THE COMPANIES ACT 1965: SOME RECENT AMENDMENTS

Law is not static. From time to time, it is altered by Parliament as a result of, *inter alia*, changes in circumstances, decisions made by the courts and also to better reflect the intention of the legislature.

The Companies Act, which was enacted in 1965[1] and came into force on 15 April 1966, is of no difference. In fact, it is one of the most frequently amended statutes in Malaysia. In 1997 and 1998, there were three amendments to the Act. They are:

(a) Companies (Amendment) Act 1997[2] which took effect on 1 September 1997;
(b) Companies (Amendment) Act 1998[3] which took effect on 1 September 1998; and
(c) Companies (Amendment) Act 1998[4] which took effect in two stages, that is, on 1 November 1998 and 1 December 1998 respectively.

The amendments made are vast and wide. In this article, it is proposed to highlight some of the major changes, in particular, on the procedures with regards to the registration of a company, the powers of a company in general and in particular with regards to the purchase of its own shares, disclosure of shareholding, the appointment and resignation of a company secretary and restraining order granted by the court pending the formalisation of a scheme of compromise or arrangement between a company and its creditors.

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[1]Act 125.

[2]Act A1007.

[3]Act A1022.

[4]Act A1043.

1. Registration of a Company

Prior to the amendment to section 16, the Registrar of Companies (hereinafter referred to as 'ROC') may require any of the following persons to give a Statutory Declaration to confirm that all the requirements under the Companies Act 1965 have been complied with before he registers a company:

(a) the lawyer who was engaged in the formation of the company; or
(b) the person named in the Articles of Association as director or secretary of the proposed company.

However, with effect from 1 September 1998, the Act requires the person named in the Articles of Association as the first secretary of the company (hereinafter referred to as 'the First Secretary') to lodge such Statutory Declaration with the ROC. Hence, the following amendments took place:

(a) the Statutory Declaration of Compliance is mandatory. The prescribed form is in Form 6 of the Companies Regulations 1966; and
(b) the Statutory Declaration of Compliance shall be made by the First Secretary. A Statutory Declaration of Compliance by any other person is of no value for the purpose of fulfilling the requirements of registering a company.

It is also to be noted that a new sub-section (8) now empowers the ROC to reject the registration of a proposed company's Memorandum of Association if he is satisfied that:

(a) the proposed company is likely to be used for unlawful purposes or any purpose prejudicial to or incompatible with peace, welfare, security, public order, good order or morality in Malaysia; or
(b) it would be prejudicial to national security or public interest for the proposed company to be registered.

Section 16(4) stipulates that the ROC would issue the certificate of incorporation to the said company only if the proposed company's Memorandum of Association has been registered. Hence, the rejection of the Memorandum would tantamount to the rejection of the proposed company's incorporation.[5]

Prior to 1 September 1998, it would appear that the ROC had no discretion to reject the registration of a company if the incorporation procedures have been fully complied with. The nature of the ROC's power is purely administrative.[6] It would appear that the Minister could act only after the company is formed by proceeding to appoint an inspector to inspect the affairs of the company under sections 195(c) and 196 and thereafter proceed to apply to court to wind up the company under section 218(1)(g).

2. Powers of a Company

(i) Unlawful Purpose

A company's Memorandum of Association is its constitution. It contains its powers and objects. The Companies Act 1965 also imputes the following additional powers on a company incorporated in Malaysia:

(a) power to hold land;[7]
(b) power to make donations for patriotic or charitable purposes;[8]
(c) power to transact any lawful business in aid of Malaysia during any war or hostilities involving Malaysia;[9] and

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[5]The Memorandum of Association is the company's constitution.

[6]*R* v *Registrar of Companies, ex parte Bower* [1914] 3 KB 1161. However in *Tan Lai* v *Mohamed bin Mahmud* [1982] 1 MLJ 338, Salleh Abas FJ said that the Registrar could decline to register a company incorporated to pursue illegal objects. However this is merely an *obiter dictum*.

[7]Section 16(5).

[8]Section 19(1)(a).

[9]Section 19(1)(b).

(d) for a company with "Berhad" to its name, the powers in the Third Schedule to the Companies Act unless expressly excluded or modified by its Memorandum or Articles of Association.[10]

The amendment to section 16 is also related to the objects of a company. The ROC's decision to reject the registration of a proposed company's Memorandum of Association has to be based on the contents in the document. Otherwise, could he just by looking at the identities and backgrounds of the promoters or First Directors or First Secretary and be satisfied that the proposed company would likely be used for one of the purposes mentioned in section 16(8)? His decision would have to be based on the contents in the proposed company's Memorandum of Association.

However, it is questionable whether a promoter who intends to form a company for purposes prejudicial to Malaysia or any of the purposes mentioned in section 16(8) would mention such a purpose in the Memorandum of Association. It would be fatal to do so. Instead, such a promoter could omit such an "unlawful" purpose from the Memorandum and rely on section 20.[11]

Following section 20, the parties to a contract cannot rely on the doctrine of *ultra vires* to set aside the contract on the ground that one of the parties did not have capacity.[12] Only the following persons in the following circumstances may rely upon the said doctrine:

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[10]Section 19(1)(c).

[11]Section 20 has effectively limited the consequences of the doctrine of *ultra vires*.

[12]*Public Bank Bhd* v *Metro Construction Sdn Bhd* [1991] 3 MLJ 56.

Section	By whom	Against whom	When
20(2)(a)	Members of company and floating chargee	Company	To restrain performance of the act. Parties to the contract are liable to pay each other compensation for loss and damage (not anticipated loss)[13]
20(2)(b)	Company or member of company	Present or of former officer company	Any legal proceedings
20(2)(c)	Minister	Company	Wind up the company

Moreover, a promoter who has his proposed company's Memorandum of Association rejected could always amend it to omit the offensive proposed object or power clause. Would the ROC then be able to reject the Memorandum of Association since all the specified powers and objects stated therein are no longer prejudicial to the country?

Hence, it is submitted that the ROC would be able to exercise his discretion more effectively if he were empowered to reject the registration of the company *per se* rather than limit it to the rejection of the registration of the proposed company's Memorandum of Association. This is notwithstanding the requirement that a company would be incorporated upon registration of the Memorandum by the ROC.[14]

[13]Section 20(3).

[14]Section 16(1).

(ii) Purchase and Financing Purchase of Own Shares

Section 67A was added into the Companies Act with effect from 1 September 1997. Prior to it, the law was that a company could not:

(a) buy;
(b) finance the purchase of;
(c) deal in; or
(d) lend money on the shares in itself or its holding company[15] unless:

(i) the lending of money by the company is in the ordinary course of its business, which includes the lending of money;[16]
(ii) the financial assistance is given for the purpose of purchasing the company's shares by trustees for the benefit of its or subsidiary's employees, which includes full time directors;[17] or
(iii) the financial assistance is given to the employees of a company or subsidiary company (except for directors) to purchase the said shares under what is commonly known as an 'Employees Share Option Scheme'.[18]

In the event of contravention, the officers[19] who approved the unlawful transaction, and not the company, would be guilty of an offence.[20] The said officers would also be liable to pay compensation to the company or any third party for any loss or damage suffered as a result of such a transaction.[21]

The reason for such restriction is that any dealing by a company on its shares would result in the diminishing of its financial resources

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[15]Section 67(1).

[16]Section 67(2)(a).

[17]Section 67(2)(b).

[18]Section 67(2)(c).

[19]The word "officers" is defined in section 4(1) to include any director, secretary or employee of the company.

[20]Section 67(3).

[21]Section 67(4).

and reduction of its capital, which is prejudicial to its shareholders and creditors.

In 1997, the law on the purchase and financing of a company's own shares was amended by incorporating a new section 67A. The amendment which took effect from 1 September 1997 permitted a company to buy back and also finance the purchase of its own shares provided:

(a) the transaction is so authorized by its Articles of Association;
(b) the company is solvent at the time of the purchase or financing;
(c) the shares are purchased through the Stock Exchange on which the shares are quoted;[22] and
(d) the purchase is done *bona fide* and in the interest of the company.

When the amendments were effected, they were found to be lacking in certain areas, *inter alia*:

(a) most of the companies that would like to prop up their share prices were experiencing a liquidity problem. It is not feasible for financial institutions to lend money to companies in financial difficulties for this purpose;
(b) the company must cancel the shares purchased by it but following section 67A(4), such cancellation would not be a reduction in capital even though it was admitted in section 67A(3) that the company's issued capital would be diminished accordingly as a result thereof. And the amount so reduced would be transferred to the capital redemption reserve; and
(c) should the company be empowered to finance or guarantee the financing for any proposed purchaser of its shares? It is to be noted that the proposed purchaser must purchase the shares through the Stock Exchange and such financing must be done *bona fide* in the interest of the company. Would the company gain from such financing? It would end up the loser if the purchasers were to default on the loans given for this purpose.

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[22]Hence, two requirements, that is, the company must be a public listed company and the share buy back must be through the open market, must be fulfilled.

Hence, with effect from 1 November 1998, the provision in section 67A was amended as follows:

(a) the provision permitting a company to provide financial assistance to any person for the purpose of purchasing of its shares was removed. Hence, there are now only three original situations as listed in section 67(2) which empower a company to finance the purchase of its or its holding company's shares;
(b) the company will not be permitted to purchase its own shares if such buy back would result in it becoming insolvent. Hence, a company could purchase its own shares only if:[23]

(i) it is so authorized by its Articles of Association;
(ii) it is solvent at the time of the purchase;
(iii) the share buy back is through the Stock Exchange;
(iv) it is done *bona fide* and in the interest of the company; and
(v) the company will not become insolvent by incurring debts for the share buy back;

(c) in respect of the source of funds for the share buy back, section 67A(2)(a), by implication, permits borrowing for this purpose. Moreover, the company is now permitted to utilize the funds in its share premium account to buy back its shares;[24]
(d) such shares so purchased need not be cancelled. A company that exercises its share buy back rights is given an alternative, that is, to retain the shares in the treasury. The "treasury shares" could either be:

(i) distributed to the existing shareholders as share dividends. If this is done, the share premium account would have to be reduced accordingly; or
(ii) resold at the Stock Exchange.

The decision on the fate of the shares so purchased is to be made by the directors;[25] and

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[23]Section 67A(2).

[24]Section 67A(3).

[25]Section 67A(3A) and (3B).

(e) whilst the shares are held in the treasury, the members' rights attached to them, that is, the right to vote and to the declared dividend are suspended. Likewise, the shares shall not be taken into account in calculating the number or percentage of shares in the company for any purpose whatsoever.[26]

The share buy back procedures in Regulation 18A of the Companies Regulations 1966 were amended to reflect the changes in the law. Likewise, the Kuala Lumpur Stock Exchange (hereinafter referred to as 'KLSE') also amended its rules on the same.

3. Disclosure of Shareholding

(i) Request for Disclosure of Shareholding

It is noteworthy that the transparency in the shareholding and ownership structures of a company is further enhanced by empowering the ROC, KLSE and Securities Commission to obtain information and particulars of a person's shareholding in a company.

Pursuant to section 69A, the ROC is empowered to require any person or company to give a Statutory Declaration on information and particulars of his shareholding in a company, for example, whether the shares were acquired or held by him for his own benefit or the benefit of a third party. Such statutory declaration must be furnished to the ROC within 7 days from the date of receipt of the notice from the ROC.

With effect from 1 November 1998, failure to supply such Statutory Declaration would subject the person or company to imprisonment for a maximum period of 3 years or a fine not exceeding RM1 million. The fine was increased from a mere RM50,000.[27]

Under section 69O, a public listed company is empowered to require any of its shareholders to disclose, within the time stipulated in the notice, the nature of his interest. If he is not the beneficial owner, the

[26]Section 67A(3C).

[27]Section 69A(3).

particulars of the beneficiary are to be disclosed. The said company may also send a similar notice to the person named as beneficiary by the shareholder. Prior to 1 November 1998, the failure to supply the information required would subject such defaulting shareholder to be imprisoned for a maximum period of 2 years or fined up to RM5,000.

However, with effect from 1 November 1998, Act A1043 amended section 69O to the following effect:

(a) the maximum fine was increased to RM1 million;
(b) the Stock Exchange and/or the Securities Commission are now empowered to direct a public listed company to exercise its powers under this provision; and
(c) in the event the public listed company fails to comply with the directive, the company and every officer of the company who is in default shall be guilty of an offence and liable to be fined up to RM1 million.

With this amendment, there are now two sets of penalties that is, one for a defaulting shareholder or beneficiary of the shares[28] and the other for the defaulting public listed company and its officers. To further enhance the powers of the regulating bodies in this area, it is suggested that there should be an additional penalty for each day during which the offence so continues after the conviction, that is, a default penalty.

(ii) Substantial Shareholding

The purpose of the substantial shareholding provision is to enable directors and members of a company to ascertain the identities of holders of large number of shares and the extent of their shareholding. This is particularly important for a shareholder who intends to acquire shares for the purpose of controlling the company.[29] Likewise, it is also in the interest of directors and shareholders to know if someone

[28]Section 69O(6) provides that any person who fails to comply with the notice or in purported compliance, makes a false statement shall be guilty of an offence and liable to be imprisoned for up to two years and fined not exceeding RM1 million.

[29]K. Arjunan & Low C.K., *Lipton & Herzberg's Understanding Company Law in Malaysia*, at page 148.

is in the position to block a special resolution or to control a company. Under the Companies Act 1965, the substantial shareholding provisions are applicable only to public companies.[30]

Definition Provision

Prior to 1 November 1998, a shareholder is a substantial shareholder if he holds 5% or more of the nominal value of the voting shares or class of shares in a company. Following the amendment to section 69D, it has now been reduced from 5% to a mere 2%. With this amendment, the shareholding structure in a company becomes more transparent.

Bare Trustee

A bare trustee is a person who does not have any right at all to determine how the interest of the beneficiary is to dealt with[31] or who has no say in the utilisation of the powers attached to the shares.[32] The shareholders' rights rest not with the registered shareholder who is the bare trustee but with the beneficiary of the shares.

Following the inclusion of the new section 69P with effect from 1 November 1998, a bare trustee who holds 2% or more of the shareholding or class of shares in a company is now deemed to be a substantial shareholder. The provisions on substantial shareholding are also applicable to him. In his notice to the company, apart from the usual particulars and details, a shareholder is also required to disclose the particulars of each of his beneficiaries and their respective shareholdings. He is also required to notify the company if there is any change in his status and in the particulars of the beneficiaries.

Following this amendment:

(a) a shareholder could no longer hide behind his nominee; and
(b) a nominee company would have to notify the company of any change in its shareholding whether in terms of the aggregate of its shareholding or any of its beneficiaries' particulars or shareholding.

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[30]Section 69B.

[31]*Corporate Affairs Commission* v *Orlit Holdings Ltd* (1983) 8 ACLR 164.

[32]*Corumo Holdings Pty Ltd* v *C Itoh Ltd* (1990) 5 ACSR 720, at page 747.

This would result in additional administrative work for the nominee company. Its clientele would also be revealed.

Notification

Not only the percentage of shareholding of a substantial shareholder is reduced to 2%, the shareholder is also required, with effect from 1 November 1998, to notify the company of any change in his status, that is:

(a) when he becomes a substantial shareholder;[33]
(b) when he ceases to be a substantial shareholder;[34] or
(c) when there is any change in the percentage of his holding[35] within 7 days, instead of 14 days, of the change.

Penalty

If the substantial shareholder fails to notify the company within the time prescribed of the change in his status, he is liable to a fine of up to RM1 million, instead of RM5,000. This increase took effect from 1 November 1998 with the amendment to section 69M.

(iii) Shares of Public Listed Companies To Be Deposited with the Central Depository

A new division, Division 6A with sections 107A to 107F, was added into the Companies Act 1965 *via* Act A1043 to govern the compulsory deposit of shares traded through the Stock Exchange into the Central Depository and the consequences therefor. However, unlike the other parts of the Act A1043, the new Division 6A came into force one month later, that is, on 1 December 1998.

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[33]Section 69E.

[34]Section 69G.

[35]Section 69F.

Interpretation

The new section 107A is the interpretation section, that is, the provision containing the definitions for phrases commonly used in the Division.

Registers

Notwithstanding section 100, the record of depositors kept by a central depository is now recognised as the register of members, debenture holders, interest holders and option holders, as the case may be. The depositors are entitled to all rights, benefits, powers and privileges and subject to liabilities, obligations and duties in respect of the instruments deposited by them with the central depository.[36] They are also entitled to attend the company's general meeting if their names appear on the record of depositors 3 market days (when there is trading at the Stock Exchange) before the meeting.[37]

Although a public listed company is still required to keep the registers of members, debenture holders, interest holders and option holders, such registers need not be updated. Hence, the registers kept by such companies would contain the particulars of only the original members, debenture holders, interest holders and option holders respectively.

Following through from section 107B(4) that 'the record of depositors shall be prima facie evidence of any matters inserted therein', the new section 107D prohibits the court from ordering any rectification of the said record at the central depository unless the court is satisfied that:

(a) a depositor did not consent to a transfer of any securities;[38] or
(b) a depositor should not have been registered as having title to any securities.[39]

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[36]Section 107B(2).

[37]Section 107B(3).

[38]Section 107D(2)(a).

[39]Section 107D(2)(b).

Transfer

With effect from 1 December 1998, the transfer of shares in a public listed company is to be effected by way of book entries at the central depository.[40] The company's power to effect and register any transfer of its shares is removed thenceforth.

Saving Provision

This is a saving provision empowering the Minister to grant exemptions to any company or class of companies from the operation of any provisions in this new Division 6A.

4. Appointment and Resignation of Company Secretary

(i) Appointment

Prior to the appointment of any person as director, the proposed director has to lodge with the Official Receiver and ROC a Statutory Declaration that he consents to act as a director of the company and that his appointment shall not contravene sections 125 and 130.[41]

There was no similar requirement for the company secretary and hence situations could arise where a person was appointed as the company secretary without his consent or knowledge. A company secretary is the administrator of the company.[42] He is also an officer of the company in the eyes of the Companies Act 1965.[43] Hence the position is attached with liabilities.

However, it has been made a requirement, with effect from 1 September 1998, that a proposed company secretary makes a declaration

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[40]Section 107C.

[41]Section 123(4).

[42]*Panorama Developments (Guilford) Ltd* v *Fidelis Furnishing Fabrics Ltd* [1971] 2 QB 711.

[43]See the definition of "officers" in section 4(1).

on his consent to be so appointed and that his appointment shall not contravene sections 139A and 139C.[44] The format of the declaration is prescribed in the new Form 48F.

(ii) Resignation

Not all companies have their own in-house qualified company secretaries. Instead, some of them engage the services of a qualified company secretary who is paid a retainer fee.

There are many incidents where such company secretaries could not contact any of the directors of the said company. Under such circumstances, collecting overdue fees would be the last of his worries. As an officer of the company, he would be liable if the company fails to comply with certain statutory requirements which were beyond his control, such as lodgment of the annual return[45] and the holding of the annual general meeting.[46] If the company was laden with debts, he could expect summons and writs issued against the company to be served on the registered office, that is, his office.

To compound this problem, he could not resign. He could not submit his resignation to the Board of Directors as its members could not be located.[47] Serving a notice on the ROC or informing the ROC of his intention to resign would not diminish his problem. A search at the ROC on the company would still reveal him as the company secretary. In short, he would still be the company secretary on record.

The new sub-sections (1C), (1D) and (1E) to section 139, which came into force on 1 September 1998, is an answer to many prayers. Where the company's directors could not be communicated with at their last known residential addresses, the company secretary may lodge with the ROC a notice notifying him of the fact and his intention to vacate the office as secretary. Such notice is to be lodged with the ROC in the prescribed format, Form 48E. The cessation of office would take effect at the end of one month from the date of the notice.

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[44]Section 139(6).

[45]Section 165.

[46]Section 143.

[47]Article 95, Table A.

However, the company secretary would still be liable for any act or omission done before the cessation.[48] Hence, company secretaries are advised to keep in contact with their directors. Once the directors could not be contacted, the company secretary should take the necessary steps to protect his interests.

However, the amendments did not resolve the following problems:

(a) Registered Office

The company secretary's office is also the company's registered address. Although the company secretary could resign from the position, there is no provision on the change of the registered office or the cessation of his office as the company's registered office. Hence, his office would remain the company's registered office until the appointment of a new company secretary. Meanwhile, he would continue to receive all correspondence, writs and summons for the company.

(b) Statutory Books

The statutory books such as the minutes book,[49] the register of directors, managers and secretaries[50] and the register of charges[51] together with copies of the instruments thereof are kept at the registered office. The registers of members,[52] substantial shareholders,[53] debenture holders,[54] interest holders[55] and option holders[56] may also be kept at the registered office. Until the appointment of a new company secretary, the various statutory books and registers would continue to be kept in the custody of the former company secretary. Though he has a lien on them until

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[48]Section 139E.

[49]Section 157.

[50]Section 141.

[51]Section 115.

[52]Section 159.

[53]Section 69L.

[54]Section 70.

[55]Section 92.

[56]Section 68A.

his outstanding fees and charges are paid, his immediate problem of storage space would not be resolved. Likewise, the statutory books and registers must continue to be made available for inspection at the request of the members and, in some instances, the public. Though fees could be collected in some instances, they are not sufficient to cover the costs of administration involved.

5. Restraining Order

Where a company is heavily in debt and has no means to satisfy its debts as and when they fall due, it may be feasible for the creditors to agree to some form of compromise with each other and the borrower to:

(a) defer repayment;
(b) accept a lower amount in satisfaction of their debts; and/or
(c) convert their debts into shares in the company.

This is particularly so if the company is still viable and is merely experiencing a temporary liquidity problem. However, all the creditors must accept such a compromise. If any of the creditors were to throw in the spanner, the compromise would come to an early demise. It is to be noted that section 218(1)(e) read with 218(2)(b) permit a creditor for a mere RM500 to petition to wind up a company. That is the risk of an "informal" compromise.

Section 176 provides a statutory form where an arrangement duly approved by the following[57] would be binding on all creditors in that particular class, including the dissenting creditors:

(a) 75% of the creditors of that class who vote in favour of the arrangement; and
(b) the court.

Section 176(11) defines "arrangement" to include 'a reorganisation of the share capital of a company by the consolidation of shares of

[57]Section 176(3).

different classes or by the division of shares into shares of different classes or by both these methods'.

However, the risk of creditors taking actions to pre-empt the proposed arrangement is real. Thus, where a compromise or arrangement has been proposed between the company and its creditors, section 176(10) enables a company to make an application to the court to 'restrain further proceedings in any action or proceeding against the company except by leave of the court and subject to such terms as the Court imposes' (hereinafter referred to as "Restraining Order"). The general principles are:

(a) there must be a proposal of the scheme of compromise or arrangement which is viable, feasible or workable;[58]
(b) the application must be made *bona fide*;[59] and
(c) the application must be made *inter partes*.[60]

However, loopholes in the provision were noted during the economic turmoil that started in mid 1997. The legislature took steps to plug them by introducing new sub-sections (10A), (10B), (10C), (10D) and (10E) to section 176 which came into force on 1 November 1998.

(i) Conditions

Pursuant to the new section 176(10A), the court may grant a Restraining Order (hereinafter referred to as 'RO') for only ninety days or such longer period as the court may for good reason allow. Before any RO is granted, the court must be satisfied that the following four conditions are met:

(a) there is already a proposal for the scheme of arrangement between the company and its creditors holding at least half of the value of its debts;

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[58]*Twenty First Century Oils Sdn Bhd* v *Bank of Commerce* [1993] 2 MLJ 353.

[59]*Re Kuala Lumpur Industries Bhd* [1990] 2 MLJ 180.

[60]*Re Foursea Construction (M) Sdn Bhd* [1998] 3 MLJ 135.

(b) the RO is necessary to enable the company and creditors to formalise the arrangement under section 176(1);
(c) a statement on the company's affairs as at three days before the application must be lodged with the court together with the application; and
(d) the court approves and appoints the person nominated by the company's majority creditors to sit on its board of directors.

(ii) Nominee Director

The director nominated by the creditors and approved and appointed by the court to sit on the company's board would have:

> "...access at all reasonable times to the accounting and other records (including registers) of the company and is entitled to require from any officer of the company such information and explanation as he may require for the purpose of his duty".[61]

Such director would also be subjected to all sanctions and penalties imposed on all directors of the company if certain offences were committed. This would include the offences under sections 176(10C), (10D) and (10E). Hence, the creditors' nominated director should concern himself not only with the company's accounts but also all other duties expected of a company's director.

What is the duty of a nominee director? The law is that such a nominee director's duties are towards the company, and not his nominators. It may be disloyal of him to report what he knows to the nominators.[62] It may even be a breach of confidence if he were to disclose information received in confidence in his capacity as director to anyone including his nominators. A nominee director is not in an enviable position. There are bound to be clashes of competing interests between the company and his nominators. For all intents and purposes, the law governing a director is also applicable to a nominee director.

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[61] Section 176(10B).

[62] *Raffles Hotel Ltd* v *Rayner* [1965] 1 MLJ 60.

What then is his standard of duty? Section 132(1) stipulates 'A director shall at all times act honestly and use reasonable diligence in the discharge of the duties of his office.' The phrase "reasonable diligence" is not defined and we have to look at case law for guidance. The classic statement was issued in the negative by Romer J in *Re City Equitable Fire Insurance Co Ltd*:[63]

> "A director need not exhibit in the performance of his duties a greater degree of skill than may reasonably be expected from a person of his knowledge and experience".

Where the creditors are required to nominate a representative to the debtor's board, it would be expected of them to nominate a person who possesses skills in rehabilitating the company. Such a director would be expected to show a reasonable amount of skill that commensurate with his qualifications and experience. He owes such duty to the company and any breach by him could result in a claim by the company.

Such nominated director is prohibited from obtaining an indemnity from the company.[64] Hence, it is advisable for him to obtain, before his appointment, indemnification against his liabilities as director of the debtor company from the creditors who nominated him and whose instructions he could not take.

(iii) Restriction on Disposal and Acquisition of Property

After the court has granted the RO, any disposal or acquisition of property by the company must be made in the ordinary course of its business.[65] Failing which, the transaction is void and every officer who is in default will be guilty of an offence and liable to imprisonment for a period not exceeding 5 years and/or fine of up to RM1million. This amendment has the desired effect of checking any attempts to strip a company of its assets whilst under the protection of an RO.

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[63][1925] 1 Ch 407.

[64]Section 140(1).

[65]Sections 176(10C) and 176(10D).

(iv) Notification

Pursuant to section 176(10E), the RO must be lodged with the ROC and a notice thereof published in at least "1 daily newspaper circulating generally throughout Malaysia" within 7 days after the granting of the order. The penalty for non-compliance is a fine not exceeding RM100,000.

However, it is to be noted that it appears that only a notice of the RO, and not the full text of the RO, is to be published. Hence, the full effect of the RO may not be known to the company's creditors. This may give rise to contempt of court if steps taken to protect their interests are contrary to the RO's terms.

6. Other Amendments

Apart from the above amendments, the other amendments to the Companies Act 1965 that were effected in 1997 and 1998 are mostly administrative in nature. For example, the new section 11A[66] provides for the lodgement of documents *via* electronic means.[67] Following the insertion of the new section 68A, a company that grants options to purchase its unissued shares is also now required to keep a register on the particulars of such options.[68] If there are more than 50 option holders, an index on them must also be kept.[69] Whilst on the issue of options, it is also to be noted that section 68 was also amended to increase the maximum period of the options from 5 years to 10 years.

Following through from the Accounting Reporting Act 1997, the Companies Act 1965 was also amended with effect from 1 September 1998 by adding in a new section 166A to ensure that the accounts of a company and the consolidated accounts of a holding company are in accordance with the standards issued by the Malaysian Accounting Standard Board,[70] an independent statutory body. However, where the

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[66]Added in *vide* Act A1022 with effect from 1 September 1998.

[67]However, the procedure therefor has yet to be announced and hence, not implemented thus far.

[68]*Vide* Act A1043 with effect from 1 November 1998.

[69]See section 68A(3) read together with section 158(5).

[70]Financial Reporting (Publication of Approved Accounting Standards) Regulations 1999.

directors of a company or holding company form the opinion that such compliance would not give a true and fair view of the company's affairs, strict compliance of the standards is waived provided the directors disclose their reasons[71] and the company's external auditor gives his comments thereon.[72]

With the amendment to section 365 of the Companies Act 1965 with effect from 1 November 1999, the maximum dividend paid to the shareholders is also regulated. The maximum dividend which a company[73] could declare is the higher of its after tax profit of that financial year and the average dividends declared in the past two financial years.[74]

With effect from 1 September 1998, the ROC could present a winding up petition against a company[75] on the grounds specified in the new section 218(1)(m) and 218(1)(n), that is, the company was being used for any unlawful purpose or any purpose prejudicial to the public or national security or wellbeing.

7. Conclusion

The amendments to the Companies Act 1965 in 1997 and 1998 are vast and wide. Though well intended, some of the amendments left much to be desired. Not much thought was given to the effects of some of the changes resulting in some sections being re-amended after a short period of time.[76] Some practical problems have yet to be resolved.[77] It is suggested that a feasibility study should be made and

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[71]Section 166A(4).

[72]Section 174(2).

[73]It is submitted that the exception laid down in section 365(1C) is no longer effective in view of the third condition, that is, the financial year of the company must have commenced before 1 July 1997. The only exemption is where the Minister of Finance has granted a waiver pursuant to section 365(1D).

[74]Section 365(1A).

[75]Section 217(1)(h).

[76]For example, section 67A which was amended after 1 year. It has also been announced that section 365 would also be amended.

[77]See section 139 where the former company secretary's office would remain the company's registered office and still be saddled with the company's registers and statutory books as well as all incoming correspondence.

feedback obtained from regulatory bodies, practitioners and academicians before effecting any amendment to the Companies Act 1965 in the future.

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The End in Sight

'The State - not only the Christian State but the State as such - has a divine role,' An Archbishop of Canterbury, *Sacred and Secular*.

It is time, said the Director, to show you something of our progress in the field of social engineering. You have been working in the isolation of the Upper Amazon for far too long, ninety, a hundred years did you tell me?

You are too kind, I said.

No at all, he replied. Time means so little, with our new drugs, and as for kindness, well, the word falls strangely to my ears. It is not a word we favour, these days.

Where does your explanation begin, I enquired. Remember that I have been divorced from the progress of modern life for what is by some standards quite a long time.

I think, said the Director, that an exhibition of our present activities will help you. And perhaps, if you see our social engineering processes in action for yourself, you will be able to understand the considerable advances we have made in your absence.

There were signs of progress before I left, I said.

The Director looked at me sharply, as if he suspected an irony. Let me show you, he said after perhaps five seconds. Channel SE 2 will be on at the moment. SE 1 is of course the Westminster Channel, quite entertaining in its own way, but too remote from the realities of everyday life. He considered the matter for a moment. For this reason, perhaps, it has an element of the comic. The Prime Minister, for example, wears a different tie each day, a quaint, old-fashion custom designed to impress us all with the maturity of his wisdom. He never wears it outside the House, of course.