Brief: 1/03 Folder: 4/ Oct - Dec

THE BRIEF

ZR*p*

KDN No: PP12857/8/2004

BRIEFING...

CORPORATE

WINDS OF CHANGE... The Kuala Lumpur Stock Exchange began its demutualisation journey in July 2001. The Demutualisation (Kuala Lumpur Stock Exchange) Bill 2003 has yet to be passed into an Act but already the target date of February 2004 has been set to incorporate KLSE Bhd. We examine what this transformation is all about and how it will take place.

WHY? Traditionally, stock exchanges around the world operate as non-profit, mutual or co-operative organisations. By the very nature of such an organisation, the broker firms are also usually the owners, decision makers and direct users of the trading services of the exchange. The decisions of the exchange are the decisions of the broker firms, influenced primarily by their needs and interests.

The recommendation made by the Securities Commission ('SC') to demutualise and list the Kuala Lumpur Stock Exchange ('KLSE') stems from its recognition of the need for a more customer-focused, market-driven system of ownership and governance of the KLSE. The objective of the demutualisation is to make the KLSE a profit-oriented entity that is competitive, efficient and transparent. From a company run by a group of people with mutual interests, the exchange is evolving into a listed company run by professionals with more diverse interests such as those of the public, the government, capital markets and potential investors.

As stated in the Capital Market Master-Plan, commercial decisions of the KLSE under the demutualised structure will no longer be based solely on the interests of the broker members. Decisions of the broker members will no longer be on the basis of one-member-one-vote. A demutualised exchange will allow other stakeholders, including issuers and investors, through their ownership of and representation to the governing body of the KLSE, to participate in its decision-making. This will enable the KLSE to respond to the collective interests of its broader stakeholders and consequently be more customer-focused and market-oriented. It has been proposed that, upon demutualisation, 90% of the shares of the exchange be equally divided amongst the stockbrokers, the Ministry of Finance and the Capital Market Development Fund, with the remaining 10% to be held by remisiers.

A further reason for a demutualised exchange is to raise capital. This is important, as new technology to modernise, upgrade and develop the exchange requires vast amount of capital.

HOW? Salient aspects of the Demutualisation (Kuala Lumpur Stock Exchange) Bill 2003 ('the Bill') include:

> ***Procedures for conversion*** This would include applying to the Companies Commission of Malaysia for its conversion from a company limited by guarantee to a public company limited by shares.
>
> ***Vesting of property in a wholly-owned subsidiary of the KLSE*** The Bill envisages a wholly-owned subsidiary of the KLSE to be designated as a 'transferee company' wherein designated property, rights and liabilities of the KLSE shall be transferred or vested.

CHALLENGES The KLSE has in fact released its new organization structure. What is apparent is the cluster of business units that has been placed under the purview of the Chief Operating Officer ('the COO'). The COO oversees the exchanges; clearing; settlement and depositing services; and information services and systems or technology services. One major concern raised by the demutualisation of the exchange is the ability of the profit-oriented exchange to effectively perform its regulatory role in the

capital market. The profit-making objective of the demutualised exchange may conflict with its regulatory ones. In addition, as a profit-centred organisation, a demutualised exchange may not guarantee better regulation nor promote investor confidence unless the exchange is properly governed. A demutualised exchange cannot bring the intended benefits to the Malaysian capital market unless the interests of investors, issuers and other stakeholders are sufficiently protected.

The potential conflicts arising as a result of demutualisation of the exchange had been a major focus of the KLSE during the formulation of the demutualisation plan. To address this potential conflict, the KLSE has formulated a comprehensive Public Interest Framework to be implemented upon its demutualisation. The Public Interest Framework comprises the following components:

Governance This is to ensure that when making decisions, the public interest commitments of the demutualised entity are not ignored by the Board of Directors.

Shareholding and decision-making capacity Approval from the Ministry of Finance will be required to enable acquisition of shareholding higher than the prescribed limit and also on decisions that impact national policies.

Supervision The SC will undertake supervision of the exchange after its demutualisation and listing. A regulatory framework would be formulated and established for this purpose.

Capital Market Development Fund This is to ensure that efforts related to market development will not be abandoned as a result of the exchange becoming profit-oriented.

Regulation This is to ensure the objectivity and independence of the demutualised exchange in the performance of its regulatory functions.

Risk management This will be introduced at three levels, namely at (a) operational; (b) corporate; and (c) board.

CONCLUSION It may be too early to gauge the success of KLSE Bhd but one may learn from success stories of other demutualised exchanges.

Potential conflicts may still be a cause for concern and teething problems such as staffing issues will have to be dealt with. However just like changes in other institutions that must stand the test of time, this will be no different - **ZR*p***

COMMERCIAL

THE END OF AH LONGS?...

In recent months, the spotlight has been on loan sharks (commonly referred to as 'Ah Longs'), especially since a number of suicides have been blamed on their constant harassment of borrowers. One of the reasons for the amendments to the Moneylenders Act 1951 ('the Act') is to eradicate the problems linked to loan sharks. We examine the implications of such amendments and whether they spell the end of the Ah Longs.

MONEYLENDER Pursuant to the amendments to the Act, a 'moneylender' is now defined as 'any person who lends a sum of money to a borrower in consideration of a larger sum repaid to him.' In particular, the amendment seeks to do away with the connotation that a moneylender may not carry on the business of money-lending as a principal or an agent as seen previously in the Act.

LICENCES Perhaps the most apparent feature of the amendments is the fact that money-lending licences which were previously issued by State Governments and Kuala Lumpur City Hall, now come under the jurisdiction of the Ministry of Housing and Local Government pursuant to the introduction of sections 5A, 5B, 5C, 5D, 5E and 5F. These new provisions regulate various aspects of licensing such as application for, granting of, period of validity, conditions imposed and the renewal and display of.

The Ministry, being the sole agency issuing licences to the moneylenders, is now empowered to screen applications thereby ensuring that it is not abused.

In addition, more stringent conditions are introduced by setting the circumstances under which licences shall not be issued. Section 9 prohibits the issuance of licences to the following: (a) individuals or companies convicted of breach of trust offences; (b) directors, managers and companies declared bankrupt or being wound up; and (c) applicants or companies that have had their licences revoked. This is to ensure that companies or individuals involved in money-lending are reputable and free of criminal records. The penalty for failing to comply with this provision is a fine of between RM20,000 to RM100,000 or 5 years' jail. Repeat offenders could even be whipped.

POWERS OF INVESTIGATION Under the previous position, police could only act against loan sharks if they resorted to violence or threat - as provided for under the Penal Code. The Penal Code does not provide for actions against illegal money-lenders.

As a result of rampant harassment cases by debt-collectors using strong-arm tactics, Part III has been introduced and it refers to the powers of investigation, search, seizure and arrest that may be exercised by an Inspector or police officer. Sections 10A, 10B, 10C, 10D, 10E, 10F, 10G, 10H, 10I, 10J and 10K of the Act now provide an Inspector or a police officer with powers to facilitate investigations.

The new sections 10L, 10M, 10N and 10O refer to evidentiary issues such as the evidence of agent provocateurs, the admissibility of statements made by accused persons, information received from informers and protection of such informers.

FORM OF AGREEMENT Section 16 of the Act (in relation to the note or memorandum of a moneylender's contract) has now been amended to make it compulsory for all loan agreements to be made on a prescribed form, determined by the moneylending Registrar. It is also a condition that the agreements be stamped and signed by all parties. This is to ensure that there is uniformity and that agreements are standardized. In addition, it also protects the interest of all parties – that they fully understand what is stipulated in the agreement.

INTEREST RATES Section 17A introduced via the amendments maintains the interest rate for secured and unsecured loans at 12% p.a. and 18% p.a., respectively. However, the permissible daily interest rate has been fixed at 8% p.a., to be calculated on the outstanding balance to be repaid. Previously, lenders were allowed to charge interest on the whole loan with no rates specified. Today, moneylenders who continue to charge excessive interest rates may find the agreement void and unenforceable. They may also be fined up to a maximum of RM20,000 or be imprisoned for a maximum term of 18 months; or be liable to both.

OFFENCES & ENHANCED PENALTIES Although there were offences and penalties prescribed under the Act, these provisions had not been enforced effectively.

In light of rampant harassment by unscrupulous moneylenders, new offences and penalties have been meted out via the introduction of sections 29A, 29B, 29C, 29D, 29E and 29F. Section 29B, in particular, makes it an offence to harass or intimidate the borrower and members of his family.

Penalties on the other hand have been enhanced. The maximum fine for an individual, company, society or firm will now be increased from RM1,000 to RM50,000. Conviction for a second or subsequent offence could attract a maximum fine of up to RM100,000.

The new section 10P should also be taken note of as it provides that a moneylender who lends money without executing a moneylending agreement with the borrower now commits an offence under the Act.

An interesting observation of the amendments is the introduction of the punishment of whipping in respect of offences under sections 10I, 10P and 29B.

CONCLUSION While the amendments to the Act have been a long awaited measure, moneylenders themselves are now having concerns as they fear that more stringent rules and procedures, like the requirement to get a Commissioner for Oaths to certify loan agreements and the restriction imposed on visiting borrowers at home, would incur additional costs and create riskier business environment.

In fact in a recent dialogue attended by moneylenders and police officers, the former expressed concerns that the amendments to the Act may even force the legal moneylenders out of business and encourage loan shark activities.

The Federation of Malaysian Consumers Association on the other hand has stated that while the amendments should be lauded, the Government should also make an effort in encouraging banks and financial institutions to provide loans to the public - ZR*p*

INDUSTRIAL RELATIONS

CONDUCT UNBECOMING…

The Code of Practice on the Prevention and Eradication of Sexual Harassment in the Work Place ('the Code') was introduced in 1999 but it has been reported that today, only about 1% of companies in Malaysia have adopted it. We examine how effective the Code has been in curbing sexual harassment in the work place and why there is a need for a separate Bill.

SEXUAL HARASSMENT DEFINED… According to Article 4 of the Code of Practice on the Prevention and Eradication of Sexual Harassment in the Work Place ('the Code') which was launched on 1 March 1999, sexual harassment is defined as

> …any unwanted conduct of a sexual nature having the effect of verbal, non-verbal, visual, psychological or physical harassment:
>
> - that might, on reasonable grounds, be perceived by the recipient as placing a condition of a sexual nature on her/ his employment; or;
> - that might, on reasonable grounds, be perceived by the recipient as an offence or humiliation, or a threat to her or his well-being, but has no direct link to her/ his employment.

Verbal harassment This includes teasing, joking or making suggestive remarks or sounds.

Non-verbal harassment Such harassment refers to indecent overtones such as those denoted by lip-licking, specific food-eating and even hand signals.

Visual harassment This includes conduct such as covering the wall with pin-ups, calendars, drawings and even photographs of naked and scantily clad women.

Psychological harassment Such harassment is one that affects a person's psychological well-being which could include constant proposal for dates.

Physical harassment This form of harassment, which is the most common, refers to distasteful action such as touching, patting, pinching and stroking.

A SEPARATE BILL? Unfortunately the Code is a non-binding guideline for employers. It does not protect anyone; nor can it be a deterrent to sexual harassment if it is not adopted and implemented. In fact research has shown that only 1.2% of companies registered under SOCSO have implemented the Code. To make matters worse, there are reports indicating that when victims did indeed lodge complaints against their management staff, they were further penalized.

Sexual harassment nevertheless has been publicly recognized as a serious offence that violates a person's dignity, creating an intimidating and hostile environment. Trade unions and women's groups therefore have called for specific laws to combat sexual harassment at the work place.

Currently the only law dealing with sexual harassment is found in section 509 of the Penal Code. The section, which deals with words or gestures intending to insult the modesty of a person, reads:

> Whoever, intending to insult the modesty of any person, utters any word, makes any sound or gesture, or exhibits any object, intending that such word or sound shall be heard, or that such gesture or object shall be seen by such person, or intrudes upon the privacy of such person, shall be punished with imprisonment for a term which may extend to five years, or with a fine, or with both.

Besides the insufficiency of current laws, the other reasons for a separate Bill are as follows:

> ***To redefine 'employee'*** The Bill broadens the concept of work and the notion of workplace by redefining the meaning of 'employee' to include contract and sub-contract workers, voluntary workers and students.
>
> ***Appointment of officials*** The Bill is to provide for the appointment of a Director to promote recognition and approval of the accepted attitudes, acts and practices and to prepare guidelines for the avoidance thereof.
>
> ***Establishment of a Tribunal*** To set up an external, independent system for processing complaints, conciliation and a specialized Tribunal to hold inquiries and order effective and meaningful remedies. The Tribunal should comprise persons with legal and relevant expertise and experience. The inquiries should be conducted expeditiously and with as little formality as possible.

GREY AREAS The main hurdle to overcome in battling sexual harassment is defining it. Since sexual harassment may be in various forms, one man's perception of the same may not be shared by others. For example, would complimenting a woman amount to sexual harassment?

There are also nagging doubts about situations where the woman may be the aggressor and the man, the aggrieved. It must be borne in mind that sexual harassment is not about sex, it is about unwanted abusive behaviour. It is not only exclusive to men, women are also guilty of similar discriminatory behaviour. One may recall Michael Crichton's *Disclosure* – a story of a man's allegation of sexual harassment against a female colleague and former lover – the underlying message highlighted here is the reality of sexual harassment.

The issue of proof may pose a problem especially if the matter is litigated in court. For example if the complainant does not provide independent evidence, such as a witness, there will always be doubts as to whether the incident did actually occur.

Problems may also arise if the incident is not reported as soon as possible. This was highlighted in the High Court case of *Jennico Associates Sdn Bhd v Lilian Therera De Costa* (1998). According to the allegation, Ms De Costa was forced to quit her job in 1994 after resisting advances of her then employer. The Industrial Court found in her favour but the High Court (in an application made by Ms De Costa's employer to quash the decision of the Industrial Court) disagreed, stating that the evidence of Ms De Costa was unacceptable as it was not supported by any other independent evidence, in that she had not lodge a police report, nor did she inform her husband about it *immediately* after it had occurred (though she had eventually related the incident to both her friend and husband). The decision of the Industrial Court was quashed.

CONCLUSION There has also been some concern over equating sexual harassment with sexual trading, the latter referring to a situation where women (and sometimes even men) use their physical attributes to achieve their goals. This should not be confused with sexual harassment where the aggrieved, in most cases, gains nothing but is instead subject to humiliation, degradation and anguish - **ZR*p***

BANKING

SUKUK – A CERTIFICATE BY ANY OTHER NAME... Sukuk is almost a household name today, especially since the secondary listing of the Government's USD 600 million Sukuk Al-Ijarah Trust Certificate on the Labuan International Financial Exchange (LFX). What exactly does Sukuk Al-Ijarah mean and why has it been the talk of the town?

'Sukuk' is simply an Arabic term for 'certificate' or 'notes' and is similar to trust certificates issued by other conventional issuers. To understand how a Sukuk operates in the realm of Islamic Banking and Finance, one must be familiar with certain concepts of Islamic financing.

Some common modes of Islamic financing are (a) Bai Bithamin Ajil (BBA); (b) Murabaha; (c) Ijarah; (d) Mudarabah; (e) Musyarakah

BAI BITHAMIN AJIL This refers to a buying and selling transaction between the bank (or institution) and the customer, whereby the former buys a property at the prevailing market price and sells it to the customer at a mark-up price where payments are made by instalments over a period of time agreed upon by both parties.

MURABAHA Murabaha is similar to a BBA with the exception that the latter recognizes payments in instalments while the former is a deferred lump sum sale.

IJARAH Ijarah means 'to transfer the usufruct of a particular property to another person in exchange for rent claimed.' It is in fact equivalent to leasing. The bank finances it customer to enable the latter to use the services of certain assets based on the principal of Al-Ijarah. The bank purchases the assets required and leases it to the customer for a fixed period as agreed by both parties. During the lease period, the customer pays rentals to the bank which comprise the cost for the purchase of the assets as well as its profit margin. What should be noted about the Al-Ijarah transaction is that the ownership of the assets remains with the bank and the assets become security for the facility.

MUDARABAH Mudarabah refers to a partnership where one partner invests while the second manages it.

MUSYARAKAH Musyarakah on the other hand is a partnership where all partners invest and likewise, all partners participate in the management of the business as well as share the loss to the extent of the ratio of their investment.

SUKUK AL-IJARAH The USD 600 million trust certificates were based on Sukuk Al-Ijarah. Issued by Malaysia Global Sukuk Inc, they are due in the year 2007 and have had their primary listing on the Luxembourg Stock Exchange on 23 August 2002. This award-winning issuance of certificates was oversubscribed twice.

CONCLUSION Although the popularity of the Sukuk Al-Ijarah with investors is in no doubt, it is interesting to note that there is no specific framework governing the products in the Islamic capital markets. The relevant authorities however are now looking into the possibility of amending relevant aspects of the law, such as the Securities Industry Act 1983 – ZR*p*

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BRIEF CASE...

ADR/ CONVEYANCING

PUNCAKDANA SDN BHD V TRIBUNAL FOR HOUSEBUYERS CLAIMS & ANOR APPLICATION – September 2003, High Court

FACTS With the enforcement of the Housing Development (Control & Licensing) Act 2002 ('the Act') on 1 December 2002, a Tribunal for Housebuyers' Claims ('the Tribunal') was established with the jurisdiction to hear and adjudicate disputes between house buyers and housing developers. The applicant, Puncakdana, sought to quash awards given by the Tribunal to certain purchasers on the ground that the sale and purchase agreements in question were signed before 1 December 2002, hence to allow the Tribunal to grant these awards was equivalent to granting the Tribunal retrospective powers.

HIGH COURT The application was allowed and the awards were quashed on the basis that it was the intention of Parliament that the provisions with regard to the establishment of the Tribunal are not to operate retrospectively and that if Parliament had intended for the Tribunal to have retrospective jurisdiction over sale and purchase agreements entered into before the coming into force of the Act, it would have said so in clear words.

It was stated by Mohd Raus J that to decide in favour of the purchasers would amount to making the developers criminally liable on a retrospective basis and that this was wrong from a legal viewpoint.

ANALYSIS While it may be argued that the judge could not be faulted on his decision with regard to criminal liability (as it is a cardinal principle of law that penal sanctions cannot be made retrospective by virtue of article 7 of the Federal Constitution), some quarters are of the view that the judge could have severed the award made by the tribunal from the penal provisions of the Act.

This decision however does not mean that the developers in question are absolved of the responsibilities they have towards their respective purchasers. What the court had decided is only that the purchasers are not allowed to seek relief from the Tribunal. The purchasers still have the option of taking the long and winding road to the civil courts. The problem is that this may defeat the purpose of the establishment of the Tribunal that is to provide for an alternative dispute resolution. Furthermore the Tribunal was established to serve the interests of the purchasers.

It must be noted however that affected purchasers wishing to seek redress in the civil courts must first withdraw their claims lodged with the Tribunal. This is to comply with section 16R of the Act which prohibits the hearing of a dispute between the same parties by both the Tribunal and the court.

POSTSCRIPT Take note that at the time of the publication of this article, it was learnt that

the Attorney General's Chambers had filed a notice of appeal against the High Court decision and an early date has been sought for the hearing of the appeal. In the meantime all cases pending before the Tribunal have been postponed indefinitely - ZR*p*

CIVIL PROCEDURE

PETROLEUM NASIONAL BERHAD v KERAJAAN NEGERI TERENGGANU – August 2003, Court of Appeal

TO BE OR NOT TO BE… (SUMMARILY DISPOSED OF) That was the question posed to the Court of Appeal in the recent decision of *Petroleum Nasional Berhad v Kerajaan Negeri Terengganu*. This decision raises a short but nevertheless important and interesting procedural point.

THE BACK-DROP In 1978, the Government of the State of Terengganu vested in Petroleum Nasional Berhad ('Petronas') the ownership and exclusive rights to explore, exploit as well as to extract petroleum from its onshore or offshore in consideration of Petronas paying a cash sum equivalent to 5% of the value of petroleum extracted and sold. Having paid since 1978, Petronas ceased payment in early 2000. The Government of the State of Terengganu sued Petronas for breach of contract, deprivation of property, unfair discrimination, estoppel and unlawful or ultra vires acts; while the Federal Government of Malaysia was sued for inducement of breach of contract, unreasonableness and error of law.

THE ISSUES The issues for the court to determine were (i) whether the plaintiff (respondent in the Court of Appeal) had the rights to petroleum discovered off-shore in the continental shelf; and (ii) whether the plaintiff/ respondent had sovereign rights. These were pure legal questions based on the construction of documents, statutes, the Federal Constitution and the State Constitution of Terengganu. The court was also faced with the interpretation of the definition of 'continental shelf' and 'off-shore land'.

THE DOUBLE-BARREL The Rules of High Court 1980 ('RHC') has in its armoury, to short circuit lengthy and expensive if not protracted litigation, double barreled provisions in Order 14A and Order 33 rule 2. The former is comparatively a new inclusion made in 2000 that enables the court to determine any question of law or construction of document where it appears to the court that such question is suitable for determination without the full trial of the action and that such determination will finally determine the entire cause or matter or any claim or issue therein**.**

Order 33 rule 2 on the other hand provides that the court may order any question or issue arising in any cause or matter, whether of fact or law or partly of fact and partly of law, and whether raised by the pleadings or otherwise, to be tried before, at or after the trial of the cause or matter, and may give directions as to the manner in which the question or issue shall be stated.

THE GENESIS At the High Court, both the defendants (the appellants in the Court of Appeal) filed their respective applications to have the dispute resolved by way of Order 14A and Order 33 r 2 and had framed certain issues. The plaintiff/ respondent opposed the applications and contended that such suggested route would be imminently unsuitable, as the pleadings were voluminous; causes of action were

exhaustive; issues raised were complex; each cause of action raised multiple issues of facts and law; and that the questions of law were novel and difficult. It was also submitted that these questions of law could not be answered, either in isolation or vacuum, without considering documentary and oral evidence; discovery of documents; the large quantum of monies involved; and the fact that the dispute had heavy commercial and constitutional implications and importance.

The learned trial Judge, after hearing arguments, dismissed both the applications and held that the plaintiff/ respondent should be afforded an opportunity to adduce evidence through its witnesses, and that the framed issues did not consider the alternative causes of action raised by the plaintiff/ respondent. It was also held that Order 14A and Order 33 rule 2 should only be used in 'clear and simple' cases.

THE APPEAL The arguments of the defendants/ appellants not only attacked the above findings of the High Court but also its omission to consider certain matters relating to the core issue, collateral issues and the scope and applicability of both Order 14A and Order 33 rule 2 and the distinction between the two.

Having considered a plethora of precedents, the pleadings, the affidavit evidence and the full arguments, the Court of Appeal, in its considered judgment (delivered by his Lordship Mohd Noor Ahmad JCA) allowed the appeal and held inter alia as follows:

- If the questions framed for consideration are capable of disposing the threshold issues and thereby disposing of the primary or a substantive part of the suit, the court should proceed to determine that issue;

- The respondent to an application under Order 14A is not entitled to contend that he should be allowed to hunt around for evidence or to argue that 'something might turn up on discovery which could be relied upon or explain or modify the meaning of the relevant document.'

- In interpreting a statute, regard must be had to section 17A of the Interpretation Acts 1948 and 1967 which requires the court to apply the purposive approach and 'with regards to seeking the intention of Parliament, the correct approach is to ascertain the meaning of the words employed by Parliament rather then intention of Parliament.'

- On the interpretation of the definition of 'continental shelf' and 'off-shore land', there was no ambiguity in the legislation concerned.

- Subsequent conduct of parties is inadmissible to interpret an agreement but it is admissible to show where there was a contract and what the terms of the contract were, either originally or by variation, or as the basis for an estoppel.

- Merely because a case appears to be or is complicated, it does not mean that the court must shun away from considering the applicability of Order 14A and Order 33 rule 2 if the issues and questions of law posed are clear and definite.

ANALYSIS In the light of the Court of Appeal's refreshing and proactive approach, institutions are urged to take note of the importance of keeping and maintaining contemporaneous evidence of all events, which can successfully be used to settle facts so that issues could be framed and resort could be had to either or both Orders to circumvent delays and expensive trials - ZR*p*

BRIEF-UP...

BANKRUPTCY (AMENDMENT) ACT 2003

Act No
A1197

Act amended
Bankruptcy Act 1967

Date of coming into operation
1 October 2003

Amendments
Sections 2, 5, 33B, 43, 70, 71, 84, 84A, 104, 109, 110, 138, Schedule C

Deletion
Section 117

Notes
Section 2 is amended to provide for the definition of 'social guarantor'.

With the amendment to section 5, the minimum debt which enables a person to be declared a bankrupt has been increased from RM10,000 to RM30,000 and action will only be taken against the social guarantor after all steps to collect the debts have been taken against the borrower.

Section 109 has been amended to increase from RM100 to RM1,000, the minimum amount which cannot be borrowed by an undischarged bankrupt without informing the creditor that he is one - **ZR*p***

CONSUMER PROTECTION (AMENDMENT) ACT 2003

Act No
A1199

Act amended
Consumer Protection Act 1999

Date of coming into operation
1 September 2003

Amendments
Sections 86, 98, 99, 100, 101

Introduction
Section 109A

Notes
Section 86(1)(b)(i) is amended to enable additional members from among members of the Judicial and Legal Services to be appointed to the Tribunal.

With the amendments to sections 98(1), 100(1) and 101(1), the jurisdiction of the Consumer Tribunal is expanded in that the Tribunal may now hear and determine cases where the total amount claimed does not exceed RM25,000. Prior to the amendment, the Tribunal's jurisdiction was limited to the amount of RM10,000.

The introduction of section 109A is for the purpose of making it mandatory for the Tribunal to reduce into writing and publish in the gazette, any procedure established - **ZR*p***

PATENTS (AMENDMENT) ACT 2003

Act No
A1196

Act amended
Patents Act 1983

Date of coming into operation
14 August 2003

Amendments
Sections 34, 35, 52,

Introduction
Part XIVA (sections 78A – 78Q)

Deletion
Section 13

Notes
The amendments are primarily to provide for the international filing of patent and utility innovation applications under the Patent Co-operation Treaty ('the Treaty').

The Treaty was concluded in Washington and came into force in 1978. It facilitates the obtaining of protection of inventions where such protection is sought in any or all of the States that are parties to the Treaty. It enables the filing of one patent or utility innovation application in one State but having effect in several states instead of the applicant having to file separate applications in each of the States.

Malaysia is desirous of being a party to the treaty, hence the amendments - ZR*p*

COPYRIGHT (AMENDMENT) ACT 2003

Act No
A1195

Act amended
Copyright Act 1987

Date of coming into operation
1 October 2003

Amendments
Sections 3, 41, 41A, 43, 50, 54

Introduction
Section 50A

Notes
The definition of 'premises' in section 3 has been amended to exclude 'any place in the open air.'

The amendments to sections 41 and 43 are for the purpose of enhancing the punishment for criminal offences relating to copyright.

Section 41A is amended to enable only offences under subsidiary legislation made under the Act to be compounded.

Section 50A is introduced to provide the Assistant Controller with the power to arrest an offender without warrant. In consequence of this, section 50 has also been amended - ZR*p*

PAYMENT SYSTEMS ACT 2003

Act No
627

Date of coming into operation
1 November 2003

Notes
The Payment Systems Act 2003 ('the Act') consolidates the provisions relating to payment systems which were previously found in the Banking and Financial Institutions Act 1989 ('BAFIA') and the Central Bank Act 1958 ('CBA'). The entry of non-banking institutions into the payment services industry has also made it vital for a comprehensive legislative framework.

The Act seeks to make provisions for the regulation and supervision of payment systems and payment instruments in Malaysia consistent with one of the principal objects of the Central Bank, by virtue of the CBA, which is to promote monetary stability and a sound financial structure.

Section 2 which is in Part I of the Act contains definitions including 'payment instrument' and 'payment system'. Part II of the Act refers to Payment Systems while Payment Instruments is dealt with in Part III. The powers of the Central Bank are provided for in Part IV while references to Investigation, Search and Seizure are made in Part V. Offences are dealt with in Part VI while Part VII refers to Miscellaneous - ZR*p*

MONEYLENDERS (AMENDMENT) ACT 2003

Act No
A1193

Act amended
Moneylenders Act 1951

Date of coming into operation
1 November 2003

Amendments
Sections 2, 2A, 4, 5, 6, 8, 9, 11, 12, 15, 16, 17, 18, 19, 21, 23, 25, 26, 27, 29

Introduction
Sections 4A, 5A, 5B, 5C, 5D, 5E, 9A, 9B, 9C, 9D, 9E, 9F, 9G, 10A, 10B, 10C, 10D, 10E, 10F, 10G, 10H, 10I, 10J, 10K, 10L, 10M, 10N, 10O, 10P, 11A, 17A, 29A, 29B, 29C, 29D, 29E, 29F, 29G, 29H

Deletion
Sections 3, 7, 10, 13, 14, 22, 24, 28, 30, 30A, Second Schedule,

Notes
See article on page 3 - ZR*p*

SC GUIDELINES ON ISSUE/ OFFER OF SECURITIES

GUIDANCE NOTES 7A & 7B ISSUED PURSUANT TO CHAPTER 7 OF THE POLICIES AND GUIDELINES ON ISSUE/ OFFER OF SECURITIES

Date of coming into operation
19 September 2003

Notes
With the revised listing policy of the Securities Commission ('SC'), Malaysian-owned companies with foreign companies and quality foreign corporations operating in Malaysia can now list on the Kuala Lumpur Stock Exchange ('KLSE'). The purpose of the Guidance Notes was to clarify the requirements relating to the listing of foreign corporations and foreign-based operations on the KLSE and any subsequent issue, offer and listing of the securities.

It is hoped that the listing of these companies will increase the diversity and the quality of companies listed on the KLSE and expand the range of investment opportunities for investors.

Under Guidance Note 7A, 'foreign corporation' is defined as 'an entity incorporated outside the jurisdiction of Malaysia and formed on the principle of having the liability of the members limited by its constituent documents to an amount unpaid on the shares respectively held by them and where there is no limitation on the number of members imposed by its constituent documents.'

A foreign corporation can only seek primary listing on the KLSE and apply for listing and quotation on the Main Board. It must be denominated in Ringgit Malaysia. Before submission to the SC for approval, a foreign corporation must first obtain approval of all its domestic regulatory authorities, as may be required. The approval of Bank Negara Malaysia is required for the use of proceeds from the issue/offering of securities.

Guidance Note 7A also sets out the criteria for listing and the factors which the SC would take into consideration in approving or rejecting the foreign corporation's application.

Guidance Note 7B was issued to clarify the percentage ratios used in determining the extent of foreign-based operations of a company seeking listing on the KLSE. The percentage ratios used are the net tangible asset ('NTA') of the foreign-based operations divided by the NTA of the group and the after-tax-profit ('PAT') of the foreign based operations divided by the PAT of the group based on the latest available full financial year accounts, proforma balance sheet (for NTA ratio) and the profit forecast (for PAT ratio) submitted to the SC. If any of the percentage ratios is above 25%, the corporation would be considered as having a substantial foreign-based operations. If any of the percentage ratios is above 50%, the corporation would be considered as having a major foreign-based operations - **ZR*p***

They (the Law Lords) think the great aim is certainty in the law. My aim is justice.
- Lord Denning

SC GUIDELINES ON ISSUE/ OFFER OF SECURITIES –
GUIDANCE NOTE 8A ISSUED PURSUANT TO CHAPTER 8 (EQUITY OFFERINGS) OF THE POLICIES AND GUIDELINES ON ISSUE/ OFFER OF SECURITIES

Date of coming into force
18 November 2003

Notes
A listed company now submitting proposals for share splits to the SC need not appoint a principal adviser for the purposes of the submission. A three month deadline is imposed - ZR*p*

KLSE LISTING REQUIREMENTS -
AMENDMENTS IN RELATION TO DOCUMENTS TO BE SUBMITTED IN RELATION TO APPLICATION FOR QUOTATION

Date of coming into operation
1 December 2003

Amendments
Appendix 3A Part C, Appendix 5A Part B

Notes
An applicant must now provide an undertaking that all notices of allotment will be issued and despatched to all successful applicants prior to the date for listing and quotation of the securities or call warrants in support of an application for quotation of securities - ZR*p*

KLSE LISTING REQUIREMENTS –
AMENDMENTS IN RELATION TO SHARE BUY-BACK

Date of coming into operation
1 November 2003

Amendments
Paragraphs 12.06, 12.16, 12.17, 12.19 Appendix 12A Part B

Notes
Listed companies now have the option to issue a Share Buy-back statement accompanied by a notice of general meeting instead of issuing a shareholder's circular when renewing an existing shareholder's mandate for Share Buy-back. A Share Buy-back statement is a concise document containing minimum contents of most relevant information as set out in Appendix 12A Part B of the KLSE Listing Requirements ('the Listing Requirements'). The information required is similar to the contents of a shareholder's circular. Before the issuance of the Share Buy-back statement, the draft statement together with a checklist has to be submitted to KLSE for its prior approval.

The objective of the amendment is to save time and administrative costs and to provide listed companies with more flexibility.

The amendments have also allowed listed companies to appoint up to two stock-broking companies for the purpose of purchasing its own shares or re-selling treasury shares on the KLSE - ZR*p*

KLSE LISTING REQUIREMENTS – AMENDMENTS IN RELATION TO RATIONALIZATION WITH THE SC GUIDELINES

Date of coming into operation
1 September 2003

Amendments
Paragraphs 1.01, 3.04, 3.13, 4.02, 5.04, 5.06, 6.22, 8.38, 9.42, 9.43, Appendix 5B, Appendix 9C Part C and Appendix 9D Part A

Notes
Some aspects of the amendments are with regard to the definition of 'infrastructure project company' and rules with regard to minimum issued and paid-up share capital and property trusts funds.

INFRASTRUCTURE PROJECT COMPANY The definition of 'infrastructure project company' has been amended to have the same meaning given in the SC Guidelines on Issue/Offer of Securities, i.e. 'a public company which has its core business in an infrastructure project.'

MINIMUM ISSUED & PAID-UP CAPITAL With regard to the minimum issued and paid-up share capital, an applicant seeking listing on the Main Board and Second Board must now meet the new minimum requirement of having an issued and paid-up share capital of RM60 million comprising ordinary shares of at least RM0.10 each and RM40 million comprising ordinary shares of at least RM0.10 each respectively.

CALL WARRANTS In relation to the issue of call warrants, in view of the revised SC Guidelines which were introduced on 1 May 2003, the maturity date of call warrants has been amended to no earlier than six months and no later than five years from the date of issue. The amended Listing Requirements no longer sets out the other terms of issue of call warrants since an issuer may now refer to the SC Guidelines of Issue of Call Warrants. An issuer, however, must ensure that on initial listing, the call warrants must be credited in the securities accounts of at least 100 holders of call warrants holding not less than one board lot of call warrants each.

ADVERTISEMENT FOR PROSPECTUS In view of the amendments, an applicant seeking listing on the Main Board and Second Board is no longer required to publish an advertisement for its abridged prospectus, prospectus or application forms in a widely circulated daily Bahasa Malaysia and English newspaper.

PROPERTY TRUSTS FUNDS Directors of the management company dealing with Property Trust Funds ('the management company') must comply with paragraph 15.03 of the Listing Requirements that requires (i) an appointed director of the listed issuer to provide a letter of undertaking to comply with the Listing Requirements; and (ii) an appointed independent director of a listed issuer to provide a letter of confirmation of his 'independence', to the KLSE not later than 14 days after his appointment - **ZR*p***

KLSE LISTING REQUIREMENTS – AMENDMENTS IN RELATION TO TIMEFRAME FOR LISTING AND QUOTATION OF SECURITIES AFTER THE RECEIPT OF THE APPLICATION FOR QUOTATION

Date of coming into operation
1 September 2003

Amendments
Paragraphs 3.07, 5.07, 6.03

Notes
The amendment has reduced the timeframe for admission of securities to the Official List and quotation in the KLSE from three to two clear market days after receipt of the completed application for quotation together with the requisite documents and/or confirmations. Similarly, the timeframe for admission of call warrants and new issue of securities have also been reduced to two clear market days after receipt of the completed application for quotation.

It is to be noted that paragraphs 2.23.1 and 3.3.1 of the MESDAQ Listing Requirements have also been amended. The admission process for shares to the Official List has been reduced to two clear market days after receipt of the completed application for quotation together with the requisite documents and/ or confirmations. The timeframe also applies to new issues of securities - ZR*p*

BRIEFLY...

FOREIGN

ALL STRESSED OUT (AT WORK) !

In what has been described as a landmark case, the British Health & Safety Executive (HSE) issued its first 'improvement notice' against a National Health Service hospital for failing to protect doctors and nurses from stress at work. The 'improvement notice' was issued after investigating a written complaint by a former employee about alleged bullying and the long-hours culture of the hospital.

The hospital has until December 2003 to assess stress levels among its over a 1000 staff members and to find a way to reduce stress levels, failing which, the hospital will be liable to court action and fines under the UK Health & Safety at Work Act 1974.

While some have argued that this is the latest and most convenient weapon used by trade unions and their members with which to beat employers, new research has indicated that long-term stress is bad for the heart because workers deal with it by smoking, drinking and 'slobbing-out'.

Though the steps taken by the HSE may be progressive for employees generally, an issue for serious consideration is how to develop a practical process to assess workplace stress. While employees could undertake an isolated stress audit and identify problems, they may not be able to provide solutions - ZR*p*

LOCAL

ANTI-TERROR LAWS – BAD NEWS FOR WHOM?

The Penal Code (Amendment) Bill 2003 ('the Bill') seeks to punish not just terrorists but also those who provide them with financial services or facilities.

Section 130 O of the Bill reads as follows:

> (1) Whoever, directly or indirectly, provides or makes available financial services or facilities –
>
> (a) intending … or knowing or having reasonable grounds to believe that the services or facilities will be used … for the purpose of committing or facilitating the commission of a terrorist act …; or
>
> (b) knowing or having reasonable grounds to believe that … the services or facilities will be used by or will benefit any terrorist …;
>
> shall be punished –
>
> (aa) if the act results in death, with death; and
>
> (bb) in any other case, with imprisonment for a term of not less than seven years but not exceeding thirty years, and shall also be liable to a fine.
>
> (2) For the purposes of subsection (1), 'financial services or facilities' includes the services and facilities offered by *lawyers and accountants* acting as nominees or agents for their clients.

The offence is also referred to in the amendments to the Anti-Money Laundering Act 2001 (soon to be known as the Anti-Money Laundering and Anti-Terrorism Financing Act) ('the Act') as 'terrorism-financing' offences. Persons charged with such offences are liable to be prosecuted under the Act as well. Amendments to the Act also seek to extend the powers to freeze, seize and forfeit property used in the commission of terrorism financing offences.

Human rights bodies argue that such punitive measures in both the Bill and Act cannot be justified, compounded by the lack of clarity over the definition of 'terrorism' and 'acts of terror'. In fact it has also been argued that the amendments are '…bad news for journalists'.

The main grouse is the drafters' failure to adequately define 'terrorist acts' which are not being differentiated from other crimes. For instance, the Bill makes reference to 'terrorist acts' as one that 'involves, or threatens to involve serious bodily injury to people, damage to property, and creates a risk to the health or safety of the public.' It has been questioned how that is different from other 'crimes' – for example, if one were to cause serious bodily injury to another or threaten to do so, does that make him a terrorist?

The Bar Council and the Malaysian Institute of Accountants have called for a reconsideration of the proposed changes because they place an overwhelming burden on lawyers and accountants but the Government has defended the proposal on the basis that many such activities are hidden behind the façade of legitimate organizations.

In the light of rampant acts of terror on a global level, the fears expressed by the Government may very well be legitimate - ZR*p*

STOP THE PRESS !!!

On 18 December 2003, the Court of Appeal in *Puncakdana Sdn Bhd v Tribunal for Housebuyers Claims & Anor Application* set aside the decision of the High Court that declared that the Tribunal did not have jurisdiction to hear claims on properties where the sale and purchase agreements were signed before 1 December 2002.

The Court of Appeal judges have reinstated all the awards handed down by the Tribunal in several cases involving properties purchased before 1 December 2002.

The decision of the Court of Appeal has been referred to by Housing and Local Government Minister Datuk Seri Ong Ka Ting as …'a very good decision' while National Housebuyers Association Secretary-General, Chang Kim Loong welcomed it as '…a progressive and promising step towards its implementation.'

ZR*p* IN-BRIEF...

The ZR*p* Brief is published for the purposes of updating its readers on the latest development in case law as well as legislation.

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