



# THE APPROVED COMPANY SECRETARIES

KDN: PP 11199/02/2013(031616)

ISSUE 1/2023

**CORPORATE RESCUE MECHANISMS IN MALAYSIA:  
PART 1 - WHAT IS A JUDICIAL MANAGEMENT ORDER?**

**A CASE OF JUDICIAL MANAGEMENT VERSES WINDING  
-UP PETITION**

**SST: CAR SERVICE AND REPAIR SERVICES**

ISSN 1675-2376



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# FROM THE EDITOR'S DESK

Dr. Adissayam Xavier Suseimanikam, FIACS



It is always a great pleasure to connect with all our members through our quarterly newsletters and I extend my warmest greetings to all. Welcome to the 1<sup>st</sup> issue of IACS newsletter for 2023.

2022 was a busy year for IACS, having successfully organised and conducted a total of thirty one (31) training programmes (twenty four (24) webinars and seven (7) physical seminars) throughout the country. I wish to express my sincerest thanks to all our members for their support and participation. Taking this opportunity, I sincerely express my deep appreciation to all our Organising Chairpersons and staff, for without their hard work, IACS could not have achieved this success. Do look up our training calendar in this newsletter and mark your dates for our upcoming training programmes especially those organised physical seminars in your regions.

I wish to inform our members that IACS had recently formed the Publication Board, segregating the publication functions from the parent Technical Advisory and Publication Board. Henceforth, it will be named as Technical Advisory Board. The primary purpose of the Publication Board is to produce and publish newsletter, books and papers including e-books and e-articles, compilations, research and surveys on company law and practice, corporate governance, taxation and other topics and interests relating to company secretarial practices and for general dissemination to members of the Institute and the public.

In continuation, in the pipeline is our inaugural book publication titled "IACS Digest – Series 1," which we hope to distribute to all our members during our next AGM in June 2023. The objective of this IACS Digest is to condense the various issues of the IACS Newsletters into selected articles for the benefits of our members as well as students and other professionals. We wish to extend our sincerest appreciation to the article contributors for their kind consent to republish the articles in this book, namely Dr. Cheah Foo Seong, Ms. Choong Hui Yan, Mr. Jason Yong Kok Yew, Mr. Sean Tan Yang Wei, Ms. Jesselyn Tham and Mr. Benjamin Tham Tuck Chuen. My sincere gratitude also extends to the Council, the Publication Board and the Technical Advisory Board members for their unwavering support of this book endeavour. IACS also owes special gratitude to Assoc. Professor Dr. Bernard Tan Hoi Piew who volunteered and actively participated in bringing the "IACS Digest-Series 1" publication to reality. Thanks to you Dr. Bernard Tan.

SSM has recently published a Consultative Document on Proposed Review of Audit Exemption Criteria for Private Companies in Malaysia. SSM is proposing to review the threshold of the qualifying criteria for audit exemption for certain categories of private companies. As a background, the qualifying criteria for audit exemption was introduced on 4<sup>th</sup> August 2017 Practice Directive No. 3/2017 in line with the policies to reduce the regulatory and administrative burdens faced by smaller companies in complying with the Companies Act 2016. To ensure that the objectives of the policies remain relevant and beneficial, SSM is proposing that the threshold for the audit exemption qualifying criteria be increased to allow more companies especially the Small and Medium Enterprises (SMEs) to benefit from these policies. IACS had submitted its comments on this consultative document accordingly on 28<sup>th</sup> February 2023.

Last but not least, members are encouraged to write to us about any technical or other operational issues as well as enquiries with SSM or other agencies regarding the company law and other corporate secretarial matters so that we may respond or discuss them at the proper forums or meetings.

In closing, I wish to inform our members that our next annual general meeting (AGM) is tentatively scheduled on 17<sup>th</sup> June 2023 in Kuala Lumpur and the Council hopes to meet all of you there and also at our forthcoming seminars. We will advise our members on the actual date of our AGM.

We sincerely appreciate your continuous support, take care and stay safe

Thank you.



## INSTITUTE OF APPROVED COMPANY SECRETARIES (387525-X)

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### Contributions of Article

The Council would like to invite members to contribute articles and news, which may be of interest to company secretaries for publication. However, the Council reserves the right to edit articles for clarity purposes or it shall at its absolute discretion not publish any or all articles or news received from contributors. A fee will be paid for contributions approved by the Board.

Designed & Printed By : **AKITIARA INDUSTRI SDN BHD**  
3, Jln TPP 1/3, Tmn Industri Puchong,  
Batu 12, 47160 Puchong,  
Selangor Darul Ehsan, Malaysia.

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# **CORPORATE RESCUE MECHANISMS IN MALAYSIA: PART 1 - WHAT IS A JUDICIAL MANAGEMENT ORDER?**

By Sean Tan Yang Wei (Principal Associate) &  
Valerie Seaw Ja Hui (Pupil)  
Messrs. Thomas Philip

## **Introduction**

Judicial Management (JM) is a court-supervised corporate rescue mechanism introduced in Malaysia under the Companies Act 2016 (“CA 2016”) and governed under Companies (Corporate Rescue Mechanism) Rules 2018.

In brief, JM involves a court-appointed liquidator whose main duty and function is to rehabilitate and rescue a financial distressed company by devising a restructuring scheme or statement of proposal for the approval of the company’s creditors. If rehabilitation is not possible, then the appointment of a Judicial Manager is aimed at ensuring that the creditors are able to obtain a better return on their debts than going through liquidation.

## **Brief Characteristics**

### The Judicial Manager

The Judicial Manager must be a licensed liquidator or insolvency practitioner (who is not an auditor of the company in question). Once appointed by order of Court, the Judicial Manager is empowered to manage the affairs of the company in question, usually with the main aim of rescuing or rehabilitating its businesses.

Upon their appointment, the Judicial Manager will exercise their authority to come up with a restructuring scheme or statement of proposal for the approval of the company’s creditors. This scheme or proposal would usually involve repayment plan to creditors in tranches, sale of part of the company, fund injections, strategic merger or acquisition etc. Where the rescue of the company is not viable, then the Judicial Manager is tasked with ensuring a more advantageous realisation of the assets of the company for the interest of its creditors.

### The Statutory Moratorium

One of the main features of a JMO is the moratorium which is put in place to protect the company from litigation during the duration of the application and the JMO. The moratorium is designed to prevent third parties (such as creditors of the company) from commencing or continuing any legal suits, proceedings and execution proceedings against the company without the prior leave or permission of the Court. This extends to winding up proceedings (including the advertisement and gazetting of the winding up petition), all legal suits against the company and the enforcement of any security against the company.

This blanket freeze on all legal proceedings against the company protects the company from having to expend its very limited resources to defend against multiple legal proceedings. Instead, this allows the company’s resources to be utilised towards reviving the company’s business or, at the very least, allows more of the already dwindling assets of the company to be realised by the Judicial Manager for the company’s creditors.

An automatic interim moratorium is triggered as soon as the application for JM is filed in Court and lasts until the JM application is either allowed or dismissed by the Court. If the application is dismissed, then the interim moratorium will be lifted and the company will once again be unprotected from all legal proceedings and quasi-legal proceedings such as arbitration instituted against it. However, if the JM application is allowed and a Judicial Manager is appointed, then a permanent moratorium will be triggered from the appointment of the

Judicial Manager and will last throughout the duration of the JMO. Such permanent moratorium shall remain in force for a period of six (6) months starting from the date of the granting of a JMO and might be further extended for an additional six-month period upon the Judicial Manager's application to court for an extension of the JMO.

Interestingly, in the case of **Syed Ibrahim & Co v Trans Fame Offshore Sdn Bhd**, the learned Court granted a second JMO to Trans Fame after the expiry of the first JMO after 12 months upon a fresh application for Judicial Management filed by the Judicial Manager. This decision suggests that a company may be placed under JM for more than the statutory time-period of 12 months provided a fresh application is made. Doing so will also trigger the moratorium afresh. This position seems to bypass the principle that a JMO should last no longer than 12 months.

For a more in-depth discussion on the scope of the moratoriums in the context of a JMO, see our previous article, "The Statutory Moratorium under the Judicial Management Scheme".

### Conclusion

JMO in certain situation may be the hail mary for financially distressed companies as it provides the necessary breathing space for the said company to restructure and/or rehabilitate in aim to revive its business with the assistance of an independent and qualified insolvency practitioner. In our next article, we will explore on the necessary steps and/or requirements in applying for a JMO.

*This article was originally published on Thomas Philip website [www.thomasphilip.com.my](http://www.thomasphilip.com.my) on 8<sup>th</sup> September 2022 and reproduced with permission of the writers.*

## A CASE OF JUDICIAL MANAGEMENT VERSES WINDING-UP PETITION

By  
Dr. Cheah Foo Seong, FCIS, FIPA (Aust), MBA, LL.M, LL.D

### Introduction

Judicial management (JM) is a court-supervised corporate rescue mechanism under Companies Act 2016, and governed under Companies (Corporate Rescue Mechanism) Rules 2018. The effect of JM order is to place the financial ailing company under the management, first of a provisional, and then of a final judicial manager if the provisional order is confirmed. The directors no longer have the power to manage the company.

Winding up order is intended to bring about the dissolution of the company, whereas the purpose of JM order is to salvage the company from dissolution.

The High Court in **Exxobrite Sdn Bhd v Value Plus Industries Sdn Bhd (grounds of judgment dated 29 July 2022)** dealt with the moratorium effect of a judicial management order and the insolvency repercussions arising from the judicial management process.

### Summary of the Decision and Significance

The company, Value Plus, was placed into judicial management. As part of the judicial management process, the judicial manager had carried out the proof of debt exercise and drew up the judicial manager's Statement of Proposal. The creditor, Exxobrite, had its debt admitted in the judicial management process.

While the judicial management order was still subsisting, Exxobrite issued a winding up statutory demand for the sum of approximately RM73,000.00.

Subsequently, Exxobrite filed a winding up petition based on both section 466(1)(a) and 466(1)(c) of the Companies Act 2016. Section 466(1)(a) is where there is the presumption of the inability to pay debt when the statutory demand is not complied with. Section 466(1)(c) is where the inability to pay debt is after taking into account the contingent and prospective liabilities of the company.

First, the Court held that the statutory demand was defective as the issuance of the demand was a commencement of a legal process during the period of the judicial management order. This was contrary to section 411(4)(c) of the CA 2016 where “no ... other legal process shall be commenced ... against the company ... except with the consent of the judicial manager or with the leave of the Court ...”

Second, the Court still granted the winding up order based on the alternative ground of section 466(1)(c) of the CA 2016. There was an admitted debt through the judicial manager’s admission of the proof of debt. The judicial manager’s Statement of Proposal also showed that Value Plus’ current liabilities far exceeded its current assets. This was evidence of Value Plus’ commercial insolvency. Therefore, taking into account the contingent and prospective liabilities of the company, the Court found that Value Plus was unable to meet its existing debts.

### **Background Facts**

On 16 February 2021, a judicial management order (**JM Order**) was granted over Value Plus. The JM Order lasted for 6 months and was then extended until 15 February 2022. During the JM Order, the judicial manager carried out the proof of debt exercise. The judicial manager admitted the debt of approximately RM73,000 owing to Exxobrite through a Notice of Admission dated 24 November 2021.

On 25 January 2022, Exxobrite issued a statutory demand against Value Plus for the payment of the debt within 21 days.

On 15 February 2022, the JM Order lapsed.

On 15 June 2022, Exxobrite filed its winding up petition against Value Plus based on, among others, sections 466(1)(a) and 466(1)(c) of the CA 2016.

Value Plus filed an application to, among others, strike out the winding up petition. This is on the ground that the statutory demand was invalid as it was in breach of the moratorium under the JM Order.

The Court proceeded to hear the winding up petition along with the striking out application.

### **Decision of the Court**

**First**, the Court considered whether the statutory demand was defective and invalid. Exxobrite argued that the statutory demand was not the commencement of a legal process and therefore did not contravene section 411 of the CA 2016. The argument was that a legal process meant a summons, writ, warrant, mandate or other process issued from a court.

The Court referred to the High Court of Justice in Northern Ireland case of *Fulton and another v AIB Group (UK) plc* [2014] Nich 8 concerning administration, being an equivalent process like judicial management. The case held that a statutory demand was a legal process for the purposes of a moratorium in administration.

The Court held that the term “legal process” for a moratorium in judicial management must include a statutory demand for winding up. It is the statutory demand issued under section 466(1)(a) of the CA 2016 which triggers the right to file or commence a winding up petition premised on section 465(1)(e) read with section 466(1)(a) of the CA 2016.

Further, the moratorium in judicial management was drafted wide enough to cover the terms “other proceedings”, “execution” and “or other legal process”. Parliament would have intended the moratorium to be applicable over not only legal proceedings in the normal sense (i.e. applications, proceedings or matters in Court) but also a wider spectrum of ‘legal processes’.

The moratorium is intended for the underlying purpose of the corporate rescue mechanism, being the survival of the company or the rehabilitation of the company. The statutory demand would undoubtedly put pressure on the company to make payment to the creditor and the creditor, Exxobrite, would consequently obtain an advantage over other creditors.

Nonetheless, in deciding whether to strike out the winding up petition, the Court noted that the petition was also based on the alternative ground of section 466(1)(c) of the CA 2016. It would not be a plain and obvious case for striking out.

**Second**, the Court proceeded to hear the petition itself and decided to wind up the company. Exxobrite was already an admitted creditor by way of the judicial management process. The judicial manager had accepted Exxobrite’s proof of debt.

Next, the judicial manager’s statement of proposal reflected the company’s current liabilities at RM19.4 million but with current assets only at RM8.7 million. The Court applied the test of commercial insolvency in whether the company is able to meet its current debts.

Finally, the Court also took into account the various serious allegations of misappropriation of funds and dissipation of assets. The assets of the company were in jeopardy. There was a fall-out between the different factions of the directors and shareholders. The Court found that there was an overwhelming evidence of the company’s commercial insolvency and that the company was now paralysed and in a state of defunct. It was just and equitable that the company be wound up.

### **Concluding Comments**

This decision does demonstrate the wide protection offered by a moratorium in judicial management. This case was decided in a situation of the moratorium after the JM Order is granted. But this would similarly apply to the initial moratorium after the filing of the judicial management application under section 410(c): “*no other proceedings and no execution or **other legal process** shall be commenced ... against the company*”. Nonetheless, where the judicial management process is unsuccessful, it does expose the company to the immediate threat of winding up.

After all, even the filing of a judicial management application must be where the Court considers that “*the company is or will be unable to pay its debts*” (under section 404(a) of the CA 2016) i.e. where the company is essentially insolvent.

If the judicial manager is appointed, the judicial manager would have to ascertain and admit to the existence of the debts owed to the creditors.

The Statement of Proposal would also admit to the financial position of the company, and where it is likely that the company would be cashflow insolvent and balance sheet insolvent.



# SST: CAR SERVICE AND REPAIR SERVICES

By Choong Hui Yan

B.Acc(Hons)(Malaya), ACCA(UK), Licensed Secretary

Sales and Service Tax (SST) was introduced to replace the Goods and Services Tax (GST) with effect from 1st September 2018, is now known as SST 2.0. The Malaysian Sales Tax Act 2018 and Service Tax Act 2018 came into operation while the Goods and Services Tax Act 2014 has been repealed. The SST 2.0 is more comprehensive and with larger scope as compared to the SST 1.0 under the Sales Tax Act 1972 and Service Tax Act 1975.

This article focuses its discussion on the taxable services provided by a taxable person who carries a business of car service or repair business operators, i.e. authorized car service centres (3S or 4S centres of different car brands), tyre shops or any person providing general car repairing, car servicing and other car-mechanical services.

The provision of services will be taxed at 6% under SST 2.0, but not all services provided by car service or repair business operators are taxable. This creates unnecessary confusion and challenges for the industry, and made GST preferable as all value-added services are taxable. However, consumers benefited from this service tax.

## Service tax operation

Generally all car service and repair services are taxable services, as prescribed under the Item 5 of Group I of the First Schedule of Service Tax Regulations 2018. Business operators with labour service income exceeding RM500,000 threshold for 12-month period are liable to register under the Service Tax Act 2018 and collect service tax on behalf of the government.

In Malaysia, it is a mandatory requirement for the registrant business operators to publish its service tax registration status within the business premises, and the service tax identity number be printed on documents, such as letters, quotations, invoices, debit notes or credit notes and even receipts. Under Regulations 10 and 11 of the Service Tax Regulations 2018, the contents of these documents must include reference number, date, registrant's name, address

and identity number, appropriate billing description to differentiate taxable or non-taxable supplies, discount, service tax rate, service tax sum, amount payable exclusive and inclusive of service tax and must be presented in Ringgit Malaysia (RM). For debit and credit notes, the original invoice number, date and reason for adjustment must be specified.

The taxable period of service tax is on bi-monthly basis. Service tax return is to be submitted to the Royal Malaysian Customs Department (RMCD) at the last day of the following month of each taxable period [s 26] together with its payment. The service tax is levied on the taxable services which are paid by customers within the taxable period. In other words, service tax is payable to the RMCD only when payment received. This mechanism is indeed business friendly, where the registrant business operators do not need to pay service tax for unpaid taxable services. However, this advantage is not permanent as Section 11 of the Service Tax Act 2018 requires payment of service tax even if no payment was received from customers after 12 months.

## Taxable and non-taxable services

The registrant business operators must be well aware that only labour services are taxable and the sales of spare parts are not taxable. For example, if a customer comes for car air-conditioner services, the car air-conditioner gas is not taxable, but only the labour fees for cleaning and filling up the car air-conditioner gas are taxable.

Other example of taxable labour services are general services and maintenance, diagnosis with specific procedures, tyre balancing and alignment, tyre patching, air-conditioner repairing, repairing, welding, painting and any other labour work to change or repair parts of a car.

On the other hand, labour services on installation of car accessories including installation of dashcam, audio or visual systems, tint, alarm, tyre meter reading, auto-car lock and any other accessories which is



not repairing in nature are not taxable for service tax. Besides, towing and grooming services, such as waxing or polishing, are also not taxable.

Thus, if a customer comes to change windscreen with tint services, the windscreen and the tint material are not taxable, but the labour to change windscreen is taxable.

Registrant business operators must carefully set up their billing or accounting system with default taxable or non-taxable service fee lines to avoid human error. Any taxable services with service tax omitted from customers, will be borne by the registrant business operators. Wrongful imposition of service tax to customers may have customer disputes or facing compounds from RMCD.

#### **Car wash service needs separate disclosure**

Besides, most business operators do provide car wash services to enhance customer experience and

satisfaction after car servicing or repairing works. Such car wash service is taxable under Item 13 of Group I of the First Schedule of Service Tax Regulations 2018.

Thus, it needs separate disclosure in the service tax return form (SST-02). Such separate reporting requires special set up on the billing and accounting system to avoid incorrect SST return submitted.

#### **Conclusion**

SST is cash flow friendly, but complicated when determining its taxable services. But generally most car service and repair services are taxable services. The company accountant, auditor and even secretary is good to be well equipped with SST knowledge to value add to customers since SST compliance is still low. Company secretary, being the first person to know the business nature of the company during incorporation, may value add by reminding on SST registration requirements and compliances.

## **DIRECTOR'S INDEMNITY: COMPANY'S CONSTITUTION ALONE IS NOT ENOUGH**

By Benjamin Tham Tuck Chuen  
Practising Lawyer, M/S Benjamin Tham & Co.,

A company director has many legal duties and obligations, which may or may not be clearly defined or distinguished under some circumstances. In the current corporate climate, as stakeholders, shareholders and other parties are becoming more aware of the responsibilities and duties of directors and their respective rights in relation to bringing actions against errant directors, company directors are increasingly susceptible and exposed to claims for personal liability for their actions and decisions, whether rightly, negligently or wrongly exercised.

If the relevant judicial or authoritative body determines that the company director has breached his or her duties and things did go wrong, the company director can be personally liable for the loss and damages, as well as being responsible for the resulting costs.

One way to minimise the risks of being personally liable for any loss or damage which may be caused while acting in the capacity of a director is to obtain an indemnity to be given by the company in his or her favour when appointed as a director.

Most (if not all) constitutions (or articles of association under the repealed Companies Act 1965) of Malaysian companies would have a provision to indemnify the directors. Be that as it may, even if the constitution obliges the company to indemnify a director, the director will not be able to enforce the provision in the constitution against the company, as the constitution is a legal document deemed to be binding only between the company and its members, and amongst the members *inter se*. Even if the director is also a member of the company, the

director will only be able to enforce those provisions in the constitution which confers rights on members, as a member.

Recently on 15 October 2021, the Court of Appeal in the case of ***Perdana Petroleum Berhad (formerly Petra Perdana Berhad) v Tengku Dato' Ibrahim Petra and 3 others*** [2021] 6 MLJ 663 [[click here to download the Grounds of Judgement](#)] ruled that the constitution of the company itself does not provide an indemnity to its director, notwithstanding that the constitution has an indemnity provision. The appellate court elucidated that for a director to be indemnified by the company, the indemnity provision must be incorporated, whether impliedly or expressly, in a separate legal agreement between the company and the director.

### **Background Facts of Perdana Petroleum Berhad's case**

In an earlier suit, Perdana Petroleum Berhad (PPB) filed a claim against 4 of its former directors for breach of fiduciary duties and the matter went all the way up to the Federal Court, wherein the Federal Court gave a decision that offers guidance to determine when a director acts in the best interest of the company and the discretion afforded in making a business judgment and which resulted in the exoneration of 2 of them (i.e., being former independent non-executive directors) of wrongdoing and 1 director to be found negligent or in breach of duty of care.

After the Federal Court's decision, the 4 former directors filed an action in the High Court to seek an indemnity against PPB of more than RM2.6 million for the legal fees and costs incurred in relation to the earlier suits and appeals, relying on Article 170 of PPB's constitution (which follows Article 113 of Table A of the repealed Companies Act 1965) which states:

#### ***"INDEMNITY***

*170. Every director, managing director, agent, auditor, secretary, and other officer for the time being of the company shall be indemnified out of the assets of the company against any liability incurred by him in defending any proceedings, whether civil or criminal, in which judgment is given in his favour or in which he is acquitted or in connection with any application under the Act in which relief is granted to him by the Court in respect of any negligence, default, breach of duty or breach of trust."*

The High Court judge gave the orders in favour of the 4 former directors for indemnity against PPB, whereby PPB then appealed to the Court of Appeal.

### **The Court of Appeal's Decision in Perdana Petroleum Berhad's case**

The question posed to the Court of Appeal was whether the former directors could rely on the indemnity clause in the company's constitution.

The Court of Appeal held that the constitution constitutes a legal binding contract between the company and its members (shareholders) only. A third party, whether that party is an officer or employee of the company or otherwise, cannot enforce any provision in the constitution against the company. The mere fact of appointment as director or officer of the company, would not automatically result in an incorporation of specific articles into their terms of appointment.

Darryl Goon JCA noted Stanley Burton J's statement in ***Globalink Telecommunications Ltd v Wilmbury Ltd and others*** [2003] 1 BCLC 145, p 154: *"The articles of association of a company are as a result of statute a contract between the members of a company and the company in relation to their membership. The articles are not*



*automatically binding as between a company and its officers as such. In so far as the articles are applicable to the relationship between a company and its officers, the articles may be expressly or impliedly incorporated in the contract between the company and a director. They will be so incorporated if the director accepts appointment 'on the footing of the Articles,' and relatively little may be required to incorporate the articles by implication: per Ferris J at para [26] of his judgment."* However, such provision may be incorporated between a company and a third party (e.g., director) through a separate arrangement or document e.g., a deed of indemnity or incorporated into the letter of appointment.

Darryl Goon JCA stated that *"In our view, without more, the articles of association do not become terms in a contract between a company and a third party (i.e., person or persons other than its members qua members), whether it be officers of the company or otherwise. However, the articles may be incorporated into such contracts, expressly or impliedly. It is also the case that Courts take the view that comparatively little is required for the incorporation of a term in the article that provides indemnity to an auditor or director who is appointed. However, it remains necessary that there be an incorporation of the particular article in question."*

In PPB's case, the former directors failed to produce any evidence of incorporation of the constitution's indemnity provision into any separate document and hence, failed in their bid for indemnification of their substantial legal fees and costs.

The former directors had also relied on Section 289 of the Companies Act 2016, which provides that the company *may* indemnify an officer or auditor of the company under certain conditions. The Court of Appeal held that the provision in Section 289 does not confer any statutory right to officers or auditors and is merely permissive, such as to permit and authorise the company to indemnify its officers or auditors. Hence, for an officer/director or auditor to rely on the indemnity, there must be a separate contract or agreement between the company and the officer/director or auditor.

## Takeaways

PPB's case shows the importance of directors and other officers (including but not limited to the company secretary) and auditor of the company to obtain an expressed and separate indemnity from the company and not merely rely on the company's constitution. The written indemnity provision may be incorporated in the letter of appointment or a separate letter or document which can serve as evidence.

As it is uncertain whether a **former** director or officer of the company can continue to rely on the indemnity that is provided to him/her in the similar wordings of Article 170, when procuring an indemnity from the company, the director or officer of the company should ensure that the indemnity clause provides that he/she is indemnified to the fullest extent permitted by law, including even after he/she has ceased to be the director or officer of the company.

*This article was originally published on Benjamin Tham & Co. website [www.btcollaw.com](http://www.btcollaw.com) on 17<sup>th</sup> November 2021 and reproduced with permission of the writer. The information in this article is intended only to provide general information and does not constitute professional advice or legal opinion. Please consider seeking legal advice and/or other professional advice and assistance in relation to any particular matter you or your organization may have.*

\* Information is as at 17 November 2021

# KEY AMENDMENTS TO THE EMPLOYMENT ACT 1955

By Ivan Aaron Francis (Associate)  
Messrs. Thomas Philip

News that the Employment (Amendment) Act 2022 was to come into force on 1st September 2022 sent Malaysian employers into panic-mode as the announcement only allowed employers a few weeks to ensure compliance with the applicable provisions. Fortunately, the implementation has been postponed to 1st January 2023, giving employers ample time and opportunity to comply with the Employment Act ("EA") and revise their employment contracts. This article will set out some of the key amendments employers and employees should take note of.

## 1) Widening the scope of employees protected under the Employment Act

The largest change to the employment landscape in Malaysia pursuant to the Employment (Amendment of First Schedule) Order 2022 is that the First Schedule has been widened to include any person who has entered into a contract of service, meaning the EA now applies to all employees irrespective of wage. Notwithstanding this, certain provisions in respect of overtime payments and termination benefits will not apply to employees earning more than RM4000/month.

The previous position was that only employees earning up to RM2000/month were protected under the Act. This widening of EA's scope means employers should ensure that their employment contracts comply with the minimum standards set under the EA. Any employment terms that are less favourable to the employee can be rendered void and unenforceable.

## 2) Increase in maternity leave period

The 60 days of maternity leave entitlement under the EA has been increased to 98 days. This is a welcome change to match international labour standards and ensure that working mothers have sufficient time to recuperate and care for their child.

## 3) Paternity leave

The EA now provides working fathers 7 days of paid paternity leave for each confinement, up to a limit of

5 confinements. Although 7 days may not be enough, it is a good start in the Malaysian framework.

## 4) Flexible Working Arrangement

The EA now provides that employees can submit a written application for flexible working arrangement to modify their hours, days or place of work. Any application must be approved or rejected by the employer within 60 days in writing, and any rejection must be justified.

Besides the ambiguity in the framework, not all job positions are suitable for flexible working arrangement and require physical presence. Naturally employers should draft and implement policies to cover flexible working arrangements as it will make such employments much more competitive and attractive to the market.

## 5) Notice to raise awareness on sexual harassment

Employers must now exhibit conspicuously at the place of employment, a notice to raise awareness on sexual harassment.

## 6) Lesser maximum working hours

The EA now provides that the maximum working hours for employees are reduced from 48 to 45 hours per week. This means that employees are now entitled to overtime payments for any extra hours spent beyond the 45 hours.

## 7) Sick leave and hospitalisation leave

Prior to the amendment, an employee is entitled to paid sick leave of 14 to 21 days, depending on their length of employment, where no hospitalisation is required. Where hospitalisation is required, an employee is entitled to 60 days of paid sick leave provided that the total number of paid sick leaves taken in a year does not exceed 60 days

Pursuant to the new amendment, the 60 days of paid sick leave for hospitalisations are now in addition to the 14 to 21 days of paid sick leave where hospitalisation is not necessary.



### 8) Prohibition of forced labour

New provisions have been included to prohibit forced labour whereby employers who threaten, deceive or force an employee to do any work or prevent that employee from leaving a place of work after work is done, are liable to a fine not exceeding RM100,000 or imprisonment not exceeding 2 years or both.

### 9) Employing and terminating foreign employees

Employers must obtain prior approval from the Director General of Labour before employing foreign employees. The Director General can approve such applications and fix conditions to them where necessary.

On the other hand, if a foreign employee is terminated, the employer must inform the Director General of Labour within 30 days. If the foreign employee

absconds from the employment, the employer shall inform the Director General within 14 days.

### 10) Director-General's power to inquire and decide disputes regarding discrimination in employment

The Director General of Labour has power to inquire and determine any disputes and matters relating to discrimination in employment. The DG can make an order and any employer failing to comply with said order commits an offence.

On the whole, employers are advised to review their employment terms and policies to ensure compliance with the EA to avoid sanction.

*This article was originally published on Thomas Philip website [www.thomasphilip.com.my](http://www.thomasphilip.com.my) on 7<sup>th</sup> November 2022 and reproduced with permission of the writer.*

## PRESS RELEASES FROM COMPANIES COMMISSION OF MALAYSIA (SSM)

### SSM PERKENAL DUA INISIATIF BAHARU, TERUSKAN ENAM INISIATIF SEDIA ADA BAGI MEMBANTU PEMULIHAN EKONOMI NEGARA 2023

**Kuala Lumpur, 16 Februari 2023** – Selari dengan usaha Kerajaan dalam membantu pemulihan ekonomi negara pasca pandemik COVID-19, YB Datuk Seri Salahuddin Ayub, Menteri Perdagangan Dalam Negeri dan Kos Sara Hidup (KPDN) telah mengumumkan tiga inisiatif pengurangan kompaun bagi tahun 2023 pada 10 Januari lalu.

Inisiatif pertama melibatkan pengurangan kompaun sebanyak 90% daripada nilai asal ke atas syarikat yang berstatus 'dissolved' di bawah Akta Syarikat 1965 dan Akta Syarikat 2016. Pelaksanaan inisiatif ini bertujuan membantu meringankan beban kewangan pengarah dan syarikat yang telah tutup.

Bagi inisiatif kedua, SSM memperkenalkan pengurangan kompaun sebanyak 90% daripada nilai asal kompaun bagi semua kesalahan lazim di bawah Akta Syarikat 2016. Pengurangan kompaun ini akan diberikan kepada syarikat selepas pematuhan terhadap kegagalan atau kesalahan diambil tindakan oleh pihak syarikat. Pengurangan kompaun hanya diberikan bagi kesalahan lazim di bawah Seksyen 68(1), Seksyen 248(1), Seksyen 258(1), Seksyen 259(1), Seksyen 340(1), Seksyen 30(1) dan Seksyen 30(2) Akta Syarikat 2016. Pelaksanaan inisiatif baharu ini diharap dapat membantu komuniti korporat untuk meneruskan perniagaan di dalam persekitaran perniagaan yang mencabar.

Bagi inisiatif ketiga, SSM meneruskan pengurangan kompaun sebanyak 90% daripada nilai asal kompaun bagi semua kesalahan di bawah Akta Syarikat 1965. Inisiatif ini bertujuan untuk memastikan data yang disimpan berhubung entiti syarikat di dalam pendaftaran SSM adalah terkini dan juga bagi mendorong syarikat mematuhi amalan tadbir urus terbaik khususnya serah simpan Penyata Kewangan serta maklumat terkini di SSM. Di samping itu, ia juga meringankan beban kewangan syarikat-syarikat ke arah pemulihan ekonomi negara dalam fasa peralihan ke endemik.

Lanjutan daripada pengumuman tersebut, SSM juga akan meneruskan lima lagi inisiatif sedia ada dengan beberapa penambahbaikan, menjadikan bilangan keseluruhan lapan inisiatif SSM pada tahun 2023.

Bagi inisiatif keempat, SSM melanjutkan tempoh masa pendaftaran SSM BizTrust secara percuma sehingga 31 Disember 2023 dan memperluaskan penggunaan Kod QR SSM BizTrust kepada entiti Perkongsian Liabiliti Terhad (PLT) berdaftar yang boleh diperolehi secara automatik.

Bagi inisiatif kelima, SSM meneruskan pelaksanaan inisiatif Skim Pendaftaran Perniagaan Prihatin (SPPP) yang diperkenalkan pada tahun 2021 untuk menawarkan pendaftaran perniagaan secara percuma kepada usahawan kumpulan B40 dan pelajar IPT sepenuh masa. Pada tahun 2023, syarat SPPP diperluaskan kepada pasangan suami dan isteri usahawan B40 untuk menggalakkan isi rumah usahawan kumpulan tersebut menjadikan perniagaan sebagai salah satu sumber pendapatan dalam mendepani cabaran ekonomi masa kini.

Inisiatif keenam pula, SSM meneruskan pelaksanaan Skim 1 OKU 1 Perniagaan (S1O1P) yang menyediakan pendaftaran dan pembaharuan perniagaan secara percuma bagi menggalakkan golongan OKU menceburi bidang perniagaan secara sah.

Inisiatif ketujuh, SSM akan meneruskan cadangan pindaan bagi menambahbaik peruntukan-peruntukan di bawah Akta Syarikat 2016 berkaitan mekanisma penyelamat korporat dan skim kompromi atau perkiraan.

Penambahbaikan serta pindaan ini akan membolehkan syarikat-syarikat yang menghadapi masalah kewangan memohon proses rehabilitasi korporat yang bersesuaian agar syarikat boleh terus beroperasi. Inisiatif ini adalah penting untuk membantu sektor korporat yang menghadapi masalah kewangan, terutama sekali akibat dari kesan pandemik COVID-19 agar kekal beroperasi dan menjana ekonomi negara. Rang Undang-Undang ini juga akan memperkenalkan peruntukkan mengukuhkan polisi berhubung kerangka pelaporan pemunyaan benefisial yang komprehensif.

Melalui inisiatif kelapan pula, SSM akan meneruskan cadangan untuk memperkenalkan peruntukan-peruntukan berkaitan mekanisma penyelamat korporat di bawah Akta Perkongsian Liabiliti Terhad 2012. Peruntukan-peruntukan ini bertujuan untuk menambahbaik kerangka perundangan sedia ada berkaitan rehabilitasi korporat bagi entiti Perkongsian Liabiliti Terhad.

KPDN dan SSM berharap inisiatif-inisiatif yang dilaksanakan ini dapat membantu ke arah pemulihan ekonomi negara sejajar dengan pelbagai inisiatif yang dilaksanakan oleh Kerajaan.

Untuk maklumat lanjut, orang ramai boleh menghubungi Pusat Panggilan SSM di talian 03-77214000 atau emel kepada [enquiry@ssm.com.my](mailto:enquiry@ssm.com.my).

**DIKELUARKAN OLEH: SURUHANJAYA SYARIKAT MALAYSIA TARIKH: 16 FEBRUARI 2023**

### **PENGARAH SYARIKAT DITUDUH MENDORONG DUA INDIVIDU MEMBUAT PERJANJIAN UNTUK MENDEPOSITKAN WANG KEPADA SYARIKAT MELALUI PERNYATAAN YANG DIKETAHUI PALSU**

**Kuala Lumpur, 18 Januari 2023** – Seorang pengarah syarikat dihadapkan di Mahkamah Sesyen Kuala Lumpur atas satu pertuduhan telah mendorong dua individu untuk membuat perjanjian yang bertujuan untuk menandatangani wang kepada syarikat Tugu Pertama Sdn. Bhd melalui pernyataan yang diketahuinya sebagai palsu.

Tertuduh yang bernama Rohaniza Mohd Reduan telah dituduh dengan satu pertuduhan di bawah Seksyen 594(1) (a) Akta Syarikat 2016. Melalui pernyataan yang diketahuinya sebagai palsu iaitu pesanan semasa daripada



Malaysia Airports Sendirian Berhad (Miri) bertarikh 9 Februari 2018, tertuduh dikatakan telah mendorong Ooi Chuon Hiong dan Lim Fang Yau untuk membuat surat perjanjian (sebagai pelabur) bertarikh 25 Februari 2018 yang bertujuan menandatangani wang sebanyak RM19,200 dengan syarikat Tugu Pertama Sdn. Bhd.

Seksyen 594(1)(a) Akta Syarikat 2016 memperuntukkan mana-mana orang yang, melalui apa-apa pernyataan, janji atau ramalan yang diketahuinya sebagai mengelirukan, palsu atau memperdayakan atau melalui apa-apa penyembunyian fakta material secara curang atau dengan membuat apa-apa pernyataan, janji atau ramalan secara melulu yang mengelirukan, palsu atau memperdayakan, mendorong atau cuba untuk mendorong seorang yang lain membuat atau menawarkan untuk membuat apa-apa perjanjian bagi atau yang bertujuan memperoleh, melupakan, melanggan atau menaja jamin sekuriti boleh pasar atau meminjam atau menandatangani wang kepada atau dengan mana-mana perbadanan.

Tertuduh telah mengaku tidak bersalah terhadap pertuduhan tersebut dan memohon untuk dibicarakan. Hakim Mahkamah Sesyen Kuala Lumpur M. Bakri Abd Majid membenarkan jaminan sebanyak RM7,000 dengan seorang penjamin.

Pendakwaan telah dikendalikan oleh Pegawai Pendakwa Suruhanjaya Syarikat Malaysia (SSM), Najia Abdul Razak manakala tertuduh tidak diwakili.

Seksyen 594(1)(a) Akta Syarikat 2016 menyatakan bahawa adalah menjadi kesalahan apabila seseorang, melalui pernyataan yang diketahuinya sebagai palsu, telah mendorong seseorang yang lain untuk membuat perjanjian untuk menandatangani wang dengan suatu perbadanan. Jika disabitkan kesalahan, penjara tidak melebihi 10 tahun atau denda tidak melebihi RM3 juta atau kedua-duanya sekali boleh dikenakan.

SSM memandang berat kesalahan seperti ini kerana ia menjejaskan amalan tadbir urus korporat baik yang seharusnya dipraktikkan oleh syarikat. Tindakan pendakwaan ini adalah satu peringatan kepada orang awam bahawa SSM akan mengambil tindakan perundangan sekiranya berlaku kesalahan di bawah peruntukan undang-undang yang dikawalselia oleh SSM.

**DIKELUARKAN OLEH: SURUHANJAYA SYARIKAT MALAYSIA**

**TARIKH: 18 JANUARI 2023**

## IACS NEW MEMBERS

We would like to welcome the following new members to IACS :-

IACS No.	Ordinary Members	State
M 2634	Ms. Chew Siew Moey	Melaka
M 2635	Ms. Lee Yee Ching	Selangor
M 2636	Ms. Christine Lum Yuet Meng	Selangor
M 2637	Ms. Meenambal a/p Subramaniam	Kuala Lumpur
M 2638	Ms. Hiew Ka Yi	Johor

In the meantime, we take this opportunity to thank you for the support given to the Institute. We look forward to your active participation in all activities of IACS for the development of the company secretarial profession.

# FAQS ON COMPANIES ACT 2016 AND TRANSITIONAL ISSUES

## PART E

### NOTIFICATION OF PARTICULARS AND CHANGE IN REGISTER OF DIRECTORS, MANAGER AND SECRETARIES

1. **In the notification under section 58, Note 1 states the requirement that a resolution to be attached where necessary. Does this mean that any change of particulars such as expiry date of passport would also require a board resolution etc.?**

Answer:

Resolution is only required to be attached where there is a change in the appointment or removal of a director. Changes relating to the particulars of a director or officer such as the passport number, address etc. will not require any resolution.

2. **Director's Service Address (updated on 9 June 2017)**

**If a director does not have any business address or e-mail address and his residential address is the only address used for communication, must the company notify SSM the service address?**

Answer:

Yes "service address" as defined under section 2 is linked to section 58 (similar to the previous Form 49 - with additional info on service address). In this case the notification must be made to notify that the residential address and the service address are the same address. If there is a change in the name/residential/any prescribed particulars address these changes must be notified to SSM as well.

3. **Does service address include telefax, any electronic transmission or messenger application? (updated on 9 June 2017)**

Answer:

Service address is defined under section 2 as "service address", in relation to a director, means an address, electronic or otherwise, provided to the company to which any communication may be sent.

4. **A company secretary had resigned and gave notice of her resignation to the Board of Directors. The directors agreed with the resignation and signed the resolution and further gave effect to this change.**

**Can the secretary lodge her resignation through MyCoID2016? (updated on 24 September 2018)**

Answer:

The secretary who has resigned cannot act as the secretary of the company and any changes with SSM can be carried out by the directors or by the newly appointed secretary.

5. **What action should a company take if there is a change in the nature of its business? (updated on 15 November 2022)**

Answer:

A company must notify any change of the nature of its business within fourteen (14) days after such change. The company may refer to PD2/2017.

Source: SSM website [www.ssm.com.my](http://www.ssm.com.my)

## IACS TRAINING CALENDAR 2023

No	Date	Locations	Topic/s	Speaker	CPE Points
1	06/04/2023	Zoom Webinar	Dividends – To Declare or To Authorise?	Kenneth Foo	4
2	12/04/2023	Sibu, Sarawak	Annual Return, Accounts, AGM and Audit Updates and Perspective	Jessica Liew	8
3	18/04/2023	Zoom Webinar	Company Secretary – The Changing Roles- Beware!	Jessica Liew	4
4	11/05/2023	Zoom Webinar	Company Secretary as Governance Professional	Dr. Zubaidah Zainal Abidin	4
5	19/05/2023	Kuching, Sarawak	Capital Maintenance – An In-Depth Case Study Session On Shares	Kenneth Foo	8
6	24/05/2023	Zoom Webinar	TBC	Kenneth Foo	4
7	07/06/2023	Zoom Webinar	Frequently Committed Offences by Directors/Secretaries – Clear and Present Danger	Jessica Liew	4
8	09/06/2023	Zoom Webinar	TBC	Kenneth Foo	4
9	23/06/2023	Kuantan, Pahang	Companies Act 2016 – Updates & Developments Since 31 January 2017	Kenneth Foo	8
10	07/07/2023	Melaka	Capital Maintenance – An In-Depth Case Study Session On Shares	Kenneth Foo	8
11	13/07/2023	Zoom Webinar	Violations of the Companies Act 2016 – Oversights by Directors and Secretaries	Dr. Zubaidah Zainal Abidin	4
12	28/07/2023	Zoom Webinar	TBC	Kenneth Foo	4
13	10/08/2023	Ipoh, Perak	Annual Return, Accounts, AGM and Audit Updates and Perspective	Jessica Liew	8



No	Date	Locations	Topic/s	Speaker	CPE Points
14	16/08/2023	Zoom Webinar	TBC	Kenneth Foo	4
15	24/08/2023	Zoom Webinar	Statutory Records Updates-The Future	Jessica Liew	4
16	07/09/2023	Johor Bahru, Johor	Updates On Incorporation, Constitution, Directors, Shares And Records Keeping	Kenneth Foo	8
17	22/09/2023	Alor Setar, Kedah	Updates On Incorporation, Constitution, Directors, Shares And Records Keeping	Kenneth Foo	8
18	26/09/2023	Zoom Webinar	AMLA – Director and Secretary’s Reporting Obligations	Dr. Zubaidah Zainal Abidin	4
19	05/10/2023	Zoom Webinar	Managing Effective Meetings – Virtual and Hybrid and Physical Meetings	Jessica Liew	4
20	20/10/2023	Penang	Capital Maintenance – An In-Depth Case Study Session On Shares	Kenneth Foo	8
21	26/10/2023	Zoom Webinar	TBC	Kenneth Foo	4
22	08/11/2023	Kuala Lumpur	Capital Maintenance – An In-Depth Case Study Session On Shares	Kenneth Foo	8
23	17/11/2023	Zoom Webinar	TBC	Kenneth Foo	4
24	28/11/2023	Zoom Webinar	Director’s Behavior and Boardroom Dynamics	Dr. Zubaidah Zainal Abidin	4
25	01/12/2023	Zoom Webinar	Effective Minutes Writing	Jessica Liew	4
26	07/12/2023	Zoom Webinar	TBC	Kenneth Foo	4

*The organiser reserves the right to change the date, topic, venue or to cancel the programme.*

# EVENT HIGHLIGHTS

## IACS CPD Seminar in Johor Bahru on 11th January 2023

The seminar was held at Grand Paragon Hotel Johor Bahru, Johor. The speaker was Mr. Kenneth Foo and the topic of the seminar was *"Analysis and Case Studies on Beneficial Ownership of Legal Persons"*



## IACS CPD Seminar in Kuala Lumpur on 17th February 2023

The seminar was held at AC Hotel by Marriott Kuala Lumpur. The speaker was Mr. Kenneth Foo and the topic of the seminar was *"Updates on Incorporation, Constitution, Directors, Shares and Records Keeping"*





# How to become a member of Institute of Approved Company Secretaries?



## 1) IACS

INSTITUTE OF APPROVED COMPANY SECRETARIES (IACS) was incorporated in Malaysia on 16 May, 1996 as a company limited by guarantee and not having a share capital under the Companies Act.

## 2) OBJECTIVES OF IACS

The objects for which IACS is established are:-

- a) To co-ordinate and co-operate with all the regulating authorities in enhancing the professionalism of company secretaries.
- b) To provide an avenue for company secretaries to get together to improve and advance their interest and professional status and to provide a vehicle for regulating the conduct and professional ethics of company secretaries.
- c) To conduct seminars, conferences and meetings for the presentation of papers and delivery of lectures, and for the acquisition and dissemination by other means of information connected with the profession of company secretaryship and other related corporate practice.
- d) To form a library for the use of members and to collect, collate and publish information of service and/or interest to members of the profession and to establish and maintain libraries and collection of documents, papers, research materials and other effects.
- e) To submit either independently or jointly with other representations, etc; to the relevant authorities pertaining to any legislation either enacted or otherwise for the purpose of promoting the position of members or the professional conduct of company secretaries.
- f) To afford opportunities for social contact amongst members.
- g) To print and publish newsletters, periodicals, books or otherwise that are desirable for the benefits of members and the public with the approval of the authority concerned.

## 3) MANAGEMENT OF IACS

The Management of IACS is vested in the Council (the Board of Directors). The powers of the Council are governed by the provisions of the Constitution of IACS and the Companies Act 2016.

## 4) CATEGORIES OF MEMBERSHIP AND THEIR DISTINGUISHING LETTERS

The composition of membership of the Institute shall be classified as follows:-

- (a) Fellow Member – FIACS
- (b) Ordinary Member – MIACS
- (c) Honorary Member – HIACS
- (d) Associate Member – AIACS
- (e) Graduate Member – GIACS
- (f) Student Member

## 5) GUIDELINES FOR MEMBERSHIP APPLICATION

- (a) Membership of IACS is by application on the prescribed form.

- (b) The subscribers to the Constitution and such other persons as shall be admitted to membership in accordance with the provisions hereinafter contained shall, subject as provided by these present, be Members of the Institute.

- (c) All applications shall be accompanied by the following:-

- Certified copy of valid Company Secretary Licence issued by CCM under Section 20G of the Companies Commission of Malaysia Act 2001 or Practising Certificate issued by the Registrar under Section 241 of the Companies Act 2016 by any other Company Secretary or Auditors or Commissioner for Oaths (applicable to Ordinary members only)
- Copies of other certificates of qualifications or membership in relevant associations/ bodies (if available). For Associate, Graduate and Student members, the copies of certificates must be certified by any other Company Secretary or Auditors or Commissioner for Oaths
- Two driving licence-size photographs.
- Photocopy of National Registration Identity Card.
- The registration fee and annual subscription shall be such sums as the Council may from time to time prescribe.

- (d) The respective registration fee and annual subscription for the time being are as follows:

CATEGORY OF MEMBERSHIP	REGISTRATION FEE	ANNUAL SUBSCRIPTION
FELLOW	RM 150.00	RM 250.00
ORDINARY	RM 150.00	RM 200.00
ASSOCIATE	RM 100.00	RM 150.00
GRADUATE	RM 100.00	RM 150.00
STUDENT	RM 50.00	RM 50.00

\* Members applying for upgrading to Fellow/Ordinary Members are required to pay a sum of RM170.00 being registration fee (RM150.00) and nominal upgrading fee (RM20.00).

## 6) PRIVILEGES AND RULES OF MEMBERSHIP

- (a) A Member is entitled to use the distinguishing letters as indicated in para 4 after his/her name.
- (b) Members shall be entitled to:-
  - Receive notices and circulars of IACS pertaining to latest news relating to Secretarial Practices from CCM and other regulatory bodies.
  - Attend IACS' general meetings.
  - Vote at IACS' general meetings (applicable to Ordinary & Fellow Members)
  - Receive a Certificate and I.D. of Membership.
  - Participate in seminars, schemes and privileged to enjoy reduced fee and other benefits.
- (c) All Members shall adhere to the provisions of the Constitution, the Code of Ethics and regulations in force and any amendments or changes thereof by the Institute.