Reform in the Malaysian Corporate Landscape
Key Highlights under the New Companies Act
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Introduction

The current Companies Act 1965 is set to be replaced by the new Companies Act passed on 4 April 2016 by the Dewan Rakyat (House of Representative). The new Companies Act was gazetted on 15 September 2016 and is now awaiting the Gazette for Appointment of Date of Coming into Operation. The aim of the new law is to elevate the Malaysian corporate landscape to be on par with the existing international standards.

The Companies Commission of Malaysia (“SSM”) published a draft of the new Companies Act (“Act”) on 2 July 2013 for public consultation. This initiative was part of the Corporate Law Reform Programme that began in December 2003 with a view to develop a conducive and dynamic business and regulatory environment in Malaysia.

The Corporate Law Reform Committee (CLRC), established by SSM, reviewed the Companies Act 1965 with the aim to achieve the following objectives:

- To create a legal and regulatory structure that will facilitate business; and
- To promote accountability and protection of corporate directors and members taking into account the interest of other stakeholders, in line with international standards.

Accordingly, the incorporation of the CLRC’s recommendations into the companies law was set out to:

- modernize the law by taking into account the advances made in Information and Communication Technology (ICT);
- reduce the costs of compliance;
- reduce duplication and conflicts that exist between the various corporate regulatory bodies;
- simplify the existing operational processes of a company; and
- simplify the current legislative language as used in the current Companies Act 1965.

Against this backdrop, we set out below the major changes introduced by the new Companies Act which are reflective of the objectives mentioned above.
Creating a Conducive Legal and Regulatory Framework for Business

Single Shareholder and Single Director for Private Company
The current Section 36 of the Companies Act 1965 prohibits any company (other than a company whose issued shares are wholly owned by a holding company) from carrying a business with fewer than two shareholders for more than 6 months and Section 122 requires to have a minimum of 2 resident directors.

The Act will allow private companies to have a single director and single shareholder (Section 9 and 196 (1) of the Act respectively). This will reduce business costs in general and will heighten the spirit of entrepreneurship.

Annual General Meeting (AGM) No Longer Required for Private Company
Under the Section 143 (1) of the Companies Act 1965, every company in Malaysia is required to hold an AGM once in every calendar year.

The AGM for private companies will be abolished under the Act (Section 340 of the Act). However, appropriate safeguards are in place by allowing (not requiring) members representing at least 5% of the paid up capital of the company carrying the right of voting at meeting of the members of the company to call for meeting of members to be convened if more than 12 months has elapsed since the end of the last meeting of members convened (Section 311 (4) of the Act).

This no-AGM regime for private companies will have consequential changes to existing procedures.

For example, the audited accounts will be circulated to the shareholders or laid before the company at a meeting of the members, instead of being tabled at the AGM. There is a procedure to allow for the automatic re-appointment of auditors unless the directors or shareholders decide otherwise.

Hence, this move will reduce the running and maintenance costs of private companies in Malaysia.

Unanimity Rule for Written Resolution Abolished for Private Company
Under the current Section 152A of the Companies Act 1965, there must be unanimous shareholder’s consent for written resolutions. That is, resolution signed by all members deemed to be duly passed at meeting.

Section 290 of the Act abolishes this unanimity requirement by allowing a private company to pass a written resolution by the same majority as required for the resolution if it was passed at a meeting duly convened. For example, Section 291(1) states that an ordinary resolution means a resolution passed by a simple majority of more than half of members representing the total voting rights.

As an additional safeguard to ensure the interests of minority shareholders are protected, Section 302 gives members holding at least 5% of the total voting rights (or such lower percentage as specified in the constitution) the right to require the company to circulate a resolution that may be properly moved as a written resolution.

This move will ease administrative operation cost and the minority shareholders’ rights are not compromised.

Audit Exemption
Section 267 of the Act introduces a new requirement that provides the Registrar of Companies the power to exempt any private company from the requirement to appoint an auditor according to the conditions as determined by the Registrar. Although the qualifying conditions for the exemption is still underway, this move will reduce the regulatory and compliance cost particularly for small private owner-managed companies.
Share Capital and Capital Maintenance

No-Par Value Regime
The current Companies Act 1965 requires Malaysian companies to issue shares with a par value or nominal value.

The Act (Section 74) introduces the no-par value regime where shares of a company shall have no par or nominal value. Where a share is issued before the commencement of Section 74, the amount paid on the share shall exclude any share premium, that is, the value paid above the par value (Section 618 (1) of the Act). However, companies have a transitional period of 2 years to utilize the existing balances credited in the share premium account and capital redemption reserves, before they become part of the company’s share capital upon the commencement of Section 74, in a manner specified in Section 618 (3) of the Act.

This no-par value concept will facilitate greater flexibility in capital raising in the future and simplify share accounting. This will further reduce the administrative costs of the company.

Reforming Share Buy-Back
The Companies Act 1965, Section 67A, currently allows a public company to purchase its own shares if the company is solvent at the date of purchase and will not be insolvent as a result of the buy-back, and the purchase is made in good faith and in the interests of the company.

This requirement has been refined by Section 67A of the Act by:
A. Generally, maintaining the existing requirements of Section 67A; and
B. Imposing a solvency test where a majority of the directors must make a solvency statement. This statement will state that the share buy-back would not result in the company being insolvent and its capital being impaired at the date of the solvency statement and the company will remain solvent after the buyback during the period of six months after the date of the declaration is made.

This change aims to safeguard the interests of creditors by ensuring that the company will continue to remain solvent.

Alternative Procedures for a Reduction of Capital
Under the existing Companies Act 1965, Section 64, a company may only reduce its capital if it has obtained shareholders’ approval via a special resolution and that it must be confirmed by a Court Order.

While this Court Order route is retained in the Act, an alternative capital reduction procedure based on a solvency statement is introduced.

This is provided in Section 117 which sets out the following steps:
A. All the directors make a solvency statement which essentially must confirm that the company is cash flow solvent and balance sheet solvent (see Section 112 which sets out the full solvency test for the purposes of this mode of capital reduction);
B. The solvency statement is made available to the shareholders and the shareholders pass a special resolution for the capital reduction;
C. Within 7 days of the special resolution, send a notice to the Director General of the Inland Revenue Board and to the Registrar of Companies to state that the special resolution has been passed. The solvency statement is also lodged with the Registrar of Companies;
D. Within 7 days of the special resolution, advertise notice of the resolution in a national language newspaper and an English language newspaper;
E. Creditors then have a right to object to the capital reduction within a 6-week period from the date of the special resolution by filing a court application;
F. If there are no such challenges from the creditor within that 6-week period, the company can then file further documents with the Registrar of Companies before the end of the eight weeks from that date of the special resolution. The capital reduction will take effect once the Registrar has recorded the information lodged with him in the appropriate register.

This is a quicker and cheaper route of carrying out a capital reduction instead of the present Court Order route.

Nonetheless, directors, should note that they will be held accountable and may face criminal sanctions for offences regarding the solvency statement. For instance, a director who makes the solvency statement without having reasonable grounds for the opinion in the statement can face maximum imprisonment of 5 years or to a maximum fine of RM500,000.00 or both (Section 114 of the Act).
This alternative route for capital reduction can expedite corporate exercises with additional protection to creditors and shareholders of the company by satisfying the solvency test and increased sanctions on directors.

Financial Assistance Whitewash
Section 67 of the current Companies Act 1965 prohibits companies to give whether directly or indirectly and whether by means of a loan, guarantee or the provision of security, any financial assistance for the purpose of or in connection with a purchase or subscription made by any person of or for any shares in the company, or in a subsidiary's holding company.

The Act introduces the financial whitewash procedure (Section 126 of the Act) whereby private and public companies (but not public listed companies) may give financial assistance for the purpose of the acquisition of a share in the company or its holding company or for the purpose of reducing or discharging liability incurred for such an acquisition, if the financial assistance is approved by a special resolution of the shareholders;
B. approved by a majority of the directors of the company;
C. that the directors who voted in favor of the resolution make a solvency statement (similar to the solvency statement made for a reduction of capital);
D. the aggregate amount of the assistance and any other financial assistance given under that section that has not been repaid does NOT exceed 10% of the aggregate amount received by the company (such aggregate amount is the amount as disclosed in the most recent audited financial statements of the company);
E. the company receives fair value in connection with the giving of the assistance; and
F. the assistance is NOT given more than 12 months after the day on which the solvency statement is made.

The new financial assistance regime will enable the company to implement corporate exercises with greater flexibility.
Corporate Governance and Accountability

Director’s Fees and Benefits to be Fixed and Approved by Shareholders

The approval of directors’ fees is not covered explicitly under the current Companies Act 1965. Under common law, it is the shareholders of the company who have the authority to approve a directors’ fees.

Section 230 of the Act requires a general meeting of shareholders to approve the fees and benefits of directors of a public company or of a listed company and its subsidiary. In the case of private companies, the Board may, subject to the constitution approve the fees of the directors, and any benefits payable to the directors including any compensation for loss of employment of a director or former director. Any such approval must be recorded in the Board minutes and the Board shall notify the shareholders of the approval of such fees within 14 days of the date of approval.

Members holding at least 10% of the total voting rights, within 30 days after they have knowledge of such payments, may however require the company to pass a resolution to approve the payment either by way of a written resolution or at a general meeting.

In addition, this Act also provides a statutory right to shareholders of public companies to inspect directors’ contracts of service under Section 232.

This provision increases oversight and transparency over directors’ remunerations.

Distribution Out of Profit – Dividend

Under the Act (Section 131, 132 and 133), stricter requirements have been imposed to ensure that distribution of dividends must meet a solvency test. This solvency test for dividends is defined as the company being able to pay its debts as and when the debts become due within 12 months after distribution.

Firstly, the directors may only authorise distribution when the directors are satisfied that the company will be solvent immediately after the distribution is made.

Secondly, after distribution is authorised and before it is made, the directors must be satisfied on reasonable grounds that the company will still remain solvent. If not, the directors must take all necessary steps to prevent the distribution.

Thirdly, there is added civil liability to the company. Directors or managers of a company who willfully pays or permits to be paid any dividend in contravention of the above, which he knows is not profits, shall be liable to the company for the excessive improper value of the dividends.

Fourthly, there is also extended potential civil liability on the recipient shareholder. The company may recover from a shareholder any amount of dividend which exceeded the proper value unless the shareholder had received the dividend in good faith and had no knowledge that the company did not satisfy the solvency test.

Finally, there are potential criminal sanctions. Any director of the company who willfully authorizes the payment of unlawful distribution shall be, on conviction, liable to imprisonment for a term not exceeding 5 years or a fine of not exceeding RM3,000,000 or both.

These new provisions relating to applying a solvency test to distribution of dividends will enhance the accountability of the directors of the company and to safeguard creditor interests.

Resignation of Auditors and attendance of Auditors at AGM

The current statutory provision under Section 172(14) and (15) of the Companies Act 1965 governs resignation of auditors. The resignation of an auditor is only effective upon the appointment of a new auditor at a general meeting.

This requirement has been deleted and replaced by Section 281 of the Act. Auditors can resign by giving a written notice of resignation to the company and the auditor’s term of office will come to an end after 21 days.

In the case of a public company, the resigning auditor can issue a requisition notice, where the directors are to immediately convene a general meeting for the purpose of receiving and considering the explanation of the circumstances connected with his resignation. The director shall hold the general meeting within 28 days from the date of the receipt of the requisition notice. Every director who fails to take all reasonable steps to secure a meeting commits an offence.

In addition, an auditor of a public company shall attend every AGM where the financial statements of the company for a financial year are to be laid. An auditor who fails to attend the AGM commits an offence unless (Section 285 of the Act):

A. the auditor is prevented by circumstances beyond his control from attending the meeting;
The new Corporate Voluntary Arrangement (CVA) regime is modelled after the UK provisions. The Act (Section 396 and 397) allows the directors to appoint an insolvency practitioner to act as a nominee. The nominee will provide his positive opinion that the proposed voluntary arrangement has a reasonable prospect of being approved.

Court papers for the CVA will then be filed and an automatic 28-day moratorium will apply. During the 28 days, the nominee must call a meeting of the members and the creditors of the company to vote on the proposed voluntary arrangement. It is possible to extend the moratorium by 60 days if agreed to by the nominee, members and creditors.

In obtaining approval of the proposed voluntary arrangement, the threshold to be met is more than 50% at the meeting of the members and at least 75% in value at the meeting of the creditors. Once approved, the proposed voluntary arrangement shall take effect and be binding on all creditors of the company.

Please note that Section 395 provides that corporate voluntary arrangement does not apply to public companies, a licensed institution regulated by the Central Bank of Malaysia or a company which is subject to the Capital Markets and Services Act 2007 and a company which creates a charge over its property.

Other notable changes

In addition to the major changes highlighted above, there are other changes introduced which are not dealt with in this publication. These changes, include, amongst others:

A. Companies have unlimited capacity (Section 21)
B. Enhanced definition of a director (Section 2)
C. Specifying the minimum age for a person to be appointed as a director (Section 196)
D. The maximum age limit for a person to retire as a director is no longer specified (Section 205)

E. Introducing the provisions relating to indemnifying or effecting any insurance for an officer or auditor for the liability for any act or omission occurred in their capacity as an officer or auditors, as the case may be. Any indemnification or provision of insurance must be in accordance with Section 289.

Conclusion

A substantial part of these reforms is drawn from the experience of other jurisdictions, in particular, the United Kingdom and Australia. Generally, these regulatory reforms were aimed at enhancing corporate governance, transparency, and spurring entrepreneurship by simplifying corporate vehicles. The advent of modernizing the globalization is undoubtedly the impetus to these reforms and transformation. It is anticipated that the new Companies Act will transform the Malaysian corporate landscape and horizon when it comes into force in the near future.

Reference:

01. Draft Companies Act 2013 - Comparison with Companies Act 1965
02. Suruhanjaya Syarikat Malaysia (Companies Commission of Malaysia) - Review of the Companies Act 1965 - Final Report by the Corporate Law Reform Committee (CLRC)
03. Revolutionising the Corporate Law Landscape in Malaysia - Key Changes Under the New Companies Bill by Wong & Partners, February 2014

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Corporate Rescue Mechanisms: Corporate Voluntary Arrangement and Judicial Management

The Act introduces two new rescue mechanisms, Judicial Management and Corporate Voluntary Arrangement, which will complement the existing provisions for a scheme of arrangement. The corporate rescue mechanisms will aim to help financially distressed companies to remain as a going concern.

Judicial Management

Under a judicial management scheme, upon application by a company or a company’s creditor, the Court can order the management of the company itself to be ceded over to an independent qualified insolvency practitioner who is the Court-appointed Judicial Manager. The Judicial Manager will prepare a restructuring plan/proposal which must be approved by 75% of the total value of creditors (Section 421 of the Act). Once approved by the creditors and sanctioned by the Court, the plan will be implemented.

To provide some respite from legal proceedings by creditors against the company, a moratorium will apply automatically upon the filing of the judicial management application. This moratorium will effectively stay all legal proceedings against the company. This moratorium will continue on upon the making of the judicial management order.

Please note that Section 403 provides that judicial management shall not apply to a licensed institution regulated by the Central Bank of Malaysia or a company which is subject to the Capital Markets and Services Act 2007.

B. the auditor arranges for another auditor with knowledge of the audit to attend and carry out the duties of the auditor at the meeting;  
C. if the auditor is a partner of a firm, the person attending the meeting in place of the designated auditor is a partner of that firm; or  
D. the auditor arranges for an agent authorized by the auditor in writing to attend and carry out the duties of the auditor at the meeting.
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