the ZRp brief

Brief: 6/08 Folder 4/Oct - Dec 2008 KDN No: PP12857/08/2009(021767)

Members of the Sports Committee at the Annual Sports Dinner:
From left: President - Aniz Ahmad Amirudin (Associate - Dispute Resolution); Committee Member - Meserlissa Tham (Associate - Corporate Finance); Secretary - Raine Chin (Associate - Corporate Finance); Vice President - Hamsa Valli Palaniappan (Associate - Corporate Telco) and Treasurer - Joanne Ching (Associate - Knowledge Management)

ZUL RAFIQUE & partners

A BRIEF NOTE...

by Dato' Zulkifly Rafique

A special thanks to our Sports Club Committee

Twenty years ago, I would have scoffed at the idea that there was any co-relation between body and mind. In fact I remember pooh-poohing a message plastered on a sign board that I encountered on one of my trips, which read: "Eat Healthily, Exercise Regularly, Drink Moderately and Increase Productivity". Today however I am a health convert and I strongly believe that a healthy body translates into a healthy mind.

It is with that philosophy in mind that we formed an internal Sports Club at **ZUL RAFIQUE** *& partners*. Our Sports Club was formed not only to encourage members to participate in games and sports but for us to get to know one another better. The **ZUL RAFIQUE** *& partners* Sports Club just celebrated its seventh year by hosting a Hawaiian themed dinner on 21 November 2008.

I would like to thank our Sports Club Committee for promoting another year of good health, team spirit and camaraderie and for organising a fun-filled and eventful dinner party.

A Happy Year End to all our friends and may the New Year see you healthy and happy !

in this issue...

BRIEF-FLASH...

- **A DIRECTOR AT 18?** A proposal has been put forth by the Corporate Law Reform Committee (CLRC) to reduce the minimum age of a private company director from 21 to 18 by amending section 122(2) of the Companies Act 1965. This, it is said, is in line with section 2 of the Age of Majority Act 1971, which stipulates that a person who has reached the age of 18 is considered an adult.

- **EASIER LISTING RULE** It was announced on 20 November 2008 that the Government has decided to relax a major listing rule that would enable companies to list on the local stock exchange even if they failed to find Bumiputera investors to buy 30% of the shares. This move has been welcomed, especially by foreign investors.

- **FIRST FOREIGN VCC IN MALAYSIA** Venture Capital Company (VCC), Japan Asia Investment Co Ltd (JAIC), will now be able to undertake activities in Malaysia as it has just received approval from the Securities Commission (SC). This is the first foreign VCC in Malaysia.

- **ISLAMIC HEDGE FUNDS?** As an alternative Islamic investment, the proposal is to venture into Islamic Hedge Funds. This was suggested at the International Islamic Capital Forum in Kuala Lumpur recently. This suggestion is in light of the decrease in conventional hedge funds following the global credit crisis and to also introduce flexibilities within the syariah context.

- **LICENCES FOR INDIA AND KUWAIT FUND MANAGERS** The SC has issued licences to two foreign Islamic fund managers, namely India's Reliance Asset Management and Kuwait-based Global Investment House. Applications by other foreign financial institutions are currently being reviewed.

- **OPR REDUCED TO 3.25%** Bank Negara Malaysia has decided to reduce the overnight policy rate (OPR) from 3.5% to 3.25%.

- **PROPOSED LAW FOR CONTRACTORS** There has been a suggestion for the enactment of the Construction Industry Payment and Adjudication Act. This is in light of many disputes relating to non-payment. Other countries with similar statutes include Australia (Building and Construction Industry Security of Payment Act 2002), New Zealand (Construction Contracts Act 2002) and Singapore (Building and Construction Industry Security of Payment Act 2004).

FOREIGN FLASH

- **ASIA OFFICE FOR ARBITRATION COURT** The International Chamber of Commerce (ICC) International Court of Arbitration has chosen Hong Kong for its first overseas office. The move was apparently made in recognition of the growing importance of Asia-Pacific to the International Court of Arbitration.

- **BARBIE V BRATZ** In a victorious ruling in favour of Mattel (the manufacturer of Barbie), MGA Entertainment (the maker of Bratz) has been ordered to pay the former USD100 million. Mattel in its claim for copyright infringement contended that the designer of Bratz, Carter Bryant, came up with the idea while working at Mattel.
- **LOOK MA...NO WIGS!** English judges, in October 2008, departed from tradition when they ditched the wigs that were very much associated with the judiciary. The modernisation however does not affect judges in the criminal courts.
- **US CYBER BULLY SENTENCED** The trial of infamous cyber bully, Lori Drew, ended with the imposition of sentence of imprisonment and fine. Lori Drew faced charges of conspiracy and accessing protected computers without authorisation. The charges against Lori Drew were based on the allegation that she had posed as a 16 year old boy and assumed the pseudonym 'Josh Evans' with the intention of starting a relationship with 13 year old Megan Meier, a friend of Drew's daughter. Megan Meier committed suicide when the relationship with 'Josh Evans' turned sour. There was a strong reaction from the public about the suicide. The trial is seen as a landmark case relating to Internet law.
- **DNA DATABASES** The European Court of Human Rights has decided, in a landmark judgment, that to keep DNA samples of innocent persons is a violation of human right and therefore these records should be destroyed. The ruling was made in relation to Michael Marper and another known as S, who in separate cases had their DNA samples retained by the police although they were cleared of all suspicions.

BRIEFING...

COMPANY LAW

LIBERALISATION OF EQUITY HOLDING

The Deputy Prime Minister and Finance Minister of Malaysia, Dato' Sri Najib Tun Abdul Razak, had in November 2008 announced the liberalisation of the 30% minimum Bumiputera equity requirement in an Initial Public Offering (IPO).

In this article, we examine the implications of the liberalisation of this rule.

INTRODUCTION The number of IPO exercises in Malaysia have significantly decreased over the past few years, according to information provided by Bursa Malaysia Securities Bhd (Bursa Malaysia):

Year	Main Board	Second Board	MESDAQ Market	Total
2008	7	8	6	21
2007	17	8	3	28
2006	10	8	22	40
2005	16	17	46	79

Source: Website of Bursa Malaysia

The condition of the capital markets in Malaysia has deteriorated further as a consequence of the global financial crisis. Bursa Malaysia Chief Executive Officer, Datuk Yusli Mohamed Yusof, in a recent press conference, indicated that the target of 30 IPOs for year 2008 is unlikely to be met due to unfavourable market conditions. As part of its efforts to boost the capital markets of Malaysia, the liberalisation of the minimum 30% Bumiputera equity condition (the Liberalisation) was introduced to ensure that the capital markets of Malaysia remain progressive and competitive.

The Liberalisation shall not be perceived as an abolition of the 30% Bumiputera equity condition. The 30% Bumiputera equity participation at the point of listing will continue to be enforced, but with slight change in terms of methodology. The relevant provision in the Foreign Investment Committee's (FIC) ***Guidelines On The Acquisition Of Interest, Mergers And Take-Overs By Local And Foreign Interests*** governing the 30% Bumiputera equity participation in an IPO exercise continues to remain in force.

FIC GUIDELINES Paragraph 11.8 of the ***FIC Guidelines On The Acquisition Of Interest, Mergers And Take-Overs By Local And Foreign Interests*** states that the equity conditions that will be imposed on companies seeking listing on Bursa Malaysia are as follows:

Paragraph 11.8.1
Main Board or Second Board – upon listing, companies are required to have at least 30% Bumiputera equity unless exempted by the relevant Government agencies or regulatory bodies.

Paragaraph 11.8.2
Malaysian Exchange of Securities Dealing and Automated Quotation Berhad (MESDAQ) – upon listing, companies are required to comply with the Bumiputera equity condition.

FORMER POSITION Companies seeking listing, as well as those which are already listed, are required to allocate at least 30% equity to Bumiputera institutions and investors endorsed by the Ministry of International Trade and Industry (MITI). This condition has been applied consistently to all local companies seeking listing or local companies already listed. Companies that are unable to comply with this ruling are required to apply for an extension of time for compliance and this has caused delay in the listing of a company.

POSITION Under the revised policy, companies seeking listing will still have to comply with the minimum 30% Bumiputera equity condition with shares having to be made available to MITI-approved Bumiputera investors. In the event of unsubscribed shares, these shares will be offered to the wider Bumiputera public as part of the IPO balloting process. Companies will be deemed to have complied with the minimum 30% Bumiputera equity condition once they have completed this process.

In line with the Liberalisation, companies which have already been listed but are unable to meet the 30% Bumiputera equity requirement despite the various extensions of time granted, will be deemed to have complied with the 30% Bumiputera equity condition.

COMMENTS The Liberalisation is generally regarded as an improvement as it ensures competitiveness of the capital markets in Malaysia. The Liberalisation creates greater certainty and lesser listing time, and enhances the wider participation by the general Bumiputera public in an IPO exercise.

The relaxation is especially beneficial to smaller companies as well as companies from certain industries that are unable to attract Bumiputera investors. The relaxation will also encourage Malaysian companies to list in Malaysia rather than abroad.

However, due to the current global financial crisis, it would be unlikely for us to see many IPO exercises immediately after the introduction of the Liberalisation. As such, the impact of the Liberalisation will not be felt in the short term.

CIVIL PROCEDURE

REFORM OF THE CIVIL JUSTICE SYSTEM

The Civil Justice System in several countries has been going through a makeover. Some examples include United Kingdom (UK), Australia and Hong Kong (HK).

Dato' Cecil Abraham examined the possibility of similar reforms in Malaysia in his paper delivered at the recent LawAsia Conference held in Kuala Lumpur in October 2008.

This is an abridged version of Dato' Abraham's paper.

WHY REFORM? The simple and straightforward reason is the backlog of cases in the High Court and Subordinate Courts. The following are some of the proposals for the reform of the Malaysian Civil Justice System:

Simplification The rules should be simplified and the overriding principle should be the justice of the case.

Case Management There should also be amendments to the Case Management Procedural Rules, and the judge who deals with case management will have to be pro-active. It was stated by Mr Justice Spigelman at the Malaysian Annual Judges Conference in 2006:

> *The objective of case management is to reduce delays and minimise the costs of litigation… Litigants who are dilatory in their preparation, or who otherwise take up too much of the court's time, waste public resources and exacerbate the delays which other litigants have to suffer. It is perfectly appropriate for judges to take steps to ensure that litigation is conducted efficiently and expeditiously.*

Mediation at Case Management In suitable disputes, the judge should consider mediation. It is a moot point whether mediation should be made compulsory or otherwise.

In Singapore where mediation is voluntary, they have had an extremely high success rate. Malaysia has more than 200 qualified mediators, yet they are not fully utilised. In order for mediation to be successful, there must also be a change in the mindset of Malaysian lawyers and the litigants, namely that when the matter is referred to mediation, there should be a genuine desire to narrow the issues and try to mediate the dispute. However, it would be a futile and time-consuming exercise if parties and their counsel subject themselves to mediation merely because the judge had so ordered.

Pre-Action Protocol The purposes of a pre-action protocol are as follows: (a) to focus the attention of litigants on the desirability of resolving disputes without resorting to litigation; (b) to enable them to obtain the information they reasonably need in order to enter into an appropriate settlement; (c) to make an appropriate offer (of a kind which can have costs consequences if litigation ensues); and (d) if a pre-action settlement is not achievable, to lay the ground for expeditious conduct of proceedings.

The use of pre-action protocol was considered in HK in 2004, as part of the final report of the Chief Justice's Working Party on Civil Justice Reform. It was noted in the report that there was substantial evidence that pre-action protocols in England and Wales had led to significant front-loading of costs.

Pre-action protocols narrow the issues prior to issuance of proceedings. The outlined steps that parties should take, in particular, to seek and provide information prior to making a legal claim may result in settlements. This would in turn alleviate the backlog of cases. However, this change would require education and a shift in the very adversarial mindset of the Malaysian lawyer.

Improving Standards A change in our adversarial culture is also recommended. Our lawyers should be trained to focus on co-operation, candidness and respect for the truth. The paramount duty of the lawyers and litigants must be to the court to further the administration of justice as these are universal overriding obligations.

Pro-active Judges Judges should be pro-active in dealing with applications, especially those of an interlocutory nature. The present practice is for written submissions to be filed and this is a time-consuming exercise. The judges should also be familiar with the standard authorities in respect of applications for injunctions, summary judgments and striking out, so that they are able to deal directly and promptly with issues pertaining to the application. This is to ensure an efficient disposal of these applications, which would go to some extent in alleviating the backlog of cases.

> *The Malaysian Law reports are replete with decisions on technical objections. There has grown up an unnecessary jurisprudence on how jurats are to be formulated and on intitulement. Much judicial time and the exertion of counsel have been spent resulting in these decisions. The question is how do these cases advance the justice of the case?* - Dato' Cecil Abraham

Education of Lawyers Continued legal education of the lawyers should be made compulsory as is the case in other common law jurisdictions. Continued legal education is particularly necessary and important for senior members of the Bar who may not have kept up with recent developments in the law. The fact that one is experienced does not mean that one is learned in the law as there are many developments taking place in the law by way of decisions in various jurisdictions around the world and it is not always possible to keep up-to-date. Hence, continued legal education will enable lawyers of all ages to be up-dated and learn new methods of dealing with disputes.

Judicial Studies Board In the UK, a Judicial Studies Board (JSB) was set up in 1979. Its purpose is to ensure the provision of high quality training to judicial officers. It is suggested that a JSB be set up in Malaysia where newly-appointed judicial officers should attend for a fixed duration to be enlightened on aspects such as judicial temperament, writing of judgments, judicial ethics, conflict of interest and bias.

Ad Hoc or Judicial Commissioners Our judges are constantly inundated with work. They have to sit and hear interlocutory applications before they do so in open court for trials. In the past, Judicial Commissioners (JC) have been appointed to assist in the clearing of the backlog. This practice should be revived to enable judges to deal with trials on a continuous basis rather than the present practice of staggered hearings. This will help to reduce the backlog.

CONCLUSION The Civil Justice System in Malaysia is in need of radical reform. Our rules and procedures are antiquated and there has to be a paradigm shift to move away from these rules to adopt more progressive rules that are being followed and implemented in other common law countries. The legal fraternity should address the need to look comprehensively at our civil justice system with a view to adequately overhauling it so that Malaysia becomes a country where justice is not delayed. A commission for Reform of our Civil Justice System should therefore be established.

ISLAMIC BANKING

THE VALIDITY OF AL-BAI BITHAMIN AJIL In the recent case of ***Arab-Malaysian Merchant Bank Bhd v Silver Concept Sdn Bhd***, Datuk Abdul Wahab Patail decided that the Al-Bai Bithamin Ajil is against the Islamic Banking Act 1983. In light of this, the Islamic banking institutions and financial industries in Malaysia might have to re-examine their legal documentation pertaining to the popular Islamic finance instrument.

In this article, we examine the aspects of Al-Bai Bithamin Ajil and its compatibility with conventional financial instruments.

AL-BAI BITHAMIN AJIL Al-Bai Bithaman Ajil (BBA), or the deferred payment sale, has been a common instrument in the Islamic banking industry for nearly two decades. It is a Shariah concept introduced to facilitate growth and development of Islamic finance, and is used extensively in various Islamic financing instruments including bridging finance, cash line facilities, contract financing, project financing and letters of credit. The BBA refers to the sale of goods on a deferred payment basis with a profit margin agreed to by both parties. In the context of Islamic home financing, the goods are replaced with immovable property to be used as collateral for the subsequent transaction.

HOW IT WORKS The mechanics of a BBA is explained as follows. The borrower would first identify the asset that he intends to purchase and approach the bank to draw out a schedule of financing period and nature of repayment. The bank will purchase the asset that the borrower is interested in, and almost immediately sell the asset to the borrower at an earlier-agreed price, which consists of the actual cost of the asset paid by the bank and the bank's profit margin. The borrower will have to charge the property back to the bank as security in the event of default in repayment.

A conventional loan however sees the bank disbursing a sum of money to the borrower, which the latter would have to pay periodically, the sum loaned to him together with an amount known as interest. The BBA prides itself on the absence of the element of interest, which is perceived as ***riba'*** or usury. ***Riba'*** is strictly prohibited in Islam, but what constitutes ***riba'*** itself is very much a contention. Some hold that it is the excessive and exploitative charging of interest, while others opine that it is the very idea of interest that is prohibited. It is generally linked with the practice of giving out loans and demanding a return of such loan with a certain profit margin which fluctuates with the market. Since the BBA contains the sale and purchase of property as opposed to a loan, the relationship created would be that of a ***bona fide*** buyer and seller, and any profit thereon is regarded as a clean, agreed profit resulting from a sale.

DIFFERENCES BETWEEN BBA AND A CONVENTIONAL LOAN The crucial differences between a BBA facility and a conventional loan may be reduced to the following:

- The relationship between the bank and its customer in a BBA facility is that of a buyer/seller, as opposed to a relationship of creditor/debtor in a conventional loan.
- The BBA is void of any interest charges.
- The profit margin in a BBA facility is predetermined and fixed, as opposed to the interest rate in a conventional loan which fluctuates according to the bank's base lending rate.

In this instance, the BBA appears more attractive as it does not contain the element of ***riba'***, thus making it Shariah-compliant.

Furthermore, the fixed rate provides for better financial planning as it is not influenced by any fluctuation in interest rate. On the other hand however, under the current method of applying the BBA facility, the Property Sale Agreement usually contains a clause to the effect that should the customer default in payment, the bank may recall the facility, and the entire amount of the property's selling price shall become due. Because of the charge agreement, the bank may also be entitled to dispose of the property upon the customer's default in order to recover the full amount due. In the current practice, the selling price would include the purchase price together with the agreed profit margin of the bank for the entire tenure of the facility.

This risk, which is both burdensome and contrary to the spirit of disallowing ***riba'***, sits at the crux of the decision of the High Court.

FACTS OF THE CASE The plaintiff's claim in the High Court was to retrieve the full selling price under the facility agreement due to the defendant's default. The defendant submitted that the BBA was illegal, null and void on the basis that it was a scheme to defraud the public and the public authority in that although the loan agreement is couched and disguised as a sale transaction, the fact is that the BBA is nothing more than a loan transaction with a fixed interest.

In delivering judgment, Abdul Wahab Patail J effectively ruled that the application of the BBA was contrary to the Islamic Banking Act 1983, which mandates that all Islamic banking instruments must not contain elements prohibited in Islam.

It was stated by the learned judge:

> ***Where the bank purchased directly from its customer and sold back to the customer with deferred payment at a higher price in total, the sale is not a bona fide sale, but a financing transaction, and the profit portion of such Al-Bai' Bithaman Ajil facility rendered the facility contrary to the Islamic Banking Act 1983 or the Banking and Financial Institutions Act 1989, as the case may be.***

The learned judge reasoned that the agreements needed to be read together as a whole and not in isolation; to examine the substance and not its form – and while the agreements appear to be Shariah-compliant contracts, they were in fact nothing short of a circumvention of the prohibition against ***riba'***. Based on the analysis of the purpose and intent of the prohibition against ***riba'***, he said that the selling price should not be interpreted so as to impose a heavier burden than a conventional loan with interest.

Relying on the earlier case of ***Affin Bank v Zulkifli Abdullah*** [2006] 1 CLJ 483, it was stated that where there is a ***bona fide*** sale however, the court will look at the equitable interpretation of the sale price instead of the contracted sale price.

> ***The BBA facility is an established syariah compliant facility. It is a syariah form of financing conducted in the form of a sale with payment by instalment. There is a gulf of difference between the legal consequences of a sale and a loan. But having to pay is always having to pay.***
> - Abdul Wahab Patail J

THE IMPLICATIONS The ruling disallows banks from collecting the profit margin included in the selling price since the equitable interpretation ordered by the court allows banks to retrieve only the purchase price of the property alone in the event of a default. Furthermore, methods of documenting the entire BBA facility now require restructuring, and this may pose some difficulty on the Islamic banking institutions.

COMPANY LAW

THE LONG AND SHORT OF SHORT SELLING Short selling has been in the news recently in the midst of claims that it had played a role in the collapse of financial giant, Lehman Brothers.

In this article, we examine several aspects of short selling and its implications in the financial market.

WHAT IS SHORT SELLING Short selling (or sometimes known as shorting) is the selling of a security that is not owned by the seller, but that is promised to be delivered. In general, people think of investing as buying an asset, holding it while it appreciates in value and then eventually selling to make a profit. Shorting is the opposite, whereby an investor makes money only when a shorted security falls in value.

Simply put, the rule of short selling is to sell high, buy back low, and pocket the difference. Short sellers see an overvalued stock which they predict will drop in price and they borrow some shares from a brokerage firm and sell them immediately, at the current price. Sooner or later, the short sellers would have to buy back the same number of shares and return them to the brokers. If the share price drops, the seller makes a profit by buying back the shares at a lower price and returning them to the broker. If the price rises, the seller still buys the shares and end up taking the loss.

THE RISKS OF SHORT SELLING Short selling can be profitable but at the same time it can be risky as illustrated below:

- When you short sell, your losses can be infinite. A short sale loses when the stock price rises, and the stock is (theoretically, at least) not limited to how high it can go. On the other hand, a stock cannot go below 0, so your upside is limited. Bottom line, you can lose more than you initially invested, but the best you can earn is a 100% gain if a company goes out of business.

- Shorting stocks involves using borrowed money, otherwise known as margin trading. Just as when you go long on margin, it is easy for losses to get out of hand because you must meet the minimum maintenance requirement of 25%. If your account slips below this, you will be subject to a margin call – you will be forced to put in more cash or liquidate your position.

- If a stock start to rise and a large number of short sellers try to cover their positions at the same time, it can quickly drive up the price even further. This phenomenon is known as a short squeeze. Usually, news in the market will trigger a short squeeze, but sometimes traders who notice a large number of shorts in a stock will attempt to induce one. This is why it is not a good idea to short a stock with high short interest. A short squeeze is a great way to lose a lot of money extremely fast.

- Even though a company is overvalued, it could conceivably take a while to come back down. In the meantime, you are vulnerable to interest, margin calls, and being called away. Academics and traders alike have tried for years to come up with explanations as to why a stock's market price varies from its intrinsic value. However, they have yet to come up with a model that works all the time.

Despite the inherent risks, it is hard to deny that short selling makes an important contribution to the market. While regular trading fills the market with people who only want their stocks to go up, short selling creates people who want the market to go down, and hence does

a better job at keeping the market honest. As economics professor of Vanderbilt University, Peter Rousseau, puts it, "It's always good to have people on both sides".

Short selling provides liquidity, drives down overpriced securities, and generally increases the efficiency of the markets. Short sellers are often the first line of defense against financial fraud. While the conflicts of interest from investment banking keeps some analysts from giving completely unbiased research, work from short sellers is often regarded as being some of the most detailed and highest quality research in the market. It has been said that short sellers actually prevent crashes because they provide a voice of reason during raging bull markets.

Short selling also has its dark side, due to the actions of a small number of traders using unethical tactics to make a profit. This happens when traders manipulate stock prices in a bear market by taking short positions and then using a smear campaign to drive down the target stocks. This is the mirror version of the 'pump and dump', where unethical traders buy stock and issue false information that causes the target stock's price to increase. Short selling abuse like this has grown with the advent of the Internet and also the growing trend of small investors and online trading.

Every time a market crashes, short selling is blamed because even legitimate short transactions, with stocks that actually exist, drive prices down faster. The recent collapse of Lehman Brothers Holdings Inc also sees the condemning of short sellers and the Securities of Exchange Commission (SEC) has reacted by planning measures to rein in aggressive forms of short-selling. The measures include removing an exception for market makers in options on stocks from rules restricting naked short selling and a tightening of anti-fraud rules related to that activity.

LEGAL PROFESSION

THE TESCO LAW – IS IT LESS TAXING?

The UK Legal Services Act 2007 (the Act), which received the Royal Assent on 30 October 2007, took effect from 7 March 2008.

The Act, which allows supermarkets to offer legal services, has been dubbed the 'Tesco Law'. It seeks to liberalise and regulate the market for legal services in England and Wales, and to provide a new route to consumer complaints in relation to legal services.

We examine the provisions of the UK Legal Services Act 2007 and the reasons for and against the enforcement of certain aspects of the Act.

There are numerous reasons for the formation of the Act. The main reason is attributed to the high number of different bodies regulating different but often overlapping areas of the legal services market. This may cause confusion to the public. The market for legal services has grown in recent years and now requires common standards for professional practice. Hence, the enactment of the Legal Services Act 2007.

There are three main functions executed by the Act. Firstly, it creates a single supervisory body, the Legal Services Board (LSB) to supervise the regulation of legal services by all approved regulators. Secondly, the Act creates alternative business structures (ABSs) under Part 5 of the Act which provides for the licensing of new business structures in legal services allowing lawyers to form partnerships with non-lawyers (up to 25%). ABSs allow outside investment and external ownership of legal businesses comprising of multidisciplinary practices (providing legal and other services).

Thirdly, it creates the Office for Legal Complaint (OLC), which enables consumer to lodge complaints about legal services.

What seem to be most talked about are the ABSs which allow lawyers to form partnerships with non-lawyers, a concept that is almost unheard of in other jurisdictions. In Malaysia, this is expressly prohibited by rule 52 of the Legal Profession (Practice & Etiquette) Rules 1978.

This means that non-lawyers can now own law firms. The move is intended to encourage entrepreneurship and ultimately result in competitive prices for the consumer. In fact, it may even lead to law firms teaming up with insurers, IT firms or even supermarkets! This would also mean that the ABSs will be able to provide services other than legal services.

Although this move is seen as a breakthrough in the provision of legal services, high street law firms in the UK are not exactly thrilled. Their claim is that they will be disadvantaged by a competitive 'free-for-all' landscape and allowing non-lawyers to own law firms could compromise professional integrity.

At the Annual Dinner:
Standing from left: ***Jacqueline Leong***; ***Feonna Williams***; ***Jason Lee*** (Pupils); ***Teow Yi Jing*** (Associate – Corporate Conveyancing); ***Teh Hooi Woon*** (Associate – Corporate Energy & Utilities); Foreground: ***Irene Lim*** (Associate – Corporate Construction)

BRIEF-CASE...

TRADE MARKS – Opposition to registration of Trade Marks – Trade marks in respect of goods in Class 9 – Whether first respondent had prior use of trade mark – Whether appellant could claim monopoly over mark

WALTON INTERNATIONAL LTD V YONG TENG HING B/S HONG KONG TRADING CO & ANOR [2007] 3 CLJ 252, High Court

FACTS This is an appeal by the appellant against the decision of the Registrar of Trade Marks (Registrar) dismissing the appellant's opposition against the first respondent's application to register the trade mark GIORDANO for optical and sun glasses under Class 9. The appellant argued that it was the originator of the mark and that the first respondent had copied the appellant's trade mark. In reply, the first respondent argued that it had prior use of the mark since 1992 and there was no evidence that the appellant applied for registration of the mark in Class 9. Neither was there any evidence that the appellant had used the mark on goods in Class 9.

ISSUE One of the issues for consideration was whether the appellant could claim monopoly over the mark.

HELD In dismissing the appellant's appeal, the Court of Appeal held that the Registrar was right in dismissing the appellant's opposition to the first respondent's application to register the GIORDANO mark under Class 9. Whilst there was clear evidence that the respondent was the first person to have used the mark, there was no evidence that the appellant had sold goods bearing the said mark in Class 9 in Malaysia.

ARBITRATION – Agreement to refer dispute to arbitration – Jurisdiction of court – Whether arbitration agreement null and void – Arbitration Act 2005, section 10 – Contracts Act 1950, section 29

BORNEO SAMUDERA SDN BHD V SITI RAHFIZAH MIHALDIN & ORS [2008] 5 CLJ 435, Court of Appeal

FACTS The appellant and the respondents (except for the first and second respondents) were parties to a Joint Venture Agreement containing an arbitration agreement. The first and second respondents later commenced an action in the High Court against the appellant and another defendant. The appellant applied to stay the action, relying on section 10(1) of the Arbitration Act 2005. The High Court judge dismissed the application on the grounds that the arbitration agreement was null and void because it ousted the jurisdiction of the court. The appellant appealed.

ISSUE One of the issues for consideration was whether the arbitration agreement was void for having the effect of ousting the jurisdiction of the courts.

HELD In allowing the appellant's appeal, the court held that the arbitration agreement was not void as an agreement to arbitrate does not oust the jurisdiction of the ordinary courts. Otherwise, no arbitration clause would ever survive. This is clearly illustrated by exceptions 1[1] and 2[2] of section 29 of the Contracts Act 1950 and the ratio in ***Scott v Avery*** [1856] 10 ER 1121.

[1] ***Exception 1*** – This section shall not render illegal a contract by which two or more persons agree that any dispute which may arise between them in respect of any subject or class of subjects shall be referred to arbitration…

[2] ***Exception 2*** – Nor shall this section render illegal any contract in writing, by which two or more persons agree to refer to arbitration any question between them which has already arisen, or affect any law as to references to arbitration.

CONTRACT – Contract conditional upon obtaining approval from the relevant authorities – Waiver by conduct – Whether parties estopped from relying on condition precedent – Whether deposit paid recoverable

CHASE PERDANA BHD V MD AFENDI HAMDAN [2008] 5 CLJ 355, Court of Appeal

FACTS The appellant, wanting to acquire shares in one Jernih Kaya Sdn Bhd, paid RM1 million to the respondent as deposit and undertook to pay the balance RM4 million upon obtaining the approval of the Foreign Investment Committee (FIC) for the share acquisition. The appellant then made a public announcement about the acquisition. The approval, however, was subsequently refused and the appellant claimed the refund of the RM1 million deposit, arguing that the condition precedent in the agreement, which is the FIC approval, had not been obtained. The respondent, on the other hand, argued that the appellant had waived the requirement of the FIC approval by its conduct in making the public announcement.

ISSUES The issues for consideration were: (a) whether the parties were estopped from relying on the condition precedent; and (b) whether the deposit paid was recoverable.

HELD In dismissing the appellant's appeal, the court held that if parties to a contract conduct themselves in such a way as to show that the contingent condition is not significant, then neither party can subsequently seek to rely on such condition. On the facts of the case, it was held that the appellant and the respondent had conducted themselves in such a way as to disregard the requirement of the FIC approval.

BRIEF-UP...

GUIDELINES/RULES/ PRACTICE NOTES ISSUED BETWEEN OCTOBER AND DECEMBER 2008 BY BANK NEGARA MALAYSIA/ SECURITIES COMMISSION/ BURSA MALAYSIA SECURITIES BHD

BANK NEGARA MALAYSIA (BNM)

- *Joint Information Note on the Issuance of Foreign Currency-Denominated Bonds and Sukuk in Malaysia* – 12 November 2008

SECURITIES COMMISSION (SC)

- *Guidelines on Anti-Money Laundering – Guidelines on Prevention of Money Laundering and Terrorism Financing for Capital Market Intermediaries* – Amended on 15 December 2008 to insert new paragraphs 7.1.5 and 7.2.4A

- *Guidelines on Bond – Debt Securities – PN5: Application of the Guidelines to the Listing of Debt Securities on Bursa Malaysia under an Exempt Regime* – Date Issued: 4 December 2008

- *Guidelines on Bond – Islamic Securities – PN5: Application of the Guidelines to the Listing of Islamic Securities – PN5: Application of the Guidelines to the Listing of Islamic Securities on Bursa Malaysia under an Exempt Regime* – Date Issued: 4 December 2008

- *Guidelines issued under Stockbroking – Guidelines on Electronic Contract Notes* – Revision Date: 18 November 2008

BURSA MALAYSIA SECURITIES BERHAD (BMSB)

- *Amendments to the Listing Requirement for Main Board and Second Board – Listing of Sukuk and Debt Securities under an Exempt Regime* – Effective Date: 4 December 2008

GET MOTIVATED !

HOW DO YOU MEASURE SUCCESS

... BY JOSH HINDS

How do I know when I am successful? Boy, talk about the granddaddy of open-ended questions eh? Please bear with me though, as I believe we would all do well to give it some serious thought.

Have you ever noticed how many folks choose to equate success with a monetary figure – they place a dollar amount on it and assume that once that figure is attained they will suddenly feel successful.

Unfortunately, it is rarely as easy as saying that once we have 'X' number of dollars in the bank, we will somehow magically feel as though we've truly lived a life of worthwhile achievement.

With that said, the question is how do we get past the point where we're only equating success with a sticker price?

TAKE YOUR SUCCESS PERSONALLY...

Years ago, I heard success defined as, 'having the freedom to be yourself' and I think that is about the best definition I have heard to date. It is the gauge I use in my own life to know whether I am leading a successful life. My feeling is that as long as I have the resources necessary to move through life, fully able to pursue the goals and dreams that are important to me, then I am a successful.

At first, the above definition might appear to be a bit open-ended, but it should get you really thinking if you give it some serious thought. For starters, it gives us the room to dream and really think about what it would take to live out our goals and dreams – the things that we truly place personal value on – not just those things that outside forces may deem as important.

Say, for example, you want to be the best parent you can be. That does not take a lot of money does it? (unless you think to be a good parent you have got to have ample amounts of money to care for your kids).

You see, the point here is not what amount of money you have, or lack thereof. In fact, only you will be able to decide what is enough for you and your loved ones.

It is far easier to take due credit for our past achievements when we are not holding ourselves up to someone else's standard.

Competition is not a bad thing, but when it is the only measuring stick we use, it can end up working against us if we are not careful. In my humble opinion, success is best measured on a personal level. If we attempt to put a frame around what we see as being successful or not – if we view others and say, they have this many material possessions so they must be successful, we are missing out.

You see, when we frame what constitutes living a successful life around those things that we personally see as valuable, then we enjoy where we are now more. Life seems to offer up opportunities to us that we never seemed to notice before.

By the same token when we set out to do the best we can do, inevitably great opportunity finds us because we are doing what truly makes us happy. We are in alignment and ready for the opportunities that life will put in our path.

Do not misunderstand me here. I am not saying that acquiring wealth is not a result of achieving success. I am simply saying that at best it is a result that comes from following your dreams. Working towards achieving those things that you deem to be most important. I would also suggest that lack of financial rewards most definitely is not the only currency with which we should measure our level of success.

KEEP THIS THOUGHT IN MIND ***Success is a personal thing. Define it according to what you value most and you are far more likely to achieve it as well as enjoy it once you have it.***

Here's To Your Success,
Josh Hinds

Josh Hinds of http://GetMotivation.com specializes in helping people to achieve maximum success and live the life of their dreams. He is the author of Why Perfect Timing is a Myth: Tips for Staying Inspired and Motivated Day in and Day out! available at http://GetMotivation.com/booklet/

Partners unrecognisable... just before their performance at the **ZUL RAFIQUE** *& partners* Sports Club Annual Dinner: From left (standing): ***Michele Chong***; ***Lim Mun Lai***; ***P Jayasingam***; ***Darren Kor***; ***Rishwant Singh***; ***Nik Azli Abu Zahar*** From left (foreground): ***Wong Keat Ching***; ***Farah Mohd Said***

Painting a pretty picture at the **ZUL RAFIQUE** *& partners* Sports Club Annual Dinner:
From left: ***Vivien Wong*** (Corporate Conveyancing); ***Vivian Poon*** (Dispute Resolution); ***Elizabeth Lee*** (Dispute Resolution); ***Amy Lee*** (Dispute Resolution)

ZR*p* IN-BRIEF...

The ZR*p* 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
mei.lai@zulrafique.com.my

The contributors for this **Brief** are:

- *Dato' Cecil Abraham*
- *Mariette Peters*
- *Joanne Ching Shan Mae*
- *Choo Shi Yi*
- *Hoe Mei Lai*
- *Muhamad Anwar Zamree*

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

Printer:
Max & Mint (M) Sdn Bhd
32-2, Jalan Puteri 5/5, Bandar Puteri Puchong
Puchong, 47100 Selangor Darul Ehsan
Tel: 03-80628285; Fax: 03-80628295

BRIEF-TAKE...

Michele Chong (michele@zulrafique.com.my)

Michele Chong has been in practice for 10 years, with 8 years in **ZUL RAFIQUE** *& partners*. She was made a partner of the firm in January 2008. A graduate of the University of East Anglia, United Kingdom, Michele is primarily engaged in the practice area of Infrastructure and Construction.

She has advised and drafted various construction contracts and Engineering, Procurement and Construction Contracts (EPCC) for national / international projects, and has been involved in contract implementation risk management advisory work. Her experience extends to the East Coast Economic Region Master Plan study conducted from February to September 2007.

Although inundated with work, Michele manages to find time to unwind and destress by dancing (she has a passion for Salsa), horse-riding and golf.