Brief: 1/03 Folder: 3/ July - Sept

THE ZRp BRIEF

KDN No: PP12857/9/2003

BRIEFING...

BANKRUPTCY

THE LAST RESORT...? While the Minister in the Prime Minister's Department has advised that banks and financial institutions must be sensitive towards borrowers and act only when there are no other solutions, the Association of Credit Management Malaysia believes that such proposal may stunt business growth.

We analyse the implications resulting from the recent amendments to the Bankruptcy Act 1967.

The rising number of bankruptcies is one of the reasons for the amendments to the Bankruptcy Act 1967 ('the Act'). As at February 2003, there were over a 100,000 bankrupts in the country. It has been referred to as a 'social problem'. The amendments will have major ramifications for the financial services and corporate sectors.

WHAT ARE THE CHANGES...

Increase in Debt Ceiling One of the most significant changes is the amendment made to section 5 of the Act which raises the debt ceiling from RM10,000 to RM30,000. While this move is to be consonant with changes in the economic, social and political situation in the country, the Association of Credit Management Malaysia (ACMM) has voiced its opinion stating that increasing the minimum amount may stunt the growth of the recovering Malaysian economy, as financial institutions and credit companies may have no recourse against credit card holders and hirers and as a result thereof may be cautious in extending credit.

On the other hand, it has been argued that the RM10,000 minimum amount is too low a figure and not at all reflective of the current living standards.

Right of Bankrupts to Obtain Credit Another figure that has been described as archaic and outdated is the amount of credit that is allowed by an undischarged bankrupt without having to inform the creditor that he is such. Currently it stands at RM100. With the amendment to section 109 of the Act, the amount is raised to RM1,000.

Restrictions on Bankruptcy Proceedings against Guarantors A new subsection (3) to section 5 of the Act will prohibit creditors from commencing bankruptcy proceedings against 'social guarantors' unless they prove to the satisfaction of the court that they have exhausted all avenues to recover debts owed to them by the debtor.

The amendments have defined a 'social guarantor' as a person who provides, not for the purposes of making profit, (a) guarantee for a loan, scholarship or grant for educational or research purposes; (b) guarantee for a hire purchase transaction of a vehicle for personal or non-business use; and (c) guarantee for a housing loan transaction solely for personal dwelling. It should be noted that this particular amendment does not apply to corporate guarantors.

It has been argued that the protection afforded to social guarantors may result in undue delay in comparison to the position prior to the amendment where action may be taken against the borrower and guarantor simultaneously.

Furthermore isn't one deemed to understand the contract that one is signing? Likewise shouldn't a guarantor be aware of his risks and liabilities?

Creditors' Right to Surplus Section 43(3) of the Act is amended to prevent the application of any surplus (after all debts proved have been paid in payment of interest after the date the Receiving Order is granted by the court) to creditors with the exception of secured creditors who realize their security within six months from the date of the Receiving Order. This particular amendment appears to be less favourable to the creditor as currently, such surplus may be applied in the payment of interest on all debts proved in the bankruptcy, whether secured or unsecured.

Powers of the Director General of Insolvency A new section 84A is inserted providing for additional powers of the Director of Insolvency, which include the powers of the Commissioner of Police under the Police Act 1967 and the Criminal Procedure Code.

Appointment of Investigating Officers The Director General of Insolvency will also have the power to appoint investigating officers who will have all the powers of a police officer under the Police Act 1967 and the Criminal Procedure Code, in particular, the power to conduct criminal prosecution for offences under the Act, subject to written authorisation and the control and direction of the Public Prosecutor.

Title of Official Assignee and other officers The titles of 'Official Assignee' and 'Deputy Official Assignee' are replaced by 'Director General of Insolvency' and 'Deputy Director General of Insolvency' respectively while the positions of 'Senior Assistant Official Assignee' and 'Assistant Official Assignee' will be referred to as 'Senior Assistant Director of Insolvency' and 'Assistant Director of Insolvency'. The office of 'Bankruptcy Officer' will be replaced with 'Insolvency Officer' while two additional offices are created, namely 'Director of Insolvency' and 'Deputy Director of Insolvency'.

CONCLUSION Though the amendments will significantly limit the rights of creditors, one wonders whether as a result of it business growth may be affected. Will the amendments backfire as the ceiling of RM30,000 encourage borrowers to spend more resulting in an increase of the number of bankrupts in the long-run? Will lenders on the other hand be unwilling to extend credit for amounts lower than RM30,000 and a result of this, affect borrowers, especially those in the lower and middle-income group ? – ***ZRp***

CONVEYANCING

OF TRIALS AND TRIBUNALS...
The Housing Development (Control & Licensing) Act 2002 ('the Act') came into effect on 1 December 2002. One of the more significant changes especially for the buyers is the establishment of the Tribunal for Homebuyer Claims ('the Tribunal'), a form of alternative dispute resolution for the housing industry.

We examine how the Tribunal operates, its challenges and obstacles; and to what extent it serves as a concession to the consumers.

ESTABLISHMENT OF THE TRIBUNAL The Tribunal for Homebuyer Claims ('the Tribunal'), established under the Housing Development (Control & Licensing) Act 2002 ('the Act'), comprises seven members, namely: (i) the Chairman; (ii) the Deputy Chairman; and (iii) five members. The Chairman and Deputy Chairman are appointed by the Minister from amongst members of the Judicial and Legal Service while the five ordinary members may be appointed amongst advocates and solicitors having at least seven years' standing.

WHO IS A 'HOMEBUYER'? A new personality, 'the homebuyer' is brought to life via section 16A of the Act to refer to a purchaser and this includes a person who has subsequently purchased a housing accommodation from the first purchaser.

The definition however does not seem to include any subsequent purchaser after the sub-purchaser, nor does it provide for a developer to institute or file any claim with the Tribunal though he may raise a counter-claim when responding to the claim filed by the homebuyer.

JURISDICTION OF THE TRIBUNAL

Monetary The Tribunal has jurisdiction to determine any claim *not* exceeding RM 25,000 unless both parties agree in writing that the Tribunal should do so nevertheless.

Time frame The claim must be brought to the Tribunal not later than 12 months from the date of issuance of the CFO (certificate of fitness for occupation) or the expiry date of the defects liability period as set out in the Sale and Purchase agreement.

Subject matter The Tribunal has *no* jurisdiction whatsoever over any claim for the recovery of land (or interest in land); or any dispute concerning any entitlement under a will or settlement, or on intestacy, goodwill, chose in action, trade secret or other intellectual property right; nor has the Tribunal jurisdiction over a claim arising from personal injury or death.

JURISDICTION OF THE COURTS Where a claim is lodged within the jurisdiction of the Tribunal, the issue in dispute is not to be made the subject of proceedings in any court, unless such court proceedings were commenced *before* the claim was lodged at the Tribunal; or where the claim before the Tribunal is withdrawn, abandoned or struck out.

Where, on the other hand, court proceedings have commenced, the issue in dispute cannot be made a claim before the Tribunal. A claim however may be brought before the Tribunal if that claim,

originally brought before the court, is subsequently withdrawn, abandoned or struck out.

PROCEDURE The procedures are simple and uncomplicated. The homebuyer lodges his claim in the prescribed form with the prescribed fee. Thereafter, the Secretary is to give notice of the details of the hearing to the claimant and the respondent. All proceedings are open to the public.

Every party is entitled to attend and be heard at the hearing. However no advocate and solicitor may represent any party at the hearing unless the matter in question involves complex issues of law and where one party suffers financial hardship if he is not represented.

AWARDS OF THE TRIBUNAL The tribunal shall make its awards without delay and where practicable within 60 days from the first day of commencement of the hearing before the Tribunal.

Any person who fails to comply with an award made by the Tribunal is said to commit an offence, and is liable to a maximum fine of RM5,000 or to imprisonment for a maximum term of two years or to both.

TRIBUNAL ON TRIAL? The Tribunal was designed specially to hear disputes arising from homebuyers against their developers - whether it is bad workmanship or late delivery. It acts as a civil court but is supposedly free of the complicated and laborious aspects of litigation. It was tailored in a way that proceedings would be less costly but speedier than that in the courts of law. This was perhaps why the Tribunal was initially regarded as a haven for aggrieved buyers.

Recently there have been nagging issues resulting in a reassessment of the function and purpose of the Tribunal. One situation in particular concerns 50 house-buyers who filed a claim at the Tribunal. Six of them had received awards in their favour. Their joy was short-lived however when the developer filed an application in the High Court seeking judicial review of the decision of the Tribunal, on the basis that the Tribunal has no jurisdiction to hear disputes arising from sale and purchase agreements signed before 1 December 2002. The developer is also seeking an order of prohibition preventing the Tribunal from proceeding with hearing and determining the claims lodged by the remaining 44 buyers. The decision will have a binding effect on all other cases of similar nature. (At the time this article was written, the High Court had begun hearing the application).

On one hand many feel that the developers should not be allowed to question the tribunal's jurisdiction as this may drag aggrieved buyers into a legal muddle and may very well frustrate the act of Parliament in establishing the Tribunal in the first place. On the other hand, one wonders whether it is fair for the Tribunal to have retrospective power, and for that matter, for the court's power to be ousted.

A further issue concerns enforcing the award obtained. The Tribunal may be dispensing fast justice but there are hurdles to overcome in enforcing it. Are house-buyers to resort to the common rigmarole of civil procedure such as the judgment debtor's summons, writ of seizure and sale, garnishment proceedings and winding-up procedure?

It is reported that the Tribunal has solved 400 of the 2,000 cases referred to it but only time will tell whether the Tribunal has really served the purpose for which it was established - ***zrp***

INDUSTRIAL RELATIONS

WAGES – A LIABILITY OR PRIORITY…? We examine the implications of section 31 of the Employment Act 1955, in particular the statutory obligation to accord priority to the payment of wages to employees and the conflict that may arise in relation to section 57 of the Pengurusan Danaharta Nasional Berhad Act 1998.

SECTION 31 OF THE EMPLOYMENT ACT In essence, section 31 of the Employment Act 1955 ('the Act') statutorily gives priority to wages in a situation where there is a *judicial order* for sale of property which is the subject mater of a mortgage, charge, lien or decree or if it is sold pursuant to an exercise of rights under a debenture. In such an event, if the property is in fact 'the place of employment', priority is statutorily given to a claim for wages by the employees, which would take precedence over the rights of the chargee or the debenture holder in respect of the proceeds of sale.

SECTION 57 OF THE DANAHARTA ACT An issue that arises is whether section 31 applies to property disposed of by virtue of a *private treaty*. An example would be where Pengurusan Danaharta Nasional Berhad ('Danaharta') disposes of property pursuant to section 57 of the Pengurusan Danaharta Nasional Berhad Act ('the Danaharta Act') which confers upon Danaharta the power to dispose of assets by private treaty. On a strict and literal interpretation of section 31, it appears that employees may not have any priority over the proceeds of such sale since there is no reference whatsoever made to *private treaty*.

It may however be interesting to note the case of *Ban Hin Lee Bank Berhad v Applied Magnetics (M) Sdn Bhd (In Liq)* (2003). In that case the issue concerned competing claims between a lien-holder on the one hand and ex-employees of the company on the other, over the proceeds of sale by the liquidator of the company who had sold the subject property by way of a private treaty. It was held by the High Court that section 31 applied nevertheless to the proceeds of such sale. The basis of the decision was fairness and justice instead of a literal interpretation of the section.

Though the rationale of section 31 is comprehensible, one wonders whether the court in *Ban Hin Lee Bank* erred in expanding the width and scope of section 31 so as to achieve social justice for the employees of the company.

GENERALIA SPECIALIBUS NON DEROGANT It should be noted that the Danaharta Act is a specific piece of legislation which came into effect on 1 September 1998, a date which is well after 1 June 1957, that is the date the Employment Act 1955 came into force. The maxim 'generalia specialibus non derogant' (special words derogate from general words) should therefore apply to preclude any claim for priority. Furthermore Danaharta's priority could also be said to be intact by virtue of paragraph 5(8) of the 15th Schedule to the National Land Code 1965 ('the NLC'). The argument therefore is that the

proceeds of a private sale based on section 57 of the Danaharta Act read with clause 5(8) of the 15th Schedule to the NLC should be given pre-eminence and should be insulated from any claim or priority arising under section 31 of the Act – **ZRp**

CORPORATE

WATCHDOGS AT WORK...

RE-INVENTING THE CORPORATE WHEEL? They have received brickbats and bouquets but what exactly is the role of the Minority Shareholders Watchdog Group? What have they achieved in the last two years and for how long will they keep barking?

Incorporated in July 2001, the Minority Shareholders Watchdog Group (MSWG) consists of five founding members, namely the Employees Provident Fund (EPF); Permodalan Nasional Bhd (PNB); Armed Forces Fund Board (LTAT); Pilgrims Fund Board (Tabung Haji) and the Social Security Organisation (SOCSO) and is at present funded by such members. It was set up as a non-profit organization to, among others:

- provide a forum for minority shareholders to share their experiences;
- be a think-tank and a resource centre for minority shareholders;
- encourage shareholder activism; and
- initiate collective shareholder activism;

MSWG is not a regulator backed by legislation – neither was it set up as a vehicle to question the management of listed companies. In fact its role was described in the August 2002 Bulletin of the SIDC (Security Industry Development Centre) as follows:

> In playing its role, it must be remembered that the MSWG is not a guard dog which attacks its foes, as the MSWG has no teeth and does not bite. It also does not act as a bloodhound, as its role is not to investigate; that is the role of the regulators. As a watchdog, the MSWG's role is to watch for danger and bark alerting people of impending danger. It is up to the people to take heed of the warnings of the watchdog.

'TOP-DOWN, BOTTOM-UP' The MSWG also reviews and reforms the legal and regulatory framework for public-listed companies. It has an interest in ensuring that the Malaysian Code on Corporate Governance (the Code) is observed.

The Code was issued in 2000 and, amongst others, it rendered more stringent directors' responsibilities. The functions of the MSWG and the aim of the Code appear to coincide as ultimately, what is desired is a 'top-down, bottom-up' structure in corporate governance in Malaysia – 'top-down' referring to directors applying the Code; 'bottom-up' referring to minority shareholders demanding (through MSWG) that the Code be implemented.

SHAREHOLDER ACTIVISM – A NEW PHENOMENON? It has been said that MSWG is not re-inventing the corporate wheel as shareholder activism is not a new phenomenon. However it cannot be denied that such activism shot to dizzying heights mainly due to the Enron and Worldcom debacle.

SUCCESS STORIES? MSWG had monitored various companies over the year 2002 and have kept watching briefs over them. It has also attended company meetings, most notably for TRI (now Celcom), Naluri and KFC Holdings.

A fairly recent development with the MSWG is that it has offered to monitor up to 200 listed companies as part of a service that it intends to introduce. The service is to be called MSWG 200 and will cover counters that are linked to the KLSE's indices. Although this service is targeted at institutional investors, minority shareholders should be reassured at the thought of their investments being monitored.

MSWG may also introduce CG Rating, a corporate governance rating service that will assess how well a company is being run. The proposal is to rate top five companies in about 11 sectors according to how well they are being managed.
These services could perhaps be the initial steps of MSWG in transforming itself into a self-financing organization.

Some may be skeptical about the role of the MSWG but in the words of our Prime Minister, Dato Seri Dr Mahathir Mohamad (in the foreword to a book written on Company Law):

> Badan Pengawas will promote better and more effective corporate governance practices which could set a benchmark for others in the region – **ZRp**

CORPORATION – An ingenious device for obtaining individual profit without individual responsibility -

Ambrose Bierce *(1842 – 1914)*

BRIEF-CASE

BANKING/ CONSTITUTIONAL LAW

KEKATONG SDN BHD V DANAHARTA URUS SDN BHD – June 2003, Court of Appeal

FACTS The appellant ('Kekatong') was the registered proprietor of certain lands. These lands were charged by way of a third party charge to a bank, which had availed facilities to a borrower. The borrower had defaulted and judgment was entered against him. The bank commenced foreclosure proceedings and obtained an order for sale, which was subsequently, on appeal, set aside. Upon the implementation of the Pengurusan Danaharta Nasional Act 1998 ('the Act'), the bank sold the loan and the securities to the respondent ('Danaharta'), with whom, pursuant to the provisions of the Act, the land vested.
Kekatong applied to the High Court seeking to restrain Danaharta from exercising any rights under the Act or under the vesting order and with particular regard to section 57 of the Act and paragraph 5 of the 15th Schedule to the National Land Code 1965 ('the NLC').

The High Court refused the injunction on the basis that there was no serious question to be tried and in any event it had no jurisdiction to grant an injunction by reason of section 72 of the Act. Kekatong appealed to the Court of Appeal.

CHAMELEON IN THE COURT OF APPEAL…
The issue of the validity of section 72 of the Act was not raised before the High Court. Instead the Court of Appeal was entreated by counsel for the respondent to consider it as it had never been tested at the appellate courts. Counsel for appellant having confirmed the facts, consented to have this issue decided by the Court of Appeal.

HIGHLIGHTS OF THE DECISION OF THE COURT OF APPEAL The meaning of 'law' was discussed with reference to articles 8(1) and 160(2) of the Federal Constitution with the conclusion that the definition of 'law' in the same is not confined to written law but also includes 'common law'.

With this in mind, the Court of Appeal held that (a) the expression 'law' in article 8(1) refers to a system of law that incorporates the fundamental principles of natural justice of the common law; (b) access to justice is part and parcel of the common law; and (c) the doctrine of the Rule of Law which forms part of the common law demands minimum standards of substantive and procedural fairness.

MINIMUM STANDARDS OF FAIRNESS
In the light of the definition given to the meaning of 'law', it was held that section 72 of the Act is unconstitutional as it fails to meet the minimum 'standards of fairness both substantive and procedural by denying to an adversely affected litigant the right to obtain injunctive relief against' them 'under any circumstances'.

The Attorney General's argument that the Act is '…a special law specifically enacted to meet an economic exigency' and 'that the Act was passed in the public interest and for the public good' did not find favour with the Court of Appeal on the grounds that all Acts of Parliament are passed in the public interest and for the public good and that the Parliamentary motive is irrelevant to the issue of constitutionality. The preamble to the Act is to be resorted to only where there is ambiguity and in the context of section 72, there is none.

ANALYSIS Danaharta has applied for leave to the Federal Court. There is however an impediment by virtue of the provisions of the Court of Judicature Act 1964 in that an appeal to the Federal Court is by leave and on questions framed and is not based on a rehearing or review. One of the fundamental ingredients is that the issue must be one that has been decided by the High Court and subsequently the Court of Appeal. If it was instead the decision of the Court of Appeal on an issue that arose before it, the Federal Court will have no jurisdiction to hear the case. On the facts given in the case, it appears that Danaharta may have to overcome this obstacle first.

An interesting aspect of the case is the undue emphasis on the concept of minimum standard of fairness. Isn't the Act itself a reflection of 'social justice'? It was after all passed in the name of public interest and public good – to alleviate the crunch felt by the country during the financial crisis in the late 1990's.

In any event, what does justice mean? Is it reflected by the figure of the blindfolded woman holding the scales in one hand and a sword in the other; or could it very well be in the words of Alf Ross (Scandinavian realist and legal philosopher) that '…to invoke justice is the same thing as banging on the table - an emotional expression which turns one's demand into an absolute postulate.' - **ZRp**

CONTRACT

DATO MOHD ANUAR BIN EMBONG V BANK BUMIPUTRA MALAYSIA BHD – February 2003, Court of Appeal

PRELUDE When a contract is breached, damages that may be awarded according to section 74 of the Contracts Act 1950 ('the Act') are two-fold – first, the damages which naturally arose in the usual course of things from the breach; or secondly, damages which the parties knew, when they made the contract, would likely result from the breach.

The leading authority on damages is the celebrated case of *Hadley v Baxendale* (1854), which more than a century ago, settled the core principles on damages, which are now embodied in section 74 of the Act.

FACTS The plaintiff ('the borrower') who owned a parcel of land wanted to develop the same by constructing 66 units of shop-houses for sale. The defendant ('the bank') availed in June 1979 an overdraft facility for RM1.5 million. The facility was secured by a first legal charge on the master title. The land was converted and subdivided.

In January 1983, the borrower applied to enhance the facility and submitted a feasibility study report ('the FSR') in which the projected profit was shown in excess of RM3.4 million. In March 1983, the facility was increased to RM2.5 million. The bank had agreed to discharge the charges on six titles to enable the borrower to raise part of the bridging finance. The bank had failed to honour its part of the bargain as a result of which the High Court declared the bank liable for breach of contract.

Damages were thereafter assessed by the High Court. The borrower, being dissatisfied with the quantum of damages, appealed to the Court of Appeal.

The issue was whether the loss of profits suffered by the borrower came within the purview of the first limb of section 74 or was the second limb more suited to the facts.

COURT OF APPEAL The Court of Appeal unanimously held that the bank's failure to honour its obligation was in breach of the contract and therefore the loss of profit that would likely result from the breach, such damages not being remote, fell within the purview of the second limb of section 74 of the Act.

The court was of the opinion that as the bank had received the FSR and obviously relied on it as evidenced by the enhancement of the credit facility, it accepted the figures and knowledge with regard to the loss of profits the borrower could suffer by such breach was deemed. Furthermore the bank did not raise any queries on the figures stated in the FSR.

ANALYSIS In applying for a credit facility it is a norm in the industry for a customer to furnish the source of repayment. In the instant case however the courts had treated such disclosure of information, literally as a notice of the profits the customer intends to make or is likely to make. The banks should perhaps be aware of this consequence and be forewarned and for purposes of legal protection it may be advisable to add a suitable exemption clause - ZR*p*

BRIEF-UP...

EMPLOYEES PROVIDENT FUND (AMENDMENT) ACT 2003

Act No
A1190

Date of coming into operation
1 August 2001 (sections 3, 4, 5, 6, 7)
19 August 2002 (section 2)

Amendments to the Employees Provident Fund Act 1991
Sections 54, 70A, First Schedule, Third Schedule

Introduction
Section 70F

Deletion
Section 70B

Notes
With the amendment of section 54, computer-financing schemes have been abolished.

The amendment to section 70A seeks to abolish the liability of workers, who are not citizens of Malaysia, to contribute to the Employees Provident Fund though they may elect to do so if they wish.

The amendment to the First Schedule is for the purpose of introducing two new categories of persons not considered as employees under the Act.

The introduction of section 70F is to enable the Board to return to a non-Malaysian member of the Fund the amount standing to his credit - **ZRp**

LABUAN OFFSHORE SECURITIES INDUSTRY (AMENDMENT) ACT 2003

Act No
A1191

Date of coming into operation
30 May 2003

Amendments to the Labuan Offshore Securities Industry Act 1998
Sections 2, 3, 11, 12, 17, 21, 26, 32, 33, 34, 35, 37, 38, 44, 45, 47, 50, 51

Introduction
Sections 11A, 12A, 38A

Notes
Specific definitions such as 'listing sponsors' and 'trading agents' have been introduced while certain existing definitions in section 2 such as 'mutual fund' and 'committee' have been amended.

The amendment made to section 32 of the Labuan Offshore Securities Industry Act 1998 is to allow the Exchange to make rules on the conditions and administration of licences issued by the Exchange.

Section 12A is introduced to ensure that only fit and proper persons are allowed to carry on business as trustee, custodian, manager and administrator while section 38A gives the Minister the power to suspend trading. The contravention of the suspension order is now an offence - **ZRp**

KLSE LISTING REQUIREMENTS – AMENDMENTS CONSEQUENTIAL TO THE IMPLEMENTATION OF STANDARD BOARD LOTS

Date of coming into operation
7 April 2003
28 April 2003
26 May 2003

Amended provisions of the Listing Requirements
Paragraphs 3.05, 4.03, 4.09, 4.14, 11.10, Appendices 3A (Parts A & C), PN 8/2001

Notes
The objectives of the amendments in relation to the standard board lots was to make the investment in securities more accessible and affordable to all investors and to enhance investor participation in high securities. It was also to assist in reducing the holding of odd lots and enhancing the shareholding spread of securities.

Securities are currently traded on the KLSE in board lots of 100 units.

With the completion of the standard board lots, investors would be given a more attractive and lower entry level to securities investment and it is hoped that this will open up the widest range of investment opportunities in KLSE to all categories of investors in line with the recent measures to enhance the economy and capital market - **ZR*p***

KLSE LISTING REQUIREMENTS – AMENDMENTS IN RELATION TO PUBLIC SPREAD

Date of coming into operation
1 July 2003
(*Listed Issuers with an issued and paid-up capital of less than RM60 million on the Main Board or Second Board have to comply with the revised requirement by 30 June 2004*)

Amended provisions of the Listing Requirements
Paragraphs 1.01, 3.05, 4.03, 4.06, 4.09, 8.15, Appendices 3A (Parts B & C)

Notes
The definition of 'public' has been amended to include substantial shareholders of the applicant or listed issuer having direct or indirect interest of not more than 15% of the total number of shares in the applicant or listed issuer instead of 15% of the issued and paid up shares in the applicant or listed issuer.

In respect of the 25% of the total number of shares to be held by public shareholders, the minimum number required, which was previously dependent upon the size of the listed issuer's issued and paid-up capital, has been revised to 1000 public shareholders holding 100 shares irrespective of the issued and paid-up capital of the listed issuer.

The applicant can now take into account all shares in it held by the employees and Bumiputera shareholders to make up the 25%

public spread as opposed to the previous 5% and 10% of employees and Bumiputera shareholding respectively.

The KLSE may also accept a percentage lower than the 25% public spread if it is satisfied that such lower percentage is sufficient for a liquid market in such shares. In the event the public spread is equal to or below 10% of the total number of listed shares, the KLSE may suspend trading in the securities of the listed issuer - **ZR*p***

KLSE – ISSUANCE OF PRACTICE NOTE 15/2002 ON CONTINUING EDUCATION PROGRAMME

Practice Note 15/2002 relates to paragraph 15.09 of the KLSE Listing Requirements and Practice Note 5/ 2001.

Paragraph 15.09 of the KLSE Listing Requirements provides that directors must attend training programmes prescribed by the Exchange. Training for directors commenced in April 2001 with the introduction of the Mandatory Accreditation Programme (MAP) - a foundation programme aimed at providing directors with a general overview of the regulatory framework of the duties and liabilities associated with the office of a director.

The Continuing Education Programme (CEP) on the other hand is aimed at keeping directors updated and abreast with developments – in particular regulatory developments - **ZR*p***

BRIEFLY...

LOCAL

THE ELECTRONIC TRANSACTIONS ACT

The Electronic Transactions Act, proposed by the Domestic Trade & Consumer Affairs Ministry is to be tabled in Parliament this November. This is part of the government's effort to prevent e-commerce frauds.

Currently there are no specific laws controlling e-commerce in Malaysia and unfortunately there were many who were gullible enough to think that they could obtain instant profits regardless of the fact that certain businesses had been exposed. The SKYBIZ scandal (a multi-level marketing scheme) for example revealed that more than 65,000 people were involved where each had to pay about RM380.

Once the Electronic Transactions Act takes effect, consumers may be assured that perpetrators of Internet scams will not get away, if they are in Malaysia. Though it may be a progressive step in e-commerce, there is a dire need for cross-border co-operation among governments to ensure that such legislation is effective.

In the final analysis however, it is for the consumer to be cautious when approached by proposers of such schemes, and not be seduced by promises of instant profit - **ZR*p***

PROTECTION FOR WHISTLE-BLOWERS?

They may be not be household names but inhabitants of the corporate world will definitely be familiar with Cynthia Cooper and Sherron Watkins, the whistle-blowers of WorldCom and Enron respectively. In fact they were named 'Persons of the Year' by TIME magazine.

Closer to home, we question the measures taken to protect whistle-blowers. The Witness Protection Bill that is currently being drafted will include protection for whistle-blowers who raise the alarm on corporate misdeeds. This would complement the government's attempts at cleaning up corporate fraud.

Other laws are also being amended to speed up cases under investigation. For example, changes are to be made to the Criminal Procedure Code to allow the Public Prosecutor to call up the file on any particular case being investigated.

According to a survey conducted by health associations in the US, most whistle-blowers suffered some form of corporate harassment and this deterred many from coming forward to unveil misdeeds.

It has been suggested therefore that companies provide a platform for employees to report any fraudulent activities, even if it means outsourcing the function to an external party. An example would be Pinkertons, a US-based company that provides moral support to whistle-blowers suffering from the stresses of their actions.

Although one of the aims of the Witness Protection Bill is to prevent whistle-blowers from facing punitive action by their employees, permanent job security is not an absolute guarantee as there may be other intervening human factors - **ZRp**

BANKING ON PRIVACY...

Once the Payments Systems Act 2003 takes effect, bank officials and financial institutions that reveal details of their customers' accounts to third parties are liable to be fined up to RM500,000.

This law is formulated with the intention of protecting the interest of customers as there were many complaints that information belonging to customers was being released by bank officials.

The Payment Systems Act 2003 will also enable Bank Negara to monitor the payment system and instruments of financial institutions - **ZRp**

Most laws are, and all laws ought to be, stronger than the strongest individual
- George Bernard Shaw *(1842 – 1914)*

FOREIGN

SEX.COM – KREMEN V COHEN… FINAL CHAPTER?

The dispute began in 1995 when Stephen Cohen hijacked the domain-name sex.com that was at the time left dormant by its registered owner, Gary Kremen. Kremen had apparently registered sex.com in 1994 through Network Solutions but that name was hijacked by Cohen when he deceived Network Solutions into transferring it to himself. Cohen went on to launch an online pornography site with that name.

Kremen sued Cohen and Network Solutions in the Federal District Court in San Jose, US and was awarded USD 65 million but the claim against Network Solutions was dismissed. Cohen's appeal finally reached the US Supreme Court but was dismissed.

A subsequent issue that arose was whether Network Solutions may be held liable for the tort of conversion for handing over ownership of the domain name to Cohen, bearing in mind that a domain name is intangible property. This question was recently answered in the affirmative by the 9th US Circuit Court of Appeals.

The decision of *Kremen v Cohen* has been referred to as '…the best test case imaginable.' Not only will domain name owners benefit from the law this case has established but it is also a reflection of Internet governance - ZRp

ZRp IN-BRIEF…

The ZRp 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 should you require further information, please contact the Editor at:

mariette.peters@zulrafique.com.my

The contributors for this **Brief** are:

- *Shahul Hameed Amiruddin*
- *S Nantha Balan*
- *Mariette Peters*
- *Cathryn Chay*
- *Wong Keat Ching*
- *Lee Siew May*
- *Leong May Ling*

- **Arbitration & Alternate Dispute Resolution**
  (Wilfred Abraham; T Kuhendran)
- **Banking & Finance**
  (Loh Mei Mei; Choo Suit Mae)
- **Banking Litigation**
  (Khairuzzaman Muhammad)
- **Capital Markets**
  (Choo Suit Mae; Loh Mei Mei; Zandra Tan)
- **Commercial Crime**
  (Shahul Hameed Amirudin)
- **Commercial Litigation**
  (Khairuzzaman Muhammad; S Nantha Balan)
- **Communications & Multimedia**
  (Au Wei Lien)
- **Corporate Finance**
  (Jerry Ong; Choo Suit Mae; Loh Mei Mei; Zandra Tan)
- **Corporate Litigation**
  (Shahul Hameed Amirudin; S Nantha Balan)
- **Corporate Insolvency & Restructuring**
  (Shahul Hameed Amirudin)
- **Energy & Utilities**
  (Lukman Sheriff Alias)
- **General Commercial & Corporate Advisory**
  (Dato' Zulkifly Rafique; Choo Suit Mae)
- **Industrial Relations**
  (P Jayasingam)
- **Infrastructure & Construction**
  (Wilfred Abraham; Tunku Alizan RM Alias)
- **Intellectual Property**
  (Au Wei Lien)
- **Knowledge Management & Research**
  (Wilfred Abraham; Khairuzzaman Muhammad; Mariette Peters)
- **Media & Defamation**
  (Shahul Hameed Amirudin; S Nantha Balan)
- **Mergers & Acquisitions**
  (Dato' Zulkifly Rafique; Jerry Ong)
- **Oil & Gas**
  (Tunku Alizan RM Alias)
- **Privatisation & Corporatisation**
  (Lukman Sheriff Alias)
- **Property & Conveyancing**
  (Au Wei Lien)

Our Corporate Values

Communication

Loyalty

Integrity

Passion

i

Teamwork

Ownership

n

Publisher:
Zul Rafique & Partners Consultancy Sdn Bhd
Suite 17.01, 17th Floor, Menara PanGlobal
No 8 Lorong P Ramlee, 50250 Kuala Lumpur
Tel: 03-20788228; Fax: 03-20341913

Printer:
Bintang Print Enterprise
No 91-1, 1st Floor, Changkat Thambi Dollah
Off Jalan Pudu,
55100 Kuala Lumpur
Tel: 03-21417893; Fax: 03-21424869