the brief

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A Brief Note...

by Dato Zulkifly Rafique

We Win Again !!

Zul Rafique & Partners (ZRp) has been declared **National Law Firm of the Year**....again...for the year 2006 !!

We have completed 6 years – and what an exciting journey it has been. We were declared National Law Firm of the Year for the years 2002, 2005 and 2006 by not only the International Financial Law Review but also the Asian Legal Business.

Our curtains were raised in December 1999 showcasing 12 partners, 18 lawyers and 28 support staff and today we have grown by 300% to 19 partners, 61 lawyers and 88 staff.

Whilst some of us are still nursing our post-holiday blues, the rest of us have enthusiastically made our way back to the grindstone to start our 7th year with a bang !

In the first quarter of the year, we have witnessed a legal and business landscape that has been developing at an exciting pace. For instance the long-awaited amendments to the Arbitration Act have taken effect. There has also been some hype on the Fair Trade Practices Act. On the financial sector side, Bursa Malaysia and Bank Negara Malaysia have been abuzz with various new guidelines and policies.

Do take time to digest the more minute details in this issue of the ZRp Brief.

We have always taken pride in disseminating information and imparting our knowledge through our quarterly newsletter – so let me end my note on an apt quote from Francis Bacon:

Knowledge is Power

in this issue...

ZUL RAFIQUE & partners

BRIEFING...

BANKING

AL-BAI BITHAMAN AJIL...AN UNCONVENTIONAL LOAN? The judgment of Datuk Abdul Wahab Patail J in the recent High Court case of ***Affin Bank Berhad v Zulkifli Abdullah*** has raised awareness and even concerns over the operations of Islamic banking, in particular the workings of the Al-Bai Bithaman Ajil facility.

INTRODUCTION After more than two decades since Islamic banking was introduced*, the High Court case set the precedent as being the first case where a civil court has reviewed a contract that has long been used by Islamic financial institutions. The case also saw comparisons being drawn between the effect on a borrower under an Al-Bai Bithaman Ajil facility and a borrower under an interest-ridden conventional loan; and that the "borrower under an interest-ridden loan is far better off" in the event of default in payment.

* Islamic banking was introduced into the Malaysian banking system in 1983. This was made possible by the passing of the Islamic Banking Act 1983. The Act came into force on 10 March 1983 and it applies throughout Malaysia.

The Al-Bai Bithaman Ajil facility is defined as a 'deferred payment sale' which includes a profit margin agreed to by both parties. It is a mode of Islamic financing (based on Syariah principles) that is used for property, vehicle and other consumer goods. This financing facility is based on the principle of ***Al-Inah,*** which was originally used to envisage a three-point transaction, but now applies to situations involving even two parties. The financial institution providing the loan would first purchase the goods or assets that the borrower intends to buy. The goods or assets will then be sold to the borrower at an agreed price, to be paid in instalments over a tenure mutually agreed by both parties.

As one of the basic principles underlying Islamic transaction is the prohibition of interest ***(riba)***, no interest will be charged on any loan given under Islamic financing. However, to compensate the bank for its profit, the price at which the bank sells the goods or assets to the borrower will incorporate the actual cost of the goods or assets and also the bank's profit margin. This pre-quantified amount is known as the 'bank selling price', which is fixed at the time the contract is entered into. The main advantages of this plan are that instalments remain fixed over the period of the contract and no adjustment is made even if the interest rates fluctuate. As such, the borrower's interest rate risk is eliminated.

AFFIN BANK BERHAD V ZULKIFLI ABDULLAH In this case the High Court highlighted the alleged exorbitant price that a borrower under an Islamic banking loan has to pay in the event of default.

In that case, the loan that the defendant took from the plaintiff bank amounted to RM33,454.19. However after the defendant defaulted in his payment, the bank claimed the amount of RM958,909.21 which included not only the loan obtained but also the bank's profit margin spanning through the 25 year tenure of the facility ('bank selling price'). Furthermore, the house that was the subject matter of the loan was to be auctioned off to make up for the balance still owing to the bank.

Datuk Abdul Wahab Patail J cited two previous High Court cases** involving a similar Islamic financing facility, and commented that even if the full purchase price of the goods or assets were recovered on auction, the defendant would still find

himself owing a substantial amount. This comes about as under the Al-Bai Bithaman Ajil facility, the bank claims a profit on any unexpired tenure, as opposed to a conventional loan whereby interest and late payment interest would be limited to the period from release of the loan until full settlement, and not for the original full tenure of the loan. As his Lordship was of the opinion that profit charged on the unexpired part of tenure is unearned profit, it contradicts the principle of Al-Bai Bithaman Ajil and as such cannot be claimed. Accordingly, his Lordship slashed the amount claimed by the bank to RM558,909.21 which was the total amount of the penalty, the bank's profit (between 1999 and 2005 which is up to the judgment date) and the loan itself.

The two cases cited are the High Court decisions of *Bank Islam Malaysia Berhad v Adnan bin Omar (1994) and Bank Islam Malaysia Bhd v Shamsuddin bin Haji Ahmad (1999).*

ANALYSIS The ruling has opened Pandora's Box. The first concern is whether a civil court has jurisdiction to review Islamic banking contracts and whether the court's interpretation of the contract was in accordance with Syariah principles. Secondly, whether such contracts (Al-Bai Bithaman Ajil) should be limited to short-term transactions.

These are interesting issues to consider but the answers are subject to the development of Islamic jurisprudence in the secular industries.

"It's time for the Bar to leave the comfort zone and grab the bull by the horns. I think we should change. We got a lot to lose if we don't get out of this comfort zone," Datuk Seri Nazri Aziz said on April 6 during a luncheon to celebrate Zul Rafique & Partners' success in being declared National Law Firm of the Year 2006 by the International Financial Law Review - The Edge Daily

COMMUNICATIONS AND MULTIMEDIA

THE REPERCUSSIONS OF A BORDERLESS WORLD... Online trading conducted the dotcom way is borderless. If a Malaysian trader wishes to enter into a commercial transaction with an English trader, he would be able to do it 'online'. The issue that arises here is whether there is legislative protection of data that passes from one trader to another, or from one customer to another. Is there an end to open season on personal data?

TIGHTENING THE REINS On an international level, the Organisation for Economic Cooperation and Development has issued 'Guidelines Governing the Protection of Privacy and Transborder Flow of Personal Data'. In an attempt to harmonise the various national privacy laws in Europe, the European Parliament and the Council in 1995 adopted the 'EU Directive on Data Protection' to promote European-wide commerce.

European countries and most other countries including Australia, New Zealand, Canada, Argentina, Brazil, Hong Kong, South Korea, Taiwan and Thailand have also adopted this approach. Malaysia prepared the Personal Data Protection Bill in 1998, but it is yet to be tabled in Parliament.

THE END OF CONSUMER RELUCTANCE? There are several reasons that make it necessary for legislation to regulate this aspect of data transmission. For example, concerns over security and privacy are often cited as the cause for the slow proliferation of e-transactions. Further, the ability of technology to gather, recover, circulate and manipulate personal data has given rise to fears that the privacy of individuals may be easily compromised. Thus, data protection legislation would encourage growth of e-commerce in the country, as the

presence of legal protection over personal data will play a part in creating a safer environment to transact online, assuaging consumer reluctance due to fears of, for instance, identity theft. Legislation also plays a part in plugging gaps in a vulnerable system that has seen corporate abuse of private user information.

EXCESSIVE ACCESS Legislation that confers protection to personal data is also important as a safeguard against the abuse of provisions that permit the commission of acts that would otherwise amount to intrusion of data privacy. For instance, in Malaysia, it is provided in section 79 of the Digital Signatures Act 1997 ('DSA'):

> (1) A police officer conducting a search under section 77 or 78 or an authorised officer conducting a search under section 77 shall be given access to computerised data whether stored in a computer or otherwise.
>
> (2) For the purposes of this section, "access" includes being provided with the necessary password, encryption code, decryption code, software or hardware and any other means required to enable comprehension of computerised data.

Information is the oxygen of the modern age. It seeps through the walls topped by barbed wire, it wafts across the electrified borders - Ronald Reagan

Another example is section 249 of the Communications and Multimedia Act 1998 ('CMA') that gives power to a police officer or an authorised officer to intercept communication, which, in the opinion of the Public Prosecutor, is likely to contain any information which is relevant for the purpose of any investigation into an offence under the CMA. In fact, by virtue of section 265(1) of the CMA, the Minister may determine that a licensee or a class of licensees shall implement the capability to allow authorised interception of communications for the sake of national interest.

The Personal Data Protection Bill* under the jurisdiction of the Ministry of Energy, Communications and Multimedia was drafted in 1998. The aims of the proposed legislation are to regulate the collection, possession, processing and use of personal data by any person/ organisation, and also to establish a set of common rules and guidelines on the handling of personal data. Amongst the objectives of the proposed legislation are to provide adequate security and privacy in handling personal information, to create confidence amongst consumers and to promote e-transactions.

Without legislative protection accorded to personal data, these provisions and those of a similar nature are open to abuse. An officer conducting a search under the DSA or the CMA would virtually have carte blanche to access any data regardless of the nature of the data and the necessity of having access to such data. Hence, to ensure that personal data is protected, legislation is necessary to limit such power of search to the necessary extent and circumvent its application to irrelevant data.

CONCLUSION Legislation is essential in order to ensure that the issues of adequacy and enforcement of data protection are properly addressed. It would provide a measure of constant protection and also allow for the appointment of a qualified party who is able to monitor the borderless flow of personal data, according to a prescribed standard to ensure that an individual's personal data is not easily misused or abused.

*In December 2003, it was reported that the government was re-looking at and re-drafting the much awaited Personal Data Protection Bill. The relevant Minister was quoted as saying that "we have to balance the need for privacy with public policy interests".

ARBITRATION

ARBITRATION ACT 2005...AN OVERHAUL? The Arbitration Act 1952 ('the 1952 Act') has been in existence for over half a century and the need for reform of arbitration laws in the country has been pressing for some time now. Recently, the long awaited Arbitration Act 2005 ('the 2005 Act') which came into force on 15 March 2006, repealed both the 1952 Act and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards Act 1985.

The Act reforms the law relating to domestic arbitration, provides for international arbitration, the recognition and enforcement of awards and for related matters. It also seeks to promote international consistency of arbitral regimes.

NON-INTERVENTIONIST APPROACH The most striking feature of the 2005 Act is that it advocates the philosophy of party autonomy and has, to a certain extent, tried to diminish the interventionist approach of the courts.

Section 8 of the 2005 Act expressly states that unless otherwise provided, no court shall intervene in any of the matters governed by the 2005 Act and under section 10, the court's discretion to reject stay of proceeding applications pending referral of the matter to arbitration has been removed. A stay will only be granted if the court finds that the arbitration agreement is null and void or that there is in fact no dispute to be referred.

Under the 2005 Act the arbitral tribunal will have express power to order certain interim measures, such as security for costs and the preservation, interim custody or sale of any property which is the subject-matter of the dispute. It retains the court's power to make such orders, which presently exists under the 1952 Act.

FINALITY OF AWARDS An important area which the Act covers is in respect of the finality of arbitral awards. A challenge to the award is limited to setting aside the award on the grounds stated in section 37 of the 2005 Act and the challenge to the award on the grounds of an error of law on the face of the award is replaced with a system of reference on questions of law to the High Court.

In emphasising its non-interventionist approach, in particular to international arbitrations, the 2005 Act also provides that Part III, which includes the right to refer questions of law to the High Court, is not applicable to parties in international arbitrations unless they agree otherwise. It also allows parties to a domestic arbitration to opt out of Part III of the 2005 Act if they so desire.

The complexities and controversies brought by section 34 of the 1952 Act that states that the 1952 Act is not to apply to certain arbitrations, save in respect of its enforcement, has come to an end. There is no corresponding section under the Act.

JURISDICTION As an arbitrator is not empowered to recognise or rule on its own jurisdiction under the 1952 Act, an issue as to jurisdiction can be raised even after the course of arbitration in order to render the award unenforceable, for example at the enforcement stage. The party contesting the jurisdiction of the arbitrator will not be faulted even if he does not raise the issue during the arbitration. The 2005 Act however empowers the arbitrator to recognise its own jurisdiction, and this would mean that any jurisdiction issue must be brought up and challenged during the arbitration, at a stage not later than the submission of the statement of defence, as provided for by section 18.

CONCLUSION The passing of the 2005 Act ensures that a proper platform exists for the conduct of arbitration in Malaysia, in particular of international commercial arbitration, in a modern and effective manner.

CORPORATE

THE LONG AND SHORT OF HEDGE FUNDS Tun Mahathir Mohamed, former Prime Minister of Malaysia who helmed the country during the Asian financial crisis in 1997-98, famously dubbed hedge funds 'highwaymen of the global economy', blaming hedge fund managers for the economic downturn. But what exactly are hedge funds and is this phenomenon as potentially disastrous as made out to be?

WHAT ARE HEDGE FUNDS? A hedge fund, as defined by Gregory Connor and Mason Woo in ***An Introduction to Hedge Funds***, is an actively managed, pooled investment vehicle that is open to only a limited group of investors and whose performance is measured in absolute return units. Hedge funds (as opposed to mutual funds) aim to deliver 'absolute returns', that is to employ investment strategies with the primary aim of minimising investment risk while delivering profits under all circumstances.

Hedge funds 'hedge' against risk by diversification and employing various strategies, to make consistent and stable returns. For example, event-driven strategy hedge funds may invest in distressed or special situations by reducing risk uncorrelated to the market. They may buy interest-paying bonds or trade claims of companies undergoing reorganisation, bankruptcy or some other corporate restructuring - counting on events specific to a company rather than more random macro trends, to affect their investment. Long/short equity funds, while dependent on directions of markets, hedge out some of these market risks through 'short positions' that provide profits in a market downturn to offset losses made by the 'long positions'.

THE HISTORY OF HEDGE FUNDS The first hedge fund was set up by Alfred Winslow Jones in 1949 as an investment partnership. Jones considered himself an excellent stock picker, but a poor market timer. Using a market-neutral strategy of having equal long and short positions, combined with his exceptional stock selection, Jones created a portfolio that reacted less to the vagaries of the overall market. He also used the capital made available from short selling as leverage to make additional investment. Jones also hired other managers, delegated authority for portions of the fund, and thus initiated the multi-manager hedge fund, which later evolved into the first fund of hedge funds. Between the mid-1960s to 1990s, Jones' fund had inspired many imitations. Hedge funds now vary widely in investing strategies, size and other characteristics.

CHARACTERISTICS AND TYPES OF HEDGE FUNDS Hedge funds derive their capital from a private pool of investors limited by the large contribution of capital required to enter into a hedge fund. Unlike their mutual funds-cousins, the hedge fund is a private fund catering to largely wealthy individuals and institutional investors and subject to little scrutiny and regulation, which govern other mutual funds. Hedge funds are also not required to provide periodic pricing or valuation information to their investors, nor publicly disclose their holdings.

The hedge fund world is shadowy and secretive; managers of hedge funds rely on the stealth of their trading strategies to achieve the desired result. Hedge fund managers are generally compensated based on performance, being a percentage of returns generated through their trading. Most hedge funds are highly specialised, relying on the specific expertise of the manager or management team. Hedge funds are restricted by law to no more than 100 investors per fund, and thus most hedge funds set extremely high minimum investment amounts.

Hedge funds employ various styles and strategies, some of which are described below:

Long/Short Equity
The focus is on security selection to achieve absolute returns, while decreasing market risk exposure by offsetting short and long positions. The classic long/short position is to choose two closely related securities and then to sell short the perceived overvalued one and 'go long' on the undervalued one. 'For example, Burger Chain A has just come out with a low-fat burger that you and your children love. Burger Chain B's new fat-free burger on the other hand, is dry and tasteless. So, sensing a trend here, you rush out and buy $5,000 worth of Burger Chain A's stock and sell short $5,000 of Burger Chain B. What you have done is to become a market-neutral investor,' according to Dion Friedland in ***Market Neutral Long / Short Equity Trading.***

Relative Value
This exploits perceived mispricing between related financial instruments. An example given by Gregory Connor and Mason Woo deals with the situation where convertible bonds are undervalued compared to the theoretical value of the underlying equity, the hedge fund manager goes 'long' on the convertible bonds and 'short' on the underlying stock.

Event Driven
This exploits perceived mispricing of securities by anticipating events such as corporate mergers or bankruptcies. Merger arbitrage is the investment in both companies (acquirer and takeover candidate) of an announced merger. Until the merger is completed, there is usually a difference between the takeover bid price and the current price of the takeover candidate. A fund manager may buy long the takeover candidate and short the stock of the acquirer, and expect the prices of the two companies to converge. Bankruptcy and financial distress are also hedge fund opportunities.

Tactical Trading
This includes a large variety of directional strategies, including the sub-categories of global macro and commodity trading advisers. Global macro funds make investments based upon appraisals of international conditions, aiming to profit from changes in global economies. Commodities trading advisers specialise in speculative trading in futures markets. Trades may involve futures in precious metals, currencies, financial instruments or commodities in futures exchanges throughout the world.

Fund of Funds
These are combinations of different strategies – call them the biogenetic hybrids of the hedge fund universe. 'This involves mixing and matching hedge funds and other pooled investments vehicles, blending different strategies and assets classes to provide a more stable long-term investment return than any of the individual funds,' according to Dion Friedland.

HEDGE FUNDS IN THE NEWS Hedge funds are a force to be reckoned with. Although there is very little empirical data, Joseph Mccafferty in ***How to talk to a Hedge Fund*** extracted from CFO Asia (July / August issue), provided an estimate by the Hennessee Group, a US-based hedge-fund advisor, which reveals that there are more than 8,000 hedge funds holding nearly USD1 trillion in assets. Hedge funds employing global macro strategies contain the largest funds and include such funds run by Steinhardt, George Soros (Quantum Group), and Julian Robertson (Tiger Management).

The vast majority of hedge funds, however, employ less volatile strategies than these; instead they emphasise on making consistent returns, rather than magnitude. Most use derivatives only for hedging or do not use derivatives at all and many use no leverage. Nevertheless, news on the failures of hedge funds have been spectacular; to illustrate a few:

- Aman Capital Management, one of Singapore's largest hedge fund firms with S$242 million in assets under management announced its closing in 2005 after significant derivatives trading losses in April 2005 following the collapse of China Aviation Oil, the Singapore-listed jet fuel importer which was hit by derivatives trading losses of S$550m. This was extracted from ***Singapore-based Hedge Fund Closes due to Losses.***

- Manhattan Investment Fund, a fund set up by Michael W. Berger in April 1996 raised more than USD350 million from investors. However this fund lost in excess of USD300 million when prices of stocks sold short increased dramatically. Following a series of fraudulent acts to conceal the losses and overstate the performance and value of the fund, investors were told that the fund had a net market value of more than USD426 million in assets when in fact its net value was reduced to less than USD28 million. Berger was charged for security fraud in 2000, as was reported in ***SEC Charges Hedge Fund and Its Adviser with Fraud, Emergency Relief Ordered.***

- Long Term Capital Management (LTCM) was established by John Meriwether, the famed bond trader from Salomon Brothers, who assembled an all-star team of traders and academics. LTCM largely used relative value strategies, involving global fixed income arbitrage and equity index futures arbitrages. Its techniques were designed to pay off in small amounts, with extremely low volatility. In order to achieve higher returns from these small price discrepancies, LTCM employed very high leverage. At the beginning of 1998, the fund had an equity of USD5 billion and borrowed over USD125 billion, a leverage of roughly thirty-to-one. LTCM's partners believed, on the basis of their complex computer models, the long and short positions were highly correlated and the net risk was small. However LTCM suffered significant losses when betting on the Russian ruble and as a result of consequent global interest rate anomalies. This jeopardised LTCM's short positions in the debt market. LTCM lost 90% of its value and experienced a severe liquidity crisis. Following a bailout of LTCM by the Federal Reserve Bank, many creditor banks had to take a substantial write-off as a result of losses on their investments, according to an extract from Gregory Connor and Mason Woo's ***An Introduction to Hedge Funds.***

Look at market fluctuations as your friend rather than your enemy; profit from folly rather than participate in it – Warren Buffet

CONCLUSION The hedge fund presents an exciting and innovative form of investment. It confronts the traditional fund sector with a strong challenge. Notoriously known for its short selling, it has gained a reputation for being unscrupulously damaging in its wake and defies the idea of traditional long-term investment. There have been many calls for its direct regulation to ensure a fairer and more transparent international financial system, following fears that hedge funds get more access to sensitive information owing to their close links with the investment banks. Furthermore, a hedge fund manager or adviser has total trading authority over the hedge fund. However, having regulations and practising transparency would cause hedge funds to lose the edge of maximising profits through stealth tactics and would be inimical to a very private group of investors consisting of wealthy individuals and institutions. It is undeniable that hedge funds are here to stay. As Louis Thompson, president and CEO of the National Investors Relations Institutes once said, 'One trillion [dollars] in assets can't be ignored.' It would be exciting to observe the future developments and challenges in the regulation of this unwieldy subject.

CORPORATE

TO BLOW OR NOT TO BLOW...THE WHISTLE! If you chance upon some legal improprieties within your organisation, what would you do? Quit your job because your moral values and principles weigh heavily against you being in a substandard organisation? Or turn a blind eye and inadvertently condone such cover-up by your silence? Or would you jeopardise your career, future and even your life to stand up against what you believe should not go unnoticed and unpunished? If you are brave enough to not only hold firm to your belief but also speak up against the illegal misconducts, then you would probably condone whistleblowing as a means of creating public awareness.

WHAT IS WHISTLEBLOWING?

Whistleblowing, although not a new phenomenon, has increasingly become a big issue, especially after numerous high-profile exposés. Amongst the whistleblowers are Sherron Watkins who shed light on Enron's dodgy accounting practices; Dr David Kelly who alleged that the Blair Government had 'sexed up' the intelligence dossier concerning Saddam Hussein's weapons of mass destruction; and W Mark Felt aka ***Deep Throat*** whose insider information led to the Watergate Scandal which saw President Richard M Nixon resigning and some of his highest-ranking aides facing prison sentences. On the home front, Irene Fernandez has thrown caution to the wind and ultimately her own freedom to expose the alleged shoddy treatment of detainees in detention camps.

Whistleblowing should be distinguished from other forms of disclosure such as spying, informing or low-form snitching. Although 'whistleblowing' has not been defined globally, ***Black's Law Dictionary*** defines it as 'an employee who reports an employer's wrong-doing to a governmental or law-enforcement agency.' Geoff Hunt in his book ***Whistleblowing*** defines it as 'a public disclosure by a person working within an organisation, of acts, omissions, practices or policies perceived as morally wrong by that person and is a disclosure regarded wrongful by that organisation's authorities.'

Whistleblowing is seen as a key check on public and private companies. Since raising the alarm would consequently affect the whistleblower's organisation and even its clients, there should be strong moral justification for blowing the whistle. First, the whistleblower must reasonably believe that there is a grave wrongdoing occurring in the organisation that has not been resolved despite exhausting all appropriate channels within the organisation. However, whether the activity/ wrongdoing is in actual fact illegal is irrelevant so long as the whistleblower believed it was illegal and the belief was reasonable. The whistleblower should also have thoroughly investigated the situation and should be convinced that blowing the whistle will cause more good than harm.

PROTECTING THE WHISTLEBLOWER?

Blowing the whistle requires tremendous courage, as the whistleblower himself is not adverse to the effects. Whistleblowers reportedly suffer from humiliation, isolation and being shunned by colleagues. They also face difficulty in their work, possible suspension, being blacklisted from another job in their field or receive negative performance appraisals. Some even turn to suicide as a means to end the harassment. Therefore, whistleblowers need proper protection against the wrongdoers in order to impart the truth without reservations. To be protected, the whistleblower must have reported the wrongdoing to a governmental agency after bringing up the issue internally without any effective change. If the law applies to protect the whistleblower, the employer will be legally barred from retaliating against the whistleblowing employee.

E! IS FOR ENRON A law passed in the wake of this phenomenon in the US is the Sarbanes-Oxley Corporate Reform Act 2002 (SOCRA), mainly as a result of the Enron scandal. Pursuant to this Act, protection has been extended to whistleblowers in publicly traded companies for the first time. The SOCRA makes it illegal to 'discharge, demote, suspend, threaten, harass or in any manner discriminate against' whistleblowers by meting out criminal penalties of a maximum of 10 years for executives who so retaliate. It is also a requirement for the board audit committees to establish procedures to hear such complaints. Furthermore, the Secretary of Labour is allowed to order the company to rehire a terminated employee without a court hearing.

In the United Kingdom, the relevant legislation is the Public Interest Disclosure Act 1998 (PIDA). This statute encourages people to raise concerns about malpractice in the workplace and help the organisations address the message rather than the messenger. The PIDA also makes gagging clauses in employment contracts and severance agreements void as they conflict with its principles.

THE MALAYSIAN POSITION In Malaysia, sections 99E and 99F have been incorporated into the Securities Industry Act 1993, to provide for whistleblowing. These sections were incorporated into the Securities Industry Act 1993 on 30 December 2003.

Section 99E sets out the duties of an auditor of a listed company, where he is required to submit a written report to the Securities Commission on a breach or non-performance of any securities laws or exchange rules he encounters and at the same time conferring upon him immunity from being sued by the organisation. Section 99F imposes a similar duty on the chief executives, officers preparing or approving financial statements, internal auditors or secretary of the listed companies.

The suggested Witness Protection Bill (which has yet to be enacted) is intended to provide legal protection to whistleblowers as prosecution witnesses, preventing them from being sacked or punished by their employers. The outcome of it all sees a number of companies/ organisations realising that there are benefits in encouraging whistleblowing. For example, British bank, Abbey National Bank, gives its employees regular advice on how to blow the whistle, including suggesting that they contact Public Concern At Work, a charity manned by lawyers, should they get no positive response internally. Malaysia's national airline, Malaysia Airlines System Berhad (MAS) has started a whistleblower programme to encourage employees to expose malpractices and irregularities following two straight quarters of record losses.

CONCLUSION Whistleblowing is a growing norm today, where transparency is the main concern for the society. More recognition is accorded to the whistleblowers' contribution due to better, albeit slightly, legal protection. On the flip side however, this practice may not be welcomed by the journalism world, as secrecy and upholding sources' identities ensure that the democratic public gets to know what it needs to know. That aside, laws protecting whistleblowers are increasing, as today, whistleblowers are viewed as saviours acting in the public's interest.

Silence in the face of wrongdoing only frees the arrogance needed to perpetuate it – Estelle Levy

After all TIME magazine named the trio of female whistleblowers (Sherron Watkins, Cynthia Cooper and Coleen Rowley) as its ***2002 Persons of the Year.***

PROPERTY/ HOUSING DEVELOPMENT

BOOKSMART V STREETSMART? ... WHO SHOULD MANAGE OUR PROPERTY? The raging debate continues as to who should carry out the work of property management.

On one hand, there are the practising property managers (among them shopping centre managers and individuals managing strata titled properties on behalf of owners cum developers) who feel they are better equipped. On the other hand, there are valuers registered with the Ministry of Finance's Board of Valuers, Appraisers & Estate Agents (BVAEA) who claim to be the most proficient.

We examine the views of both the proponents and opponents of the proposed amendments to the Valuers, Appraisers and Estate Agents Act 1981.

PROPOSED AMENDMENTS The proposed amendments to the Valuers, Appraisers and Estate Agents Act 1981 ('the Act') include the creation of a property management register in which certain non-valuers and bona fide persons could be included 'provided they possess basic qualifications' within a specified time frame of one year after the amendments have been gazetted. Currently, the two existing registers are for valuers and estate agents.

The provision in focus is section 21 of the Act which provides for only registered valuers and appraisers to manage a property on behalf of the owner, for a fee. This does not, however, preclude owners from managing the property themselves by setting up management companies where managers do not charge a fee but are paid salaries. Property management therefore is in a free-for-all situation.

THE BONE OF CONTENTION Seven major bodies have voiced their concerns over the opening of a third register for property managers with the proposed amendment to the Act and they include the Real Estate & Housing Developers' Association (REHDA), the Associated Chinese Chamber of Commerce and Industry Malaysia (ACCCIM) and the Malaysian Association of Shopping Complex and Highrise Management (PPK). The groups advocating the amendments are the Board of Valuers, Appraisers & Estate Agents (BVAEA), Institution of Surveyors Malaysia (ISM) and the Association for Valuers and Property Consultants in Private Practice Malaysia (PEPS). Whilst both proponents and opponents share a common ground, that is property management must be properly and effectively managed, the bone of contention appears to be: ***Who should manage the property?***

BOOKSMART V STREETSMART Whilst the opponents argue that the success of property management depends very much on a property manager's entrepreneurial ability and business acumen, and not so much on his academic training, the proponents maintain that the separate register that would be opened for property managers through the proposed amendment would ensure bona fide persons who practise as property managers.

Although the common aim of all parties is to raise the standard of property management in Malaysia to world class, some feel that regulation will not bode well with globalisation.

According to Richard Chan, President of PPK Malaysia, "While deregulation is the word heard globally, the move to have property management under valuers implies that we are going backwards in Malaysia."

On the other hand, the proponents argue that there is a need for better property management to ensure the quality of performance based on the creation of more and more strata-type developments. In fact, property management has evolved into a complex discipline. It is not merely about rent

collection and garbage disposal anymore, but entails the 'formulation of value accretion strategies, improving revenue flows, unlocking latent real estate values while giving unit owners, tenants and users maximum satisfaction'.

Poorly managed buildings are not uncommon. In fact, according to the National House Buyers Association (HBA), about 70% of the condominiums and apartments in the country are badly managed. In the wake of two recent fatal incidents involving Bianca Thio (who drowned in the swimming pool when her leg reportedly got sucked into a drainage) and Fong Wei Xiong (who plunged to his death in the lift shaft when attempting to jump out of a lift that had stalled between floors), one is compelled to ponder over the words of Prime Minister, Datuk Seri Abdullah Ahmad Badawi that Malaysia has "...world class infrastructure but Third World maintenance."

PROPERTY MANAGEMENT CODE OF PRACTICE In fact, it is not only a review of the Act that is advocated, there have also been suggestions for a Property Management Code of Practice (PMCP) to be implemented as a framework to regulate all management practitioners, whether registered or not. The PMCP is intended to educate property management professionals and owners about the need to work towards compliance to sustain property values. The PMCP becomes all the more important in the light of the absence/ delay in tabling of the Building & Common Property (Maintenance & Management) Bill.

CONCLUSION The debate is far from over and neither camp is relenting. While there are allegations that the amendments are advocated by those with a vested interest, the counter argument is that professional property managers should not be afraid to be accredited and regulated. After all, it is said, "Aren't all professionals subject to the rules and regulation of a governing body?"

BRIEF-UP...

NATIONAL HERITAGE ACT 2005

No
645

Date of coming into operation
1 March 2006

Notes
This Act was enacted for the conservation and preservation of National Heritage, natural heritage, tangible and intangible cultural heritage, underwater cultural heritage, treasure trove and other related matters.

MALAYSIAN DEPOSIT INSURANCE CORPORATION ACT 2005

No
642

Date of coming into operation
15 August 2005

Notes
One of the main aspects of this Act is the establishment of the Malaysian Deposit Insurance Corporation that functions to administer a deposit insurance system, to provide insurance against the loss of part or all deposits of a member institution, provide incentive for sound risk management in the financial system and promote or contribute to the stability of the financial system. A member institution is defined in section 37 of the Act to mean any licensed financial institution.

STAMP DUTY (EXEMPTION) (NO 27) ORDER 2005

No
PU(A) 484/2005

Issued Under
Stamp Act 1949, section 80(1)

Date of coming into operation
25 November 2005

Notes
An order to exempt all instruments of deed of assignment executed between a Real Estate Investment (REIT) or a Property Trust Fund (PTF) approved by the Securities Commission and the disposal relating to the purchase of property.

MALAYSIAN CODE ON TAKE-OVERS AND MERGERS (AMENDMENT) 2006

No
PU(B) 17/2006

Legislation amended
Malaysian Code on Take-Overs & Mergers 1998

Amendment
Section 13

Date of coming into operation
27 January 2006

Notes
Section 13 of the Malaysian Code on Take-Overs and Mergers 1998 is amended to replace the words "thirty-five" with "twenty-one"

LOAN (LOCAL) (AMENDMENT) ACT 2005

No
A1257

Legislation amended
Loan (Local) Act 1959

Amendments
Heading to Part IV; Sections 4, 5, 11, 13, 14

Introduction
Sections 11A and 11B

Date of coming into operation
1 February 2006.

BANKING & FINANCIAL INSTITUTIONS (EXEMPTION) (NO 2) ORDER 2006

No
PU(A) 52/2006

Issued Under
Banking & Financial Institutions Act 1989, section 118(1)

Date of coming into operation
10 February 2006

Notes
Exempts a licensed merchant bank, licensed discount house or a dealer from the application of sub-section 49(9) of the Act insofar as the said provision relates to the sale, disposal, transfer, amalgamation or merger of a licensed merchant bank, a licensed discount house or a dealer for the purpose of the establishment of an investment bank.

RULES/GUIDELINES/PRACTICE NOTES ISSUED BY SECURITIES COMMISSION/BURSA MALAYSIA SECURITIES BHD/BANK NEGARA MALAYSIA BETWEEN JANUARY AND MARCH 2006

BURSA MALAYSIA SECURITIES BERHAD (BMSB)

- Amendments to the Rules Of BMSB Pertaining to Brokerage Fees for ABFMY1 Trades and to Provide Clarity In Relation To Existing Rules On Brokerage Fees – ***13 February 2006***
- Amendments to the Rules Of BMSB Pertaining to Disclosure Of Information On Volume And Value Of Securities Traded By Participating Organisations ('POs') – ***6 February 2006***
- Amendments to the Rules Of BMSB Pertaining to Branch Offices of Non-Universal Brokers – ***3 January 2006***
- Amendments to the Rules of BMSB (R/R 1 of 2006) - Corrigendum to POs' Circular R/R 22 of 2005 – ***January 2006***
- Amendments to the Rules of BMSB (R/R 23 of 2005) - Corrigendum to POs' Circular R/R 22 of 2005 - ***January 2006***
- Amendments to the Rules of BMSB Pertaining to the Provision of Other Types of Financing By POs' (Other Than Margin Financing) - ***23 December 2005***
- Directives Allowing the Provision of Discretionary Financing By POs - ***23 December 2005***
- Amendments to the Rules Consequential to Allowing for the Provision of Discretionary Financing By POs - ***23 December 2005***

SECURITIES COMMISSION (SC)

- SC Guidelines on Performance of Supervision Functions at Group Level for Capital Market Intermediaries - ***Revised 2 March 2006***
- SC Guiding Principles for Outsourcing of Back Office Functions for Capital Market Intermediaries - ***Revised 2 March 2006***
- SC Guidelines on the Registration of Bond Pricing Agencies (BPA Guidelines) – ***25 January 2006***
- SC Practice Note on Recognition of Credit Rating Agencies by the Securities Commission for the Purpose of Rating Bond Issues – ***25 January 2006***
- SC Guidelines on Registration of an Electronic Broking System - ***6 January 2006***
- Practice Note 3 to the SC Guidelines on the Offering of Islamic Securities - Application of the Guidelines on the Offering of Islamic Securities to the Issuance of Islamic Negotiable Instruments with Original Tenures of More than Five Years - ***12 December 2005***
- Guidance Note 9 to the SC Guidelines on Unit Trust Funds - Statistical and Compliance Returns (UTF Returns) - ***9 November 2005***
- Guidance Note 10 to the SC Guidelines on Unit Trust Funds - Investments in Securities Not Traded In or Under the Rules of an Eligible Market - ***16 December 2005***

BRIEF-CASE...

SHIPPING LAW – Meaning of 'transshipment'

APV HILL & MILLS (M) SDN BHD v AQ-PACIFIC WIDE SDN BHD & ANOR 2005, Court of Appeal

FACTS The plaintiff ('the appellant') and the defendant entered into a contract whereby the former had agreed to supply certain equipment C & F from Malaysia (Shah Alam/ Port Klang) to the Benghazi port in Libya with specific condition of no transshipment of the equipment on its way from Malaysia to Libya. A ship called ***Lady Jane*** was to be used to transport the equipment. The ***Lady Jane***, however, would stop only in Singapore. To comply with the condition against transshipment, a feeder vessel, ***Seng Leong***, was used to transport the equipment from Port Klang to Singapore. In Singapore, it was kept in a godown whilst awaiting the takeover by the ***Lady Jane***.

ISSUE The issue for consideration was whether there was transshipment in the shipment of the equipment.

HELD Transshipment means the transporting of cargo by means of a vessel to an export vessel which is to take the goods to its port of destination. Storage on land for a period does not necessarily alter a transshipment journey of goods.

The element of transshipment is involved when the equipment was transported from Port Klang by the ***Seng Leong*** to Singapore to be loaded onto the ***Lady Jane*** for it to be shipped to the Port of Benghazi. By using the feeder vessel therefore, the plaintiff went against the terms of the contract.

COMPANY LAW/ LAND LAW - Whether receivers and managers had power to sell land under debenture and charge

SIMPANG EMPAT PLANTATION SDN BHD v ALI TAN SRI ABDUL KADIR & ORS 2005, Court of Appeal

FACTS The plaintiff obtained a loan from the fourth defendant under a security of a debenture under the Companies Act 1965 and a charge under the National Land Code 1965. The first, second and third defendants were subsequently appointed as receivers and managers of the plaintiff pursuant to the debenture. The receivers and managers then called for tenders to sell the said land. The fifth defendant offered to purchase the land for RM4 million. The land was purchased by the fifth defendant and registered in the name of the sixth defendant.

ISSUE The issue for consideration was whether the title of the sixth defendant was defeasible by virtue of section 340(2)(b) of the National Land Code 1965.

HELD In referring to the 1997 Federal Court case of ***Kimlin Housing Development Sdn Bhd v Bank Bumiputra (M) Bhd & Ors****, the judge ruled that the receivers and managers had no power to deal with the land. The fourth defendant should have resorted to the National Land Code to sell the land off to satisfy the debt owed. Since the receivers and managers had no right to sell the land, no title could pass to the sixth defendant on the basis of ***nemo dat quod non habet.***

It was held in *Kimlin Housing Development Sdn Bhd v Bank Bumiputra (M) Bhd & Ors* that a chargee of land could not by a debenture exclude the operation of sections 254 to 265 of the National Land Code 1965.

MONEYLENDING – Meaning of 'moneylending' and 'moneylender' within the Moneylenders Act 1951

MUHIBBAH TEGUH SDN BHD V YAACOB MAT YIM 2005, High Court

FACTS The borrower (defendant) had received a loan in the sum of RM150,000 from the plaintiff company. It was agreed for the loan to be interest-free but a 10% late payment charge was imposed after a specified date.

ISSUE The issue for consideration was whether the plaintiff, who had lent money (on one or two occasions) to the defendant in consideration of a larger sum, could be presumed to be a moneylender according to section 3 of the Moneylenders Act 1951 and whether such transaction was a moneylending transaction.

HELD It is a question of fact whether a lender is a 'moneylender'. Lending money in one or two transactions does not make the lender a moneylender within the definition in section 2 of the Moneylenders Act 1951. The Act is intended to apply to moneylenders exclusively and not to the moneylending transaction itself.

Furthermore, the plaintiff had not charged interest on the loan – only a 10% per annum interest in respect of default or late payment interest. The charging of only late payment interest on a loan ought not to constitute a moneylending transaction.

Reading sections 2 and 2A of the Moneylenders Act 1951, there must be proof that the transaction by the lender of carrying on the business of moneylending entailed some degree of system and continuity.

REVENUE LAW - Whether a joint-venture agreement created a partnership between the parties for the purpose of Income Tax Act 1967

SUASANA INDAH SDN BHD V KETUA PENGARAH HASIL DALAM NEGERI 2005, Court of Appeal

FACTS Suasana Indah Sdn Bhd (the appellant) and Syarikat Perniagaan Selangor Sdn Bhd (SPSSB) entered into a joint-venture agreement. Owing to disagreements however, the joint-venture agreement was cancelled by SPSSB and the appellant was paid RM6.4 million as compensation. Before the Special Commissioners, the appellants contended that the sum of RM6.4 million was not subject to tax as it was capital withdrawn from the partnership constituted by the joint-venture agreement.

ISSUE The issue for consideration was whether the joint-venture agreement created a partnership between the appellant and SPSSB, taking into account section 2 of the Income Tax Act 1967.

HELD The definition of 'partnership' in section 2 of the Income Tax Act does not apply for the purpose of determining at large whether an arrangement between parties is a partnership. That issue should be determined by the law of partnership. Furthermore, article 11.7 of the joint-venture agreement provided that parties were not a partnership. Article 11.7 therefore must prevail and be given effect to.

"The Taylor's Law School will be hosting its inaugural Taylor's Inter-College Law Debate on July 6 and 7. Co-sponsored by law firm Zul Rafique & Partners, the competition is expected to attract participants from private institutions of higher learning," – The STAR

CONTRACT LAW – Whether respondent was an authorised estate agent within the meaning of the Valuers, Appraisers & Estate Agents Act 1981

TEH ENG PENG & ANOR V TEH SWEE LIAN 2005, Court of Appeal

FACTS The appellants and respondents had entered into an agreement where the former, with the intention of disposing certain lands, gave the respondent authority to find a buyer for the said lands. The respondent, who succeeded in obtaining a purchaser, brought a claim for his commission. The appellants argued that the respondent was not authorised to undertake estate agency practice as he was not a real estate agent.

ISSUE Whether the respondent was entitled to the commission.

HELD The transaction in question was an isolated one. There was no 'estate agency' relationship existing and there was nothing to show that the respondent had even offered any professional advice or other services to the appellant as an estate agent. However the parties had reached an agreement where the respondent would be paid a commission if he succeeded in obtaining a buyer for the property. The respondent was therefore entitled to the commission.

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BRIEF-FLASH...

- **BRANCHING LIBERALISATION** Although most of the major foreign banks are excited about the branching liberalisation move by Bank Negara Malaysia, a further liberalisation exercise would be even more welcome, on the basis that an additional four branches may not be sufficient leeway for the foreign banks to expand and increase market share.
- **GOOD NEWS FOR HOUSEBUYERS** With the Solicitors' Remuneration Order 2006, legal fees for standard sale and purchase agreements have been reduced. The new rates are applicable to those purchasing properties that are regulated under the Housing Development (Control & Licensing) Act 1966. The fees are RM250 for property costing up to RM45,000. For property costing between RM45,000 and RM100,000 a 25% rebate has been introduced; 30% for property priced between RM100,000 and RM500,000, and 35% rebate for units costing more than RM500,000.
- **'AYE' TO BUILD-THEN-SELL BY BAR COUNCIL** The Bar Council at a joint press conference held recently with the Federation of Malaysian Consumer's Associations, the Consumers' Association of Penang and the National Housebuyers Association (HBA) endorsed the 10:90 Build-then-Sell model of housing delivery. The HBA viewed this as a very encouraging step as it would lend tremendous weight to its cause.
- **FAIR TRADE PRACTICES ACT** We are moving closer to a Fair Trade Practices Act. According to reports, the Domestic Trade and Consumer Ministry is working with the Attorney-General's Chambers in drafting the Fair Trade Practices Bill to be tabled in Parliament this year. The proposed Act is aimed at obliterating monopoly in trade, cartel

networks and other negative activities that can worsen inflation and stifle economic growth. The proposed law could also empower the government to take firm action against profiteers.

- **MONEY BACK!** The Consumer Claims Tribunal ordered a company to refund a consumer the payment she had made after she had cancelled her participation in a slimming programme, as she had done so within 24 hours. The consumer, who was pregnant when she had signed up for the programme, cancelled her participation upon being advised by her gynaecologist. The Chairman said that the woman's condition and the fact that she had cancelled within 24 hours were reasonable excuses.

- **NATIONAL LANDSCAPE POLICY** A National Landscape Policy is expected to be implemented this year and will be used as guidelines by local authorities and states in the planning of landscape development.

- **PLAIN ENGLISH PLEASE** As part of its education programme to help consumers understand the benefits of having an insurance policy, Bank Negara Malaysia has asked the Life Insurance Association of Malaysia (LIAM) and General Insurance Association of Malaysia (PIAM) to ensure that insurance policies be drafted in plain and simple language. Although the documents are legal in nature, the aim is to make these contracts consumer-friendly.

Lawyers put things in gobbledygook so it then takes another lawyer to decipher it so you double the employment. – Alex Buzo

- **ACCESS PRICE LIST** An access price list is expected to be announced soon. This is to regulate prices charged by mobile network service providers for use of their services. The policy, which would be applicable to existing mobile network infrastructure owners, would be placed under licensing conditions for the various industry players.

- **SUKUK AL-IJARAH** This was launched by Bank Negara Malaysia, as part of its efforts to bolster the country as a global Islamic financial hub. The inaugural issuance that took place on 16 February 2006 was a size of RM400 million. Bank Negara Malaysia will issue this instrument on a regular basis with subsequent issues ranging from RM100 million to RM200 million. This Islamic monetary instrument, based on the Al-Ijarah or 'sale and lease back' concept, has been approved by the National Syariah Advisory Council. A special purpose vehicle, BNM Sukuk Berhad has been established to issue the Sukuk Ijarah.

- **OPTIC DISC ACT 2000 TO BE AMENDED** Amendments to the Optic Disc Act 2000 have been suggested by the Ministry of Domestic Trade and Consumer Affairs. Such amendments are intended to enable legal action to be taken against buyers and owners of premises involved in selling pirated compact discs, video compact discs and digital video discs.

- **LAWS ON BODY SEARCH** Laws on body search based on the current police rules will soon be enacted. The Criminal Procedure Code is to be amended to include guidelines on body searches by the police. The issue pertaining to body searches gained public attention after the 'nude squat' controversy.

- **IMMUNITY FROM CLAIMS** The Federal Court has ruled that local councils cannot be held liable for losses suffered by anyone should a building collapse. It was held therefore that the Ampang Jaya Municipal Council (MPAJ) was not liable for losses suffered by the residents of the two blocks of the Highland Towers Condominium who had to evacuate after the collapse of Block One on 11 December 1993. The basis of the immunity was held to be section 95(2) of the Street, Drainage & Building Act 1974.

- **REGISTRAR OF SOCIETIES ACT TO BE AMENDED** Upon amendments to the Registrar of Societies Act 1966 taking effect, those holding positions in organisations or societies who are made bankrupt will in future have to alert the Registrar of Societies (ROS) on their changed status. The importance of such a ruling was emphasised because there were numerous individuals who were still holding on to their positions despite being bankrupts and misleading those who have dealings with them.

- **MARITIME ARBITRATION SYSTEM BY SEPTEMBER** Despite the signing of an agreement between the Kuala Lumpur Regional Centre for Arbitration (KLRCA) and the Malaysia Maritime Institute (IKMAL), Malaysia's maritime arbitration system has yet to fully develop. Changes are expected this year as it was reported that the KLRCA is seeking the support of the maritime industry and the Government to put in place an effective system.

- **AMENDMENTS TO THE LOCAL GOVERNMENT ACT 1976?** Amendments to the Local Government Act 1976 have been suggested to allow the state to transfer a department director from one council to another within the state. The current rules were silent on the matter of transfer causing the "hands of the state to be tied". It has been reported that the amendments were part of a bigger picture to improve services to the people.

- **NEW RULES FOR SAFETY AND HEALTH AT WORKSITES** It has been reported that the Human Resources Ministry's Department of Occupational Safety and Health (DOSH) will soon be introducing regulations that would require employers to manage safety and health at worksites. These regulations would require employers to conduct hazards identification, risk assessment and risk control at the construction sites.

- **RETIREMENT AGE RAISED TO 58** A study conducted by the Public Service Department indicates that the retirement age for civil servants should be extended to 58. Although no immediate plans have been announced, the Government has been urged to take this into consideration, bearing in mind the critical sectors which provide services that are badly required by the public.

- **INITIATIVES TO COMPLEMENT CAPITAL MARKET** Initiatives by the Securities Commission to complement the market and regulate infrastructure will continue. According to SC Chairman, Tan Sri Mohd Nor Md Yusof, the development initiatives in 2006 would be aligned with the plans of Phase 3 of the Capital Market Master Plan (CMP 2006-2010).

- **SINGAPORE TRADEMARK LAWS AMENDED** The Trademark Act and Rules of Singapore have been recently amended and have come into force on 1 January 2006. The rules affected are Rules 21, 23, 33, 34, 65, 65A and 77B, which relate, among other things, to deficiencies in application, failure to respond to the Registrar's queries and late renewal of registrations.

ZRp IN-BRIEF...

The ZRp Brief is published for the purposes of updating its readers on the latest development in case law as well as legislation. We welcome feedback and comments and should you require further information, please contact the Editors at:

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