

THIRD ASIAN ROUNDTABLE ON CORPORATE GOVERNANCE

MALAYSIA COUNTRY PAPER

By

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1. General legal Framework

The directors of any company in Malaysia must by law be at least two in number and at least two who are resident in Malaysia.¹ To qualify as 'Malaysian resident', the director must have Malaysia as his only or principal place of residence.² What suffices as residence is not defined or spelt out in the CA. The concept of residence has been considered in the context of other laws though. It has been held, for the purposes of the Income Tax Act 1967, that to be a 'resident', the person must reside in Malaysia and any absences must be temporary and reasonable, and not inconsistent with the claim of residence.

The Companies Act 1965 ("CA") provides that if a director purports to resign in circumstances where by his resignation, the company would be left with less than the minimum two directors required by law, the resignation shall be deemed to be invalid.³ It follows that if by a resignation of a Malaysian resident director the number of non-Malaysian directors would fall below two, the resignation would also not be effective. If in the last mentioned scenario, the Malaysian resident director is to be replaced with another Malaysian resident, the resolution accepting the resignation of the former should be drafted in such a way that it becomes effective only upon the appointment of the successor. If so drafted, it is generally thought the resignation would be effective, notwithstanding section 122(6), CA.

The Registrar of Companies may only register a company if the Memorandum and Articles of Association contain the names of at least two, Malaysian resident persons who are to be the first directors of the company.⁴

Only persons of full age can be appointed as director⁵. The CA does not spell out what 'full age' means, but under other Malaysian legislation, 'full age' is attained at the age of eighteen.⁶ There is also a maximum age limit of 70.⁷ It is possible for a person over 70 to continue in office as director if his re-appointment is secured by a resolution passed by a three-fourths majority of all those entitled to vote, whether in person or by proxy, at a general meeting.⁸

¹ Section 122(1) of the Companies Act 1965 ("the CA").

² Ibid.

³ Section 122(6), CA.

⁴ Section 16(7), CA.

⁵ Section 122(2), CA.

⁶ Age of Majority Act 1971.

⁷ Section 129(1), CA.

⁸ Section 129(6), CA.

Only natural persons can be appointed director.⁹ It is interesting that section 122(5) provides that upon the coming into force of the CA, any corporation holding office as director shall cease to hold office. This suggests that under the legislation in force prior to the coming into effect of the CA, corporations could hold office as director in Malaysia.

The CA does not require a director to have a shareholding qualification in order to become a director of a company incorporated under the CA. One can envisage a situation where the subscribers to the Memorandum of a newly formed company are also its directors, then logically, to that extent, the directors have to hold shares. Although the CA has no prescription as to share qualification, a shareholding qualification is commonly prescribed under many articles of association. Article 71 of Table A to the 4th Schedule, CA, provides that the company at a general meeting may prescribe a shareholding qualification for directors of the company. Presumably, the object of prescribing a share qualification is to try to make the director act in the affairs of the company in a way that he might not if he were not holding an equity stake in the company at all. In practical terms, if a person seeking appointment to the office of director does not hold shares at the time of his appointment, he must acquire the shares within two months from the date of appointment.¹⁰

Undischarged bankrupts are disabled from holding office as directors.¹¹ However, the CA does provide that if leave of court is obtained beforehand, an undischarged bankrupt may be so appointed.¹² Persons convicted of certain offences¹³ may not, save by leave of court, be appointed as directors within 5 years of conviction, or if sentenced to imprisonment, within 5 years from release from prison.

In terms of formalities, in order to be appointed as a director, a person must have completed the mandatory statutory consent form prescribed by the Regulations to the CA.

Directors are normally elected for 3 years terms, and generally, 1/3 of the board will retire at each annual general meeting. There is no provision under Malaysian law for employees to nominate or elect a director to represent their interests.

Non-executive directors are subject to the same 3-year term. Reappointment is not automatic. Essentially, non-executive directors must be appointed under the same process through which all directors, executive directors as well, are appointed. The Malaysian Code on Corporate Governance provides that every company should establish a committee consisting exclusively of non-executive directors, a majority of whom should be independent, to consider and recommend nominees for appointments to the board.¹⁴

2. The Composition of the Board

For a long time, perhaps too long judging from the corporate casualty list in the wake of the economic turmoil in Malaysia 1997-1998, board composition and independence from management were subjects not accorded sufficient priority by legislators and regulators alike, let alone the industry itself. The position has dramatically changed in the wake of the publication of the Report of the Finance Committee on Corporate Governance of February 1999 ("the Finance Committee Report").

⁹ Section 122(2), CA.

¹⁰ Section 124(1), CA.

¹¹ Section 125(1), CA.

¹² Ibid.

¹³ Described in section 130, CA. The prohibition is against taking part in "management". If the definition of "manager" in section 4, CA, is read together with section 130, the term "management" would embrace and extend to the chief or principal executive officer of the company even if not a director.

¹⁴ See AA VIII.

The Finance Committee Report emphasised the need to strive for a balanced board, in order to avoid the board being dominated by one individual.¹⁵ To this end, it was stressed that independent board members ought to be persons of calibre, have credibility and possess relevant skill and experience to deal with important board issues.¹⁶

Up to that time, no study had been undertaken of the workings of boards in Malaysia of the kind or of the magnitude of that undertaken by the Kuala Lumpur Stock Exchange (“KLSE”) and PricewaterhouseCoopers in 1998-99.¹⁷ A survey questionnaire was sent to all companies listed on the KLSE. At the time of the survey, that meant 450 Main Board companies and 272 Second Board companies.¹⁸ Of those, 167 Main Board companies and 137 Second Board companies were said in the report to have responded to the questionnaire.¹⁹ I make no apologies for quoting from this excellent report.

In terms of average board composition, the Corporate Governance Survey found that the results were as follows:

Independent non-executive directors	:	2.6
Non-executive directors	:	2.6
Executive directors	:	2.8

The backgrounds from which independent directors are drawn can be gleaned from the Corporate Governance Survey results on typical composition of audit committees. The study of audit committees is instructive as an indication of the backgrounds of independent directors as a whole given that such committees must be comprised of at least a majority of independent directors.²⁰ The profile is reproduced below:²¹

KLSE/PWC Corporate Governance Survey

Audit Committee	Majority (%)	About (%)	Half	Minority (%)	None (%)	No Answer (%)
Financial Professionals	20	17		37	21	5
Legal Professionals	6	8		23	52	11
Retired Industry Leaders	7	6		17	61	9
Retired Senior Government Officials	9	6		32	45	8

Following on the heels of the KLSE/PWC Corporate Governance Survey was a survey of internal audit and risk management practices in Malaysian listed companies by the Malaysian Institute of Corporate Governance (“MICG”), the Institute of Internal Auditors Malaysia (“IIAM”) and Ernst & Young (“E&Y”) (“the Internal Audit Survey”). This survey adds to the store of recent empirical

¹⁵ Page 75.

¹⁶ Ibid, page 82.

¹⁷ Corporate Governance Survey Report (March 1999), KLSE & PWC.

¹⁸ See Section 2.0 entitled “Methodology”.

¹⁹ Ibid.

²⁰ As to what is meant by ‘independent’ directors, see below.

²¹ Reproduced from the KLSE & PWC Corporate Governance Survey Report.

data on the backgrounds of independent directors. The results of the Internal Audit Survey on the composition of audit committees are as follows:

MICG/IAM/E&Y Internal Audit Survey

Audit Committee Composition	Majority (%)	Half (%)	Minority (%)	None (%)
Financial Professionals	23	6	36	35
Retired Industry Leaders	4	3	16	77
Legal Professionals	5	4	25	66
Retired Senior Govt Officials	10	4	29	57
Others	18	4	33	45

There is no empirical data on what proportion of boards are comprised of foreign or in particular 'western' directors. However, there are a number of companies in Malaysia where the principal executive management positions on the board are held by foreigners, and in particular, westerners. An example is British American Tobacco Berhad, the Malaysian listed subsidiary of the worldwide tobacco giant. Both the Chief Executive Officer and Finance Director are foreign and western. The same goes for many of the Malaysian subsidiaries of foreign banks, such as HSBC Bank Malaysia Berhad and Standard Chartered Bank Malaysia Berhad. There is no readily available means of collating information about board composition in non-listed companies, be they large, medium or small.

Going by all these recent developments in Malaysia, it seems that in the context of board composition, the notion of independence from management is important and therefore taken seriously.

The CA does not itself contain any concept of 'independent' director, and has no provision requiring directors to be independent of substantial shareholders or management. The same position obtains under the common law, which applies in Malaysia by virtue of the Civil Law Act of 1956. However, the KLSE Listing Requirements ("Listing Requirements") now provide that every applicant for listing on the KLSE must ensure that at least two directors or 1/3rd of the board, whichever is higher, are independent directors.²² If the number of directors of the applicant is not 3 or a multiple of 3, then the number nearest 1/3rd shall apply.²³ This prescription continues to apply throughout a company's listing. The provisions of paragraph 3.14 are repeated in paragraph 15.02 of the Listing Requirements.

These recent changes to the Listing Requirements²⁴ were precipitated by recommendations contained in the Report.²⁵ The current Malaysian Code on Corporate Governance (March 2000) ("the Code") also provides that to be effective, a board should strive for a board composition that has at least 1/3rd independent membership.

Providing for 1/3rd independent board membership alone would be ineffectual if not matched by an improved definition of 'independent'. Paragraph 1.01 contains a new definition of "independent director", as follows:

Independent director means a director who is independent of management and free from any business or other relationship which could interfere with the exercise of

²² Paragraph 3.14(1).

²³ Paragraph 3.14(2).

²⁴ The Listing Requirements were amended w.e.f. January 2001.

²⁵ The size of non-executive participation on the board is dealt with in recommendation 3.5.6.

independent judgment or the ability to act in the best interests of an applicant or a listed issuer. Without limiting the generality of the foregoing, an independent director is one who: -

- (a) is not an executive director of the applicant, listed issuer or any related corporation of such applicant or listed issuer;
- (b) Has not been within the last 2 years and is not an officer (except as an independent director) of the applicant, listed issuer or any related corporation of such applicant or listed issuer. For this purpose, "officer" shall have the meaning given in section 4 of the Companies Act 1965;
- (c) is not a major shareholder of the applicant, listed issuer or any relation corporation of such applicant or listed issuer;
- (d) Is not a relative of any executive director, officer or major shareholder of the applicant, listed issuer or any related corporation of such applicant or listed issuer. For this purpose, "relative" means the spouse, parent, brother, sister, child (including adopted or step child) and the spouse of such brother, sister or child;
- (e) is not acting as a nominee or representative of any executive director or major shareholder of the applicant, listed issuer or any related corporation of such applicant or listed issuer;
- (f) is not engaged as a professional adviser by the applicant, listed issuer or any related corporation of such applicant or listed issuer either personally or through a firm or company of which he is a partner, director or major shareholder, as the case may be; or
- (g) Has not within the last 2 years and does not engage in any transaction with the applicant, listed issuer or any related corporation of such applicant or listed issuer, whether by himself or with other persons or through a firm or company of which he is a partner, director or major shareholder, as the case may be, the value of which exceeds RM250,000.

The Malaysian attempt at defining 'independence' is aimed at two concepts in particular, independence from management and independence from the controlling shareholder. The best of definitions can only go so far. In practice, true independence is probably harder to attain.

3. The Responsibilities of the Board

In considering the responsibilities of boards, it is instructive to look at the general division of powers in a company. The division of powers between management and the general meeting is determined by reference to the articles of association of the company and the CA. If the articles generally vest certain powers in the directors, then the members in a general meeting may not impose their will upon the directors in relation to the exercise of those powers.

Of powers delegated to the board alone, to what end and range of activities are these powers used? There is little or no empirical data available for Malaysia on the various activities to which boards devote themselves, nor is there any data as to the amount of time expended on such activities.

The Finance Committee on Corporate Governance considered the issue of whether the functions of the board ought to be formulated and enshrined in a statute. In their deliberations, the

Committee looked at some precedents in the English-speaking world. Among such formulations was section 3.02 of the American Law Institute's Restatement of Corporate Law. That provision spelt out the various functions of the board as follows²⁶:

- Select, regularly evaluate, fix the compensation of and where appropriate replace principal senior executives.
- Oversee the conduct of the corporation's business to evaluate whether the business is being properly managed.
- Review and where appropriate approve the corporation's financial objectives and major corporate actions or goals.
- Review and, where appropriate, approve major changes in, and determinations of other major questions of choice respecting the appropriate auditing and accounting principles and practices to be used in the corporation's financial statements.

The Finance Committee also reviewed the Toronto Stock Exchange's Committee on Corporate Governance's list of five specific functions of the board:

- Adopting a strategic planning process
- Managing risk
- Appointing, training and monitoring senior management.
- Adopting an effective communications policy
- Monitoring the integrity of corporate internal controls and management information systems

The Finance Committee on Corporate Governance recommended that there should be a statutory formulation of the minimum functions of the board.²⁷ As yet no legislation has been passed to implement the recommendation. However, the Malaysian Code on Corporate Governance of March 2000 now provides for the assumption, by the board, of six specific principal responsibilities:²⁸

- Reviewing and adopting a strategic plan for the company
- Overseeing the conduct of the company's business to evaluate whether the business is being properly managed
- Identifying principal risks and ensure the implementation of appropriate systems to manage these risks
- Succession planning, including appointing, training, fixing the compensation of, and where appropriate, replacing senior management
- Developing and implementing an investor relations programme or shareholder communications policy for the company

²⁶ The items set out are extracted from the Finance Committee Report at page 109-110.

²⁷ Report at paragraph 2.1.20, page 114.

²⁸ Code, Part 2, Section AA(I).

- Reviewing the adequacy and the integrity of the company's internal control systems and management information systems, including systems for compliance with applicable laws, regulations, rules, directives and guidelines.

Apart from such explicitly vested responsibilities under the Code, a combination of statutory and common law duties are visited upon directors of Malaysian companies. Section 132(1) CA provides:

A director shall at all times act honestly and use reasonable diligence in the discharge of the duties of the office

It is generally accepted that for the purposes of Malaysian law, the provision mirrors common law duties requiring directors to act bona fide in the interests of the company and with diligence. Thus, any act done in deliberate disregard of the company's interests will not be regarded as done bona fide. Breach of this provision constitutes a criminal offence.

The test of whether a director has acted honestly or not is whether or not an honest and intelligent man in the position of a director could have reasonably believed, in the whole of the circumstances, that the act or transaction in question was for the benefit of the company.²⁹

Malaysian law is no different from other common law jurisdictions in treating directors as fiduciaries.³⁰ As such, the law imposes various non-statutory fiduciary duties on directors. Under Malaysian law, a director may breach such duties notwithstanding that he possesses an honest motive. All duties are primarily owed to the company, though in limited circumstances, more circumscribed duties may be owed to shareholders directly, and possibly to creditors.

Section 132(5) CA makes it clear that the statutory duty to act honestly and with diligence is in addition to and not in derogation of any other written law or rule of law relating to the duties or liabilities of directors as officers of a company. Therefore the aforementioned section 132(1) duty to act honestly and with diligence operates in parallel with existing common law and equitable rules.

The first of the aforementioned fiduciary duties is the duty of a director not to place himself in a position where his interest and duty conflict. In this regard, a director must not profit by reason of exploitation or misuse of corporate opportunities. The rule is strict in that it matters not that the company cannot itself exploit the opportunity in question. This is a consequence of the strict equitable rule that forbids a trustee from making a profit out of his trust.³¹

Further, because every company is entitled to the unrestricted services of its entire board, the same rule prohibits directors from contracting with the company. However, the strictness of the equitable rule is ameliorated by statute, quite apart from any relaxation of the rule by the articles of association. Section 131 CA enables a director to contract with the company if he has complied with the requirements of section 131. Principally, section 131 is about mandatory disclosure, to the board of directors, of any interest, direct or indirect, of a director, in any contract or proposed contract with the company.

Secondly, as alluded to earlier, directors are also under a duty to act bona fide in the interests of the company. They are under an obligation to exercise their powers for proper purposes. They must not act for any collateral purpose. The phrase "interests of the company" will be considered shortly.

²⁹ See Chan & Koh, *Company Law*, (1997) paragraph 6.207 and the cases cited at footnote 40.

³⁰ See for example, *Sinmah Timber Industries Sdn Bhd v David Low See Keat* [1999] 5 MLJ 421 at 432.

³¹ See Lord Templeman in *Guinness v Saunders* [1990] 2 AC 663 at 692.

Directors are also visited with common law duties of care and skill. This must be understood in the context of the case law that has developed out of this duty. It is generally accepted that directors are not obliged to bring with them any special qualifications to the office. However, old dicta to the effect that a director need not develop any knowledge of the business of the company and may run the company in ignorance of things connected to such business need to be re-evaluated in light of the more exacting standards expected by stakeholders of today.

The duty of skill is a blend of the reasonable man standard and the peculiar skills of the director concerned. The latter comes into play in circumstances where the director possesses some specific qualification such as an accounting or legal qualification. If he possesses such a qualification, he is expected to use such knowledge if pertinent to the act or transaction in question, but he will be judged by reference to a standard of skill commensurate with the level of his qualification.

Malaysian law regards all duties of directors as being owed to the company and the company alone. But the 'company' in effect means the members as a corporate entity. No duty is owed to individual shareholders, although a transaction specific duty may arise, such as where an agency arises between directors and shareholders. Some Commonwealth jurisdiction have recognised a duty, as yet only generally formulated, owed by directors to creditors. No Malaysian court has had the occasion to recognise or directly apply a duty such as that which has been accepted in Australia and New Zealand. Because duties are owed to the company alone, no room has been found under Malaysian law for a duty owed by directors to employees. However, while no duty is owed to them, it is permissible for directors to have regard to the interests of creditors and employees and other stakeholders.

The legal notion of 'duty' is legally meaningful and comprehensible only by reference to its correlative, i.e. a 'right', which would mean the right of enforcement. Only the company may enforce duties owed by directors, while members, employees and creditors have no 'right' to enforce such duties. Members may enforce such duties directly by certain exceptional procedures developed by the common law to overcome situations where directors breach their duty, harm is occasioned to the company but although the company ought to sue, the wrongdoers are in control of the company and it will not sue.

But members often lack the proper procedural and substantive incentives to resort to those procedures. The result is therefore usually apathy or resignation and acquiescence. Among measures that could incentivise shareholders are 'American style' class actions in place of the more restrictive 'representative actions' under English and Malaysian law. Costs are another matter. Legislation applying to the legal profession in Malaysia does not permit its advocates to resort to contingency fee litigation. Hence legal fees are borne by the loser, and in complex commercial litigation, the costs can be prohibitive. Defendants may also challenge the notion that wrongdoers are in control, and preliminary hearings into that can be time consuming and cumbersome.

Also, employees and creditors totally lack the 'standing to sue' so necessary to vest a cause of action in a person.

Malaysia has also recently introduced a statutory right of action³² in favour of individuals who have sustained loss or damage as a result of breaches of various provisions of the Securities Commission Act 1993. A right of action to recover compensation for loss and damage for and on behalf of injured individuals is also vested in the Securities Commission itself.³³

³² Securities Commission Act 1993, section 153.

³³ Ibid, section 155.

Enforcement action is not confined to members alone. The KLSE has the right to enforce breaches of its listing requirements, and the Securities Commission can also enforce the same requirements. As a result of amendments to the Securities Industry Act 1983, action can now be taken against the directors directly when formerly enforcement and punishment was restricted to the listed entities per se. When an individual becomes a director of a listed entity, or when a company applies for listing, an undertaking, to comply with the Listing Requirements, in a prescribed form, has to be submitted to the KLSE.

I alluded to the phrase 'interests of the company'. Whose interests are the interests of the company? A Malaysian textbook has noted that there are various aspects to this³⁴. It could mean:

- The company as a corporate entity.
- The interests of members. The collective interests of members can be equated with the interests of the company.
- Interests of employees. Unlike Singapore or Malaysia, legislation does not oblige directors to have regard to interests of employees.
- Interests of creditors. Even if there is no 'duty' owed directly to creditors to have regard to their interests, increasingly, consideration is being given to whether directors ought to have regard to their interests irrespective of whether a legally enforceable right is correspondingly vested in creditors.

In the Corporate Governance Report, the Finance Committee expressed the view that the phrase 'interests of the company' should not be codified.

4. The Decision-Making Process of the Board

I have earlier set out what the Finance Committee considered in their report to be the core responsibilities of a board. These responsibilities are set out in the new Code.³⁵ The CA does not of itself specify what matters are specifically for management and what matters are for the entire board, but generally one can by sifting through the CA divine certain acts which only the board as a whole can do, such as approve the annual accounts.

The Code on Corporate Governance does advocate the creation of a 'formal schedule' of matters specifically reserved to the board for decision to "ensure the direction and control of the company is firmly in its hands."³⁶ Although the Code does not enumerate what matters comprise the formal schedule, the Code does suggest that the schedule should include at least the following:

- Acquisitions and disposals of assets of the company or its subsidiaries that are material to the company.
- Investments in capital projects, authority levels, treasury policies and risk management policies.

The Code also provides that the Board should lay down internal rules to determine the "materiality" of transactions and so forth.

³⁴ Annotated Statutes of Malaysia, *The Companies Act 1965*, Butterworths, Ed. Walter Woon, at page 393.

³⁵ See AA I.

³⁶ Code, page 32, Note XV.

In order for the Board, and in particular the independent non-executive directors, to exercise any meaningful form of oversight or control over management, the board must meet regularly and it must be supplied with adequate information in a timely fashion. The Malaysian Code on Corporate Governance now requires boards to meet regularly, and it requires the supply of information, "in a form and of a quality appropriate to enable it to discharge its duties", to the Board. The newly revamped KLSE Listing Requirements provide that every listed entity must ensure that every one of its directors has full and unrestricted access to information, and independent professional advice.³⁷

Substantial shareholders often manage to secure some form of board representation on Malaysian listed companies. However, most other stakeholders would have no specific board representation.

5. The Relationships Among Board Members and Between the Board and other Bodies

Both the Finance Committee Report on Corporate Governance and the Code touched in no small way on the pivotal role potentially playable by the Chairman of the Board. The Code provides that there should be a "clearly accepted division of responsibilities" between the Chairman of a company and the Chief Executive Officer.³⁸ The Code also provides what the Chairman is principally responsible for. He is enjoined from simply giving in to the 'dominant' voice on the board, if any.

Board committees are now a necessity. Among the committees the formation of which is suggested by the Code on Corporate Governance are:

- Committee dealing with nomination of directors, and evaluation of performance of directors.
- Committee dealing with compensation and remuneration of directors and senior management.
- Committee dealing with internal controls and the integrity of the external audit.

The other, now familiar, committee is the audit committee. Audit committees are now an established feature of Malaysian listed companies. The KLSE's Listing Requirements were amended in 1993³⁹ to include for the first time provisions relating to, inter alia, audit committees. The position under the re-vamped Listing Requirements now is that companies seeking admission to the Official List must establish an Audit Committee.

The Listing Requirements provide⁴⁰ that an audit committee shall be appointed and shall be composed of not fewer than 3 members of whom a majority shall be independent directors. Paragraph 15.10(1) also provides that at least one (1) member of the audit committee must be a member of the Malaysian Institute of Accountants⁴¹. However, if he is not, then he must have at least 3 years working experience and passed either certain examinations specified in the Accountants Act 1967 or must be a member of one of the associations of accountants mention in the same statute.

³⁷ Paragraph 15.04.

³⁸ Code, Explanatory Note II, Section AA, paragraphs 4.18 to 4.21.

³⁹ Amendment List 1/93 with effect from 1.8.93

⁴⁰ Paragraph 15.10(1).

⁴¹ A statutory body established under the Accountants Act 1967 to regulate the accounting profession in Malaysia.

The functions of an audit committee are now comprehensively spelt out in the re-vamped Listing Requirements, as follows:

- (1) review the following and report the same to the board of directors of the listed issuer:-
 - (a) with the external auditor, the audit plan;
 - (b) with the external auditor, his evaluation of the system of internal controls;
 - (c) with the external auditor, his audit report;
 - (d) the assistance given by the employees of the listed issuer to the external auditor;
 - (e) the adequacy of the scope, functions and resources of the internal audit functions and that it has the necessary authority to carry out its work;
 - (f) the internal audit programme, processes, the results of the internal audit programme, processes or investigation undertaken and whether or not appropriate action is taken on the recommendations of the internal audit function;
 - (g) the quarterly results and year end financial statements, prior to the approval by the board of directors, focusing particularly on:-
 - (i) changes in or implementation of major accounting policy changes;
 - (ii) significant and unusual events; and
 - (iii) compliance with accounting standards and other legal requirements;
 - (h) any related party transaction and conflict of interest situation that may arise within the listed issuer or group including any transaction, procedure or course of conduct that raises questions of management integrity;
 - (i) any letter of resignation from the external auditors of the listed issuer; and
 - (j) whether there is reason (supported by grounds) to believe that the listed issuer's external auditor is not suitable for re-appointment; and
- (2) Recommend the nomination of a person or persons as external auditors.

The current position is that listed companies are required to report on the composition and terms of reference of their respective audit committees in their annual reports. This was one of the recommendations of the Finance Committee in its Report of Corporate Governance. However, the extent of reporting in the annual report differs from company to company. For example, in its 1999 Annual Report, British American Tobacco Berhad set out the composition and terms of reference of its audit committee and information on the minimum frequency of meetings but no additional information was given on the actual number of meetings and what actually transpired. A random perusal of Annual Reports for some other listed companies (Diethelm Holdings (Malaysia) Berhad, Selangor Properties Berhad, Chocolate Products (Malaysia) Berhad, Paragon Union Berhad, and Olympia Industries Berhad) indicated the same level of treatment. On the other hand, in its 1999 Annual Report, besides giving the terms of reference and composition of the audit committee, Guthrie Ropel Berhad set out information concerning the number of meetings held up to 31.12.99 and a summary of what the committee did, which was helpful.

These reports were prepared under the previous listing requirements regime. It is too early and thus not possible at this stage to assess the level and extent of compliance, in Annual Reports of listed companies, with the new re-vamped listing requirements.

Audit committees are obliged to bring to the attention of the KLSE breaches of the Listing Requirements.⁴² Audit committees have the following rights and powers under the re-vamped Listing Requirements:

- (a) authority to investigate any matter within its terms of reference;
- (b) have the resources which are required to perform its duties;
- (c) have full and unrestricted access to any information pertaining to the listed issuer;
- (d) have direct communication channels with the external auditors and person(s) carrying out the internal audit function or activity (if any);
- (e) be able to obtain independent professional or other advice; and
- (f) be able to convene meetings with the external auditors, excluding the attendance of the executive members of the committee, whenever deemed necessary.

Conflicts in interest are regulated by the general equitable and common law principles as well as by statute. I have earlier alluded to section 131 of the CA. However, section 131 is more transaction orientated, and does not cover the myriad situations where directors, especially executive directors, appointed by the controlling or other substantial shareholder, find that interests of the 'principal' are not necessarily congruent with the 'interests of the company' as a whole. The Finance Committee Report noted the counterweight to such situations is the independent element in the board.

6. Board Remuneration and Training

A substantial amount of attention was devoted in the Finance Committee Report to remuneration of directors and to training.

The Code on Corporate Governance deals with directors' remuneration as a separate issue in Part B. It recognises that remuneration is linked to experience and the level of responsibility. The Code appreciates that remuneration must be sufficient to attract the kind of talent necessary to run companies successfully. What the Code prescribes is the formation of a committee to deal with board and senior management remuneration (as to which see an earlier section of this paper). The Code advocates the establishment of a formal and transparent procedure for developing policies on board remuneration and for fixing the remuneration packages of individual directors. The Code also prescribes mandatory disclosure of remuneration in the annual reports of listed companies.

Remuneration packages containing stock options are relatively common among Malaysian listed companies. However, the Securities Commission's Guidelines on New Issues of Shares have to be complied with – these inter alia determine the extent of shares that can be issued. Also the Securities Commission's approval is required.

⁴² Paragraph 15.17

As for training, paragraph 15.09 of the new KLSE Listing Requirements provides that every director of a listed company must ensure that he undergoes continuous training to equip himself to effectively discharge his duties as a director. For that purpose and to that end, the listing requirements prescribe that directors must attend such training programmes that may be prescribed by the KLSE from time to time.

External training programmes are carried out, for example, by the Malaysian Institute of Corporate Governance.

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