

the ZRP brief

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A BRIEF NOTE...

by Dato Zulkify Rafique

The year that was...

What a year it has been... and we are now seven years old! Although I can't believe that 2006 is over, I look forward to 2007 with all the zest and zing that I can muster.

The last quarter of the year has been interesting for Malaysians, especially for those in the legal and business industries. The landscape has been abuzz with the number of transactions relating to mergers and acquisitions including the easing of bank rules on the same.

It has also been a busy time for Parliament. The enforcement of the Electronic Commerce Act 2006 has provided a boost to cyber-shopping. We have also witnessed some very interesting developments in the securities and banking industries with several changes made by the Securities Commission and Bank Negara Malaysia.

While you digest each and every bit of our last issue of the year 2006, we at Zul Rafique & partners would like to take this opportunity to wish you a safe year-end and a happy and prosperous new year.

Let us take a moment to reflect, count our blessings and be thankful as I end my message on some food for thought.

Be at war with your vices, at peace with your neighbours, and let every New Year find you a better person.
– Benjamin Franklin

in this issue...



BRIEF-FLASH

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The highlights of our last quarter include:

- Bank M & A Rules eased
- New Rules on Bond Trustees
- Plantations Merger
- World's First Syariah-Compliant Exchangeable Sukuk
- UK REITs in 2007



BRIEFING...

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Our features for this Brief include:

- *Short Selling... Cutting a Long Story Short*
- *The Three Towers... A Tragedy of our Time*
- *The Coming of Age... Implications of the Electronic Commerce Act*



BRIEF-CASE...

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Our Brief-Case is packed with the following:

- *Standard Chartered Bank v KTS Sdn Bhd* [2006] 4 CLJ 79, Federal Court
- *Bank Industri & Teknologi Malaysia Bhd v Wilmont Sdn Bhd & Ors* [2006] 4 CLJ 67, High Court
- *Cherie Booth QC v AG, Malaysia* [2006] 4 CLJ 224, Federal Court
- *All Malayan Estates Staff Union v Rajasegaran & Ors* [2006] 4 CLJ 195, Federal Court



BRIEF-UP...

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Statutes that have been either introduced or amended:

- Electronic Commerce Act 2006
- Central Bank of Malaysia (Amendment) Act 2006
- Guidelines/ Rules/ Practice Notes issued by Bank Negara Malaysia, Securities Commission, Bursa Malaysia Securities Bhd and Foreign Investment Committee between October and December 2006.

BRIEF-FLASH...

- **AMENDMENTS TO THE HOUSING DEVELOPMENT ACT** There is a proposal to amend the Housing Development Act to enable the Tribunal for Homebuyer Claims to hear claims involving up to RM50,000. The current limit is RM25,000. This was indicated by the Housing and Local Government Minister, Datuk Seri Ong Ka Ting in his keynote address at the National Property and Housing Summit 2006 on 12 September 2006. ☞
- **AMENDMENTS TO THE PROMOTION OF INVESTMENTS ACT** Amendments to the Promotion of Investments Act 1986 are expected to be tabled in Parliament next year. The main aim of these amendments is to attract foreign investors by providing for business-friendly measures to meet current and future needs of industrial development. ☞
- **BOOST FOR FOREIGNERS** With effect from 1 November 2006, foreigners will be allowed to purchase property costing RM250,000 and above, without the approval of the Foreign Investment Committee (FIC) on condition that such property is not rented out, leased or purchased for investment purposes. ☞
- **BANK M & A RULES EASED** According to Bank Negara Malaysia (BNM), banks are now allowed to have talks on mergers and acquisitions simultaneously with more than one suitor. The move is said to be a reflection of the transition of the financial system to a more deregulated environment. Such move has been lauded by several quarters, including the Minority Shareholders Watchdog Group (MSWG). ☞
- **DISCUSSIONS ON 10:90 BTS SYSTEM** To enable the implementation of the proposed 10:90 Build-Then-Sell (BTS) mode of housing delivery, the government has commenced discussions with BNM and the bankers' association representatives. The BTS system is based on the Australian conveyancing system where the purchaser pays only 10% after signing the Sale and Purchase agreement. The developer will have to then complete construction of the house before the purchaser makes the balance payment. ☞
- **ISLAMIC OIL-PALM PLANTATIONS REIT** The Securities Commission (SC) has given approval for the setting up of the *Al-Hadharah* Boustead REIT. The REIT, which is to be managed by Boustead REIT Managers Sdn Bhd, is expected to be listed by January 2007. ☞
- **LAW TO CONTROL HIGHLAND DEVELOPMENT** A new law to control the development of hilly areas has been proposed and is expected to be tabled in Parliament early next year. With the enforcement of the law, every development project will be required to undergo the Environment Impact Assessment and geo-technic studies to determine if the proposed site is suitable for development. ☞
- **NEW RULES ON BOND TRUSTEES** With effect from 2 January 2007, only trust companies registered with the SC are eligible to be appointed as bond trustees. This was announced by the SC on 12 October 2006 when it released the *Practice Note on Registration by the Commission for the Purpose of Acting as a Bond Trustee*. ☞
- **NO MORE 'MC' IN YOUR CURRY** The prefix 'Mc' is the exclusive right and trademark of McDonald's Corporation. The McCurry Restaurant located at Jalan Ipoh will therefore not be allowed to use the prefix in their signage and company. This was the ruling handed down by the High Court after a five-year legal

tussle between the fast food giant and McCurry Restaurant (KL) Sdn Bhd. ☞

- **OPR REMAINS AT 3.5%** BNM's Monetary Policy Committee has decided to leave the Overnight Policy Rate unchanged at 3.5%. This is based on the steady growth of the Malaysian economy, expected to be sustained into the fourth quarter of the year. ☞
- **PAROLE BILL** Legislation on a structured parole system is expected to be tabled in Parliament next year. The main aim of the parole legislation is to address the issue of overcrowding in prisons. ☞
- **PLANTATIONS MERGER** Nine companies including Sime Darby Bhd, Golden Hope Plantations Bhd and Kumpulan Guthrie Bhd are to merge, resulting in the formation of the world's largest plantation company. ☞
- **RETIREMENT FUND BILL** The Retirement Fund Bill has been tabled in Parliament and is aimed at replacing the Pensions Trust Fund Act 1991. The provisions of the Bill will facilitate the setting up of a new pension fund to administer and manage the retirement monies of government employees. ☞
- **SPAN READY IN JANUARY 2007** The National Water Services Commission or Suruhanjaya Perkhidmatan Air Nasional (SPAN) is expected to be established in January 2007. A watchdog for the country's water-related industry, the Commission is slated to address various problems faced by the water industry. On a related note, the Dewan Rakyat was told that the government may merge the water and sewerage services when both the water-related Acts are fully implemented. ☞
- **STRATA TITLE ACT TO BE AMENDED** With the numerous problems surrounding

gated community projects, several quarters will heave a sigh of relief when the amendments to the Strata Title Act are read in Parliament. The amendments are expected to be passed next year. ☞

- **UNKIND CUT?** Based on s 38(1) of the Electricity Supply Act 1990, the Court of Appeal decided that Tenaga Nasional Bhd (TNB) is entitled to cut the power supply of a property without a court order if it was aware that the electricity meter had been tampered with. ☞
- **WITNESS PROTECTION BILL SOON?** It is reported that the drafting of the Witness Protection Bill is in the final stages. The Bill is aimed at providing adequate protection to witnesses subpoenaed to give evidence in a criminal trial. ☞
- **WORLD'S FIRST SYARIAH-COMPLIANT EXCHANGEABLE SUKUK** In October 2006, the Labuan International Financial Exchange (LFX) debuted the primary listing of the world's first Syariah-compliant Exchangeable Trust Certificates (Sukuk) issued by Khazanah Nasional Bhd (Khazanah). Khazanah, via a special purpose vehicle, Rafflesia Capital Ltd, successfully concluded the landmark issuance of its US\$750 million trust certificates. ☞

FOREIGN FLASH

- **24-YEAR SENTENCE FOR ENRON BOSS** Former Enron boss, Jeffrey Skilling has been sentenced to a 24-year imprisonment term on his conviction for fraud, conspiracy and insider trading involving Enron, a one-time energy giant. ☞
- **AGEISM LAW IN UK** Described as the 'biggest single change to employment

practices in 30 years', the United Kingdom embraced the Employment Equality (Age) Regulations 2006. The regulations, which took effect on 1 October 2006, make it unlawful to discriminate against workers under the age of 65 on the grounds of age. Several aspects of employment will be affected and these include recruitment, training, promotion, redundancy, retirement, salary and pension. ❧

- **BOOST FOR FREE SPEECH IN UK** The House of Lords, in October 2006, ruled in favour of the Wall Street Journal Europe in a claim for libel by Saudi billionaire, Mohammad Jameel. The paper had published an article insinuating that Mohammad Jameel was linked to terrorists. The House of Lords decided that the story was in the interest of the public. ❧
- **DEFAMATION ON THE NET** The California Supreme Court ruled that internet providers and bloggers are not liable for defamatory comments written by third parties. The ruling was based on the freedom of expression. ❧
- **ONLINE GAMBLING LAW** On 13 October 2006, US President George W Bush signed the Unlawful Internet Gambling Enforcement Act rendering online gambling unlawful in the US. The legislation has been met with both criticism and support. ❧
- **REITS BILL APPROVED BY GERMAN CABINET** The German Cabinet has approved a draft bill to introduce REITs, which is to be implemented in 2007. Although generally a welcoming measure, there are some concerns about the effect of such bill on householders. ❧
- **'STARBUCKLED' IN TRADEMARK DISPUTE** Starbucks Corp lost a trademark dispute in the Patent Court of Korea against a South Korean Company that sells coffee using the brand name 'Starpreya'. Although the logos of both companies are

based on the face of a woman within a circle, it was held by the court that there was no confusion caused amongst customers. ❧

- **UK REITS IN 2007** REITs will be introduced in the UK in January 2007. It is claimed that the introduction of REITs would 'invigorate' the UK's property market. ❧

BRIEFING...

CORPORATE

SHORT SELLING... CUTTING A LONG STORY SHORT

After an absence of nearly nine years, short selling and stock borrowing and lending will be making a comeback on Bursa Malaysia (Bursa), on condition that they are regulated by Bursa. Both services were banned in late 1997 after being blamed for causing the economic downturn in that year. The regulated short selling (RSS) and stock borrowing and lending (SBL) were expected to be launched on 29 September 2006, but had been postponed to 16 October 2006 due to operational issues.

In this article we examine the features of short selling as well as its implications.

DEFINITION Short selling or 'shorting' is a speculative strategy to profit from the decline in the prices of securities. Investors normally make profits from the increase in the price of securities. A short seller, however, would capitalise from the decline in the prices.

In anticipation of a fall in price, the short seller would start off by borrowing shares from shareholders who do not intend to actively trade on the market. With the

borrowed shares, the short seller would then sell them off on the market. In order to 'close' or 'cover' their positions so as to return the borrowed shares to the rightful shareholders, the short seller will then buy back the shares, but this time when the prices have fallen. This way, he will make a profit by selling the shares high, but on a low buy back to return to the shareholders. By doing this, the short seller is said to be 'covering the short'.

RISKY BUSINESS? Short selling is potentially risky as this type of investment may attract unlimited losses. In comparison to the usual form of dealing with shares, which is the buying and selling of shares by trading them on the open market, short selling only allows for limited gains as there will only be profits when the prices of the shares decline. As the prices can only drop to zero, the profits are limited. Conversely, a short seller will suffer loss when the prices rise, and there is no limit to the price-increase. If the short seller is forced to buy back the shares he sold at a much higher price than when he bought it initially, he will definitely make a loss.

Besides that, short sellers must be aware of the potential happening of a 'short squeeze'. This happens when a large number of short sellers buy back shares in order to cover their positions, thereby inadvertently causing an increase in the prices of shares. Those short sellers who are slower in covering their positions will be suffering from this short squeeze through additional covering. There is also the issue of interest and cost payable to the lender as consideration for the lender lending the short seller his shares. The requirement of precise timing and the fact that this practice is contrary to the overall direction of the market, coupled with the need for a good speculative mind to make a profit, make short selling a risky business.

ADVANTAGES Short selling, however, has its advantages. It is useful in moving the market, where shares that shareholders hold for long-term investment can be actively traded again in the market. It was also said that since short selling requires close scrutiny of companies'

finances over a period of time to gauge the future movement of the shares, there have been instances where this practice had led to the discovery of fraudulent activities. On a personal scale, shareholders can also earn lending-fees for shares that would otherwise be sitting idle in their accounts.

With these advantages, Malaysia is keen on relaunching RSS and SBL, mainly as an effort to boost liquidity and attract more foreign investors.

MALAYSIAN MARKET REACTION The RSS and SBL have not been received with open arms by a majority of local investors and stockbrokers alike. This has all to do with the condition imposed by Bursa in reintroducing these facilities - that the services have to be regulated by Bursa for fear of a repeat of the 1997 crisis where market manipulation/speculation brought the Asian market to a crash. Regulatory control is exercised through the use of the central lending agency (CLA) model, instead of the usual over-the-counter (OTC) model that is popular in the United States, Singapore and Hong Kong.

The OTC model allows investors to lend and borrow stocks through banks or brokers at freely negotiable rates. The CLA model, on the other hand, requires all such transactions in Malaysia to go through the stock exchange. Thus, Bursa will be acting as the middleman to match lending interest against borrowing interest. As there is no such thing as a free lunch, Bursa will be charging a fee, initially proposed to be amounting to 1% per annum of the value of the shares transacted.

However, the displeasure of investors and stockbrokers at the amount charged saw Bursa revising the fee to 0.2%. Even with the reduction, it was calculated that as end-users of the facility, the short seller would be paying between 4% and 4.5% per annum just to borrow the shares. This is one of the reasons why many prefer the more efficient, lower-cost OTC model, where no middleman is required. The controls that Bursa has in place also make it more tedious for short selling.

The Chief Operating Officer of Bursa, however, says that these controls would be relaxed once short selling takes off smoothly. It has been reported that there are plans to persuade the government to allow for the OTC model to operate parallel with the CLA model, as was achieved successfully in Korea.

Furthermore, short sellers need to go through the cumbersome process of obtaining shares. A short seller will have to put in a borrowing request through to Bursa and then wait for 15 minutes for the system to run a poll and find a match to his request. Only if there are available shares to borrow will the agreement be concluded. The non-refundable policy kicks in here, as once the available shares are found, there is no chance for the short seller/borrower to return the shares, whether or not he agrees to borrowing those particular shares. He can only do so the next day, and that will cost him a day's fees.

Most stockbrokers are very much convinced that the RSS and SBL will not take off as planned, due to the various issues that still need to be addressed, for example the issue of the fee structure and the cumbersome process that one has to encounter just to find a lender and obtain some shares. Notwithstanding these challenges, Bursa had intended to proceed with the launch as it was 'operationally ready to launch on 16 Oct 2006, whether the brokers are ready or not'.

There is, however, a post-script: Bursa had, on 13 October 2006, confirmed that the relaunching would once again be deferred, this time to January 2007.

How well it is received, only time will tell. ☞

TORT - NEGLIGENCE

THE THREE TOWERS... A TRAGEDY OF OUR TIME

11 December 1993 is a day that forms part of Malaysian history - one that turned into shock, sorrow and subsequently despair.

We examine the factual scenario of the tragedy that protracted into one of the lengthiest and most complicated litigation matters, ending with the recent decision of the Federal Court that left many harbouring questions about the liability and the extent of the immunity of the powers that be.

FACTS On 11 December 1993 at about 1.30 pm, a tragedy struck which shocked the nation. A landslide following 10 days of heavy rain in the Ulu Klang area had caused the 12-storey Block One of the Highland Towers condominium to collapse, killing a total of 48 people. Although Blocks Two and Three of the condominium remained, the local authority ordered the occupants to vacate their units immediately as they were deemed to be unsafe for human inhabitants, causing 1,000 residents to be homeless. The two blocks have since been abandoned, vandalised and have regressed into a state of dilapidation.

About three years later, a total of 73 residents from Blocks Two and Three filed a suit against 10 defendants, which included the local council, Majlis Perbandaran Ampang Jaya (MPAJ), for causing or contributing to the collapse of Block One and the subsequent abandonment of the other two blocks. Another case was filed by the families of those killed in Block One, but to date the case has not even reached the trial stage.

HIGH COURT The suit against the 10 defendants was based on liability, negligence and nuisance. On 11 August 2000, James Foong J delivered judgment of the High Court in *Steven Phoa Cheng Loon & Ors v*

Highland Properties Sdn Bhd & Ors. His judgment was based on the following findings of facts, namely that MPAJ had required a proper drainage system to be implemented on the hillslope before and during the construction of the Highland Towers condominium blocks and that to resolve the drainage problems, MPAJ had diverted the East stream (a stream on the hillslope).

The judge found that having required the diversion of the East stream, MPAJ was expected to ensure its proper maintenance, entailing a duty on its part to conduct regular inspection so as to ensure its proper implementation. His Lordship however found this to be wanting. The judge relied on ss 53 and 54 of the Street, Drainage & Building Act 1974 (SDBA) to impose a duty on MPAJ as the local authority, to maintain 'watercourses' within its jurisdiction. Breach of the duty to maintain the East stream 'was a major factor that caused the collapse of Block One and an important element in ensuring the instability of the slope behind Blocks Two and Three.'

The judge, however, found recourse in s 95(2) of the SDBA and opined that the immunity provided under the said section was wide enough to cover the alleged danger created by MPAJ, hence MPAJ was immune from liability for the pre-collapse period. The relevant part of s 95(2) reads:

...local authority shall not be subject to any action, claim, liability or demand whatsoever arising out of any building or other works carried out in accordance with the provisions of this Act...or by reason of the fact that such building works or plans thereof are subject to inspection and approval by... the local authority, and nothing in this Act... shall make it obligatory for... the local authority to inspect any building... to ascertain that the provisions of this Act... are complied with or that plans, certificates and notices submitted to him are accurate.

The judge, however, found MPAJ to be liable in negligence for the post-collapse period, resulting in Blocks Two and Three being rendered unsafe, hence 15% liability was apportioned to MPAJ. MPAJ appealed.

COURT OF APPEAL Gopal Sri Ram JCA in the Court of Appeal in *Arab-Malaysian Finance Bhd v Steven Phoa Cheng Loon & Ors* (2003) found that 'this is not merely a case of, to borrow the language of the section, inspection or approval of building or other works or the plans thereof. This is a case where a danger was expressly created at the instance of [MPAJ].' The Court of Appeal set aside the indemnity granted by the High Court to MPAJ under s 95(2) of the SDBA. As a consequence, MPAJ was held to be liable to the plaintiffs in the tort of negligence, hence 15% responsible for the pre-collapse period. The Court however ruled that MPAJ was not liable for losses suffered during the post-collapse period. MPAJ appealed against the pre-collapse liability and the plaintiffs cross-appealed against the post collapse liability.

FEDERAL COURT On 17 February 2006, our apex court, the Federal Court in *Majlis Perbandaran Ampang Jaya v Steven Phoa Cheng Loon & Ors*, delivered its long-awaited decision. All three judges, Steve Shim CJ (Sabah & Sarawak) and Federal Court judges, Abdul Hamid Mohamed FCJ and Arifin Zakaria FCJ unanimously held that with regard to the pre-collapse liability, MPAJ is clothed with legal immunity and is fully protected from liability under s 95(2) of the SDBA, as in effect the creation of the danger in the diversion of the East stream relates essentially to approval and inspection by MPAJ and thus fell squarely within the ambit of the second and third limbs of the section. Steve Shim CJ opined that a statutory body (MPAJ) can be granted immunity from liability if the words granting such immunity are clear and explicit.

As for the post-collapse liability, the Federal Court dismissed with a 2-1 majority the cross-appeal by the plaintiffs (respondents). Abdul Hamid Mohamad FCJ said that if the local councils were made liable, it would open the floodgates to further claims for economic loss, and this would deplete the council's resources meant for the provision of basic services and infrastructure. Further, it was not

fair, just or reasonable that taxpayers' money be utilised to pay the 'debts' of such people. He was of the view that 'the provision of basic necessities for the general public has priority over compensation for pure economic loss of some individuals, who are clearly better off than the majority of the residents in the local council area'. He also said a local council has an endless list of duties to perform for its residents and relied mainly on assessment rates and fees for licenses. Arifin Zakaria FCJ concurred with his findings.

Steve Shim CJ dissented on this point and said that MPAJ should not be allowed to seek protection under the law because it was negligent in taking appropriate measures to ensure the stability and safety of Blocks Two and Three. His dissenting judgment, however, had to give way to the majority decision. Hence, the plaintiffs made an application to the Federal Court to review its decision, on the ground that the said decision created a dangerous precedent enabling local authority to do as they wished. Alauddin Mohd Sheriff FCJ, Nik Hashim Nik Abdul Rahman FCJ and Augustine Paul FCJ unanimously dismissed the application for leave to review the decision, stating that it involves a question of a finding of fact, which is not open for review.

Ensuing from the decision of the Federal Court, it is questionable whether it is in consonant with public interest if the local authority is provided with total immunity from blame; and whether making the local authority liable in such instances would really open the floodgates in litigation. Nevertheless, the perception that local authorities are immune to prosecution due to the Federal Court judgment on the Highland Towers case may be incorrect, as the judgment should be taken to apply only to decisions made under the SDBA. ☞

INFORMATION TECHNOLOGY/ CONTRACT

THE COMING OF AGE... IMPLICATIONS OF THE ELECTRONIC COMMERCE ACT

The Electronic Commerce Act 2006 (ECA) came into effect on 19 October 2006. It seeks to reaffirm the validity and legal effect of transactions by electronic means, to remove legal obstacles to electronic commerce ('e-commerce'), and to provide certainty in electronic communications.

We examine the implications of the unprecedented provisions of the ECA.

INTRODUCTION The ECA applies only to commercial activities. It does not apply to regulatory activities between the public and government, and it is also inapplicable to wills, creation of trusts, power of attorney and negotiable instruments.

Prior to the ECA, there were no laws governing internet transactions and the public was unable to bring their cases to the tribunal in the event of fraud. An amendment to the Consumer Protection Act 1999 ('CPA') some time in December or by early next year will enable consumer cases to be heard under the ECA.

GENERAL PROVISIONS Sections 6 and 7 of the ECA provide that the affirmation of the legal effect, validity or enforceability of an electronic message, proposal or revocation of a proposal and acceptance of any related communication may be expressed by electronic messages; and for the affirmation of the legal effect, validity or enforceability of contracts formed by the use of an electronic message.

The ECA further provides in s 8 that if the legal requirement for information is to be in writing, such requirement may be fulfilled by

an electronic message that is accessible and intelligible for subsequent reference. Section 9, on the other hand, states that an electronic signature fulfils any legal requirement for signature, provided the criteria are met.

According to s 10, a digital signature fulfils the legal requirement for a seal to be affixed to a document, and the Minister of Domestic Trade and Consumer Affairs is empowered to prescribe any other type of electronic signature, which may be available in the future, that fulfils any legal requirement for a seal to be affixed to a document.

In situations where there is a legal requirement for any document to be in its original form, the ECA provides that an electronic message is regarded as an original document if it fulfils the listed criteria. The criteria for assessing the integrity of information and the standard of reliability of information required for the electronic message to be regarded as an original are also set out in s 12.

In relation to the retention of a document in the form of an electronic message, the requirements are fulfilled if the electronic message satisfies the criteria set out in s 13 of the ECA.

Section 14 dictates that the retention, service, sending or delivery of a document in the form of an electronic message in one copy fulfils any legal requirement for the retention, service, sending or delivery of the document in more than one copy.

Section 17 deals with the situation where there is a question as to whether a data message was in actual fact sent by the person indicated as being the originator; whereas s 20 seeks to provide for the point in time when an electronic message is deemed to be sent.

Sections 21, 22 and 23, on the other hand, provide for the time and place an electronic message is deemed to have been received.

ELECTRONIC TRANSACTION V COMMERCIAL TRANSACTION...

According to s 2(1) of the ECA, the Act applies only to commercial transactions.

'Commercial Transaction' is defined in s 5 and reads as follows:

A single communication or multiple communications of a commercial nature, whether contractual or not, which includes any matters relating to the supply or exchange of goods or services, agency, investments, financing, banking and insurance.

The obvious drawback to the ECA is seen from this point, ie the Act is not wide enough to cover any other communications which are not commercial in nature. Perhaps the ECA should have been drafted to apply to 'electronic transactions', instead of the limited 'electronic commercial transactions', so that any statement, declaration and notice would also be covered under the ECA.

USE NOT MANDATORY/ EXPRESS CONSENT NOT REQUIRED?

Pursuant to s 3(1) of the ECA, 'nothing in the Act shall make it mandatory for a person to use, provide or accept any electronic message in any commercial transaction unless the person consents to the using, providing or accepting of the electronic message'. It is further stated in s 3(2) that 'a person's consent to use, provide or accept any electronic message in any commercial transaction may be inferred from the person's conduct.'

These provisions, therefore, allow for consent to be expressed or implied. It must be noted that this affects the core objective of the ECA. The ECA was enacted for the basic purpose of creating certainty in the e-world, and thus, allowing for inference of consent to be made from a person's conduct may not exactly achieve the objective of the Act. Furthermore, it is a general perception that there are several consumers who may not be ready to shift to transacting in the borderless world for reasons relating to lack of confidence in such transactions or for fear of being cheated.

In allowing for the concept of implied consent, this would increase the lack of confidence, due to uncertainty on the exact time when consent, if at all, was given.

CROSS-BORDER TRANSACTIONS The Internet is a giant network. Websites on the World Wide Web are like store fronts with exposures that are worldwide in scope and inherently accessible. Anyone with access to the Internet anywhere in the world can easily access and interact with the World Wide Web. Because the Internet transcends geographic borders, commercial use of Internet-based activities may be sufficient to confer nationwide and even international jurisdiction. However, there appears to be no specific provision under the ECA in relation to cross-border transactions.

RECOURSE TO DISPUTE IN THE BORDERLESS WORLD Pursuant to the ECA, the mechanisms available as recourse to an e-commerce dispute would be by way of civil action or a claim in the Tribunal for Consumer Claims, established under the Consumer Protection Act.

A civil action may be initiated by the aggrieved party as in the case of a conventional trade; and the ECA will be read together with other existing laws that govern commercial activities. Alternatively, the aggrieved party may lodge a claim in the Tribunal for Consumer Claims, for any loss suffered on any matter concerning his/her interest as a consumer under the CPA. It must be noted, however, that a claim lodged in the Tribunal for Consumer Claims is limited to RM25,000.

GOOD ENOUGH? Enacting the ECA may have been a step forward to addressing the legislation governing the e-commerce world. However, there are many improvements that need to be made in the light of the existing loopholes, before the Act may be considered perfect.

BRIEF-CASE...

INSURANCE - Whether respondent was entitled to insurance money

STANDARD CHARTERED BANK V KTS SDN BHD [2006] 4 CLJ 79, Federal Court

FACTS By virtue of a joint fire insurance policy executed by the borrower (a company known as Lampak) and the appellant bank, all materials, stock-in-trade, other properties and assets, covered by the debenture were insured against loss or damage by fire.

The respondent entered into a contract with Lampak to purchase sawn timber for which the respondent made payment. However, before delivery, a fire broke out and destroyed the sawn timber.

ISSUE The issue for consideration revolved around the party who was entitled to the insurance money.

HELD The Federal Court reiterated a very basic rule applicable to the law of insurance, that is 'the contract of insurance contained in a marine or fire policy is a contract of indemnity, and of indemnity only, and that this contract means that the assured, in a case of a loss against which the policy has been made, shall be fully indemnified, but shall never be more than fully indemnified.'

The policy in this case was meant to compensate the owner whose goods were destroyed by the fire. The insurance money therefore, which represents the goods destroyed by the fire, belongs to the owner of the goods, that is the respondent, and not the appellant bank. 

BANKING LAW - Whether the banker/lender had the duty to inquire into whether the facility granted had complied with M & A of the borrower

BANK INDUSTRI & TEKNOLOGI MALAYSIA BHD V WILMONT SDN BHD & ORS [2006] 4 CLJ 67, High Court

FACTS Pursuant to a letter of offer and a facility agreement, the plaintiff had granted the first defendant a term loan facility of RM730,000 - with the second, third and fourth defendants as guarantors.

ISSUE The issue for consideration was whether the plaintiff bank, in providing a facility to the borrower, had a duty to inquire if the borrower had complied with the provisions of the defendant's memorandum and articles of association (M & A).

HELD The plaintiff bank, as an outsider, could not be held accountable for the borrower's internal affairs. As long as the plaintiff had entered into the facility agreement with the first defendant in good faith, there was no obligation whatsoever imposed on the plaintiff in law to enquire if the provisions of the first defendant's M & A had been complied with.

...we would interpolate to observe that the effect of the Rule in Turquand's case is that it reduces the enquiries which outsiders having dealings with a company must make, which of course promotes business convenience. – per Edgar Joseph Jr FCJ in Pekan Nenas Industries Sdn Bhd v Chang Ching Chuen [1998] 1 CLJ 793

The defendant borrower was estopped from asserting that the provisions of the M & A had not been complied with. 

COMPANY LAW - Breach of fiduciary duty on part of directors - Whether directors had to account for profits only or gross income earned

MOHD ZAIN YUSOFF & ORS V AVEL CONSULTANTS SDN BHD & ANOR [2006] 4 CLJ 31, Court of Appeal

FACTS The first respondent was appointed by System Television Malaysia Bhd (STMB) as its project manager to establish and run its TV channel. The first and second appellants were the directors of the first respondent but had subsequently resigned and set up another company, Perunding AJZ. The services of the first respondent were subsequently terminated by STMB and Perunding AJZ was appointed as consultants for the TV3 project in place of the first respondent.

ISSUE In an action by the respondent for breach of fiduciary duty, the issue that arose was whether the respondents were entitled to the profits only or to the total gross income derived by the appellants.

...in ascertaining the damages the former employer would be entitled to, the appropriate order is for an account of profits of the business of the new companies before tax less an appropriate allowance for expenses, skill, expertise, effort and resources contributed by them. – Warman International Limited & Anor v Brian Dwyer & 2 Ors [1995] 2 CLJ 326

HELD The respondents were entitled to the profits only. The appellants were allowed to make deductions for the expenditure incurred by them to earn the income. 

LEGAL PROFESSION - Whether a QC could be admitted under the Legal Profession Act to appear in the Federal Court

CHERIE BOOTH QC V AG, MALAYSIA [2006] 4 CLJ 224, Federal Court

ISSUE The issue for consideration in this case was whether the appellant had special qualification or experience of a nature not available amongst advocates and solicitors in Malaysia, as required by s 18 (1) of the Legal Profession Act 1976 (LPA), for the purpose of appearing in two Federal Court appeals.

The appellant was described as 'an outstanding Queen's Counsel specialising in public law' and 'a leader in administrative and public law'. The issue, however, was whether these qualities were 'of a high degree and type which could not be found in local lawyers' as provided for in s 18 of the LPA.

HELD In dismissing the appeal, it was held that the appellant did not possess any special qualifications or experience that was NOT available amongst advocates and solicitors in Malaysia.

The applicant may have special qualifications or experience but that alone does not seem to be sufficient under the statute. He has to go further and satisfy the court that the special qualifications he possesses are comparatively of such type and character that no advocate and solicitor practising in Malaysia can be said to possess or equal that high degree of accomplishment which has been acquired or exhibited by the applicant. – per Sharma J in Re SK Lee [1971] 2 MLJ 40

Furthermore, it was held that the appellant's absence in court during the trial in the High Court and Court of Appeal would affect her ability to effectively assist the Federal Court.✂

LABOUR LAW/ LEGAL PROFESSION/ CONSTITUTIONAL LAW - Whether the seven-year period stipulated in s 23A(1) of the Industrial Relations Act 1967 refers to the period of being in practice or being admitted and enrolled as an advocate and solicitor

ALL MALAYAN ESTATES STAFF UNION V RAJASEGARAN & ORS [2006] 4 CLJ 195, Federal Court

ISSUE The issue in this case revolved around the appointment of the respondent as Industrial Court Chairman, in particular whether an advocate and solicitor who has not been practising for seven years preceding his appointment, is qualified to be appointed as a Chairman of the Industrial Court under s 23A(1) of the Industrial Relations Act 1967; and if not qualified, whether awards handed down by him in that capacity are a nullity.

This rule of public policy is encapsulated in section 41(a) of the Interpretation Acts 1948 and 1967 which provides that the proceedings of a board, commission, committee or similar body established by law shall not be invalidated by any defect afterwards discovered in the appointment or qualification of a person purporting to be a member. – per Augustine Paul FCJ in All Malayan Estates Staff Union v Rajasegaran & Ors [2006] 4 CLJ 195

HELD The appointment of the respondent is invalid as he was not in practice with a valid practising certificate for the required seven-year period, but the awards handed down by him were done in his capacity as a Chairman of the Industrial Court and are not a nullity on grounds of public policy.✂

TORT - Whether duty of care is owed in cases of negligent misstatement (by act or omission) leading to pure financial loss

KGV & ASSOCIATES SDN BHD V THE CO-OPERATIVE CENTRAL BANK LTD
[2006] 4 CLJ 241, Court of Appeal

FACTS The defendant, who was a valuer, had prepared and addressed a valuation report setting out the estimated value of a piece of property to one Tan when in actual fact, the report was needed for a friend of Tan, one Kong, who had obtained a loan from the plaintiff (lender) based on the valuation report.

Upon default by Kong, the plaintiff discovered that the valuation report was flawed and subsequently claimed against the defendant for pure financial loss.

ISSUE Whether the defendant was liable for negligent misstatement, when the erroneous valuation report was commissioned by a third party (Tan) and not the real borrower (Kong), to whom the plaintiff granted two loans based on the valuation report.

In my view...on the subject of a negligent misstatement (by act or omission) leading to pure financial loss is this. Whilst there are several useful tests, indicia or guidelines to ascertain whether a duty of care exists in given circumstances, the ultimate question whether a duty of care should be in a particular case is essentially fact sensitive. – per Gopal Sri Ram JCA in KGV & Associates Sdn Bhd v The Co-operative Central Bank Ltd [2006] 4 CLJ 241

HELD There could be no assumption of responsibility by the defendant, who made the report for the third party (Tan), not knowing that the report was to be used by the true borrower (Kong) of the plaintiff's loans. ❄️

LABOUR LAW - Whether the views of the panel of a Domestic Inquiry are binding on the management of the employer

JANKINS A/L SELINA LAZER PEREIRA V RHB BANK BERHAD Industrial Court
Award No 1504 of 2006

Are the views of the panel of a Domestic Inquiry binding on the management of the employer?

We examine this issue in this commentary with reference to a recent Award of the Industrial Court.

FACTS The claimant, an Assistant Branch Manager at a branch of the respondent (the 'Bank') was required to attend a Domestic Inquiry ('DI') to answer to allegations of him being involved in the fraudulent withdrawal of RM74,750 from an inactive account belonging to a customer of the Bank.

The majority view of the panel of DI was that the claimant was not guilty.

In spite of the view of the DI, the Disciplinary Committee of the Bank decided to dismiss the claimant on the basis that the integrity of the claimant was suspect.

ISSUE One of the issues that arose was whether the Disciplinary Committee of the Bank was bound by the views of the DI.

HELD It was held that the recommendation of the DI did not bind the management of the Bank. This was based on the overwhelming evidence of the high probability of the claimant being involved in the misconduct alleged against him. The court referred to *Integrated Forwarding & Shipping Sdn Bhd v Zakaria Jaafar*, a similar decision reported in 1999.

BRIEF-UP...

ELECTRONIC COMMERCE ACT 2006

No
658

Date of coming into operation
19 October 2006

Notes
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INTERNATIONAL INTERESTS IN MOBILE EQUIPMENT (AIRCRAFT) ACT 2006

No
659

Date of coming into operation
19 October 2006 

CENTRAL BANK OF MALAYSIA (AMENDMENT) ACT 2006

No
A1271

Date of coming into operation
19 October 2006

Legislation amended
Central Bank of Malaysia Act 1958

Amendments
Sections 30, 30A and 44A 

CONTROL OF SUPPLIES (AMENDMENT) ACT 2006

No
A1270

Date of coming into operation
14 September 2006

Legislation amended
Control of Supplies Act 1961

Amendments
Sections 2, 5, 6, 7, 8, 9, 10, 11, 20, 22 and 22A 

LEGAL PROFESSION (AMENDMENT) ACT 2006

No
A1269

Date of coming into operation
2 October 2006

Amendments
Sections 3, 4, 7, 9, 13, 35, 38, 46A, 64, 65, 66, 70, 70A, 76, 93, 94, 95, 98, 99, 100, 103, 103A, 103B, 103C, 103D, 103E, 108, 109, 110 and 111

Deletion
Sections 67, 97, 101, 102 and 103G 

**GUIDELINES/RULES/ PRACTICE
NOTES ISSUED BY BANK NEGARA
MALAYSIA/ SECURITIES
COMMISSION/ BURSA MALAYSIA
SECURITIES BHD/ FOREIGN
INVESTMENT COMMITTEE BETWEEN
OCTOBER AND DECEMBER 2006**

BANK NEGARA MALAYSIA (BNM)

- *Guidelines on the Establishment of International Islamic Bank* - 15 September 2006
- *Guidelines on the Establishment of International Takaful Operator* - 15 September 2006
- *Guidelines on the Establishment of International Currency Business Unit (Islamic Bank)* - 15 September 2006
- *Guidelines on the Establishment of International Currency Business Unit (Takaful Operator)* - 15 September 2006

SECURITIES COMMISSION (SC)

- *Guidance Note 14 to the SC Guidelines on Advertisements and Promotional Materials (A & P Guidelines)* - 21 November 2006
- *SC Guidelines on Structured Warrants - Guidelines for the Issue of Structured Warrants - Amended as at October 2006* - 31 October 2006
- *Circular on Collective Investment Schemes in relation to Single-Pricing for Unit Trust Funds* - 20 October 2006
- *Guidance Note 4 to the SC Guidelines on Asset Valuation in relation to Appointment of Valuer for Valuation of Foreign Property Assets* - 18 October 2006
- *Practice Note 1 to the SC Guidelines on FIC Applications* - 5 December 2006

- *Practice Note to the SC Guidelines on Bonds (Islamic Securities) in relation to Registration by the SC for the Purpose of Acting as a Bond Trustee* - 12 October 2006
- *Practice Note 2B to the SC Guidelines on Bonds (Debt Securities) in relation to the Application of the Guidelines on the Offering of Private Debt Securities to Foreign Multinational Corporations* - 6 October 2006
- *Practice Note 2B to the SC Guidelines on Bonds (Islamic Securities) in relation to the Application of the Guidelines on the Offering of Islamic Securities to Foreign Multinational Corporations* - 6 October 2006

BURSA MALAYSIA SECURITIES BERHAD (BMSB)

- *Amendments to the Listing Requirements for Main Board/Second Board and MESDAQ Market in relation to Announcements and Circulars* - 31 October 2006; Effective Date: 15 November 2006
- *Update in KLSE Syariah Index (KLSI) Components* - 30 October 2006
- *Bursa Malaysia Defers RSS/SBL Launch to January 2007* - 13 October 2006
- *LFX Lists World's 1st Syariah-Compliant Exchangeable Trust Certificates (SUKUKS)* - 5 October 2006
- *Q&A to Letter Dated 4 August 2006 - Disclosure in relation to Any Agreement, Joint Venture or Collaboration for the Purpose of Bidding for or Securing a Project or Contract* - 5 October 2006

FOREIGN INVESTMENT COMMITTEE (FIC)

- *FIC Press Release on the Guidelines on Acquisition of Properties by Foreign Interests* - Effective Date: 1 November 2006

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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would like to take this
opportunity to wish everyone

