the ZRp brief

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10TH ANNIVERSARY

A perfect 10...**ZUL RAFIQUE** *& partners* celebrate their 10th anniversary at a local restaurant in Kuala Lumpur on 17 December 2009. (More pictures inside)

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ZUL RAFIQUE *& partners*

Excerpt of Dato' Zulkifly Rafique's speech at the 10th Anniversary Dinner

A very good evening everyone.

This is the kind of ambience I cherish, one where there are no boundaries; no hierarchy; and I am sure later there will be no holds barred.

What is important tonight is not just the camaraderie that is present, but the fact that we are celebrating our 10th birthday. Ten years ago, 9 partners, 18 lawyers and 18 staff members helped in founding the law firm of **ZUL RAFIQUE** *& partners*.

The firm was founded on my aspiration to create a boutique law firm – one with several specialist practice groups, run by individuals, either identified or groomed to be experts in their niche areas. Of course, there were hiccups along our journey. There were the loyal ones who stayed with us through thick and thin and those who jumped ship when they felt that the grass looked greener. There were those who also joined us along the way, and this served to strengthen our presence.

Whatever the circumstances, we have braved the occasional storm and it has been a good and productive decade. In 10 years, we have grown 3 times the size, with 30 partners, close to 50 lawyers and 85 staff members. And with the number of international awards and recognition, we have definitely arrived.

But with the growth we cannot and should not lose sight of what we aspired to do, that is to do our best and to achieve that, we need to be disciplined, focused and passionate about what we do.

And as we develop even further, remember that there is always room for improvement – so let's be grateful for what we have had and yet strive to work towards a better and brighter year ahead.

Here's looking at us !

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BRIEF-FLASH...

- **A CHANGE IS GONNA COME** Changes to the Internal Security Act 1960 (ISA) appear closer to home with Home Minister, Dato' Seri Hishammuddin Tun Hussein identifying several areas that need to be addressed.

- **AMENDMENT TO ANTI-HUMAN TRAFFICKING ACT 2007** There is a proposal by the Human Rights Commission to amend the Anti-Human Trafficking Act 2007 to address certain issues, including screening and identification of victims.

- **APPOINTMENT OF JUDGES** Three judges of the Court of Appeal, Dato' Md Raus Sharif, Dato' Abdull Hamid Embong and Datuk Heliliah Mohd Yusof, have been elevated to the Federal Court, whilst the Court of Appeal will receive three judges, Dato' TS Nathan, Dato' Tee Ah Sing and Datuk Syed Ahmad Helmy Syed Ahmad, who have been elevated from the High Court. Six judicial commissioners, Ahmad Zaidi Ibrahim, Dato' Mohd Zawawi Salleh, Dr Haji Hamid Sultan Abu Backer, Abang Iskandar Abang Hashim, Nallini Pathmanathan and Mohamad Ariff Mohd Yusof have been elevated to the High Court.

- **THE CENTRAL BANK OF MALAYSIA ACT 2009** The new Central Bank of Malaysia Act 2009 has come into force from 25 November 2009. The Act will provide Bank Negara Malaysia with powers that include powers to engage in international cooperation.

- **EMPLOYEES' DISMISSAL JUSTIFIED** The dismissal of nine employees six years ago by Bank Bumiputra Commerce Berhad was held to be valid by the Industrial Court. The employees were found to have tarnished the reputation and image of the Bank by participating in a picket at the bank premises.

- **GLUE SNIFFING LAWS** It has been reported that a draft Bill to outlaw glue sniffing has been sent to the Attorney General's Chambers for further action.

- **HALAL ACT NEXT YEAR?** The Halal Act is expected to be enforced next year.

- **MAXIS IPO** On 19 November, Maxis Berhad issued 2.25 billion shares valued at RM4.75 each. This is the largest ever IPO (Initial Public Offering) in the Southeast Asian region to date as it aims to raise an estimated RM11.2 billion.

- **NATIONAL LAND CODE TO BE AMENDED** Amendments to the National Land Code are being considered to remove the effect of the ruling made by the Federal Court in ***Adorna Properties Sdn Bhd v Boonsom Boonyanit***. This was expressed by the Head of the Civil Division of the Attorney General's Chambers when she addressed the Federal Court as a 'friend of the court' in a case involving the indefeasibility of land title.

- **OPR UNCHANGED AT 2%** The overnight policy rate (OPR) remains unchanged at 2%.

- **SECTION 498 OF PENAL CODE TO STAY** Section 498 which refers to the offence of enticing a married woman, will not be repealed or amended. This is despite the several views aired that such provision is very archaic and traditional.

- **SIME'S RM4.5 BIL ISLAMIC NOTES** Sime Darby has proposed to undertake an Islamic medium term note (IMTN) programme of RM4.5 billion and an Islamic commercial paper/ IMTN of RM500 million. The proceeds raised from the two programmes will be used for the group's working capital and general corporate purposes.

- **WHISTLE BLOWER ACT** The announcement of a Whistle Blower Act was made by the Prime Minister when he tabled the 2010 Budget. The proposed Whistle Blower Act is to encourage informers to expose corrupt practices.

FOREIGN FLASH

- **! IS NOT A TRADEMARK** It has been held by the European Court of First Instance that an exclamation mark cannot be registered as a trademark. The application to register the punctuation mark was made by Joop!, a German perfume and clothing company founded by Wolfgang Joop.

- **AFFORDABLE HEALTH CARE FOR AMERICA ACT** The US House of Representatives passed the Affordable Health Care for America Act. The Act is expected to restrict insurance companies from denying coverage to anyone with a pre-existing condition or charging higher premiums based on gender or medical history.

- **FAIR WORK ACT 2009** The Australian Fair Work Act 2009, which was implemented on 1 July 2009, aims to provide a fair and comprehensive safety net of minimum employment conditions that cannot be stripped away. It accords protection from unfair dismissal for all employees; and protection and hope for a better future for the low income group.

- **FEE GUIDELINES NO MORE** The set of fee guidelines imposed on conveyancing transactions has been abolished by the Singapore Law Society. The guidelines were introduced in Singapore 6 years ago.

- **FOUR-YEAR BATTLE FOR UPGRADED MARKS** A law student has won a legal battle to have her marks upgraded. The original marks of 40% for criminal law and 46% for legal negotiation at the Bar Vocational Course, were upgraded respectively to 71% and 62%.

- **HACKER TO FACE EXTRADITION** Infamous hacker, Gary McKinnon, may face extradition to the United States following the UK High Court's refusal to allow him to appeal to the UK Supreme Court. McKinnon, who hails from Scotland, was accused of breaking into the US's military computer system. The extradition proceedings alone have been ongoing since 2002.

- **KOREA AND THE POISON PILL** The South Korean government will be introducing the 'poison pill system' after local Korean family-run businesses, or ***chaebol***, have been pressuring the government after becoming increasingly concerned at not having the necessary legal mechanism to protect themselves against hostile take-overs. These hostile bidders, once succeeding in controlling the target company's board, can then determine the said company's management, which more often than not means the ousting of the present management.

BRIEFING...

LAND LAW

IS IT A CHARGE OR MORTGAGE? The assimilation between a mortgage and a charge as representing a synonymous and identical instrument is inevitable due to several characteristics that can be gleaned from both and are therefore easily mistaken.

In this article, we examine the differences between a charge and mortgage and to what extent these concepts apply to the Malaysian conveyancing jurisprudence.

CHARGE V MORTGAGE A mortgage is a creature of English Land Law whilst a charge, on the other hand, is a creature of statute. In Malaysia, a charge is governed by the National Land Code 1965 (NLC). A mortgage arises out of an agreement between the parties whilst the procedures, manners and terms for the creation of a statutory charge are provided for by statute.

TITLE V INTEREST A mortgage effectively transfers the legal title and ownership of the land from the registered proprietor (mortgagor) to the mortgagee. In the case of a charge however, the legal title to ownership remains vested in the name of the registered proprietor (chargor). The person in whose favour the charge is created (chargee) acquires only an interest in the land. It is sometimes said that a statutory charge is a hypothecation which merely acts as an encumbrance on title.

REDEMPTION OF COLLATERAL Another manifest difference lies in the right to redeem the said collateral. Under a mortgage, the mortgagor is left with a right only in equity to redeem the land from the mortgagee upon repayment of the loan. This equity to redeem is referred to as the 'equitable right of redemption'. Failure to repay will amount to forfeiture of ownership. In comparison to a charge transaction, failure of the chargor to repay the amount due will not extinguish the right to redeem but rather it imposes a statutory right upon the chargee to enforce the said security by way of judicial sale or to take possession of the said land. At any time before the sale, the chargor is entitled to tender the loan amount stipulated and he will be entitled to a discharge of the charge.

CASE LAW CONFUSION The confusing assimilation can also be seen in the decisions of local cases that employ both the terms 'mortgage' and 'charge' interchangeably. In the 1984 Federal Court decision of ***Mahadevan v Manilal & Sons***[1], it was noted that Malaysia recognises a mortgage in the Torrens context, referred to as a torrens mortgage. A torrens mortgage is where the mortgagor retains the legal ownership whilst the mortgagee acquires a statutory right to enforce his security. What was described as a torrens mortgage is in actual fact a charge in the context of the NLC.

Reference was also made to section 21 of the Limitation Act 1953, particularly to the phrase 'a mortgage or other charge on land'. The existence of the word 'mortgage' in juxtaposition with 'charge' may have given rise to the confusion between the two, and also to the view that it must have been Parliament's intention to endorse the concept of 'mortgage'. Subsequent cases[2] have also joined the foray of distinguishing between a 'mortgage' and a 'charge'.

[1] [1984] 1 MLJ 266

[2] ***Chuah Eng Khong v Malayan Banking Bhd*** [1998] 3 MLJ 97; ***Phileo Allied Bank (M) Bhd v Bupinder Singh all Avtar Singh & Anor*** [2002] 2 MLJ 213; ***Ooi Chin Nee v Citibank Bhd*** [2003] MLJU 5; ***Hong Leong Bank Berhad v Goh Sin Khai*** [2005] 3 MLJ 154

What is important to note however are the remarks made by Syed Ahmad Helmy J in the 2005 case of ***Hong Leong Bank Berhad v Goh Sin Khai***, where his Lordship stated:

> ...there is a marked difference between the two and although the distinction between a mortgage and a charge was pointed out earlier, greater analysis into the concept of a mortgage is required since it is new to our system of land law in the sense that it has not often come up for judicial consideration.

CONCLUSION As such, it can be concluded that the interchangeability between the two terms is due more to lack of understanding in its application to the local jurisdiction as opposed to it being intentional. It is therefore suggested that Parliament must make the effort of properly delineating the applicable boundaries of both 'mortgage' and 'charge' to avoid any future overlap.

Rishwant Singh and ***Michele Chong***

From left – ***Adelin Goh, Tang Ai Leen, Zandra Tan*** and ***Loh Mei Mei***

BANKING AND FINANCE

THE CENTRAL BANK OF MALAYSIA ACT 2009 The Central Bank of Malaysia Act 2009 (the Act), which came into force on 25 November 2009, was enacted to enable Bank Negara Malaysia (the Bank) to deal more effectively with emerging risks and challenges in discharging its role and responsibilities as Malaysia's central bank.

This article aims to highlight pertinent provisions in the Act.

FUNCTIONS OF THE BANK The Act has prescribed that the primary functions of the Bank are to formulate and conduct monetary policy; issue currency; regulate and supervise financial institutions; provide oversight over the money and foreign exchange markets; exercise oversight over payment systems; promote a sound, progressive and inclusive financial system; hold and manage the foreign reserves of Malaysia; promote an exchange rate regime consistent with the fundamentals of the economy; and act as financial adviser, banker and financial agent of the Government.

MONETARY POLICY COMMITTEE In order to provide greater monetary stability, the Act institutionalises the autonomy for the formulation and implementation of monetary policy through the establishment of the Monetary Policy Committee (MPC), which comprises between seven and eleven members. Members of the MPC must be persons of probity, competence and sound judgment with relevant expertise and experience.

FINANCIAL STABILITY EXECUTIVE COMMITTEE To enhance Malaysia's resilience towards any financial crisis, the Act has incorporated an explicit mandate that includes risks which disrupt the financial intermediation process or which affect public confidence. To ensure that these objectives are achieved, the Act establishes the Financial Stability Executive Committee (FSEC). The FSEC comprises the

Governor, a Deputy Governor and at least three other members to be appointed by the Minister on the recommendation of the Bank's Board of Directors.

ENHANCED ROLE OF THE SYARIAH ADVISORY COMMITTEE In view of the growing prominence of Islamic financial system worldwide and to ensure Malaysia's leading role in this industry, the Act provides for an enhanced role of the Syariah Advisory Council on Islamic Finance.

THE THREE COMMITTEES In terms of governance and accountability, the Governor and Deputy Governors will continue to be answerable to the Bank's Board of Directors for their actions and decisions. The Act further empowers the Board of Directors to establish three specific committees, namely the Board Governance Committee (BGC), Board Audit Committee (BAC) and Board Risk Committee (BRC) that are chaired by a non-executive director. This is to ensure the independence of the oversight on the functioning of the Bank.

BOARD GOVERNANCE COMMITTEE The Board Governance Committee's function shall include nominating members of the MPC and other Committees of the Bank, to examine and recommend the budget and operating plan of the Bank to the Board for approval, and such other matters as provided for in the Act.

BOARD AUDIT COMMITTEE The Board Audit Committee will assist the Board in its oversight on the integrity of the accounts and financial statements of the Bank, the effectiveness of internal control system, performance of internal audit functions and compliance with legal and regulatory requirements.

BOARD RISK COMMITTEE The Board Risk Committee will assist the Board of Directors in the review of the organisational risk management activities undertaken by the Bank.

CONCLUSION In conclusion, the Central Bank of Malaysia Act 2009 will provide greater clarity to the Bank's mandate in relation to monetary and financial stability and will grant the Bank the necessary powers and instruments to achieve its mandates.

CRIMINAL LAW

SUICIDE IS PAINLESS? Assisted suicide or sometimes referred to as 'euthanasia' is resurfacing in the sea of controversy. It is understood as the deliberate, intentional termination of the life of a patient suffering intolerably from an underlying disease.

The recent case involving Debbie Purdy and her quest for assistance to die has opened a can of worms, so to speak. In this article we examine the legal issues surrounding the act of assisting suicide, mainly whether the ending of a terminally ill person's life is an act of humanity or is it exercising the right to play God.

THE DEBBIE PURDY CASE[3] The recent debate revolving around assisted suicide was shoved in the limelight when a British woman, Debbie Purdy, suffering from multiple sclerosis brought her case all the way to the House of Lords to clarify Britain's ambiguous laws on such matter. Her claim was to force the British authorities to specify exactly when someone would be prosecuted for helping another person commit suicide.

The conduct of assisting the suicide of another is illegal under the English Suicide Act of 1961, and anyone convicted faces up to 14 years in prison. The law in England was ambiguous as to what point a person had broken it. For instance, whether it is illegal to sit with a person on the plane to the clinic, open the door of the car to the airport, or even help them arrange the trip. No one has ever been prosecuted for that crime in the United Kingdom.

[3] *R (Purdy) v Director of Public Prosecutions* [2009] UKHL 45

Purdy succeeded in arguing that it was a breach of her human rights not to know whether her husband, Omar Puente, would be prosecuted if he accompanied her to the Swiss clinic, Dignitas, where she wished to die should her condition deteriorate. Before the judgment was delivered, she had reiterated the fact that she had wanted her husband to be by her side when she died. She further added that if the judgment was not in her favour, she would still travel alone.

> ***A person who aids, abets, counsels or procures the suicide of another, or an attempt by another to commit suicide, shall be liable on conviction, to imprisonment for a term not exceeding fourteen years.*** – section 2 of the UK Suicide Act 1961

CARTE BLANCHE? It is important to note that the ruling in the Debbie Purdy case is not a carte blanche to assisted suicide. The House of Lords merely requested for the clarification of the law. Nowhere in the judgment is it said that assisting suicide is permissible.

> ***Its language suggests that it applies to any acts of the kind it describes that are performed within this jurisdiction, irrespective of where the final act of suicide is to be committed. So acts which help another person to make a journey to another country, in the knowledge that its purpose is to enable the person to end her own life there, are within its reach… Furthermore it does not permit of any exceptions.*** – Lord Hope of Craighead in ***R (Purdy) v Director of Public Prosecutions***

THE MALAYSIAN POSITION The topic on euthanasia is not a foreign subject in Malaysia and the question that persists is whether Malaysians are ready to address such an issue. We have heard of pet owners putting their pets to 'sleep' if they were suffering, yet can the same concept apply to a human being? In our rather conservative and religious society, the thought of legalising euthanasia may not be well embraced by many but there are some who subscribe to a different point of view.

> ***If any person commits suicide, whoever abets the commission of such suicide shall be punished with imprisonment for a term which may extend to ten years, and shall also be liable to a fine*** – section 306 of the Malaysian Penal Code

From a religious perspective, emphasis is placed on the sanctity of life and the duty to go through life's pre-destined suffering in order to achieve better and purer spiritual experiences.

From the medical angle however, doctors are faced with the dilemma of whether to put the patient out of his misery or to uphold their Hippocratic oath to guard human life.

THE ACT OF ABETMENT From a legal standpoint, the position is quite clear. Both the acts of suicide and abetting such act are illegal under sections 309 and 306 respectively of the Penal Code.

CONCLUSION The question of the extent of abetment also arises in Malaysia. Although the act of abetment referred to in section 107[4] of the Penal Code, it is neither explained nor defined. However, until and unless the Malaysian courts are prepared to demarcate the extent of abetment, any form of assistance may be viewed as an abetment of the offence.

[4] A person abets the doing of a thing who-
First - Instigates any person to do that thing; or
Secondly - Engages with one or more other person or persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing; or
Thirdly - Intentionally aids, by any act or illegal omission, the doing of that thing

INTELLECTUAL PROPERTY

OF CHEDDAR, CHAMPAGNE AND DARJEELING... The mention of these words would, in many minds, conjure images of food and drink, but in actual fact these are names of places which have become renowned because of their products. If such is the case, can Cheddar cheese be produced in Alsace (France), instead of Cheddar (UK); or champagne be produced in Chile (South America), instead of Champagne (France)?

Recently, the Tourism Minister of Malaysia made statements regarding Malaysia's intention to lay claim to several dishes such as ***nasi lemak***, ***hokkien mee*** and chilli crab curry. Although her statement has been clarified, the question that arises is to what extent certain dishes are allowed to receive the protection of a geographical indication.

WHAT IS A GEOGRAPHICAL INDICATION? According to section 2 of the Geographical Indication Act 2000 (GIA), a geographical indication is an indication which identifies any goods as originating in a country or territory, or a region or locality in that country or territory, where a given quality, reputation or other characteristic of the goods is essentially attributable to their geographical origin.

The use of geographical indicators conveys not only the cultural identity of a nation, region or specific area but also adds value to the natural riches and the skills of its population. Although geographical indications have a long history in international conventions, they have been advocated mainly by wine producing countries as they are widely utilised as indications of origin for wines and spirit. There are other beverages which have earned its reputation from its association with a locality, such as the Darjeeling tea.

TRIPS The term geographical indication was used for the first time in the ***Trade Related Aspects of Intellectual Property Rights (TRIPS)*** agreement. The TRIPS agreement came into effect on 1 January 1995. The highlights of TRIPS are its two levels of protection where at a basic level, all geographical indications must be protected against use which would mislead the public or constitute an act of unfair competition; and at a more specific level, special protection provided for wines and spirit produce.

CASE LAW In Malaysia before the adoption of TRIPS, protection was extended under the tort of passing-off. The earlier case of ***Webster Automatic Packeting Factory Ltd v Chop Kim Leong Thye***[5] saw a claim in passing-off to restrain the defendant from falsely claiming that he had his tea grown in Ceylon. The more recent case of ***Scotch Whisky Association & Anor v Ewein Winery (M) Sdn Bhd***[6] was based on a claim made by the plaintiffs against the defendant on the contention that the latter was selling in Malaysia, spirits which were not Scotch Whisky but labelled in such a way as to suggest that they were whisky distilled and matured in Scotland.

GEOGRAPHICAL INDICATION ACT 2000 The GIA came into force on 15 August 2001, making effective the provisions of TRIPS. The scope of protection extends to protect against any misleading information provided in the product. The remedies available are injunction and damages.

CONCLUSION There are no reported Malaysian cases that have addressed issues under the GIA, but the next time you have your cup of Darjeeling, you may be interested in checking whether the tea was produced in Darjeeling, India or elsewhere.

[5] [1933] MLJ 61
[6] [1994] 3 CLJ 509

CRIMINAL LAW

THOU SHALL NOT COVERT THY NEIGHBOUR'S WIFE ... Section 498 of the Penal Code has recently been in the news. The offence under this provision relates to marriage, in which it is a crime for a man to entice or take away a married woman from her husband or from any person having guardianship of her on the husband's behalf. The said offence carries with it either imprisonment for a term of two years or with fine or both.

In this article, we examine the basis of this provision and to what extent it fits in modern society.

SECTION 498 OF THE PENAL CODE

Section 498 of the Malaysian Penal Code is adopted from the Indian Penal Code. The section serves as a legislative sanction that protects the husband against the seducer of his wife; the married woman from being fooled by the empty promises of men; and for the overall protection of the sanctity of marriage. The points requiring proof upon its invocation are that the said woman is married and the paramour knows of her said status; the woman is living with her husband or with someone else on his behalf; the woman was taken or enticed or detained from her husband; and that the intention for doing so was that she might have illicit sexual intercourse with the paramour. Upon fulfillment of the above ***actus reus*** and ***mens rea***, the paramour would then be convicted under the section.

Until the very recent case involving section 498 of the Penal Code that attracted much attention, not many women knew of the existence of such a provision in the Penal Code – which is ironic as its main objective is to protect women.

CASE LAW There are only a handful of Malaysian cases involving issues under section 498 of the Penal Code, half of which were dismissed by the court. Even the ones that have been reported pursuant to the section are cases that were reported decades ago, such as ***R v Ratnam***[7] ; ***Rex v Govindasamy***[8] ; ***PP v Liew Hin alias Liew Wah***[9] ; and ***Ramasamy v PP***[10]. A more recent case, ***Re Rasiah Munusamy***[11] was reported in 1983.

OUTDATED? ARCHAIC? TRADITIONAL?

Several quarters have looked upon section 498 quite unfavourably. They take it as a subtle insult to their intelligence for having the stigma of being gullible to enticement and that they require such a drastic attempt at protection. Another cause of unrest is that section 498 refers only to the criminal liability of the man. The section does not apply to the wife who may have encouraged the actions of her paramour or if the roles were reversed and that it was a woman who enticed a married man.

Section 498 of the Malaysian Penal Code, derived from the Indian Penal Code, is based on the very archaic notion that women were the property of their husbands, if they were married, or of their fathers, otherwise. The situation in India at the time definitely precipitated the drafting of such a law to curb such acts from occuring. On one hand, such a section may make one question and wonder if women should still be treated as such commodity, especially in the 21st century. A further moot point is whether women, who have generally achieved professional independence, should be viewed as the emotionally weaker gender who easily succumbs to temptations and thus need such protection.

CONCLUSION Whatever the sentiments may be, Parliament has decided that section 498 of the Penal Code is here to stay. Perhaps women should look at the section as protecting rather that patronising the fairer gender.

[7] [1930] SSLR 218
[8] [1933] 1 LNS 79
[9] [1933] 1 LNS 58
[10] [1938] 1 LNS 61
[11] [1983] 1 LNS 26

LEGAL PROFESSION

LISTEN WITHOUT PREJUDICE... The phrase 'without prejudice' is an almost ubiquitous legal phrase. It is a rule of evidence which operates to withhold evidence of negotiations which have been conducted with a view to settling a dispute.

The rule has recently been reassessed in the case of ***Oceanbulk Shipping & Trading SA v TMT Asia Limited***[12], and in this article we examine the origins and development of the rule and whether such rule has in fact been diluted.

SECTION 23 OF THE MALAYSIAN EVIDENCE ACT 1950 The 'without prejudice' rule, codified in section 23 of the Malaysian Evidence Act 1950, provides that ***in civil cases, no admission is relevant if it is made either upon an express condition that evidence of it is not to be given, or under circumstances from which the court can infer that the litigants had such an intention***. This provision is employed to render an admission inadmissible if it is made based on an express intention that evidence of it shall not be given at the subsequent trial. One of the methods of expressing the intention to exclude these communications is to attach to them the 'without prejudice' endorsement.

RATIONALE FOR THE 'WITHOUT PREJUDICE' RULE The rationale for the rule was explained in several English cases including ***Rush & Tompkins v Greater London Council***[13] and ***Cutts v Head***[14]. In the latter case, the basis of the rule was explained in the words of Oliver LJ:

> That the rule rests, at least in part, upon public policy is clear from many authorities, and the convenient starting point of the inquiry is the nature of the underlying policy. It is that parties should be encouraged as far as possible to settle their disputes without resort to litigation and should not be discouraged by the knowledge that anything that is said in the course of such negotiations ... may be used to their prejudice ***in the course of the proceedings***.

MALAYSIAN CASES In Malaysia, in the Federal Court case of ***Malayan Banking Bhd v Foo See Moi***[15], two conditions were stipulated for the 'without prejudice' rule to apply, namely, that: (a) some individuals must be involved in a dispute and that dispute must have led them to negotiate with one another; and (b) the communications between the parties must contain suggested terms that would finally lead to the settlement of the dispute.

> ***The public policy justification, in truth, essentially rests on the desirability of preventing statements or offers made in the course of negotiations for settlement being brought before the court of trial as admissions on the question of liability.*** – Olivier LJ in ***Cutts v Head***

OCEANBULK SHIPPING & TRADING SA V TMT ASIA LIMITED In the case of ***Oceanbulk Shipping & Trading SA v TMT Asia Limited***, based on a contract between the two, the former presented the latter with an invoice of USD40 million. TMT failed to pay and as a result, negotiations followed, which culminated in a settlement agreement. Oceanbulk subsequently sued TMT for breach of the settlement agreement. TMT sought to rely on the negotiations that took place. The issue was whether evidence of the negotiations was admissible bearing in mind that the negotiations were made without prejudice. The High Court held that the negotiations were admissible not only to

[12] [2009] EWHC 1946
[13] [1989] AC 1280
[14] [1984] Ch 290
[15] [1981] 1 LNS 95

prove the settlement agreement but also extended to the construction, meaning and interpretation of the terms of such agreement.

This decision has been criticised in light of the earlier decision in ***Ofulue v Bossert***[16], where it was reminded that the 'without prejudice' rule should be construed strictly and any exception to the rule should be scrutinised with a fine-tooth comb.

CONCLUSION The ***Oceanbulk*** case is a reminder that the 'without prejudice' rule is not absolute. The existence of the label or otherwise is not conclusive of the nature of the communications between the parties.

It was also noted in the case of ***Rush & Tompkins Ltd v Greater London Council*** that the courts could still examine the facts of the case to decide if the communications between the parties were in actual fact made without prejudice.

Similar views were echoed by the High Court in ***Wong Nget Thau v Tay Choo Foo***[17] in the words of Ian Chin J:

> The fact that a document is headed 'without prejudice' does not conclusively or automatically render it privileged from admission in evidence in any subsequent proceedings, and if a claim for such privilege for the document is challenged, the court will look at the document to determine its nature. The court must in each case, when deciding whether a particular letter marked 'without prejudice' is admissible, consider whether the letter was part of a genuine attempt to settle a dispute.

[16] [2009] UKHL 16
[17] [1994] 4 CLJ 617

BRIEF-CASE...

CONSTITUTIONAL LAW – Right to counsel – Whether such right extends to right to competent counsel – Implications of incompetent counsel

SHAMIM REZA ABDUL SAMAD V PP

[2009] 2 MLJ 506, Court of Appeal

FACTS The appellant was convicted and sentenced to death by the High Court.

ISSUE One of the issues for consideration was whether the incompetence of counsel was a legitimate ground for which an appellate court may intervene to set aside a conviction.

HELD According to article 5 of the Federal Constitution, a person has a right to a fair trial. In an extreme situation, where the accused is deprived of the necessities of a fair trial based on the conduct of his advocate, an appellate court may have to quash the conviction and will do so if it appears that there has been a miscarriage of justice. What constitutes an extreme situation must depend on the facts of the case. The authorities appear to envisage a case where there has been a flagrant or gross incompetence on the part of counsel as to deprive an accused of a fair trial. Thus, the incompetence of counsel is a ground on which a conviction may be quashed, provided that: (a) such incompetence must be flagrant in the circumstances of the given case; and (b) it must have deprived the accused of a fair trial thereby occasioning a miscarriage of justice.

The facts of the present case however do not fall within an extreme case of incompetence of counsel.

CIVIL PROCEDURE – Winding-up petition based upon judgment obtained in a foreign jurisdiction – Failure to register – Setting aside petition

THE BANK OF EAST ASIA LTD SINGAPORE BRANCH V AXIS INCORPORATION BHD (NO 2) [2009] 5 CLJ 87, High Court

FACTS The applicant (The Bank of East Asia Limited Singapore Branch) issued a notice under section 218 of the Companies Act 1965 (the Act) against Axis Incorporation Bhd (the respondent), followed by a winding-up petition. This was done pursuant to a judgment in default of appearance obtained in the High Court in the Republic of Singapore against the respondent. The foreign judgment was not registered in Malaysia but the petitioner obtained an ***ex parte*** order for the appointment of a provisional liquidator against the respondent. The respondent filed an application to set aside the ***ex parte*** order and to remove the provisional liquidator.

ISSUE One of the issues for consideration was whether the word 'proceedings' in sections 4(2) and 7 of the Reciprocal Enforcement of Judgments Act 1958 (REJA) included the presentation of a winding-up petition.

HELD The meaning of 'proceedings' in sections 4(2) and 7 of the REJA refers to proceedings in any action or matter including winding-up proceedings. Since the petition was founded on the Singapore judgment and the winding-up proceedings were made in order to recover the judgment debt under such judgment, the Singapore judgment must be registered in Malaysia for such proceedings to be validly instituted.

INDUSTRIAL RELATIONS – Dismissal – Whether order for dismissal by Disciplinary Committee is valid – Whether dismissal in breach of natural justice

AH MOI V TENAGA NASIONAL BHD [2009] 5 CLJ 689, Court of Appeal

FACTS The appellant, a junior technician in the respondent's company, was demoted to the position of general labourer as a result of disciplinary proceedings. In these proceedings, the appellant had admitted his guilt. The Disciplinary Board had also issued the appellant with a final warning of dismissal should there be a repetition. It is contended that the appellant refused to perform the work of a general labourer, as a result of which he was dismissed. The appellant was not present at the hearing of the second proceedings and there was the fact that the official who framed the charges against him was present in the deliberation of the decision to dismiss the appellant.

ISSUE The issue for consideration was whether the dismissal was fair.

HELD The absence of the appellant at the second disciplinary proceedings was due to his own conduct of deliberately refusing to accept the show cause letter posted to him. Nonetheless, there was a breach of the rules of natural justice by the presence of the respondent's official at the disciplinary proceedings against the appellant and the non-compliance by the respondent of the rule on dismissal notices under the NEB rules and regulations.

ISLAMIC BANKING – Validity of the Bai Bithaman Ajil (BBA) contract – Whether comparison between BBA and conventional loan agreement appropriate

BANK ISLAM MALAYSIA BHD V LIM KOK HOE & ANOR AND OTHER APPEALS [2009] 6 CLJ 22, Court of Appeal

FACTS The plaintiff in the respective 12 cases was Bank Islam Malaysia Berhad (BIMB). The defendants were BIMB's customers. The judge ruled that the Bai Bithaman Ajil (BBA) contracts were contrary to basic principles of Islam. Citing ***Affin Bank Bhd v Zulkifli Abdullah***, the judge held that an Islamic bank could only recover the balance of the principal of the facility including the profit on the balance principal calculated on a daily rate until payment. It was further ruled that since interest is prohibited in Islam, BIMB could only recover the principal sum advanced pursuant to section 66 of the Contracts Act 1950.

ISSUE The issue for consideration was the validity of the BBA contract and whether it is contrary to Islam.

HELD In allowing the appeal, the Court of Appeal held that a BBA contract is a sale agreement whereas a conventional loan agreement is a money lending transaction. The profit in a BBA contract is different from the interest earned in a conventional loan transaction which is prohibited in Islam.

BRIEF-UP...

CENTRAL BANK OF MALAYSIA ACT 2009

No
701

Date of coming into operation
25 November 2009

Notes
Please see article on page 5

SMALL & MEDIUM INDUSTRIES DEVELOPMENT CORPORATION (AMENDMENT) ACT 2009

No
A1358

Date of coming into operation
2 October 2009

Amendments
Sections 1, 2, 3, 4, 12, 13, 18, 19 and **Schedule**

Incorporation
Part IA, Sections 14A and **17A**

ROAD TRANSPORT (AMENDMENT) ACT 2009

No
A1356

Date of coming into operation
1 October 2009

Amendments
Sections 2, 4, 65, 67, 113 and **120**

BIOSAFETY ACT 2007

No
678

Date of coming into operation
1 December 2009

INLAND REVENUE BOARD OF MALAYSIA (AMENDMENT) ACT 2009

No
A1355

Date of coming into operation
15 October 2009

Amendment
First Schedule

GUIDELINES/RULES/ PRACTICE NOTES ISSUED BETWEEN OCTOBER AND DECEMBER 2009 BY BANK NEGARA MALAYSIA AND SECURITIES COMMISSION

BANK NEGARA MALAYSIA (BNM)

- BNM Guidelines & Circulars Listing – In relation to Capital Adequacy – Risk-Weighted Capital Adequacy Framework (Basel I – Risk-Weighted Assets Computation) – ***Updated: 23 October 2009***
- BNM Guidelines & Circulars Listing – In relation to Capital Adequacy – Risk-Weighted Capital Adequacy Framework (Basel II – Risk-Weighted Assets Computation) – ***Updated: 23 October 2009***
- BNM Guidelines & Circulars Listing – In relation to Prudential Limits and Standards – Prudential Standards on Securitisation Transactions – ***Updated: 23 October 2009***

SECURITIES COMMISSION (SC)

- Guidelines on Structured Warrants – Guidelines on Issuer Eligibility – Structured Warrants – ***Date Issued/ Effective Date: 1 December 2009***

- Guidelines on Collective Investment Schemes – In relation to Foreign Collective Investment Schemes – Guidelines for the Offering, Marketing and Distribution of Foreign Funds – ***Updated: 9 November 2009***

- Venture Capital Tax Incentive Guidelines – Supersedes the Guidelines for Annual Certification for Tax Incentives for the Venture Capital Industry – ***Date Issued/ Effective Date: 29 September 2009***

- Guidelines on Take-Overs Code – Application of the Malaysian Code on Take-Overs & Mergers 1998 in relation to Selective Capital Reductions – ***Date Issued: 29 September 2009***

- Guidelines on Take-Overs Code – Application of the Malaysian Code on Take-Overs & Mergers 1998 in relation to Making Announcements on Competing Offers – ***Date Issued: 29 September 2009***

Leong May Ling and *Jennifer Tan*

ZR*p* 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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HAPPY BIRTHDAY!

So Kim Chuan and *Dato' Zulkifly Rafique*

Darren Kor and *Thaya Baskaran*

Shahul Hameed Amirudin