

# the **ZRp** brief

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IJARAH DEAL OF THE YEAR

MERGERS & ACQUISITIONS DEAL OF THE YEAR

**ZUL RAFIQUE & partners** won the Ijarah Deal of the Year and Mergers & Acquisitions Deal of the Year 2010 Awards at the *Islamic Finance News Awards* Ceremony on 24 February 2011.

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**ZUL RAFIQUE & partners**

## A BRIEF NOTE...

by Dato' Zulkifly Rafique



### To Catch a (Cyber) Thief

Have you wondered why people commit crimes? I have been asking myself this question lately.

Several months ago, someone (let's refer to him as the Fraudster) impersonating me, sent emails to several recipients abroad with the ultimate aim of getting them to part with hard-earned cash. Luckily, a few of these recipients had the common sense to contact me directly to alert me of these emails. I did what most people would do – lodge a police report.

What baffles me is the Fraudster had definitely done his research on me as he used my personal details and even the address of **ZUL RAFIQUE & partners**. I have heard and read of many others who have had their personal details used in a similar manner.

I would like to urge everyone to be cautious when dealing with emails sent from unknown persons, especially if they are soliciting assistance, money or your personal details. We read about these incidents everyday. There is no end to what these rogues will do. They find ingenious ways, by tapping into technology to perpetrate their fraudulent activities.

So, it is back to my question. Why do people commit crimes? Simply because they can and they will do so especially when they come across unsuspecting, trusting and sometimes gullible people. So let's make it our responsibility to prevent, to the best of our ability, these fraudsters from achieving their goals.

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## BREAKING NEWS...

### ZUL RAFIQUE & partners CLINCHES TWO AWARDS

ZUL RAFIQUE & partners once again displayed its prowess as one of the leading corporate and finance practices in Malaysia. The firm's strong synergy had earned itself the '*Ijarah Deal of the Year*' and '*Mergers & Acquisitions Deal of the Year*' in 2010, awarded by Islamic Finance News, a leading global Islamic finance news provider

Last year, the Banking and Finance practice group of the firm played a significant role in advising Celcom Transmission (M) Sdn Bhd, ('Celcom') a wholly-owned subsidiary of Celcom Axiata Berhad, the second largest mobile operator in Malaysia. Led by leading partner **Ms Loh Mei Mei**, the transaction involved an Islamic issuance programme under the Islamic principle of *Ijarah* jointly arranged by CIMB Investment Bank Berhad and Maybank Investment Bank Berhad.

The transaction also observed the firm's Corporate practice group headed by **Ms Au Wei Lien** in advising an internal restructuring exercise where Celcom Axiata's network businesses were transferred to Celcom Axiata and Celcom Transmission (M) Sdn Bhd.

The deal had certainly contributed towards the rebound of the global Sukuk in the second half of the year 2010. Celcom had successfully made a placement of RM4.2 billion nominal value unrated Sukuk in a private offering to Employee Provident Fund, CIMB Islamic Bank Bhd and Malayan Banking Bhd in August 2010.

The completion of the exercise also enhanced Celcom's operational efficiencies and cost savings.

## BRIEF-FLASH...

- **70% ONLY** Bank Negara Malaysia has imposed a new rule allowing banks to lend up to only 70% of the value of the house. This rule which took effect from November 2010, applies to borrowers taking up a third housing loan. 
- **ACCESS & BENEFIT SHARING BILL IN THE PIPELINE** The Access & Benefit Sharing Bill is expected to be tabled in Parliament in July 2011. The Bill aims to combat biological piracy by regulating and protecting the access of natural resources, and to ensure a fair and equitable sharing of benefits from the use of the resources. 
- **AMENDMENTS TO THE ROAD TRANSPORT ACT 1987** The Road Transport Department is empowered, from 1 February 2011, to take action against traffic offenders on all roads in the country, including multi-story parking lots. In addition, vehicle owners must update their new addresses within two weeks, failing which, a fine shall be imposed. 
- **AMENDMENTS TO THE VALUERS, APPRAISERS & ESTATE AGENTS ACT 1981** Amendments to the Valuers, Appraisers & Estate Agents Act 1981 have been tabled in Parliament for both the Second and Third Readings in November 2010. One of the proposed amendments is the registration of probationary valuers and estate agents. 
- **COMPETITION COMMISSION ACT 2010** The Competition Commission Act came into force on 1 January 2011. The Competition Commission is established to oversee the implementation of the Competition Act 2010 which takes effect on 1 January 2012. 
- **INNOVATION ACT TO BE TABLED** To encourage the commercialisation of the research and development effort by local universities, the Innovation Act will be tabled. A special unit under the Prime Minister's Department has been set up as a one-stop centre, to plan and formulate policies to encourage innovation. 

- **WRITTEN JUDGMENTS IN ENGLISH VALID**

The Federal Court ruled in November 2010 that grounds of judgment written in English are valid. This ruling was made in Dato' Seri Anwar Ibrahim's appeal against the decisions of the Court of Appeal and High Court in the defamation suit against former Prime Minister, Tun Dr Mahathir Mohamad. ✚

- **KAMPUNG BARU DEVELOPMENT**

**CORPORATION BILL** A Bill to govern the development of Kampung Baru, a 110-year-old enclave in Kuala Lumpur is set to be tabled in Parliament for the Second Reading in June. The Bill proposes, amongst others, to establish an advisory council and a corporation fund. ✚

- **'MC' MARK FROM FEB 1** Children's toys without the 'MC' ('Malaysian Conformity') mark will be confiscated with effect from 1 February 2011. This new guideline applies to both locally manufactured and imported toys. ✚

- **NEW BROKING RULES** Bursa Malaysia is moving towards a more self-governing framework recently. It has sought feedback from the public with regard to its proposed new rules of the stock exchange. ✚

- **PLEA BARGAINING DEAL** A proposal has been made to offer a 50% reduction of maximum punishment for the accused who pleads guilty in criminal cases. An early guilty plea could reduce the backlog of cases since time and resources would be saved without lengthy trials. ✚

- **PROTECT THE WHISTLE BLOWERS** The Whistleblower Protection Act 2010 came into force on 15 December 2010. It aims to protect informers who expose corrupt practices, both in the public and private sectors. Under the Act, the protection against detrimental action is extended to any person related to or associated with the whistleblower. ✚

- **REVISED TAKE-OVERS AND MERGERS**

**CODE** The Securities Commission has revised its Take-Overs and Mergers Code which supersedes the Malaysian Code on Take-Overs and Mergers 1998. The new Code came into force on 15 December 2010. ✚

- **STRATEGIC TRADE ACT 2010** This Act took effect on 1 January 2011 with the aim of controlling exports of strategic products which may be engaged for terrorist activities. ✚

- **TRADITIONAL & COMPLEMENTARY MEDICINE BILL** A Traditional & Complementary Medicine Bill will be tabled in Parliament to regulate the traditional medical practice in Malaysia. ✚

- **WILDLIFE CONSERVATION ACT 2010** Stiffer penalties are imposed under the Wildlife Conservation Act 2010 which came into force on 28 December 2010. The Act also addresses issues on wildlife welfare and cruelty. ✚

## FOREIGN FLASH

- **GREEN COURT** India will be the third country to set up a 'green court', after Australia and New Zealand. The court is said to be for 'anybody and everybody' seeking damages arising out of inadequate implementation of environmental laws. ✚

- **QUICKER CASINO EXCLUSION ORDER** Families of gamblers in Singapore who apply for casino exclusion orders have to wait two weeks only to obtain such order. Counselling and a detailed 25-page report were previously required before a hearing date is given. Now, a hearing date is given once the National Council of Problem Gambling is contacted for the order. ✚

- **UK ANTI-BRIBERY ACT** Malaysia and UK will see a 'win-win' situation to help one another to curb corruption as the UK is enforcing an all-encompassing law to criminalise British firms that bribe in order to secure overseas contracts. The Anti-Bribery Act will take effect from 1 April 2011. ✚

- **LEGAL COMPULSION TO VISIT ELDERLY PARENTS** China is making amendments to the law on Protection of the Rights and Interests of the Elderly 1996. The changes include imposing a legal duty upon children to visit their aged parents. ✚



## BRIEFING...

### CORPORATE

#### **MALAYSIAN CODE ON TAKE-OVERS**

**AND MERGERS 2010** The new Malaysian Code on Take-Overs and Mergers 2010 (2010 Code) came into force on 15 December 2010.

Several significant changes from its predecessor, the Malaysian Code on Take-Overs and Mergers 1998 (1998 Code), are observed in this article.

**ACQUISITIONS AND TAKE-OVERS** The most prominent change is the application of the 2010 Code to an acquisition or take-over, irrespective of how the control or acquisition is effected. This would include a scheme of arrangement, compromise, amalgamation or selective capital reduction. This is a deviation from the 1998 Code which governs only conventional take-overs via the acquisition of voting shares in a company.

**21 TO 10** Under the 1998 Code, upon accepting a take-over offer, the minority shareholders would have to wait 21 days to receive its consideration for accepting such offer. This waiting period is now reduced to ten days under the 2010 Code. The ten-day period begins from the date the offer becomes or is declared wholly unconditional, if the valid acceptances are received during the period when the take-over offer is still conditional. Alternatively, it begins from the date of the valid acceptances, if the valid acceptances are received after the take-over offer has become or has been declared wholly unconditional.

**STANDARDS OF DISCLOSURE** Another difference between the 1998 Code and 2010 Code is the standards of disclosure to be adopted by the offeror and offeree. Pursuant to the 2010 Code, where there is an untoward movement or significant increase

in the volume of share turnover of an offeree, the potential offeror shall announce whether there is a take-over or a possible take-over before approaching the Board of Directors of the offeree. After being approached by a potential offeror, the Board of Directors of the offeree shall announce whether there is a take-over offer or a possible take-over offer and shall therefore keep a close watch on its share price and volume of share turnover. Until a firm commitment or an announcement of the take-over exercise is made, both the potential offeror and offeree shall make a monthly announcement setting out the progress on the negotiations that are being held.

Where a potential offeror announces that he does not intend to make a takeover offer, the potential offeror, or a person acting in concert with the potential offeror or a person subsequently acting in concert with the potential offeror, shall not, make a take-over offer to the same offeree, within six months after the announcement is made.


**ETHICAL CONDUCT** In addition, the 2010 Code codifies the necessary ethical conduct of persons involved in a take-over offer, merger or compulsory acquisition. As such, under the 2010 Code a person shall observe good standards of commercial behaviour so that the minority shareholders are given fair and equal opportunities to consider the merits and demerits of a take-over offer, merger or compulsory acquisition.

*The loophole has been plugged. Regardless of the take-over route, all these corporate exercises are now subject to the same minimum 75% shareholder approval level. It is a really good move for minority investor protection - Rita Benoy Bushon, CEO, Minority Shareholder Watchdog Group (The STAR – 8 February 2011 – Take-over rules changes lauded)*

**PRIVATISATION OR TAKE-OVER** The 2010 Code however does not address the issue of privatisation or take-over of public companies pursuant to the sale of assets and liabilities (A & L Route) of a listed entity. A public consultation paper was issued by the Securities Commission (SC) and Bursa Malaysia Securities Berhad (Bursa Malaysia) in March 2009 to seek public feedback on the review of the requirements in relation to privatisation or acquisition via the A & L Route. Based on the feedback received, the SC and Bursa Malaysia announced on 28 January 2011, the following amendments to the Listing Requirements of Bursa Malaysia.

- i) where a privatisation or acquisition is undertaken via the A & L Route, it must garner the approval of at least 75% in value of the shareholders present and voting, either in person or by proxy;
- ii) the requirements of appointing a main advisor and independent advisor for a privatisation or acquisition effected through the A & L Route;
- iii) defining the roles of the main advisor and independent advisor in a privatisation or acquisition effected through the A & L Route; and
- iv) prescribing the additional specific information that must be included in the announcement and circular of a privatisation or acquisition effected through the A & L Route.

**CONCLUSION** The 2010 Code and amendments to the Listing Requirements aim to better protect the interest of minority shareholders of a listed entity from being trampled by majority shareholders.

Analysts and stakeholders are still divided as to whether the 2010 Code and amendments to the Listing Requirements will affect the attractiveness of the Malaysian capital markets considering that the 2010 Code is comparatively restrictive than the 1998 Code and Listing Requirements. 

## GENERAL

**BLOW THAT WHISTLE!** The long-anticipated Whistleblower Protection Act 2010 finally took effect on 15 December 2010. It is a unique legislation, in contrast to typical laws created to restrict certain actions. It calls for one to act positively, stepping forward to expose corrupt practices and other forms of misconduct, within the public and private sectors.

In this article, we examine the scope and application of the Whistleblower Protection Act 2010.

*"The world is a dangerous place, not because of those who do evil, but because of those who look on and do nothing." - Albert Einstein*

**INTRODUCTION** The term '*whistleblower*' was coined as early as the 1960's. It was derived from the practice of English 'bobbies' (police) who would blow their whistles when they noticed the commission of a crime. In today's context, Erin Brockovich (played by Julia Roberts in the movie, *Erin Brockovich*), fit the description where she exposed a Californian power company that was responsible for contaminating the Hinkley community's drinking water supply.

**PURPOSE** The Whistleblower Protection Act 2010 (the Act) aims to combat corruption and other wrongdoings by encouraging and facilitating disclosure of improper conduct both in the public and private sectors. More importantly, the Act protects the whistleblower from detrimental action.

**WHO IS A WHISTLEBLOWER?** A whistleblower is a person who makes a disclosure of improper conduct to the enforcement agency. An agency in this context refers to any ministry, department, agency or other body set up by the Federal Government, State Government or Local Government. It includes a body established by Federal law or State law or a unit, section, division, department or agency of a body established by Federal law or State law, where all such bodies are conferred investigative and enforcement functions.<sup>1</sup>

<sup>1</sup> Section 2 (a), (b) and (c) of the Act

## DISCLOSURE OF IMPROPER CONDUCT<sup>2</sup>

Under the Act, improper conduct means any conduct which, if proved, constitutes a disciplinary offence or criminal offence. A person may disclose the improper conduct based on his reasonable belief that any person has engaged in, is engaging in or is preparing to engage in such conduct. This disclosure may be made orally or in writing. The Act adopts a somewhat wide approach on such disclosures. Any improper conduct which occurred before the commencement of the Act may be disclosed. Disclosures by employees will negate any provision in any contract of employment that purports to preclude the disclosure of improper conduct. In addition, a disclosure concerning a Member of Parliament or State Legislative Assembly shall not amount to a breach of privilege. It should be noted, however, that the Act does not apply to disclosures that are specifically prohibited by any written law, such as, the Official Secrets Act 1972.

## POWERS OF ENFORCEMENT AGENCY<sup>3</sup>

Generally, the enforcement agency is empowered to receive disclosures of improper conduct, enforce the whistleblower protection, deal with the disclosures, receive and deal with complaints of detrimental action and to implement the provisions of the Act.

**PROTECTION<sup>4</sup>** The Act offers 3 types of protection, namely (i) protection of confidential information, (ii) immunity from civil and criminal action, and (iii) protection against detrimental action.

**Confidentiality** Confidential information obtained in the course of investigation shall not be disclosed. Any entry contained in books, documents or papers which could expose the whistleblower's identity must be concealed or be obliterated.<sup>5</sup>

**Immunity** A whistleblower is clothed with immunity from civil and criminal action as provided for in section 9 of the Act. This immunity also includes disciplinary action. Further, no action, claim or demand may be taken against the whistleblower. However, this immunity is subject to section 11(1) of the Act which deals with revocation of the given protection.

**Detrimental Action** Detrimental action includes action causing injury, loss or damage, intimidation or harassment, interference with lawful employment or livelihood of any person which extends to discrimination, discharge, demotion, suspension, disadvantage, termination or adverse treatment and a threat to take any of the action mentioned above. A person is also deemed to take detrimental action when the person incites or permits others to threaten the whistleblower.<sup>6</sup> This protection extends to any person related to or associated with the whistleblower.<sup>7</sup>

**Remedies** A whistleblower may request the enforcement agency to seek damages or compensation, injunction or any other relief as the court deems fit as provided under section 15(1) of the Act. This can be done within three months after the enforcement agency informs him that detrimental action has been taken against him based on investigation, or at any time the whistleblower fears the detrimental action may be taken against him. Alternatively, a whistleblower or any person related to him may seek the remedies themselves as stated in section 15(2) of the Act. In addition, he may request the enforcement agency to act on his behalf for relocation of place of employment.<sup>8</sup>

2 Section 6  
3 Section 3  
4 Section 7  
5 Section 8(3)

6 Section 10(3)(b)  
7 Section 10(1)  
8 Section 19

*Hopefully, this will encourage informants to come forward and expose corrupt practices and other forms of misconduct, without fear of being stigmatised or suffering repercussions*  
 – Datuk VK Liew, Deputy Minister in the Prime Minister's Department (The STAR – 7 December 2010 – *Whistleblower Protection Act to come into force next week*)


**INVESTIGATION**<sup>9</sup> The enforcement agency shall commence investigation upon the disclosure made or when a detrimental action is reported. If the disclosure or the complaint of detrimental action is not substantiated, the whistleblower shall be informed. When the improper conduct or the complaint constitutes a disciplinary offence, the enforcement agency shall make recommendations to the appropriate disciplinary authority to initiate disciplinary proceedings or appropriate steps against the wrongdoer. Some healthy signs to boost the implementation of anti-corruption are observed in the following, namely, that: (i) the appropriate authority must take recommended steps within six months from the date of finding and recommendation given by the enforcement agency; and (ii) the enforcement agency must be informed of reasons for not initiating disciplinary proceedings or steps recommended within 14 days of making such a decision.

In the event of insufficient or absence of action, the enforcement agency may report to the Minister on the investigation, finding, recommendation and the response given. The Act also imposes a mandatory obligation on the enforcement agency to inform the whistleblower of the outcome of the investigation and action taken against the wrongdoer.

**REVOCATION**<sup>10</sup> Protection conferred under the Act may be revoked upon the following circumstances, namely, when (i) the whistleblower participates in the improper conduct; (ii) the whistleblower wilfully discloses a material statement which, to his knowledge, is false; (iii) the disclosure is frivolous or vexatious; (iv) the disclosure involves questioning the merits of government policies; (v) the disclosure is made solely and substantially to avoid dismissal or other disciplinary action; and (vi) the whistleblower commits an offence under the Act in the course of making his disclosure. A written notice must be given if the protection is revoked. Section 11(3) of the Act could, however, bring hope to restore the protection as any aggrieved person may refer the matter to court.

*If any detrimental action is taken against the whistleblower, he or she may file a complaint to any of the enforcement agencies* – Datuk VK Liew, Deputy Minister in the Prime Minister's Department (The STAR – 3 January 2011 – *Whistleblowers protected by Act in fight against graft*)

**REWARD** A whistleblower may be rewarded for the disclosure or complaint of detrimental action as provided in section 26 of the Act. The Act is silent on whether the reward is in monetary form. However, Datuk VK Liew, Deputy Minister at the Prime Minister's Department said the details are not finalised yet.

**CONCLUSION** A whistleblower is exposed to risk, retaliation and danger. Losing a job or even one's life is possible. Hence, the Act is an armour to protect whistleblowers. This armour could extinguish the arrows of corruption in Malaysia only when its implementation are genuinely, seriously and effectively carried out. 

9 Sections 12, 13 and 14

10 Section 11



## GENERAL

**SOMETHING IN COMMON?** The English common law has been the subject of many a debate. Whilst there have been calls to abolish it, certain quarters are adamant that it should remain.

When and how did the English common law become part and parcel of Malaysian jurisprudence? We answer these questions in the following article.

**BASIS OF THE LEGAL SYSTEM** The Malaysian legal system today is built upon and developed along a mixture of laws and legal systems as a result of Malaysia's historical colonisation by Western powers. The foundation of our legal system is local customary laws and Islamic laws that developed over time with the influence of foreign laws, which predominantly includes English law.

The Malaysian legal system began in the 14th century. Since Islam was a tremendous influence, a legal system based on local customs and Islamic laws was established. There was also an adjudication system, namely the Syariah Courts with the Ruler vested with the powers of the highest appellate court. This legal system then became the prototype of the legal systems of the surrounding states.

**THE COLONIALISATION** Malaysia was colonised by the Portuguese, Dutch, Japanese and British but the biggest impact on our legal system was from the British. English laws were first imported into Malaysia through the Charters of Justice in the Straits Settlements and treaties entered by the Sultans of the Malay States. English law was applied to the Straits Settlements as long as no hardship or injustice was caused to the local inhabitants. In the Malay States however, British Advisors were appointed. They acted as Advisors to the Sultans on general matters except those relating to Islam and Malay customs. As Malaysia was close to its independence, English common law and the rules of equity were formally imported through the Civil Law Ordinance 1956 (renamed as the Civil Law Act 1956), which remains until today.

**THE CIVIL LAW ACT 1956** Section 3 of the Civil Law Act 1956 provides that English common law and rules of equity are to be applied by Malaysian courts provided there are no relevant local written laws. This is subject to local circumstances and conditions. However, only the common law and rules of equity as of 7 April 1956 (Peninsula Malaysia), 1 December 1951 (Sabah) and 12 December 1949 (Sarawak) are applicable.

Section 5 of the Civil Law Act 1956 provides for the applicability of English laws in commercial matters but limited to those as of 7 April 1956.

The approach of the Malaysian courts is to first determine whether Malaysia has any relevant written law before applying English common law principles. If there is, the court is bound to apply such written law. Otherwise, the court should determine the position of that particular common law principle as of the dates specified in section 3 of the Civil Law Act 1956. The application of such rule must then be decided in light of local circumstances and inhabitants. The court has the discretion to accept its application, either wholly or in part.

*Obviously, the CLA (Civil Law Act) is not to be followed blindly or literally. The very provision itself suggests that even its drafters expect us to develop our own common law. Indeed, there are enough grounds for us to establish our MCL (Malaysian Common Law) - Dr Wan Azhar Wan Ahmad, Senior Fellow/Director, IKIM (The STAR – 18 September 2007 – Time to Malaysianise common law system)*

**MALAYSIAN COMMON LAW** In reality, it is preposterous to apply common law principles as of the dates specified, as they would almost likely be outdated and archaic. The alternative, however, is for the courts to formulate Malaysia's own common law based on sources deemed fit, be it local or foreign, and including any English common law principle developed after the relevant dates stipulated in the Civil Law Act 1956. Does this then render the provisions in the Civil Law Act 1956 redundant?

This is a question to be decided by Parliament. Unless changes are made, the courts are bound by the law. This view was expressed by the Federal Court in *Majlis Perbandaran Ampang Jaya v Steven Phoa Cheng Loon & Ors*<sup>11</sup> in the words of Abdul Hamid Mohamad FCJ, adopting the passage by Hashim Yeop A Sani CJ in *Chung Khiaw Bank Ltd v Hotel Rasa Sayang*<sup>12</sup> :

*Section 3 of the Civil Law Act 1956 directs the courts to apply the common law of England only in so far as the circumstances permit and save where no provision has been made by statute law. The development of the common law after 7 April 1956 (for the states of Malaya) is entirely in the hands of the courts of this country. We cannot just accept the development of the common law in England.*

It was also stated by Peh Swee Chin J in *Syarikat Batu Sinar Sdn Bhd & 2 Ors v UMBC Finance Bhd & 2 Ors*<sup>13</sup> :

*We have to develop our own common law just like what Australia has been doing, by directing our mind to the 'local circumstances' or 'local inhabitants'.*

The application of English common law was questioned by several, including former Chief Justices, Tun Abdul Hamid Omar and Tun Ahmad Fairuz Sheikh Abdul Halim. In 2007, Tun Ahmad Fairuz proposed the use of Syariah law instead of English common law in court proceedings. He was of the view that preserving the use of English common law showed that Malaysia was still unable to escape the clutches of colonialism even after 50 years of independence. According to Tun Ahmad Fairuz, since Malaysia has many legal experts who are able to provide their views on solving legal matters, it is time to develop our own Malaysian common law.


The Bar Council, however, took a different stand. The then President, Ambiga Sreenevasan, stated that the Federal Constitution and Malaysian laws were formulated and developed along

English common law principles. Malaysian judges have a wide discretion to accept any English common law principle or rule of equity through sections 3 and 5 of the Civil Law Act 1956. The abolition of English common law is akin to an overnight discard of 'the corpus of Malaysian case law painstakingly built by distinguished Malaysian judges'.

According to Datuk Seri Nazri Abdul Aziz, Minister in the Prime Minister's Department, there is no pressing need to abolish English common law, as it may still be useful in Malaysia under the prevailing situation and in instances where there are no local laws. As a matter of fact, the application of English common law only arises where written laws are absent. This provides a safeguard for Malaysian courts when dealing with unprecedented cases.

**CONCLUSION** English common law has a rich and strong foundation which has been applied by judges for centuries. The Malaysian Parliament legislates based on English common law while making adaptations to suit local needs and circumstances or take after the way of other Commonwealth jurisdictions such as Singapore, India and Australia in the adoption of English common law.

Currently, the dependence on English common law is minimal due to an effort invested in updating our legislation. Despite this, there is no harm in retaining the application of English common law should there be no applicable law. Having said that, however, it is pertinent to note the views of Prof Hickling, in his work entitled 'Malaysian Laws,' where it is stated:

*... but whatever system is to be adopted should grow out of and be in harmony with the nature of the people it is designed to serve, for otherwise it will work to injustice. For those English and American lawyers who see in "Our Lady the common Law" a figure of romance so powerful, as to convert the common law itself almost into a religion. That way, madness lies.* 

11 [2006] 2 MLJ 389

12 [1990] 1 MLJ 356

13 [1990] 2 CLJ 691

## GENERAL

### PLUGGING THE LEAK... *WikiLeaks*

is now a household name due to the infamous and controversial leak of certain information that has compromised the national security of several nations. Its founder, editor-in-chief and main spokesman, Julian Assange, whether loved or loathed, is now embroiled in a trial that he claims to have been orchestrated by those with vested interest.

The *WikiLeaks* scandal brings to the forefront the divide between information that is deemed to be official secret and the right of access to such information.

Within a year of its launch, *WikiLeaks*, as the name suggests, was already leaking more documents pertaining to various controversial affairs of states and governments than any other existing online database. It is now infamous for bringing the field of investigative journalism to a whole new level. Its founder, editor-in-chief and main spokesman, Julian Assange, was responsible for leaking approximately 250,000 confidential documents believed to be passed by a disloyal US Army private. This inevitably landed him not only in trouble but also on Interpol's red notice list of wanted people.


Countries that have been on the receiving end of *WikiLeaks* include Malaysia and Singapore. The strongest condemnation came from President Obama who described Assange's action as 'deplorable'. Notwithstanding that, Assange possesses a strong support system from those who believe in his manifestation of cyber truth and claim that his arrest was politically motivated.

**RIGHT TO INFORMATION** Various terms are used to define this so-called information-sharing by activists, but for some parties, this form of whistleblowing is a sorry excuse for the infringement of laws relating to official secrets.

**WHISTLEBLOWING** Whistleblowing had arguably been a foreign subject in Malaysia until the Whistleblower Protection Act 2010 (WPA) was enacted. The WPA, which came into force in December 2010 confers protection to a whistleblower, defined as any person who makes a disclosure of improper conduct to an enforcement agency. The enforcement of the WPA is hoped to combat corruption, taking into account the success stories in other developed countries.

**PROHIBITED DISCLOSURE** The problem arises when a disclosure is specifically prohibited by another statute. For example, section 123 of the Evidence Act 1950 (EA) prohibits a person from disclosing official records pertaining to the affairs of State. The phrase 'affairs of State' may cover a horizon of possibilities and section 123 of EA may be a hindrance to the effectiveness of the WPA. A workable system should be formulated to achieve the most effective way of curbing the never-ending concern of corruption, which was the intention of the lawmakers in passing the law in the first place. It is suggested that the two provisions may be applied in tandem where improper conduct, under the WPA, may be identified where affairs of State are concerned. The atrocious effects of disclosing every confidential affair of the State should be borne in mind, as public interest will ultimately take precedence over any laws.

In the Federal Court case of *BA Rao v Sapuran Kaur*<sup>14</sup>, Raja Azlan Shah FCJ compared the concept of 'affairs of the State' to that of an elephant, stating, '*It is perhaps easier to recognise than to define and their existence must depend on the particular facts of each case.*'

There is no doubt that Assange recognises an elephant when he sees one. The deliberation over its definition however, may very well cost him his freedom. 

14 [1978] 2 MLJ 146


## BRIEF-CASE...

**COMPANY LAW** – Registration of company name – Whether similar and thus confusing – Whether loss occurred as a result of such similarity – Whether continued use of name undesirable within context of section 22(1) Companies Act 1965

**DG KOM SDN BHD V PENDAFTAR SYARIKAT & ANOR** [2010] 8 CLJ 73, High Court

**FACTS** The second defendant, DIGI.COM BERHAD, is a well-known digital communications company and also the holding company of DiGi Telecommunications Sdn Bhd. The second defendant was incorporated in 1997 under the name of Mutiara Swisscom Sdn Bhd. It later changed its name to Mutiara Swisscom Bhd, then to DIGI Swisscom Bhd and finally to DIGI.COM BERHAD in 2000. The plaintiff, DG-Kom Sdn Bhd, incorporated in 1982, is involved in the supply of large scale computer equipment and systems. This is an appeal by the plaintiff against the decision of the Registrar of Companies (the first defendant) in allowing the second defendant to continue using the name DIGI.COM BERHAD.

**ISSUE** The issue for consideration was whether there was similarity and confusion between the two names and whether the use of DIGI.COM BERHAD was 'undesirable' within section 22(1) of the Companies Act 1965.

**HELD** It was held that the names were not identical, particularly visually, and to that extent, they were different and distinct. Moreover, the two entities were involved in different businesses and there was therefore no detriment or loss to the plaintiff. The continued use of the name by the second defendant was therefore not 'undesirable' within section 22(1) of the Companies Act 1965. 


**LABOUR LAW** – Dismissal of employee by Islamic Financial Services Board – Whether Industrial Court had jurisdiction to adjudicate dismissal claim – Whether Islamic Finances Services Board immune from legal process

**ISLAMIC FINANCE SERVICES BOARD (IFSB) V MARLIN FAIROL MOHD FAROQUE & ANOR** [2010] 8 CLJ 173, High Court

**FACTS** The respondent was employed by the appellant and later dismissed on the ground of unsatisfactory performance. The matter was brought before the Industrial Court where the respondent was awarded compensation. The appellant applied for an order of *certiorari* under Order 53 of the Rules of the High Court 1980 to quash the award of the Industrial Court.

**ISSUE** The main issue arising was whether the Industrial Court had jurisdiction to hear the matter, bearing in mind that the appellant is an international organisation vested with privileges and immunities under section 7 of the IFSB Act 2002 and regulation 2 of the IFSB (Privileges & Immunities) Regulations.

*Viewed from the perspective of international obligations assumed by Malaysia as the host country, it is necessary to maintain the independence and international character of the IFSB for the body to be vested with not only juridical personality but also necessary privileges and immunities from suit and from legal process – Mohamad Ariff Yusof J*

**HELD** In quashing the award of the Industrial Court, it was held that the privileges and immunities were necessary for the IFSB to maintain its independence and international character. 




**BANKING LAW** – Forged cheques – Whether drawer knowingly or negligently contributed to forgery of unauthorised signature – Whether bank protected against liability in honouring stolen and forged cheques

**PRIMA NOVA SDN BHD V AFFIN BANK BERHAD** [2010] 9 CLJ 75, High Court

**FACTS** The plaintiff's premises were broken into on 13 November 2003 and four cheques were stolen. The plaintiff instructed the defendant to stop payment of the cheques via a letter dated 18 November 2003 but the letter reached the defendant only on 19 November 2003, by which time, the cheques which had been forged, were honoured by the defendant. The plaintiff filed a claim against the defendant, seeking recovery of the amount paid out on the cheques.

**ISSUE** The issue for consideration was whether the defendant could rely on section 73A of the Bills of Exchange Act 1949 as a defence in respect of the forged cheques and whether clause 4.2 of the Rules and Regulations Governing Operation of Current Account (the Rules and Regulations) applied to the facts of this case.


**HELD** In relying on section 73A as a defence in honouring the forged cheques, the defendant must prove the following, namely, that; (i) the signatures on the cheques were forged, (ii) the plaintiff had knowingly and negligently contributed to the forgery, and (iii) the defendant honoured the cheques in good faith. The defendant had proved all of the above. Further, the plaintiff had agreed to be bound by the Rules and Regulations when opening an account with the defendant. Clause 4.2 of the Rules and Regulations requires the plaintiff to give prompt instructions to stop payment of the cheques. The plaintiff had delayed to do so. Hence, the plaintiff's claim was dismissed. 

**TORT LAW** – Negligence – Whether bailee failed in its duty – Whether such failure rendered agreement voidable at the option of the bailor

**TAI SENG GLASS SDN BHD V JASA KITA WAREHOUSING SERVICE SDN BHD** [2010] 9 CLJ 161, Court of Appeal

**FACTS** The plaintiff agreed to store 48 cases of safety glass at the defendant's warehouse. The plaintiff agreed to have its goods stored in an open yard and covered with tarpaulin due to insufficient space. Subsequently, the plaintiff removed 11 cases which were in good condition. Later, the plaintiff commenced an action against the defendant after the remaining 37 cases of glass were damaged due to exposure to rain or water. The defendant denied negligence and counterclaimed against the plaintiff for its unpaid storage charges. The High Court dismissed the plaintiff's claim and allowed the defendant's counterclaim.

**ISSUE** The issue for consideration was whether the damage to the goods occurred during the storage and whether it was due to the defendant's failure to take all reasonable care as a general warehouseman.

**HELD** The Court of Appeal held that the defendant had to prove that it had exercised care and diligence in relation to the plaintiff's goods. The defendant, however, had failed to do so. The agreement on storage fees became voidable at the option of the plaintiff as bailor, pursuant to section 106 of the Contracts Act 1950. Thus, the plaintiff was therefore justified in not paying the storage fees. 

## BRIEF-UP...

### LAND PUBLIC TRANSPORT ACT 2010

No  
715

*Date of coming into operation*  
**31 January 2011 (except sections 6 - 12)**

*Notes*


An Act to provide for and regulate land public transport, and for matters incidental thereto. 

### COMPETITION COMMISSION ACT 2010

No  
713

*Date of coming into operation*  
**1 January 2011**

*Notes*


An Act to provide for the establishment of the Competition Commission, to set out the powers and functions of such Commission, and to provide for matters connected therewith or incidental thereto. 

### STRATEGIC TRADE ACT 2010

No  
708

*Date of coming into operation*  
**1 January 2011**

*Notes*


An Act to provide for control over the export, transshipment, transit and brokering of strategic items, including arms and related material, and other activities that will or may facilitate the design, development and production of weapons of mass destruction and their delivery systems and to provide for other matters connected therewith, consistent with Malaysia's national security and international obligations. 

### MALAYSIA DEPOSIT INSURANCE CORPORATION ACT 2011

No  
720

*Date of coming into operation*  
**31 December 2010**

*Notes*


An Act to provide for the continuing existence of the Malaysia Deposit Insurance Corporation, the administration of a deposit insurance system and a takaful and insurance benefits protection system under this Act, and for matters incidental thereto or connected therewith. 

### WILDLIFE CONSERVATION ACT 2010

No  
716

*Date of coming into operation*  
**28 December 2010**

*Notes*


An Act to provide for the protection and conservation of wildlife and for matters connected therewith. 

## WHISTLEBLOWER PROTECTION ACT 2010

No  
711

*Date of coming into operation*  
**15 December 2010**

### Notes

An Act to combat corruption and wrongdoings by encouraging and facilitating disclosures of improper conduct in the public and private sectors, to protect persons making those disclosures from detrimental action, to provide for the matters disclosed to be investigated and dealt with, and to provide for other matters connected therewith. 

## CHILDREN AND YOUNG PERSONS (EMPLOYMENT) (AMENDMENT) ACT 2010

No  
A1386

*Date of coming into operation*  
**1 March 2011**

### Amendment

**Sections 1A, 2, 7, 14 and 16**

### Introduction

**Section 9A**

### Deletion


**First Schedule** 

## INTERNATIONAL ISLAMIC LIQUIDITY MANAGEMENT CORPORATION ACT 2011

No  
721

*Date of coming into operation*  
**25 October 2010**

### Notes


An Act to enable Bank Negara Malaysia to become a member of the International Islamic Liquidity Management Corporation, to give effect to the agreement establishing the International Islamic Liquidity Management Corporation, to confer certain powers, privileges and immunities upon the International Islamic Liquidity Management Corporation and its subsidiaries, and to provide for matters connected therewith. 

## CAPITAL MARKETS & SERVICES (DISPUTE RESOLUTION) REGULATIONS 2010

No  
PU(A) 437/2010

*Date of coming into operation*  
**30 December 2010**

### Notes

Under the Regulations, the Securities Commission may approve any body corporate to act as a dispute resolution body in respect of claims in the Malaysian capital markets. 

## BANK SIMPANAN NASIONAL (AMENDMENT) ACT 2011

No  
A1389

*Date of coming into operation*  
24 February 2011

*Amendment*  
Sections 2, 5, 6, 8, 9, 13, 35 and 36

*Introduction*  
Sections 11A, 14A, 14B, 14C and 14D 

## CONSUMER PROTECTION (AMENDMENT) ACT 2010

No  
A1381

*Date of coming into operation*  
1 February 2011

*Amendment*  
Sections 2, 9, 11, 23, 53, 98 and 146

*Introduction*  
Sections 21A, Parts IIIA, XIA and Schedule

*Deletion*  
Section 103 

## ROAD TRANSPORT (AMENDMENT) ACT 2011

No  
A1391

*Date of coming into operation*  
31 January 2011

*Amendment*

Sections 2, 5, 7, 10, 11, 14, 17, 21, 22, 23, 34, 35, 35A, 36, 37, 38, 48, 53, 56, 60, 62, 63, 64, 65, 66, 69, 71, 88, 108, 109, 112, 117, 118, 122 and 125

*Introduction*

Sections 4A, 4B, 27A, 53A, 53B, 53C, 58A, 115A, 119B, 127A, Part IIB and Schedules

*Deletion*

Section 110A 

## COMMERCIAL VEHICLES LICENSING BOARD (AMENDMENT) ACT 2010

No  
A1376

*Date of coming into operation*  
31 January 2011

*Amendment*  
Sections 1A, 2, 3, 9 and 27

*Deletion*  
Section 4 

## TOURISM VEHICLES LICENSING (AMENDMENT) ACT 2010

No  
A1374

*Date of coming into operation*  
31 January 2011

*Amendment*  
Section 1 



## EDUCATIONAL INSTITUTIONS (DISCIPLINE) (AMENDMENT) ACT 2010

No  
A1375

*Date of coming into operation*  
1 December 2010

*Amendment*  
Sections 2, 5, 11 and 21

*Deletion*  
Sections 4, 13, 15 and 16

*Substitution*  
Sections 9, 10, 12 and 14 

## ANTI-TRAFFICKING IN PERSONS (AMENDMENT) ACT 2010

No  
A1385

*Date of coming into operation*  
15 November 2010

*Amendments*  
Long Title, Sections 1, 2, 3, 5, 6, 7, 15, 23, 25,  
27, 35, 44, 51, 52, 58, 63, 66, Parts II and Part V

*Introductions*  
Sections 15A, 17A, 61A and Part IIIA 

## GUIDELINES/ RULES/ CIRCULARS/ DIRECTIVES/ PRACTICE NOTES ISSUED BETWEEN JANUARY AND MARCH 2011 BY BURSA MALAYSIA, SECURITIES COMMISSION AND BANK NEGARA MALAYSIA

### BURSA MALAYSIA SECURITIES BERHAD (BURSA MALAYSIA)

- Amendments to the Rules of Bursa Malaysia Derivatives Berhad in relation to Specified Exchanges – *Effective Date: 2 February 2011*
- Amendments to the Main Market and ACE Market Listing Requirements in relation to Privatisation of Listed Corporations via disposal of assets – *Effective Date: 28 January 2011*
- Amendments to the Rules of Bursa Malaysia Securities Berhad in relation to the removal of the ability to enter Market Orders – *Effective Date: 17 January 2011*
- Amendments to the Rules of Bursa Malaysia Securities Berhad in relation to fully liberalising commission sharing between participating organisations and commissioned dealer's representatives – *Effective Date: 1 January 2011*
- Amendments to the Rules of Bursa Malaysia Depository Sdn Bhd in relation to (1) Foreign Listings, (2) Enhancing Bursa Depository's power to take action for a breach of an undertaking, representation, warranty or terms and conditions; (3) Withdrawal of securities; and (4) Clarifying the list of Authorised Nominees – *Effective Date: 22 December 2010*
- Directives/ Clarifications issued in relation to Main Market Listing Requirements relating to disclosure of realised and unrealised profits losses – *Date Issued: 20 December 2010*

- Directives/ Clarifications issued in relation to ACE Market Listing Requirements relating to disclosure of realised and unrealised profits losses – *Date Issued: 20 December 2010*
- Amendments to the Rules of Bursa Malaysia Securities Berhad in relation to Financial Reporting Requirements – *Effective Date: 4 November 2010*

## SECURITIES COMMISSION (SC)

- FAQs in relation to Asset Valuation Guidelines – *Date Issued: 21 February 2011*
- Guidelines issued under Licensing & Registered Persons – In relation to Registered Persons – Guidelines on Investor Protection – *Effective Date: 17 December 2010*
- Malaysian Code on Take-overs and Mergers 2010 (2010 Code) – *Effective Date: 15 December 2010*
- Practice Notes on the 2010 Code – *Effective Date: 15 December 2010*
- Guidelines issued under Take-overs Code – Guidelines in relation to Malaysian Code on Take-overs and Mergers (2010) – Guidelines on Contents of Application relating to Take-overs and Mergers – *Effective Date: 15 December 2010*

## BANK NEGARA MALAYSIA (BNM)

- Foreign Exchange Administration Rules on (a) Payments in Ringgit and Foreign Currency involving resident and non-resident individuals; (b) Foreign Currency Account of residents – *Date Issued: 4 March 2011*
- Guidelines & Circulars Listing – Guidelines issued under Banking – In relation to Prudential Limits & Standards – Guidelines on Corporate Governance for Licensed Islamic Banks – *Date Updated: 28 February 2011*
- Guidelines & Circulars Listing – Guidelines issued under Banking – In relation to Capital Adequacy – Capital Adequacy Framework for Islamic Banks – *Date Updated: 10 January 2011*

- Guidelines & Circulars Listing – Guidelines issued under Banking – In relation to Capital Adequacy – Risk-Weighted Capital Adequacy Framework and Capital Adequacy Framework for Islamic Banks (General Requirements and Capital Components) – *Date Updated: 7 January 2011*
- Guidelines & Circulars Listing – Guidelines issued under Banking – In relation to Capital Adequacy – Risk-Weighted Capital Adequacy Framework (Basel II - Risk-Weighted Assets Computation) – *Date Updated: 6 January 2011*
- Guidelines & Circulars Listing – Guidelines issued under Shariah – Concept Paper on Shariah Parameter Reference 5: *Istisna'* Contract – *Date Issued: 28 December 2010*
- Guidelines & Circulars Listing – Guidelines issued under Banking – In relation to Prudential Limits & Standards – Guidelines on Corporate Governance for Licensed Institutions – *Date Updated: 24 December 2010*
- Guidelines & Circulars Listing – Guidelines issued under Insurance & Takaful – In relation to Prudential Limits & Standards – Minimum Standards for Prudential Management of Insurers (Consolidated) – *Date Updated: 24 December 2010*
- Guidelines & Circulars Listing – Guidelines issued under Insurance & Takaful – In relation to Financial Reporting – Guidelines on Financial Reporting for Takaful Operators – *Date Issued: 23 December 2010*
- Guidelines & Circulars Listing – Guidelines issued under Insurance & Takaful – In relation to Prudential Limits & Standards – Guidelines on Takaful Operational Framework – *Date Issued: 23 December 2010*
- Guidelines & Circulars Listing – Guidelines issued under Insurance & Takaful – In relation to Prudential Limits & Standards – Guidelines on Valuation Basis for Liabilities of General Takaful Business – *Date Issued: 23 December 2010*
- Guidelines & Circulars Listing – Guidelines issued under Insurance & Takaful – In relation to Prudential Limits & Standards – Guidelines on Valuation Basis for Liabilities of Family Takaful Business – *Date Issued: 23 December 2010*

- Guidelines & Circulars Listing – Guidelines issued under Banking – In relation to Capital Adequacy – Capital Adequacy Framework for Islamic Banks – Disclosure Requirements (Pillar 3) – *Date Updated: 17 December 2010*
- Guidelines & Circulars Listing – Guidelines issued under Banking – In relation to Financial Reporting – Classification and Impairment Provision for Loans/Financing – *Date Issued: 17 December 2010*
- Guidelines & Circulars Listing – Guidelines issued under Banking – In relation to Capital Adequacy – Risk-Weighted Capital Adequacy Framework (Basel II) – Internal Capital Adequacy Assessment Process (Pillar 2) – *Date Issued: 8 December 2010*
- Guidelines & Circulars Listing – Guidelines issued under Banking – In relation to Capital Adequacy – Capital Adequacy Framework for Islamic Banks – Internal Capital Adequacy Assessment Process (Pillar 2) – *Date Issued: 8 December 2010*



*Dato' Zulkifly Rafique sharing a light moment with the pupils of ZUL RAFIQUE & partners*

## 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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## CONGRATULATIONS

ZUL RAFIQUE *& partners* would like to congratulate the following on their recent promotion to partnership.



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*Tengku Ierasul Khaier Putra Tengku Alaudin*  
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