the ZRp brief

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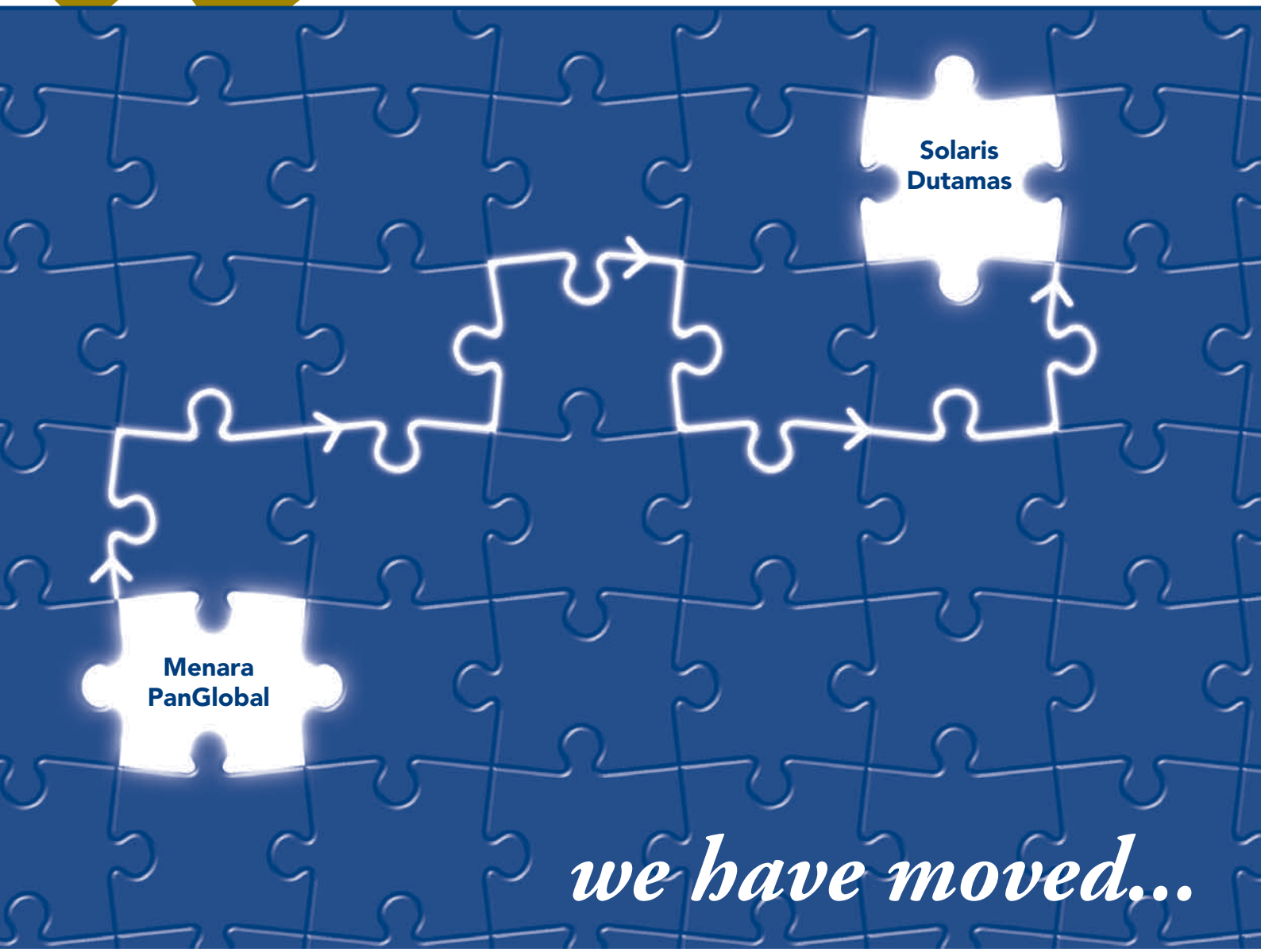

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ZUL RAFIQUE & partners

A BRIEF NOTE...

by Dato' Zulkifly Rafique

A new dawn...

We spent 10 glorious years at Menara PanGlobal and on 17 May 2010, we finally moved to our own premises at Solaris Dutamas. With the move we have taken with us many cherished memories of our time in the former premises.

The move was a monumental task but with everyone's assistance, we managed this challenge. We now have more or less settled in our new abode.

On another note, it was a delight to know that we were declared the *Malaysia Deal Firm of the Year* by the Asian Legal Business. In the same awards ceremony held on 4 June 2010 at the Ritz-Carlton Millenia Singapore, we obtained awards for *Islamic Finance Deal of the Year* (for our involvement in the Petronas Jumbo Sukuk), *Equity Market Deal of the Year* (for our involvement in the Maxis IPO) and *South East Asia Deal of the Year* (also for the Maxis IPO). It seemed too good to be true to have received four awards in one ceremony. Someone commented that it was a pleasant "housewarming" gift.

I would like to thank everyone who contributed to these awards and for those of you in the neighbourhood, do drop by our office at :

D3-3-8, Solaris Dutamas
No 1, Jalan Dutamas 1
50480 Kuala Lumpur.

in this issue...

BRIEF-FLASH...

- **BEYOND OFFICE HOURS...** The Federal Court has ruled that the Malaysian Anti Corruption Commission (MACC) may question witnesses beyond office hours. The ruling was made in the suit by one Tan Boon Wah against the MACC, where the former claimed that the latter had detained and questioned him for 16 hours overnight.

- **COURT OKAYS ENGLISH** The High Court has ruled that it is constitutional to teach Mathematics and Science in English. The suit was filed by 4 students, through their fathers, in 2006, based on the Federal Constitution, National Language Act 1967 and Education Act 1996.

- **COPYRIGHT ACT TO BE AMENDED** Amendments to the Copyright Act 1987 are expected to be tabled soon in Parliament. Amongst the proposals is action against anyone who is in possession of even a single copy of pirated works.

- **DIRECT SALES ACT TO BE AMENDED** It has been reported that the Direct Sales Act 1993 will be amended to protect consumers from becoming victims of people who attempt to maximise profit from direct sales.

- **PM'S POWER** The Federal Court has ruled that only the Prime Minister has the power to appoint and revoke the appointment of Cabinet Ministers. The decision was delivered in rejecting the appeal of Dato' Seri Anwar Ibrahim in challenging his dismissal as Deputy Prime Minister and Finance Minister on 2 September 1998 by the then Prime Minister, Tun Dr Mahathir Mohamad.

- **REGISTRATION NOT MANDATORY** Failure of the government to register an acquisition of land was held by the High Court not to affect the validity of such acquisition. In March, the High Court held that the occupancy of the land by Ishmael Lim Abdullah in the past 18 years was not valid as the land had been acquired in 1973.

- **WHISTLEBLOWER PROTECTION BILL** The Whistleblower Protection Bill was tabled in Parliament in April 2010 for the first reading. The Bill is aimed at protecting those who make disclosures against persons suspected of corrupt practices.

- **ZUL RAFIQUE *& partners* WINS 4 AWARDS!** ZUL RAFIQUE *& partners* was declared *Malaysia Deal Firm of the Year* by the Asian Legal Business. In the same awards ceremony held on 4 June 2010 at the Ritz-Carlton Millenia Singapore, ZUL RAFIQUE *& partners* obtained awards for *Islamic Finance Deal of the Year* (for our involvement in the Petronas Jumbo Sukuk), *Equity Market Deal of the Year* (for our involvement in the Maxis IPO) and *South East Asia Deal of the Year* (also for the Maxis IPO).

FOREIGN FLASH

- **ANTI-BULLYING LAW** An anti-bullying law has been passed in Massachusetts as a result of the suicide of Phoebe Prince, an Irish immigrant. The law requires school personnel to investigate bullying. Phoebe Prince, a 15 year old student at the South Hadley High School hanged herself in January 2010, after constant bullying from her classmates.

- **BAN ON SHORT-SELLING** Short-selling has been banned by the German Finance Ministry and this is expected to affect the country's ten most important financial institutions.

- **SINGAPORE'S NEW ATTORNEY GENERAL** Sundaresh Menon SC will replace Walter Woon as the next Attorney General of Singapore sometime in October. Sundaresh Menon, who has 20 years' experience in arbitration and dispute resolution, is currently the Managing Partner of Rajah & Tann.

- ***VICTORIA'S SECRET* VICTORY** It was held by the United States Court of Appeal that the mark *Victor's Little Secret* had the likelihood to tarnish the reputation of *Victoria's Secret* by virtue of the Trade Dilution Revision Act. The 2006 statute revised the Federal Trademark Dilution Act of 1995 where plaintiffs now had to prove 'likelihood' of dilution rather than 'actual dilution'.

BRIEFING...

MONEYLENDING

AR-RAHNU... AN ALTERNATIVE?

The concept of pawn-broking is no longer associated merely with the destitute or poor. In fact, it is now promoted as an alternative and easier source of credit.

In this article, we examine several aspects of *Ar-Rahnu* (Islamic pawn-broking) and whether it is to be preferred to other types of moneylending.

INTRODUCTION The financial system plays a very important role in supporting the growth process of the economy and hence may influence the standard of living of the society at large. The financial system must therefore provide a complete range of products and services to meet the different needs of the Malaysian economy. This includes providing more complex products and services as well as a better financial infrastructure to meet the more sophisticated needs of customers. This is to enable Malaysia to achieve a growth that takes into account the development of all segments of society.

Ar-Rahnu literally means to pledge, pawn or retain. It is technically a contract of pledging a security which is binding when possession of the pledge has taken place. Pledge or *Rahn* is to convert property into security in respect of a right or claim, the payment for which may be taken from the value of the property. In Islamic jurisprudence, the terminology *Rahn* means the possession offered as security for a debt so that the debt will be taken from them in case the debtor fails to repay it. Therefore in short, *Ar-Rahnu* means an act whereby a valuable asset is made as collateral for a debt. The collateral will be utilised to settle the debt if the debtor defaults.

In this context, the *Ar-Rahnu* scheme appears to be more appropriate as it provides a financial product for the small business group which may have limited access to conventional loan facilities.

This *Ar-Rahnu* scheme was first introduced in 1993 in Terengganu through the *Muasassah Gadaian Islam Terengganu*, and is now recognised as a viable moneylending scheme. It was introduced as an alternative and easier source of credit, with gold as collateral in exchange for cash.

OBJECTIVE AND PRINCIPLE The objective of the *Ar-Rahnu* scheme is to create an alternative financing channel to the conventional pawn-broking, one that complies with the Syariah principles that are seen to be more transparent and ethical. The *Ar-Rahnu* scheme is also expected to contribute to the improvement of the socio-economic well-being of Malaysians irrespective of race and religion through micro-credit financing. Furthermore, it aims to increase the number of Islamic banking products in line with the goal to establish a comprehensive Islamic financial system covering all financial aspects including banking, insurance and the money and capital markets.

Generally, the *Ar-Rahnu* scheme is the main source of funds for those who need loans immediately for a specific period. The majority of the customers of the scheme generally do not have either access to other sources of funds or the capacity to obtain loans or financing from financial institutions. Thus, this group of customers, regardless of whether they are in need of funds for their small businesses or are in financial difficulties, will be able to take advantage of the *Ar-Rahnu* scheme.

Under the scheme, valuable items may be used as collateral to obtain revolving capital. In addition, if the business turnover of the customer is high, the use of the *Ar-Rahnu* scheme will not only improve their cash flow, but will also help in reducing the operating costs of their businesses. In relative terms, financing costs will be lower and the small businesses will enjoy a higher profit margin. After regaining the capital and profit, they may in turn repay the loan under the scheme, and subsequently redeem the gold items that had been used as collateral. Therefore, the use of the *Ar-Rahnu* scheme as a source of financing for business purposes will represent an additional channel for funds to the small business group.

According to the principles of *Ar-Rahnu*, the ownership of the security is not transferred to the pledgee. The transfer of ownership occurs only under certain conditions, as an effect of the contract. The pledgee is liable for the pledge, to the amount either of its value or of the debt secured, whichever is less. The pledgee, however, has the right to sell the security when the debt is due in order to pay himself out of the proceeds. The pledge is in principle a collateral security, the debt remains in existence insofar as it is not covered by the sale of the pledge, and any credit balance which remains after the sale of the pledge is held by the pledgee in trust for the pledgor.

The objective of Ar-Rahnu is to create an alternative financing channel to the conventional pawn-broking, one that complies with the Syariah principles that are seen to be more transparent and ethical.

THE LAW The legal principles on pledges applicable under this scheme are as follows: (a) The contract becomes irrevocable after the pledge is received by the pledgee; (b) One pledge may be exchanged for another; (c) The pledgee may, on his own accord, annul the contract; (d) Two creditors may take a common pledge from a single debtor; (e) The pledgee has the right to hold the item until the debt is fully repaid; (f) The pledgor must compensate if the item pledged is destroyed or damaged. If it is destroyed or damaged by the pledgee, an amount of its value is struck off the debt; (g) If the pledgor fails to repay, the pledgee may exercise his right to sell the pledge; (h) The expenses incurred for the keeping of the pledge fall on the pledgor; and (i) If the time for paying the debt has arrived and the pledgor refuses to make payment, the pledgee may approach the court to compel the pledgor to sell the item pledged in order to pay the debt.

CONCLUSION In conclusion, under this *Ar-Rahnu* scheme, the borrower will pledge its securities as collateral for the loan granted. However, in the event where the borrower fails to repay the loan on maturity date, the lender has the right to sell the pledged securities and use the proceeds from the sale of the securities to settle the loan. If there is surplus money, the lender will return the balance to the borrower.

INDUSTRIAL RELATIONS

A CHANGE IS GONNA COME... THE FUTURE OF INDUSTRIAL TRIBUNALS

This article is based on a paper presented by Mr P Jayasingam at the Employment Law Conference that was held in January 2010 in Kuala Lumpur.

In his paper, Mr Jayasingam, the head of the Industrial Relations Practice Group at **ZUL RAFIQUE** *& partners*, examines several challenges faced by the Industrial Court and the changes that are required to its mechanism.

WHY CHANGE? The one thing that is constant in life is change, and changes are required for improvement, enhancement and the betterment of society.

In the same manner, reforms in the context of Industrial Tribunals are required for simple reasons of convenience and efficiency. The purpose of this paper is to address some of the areas that should be reviewed, re-looked and reassessed.

THE DISMISSAL PROCESS The first is the dismissal process. When an employee is dismissed, there are several stages to go through before it reaches the Industrial Court.

Representations The first deals with representations that have to be made to the Director General of Industrial Relations before a conciliation process may begin. After such representations are made, it must be determined if there is any possibility of a settlement. If the answer is in the negative, the Minister of Human Resource will be notified and it is then for him to decide whether to refer the matter to the Industrial Court.

This process appears to be fraught with difficulties. Firstly, the officers who are tasked with assisting the parties to settle often lack the comprehension of legal issues. Owing to such ignorance, they sometimes pressure the parties into a settlement. In fact, employees frequently complain that they are threatened into settling the case with their employers, failing which their cases would not be referred to the Industrial Court for adjudication.

Employers, on the other hand, feel shortchanged as they are forced to pay out compensation even when they feel that the decision to dismiss or terminate the services of the workman was justified.

Expertise A further issue that needs to be addressed concerns the Minister when he decides whether to refer the dispute to the Industrial Court. The factors that are considered by the Minister in exercising his discretion are generally not disclosed.

A perusal of the affidavits of the Minister (filed in the High Court when they are challenged by way of judicial review) indicates that the decisions are often arrived at in an arbitrary manner and are sometimes not based on the facts and issues before him. It is therefore felt that it would be more apt to allow the Industrial Court to decide these issues. Otherwise, it may be argued that the conduct of the Minister may tantamount to usurping the function of the court.

Delay It must also be borne in mind that the entire dismissal process is time-consuming and more often than not, leave both parties dissatisfied.

Further delays are caused when the aggrieved party decides to challenge the Minister's decision on whether to refer the matter to the Industrial Court. This is usually done by way of judicial review in the High Court and subsequently by way of appeals to the Court of Appeal and the Federal Court.

These avenues to review and appeal completely militate against the notion that industrial disputes ought to be settled expeditiously.

Non-legal representation A further point to note is the fact that an advocate and solicitor is barred from representing a workman or an employer pursuant to proceedings under section 20(2) of the Industrial Relations Act 1967 (IRA). The rationale provided by the Ministry of Human Resource is that advocates and solicitors would be an impediment to a speedy and effective settlement as proposed by the Industrial Relations officer.

I am of the view that this is a misconception. In fact the contrary is probably true. Lawyers, being legally trained, may be more suitable to assist in disposing of the matter sooner than later.

Mediation The suggestion therefore is to amend the laws to create a system where, in the event of a dispute, the matter will first be referred to mediation. The mediation process should be a formalised one created within the labour law system.

If mediation fails, the matter should be referred directly to the Industrial Court. It is therefore suggested that the Ministerial duties should be by-passed for the reasons earlier alluded to.

THE APPEAL PROCESS The second area that I would like to address is the appeal process.

Limited What is quite obvious about the appeal process is that it is very limited. In fact, according to section 33B of the IRA, an award, decision or order of the Industrial Court shall be final and conclusive and shall not be challenged, appealed against, reviewed, quashed or called in question by any court.

Although section 33B creates the impression against appealing against the decision of the Industrial Court, there is, to a certain extent, some form of appeal in the judicial review process and references to the High Court provided for in section 33A.

Reference to the High Court Section 33A is what is known as the provision on reference to the High Court. There are several restrictions provided for in the section. Furthermore, the process is complicated. The applicant must first apply to the Industrial Court which made the award. The purpose of this application is to refer to the High Court a question of law. And this particular question of law must satisfy the conditions set out in paragraphs (a), (b), (c) and (d) of section 33A(1) of the IRA.

33A. Reference to the High Court on a question of law.

(1) Where the court has made an award under section 30(1) it may, in its discretion, on the application of any party to the proceedings in which the award was made, refer to the High Court a question of law -

(a) which arose in the course of the proceedings;

(b) the determination of which by the court has affected the award;

(c) which, in the opinion of the court, is of sufficient importance to merit such reference; and

(d) the determination of which by the court raises, in the opinion of the court, sufficient doubt to merit such reference.

What is also important to note, specifically in subsection (1), is that the Industrial Court is given a wide discretion when considering whether to refer the questions to the High Court.

This process is called a reference to the High Court. Although one cannot be blamed for forming the impression that this in itself is an appeal, it was categorically stated in *Cheek Hong Leong v KYM Industries (M) Sdn Bhd*[1] that section 33A of the IRA is not a vehicle for appeal from the Industrial Court to the High Court.

Judicial Review Judicial review, on the other hand, is a review of the decision-making process of a tribunal such as the Industrial Court.

The High Court is vested with statutory powers to review the awards of the Industrial Court by paragraph 1 of the Schedule to the Courts of Judicature Act 1964, the Specific Relief Act 1950 and the Rules of the High Court 1980.

1 [1999] 5 MLJ 46

It is important to distinguish the judicial review process from that of an appeal.

Distinction between judicial review and an appeal The distinction between judicial review and a general right of appeal is that in the latter situation, the court may examine both the legality and merits of a decision whereas in a judicial review, it is the legality only that is in issue. Furthermore in an appeal, the court may substitute its decision for that of the decision-maker appealed from, whereas in a judicial review, the court may either quash the decision or remit it to the decision-maker for reconsideration.

There are several cases where the distinction between judicial review and appeal was expounded and the gist of the matter is that a dichotomy was created between errors of law that go to jurisdiction and those that do not.

After 1995 however, that distinction was abolished. Novel grounds seem to be surfacing all the time to justify greater intervention by the courts under the guise of judicial review. This has diluted the demarcation between an appeal process and a judicial review, and also left the law on judicial review uncertain and unsettled.

The quarters who criticise the judicial review process argue that the availability of this review mechanism is inconsistent with the objective of the IRA, namely, the speedy settlement and resolution of industrial disputes. Industrial disputes are meant to be disposed of in a speedy manner with an element of finality. When industrial awards are assessed or reviewed by the High Court, it defeats the purpose of creating an independent adjudication system for industrial disputes that will see a speedy and final conclusion of the dispute.

This also means that the industrial adjudication is no longer exclusive and is fused with the civil courts.

Is High Court the proper forum? Furthermore, the question that arises is whether the High Court is a proper forum. One must bear in mind that the High Court is already an overworked machinery. It has to hear and dispose of not only judicial review applications but other types of civil cases as well. Therefore, it may not be appropriate to further burden the High Court.

Moreover, an unsuccessful applicant or aggrieved party at the judicial review proceedings has an automatic right of appeal to the Court of Appeal and a further appeal to the Federal Court on a question of law. This will add to the tiers of appeal and destroy the element of finality that ought to accompany industrial awards.

One must bear in mind that the High Court is already an overworked machinery. It has to hear and dispose of not only judicial review applications but other types of civil cases as well. Therefore, it may not be appropriate to further burden the High Court.

Two options should therefore be considered for reform.

Option 1 Under the first option, it is proposed that the IRA be amended to allow parties to have a direct right of appeal to the High Court from any award, decision, order or ruling of the Industrial Court. The proposal is that the judge presiding in the High Court should have the requisite experience in Industrial Relations matters. A further appeal from the High Court to the Court of Appeal may be allowed but only with leave of the court.

Option 2 The second option is to provide for a direct right of appeal from the Industrial Court to a higher body or tribunal known as the Malaysian Employment Appeal Tribunal (EAT). It is proposed that the President of the EAT shall be a High Court judge who is assisted by a panel of High Court judges. It is further proposed that there may be a further appeal to the Court of Appeal, but with leave.

The question is which option is preferred.

The preferred option The preferred option is Option 1. This is because with Option 2, there may be a risk of creating a three-tier appeal. Although in Option 2, the appeal from the EAT is to the Court of Appeal, the High Court may still exercise its supervisory powers over matters that fall within the EAT's jurisdiction.

This will ultimately make the whole process lengthy and will naturally lead to more delay.

ENFORCEMENT OF AWARDS The third area of concern is enforcement of awards. This is addressed in section 56 of the IRA, where if the award is not complied with, a complaint may be lodged with the Industrial Court.

The Industrial Court may direct the party to comply with the award. If there is non-compliance with the direction of the court, the award, after having been referred to the High Court, may be enforceable as a judgment of the High Court.

This, in my view, is a very cumbersome process. In fact, it is tedious and may lead to unnecessary delay.

The law should be amended to ensure that aggrieved parties may directly enforce awards of the Industrial Court.

Otherwise it would defeat the purpose of the award itself.

CONCLUSION As a conclusion, it is reiterated that the areas of reform include: (a) dismissal; (b) the appeal process; and (c) enforcement of awards.

There is no guarantee that these changes would definitely enhance and improve the current process, but perhaps one should reflect on the words of George Lichtenberg:

> *I cannot say whether things will get better if we change; what I can say is they must change if they are to get better.*

INTERNATIONAL LAW

(DIPLOMATIC) IMMUNITY OR IMPUNITY? Diplomatic immunity is a long-standing principle of international law that affords foreign government officials protection from the jurisdiction of local courts and other ordinary processes of law.

There is currently a heated debate concerning diplomatic immunity in light of the case in Singapore in which a Romanian diplomat was allegedly the driver of a car involved in a hit-and-run incident. The hit-and-run incident which occurred on 15 December 2009 left a Malaysian, Tong Kok Wai, dead, and two others seriously injured. The diplomat left Singapore for home two days after the incident, and has refused to attend a coroner's inquiry into the death.

HISTORY OF DIPLOMATIC IMMUNITY

The history of diplomatic immunity may be traced to Greek, Roman and even Islamic tradition. However, modern immunity was first granted in 1709 by the British Parliament.

VIENNA CONVENTION ON DIPLOMATIC RELATIONS

Today, the scope of diplomatic immunities and privileges enjoyed by diplomats have been codified under the Vienna Convention on Diplomatic Relations 1961 (the Convention) which has been ratified by 186 State Parties. The Convention covers protection for the diplomatic agents as the head of mission sent by the sending State as well as its family and staff.

Presently, the Convention has been regarded by jurists as the cornerstone of modern international relations as it is reflective of international custom and consequently binds even non-State Parties.

Under the Convention, a diplomatic agent enjoys several forms of protection such as tax exemption and his person, private residence and property is inviolable against any violations and trespass. Additionally, he is absolutely immune from the criminal jurisdiction of the receiving State whilst enjoying partial immunity from its civil and administrative jurisdiction, except in real actions involving private immovable property situated in the territory of the receiving State, succession where the diplomatic agent is involved as an executor, administrator, heir or legatee in his private capacity and any professional or commercial activity exercised by the diplomatic agent outside his official functions. The purpose for such immunity is to protect and preserve the channels of diplomatic communication by exempting diplomats from local jurisdiction to enable them to undertake the performance of their official duties with certainty, independence, and security. Immunities under the Convention are absolute unless expressly waived by the sending State in accordance with Article 32 of the Convention.

> *The person of the diplomatic agent shall be inviolable. He shall not be violable to any form of arrest or detention. The receiving State shall treat with due respect and shall take all appropriate steps to prevent any attack on his person, freedom or dignity.* – Article 29 of the Vienna Convention on Diplomatic Relations 1961

IMMUNITY OR IMPUNITY? Due to its extensive and absolute armour, the concept of immunity, has, on many occasions, been utilised in advocating the escape of diplomatic agents from liability for misconduct or worse, grave crimes.

A recent event is the hit-and-run accident that occured on 15 December 2009 at Bukit Panjang, Singapore. Dr Silviu Ionescu, a Romanian diplomat, was implicated in the incident as a car belonging to the Romanian embassy was reported to have hit three pedestrians before speeding away. One of the victims, 30 year old Tong Kok Wai, a Malaysian, died due to the injuries suffered. Dr Silviu Ionescu, however, maintained his innocence by claiming that his car was stolen just before the incident occurred. Three days after the accident, Singapore authorities allowed Dr Ionescu to fly back to Romania to seek medical treatment for his diabetes. Later, the diplomat told the Romanian journalists that he will not be returning to Singapore.

A coroner's inquiry was conducted and Singapore has made two requests – one for Dr Silviu Ionescu to attend the inquiry; and the second, for Romania to waive diplomatic immunity of Dr Ionescu's driver, Marius Trusca. Trusca's immunity was waived and he gave evidence in the inquiry. It was decided at the coroner's inquiry that there was enough evidence to charge Dr Ionescu. It was recently reported that Dr Ionescu has been remanded in Romania.

CONCLUSION The spawn of misconduct and grave offences committed by these diplomats have grown exponentially throughout the years[2], with only a handful receiving redress for those acts. It should be reminded that the spirit of the Convention is to preserve and enhance diplomatic relations as opposed to using it as vortex for unpunished criminals and the graveyard to bury accountability. Diplomatic agents yield great and absolute power in ensuring and maintaining the prosperity of inter-sovereign relationships and in forging long-lasting cooperation, and the blinded scales of the law is to uphold justice regardless of position. It is best to remember that failure of good diplomatic relations will inevitably lead to warfare and the loss of peace as we know it.

2 Other incidents include the occurrence in Romania where in 2004, an American Marine serving in Romania caused an accident which killed a popular Romanian singer. In 2001, a pedestrian was killed in Canada when a Russian diplomat drove his car into him.

GENERAL

THE WITNESS PROTECTION ACT 2009 The origins of the witness protection programme started in the US in the 1970s as a legal procedure to bring justice against the Mafia and other powerful criminal organisations. The cooperation of the witness had become critical to the successful prosecution of the offender but because of the powerful capabilities of the criminal group, it became necessary for the government to provide for the safety of the witness.

In Malaysia, the Witness Protection Act 2009 took effect on 15 April 2010. In this article we examine several aspects of the Act.

Lord President Suffian (as he then was) in delivering the judgment of the Federal Court in the case of *Husdi v Public Prosecutor*[3], stated:

> *... Malaysia is a small country, with a small population, and Malaysians are easily scared: **they are reluctant to be involved**. If a crime is committed under their nose they look the other way, see, hear and say nothing, do little or nothing to help identify – let alone – arrest the offender;... and **Malaysians will be more reluctant to come forward with evidence** to incriminate their fellows.*

Notwithstanding the fact that the above dicta was made in the context of the denial of an accused person's right to have access to statements made by witnesses during police inquiry, the very same reasoning could well justify the enactment of the Witness Protection Act 2009 (WPA) some 30 years later; primarily to ensure safety and security of witnesses who are willing to or has given evidence or any information in relation to an offence. Witness protection[4] could be defined as protection accorded to a 'threatened' witness and such protection may continue even after the trial has concluded.

3 [1980] 2 MLJ 80
4 Previously known as 'Witness Tampering'

In the US, this act of shielding is conducted via a programme known as the 'Witness Security Program' which was created *vide* Title V of the Organized Crime Control Act 1970. The UK practises a similar system administered by relocating them and their domestic police forces. These witnesses are usually shielded by relocating them and providing them with new identities so that the accused person or his agents would not be able to trace them. This could effectively avoid any possibility of harm or death by reason of vengeance.

In Malaysia, historically, the Commission of Enquiry Act 1950 afforded wide protection to evidence adduced in an enquiry since the evidence therein will be conferred with absolute privilege status and the person giving such evidence could not be subject to any suit or other civil proceedings in respect of that evidence. However, in this modern age, greater protection is required and vital in protecting the 'whistleblowers'. Hence, by establishing the WPA, Malaysia marked its entry into witness protection schemes.

ESTABLISHMENT OF THE WITNESS PROTECTION PROGRAMME The long title of the WPA is '*An Act to establish a programme for the protection of witnesses and for other matters connected therewith.*' Section 3 of the WPA provides for an establishment of the Witness Protection Programme (the Programme). The Minister responsible for the Programme has the discretion to appoint an administrator for the Programme who shall be referred to as the Director General (the DG). The functions of the DG are set out in section 5 of the WPA.

ELIGIBILITY According to the WPA, a witness may apply for protection through the Programme and the DG shall, upon considering the factors stipulated in section 9, recommend the eligibility of a witness to the Attorney General pursuant to section 10.

A successful witness will be provided with reasonable and necessary measures for his safety and welfare, and this includes accommodation, relocation and even assistance in the application for a new identity.

RIGHTS AND OBLIGATIONS OF A PARTICIPANT Part III of the WPA deals with the rights and obligations of a participant of the Programme. Non-disclosure of the original identity is required from the participant of the Programme who has been given a new identity.

SECRECY AND PROTECTION The WPA imposes an obligation of secrecy on the DG and his officers. The identity of the participant who becomes a witness in a criminal proceeding is also protected, and according to section 20 of the WPA, the part of the proceedings that relates to the identity of the witness is to be conducted in camera and the court may make the necessary orders to suppress the publication of the evidence in relation to the new identity of the witness.

Section 17 - Obligation of secrecy.

(1) ... the Director General or any of his officer, whether during his tenure of office or during his employment or after that, and any other person who has by any means access to any information or document relating to the affairs of the Programme, shall not give or otherwise disclose such information or document to any person.

TERMINATION OF THE PROGRAMME The protection afforded to a participant may be terminated when the participant knowingly gives false information, behaves in a manner that threatens the integrity of the Programme, or where the DG is of the opinion that there is no reasonable justification for the continuation of the protection. The termination will be decided by the Attorney General pursuant to the recommendations of the DG. The Programme may also be terminated by the participant on his own accord by writing to the DG.

BRIEF-CASE...

LAND LAW – Acquisition of land – Objection against compensation award – Whether appellant a 'person interested' within meaning of section 37 of Land Acquisition Act 1960

LEMBAGA LEBUHRAYA MALAYSIA V CAHAYA BARU DEVELOPMENT BHD

[2010] 4 CLJ 419, Court of Appeal

FACTS The respondent, who was the registered owner of certain land that was required for a public purpose, was awarded compensation for the acquisition of such land. The appellant, claiming to be a person interested under section 37(3) of the Land Acquisition Act 1960 (LAA), objected to the award by filing Form N. The Land Administrator withheld 25% of the said award for payment to the respondent.

ISSUE The issue for consideration was whether the appellant was a person interested within the meaning of section 37 of the LAA.

HELD It was held that all the requirements of section 37(3) of the LAA had been met as the appellant had undertaken a work of public utility which fell plainly within the expression 'public purpose', and the award had exceeded RM15,000. The appellant also fell within the category of a 'person interested' as section 2 of the LAA provides that the 'person interested' includes every person claiming an interest in compensation to be made on account of acquisition of land under the LAA. There was an alternative remedy under the LAA by way of Land Reference proceedings. The respondent could have waited for the reference under section 38(5) of the LAA to be made by the Land Administrator. On this ground alone, the applications for declarations should have been refused.

BANKING – Islamic banking facilities – *Murabaha* facilities restructured into revolving *Al-Bai Bithaman Ajil* (BBA) facility – Default of payment – Validity of BBA facility agreement – Whether challenged for want of compliance with Syariah principles

TAN SRI ABDUL KHALID IBRAHIM V BANK ISLAM MALAYSIA BHD & ANOR CASE

[2010] 4 CLJ 388, High Court

FACTS The Bank provided two *Murabaha* Facilities to the plaintiff. Due to repeated breaches by the plaintiff, the Bank offered to restructure the two *Murabaha* Facilities into a Revolving *Al-Bai Bithaman Ajil* Facility Agreement (BBA Facility Agreement). When the Bank applied to enter summary judgment against the plaintiff, the plaintiff alleged an existence of a collateral agreement and attempted to challenge the validity of the BBA Facility Agreement.

ISSUE Whether the validity of the BBA Facility Agreement was challenged for want of compliance with Syariah principles.

HELD It was confirmed that the secretariat to the Syariah Advisory Council (SAC) had responded with a written ruling from the SAC which essentially stated that the BBA Agreement was acceptable and a recognised transaction in Islam. The Bank also had the duty to sell the pledged shares when the plaintiff failed to remedy the breaches, otherwise the Bank would be blamed for not exercising its rights under the security documents before taking action against the plaintiff. Furthermore, the plaintiff had signed a Memorandum of Acceptance, admitting to owing the Bank under the earlier *Murabaha* Agreements.

CONSTITUTIONAL LAW – Dismissal of Minister – Whether dismissal valid – Whether any legal provision as to how to effect a revocation to ministerial appointment

DATO' SERI ANWAR IBRAHIM v PERDANA MENTERI MALAYSIA & ANOR [2010] 5 CLJ 369, Federal Court

FACTS The appellant was appointed Deputy Prime Minister and Minister of Finance in 1995. On 2 September 1998, the first respondent revoked the appellant's appointments with immediate effect through a letter. The appellant contended that the revocation was unlawful and that the first respondent had effected the revocation without prior assent of the Yang di-Pertuan Agong.

ISSUES Whether prior approval of the Yang di-Pertuan Agong is required for the revocation of ministerial office pursuant to Art 43(5) of the Federal Constitution, and if such non-compliance is curable by the Ministers of the Federal Government (Amendment) Order 1998 (the Order).

HELD Following the principle that only the authority that appoints has the right to revoke the appointment, the appeal was dismissed. The Prime Minister has the power to choose and appoint, and to revoke the appointment of, any Minister. Reference to the Yang di-Pertuan Agong in Art 43(5) is only a formality. Since there is no legal provision as to how a revocation is to be effected, the gazette was sufficient evidence to show that the requirement of Art 43(5) has been met. The omission to follow the requirements under Art 43(5) was curable by the Order.

OUR NEW HOME...

The Middle Floor, East Wing

The gym

The Resource Centre

BRIEF-UP...

WITNESS PROTECTION ACT 2009

No
696

Date of coming into operation
15 April 2010

Notes
An Act to establish a programme for the protection of witnesses and for other matters connected therewith.

(See article *The Witness Protection Act 2009* on page 9)

SURUHANJAYA PENGANGKUTAN AWAM DARAT ACT 2009

No
714

Date of coming into operation
3 June 2010

Notes
An Act to provide for the establishment of the Suruhanjaya Pengangkutan Awam Darat towards achieving a safe, reliable, responsive, accessible, efficient, planned, integrated and sustainable land public transport, while ensuring the provision of affordable services for the carriage of passengers and competitive services for the carriage of goods and for related matters.

MENTAL HEALTH ACT 2001

No
615

Date of coming into operation
15 June 2010

Notes
An Act to consolidate the laws relating to mental disorder and to provide for the admission, detention, lodging, care, treatment, rehabilitation, control and protection of persons who are mentally disordered and for related matters.

GUIDELINES, RULES AND PRACTICE NOTES ISSUED BETWEEN APRIL AND JUNE 2010 BY BURSA MALAYSIA SECURITIES BERHAD / SECURITIES COMMISSION / BANK NEGARA MALAYSIA

BURSA MALAYSIA SECURITIES BERHAD (BMSB)

- Amendments to the Main Market Listing Requirements relating to eDividend – *Date Issued: 15 April 2010; Effective Date: 1 September 2010*
- Amendments to the ACE Market Listing Requirements relating to eDividend – *Date Issued: 15 April 2010; Effective Date: 1 September 2010*
- Main Market: Directions / Clarifications – Disclosure Requirements Pursuant to Implementation of FRS 139 – *Date Issued / Effective Date: 25 March 2010*
- ACE Market: Directions / Clarifications – Disclosure Requirements Pursuant to Implementation of FRS 139 – *Date Issued / Effective Date: 25 March 2010*

SECURITIES COMMISSION (SC)

- Guidelines issued under Collective Investment Schemes – In relation to Unit Trusts – Guidelines on Unit Trust Funds – *Date Updated: 1 June 2010*

- Guidelines issued under Collective Investment Schemes – In relation to Prospectus – Prospectus Guidelines for Collective Investment Schemes – *Date Updated: 1 June 2010*

BANK NEGARA MALAYSIA (BNM)

- Guidelines & Circulars Listing – Guidelines issued under Banking – In relation to Prudential Limits & Standards – Guidelines on Property Development & Property Investment Activities by Islamic Banks – *Date Updated: 1 April 2010*

- Guidelines & Circulars Listing – Guidelines issued under Shariah – Shariah Governance Framework for Islamic Financial Institutions – *Date Issued: 20 May 2010*

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The cafeteria

ZRp IN-BRIEF...

The ZRp Brief is published for the purposes of updating its readers on the latest development in case law as well as legislation. We welcome feedback and comments and should you require further information, please contact the Editors at:

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HEARTIEST CONGRATULATIONS!

ZUL RAFIQUE *& partners*

would like to congratulate

YBhg. Tan Sri Dato' Cecil Wilbert Mohanaraj Abraham
(Senior Partner of the firm)

on being conferred

PANGLIMA SETIA MAHKOTA (P.S.M.)
by
YANG DI-PERTUAN AGONG MALAYSIA XIII
on the occasion of
His Royal Highness' Birthday

Sincere wishes from:
The Partners, Associates and Staff
of

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