Brief: 2/04 Folder: 1/ Jan - March

THE ZRp BRIEF

KDN No: PP12857/8/2004

BRIEFING...

LEGAL PROFESSION

SOME WALLS HAVE EARS...

We have heard of Hadrian's Wall, the Wailing Wall, Berlin Wall and the Great Wall of China. Whether to keep away the Caledonians, the suicide bombers, the West Germans or the barbarians from the North, they all have one thing in common – to separate and divide.

The term 'Chinese Wall' is now part of corporate jargon. What is the intention of erecting such a wall and whom are we keeping away?

THE GREAT WALL The term 'Chinese Wall' is used to describe a rule prohibiting the exchange of confidential information between different departments of an organisation, typically a financial institution. It refers to communication barriers between members or departments. They were built in establishments as early as the 1930s, following the 1929 crash where it became apparent that there was a need to separate investment bankers from brokerage firms in order to avoid the conflict of interest between objective analysis and the desire to have a successful stock offering. They were also constructed to ensure that price-sensitive information is not leaked – for example from a corporate finance department involved in a takeover to a dealer who would be in a position to buy shares in the companies involved.

The term 'Chinese Wall' was supposed to reflect the strength and almost impermeability of the Great Wall of China. Though imaginary, some firms have literally built Chinese Walls by way of physically separating their departments.

PRINCE JEFFRI BOLKIAH V KPMG A discussion of Chinese Walls would not be complete without reference to the decision of the House of Lords in *Prince Jeffri Bolkiah v KPMG* (1999). The case concerned a firm of accountants that had been retained for a period of 18 months by Prince Jeffri Bolkiah (then the Chairman of Brunei Investment Agency ('BIA')) to provide forensic accounting services and litigation support in a private litigation in which he was involved. Prince Jeffri was subsequently dismissed from his position as chairman of BIA and the Brunei Government retained KPMG to assist in investigations into the conduct of the affairs of BIA whilst Prince Jeffri was Chairman.

The issue for consideration was whether KPMG could act for the Brunei Government to investigate BIA when it had previously acted for Prince Jeffri, notwithstanding that KPMG had ceased acting for him.

Despite the fact that KPMG had, according to them, erected a Chinese Wall, the House of Lords restored the decision of the court of first instance in not allowing KPMG to work on the case. The basis of the decision was that while it is one thing to separate the insolvency, audit, taxation and forensic departments of a large, multi-office firm of accountants from one another and erect Chinese Walls, it is another to attempt to place a communication barrier between members – all of whom are drawn from the same department and have been accustomed to working with each other.

ERECTING THE WALL In *Prince Jeffri v KPMG* it was held that an impregnable and impermeable Chinese Wall could be erected if some of the following were done:

- Physical separation of the various departments of a firm;
- Training and education to ensure that staff members are aware of the need to maintain the confidentiality of the information;
- Enforcement of strict procedures and sanctions when someone 'climbs over the wall'; and
- Appointment of 'Wall Inspectors'.

EXTENDING THE WALL An interesting issue is whether it is possible to erect Chinese Walls in a law firm, bearing in mind that the position of an advocate and solicitor is very clearly laid down in rule 5(b)(i) of the Legal Profession (Practice & Etiquette) Rules 1978 where it is stated:

> An advocate and solicitor who has at any time advised or drawn pleadings or acted for a party in connection with the institution or prosecution or defence of any suit, appeal or other proceedings shall not act, appear or plead for the opposite party in that suit, appeal or other proceedings.

In fact the issues of client confidentiality and Chinese Walls were dealt with recently by the High Court in *Kayla Beverly Hills (M) Sdn Bhd v Quantum Far East Ltd & Ors; Uma Devi R Balakrishnan (Third Party)* (2003) where it was held that an advocate and solicitor acting for the plaintiff in a related suit could not act for the third party (against the plaintiff) in the present suit especially when the third party gave conflicting evidence on oath in both suits.

Kayla Beverly Hills (M) Sdn Bhd v Quantum Far East Ltd & Ors; Uma Devi R Balakrishnan (Third Party) was an obvious case of conflict of interest as the lawyer was personally involved in the conduct of both suits.

When dealing with a large firm of solicitors however, the question that arises is whether the knowledge of one lawyer should be imputed to all other lawyers, associates and partners.

In the Canadian case of *Martin v Gray* (1990) it was held that as a general rule it is presumed that lawyers who work together share confidences unless it can be shown on the basis of clear and convincing evidence that all reasonable measures have been taken to ensure that no disclosure will be made by the lawyer (who has the knowledge) to the member or members of the firm who are engaged against the former client – and such reasonable measures would include institutional mechanisms such as Chinese Walls.

CONCLUSION Caution however must be exercised in applying and implementing the concept of Chinese Walls. It must be noted that governing bodies of the legal profession have yet to approve of these measures. These communication barriers therefore should not be taken as foolproof.

In the words of Robert Kingston in *Law: Invasion of the Bean-Counters:*

> There is not a Chinese Wall over which a grapevine cannot grow.

After all, if the Great Wall of China had failed to keep away the barbarians from the North, how much could we expect of fictitious walls such as these - ZR*p*

INSURANCE

TAKAFUL - AN ISLAMIC CONCEPT DEFINED... Syarikat Takaful Malaysia Bhd won the Best Provider of Takaful Services award from Euromoney, an international financial publication based in London.

We explore the meaning of Takaful and how it differs from conventional insurance.

DEFINITION 'Insurance' is essentially a contract made with reference to an event, the occurrence of which is uncertain. The contract must provide that the assured will become entitled to something on the occurrence of some event, and the event must be one that involves some element of uncertainty. It therefore insures against the risk of the occurrence of the event. In Islam, the concept of insurance embraces the concepts of mutual protection and shared responsibility as seen in the practice of blood money or *diyah* under the Arab tribal custom.

The rules of insurance in Islam are called Takaful, a noun stemming from the Arabic verb kafal, which means 'taking care of one's needs'. The basic objective of takaful is to pay for a defined loss out of a defined fund. The loss will not be transferred as a liability to any intermediary as the operation does not fall under the contract of buying and selling whereby the seller would normally agree to provide the guarantee.

A takaful contract is classified as a donation contract in which the aim is not to obtain undue advantage at the cost of other participants but its intentions are to limit losses and spread the liability amongst the participants equally. This encapsulates the nature of takaful itself - co-operation and mutual assistance.

A LEGAL FRAMEWORK In Malaysia, takaful is governed by the Takaful Act 1984 ('the Act') wherein section 2 defines 'takaful' as:

> …a scheme based on brotherhood, solidarity and mutual assistance which provides for mutual financial aid and assistance to the participants in case of a need whereby the participants mutually agree to contribute for that purpose.

Apart from the Act, takaful is also governed by the Takaful (Statutory Deposits) Regulations 1985 and the Takaful (Annual Registration) Fees Regulations 1985.

TAKAFUL V CONVENTIONAL INSURANCE

The Insurer

The main difference between takaful and conventional insurance lies in the fact that in takaful, the company is not the insurer insuring the participants or members. As reflected by the definition in the Act, the persons participating in the takaful scheme mutually insure one another. The takaful company facilitates the risk mitigation process, that is to say, it merely handles the investment, business and administration matters of the scheme. Further, as in any Islamic financial transaction, takaful forbids uncertainty (*Gharar*), the presence of interest (*Riba*) and the element of gambling (*Maisir*). These concepts are fundamentally forbidden in Islam and freedom from these concepts is considered the most important norm of Islamic financial ethics.

Risk

Conventional insurance relates to losses arising from unpredictable future events associated with risk. The premium payee, or the insured, in return for a guarantee by the insurance company, substitutes certainty for uncertainty, for instance the impact of an unforeseen disaster is softened by the provision of compensation. In this regard, it has been argued that the basis for the computation of such compensation paid is totally unknown to the insured. This is akin to *Gharar* or uncertainty in Islam and is strictly forbidden in contractual relations. Although takaful insurance is not altogether free from *Gharar* or uncertainty, its effect is considered trifle because in takaful there is a paradigm shift from a state of competing interests among the contracting parties to a form of contract that is based on co-operation and mutual support in order to combat calamity and loss. Further, takaful contracts specify the manner of profit sharing amongst the persons participating in the scheme (as contributors of capital) and the company as the facilitator of the process.

Interest

In essence, conventional insurance also relies on the generation of interest. An example of conventional insurance is life insurance, in which the beneficiaries will receive an amount greatly exceeding the amount of premium paid by the insured in addition to interest, dividends as well as all the premiums paid by the insured prior to his death. In takaful, the compensation as agreed in the contract is paid out of a common fund comprising portions from each takaful instalment paid by the participants. These instalments consist of defined amounts and are paid as a contribution or donation (*Al-Tabarru'*). The funds are invested in accordance with the *Mudharabah* principles and in charity funds as compared to conventional insurance in which premiums are invested in interest-bearing accounts or in companies, which may be undesirable as some of these companies may be dealing in activities forbidden by Islam.

Gambling

If *Gharar* exists in conventional insurance policies, it implicitly follows that there also exists an element of gambling or *Maisir*. Arguably, dealing in transactions involving considerable uncertainty may be construed as gambling and in this regard, conventional insurance involves a contract of indemnity in which monies would be paid pursuant to a chance that an event may or may not take place. On the other hand, takaful, being based on a contract of 'mutual financial aid and assistance' centres upon the provision of material security on the basis of 'brotherhood and solidarity' in the event of any unexpected future loss. If the amount named in the policy falls short of the damage incurred (which is within the scope of the policy), the takaful operator may allow beneficiaries an additional amount to cover the shortfall.

THE WAY FORWARD Takaful is not restricted to only certain schemes. It has a variety of services that fall under different categories, namely, the family solidarity business (individual and group plans) and general business, which also consists of various protection plans and schemes. The fundamentals of takaful as embodied in the statute comprise mutual contribution and solidarity by provision of mutual financial aid and assistance in case of a need. It also refrains from practices antagonistic to Syariah. It upholds the concept of trusteeship and is not aimed at self-enrichment. Thus, from an Islamic point of view, takaful must be seen as the way forward - ZR*p*

BRIEF-CASE...

CONTRACT/ PROCEDURE

HO LAI YING & ANOR v CEMPAKA FINANCE BHD – December 2003, Court of Appeal

FACTS In this case, the respondent company had given a facility to the first appellant (borrower) that was guaranteed by the second appellant (guarantor). The appellants had challenged the certificate of indebtedness that was relied upon by the respondent in its application for summary judgment - on the ground that the respondent had failed to produce a statement of accounts to verify the amount claimed.

HELD It was held that a certificate of indebtedness in itself was not sufficient to establish a prima facie case of indebtedness which had enabled the respondent to obtain summary judgment against the appellants.

In this case the court, agreeing with the appellants, ruled that there was a triable issue and that the certificate of indebtedness could be conclusive only if the respondent's affidavits clearly illustrated how the sum claimed was arrived at.

ANALYSIS The ruling by the Court of Appeal demolishes the efficacy of the certificate of indebtedness as a contractually agreed method of determining the amount that is due and owing by the borrower. Hitherto, the approach of the courts is that unless it can be shown that there is fraud or manifest error in the amount stated, the certificate is generally regarded as conclusive.

On the face of the judgment of the Court of Appeal, it appears that several important decisions were not cited to the court - or if cited, were not considered. The following cases (which support the conclusiveness of a certificate of indebtedness) were not considered by the Court of Appeal, namely *Citibank NA v Ooi Boon Leong & Ors* (1981) (Federal Court, Malaysia); *Siong Holdings Sdn Bhd v Development & Commercial Bank Bhd* (1997) (Court of Appeal Malaysia); *Bache & Co (London) Ltd v Banque Vernes E Commerciale De Paris SA* (1973) (Court of Appeal, England) and *Dobbs v National Bank of Australasia Ltd* (1935) (High Court, Australia)

CONCLUSION To the extent that important cases were not considered by the Court of Appeal, the judgment may be regarded as 'per incuriam'. However, it is unlikely that Registrars or Judges of the High Court would readily accept the 'per incuriam' argument. Instead they are more likely to passively follow the principle enunciated by the Court of Appeal, rendering the certificate inconclusive. It would be prudent therefore to annex the certificate as well as the statement of accounts and to demonstrate on affidavit, how the amount that is being claimed was arrived at. Perhaps in due course, the Federal Court may have an opportunity to reverse the decision of the Court of Appeal in *Ho Lai Ying & Anor v Cempaka Finance Bhd* and resurrect the conclusiveness of the certificate of indebtedness.

POSTSCRIPT It may be interesting to note another Court of Appeal case on the same point - *Soon Peng Yam & Anor v Bank Of Tokyo-Mitsubishi (Malaysia) Bhd* (2004) which endorses the same principle – that the certificate of indebtedness is not conclusive proof of the debts due - ZR*p*

BRIEF-UP...

FINANCE ACT 2003

Act No
631

Acts amended
Income Tax Act 1967, Finance (No 2) Act 1998, Income Tax (Amendment) Act 2000, Petroleum (Income Tax) Act 1967, Labuan Offshore Business Activity Tax Act 1990

Date of coming into operation
See provisions in the Act

Amendments

- **Income Tax Act 1967 - sections 2, 34, 34A, 35, 36, 39, 48, 77, 77A, 103, 103A, 107C and 108; Schedules 1, 3 and 6**
- **Income Tax (Amendment) Act 2000 – section 24**
- **Finance (No 2) Act 1988 – section 3**
- **Labuan Offshore Business Activity Tax Act 1990 – section 11**
- **Petroleum (Income Tax) Act 1967 – section 18**

Introduction

- **Income Tax Act 1967 - section 46A**
- **Labuan Offshore Business Activity Tax Act 1990 - section 8A** – ZR*p*

DEMUTUALISATION (KUALA LUMPUR STOCK EXCHANGE) ACT 2003

Act No
632

Date of coming into operation
2 January 2004

Notes
Section 4 outlines the consequences of the conversion of the Exchange. This section specifically excludes the application of certain provisions of the Securities Commission Act 1993 and the Companies Act 1965 to matters relating to the allotment, issue and acquisition of new shares upon such conversion. Section 4 also prohibits the disposal of the voting shares issued upon the conversion of the Exchange until the shares have been listed unless the approval of the Minister is obtained.

Section 6 provides for the status of a member company upon conversion where such member company shall be recognized as a participating organisation by the transferee company and shall be subject to the rules of the transferee company.

Section 9 contains provisions relating to the vesting of the property, rights and liabilities of the Exchange to the transferee company while section 10 provides that the approval of the Minister granted to the Exchange before the conversion date is deemed to have been transferred to the transferee company on the vesting date - ZR*p*

SECURITIES COMMISSION (AMENDMENT) ACT 2003

Act No
A1217

Act amended
Securities Commission Act 1993

Date of coming into operation
5 January 2004

Amendments
Sections 2, 2E, 4, 15, 22, 33D, 45, 152 and 158; Schedules 1, 2 and 3

Introduction
Sections 2F, 2G, 2H and 151A

Notes
Amendments to certain definitions in section 2 are made primarily to reflect the demutualisation of the Kuala Lumpur Stock Exchange.

The introduction of sections 2F, 2G and 2H is for the purpose of ensuring that securities laws are 'technology neutral'.

The amendments to sections 33D and 158 are for the purpose of clarifying the range of actions that may be taken by the Securities Commission against persons who fail to comply with the provisions – ZR*p*

Even when laws have been written down, they ought not always to remain unaltered -
Aristotle (384 – 322 BC)

SECURITIES INDUSTRY (CENTRAL DEPOSITORIES) (AMENDMENT) ACT 2003

Act No
A1216

Act amended
Securities Industry (Central Depositories) Act 1991

Date of coming into operation
5 January 2004

Amendments
Sections 2, 4, 5, 13, 14, 19, 58 and 62; Section 29 of the Securities Industry (Central Depositories) (Amendment) (No 2) Act 1998

Introduction
Sections 5A, 5B, 5C and 61B

Notes
Amendments to certain definitions in section 2 are made primarily to reflect the demutualisation of the Kuala Lumpur Stock Exchange.

The new section 5A sets out the grounds and procedures for the withdrawal of the approval granted to a central depository while section 5B sets out the effect of the withdrawal of the approval granted to a central depository. Section 5C on the other hand provides that an exchange holding company and its subsidiary central depository are subject to the relevant provisions of section 11D and 11J of the Securities Industry Act 1983 that apply to such exchange holding company and central depository – ZR*p*

SECURITIES INDUSTRY (AMENDMENT) ACT 2003

Act No
A1218

Act amended
Securities Industry Act 1983

Date of coming into operation
5 January 2004

Amendments
Sections 2, 7, 8, 8B, 9A, 9B, 10, 11, 11B, 14, 15A, 23, 24, 34, 40, 40A, 41, 47C, 48, 50, 59, 62, 67, 68, 69, 70, 72, 78, 79, 82, 83B, 89J, 90A, 92, 93, 95, 98, 100, 100A, 120, 122B, 124 and 126A

Introduction
Sections 8C, 8D, 9D, 9E, 11C – P, 28B, 47F, 99E and 99F; Parts VIIIA, XA

Deletion
Section 126B

Notes
Section 2 of the Act is amended to introduce the definitions of several new terms such as 'exchange company', 'exchange holding company', 'holding company', 'participating organization' and 'public interest directors' while the amendments to section 11 are consequential to the demutualisation of the stock exchange.

Sections 11C – P seek to introduce a public interest and public accountability framework in relation to an exchange holding company, following the demutulisation of the stock exchange.

The amendments introduce Part VIIIA (comprising sections 83C – Q) entitled 'Capital Market Development Fund' and Part XA (comprising sections 101 – 117) entitled 'Modifications to the Law of Insolvency and Miscellaneous Provisions Relating to the Operations and Procedures for the Recognized Clearing House', the provisions of which are for the purpose of ensuring the systematic integrity of the clearing and settlement arrangements of the recognized clearing house - ZR*p*

ISLAMIC BANKING (AMENDMENT) ACT 2003

Act No
A1214

Act amended
Islamic Banking Act 1983

Date of coming into operation
1 January 2004

Amendments
Sections 3 and 21

Introduction
Section 13A

Notes
The new section 13A enables an Islamic bank to seek the advice of the Syariah Advisory Council established under section 16B(1) of the Central Bank of Malaysia Act 1958. The advice of the Council must be complied with by the Islamic bank - ZR*p*

PAWNBROKERS (AMENDMENT) ACT 2003

Act No
A1209

Act amended
Pawnbrokers Act 1972

Date of coming into operation
1 January 2004

Amendments
Sections 2, 3, 7, 8, 9, 10, 11, 12, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 28, 29, 30, 31, 34, 39, 40, 41, 43 and 45

Introduction
Sections 8A, 10A, 10B, 10C, 11A, 11B, 11C, 11D, 11E, 11F, 11G, 13A, 41A, 43A, 43B, 43C and 46A; Parts IA, IB, IIA, IVA and IVB

Deletion
Sections 33, 38 and 44

Notes
Whilst section 3 is amended to increase from RM5,000 to RM10,000 the amount of money which when lent on the security of any pledge, makes the transaction a pawning, section 23 is amended to increase from RM100 to RM200 the value of the pledge which can be the property of the pawnbroker in the event the pawner fails to redeem such pledge within the stipulated time.

The new section 8A provides the circumstances under which a licence shall not be issued while the new sections 10A, 10B and 10C contain provisions regarding the conditions that may be attached to a licence - ZR*p*

TAKAFUL (AMENDMENT) ACT 2003

Act No
A1212

Act amended
Takaful Act 1984

Date of coming into operation
1 January 2004

Amendments
Section 8

Introduction
Section 53A

Notes
Section 8 is amended to provide for the change of name of the 'Syariah Supervisory Council' to the 'Syariah advisory body' and the requirement to include in the Articles of Association of a takaful operator a provision for the establishment of a Syariah advisory body as may be approved by the Director General.

The new section 53A will enable a takaful operator, a takaful agent, a takaful broker and an adjuster (this includes an association whose members are takaful operators, takaful agents, takaful brokers or adjusters, and an association whose members are insurance companies, insurance agents, insurance brokers or insurance adjusters, some of whom operate takaful businesses) to seek the advice of the Syariah Advisory Council established under subsection 16B(1) of the Central Bank of Malaysia Act 1958 and the advice of the Council must be complied with - ZR*p*

FUTURES INDUSTRY (AMENDMENT) ACT 2003

Act No
A1215

Act amended
Futures Industry Act 1993

Date of coming into operation
5 January 2004

Amendments
Sections 2, 4, 5, 6B, 7, 7A, 8, 10, 12, 20, 22, 25, 28, 35 and 106C

Introduction
Sections 4A, 7B, 36A and 106D

Deletion
Section 6C

Notes
The amendments to sections 2 and 35 and the deletion of section 6C are consequential to the demutualisation of the stock exchange. The introduction of section 4A and the amendment of section 6B are in connection to the provisions of the Securities Industry Act 1983.

Amendments to sections 20, 22 and 25 are to provide flexibility to the Securities Commission in terms of exemption of certain persons and in the duration of licences granted by the Commission - ZR*p*

CENTRAL BANK OF MALAYSIA (AMENDMENT) ACT 2003

Act No
A1213

Act amended
Central Bank of Malaysia Act 1958

Date of coming into operation
1 January 2004

Amendments
Sections 2, 4, 30, 37, 42, 49 and 51

Introduction
Sections 16B, 30A, 44A, 44B, 44C, 44D and 54A

Notes
The new section 16B provides for the establishment of the Syariah Advisory Council in the Central Bank to advise the Central Bank on Syariah matters in relation to the Islamic financial industry. Section 37 on the other hand is amended to introduce subsections (4), (5) and (6) to empower the Central Bank to require banking institutions which fail to comply with the recommendations of the Central Bank made pursuant to subsection (1) of section 37 in relation to the granting of advances and the extension of credit facilities to place a sum on deposit with the Central Bank.

The new sections 44A, 44B, 44C and 44D expressly empower the Central Bank to carry out its functions in developing the ringgit bond market - ZR*p*

BANKING AND FINANCIAL INSTITUTIONS (AMENDMENT) ACT 2003

Act No
A1211

Act amended
Banking and Financial Institutions Act 1989

Date of coming into operation
1 January 2004

Amendments
Sections 2, 15, 19, 23, 33, 116 and 124; Third and Fourth Schedules

Deletion
Section 119

Notes
The purpose of amending sections 2, 19, 23, 116 and 119 and the Third and Fourth Schedules is to reflect the regulation of payment systems and payment instruments under the Payment Systems Act 2003.

Section 124 is amended to introduce the definition of 'Syariah Advisory Council' – ZR*p*

SC GUIDELINES GUIDANCE NOTE 3
GUIDELINES ON ASSET VALUATION

Date of coming into operation
9 February 2004

Notes
Under the MSEB Listing Requirements and the MSEB Listing Requirements for MESDAQ Market, where bonus issue is to be made by way of capitalisation of reserves arising from revaluation of lands and buildings, a property valuation report must be prepared in compliance with the Guidelines on Asset Valuation and the guidance note was issued to provide clarification of the contents of the valuation reports prepared for the said purpose - ZR*p*

SC GUIDELINES GUIDANCE NOTE 6B
ISSUED PURSUANT TO CHAPTER 6 (PUBLIC OFFERINGS AND LISTINGS ON KLSE)

Date of coming into operation
9 January 2004

Notes
The guidance note was issued to replace paragraph 2.1 of Guidance Note 6 in relation to the minimum public offer size. The public offer portion should constitute at least 5% of the company's enlarged issued and paid-up capital or an aggregate of RM3 million in par value, whichever is higher - ZR*p*

MSEB LISTING REQUIREMENTS
AMENDMENTS CONSEQUENTIAL TO THE DEMUTUALISATION OF THE KLSE

Date of coming into operation
5 January 2004

Amendments
Paragraphs 1.01, 1.02A, 2.24, 2.26, 2.27, 3.16(3), 6.24(2), 7.38(7), 8.09, 8.09(1A), 8.15(1), 8.15(5), 8.33(3), 9.20, 9.21(2), 9.22, 9.26, 10.08(4), 11.02, 11.09, 11.13, 11.14, 11.15, 11.16, 12.02, 12.16, 12.17, 16.09, 16.13; Appendices 2A, 3A Part C, 3A Part D, 3B, 3C, 3D, 4B Part C, 4C, 4D, 4E, 5A Part B, 5C, 5D, 6A Part C, 6C Part A, 6D, 9B, 10B Part A, 11B, 11C, 12A, 13B and 15A

Notes
On 5 January 2004, the Kuala Lumpur Stock Exchange was converted into a public company limited by shares. As a result of the conversion, the operating exchange is now known as the Malaysia Securities Exchange Berhad ('MSEB') and the KLSE Listing Requirements are now known as the MSEB Listing Requirements.

The amendments to the MSEB Listing Requirements are for the purposes of: (a) incorporating and modifying the definitions to cater for 'MSEB' and 'KLSE Berhad'; (b) deleting the provisions relating to preparation of accounts according to the Malaysian Accounting Standards Board; and (c) deleting the provisions on minimum content of offer and offeree documents in relation to take-overs and mergers and vetting of the same by the MSEB - ZR*p*

MSEB LISTING REQUIREMENTS
AMENDMENTS RELATING TO BONUS ISSUE AND EMPLOYEE SHARE OPTION SCHEME (ESOS)

Date of coming into operation
10 February 2004

Amendments
Paragraphs 1.01, 3.07, 3.07A, 3.08, 3.16, 3.17A, 3.17B, 6.01, 6.15, 6.26A, 6.26B, 6.26C, 6.26D, 6.27, 6.30, 6.30A, 6.30B, 6.30C, 6.30D, 6.30E, 6.30F, 6.30G, 6.30H, 6.31, 6.32, 8.21A, 8.21B, 8.21C and 8.21D; Appendices 3A Parts B & C, 6A Parts A to C, 6B Part A, 6C Part A, 6F and 9C Part A; Schedule of Fees

Notes
The amendments were undertaken in consequence of the amendments to Schedule 1 of the Securities Commission Act 1993 exempting public companies issuing bonus issues and ESOS from procuring the approval of the Securities Commission.

The amendments have relaxed the requirements in relation to ESOS. There is an option under the Listing Requirements for the companies to offer the ESOS to non-executive directors and the percentage of shares that may be issued under ESOS has been increased from 10% to 15%.

Following the amendments, Guidance Notes 8B and 9A of the Securities Commission Policies and Guidelines on Issue/Offer of Securities in relation thereto have no application - ZR*p*

MSEB LISTING REQUIREMENTS

AMENDMENTS RELATING TO THE LISTING OF FOREIGN CORPORATIONS

Date of coming into operation
8 January 2004

Amendments
Paragraphs 1.01, 2.20, 3.01, 3.17, 4.01, 4.08, 4.09, 4.10, 4.11, 4.12, 4.12A, 4.12B, 6.10, 7.03, 8.23, 8.35, 8.36, 8.36A, 9.36, 9.37, 9.38, 9.39, 9.40, 9.41 and 12.12; Appendices 3A, 4A, 4G, 6A, 9C and 12A Parts A & B

Notes
The amendment has replaced the term 'foreign-based company' with 'foreign corporation' and it shall have the meaning given to it in the Securities Commission Policies and Guidelines Policies on the Issue/Offer of Securities.

In an application for listing in the MSEB, a foreign corporation must give an undertaking to the MSEB that it shall comply with the Listing Requirements. In the event a foreign company is unable to comply with the Listing Requirements, it must provide a report by an independent legal adviser explaining why compliance with the relevant provisions will contravene the laws of the place of incorporation - ZR*p*

Change is the law of life. And those who look only to the past or present are certain to miss the future – **JF Kennedy** (1917 - 1963)

BRIEFLY...

LOCAL

NEW CYBER LAWS DELAYED?

The implementation of the long-awaited cyber laws may be delayed until the next parliamentary sitting. The laws are the Personal Data Protection Act, the Electronic Transactions Act and the Electronic Government Activities Act.

The idea of a Personal Data Protection Act was first mooted seven years ago and is intended to regulate the collective possession, processing and use of personal data and to ensure that there are adequate measures for the security, privacy and handling of personal information. The purpose of enacting the Electronic Transactions Act is to recognise electronic transactions while the Electronic Government Activities Act seeks to establish common protocols for electronic interaction between the Government and the public.

The delay may be due to the need to meet international data protection standards.

Other cyber laws that are already in force include the Digital Signature Act 1997, Computer Crimes Act 1997, Communications & Multimedia Act 1998 and the Optical Disc Act 2000 - ZR*p*

THE INTERNATIONAL SHIP & PORT FACILITY SECURITY ('ISPS') CODE…THE CONSUMER'S BURDEN?

The International Ship and Port Facility Security ('ISPS') Code ('the Code') is a set of new maritime regulations designed to help detect and deter threats to international security. It comes into force in July 2004, the deadline having being set by the International Maritime Organisation ('IMO'). The ISPS Code applies to all cargo vessels over 500 gross tones (gt) and passenger ships in international trade and port facilities.

The Code reflects a global concern over security following the events precipitated by the 11 September 2001 incident. It is expected to have a major impact on the way ships and ports cope with security matters in the history of maritime development. The requirements of the Code include having the ship identification number permanently marked on the vessel's hulls, keeping a continuous synopsis record ('CSR') onboard showing the vessel history and maintaining a ship security alert system ('SSAS').

The fear expressed by many industry players is that consumers may have to absorb the costs of the implementation of the Code. In fact the cost of chartering a ship is likely to increase because of the need to train officers and equip the vessel with additional safety measures.

While the most of the shipping industry players agree that there should not be an absolute prohibition on the increase in charges, it is also their view that the extra charges are made transparent and are not arbitrary or exorbitant - ZR*p*

FOREIGN

THE PARMALAT FUDGE – EUROPE'S ENRON?

Parmalat (an Italian dairy and food company founded in Parma, Italy) admitted in December 2003 that it had about 4 billion euros of missing funds when its bank, Bank of America, found a document falsely stating that Parmalat's unit in the Cayman Islands was holding money.

When the Parmalat scandal broke, it was dubbed Europe's Enron but one wonders whether it is really analogous to the American corporate scandals of the past 3 years? Although there are similarities, it is suggested (by Thomas Donaldson, Professor of Legal Studies at Wharton) that '... Parmalat is much more of a common, garden-variety fraud, but on an immense scale.' A key factor was 'the outright forgery of a letter saying that the dairy company had 4 billion euros on deposit at the Bank of America', making it more than just an accounting fraud.

One wonders whether this is the result of Italy's relaxed rules on corporate fraud. Under Prime Minister Silvio Berlusconi, false book-keeping had been reduced to a mere misdemeanour; and reporting requirements for offshore balances had been abolished. Even witness-protection programs that made it easier for whistle-blowers to come forward had also been cut back.

Whichever way one views the situation, Parmalat is definitely facing the red card and may have to bow out of the corporate game - ZR*p*

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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