁵ Hannan, A., [Usul Al-Fiqh], Accessed at: <https://thequranblog.files.wordpress.com/2008/06/usul-al-fiqh.pdf>, Accessed on:28.11.2015

principles underlying an existing decision on some other point which could be regarded with the new problem”⁶⁵⁶.

There are two main characteristics which distinguish corporations from other legal entities: its legal personality and limited liability. Legal personality is clearly recognised by Islamic law in the form of the *waqf*⁶⁵⁷, *bayt al-mal* and *masjid*⁶⁵⁸ were developed in Islamic countries through the ages. Since these forms of fictitious legal personality are acceptable to Islamic law, the modern business corporation should also be acceptable⁶⁵⁹.

Regarding the second characteristic of corporations, limited liability was also recognised by classical Islamic law to some degree 1300 years ago. Recognition of limited liability is clearly apparent from *sharikat almodaraba*, where two or more persons provide finance, and the other or others provide the entrepreneurship and management for the venture. The venture may be a trade, an industry or a service and is intended to be profit-making, where profit is shared in agreed proportion. Any loss is borne by the financiers only in proportion to their share in the total capital without the provider of entrepreneurship and management⁶⁶⁰. This means that the provider of entrepreneurship and management has limited liability in the case of company losing financially or in the case of insolvency.

⁶⁵⁶ Okon, E., [The sources and schools of Islamic jurisprudence], American Journal of Social Management Science, 2012, Vol. 3, No.3, (pp.106-111), at p.107, Accessed at: <http://www.scihub.org/AJSMS/PDF/2012/3/AJSMS-3-3-106-111.pdf> , Accessed on: 28.12.2015

⁶⁵⁷ Literally: Endowments.

⁶⁵⁸ *Masjid* refers here to the mosque as a public institution, possessing elements of a public corporation in relation to the collection and management of public funds such as charity.

⁶⁵⁹ Hafeez, M., [An Analysis of Corporate Entity and Limited Liability in Islamic and Western Perspectives of Corporate Governance], International Journal of Business, Economics and Law, Vol. 2, Issue 3, 2013, ISSN 2289-155, (pp.104-107), at p.104, Accessed at: <http://ijbel.com/wp-content/uploads/2014/07/An-Analysis-of-Corporate-Entity-and-Limited-Liability-in-Islamic-and-Western-Perspectives-of-Corporate-Governance-Dr.-Malik-M.-Hafeez.pdf>, Accessed on: 27.11.2015.

⁶⁶⁰ Saleem, S., [Role of Islamic Banks in Economic Development], Munich Personal RePEc Archive, Paper No. 6449, p.67, Accessed at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=989055, Accessed on: 27.11.2015

Thus, the general concepts of corporation, legal personality and limited liability are recognised by classical Islamic law. However, the form in which Islamic law recognises these is not the same as in western legislation nowadays. The reason behind that is that this concept of corporation had not yet emerged in those days and so jurists (*fuqaha*) had no reason to describe its legal components. Now that the concept of corporation has emerged, the International Islamic *Fiqh* Academy has issued a statement and conducted research about the modern corporate as joint-stock company, limited company and limited liability partnership. The *Fiqh* Academy has recognised them along with the concept of companies as having legal personality in Resolution No. 130 (4/14) in January 2003⁶⁶¹. However, the *Fiqh* Academy has discussed in detail neither the provisions of companies nor the issue of causes of dissolution of companies. Therefore in this section only the causes of dissolution of partnership in Islamic law are treated.

One of the challenges to consider when discussing causes of dissolution is that Jurists (*fuqaha*) do not group together the various causes of dissolution, unlike the Partnership Act 1890 which does so. This non-combination of causes of dissolution of companies under a specific section of statute makes the study of causes of partnerships' dissolution more difficult since it is necessary to identify causes of partnership dissolution in Islamic law. Thus, the aim of this chapter is to explore and categorise causes of dissolution of partnership (*shirakat*) in Islamic law and to make a critique of some of these causes. Additionally, there will also be a focus on whether the Islamic law contradict existing causes of dissolution of partnership in English law or not. To reach these aims we will

⁶⁶¹International *Fiqh* Academy Resolution # 130 (14/4) of the Islamic *Fiqh* Academy in its meeting (14) dated 16 January 2003 in Doha, Qatar, Accessed at <http://www.fiqhacademy.org.sa/qarat/14-4.htm>, Accessed on 21.10.2015.

discuss the main instances in which a partnership may be dissolved in Islamic law under two main headings: voluntary causes of dissolution of partnership in Islamic law and non-voluntary causes of dissolution of partnership in Islamic law.

4.2 Voluntary causes of dissolution of partnership in Islamic Law

4.2.1 Dissolution of partnership by notice

Throughout history, Islamic Jurists (*fuqaha*) have concurred without exception that the unanimous agreement of partners to dissolve a partnership is required in the case of a fixed term partnership when one of them wishes to dissolve a partnership before the end of partnership term. The consensus amongst Islamic Jurists is based on a proof text which is seen to clearly support the concept of an agreement between partners to binding upon them. The source of the proof text is a *Hadith* which records that the Prophet Mohammed - peace be upon him - said: “Muslims are committed to their conditions...”⁶⁶² The effect of this verse when applied to partnership is that partners are presumed to be committed to the duration of their partnership in its entirety. Therefore, Islamic Jurists⁶⁶³ are in unanimous agreement that no partner may leave a fixed term partnership until and unless they are both in agreement to dissolve that partnership⁶⁶⁴. These provisions of Islamic law are the same as the above-mentioned provision⁶⁶⁵ in English law. However, there are debates among Islamic Jurists (*fuqaha*) whether in Islamic law dissolution of partnership

⁶⁶² Jami` at-Tirmidhi, The Chapters On Judgements From The Messenger of Allah, vol. 3, Book 13, *Hadith* 1352, Accessed at: <http://sunnah.com/tirmidhi/15/32>, Accessed on: 12.11.2015

⁶⁶³ Those who said a fixed term partnership is valid. More details in 4.2.2

⁶⁶⁴ Almasri, A., *Omdet Alsalek wa Odat Alnasik*, (Qatar, Shawn Diniah, 1st ed, 1982), pp.174-165

⁶⁶⁵ In 2.1.1 Dissolution by the unanimous agreement of partners

requires unanimous agreement of partners as for a partnership at will, or whether the partnership can be dissolved unilaterally by even only one of the partners giving notice. The *Malikiyya* state that the partnership agreement is a binding contract. Therefore, if the partnership is held on terms such as "we share", or another similar expression, no partner can leave a partnership without agreement from other partners⁶⁶⁶.

The *Hanafiyya and Hanbaliyya* state that it is only legal to dissolve a partnership without unanimous agreement under **two** conditions⁶⁶⁷: firstly, the other partner or partners must know about the termination of a partnership for the termination to take effect. This is because termination relies upon the knowledge of all partners, without which knowledge there is detriment to a partner or partners unaware of the termination. The second condition is that the partnership assets must be liquidated and not remain in the form of fixed assets such as buildings, malls or factories, at the time of termination. The purpose of liquidating all assets is to ensure the just distribution of profits⁶⁶⁸. The Islamic legal view, shared by the *Hanafiyya, Malikiyya and Hanbaliyya* schools – all of whom focus on the business aspect of the partnership as a main condition of its legal existence - is contrary to the situation in English law, as the dissolution of partnership in English law will take place before liquidation.

In contrast, the *Shafiyya* School, which stresses the legal relationship between the partners as its main condition, is the school most disposed towards granting the dissolution of partnership; the *Shafiyya* give the right to any one of the

⁶⁶⁶ Alkohaji, A., *Zad Almohtaj Bi Sharh Almenhaj*, (Qatar, Shawn Diniah, 1st ed, 1982), vol.2, pp.252-242

⁶⁶⁷ Al- Kasani, A., *Badaa' Sanaa'*, (Beirut: Dar Alkutub Alalmiah, 2003) vol.7, p.77, Ibn Qudamh, M., *Almogni* (Cairo: Dar Alulom Almoghne, 18th ed, 1997), vol.7, pp.131, 123

⁶⁶⁸ Al- Kasani, A., *Badaa' Sanaa'*, (Beirut: Dar Alkutub Alalmiah, 2003), vol.6, p.77

partners who has an interest to dissolve the partnership to do so whenever he wants. Thus, the agreement of the other partner or partners is deemed unnecessary as a condition for dissolution. According to the *Shafiyya*, the relationship between the partners in a partnership is analogous⁶⁶⁹ to that of agency. The analogy which the *Shafiyya* make is a comparison between the powers of an owner and his agent and the relationship of one partner to another. In the same way that an owner can cancel the powers of his agent to act for him even without the agent's knowledge, so may any partner, each of whom is an agent for the other, cancel that agency and thereby dissolve the resulting partnership between them, even without giving notice of this to the other⁶⁷⁰. The mutuality of agency between the partners is the characteristic fundamental to the distinct approach of the *Shafiyya*, who focus on the legal relationship between the partners and not the business itself as a main constituting factor for the legal existence of the partnership.

The ability in law to achieve dissolution of a partnership is required on the premise of not dealing unjustly, which is a founding principle in Islamic law. The Holy *Quran* states⁶⁷¹ “Deal not unjustly and you shall not be dealt with unjustly”⁶⁷² and the prophet Mohammed - peace be upon him – said “There should be neither harming (*Darar*) nor reciprocating harm (*Diraar*)”⁶⁷³. This means that there should be neither the causing of detriment nor the suffering of

⁶⁶⁹ The technique of analogy to deduce law in Islam is known as Qiyas, as explained above in the introduction.

⁶⁷⁰ Alnawawi, Y., *Rawdat Altaliban*, (Egypt: Dar Alm Alkitab, 2008), vol.4, p.283, vol.5, p.141

⁶⁷¹ Translated to most closely represent the original

⁶⁷² Part three, Chapter two, Al-Baqarah, Verse 279, Accessed at: <http://quran.com/2/278-279>, Accessed on: 29.01.2016

⁶⁷³ Sunan Ibn Majah, vol. 3, Book 13, Hadith 2340, Accessed at: <http://sunnah.com/ibnmajah/13/33>, Accessed on: 29.01.2016

detriment, which is what the *Hanafiyya*, the *Malikiyya* and the *Hanbaliyya* mean when they stipulated two conditions for the termination of partnership.

Thus, **three** schools - *Hanafiyya*, the *Malikiyya* and the *Hanbaliyya* - prioritise the concern for financial harm. Therefore, the three schools consider the analogy of partnership with agency (power of attorney) as what the *Shafiyya* believe is not accurate. The reason for not accuracy of analogy of partnership with agency (power of attorney) is that there is no damage upon the agent if the owner cancels the powers of his agent to act on behalf of him even without the agent's knowledge. However, without partners' knowledge there is potential damage to a partner or partners unaware of the termination. By contrast, the *Shafiyya*, while agreeing that financial harm should not result from a partnership, it is not a premise to dissolve a partnership, as the same could be achieved through compensation. As to the Quranic verse on harm, their view is that the Holy *Quran* is making a general statement without specific application to partnerships or businesses⁶⁷⁴.

In conclusion, dissolution of partnership by notice is recognized by Islamic law in all schools, *Hanafiyya*, *Malikiyya*, *Shafiyya* and *Hanbaliyya*. They agree unanimously that fixed term partnership requires unanimous agreement of the partners for dissolution. All the schools also agree unanimously that indefinite partnership can be dissolved if all partners agreed to dissolve it. However, there are debates amongst them as to whether a partnership at will needs a unanimous agreement to dissolve it or whether any partner can dissolve the partnership without the acceptance of the other partner. The schools came to a conclusion

⁶⁷⁴ Otherwise no Islamic legal authority could propose a Qiyas-based argument that could succeed against a Quranic verse.

that any partner can terminate and dissolve the partnership whenever any partner wants if this will avoid injustice or harming others; this Islamic view is the same as English law on this point. However, dissolution of partnership in English Law will take place before liquidation. In contrast, the dissolution of partnership in Islamic law according to The *Hanafiyya*, *Malikiyya* and *Hanbaliyya* Schools cannot take place before liquidation of fixed assets.

The differences and similarities between Islamic and English law may be summarised as follows. The term of fixed partnership or of lives is acceptable to Islamic law. However, English law requires a clause to limit business to that which is profitable; Islamic law does not require this. On expiry of term, as long as business continues beyond the expiry of term, partnership rights and duties continue as before the expiry of term, which is the same in Islam. Unlike English law, Islamic law will not consider that the adding of a new partner into a partnership will not dissolve a partnership and create a new one at will.

As to the requirement for unanimous agreement, an agreement to dissolve a fixed term partnership and give notice to all partners to dissolve is required in both English and Islamic law. Unanimous agreement and notice given to all partners to dissolve a partnership at will is required by the *Hanafiyya*, *Malikiyya* and *Hanbaliyya* schools. However, as in English law, the *Shafiyya* does not require it, therefore agreeing with English law that dissolution takes place “as from” – the moment of notice given, irrespective of unanimity of agreement. The only difference regarding the element of notice is that in English law notice must be served in writing, whereas in Islamic law it may be oral. A further point is that in English law, the breakup of relationships between people, such as

husband-wife relationships, will usually end in the dissolution of any business partnership between them. This is not the case in Islam; business relationships will always survive the end of a marriage.

4.2.2 Expiration of the term

Opinion is divided among Islamic jurists as to whether or not a fixed term partnership is valid. Some of the *Hanafiyya* scholars state that if the two jointly interested parties determine a term for the partnership, it should end by the end of this term⁶⁷⁵. Similarly, the *Hanbaliyya* can be said to accept fixed term partnerships. Muhanna, a scholar of the *Hanbaliyya*⁶⁷⁶ said: “I asked Imam Ahmed bin Hanbil⁶⁷⁷ about a man who deposited a thousand [dirham] with his business partner for him to speculate with for the period of a month [in the framework of the partnership]. He said, if the month passes [and you have not returned the money], it shall be [considered] a loan. Imam Ahmad replied: this is alright to be a loan”⁶⁷⁸. This means that according to *Hanbaliyya* a partnership can exist for a specific period and the partnership will expire afterward. However, the *Malikiyya* and the *Shafiyya* and some *Hanafiyya* scholars state that it is not legal to determine the term of a partnership⁶⁷⁹. They try to support their opinion by arguing that the proposed duration of partnership for a fixed period could be harmful for the worker whose greater profit and better fortune may lie in holding on to the belongings and selling them after a given time. By

⁶⁷⁵ Ibn Abdin, M., *Hashyat Ibn A'bden*, (Cairo: Alem Al Kitaab, 13th ed, 2001), vol.3, p.312

⁶⁷⁶ This school was founded by Imam Ahmad bin Hanbal (d.855 A.D.)

⁶⁷⁷ The scholar of *Hanabilah* school

⁶⁷⁸ Ibn Qudamh, M., *Almogni* (Cairo: Dar Alulom Almoghne, 18th ed, 1997), vol.7, p.177, Al-mardawi, A., *Al-ensaf*, (Qatar, Matbat alsonah almuhamadih, 4th ed, 1956), vol.5, p.430, Ibn Moflh, M., *Al-foroaa* (Cairo: Aalam Alkitab, 4th ed, 1985), vol.4, p.382

⁶⁷⁹ Alkohaji, A., *Zad Almohtaj Bi Sharh Almenhaj*, (Qatar, Shawn Diniyah, 1st ed, 1982), vol.2, pp.344,345

determining the term of this time, the better outcome might not happen⁶⁸⁰. Therefore both the *Malikiyya* and the *Shafiyya* hold that it is not permitted to create a partnership for a specified period.

Looking more deeply into the principles of Islamic law one will find that those of the *Hanafiyya* and the *Hanbaliyya* who permit the existence of partnerships appear to be more correct, in that the default position in Islamic law is to permit partnerships, and there is no objection to fixing a term for partnerships. Furthermore, the prophet Mohammed - peace be upon him – said,⁶⁸¹ “...Muslims will be held to their conditions, except the conditions that make the lawful unlawful or the unlawful lawful⁶⁸²...” Thus, determining the term of partnership, is neither making the lawful unlawful, or the unlawful lawful, namely to either forbid the permitted or permit the forbidden, and so is permitted to do. Additionally, the 7th century the judge of Kufa (Iraq) in a ruling for the companions of the prophet Mohammed said: "Whosoever sets upon himself a condition, voluntarily and under no compulsion, shall be committed to his condition"⁶⁸³. Finally, the disadvantage in what the *Malikiyya* and the *Shafiyya* said to support their opinion, that the proposed duration of partnership by a fixed period could be harmful for the worker is unnecessary to claim, as we can say that the ending of proposed duration of partnership is lawful and permissible in Islamic law if there is no harm caused to individuals or to the economy. Additionally, there are advantages to fixed term contracts to provide

⁶⁸⁰ Ibn Qudamah, M., *Almogni*, (Cairo: Dar Alulom Almoghne, 18th ed, 1997), vol.7, p.177

⁶⁸¹ Jami` at-Tirmidhi, The Chapters On Judgements From The Messenger of Allah, Vol.3, Book 13, Hadith 1352, Accessed at: <http://sunnah.com/tirmidhi/15/32>, Accessed on:12.11.2015

⁶⁸² An example of that is if partners make a condition in their agreement to sell alcohol or to get usurious loan. This would make the “unlawful lawful”.

⁶⁸³ Sahih Bukhari, Vol.3, Chapter.33, No.242, Accessed at: https://www.sahih-bukhari.com/Pages/Bukhari_3_33.php, Accessed on:06.05.2017

security for partners, as there is clarity in the terms binding the partnership, and an assurance that the business is continuing according to set terms. Furthermore, fixed term partnerships benefit from stability in that one partner cannot ever exercise an option to dissolve the partnership.

In conclusion, as a result of the above analysis of Islamic law the *Hanafiyya* together with the *Hanbaliyya* school consider Islamic law to be the same as English law in recognising fixed term partnerships, and therefore also the expiry of such terms of partnership. However, once the fixed period is over, whereas in English law the partnership will revert to a new one which will exist at will, the *Hanbaliyya* will regard capital invested by the partners as a loan. Thus, for those Islamic jurists who accept the existence of a fixed term partnership, its expiry brings an end to the life of the partnership, and no further partnership arises automatically. Therefore, to indicate that a partnership is ongoing, there will have to be signs of an ongoing relationship between the partners, either implied or expressed, such as over the sharing of profits and not merely the existence of a continuing business. This contrasts sharply with English law which accepts that a partnership will continue to exist as long as the business continues to operate. The effect of this is that the money previously part of a partnership now exits that partnership and becomes a loan in the hand of a sole investor. That investor is now liable to return the share of the other partner to him.

4.2.3 Termination of single adventure

Following an extensive search through all sources of classical Islamic law and according to all Islamic schools, this thesis has arrived at the conclusion that classical Islamic law does not mention whether a partnership entered into

for a single venture will dissolve or not when the single venture terminates. However, contemporary Islamic law scholars such as Khaiat⁶⁸⁴ and Almosa⁶⁸⁵ state that partners can set up a partnership for a single venture; they can agree at the time of setting up the partnership that the partnership will dissolve after finishing a single transaction. Khaiat and Almosa support their opinion on three premises. Firstly, there is no principle of *Shariah* which prevents partners from agreeing to dissolve the partnership after finishing a single transaction. Secondly, as the Prophet Mohammed said, as reported in *Hadith*: “Muslims are committed to their conditions...”⁶⁸⁶ This *Hadith* gives partners a broad scope to make conditions for contractual dealings. This means that if partners set up a partnership having agreed that the only purpose of setting this partnership up is to do a single transaction, the partnership will dissolve after finishing this single transaction. Thirdly, Khaiat and Almosa relied on the legal technique of logical reasoning of analogy⁶⁸⁷ to legitimise the concept of a partnership entered into for a single venture. They draw an analogy between a fixed term partnership and a single venture partnership, commenting that the common factor between them is that there is a limitation in both forms of partnership. The scholars in classical Islamic law recognised and mentioned that fixed partnership⁶⁸⁸ will dissolve after the end of a term of partnership. Therefore by analogy the partnership entered into for a single venture will dissolve after finishing a single transaction⁶⁸⁹.

⁶⁸⁴ Khaiat is an Islamic scholar and a member of the International Islamic Fiqh Academy.

⁶⁸⁵ Professor in Islamic Law School at Imam Muhammad ibn Saud Islamic University in Riyadh

⁶⁸⁶ Jami` at-Tirmidhi, The Chapters On Judgements From The Messenger of Allah, Vol.3, Book 13, Hadith 1352, Accessed at: <http://sunnah.com/tirmidhi/15/32>, Accessed on: 12.11.2015.

⁶⁸⁷ The technique of analogy to deduce law in Islam is known as Qiyas, as explained above in the introduction.

⁶⁸⁸ In 4.2.2 full discussion of Islamic jurists' opinions of whether or not a fixed term partnership is valid.

⁶⁸⁹ Khaiat, A., *Sharikat fi Alshria Alislamiyah*, (Beirut, Muasast Alresalah, 4th ed, 1994), vol.1, p.360

There is a possibility for the continuation of a partnership after finishing a single transaction; in this case, the business continues. This continuation can occur subject to the partners' desire, whether they are expressly or impliedly desirous to continue. The agreement to continue must be before the liquidation and distribution of the partnership assets. However, if there is no chance for the partners to continue the partnership because the liquidation and distribution has done, the partners will have to set up a new partnership to carry on the business⁶⁹⁰.

We can conclude this section by shedding some light on accidental partnerships in the context of Islamic law. Accidental partnerships are those which come into existence as a result of the partners' conduct, even if they state that they are not in a partnership. There is no evidence from sources of Islamic law that a verbal undertaking between partners to not continue business can stand in contradiction to their actions. The reason for an absence of guidance on this in Islamic law may logically be that we would presume that business conducted between partners must be a partnership, for if not, there is no other framework inside of which they could be working. Thus, Islamic law in parallel to English law admits the existence of accidental partnerships arising.

Although it is a general principle of *Shariah* that very high value is set upon the word of one partner to the other, nonetheless conduct will sometimes prove more significant than the word. Therefore, if there is clear conflict between the words of the partners insisting that they are no longer in partnership, and their actions, which demonstrate that they are still in partnership, *Shariah* rules that

⁶⁹⁰ Almosa, M., Sharikat Alashkhs, (Al Riyadh, Saudi Arabia, 1st ed, 1997), p.355

actions speak louder than words. Hence, *Shariah* law can be presumed to recognise accidental partnerships as legally valid.

4.2.4 Dissolution by the unanimous agreement of partners

All Islamic schools⁶⁹¹ are in no doubt that a partnership will dissolve if partners agreed unanimously to dissolve it⁶⁹². The reason is that in the same way as partners are entitled to agree unanimously to set up a partnership in accordance with their preferences, so they are also entitled to dissolve it by their unanimous agreement. A unanimous agreement to dissolve a partnership works even when dissolution allows the partners to avoid an injustice or if it causes harm to other partners⁶⁹³, to the economy of the Islamic nation or to third parties such as creditors⁶⁹⁴. As a general principle of *shariah*, agreement of partners to dissolve unanimously can take place either by express or implied means, subject to local custom.

4.3 Non-voluntary causes of dissolution of partnership in Islamic Law

4.3.1 Death of a partner

Death is regarded as an event which, in the view of all schools of Islamic law⁶⁹⁵, is considered reasonable – but not compulsory - to bring to an end the deceased's relation with others. If the partnership contains only two partners and one of them died, the partnership will dissolve in the eyes of Islamic law,

⁶⁹¹ Khaiat, A., *Sharikat fi Alshria Alislamiyah*, (Bairut, Muasast Alresalah, 4th ed, 1994), vol.1, p.355

⁶⁹² However, it is important to note as mentioned above that the *Shafiyya* do not require unanimity among the partners to terminate the partnership.

⁶⁹³ Al- Kasani, A., *Badaa' Sanaa'* (Beirut: Dar Alkutub Alalmiah, 2003), vol.7, p.78

⁶⁹⁴ Khaiat, A., *Sharikat fi Alshria Alislamiyah* (Beirut, Muasast Alresalah, 4th ed, 1994), vol.1, p.356

⁶⁹⁵ *Hanafiyya, Malikiyya, Shafiyya and Hanbaliyya schools*

according to *Hanafiyya*⁶⁹⁶, *Shafiyya*⁶⁹⁷ and *Hanbaliyya*⁶⁹⁸ schools. The dissolution will take place even if the other partner does not know about the death, unless the surviving partner accepts to continue the partnership with the heirs of the deceased, if the heirs are adults⁶⁹⁹. However, if the heirs of the deceased are minors the *Hanafiyya*⁷⁰⁰ and *Hanbaliyya*⁷⁰¹ make a condition which is that approval from the guardian of the minor heir of the deceased to allow him is required for his dealings to be legally effective. In contrast, the *Shafiyya*⁷⁰² stated that even if the minor is allowed by his guardian, his dealings are not legally effective, that the guardian does not have a right to permit the minor to trade; a partnership with him must dissolve. It seems that the *Hanafiyya* and *Hanbaliyya* view which permits the dealings of a minor with permission from the guardian is the preponderant one. This is due to the fact that Allah says in the Holy *Quran*⁷⁰³:

“And test the orphans [in their abilities] until they reach marriageable age. Then if you perceive in them sound judgement, release their property to them. And do not consume it excessively and quickly, [anticipating] that they will grow up. And whoever, [when acting as guardian], is self-sufficient should refrain [from taking a fee]; and whoever is poor - let him take according to

⁶⁹⁶ Al- Kasani, A., *Badaa' Sanaa'*, (Beirut: Dar Alkutub Alalmiah, 2003), vol.6, p.112; Srkhsai, Sh., *Al-Mabsoot* (Beirut: Dar Almarif, 6th ed, 1989), vol.2, p.69; Almirgiani, A., *Al- Hadaah Sherh Al-Bbdaah*, (Pakistan: Idart Alquran wa Alulum Aluslamih, 11th ed, 1995), vol.3, p.208

⁶⁹⁷ Alshirazi, I., *Muhazb*, (Egypt: Dar Alkutub Alalmiah, 4th ed, 1998), vol.1, p.388

⁶⁹⁸ Alrihani, M., *Matalib Oley AlNuha*, (Egypt: Almahtab Aleslami, 1st ed, 1969), vol.3, p.537

⁶⁹⁹ Under Islamic law, *bulug* (puberty) starts when certain signs appear e.g. for a boy when he gets wet dream and for a girl when she gets menstruation or he/she attains specific age. There are differing views among Islamic Schools about the age of majority which is known as *bulug* (puberty). The *Hanafiyya* and *Malikiyya* said the age of majority is 18th. The *Shafiyya* and *Hanbaliyya* said 15th is the age of majority.

⁷⁰⁰ Almirgiani, A., *Al- Hadaah Sherh Al-Bbdaah*, (Pakistan: Idart Alquran wa Alulum Aluslamih, 11th ed, 1995), vol.9, p.310

⁷⁰¹ Almrdaawi, A., *Alensaf* (Cairo: Matbat Alsuunah Almuhamadih, 1st ed, 1956), vol.5, p.343

⁷⁰² AL Nawawi, Y., *Al Majmoa*, (Egypt, Dar alfer, 8th ed, 1978), vol 9, p.165

⁷⁰³ Translated to most closely represent the original

what is acceptable. Then when you release their property to them, bring witnesses upon them. And sufficient is Allah as Accountant.”⁷⁰⁴

The best way to check whether or not orphans are mature is to put them to the test with regards to business; the guardian of their estate allows them to trade and observes them to see if they are competent. This means that the business dealings of the minor who is allowed to do so by the guardian are legal. However, if the partnership contains three or more partners, the partnership will continue among the surviving partners without the deceased's heirs according to *Shafiyya*⁷⁰⁵ and with obvious according to the *Hanafiyya*⁷⁰⁶ and *Hanbaliyya*⁷⁰⁷ schools. It is reasonable in Islamic law according to those schools that the surviving partners agree with the deceased heirs to continue the partnership without dissolution⁷⁰⁸. The *Malikiyya* School has a different view, which is that the partnership will not dissolve in the case of one partner dying, whether the partnership contains two partners including the deceased partner, or more. The first reason for this is that the partnership agreement is a binding contract. Therefore, once the partnership is set up, none of the partners can leave the partnership without the agreement of the other partners⁷⁰⁹. The second basis for the view of the *Malikiyya* is that looking to the interest of the heirs of the deceased is the priority. Therefore, the continuation of the partnership is usually more in the interest of the heirs of the deceased than its dissolution.

⁷⁰⁴ Surah Al-Nisa, Verse 6, Accessed at: <http://quran.com/4/6>, Accessed on 14.10.2015

⁷⁰⁵ Alshirazi, I., *Muhazb*, (Egypt: Dar Alkutub Alalmiah, 4th ed, 1998), vol.1, p.388

⁷⁰⁶ Al- Kasani, A., *Badaa' Sanaa'*, (Beirut: Dar Alkutub Alalmiah, 2003), vol.6, p.112; Srkhsai, Sh., *Al-Mabsoot*, (Beirut: Dar Almarif, 6th ed, 1989), vol.2, p.69; Almirgiani, A., *Al- Hadaah Sherh Al-Bbdaah*, (Pakistan: Idart Alquran wa Alulum Aluslamih, 11th ed, 1995), vol.3, p.208

⁷⁰⁷ Alrihani, M., *Matalib Oley AlNuha*, (Egypt: Almahtab Aleslami, 1st ed, 1960), vol.3, p.537

⁷⁰⁸ Al- Kasani, A., *Badaa' Sanaa'*, (Beirut: Dar Alkutub Alalmiah, 2003) vol.6, p.112; Ibn Abdin, M *Hashyat Ibn A'bden*, (Cairo: Alem Al Kitaab, 2001, 13th ed), vol.4, pp.327-328; Almirgiani, A., *Al- Hadaah Sherh Al-Bbdaah*, (Pakistan: Idart Alquran wa Alulum Aluslamih, 11th ed, 1995), vol.3, p.208

⁷⁰⁹ Alkohaji, A., *Zad Almohtaj Bi Sharh Almenhaj*, (Qatar, Shawn Diniyah, 1st ed, 1982), vol.2, pp.252-242

On examination of Islamic law, it appears that the *Hanafiyya*, *Shafiyya* and *Hanbaliyya* schools are more correct on the issue of continuing relationship between the survivors of a partnership and the dead partner. Thus, the partnership will dissolve directly if the partnership contained only two partners. This is logical, as a partnership must contain two or more partners and when the partnership containing only two, and one of them died, the survivor will be on his own and partnerships can neither set up nor continue to exist with one partner. However, the partnership can contain a stipulation to continue with the heirs of the deceased if there is a pre-condition in the partnership agreement. This is based on what the prophet Mohammed said: “Muslims are committed to their conditions...” On the basis of the same *Hadith*, if the partnership contains three partners or more and one of partners died, the partnership will not dissolve among the surviving partners. The surviving partners would continue in the partnership undisturbed. There is a possibility to continue the partnership with the deceased’s heirs if there is a pre-condition in the partnership agreement which shows that there is an express stipulation in the contract to hold together the surviving partners with the heir. A possible theory behind the need for dissolution in the event of the death of a partner is that the business partnership itself under Islamic law is not what is cancelled. Rather it is the dissolution of community which happens due to the death of one partner. For this reason, provided there is evidence to show that there is an express stipulation in the contract to hold together the surviving partners with the heir, the partnership will continue to exist. Partnership is dissolved at law because the death ruptures the community which allows a partnership to continue.

In Islamic law, as long as a partnership contains no less than three partners, if one of partners dies, the partnership will not dissolve. The surviving partners would continue in the partnership undisturbed. By contrast, English law is that on the death of one partner, the partnership will dissolve, no matter how many surviving partners remain. However, if there is a specific provision in an agreement, the partnership can continue beyond the point of the death of a partner. In Islamic law a special written provision is meaningless; the continuing existence of a partnership depends only on whether the surviving number of partners is no less than two in number. Thus, the logic behind the dissolution of a partnership in Islamic law differs entirely from English law. Whereas in English law the fact of a death occurring is what prompts dissolution, in Islamic law, it is not the death itself but the consequence of death bringing the partners to less than two in number.

4.3.2 Loss of the capital of partnership

There are two types of commercial activities. Some activities need capital investment, others such as law firms do not. The subject of this section is partnership for which capital and assets are the backbone of a partnership upon which it relies to run its activities. If the capital upon which a partnership relies is lost to the business, the partnership will dissolve in Islamic law, according to all Islamic schools, *Hanafiyya*⁷¹⁰, *Malikiyya*⁷¹¹, *Shafiyya*⁷¹² and *Hanbaliyya*⁷¹³.

⁷¹⁰ Samar Qandi, A., *Tohaft Alfogaha*, (Cairo: Dar Alkutub Alalmiah, 4th ed, 1984), vol.3, pp.8-9; Al-Kasani, A., *Badaa' Sanaa'*, (Beirut: Dar Alkutub Alalmiah, 2003), vol.6, p.78; Abdin, M., *Aldor Almokhtar With Hashyat Ibn A'bden*, (Cairo: Alem Al Kitaab, 2001, 13thed), vol.4, p.165; *Alhedaya with Fateh Alqadeer* (Riyadh: The Ministry of Islamic Affairs AND Endowments In Saudi Arabia, 1995, 1st ed), vol.6, p.179.

⁷¹¹ Ibn Rushd, M., *Almoqademat Amomahadat* (Egypt: Dar Altorath Al-islami, 1998), vol.3, p.36.

⁷¹² Alnawawi, Y., *Rawdat Altaliban* (Egypt: Dar Aalm Alkitab, 2008) vol.5 p.139,140.

⁷¹³ Ibn Qasam, A., *Hashyat Alrawd Almorbia*, (Al Riyadh, Saudi Arabia, 1st ed, 1976), vol.5 p.260; Alhajawi, M., *Aleqna*, (Riyadh: Darat Almalik Abdulaziz, 3rd ed, 2002), vol.2, p.65; Ibn Qudamah, A.,

The theory behind the need for dissolution in the event of the loss of the capital of partnership is that the presence of the capital and assets are part of the partnership agreement and therefore is the very backbone of the partnership. Therefore if such capital and assets are lost to the business, the partnership must be dissolved.

Accordingly, there is a debate among the schools of Islamic law, whether a partnership should dissolve if the partnership bought goods and thereafter the capital of the partnership was lost or destroyed before paying the price of the goods to the seller. The *Hanafiyya* and *Hanbaliyya* schools maintain that if the capital of the partnership was lost and destroyed before any act of undertaking, the partnership dissolves. However, if it was lost and destroyed after the undertaking or bought goods, the partnership will not dissolve; the partnership remains valid. The theory behind this is that what was bought becomes the capital and assets of the partnership which can support the partnership to run and continue⁷¹⁴. This implies that according to these two schools, the fact of exercise of control over the goods renders it an asset for the partnership. On the other hand, the *Shafiyya* said that the partnership whether the assets were lost to the partnership either before or after any act of undertaking, the partnership must be dissolved. As *Rawdat Altaliban*⁷¹⁵ states: “If the capital of a partnership was a thousand and the partnership purchased cloth with its funds, and then the thousand were lost when it was in the hands of payer before the seller received

Almoqne, (Egypt: Dar Alkutub Alalmiah, 4th ed, 1979), vol.2, p.178; Almr-dawi, A., Alensaf, (Cairo: Matbat Alsuunah Almuhamadih, 1sted, 1956), vol.5, p.444

⁷¹⁴ Ibn Qudamh, M., Almogni, (Cairo: Dar Alulom Almoghne, 1997), vol.7, p.176; Al- Kasani, A., Badaa' Sanaa', (Beirut: Dar Alkutub Alalmiah, 2003), vol.7 p.78

⁷¹⁵ One of the most important book and a reference of *Shafiyya* school

it, the partnership becomes dissolved⁷¹⁶. Thus, the general consensus of Islamic Jurists (*fuqaha*) is that according to Islamic law that the partnership will dissolve if all capital and assets of a partnership is lost. Furthermore, the situation discussed by the *Hanafiyya* and *Hanbaliyya* schools concerning losing or destroying the capital of the partnership after receiving goods but before paying the price of the goods appears to be the more correct position in Islamic law. According to this approach, the main point in Islamic law is whether or not the partnership can be held capable of continuing business simply because they are holding goods, and no other capital or assets. This is due to the fact that incapacity and consequent dissolution of the partnership is avoided by the partnership being able to sell the goods to regenerate the money. Thus, the partnership is still able to remain in existence.

Nonetheless, this opinion needs some refinement for the sake of accuracy. Losing or destroying the capital of the partnership after purchasing goods, but before paying the price of the goods to the seller will not dissolve the partnership unless the seller asks to dissolve the partnership. This is because the seller will be considered a creditor, and the creditor has a right to seek to dissolve the partnership to recover what he is owed. The position in Islamic law does not compare with English law as the Partnership Act 1890 does not mention loss of partnership capital as a cause of dissolution; the nearest as a loss of capital leading to dissolution is bankruptcy which will be discussed later⁷¹⁷.

⁷¹⁶ Alnawawi, Y., *Rawdat Altaliban*. (Egypt: Dar Aalm Alkitab, 2008), vol.5, p.139,140

⁷¹⁷ In 4.3.6 *Iflas* – bankruptcy - of a partner

4.3.3 Leaving Islam and changing residence to *Dar al-Harb*

Historically, Islam viewed the world as divided mainly into two areas: *Dar Islam* and *Dar al Harb*. These terms emerged ten centuries ago in Abbasid Iraq. *Dar Islam* (a place of peace) refers to a place which abides by Islamic law, and where the members of certain religions such as Judaism and Christianity live under full protection of Muslim rule. *Dar al-Harb* (a place of war) is a place which is under governance which does not abide by Muslim law or convention peace with Islamic country and that governance is at war with a *Dar Islam*⁷¹⁸.

According to the *Hanafiyya* School, a partner leaving the religion of Islam and taking up residence in *Dar al-Harb* is considered a cause of dissolution of partnership⁷¹⁹. Sources of law according to the *Malikiyya*, *Shafiyya* and *Hanbaliyya* schools do not mention this issue at all. To clarify the *Hanafiyya* view: a partner who recants his faith in the Islamic religion is a cause of dissolution of partnership if he also defects to a country outside the realm of Islam.

However, the partnership will not dissolve if the partner recanting his religion does not leave a *Dar Islam* to a *Dar al-Harb*⁷²⁰. Another condition is that dissolution will take place only if the partnership contains two partners. However, if the partnership contains three partners or more, the partnership will not dissolve, as the remaining partners expel the defecting partner⁷²¹. The theory behind this provision is that communication between the partners will be made

⁷¹⁸ Al-Zuhili, W, [Islam and international law], *International Review of the Red Cross*, Vol. 87 no. 858, June 2005, p.278, Accessed at: https://www.icrc.org/eng/assets/files/other/irrc_858_zuhili.pdf, Accessed on: 01.12.2015

⁷¹⁹ Al- Kasani, A., *Badaa' Sanaa'*, (Beirut: Dar Alkutub Alalmiah, 2003), vol.6, pp.62,87,133

⁷²⁰ Abdin, M., *Aldor Almokhtar With Hashyat Ibn A'bden*, (Cairo: Alem Al Kitaab, 13th ed, 2001), vol.4 p.327; *Alhedaya with Fateh Alqadeer*, (Riyadh: The Ministry of Islamic Affairs AND Endowments In Saudi Arabia, 1st ed, 1995) vol.2 p.194

⁷²¹ Al- Kasani, A., *Badaa' Sanaa'*, (Beirut: Dar Alkutub Alalmiah, 2003), vol.6, p.133

impossible. Thus, the partnership will become meaningless as it must consist of the relationship which subsists between two persons or more carrying on a business in common with a view of profit. This cannot be achieved if one of two partners departs both religion and residence and live across enemy borders. There is a similarity to the concept in English law of “enemy alien”. An enemy alien means that a partner is either resident in a country which is at war with the United Kingdom or that he is carrying on business there, whatever his nationality⁷²². In such a case, a partnership with an enemy alien dissolves automatically.

In my opinion the apostasy of a partner in itself is not cause of dissolution of partnership even in the view of the *Hanafiyya* school. The partnership will not dissolve if the partner does not leave *Dar Islam* to a *Dar al-Harb*⁷²³. Thus, it appears that the main cause of dissolution is joining a country at war with Islam, in relation to which changing religion is an incidental factor. Since the majority of those who left the borders of Islam necessarily went to live in enemy territory, the *Hanafiyya* stated simply that an apostate to the religion of Islam was a cause of dissolution, while what they really meant was that he had allied himself with an enemy country. Modern Islamic jurists do not define the world into *Dar Islam* and *Dar al- Harb* in the same way, as the majority of Islamic lands are nation states at peace with countries under non-Islamic rule.

⁷²² R. C. Banks, *Lindley & Banks on Partnership*, (London: Sweet & Maxwell, 19th ed, 2010), p.64.

⁷²³ Abdin, M., *Aldor Almokhtar maa Hashyat Ibn A'bden*, (Cairo: Alem Al Kitaab, 13th ed, 2001), vol.4, p.327; *Alhedaya maa Fateh Alqadeer*, (Riyadh: The Ministry of Islamic Affairs and Endowments In Saudi Arabia, 1st ed, 1995), vol.2, p.194.

4.3.4 Incapacity of a partner

There are several types of contracts; one of these types is partnership contract. Therefore, the provisions of partnership are mostly subject to the provisions of the law of contract. Not necessary every person can make a legal contract; to draft a valid legal contract there must be some legally enforceable elements⁷²⁴. The most important element of a valid partnership contract in classical Islamic law is the capacity of the parties to act as legitimate parties to the contract. They must have a full legal capacity which is known as *ahliyyah* in Islamic terminology⁷²⁵. This element revealed in The Holy *Quran* says⁷²⁶ "Observe the orphans through testing their abilities until they reach the age of marriage; then if you find them capable of sound judgement, hand over to them their property"⁷²⁷. Therefore, the most important part of each party is the possession legal capacity (*ahliyyah*). Islamic scholars defined capacity as a quality which makes a person qualified to acquire rights and to undertake duties and responsibilities⁷²⁸, or to be eligible to establish a right for or an obligation upon himself. Legal capacity must not reduce at all either before or during a partnership agreement. Defectiveness of capacity may refer to either mental or physical incapacity of any kind.

⁷²⁴ Abdul Jalil, M., Rahman, M., [Islamic Law of Contract is Getting Momentum], International Journal of Business and Social Science, vol. 1 No. 2; November 2010, (pp.175-192) at: p.180, Accessed at: http://ijbssnet.com/journals/vol_1_No_2_November_2010/14.pdf , Accessed on: 05.01.2016

⁷²⁵ Sharma, A., [Requirement For Valid Contract To Shariah Law], Law Teacher website, Accessed at: <http://www.lawteacher.net/free-law-essays/contract-law/requirement-for-valid-contract-to-shariah-law-contract-law-essay.php#ixzz3oGG8qbGH>, Accessed on: 25.02.2016

⁷²⁶ Translated to most closely represent the original

⁷²⁷ This is the nearest translation of Verse 6, Surah Al-Nisa, Accessed at: <http://quran.com/4/6>, Accessed on 14.10.2015

⁷²⁸ Sharma, A., [Requirement For Valid Contract To Shariah Law], Law Teacher website , Accessed at <http://www.lawteacher.net/free-law-essays/contract-law/requirement-for-valid-contract-to-shariah-law-contract-law-essay.php#ixzz3oGG8qbGH>, Accessed on: 06.05.2017

Islamic jurists mention three causes of defective mental capacity; if one of them occurs, it will lead to the dissolution of that partnership. One of those defects mentioned in classical Islamic law is insanity. Any transactions of a person who is legally insane and who therefore lacks mental capacity are void; partnership with a legally insane person is therefore defective⁷²⁹. Hence, the *Hanafiyya*⁷³⁰, *Shafiyya*⁷³¹ and *Hanbaliyya*⁷³² have said that partnership will dissolve if any partner has become insane because the partner has become incapable to perform as a partner in the partnership business. The second defect of mental capacity is idiocy which as an Islamic legal term refers to a state in which a person at times speaks and acts like a sane and normal person, while at other times he behaves with the illogicality or irrationality of a madman. It is also described as an adult who has a mind of a child and acts like a child. So where a person who is legally classified as an idiot gives his consent while he is in his right mind, his consent takes effect. However, when a person acts like a madman, his consent is defective⁷³³. The *Shafiyya*⁷³⁴ and *Hanbaliyya*⁷³⁵ mention that a partnership will dissolve if there is an invalidation of the legal capacity of one partner due to his incompetence⁷³⁶.

The third defect mentioned in classical Islamic law concerning mental capacity is the unconsciousness of one of the partners. Unconsciousness here refers to the lack of awareness and the lack of capacity for sensory perception as if one is

⁷²⁹Abubaker, I., [Islamic Law], p.27, Accessed at: <https://chilot.files.wordpress.com/2011/06/islamic-law.pdf>, Accessed on:05.01.2016.

⁷³⁰ Al- Kasani, A., *Badaa' Sanaa'*, (Beirut: Dar Alkutub Alalmiah, 2003), vol.6, pp, 78-112; Abdin, M., *Aldor Almokhtar With Hashyat Ibn A'bden*, (Cairo: Alem Al Kitaab, 13th ed, 2001), vol.4, p.328

⁷³¹ Alnawawi, Y., *Rawdat Altaliban*, (Egypt: Dar Alm Alkitab, 2008), vol.5, p.283

⁷³² Ibn Kudamh, M., *Almogni* (Cairo: Dar Alulom Almoghne, 1997), vol.7, p.172

⁷³³Abubaker, I., [Islamic Law], p.27, Accessed at: <https://chilot.files.wordpress.com/2011/06/islamic-law.pdf>, Accessed on: 05.01.2016

⁷³⁴ Alnawawi, Y., *Rawdat Altaliban*, (Egypt: Dar Alm Alkitab, 2008), vol.5, p.283

⁷³⁵ Ibn Qudamh, M., *Almogni*, (Cairo: Dar Alulom Almoghne, 18th ed, 1997), vol.7, p.172

⁷³⁶ Alnawawi, Y., *Rawdat Altaliban*, (Egypt: Dar Alm Alkitab, 2008), vol.5, p.283

asleep or dead. An example of this is a person suffering concussion and as a result whose memory is affected and is not in control of his thoughts, actions or behaviour. This defect is mentioned only by the *Shafiyya*⁷³⁷. The reason behind unconsciousness being regarded as a defect is that it renders a partner incapable to perform as a partner in the partnership business. There is no implied or presumed consent to agency which carries over from one partner to the other. Therefore the alert partner cannot automatically act as agent for the partner who is unconscious.

In general application to all cases, the classical Islamic scholars have stated that the mental incapacity of one partner will cause dissolution of partnership whether the incapacity is either permanent or temporary if the temporary incapacity continued for a prolonged period. The classical Islamic scholars set the threshold for the prolonged period of insanity and idiocy at one month⁷³⁸. Unconsciousness will be considered as prolonged in duration if that state has persisted for more than the intervening time between two scheduled prayers⁷³⁹. In Islamic law, the intervening period could be as short as two hours⁷⁴⁰. However, it may be that the intervening time is of duration closer to the maximal difference between the two prayers furthest apart from each other, namely the prayer at nightfall and the following prayer at daybreak which is about twelve hours in length⁷⁴¹. The partnership will not dissolve if full capacity

⁷³⁷ Sharbini, M., *Bejermeh Ala alkhateb*, (Beirut: Dar Alkutub Alalmiah, 8th ed, 2003), vol.3, p.107

⁷³⁸ Kafif, A., *Al-Sharikat fi Al-fiqh Al-Islami*, (Egypt: Dar Alfiker Alarabi, 2009), p.135

⁷³⁹ Pray or *Salah* as an Islamic terminology is the second Pillar of Islam of the Five Pillars of the faith of Islam and an obligatory religious duty for every Muslim to perform it five times a day. See BBC website, Accessed at: <http://www.bbc.co.uk/religion/religions/islam/practices/salat.shtml>, Accessed on: 05.01.2016

⁷⁴⁰ An example of a two-hour interval is between the *duhr* prayer at noontime and *‘asr*, which occurs at around 2pm, when the human shadow doubles in length.

⁷⁴¹ The nightfall is called *‘isha*, and the daybreak prayer is called *fajr*.

returns to the incapacitated partner before that period of time has elapsed⁷⁴². Once this period of time has passed, the partnership dissolves immediately.

There is no apparent basis in Islamic legal reasoning for the suggested thresholds of one month for insanity and idiocy. However, the suggested timing of an interval between two scheduled prayers for unconsciousness may be the result of custom and practice contemporary to the classical scholars. Local custom and practice, or usage, is called *'urf* in Arabic. Thus, referring to a period of time in the framework of intervals between prayers is a standard reference useful for quantifying that period of time as lengthy in duration. Nonetheless, whereas a definition emerging from *'urf* is useful as an indication, it is not legally binding. Therefore this definition may be changed to reflect what nowadays would be considered as appropriately lengthy periods of time sufficient to establish insanity, idiocy or a state of unconsciousness. The reason for the periods suggested by the scholars was to ensure that sufficient time should elapse before presuming that a patient will not recover from his state of incapacity. Therefore, if a modern medical diagnosis establishes that a patient has no chance to recover within a period shorter than that suggested by the scholars, that waiting period may no longer be required. Essentially, medical knowledge will provide a greater degree of certainty than the mere expectation arising from the passage of time.

To conclude this section we can say that it is clear that classical Islamic law focuses on the mental capacity to draft a valid partnership contract. Similarly, jurists pay attention to physical capacity as a requirement for valid partnership contracts. Islamic law gives the right to a partner who has physical capacity to

⁷⁴² Sharbini, M., *Bejerme Ala alkhateb*, (Beirut: Dar Alkutub Alalmiah, 8th ed, 2003), vol.3 p.107.

demand dissolution of partnership when another partner becomes physical incapacitated⁷⁴³. The demand to dissolve in this situation is a right which can be invoked when the partnership requires physical labour. An example of a partnership requiring physical labour is *Shrikat Alabdan*, which is where two or more partners share labour and earnings, contribute skills but no capital; they jointly undertake services to customers and distribute payment in agreed proportion. Thus, two tailors may agree to undertake joint services for their customers on the condition that the wages earned will be distributed between them equally, irrespective of the volume of the work each partner has actually done⁷⁴⁴. However, if the partnership does not require physical labour, no partner has the right to demand dissolution of a partnership if one partner became physically incapable. Therefore, the opinion in this thesis is that the court should dissolve a partnership where a partner becomes physically incapacitated if the work of the partnership requires physical labour. Similarly, the court should dissolve a partnership in all situations where a partner becomes mentally incapacitated. The difference between mental capacity and physical capacity as a condition of valid partnership in Islamic law is that the full mental capacity of one partner benefits a partner who lacks mental capacity. Thus it is for the benefit of a partner who lacks the required capacity that he not continue bound by the partnership while incapable to perform and instead be excluded from it. Incapacity acts to invalidate a partnership at any point; under Islamic law, any

⁷⁴³ Almqdisi, A., *AL-Sharh AL-kaber*, (Riyadh, Hajer, 9th ed, 1995), vol.14, p.164; Ibn Kudamh, M., *Almoghn*, (Cairo: Dar Alulom Almoghne, 18th ed, 1997), vol.7, p.176

⁷⁴⁴ El-Saadouni, R., *The Liability of Groups of Companies in Islamic Law (A Comparative Study with Common Law)*, (University of Stirling, PhD Thesis, 2013), p147, Accessed at: https://dspace.stir.ac.uk/bitstream/1893/18619/1/The%20Liability%20of%20Groups%20of%20Companies%20in%20Islamic%20Law_%20A%20Comparative%20Study%20with%20Common%20Law.pdf, Accessed on: 05.01.2016; Saleem, S., [Role of Islamic Banks in Economic Development], p.60, Accessed at: <http://www.iefpedia.com/english/wp-content/uploads/2009/11/Role-of-Islamic-banks-in-economic-development..pdf>, Accessed on: 27.11.2015

partnership entered into by one who is legally insane, idiot or unconscious is null and void (*bitil*) and the court should dissolve the partnership. Similarly, the court should dissolve a partnership if any of these three mental incapacities occurs after one has entered the partnership. These legal incapacities equate with the legal incapacity of a minor in Islamic law; a minor is considered to be without prudence and aptitude for business. The reason why the court should dissolve the partnership is that both those who are mentally incapacitated and minors lack the mental capacity essential to produce legal associations which requires intention on the part of a contracting partner and which in turn forms the legality of all contracts in Islamic law⁷⁴⁵. Therefore the mental capacity to form or continue a partnership is a compulsory condition for the partnership's existence and the partnership will dissolve by court order once mental incapacity occurs. Thus, the condition for partnership of mental capacity is designed to protect the sufferer from the results of his own incapacity. By contrast, physical capacity is made a condition for the benefit of the partner who has full legal capacity, to protect him from the physically incapacitated partner who cannot any longer work in the partnership. Logically speaking, it is not fair for a physically incapacitated partner to benefit from the profit unless the partner with full capacity accepts that.

In comparing English law with Islamic law, there are a number of similarities and differences worth noting. Whereas statutory incapacitation requires permanence in English law, Islamic law does not require this. Academics in

⁷⁴⁵ Alhowaimil, I., Frustration of Performance of Contracts: A comparative and Analytic Study in Islamic Law and English Law, (Brunel University, PhD Thesis, 2013), P.157, Accessed at: <http://bura.brunel.ac.uk/bitstream/2438/8532/1/FulltextThesis.pdf>, Accessed on: 05.01.2016; Alsanhuri, A., Contract theory, (Cairo: Dar alsalam, 1st ed, 1998), vol.2, pp.43-47.

English law have however suggested that time should be given to assess the permanence of a condition⁷⁴⁶. Islamic law agrees with this notion but sees the allowance of time as a fixed period of one month for insanity and idiocy or an interval between two prayers for a state of unconsciousness. It has been suggested that in the case of allowing for time to assess the permanence of a condition of incapacity, an English court should almost always use medical evidence to consider chances of recovery⁷⁴⁷. Neither English nor Islamic law expressly advocates the use of medical evidence for this purpose. However, although Islamic law does not mention the use of medical evidence it also does not prohibit its use for this purpose. One may therefore say that common to both legal systems, reliable medical evidence may be used to either lengthen or shorten the period of time needed to consider whether a partner is incapacitated or not. A further difference between the two systems of law is that whereas English courts decide on a case-by-case basis whether to dissolve a partnership or alternatively, as a side-by-side option, to stay proceedings pending further developments⁷⁴⁸, Islamic law views these alternatives as non-optional but as two parts of one fixed procedure, namely, a stay of proceedings for one month or the interval between prayers, followed by dissolution. As a final point, there is a difference in the matter of who may petition for dissolution. Whereas in Islamic law a physically incapacitated person may petition for dissolution, English law does not allow for this.

⁷⁴⁶ R. C. Banks, *Lindley & Banks on Partnership*, (London: Sweet & Maxwell, 19th ed, 2010), p.826

⁷⁴⁷ *Ibid*

⁷⁴⁸ As stated in *Whitwell v Arthur* (1865) 35 Beav 140, at 141

4.3.5 Inequality between the shares in capital among partners in a partnership

One specific type of partnership in classical Islamic law is *al-Mufawadhah* partnership⁷⁴⁹. This type of partnership is defined by the *Hanafiyya* School as a partnership between two or more parties with equal footing in all aspects such as funds contributed, right to management and liabilities. This equality is effective from the date of contract to the date of termination. Thus, each of the partners contributes a portion of the overall capital and participates in equal measure in work and management of the partnership, bearing responsibility and liability for debts. By virtue of making contribution and bearing liability, each partner has an equal share in profits and equal liability for losses from the commencement of the partnership to its expiration or termination date⁷⁵⁰. According to the *Hanafiyya* School the equality between the share capitals of partners in the partnership is a condition to set up a valid *al-Mufawadhah* partnership and it is also a condition to remain a valid partnership in its running duration. Therefore, inequality of shares capital of *al-Mufawadhah* will lead to dissolution of the partnership according to *Hanaafiyya* School⁷⁵¹. However, *Malikiyya*⁷⁵² and *Hanbaliyya*⁷⁵³ do not consider this to be necessary condition. They require only the equality of capital contributions. The *al-Mufawadah* partnership according to the definition of the *Malikiyya* is that the partners take the profits in proportion to their investment,

⁷⁴⁹ The *Hanafiyya*, *Malikiyya*, and *Hanbaliyya* schools, all recognize *mufawadah* partnership, with some differences, Accessed at: <http://www.ibfim.com/images/media/articles/jointtenancy.pdf>, Accessed on: 07.09.2017, p.4

⁷⁵⁰ Bin Borhan, J., [bin Mohamad, M., *Conducts of Partners in al-Sharikah al-Mufawadah: An Analysis from Hanafi's Classical Sources*], SEMINAR EKONOMI ISLAM PERINGKAT KEBANGSAAN 2009 (SEIPK '09) "KE ARAH PENGUKUHAN DAN PEMAHAMAN APLIKASI SISTEM EKONOMI ISLAM DI MALAYSIA", p.2, Accessed at: <http://www.kantakji.com/media/163528/file624.pdf>, Accessed on: 05.01.2016, and see also: Investment & finance website, Accessed at: <http://www.investment-and-finance.net/islamic-finance/m/mufawadah-partnership.html>, Accessed on: 05.01.2016

⁷⁵¹ Al- Kasani, A., *Badaa' Sanaa'*, (Beirut: Dar Alkutub Alalmiah, 2003), vol.6, pp.59-78

⁷⁵² Ibn Rushd, M., *Almoqademat Amomahedat*, (Egypt: Dar Altorath Al-islami, 1998), vol.3, p.35

⁷⁵³ Ibn Qasam, A., *Hashyat Alrawd Almorbia*, (Al Riyadh, Saudi Arabia, 1st ed, 1976), vol.5, p.264

and both investments and dividends may be unequal in amount. However, although the investment and dividend shares may vary, the liability for losses of each partner is joint and several. Additionally, they have the responsibility for the share of profits and losses to the extent that they have full authority to act on behalf of the each other. The partners are thus jointly and severally responsible for the liabilities arising out of the ordinary course of the partnership business. The mutual liability means that each partner has the power to act as an agent (*wakil*) for the partnership business. Each partner may also act as surety or guarantor (*kafil*) for other partners in the business.

On analysis of this point in classical Islamic law we may establish that the *Hanafiyya* school are of the opinion that the *al-Mufawadah* partnership will dissolve not because shares in capital unequally distributed among partners is prohibited in *Sharia* law, but because there must be a distinction between partnerships based on unequal investment which is *al-inan* partnership and *al-Mufawadah* partnership which is based on equality in shares in capital among partners. Therefore, it may be better that a partnership ceasing to be *al-Mufawadah* in the case of unequal shares in capital among partners should automatically revert to be *al-inan* partnership. The *Malikiyya*, and *Hanbaliyya* schools whilst recognising *al-Mufawadah* partnership, do so with some differences. They maintain that in *al-Mufawadah* the proxy to act on behalf of a partner as an agent is granted freely from the outset and without limitation or need to consult the other partner before embarking on a new venture. By contrast, in *al-inan*, partnership, the partners must consult each other before each and every business venture.

4.3.6 *Iflas* of a partner

The classical Islamic schools defined *iflas* specifically as: “when the loan has absorbed all of debtor wealth. The debtor does not have any further money or assets to fulfilment of his loan”⁷⁵⁴. This means the term of *iflas* need two elements, firstly, the presence of loan. Therefore, we cannot use *iflas* as an Islamic term when a person loss all his money or assets but he did not get a loan. Secondly, the term refers to the absorption of all debtor wealth. Therefore, we cannot use *iflas* even in the case of a loan unless the loan absorbs of all the wealth of a debtor.

Thus the Arabic word *iflas* means bankruptcy which has two modern connotations: balance sheet insolvency, when the assets of a business are less in value than its liabilities and also income statement or cash flow insolvency. The latter situation is when a business has insufficient liquid assets or any other asset capable of producing income which may be used to pay debts as they become due. It is worth noting that in Islamic law the requirement to pay debts is equally binding on businesses as it is on individuals. Thus, the Arabic word *mufliis* refers to either or a person or a business enterprise of any kind which has gone bankrupt⁷⁵⁵. The classical Islamic scholars in their references usually use the word *mufliis* to refer to a person himself and not to a partnership. However, when the partnership loses all its assets, classical Islamic scholars call it “losing of partnership”, not bankruptcy of partnership⁷⁵⁶.

⁷⁵⁴ Ibn Rushd, M., Bida'iat al-mjtaahid waa Nihaiat al-mugtasid, (Cairo: Mactabat ibn Taimiah, 9th ed, 1995), vol.4, p.73

⁷⁵⁵ Awad, A., & Michael, R., [Iflas and Chapter 11: Classical Islamic Law and Modern Bankruptcy], 44 Int'l Law. (2010), (pp.975-1000), at p.980, Accessed at: <http://digitalcommons.pace.edu/cgi/viewcontent.cgi?article=1747&context=lawfaculty>, Accessed on: 10.01.2016

⁷⁵⁶ Al Mansor, A., Iflas sharikat, (Riyadh: Dar konos Ishbilia, 1st ed, 2012), vol.1, p.66

In classical Islamic law if a partnership contains only two partners, the bankruptcy of even one of the partners in the partnership causes dissolution according to the *Hanafiyyah*, *Malikiyya*, *Shafiyya* and *Hanbaliyya*⁷⁵⁷. However, the dissolution will be optional if the partnership contains three partners or more and one of them becomes bankrupt. In this case, the other partners can expel the bankrupt partner and continue the partnership⁷⁵⁸. Liability for debts is totally apportioned to the bankrupt partner and is not shared by the others jointly or severally. Thus, whereas in English law there are some rare cases in which other partners need not be declared bankrupt⁷⁵⁹, in Islam other partners are only declared bankrupt for purely practical reasons, namely, if after the bankruptcy of one partner there is only one other partner left.

Islamic law is paternalistic: the court treats the bankrupt as a minor or otherwise incapacitated person without any control over his possessions undergoing a process of liquidation⁷⁶⁰. In the same way, in English law a bankrupt similarly cannot control his finances. However, he has protection in that creditors seeking enforcement of debts can be prevented from doing so when a voluntary arrangement is in place⁷⁶¹.

There can be no recourse for a debtor to directly approach the Office of a Receiver; he must work only with the court appointee for the entire process of liquidation and the paying off of creditors. However, Milman argues that there is a ‘discernible trend’ of English law allowing for the phenomenon of ‘debtor in

⁷⁵⁷ Almosa, M., *Sharikat Alashkhs*, (Al Riyadh, Saudi Arabia, 1st ed, 1997), p.339

⁷⁵⁸ Taiar, A., *Sharikat fi Alshria Alislamiyah*, (Bairut, Muasast Alresalah, 4th ed, 1994), vol.1, p.350

⁷⁵⁹ *Mills v Bennet* (1814) 2 Maule and Selwyn 556

⁷⁶⁰ Awad, A., & Michael, R., [Ifas and Chapter 11: Classical Islamic Law and Modern Bankruptcy], 44 *Int'l Law*, (2010), (pp. 975-1000), at: p.989, Accessed at: <http://digitalcommons.pace.edu/cgi/viewcontent.cgi?article=1747&context=lawfaculty>, Accessed on: 10.01.2016

⁷⁶¹ Gerard McCormack, *Secured Credit under English and American Law*, (Cambridge: Cambridge University Press, 1st ed, 2004), p.118. Accessed at: [click here](#) Accessed on: 10.01.16

possession'. This means that increasing room is given for debtors to manage repayment with minimum interference by supervisors once Company Voluntary Arrangements are in place⁷⁶².

The date of dissolution in Islamic law is the same day that the order for bankruptcy is given by the court. Since it is only through the court that bankruptcy may be filed, there is no option for bankruptcy to be processed with an adjudicator without first going through the court. Classical Islamic law recognises neither corporate entities nor release from debt through bankruptcy and therefore does not admit the English legal notion of bankruptcy which has the power to cancel a debt due to the bankruptcy⁷⁶³.

In classical Islamic law, creditors may commence bankruptcy procedures. By contrast the powers and obligations of debtors under Islamic law are limiting. Even though debtors must pay in accordance with creditor's agreement they are not entitled to initiate a proceeding of bankruptcy towards relief from repayment. Classical Islamic law therefore admits "involuntary" proceedings of bankruptcy, arising from circumstances, not deliberately initiated by the debtor. This contrasts with most bankruptcy and insolvency regimes which embody voluntarily initiated bankruptcy alternatives.

There is, however, one qualification under classical Islamic law which is a prerequisite for creditors to be able to initiate proceedings against debtors. Only in the case of debt which has matured may creditors have the entitlement to initiate proceedings or make claims under classical Islamic law. Although debt

⁷⁶² Milman, D., [Reforming Corporate Rescue Mechanisms], Chapter.17 in De Lacy (2002) in *The Reform of United Kingdom Company Law*, (pp 415-435), at 433

⁷⁶³ Michael J.T., [An Introduction to Shari'ah Considerations in Bankruptcy and Insolvency Contexts and Islamic Finance's First Bankruptcy (East Cameron)], SSRN, June 17, 2012, p3, Accessed at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1826246, Accessed on:06.05.2017

which has matured for repayment is a basis for a claim, the amount of debt does not change. According to the principles of *Shariah*, a creditor may only claim and a debtor pay only the original amount owed and no greater amount resulting from the acceleration of the debt. Hence, payment is made only in line with the original repayment schedule, irrespective of default and whether or not the parties are pursuing remedies. This position in classical Islamic law contrasts sharply with secular bankruptcy and insolvency regimes which are often at liberty to pursue debts in accordance with an aggressive claims culture. Under applicable *Shariah* principles once a creditor initiates a proceeding, the mechanism for recovery of the debt is that a judge seizes the debtor's assets, pending a determination of whether the debtor is a *mufliis*. The seizure of assets freezes the debtor's assets, prevents further sale onward, disposing or management of assets by the debtor, until the court can determine the status of bankruptcy of the debtor⁷⁶⁴.

The main effect upon a bankrupt is that all his assets and property will freeze and then the court announces that his assets are withheld so people do not deal with him⁷⁶⁵ and people will thereby be encouraged not to deal with him as he will lose their trust in financial matters. Therefore, dissolving the partnership may be the only way to terminate the liability of the other partner if the partnership contain only two partners, or alternatively, it may prove easier to simply expel the bankrupt partner.

⁷⁶⁴ McMillen, J T Michael, [An Introduction to Shari'ah Considerations in Bankruptcy and Insolvency Contexts and Islamic Finance's First Bankruptcy (East Cameron)], SSRN, 17.June. 2012, p.3, Available at SSRN, 17. June. 2012, Accessed at: <http://ssrn.com/abstract=1826246> or <http://dx.doi.org/10.2139/ssrn.182624>, Accessed on:19.01.2016

⁷⁶⁵ Mohsen, A., [Bankruptcy in Islamic Law (*sharia*)], November 2014, Accessed at: <https://www.linkedin.com/pulse/20141113092630-314687442-bankruptcy-in-islamic-law-sharia>, Accessed on 19.01.2016

At this point it is worth mentioning that English law recognises voluntary alternatives to bankruptcy, namely, IVAs and DROs. Although IVAs and DROs are a modern invention, the concept of charitable relief through prolonging the repayment of a debt is encouraged. The Holy *Quran* says⁷⁶⁶: “And if someone is in hardship, then [let there be] postponement until [a time of] ease. But if you give [from your right as] charity, then it is better for you, if you only knew.”⁷⁶⁷ Thus, English law expressly offer a choice of voluntary options for discharging debt before resorting to bankruptcy proceedings, *Shariah* law is clearly favourably inclined towards these options.

4.3.7 Expulsion of a partner from the partnership

All sources of classical Islamic law⁷⁶⁸ state that neglect and misconduct by a partner prejudicial to the carrying on of business is grounds for any innocent partner to expel him. Expulsion will lead to dissolution of the partnership if the partnership contains only two partners. This is because all types of partnership in Islamic law by definition exist on condition of consisting of two partners or more. However, if the partnership contains three partners or more, the innocent partners are entitled to continue the partnership where the remaining partners number not less than two⁷⁶⁹. In contrast, in English law it is not possible to part-dissolve a partnership in this way; unless the partnership agreement expressly states that one partner may be expelled⁷⁷⁰ a court can only dissolve the whole partnership. For example, if one solicitor partner wrongfully served notice on

⁷⁶⁶ Translated to most closely represent the original

⁷⁶⁷ Surat al-Baqarah verse 280, Accessed at: <http://quran.com/2/280>, Accessed on: 10.01.2016

⁷⁶⁸ The *Hanafiyyah*, *Malikiyya*, *Shafiyya* and *Hanbaliyya*.

⁷⁶⁹ AL Nawawi, Y., *Al Majmoa*, (Egypt, Dar al-fker, 8th ed, 1978), vol.13, p.532; Ibn Qudamh, M., *Almogni* (Cairo: Dar Alulom Almoghne, 18th ed, 1997), vol.5, p.24

⁷⁷⁰ PA 1890 s.25

another partner to leave the practice, in English law the whole partnership will dissolve⁷⁷¹ unless there is express provision for it in the partnership agreement. On rare occasions a court may order for a partner to be paid out his share which effectively removes him from the partnership. This is known as a *Syers v Syers order* derived from the case judgment: “...there is no...order for the dissolution of the partnership; but there is this, which is certainly not very usual, an order for the accounts, which must be accounts of the profits of the partnership...”⁷⁷². The rare occasion in English law, of the court effectively expelling the partner by paying him his share, is actually the default legal position in Islamic law. This means that Islamic law recognises that all other non-expelled partners continue in the partnership unaffected.

Expulsion of the partner who has done wrong takes effect without a court order unless the expelled partner does not agree to the expulsion, in which case the matter will be referred to the court. However, the *Malikiyya, Hanafiyya and Hanbaliyya* state two conditions to be fulfilled for the expulsion take effect. Firstly, the expelled partner must know about the expulsion from the partnership for the expulsion to take effect. Second, the element of good faith by these three schools of Islamic law is required to avoid doing any harm to the other partners - there should be no unfair advantage of a financial nature of any kind - or to deprive a partner a suitable amount of time to cope with the outcome of expulsion⁷⁷³. In contrast, the *Shafiyya* state that the expulsion will take place even without knowledge the expelled partner. The *Shafiyya* consider that due to the relationship between the partners being that of an agency, wherein one acts

⁷⁷¹ *Thakrar v Vadera* unreported. 31.3.1999, as quoted in R. C. Banks, Lindley & Banks on Partnership, (London: Sweet & Maxwell, 19th ed, 2010), p.835

⁷⁷² *Syers v Syers order* (1876) 1 App. Cas. 174 at 178

⁷⁷³ Khaiat, A., Sharikat fi Alshria Alislamiyah, (Bairut, Muasast Alresalah, 4th ed, 1994), vol.1, p. 352

for the other even without the need to obtain consent, there is no need for the remaining partners to be informed of the expulsion leading to dissolution⁷⁷⁴.

Classical Islamic law scholars recognised the need to dissolve partnerships where the relationship between the partners made the continuing of business impossible. However, they did not need to impose restrictions upon partnerships to ensure against injustice as people were relied upon to keep their word. In a society where people reviewed and controlled their own actions so as to be sure to accord with faith in Allah the Creator as the all-knowing Supervisor of all His creatures, agreements were not often attested to in writing. However, times change, and as a result of misconduct and neglectful behaviour which can lead to a partner's expulsion, it is no longer enough to rely on one's word, and it is now standard to require a court order.

4.3.8 Two persons: minimum requirements for a partnership

No direct mention is made in any classical Islamic source of a minimum number requirement for a partnership, without which a partnership will dissolve. However, current Islamic law scholars state that the partnership dissolves if one partner bought all other partners' shares and assets, thereby becoming the sole owner of the partnership's assets. The reason for the minimum requirement is that partnerships must contain at least two or more partners to either set up a partnership or to continue an already existing partnership or else it will dissolve. This logic is understood from the definition of partnership by Islamic scholars that partnership is a "contract between two or more owners of wealth for joint

⁷⁷⁴ As what we discussed ideals in 4.2.1.

trade or it is a contract for shared labour and shared profits”⁷⁷⁵. This definition implies that a partnership must contain at least two persons.

Additionally, this definition shows that the relationship between partners in Islamic law is a contractual relationship. Therefore, partnerships are subject to the elements of contract such as the parties (offeror and offeree), offer and acceptance, the subject matter and the consideration (property or wealth). These elements must be fulfilled in order for a partnership to be valid⁷⁷⁶. The most important element of valid partnership contract in classical Islamic law is the parties or the partners, who must be two or more in number. Therefore, if this element has been lost, the partnership could not be set up, the existing partnership would not be valid and it will dissolve⁷⁷⁷.

The concept of a person in English law is clearly defined to include either a human being or a corporation. Classical Islamic law does not mention that in any of its sources they did not recognise the concept of corporation in that time. As the Islamic academic *fiqh* recognises the concept of corporation and there is nothing in this concept to contradict *shariah*, there is no reason but to accept the unincorporated entity as a person.

4.3.9 Dissolution by illegality of partnership

An in-depth search reveals that classical Islamic law does not mention directly that illegality of partnership leads to dissolution. However, Islamic

⁷⁷⁵ Kharofa, J., [Partnership – Definition any Types], Concepts in Islamic Economics and Finance (2006), Accessed at: <https://cief.wordpress.com/2006/03/04/partnership-definition-and-types/>, Accessed on: 25.11.2015

⁷⁷⁶ Sharma, A., [Requirement For Valid Contract To Shariah Law], Law Teacher website, Accessed at: <http://www.lawteacher.net/free-law-essays/contract-law/requirement-for-valid-contract-to-shariah-law-contract-law-essay.php>, Accessed on: 25.11.2015

⁷⁷⁷ Almosa, M., *Sharikat Alashkhs*, (Riyadh, Saudi Arabia, 1st ed, 1997), p.360; Khaiat, A., *Sharikat fi Alshria Alislamiyah*, (Bairut: Muasast Alresalah, 4th ed, 1994), vol.1, p.364

scholars⁷⁷⁸ have agreed nowadays that contracts and all business organisations include corporations and partnerships can be established under Islamic law based on the general principle of permissibility. This means that all things are permissible and nothing can be declared illegal except on the basis of a clear prohibition in the Holy *Quran* and the *Sunnah*⁷⁷⁹.

Therefore, contemporary Islamic scholars have derived two main principles from the Holy *Quran* and the *Sunnah*, which have to be considered in any business transaction to be permitted (*yajuz*) and therefore considered legal under Islamic law⁷⁸⁰. The first principle is that the objective of the business transaction should be "*Halal*" (legal or permitted in the *Shariah*). A company will be considered forbidden "*Haram*" if it is based on one or more of forbidden actions such as "*Riba*" (usury)⁷⁸¹, "*Gharar*" (uncertainty)⁷⁸², "*Qimar*" (gambling)⁷⁸³, or if the partnership engages in transactions or investments involving prohibited products or services such as alcohol, pork-derived foods, or pornography⁷⁸⁴. The other principle is that the business transaction should not void itself according to the *Shariah*⁷⁸⁵. To avoid being rendered void, the business needs to comply with the following two main basic principles of Islamic contract law mentioned in the

⁷⁷⁸ For instance: Al-khafif, A., (Egypt: Dar al-fker, 8th ed, 1978), pp.122-127; Almusa, M., Personal Companies Between Law and Shariah, (Riyadh: Dar Alasema, 1st ed, 1998), pp. 279-305.

⁷⁷⁹ Al-khafif, A., Alsharikat, (Egypt, Dar al-fker, 8th ed, 1978), p.127

⁷⁸⁰ International Fiqh Academy Resolution # 130 (14/4) of the Islamic Fiqh Academy in its meeting # (14) dated 16 January 2003 in Doha, Qatar, Accessed at: <http://www.fiqhacademy.org.sa/qarat/14-4.htm>, Accessed on:19.10.2015.

⁷⁸¹ The Holy Quran, Surah Albaqarah, verse 278, Accessed at: <http://quran.com/2/278>, Accessed on: 19.10.2015

⁷⁸² As a technical term, *Gharar* refers to the element of uncertainty in a contract which may lead to unknown consequences or results. See Salwani Razali, S., University [A revisit to the Principle of Gharar in Islamic Banking Financing Instruments], p.26, International Islamic Finance Conference Peer Reviewed Paper delivered at the International Islamic University, Accessed at <http://www.kantakji.com/media/8656/m209.pdf>, Accessed on: 06.05.2017

⁷⁸³ The Holy Quran, Surah Almaidah, verse 90, Accessed at: <http://www.ahadees.com/ayat-90-surah-5.html>, Accessed on: 20.10.2015.

⁷⁸⁴ The Holy Quran, Surah AlMaidah, verse 3, Accessed at: <http://ahadees.com/ayat-3-surah-5.html>, Accessed on: 20.10.2015.

⁷⁸⁵ Nyazee. I., *Islamic Law of Business Organization Corporations*, (India, Adam Publishers & Distributors, 1st ed, 2010), pp. 145-156.

Holy *Quran*⁷⁸⁶: “[thus] you do no wrong, nor are you wronged”. This means that in any transaction one should do no wrong, nor should a person expect to be wronged⁷⁸⁷. The second principle is that one should not cause a perpetual distribution among the wealthy, as Allah said in the Holy *Quran*⁷⁸⁸ “... so that it will not be a perpetual distribution among the rich from among you. And whatever the Messenger has given you - take; and what he has forbidden you - refrain from. And fear Allah; indeed, Allah is severe in penalty”⁷⁸⁹. This means that Islamic law requires the populace – whether Muslim or not – that it does not become beholden to a class of wealthy usurers. Therefore, partnership as a business organisations must accord with those principles to set up and to run a partnership or the partnership will dissolve. For instance the partnership will be illegal in Islamic law if it is set up as a partnership for gambling. If a partnership changed business to become one of gambling, that change would lead to its dissolution.

In comparing English with Islamic law on the illegality as a cause of dissolution, there are several points expressly stated in English law, as mentioned in this thesis on the topic of dissolution by illegality of partnership⁷⁹⁰, which are not expressly mentioned in Islamic law. The main points mentioned in English law include: that illegality is a cause of dissolution; that a partnership will not be able to form for an illegal purpose; that a partnership is not determined by the knowledge of the partners but it is an operation of the law itself which automatically dissolves the partnership; finally, that if mutually agreed among

⁷⁸⁶ Translated to most closely represent the original

⁷⁸⁷ The Holy Quran, Surah Albaqarah, verse 279, Accessed at: <http://quran.com/2/279>, Accessed on: 19.10.2015

⁷⁸⁸ Translated to most closely represent the original

⁷⁸⁹ The Holy Quran, Surah Alhashr, verse 7, Accessed at: <http://quran.com/59>, Accessed on: 19.10.2015

⁷⁹⁰ See section 2.3.4

the partners, a partnership may reconstitute itself once the reason for the original illegality is solved. Since the causes for dissolution due to illegality in English law do not contradict any principle in classical Islamic law, dissolution due to illegality and the other matters abovementioned are all acceptable to *sharia*.

4.4 Summary

We can sum up this chapter by saying that the word used for partnership in Islamic law is '*sharikat*', which refers to participation in a business of any type which include corporations and partnerships. Islamic law addresses in a general manner the provisions of corporation and in detail the provisions of partnership. *Sharikat* as a legal term differentiated into *sharikat al-milk* (non-contractual)⁷⁹¹ and *sharikat al-uqud* (contractual), neither of which are mentioned expressly, either in the Holy *Quran*, or in the *Sunnah*. However, when partnerships '*sharikat*' emerged Muslim scholars engaged in *ijtihad*, which are scholarly efforts to demonstrate the rule of Islamic law concerning those types of partnership. *Ijtihad* refers specifically to those efforts made by scholars in a decision-making process to rule on new, emerging issues by relying on interpretations of the principles present in the Holy *Quran* and the *Sunnah*. This means that the *sharia* law is flexible and suitable for application at any time and in any place by the *ijtihad* of jurists. As a result, when the concept of corporation emerged, the International Islamic *Fiqh* Academy issued a statement and conducted research about the modern corporate as a joint-stock company, a limited company and a limited liability partnership and recognised them along with the concept of companies as having legal personality.

⁷⁹¹ This type of *sharikat* is usually created by way of inheritance, wills, or other situations where two or more persons come to hold an asset in common.

A further aspect of the attitude of Islamic law is that it recognises legal personality and separate legal entity. However, the recognising of legal personality and separate legal entity does not lead on to distinguish between the causes of corporation or of partnership. It seems that Islamic law considers the causes of dissolution of partnership are themselves also causes of dissolution of company and does not distinguish between them. Nevertheless, the main focus of Islamic law is on the partners' agreement based upon the dicta of Prophet Mohammed: "Muslims are committed to their conditions..."⁷⁹². This means that *pacta sunt servanda* and any participation in a business of any type whether company or partnership is subject to the partners' terms and agreement. Not only are contractual terms binding but also local custom and legislation of any countries and international law, on condition that these provisions of law and custom achieve justice, do not harm others and are not in conflict with principles of *sharia*.

A comparison of English and Islamic legal systems will demonstrate some of the advantages and disadvantages of both systems. In English law the effect of change of composition of a partnership, whether due to the addition or to the removal of a partner is the immediate end of that partnership. This gives rise to a dilemma as to how to avoid this negative impact. Islamic law deals with this dilemma perfectly; any change in a partnership will only lead to the cessation of business and the dissolution of the firm if the remaining partners agree to dissolve the partnership. This will reduce the percentage of dissolutions of partnership.

⁷⁹² Jami` at-Tirmidhi, The Chapters On Judgements From The Messenger of Allah, Vol.3, Book 13, Hadith 1352, Accessed at: <http://sunnah.com/tirmidhi/15/32>, Accessed on: 12.11.2015

A further contrast between Islamic and English law is that loss of partnership capital in Islamic is a cause of dissolution of a partnership. This is because the partnership's capital and assets are part of the partnership agreement and are the very backbone of the partnership. Therefore if such capital and assets are lost to the business, the partnership must be dissolved. However, the Partnership Act 1890 does not mention loss of partnership capital as a cause of dissolution; neither does it mention inequality between the shares in capital among partners in a partnership nor does it expressly mention the expulsion of a partner from the partnership as a cause of dissolution of partnership. Another difference between Islamic law and English law is that in Islamic law the partnership assets must be liquidated before dissolution⁷⁹³ just as in English law dissolution of the company is the final stage of the winding up of a company. Partnerships in English law, by contrast, first go through dissolution and are wound up afterwards.

There is a similarity between the two legal systems, concerning the concept of "enemy alien" which is an automatic cause of dissolution of partnership in English law. This compares with the apostasy of a partner who joins a country at war with an Islamic country as a cause of dissolution of partnership in Islamic law. Although classical Islamic law does not mention IVAs and DROs expressly, *shariah* law is clearly favourable towards these options. This evident from the concept of charitable relief through prolonging the repayment of a debt which is encouraged The Holy *Quran*: "And if someone is in hardship, then [let there be] postponement until [a time of] ease. But if you give [from your right as] charity, then it is better for you, if you only knew."

⁷⁹³ More details in 4.2.1 Dissolution of a partnership by notice

Flexibility is one of the advantages of Islamic law which makes room for partners to expel an unwanted partner if they have valid reasons. The expulsion of an unwanted partner will not lead to dissolution of partnership. This flexibility does not exist in English law as it is not possible to part-dissolve a partnership in this way unless the partnership agreement expressly states that one partner maybe expelled; a court can only dissolve the whole partnership. The all-or-nothing effect on partnership in English law is not the case in Islamic law, which would recognise that all the partners continue in the partnership unaffected. Finally, in general the causes of dissolution of companies and partnerships are not conflict with principles of *shariah*. Therefore, it is possible that Islamic countries adopt causes of dissolution in English law without fear of the transfer of any inherent contradiction to Islamic law.

Chapter 5 Causes of dissolution of companies and partnerships in Saudi Law

5.1 Introduction

We talked above⁷⁹⁴ about dissolution of companies and partnerships as these are the most important business entities in English law. The writer has reviewed the legislation governing business entities in Saudi Arabia. The aim of this review was to explore causes of dissolution of company and partnership in Saudi Law and to make a critique of some of these causes; then comparing these causes with English law in light of Islamic law. These pieces of legislation show that Saudi Law does not divide business entities expressly into companies and partnerships in the same way as English law does. Business entities are roughly divided by the Saudi law with respect to their formation into firstly: *sharikat al-ashkhas* (companies of persons) which are based on personal considerations. The contracts of association have a leading role in the relationship between the partners. Even though the *sharikat al-ashkhas* has legal personality its partners are the foundation upon which it rests. Thus, if a partner died or became bankrupt the *sharikat* may end. Effectively, the partners and the *sharikat* are one and the same. The second type of business entity is *sharikat al-amwal* (companies of capital). This *sharikat* are based upon contributions of capital made by the members. The contract of *sharikat al-amwal* plays a secondary role to the legal person. *Sharikat al-amwal* functions independently from its members and is never affected by their status.

From these explanations of both *sharikat al-ashkhas* and *sharikat al-amwal* we can say that *sharikat al-ashkhas* are understood in English law as

⁷⁹⁴ In chapters two and three

being similar to partnerships and *sharikat al-amwal* are understood in English law as being comparable to companies⁷⁹⁵. Therefore, the term “partnership” in this chapter refers to the concept of Saudi Law which is known as *sharikat al-ashkhas* and the term ‘company’ in this chapter refers to the concept of Saudi Law which is known as *sharikat al-amwal*.

The causes of dissolution of companies and partnerships are mentioned in the texts of several pieces of legislation such as: Corporate Governance Regulations, Consultative Assembly of Saudi Arabia, The Commercial Court Law 1970, Settlement That Preventing from Bankruptcy Law 1996 and Arbitration Law 2012. The main statute is the Companies Law 2015⁷⁹⁶ which mentions the causes of dissolution of companies and partnerships mainly in four Articles. Article 16 governs the causes of dissolution of both companies and partnerships. Article 37 governs the causes of dissolution of partnerships. However, Articles 149-150 govern causes of dissolution of companies.

There is a very important question to address, as to why Saudi Law sets out the provisions of both companies and partnerships in the same Law. The reason is that the title of the Act is ‘*Nazam Al-sharikat*’; the word ‘*sharikat*’ in Arabic means both ‘companies’ and ‘partnerships’. Thus, one Act includes both entities in law. In accordance with the Companies Law 2015 which combines statutory provisions on companies and partnerships, I shall deal with those entities together or separately as they appear in that Law. Therefore this chapter is divided into three sections: causes of dissolution of both companies and

⁷⁹⁵ This point is not awareness from many students have background from Arab counters.

⁷⁹⁶ I have used the official translation of this legislation from the website of the Ministry of Commerce and Industry of Saudi Arabia. However, this is not an accurate translation of the Arabic original, as this legislation is governed provisions of both companies and partnership. The original term in Arabic is *sharikat* which means companies and partnership.

partnerships; causes of dissolution specifically of partnerships and causes of dissolution with reference to companies.

5.2 Causes of dissolution of both companies and partnerships in Saudi Law

5.2.1 Expiration of the term

In Saudi Law, partners are presumed to be committed to the terms of the partnership deed which they agreed, or as company shareholders by the articles of association which they committed themselves to. Therefore, under the Saudi Companies Law 2015 partners and shareholders have a full right to set appropriate terms which they believe will lead them to commercial success. However, it seems that there is a conflict amongst the articles of Companies Law 2015 with regard to duration. Some articles do not recognise a partnership at will or a company to exist for an indefinite period of time. The Law only recognises a fixed partnership or company to exist for a definite period of time. Article 23 of the Companies Law 2015 states: “The partnership’s contract shall specifically contain the following particulars...e.) The date of formation of the partnership and its duration...”⁷⁹⁷. Furthermore, Article 65 of the Companies Law 2015 states that: “the directors must apply for the registration of the company in the Register of Companies...Such registration shall specifically contain the following particulars... a) the company’s name, activity, head office, and its duration”⁷⁹⁸. This clearly shows that there is a need to determine from the outset the length of time of a company or a partnership.

⁷⁹⁷ Companies Law 2015, Article 23

⁷⁹⁸ Ibid, Article 65

Thus, Saudi law will only recognise the existence of a fixed partnership, and not one formed at will. Similarly, Saudi law only recognise the existence of a company with a definite term of duration in its governing documents. However, Article 36 of the Companies Law 2015 states “A partner does not have a right to withdraw himself from a partnership if the period of a partnership is fixed. Nonetheless, if the period of partnership is not fixed, the partner can in good faith withdraw himself from the partnership....” The phrase “the period...not specified” stands in contradiction to Articles 65 and 23. This means that neither does a partnership have to be fixed, nor does a company have to have any definite period. Obviously, it is better to give partners full right to choose the type of the partnership, whether it will be fixed or at will. Similarly, it should be left shareholders to choose whether they want a company to exist for a fixed or indefinite period of time. However, it is more important to avoid vagueness arising from contradictions between its constituent articles. Therefore, these articles in Saudi Company Law 2015 need reform in order to be made clearer.

Another area to consider is the degree of flexibility on how a partnership can terminate. Whereas in English law a partnership is considered fixed if it is limited either by date of termination, by an event such as the death of a partner or by change in financial circumstance such as an irreversible downturn in profitability⁷⁹⁹, Saudi law will recognise only limitation by date. This is because Saudi Law does not expressly recognise partnerships at will, but passively recognises them in Article 36. At the other end of the scale, Alaorani has said that Saudi Law will not recognise a partnership as a fixed partnership if the duration of the partnership is very long, as long as the average of human life.

⁷⁹⁹ More details in 2.2.1

The partnership will be considered as a partnership at will, impliedly, even though the partnership specified a specific time. Also, the partnership will be considered as a partnership at will, if the duration of the partnership depends upon the death of one of the partners⁸⁰⁰. This is because such a condition is indeterminate.

The Companies Act 2006 does not specify a position regarding the duration of a company, whether there has to be a definite period of time or not for its duration. This means that the life of the company remains subject to the shareholders' terms. The company will continue to exist for as long as it is not wound up. The position in Islamic law is the same as in English law, that one may specify the duration of a partnership and a partnership at will. The only difference is that what is important to Islamic law is that there remains a substantive relationship between the partners. By contrast, what matters in English law is that the business continues to operate⁸⁰¹. Therefore, to avoid vagueness, article 23 of the Companies Law 2015 should be rephrased to read: "The partnership's contract shall specifically contain the following particulars...e.) The date of formation of the partnership and its duration if it is a fixed partnership..." Also, article 65 of the Companies Law 2015 should be revised thus: "The directors must apply for the registration of the company in the Register of Companies... Such registration shall specifically contain the following particulars... a) the company's name, activity, head office, and its duration if the company is specified to exist for a period of time".

⁸⁰⁰ Alaorani, M., Commercial Law, (Beirut: Manshorat Alhalabi, 4th ed, 2003), p137

⁸⁰¹ More details in 4.2.2

The Companies Law 2015 has no specified maximum period of term for the life of the company or partnership. However, the dissolution of a partnership or a company will take place by the force of law if the period of the partnership and company ended. The situation in English law is the same as in Saudi law. There is no specified minimum or maximum term for the life of the company or partnership. The company or partnership will dissolve by the force of law if the period of the partnership or company has ended⁸⁰². The minimum term in Islamic law is implied in the view of the *Hanbaliya* which states that a partnership can exist for a specified time, however short, and there is no maximum period. Scholars from the other three schools do not agree with the *Hanbaliya* that a partnership can be agreed for a specified period⁸⁰³. All three systems of law which are English, Islamic and Saudi all agree that there is no maximum and minimum period of time for the term of existence of a partnership.

5.2.2 Termination or the impossibility of the adventure

The Companies Law 2015 considers that the purpose of a partnership or a company is one of the most important parts of its memorandum in which the purpose must be stated⁸⁰⁴. The existence of a partnership or a company could be limited to multiple adventures or implementing a single adventure, such as to build a structure, a dam or a bridge. According to Article 16(2) of the Companies Law 2015, a partnership or a company will be dissolved if the purpose of the partnership or company is fulfilled. This means that on the fulfilment of adventure, the company or partnership terminates. Additionally,

⁸⁰² More details in 2.1.1

⁸⁰³ More details in 4.2.2

⁸⁰⁴ Companies Law 2015 Articles.23,45,54,65 and 156

Article 16(2) of the Companies Law 2015 includes that the company or partnership will dissolve if its adventure is impossible to realise.

It is noteworthy that Saudi law discusses the point of adventure on two points: termination and impossibility. Neither English law nor classical Islamic law discusses these two points. This does not mean that English and Islamic law is in rejection of these aspects of law, simply that Saudi law has the advantage of having expressed itself on these matters. With regards to the termination of adventure, the position in both English law⁸⁰⁵ and classical Islamic law⁸⁰⁶ is identical to Saudi law. A single venture terminates when the purpose of the partnership is fulfilled, unless there is a clause written in to the agreement to avoid this, which is acted upon before the end of the single venture. Whether or not partners carrying on business beyond the life of a single adventure create a partnership at will is not mentioned in Saudi law.

A further point of interest which the Companies Law 2015 does not mention, nor do the legal systems of either English or classical Islamic law is that if a partnership or a company was set up for a fixed period of term to implement a single adventure, then the single adventure completed before the fixed period of term of the partnership or company is finished. The question is whether the partnership or company will dissolve after completion of the single venture, or the partnership or company will remain valid until the end of the fixed period of term appointed. Bariry states that if a partnership or a company completes the adventure, it will be dissolved even if the fixed period of term not expired yet. The reason behind that is that the main intention when setting up the partnership

⁸⁰⁵ More details in 2.2.2

⁸⁰⁶ More details in 4.2.3

or the company is to complete the adventure. The term is only an estimated period which the partnership agreement or company memorandum must mention as obligatory for fulfilment. Correspondingly, a partnership or company will not dissolve by the force of the law if a partnership or a company does not complete the single adventure, even though the fixed period of term has expired. Bariry suggested that the Saudi Companies Law should reflect this view⁸⁰⁷. Alternatively, Elkholy mentions that if the single adventure completed before the fixed period of term of the partnership or company is finished or vice versa, the company or the partnership will dissolve after the later of the two events⁸⁰⁸.

Either Bariry or Elkholy's approach can fill the gap in current law. However, Bariry's point of view is logically more correct and justifiable. Bariry considers the dissolution to occur when the real motive of setting up the company is absent, or that the partnership has achieved its purpose by the adventure terminating. Bariry's opinion is thus more correct than Elkholy's view, which does not focus on the purpose of the venture as the absolute and decisive reason for the existence of the partnership or the company.

Thus it is better to approach the matter of single venture by treating the root cause of the problem. The root of the problem for single venture is the condition in Saudi law that a partnership or company must be stipulated to exist for a fixed period of time⁸⁰⁹. This means that the single venture could come to an end before its purpose is fulfilled. By removing the legal insistence upon a fixed period for any venture, the partners would be free to set up the partnership and

⁸⁰⁷ Bariry, M., Commercial Transaction Law in Saudi Arabia, (Riyadh: Mahad Aledarh, 1st ed, 2001), vol.1, p.144

⁸⁰⁸ Alkholy, A., Almojaze in the Saudi commercial law, (Cairo: Saaid AbduAllah Wahbah, 1st ed, 1973), p.143

⁸⁰⁹ More details in 5.2.1

also the shareholders would be free to set up the company to serve their venture only, without having to mention a period of time which could later cause confusion concerning the status of the partnership or company.

5.2.3 Transfer of all shares to one person

As a general principle in the Companies Law 2015 there must be at least two or more partners to either set up a partnership or company or to continue an already existing partnership or company, or else it will dissolve. This is presumed by Article 2 of the Companies Law 2015 which defines a company or a partnership as a contract under which two or more persons undertake to participate in an enterprise for profit, by contributing a share in the form of money, work or both of them, with a view to dividing any realised profits or incurred losses as a result of such enterprise. The Companies Law 2015 uses the phrase “two or more persons” which implies that a company or a partnership must contain at least two persons. “Persons” refers not only to individuals, but also to groups of people. This implication is mentioned expressly in Article 16(d) of the Companies Law 2015 “... a company shall be dissolved for any of the following reasons... (d) Transfer of all shares or stocks to one partner...” The position in Islamic law is the same as in Saudi law: there must be at least two persons in a partnership or in a company. The very concept of partnership in classical Islamic law – known as “*sharikat*” - is governed by the principle of “*khalṭ*” meaning “mixed”, which presumes the involvement of more than one person⁸¹⁰. However, English law recognises the existence of a company consisting of one member. Although under English law partnerships must have

⁸¹⁰ More details in 4.1 and 4.3.8

two or more partners⁸¹¹, the law recognises the existence of single member companies. Statute impliedly recognises single member companies by stating that the rules applicable to two or more member companies are modified as necessary to companies that have no more than one member⁸¹².

The old Companies Law 1965 was very strict on this matter. Once the numbers of partners were reduced to less than two a partnership or a company would automatically dissolve⁸¹³. However, the new Companies Law 2015 was amended to introduce a softer process. The company or the partnership has to be switched to a single member joint stock company if all shares have been bought by the Saudi government or by an individual, with the condition that the capital of the company be five million Riyals and more⁸¹⁴. If this condition has been fulfilled then the company or the partnership has to switch it to a single member limited liability partnership for one year from the date of transferring. Otherwise, the company or the partnership will dissolve automatically by force of the law⁸¹⁵. This means that the default legal position in Saudi law is that a partnership or company will dissolve if there are less than two partners or members. However, there is one exception in limited circumstances to allow for the transfer the company or partnership to a one-member company for a maximum of one year and if the capital is worth at least five million Saudi Riyals or more.

The position of the Saudi law on this point is beneficial since a company or partnership will not automatically dissolve on the number of persons to one.

⁸¹¹ As mentioned in PA 1890 s.1(1) and as clearly stated in *Hurst v Bryk* [1999] Ch.1 para 10

⁸¹² CA 2006 s.38

⁸¹³ Companies Law 1965, Article 15(3)

⁸¹⁴ Companies Law 2015, Article 55

⁸¹⁵ *Ibid*, Article 149

There are alternative structures in existence to allow the business to continue. These alternatives are not provided in either English or classical Islamic law. The reason why Islamic sources do not mention this is because the term “*sharikat*” means that it is “*khalt*” which refers to a legal relation in which the dealings between at least two people are mixed in with each other. Therefore, the term *sharikat* used in this context is linguistically inaccurate. It would be more appropriate to suggest an alternative name for the one-member company, such as describing it as a “one-member entity”, in Arabic “*kaian*”. Whereas the linguistic use of *sharikat* is incompatible with a single member company, there is also the disadvantage that too much power is concentrated in the hands of one person. According to a proposed EU law directive, the sole member will be allowed to take decisions without holding meetings. However, this autonomy is checked and balanced by a requirement on a single member company to be able to show that after paying dividends, sufficient funds remain to fully cover all liabilities⁸¹⁶.

5.2.4 Dissolution by the agreement of partners or shareholders

An agreement by partners or shareholders to dissolve partnerships or companies before the expiry of their term is one cause of dissolution and is mentioned in the Companies Law 2015⁸¹⁷. In Saudi law the early dissolution of the partnership requires unanimous agreement from all partners⁸¹⁸ unless the partners have agreed otherwise⁸¹⁹. This means that in advance of court action being applied for, the same result and a better, cheaper outcome can and should

⁸¹⁶ Brodies Legal Resource website, Accessed at: <http://www.brodies.com/blog/corporate/single-member-companies-news-europe>, Accessed on: 21.03.2016

⁸¹⁷ Article, 16(d)

⁸¹⁸ Companies Law 2015, Article 27

⁸¹⁹ Aljabr, M., The Commercial Law in Saudi Arabia, (Riyadh: King Fahd Library, 4th ed, 1996), p.219

be achieved democratically through the partners or shareholders' unanimous agreement. The right of partners to agree on dissolution before the expiry of the term of their partnership or company corresponds to their full right to continue and extend the length of the term.

The provisions in English law⁸²⁰ are not very different from the provisions in Saudi law. Unanimity of agreement to dissolve is a condition for a fixed partnership but not for a partnership at will. In Saudi law, all partnerships must be fixed, and require the agreement of all partners. However, the requirement for a partnership at will does not occur as the partnership at will itself cannot legally exist in Saudi law. Islamic law recognises unanimous dissolution by partners as parallel their right to set it up in accordance with their preferences. Islamic law will recognise such dissolution but if it not causes harm to others, and can be achieved by either express or implied terms⁸²¹.

With regards to companies, the early dissolution of a company in Saudi law requires resolutions of an extraordinary meeting of general assembly of the shareholders. If a resolution pertains to an extension of the term of the company, the resolutions must be adopted by a three-fourths majority vote of the shares represented at that meeting⁸²². There is a difference between the proportions required to dissolve a partnership as opposed to a company. It seems that the reason for the different percentages required is based on personal consideration and the identities of partners. Whereas the consideration of the company is based upon the company's capital, that of the partners in partnerships is based simply upon personnel. This explains why Saudi law has differentiated

⁸²⁰ More details in 2.2.3

⁸²¹ More details in 4.2.4

⁸²² Companies Law 2015, Article 94(4)

standards for partnerships and companies. Partnerships require unanimous agreement, since they were formed by the will of all of the partners together. By contrast, companies only require three-quarters of the shareholders because it is not they but the capital which formed the company which they run. These specific requirements for companies are not mentioned either in English or classical Islamic law. Nonetheless, these specific provisions in Saudi law do not contradict any principle of *Sharia* law.

For an early dissolution to take place Alghamidi⁸²³ says that there are **three** conditions. Firstly, the companies or partnerships have to be solvent. Secondly, the company or partnership is still carrying on the business. Thirdly, there must be good faith between partners or shareholders. Therefore, any early dissolution which adversely affects either a minority of shareholders or a third party, or aims to cheat and defraud, will not happen at law⁸²⁴. Alghamidi does not give a reason for his view that there is a need for the three conditions. However, it could be that the reason is to reduce the possibility of early dissolution being used wrongfully. To seek early dissolution, the company must be solvent to protect third parties such as a creditor against a company seeking to escape payment of a debt. As long as there is money in the company account and the business is running, third parties' positions are safe. The third condition, good faith, is clearly needed for the early dissolution of a company or a partnership. The only condition of the three mentioned in both English and classical Islamic law is good faith. Contrary to Alghamidi, the condition of good faith is sufficient to cover the other two conditions, solvency and continuance of

⁸²³ Alghamidi, A., Husaini, B., The Commercial Law, (Riyadh: Kind Fahd Library, 3rd ed, 2012), p.212

⁸²⁴ *Ibid*

business. It is better in certain circumstances to take advantage of the good faith that exists to dissolve a company or partnership when there are no funds or when the business has ceased to occur. The ability to dissolve early saves expenses which would be incurred by waiting until there is no choice but to close down a failing enterprise. Thus, there appears to be no support for Alghamidi's view either logically or in statute; it is not necessary to presume that the company or partnership be solvent before dissolution, although good faith is required to ensure that there is at no point, unfair advantage taken of any partner.

5.2.5 Merger

The definition of merger of companies and partnerships is not provided in the Companies Law 2015. However, this legislation shows that merger may take one of two forms, either: a) where the assets and liabilities of at least one company or partnership are transferred over to another public company or partnership or b) where the liabilities and assets of two or more public companies or partnerships are transferred to a third, new company or partnership. Thus, merger involves two or more companies or partnerships being brought under the umbrella of one company or partnership. The absorbing company or partnership under which the other companies or partnerships are brought may either be a new company or partnership to absorb the companies or partnerships, or that one absorbs the other⁸²⁵.

In Saudi law, merger is a cause of dissolution of company and partnership; as Article 16(d) states: "With due regard to the causes of dissolution particular to

⁸²⁵ Companies Law 2015, Article 191(1)

each kind of companies, a company shall be dissolved for any of the following reasons... d) Merger of the company or partnership into another...”. However, in English law merger⁸²⁶ is not expressly mentioned as a cause of dissolution of partnership in the Partnership Act 1890. However, dissolution of a partnership occurs when there is a change in the membership of the partnership⁸²⁷. Thus; merger is also a cause of dissolution of partnership in English law. By contrast, the Companies Act 2006⁸²⁸ mentions expressly and formally that in the case of merger a company will dissolve. Thus, merger is recognised as a cause of dissolution⁸²⁹. Hence, merger is a cause of dissolution both of companies and of partnership in both English and Saudi law. This is expressly mentioned in the Companies Law 2015 for both companies and partnerships, whereas it is mentioned expressly in English law only in the case of company merger and only impliedly with regards to partnership. Furthermore, English law recognises both domestic and cross-border mergers⁸³⁰, which is not the case in Saudi law. Saudi law should therefore consider legislation as a framework to recognise the provisions of cross-border mergers. There are many advantages to recognising cross-border mergers. Economically, markets could expand; production and distribution rise and the country’s bargaining power would increase⁸³¹. However, for this to happen Saudi judges would benefit from unfettered

⁸²⁶ Although the Partnership Act 1890 does not mention expressly merger of partnerships, this does not mean that partnerships cannot merge. It is possible that a partnership A merge with partnership B, and the assets and liabilities of partnership A transfer to partnership B; or that the liabilities and assets of partnerships A and B transfer to a third, new partnership, C. See HM Revenue & Customs website 14.09.2015 Statement of Practice D12: Partnerships, para.10.1, Accessed at: <https://www.gov.uk/government/publications/statement-of-practice-d12/statement-of-practice-d12#mergers>, Accessed on: 06.07.2017

⁸²⁷ More details in 2.1

⁸²⁸ CA 2006 s.900

⁸²⁹ More details in 3.2.2

⁸³⁰ Ibid

⁸³¹ Ibid

discretion to recognise all mergers, in the same way as judges have discretion under English law.

The classical Islamic scholars do not expressly mention that merger is a cause of dissolution. However, technically, merger, whether by absorption or transferral leads to dissolution of the company or partnership. As the fact of merger does not contradict any principle of Islamic law, it can be recognised as a cause of dissolution in Islamic law.

A merger in Saudi law is not valid unless the decision made by each company or partnership is issued in accordance with the conditions of transforming the company prescribed in the contract of the company or its regulations⁸³². In a partnership, this decision requires unanimous agreement from all partners⁸³³, unless the partners have agreed otherwise⁸³⁴. However, in a company, the required resolutions of an extraordinary general assembly meeting of a company are adopted by a three-fourths majority vote of the shares represented at that meeting, if a resolution pertains to extension of the term of the company⁸³⁵. In English law, a resolution must be adopted by unanimous vote: all shareholders or persons holding securities who carry a right to vote must “so agree”⁸³⁶. By contrast, the English law does not mention in the case of partnership what is the required number of partners. However, the Partnership Act 1890 clearly states that any change in the rights and duties of partners requires the consent of all partners. The consent between the partners may be given expressly or be

⁸³² Companies Law 2015, Article 191(4)

⁸³³ Ibid, Article 27

⁸³⁴ Aljabr, M., The Commercial Law in Saudi Arabia, (Riyadh: King Fahd Library, 4th ed, 1996), p.219

⁸³⁵ Companies Law 2015, Article 94(4)

⁸³⁶ CA 2006 s.918(A)(1)

inferred by course of conduct. This means that all changes and variations, including merger will require the unanimous consent of partners⁸³⁷.

When a merger takes place, a transferor company or partnership dissolves. There is a point requiring clarification regarding Article 203 of the Saudi Companies Act 2015 which states that as soon as dissolution occurs, the company enters the phase of liquidation and retains legal personality to the extent necessary for the liquidation until the liquidation ends⁸³⁸. This Article implies that merger, as a cause of dissolution, will lead the company or partnership to liquidation. However, in practice, merger does not and should not lead to liquidation as this will interfere with the transfer of company or partnership assets. Since Saudi law appears to require all dissolutions, including those caused by merger, to move to liquidation, it would be necessary suggestion a clarification of the Article 203 and redrafts it to read: “Except in the case of merger, all dissolutions lead to liquidation...” If Saudi law were to adopt such an amendment to exclude merger from leading to liquidation, the law would be clarified. English law has already clarified this point which reflects on the good state of drafting of the statute. The Companies Act 2006 states that merger is achieved “without winding up, of any transferor company”⁸³⁹. Saudi law should expressly mention that merger does not lead to liquidation, for the sake of clarity.

To conclude this section it can be said, all three legal systems in this thesis, Islamic, Saudi and English regard merger as a cause of dissolution. This is both reasonable and unavoidable as the mechanism of merger leads to dissolution

⁸³⁷ PA 1890 s.19

⁸³⁸ Ibid, Article 203(1)

⁸³⁹ CA 2006 s. 900(2)(d)

compulsorily. The consequence of merger is that when it takes place the legal personality of the merged company or partnership ends. Its financial entity, rights and duties are all transferred into the absorbed company or partnership⁸⁴⁰. On transferral of assets, the transferor company ceases to exist.

5.2.6 Dissolution by the court

Article 16(f) of the Saudi Companies Law 2015 states that companies or partnerships can be dissolved by issuance of adjudication by the Commercial Court upon request from one partner or shareholder or upon the request from the stakeholders. Any conditions set which prohibit this right are invalid. Saudi legislation gives the court a full right to dissolve companies or partnerships upon request from one partner or shareholder or upon request from the stakeholders. What is understood by “stakeholders” can be viewed as two approaches. The wider view of what is meant by “stakeholders” by Bariry⁸⁴¹ includes creditors of the company or partnership and also creditors of any partner of it. The creditors of a company or partnership may have an interest in the dissolution of the company or partnership if they see the deterioration of the company's conditions and its move from bad to worse. Alternatively, that the creditor fears that if the company or partnership keeps continuing the business that will lead the company or partnership to lose most of its assets. As a result of that, the remaining assets in liquidation will be insufficient to pay off the creditors’ debt. Bariry⁸⁴² added that this phrase includes creditors of any individual partner of the company or partnership. The partner's creditor has a right to apply to the

⁸⁴⁰ Companies Law 2015, Article 192

⁸⁴¹ Bariry, M., Commercial Transaction Law in Saudi Arabia, (Riyadh: Mahad Aledarh, 1st ed, 2001), vol.1, p. 147

⁸⁴² Ibid

court because he has an interest in dissolving the company to restore his freedom to take out from his debtor's share, post-dissolution, from division after liquidation. However, there is a narrow view of what is meant by "stakeholders" as expressed by Aljabr⁸⁴³ refers only the partners in the partnerships or shareholders in the companies. Both Bariry and Aljabr have tried to define how wide the class of stakeholders is. However, article 2 of the Corporate Governance Regulations defines stakeholders as "Any person who has an interest in the company, such as shareholders, employees, creditors, customers, suppliers, community"⁸⁴⁴. That means that the class of stakeholders is even wider than what is expressed by Bariry. Any or all of the persons mentioned in article 2 may petition the court for dissolution.

The Companies Law 2015 gives the court a wide discretion to dissolve the company or partnership. However, there is no specific standard as a general framework to identify the limitation of the power of the court. We can take an indication of the scope of discretion which the court has from the previous Companies Law 1965. The Article 15(7) of Companies Law 1965 states: "...dissolve the company or partnership upon the request of one of the parties concerned for serious reasons that justify such a step". This statement from the previous Companies Law 1965 has limited the scope of discretion of the court to some extent. However, the meaning of the phrase "serious reasons" still has a very wide meaning. Some authors have tried to clarify the meaning of "serious reasons". Taha⁸⁴⁵ mentioned as an example of "serious reasons" a partners' act

⁸⁴³ Aljabr, M., The Commercial Law in Saudi Arabia, (Riyadh: King Fahd Library, 4th ed, 1996), p.224

⁸⁴⁴ Corporate Governance Regulations, Accessed at: <https://cma.org.sa/en/RulesRegulations/Regulations/Documents/CORPORATE%20GOVERNANCE.pdf>, Accessed on: 31.12.2015

⁸⁴⁵ Taha, M., Asasiat Alcanon Altigari, (Beirut: Manshorat Alhalabi, 2nd ed, 1999), p.333

in refraining from implementing his obligations and not paying his shares; to not pay is logically his intent. Another example of “serious reasons” is a dispute among shareholders or partners who leave no way for cooperation among them, or the behaviour of one shareholder or partner who may act harmfully towards the company, for example by acting in negative competition to the company. Additionally, deceit, fraud, neglect or any fatal error committed by a partner are also “serious reasons”.

Bariry⁸⁴⁶ added that the spiriting away of a company's money by the company to the detriment of the creditor justifies the creditors dissolving the company. This is because it is the creditors’ interest to get their rights from the liquidation and division which followed the decision of dissolution before the company’s money is lost to them. Ridwan⁸⁴⁷ gives a different example of one of the “serious reasons” whose root does not lie in the act of a partner: mental incapacity. The definition of mental capacity is if one shareholder or partner due to mental incapacity becomes incapable to perform his duties in the business. His incapability to make a decision is due to the mind or brain being impaired or disturbed functioning. Similarly, “serious reasons” will include if one shareholder or partner suffers a physical disability and became incapacitated physically from performing his part of the business. A further example of “serious reasons” is the occurrence of an economic crisis as the company or partnership finds it impossible to invest its proceeds. However, Ridwan considers the examples of mental incapacity and physical incapacity as “serious reasons” for both partnerships and companies.

⁸⁴⁶ Bariry, M., Commercial Transaction Law in Saudi Arabia, (Riyadh: Mahad Aledarh, 1st ed, 2001), vol.1, p.148

⁸⁴⁷ Ridwan, A., Alsharikat Altijariah fi Alcanon Alkuaity Almukaran, (Cairo: Dar Alfikr Alarabi, 1st ed, 1987), p.144

Bariry and Ridwan include physical and mental capacity as a serious reason for company dissolution. The main point of discussing Ridwan and Bariry is not to make a critique of their opinions in themselves concerning what constitutes “serious reasons”. As the relationship between shareholders in a company is only a business relationship and not built on personal consideration based on partner trust and personal bond between the jointly interested parties, the physical and mental capacity of any shareholder is irrelevant to company dissolution. The main point to illustrate from the conflicting views of Bariry and Ridwan is to show how Article 16(f) of the Companies Law 2015 in its current state can mislead not only a layperson but also experts such as Ridwan and Bariry. The wide discretion inherent to the Companies Law 2015 has led to views which consider the inclusion of premises for dissolution which the same enacted law does not include. Therefore, Article 16(f) of the Companies Law 2015 needs to be reviewed.

This point in turn leads us to a comparative view of the current states of dissolution law in Saudi and English law. Saudi law has issued a very wide discretion to courts to dissolve companies and partnership. Section 35 of the Partnership Act 1890 addresses this issue by including four individual categories of causes of dissolution and then giving courts the same wide discretion to courts to dissolve partnerships as in Saudi Law. Unfortunately, the Partnership Act 1890 tried to limit to the court’s discretion but gives way at the end in section 35(f) by stating “...in the opinion of the Court, render it just and equitable that the partnership be dissolved”. The formula of law in section 35 of the Partnership Act 1890 creates **two** inherent problems. Firstly, it gives the court a wide discretion. Secondly, the various subsections of section 35(b) to (e)

seem to overlap. For instance, on the facts of the case the case in *Baring v Dix*⁸⁴⁸ dissolution could occur under section 35(f) rather than section 35(e). Contrast how Lindley⁸⁴⁹ presumes *Baring v Dix*⁸⁵⁰ to be facts of dissolution only under section 35(e) while Milman and Flanagan⁸⁵¹ consider how the same case could have come under section 35(f). A problem with this is that the court will consider the grounds upon which dissolution was brought, to the exclusion of others. Therefore, a petition to dissolve brought under a particular subsection may result, on a technicality, in an unfavourable outcome. Furthermore, the inadequacy of the current framework of both the English section 35 and the Saudi Article 16 is that there are no consistent standards to help determine which cases deserve to be heard under that subsection; this is left to the mind of the individual judge who cannot be held out as an expert in every type of case requiring the exercise of discretion⁸⁵². Therefore, specific standards are needed to guide courts in deciding which cases should be heard under those sections in court; also, how far discretion can be taken in particular circumstances, especially due to the fluid nature of discretionary decisions. As judges apply and interpret, but cannot make new law, it would fall to the legislature to legislate for the setting of those standards through the issuance of a statutory instrument. To ensure that that the effect of discretion in section 35(f) is not “open-ended” as critics of section 35 have indicated⁸⁵³ - the same applying to section 16(f) in Saudi law - all that would be required is the mirror-imaging of equitable

⁸⁴⁸ (1786) 1 Cox 213

⁸⁴⁹ R. C. Banks, *Lindley & Banks on Partnership*, (London: Sweet & Maxwell, 19th ed, 2010), p.832

⁸⁵⁰ (1786) 1 Cox 213

⁸⁵¹ Milman. D., and Flanagan, T., *Modern Partnership Law*, (London: Croom Helm, 1983), p.122

⁸⁵² Matthias Klatt, [Taking Rights Less Seriously: A Structural Analysis of Judicial Discretion], *Ratio Juris*, vol.20, No.4, December 2007 (pp.506-529) at: p.527.

⁸⁵³ Neil Guthrie, [Equity isn't just the exercise of judicial discretion], 2013, Borden Ladner Gervais LLP, Lexology, Accessed at <http://www.lexology.com/library/detail.aspx?g=ad0e8390-58d1-42d7-8daf-f65faf0528f0>, Accessed on: 27.05.2015

principles with their limitations of application with the legal application of discretion in both section 35(f) in English law and section 16(f) in Saudi law. The proposal in this thesis for standard rules limiting the application of court discretion will endow the legal process leading to dissolution with a greater degree of clarity as to its probable outcome⁸⁵⁴.

Naturally, the imposition of rules for discretion by the legislature could interfere in the freedom of judges to apply that discretion. Therefore, the challenge will lie in how to extract guiding principles from a very widely and imprecisely principled body of common law such as discretionary decisions based on just and equitable considerations. Perhaps some broad categories not dissimilar to that which already exists in the form of maxims in equity will suffice to provide similar guidelines to reign in discretion from being open-ended, and endow judicial discretion with a framework which is neither rigid not fluid, but flexible.

With regards the Companies Act 2006, no causes of dissolution by the court are mentioned, which is due to a lack of drafting. However, all circumstances in which a company may be wound up by the court which are mentioned in section 122 of Insolvency Act 1986 can be considered as cases of dissolution of company by court as liquidation definitely lead to dissolution. Therefore, listing the causes of dissolution of company by court is an essential requirement, along with consistent standards to help determine which cases deserve to be heard under the court. The Companies Act 2006 must express clearly what the possible causes of dissolution by court are. On the other hand, both Saudi and

⁸⁵⁴ The matter of standards for court discretion is only briefly highlighted here as analysis in any further depth is outside the scope of this thesis and would be more appropriate to revisit in a future study, as pointed out in my concluding chapter 6.4

English law – the latter in the case of partnerships - should limit statutory discretion from being too wide.

5.3 Causes of dissolution of partnerships in Saudi Law

5.3.1 Death of a partner

Death is regarded as an event which understandably, in the eyes of the Saudi law, brings a partnership to an end. The death of one partner causes the dissolution of a partnership, as article 37(1) of the Companies Law 2015 states: “A partnership shall be dissolved by the death ... of one of the partners...” The date of dissolution of a partnership in Saudi law is the date of death of the partner; this is the same in English law⁸⁵⁵. The rule of dissolution on the occasion of death is thus said to be strictly applied, except if there are very specific provisions in the agreement that the business could continue beyond the death of a partner, among the surviving partners⁸⁵⁶. In Saudi law, this provision may be made before, on or shortly after the death of the partner. In contrast, the provision in English law is more stringent, that the agreement between the partners must be made prior to the death of the partner⁸⁵⁷. In contradistinction to both English and Saudi law, Islamic law requires no decision by partners to continue with the partnership for the partnership to survive after the death of one of the partners. According to Islamic law, a partnership will not dissolve on the occasion of the death of a partner if there are two or more surviving partners. Thus, Islamic law is most preserving of the life of the partnership.

⁸⁵⁵ PA 1890 s. 33(1)

⁸⁵⁶ Companies Law 2015, Article 37

⁸⁵⁷ More details in 2.3.2

Whereas Islamic and therefore Saudi law vary on the matter of the continuity of partnership, they agree on the presumption that partnerships must usually consist of adults, that is to say, citizens of the age of majority. The general principle in Saudi law is to prevent minors to trade or to start up a business until they reach adulthood. The reason for this is to protect the minors from harm or from becoming victims of fraud. The *Shura* Council⁸⁵⁸ of Saudi Arabia issued a decree that the age of eighteen is the age of adulthood⁸⁵⁹. This means that the age of eighteen is seen to be the age of acquiring the capacity for business acumen.

However, there is an exemption from this general principle that the partnership's contract may provide that, if any partner dies, the partnership shall continue to exist with his heirs even though they are minors⁸⁶⁰. In this situation, if one partner dies and all his heirs are minors or some of them are minors and decide to continue with surviving partners, this partnership must be transformed within a year into a limited partnership if the partners want to continue running the business. The minors' heirs will be limited partners who are liable only to the extent of the amount of money that that partner has invested⁸⁶¹. The partnership will dissolve if the year has passed and the transformation has not taken place or if the minor heirs have become adults⁸⁶². The transformation from partnership to limited partnership must be agreed by all partners⁸⁶³. If any partner disagrees with this transformation, he has a full right to withdraw from the partnership.

⁸⁵⁸ Consultative Assembly of Saudi Arabia website, Accessed on: 04..01.2016, Accessed at: <https://www.shura.gov.sa/wps/wcm/connect/ShuraEn/internet/Home/>

⁸⁵⁹ Decree number is 144 on 05.11.1374 Hijri.

⁸⁶⁰ Companies Law 2015, Article 37(1)

⁸⁶¹ Ibid

⁸⁶² Ibid

⁸⁶³ Ibid, Article,187(1)

However, this will not lead to the dissolution of the partnership⁸⁶⁴. The transformation of the partnership does not result in creating a new legal person and the partnership retains its rights and commitments prior to the mentioned transformation⁸⁶⁵.

In English law the age of majority is 18⁸⁶⁶, as in Saudi law. Although the Partnership Act 1890 does mention that a partnership can continue after the death of one of the partners, subject to the agreement of the surviving partners prior to the death to continue⁸⁶⁷, it does not explain what should happen if the deceased partner's heir is a minor and whether it is possible to continue the partnership between a minor and the surviving partners. This is a legal gap in English law which needs to be filled. This point is covered in Islamic law, if the heirs of the deceased are minors, the guardian must approve a minor heir of the deceased to conduct business for the actions of the minor to be legally effective⁸⁶⁸.

An important point in Saudi law relates to protection of the creditors of partnership. The transformation of a partnership into a limited partnership does not result in discharging the partners of the responsibility for the partnership's debts unless the creditors accept that. "This acceptance is assumed if none of the creditors object to the decision of transformation within thirty days from the date of his notification by registered letter"⁸⁶⁹. This point is mentioned neither in English law nor in classical Islamic law; although the principle of *sharia* law

⁸⁶⁴ Ibid, Article,187(2)

⁸⁶⁵ Ibid, Article,188

⁸⁶⁶ Births and Death Registration Act 1953 section 3A (5)(b); Since the Children's Act 1975 express mention has been made in statute to the age of majority as being 18.

⁸⁶⁷ PA 1890 s. 33(1)

⁸⁶⁸ This is according the strongest view which is *Hanafiyya* and *Hanbaliyya*. More details in 4.3.1

⁸⁶⁹ Companies Law 2015, Article,189

does not prevent this position⁸⁷⁰. As a conclusion, it would be advisable for both English and Saudi law to adopt the classical Islamic view that the death of one partner is not a cause of dissolution of partnership unless the partners agree otherwise.

5.3.2 Bankruptcy of a partner

Article 103 of the Saudi Commercial Court Law 1970 defined a bankrupt as “a person whose debts are more than all his funds, so he declares inability to pay such debts”. This means that once the debtor reaches the point that what he owes is more than what he currently owns, he is liable to be declared a bankrupt. This is the same as in Islamic law⁸⁷¹ and English law where a bankrupt might only be declared as such once he has exceeded his ability to borrow monies to pay off a debt or even in advance of owing more than owning if there is no reasonable prospect of repaying the monies⁸⁷².

Bankruptcy is regarded as an event which is reasonable, in the eyes of the Saudi law, to bring a partnership to an end. The bankruptcy of one partner causes the dissolution of a partnership as Article 37(1) of the Companies Law 2015 states: “A partnership shall be dissolved by the....declaration of bankruptcy or insolvency of one of the partners ...” However, the surviving partners may agree to continue the partnership between themselves⁸⁷³. The concept of bankruptcy of one partner as a cause of dissolution is also recognised in English law.

⁸⁷⁰ More details in 4.3.9

⁸⁷¹ More details in 4.3.6

⁸⁷² Insolvency Act 1986 s. 267(c)

⁸⁷³ Companies Law 2015, Article, 37(2)

This dissolution can either be prevented “subject to any agreement between the partners”⁸⁷⁴ or it can be opted for by the other partners⁸⁷⁵. The original position in Islamic law is that following a bankruptcy of one of the partners, the bankruptcy itself will not lead to dissolution unless there is a decision by the other partners to dissolve the partnership. This is because, according to Islamic law, a partnership will not dissolve on the occasion of the bankruptcy if there are two or more surviving partners. Hence, the default position in Islamic law on the bankruptcy of a partner is to preserve the partnership for the remainder of the partners, unless the surviving partners want otherwise. This is the reverse position from English and Saudi law whose default position at law is to dissolve a partnership on the occasion of a bankruptcy of one of its partners unless the partners otherwise decide. Thus, Islamic law is the most preserving of the life of the partnership⁸⁷⁶.

5.3.3 Withdrawal of a partner

Article 37(1) of the Companies Law 2015 states “A partnership shall be dissolved....by the withdrawal of any partner from the partnership...” However, the remaining partners may agree to continue the partnership among the surviving partners⁸⁷⁷. There are three conditions which have to be considered in withdrawal of a partner from the partnership for the withdrawal to be valid. Firstly, the partner withdrawing must give notice to the other partners about his withdrawing with reasonable time⁸⁷⁸. It is good that the legislation enters in this condition that the suddenness of immediate effect of withdrawal of a partner and

⁸⁷⁴ PA 1890 s.33(1)

⁸⁷⁵ PA 1890 s.33(2)

⁸⁷⁶ More details 4.3.1

⁸⁷⁷ Companies Law 2015, Article, 37(2)

⁸⁷⁸ Ibid, Article, 36(1).

notices served for dissolution cause significant distress to the parties. Automatic dissolution adds to distress and is not favourable for business. However, the phrase “reasonable time” is not specified in the legislation, which may lead to dispute among partners. The main point of allowing reasonable time is to benefit the other partners who are not withdrawing from the partnership to prepare themselves for the next stage of business following the withdrawal.

A possible solution to help determine what is a reasonable time is the addition of a provision in statute which defines “reasonable time” as specific days which it is suggested should be 90 days in the case of withdrawal. The period of 90 days is considered a reasonable time in similar circumstances mentioned in two important sources; one is RUPA 1997 in Section 801(4) of the Revised Uniform Partnership Act (RUPA) 1997 which allows for 90 days after notice is given to the partners to “cure” insubstantial or innocent regulatory violations. The other source is the 2000 Law Commissions’ Consultation Paper No. 159 which allows a suggested period of 90 days as “a period of grace...for the sole remaining “partner” to find a new partner.”⁸⁷⁹ Although the final report opposes⁸⁸⁰ introducing a period of grace to save a partnership from breaking up Saudi law would benefit from introducing law reform and drawing based on RUPA and the Commission Report to better determine the concept of “reasonable time” in the context of withdrawal.

The second condition of validity of withdrawal of a partner from the partnership in the Saudi Companies Law 2015 is that the withdrawal is to be done with good

⁸⁷⁹ Commission and the Scottish Law Commission (2000) Partnership Law: A Consultation Paper. London: The Stationery Office, Joint Report of the Law Commission no. 159, Scottish Law Commission no. 111. para. 6.62

⁸⁸⁰ Partnership Law: Joint Report of the Law Commission and the Scottish Law Commission (Law Com No. 283 Scottish Law Com No. 192, 2003, Cm 6015), p.142

faith and is not to be done to harm the other partners⁸⁸¹. It is considered bad faith if the partner withdraws from the partnership to sign a commercial deal individually that the partnership is currently intending to sign. The other situation in which bad faith is caused is if the withdrawal will bring crisis upon the partnership⁸⁸². The third and final condition is that the partnership has to be a partnership at will which is of an undefined time. In this case, a partner can withdraw from the partnership. However, a partner cannot withdraw from a fixed partnership before he gets unanimous agreement from all partners to withdraw. This is due to the fact that withdrawal before the expiry of the term of fixed partnership without obtaining unanimous agreement from the other partners breaches the original agreement of the partnership. However, if one of these conditions is not fulfilled or if the partnership is a fixed partnership, no partner can withdraw from the partnership without approval from other partners or by applying to the court and support his application with reasons reasonable in the view of the court and under its discretion⁸⁸³.

To compare with the position in English law, even though withdrawal is not mentioned in the Partnership Act 1890 as a cause of dissolution, it is however a cause of dissolution impliedly under section 42(1) of the Partnership Act 1890 which discusses what happens in the aftermath of a partner ceasing to be a partner: “where any member of a firm has...ceased to be a partner...the outgoing partner...is entitled...to such share...made since the dissolution.” This implies that should a partner withdraw from a partnership, dissolution ensues from which the withdrawing partner may receive his share. Although mention of the

⁸⁸¹ Companies Law 2015, Article 36(1)

⁸⁸² Aljabr, M., The Commercial Law in Saudi Arabia, (Riyadh: King Fahd Library, 4th ed, 1996), p.226

⁸⁸³ Companies Law 2015, Article 36(1)

concept of withdrawal is not expressly made in the Act, any change in the partnership under section 1(1) of the Act, states Berry, triggers dissolution⁸⁸⁴. Classical Islamic law takes a diametrically opposite approach to both Saudi and English law, in that as long as two partners remain after the withdrawal of another partner or partners, the partnership continues. The exception to that is if the remaining partners in those circumstances agree to dissolve. Thus, classical Islamic law does not consider withdrawal as a cause of dissolution as long as there is a minimum of two remaining partners; in that situation dissolution is an option taken voluntarily by the partners and not imposed by law by default in the event of withdrawal. Thus, Islamic law demonstrates the greatest concern towards the continuity of the life of a partnership. The approach of Islamic law which supports the continuance of partnerships should be adopted in both Saudi and English systems to encourage the continuance of business wherever possible.

The final point in this section discusses the liability of a withdrawing partner. Article 20(2) of Companies Law 2015 mentions that if a partner withdraws from the partnership, he will not be liable for such debts due by the partnership one month after his withdrawal from the partnership. However, the withdrawing partner will be liable for any debts incurred with a 30 day period following his withdrawal. It is possible that the reason for liability to continue beyond the date of withdrawal for one month is to give a measure of protection to the other partners to hold the withdrawing partner accountable for debts incurred on the way out of the partnership. For example, he may be withdrawing because he has

⁸⁸⁴ Berry E., [The criminal liability of partnerships and partners: increasing the divergence between English and Scottish partnership law?] [2014] Journal of Business Law, No.585 at 594

knowledge which prompts him to leave so he can benefit from it to the exclusion of the other partners. To the contrary of Saudi law, section 17(2) of Partnership Act 1890 states: “A partner who retires from a firm does not thereby cease to be liable for partnership debts or obligations incurred before his retirement”. Effectively, what the Act refers to as “retire” can mean “withdraw”. This means that English law removes all shared liabilities at the point of termination of partnership, whereas Saudi law insists on a period of retention of liability which ignores the fact of withdrawal. As in English law, the position in classical Islamic law regarding liability is that liability for debts incurred by a withdrawing partner incurred during the life of the partnership finish at the point of withdrawal. However, Islamic law does not reject the possibility of a withdrawing partner being liable for a further month beyond withdrawal, provided it is mentioned in the partnership agreement, especially if this condition benefits the partnership by protecting all of its partners. Islamic law is as Saudi law on this point; if there is a precondition to all agreements drawn up in KSA, there is no contradiction by Saudi law of Islamic law on this point.

5.3.4 Expulsion of a partner

Expulsion of a partner is a new cause of dissolution of partnership which is mentioned in Saudi Companies Law 2015 and which was not expressed as a cause of dissolution of partnership in the old Saudi Companies Law 1965. Article 36(2) states: “the numerical majority of the partners may apply to the court to expel one or more partners from the partnership if there are legitimate reasons to do so”. This means that the partners do not have an independent right to expel any partner. The court only has the right to expel the partner from the

partnership. In this case the court under its discretion has authority to decide the continuation of the partnership if it achieves the interest of the partnership and partners in keeping with the rights of others. However “... if the continuation of the partnership is not possible between the remaining partners, the court under its discretion may decide to dissolve the partnership...”⁸⁸⁵. The main contrast with English law is that unless there is a specific clause in the agreement, the court may only dissolve the whole of the partnership and not part of it. This is neither the case in Islamic or Saudi law, where although only the court may dissolve a partnership, it is not necessary for there to be a clause allowing for that in the agreement. Thus, both Islamic and Saudi law would recognise the remaining partners as continuing in the partnership post-expulsion of the partner or partners who must leave it.

Article 36(2) of the Companies Law 2015 gives the court a broad discretion to dissolve the partnership on grounds that the “continuation of the partnership is not possible”. The problem with this clause is that the meaning of “not possible” is indeterminate of scope, it is not defined how wide a clause it is. There is a need to clearly determine the meaning of “not possible” and give it a standard definition⁸⁸⁶. Classical Islamic law considers that dissolution is the solution for that situation, and offers neglect and misconduct as reasons why business can be considered impossible to continue. The reason for this is that Islamic law presumes that people will be able to rely upon the word of a Muslim in business,

⁸⁸⁵ Companies Law 2015, Article 36(2)

⁸⁸⁶ More details about court discretion in 5.2.6

but if this presumption then proves unreliable, it is better that partnerships dissolve⁸⁸⁷.

The Saudi Companies Law 2015 mentions that if a partner is expelled from a partnership then he will not incur liability beyond one month after his expulsion from the partnership and is liable for any debts incurred with a 30-day period following his expulsion⁸⁸⁸. In the case of misconduct, it may be that the extra 30-day period serves to create a safety net for the other partners who may wish to investigate further in that time whether part of his misconduct was to achieve expulsion deliberately and thereby hide other, more serious wrongdoing he may have committed. By contrast, the Partnership Act 1890 does not impose liability for any such post-expulsion period. Nonetheless, an expelled partner will continue to bear liability for all matters contracted before the date of expulsion. This is derived from section 17(2) of the Partnership Act 1890 which insists upon all debts and obligations predating leaving the partnership to continue. As in English law, the position in classical Islamic law is that it does not impose any extra period of liability beyond the date of expulsion. However, Classical Islamic law does not reject the possibility of an expulsion carrying an extra 30-day period of liability, especially if this condition benefits the partnership by protecting all of its partners and provided it is mentioned in the partnership agreement as a matter of law or agreement between the partners. As Saudi law is a precondition to all agreements drawn up in KSA, there is no contradiction by Saudi law of Islamic law on the point of expulsion.

⁸⁸⁷ More details about Expulsion of a Partner in Islamic Law in 4.3.7

⁸⁸⁸ Companies Law 2015, Article 20(2)

5.3.5 Dismissal or resignation of the manager of a partnership

When scanning the Companies Law 2015 **two** types of partnership managers are to be found. The first type is, the manager who is also partner in the partnership⁸⁸⁹. The second type is, the manager who is not a partner⁸⁹⁰ in the partnership⁸⁹¹. This second type of manager of partnership who is not a partner will not lead to dissolve the partnership when the he is dismissed or he resigned⁸⁹². However, if the manager of the partnership is a partner, the partnership will dissolve whether he is dismissed by other partners or whether he resigned⁸⁹³ unless the partners have agreed in the partnership agreement otherwise⁸⁹⁴. There is a condition for dissolving the partnership if the manager is a partner which is that the manager was appointed in the memorandum of association of a partnership⁸⁹⁵. However, if the manager is appointed in a separate document and not in the memorandum of association of a partnership, the partnership will not dissolve if he is dismissed or if he resigned⁸⁹⁶. Furthermore, to dissolve the partnership due to the dismissal of a manager appointed in the memorandum of association of a partnership there is a need for unanimous agreement between all partners including the partner who is manager. This is because this amendment is an amendment in the memorandum of association of a partnership and resolutions concerning the amendment of the memorandum of association of a partnership are valid only if adopted by

⁸⁸⁹ This means this manager owns shares in the partnership.

⁸⁹⁰ This means this manager does not own shares in the partnership. Therefore, he is not a partner. He is only managing the partnership based on fixed salary.

⁸⁹¹ Aljabr, M., The Commercial Law in Saudi Arabia, (Riyadh: King Fahd Library, 4th ed, 1996), p.253

⁸⁹² Companies Law 2015, Articles 33.34

⁸⁹³ Ibid, Article, 33(1)

⁸⁹⁴ Ibid, Article, 34(1)

⁸⁹⁵ Partnership in Saudi law is incorporated, has separate legal entity, and must register in Saudi ministry of commerce.

⁸⁹⁶ Ibid, Article 33(2),(1).

unanimous vote⁸⁹⁷. There is an alternative to remove the manager if there is not unanimous agreement between all partners. This way is by a decision issued by the court at the request of a majority of partners⁸⁹⁸. One point worth noting is lack of clarity in terms of the majority required. Saudi law does not mention whether the majority required is 51% or two-thirds of the partners. This is significant because if a Saudi court can approve a simple majority (51%) this contrasts sharply with the reticence of English law to recognise anything that is not the express will of all of the partners. This may influence where to go to court in an international situation.

An additional consideration for appointments contained in the memorandum of association of a partnership is that if the manager is an appointed partner and is included in the memorandum of association of a partnership, he cannot resign from management, except for an acceptable cause; otherwise, he is responsible for damages resulting from this. As stated in statute, such resignation shall entail the dissolution of the partnership, unless the partners have agreed otherwise⁸⁹⁹.

This means that the existence of the partnership is beholden to non-movement in the partnership. Whereas no movement may at first glance appear to show stability, it may, to the contrary betray paralysis in the partnership. As a final point, following the above⁹⁰⁰ discussion on the matter, it is worth bearing in mind that there is lack of clarity regarding what is meant by an acceptable cause to resign. This term of reference is very wide, and any law system, here with reference to the Saudi system, needs to set a standard by which to understand what such a standard is.

⁸⁹⁷ Ibid, Article 27

⁸⁹⁸ Ibid, Article 33(1)

⁸⁹⁹ Ibid, Article 34(1)

⁹⁰⁰ More details about court discretion in 5.2.6

Neither Islamic nor English law mention anything about the dismissal the manager of a partnership or if he resigned as a reason for dissolution of partnership. Whereas a fundamental change among the member partners would lead to the dissolution of the partnership, a change in director is not viewed in this way in English law. This gives an advantage to English law as a mere change in director will not bring about dissolution, only a change in the partners themselves. As in English law, a change of director would have no effect over the partnership itself or require its dissolution. However, Islamic law has even more advantage than English law in its flexible existence and its stability through extended continuance of existence. In Islamic law, the change in a partnership can be quite extensive without there being a need for dissolution. As long as two partners remain after the withdrawal of another partner or partners, the partnership continues unless the remaining partners agree to dissolve. Thus, classical Islamic law demonstrates the concern for the continuity of the life of a partnership, an approach which should be adopted in both Saudi and English systems so as to encourage the continuance of business wherever possible.

In conclusion, Saudi law should abandon this cause of dissolution and instead opt for maximum flexibility and stability of partnerships by adopting the most accommodating structure available, which is classical Islamic law.

5.4 Cause of dissolution of companies in Saudi Law

In addition to the causes of dissolution of both companies and partnerships which are mentioned in Article 17 of the Companies Law 2015 which are merger, dissolution by the agreement of partners or shareholders; transfer of all shares to one person, termination or the impossibility of

adventure; expiration of the term and dissolution by the court⁹⁰¹, there is only one special cause of dissolution of companies in Saudi law which is the loss of half of the capital of the company.

5.4.1 Loss of half of the capital of the company

Article 150 of the Companies Law 2015 shows that if the company loses half of the amount of the capital it may dissolve. There are a number of procedural steps to follow when this happens. Firstly, the auditor of the company informs the chairman of the board directors. Secondly, the chairman of the board of directors informs all board directors. Then, in fifteen days the board of directors calls the Extraordinary General Assembly to meeting within forty-five days to increase or decrease the capital of the company to reduce the loss of capital ratio to be less than half of the company capital or dissolve the company⁹⁰². If the Extraordinary General Assembly does not meet in the period specified or if the Assembly hold the meeting but it is unable to pass a decision on the subject, the company will dissolve by the force of the law⁹⁰³. These provisions are in place to protect the stockholder and third parties.

In English law loss of half of assets against the company's share values does not lead to dissolution. The statutory requirement in this situation is that the directors of the company must call a general meeting of the company. The purpose of that meeting is simply to consider whether any steps should be taken to deal with the situation⁹⁰⁴. In English law, if a meeting is not called, the company will still continue to exist as before. Islamic law mentions that the

⁹⁰¹ All of those causes discussed in detail in 5.2.

⁹⁰² Companies Law 2015, Article 150(1)

⁹⁰³ Ibid, Article 150(2)

⁹⁰⁴ CA 2006, s. 656

company will dissolve if the whole of its capital is lost to the company. However, the loss of a certain amount of the capital will not cause dissolution of the company, unless the shareholders otherwise agree. On the point of loss of capital, the position in Saudi law is preferred over English law in the sense that whereas Saudi law requires a company to dissolve on loss of half a company's capital, in English law such serious loss or more would require no more than for the shareholders to meet and think about what to do. The advantage of this position in Saudi law is that the shareholders and the debtors are protected. Under Saudi law, as soon as a company sustains a loss of half of its assets, it must meet and take steps to ensure that further loss is averted. Failing that, the company will dissolve, and the shareholders – and creditors – will have at least half of the assets from which to be paid out. However, loss of half of the company's value in English law requires no more than for the shareholders to meet and discuss. Therefore, shareholders arguably are better protected under Saudi than English law. By the time the company is brought to dissolution in English law, there may be very little if anything left for shareholders and creditors. This protection is lacking in English law; by the time the company is brought to dissolution, there may be very little if anything left for debtors in particular.

Any one of above causes of dissolution will lead, as a matter of consequence, to liquidation, except for merger. The company or partnership, as soon as it expires, enters the phase of liquidation and keeps the legal personality valid to the extent necessary for the liquidation to occur, and until the liquidation

ends⁹⁰⁵. This means that liquidation must occur at the stage in between the dissolution of a partnership, or of a company and its striking off. The liquidation means transferring the assets of a company or partnership into cash⁹⁰⁶. This means that in Saudi law procedurally, dissolution of a company and partnership is the final stage of its winding up. This is the same position of the company in English and Islamic law⁹⁰⁷. This stands in contrast to partnerships in English law⁹⁰⁸ which are first dissolved the partnership and are wound up afterwards.

The authority of the managers or the Board of Directors terminates and will be transferred upon the dissolution of the company or partnership to the liquidator. However they remain in charge of the administration of the company and are considered, for others, as liquidators until the liquidator is appointed⁹⁰⁹. The authority of the liquidator terminates once the duration of the liquidation ends⁹¹⁰. Unless there is a case of fraud or forgery, no claim is heard by the court against the liquidators because of the liquidation or against the partners or the shareholders because of the company's or partnership's business. Nor would a case be admitted against the managers or the members of the Board of Directors or the auditors because of their jobs once three years after the liquidation have passed⁹¹¹.

5.5 Summary

We can sum up this chapter by saying that the Saudi law does not divide business entities expressly into companies and partnerships in the same way as

⁹⁰⁵ Companies Law 2015, Article 203(1)

⁹⁰⁶ Ibid, Article 220

⁹⁰⁷ More details in 4.2.1

⁹⁰⁸ More details in 3.2.1

⁹⁰⁹ Companies Law 2015, Article 203(2)

⁹¹⁰ Ibid, Article 203(5)

⁹¹¹ Ibid, Article 210

English law does. Business entities are roughly divided by the Saudi law with respect to their formation into *sharikat al-ashkhas* (companies of persons) and *sharikat al-amwal* (companies of capital). *Sharikat al-ashkhas* are understood in English law as being similar to partnerships and *sharikat al-amwal* are understood in English law as being comparable to companies. The word ‘*sharikat*’ in Arabic means is both companies and partnerships, therefore Saudi law sets out the provisions of both companies and partnerships in the same piece of legislation. This piece of law called ‘*Nazam Al-sharikat*’; means Companies and Partnerships Act.

There is weakness in the drafting in Companies law 2015 in relating to the causes of dissolution in two places. Firstly, on the specific point in this law concerning the duration of companies and partnership, as to whether they can be fixed or whether they are indefinite, there is vagueness. This opaqueness in the Companies Law 2015 which is in Articles 36, 65 and 23 of the Companies Law 2015 should be clarified⁹¹².

Another provision which needs reforming in Companies Law 2015 is article 203, which is expressed such that as soon as dissolution occurs, the company enters the phase of liquidation. This article is not accurate that this article implies that merger, as a cause of dissolution, will lead the company or partnership to liquidation. However, in practice, merger does not and should not lead to liquidation as this will interfere with the transfer of company or partnership assets⁹¹³.

⁹¹² Details of suggested clarification in 5.2.1

⁹¹³ Details of suggested clarification in 5.2.5

From another aspect, there are several differences between Saudi law and Islamic law. Firstly, The Companies Law 2015 states that a personal creditor of a partner or shareholder cannot get his money back from his debtor's share in the capital of the company or in the partnership. However, he may do so out of the debtor's share in the profits after getting order from the court to do so. In contrast to Saudi law, Islamic law requires the paying off of personal debt that has matured. This requirement to pay off a debt is absolute, so that either a partnership or a company can be sued by a creditor or a court may enter into the assets he owns to recover the monies owed⁹¹⁴. The common factor uniting the two systems of law is that creditors cannot sue to recover personal debt if the share is part of a separate legal entity. Therefore, the reason for Saudi law allowing a creditor to sue neither a company nor a partnership is because Saudi law recognises each one as a separate legal entity. Classical Islamic law adopts the opposite position, allowing a creditor to sue for the recovery of a personal debt. This is because classical Islamic law does not devote any attention to the concept of separate legal entity. Whereas, English law allows the suing of a partnership.

Additionally, Saudi law discusses two aspects of adventure: termination and impossibility. Neither English law nor classical Islamic law discusses impossibility. This does not mean that English and Islamic law is in rejection of this aspect of law, simply that Saudi law has the advantage of having expressed itself on this point, thus clarifying the position at law that impossibility can be a cause of dissolution. However, the clarification is not without its difficulties. The condition in Article 23 of the Companies Law 2015 states that a partnership

⁹¹⁴ More details in 4.3.6 about the recovery of monies by the court from the debtor

or a company must be stipulated to exist for a fixed period. In the case that a partnership or company set up for a fixed period of term to implement a single adventure, if the single adventure completed before the fixed period of term of the partnership or company is finished, there is a problem as to when to dissolve. The question is whether the partnership or company will dissolve after completion of the single venture, or the partnership or company will remain valid until the end of the fixed period of term appointed. Astonishingly this position in Saudi law stands in contrast to the legal approach of the *Malikiyya* and the *Shafiyya* and also some *Hanafiyya* scholars who state that it is not legal to determine the term of a partnership. By removing the legal insistence upon a fixed period for any venture, the partners would be free to set up the partnership and also the shareholders would be free to set up the company to serve their venture only, without having to mention a period of time which could later cause confusion concerning the status of the partnership or company.

The third difference between Saudi law and Islamic law that the Saudi law shows that if the company loses half of the amount of the capital it may dissolve. Islamic law mentions that the company will dissolve if the whole of its capital is lost to the company. However, the loss of a certain amount of the capital will not cause dissolution of the company, unless the shareholders otherwise agree.

The fundamental difference between Classical Islamic law and the modern systems of Saudi and English law is the former draws no difference between companies and partnerships. However, in Saudi law the early dissolution of a company requires resolutions of an extraordinary meeting of general assembly

of the shareholders. If a resolution pertains to an extension of the term of the company, the resolutions must be adopted by a three-fourths majority vote of the shares represented at that meeting.

The fifth difference between Islamic law and Saudi law is that the Companies Law 2015 recognises the one-member company in Article 55. In contrast, Islamic law does not recognize this kind of company because the term *sharikat* means that it is *khalt* which refers to a legal relation in which the dealings between at least two people are mixed in with each other. Therefore, the term *sharikat* used in this context is linguistically inaccurate. It would be more appropriate to suggest an alternative name for the one-member company, such as describing it as a “one-member entity” - in Arabic “*kaian*” - whereas the linguistic use of *sharikat* is incompatible with a single member company.

Concerning the further requirement for dissolution of partnerships of unanimity of agreement, the provisions in English law⁹¹⁵ are not very different from the provisions in Saudi law. Unanimity of agreement to dissolve a partnership is a condition in English law for a fixed partnership, but not for a partnership at will. However, the difference between the two systems is that the Saudi law does not recognise the partnership at will itself whereas English law does. In contrast to Saudi law, in Islamic law provisions are subject to partners’ conditions. Thus, Islamic law does not require the unanimous agreement of all partners to dissolve a partnership according the view of the *Hanafiyya*, *Shafiyya* and *Hanbaliyya*. According to those schools, one partner may dissolve a partnership.

⁹¹⁵ See 2.2.3

The seventh difference which can be achieved, the Companies Law 2015 expresses that merger is a cause of dissolution of companies and partnerships. The classical Islamic scholars do not expressly mention that merger is a cause of dissolution. However, technically, merger, whether by absorption or transferral leads to dissolution of the company or partnership. As the fact of merger does not contradict any principle of Islamic law, it can be recognised as a cause of dissolution in Islamic law.

A further area which would benefit from greater clarity concerns the court discretion to dissolve. The Saudi Companies Law 2015 gives the court a wide discretion to dissolve the company or partnership. Similarly, the UK Partnership Act 1890 gives wide discretion to the English courts to dissolve. More so, due to a lack of drafting, the UK Companies Act 2006 expressly gives no causes of dissolution by the court. Due to the wide discretion given to courts in both jurisdictions, specific standards are needed to guide the courts in exercising their discretion.

The rule of dissolution on the occasion of death is most liberally applied Islamic law. Since according to Islamic law, a partnership will not dissolve on the occasion of the death of a partner if there are two or more surviving partners. Since Islamic law is most preserving of the life of the partnership it would be advisable for Saudi law to adopt the classical Islamic view that the death of one partner is not a cause of dissolution of partnership unless the partners agree otherwise.

On the point of withdrawal of a partner, notice should be given to the other partners with reasonable time. As this term is not defined in Saudi law, Article

37 of the Companies Law 2015 should be amended to allow for up to 90 days. This will help avoid dispute among partners.

As a general principle, classical Islamic Law is more flexible than the other two modern systems discussed. Bankruptcy, withdrawal and even death will not lead to dissolution without special agreement. Unless there is total loss of income, a minimum of two partners will ensure continuance of a partnership's existence. Thus, Islamic law is more advantageous and flexible than either English or Saudi law and provides a greater stability through the continuance of existence of partnerships and companies. This approach should be adopted in both Saudi and English systems so as to encourage the continuance of business and the life of companies and partnerships wherever possible.

Finally, Saudi commentators would be surprised to note that the UK Companies Act 2006 does not view dissolution as the end of the story of corporate life. It allows dissolved companies to be restored in different circumstances. This is an issue that has not attracted the attention of the Saudi legislature. In the opinion of this commentator, this matter should be reflected upon, as restoration can deliver a just solution in a number of situations⁹¹⁶. Restoration does not contradict Islamic law.

⁹¹⁶ See advantages of restoration in page 142.

Chapter 6 Conclusion

The expectation of a closer trading relationship between the KSA and the UK following the adoption of Vision 2030 in Saudi Arabia and in parallel with Brexit suggests a need for greater familiarity with commercial law models for policymakers, lawyers, businessmen, and international investors in the KSA and the UK. This issue is encouraging business people and lawmakers to achieve greater understanding of the positions in both the KSA and the UK. Therefore, this research was designed to improve understanding between the two countries. This was done by exploring, analysing and criticising the various aspects of law relating to causes of dissolution of companies and partnerships in the laws of these countries in light of Islamic law. The study has focused on the Saudi system, since Saudi Arabia is the home country of the researcher and it is intended that this research should have a policy impact in that country. The researcher was granted a scholarship from the Saudi government to contribute to the improvement of its law on dissolution of companies and partnerships. Since the constitutional system of Saudi Arabia relies on Islamic jurisprudence, this thesis has been researched in the context of Islamic law. This reliance on Islamic jurisprudence has given Saudi Arabia special influence in the Islamic world.

In this chapter we will conclude with important findings identified during the research. Also, we include our contribution by making legislative recommendations to Saudi and English laws as needed. Additionally, the conclusion will assess the success of research in meeting its objectives and answering the research question. Finally, the thesis makes recommendations for future research.

6.1 Key findings

After analysing and making suggestions about causes of dissolution of companies and partnerships in Saudi law and English law in the light of Islamic law, the following four points have been identified as constituting the main research finding. Firstly, the similarities and differences between Saudi and English law on the causes of dissolution of companies and partnerships are noted. Secondly, the differences between Saudi and English law regarding presentation of the law. Thirdly, legal gaps in the Saudi Companies Law 2015. Finally, we note a degree of weakness in the drafting of that Companies Law 2015 and make recommendation for reform.

6.1.1 Similarities and differences between Saudi and English Laws

PARTNERSHIPS	
English law	Saudi law
Fixed term agreements	Expiration of the term.
Termination of single adventure	Termination or the impossibility of the adventure
Dissolution by the unanimous agreement	Dissolution by the agreement of partners
Dissolution of partnership by Notice	Not applicable
Charging order on a partner's share.	Not applicable
Two persons: minimum requirements for a partnership	Transfer of all shares to one person
Death of a partner	Death of a partner
Bankruptcy of a partner	Bankruptcy of a partner
Dissolution by illegality of partnership	Not applicable
Cessation of business	Not applicable
Incapacity of a partner mentally or Physically	Not applicable
Prejudicial conduct.	Not applicable
Misconduct relating to the business	Not applicable
Partnership carried on at a loss.	Not applicable
Dissolution by the court on just and equitable grounds	Dissolution by the court
Not applicable	Merger

Impliedly mentioned	Withdrawal of a partner
Not applicable	Expulsion of a partner
Not applicable	Dismissal or resignation of the manager of a partnership.

COMPANIES	
English law	Saudi law
Insolvency	Insolvency
Merger	Merger
Demerger	Not applicable
Cessation of trading or operation	Not applicable
a company is no longer needed	Dissolution by the agreement of shareholders.
active directors want to retire	Not applicable
Not applicable	Expiration of the term.
Not applicable	Termination or the impossibility of the adventure
Not applicable	Transfer of all shares to one person
Dissolution by the court	Dissolution by the court
Not applicable	Loss of half of the capital of the company

We can notice that Saudi and English law both recognise as causes of dissolution of partnerships the following events: expiration of term, termination of single adventure, dissolution by unanimous agreement between partners, failure to maintain two persons as a minimum requirement for a partnership, death of a partner, bankruptcy of a partner and dissolution by the court. Although both legal systems recognise termination of single adventure as a cause of dissolution of partnerships⁹¹⁷, the formulation of Saudi law on this point is clearer than the formulation of the Partnership Act 1890. This is because Saudi law expresses both the termination and the impossibility of adventure as independent causes of dissolution. By contrast, English law considers impossibility of an adventure as a cause of dissolution but does not expressly

⁹¹⁷ See chapters two and five.

mention it as such. Rather, English law expressly mentions only termination of adventure as a cause of dissolution, leaving impossibility of adventure as an implied cause of dissolution under the heading of termination of adventure. For this reason, the formulation of Saudi law on this point is superior to the Partnership Act 1890⁹¹⁸.

In addition, Saudi law lists the following as causes of dissolution of partnerships: merger, withdrawal of a partner, expulsion of a partner, dismissal or resignation of the manager of a partnership. However, although English law considers those as causes of dissolution, the Partnership Act 1890 does not list them explicitly as causes of dissolution⁹¹⁹. Therefore, it would be strongly recommended that English lawmakers expressly add those causes under dissolution of partnership.

On the other hand, there are several causes of dissolution of partnerships mentioned in English law which are not covered in Saudi law. The only causes mentioned in English law are dissolution by illegality of partnership, cessation of business, the physical or mental incapacity of a partner, prejudicial conduct, misconduct relating to the business and partnership carried on at a loss⁹²⁰. Some of these causes are impliedly causes of dissolution of partnerships in Saudi law: dissolution by illegality of partnership, mental or physical incapacity of a partner, prejudicial conduct and misconduct relating to the business. These causes should be listed expressly as causes of dissolution of partnership in the Saudi Companies Law 2015.

⁹¹⁸ See 5.2.2

⁹¹⁹ See chapter five.

⁹²⁰ See chapter two.

The Companies Law 2015 pays some attention to the causes of dissolution of companies, expressly dedicating two specific articles to this point. Articles 16 and 150 state as causes of dissolution of companies the following: insolvency, merger, dissolution by the agreement of shareholders, expiration of term, termination or the impossibility of the adventure, the transfer of all shares to one person, the loss of half of the capital of the company and dissolution by the court⁹²¹. In contrast, in English law the causes of dissolution of companies are not combined under a single section or listed in sections containing causes of dissolution of companies⁹²². Although English lawmakers have brought to light provisions of dissolution of companies in several acts, they failed to combine and list the causes of dissolution of company under a single section or sections in the massive Companies Act 2006, something they did not fail to do concerning partnerships when they formulated the Partnership Act 1890. This means that the later legislative work on companies is less complete than earlier enactment on the matter of partnerships. Perhaps due to this, research is scarce on the point of causes of dissolution of companies.

It has been noted that some causes of dissolution of companies which are mentioned in English law, but not as such in Saudi law, should be transplanted into Saudi law: namely, demerger and cessation of trading or operation. In contrast there are some causes of dissolution of companies mentioned in Saudi law which could be transplanted into English law such as the expiration of the term, the termination or the impossibility of the adventure and loss of half of the capital of the company⁹²³.

⁹²¹ See chapter five.

⁹²² See 3.4.Summary

⁹²³ See chapter five.

With regards to Islamic law, there are plenty of sources and excellent discussions about causes of dissolution of partnerships in Classical Islamic law which outweighs what is available in either Saudi or English law. Classical Islamic law states causes of dissolution of partnerships which maintain the entity of partnership with extensive flexibility and do not seek dissolution. For instance, in the case of death, withdrawal, bankruptcy and dismissal the manager of a partnership or if he resigned, Classical Islamic law maintains the life of a partnership until the remaining partners seek dissolution. This means that a partnership continues despite changes in their membership until and unless the remaining partners ask for dissolution. This approach of Classical Islamic law takes a diametrically opposite approach to both Saudi and English law. According Saudi and English law, a partnership will dissolve automatically and immediately in the case of death, withdrawal, bankruptcy and dismissal the manager of a partnership or if he resigned or if there are any changes in membership, unless the remaining partners object to dissolution⁹²⁴. Dissolution of partnership under the law is automatic and immediate, requiring partners to take positive action to avoid the coming to an end of their business. This means that the default position in law produces negative consequences which partners have to live with and find ways a round. The solution is to create an effective Partnership Deed, but ideally it should be the law that provides the solution to partnerships and not that partners have to find solutions for the law⁹²⁵. Thus, Islamic law demonstrates the greatest concern towards the continuity of the life

⁹²⁴ Berry, E., [The criminal liability of partnerships and partners: increasing the divergence between English and Scottish partnership law?], *Journal of Business Law*, Vol.7, (2014), (PP.585-607) at 594; *The Companies Law 2015*, Article 16.

⁹²⁵ Further discussion in 2.6 Contracting out of partnership dissolution and in 3.4 Consequences of dissolution of companies and in 2.5 Consequences of dissolution of partnership.

of a partnership. The reason for this is to avoid, wherever possible, the negative consequences from the break-up of a partnership, for example unemployment resulting from the partnership's break-up; that remaining assets will no longer be the unique assets of the business but may be shared out between ex-partners, creditors or even the Crown. Also, the break-up of partnerships could affect national economy through the drop in corporate taxes. Therefore, the approach of Islamic law, which supports the continuance of partnerships, should be adopted in both Saudi and English systems to encourage the continuance of business wherever possible⁹²⁶.

With regards to companies and corporations, the principles of Islamic law suffice to address modernity on all issues of law. The *Sharia* furnishes the basis for encompassing answers to practically all legal matters at all times and under a variety of circumstances. However, with regards to companies and corporations in Islamic law, whereas there are some contributions from contemporary Islamic scholars to apply principles of *Sharia*, these contributions are insufficient. The reason for this insufficiency⁹²⁶ is a lack of effort on part of Islamic scholars, from the time the corporate entity was introduced into the commercial world in the seventeenth century, to bring the corporate into line with Islamic law. As a result, legal provisions on dissolution of companies and corporations in Saudi and English law outweigh what is available in references of Islamic law. Therefore, the International Islamic *Fiqh* Academy should be strongly encouraged to set up a law department with the purpose of accelerate the process of legislating in each field of law such as bringing into existence

⁹²⁶ See chapter four.

legislation such as an Islamic Companies Law and an Islamic Criminal Law to address modernity and keep pace with developments.

6.1.2 Differences between Saudi law and English Law regarding the presentation of the law

In each country the formation and presentation of law is affected by culture, language, religion and custom. Therefore, there are many differences between the English and Saudi legal systems. There are many points of departure on matters of procedure which have not been delved into in this thesis. The essential differences which have been scrutinised in greater detail are those which materially have legal effect. The first essential difference lies in the formulation by English lawmakers of the provisions of partnership into the Partnership Act 1890 and into separate Acts for the provisions of companies in the Companies Act 2006. In contrast, Saudi lawmakers set out the provisions of both companies and partnerships in the same Act and have called it the Companies Law 2015. The reason for so doing is that the title of the Act is '*Nazam Al-sharikat*'; the word '*sharikat*' in Arabic meaning both 'companies' and 'partnerships'. Therefore, the Saudi lawmaker sets out the provisions of both companies and partnerships in the same Act⁹²⁷. Another difference between Saudi law and English law from the perspective of the presentation of the law is that the Saudi law adopts partnership with a separate legal personality⁹²⁸. In contrast, English law does not recognise a separate legal personality for partnership⁹²⁹. This approach to partnerships which has been adopted in Saudi Arabia allows the partnership in Saudi Arabia to sue and be sued and also to

⁹²⁷ See 5.1. Introduction

⁹²⁸ Companies Law 2015, Article 14

⁹²⁹ See 1.2.2. The meaning of companies and partnership in Saudi law.

own and hold property directly under the partnership's own name because it has the status of a separate legal entity. It is better to revisit the issue of legal personality for partnerships in English law in the manner that the Law Commissions has proposed in the final report: partnerships should become legal entities in English law. This would better accommodate the modern reality of partnerships which were restricted to being small concerns in the late nineteenth century. Now that partnerships vary in size from two to many hundreds it is apparent that the framework of partnership law was not devised for larger partnerships⁹³⁰.

An additional difference between Saudi and English law is that dissolution of partnership in Saudi law is the final stage of winding up. Partnerships in English law, by contrast, must first go through dissolution and are wound up afterwards⁹³¹. Finally, there is a difference between Saudi and English law with regards to "company entity" in the case of a vote to merge. Saudi law views the boards of two merging companies to be considered as one board acting together in matters of vote to merger. Therefore, a shareholder in the two companies has only one vote regarding merger. However, English law views the two boards of the companies to be considered as two separate boards on the matter of voting to merge. Therefore, a shareholder in the two companies has two votes regarding merger⁹³². In this regard, Saudi law ensures that conflict of interest is less likely to occur, as an individual with two votes, one in the transferor company and the other in the transferee company would represent two contradictory positions. English law should adopt the approach of Saudi law in this respect to avoid the

⁹³⁰ Partnership Law: Joint Report of the Law Commission and the Scottish Law Commission (Law Com No. 283 Scottish Law Com No. 192, 2003, Cm 6015), p.19

⁹³¹ See 4.5.1 Loss of half of the capital of the company

⁹³² See 5.2.5. Merger

inevitable conflict of interest arising from the obligation to vote in a merger for both companies.

6.1.3 Weakness in the drafting of the Saudi Companies Law 2015

Although lawmakers in Saudi Arabia have just introduced the new Companies Law 2015, there are weaknesses in framing some articles. Firstly, there is vagueness as to whether or not Saudi companies law recognises a partnership at will⁹³³. Secondly, the drafting of Companies Law 2015 is such that the Saudi law does not clarify the position for a partnership or a company that was set up for a fixed period of term to implement a single adventure. In such a case, where a single adventure is completed before the fixed period of term of the partnership or company is finished, the question is whether the partnership or company will dissolve after completion of the single venture, or whether the partnership or company will remain valid until the end of the fixed period of term appointed. The author has suggested root and branch treatment of this issue. The root of this problem for the single venture is the condition in Saudi law that a partnership or company must be stipulated to exist for a fixed period of time. This means that the single venture could come to an end before its purpose is fulfilled. By removing the legal insistence upon a fixed period for any venture, the partners would be free to set up the partnership. Also, the shareholders would be free to set up the company to serve their venture only, without having to mention a period of time which could later cause confusion concerning the status of the partnership or company⁹³⁴.

⁹³³ See 5.2.1.Expiration of the term

⁹³⁴ See 5.2.2.Termination or the impossibility of the adventure

A further weakness emerges in Article 2 of Companies Law 2015 when drafting the definition of companies. Although that law recognises one-member companies in Article 55, Article 2 defines a company as a contract under which two or more persons undertake to participate in an enterprise for profit, by contributing a share in the form of money or work, with a view to dividing any profits or losses as a result of such enterprise. This definition is not accurate and does not include the one-member company. Therefore, Article 2 should be amended to include the one-member company on the following lines “the company is a separate legal entity set up by one member or more with a view of profit by contributing a share in the form of money, work or both of them, with a view to dividing any realised profits or incurred losses as a result of such enterprise”.

Another weakness in drafting regards Article 203 of the Companies Act 2015 which states that as soon as dissolution occurs, the company enters the phase of liquidation. The company retains legal personality to the extent necessary for the liquidation and until the liquidation ends. This Article implies that merger, as a cause of dissolution, will lead the company or partnership to liquidation. However, in practice, merger does not and should not lead to liquidation as this will interfere with the transfer of company or partnership assets. Since Saudi law appears to require all dissolutions, including those caused by merger, to move to liquidation, it would be necessary to suggest a clarification⁹³⁵.

Article 16(f) of Companies Law 2015 involves a very wide discretion being given to courts to dissolve companies and partnerships. There are no consistent standards to help determine which cases deserve to be heard under that article.

⁹³⁵ See 5.2.5.Merger

This is left to the opinion of the individual judge who cannot be held out as an expert in every type of case requiring the exercise of discretion. Thus, specific standards are needed to guide courts in deciding which cases should be heard. Although one must be aware of the importance of the standard, the challenge faced lies in how to extract guiding principles from a very widely and imprecisely based body of common law such as principles of discretion, upon which decisions are based on just and equitable considerations. Perhaps some broad categories not dissimilar to those which already exists in the form of maxims in equity will suffice to provide similar guidelines to limit discretion from being open-ended, and endow judicial discretion with a framework which is neither rigid not fluid, but flexible. This weakness in not having consistent standards is found also in section 35 of Partnership Act 1890. The proposal limiting court discretion through the introduction of standard rules will produce greater clarity for the law⁹³⁶. With regards to the Companies Act 2006, no causes of dissolution by the court are expressly mentioned in the Act. The reason for this can be due to a lack of need to do so. However, in this author's opinion not expressly mentioning the causes of dissolution of companies by the courts points to a lack of effective drafting. It is better to combine and list the causes of dissolution of company under a single section or even a few closely located sections of the Companies Act 2006 to make it easier for paractitioners, the business community, academic researchers and lawyers. A further problem with the drafting of Companies Act 2006 is the wide discretion available to the court. A standard is needed to apply the discretion. The challenge lies in how to

⁹³⁶ The matter of standards for court discretion is only briefly highlighted here as analysis in any further depth is outside the scope of this thesis and would be more appropriate to revisit in a future study, as pointed out in my concluding chapter 6.4

formulate from a very wide body of laws, guidelines which are flexible, enabling judges to apply discretion neither with rigidity nor fluidity. Therefore, the topic of consistent standards of court discretion needs more research.

6.1.4 A legal gap in Saudi Companies Law 2015

Beyond the weaknesses in the drafting of the Companies Law 2015, there are gaps in this legislation. The Companies Law 2015 does not mention demerger as a cause of dissolution of companies and partnership although technically demerger leads to dissolution. Also the Companies Law 2015 does not define merger in Saudi legislation. Therefore, the definition of merger which can be suggested is the fusion of two or more companies or partnerships by absorption or consolidation. Additionally, Saudi law does not recognise cross-border mergers even though it they contain many economic advantages. Whereas cross-border mergers are not a legal issue at this time in Saudi Arabia, they are likely to arise due to Saudi membership of the Gulf Cooperation Council (GCC) which is the localised equivalent on the Arabian peninsula of the European Union. The GCC is currently contemplating the creation of one uniform law for the union. Therefore all of these gaps in Saudi law should be filled. One final significant point is that the Saudi Law does not recognize administrative striking off of companies in its legislation or of restoration of companies to the register. It would be advisable for Saudi law to adopt these concepts to gain the advantages as they do not contradict with Islamic law.

6.2 Contribution by legislative recommendations to Saudi and English Laws

This thesis provides a contribution in the field of companies and partnerships law as being the first study that collects, and explores with full analysis and criticism the causes of dissolution of companies and partnerships in Saudi law. Furthermore, explores with full analysis and criticism the causes of dissolution of companies in English law. This thesis additionally compares causes of dissolution of companies and partnerships between Saudi and English law.

Specific recommendations should be taken on board by Saudi Arabian and by English lawmakers to contribute in improvement and increasing the effectiveness of legislation which have relevance to the causes of dissolution of companies and partnerships. First of all, lawmakers in Saudi Arabia should clarify the vagueness point, namely whether Companies Law 2015 recognises a partnership at will or not by reforming Article 23 of Companies Law 2015 along the following lines:

“The partnership’s contract shall specifically contain the following particulars...
e.) The date of formation of the partnership and its duration if the partnership is fixed partnership”

Secondly, the lawmakers should reform Article 16(2) of Companies Law 2015 along the following lines:

“Regardless of the fixed period of term, a partnership or a company will be dissolved if the purpose of the partnership or company is fulfilled or is impossible to realise.” Thus, as to when the partnership or company will dissolve, it will dissolve after the completion of the single venture if it is a fixed

partnership or a company with a definite period of time. Otherwise, the partnership or company will remain valid until the end of the fixed period of term appointed even if the venture has been achieved.

Furthermore, the definition of “companies” in Article 2 of Companies Law 2015 should be reformed to include the one-member company on the following lines “a company is a separate legal entity set up by one member or more with a view of profit by contributing a share in the form of money, work or both of them, with a view to dividing any realised profits or incurred losses as a result of such enterprise”.

Lawmakers in Saudi Arabia should also reform Article 203 of Companies Law 2015 to exclude merger and demerger from liquidation because merger and demerger lead to dissolution, and not to liquidation. The liquidation does not happen because under the merger and demerger all assets will transfer as they are to the new company. Thus, reform of Companies Law 2015 should be made on the following lines: “Except in the case of merger and demerger, all dissolutions lead to liquidation...”

An additional suggestion is that as there is no legislation governing provisions of cross-border mergers, demergers, liquidation and insolvency, such legislation should be made, especially as it contains many economic advantages. All of these legal gaps should be filled by Saudi legislation.

Moving to the UK legislative reform, although the Partnership Act 1890 does mention that a partnership can continue after the death of one of the partners, subject to the agreement of the surviving partners prior to the death to continue, it does not mention what should happen if the deceased partner’s heir is a minor

and whether it is possible to continue the partnership between a minor and the surviving partners. This is a legal gap in English law which needs to be filled. English lawmakers should transplant over this solution from Saudi law to English law. The Companies Law 2015 treats this issue properly that the partnership must be transformed within a year into a limited partnership if the partners want to continue running the business. The heirs, who are minors, will be limited partners who are liable only to the extent of the amount of money that that partner has invested.

Also, the approach of Islamic law, which supports the continuance of partnerships, should be adopted in both Saudi and English systems to encourage the continuance of business wherever possible. Rather than the current approach of Saudi and English law, a partnership will dissolve automatically and immediately in the case of death, withdrawal, bankruptcy and dismissal the manager of a partnership or if he resigned or if there are any changes in their partners.

An essential suggestion to avoid making courts overly busy, to avoid prolonged litigation, the waste of time or other unfavourable outcomes, is that it would be far better were all the subsections under section 35 of the Partnership Act 1890 were merged into one paragraph and also include mental incapacity. This reform has been suggested in this thesis on the following lines:

“Section 35(a) When a partner becomes permanently incapable, or guilty of misconduct; breach of partnership agreement or whether the business can only be carried on at loss, or whenever there are any circumstances have arisen which, in the opinion of the Court, render it just and equitable that the

partnership be dissolved; then (b) Any partner can petition to dissolve the partnership unless the petitioner is the partner in breach of the agreement solely the guilty party of the misconduct.”

A further advantage in redrafting the law is that a merged section would give a greater choice of alternatives to the judge to use at his discretion to remedy the situation before him.

A final and essential contribution in this research is the ideal legislative reform of causes of dissolution of companies and partnerships so that it comprehensively includes all causes and encourages the continuance of business wherever possible. This is the result of exploring, analysing, criticising and comparing causes of dissolution of companies and partnership between Saudi and English law which we will present at the end of this conclusion.

6.3 The success of the research in meeting its objectives: an assessment.

To know whether this thesis is a success or not, three essential points need to be achieved; by meeting the aims and objectives of the thesis; by answering the research question and by making a new contribution to the field of study.

The main aim of this thesis is analyzing the causes of dissolution of companies and partnerships in Saudi, English and Islamic law. The aim of discussing the causes of dissolution of companies and partnerships in Saudi law, has been achieved in chapter five of this thesis by reliance on legislation relevant to causes of dissolution, which are: Corporate Governance Regulations, Consultative Assembly of Saudi Arabia, The Commercial Court Law 1970, Settlement That Preventing from Bankruptcy Law 1996 and Arbitration Law

2012. The main statute is the Companies Law 2015 which mentions the causes of dissolution of companies and partnerships mainly in four articles. Article 16 governs the causes of dissolution of both companies and partnerships. Article 37 governs the causes of dissolution of partnerships. However, Articles 149-150 govern causes of dissolution of companies. The causes of dissolution in Saudi law have been analyzed and solutions have been suggested.

There is additional aim regarding causes of dissolution of companies and partnerships in English law. This aim has been achieved in chapters two and three by reliance on legislation relevant to causes of dissolution. They are: the primary statute, which is the Partnership Act 1890 and the Companies Act 2006 and also by discrete provisions in the Insolvency Act 1986 and other legislation. The causes of dissolution in English law have been explored, stated, analyzed, criticised and solutions problems identified have been suggested.

Also another goal of this thesis regards analysing causes of dissolution of companies and partnerships in Islamic law. This aim has been achieved in chapter four of this thesis by a study undertaken in reliance on the main sources of Islamic law in all four Islamic schools *Hanafiyya, Malikiyya, Shafiyya and Hanbaliyya*. The provisions of dissolution in Islamic law have been explored and the solutions have been suggested. This thesis proves that there is no contradiction in the provisions of causes of dissolution of companies and partnerships in Saudi and English law with the principles of *shariah*. This demonstrates that *Shariah* furnishes encompassing answers to practically all legal matters at all times and under a variety of circumstances.

Turning to the precise research question of the thesis which is “*To what extent is the current law governing the regulation of dissolution of companies and partnerships in the KSA sufficient and well organised?*” we will find that the thesis has answered this question in the negative. The current legislation governing the regulation of dissolution of companies and partnerships in the KSA is insufficient and needs more work to be well-organised. The weaknesses in Saudi law, divided into points, are as follows:

Firstly, the lack of mention in the law of some of the causes of dissolution which practically and technically Saudi law considers as causes of dissolution and which has been discussed in section 6.1.1 of this thesis “Similarities and differences between Saudi and English law”. Secondly: weakness in the drafting of several articles in the Companies Law 2015 which has been discussed in 6.1.2 and 6.1.3.

As a result of these weaknesses it has proved necessary to provide a proposal to redraft Articles 2, 16(2), 23, 203 of the Companies Law 2015 and to suggest an ideal legislative reform of causes of dissolution of companies and of partnerships which is comprehensive in nature and encourages the continuance of business wherever possible. All of these are considered an essential contribution and have been discussed in section 2.6 “legislative recommendations to contribute to Saudi and English laws”. From all of this presentation, it is submitted that this research has met its aims and objectives, has answered the research question and has added a new contribution to the extant knowledge in the field.

6.4 Recommendations for future research

The research that has been undertaken for this thesis has highlighted a number of topics on which further research would be beneficial. The thesis has adapted the application of doctrinal and comparative legal analysis method. A further piece of research to conduct is an empirical study which sets out to investigate the area of dissolution of companies and partnerships. This would constitute a comparative study between Saudi law and English law in light of Islamic law which may greater depth in order to diagnose where exactly the problems lie in KSA so that appropriate and workable reforms could be offered. This empirical study would consist of a series of semi-structured interviews and open-ended questions. These would be conducted with a representative sample of specialists on the topic, including practising lawyers, academic staff, judges and officials in the Saudi Arabian Capital Market Authority. All the interviews should be conducted in person after the participant has given informed consent. The interviews should be recorded and transcribed in Arabic before being translated into English and subjected to thematic analysis. These semi-structured interviews with open-ended questions will provide an opportunity to obtain additional information which may help the researcher to explore new concepts and issues. Ethical approval for the study should be obtained. The main ethical issues are: informed consent, confidentiality and the consequences of participation. All participants should be given a detailed information sheet explaining the nature and purposes of the study and any risks or benefits of participation. The researcher should confirm that the participants have understood the information before seeking a written consent. The data will be stored in line with the Data Protection Act 1998. An empirical study will add

value to my current doctrinal research, as empirical research is fact-based. Interviewing gives a chance to meet experts in the field such as lawyers, judges and other practitioners. This is more effective in gaining factual information and opinions of experts and practitioners regarding their diagnosis of problems, conflicts and disadvantages in practice relating to dissolution. Additionally, an empirical study will measure whether the outcomes of my doctrinal research are accurate and applicable or not. Finally, an empirical study will indicate how practitioners are currently dealing with these problems, conflicts and disadvantages in the legal system in KSA.

An additional area for further research that has been highlighted by the studies undertaken for this thesis is that of Cross-Border Mergers, demerger and liquidation. There has long been a need for Saudi Arabia to develop and improve those areas not only to meet domestic demands to do business, but also to keep up with international trends to attract foreign investments. This area is considered to be a gap in legal terms in Saudi law.

Another area for ripe for further study, features the specific standards for court discretion. The matter of standards for court discretion is only briefly highlighted in my thesis as analysis in any further depth is outside its scope and would be more appropriate to investigate in a future study. These standards are needed to guide courts in deciding which cases should be heard. However, any researcher should be aware about the challenge which lies in how to extract guiding principles from a very widely and imprecisely principled body of common law such as discretionary decisions based on just and equitable considerations. Perhaps some broad categories not dissimilar to those which already exists in the form of maxims in equity will suffice to provide similar

guidelines to reign in discretion from being open-ended, and endow judicial discretion with a framework which is neither rigid not fluid, but flexible.

6.5 Proposal for reform of the causes of dissolution of companies and partnerships

This proposal for reform takes into account two aspects. Firstly, that the reform should be comprehensive, which means that it include all causes of dissolution of both companies and partnerships. Secondly, the reform should encourage the continuance of business wherever possible. There now follows an outline of the proposed reform.

Causes of dissolution of partnership:

1- A partnership dissolves without winding up in the following situations:

- a- Merger
- b- Demerger.

2- Subject to any agreement between the partners, the other partners have a right to withdrawal from a partnership or dissolve it with winding up in the following situations:

- a- Death one of the partners.
- b- Cessation of business.
- c- Withdrawal of a partner.
- d- Entry of a new partner
- e- Bankruptcy of one of the partners.
- f- Dismissal or resignation of the manager of a partnership.

g- A partnership may, at the option of the other partners, be dissolved if any partner suffers his share of the partnership property to be charged under this Act for his separate debt.

h- If entered into for an undefined time, by any partner giving notice to the others of his intention to dissolve the partnership. The partnership dissolves after 90 days if the others agreed, otherwise, the partner who gave notice withdrawal from the partnership.

3- Subject to any agreement between the partners, a partnership is dissolved through winding up in the following situations:

a- If entered into for a fixed term, by the expiration of that term.

b- If entered into for a fixed term, by the unanimous agreement of partners to dissolve a partnership before end of the term.

c- If entered into for a single adventure or undertaking, by the termination or impossibility of that adventure or undertaking.

d- Transfer of all shares to one person if the remaining partner does not start to switch the partnership into companies in 90 days.

e- Illegality of partnership if the partners do not make the partnership lawful in 90 days.

4- Dissolution by the court:

a- On application by a partner the Court may decree a dissolution of the partnership when a partner becomes permanently incapable, or guilty of misconduct; breach of partnership agreement or whether the business can only be carried on at loss, or whenever there are any circumstances have arisen

which, in the opinion of the Court, render it just and equitable that the partnership be dissolved;

- b- On application by stakeholders regarding their interest, the Court may decree dissolution of the partnership.

Causes of dissolution of companies:

1- A company dissolves without winding up in the following situation.

- a- Merger.
- b- Demerger.

2- An Extraordinary General Assembly has a right to dissolve a company with winding in the following situations:

- a- Cessation of trading or operation;
- b- A company is no longer needed;
- c- An active director wants to retire and there is no-one to take over the running of the company.
- d- If entered into for an undefined time, by any shareholder giving notice to the board of director of the company of his intention to dissolve the company. Then, in thirty days the board of directors calls the Extraordinary General Assembly to meeting within sixty days to decide about the dissolution.

3- A company dissolves with winding up in the following situations:

- a- If the company decrees insolvency.
- b- If entered into for a fixed term, by the expiration of that term.

- c- If entered into for a fixed term, by decision from Extraordinary General Assembly to dissolve the company before end of the term.
- d- If entered into for a single adventure or undertaking, by the termination or impossibility of that adventure or undertaking.
- f- Illegality of the company if the company is not made lawful within 90 days.
- e- To protect the stockholders and third parties, if a company losses half of its capital, the auditor of the company must inform the chairman of the board of directors. Then the chairman of the board of directors informs all other board directors. Within thirty days the board of directors calls the Extraordinary General Assembly to meet within sixty days to increase or decrease the capital of the company to ensure the reduction of loss of capital ratio to be less than half of the company capital or else to dissolve the company. If the Extraordinary General Assembly does not meet within the period specified or if the Assembly held the meeting but it is unable to pass a decision on the subject, the company will dissolve by the force of the law.

4- Dissolution by the court.

The Court under the category of what is just and equitable may decree a dissolution of the company on application by stakeholders regarding their interest, whether they are a person, group or organisation that has an interest or a concern in an organization.

On the basis of this thesis it is submitted that the above suggested changes would improve Saudi law.

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