THE ZR*p* BRIEF

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BRIEFING...

ARBITRATION

DON'T LITIGATE - MEDIATE !

As burgeoning court queues, rising costs of litigation and delays continue to plague litigants, resort to alternative dispute resolution (ADR) has increased. We feature an overview of ADR that includes methods such as mediation and conciliation. In the context of this article however, ADR does not include arbitration.

WHAT IS ADR?

Alternative dispute resolution or ADR refers to any means of settling disputes outside of the courtroom. It is a range of procedures that serves as an alternative to litigation for the resolution of disputes, generally involving the intercession and assistance of a neutral or impartial third party. ADR typically includes, among others, negotiation, mediation and evaluation.

TYPES OF ADRS

Negotiation

Negotiation is a voluntary ADR process that does not necessarily involve a third party intermediary.

If an agreement is reached with regard to a dispute, parties will then enter into a settlement agreement which will be enforceable as a contract. The negotiation takes place informally and there is no particular structure.

Mediation/Conciliation

Mediation is a less formal alternative to litigation. It is a dispute resolution process involving a third party who meets parties together or separately and facilitates them towards a consensual agreement.

The mediator acts as a facilitator with no adjudicatory or advisory function, though in some models he may have a non-binding evaluative role.

The mediator's role includes assisting the parties both individually and together to identify the issues that are in dispute and to develop proposals to resolve the dispute.

The usual stages of mediation are as follows:

(i) Pre-mediation

The parties would need to engage in a mediation forum with the necessary introduction to the same by lawyers or their advisers. One of the factors to consider is whether mediation would be appropriate for that particular dispute.

If there is no prior contractual provision obliging parties to mediate, a contract to mediate would need to be entered into between the parties and the mediator. The venue and time of such mediation will have to be mutually agreed upon.

(ii) Mediation

During the mediation proper, the mediator usually makes an opening address on, among others, his role and

impartiality and the procedures to be followed.

Each party will then be allowed an opening address to present an outline of his case. The mediator or the parties are allowed to ask questions to clarify certain matters. After having a comprehension of the issues, an agenda for dealing with them is set. The mediator gathers information on the issues from documents, reports and submissions. At this stage, there is no need for witnesses to be produced.

During the gathering of such information, the mediator may manage and facilitate discussions and negotiations with a view to focusing on the differences between the parties and helping them to eventually resolve the issues. There are various ways of doing this, namely:

- joint or separate meetings, generating and developing options;
- brainstorming sessions;
- testing positions.

The mediator must however ensure that he retains impartiality and should not even appear biased.

(iii) Post-mediation

The end of mediation may occur where

- all issues have been resolved; or
- some issues may have been resolved and the rest are left to be resolved in other ways; or
- when both or any of the parties decide to terminate the mediation; or
- where the mediator himself ends the mediation especially if he feels that it is inappropriate to continue.

If, on the other hand, there is a resolution, parties may enter into a settlement agreement. In some cases the mediator may continue to play a role such as that of a stakeholder or supervisor of the settlement process.

Mediation-Arbitration

In this arena, the mediator assumes the role of an arbitrator if the mediation procedure as discussed above fails to produce a resolution. Once he does this, the determination he makes with regard to the issues are binding.

Mini Trial

The senior executives of the parties together with a person called a 'neutral' will hear the brief of the respective parties through lawyers and experts (if necessary) and a key witness.

This together with the views of the neutral if required, will enable the parties to assess the strengths and weaknesses of their respective cases in order to reach a settlement.

Neutral Fact-Finding Expert

The neutral expert investigates legal or technical issues and submits a non-binding report to help parties assess their positions.

In some cases parties may agree that the report would be admissible in subsequent litigation without prejudicing their rights to produce other expert reports that may contradict the first one.

Evaluation

There are two stages of evaluation:

(i) Early Neutral Evaluation (ENE)

In an ENE, a neutral person meets the parties at an early stage of the case and makes a confidential assessment of the dispute. This will assist the parties in defining the issues.

(ii) Case Evaluation

Case evaluation may take place at any stage. In a case evaluation, a case is submitted to the evaluator who considers submissions, hears witnesses and then evaluates the case for the parties.

An evaluation produces a non-binding determination. The determination is merely a guide for the parties.

ADR v LITIGATION

- The function of resolving the dispute is retained by the parties, unlike litigation which is controlled by lawyers.

- ADR provides a favourable situation to both parties as opposed to litigation which tends to favour one party only.

- Matters remain private and confidential in ADR whereas litigation is conducted in open-court.

- Speed is usually associated with ADR whereas litigation is famed for its delay.

- ADR involves lower costs. It must be noted that if the dispute is not resolved, there may be additional costs. This may nevertheless produce a favourable situation as the issues and scope may be narrowed. This cost-saving exercise may be desirable especially in any subsequent litigation.

- A healthier environment is provided in ADR as opposed to the adversarial system of litigation that promotes antagonism. A litigious situation may not be conducive to the resolution of disputes, especially where parties are keen in long-term relationships.

- While a binding contract is the result of ADR, judgments and orders are the norms of litigation.

- In ADR, there are no rigid rules on disclosure or non-disclosure of documents. Parties are therefore free

to make concessions and admissions which are implied on a 'without prejudice' basis.

IS ADR ALWAYS SUITABLE?

Although ADR is always preferred, there are situations where such method of resolving disputes may not be suitable. For instance:

- Where the parties lack the necessary capacity to contract. An example of such person is a minor.

- Cases where the issues for consideration cannot be compromised at all. Examples include issues involving constitutional law, human rights or matters of public interest.

- Cases wherein a binding precedent from the court is required.

- Situations where an injunction is sought.

- Cases when limitation is about to expire.

- Situations where one party is not willing to enter into the process in good faith and wants to use it as a delaying tactic.

CONCLUSION

ADR may not be the best method of resolving each and every problem which arises, but where possible, it seems to be the preferred choice to litigation – **ZR*p***

CORPORATE

DBR: THE FINAL PHASE...

The Securities Commission (SC) progressively implemented the disclosure-based regulation (DBR) since 1996 under a three-phased programme. With the release of the revised guidelines, the DBR programme is now in its final phase.

THE 10 MEASURES

On 11 March 2003 the Acting Prime Minister unveiled ten new measures for, among others, the listing of large companies. These measures form part of the government's overall effort aimed at ensuring continued growth of the Malaysian economy and an efficient, resilient and competitive capital market.

The measures are as follows:

- *Reduction in stamp duty*

  To enhance investor participation, stamp duty for all securities trading on the KLSE would be capped at RM200 per contract. Whilst this measure would result in a reduction in government revenue by more than RM60 million a year, it would benefit investors through lower transaction costs and further enhance the attractiveness of trading on the KLSE. The Stamp Duty (Remission) Order 2003 was recently gazetted, taking effect from 17 March 2003 and has given effect to this measure.

- *Standardization of board lots*

  All board lot sizes for securities traded on the KLSE would be standardized at 100 units by June this year to make the purchase of stocks on the KLSE more affordable besides reducing the size of odd lot holdings.

- *Exemption of large companies from profit record requirement*

  Companies (not involved in property development or construction activities) with a minimum market capitalization of RM250 million and after-tax profit of RM8 million for the latest financial year will be exempted from the three to five years' profit track record requirement. All other requirements for listing, including the five-year business operation requirement, will continue to apply.

- *Reduction of moratorium to one year*

  The new moratorium applies, among others, to promoters of certain categories of companies.

  Such moratorium would apply automatically to proposals which have been approved by the Securities Commission since October 2002.

- *Merger of government-linked companies*

- *Reduction of IPO processing time*

  To shorten the processing time to less than three months.

- *Processing of FIC approvals to be done by the SC.*

  This applies to cases where both FIC and SC approvals are required.

- *Introduction of performance incentive scheme for government-linked companies.*

- *Enhancement of capital-market skills.*

  The SC has initiated a new capital market graduate Training Scheme.

- *Enhancement of the role of intermediaries*

  There will be a review on commission rates for brokers to prevent unhealthy pricing activities.

On 1 April 2003, the SC released seven revised fund-raising guidelines to mark the entry of the Malaysian capital market into the final phase of its move from the merit-based to a disclosure-based regulations (DBR) framework for fund-raising, in line with the aim of establishing Malaysia as a preferred fund-raising centre for local companies.

DISCLOSURE-BASED REGULATION

Disclosure-based regulation is a market-based approach to regulation that focuses on the quality of information disclosed by issuers when they issue, offer or list securities so that investors can make informed investment decisions.

The SC had progressively implemented the DBR since 1996 under a three-phased programme. With the release of the revised guidelines, the DBR programme is now in its final phase. The ten measures announced on 11 March 2003 (in particular the moratorium requirement for listings and disposal of securities and the market capitalization test for listing of large companies) have also been incorporated into these new guidelines.

REVISED GUIDELINES

The Revised Guidelines which took effect from 1 May 2003 comprise:

- *Policies & Guidelines on Issue & Offer of Securities*;

  These guidelines are to provide more market-based rules such as pricing of securities, utilization of proceeds and valuation of assets. There will also be speedier approval from the SC for new issue/ offer/ listing of equities and equity-linked securities.

- *Guidelines on the Offering of Private-Debt Securities*

- *Guidelines on the Offering of Asset-Backed Securities*

  The guidelines on both Private-Debt Securities and Asset-Backed Securities will offer more clarity and flexibility to issuers and more streamlined approval process.

- *Guidelines on Asset Valuations*

  The Guidelines on Asset Valuations are applicable to new practice notes on the valuation of plant, machinery and equipment and forest assessment report.

- *Prospectus Guidelines*

  These guidelines will ensure streamlined and enhanced disclosure requirements and speedier registration procedures for prospectuses.

- *Guidelines on Unit Trust Funds*

  Some of the features of such guidelines include flexibility for the issuance of specialized unit trust products and speedier assessment of the application for the issuance of unit trust products and prospectus registration.

- *Guidelines on the Issue of Call Warrants*

  These guidelines will enable a larger pool of underlying securities to be available for call warrant issuance and will allow a greater variety of call warrants.

REVIEW OF CORPORATE PROPOSALS

The final phase of the DBR would see major changes in how the SC reviews corporate proposals involving the issue/ offer/ listing of equity and equity-linked securities. There will be two approaches used for submission of proposals to the SC, namely (a) the assessment approach; and (b) the declaratory approach.

The assessment approach will involve a more focused review of the suitability of the corporate proposal, and this approach would generally be adopted for major transactions such as new listing applications, reverse take-overs/ back-door listings and corporate proposals by distressed listed companies. The declaratory approach on the other hand will see the SC approve a corporate proposal based on a declaration (by the issuer and the principal adviser) that the corporate proposal has complied with the relevant requirements of the SC - ZRp

BRIEF-CASE...

BANKING/ CORPORATE – POWERS OF RECEIVERS & MANAGERS

MELANTRANS SDN BHD v CARAH ENTERPRISE SDN BHD & ANOR – March 2003, Federal Court

FACTS

Melantrans, as security for facilities availed to it by a bank, executed in favour of the latter, a debenture as well as a first legal charge on a lease held in land. The debenture specifically provided for the appointment of a Receiver and Manager (R & M) coupled with an irrevocable power of attorney. The R & M was therefore empowered to act as the agent of Melantrans to effect the sale of the asset secured by the debenture. Upon default, the bank appointed an R & M who then entered into a sale and purchase agreement with Carah to sell the lease. Carah refused to perform the terms of the agreement on the basis of the decision of the former Supreme Court in *Kimlin Housing Development Sdn Bhd v Bank Bumiputra Malaysia Bhd & Ors* (*Kimlin*), in which it was held that the R & M was not entitled to sell lands charged under the provisions of the National Land Code (NLC) without resorting to the foreclosure proceedings prescribed by the same Code.

THE ISSUE

The issue for consideration in Melantrans was whether the R & M appointed pursuant to the terms of a debenture, which included a power of attorney, could sell the lease which was subject to a first legal charge created under the NLC, by way of a private treaty, without resorting to the mode provided for in the NLC.

THE *KIMLIN* CONTROVERSY

Since Carah's basis was *Kimlin*, the facts in *Kimlin* are relevant. Kimlin executed two legal charges under the NLC in favour of the bank to secure the availed banking facilities. The charges were duly registered under section 108 of the Companies Act 1965. Kimlin also executed a debenture in favour of the bank with a provision to appoint an R & M with certain powers.

The R & M applied to the High Court for leave to sell the lands as there were no express provisions allowing for such a sale in the debenture. Kimlin, in the meantime, was wound-up. The R & M's application was opposed by the liquidator of Kimlin. In a landmark decision, the then Supreme Court unanimously held that the R & M was not entitled to sell the charged lands by virtue of the powers conferred upon him in the debenture, without proceeding under the NLC to obtain a judicial sale.

Kimlin made some significant inroads into powers by an R & M of a company which had gone into liquidation. The following propositions were laid down:

- The rights and powers of a chargee (in respect of an NLC charge) flow only from the relevant provisions of the NLC.

- The provisions of the NLC as to the rights of chargors are designed for their protection and cannot be waived or be contracted out. It follows that no private power of sale could be conferred on a chargee whether by way of debenture or power of attorney once the chargor has gone into liquidation.

- The provisions of the NLC setting out the rights and remedies of the parties under a statutory charge over land comprised in Part XVI of the same Code are exhaustive and exclusive and any attempt at contracting out of those rights would be void as being contrary to public policy.

- The agency and the powers of an R & M terminates ipso facto upon the granting of a winding-up order, if there are no assets or estate to be administered by him.

KIMLIN DISTINGUISHED

The facts that distinguish *Kimlin* from *Melantrans* are as follows:

- In *Kimlin* the borrower company was wound up and consequently the R & M ceased to be the agent of the chargor company whereas in *Melantrans* the borrower company was not wound up and the R & M remained the agent of the same;

- In *Kimlin*, the debenture created by the borrower company in favour of the bank did not contain an express provision appointing the R & M as the attorney of the borrower company whereas in *Melantrans* there was a valid power of attorney in favour of the R & M;

- Section 256 of the NLC provides a prescribed method of sale to be undertaken by a chargee but not a chargor. In *Kimlin* the stringent provisions of the NLC were applied because the R & M was the agent of the chargee whilst in *Melantrans*, since the R & M was acting as the agent of the chargor, the provisions of the NLC prescribing a judicial sale did not apply.

FACTOR X

Although the ratio decidendi in *Kimlin* did not apply to *Melantrans*, the Federal Court in the latter upheld and reaffirmed *Kimlin*'s principles, though observing that *Kimlin* 'did not consider the position of the R & M as the agent of the company which went into liquidation.'

ANALYSIS

Kimlin therefore has no application where the chargor is still an ongoing concern and where the R & M is empowered to deal with all assets of the company. *Melantrans* on the other hand, makes it clear that where a valid power of attorney is conferred on the R & Ms, they may act on behalf of the borrower company to sell its charged assets of the company, as the agent of the latter, regardless of whether there is a statutory charge created over the assets. – ***ZRp***

BANKING/ CONVEYANCING – ORDER FOR SALE

Ooi Chin Nee v Citibank Berhad – Jan 2003, High Court

FACTS

By a sale and purchase agreement dated 10 August 2000, the plaintiff (borrower) purchased a parcel (the property) from the developer and to complete the sale, the borrower obtained a loan from the defendant (Citibank). Pursuant to a deed of assignment, the borrower assigned all his rights in the property to Citibank.

In August 2002, pursuant to the power granted under the deed of assignment, Citibank attempted, by way of a non-judicial public auction to sell the property. The strata title to the property was subsequently issued after the initial auction, and it was registered in the name of the developer.

The borrower's contention, among others, was that he was never given any opportunity to challenge the said reserve price and also since the strata title was already issued and registered in the name of the developer, Citibank could no longer proceed with the auction of the property. The basis of the borrower's contention was Clause 4.05 of the Deed of Assignment which was as follows:

> Upon the issue of separate document(s) of title to the property by the relevant governmental authorities, the assignor shall, at its own cost and expense and immediately upon being required to do so by notice in writing from the assignee or its solicitors, take a transfer of the property and immediately deliver and deposit or cause to be delivered and deposited with the assignee or its solicitors the relevant document(s) of title and memorandum or memoranda of transfer and all other documents together with all necessary stamp and registration fees for effecting the registration thereof free from encumbrances and shall at the assignor's own cost and expense immediately execute a statutory charge or charges in the form prescribed under the National Land Code over the separate document(s) of title to the property, such charges to be in the form and substance prescribed by the assignee at its sole and absolute discretion in favour of the assignee to secure the repayment to the assignee of the facility not exceeding such principal amount as the ad valorem stamp duty from time to time stamped on the facility agreement extends to cover.

The borrower argued that the bank must first perfect the charge over the property, and then proceed to realize the security by way of a judicial sale using the 'foreclosure' procedure provided by the National Land Code 1965 (NLC). The learned High Court judge agreed with the borrower's contention, stating that 'once a separate strata title had been issued, a statutory charge must be created over the said property. This means that the charge must be registered. Once this is established then Order 83 of the Rules of the High Court 1980 (RHC) stipulates that the defendant must apply to court for leave to foreclose.'

PHILEOALLIED BANK (MALAYSIA) BERHAD V BUPINDER SINGH AVATAR SINGH & ANOR REVISITED

The case of *PhilleoAllied Bank (Malaysia) Berhad v Bupinder Singh Avatar Singh* was referred to. In that case the Federal Court reversed both the Court of Appeal and High Court decisions mandating banks to make applications to the court when disposing of properties secured by loan agreements cum assignments (LACAs).

It was noted in the Federal Court that a loan agreement cum assignment was entered into followed by the execution of a joint power of attorney in favour of the bank.

In deciding that the court had no power to force a lender holding security by way of an LACA to realize his security by making an application to obtain a judicial sale, the learned Federal Court judge was of the view that *Order 83 of the RHC was applicable only if the transaction was by way of a charge, where there was a document of title of the property in question.*

CASES DISTINGUISHED

The High Court judge in *Ooi Chin Nee v Citibank Berhad* distinguished the facts of the case before him from that of *PhilleoAllied Bank (Malaysia) Berhad v Bupinder Singh Avatar Singh & Anor* in that in the former, an issue document of title had been issued prior to the carrying out of the privately conducted sale whereas in the latter there was neither an issue document of title nor a registered charge. The High Court also relied on the mutual covenants contained in Clause 4.05 of the Deed of the Assignment wherein both the borrower and the bank had agreed on their respective obligations upon the issuance of an issue document of title.

ANALYSIS

The decision in *Ooi Chin Nee v Citibank Berhad* is in consonance with established legal principles regarding the interpretation of contracts. In *PhilleoAllied Bank (Malaysia) Berhad v Bupinder Singh Avatar Singh & Anor*, Abdul Malek FCJ, reiterated the dicta of well established cases in respect of the mutual obligations between a borrower and the lending bank:

> All things considered, we were more inclined to agree with learned counsel for the appellant in particular with his submission that in the absence of any statutory provisions or common law requiring the equitable mortgagee to obtain a court order to realise its security under an absolute assignment of rights to land, *the court should give effect to and recognise the contractual rights as determined between the vendor and the purchaser.*

As a consequence of *Ooi Chin Nee v Citibank Berhad*, we would advise that prior to lenders exercising their rights under LACAs, an enquiry must be made with the property developers to determine whether any issue documents of title have been issued under either the NLC or the Strata Titles Act 1985, and in the event that such documents have indeed been issued by the relevant authorities, the lending bank should immediately act to perfect a statutory charge pursuant to the NLC - **ZRp**

TORT – NEGLIGENCE – DUTY OF LANDLORD

SRI INAI (PULAU PINANG) SDN BHD v YONG YIT SWEE & ORS

- Nov 2002, Court of Appeal

FACTS

On 16 February 1989, a fire broke out in a hostel which was used to accommodate students of a private school. Several of the students were killed whilst others were seriously injured. The owner of the building was the second defendant, Majlis Perbandaran Pulau Pinang (MPPP). MPPP rented the building to the first defendant, Sri Inai (Pulau Pinang) Sdn Bhd (Sri Inai), which ran a private school of the same name. Sri Inai had used the building as a hostel for students attending the school.

SESSIONS COURT

The parents of the deceased and injured students sued MPPP and Sri Inai whereby liability for negligence was sought to be imposed on both MPPP (as the landlord) and Sri Inai (as the tenant) for breach of duty of care towards the hostel occupants who were the lawful visitors or licencees of Sri Inai. The Sessions Court held MPPP and Sri Inai to be equally liable for negligence.

HIGH COURT

Sri Inai appealed to the High Court against the finding of negligence. Sri Inai contended that MPPP should be solely liable for negligence.

The High Court however set aside the finding of liability against MPPP and held that Sri Inai (the tenant) alone was wholly liable for negligence.

COURT OF APPEAL

The Court of Appeal however reinstated the finding of liability by the Sessions Court. The Court of Appeal enunciated that MPPP (as a landlord) was liable on the basis that it stood in sufficiently close proximity to the lawful visitors of its tenant, Sri Inai, and therefore owed a duty of care to them. Furthermore the court observed that MPPP had failed to comply with the Uniform Building By-Laws 1986.

Speaking for the Court of Appeal, Gopal Sri Ram JCA said:

> …a landlord of premises stands in sufficiently close proximity to the lawful visitors of his tenant. And the latter is certainly someone whom the former ought to have in his contemplation when letting out his building.
>
> …the duty owed by a landlord to the lawful visitors of his tenant is to ensure that the premises that are let out are safe for the purposes for which they were meant to be used and the defect complained of by the entrant must be a defect of which the landlord had knowledge or means of knowledge.

In this case, the evidence was that MPPP whose duty it was to ensure compliance with the Uniform Building By-Laws 1986, itself had failed to comply with the same, particularly with regard to the availability of safety exits for occupants in the event of a fire. Further, MPPP was aware that the building was to be used as a hostel for young children. In the upshot, the Court of Appeal agreed with the Sessions Court and held that MPPP did in fact expose the victims of the fire to the risk of injury by its failure to comply with the relevant by-laws. The finding of liability against MPPP was thus reinstated.

ANALYSIS

It is obvious that this decision casts a duty of care on the landlord towards the licencees and visitors of his tenant. The burden may be too onerous and heavy considering the absence of relationship between the two parties, which brings to mind the issues of proximity, control and reasonable forseeablility.

It must be noted however that if the landlord knew or had means of knowing of the defect of danger inherent or apparent in the building, the liability for negligence is virtually inescapable. Knowledge of the landlord therefore appears pivotal as this would directly impinge upon the issue of forseeability - ZRp

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The life of the law has not been logic; it has been experience… The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics -

Oliver Wendell Holmes *(1841 – 1935)*

BRIEF-UP...

TRADE MARKS (AMENDMENT) ACT 2002

Act No
A1138

Date of coming into operation
3 March 2003

Amendments to the Trade Marks Act 1976
Sections 3, 4, 8, 70C, 70E, 70I, 70L, 70M, 70N

Notes
The amendments are made consequent upon the establishment of the Intellectual Property Corporation of Malaysia under the Intellectual Property Corporation of Malaysia Act 2002.

Specific definitions have been introduced while certain existing definitions in section 3(1) have been amended.

The amendment to section 4 provides that the Director General of the Intellectual Property Corporation of Malaysia shall be the Registrar of Trade Marks. The amendments also seek to empower the corporation to appoint its employees to be deputy registrars, assistant registrars and other officers of Trade Marks - ZRp

PATENTS (AMENDMENT) ACT 2002

Act No
A1137

Date of coming into operation
3 March 2003

Amendments to the Patents Act 1983
Sections 3, 8, 9, 49A, 50, 51, 52, 53, 54, 77, 88, Second Schedule

Incorporation
Section 9A

Deletion
Part II, First Schedule

Notes
The amendments are made consequent upon the establishment of the Intellectual Property Corporation of Malaysia under the Intellectual Property Corporation of Malaysia Act 2002.

Specific definitions have been introduced while certain existing definitions in section 3(1) have been amended.

The amendment to section 8 provides that the Director General of the Intellectual Property Corporation of Malaysia shall be the Registrar of Patents.

All references to the Patents Board have been removed and its functions have been taken over by the Corporation, hence the deletion of Part II - ZRp

COPYRIGHT (AMENDMENT) ACT 2002

Act No
A1139

Date of coming into operation
3 March 2003

Amendments to the Copyright Act 1987
Sections 3, 5, 22, 41A, 53

Notes
The amendments are made consequent upon the establishment of the Intellectual Property Corporation of Malaysia under the Intellectual Property Corporation of Malaysia Act 2002.

The amendment to section 5 provides that the Director General of the Intellectual Property Corporation of Malaysia shall be the Controller of Copyright. Such amendments also empower the Corporation to appoint any public officer or any of its employees to be deputy controllers, assistant controllers or other officers of Copyright.

Section 22 has been amended to delete the words 'or first made available to the public or made, whichever is the latest'. This amendment is made to avoid problems of interpretation since 'first publication' has already been explained in section 4.

By virtue of the amended section 41A, written consent of the Public Prosecutor is required before any offer to compound is made to any person – ZRp

SALES TAX (AMENDMENT) (NO 2) ACT 2002

Act No
A1183

Date of coming into operation
1 January 2003

Amendments to the Sales Tax Act 1972
Sections 7, 24, 61, 68, 73

Incorporations
Sections 31C, 31D

Notes
The new section 31C allows any person to make a claim to the Director General for a refund of sales tax where the sales tax in relation to the goods sold by him has become a bad debt. The claim however is subject to certain conditions set out in section 31C(2).

Section 31D requires a person who has been granted a refund under the proposed section 31C to repay the Director General the amount of the service tax so refunded if he, subsequent to the refund, receives any payment in relation to the goods sold. If the repayment is not made, a penalty becomes payable under the provisions of the amended section 24.

The amended section 68 provides an avenue of appeal to the court in matters relating to the refund of sales tax under section 31C - ZRp

SERVICE TAX (AMENDMENT) (NO 2) ACT 2002

Act No
A1182

Date of coming into operation
1 January 2003

Amendments to the Service Tax Act 1975
Sections 2, 3, 16, 41, 50

Incorporations
Sections 21B, 21C

Notes
The new section 21B allows any person to make a claim to the Director General for a refund of service tax where the service tax in relation to the services provided by him has become a bad debt. The claim is subject to certain conditions as set out in section 21B(2).

Section 21C requires a person who has been granted a refund under the proposed section 21B to repay the Director General the amount of the service tax so refunded if he, subsequent to the refund, receives any payment in relation to the service provided. If such repayment is not made, a penalty becomes payable under the provisions of the amended section 16.

The amended section 50 provides an avenue of appeal to the court in matters relating to the refund of the service tax under section 21B - ZRp

LABUAN TRUST COMPANIES (AMENDMENT) ACT 2002

Act No
A1179

Date of coming into operation
1 February 2003

Amendments to the Labuan Trust Companies Act 1990
Sections 2, 3, 4, 5, 6, 7, 8, 9, 10, 23,

Incorporations
Sections 11A, 28, 29

Notes
The amended section 6 requires trust companies to obtain consent from the Registrar if the trust company intends to open any office or acquire or establish any subsidiary elsewhere outside Labuan, while the amended section 7 requires all trust companies to comply with the provisions of the Offshore Companies Act 1990.

The new section 11A is introduced to enable a trust company whose business is to be transferred to another trust company, and a trust company whom the business is to be transferred, to apply to the court for an order which will enable their agreement or arrangement to be given effect to.

The new section 28 confers on the Minister the power to exempt any person from any provision of the Labuan Trust Companies Act 1990 while section 29 deals with the non-applicability of several existing provisions of the Offshore Companies Act 1990 to a trust company - ZRp

UNCLAIMED MONEYS (AMENDMENT) ACT 2002

Act No
A1161

Date of coming into operation
1 January 2003

Amendments to the Unclaimed Moneys Act 1965
Sections 4, 8, 10, 11, 12, 13, 14, 15, 16, Part II

Incorporations
Sections 10A, 10B, 17, 18

Notes
The amendments generally provide protection to persons paying unclaimed moneys under Parts I and II of the Act.

The new section 10A requires every company/ firm holding unclaimed moneys to submit a copy of the register of unclaimed moneys to be published in the Gazette while the new section 10B provides that any person may make an enquiry with the Registrar, upon payment of a fee, on the existence of any unclaimed moneys belonging to him lodged with the Registrar.

With the amendments made to section 11, unclaimed moneys will remain in the Consolidated Trust Account for 15 years before being transferred to the Consolidated Revenue Account.

Penalties have been increased with amendments made to sections 12(3) and 12(4) - ZR*p*

GEOGRAPHICAL INDICATIONS (AMENDMENT) ACT 2002

Act No
A1141

Date of coming into operation
3 March 2003

Amendments to the Geographical Indications Act 2000
Sections 2, 8, 11, 19, 32

Incorporations
Sections 11A, 19A, 19B

Notes
The amendments are made consequent upon the establishment of the Intellectual Property Corporation of Malaysia under the Intellectual Property Corporation of Malaysia Act 2002.

Certain definitions have been introduced while certain existing definitions in section 2 have been amended.

The amendment to section 8 provides that the Director General of the Intellectual Property Corporation of Malaysia shall be the Registrar of Geographical Indications.

The amendment made to section 11 is for the purpose of introducing a requirement, that is an agent for the purposes of a foreign applicant. According to the new section 11A, the agent must be domiciled or resident in Malaysia and carry on business or practise principally in Malaysia – ZR*p*

INDUSTRIAL DESIGNS (AMENDMENT) ACT 2002

Act No
A1140

Date of coming into operation
3 March 2003

Amendments to the Industrial Designs Act 1996
Sections 3, 4, 5, 8

Notes
The amendments are made consequent upon the establishment of the Intellectual Property Corporation of Malaysia under the Intellectual Property Corporation of Malaysia Act 2002.

Certain definitions have been introduced while certain existing definitions in section 3 have been amended.

The amendment to section 4 provides that the Director General of the Intellectual Property Corporation of Malaysia shall be the Registrar of Industrial Designs.

Such amendments also empower the Corporation to appoint its employees to be deputy-registrar, assistant-registrar and other officers of Industrial Designs - **ZRp**

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NEWS-BRIEF...

LOCAL

PROPOSED AMENDMENTS TO THE COMPANIES ACT 1965

The Companies Commission of Malaysia (CCM) which took over the functions of the Registrar of Companies (ROC) and Registrar of Businesses (ROB) in April 2002 is embarking on a wholesale review of the Malaysian Companies Act 1965. This is due to many developments, mainly the increased emphasis on corporate governance.

An interesting aspect of the amendments is the compulsory duty of company directors (with the exception of qualified company directors) to attend training programmes. Those who fail to do so may be fined or even jailed.

Part of the amendments will be with regard to protection for company officials who blow the whistle on listed companies or directors involved in illegal activities (the legal provision for whistle blowers currently applies only to auditors). This proposal is made by the Securities Commission.

The review however would be neither simple nor in haste. There will be consultations within and outside the government. The review is aimed at making Malaysia more market-oriented and competitive with other countries in the region. The review will also include the process of registering new companies – **ZRp**

MONEYLENDERS BILL 2003

Amendments to the Moneylenders Act 1951 have been tabled in Cabinet with the reading of the Moneylenders (Amendment) Bill 2003. Such amendments have taken place in the wake of reports of defaulting borrowers and their families being harassed by loan sharks. They are intended to revamp the whole Act to provide for greater safeguards for borrowers. Some aspects include the following:

- A moneylender would now be required to apply for a licence. An illegal money-lender risks being fined between RM20,000 and RM100,000 or even imprisoned. Repeat offenders are liable to whipping.
- The licence of a moneylender with a criminal record would be revoked.
- A moneylender must apply for an advertisement permit if he wants to advertise the business. Newspapers will otherwise be banned from carrying advertisements of money lenders.
- A borrower must sign a moneylender's agreement where the prescribed rate of interest is stated. It must be attested by an Advocate & Solicitor and all the terms of the agreement must be explained to the borrower. In order to ensure uniformity the agreement has to be stamped and signed by all parties.
- Harassment or intimidation of borrowers will attract penal sanctions.

The amendments are the collective input of the State Government, Bank Negara Malaysia and the Domestic Trade and Consumer Affairs Ministry.

FOREIGN

ZRP – NATIONAL LAW FIRM OF THE YEAR

ZR*p* was selected as the **National Law Firm of the Year** for Malaysia for 2002 by the International Financial Law Review (IFLR) at the IFLR's Asian Legal Deals of the Year. The presentation ceremony was held on 27 February 2003 in Hong Kong. Other National Law Firms of the Year that were recognized were Allen & Gledhill (Singapore); Johnson Stokes & Master (Hong Kong); Mallesons Stephen Jacques (Australia); Kim & Chang (Korea); and Chapman Tripp (New Zealand).

ZR*p* was also nominated in the following categories, namely the **Debt & Equity-Linked Deals** and the **Equity Deals**.

The IFLR has been the pre-eminent source of information on legal developments for banks, financial institutions, corporations, law firms and senior in-house counsel worldwide. From offices in New York, London and Hong Kong, IFLR reports, informs and comments on the legal issues affecting international financial markets and the global legal industry - ZR*p*

AUDITORS' DUTY OF CARE EXTENDED?

With the relatively recent decision in *Royal Bank of Scotland plc v Bannerman* (July 2002), could the audit profession be exposed to unacceptable risks?

In this case the Royal Bank of Scotland sued the auditors Bannerman Johnstone Maclay to reclaim a lost loan which it said had been offered based on information contained in the audited financial statements.

The court found that the auditors were liable for the losses incurred by the bank, thus creating what may be called 'a legal precedent with potentially explosive implications'. This decision contrasts with the decision in *Al Saudi Banque v Clark Pixley* (1990) which was approved by the House of Lords in *Caparo Industries plc v Dickman* in which it was ruled that auditors did not owe a duty of care to lending banks.

Although there were specific factors which enabled the judge to infer a duty of care between the audit firms and the bank (regardless of the absence of contract between them), the *Bannerman* decision may be viewed as unfair and even dangerous as it extends the liability of the profession beyond boundaries which are commercially realistic.
The court did however state that it was open to the auditors to disclaim any liability to third parties, though it must be noted that such disclaimer may not afford absolute immunity. In fact, a more express method of disclaiming liability is to bring the disclaimer to the attention of any third party and perhaps to even have such disclaimer acknowledged in writing by such third party.

Alternatively the auditors may write (with the clients' consent) to the relevant banks disclaiming any liability and to enumerate the terms upon which the information is to be provided.

An assurance in the light of this legal upheaval is the fact that *Bannerman* is the decision of the Court of Session of Scotland and is not binding on an English court, much less in the Malaysian jurisdiction. Furthermore the case is currently going through the appeal procedure. Nevertheless it must be borne in mind that since the decision was drawn from leading English cases, it may have persuasive effect beyond the Scottish jurisdiction - ZR*p*

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ZRp 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.

We welcome feedback and comments and if you require further information, please contact the Editor at:

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Our Corporate Values

Communication

Loyalty

Integrity

Passion

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Teamwork

Ownership
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