the ZRp brief

Brief: 8/10 Folder 1: Jan - Mar 2010 KDN No: PP12857/08/2010 (024925)

From left: Ermira Faridah, Nik Azli, P. Jayasingam, Zandra Tan, Cathryn Chay, Kung Suan Im and Lim Mun Lai
Partners at the Islamic Finance News Awards Ceremony where **ZUL RAFIQUE** *& partners* picked up two awards for IPO and Corporate Finance. The awards ceremony was held on 3 March 2010 at the Mandarin Oriental in Kuala Lumpur.

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: N.C. Print Sdn Bhd (197139-T) AS 101, Jalan Hang Tuah 4, Salak South Garden, 57100 Kuala Lumpur. Tel: 03-79825893; Fax: 03-79835314

ZUL RAFIQUE *& partners*

A BRIEF NOTE...
by Dato' Zulkifly Rafique

An encouraging start...

I am very proud to announce that we have received several awards in the first quarter of the year.

The first award is for the deal known as the ***Petronas Jumbo Sukuk Deal and guaranteed notes offering***. Our involvement in this deal secured the Corporate Finance Deal of the Year 2009, an award conferred by the Islamic Finance News. The ***Petronas*** deal was also named as one of the Deals of the Year by the Asian Counsel.

The second award that we received is the IPO of the Year conferred by the Islamic Finance News. This award was for our involvement in the ***Maxis IPO*** - the initial public offering launched by Maxis Berhad in November 2009. The ***Maxis IPO*** was also awarded Deal of the Year 2009, Best Equity Deal 2009 and Best Malaysian Deal 2009 by FinanceAsia.

Last but not least is the award conferred by the Asian Legal Business for ***Employer of Choice 2010***. This is an award that we won last year as well. This was based on an online survey conducted between December 2009 and February 2010. It was sent to more than 20,000 lawyers in the Asia-Pacific and Gulf regions.

I am encouraged and motivated by these awards and I would like to thank everyone who contributed to these accolades.

in this issue...

BRIEF-FLASH...

- **A PROPOSED PUBLIC RELATIONS ACT?** A decision on whether to enact laws governing public relations is being considered. Just like other professional fields, a Public Relations Act will be aimed at protecting and recognising public relations professionals.
- **AN ANTI-PROFITEERING ACT** It has been reported that efforts are being made to introduce anti-profiteering legislation. The aim of this legislation is to deal with irresponsible traders who try to cash in during festive seasons and in times of crisis.
- **CURRENT DECLARATION RULE** Bank Negara Malaysia has issued a new currency declaration rule, pursuant to section 23 of the Anti-Money Laundering and Anti-Terrorism Financing Act 2001, which would require travellers entering or leaving Malaysia with cash or negotiable bearer instruments exceeding USD10,000 to make a declaration in Form Customs No 22.
- **EXTRADITION TREATY SIGNED** In order to combat cross-border crimes, an extradition treaty was signed with India. The landmark document was signed on 21 January 2010.
- **GI FOR BARIO RICE** The Intellectual Property Corporation of Malaysia has awarded the Geographical Indication (GI) certification to Bario rice, a traditional rice from Sarawak. This means that except for the rice grown within the Kelabit highland in the Limbang division of Sarawak, no other rice is allowed to be called Bario rice.
- **MIND YOUR LANGUAGE** The Court of Appeal, in dismissing an appeal by Dato' Seri Anwar Ibrahim (against Tun Dr Mahathir Mohamad), ruled that the use of Bahasa Malaysia is compulsory in court proceedings. It was stated that the use of the national language was also required in the documentation to be filed in court.
- **NIGHT COURTS** Night courts are expected to be set up to facilitate the speedy disposal of cases involving street crime. This is reported to be in line with one of the NKRAs (National Key Results Areas) of the Government, that is to reduce overall crime rate, in particular street crime.
- **ONLY IN THE INDUSTRIAL COURT** It has been decided by the Court of Appeal that an employee who has been dismissed may seek remedy only in the Industrial Court. The High Court has no jurisdiction to hear the matter.
- **PHISHING FOR TROUBLE** Internet users have been advised to be cautious of phishing scams. Phishing refers to the fraudulent act of attempting to acquire sensitive information such as usernames, passwords and credit card details by masquerading as a trustworthy entity in an electronic communication.
- **PROMOTING LABUAN** On 11 February 2010, four new Acts came into force, namely the Labuan Foundations Act 2010, Labuan Limited Partnership & Limited Liability Partnership Act 2010, Labuan Financial Services & Securities Act 2010 and Labuan Islamic Financial Services & Securities Act 2010. These statutes are intended to apply to and promote the Labuan Offshore Financial Services Authority which is now known as the Labuan Financial Services Authority.

FOREIGN FLASH

- **BUSKING OR BEGGING?** In what appears to be a landmark case, street musician Bernard Pierre is appealing against his conviction after the Magistrate's Court fined him on the basis that his busking had amounted to begging.
- **CYBER TSAR APPOINTED** After seven months of hunting high and low, Howard Schmidt has been appointed cyber security tsar of the United States. Schmidt is a former eBay and Microsoft executive.
- **EQUALITY BILL** The UK Equality Bill, which is expected to come into force in October 2010, aims to promote equality and avoid discrimination in the workplace.
- **GOOGLE V GROOVLE** Google failed in its application for a transfer of the domain name (Groovle) to it. Google's complaint was based on the argument that Groovle, the domain name used by 207 Media, was similar to Google. The complaint was however dismissed by the National Arbitration Forum.
- **UK VIDEO RECORDINGS ACT 2010** The UK Video Recordings Act 2010 came into force on 21 January 2010. The purpose of the Act is primarily to correct the procedural irregularities and to restore the important public protections that the 1984 Act contains, which the public have come to expect regarding the sale of videos and DVDs.

BRIEFING...

LAND LAW

FROM *BOONSOM* TO *TAN YING HONG*... THE BEGINNING OF A NEW DAWN? Almost a decade has passed since the infamous case of ***Adorna Properties Sdn Bhd v Boonsom Boonyanit***[1] was decided. Several attempts were made to rectify the decision. There was even an application to review the decision that was made by Kobchai Susothikul[2], the son of Boonsom, to seek justice, but to no avail.

Finally in February 2010, in the case of ***Tan Ying Hong v Tan Sian San***[3], the Federal Court corrected the position.

In this article, we trace the history of the law on indefeasibility of titles as provided for in the National Land Code 1965.

FACTS The law dealing with indefeasibility of title may be found in section 340 of the National Land Code 1965 (NLC). The general rule is that the person whose title is registered obtains an indefeasible title. However, under section 340(2) of the NLC, if the registration of the title was obtained by forgery, or insufficient or void instrument, the title or interest will not be indefeasible. Furthermore, under section 340(3), if the immediate purchaser subsequently transfers the title or interest to a subsequent purchaser, the said title or interest is still liable to be set aside unless the subsequent purchaser is a purchaser in good faith.

IMMEDIATE OR DEFERRED? Indefeasibility may be immediate or deferred. Immediate indefeasibility means that the registered title or interest of the proprietor or transferee immediately to the vitiating circumstances will be conferred statutory protection despite

[1] [2001] 2 CLJ 133, FC

[2] ***Adorna Properties v Kobchai Susothikul*** [2005] 1 CLJ 565

[3] [2010] 2 CLJ 269

the existence of those circumstances. In the case of deferred indefeasibility, the indefeasibility materialises only upon a subsequent transfer.

For example, if A is the genuine registered proprietor, A then obtains an indefeasible title. If B forges A's signature and transfers it to C, C's title is liable to be defeated on grounds of forgery. If C, on the other hand transfers the land to D, who has no knowledge of such forgery, then D, as a subsequent transferee obtains indefeasible title. The indefeasibility in this case has been deferred until D obtains title.

The concept of deferred indefeasibility was recognised in cases such as ***Mohammad bin Buyong v Pemungut Hasil Tanah Gombak & Ors***[4] and ***M & J Frozen Food Sdn Bhd v Siland Sdn Bhd & Anor***[5]. In fact, this was the prevailing view until the case of ***Adorna Properties Sdn Bhd v Boonsom Boonyanit***.

Adorna Properties Sdn Bhd v Boonsom Boonyanit

In the case of ***Adorna Properties Sdn Bhd v Boonsom Boonyanit***, the genuine landowner, Mrs Boonsom Boonyanit claimed that she was the registered proprietor of the land in question. She alleged that someone had forged her signature and transferred the land to the defendant. The defendant claimed that it had no knowledge that the transfer documents were forged by someone who was not the true owner, and that it had no reason to suspect that the documents were forged.

The Federal Court decided against Boonsom's claim, stating that since the defendant did not have any knowledge of the forged documents, they were not at fault and were therefore entitled to indefeasiblity. What the Federal Court had ignored was the fact that the lack of knowledge was not relevant in cases dealing with forgery (as opposed to cases dealing with fraud) as provided in section 340(2)(b) of the NLC.

Tan Ying Hong v Tan Sian San

In ***Tan Ying Hong v Tan Sian San***, the landowner, Mr Tan Ying Hong, claimed that he had never charged his land as security for a loan. He further claimed that a forger by the name of Tan Sian San, forged his signature in order to create a forged power of attorney for the purposes of those charges. He therefore sought to declare the charges and the power of attorney null and void.

After the Court of Appeal had dismissed the application by Tan Ying Hong, on the basis that the third party respondent was a ***bona fide*** party who acquired the interest in good faith thus applying the principle in ***Adorna Properties Sdn Bhd v Boonsom Boonyanit***, an appeal was made to the Federal Court.

> *We are legally obliged to set right [the matter]. The error committed in Adorna Properties is so obvious and blatant. It is quite well known that some unscrupulous people have taken advantage of it to transfer land to themselves.*
>
> *I hope, with this decision, land authorities will be extra careful when registering transfers of land.* – Tun Zaki bin Tun Azmi FCJ in ***Tan Ying Hong v Tan Sian San***

This decision was, however, eventually overturned by the Federal Court. In its decision, the court held that the Federal Court in ***Adorna Properties Sdn Bhd v Boonsom Boonyanit*** had misconstrued section 340 of the NLC when it concluded that the proviso in subsection 3 applies equally to subsection 2. The court re-established that any interest obtained by forgery or void instrument is liable to be set aside.

[4] [1981] 1 LNS 114
[5] [1994] 2 CLJ 14

CORPORATE LAW

PROMOTING LABUAN... On 11 February, four new Acts came into force, namely the Labuan Foundations Act 2010, the Labuan Limited Partnerships & Limited Liability Partnerships Act 2010, the Labuan Financial Services & Securities Act 2010 and the Labuan Islamic Financial Services & Securities Act 2010 (the new Acts). The new Acts are applicable to the Labuan Offshore Financial Services Authority, which is now known as the Labuan Financial Services Authority (Labuan FSA).

In this article, we examine the implications of the statutes on the legal framework of Labuan FSA.

THE LABUAN FOUNDATIONS ACT 2010

The new Acts are set to dramatically improve Labuan and completely change the way the duty-free island conducts its financial services business. For example, the Labuan Foundations Act 2010 contains provisions for the establishment, management, surveillance and dissolution of foundations in Labuan. Similar to the concept of trust in the Labuan Trusts Act 1996, the foundation shall bear the responsibilities of managing, administering, owning of properties, and making investments on behalf of beneficiaries of the foundation. The difference, however, is that the foundation binds its officer to its beneficiary contractually as opposed to its duty as a fiduciary to the beneficiary.

Also included are provisions on the composition of a Labuan Foundation's council, officer, and secretary and also requirements that must be fulfilled before the election of council and members are conducted.

THE LABUAN LIMITED PARTNERSHIPS & LIMITED LIABILITY PARTNERSHIPS ACT 2010

The Labuan Limited Partnerships & Limited Liability Partnerships Act 2010 (Labuan LLP Act) introduces the limited liability partnership concept, which is new to the Malaysian sphere of doing business. The Labuan LLP Act is designed to provide for the establishment, surveillance and dissolution of Labuan Limited Partnerships and Limited Liability Partnerships. A limited partnership is established by at least one general partner and one limited partner. The general partner will be hands-on in the administration of the partnership and shall have unlimited liability. A limited partner on the other hand will not have any power on the administration of the partnership and his liability shall be limited only to the extent of his contribution towards that partnership.

Generally, the provisions on the establishment of a limited partnership and limited liability partnership are almost similar. Differences arise when it comes to the rights and obligations of a partner in a limited liability partnership and also the process for the dissolution of a limited liability partnership where it mimics the winding up process of a company. As such, one may observe that the provisions for the dissolution of a limited liability partnership are more detailed in comparison to a limited partnership.

THE LABUAN FINANCIAL SERVICES & SECURITIES ACT 2010

The Labuan Financial Services & Securities Act 2010 (Labuan FSS Act) in general combines all the provisions for the licensing and surveillance of licensed activities at Labuan International Business and Financial Centre (Labuan IBFC) to enable Labuan IBFC to be promoted as a transparent and conducive venue for international business.

Following the enforcement of the Labuan FSS Act, the following Acts are thus repealed or amended, namely the Labuan Offshore

Securities Industry Act 1998; Labuan Trust Companies Act 1990; Offshore Banking Act 1990 and the Offshore Insurance Act 1990.

This Labuan FSS Act also provides for a more complete and comprehensive business infrastructure through the homogenisation of provisions for the administration and surveillance of various industries such as the banking, insurance and trusts companies industry. It is hoped that this Act will bolster foreign investors' confidence in Labuan since the provisions on surveillance and enforcement of activities conducted at the Labuan IBFC are of international standards.

THE LABUAN ISLAMIC FINANCIAL SERVICES & SECURITIES ACT 2010 The final Act, which is the Labuan Islamic Financial Services & Securities Act 2010 (Labuan IFSS Act), is an Act specifically enacted for the surveillance and administration of Islamic Financial Securities at the Labuan IBFC. Some of the more notable provisions include those on Islamic securities activities and sukuk, registration and surveillance of Islamic capital fund and Islamic foundations, and licensing and surveillance of Islamic banking and takaful activity.

The Labuan IFSS Act also provides for the appointment of Syariah advisors and the approval of the Syariah Surveillance Council and the Labuan FSA. This Labuan IFSS Act will thus position Labuan IBFC as the first international financial centre in the world to have a comprehensive framework for the surveillance of Islamic financial services and securities industry based on Islamic laws.

CONCLUSION It is anticipated that the application of the new Acts will propel Labuan to the forefront of the financial services and securities industry and also to cement Malaysia's reputation as a pioneer of Islamic financial products.

CONSTITUTIONAL LAW

THE TALE OF TWO MENTERI BESARS...

Since the institution of court proceedings on 13 February 2009 by Dato' Seri Ir Hj Mohammad Nizar bin Jamaluddin (Nizar) against Dato' Seri Dr Zambry bin Abd Kadir (Zambry) as to the rightful Menteri Besar (MB) of Perak, much has been written about the dispute between the parties and the conduct of His Royal Highness, the Sultan of Perak (the Sultan) in the broadsheets, electronic media and by a number of political and legal commentators.

The intention of this article is to set out the facts and legal arguments pertaining to the dispute between the parties before the High Court, Court of Appeal[6] and Federal Court[7].

CHRONOLOGY OF EVENTS

30 January 2009 – Two members of the Perak State Legislative Assembly (SLA) purportedly resigned from their posts via separate letters addressed to the SLA Speaker.

1 February 2009 – The SLA Speaker informed the Election Commission (EC) and announced (through a media) the purported resignations.

1 February 2009 – The two members sent letters (to the Sultan, Perak SLA and Director of Elections) denying that they had issued letters of resignation, and that any letter containing their resignation as members of the Perak SLA was invalid.

2 February 2009 – The two members lodged separate police reports.

[6] *Dato' Dr Zambry bin Abdul Kadir v Dato' Seri Ir Hj Mohammad Nizar bin Jamaluddin (Attorney General of Malaysia, intervener)* [2009] 5 MLJ 464

[7] *Dato' Seri Ir Hj Mohammad Nizar bin Jamaluddin (Attorney General of Malaysia, intervener) v Dato' Dr Zambry bin Abdul Kadir* [2010] 2 MLJ 285

2 February 2009 – Nizar, who was the then Menteri Besar (MB) of Perak, had an audience with the Sultan to inform His Royal Highness of the purported resignations.

3 February 2009 – The two Assemblymen had written to the Sultan stating that they had lost confidence in Nizar and had therefore ceased to support him.

3 February 2009 – The two Assemblymen had written to the President of Parti Keadilan Rakyat (PKR)[8] and the Perak SLA, stating that not only had they lost confidence in Nizar and had therefore ceased to support him, they were also leaving the political party and denouncing their membership as members of PKR, effective immediately.

3 February 2009 – A third member of the Perak SLA purportedly resigned through a letter addressed to the SLA Speaker.

3 February 2009 – The third member issued a letter to the Perak SLA stating that any letter containing her resignation as a member of the Perak SLA was invalid; and that she lost confidence in DAP and was therefore leaving the political party. She reiterated however that her declaration on leaving DAP did not operate as her resignation as a member of the Perak SLA. She had also written a letter to the Honourable Secretary of DAP which reiterated the contents of her letter to the Perak SLA and a letter to the Sultan to inform His Royal Highness that she had lost confidence in Nizar and that she had ceased to support Nizar as the MB of Perak.

4 February 2009 – The third member lodged a police report on the matter.

4 February 2009 – Nizar requested for the Sultan to dissolve the Perak SLA and handed a draft proclamation for dissolution to be duly executed by the Sultan.

4 February 2009 – At about 3pm, the Sultan received letters from the three Assemblymen stating their support for Barisan Nasional (BN) and that they had lost confidence in Nizar, and that they were leaving their respective political parties but maintaining their position as members of the SLA.

4 February 2009 – At about 5pm, Nizar had an audience with the Sultan, in the presence of the Perak State Legal Advisor, to request for the dissolution of the Perak SLA.

5 February 2009 – At about 10am, the then Deputy Prime Minister Dato' Seri Mohd Najib bin Tun Abd Razak (the DPM) in his capacity as Chairman of Perak BN had an audience with the Sultan, presenting a letter of support signed by the 27 members of the Perak SLA aligned to BN, and the three Assemblymen. The letter stated that the signatories would support whoever named by the DPM as the candidate for the new MB of Perak.

5 February 2009 – At about 11am, the DPM brought in all 31 members of the Perak SLA to Istana Kinta, who pledged their support to BN. The three Assemblymen and a fourth member affirmed, upon being interviewed by the Sultan, that they had voluntarily signed the letter of support without coercion from any other party.

5 February 2009 – The Sultan issued a press statement to Bernama (the national news agency) which stated, amongst others, that: (a) Nizar was granted an audience by the Sultan to seek the Sultan's consent to dissolve the Perak SLA; (b) the DPM had also requested an audience with the Sultan in his capacity as Chairman of the Perak BN; (c) the DPM informed the Sultan that BN and its supporters, now comprising 31 State Assemblymen, had the majority in the Perak SLA; and (d) after meeting all the 31 Assemblymen, the Sultan was convinced that Nizar had ceased to command the confidence of the majority of the Perak SLA.

6 February 2009 – The Sultan appointed Zambry as new MB of Perak and the swearing-in ceremony was held at Istana Iskandariah, Bukit Chandan, Kuala Kangsar.

[8] PKR, together with the Democratic Action Party (DAP) and Parti Islam Se-Malaysia (PAS), forms the opposition alliance known as Pakatan Rakyat (Pakatan)

THE BACKGROUND FACTS After the 12th General Election on 8 March 2008, the composition of the seats in the Perak SLA was 31 seats for Pakatan Rakyat (Pakatan) and 28 for BN. Based on the majority of seats won in the Perak SLA, Pakatan proceeded to form the State Government of Perak and accordingly, Nizar was appointed as the MB of the state of Perak.

THE LOSS OF CONFIDENCE On 30 January and 1 February 2009, three members of the Perak SLA announced that they no longer supported Nizar as the MB and had pledged their support in favour of the BN alliance.

Following the defection of the three Assemblymen, Pakatan's majority in the number of seats held in the Perak SLA was reduced to 28.

The then Speaker of the House proceeded to declare the three seats vacant and sought to have a by-election called by relying on three pre-signed letters of resignation by the three Assemblymen in question. The three Assemblymen announced that they did not issue any letters of resignation as state legislative assemblymen and that they would continue to carry out their duties as assemblymen for their respective constituencies. The EC then stepped in and held that there was no causal vacancy in respect of the three state parliamentary seats. This meant that BN enjoyed a majority of 31 members to Pakatan's 28 in the Perak SLA.

Nizar however, maintained that as the three Assemblymen had resigned, there was a 'deadlock' of 28 seats for Pakatan and 28 seats for BN. In light of these developments, Nizar claimed that this 'deadlock' in the Perak SLA necessitated the dissolution of the said assembly.

On 4 February 2009, Nizar made a request to the Sultan to dissolve the Perak SLA. The provision upon which the request for dissolution was made under the Perak State Constitution became a main issue of contention during the course of the court proceedings.

THE REQUEST FOR DISSOLUTION In this case, it was not disputed that Nizar had an audience with the Sultan on 4 January 2009, during which he made the request for the dissolution of the Perak SLA. In attendance at the material time was the Perak State Legal Advisor (Legal Advisor).

THE ARGUMENTS In summary, the principal arguments raised by Nizar were as follows:

(a) that he did not resign as the MB and is entitled to hold office of MB;

(b) that a motion of no confidence had not been tabled against him in the Perak SLA to establish that he no longer commanded the support of the majority of the members of the Perak SLA;

(c) that since there was no dissolution of the Perak SLA, the Sultan was not entitled to declare the position of MB vacant pursuant to article 16(6) of the Perak State Constitution, given that Nizar contended that his application for dissolution was made under article 36(2) of the Perak State Constitution;

(d) that he did not hold office at the pleasure of the Sultan and therefore the Sultan could not dismiss him;

(e) that only the Perak SLA could decide his fate as MB by a vote of no confidence; and

(f) that the decision in ***Stephen Kalong Ningkan v Tun Abang Haji Openg & Tawi Sli***[9] was the proper authority to be followed.

[9] [1966] 2 MLJ 187

The principal arguments raised by Zambry, on the other hand, were as follows, namely:

(a) that pursuant to article 16(6) of the Perak State Constitution, the Sultan has the sole discretion to decline the request made by Nizar to dissolve the Perak SLA and that such decision was not justiciable or reviewable;

(b) that upon the Sultan exercising his royal prerogative not to dissolve the Perak SLA pursuant to article 16(6) of the Perak State Constitution, the position of Nizar falls vacant and Nizar has to tender his resignation as MB. Nizar did not have a discretion to continue in his position as MB since he was now the leader of a minority government;

(c) that pursuant to article 16(2) of the Perak State Constitution, the Sultan, upon a vacancy arising, has the discretion to appoint as MB, a member of the Perak SLA who, in the judgment of the Sultan, is likely to command the confidence of the majority of the members of the Perak SLA;

(d) that the appointment of MB pursuant to article 16(2) of the Perak State Constitution is an exercise of royal prerogative;

(e) that the appointment of Zambry as MB on 6 February 2009 was made in accordance with article 12 and article 16(2) of the Perak State Constitution;

(f) that the appointment of Zambry as MB was lawful and valid. Zambry was sworn in before the Sultan on 6 February 2009 and had the appropriate letter of appointment as MB; and

(g) that the decision in ***Datuk Amir Kahar bin Tun Datu Haji Mustapha v Tun Mohd Said bin Keruak & 8 Ors***[10] lays down the correct principles relating to the determination of who has the command of the majority of the members of the legislative assembly.

[10] [1995] 1 CLJ 184

An important factual issue arose out of the audience with the Sultan, namely, whether the request for dissolution by Nizar was made under article 16(6) or article 36(2) of the Perak State Constitution.

Article 16 - The Executive Council

(6) If the Menteri Besar ceases to command the confidence of the majority of the members of the Legislative Assembly, then, unless at his request His Royal Highness dissolves the Legislative Assembly, he shall tender the resignation of the Executive Council.

Article 36 - Summoning, prorogation and dissolution of Legislative Assembly

(2) His Royal Highness may prorogue or dissolve the Legislative Assembly.

THE BASIS OF THE REQUEST Whilst Nizar maintained that the request was made under article 36(2), Zambry insisted that such request was made under article 16(6) of the Perak State Constitution.

In support of his contention that the request for dissolution was made under article 36(2), Nizar relied on a draft proclamation which was presented to the Sultan of Perak during the audience.

On appeal, Mr. Justice Raus Shariff, JCA in his written judgment held that the draft proclamation was of little value because Nizar himself admitted that he merely picked up a standard form that had not been vetted by the Legal Advisor. Therefore, Nizar's reliance on the draft proclamation as a basis to say that the request for dissolution was made under article 36(2) of the Perak State Constitution was misplaced.

Apart from the evidence by the Legal Advisor, Zambry relied on the following evidence in support of the argument that the request for dissolution was made pursuant to article 16(6) of the Perak State Constitution, namely:

(a) the fact that between 30 January 2009 and 4 February 2009, the three independent SLA members had informed all relevant parties including the Speaker, the Sultan and the EC that they had not resigned but that they no longer supported Nizar. Instead they supported BN;

(b) the fact that Nizar had, on 5 January 2009, in a letter addressed to the Sultan, reminded the Sultan of his obligations under the Perak State Constitution and drew specific reference to article 16(6) of the same. This letter was written by Nizar himself the very next day after the audience with the Sultan; and

(c) the fact that on 5 January 2009, the Sultan, by way of a statement issued by His Private Secretary to Bernama, expressly stated that the request for dissolution by Nizar had been refused and that the Sultan had acted pursuant to article 16(2) and article 16(6) of the Perak State Constitution in making the decision.

A MATTER OF ARTICLE The importance of whether the request for dissolution was made pursuant to article 36(2) or article 16(6) is significant as there are severe ramifications under article 16(6) of the Perak State Constitution should a request for dissolution be refused by the Sultan.

Article 36(2) is a general provision which confers the power to dissolve the Perak SLA to the Sultan. Further, article 36(2), if read in its own context, envisages a situation where the government of the day, or more specifically an MB, makes a request for the dissolution of the Legislative Assembly at the expiry of the five year term or in order to get a fresh mandate from the electorate.

The circumstances, however, under which the Perak SLA may be dissolved would vary – as in this case where Nizar had made the request under article 16(6).

When a request for dissolution is made under article 16(6), the consequence is that the MB would have to resign if the request is not acceded to.

The Court of Appeal and Federal Court applied the correct approach in interpreting the above provision.

Article 16(6) clearly states that an MB **shall** tender the resignation of the Executive Council (which by definition also includes himself) in the event that his request for dissolution is refused by the Sultan.

This interpretation is not only consistent with the wordings of the Perak State Constitution but also in line with established democratic principles. It would not have been the intention of the parliamentary draftsman to provide the MB with the choice of tendering his resignation upon his request for dissolution being refused. Such an interpretation would create an absurdity as it would permit an individual to remain in office notwithstanding the fact that he does not have the support of the majority members of the SLA. The following dicta by Hj Abdul Kadir Sulaiman, J in the ***Amir Kahar***[11] case succinctly addresses this point:

> *The Article merely requires the Chief Minister to tender the resignation of the members of his Cabinet if he ceases to command the confidence of a majority of the members of the Legislative Assembly. To hold otherwise, in instances where a Chief Minister who in fact knows that he has ceased to command the confidence of a majority of the members of the Assembly cannot resign but to wait for the Assembly to be summoned and then for the Assembly to vote on the confidence would, in my view, create a legal absurdity and would be a ludicrous situation….*

[11] ***Datuk (Datu) Amir Kahar bin Tun Datu Haji Mustapha v Tun Mohd Said bin Keruak & 8 Ors*** [1995] 1 CLJ 184 at p 194

Thus, once a Chief Minister in fact knows that he has lost the confidence of a majority of the members of the Assembly, he should immediately take the honourable way out by tendering the resignation of his Cabinet. Under the circumstances, if the Chief Minister refuses or does not tender the resignation of the members of the Cabinet which includes himself, or if he tenders the resignation of himself alone, the fact remains that the Cabinet is dissolved on account of him losing the confidence of a majority of the members of the Assembly and it is not necessary, therefore, for the Yang di-Pertuan Negeri as a last resort to remove the Chief Minister and the other members of his Cabinet. This is not only the effect of article 7 of the Constitution but it is the established convention.

THE COURT OF APPEAL The fact that the letter was contemporaneous was sufficient reason at law for the appellate courts to reach a different conclusion from the High Court.

The other factors that led the Court of Appeal and the Federal Court to conclude that the request was made under article 16(6) of the Perak State Constitution were as follows, namely:

(a) the evidence of the Speaker himself that he informed Nizar of the resignations of the three Assemblymen and their defection to BN;

(b) the evidence of Nizar himself under cross-examination revealed that he was in a state of oblivion and unaware that he had lost the command of the confidence of the majority of the Perak SLA; and

(c) the fact that it was only in March 2008 that a general election had been called. A request under article 36(2) of the Perak State Constitution less than a year later seemed difficult to believe.

It is also worth noting that at the very outset, the intitulement for Nizar's judicial review application made express reference to article 16(2), article 16(6) and article 16(7), yet somehow did not make any reference to article 36(2).

It was Zambry's argument that Nizar's reliance on article 36(2) of the Perak State Constitution as the basis for seeking dissolution was an afterthought. This is so as the judicial review application was premised on article 16 of the Perak State Constitution and it was only after it was pointed out by counsel for Zambry that upon a refusal to grant a request of dissolution pursuant to article 16(6) of the Perak State Constitution that the MB would stand dismissed, did Nizar seek to alter his position and to instead rely on article 36(2) of the Perak State Constitution.

THE POWER OF THE SULTAN The power exercisable by the Sultan in this case came under scrutiny in two instances. First, when the Sultan decided to withhold his consent to dissolve the Perak SLA; and secondly, the method that the Sultan employed in deciding whether Nizar had lost the confidence of the majority of the members of the Perak SLA.

The first is not disputed. The Sultan ultimately has the absolute discretion to grant a request for dissolution as this power is enshrined in article 18(2)(b) of the Perak State Constitution.

Article 18 - His Royal Highness to act on advice

(2) His Royal Highness may act in His discretion in the performance of the following functions (in addition to those in the performance of which He may act in His discretion under the Federal Constitution) that is to say -

(b) the withholding of consent to a request for the dissolution of the Legislative Assembly

The second is the real subject of controversy. Counsel for Nizar argued that the only means to determine whether Nizar had lost the confidence of the majority of the members of the Perak SLA is by way of a vote of no confidence in the said assembly. Nizar relied on the decision of the High Court in ***Stephen Kalong Ningkan v Tun Abang Haji Openg & Tawi Sli***.

On the other hand, counsel for Zambry as well as the Attorney General contended that the measure of support or confidence in the MB may be determined by other means besides a vote of no confidence in the Perak SLA. This was based on both the Privy Council decision in ***Adegbenro v Akintola***[12] and the decision of the High Court in ***Amir Kahar*** respectively.

Both the Court of Appeal and the Federal Court were in agreement with the arguments put forth by Zambry and the Attorney General. The relevant passage is to be found in the judgment of the Court of Appeal where Mr. Justice Raus Shariff, JCA stated:

> *…there is nothing in the Perak State Constitution which can be construed as requiring that the test of confidence or lack of it must be determined by way of vote taken in the Legislative Assembly. Of course, actual voting in the Legislative Assembly is ideal but interpreting article 16(6) to require the loss of confidence to be established would lead to absurdity as the Menteri Besar who may have lost support will not be too eager to summon it. Thus, as rightly stated by Kadir Sulaiman J in Amir Kahar that there must be other circumstances, which are capable of contributing sufficient evidence to such lack of confidence in the Chief Minister or Menteri Besar.*

The reasoning of the Court of Appeal was upheld by Mr. Justice Ariffin Zakaria, CJ of Malaya in delivering the judgment of the Federal Court.

[12] [1963] 3 WLR 63

It is perhaps noteworthy to state at this juncture that upon the defection of the three Assemblymen, Nizar did not request for the Sultan to convene the Perak SLA (which was not in session at the material time) so as to enable a vote of confidence to be taken. Instead, Nizar proceeded to make a request for the dissolution of the Perak SLA.

DOING THE MATH One of the points raised by Nizar was that he had not lost the confidence of the majority of the members of the Perak SLA. Rather, there was a 'deadlock' in the Perak SLA as the composition at the material time was as follows, namely Pakatan with 28 members and BN with 28.

The above contention was arrived at by disregarding the position of the three Assemblymen (who had declared their support for BN) as he contended that their defection was, amongst others, unlawful. Such an argument is misconceived in law as the Federal Court had previously held that reliance on pre-signed resignation letters is contrary to public policy by way of the decision in the ***Nordin Salleh***[13] case. Notwithstanding the above, on the assumption that the votes of the three Assemblymen were to be discounted, Nizar still did not have a majority nor was there a position of deadlock.

This is because the 28 members aligned to Pakatan also included the then Speaker of the Perak SLA who, by virtue of article 44(3) of the Perak State Constitution, could only vote in the event of an 'equality of vote'. On our facts, even if a vote of confidence was to be taken on the floor (as insisted by Nizar), BN would have had a majority 28 as opposed to 27 on the part of Pakatan as the Speaker was not permitted under the Perak State Constitution to a vote.

[13] ***Dewan Undangan Negeri Kelantan & Anor v Nordin bin Salleh & Anor*** [1992] 1 MLJ 697

So it was factually and mathematically beyond dispute that Nizar had in fact lost the confidence of the majority of the members of the Perak SLA.

THE FEDERAL COURT The decision of the Federal Court has put an end to the dispute as to who was and is the rightful MB of the State of Perak. The Federal Court, in upholding the decision of the Court of Appeal, held that:

(a) Nizar did not request the Sultan to prorogue the Perak SLA so that a vote of no confidence may be taken on the floor. Nizar instead requested for a dissolution of the Perak SLA;

(b) the request for dissolution was made under article 16(6) of the Perak State Constitution. This was apparent from the composition of the Perak SLA, the contemporaneous evidence and the oral evidence before the courts;

(c) as Nizar no longer commanded the support of the majority of the members of the Perak SLA, based on the Constitution, he stood dismissed;

(d) the appointment of Zambry as MB was lawful and in accordance with article 16(2) of the Perak State Constitution; and

(e) there was no basis to grant any relief sought by Nizar in the application for judical review.

More importantly, in ruling in favour of Zambry, the Federal Court laid down the following principles of law:

(a) as a matter of law, the question as to whether one has the command of the majority of the members of the legislative assembly may be determined by other means other than by way of a motion of confidence before the House;

(b) the Ruler or Sultan of a State has the power to make such a determination as to who commands the majority of the support of the members of the legislative assembly provided there is cogent evidence to support such a decision in the context of an article 16(6) application;

(c) when a request for dissolution is made but is refused following the loss of confidence or the support of the majority of the members of the legislative assembly, the MB and the Executive Council must tender their resignations, failing which the relevant provision of the constitution deems the said individuals dismissed and their positions vacant; and

(d) the decision of the High Court in *Datuk **Amir Kahar bin Tun Datu Haji Mustapha v Tun Mohd Said bin Keruak & 8 Ors*** and the decision of the Privy Council ***Adegbenro v Akintola*** are good law whilst the decision in ***Stephen Kalong Ningkan v Tun Abang Haji Openg and Tawi Sli*** is not.

CONCLUSION The true effect of this decision may become apparent only in the future as Malaysia moves towards a two-party or multi-party system where party hopping and the power struggle between politicians from different political alliances may become increasingly common, as each political party or alliance vies for control of the government of the day, not only at the state level but at the federal level as well.

Dato' Seri Dr Zambry bin Abd Kadir was represented by Dato' Cecil Abraham, Sunil Abraham and Farah Shuhadah Razali from **ZUL RAFIQUE** ***& partners.***

BRIEF-CASE...

CONSTITUTIONAL LAW – Judicial proceedings – Mandatory to use National Language in courts – Memorandum of appeal filed in English language incurably defective – Federal Constitution, article 152 – National Language Act 1963/1967 – Interpretation Acts 1948 and 1967

DATO' SERI ANWAR IBRAHIM V TUN DR MAHATHIR MOHAMAD [2010] 1 CLJ 444, Court of Appeal

FACTS The appellant had sued the respondent for an alleged defamation. In the appeal to the Court of Appeal, the respondent filed a notice of motion seeking that the appellant's record of appeal be struck out on the basis that the memorandum of appeal filed by the appellant was only in the English language and not in the National Language, which is a blatant disregard of the provisions in the Federal Constitution, the National Language Acts 1963/1967 and the Interpretation Acts 1948 and 1967.

ISSUE One of the issues for consideration was whether the failure to file a memorandum of appeal in the National Language would render the record of appeal incurably defective.

HELD It was held that the absence of the memorandum of appeal in the National Language renders the record of appeal incurably defective as the supremacy of the National Language, which is Bahasa Malaysia, in the courts cannot be denied.

LAND LAW – Indefeasibility of title – Whether section 340 of the National Land Code 1965 confers an immediate or deferred indefeasibility

TAN YING HONG V TAN SIAN SAN & ORS [2010] 2 CLJ 269, Federal Court

FACTS The appellant is the registered owner of a piece of land. The first respondent, purporting to act under a power of attorney, executed two charges in favour of United Malayan Banking Corporation, the third respondent, to secure the loans of RM200,000 and RM100,000 respectively. The loans were made in favour of the second respondent, Cini Timber Industries Sdn Bhd. The appellant claimed that he did not sign the power of attorney and alleged that it was forged. He was only aware of the forgery when he received a notice of demand from the third respondent.

ISSUE Whether section 340 of the National Land Code (NLC) confers upon the registered proprietor or any person having registered interest in the land, an immediate or deferred indefeasibility.

HELD In allowing the appeal, the Federal Court held that the fact that the third respondent acquired the interest in good faith for valuable consideration is not in issue since the charges arose from void instruments and should therefore be set aside automatically at the instance of the registered proprietor, namely the appellant. It was further held that the Federal Court in ***Adorna Properties Sdn Bhd v Boonsom Boonyanit*** had misconstrued section 340(1), (2) and (3) of the NLC and had reached the erroneous conclusion that the proviso appearing in subsection (3) equally applies to subsection (2).

Note: (See article ***From Boonsom to Tan Ying Hong... The Beginning of a New Dawn?*** on page 3)

✱ BRIEF-UP...

LABUAN FINANCIAL SERVICES & SECURITIES ACT 2010

No
704

Date of coming into operation
11 February 2010

Notes
An Act to provide for the licensing and regulation of financial services and securities in Labuan, the establishment of an exchange and for other matters related thereto.

(See article ***Promoting Labuan*** on page 5)

LABUAN ISLAMIC FINANCIAL SERVICES & SECURITIES ACT 2010

No
705

Date of coming into operation
11 February 2010

Notes
An Act to provide for the licensing and regulation of Islamic financial services and securities in Labuan and for other matters related thereto.

(See article ***Promoting Labuan*** on page 5)

LABUAN FOUNDATIONS ACT 2010

No
706

Date of coming into operation
11 February 2010

Notes
An Act to provide for the establishment, regulation and dissolution of foundations in Labuan and for matters relating to it.

(See article ***Promoting Labuan*** on page 5)

LABUAN LIMITED PARTNERSHIPS & LIMITED LIABILITY PARTNERSHIPS ACT 2010

No
707

Date of coming into operation
11 February 2010

Notes
An Act to provide for the establishment, regulation and dissolution of Labuan limited partnerships and Labuan limited liability partnerships and for matters connected therewith or incidental thereto.

(See article ***Promoting Labuan*** on page 5)

LABUAN OFFSHORE FINANCIAL SERVICES AUTHORITY (AMENDMENT) ACT 2010

No
A1365

Date of coming into operation
11 February 2010

Amendments
Long title, sections 1 – 4, 9, 13 – 15, 17, 18A, Heading of Part IIA, sections 28A – D, 29, 32, 32A, 36, 36A – C and **37**

Introduction
Sections 4A, 4B, 4C, 28BA, 28E – P, 36AA, 36D – I, 38A – E and **New Schedule**

(See article *Promoting Labuan* on page 5)

LABUAN OFFSHORE BUSINESS ACTIVITY TAX (AMENDMENT) ACT 2010

No
A1366

Date of coming into operation
11 February 2010

Amendments
Long title, sections 1, 2, 3, 3A, 4 – 8, 8A, 9 – 13, 15, 16, 20, 22, 23, 25 and **26**

Introduction
Sections 2A, 2B, 17A, 17B, 22A, 27, 28, and **Schedule**

(See article *Promoting Labuan* on page 5)

LABUAN OFFSHORE TRUSTS (AMENDMENT) ACT 2010

No
A1368

Date of coming into operation
11 February 2010

Amendments
Long title, sections 1, 2, 6, Part II, sections 7 – 19, 21, Part III, sections 22, 23, 24, 26, Part IV, sections 30, 31, 33, 35, 36, 41, 42, 46, 49, 52, 53, 56, 57, 58, 59 and **62**

Deletion
Sections 4 and **5**

Introduction
Part 1A, sections 8A, 11A – E, 33A, 33B, 36A, 36B, 42A, 42B, Part IVA and **section 63**

(See article *Promoting Labuan* on page 5)

OFFSHORE COMPANIES (AMENDMENT) ACT 2010

No
A1367

Date of coming into operation
11 February 2010

Amendments
Sections 2, 7, 8, 9, 9A, 9B, 10 – 19, 21 – 23, 25, 26, 43, 46, 47, 48, 51, 53, 55, 58, 66 – 68, 81, 83 – 88, 90 – 94, 94A, 95, 105, 109 – 111, 113, 114, 117 – 124, 127, Part IX, sections 131, 133 – 135, 137, 141, 142, 144, 145, 146, 148, 149, 150, 151, 151C and **152**

Deletion
Sections 5, 6, Part IV – Divisions 1 and 2, sections 49, 50, 56, 57, 61 – 65, 103, 113A, Part VIIIA, sections 143, 147 and **Schedule**

Introduction
Sections 9D, 47A, 48A, 94B, 101A, 118A – D, Part VIIIB, section 131A, Part X, sections 137A, 142A, 151D – E and **153**

(See article *Promoting Labuan* on page 5)

CAPITAL MARKETS & SERVICES ACT 2007

No
671

Date of coming into operation
1 April 2010 (with regard to **Division 2 of Part VI of the Act**)

SECURITIES COMMISSION (AMENDMENT) ACT 2007

No
A1305

Date of coming into operation
1 April 2010 (with regard to **section 7 of the Act in respect of the deletion of Division 2 of Part IV of the Securities Commission Act 1993**)

CAPITAL MARKETS & SERVICES (AMENDMENT) ACT 2010

No
A1370

Date of coming into operation
1 April 2010

Amendments
Sections 2, 63, 216, 220, 222, 319, 368 and **371**

Introduction
Sections 316A – H, 317A and **320A**

SECURITIES COMMISSION (AMENDMENT) ACT 2010

No
A1369

Date of coming into operation
1 April 2010

Amendment
Sections 2, 15, 148 and **160**

Introduction
Part IIIA, Schedules 1 and **2**

ENERGY COMMISSION (AMENDMENT) ACT 2010

No
A1371

Date of coming into operation
15 March 2010

Amendments
Sections 2, 5, 7, 9, 10, 18, 21, 25 and **33**

Introduction
Section 17A, 18A and **30A**

Deletion
Section 34

INTERNATIONAL TRADE IN ENDANGERED SPECIES ACT 2008

No
686

Date of coming into operation
28 December 2009

Notes
An Act to implement the Convention on International Trade in Endangered Species of Wild Fauna and Flora and to provide for other matters connected therewith.

INTERPRETATION (AMENDMENT) ACT 2008

No
A1330

Date of coming into operation
15 March 2010

Amendments
Sections 3 and **18**

GUIDELINES, RULES AND PRACTICE NOTES ISSUED BETWEEN JANUARY AND MARCH 2010 BY BANK NEGARA MALAYSIA AND BURSA MALAYSIA SECURITIES BHD

BANK NEGARA MALAYSIA (BNM)

- *Guidelines on Banking – In relation to Prudential Limits & Standards* – Guidelines on International Islamic Bank – *Date Issued: 13 January 2010*
- *Guidelines on Banking – In relation to Prudential Limits & Standards* – Prohibition on Specific / Restricted and Loss-Bearing Fund Placement from Islamic Banks to Parent Banking Institutions – *Date Issued: 13 January 2010*
- *Guidelines on Banking — In relation to Financial Reporting* – Classification and Impairment Provision for Loans / Financing – *Date Issued: 26 January 2010*
- *Guidelines on Banking – In relation to Financial Reporting* – Guidelines on Financial Reporting for Banking Institutions – *Date Issued: 5 February 2010*
- *Guidelines on Banking – In relation to Capital Adequacy* – Risk Weighted Capital Adequacy Framework (Basel II) – Disclosure Requirements – *Date Issued: 5 February 2010*
- *Guidelines on Development Financial Institutions – In relation to Prudential Limits & Standards* – Guidelines on Corporate Governance Standards on Directorship for Development Financial Institutions – *Date Issued: 8 February 2010*
- *Guidelines on Banking – In relation to Financial Reporting* – Circular on the Application of FRS and Revised Financial Reporting Requirements for Islamic Banks – *Date Issued: 9 February 2010*

BURSA MALAYSIA SECURITIES BERHAD (BMSB)

- *Main Market: Directives / Clarifications* – Compliance with Paragraph 6.03(3) of the Main Market Listing Requirements / Paragraph 6.04(3) of ACE Market Listing Requirements – *Date Issued : 29 January 2010*
- *ACE Market: Directives / Clarifications* – Frequently Asked Questions on eDividend (Payment of Electronic Cash Dividend) – *Date Issued : 19 February 2010*
- *ACE Market: Directives / Clarifications* – Questions & Answers in relation to Implementation of Electronic Dividend Payment – *Date Issued : 19 February 2010*
- *ACE Market: Directives / Clarifications* – Implementation of Electronic Dividend Payment – *Date Issued : 19 February 2010*
- *Main Market: Directives / Clarifications* – Frequently Asked Questions on eDividend (Payment of Electronic Cash Dividend) – *Date Issued : 19 February 2010*
- *Main Market: Directives / Clarifications* — Questions & Answers in relation to Implementation of Electronic Dividend Payment – *Date Issued : 19 February 2010*
- *Main Market: Directives / Clarifications* – Implementation of Electronic Dividend Payment – *Date Issued : 19 February 2010*

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:

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

The contributors for this **Brief** are:

- *Dato' Cecil Abraham*
- *Mariette Peters*
- *Rishwant Singh*
- *Sunil Abraham*
- *Joanne Ching Shan Mae*
- *Farah Shuhadah Razali*
- *Ang Yong Chiang*
- *Nik Ahmed Asraf Nik Othman*

BRIEF-TAKE...

ZANDRA TAN SUET PING graduated from the University of Hull and has been with **ZUL RAFIQUE** *& partners* for 7 years. Prior to joining **ZUL RAFIQUE** *& partners*, she spent 11 years with Lee Choon Wan & Co and Lee, Perara & Tan.

Zandra specialises in corporate finance, mergers & acquisitions and other corporate and commercial advisory work. Among her notable projects this year was the USD4.5 billion bond offering by Malaysia's Petroliam Nasional Berhad.

Zandra Tan Suet Ping (zandra@zulrafique.com.my)

When asked if she has any word of advice for young aspiring lawyers, she says that legal practice is very much based on common sense and there is no substitute for hard work. "If you walk the extra mile when you are young, you will be rewarded" is her motto. Zandra also believes that first impression counts, and so dressing professionally and having a firm handshake are important, besides being courteous always whilst not forgetting to have fun.