

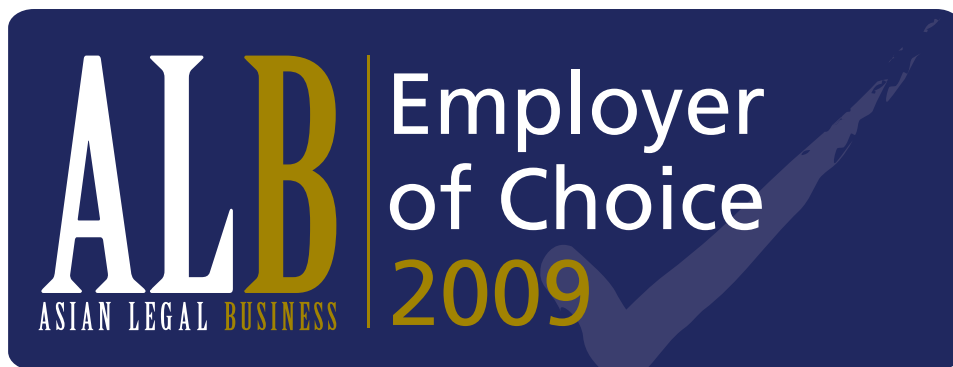


the **ZRp** brief

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ZUL RAFIQUE & partners was recently awarded Employer of Choice (Malaysia) 2009 by Asian Legal Business

ZUL RAFIQUE & partners

A BRIEF NOTE...

by Dato' Zulkifly Rafique



ALB Employer of Choice 2009

Anyone who manages a law firm will know that it is not an easy task. Exciting? Maybe. Challenging? Definitely!

The firm has been through an exciting journey. 1st December 1999 feels like just yesterday. As we approach our 10th year, I can't help but feel nostalgic, but as I look back, I can honestly say that I would not change a thing. That does not mean that it has been a breeze here at **ZUL RAFIQUE & partners**. We have had a variety of moments and each one has been a cathartic experience, especially for me.

It is on that note that I was beaming with pride when informed that we were awarded **Employer of Choice 2009** by the **Asian Legal Business**. The award was based on a print and online survey conducted among over 20,000 lawyers region-wide. For us, it is a great way of starting the New Year.

To me, the award is a true reflection of teamwork, one of the values that we truly subscribe to. Teamwork really does divide the tasks and multiply the success.

I would like to thank each and everyone who made this award possible and I look forward to more accolades.

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BRIEF-FLASH...

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The highlights in this Folder include:

- A Cyber Court?
- Judicial Appointments Commission Act 2009
- Legal Framework of LOFSA
- Sexual Harassment Act?
- Madoff Pleads Guilty
- UK's Cohabitation Bill

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The articles featured are:

- *Internet Defamation...A Case of Ceaseless Liability?*
- *From Pioneer to Prisoner*
- *A Sexual Harassment Act?*
- *The Judicial Appointments Commission Act 2009 – A Panacea to the Judicial Peril?*
- *The Malaysian Anti-Corruption Commission Act 2009*

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Our Brief-Case contains the following:

- *Puspavathy Thaveethu v Majlis Perbandaran Klang & Ors and Other Appeals*
[2008] 6 CLJ 626, Court of Appeal
- *Dato' Ting Cheuk Sii v Datuk Hj Muhammad Tufail Mahmud & Ors & Another Appeal*
[2009] 1 CLJ 899, Court of Appeal
- *Badan Peguam Malaysia v Kerajaan Malaysia*
[2009] 1 CLJ 833, Court of Appeal

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Legislation Update:

- Judicial Appointments Commission Act 2009
- Malaysian Anti-Corruption Commission Act 2009
- Guidelines/ Rules/ Practice Notes issued between January and March 2009 by Securities Commission and Bank Negara Malaysia

BRIEF-FLASH...

- **A CYBER COURT?** Energy, Water and Communications Minister, Datuk Shaziman Abu Mansor has suggested the setting up of a cyber court to deal with the ever-increasing number of cases involving cyber offences. ☞
- **CENTRAL BANK ACT OVERHAUL** A new Central Bank Act is expected to be tabled in Parliament. The new statute is to provide the central bank with the powers to perform its role and function effectively. This was announced at the 50th anniversary celebrations of Bank Negara Malaysia. ☞
- **CREDIT REFERRAL AGENCIES BILL IN THE PIPELINE?** A Bill governing credit referral agencies is currently being drafted. Under the Bill, which is expected to be tabled in Parliament this year, all credit referral agencies, including CTOS (Credit Tip-Off Service Sdn Bhd), will be placed under the supervision and guidance of the Finance Ministry and Bank Negara Malaysia. ☞
- **DNA IDENTIFICATION BILL AMENDED** The DNA Identification Bill, which sparked some controversies last year, has now been subject to amendments. The amendments are expected to allow for more options on those eligible to be appointed as director of the DNA Bank. ☞
- **FEDERAL COURT DISMISSES BAR COUNCIL'S APPLICATION** The Federal Court dismissed the application by the Bar Council to review its (the Federal Court) own decision on the validity of the appointment of Dr Badariah Sahamid as Judicial Commissioner. ☞
- **ENFORCEMENT AGENCIES INTEGRITY COMMISSION BILL** A Bill on the Enforcement Agencies Integrity Commission is expected to be tabled soon in Parliament. Procedures and guidelines are to be set out by the Commission on how enforcement is to be conducted. ☞
- **JUDICIAL APPOINTMENTS COMMISSION ACT 2009** Although many have welcomed proposals for reform of the judiciary, the Judicial Appointments Commission Act 2009, which came into force in February 2009, continues to attract a debate from several quarters on the effectiveness of the statute. ☞
- **LEGAL FRAMEWORK OF LOFSA** Changes to the legal framework of the Labuan Offshore Financial Services Authority (LOFSA) are expected to be tabled in Parliament in March 2009. ☞
- **MANAGING JUDGES APPOINTED** In a move to improve the justice delivery system, two Court of Appeal judges were appointed as Managing Judges. The objective of the exercise is to hasten the disposal of cases. The two appointed are Dato' James Foong and Dato' Md Raus Sharif. ☞
- **NEW WHOLESALE FUNDS GUIDELINES** The Securities Commission has issued new guidelines to give greater flexibility for licensed fund managers to provide innovative products. The Wholesale Funds Guidelines, which took effect on 18 February 2009, will replace the Guidelines on Restricted Investment Scheme and the provisions on wholesale funds in the Guidelines of Unit Trust Funds. ☞

- **SEXUAL HARASSMENT ACT?** The Government is planning to introduce the Sexual Harassment Act to address issues relating to sexual violence and harassment against women. Although there is a Code that deals with issues relating to sexual harassment, it is only a guideline and does not have the force of law. ❧
- **ZUL RAFIQUE & partners – EMPLOYER OF CHOICE 2009** ZUL RAFIQUE & partners was declared Employer of Choice 2009 by the Asian Legal Business based on a print and online survey conducted among over 20,000 lawyers region-wide. ❧
- **BAR COUNCIL OF INDIA BRACES ITSELF** The Bar Council of India (BCI) has indicated its readiness to discuss the possibility of liberalising the Indian legal profession. BCI is expected to take a stand on the position following ripples caused by the 'best friend's agreement' between UK's Clifford Chance and India's AZB & partners. ❧
- **MADOFF PLEADS GUILTY** Bernard Madoff pleaded guilty to 11 charges of fraud perpetrated via a Ponzi scheme. He could face up to 150 years' imprisonment. ❧
- **NEW LAW IN MACAU** A new state security law has been enacted to take effect in Macau. The law, which punishes political crimes against the Chinese government, is said to fulfill article 23 of the Basic Law of China which governs the return of the former Portuguese colony of Macau and former British colony of Hong Kong to Chinese sovereignty. ❧

FOREIGN FLASH

- **ASEAN CHARTER COMES INTO FORCE** On 15 December 2008, the Association of South East Asian Nations (ASEAN) signed the Charter that makes ASEAN a legal entity with the anticipation of a single market within seven years. The Charter also provides guidelines for economic and political integration. ❧
- **EAT LANDMARK RULING** The Employment Appeal Tribunal (EAT) of the UK, in the case of *Leslie Seldon v Clarkson Wrights and Jakes*, has ruled that partners may be forced to retire upon reaching a certain age. The dispute arose when Seldon, a former senior partner at Clarkson Wrights and Jakes, a law firm based in Kent, sued the firm after it had forced him to leave at 65, which was the mandatory retirement age for the firm's employees. ❧
- **SHORT-SELLING AND MTM RULES REVIEWED** It is said that the US will be reviewing its short-selling and mark-to-market (MTM) rules. These rules are viewed as having caused the eventual credit crunch in the US. ❧
- **SWISS BORDERS OPENED** With Switzerland joining the Schengen Agreement, cross-border passport checks at the Swiss border will be a thing of the past. The Schengen Agreement was initially signed in Schengen, Luxembourg in 1985 to enable people to move freely between countries that are parties to it. ❧
- **UK'S COHABITATION BILL** A Cohabitation Bill is being promoted in the UK to provide legal rights to couples in a committed relationship who have lived together for at least two years. ❧

BRIEFING...

CYBER LAW

INTERNET DEFAMATION... A CASE OF CEASELESS LIABILITY?

The recent decision of the European Court of Human Rights in *Times Newspapers Limited v United Kingdom* has resurrected the discussion on the multiple publication rule enunciated in the 1849 case of *Duke of Brunswick v Harmer*. In that case, it was stated that each individual publication of a libel gives rise to a separate cause of action, subject to its own limitation period.

In this article, we examine several aspects of the multiple publication rule in Internet defamation.

THE MULTIPLE PUBLICATION RULE In the context of defamation, the rule under common law means that every sale and distribution of a publication of the defamatory material is a separate publication. A plaintiff therefore could sue for defamation over any of them. This means that each time a defamatory article is brought to the attention of a third person, a new publication has occurred, and each and every publication is a separate actionable tort. This also means that each time a magazine containing a libelous statement is sold or distributed, a new publication has occurred and a fresh tort committed.


In the context of the Internet, every 'hit' or viewing of an online article constitutes a new publication of the defamatory statements. Hence, a person may be liable for several publications which ensued from his original defamatory statement.

This rule became prominent after the decision in *Duke of Brunswick v Harmer*, which was referred to and applied in more recent cases such as *Berezovsky v Michaels* (2000); *Godfrey v Demon Internet Service Ltd* (2001); *Dow Jones v Gutnick* (2002); and *Loutchansky v Times Newspaper* (2002).

TIMES NEWSPAPERS LTD V UNITED KINGDOM

In *Times Newspapers Ltd v United Kingdom*, *The Times* had, in 1999, published two articles which defamed GL. GL had brought proceedings against *The Times* but the articles remained on the website as part of its archives. Counsel for *The Times* argued that 'an article might be read in 100 different countries with 100 different libel laws, giving rise to multiple liability with no clear guidance on how long is too long'. The court however found that *The Times* had defamed GL by the continued publication on its Internet site of two articles. The Court also ruled that in the context of the Internet, the common law rule according to which each publication of a defamatory statement gave rise to a separate cause of action means that a new cause of action accrued every time the defamatory material was accessed.

CEASELESS LIABILITY? In the US, the multiple publication rule has been discarded in favour of the single publication rule – where a publisher can only be sued for libel over the original publishing of the text and not the subsequent distribution or additional printings of the same text. The rule was addressed in the US case of *Firth v State of New York* (2002).

It has been argued, therefore, that the application of the common law rule to Internet publication is most unsuitable as it imposes too onerous a burden on publishers. But until and unless the courts break free of the traditions of the common law, it appears that Internet publishers would continue to have ceaseless liability. 

CORPORATE CRIME

FROM PIONEER TO PRISONER On 12 March 2009, Bernard (Bernie) Lawrence Madoff pleaded guilty to 11 counts of fraud. The former chairman of the NASDAQ stock exchange, Madoff was also the founder of Wall Street firm, Bernard L Madoff Investment Securities LLC.

In this article, we examine the Ponzi scheme that Madoff is said to have used to swindle his investor clients. How did he deceive hundreds of investors and what does the future hold for Bernie Madoff?

THE PONZI SCHEME A Ponzi scheme is one offering unusually high returns, where early investors are paid off with money from later investors. The 'Ponzi scheme' circa 1920 was named after Charles Ponzi, an Italian immigrant who began advertising that he could make a 50% return for investors in only 45 days. Incredibly, Ponzi did exactly that! A few months later, he was making millions as people mortgaged their homes and invested their life savings. As with most frauds, he was discovered and indicted on 86 counts of fraud. A Ponzi scheme is now akin to 'one big pyramid lie'.

THE PIONEER Madoff had an illustrious career and had in his resume, listed as his job titles, businessman, treasurer, chairman and even philanthropist. Bernard L Madoff Investment Securities LLC was one of the top traders in securities in the US by the year 2000, holding approximately USD 300 million in assets. The firm was one of the first to use innovative computer information technology to disseminate stock quotes. Through the efforts of Madoff, NASDAQ was able to attract listings from top-tier technology companies such as Apple, Sun Microsystems, Cisco Systems, and later, search powerhouse Google.

The downfall of Madoff began around the first week of December 2008 during the initial ripples of the global economic meltdown when the demand for cash withdrawals from investors increased. Madoff struggled to meet their requests.

THE PRISONER Madoff was arrested on 11 December 2008 and charged for violating anti-fraud provisions under the Securities Act 1933, Securities Exchange Act 1934 and the Investment Advisers Act 1940. The offences included securities fraud, mail fraud, three counts of money laundering, making false statements and perjury.

Madoff revealed that he did not invest the money obtained from investors into the share market and that he had used the money entrusted to him by later investors to pay off the early ones. He also admitted that he falsely told investors that he had invested their money in buying and selling stocks. He had apparently transferred money from his fraudulent operations into his wholesale stock-trading firm, which he otherwise described as an honest, legitimate business.

THE PENALTY On 12 March 2009, he pleaded guilty to all counts and was immediately ordered by the judge to be jailed while waiting for sentencing, which is set for 16 June 2009. He faces up to 150 years' imprisonment or fine or both and the possibility of having to pay restitution to his victims and to forfeit proceeds or property from his scheme.

CONCLUSION The Madoff scandal has left many baffled and some amused at the fact that it took this long to discover the extent of his deception. The future does not look too bright for Madoff and 13 March 2009 is a new dawn as Madoff wakes up not as the pioneer who chartered progress in the financial world, but as a prisoner, identified merely as Inmate Number 61727054. ☹️

INDUSTRIAL RELATIONS

A SEXUAL HARASSMENT ACT? The Government's call to introduce the Sexual Harassment Act has been applauded especially since there are no specific laws dealing with the issue.

In this article, we examine concerns relating to sexual harassment in Malaysia and the viability of an Act to deal with it specifically.

WHAT IS SEXUAL HARASSMENT? *"Sexual harassment is not about sex. It is about power."* The famous line from Michael Crichton's *Disclosure* sums up what sexual harassment is all about.

Sexual harassment may be in several forms, including physical, verbal, non-verbal, visual and psychological. According to article 4 of the Code of Practice on the Prevention and Eradication of Sexual Harassment in the Workplace (Sexual Harassment Code), which was launched on 1 March 1999, sexual harassment is defined as:

...any unwanted conduct of a sexual nature having the effect of verbal, non-verbal, visual, psychological or physical harassment:

- *that might, on reasonable grounds, be perceived by the recipient as placing a condition of a sexual nature on her/ his employment; or*
- *that might, on reasonable grounds, be perceived by the recipient as an offence or humiliation, or a threat to her or his well-being, but has no direct link to her/ his employment.*

At the workplace, sexual harassment is confined NOT only to the office but extends to work-related situations such as social functions, conferences, workshops or training sessions and even during work assignments outside the office.

APPLICABLE LAWS The most relevant legislation that currently addresses sexual harassment is found in section 509 of the Penal Code. The section reads:

Whoever, intending to insult the modesty of any women, utters any words, makes any sound or gesture or exhibits any object, intending that such word or sound shall be heard, or such gesture or object shall be seen by such woman, shall be punished with imprisonment for a term which may extend to 5 years or with fine, or with both.

Besides the Penal Code, reference may be made to the Sexual Harassment Code. The Sexual Harassment Code, however, is merely a guideline used by the government to tackle the problem. It outlines the statement of purpose; legal definition of harassment; descriptions of behaviour that constitute harassment; how employees should handle harassment; how the company handles complaints; what kind of disciplinary action will entail; and name and phone numbers to lodge a complaint. However, since the Sexual Harassment Code does not have the force of law, the need for a statute appears pressing.

Sexual harassment is not about sex. It is about power - Michael Crichton (Disclosure)

It was reported in February 2009 that the Ministry of Women, Family and Community Development was in discussion with the Human Resources Ministry about the proposed Sexual Harassment Act to suggest the best way to enhance efforts to deal with problems affecting women as well as the existing guidelines.

It is hoped that the legislation against sexual harassment will provide victims with access to independent legal dispute resolution. This includes the establishment of special grievance mechanisms to encourage victims

to come forward, in a safe and supportive environment, so that the facts may be ascertained and the aggressor disciplined if necessary. Besides that, it is also important to find employers liable if they fail to act or investigate complaints of sexual harassment in the workplace.

“HE SAID, SHE SAID” One of the hurdles in addressing issues of sexual harassment is defining it. Since sexual harassment may be in various forms, one man's perception of the same may not be shared by others. For example, would complimenting a woman amount to sexual harassment?

The issue of proof may pose a problem as in many cases involving sexual harassment, it is the words of the complainant against those of the alleged abuser. The Anita Hill-Clarence Thomas controversy is a classic example of doubts that linger long after the allegations of sexual harassment were made.

Problems may also arise if the incident is not reported as soon as possible. This was highlighted in the High Court case of *Jennico Associates Sdn Bhd v Lilian Therera De Costa* (1998) where the complainant's evidence was doubted because she had not lodged a police report, nor did she inform her husband about it immediately after it had occurred (though she had eventually related the incident to both her friend and husband). The decision of the Industrial Court was quashed.

CONCLUSION Addressing sexual harassment therefore involves not only having specific legislation to deal with it. There is also a need to examine the rules of evidence and procedure as it defeats the purpose of having laws but not being able to prove the offence. ❧

LEGAL PROFESSION

THE JUDICIAL APPOINTMENTS COMMISSION ACT 2009 – A PANACEA TO THE JUDICIAL PERIL?

The Judicial Appointments Commission Act 2009 (JAC Act) took effect from 2 February 2009. Although dissatisfaction was made known in several forms, the intent and spirit of the statute are noble.

In this article, we examine several aspects of the JAC Act, especially the provisions that are said to be thwarting the independence of the judiciary.

THE HISTORY From the removal of the former Lord President more than two decades ago, to the infamous video clip of a conversation purportedly between a lawyer and a senior member of the judiciary, the last 20 years in Malaysia has witnessed a judicial potpourri of pitfalls and perils.

The allegation surrounding the video clip had led to the establishment of the Royal Commission of Inquiry into its contents. The Royal Commission found that judicial appointments are open to manipulation by the Executive and private citizens, and that prominent personalities were involved in an 'insidious movement' to fix the appointment of judges.

The findings of the Royal Commission left many in the legal profession disillusioned and demoralised. Some were still reeling from the wounds left in 1988 by the removal of the former Lord President and the suspension of five senior judges. In implementing damage-control measures, on 17 April 2008, at a special dinner organised by the Bar Council, the Prime Minister Datuk Seri Abdullah Ahmad Badawi in his speech, *Delivering Justice, Renewing Trust* announced the ex-gratia payment for 'pain and loss' suffered by the six

judges in the 1988 Judicial Crisis. It was then that the Prime Minister also promised for the establishment of a Judicial Appointments Commission (the Commission), an item on the wish-list of many, including the Malaysian Bar Council.

THE JAC ACT The promise materialised in the enactment of the Judicial Appointments Commission Act, a statute that was subject to scrutiny from the day it was tabled in Parliament. The most prominent criticism is the extent of power vested in the Prime Minister in the appointment of the members of the Commission. Section 5 reads:

- (1) *The Commission shall consist of the following members:*
- (a) *the Chief Justice of the Federal Court who shall be the Chairman;*
 - (b) *the President of the Court of Appeal;*
 - (c) *the Chief Judge of the High Court in Malaya;*
 - (d) *the Chief Judge of the High Court in Sabah and Sarawak;*
 - (e) *a Federal Court judge to be appointed by the Prime Minister; and*
 - (f) *four eminent persons, who are not members of the executive or other public service, appointed by the Prime Minister after consulting the Bar Council of Malaysia, the Sabah Law Association, the Advocates Association of Sarawak, the Attorney General of the Federation, the Attorney General of a State legal service or any other relevant bodies.*

THE CONTROVERSY The Prime Minister has a pivotal role not only in the appointment of the four eminent persons under section 5 but also in the determination of their emoluments under section 7 and their dismissal from the Commission under section 9, which the Prime Minister may effect without giving any reasons.

Another aspect of the JAC Act is section 28, which is seen as a dilution of the powers of the members of the Commission. Section 28, which refers to *Tender of Advice*, reads:

Where the Prime Minister has accepted any of the persons recommended by the Commission, he may proceed to tender his advice in accordance with Article 122b of the Federal Constitution.

The findings of the Royal Commission left many in the legal profession disillusioned and demoralized. Some were still reeling from the wounds left in 1988 by the removal of the former Lord President and the suspension of five senior judges.

It is said that section 28 of the JAC Act does not explicitly stipulate that the Prime Minister must recommend names that are proposed by the Commission. The usage of the word 'may' in section 28, coupled with the fact that he may request for a further two names without giving any reasons under section 27¹, clearly indicates that the Prime Minister is allowed to disregard the considered decision of the Commission.

CONCLUSION Although there have been many criticisms leveled against the JAC Act, only time will tell if it is a success or otherwise. Attaining absolute independence may seem, at this moment, like a Herculean task, but it is definitely a step forward towards attaining a more independent judiciary. ✍️

¹ Section 27 which refers to *Request for further selection by the Prime Minister* states that *The Prime Minister may, after receiving the report under section 26, request for two more names to be selected and recommended for his consideration with respect to any vacancy to the office of the Chief Justice of the Federal Court, the President of the Court of Appeal, the Chief Judge of the High Court in Malaya, the Chief Judge of the High Court in Sabah and Sarawak, judges of the Federal Court and the Court of Appeal, and the Commission shall, as soon as may be practicable, comply with the request in accordance with the selection process as prescribed in the regulations made under this Act.*

ANTI-CORRUPTION LAWS

THE MALAYSIAN ANTI-CORRUPTION COMMISSION ACT 2009

The Malaysian Anti-Corruption Commission Bill was tabled for first reading on 10 December 2008 and took effect from 1 January 2009, repealing the Anti-Corruption Act 1997.

In this article, we examine several aspects of the new Act.

THE MACC The Malaysian Anti-Corruption Commission (MACC) replaces the Anti-Corruption Agency (ACA). The MACC is modeled after Hong Kong's Independent Commission Against Corruption (ICAC). The Act contains provisions to monitor the professionalism of MACC officials through the formation of an anti-corruption advisory board, a special committee on corruption and a complaints committee. This is one of the steps taken to heed the demands of the public for better policing of corruption. There are already proposals to provide higher wages to staff of the MACC and increase to the workforce with more than 5,000 places to be filled to ensure that the MACC achieves its end objectives.

THE ICAC The ICAC, which is regarded worldwide as the benchmark of an effective and independent graft-fighting unit, was set up in 1974 to fight the plague that was rampant in Hong Kong. The ICAC sparked a real cultural revolution by changing the working culture and people's attitude towards taking and giving bribes, which has reduced the number of corruption cases in Hong Kong. Hong Kong was ranked fourth in Asia on the World Bank's Control of Corruption Index (CCI) 2008.

In the recent Transparency International's Corruption Perceptions Index (which ranks countries according to degrees to which corruption is presumed to exist within the bureaucracy and society), Hong Kong was ranked 12th, above even the likes of the US, whilst Malaysia was ranked 47th.

ISSUES Several issues surrounding the MACC Act were raised and publicly discussed. *Firstly*, the question was whether the MACC should be placed under Parliament as a check against unfair acts of persecution. The response was in the negative as it was felt that the viewpoints of parliamentarians were not always objective. Furthermore, the MACC should not be influenced by partisan politics in fighting corruption. There would, however, be a special committee made up by parliamentarians to be formed instead of a parliamentary committee on corruption that would look into problems regarding the investigation of corruption cases.

Secondly, there was the suggestion that prosecution powers should be placed under the chief commissioner of the MACC as there would be an issue of separation of powers between the Public Prosecutor and the MACC. Critics say that anti-corruption officers must be given full discretion to charge in court anyone under investigation and found to be involved in corrupt practices, without reference to the Attorney General's Chambers for permission.

Thirdly, the contents of the MACC Act were not made public before they were introduced. Critics have therefore questioned the alleged cloak of secrecy that enveloped the drafting of the MACC Act. The government though replied that there exists a sort of urgency in introducing the MACC Act, which had been put on the shelf for three years before being tabled.

MACC v ACA Some of the clauses of the MACC Act are considered to be progressive, as it will give wide new powers to officials to investigate and seize records, including bank accounts. It will also provide a wider scope for investigation as the MACC is also empowered to investigate graft in the private sector with total anonymity promised for whistleblowers. Five 'independent' committees are also to be formed to mitigate any excess of executive authority over the MACC, ie the Anti-Corruption Advisory Board; Special Committee on Corruption; Operations Review Panel; Corruption Prevention and Consultative Panel; and a Complaints Committee. The committees are there to provide check and balances to the MACC, and to make further recommendations on policies and functions.

The definition of 'relations' in the MACC Act will now cover more than just immediate family members and spouses. With the new law, action can be taken against in-laws, uncles, aunts, cousins, nephews and nieces, who abetted in corruption. This group of people was not included in the Anti-Corruption Act and action could not be taken against them as they were not specifically mentioned. This group of people was not included in the repealed Anti-Corruption Act 1997 and action could not be taken against them as they were not specifically mentioned. This shortcoming, however, will be overcome by introducing the new definition in the Act and their offences listed in sections 23 and 36. The MACC Act would remove the minimum jail sentence of 14 days but would maintain the maximum 20 years' jail sentence. This is said to encourage those who fear jail sentences to plead guilty and cut down on spending too much time and cost on the case. Its definition of 'public servants' has also been expanded, and it would cover a much wider spectrum of people, including sports associations, where people in such organisations are seen as performing a public function which turns them into public servants. The MACC Act has provisions that provide for the recruitment and retrenchment of its staff, independent of the Public Service Department, and this further makes them free from the bureaucracy. The head of the MACC would be appointed by the King on the Prime Minister's advice. ✨

✨ BRIEF-CASE...

LAND LAW – Indefeasibility of title and interests – Purchase of good faith and valuable consideration in public auction sale and duly registered as proprietor – Whether purchaser acquired indefeasible title and interest – Section 340(2)(b) of the National Land Code 1965

PUSPAVATHY THAVEETHU V MAJLIS PERBANDARAN KLANG & ORS AND OTHER APPEALS [2008] 6 CLJ 626, Court of Appeal

FACTS The eighth defendant, who is one of the proprietors of the land, failed to pay assessment, which led the plaintiff to apply for an order for sale in the High Court. The High Court granted the order for sale and the land was sold to the second intervener who registered as the proprietor of the land. The second intervener subsequently charged the said land to the first intervener, OCBC Bank (Malaysia) Bhd, which was registered as charge of the land. The eighth defendant then applied to set aside the order for sale, contending that it was a nullity since the originating summons was not served on her.

ISSUES One of the issues for consideration was whether section 340(2)(b) of the National Land Code 1965 was applicable on the ground that the certificate of sale was an insufficient or void instrument for the transfer of ownership of the land to the second intervener.

HELD It was held that the second intervener acquired an indefeasible title or interest to the land upon being registered as the registered proprietor. He was a purchaser in good faith and for valuable consideration, having paid the balance of the purchase price within the stipulated time. The Federal Court decision of *Adorna Properties Sdn Bhd v Boonsom Boonyanit* (2001) was followed. ✨

LEGAL PROFESSION – Advocate & Solicitor seeking right of audience – Whether advocate of the High Court of Malaya had right to appear before Court of Appeal sitting in Putrajaya but hearing appeal against the decision of the High Court of Sarawak – Advocates Ordinance of Sarawak – Courts of Judicature Act 1964 – Legal Profession Act 1976

DATO' TING CHEUK SII V DATUK HJ MUHAMMAD TUFAIL MAHMUD & ORS & ANOTHER APPEAL [2009] 1 CLJ 899, Court of Appeal

ISSUE The issue before the Court of Appeal against the decision of the High Court of Sarawak was whether counsel for the appellant, who is an advocate of the High Court in Malaya could lawfully represent the appellant in the appeals. It was the argument of the respondents that counsel for the appellants was barred from appearing in the Court of Appeal since the appeals had been posted in Sarawak, and sections 8, 10 and 16 of the Advocates Ordinance of Sarawak (the Ordinance) were referred to in aid of this argument.

HELD In dismissing the respondent's objection, the Court of Appeal referred to section 39 of the Courts of Judicature Act 1964 to say that based on that section and the proviso thereof, the President of the Court of Appeal is empowered to direct the Court of Appeal to convene a sitting anywhere within Malaysia and to direct any appeal to be heard anywhere within Malaysia. This means that an appeal against the decision of the High Court in Sabah and Sarawak may be heard by this court anywhere in the States of Malaya. Counsel for the appellants therefore had the right of audience before this court when it sits in Putrajaya. ✂

CONSTITUTIONAL LAW - Whether Federal Court had jurisdiction to review its own decision under rule 137 of the Rules of the Federal Court

BADAN PEGUAM MALAYSIA V KERAJAAN MALAYSIA [2009] 1 CLJ 833, Court of Appeal

FACTS The Bar Council took out a summons seeking a declaration that the appointment of Dr Badariah Sahamid was unconstitutional and therefore null and void. The basis of the action was that Dr Badariah had never been a practising Advocate & Solicitor and therefore did not meet the requirement of being an Advocate & Solicitor for 10 years preceding her appointment as Judicial Commissioner. The High Court referred the question to the Federal Court. The Federal Court held that the appointment of Dr Badariah was valid. The Bar Council now applied to the Federal Court to review its earlier decision on the basis that one of the Federal Court judges, in ruling on the validity of the appointment of Dr Badariah, had resorted to extraneous circumstances.

HELD In dismissing the Bar Council's application, it was held that in an application for a review by the Federal Court of its own decision, the court must be satisfied that it is a case that falls within the limited grounds and very exceptional circumstances in which a review may be made. The facts of the present case, however, did not warrant a review by the Federal Court of its own decision. ✂

BRIEF-UP...

JUDICIAL APPOINTMENTS COMMISSION ACT 2009

No
695

Date of coming into operation
2 February 2009

Notes
Please see article on page 7 

MALAYSIAN ANTI-CORRUPTION COMMISSION ACT 2009

No
694

Date of coming into operation
1 January 2009

Notes
Please see article on page 9 

NATIONAL LAND CODE (AMENDMENT) ACT 2008

No
A1333

Date of coming into operation
1 January 2009

Amendments

Sections 5, 5B, 14, 62, 80, 81, 92D, 124, 136, 140, 141, 141A, 142, 147, 204GA, 254, 264A, 375, 399, 412, 426, 429A, 429B, First Schedule, Fourteenth Schedule

Incorporation

Part One (C), 143A, Sixteenth Schedule 

MERCHANT SHIPPING (AMENDMENT AND EXTENSION) ACT 2007

No
A1316

Date of coming into operation
24 December 2008

Amendments

Sections 2, Part V, 306C and 491B

Incorporation

Sections 249A – 249Z, 249AA – 249AO, 306CA, 306JA, 306JB, 306L – 306R, 519A 

GUIDELINES/RULES/ PRACTICE NOTES ISSUED BETWEEN JANUARY AND MARCH 2009 BY SECURITIES COMMISSION AND BANK NEGARA MALAYSIA

SECURITIES COMMISSION (SC)

- *Guidelines on Collective Investment Schemes – In relation to Unit Trusts – Guidelines on Unit Trust Funds* – Amendments issued: 18 February 2009

- *Guidelines on Collective Investment Schemes – In relation to Wholesale Funds – Guidelines on Wholesale Funds* – Effective date: 18 February 2009

BANK NEGARA MALAYSIA (BNM)

- *Guidelines on Banking and Development Financial Institutions – In relation to Anti-Money Laundering – Anti-Money Laundering and Counter Financing of Terrorism (AML/CFT) Sectoral Guidelines 1 for Banking and Financial Institutions* – Updated: 10 February 2009
- *Guidelines on Banking – In relation to Prudential Limits & Standards – Statutory Reserve Requirement* – Updated: 24 February 2009
- *Guidelines on Banking – In relation to Prudential Limits & Standards – Guidelines on Reference Rates, Lending Rates and Deposit Rates of Banking Institutions* – Updated: 24 February 2009
- *Guidelines on Insurance & Takaful – In relation to Anti-Money Laundering – Anti-Money Laundering and Counter Financing of Terrorism (AML/CFT) Sectoral Guidelines 2 for Insurance and Takaful Industries* – Updated: 3 February 2009
- *Guidelines on Banking, Insurance & Takaful and Development Financial Institutions – Standard Guidelines on Anti-Money Laundering and Counter Financing of Terrorism (AML/CFT)* – Updated: 3 February 2009
- *Guidelines on Banking – In relation to Financial Reporting – Guidelines on Financial Reporting for Licensed Islamic Banks* – Updated: 11 February 2009

(i) *Attachment to Guidelines on Financial Reporting for Licensed Islamic Banks: Reclassification of Securities under Specific Circumstances*

(ii) *Attachment to Guidelines on Financial Reporting for Licensed Islamic Banks: Booking of Provisioning for Financing Assets Funded by Specific Investment Account (SIA) Placement from Parent Bank*



Norliza Rasool Khan and Lim Joo Ho (Associates - Dispute Resolution)

ZUL RAFIQUE & partners would like to congratulate Norliza on the arrival of her third child on 25 March 2009



Charles Augustine Pinto (Knowledge Officer - Knowledge Management)

🔧 GET MOTIVATED !

BULLET PROOF YOURSELF... BY
JOSH HINDS

Bullet proof yourself! No, I am not talking kevlar here. Instead I am talking about the importance of developing in yourself, multiple skills. You might choose to start a little side business. A good friend of mine started a lawn care business as a way to supplement his 'real job'. If business keeps up, he will be in a position to do it full time.

The key here is that he did not start out trying to change the world with his business idea. Instead, he gave life to the business idea. He started working it, and as a result he is reaping the rewards. Simply put, find a need in your area, and look for ways to fill those needs.

Perhaps you opt instead to go the route of continued education. In this case you might decide on adult education courses, certificate programmes, correspondence classes, or even an online university to finish or start a degree. Who knows, a combination of some or all the ideas might be your choice. The possibilities are endless. It is up to us to take advantage of them.

Rather than focus too much on specific options, I want to drill home the point that the skills we cultivate in ourselves really can increase the number of options we have available to us in life.

I believe that the person with several skills (ie something to fall back on) worries less about things that are out of their control. Things like

downturns in the economy, corporate layoffs and things along those lines. The reason is not always that he or she is less prone to these unfortunate realities than you or I.

Rather, it is that through acquiring extra skill sets they do not feel as though they are 'locked' into one particular job or career. They are, for all practical purposes, more flexible with regard to opportunities in the market place.

My friend, I urge you to get started now on the path of adding to your portfolio of skills. You deserve the peace of mind that comes with it. Keep in mind that you don't have to set out to change the world. Start small and finish big. Develop yourself, and your world will evolve around you...

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/>

Your friend in cyberspace, Josh Hinds



Jovy Loo (Corporate) and Irene Arikiasamy (Pupil)

✿ 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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✿ BRIEF-TAKE...



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Farah was admitted as an Advocate & Solicitor of the High Court of Malaya in 1998. She is principally involved in general corporate and commercial advisory matters and has advised on construction and infrastructure projects which include those initiated under the East Coast Economic Region.

Prior to joining **ZUL RAFIQUE & partners**, Farah was attached to the futures arm of Bursa Malaysia Berhad for 3 years as an in-house legal advisor. She joined **ZUL RAFIQUE & partners** in 2004 and was promoted to partnership in 2008. ✿