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The Companies Act 2016

The Companies Act 2016 [*Act 777*] ("CA 2016") received Royal Assent on 31 August 2016 and was gazetted on 15 September 2016. However, as at today, the CA 2016 has yet to come into force and is likely to take effect in the first quarter of 2017.

Currently, companies in Malaysia are governed by the Companies Act 1965 [*Act 125*] ("CA 1965") and are also regulated by the memorandum and articles of association ("M&A") (which may be in the form of Table A as set out in the Fourth Schedule of the CA 1965 ("Table A")).

If a company continues to adopt its existing M&A as the constitution after the CA 2016 has come into force, the said M&A **"… shall have effect as if made or adopted under this Act, unless otherwise resolved by the company"** (*s 619(3)* of the CA 2016).

There are several key differences under the CA 2016, and if applicable and necessary, companies may be required to amend their M&A/constitution so as to be consistent with and/or not contravene the provisions of the CA 2016. Some of these key differences are set out below (non-exhaustive list):

Issue	Under CA 1965 (Current position)	Under CA 2016 (Future position)
Restructure of shareholding and composition of directors	Companies are required to have at least two shareholders (*s 14*) and two resident directors (*s 122(1)*).	A private company may have only one shareholder and one resident director (*ss 9 and 196(1)(a)*). For a public company, it would still be necessary to have at least two directors (*s 196(1)(b)*).
Requirement for holding of annual general meetings ("AGM")	Every company (i.e. all private and public companies) is required to hold its first AGM on a date not more than 18 months from its date of incorporation and subsequent AGMs, in every calendar year and not more than 15 months after the holding of the last preceding AGM. (*s 143(1)*)	Every public company shall hold an AGM in every calendar year within 6 months of the company's financial year end and not more than 15 months after the last preceding AGM. (*s 340(2)*) However, it is not mandatory for a private company to hold an AGM.
Retirement of directors	No specific or express provision for the retirement of directors	The provision with regards to the retirement of directors are expressly set out in s 205, which shall apply unless there is a specific provision in the company's constitution or the terms of appointment regarding retirement of directors. A private company may pass a members' written resolution to determine the retirement of a director.
Convening a meeting of	**"Any director…"** may convene a meeting, whenever he thinks fit if the	Section 310 only allows for the following persons to convene a meeting of members:

members	articles of the company so provide, e.g. Article 44 of Table A.	(a) the board of directors; or (b) any member holding at least 10% of the issued share capital of a company or a lower percentage as specified in the constitution or if the company has no share capital, by at least five per centum in the number of members, to convene a meeting of members. The CA 2016 does not otherwise stipulate that "any director" may convene a meeting of members. As such, companies which have adopted Table A (or have a similar article to Article 44) would have to amend its articles, so as to be consistent with s 310.
Appointment of proxies	A member of a company is entitled to appoint any person as his proxy (whether a member or not), and such person (who is not a member) shall either be: (1) an advocate, (2) an approved company auditor or (3) a person approved by the Registrar in a particular case (*s 149(1)(b)*). Pursuant to s 149(1)(c), a member shall only be entitled to appoint a maximum of two (2) proxies to attend and vote at the same meeting, provided that the said member has specified the proportions of his holdings to be represented by each proxy (*s 149(1)(d)*).	A member of a company may appoint any person as his proxy to attend, participate, speak and vote at a members' meeting (*s 334(1)*), and there are no similar qualifications imposed by the CA 2016. Pursuant to s 334(2), a member of a company having a share capital may appoint more than one (1) proxy in relation to a meeting (i.e. unlimited), provided that the proportion of the member's shareholdings which is to be represented by each proxy, is specified. This is not applicable to a company limited by guarantee.
Members' rights for management review	There is no express provision in respect of members' rights for management review. Currently, management and decision-making are vested in the Board and as regulated under the articles of association (*s 131B* and *Article 73 of Table A*).	Section 195 of the CA 2016 gives members the right to: (1) question, discuss, comment or make recommendation on the management of the company (*s 195(1)*); (2) pass a resolution (at a meeting of members) which makes recommendations to the Board on management matters (*s 195(2)*). However, s 195(3) states that such recommendations would not be binding unless made in the best interest of the company and provided that: (1) the aforesaid right is set out in the constitution; or (2) a special resolution is passed.
Pre-emptive	There is no express provision in	Section 85 of the CA 2016 now provides for

rights to new shares	respect of pre-emptive rights to new shares. The concept of pre-emptive rights is addressed in Article 41 of Table A (if it is included in a company's M&A).	the "Pre-emptive rights to new shares". In the event the constitution of a company provides for pre-emptive rights (e.g. Article 41 or any other express provision in the articles), then the wording of Article 41 (or such other similar provision) would be applicable as s 85 clearly states that the said section would be **"Subject to the constitution, …."** of a company. However, in the event a company's constitution is silent with respect to pre-emptive rights to new shares (i.e. does not have an Article 41 or similar wordings to that effect), then s 85 of CA 2016 would apply to such company.

It would be pertinent to bear in mind s 32(2) of the CA 2016, as it clearly states that the M&A/constitution of a company shall have no effect to the extent that it is inconsistent with or contravenes any provision of the CA 2016. In anticipation of the CA 2016 coming into force next year, it would be prudent for companies to determine the best approach to "bridge" what is currently stated in their M&A/constitution and the statutory provisions as enshrined in the CA 2016, in order to ensure good corporate governance, compliance and consistency.

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