the ZRp brief

Brief: 5/07 Folder 4/Oct - Dec 2007 KDN No: PP12857/8/2007

A Brief Note...

by Dato' Zulkifly Rafique

On patience and tolerance...

My partners and I have always advocated excellence and perfection. I have advised lawyers to do better than their best and to never compromise standards.

However in the course of the drive for such aspirations, I sometimes wonder whether we have neglected our human side, the side that is supposed to nurture and guide the younger members of the profession.

It is difficult to put ourselves in the shoes of the young ones who have only just begun to embark on their career but if we recall and think about the time when we were 'bright-eyed and bushy-tailed' and so very eager to please, then maybe we would be able to appreciate the importance of investing in the youth of today.

"I believe in investing in the youth. They are our precious assets and future." Those are the words of the Prime Minister.

We must have heard those words a million times before but how many of us have taken heed of that advice? How many of us have taken the time to mentor the junior members of our establishment?

As the year draws to an end, I would like us to remind ourselves that no matter how successful we are, we should always remember that we were once that ignorant young person.

On that note, I would like to wish you a good and productive year end.

in this issue...

ZUL RAFIQUE & partners

BRIEF-FLASH...

- **A MERGER OF STATUTES** A request has been made by the Attorney General to merge both the Personal Data Protection Act and the Credit Reference Companies Act. The merge is said to provide greater control by the authorities.

- **AMENDMENT TO THE ACCOUNTANTS ACT** Amendments to the Accountants Act are expected to take place as soon as possible. The proposed amendments are to ensure that "the Act and accountants remain relevant and dynamic to meet the challenges and requirements of the profession in Malaysia".

- **BANK NEGARA MALAYSIA TO ISSUE MORE LICENCES TO FOREIGN BANKS** Bank Negara Malaysia may issue more licences to foreign banks in an effort to bolster non-ringgit denominated Islamic banking.

- **COMPULSORY REAR SEAT BELTS** Recommendations have been made to the Cabinet Committee on Road Safety for the compulsory use of seat belts by rear seat passengers of vehicles.

- **CORPORATE GOVERNANCE CODE REVISED** The Code on Corporate Governance (revised as at October 2007) released by the Securities Commission took effect from 4 October 2007 and it supercedes the Code on Corporate Governance issued in March 2000.

- **DEFAULT JUDGMENT AGAINST AYER MOLEK SET ASIDE** The decision to set aside a default judgment against Ayer Molek has been upheld. The default judgment was based on an action by Mirra Sdn Bhd who filed a civil suit for a claim based on a debt for services rendered to the company.

- **DEMERGER OF TELEKOM** A demerger of the mobile and fixed-line business of Telekom Malaysia Bhd is expected to take place. The exercise will see Celcom (Malaysia) Bhd transferred to TM International Sdn Bhd which in turn will be listed on Bursa Malaysia by the second half of 2008.

- **DNA IDENTIFICATION BILL** A DNA Identification Bill is expected to be tabled in Parliament in March 2008, once it has been finalised by the Attorney General's Chambers. There is currently no provision in the law to accommodate DNA profiling.

- **E-TANAH?** In order to enhance the efficiency of land administration in the country, the National Land Code will be amended to accommodate the E-Tanah system. The system will include the appointment of agents to collect and accept payments for various land matters.

- **FAIL HILANG?** A standardised electronic filing system is expected to be implemented. One of the main problems that is hoped to be resolved is the "missing file" syndrome that has plagued practitioners for years.

- **FELDA TO BECOME A KNOWLEDGE-BASED CENTRE** Felda Trolak is expected to become a knowledge-based centre with the establishment of the Felda Academy, Felda Trolak development project and the Maktab Rendah Sains Mara Felda.

- **FIVE YEARS MATERNITY LEAVE** Women in the civil service will be entitled to a maximum of 5 years maternity leave. This proposal is in light of the call for greater flexibility in managing the public sector workforce.

- **HAP SENG PLANTATIONS' OFFER OVERSUBSCRIBED** Soon-to-be-listed Hap Seng Plantations Holdings Bhd's (HSP) initial public offering (IPO) of 4.89 million shares was oversubscribed by 35.73 times. The IPO includes an offering of up to 40.34 million shares to Hap Seng Consolidated Bhd minority shareholders which was oversubscribed by 0.28 times and an institutional offering of 124.47 million shares to foreign and Malaysian institutional and selected investors. Upon listing, its enlarged paid-up capital will be RM800 million comprising of 800 million ordinary shares of RM1 each.

- **NEW RULES UNDER SOLID WASTE ACT** New regulations under the Solid Waste and Public Cleansing Management Act are being drafted and are expected to take effect from April 2008.

- **PULAU BATU PUTEH DISPUTE BEGINS** The 28 year old dispute between Malaysia and Singapore over the sovereignty of Pulau Batu Puteh is expected to be resolved at the International Court of Justice. The proceedings presided over by a 16-judge panel began on 6 November 2007 and was concluded on 23 November 2007.

- **SC FILES SUIT** A landmark civil suit has been filed by the Securities Commission against FTEC Resources Bhd chief for a demand of RM2.5 million that he allegedly used for his own benefit.

- **SC TO DEVELOP NEW SET OF DUE DILIGENCE GUIDELINES** The Securities Commission is expected to set new guidelines on due diligence conduct. A draft of such guidelines has been issued to the industry for feedback.

- **HALAL HUB IN SUNGAI PETANI** The State of Kedah has allocated RM15 million for the construction of 30 factory buildings to be rented to entrepreneurs producing halal products. The halal hub is expected to begin operations in 2009.

FOREIGN FLASH

- **ISLAMIC BONDS IN BRITAIN** Britain is bracing itself to become the first Western government to launch Islamic bonds. A three-month consultation is expected to take place before this venture is put in place.

- **LOUIS VUITTON WINS COPYRIGHT AND TRADEMARK SUIT** The Canadian Federal Court decided in favour of Louis Vuitton in a suit claiming copyright and trademarks infringement. The suit which began in 2001 against two individuals doing business as K2 Fashions in Richmond, British Columbia, ended on a victorious note for the producer of luxury designer items.

- **MICROSOFT LOSES APPEAL** The European Court of First Instance, in a landmark ruling, upheld a fine of 497 million Euro after a nine year battle.

- **NEW HATE LAWS IN UK** The Racial and Religious Hatred Act 2006 came into force in the UK. What is interesting about the Act is that it does not define 'religion' or 'religious hatred'. The Act is expected to provide judges with a great amount of mental stimulation as the ambiguities in the statute only means that the court will have to decide.

- **UK COMPANIES ACT 2006 TAKES EFFECT** A number of legal changes introduced by the Companies Act 2006 came into force on 1 October 2007. Some of these changes affect issues pertaining to Directors' Duties, Written Resolutions, Shareholders' Meetings and Proxy Voting.

BRIEFING...

GENERAL

THE MALAYSIAN QUALIFICATIONS AGENCY The Malaysian Qualifications Agency Act 2007 came into force on 1 November 2007. The Act sees the merger of the National Accreditation Board (LAN) and the Higher Education Ministry's Quality Assurance Division (QAD), leading to the establishment of the Malaysian Qualifications Agency (MQA).

We examine the developments that led to the enactment of the Malaysian Qualifications Agency Act 2007.

The Malaysian Qualifications Agency was established to implement the Malaysian Qualification Framework (MQF) and to continue implementing the tasks and functions of LAN after the LAN Act was repealed.

LAN was established in July 1997 under the Lembaga Akreditasi Negara Act 1996 for the purpose of ensuring the quality of education provided by private higher education institutions whilst the QAD was established in 2002, owing to a decision by the government that public universities must also be subjected to quality assurance, for the purpose of managing and coordinating the quality assurance system for all programmes of study offered by public institutions of higher learning.

The change from LAN to MQA was explained by Dato' Dr Syed Ahmad Hussein, Chairman and Chief Executive Officer of LAN:

> The change from LAN to MQA provides an opportunity that must not be missed for the repositioning of Malaysian higher education and its quality assurance process beyond the externalities of structure and organisation.

One prominent feature of the MQF is the introduction of self-accreditation by institutions whereby the Higher Education Minister may invite institutions to apply for self-accreditation subject to various criteria being fulfilled.

Dato' Dr Syed Ahmad Hussein is of the view that the public and private higher education institutions are ready for self-accreditation as they have a senate, a faculty board and external examiners to ensure quality of their courses.

As intimated by the LAN General Manager, Associate Professor Zita Mohd Fahmi, once a course is accredited under the MQA, it remains accredited forever (unlike the present process where accreditation is valid for only five years) as long as the quality is maintained. But once the quality fails to fulfill the institutional audits, a cessation date will be recorded on the Malaysian Qualifications Register where the accredited programme is listed.

To further enhance the accreditation system, Dato' Dr Syed Ahmad Hussein explained that there will be five accreditation committees under the MQA consisting of social sciences, ICT, engineering and technology, arts and the humanities, and medicine; and allied health assessors will conduct the assessment of the course and present a report to the committee for final decision.

In light of this merger, it is hoped that the MQA achieves its ultimate purpose, which is to present Malaysian higher education and its product to the world as one of highest quality when measured against the best and one worthy of initiators and innovators of human development and global progress.

CONSTRUCTION

PRIVATE FINANCE INITIATIVES Since the announcement of the Malaysian Prime Minister, Datuk Seri Abdullah Ahmad Badawi on 31 March 2006 that private finance initiatives (or more popularly known as PFIs) would be introduced under the Ninth Malaysian Plan in the implementation of privatised projects, PFI has suddenly become a hot topic once again, especially in the Malaysian construction industry, although this concept is nothing new even in Malaysia.

PFI, which is a form of a public-private partnership (PPP), has been likened to concepts such as BOT (Build-Operate-Transfer) and BOOT (Build-Operate-Own-Transfer) implemented in the past, although the PFI scheme places more emphasis on the methods of funding and the responsibilities of the private sector.

WHAT IS IT? PFI is essentially a partnership between the public and private sectors whereby the responsibility to finance and manage services traditionally provided by the public sector is transferred to the private sector in return for lease payments throughout the concession period. The concept of PFI was first introduced in the United Kingdom by the Conservative government in 1992. The government locates a private sector partner to carry out government-initiated projects and this effectively transfers control and risks of the project to the private partner. The projects are usually funded by banks or through sale of corporate bonds, and such funds are raised by the private sectors themselves.

HOW IT WORKS... In the Malaysian context, however, PFI involves projects that have been identified by the Economic Planning Unit and suggested to the relevant Ministry, who will then invite contractors to bid through the process of open tender. These projects are funded through a single purpose company, Pembinaan BLT Sdn Bhd, which is wholly-owned by the Ministry of Finance, Inc. Pembinaan BLT Sdn Bhd obtains loans from the Employees Provident Fund (EPF), and this fund will be held on trust by the Accountant General's Department, who will then release the fund to the successful bidder/contractor certified by the Public Works Department.

The concept of PFI sets the performance and standards that a contractor has to meet when operating the service. Their performance and standards are measured against key performance indices (KPIs). The Government may also penalise contractors for failing to deliver as promised, under the 'reward and penalty' system. Some argue that this could be a plus point in the sense that the private sector is bound to deliver on time as its own capital is at risk since the Government will only pay for the service when it is available. This will in turn curtail the problems of shoddy workmanship and abandoned projects.

PFI emphasises on a project giving value for money, instead of just being lowest in cost. A full evaluation of costs and benefits as well as an assessment of risks has to be undertaken to determine the value of the project. In order to determine which bidder can offer value for money, the bids are compared against a set of public sector comparator (PSC), whereby the amount offered by the private sector is compared to that of the public sector to determine if there is any value for money in awarding the project to that particular partner.

Another key feature is the issue of risk distribution, whereby the private sector will assume the major risks involved in the design, construction, operations and maintenance of the project. They will have to ensure that the facilities built are not only functional, but will last throughout the concession period. Risk is allocated to the party best able to manage them.

In terms of maintenance, the private sector is expected to manage and maintain the facilities throughout the duration of the concession,

and this will introduce the concept of whole-life costing to the projects. However, the most crucial key feature here is the principle of transparency in the whole bidding process for the project.

Under the Ninth Malaysian Plan, all powers and responsibilities for the implementation of the PFI scheme will be centralised under one body. This body will undertake a thorough review of the existing privatisation framework, which includes restructuring the approval procedures whilst strengthening the legal framework and administrative procedures to protect public and national interests.

THE WAY FORWARD... PFI is seen as a fresh new hope for construction companies to bid for new works, and this will hopefully be a catalyst to a construction boom in Malaysia once again, after suffering a slump a decade ago.

The UK's Home Ministry published and regularly updates the Standardisation of PFI Contract, a guideline which should be complied with by concessionaires or any other party in a PFI project. Malaysia, however, has not come up with a similar form of guideline, and a set of standardised guidelines and procedures is much needed to ensure consistency in its implementation.

It is hoped that PFI will be the nation's key driver for growth, and also to facilitate greater participation of the private sector in the areas of management, operations and maintenance to improve the delivery of infrastructure facilities and public services. According to Works Minister Datuk Seri S Samy Vellu, the Federal Government has saved a whopping RM154 billion in spending from 1983 to 2005 through PPP. With proper implementation, more savings should be on the cards, in addition to better and higher quality infrastructure.

TECHNOLOGY LAW

SPAM WHAM! In Malaysia there are numerous statutes dealing with cyber law. Apart from the Computer Crimes Act 1997 and the Communications and Multimedia Act 1998, there are numerous provisions that have been inserted into the already existing laws to accommodate issues pertaining to cyber law.

However what is glaringly missing is legislation to control spam.

In this article, we follow the development of Spam Law in several jurisdictions that have already implemented such laws.

INTRODUCTION Spam refers to the abuse of electronic messaging system to indiscriminately send unsolicited messages. The most common form of spam is e-mail spam though one must bear in mind that spam may penetrate other media such as instant messaging, use-net newsgroups, blogs and even mobile phones. Spam may also be used to spread computer viruses, Trojan horses and other malicious software.

Although spamming is economically viable to advertisers, the cost to those at the receiving end is high, particularly loss of productivity and fraud. In fact a survey conducted by the European Union's Internal Market Commission in 2001 estimated that junk e-mail cost internet users 10 billion Euro per year worldwide.

Spam has been the subject of legislation in various jurisdictions but Malaysia has yet to enact any form of anti-spam law.

UNITED KINGDOM In the UK, anti-spam law took effect from 11 December 2003, with an opt-in approach for consumers, which means that online marketers may send e-mail pitches and only to consumers who have agreed prior to receiving them.

UNITED STATES On 16 December 2003, President Bush signed into law the Controlling the Assault of Non-Solicited Pornography And Marketing (CAN-SPAM) Act 2003. The CAN-SPAM Act permits e-mail marketers to send unsolicited commercial e-mail as long as it adheres to 3 basic types of compliance defined in the Act, which are unsubscribe, content and sending behaviour compliance. This means that the consumer adopts an opt-out approach and such requests be honoured within 10 days.

AUSTRALIA Australia's Spam Act came into force on 11 April 2004. In fact Australia has prosecuted its first spammer, Wayne Mansfield, from Perth, for sending more than 56 million spam messages.

SINGAPORE The Spam Control Act 2007 took effect in Singapore on 12 April 2007. In line with the American and Australian models, Singapore has adopted the opt-out approach, where the Act incorporates the proposal such that those who do not want to receive unsolicited electronic messages may submit an unsubscribe request.

INDIA Although India does not have any laws dealing with spam, it has been suggested that the recipient of unsolicited e-mail may allege infringement of his fundamental right to privacy enshrined in Article 21 (our article 5) of the Constitution which states that "No one shall be deprived of his life or liberty except according to procedure established by law".

Though not expressly stated, the Supreme Court of India has included the right of privacy as part of the right to protection of 'life' and 'personal liberty'. It remains arguable however, whether the unsolicited marketing e-mail would be construed as infringement of the recipient's fundamental right to privacy.

CONCLUSION It appears that spam law is notably missing from the Malaysian jurisprudence. It is hoped that the authorities would, in the near future, look to some of the anti-spam law as models of their own.

ARBITRATION/ MARITIME

RECENT DEVELOPMENTS IN MALAYSIAN MARITIME ARBITRATION Since Malaysia is located along the Straits of Malacca, which is one of the most important stretches of water in the world, it would make sense for her to have a developed system of maritime arbitration.

The reality, however, is that Malaysia inherits its arbitration legislation from the British 50 years ago and this arbitration legislation was largely unchanged until recently.

In this article we examine the recent developments in Malaysian Maritime Arbitration.

THE CURRENT STATUTES The Arbitration Act 2005 came into effect in March 2006. It is based on the UNCITRAL (United Nations Commission on International Trade Law) Model Law and was a result of the joint efforts of the Attorney General's Chambers and the Arbitration Sub-Committee of the Malaysian Bar Council.

The other basic mainstay of Malaysian arbitration is the Kuala Lumpur Regional Centre for Arbitration (KLRCA) which adopts the UNCITRAL Rules of Arbitration of 1976.

Together with considerable investment in the KLRCA, an environment both physically advanced and which abides by the rule of law is created, which is essential to participants of international arbitrations.

KLRCA MARITIME ARBITRATION UNIT 2005 In 2005, the KLRCA officiated the formation of a distinct Maritime Arbitration Unit (the Unit), formed under the auspices of the KLRCA but whose committee consists of members of the Malaysian Maritime Institute (IKMAL). It was

envisioned that the Unit would be a multi-pronged agency, involving cargo builders to maritime lawyers and indeed to marine insurance agencies.

On 26 February 2007, Malaysia's maiden batch of maritime arbitrators, numbering 15 in total, began their training at the KLRCA. According to Datuk Captain Jaffar Lamri, this first batch consists mainly of professionals - master mariners and experienced maritime lawyers.

It has become increasingly necessary to have a Malaysian centre for marine arbitration for several reasons. Firstly, Malaysia's deepwater oil and gas ventures are overwhelmingly dominated by foreign vessels. As at 2007, all vessels over 10,000 tonnes supporting the deepwater facilities are foreign. These foreign vessels, if operating under licence or are passing territorial waters with the right of innocent passage, are not subject to local jurisdictions. If these vessels are in the high seas they are then only bound by the rules of conscionable conduct and *res communis,* as the high seas are under no jurisdiction at all. Should a dispute arise, there can be conflict as to whether the dispute should be resolved in the ship's flag state, or in the state in whose waters the dispute arose. Given these complexities, maritime arbitration emerges as the most convenient solution, as the arbitrator is, theoretically, a non-partisan, expert, third-party authority. Since awards are binding with limited right to appeal, arbitration also adds a note of finality to the dispute, conducted in an accommodating, non-hostile environment.

Secondly, in Malaysia, maritime disputes are only rarely, if ever, referred to the corresponding Courts of Competent Jurisdiction. Negotiation is the ordinary and preferred method of settlement. This method is almost unquestionably employed in the interests of saving time and in consideration of the escalating costs each day of delay can entail. Further, more time can be saved and greater fairness can be achieved through the mediation of an expert maritime arbitrator, who has at his disposal resources and expertise a non-expert judge does not, and is in a position to assess *the presumed contractual intention* of the parties in dispute.

DEVELOPMENTS AND ISSUES IN ARREST The arrest of a ship is an extraordinary right given to maritime traders to obtain security. This right grew out of the mobility of ships; any unfulfilled obligations by a ship cannot otherwise be addressed once the ship has left port, leaving behind no assets.

The right of arrest under Malaysian Law is chiefly derived from the Courts of Judicature Act 1964 which in turn refers to the United Kingdom's Supreme Court Act 1981 for admiralty jurisdiction of the High Court of Malaysia. Malaysia does not adopt the International Convention for the Unification of Certain Rules Relating to the Arrest of Sea-Going Ships 1952, colloquially known as the Arrest Convention.

It must be noted that in Malaysia, a ship cannot be arrested as security for a maritime dispute that is referred to arbitration. This is a legacy inherited from the decisions in several English cases.

THE RENA K To justify an arrest in the perspective of arbitration, the Malaysian courts refer to the principle in *The Rena K* (1979) which states that the courts must be convinced that the defendant was financially unsound and that there was a likelihood that the arbitration award would remain unsatisfied.

THE ANDRIA In *The Andria* (1984) the claimant had filed a writ *in rem*. The parties had already agreed to refer the dispute to arbitration. The defendant sold *The Andria*, the only ship belonging to the relevant shipowner. The plaintiff, anxious of its ability to realise payment on any award it might obtain in the arbitration, served the writ *in rem* and the Warrant of Arrest. The defendant furnished security to obtain the release of the ship. The English Court of Appeal confirmed that the High Court's admiralty jurisdiction to issue the warrant was in support of the court's

jurisdiction to hear and determine maritime claims, and not to provide security where the substantive claim was not to be determined by the *arresting* court. Therefore the arrest of any vessel as security may be challenged on these grounds. Efforts in the UK to ease the right to arrest for security have been largely unsuccessful in Malaysia.

THE VINTA In the unreported case of *The Vinta*, a dispute had arisen under a charter-party, which was referred to arbitration for determination, according to the terms of the charter-party. The counterclaiming party in the arbitration arrested *The Vinta* when she entered Malaysian waters as security. The defendant applied for a stay in the Malaysian proceedings and the release of the ship. Justice Shaik Daud bin Ismail stayed the writ *in rem* but allowed for the arrest of the ship to continue pending the furnishing of suitable security. On appeal to the Malaysian Supreme Court, the arrest was set aside and the security order voided. The Supreme Court further awarded damages for the wrongful arrest of *The Vinta.*

The Vinta illustrates the weakness in the Malaysian law of ship arrest. Not only is a claimant's right to security uncertain once it proceeds to arbitration, he is now liable to pay for any damages if the arrest is set aside. Should the defendants apply for a stay of the Malaysian proceedings, the arbitration award would be relied upon as creating an estoppel when entering judgment in the *in rem* proceedings. The arrest would be security for the anticipated judgment in the Malaysian action. In reality, however, the defendant shipowner may not apply for a stay, but to strike out the claim instead or to set aside the writ for being vexatious and as an abuse of process by reason of the multiplicity of proceedings. This achieves procedural, but not substantive fairness. The bottom line is that the Malaysian method of maritime arbitration carries the risk of losing the right to arrest.

Malaysia's currently inadequate laws can be an impediment to its vision of becoming a maritime nation. The right to arrest for security is a recognised point of international merchant shipping law, and is related to the greater issue of the freedom to contract. The failure to address these legal inadequacies may have devastating consequences for Malaysia. In any case, reform is not impossible and this is illustrated by the experiences of Singapore.

It is being suggested to the AG's Chambers for Law Reform that a clause to permit the arrest for arbitration may be modeled on section 26 of the English Civil Jurisdiction and Judgment Act 1964, or on section 7 of Singapore's International Arbitration Act.

CONCLUSION Malaysia's gradual ascent into better support services for the shipping industry necessitates a worthy system of dispute resolution. The fast, transnational nature of maritime undertakings have made Court settlements antiquated, obsolete, expensive, inefficient and time-consuming. The imperfections which are present in the current system can be optimistically viewed as growing pains before Malaysia emerges as a fully developed, internationally accepted center for maritime dispute resolution. In this same note of optimism, we may hope that this eventuality will soon dawn.

Olivia Lim - Associate (Corporate)

CONTRACT

CAPACITY OF A MINOR TO CONTRACT Does a minor (an individual below the age of 18 years) have the capacity to enter into a contract, particularly a scholarship agreement? It is ironic that whilst it is the minor who is in most need of scholarships and loans, the question that arises is whether they have the contractual capacity to enter into such agreements.

INTRODUCTION The relevant laws pertaining to the issue of whether a minor may enter into a scholarship agreement are as follows:

- Contracts Act 1950 (Revised 1974)
- Age of Majority Act 1971
- Contracts (Amendment) Act 1976

CONTRACTS ACT 1950 Section 11 of the Contracts Act 1950 (Revised 1974) provides that every person is competent to contract who is of the age of majority according to the law to which he is subject, and who is of sound mind, and is not disqualified from contracting by any law to which he is subject.

AGE OF MAJORITY ACT 1971 Section 2 of the Age of Majority Act 1971 stipulates that every male and female shall attain the age of majority at the age of 18.

Section 4 of the Age of Majority Act 1971 provides that the Act shall not affect, inter alia, any provision in any other written law fixing the age of majority for the purposes of that written law.

CONTRACTS (AMENDMENT) ACT 1976 As a general rule, only a person of 18 years and above has the capacity to enter into a legally binding contract pursuant to section 2 of the Age of Majority Act 1971. However as stipulated in section 4 of the Age of Majority Act, this shall not affect provisions of any other written law fixing the age of majority for the purposes of that written law.

One such law is provided in section 4 of the Contracts (Amendment) Act 1976, which expressly allows a minor, ie a person under the age of 18, to enter into a legally binding contract in relation to a scholarship agreement.

Section 4 of the Contracts (Amendment) Act 1976 provides that no **scholarship agreement** shall be invalidated on the ground that the scholar entering into such agreement is not of the age of majority.

Under the Contracts (Amendment) Act 1976, definition is given to some of the relevant terms and this includes 'scholarship agreement', 'appropriate authority' and 'approved educational institution'.

'Scholarship agreement' is defined as a contract or agreement between an appropriate authority and any person.

'Appropriate authority' is defined as the Federal Government or a State Government, a statutory authority, or an approved educational institution.

'Approved educational institution' is defined as any institution or body declared as such by the Minister under section 3.

Section 3 of the Contracts (Amendment) Act 1976 reads:

> The Minister for the time being in charge of education may by notification in the *Gazette* declare any institution or body, whether corporate or unincorporate, to be an approved educational institution for the purpose of this Act.

BRIEF-CASE...

BANKING / CONTRACT - Guarantee - Conditional or unconditional - Mutual determination of building contract - Whether original bank guarantee must be presented at time of demand

KARYA LAGENDA SDN BHD V KEJURUTERAAN BINTAI KINDENKO SDN BHD & ANOR [2007] 6 CLJ 18, Court of Appeal

FACTS A dispute arose between the first defendant (sub-contractor) and the second defendant (main contractor) wherein the latter alleged that the former had failed to complete the works for a building project on time.

In accordance with the building contract, the first defendant arranged for the plaintiff to issue a bank guarantee in favour of the second defendant. Consequently, the second defendant made a demand on the bank guarantee, which the first defendant challenged and in turn demanded for the release of the fixed deposit funds securing the bank guarantee. The High Court decided in favour of the second defendant and accordingly dismissed the first defendant's counterclaim. The first defendant appealed.

ISSUE Whether the second defendant's demand was valid to trigger payment of the bank guarantee; and if the original bank guarantee must be presented at the time of the demand before payment is made.

HELD In dismissing the appeal, the Court of Appeal held that the bank guarantee was an unconditional and 'on demand' guarantee thus indicating that the plaintiff ought to pay the second defendant upon a valid demand being made. There was no need for a demand letter that expressly stipulates that the first defendant had failed to perform or had breached the underlying building contract.

ISLAMIC BANKING - Loan facility - Al-Bai Bithaman Ajil - Rights of financier/ chargee - Whether could claim full profit thereof - Whether entitled to order for sale

MALAYAN BANKING BHD V YA'KUP OJE & ANOR [2007] 5 CLJ 311, High Court

FACTS The defendants were granted a financing facility by the plaintiff under the Syariah principle of Al-Bai Bithaman Ajil (BBA). The defendants charged a piece of property to the plaintiff as security in consideration of the plaintiff advancing the said facility. The defendants defaulted in payment, as a result of which the plaintiff filed an originating summons for an order for sale of the charged property. The defendants averred that the sum claimed was excessive and abhorrent to the notion of justice and hence implored the court to tamper the application with other orders or directions as the court deemed fit and just.

ISSUE Whether the plaintiff is entitled as of right to the full profits in the event the BBA is terminated very much earlier as in this instance, taking into consideration section 148(2)(c) Sarawak Land Code (SLC) and section 256 National Land Code (NLC).

HELD It was held that Islamic financing is based on a profit and loss sharing contract and does not deal with fixed interest rate or predetermined profits. In conforming with the intent of justice and equity under the Syariah principles, an opportunity was given to the plaintiff to demonstrate equitable conduct by filing an affidavit stating that, upon recovery of the proceeds of sale, they will give a rebate to the borrower, the amount of which must be substantial.

INSURANCE - Insurance contract - Subrogation clause in contract of indemnity - Whether insurer has locus standi to institute proceedings in the name of the insured

KEMENTERIAN PERTAHANAN MALAYSIA & ANOR V MALAYSIA INTERNATIONAL SHIPPING CORPORATION BHD & ORS [2007] 4 CLJ 820, Court of Appeal

FACTS The appellants, the Ministry of Defence, Malaysia and the Government of Malaysia executed a contract of insurance with Perdana Cigna Insurance Berhad ('the insurers') in which the insurers undertook to indemnify the appellants against any loss or damage arising from all shipping and sending. The policy included a subrogation clause where the appellants subrogate their rights and claims to the insurers and permit suits to be brought in their name at the insurers' expense. In one of the claims submitted by the appellants, the insurers admitted liability and prior to paying damages to the supplier, the insurers exercised their right of subrogation and through a legal firm, filed two negligence suits in the name of the appellants against the respondents.

ISSUES Whether the legal firm had *locus standi* to act since it had not been retained by the Attorney General's Chambers; and whether the right of subrogation has accrued before full payment under the policy had been effected.

HELD In allowing the appeal, it was held that the Government of Malaysia was merely lending their name as assured to the insurers for the enforcement of the appellants' rights and remedies against the respondents, and thus an authorisation under section 24(3) of the Government Proceedings Act 1956 was not necessary.

CIVIL PROCEDURE / CONTRACT - Estoppel - Res Judicata - Whether Lembaga Arkitek Malaysia (LAM) empowered to determine disputes between architect and client - Whether defendant could disable itself from performance

AKITEK TENGGARA SDN BHD V MID VALLEY CITY SDN BHD [2007] 5 MLJ 697, Federal Court

FACTS The appellant was appointed to prepare a development plan for a township which encompasses the respondent's land. As a result of a company restructuring, the respondent had discharged the appellant, a discharge that the appellant maintained was bad in law. The matter was referred to Lembaga Akitek Malaysia (LAM) and it was decided that the respondent had the right to terminate the services of the appellant. The decision of LAM although subsequently quashed by the High Court was subsequently set aside by the Supreme Court. Proceedings were commenced in the High Court and eventually reached the Federal Court.

ISSUE The issue for consideration was whether LAM was competent to decide on the lawfulness or otherwise of the termination of the appellant (the architect) by the respondent.

HELD It was decided that LAM is not competent to decide on the lawfulness of the termination of an architect by his client as LAM is only empowered to hear and determine disputes relating to professional conduct (vide section 4 of the Architects Act 1967).

The termination of the services of the appellant was brought about by the respondent's own acts. There was therefore a constructive breach of contract by the respondent.

ARBITRATION - Scope and effect of arbitration clause - Whether party bound by his submission to arbitration, which he agreed to earlier as a consequence of bribery

PREMIUM NAFTA PRODUCTS LTD & OTHERS V FILI SHIPPING CO LTD & ORS [2007] UKHL 40, House of Lords

FACTS The appeal concerned the scope and effect of arbitration clauses in eight charterparties in Shelltime 4 Form made between eight companies and eight charterers. It was alleged by the appellant that the charters were procured by the bribery of the senior officers who controlled the charterer companies. The appellants commenced a court proceeding for a declaration that the charters were rescinded. The respondents, on the other hand, applied for a stay under section 9 of the UK Arbitration Act 1996.

ISSUES Whether the arbitration clause is suitable to cover the question of whether the contract was procured by bribery, and secondly whether it is possible for a party to be bound by submission to arbitration when he alleges that, but for the bribery, he would never have entered into the contract containing the arbitration clause.

HELD In dismissing the appeal it was held that the parties are likely to have intended any dispute arising out of the relationship entered into, to be decided by the same tribunal unless the language makes it clear that certain questions were intended to be excluded from the arbitration's jurisdiction. Furthermore, the principle of severability under section 7 of the Arbitration Act 1996 means that the arbitration agreement must be treated as a distinct agreement and can only be invalidated on a ground related to the arbitration agreement and is not merely a consequence of the invalidity of the main agreement.

BRIEF-UP...

CARRIAGE BY AIR (AMENDMENT) ACT 2007

No
A1310

Date of coming into operation
8 October 2007

Amendments
Sections 1, 2, 4, 5, 6, 7, 8, 9, 10, 12, Fourth Schedule

Incorporation
Section 11A, Fifth Schedule

CUSTOMS (AMENDMENT) ACT 2006

No
A1279

Date of coming into operation
22 November 2007

Amendments
Sections 2 and **122C**

EVIDENCE OF CHILD WITNESS ACT 2007

No
676

Date of coming into operation
31 December 2007

Notes
This is an Act to make provisions relating to the giving of evidence by child witnesses and for other matters connected therewith.

The Act applies to persons below the age of 16 who is called or proposed to be called to give evidence in any proceedings but does not include an accused or a child charged with any offence.

MALAYSIAN QUALIFICATIONS AGENCY ACT 2007

No
679

Date of coming into operation
1 November 2007

Notes
Please see article on page 2.

SAFEGUARDS ACT 2006

No
657

Date of coming into operation
22 November 2007

Notes
An Act to make provisions for the investigation and determination of safeguards measures on products imported into Malaysia and other matters connected therewith.

The application of the Safeguards Act 2006 is in conformity with the obligations of Malaysia under the agreement establishing the WTO dated 15 April 1994, including the GATT 1994 and the Agreement on Safeguards.

UNIVERSITY OF MALAYA ACT 1961

No
682

Date of coming into operation (Revised)
30 November 2007

WIDOWS AND ORPHANS PENSION ACT 1915

No
681

Date of coming into operation (Revised)
30 November 2007

GUIDELINES/RULES/ PRACTICE NOTES ISSUED BETWEEN OCTOBER AND DECEMBER 2007 BY BANK NEGARA MALAYSIA/ SECURITIES COMMISSION/ BURSA MALAYSIA SECURITIES BHD

BANK NEGARA MALAYSIA (BNM)

- Circular on the Liberalisation of Foreign Exchange Administration Rules - In relation to ECM 4: General Payments

- Foreign Exchange Administration Requirement - Abolition of:
  (i) the requirement to submit the Overseas Account Statement by a resident company maintaining an overseas account, including a foreign currency account with a Licensed offshore bank in Labuan (ECM 7 amended accordingly)
  (ii) the requirement to submit the Inter-Company Account Statement by a resident company maintaining an inter-company account with a non-resident company (ECM 11 amended accordingly)

  Date Issued: 1 November 2007; Effective Date: 1 January 2008

- Circular on the Liberalisation of Foreign Exchange Administration Rules - Amendments to ECMs 2, 6, 7, 9, 10 and 16:
  (i) Abolition of five registration requirements
  (ii) Granting greater flexibility for Islamic funds managed onshore
  (iii) Providing greater flexibility on hedging of ringgit exposure by non-residents

  Date Issued: 20 September 2007; Effective Date: 1 October 2007

SECURITIES COMMISSION (SC)

- Guidelines on Islamic Fund Management - *Date Issued: 3 December 2007*

- Prospectus Guidelines for Public Offerings on Disclosure of Shariah-compliant status - Amended in relation to paragraphs 3.08, 4.09 and 5.05 - *Amendment as at 25 October 2007*

- Malaysian Code on Corporate Governance - *Revised as at 1 October 2007*

- Guidelines on Regulation of Markets - Issued pursuant to section 377 of the Capital Markets and Services Act 2007 to provide a better understanding of how the SC will administer the law relating to markets as provided for under Part II of the Capital Markets and Services Act 2007 - *Date Issued: 28 September 2007*

- Guidelines on Take-Overs & Mergers - The Application of the Malaysian Code on Take-Overs & Mergers 1998 in relation to Securities Borrowing and Lending Transactions - *Effective Date: 28 September 2007*

- Guidelines on Licensing - Licensing Handbook and Licensing Application Forms issued pursuant to the Capital Markets and Services Act 2007 - *Date Issued: 28 September 2007*

BURSA MALAYSIA SECURITIES BERHAD (BMSB)

- Guidance Note 14/2007 to Amendments to the Listing Requirements of Main Board/Second Board and the MESDAQ Market in relation to Trading Halt - Issued in relation to Rule 16.03A and pursuant to Rule 2.09 of the Listing Requirements - *Effective Date: 3 September 2007*

- Amendments to the Listing Requirements of Main Board/Second Board and the MESDAQ Market consequential to the introduction of the Capital Markets and Services Act 2007 - *Effective Date: 28 September 2007 (except for amendments to paragraphs 8.15 and 11.02 of both the Listing Requirements of Main Board/Second Board and the MESDAQ Market which shall take effect simultaneously with the effective date of the provisions relating to take-overs and mergers in the Act)*

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:

mariette.peters@zulrafique.com.my
joanne.ching@zulrafique.com.my

The contributors for this **Brief** are:

- *Dato' Cecil Abraham*
- *Mariette Peters*
- *Joanne Ching Shan Mae*
- *Hoe Mei Lai*
- *Brian Lew*

Publisher:
Zul Rafique *& partners* Consultancy Sdn Bhd
Suite 17.01, 17th Floor, Menara PanGlobal
No 8 Lorong P Ramlee, 50250 Kuala Lumpur
Tel: 03-20788228; Fax: 03-20341913

Printer:
Max & Mint (M) Sdn Bhd
No 38-3, Jalan Bandar 3, Pusat Bandar Puchong,
Puchong, 47100 Selangor
Tel: 03-58821572; Fax:03-58821573

BRIEF-TAKE...

Abdul Rahman bin Mohd Redza (rahman@zulrafique.com.my)

Abdul Rahman bin Mohd Redza (Rahman as he is known to us) joined ZUL RAFIQUE *& partners,* as a Legal Associate in the Corporate Department in 2003.

Prior to joining ZUL RAFIQUE *& partners,* Rahman who graduated with Bachelor of Laws (Honours) from the London School of Economics & Political Science spent 6 years at the Attorney General's Chambers as Assistant Parliamentary Draftsman and Deputy Public Prosecutor.

Upon joining ZUL RAFIQUE *& partners,* Rahman was kept busy with his involvement in the study on the development of the water services industry in Malaysia, where he not only conducted a review and assessment of the issues, challenges and problems faced by the water and sewerage industry, he also assisted in the drafting of the Constitutional Amendment Act 2005, the Water Services Industry Bill and the National Water Services Commission Bill.

The quiet, reserved and unassuming Rahman is one who appreciates nature, hence exploring and fishing are listed as his favourite past-times.

Rahman is married to Aida Jaslina and they have a daughter, Aisyah Sophea.