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Reforming Malaysian company law

Comment
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THE Companies Act 2016 (Act 777) and The Companies Commission (Amendment) Malaysia Act will come into operation on Jan 31 this year. There are two major exception provisions found in Division 8 (Corporate Rescue Mechanism) relating to corporate voluntary arrangement and judicial management (JM) which is pursuant to S.1(2) where the Minister "may appoint different dates for its coming into operation".

The Winding Up provisions Pt IV (Cessation of Companies) will also be effective as of Jan 31.

However the existing Winding Rules which was passed under the 1965 Act will still be applicable (reliance is placed on S.35 (2), Interpretation Act).

There will be a new set of Company Regulations 2017.

This new Act replaces the 1965 Act which has governed for over 50 years the rules and framework of business organisation that has sought limited liability status.

In the 620 provisions of the Act 777 (the old Act has only over 350 provisions) inter alia major new areas that has been reformed include: one shareholder entity, setting up a company without a constitution, non-application of doctrine of constructive notice, no par value shares, solvency test, liberalisation of financial assistance prohibition for company to purchase its own shares, continuing enhancement of directors' duties and governance responsibilities, AGM for private companies can be dispensed with; provision for convening of a meeting of members at more than one venue by use of technology, proxy can be appointed without them having qualifications (eg advocate, approved company auditor), approval for directors remuneration, share buyback regime amendments.

In terms of enforcement regime the Act 777 introduced civil and administrative proceedings for selected types of breaches of the Companies Act alongside penalty sanctions. Such sanctions to be imposed against the officers as personal liabilities.

Act A1478 also introduces a plethora of provisions enhancing to levying of compound fines on offenders who contravenes provisions of Act 777. Also significant is the introduction of the presumption that officers who are in management control could also be fastened with personal liabilities if a company has been found to have committed a company law offence unless the officer could rebut the presumption.

Business people will baulk at the length of company laws and this is before taking into account stock exchange regulatory rules, corporate governance codes, accounting standards and practices issued by various boards and bodies.

Company laws are not known to be brief legislation. But is brevity an end in itself?

The true issue is whether a law reform is based on sound principles which conduce to clarity, certainty and simplicity. A brief law that does not assist corporate decision makers in aligning their decisions with what is proper and legal will in fact lead to higher costs and efforts in dealing with the complexity of market choices.

Legislators and reformers are faced with unenviable choices as there are users who clamour for more detailed guidance and those who urged for less prescriptive directions and more principled based norms.

As a practitioner, we are often asked by clients to look for and exploit loopholes when a provision is not crafted adequately to deal with issues at hand. There is therefore an inexorable tension between certainty and simplicity.

Since 1965, there has been piecemeal reform which has created a patchwork of amendments. The major amendments then were often made in reaction to perceived gaps in law dealing with directors' duties and insolvency which demanded corporate restructuring.

The new Act is a comprehensive undertaking implementing recommendations which a Corporate Law Reform Committee (CLRC) set up under the auspices of Corporate Commission Malaysia (SSM) in December 2003. The SSM established the Corporate Law Reform Committee as part of SSM's strategic direction to establish a dynamic regulatory environment for business in Malaysia while dealing with corporate accountability and governance that is in line with global standards.

The law reform committee in turn had a number of working committee and devoted hundreds of hours in deliberation and consultation with relevant stakeholders in arriving at their recommendations. It was heartening for us members to see the fruition of their work in form of the Act.

It must be pointed out however that the CLRC has been functus officio upon tabling its report and the recommendations. The CLRC is neither involved in the actual drafting of the Act nor responsible for any infelicities. Kudos or brickbats should be directed to SSM and the Attorney General Chambers.

The new Act drew its lessons from various Commonwealth jurisdictions including the UK, Canada, New Zealand, Australia, Singapore and Hong Kong.

Whether Act 777 will fulfill its laudable objectives remains to be seen.

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