

# the **ZRp** brief

Brief: 11/2013

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KDN No: PP 12857/08/2013(032657)

## CHAMBERS ASIA PACIFIC AWARDS 2013 WINNER

**ZUL RAFIQUE & partners** is named *Malaysia Law Firm of the Year 2013*  
by *Chambers Asia-Pacific*

**Publisher:** ZUL RAFIQUE & partners Consultancy Sdn Bhd D3-3-8, Solaris Dutamas, No. 1, Jalan Dutamas 1, 50480 Kuala Lumpur, Malaysia  
**Printer:** NC Print Sdn Bhd (197139-T) AS 101, Jalan Hang Tuah 4, Salak South Garden, 57100 Kuala Lumpur. Tel: 03-79825893; Fax: 03-79835314

**ZUL RAFIQUE & partners**

## A BRIEF NOTE...

by Dato' Zulkifly Rafique



### Awards fever !

It was Awards fever not only at the Oscars or Emmys but at **ZUL RAFIQUE & partners** as well, where we had our fair share of accolades in the first quarter of this year.

We were declared **Malaysia Law Firm of the Year** by *Chambers Asia-Pacific* at the awards ceremony on 28 February 2013 at the China World Hotel, Beijing.

We also won two awards at the *Islamic Finance News Awards* ceremony on 5 March 2013 at the Grand Hyatt, Kuala Lumpur.

The awards were for **Restructuring Deal of the Year 2012** and the **Project Finance Deal of the Year 2012**.

In another development, we are now listed by the *Global Arbitration Review* as one of the top 100 approved specialist international arbitration firms in the world. This is an acknowledgement of the firm's international and domestic arbitration capabilities.

It is a very encouraging start to the year and I would like to thank all our clients and friends for their invaluable support. This would not have been possible without you.

On a separate note, I would like to congratulate Leong May Ling, Natalia Izra Nasaruddin, Celine Rangithan and Chan Kwan Hoe on their promotion to partnership.

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#### Legislation Update:


- Central Bank of Malaysia (Amendment) Act 2013
- Subordinate Courts (Amendment) Act 2010
- Minimum Retirement Age Act 2012
- Capital Markets & Services (Amendment) Act 2012
- Guidelines/ Rules/ Circulars/ Directives and Practice Notes issued by Bank Negara Malaysia, Bursa Malaysia and Securities Commission Malaysia.

## IN BRIEF...


- **ACCESS TO BIOLOGICAL RESOURCES AND BENEFIT SHARING ACT?**

The Access to Biological Resources and Benefit Sharing Act is expected to be tabled in Parliament this year. According to the Ministry of Natural Resources and Environment, the proposed Act will provide legal clarity on procedures for access and benefit sharing for both users and providers to the utilisation of biological resources and associated traditional knowledge. 

- **BANKRUPTCY LAWS TO BE REVIEWED**

Proposals are being made to simplify bankruptcy procedures and regulations. The suggestion is to increase the bankruptcy threshold to MYR100,000 from the current MYR30,000. 


- **BILL TO PREVENT LENIENCY IN SENTENCING**

A Bill to amend the Criminal Procedure Code is expected to be tabled in Parliament soon. The purpose of the amendment is to prevent judges from imposing lenient sentences on those convicted of statutory rape. 

- **CONSTRUCTION COURT ESTABLISHED**

A specialised Construction Court has been established in Malaysia. The courts which are set up in Kuala Lumpur and Shah Alam began operations on 1 April 2013. 

- **CONSUMER PROTECTION REGULATIONS EFFECTIVE 1 JULY 2013**


The Consumer Protection (Electronic Trade Transactions) Regulations 2012 will take effect from 1 July 2013. The Regulations will apply to businesses and services conducted online. With the increase of online fraud cases, the Regulations are viewed as necessary and timely. 

- **EMPLOYEES' SOCIAL SECURITY ACT AMENDED**


A Bill to amend the Employees' Social Security Act 1969 has been tabled to raise the age for death and invalidity pension coverage to the age of 60. This is pursuant to the recent

change to the minimum retirement age in the private sector from 55 to 60. 


- **ENVIRONMENT COURT?**

Malaysian Nature Society President, Professor Dr Maketab Mohamed has proposed for a specialised environment court to be established to deal with cases relating to wildlife and environmental crimes. This comment was made in light of the low fines imposed on a wildlife trader who was caught with eight tiger skins, 22 whole tiger bones and nine African elephant tusks. 


- **FINANCIAL SERVICES ACT 2012**

Although not yet in force, the Financial Services Act 2012, which was recently passed, is expected to have a significant impact on the financial institutions in Malaysia. Upon enforcement, the Banking & Financial Act 1989, Exchange Control Act 1953, Insurance Act 1996 and Payment Systems Act 2003 will be repealed. 

- **MONETARY JURISDICTION OF COURTS INCREASED**

With effect from 1 March 2013, the monetary jurisdiction of both the Sessions and Magistrates' Courts will increase to MYR1 million and MYR100,000 respectively. This is the result of the recent amendments made to the Subordinate Courts Act 1948 to broaden the jurisdiction of the courts from MYR250,000 previously in the Sessions Court and MYR25,000 in the Magistrates' Court. 

- **SECURITIES COMMISSION V AHMAD NAZMI BIN MOHAMED & ORS**

In a civil suit initiated by the Securities Commission<sup>1</sup>, it successfully obtained a judgment in the High Court against seven individuals for their involvement in unlicensed futures trading activities. The defendants have agreed to settle the sum of more than MYR2.3 million, being the amount solicited from the members of the public. 

<sup>1</sup> The Securities Commission was represented by *Nantha Balan* and *Norliza Rasool Khan* from *ZUL RAFIQUE & partners*.

- **SURIA KLCC V SURIA SABAH** *Suria* KLCC failed in its appeal in restraining Makamewah Sdn Bhd from using the swirl logo and name *Suria* for the *Suria* Sabah mall. Makamewah Sdn Bhd is the developer and operator of the *Suria* Sabah mall. ✚

### AROUND THE WORLD... IN BRIEF

- **AIRLINES FINED IN AUSTRALIA FOR SPAMMING** The Australian Communications and Media Authority (ACMA) has fined Tiger Airways for contravening the Spam Act 2003 of Australia. The contravention was based on the failure of Tiger Airways, despite repeated requests and warnings from ACMA, to unsubscribe customers from marketing email messages. ✚
- **BRITISH TELECOM GRANTED ABS LICENCE** British Telecom has been granted an ABS (Alternative Business Structure) licence by the Solicitors Regulatory Authority, thus launching BT Law Limited. BT Law Limited will be providing legal services in the motor claims market. ✚
- **CHANGES TO SINGAPORE'S CYBER LAWS** Amendments have been made to the Computer Misuse Act of Singapore to include provisions on pre-emptive powers to detect imminent cyber-attacks which could jeopardise national security, essential services or defence of the country and its foreign relations. The amendments also seek to rename the Act as the Computer Misuse and Cyber-security Act. ✚
- **CHANGES TO AUSTRALIA'S IDENTITY-THEFT LAW** The crime of falsifying identity is broadened under the new Australian law which also covers the use of stolen identities in drugs cases. ✚
- **DISSOLUTION OF OIL & GAS REGULATOR IN INDONESIA** The ruling of the Constitutional Court of Indonesia in annulling certain articles in Law No 22/2001, had the immediate effect of dissolving BP Migas, Indonesia's oil and gas regulator. The functions of BP Migas will now be carried out by Indonesia's Minister of Energy and Mineral Resources. ✚
- **ENERGY COMPANIES IN SPAIN FINED FOR PRICE-FIXING** The National Competition Commission of Spain has fined *Repsol*, *Cepsa* and *BP* for indirectly fixing the retail prices of fuel at service stations, which is a violation of competition law. As a result of those practices, the freedom of retail distributors to set retail prices for automotive fuel sold at their service stations were eliminated and the maximum prices and recommended prices communicated to the stations became fixed prices instead. ✚
- **FIRST AUSSIE SUKUK** SGI-Mitabu, a joint-venture between Brisbane companies, Solar Guys International and Mitabu Australia, will be using *Sharia*-compliant financing (*sukuk*) to finance its solar power project in Indonesia, with its initial *sukuk* domiciled in Labuan. This deal is Australia's first issuance of the *sukuk*. ✚
- **LANDMARK RULING IN AUSTRALIA AGAINST RATINGS AGENCY** The Federal Court of Australia has ruled that Standard & Poor's (S & P) rating of a Constant Proportion Debt Obligation (CPDO) was misleading and deceptive to a class of potential investors in Australia. Damages were ordered to be paid to investors by S & P and ABN AMRO, the bank which arranged the product. ✚



- NEW LAW IN SINGAPORE ON IVF CHILDREN** A law to address issues relating to children conceived through assisted reproduction technology has been proposed by the Singapore Government. The timing of the public consultation of the Status of Children (Assisted Reproduction Technology) Bill appears to coincide with the landmark case where a fertility clinic is being sued for using the wrong sperm in the conception of a child. ✚
- PHILIPPINE CYBERCRIME LAW SUSPENDED** The Cybercrime Prevention Act of 2012 has been suspended by the Supreme Court of the Philippines. A temporary restraining order was issued to prevent the enforcement of the Act. ✚
- RUSSIA'S INTERNET BLACKLIST LAW** A new law in Russia that allows the Government to ban specific websites, has come into force on 1 November 2012. The law aims to protect children from harmful Internet content. ✚
- SIA CARGO FINED FOR PRICE-FIXING** Australia's Federal Court has fined Singapore Airlines (SIA) Cargo over price-fixing in relation to fuel and security surcharges and a customs fee for air freight services from Indonesia to Australia. SIA Cargo admitted to the breaches under Australia's Trade Practices Act, now known as the Competition and Consumer Act 2010. An injunction was issued to restrain the airlines from engaging in such conduct for 5 years. ✚
- SINGAPORE'S CASINO CONTROL ACT TO BE AMENDED** The Casino Control Act 2009 of Singapore will be amended to minimise the adverse impacts of gambling on society. ✚
- SQUATTING LAW CHALLENGED** A woman from the United Kingdom is challenging a new law in England and Wales which criminalises squatting. The challenge is premised on a violation of her human rights. The law came into force on 1 September 2012. ✚

## ✚ BRIEFING...

### CORPORATE/ TAX

#### **BUDGET 2013 – WHAT'S IN STORE?**

On 28 September 2012, Budget 2013 (the Budget) was unveiled. Analysts across financial and tax sectors have actively engaged in the discussion of the MYR251.6 billion budget's impact for approximately 29 million Malaysians.

We examine some of the tax highlights of Budget 2013 in this article.

**RESIDENT INDIVIDUAL** To increase the disposable income of Malaysians, with effect from assessment year 2013, income tax rates for resident individuals are reduced by 1% for chargeable income bands from MYR2,501 to MYR50,000.

#### **REAL PROPERTY GAINS TAX (RPGT)**

One of the most awaited proposals concerning the property market in Malaysia is the RPGT. Disposal of real property and shares in real property company within two years from the date of acquisition which was formerly subject to 10% is now increased to 15%. Similarly, an increase from 5% to 10% is observed for properties disposed within the third and fifth year from the date of acquisition. The new rate has taken effect from 1 January 2013. While this is positively viewed as an effort to curb property speculation, some tax experts are skeptical as they claim that increasing the RPGT rates may not sufficiently address the issue of affordable housing.

#### **PRIVATE RETIREMENT SCHEME**

The Private Retirement Scheme ('PRS') was launched in July 2012 as a voluntary investment scheme, and is meant to complement Malaysia's mandatory retirement savings scheme made to the Employment Provident Fund (EPF). To discourage pre-retirement withdrawals from the PRS, with effect from the assessment

year of 2013, withdrawals of contributions from the PRS scheme made before the age of 55 (except for reasons of death or leaving Malaysia permanently) will be taxable at 8% on the amount withdrawn. The PRS provider shall withhold the tax and pay it to the Director General of Inland Revenue within a month from the date of payment of withdrawal. The amount will be increased by a sum equal to 10% in the event of a failure to comply with such requirement, and the increased sum shall be a debt due to the Government of Malaysia.

**TIME-BAR ASSESSMENT** At present, taxpayers who fail to submit their assessment or who submit a lower tax assessment than the actual may have their assessment raised within a period not exceeding six years after the expiration of the relevant year of assessment. Following the proposal in the Budget, the time-bar to raise the assessment is reduced from six to five years. However, this shall not be applicable to cases under investigation, false declaration, wilful default or negligence. The changes are with effect from 1 January 2014.

**LIMITED LIABILITY PARTNERSHIP (LLP)** The Budget excludes an LLP from the definition of 'partnership' in the Income Tax Act 1967. An LLP is subject to the tax rate of 25%. However, a preferential tax rate of 20% for the first chargeable income of MYR500,000 and 25% on chargeable income exceeding MYR500,000 is applicable if the LLP is a tax resident in Malaysia and has a total capital contribution of MYR2.5 million or less. In addition, profits paid or credited to partners of an LLP are tax-exempted. Remuneration of an LLP partner which is not specified in the partnership agreement shall not be eligible for tax deduction. The changes are with effect from the date of enforcement of the Limited Liability Partnership Act 2012 which was 26 December 2012.

## **ABANDONED HOUSING PROJECTS**

The Budget also proposes tax incentives to encourage private sectors to revive or rescue abandoned housing projects. For instance, banking and financial institutions will enjoy tax exemptions on interest income received from rescuing contractors or developers for each loan given. Secondly, the rescuing contractors and developers will be given double deduction on interest expenses and all costs directly involved in obtaining loans to revive or rescue abandoned housing projects. The original house purchaser will also enjoy stamp duty exemption on loan agreements for additional financing and on instruments of transfers. The above exemptions apply to loans and sale and purchase agreements executed between 1 January 2013 and 31 December 2015.

## **EXPENDITURE ON TREASURY SHARES**

A special deduction is proposed to be given to a company with business source income for costs incurred in acquiring treasury shares which are transferred to its employees under an employees' equity-based remuneration scheme. The cost incurred in acquiring treasury shares shall be deducted from the amount payable by the employees for the treasury shares. Should the amount payable exceed the cost of acquiring the treasury shares, no deduction is allowed. The surplus will instead be credited into an account kept by the company and utilised to reduce the cost of subsequent treasury shares transferred to the employees. The deduction is allowed from assessment year 2013.

## **SPECIAL PURPOSE VEHICLE FOR ISSUANCE OF ISLAMIC SECURITIES**

A special purpose vehicle established under the Companies Act 1965 or the Labuan Companies Act 1990 solely for the issuance of Islamic securities which adopts any *Shariah* principle and approved by the Securities Commission Malaysia or the Labuan Financial Services Authority, is neither taxable nor required to comply with administrative procedures under the

Income Tax Act 1967. The proposal is to be implemented from assessment year 2012. Previously, the tax exemption was available for issuance of Islamic securities limited to the Shariah principles of *Mudharabah*, *Musyarakah*, *Ijarah* or *Istisna'*.

**INTEREST INCOME** This is income earned from the interest attached to investment, such as interest earned from savings accounts or dividends. It is a question of fact whether interest income amounts to business income. According to the Budget, interest income is not taxable as gains or profits from a business under section 4(a) of the Income Tax Act 1967 unless the interest is derived from a debenture, mortgage or other sources which form part of the stock-in-trade of business or where the interest is receivable by a person carrying on licensed money-lending business under any written law. This shall take effect from assessment year 2013.

**BUSINESS TRUST** The Capital Markets and Services Act 2007 has been amended to introduce a business trust (BT) entity. According to the Budget, BTs and companies will receive the same tax treatment in the areas of income tax, stamp duty and RPGT. Stamp duty exemption on instruments of transfer of businesses, assets or real properties acquired and RPGT exemption for the disposer of real property or shares in a real property company will be given on a one-off basis at the initial stage of the establishment of the BT.

**CONCLUSION** Although Budget 2013 spelt out some innovative measures, only time will tell of Malaysia's resilience and strength to transform into a high-income nation without neglecting the welfare of its *rakyat*. 

## BANKING

**AMENDMENTS TO THE CENTRAL BANK OF MALAYSIA ACT** Amendments to the Central Bank of Malaysia Act 2009 ('the Act') came into operation on 8 February 2013.

This article seeks to outline some of the key changes introduced by the amendments, in relation to the power of the Central Bank of Malaysia ('the Central Bank') to take measures for financial stability and protection of rights of the parties under qualified financial agreements.

**POWER TO ACHIEVE FINANCIAL STABILITY** A major amendment is the expansion of the powers of the Central Bank for the purpose of achieving financial stability.

With the continuous evolution of the financial landscape and greater volatility in the financial markets, the power of the Central Bank has been extended under section 31 of the Act. In addition to the power to issue orders requiring any person to take measures to avert or reduce any risk to financial stability, the Central Bank may specify measures which, in its opinion, would contribute to the resilience of the financial system or limit the accumulation of any risk to financial stability. Such measure may be directed to a class, category or description of persons engaging in financial intermediation.

## OPPORTUNITY TO MAKE


**REPRESENTATION** The Central Bank has also been given extra powers to ensure compliance with any such measure or order under section 31(6). It may conduct due diligence or require such person approved by the Central Bank to submit any document or information or appoint an auditor or any other person to carry out an assessment to determine whether the person has complied with such measure or order. Failure to comply with any such measure

or order or request by the Central Bank under section 31 (6) is a criminal offence and carries the penalty of a fine not exceeding MYR10 million or imprisonment for a term not exceeding 10 years or both.

Another major amendment is the protection of rights of parties under a qualified financial agreement, of which a new definition has been introduced. There is also a new definition for, among others, qualified financial transaction referring to derivative or a repurchase, reverse repurchase or buy-sell back agreement with respect to securities.

The Act expressly provides that the enforcement by the parties of their rights under a qualified financial agreement shall not be affected by the following, namely any measure or order issued under section 31 (1); any vesting order made under section 32(1)(c); and any direction given or requirement imposed under section 77(1).

The Third Schedule to the Act has also been amended to specify the positions of the transferees and transferors under a qualified financial agreement subject to a vesting order.

**CONCLUSION** The amendments essentially intends to ensure that, in a transfer of a qualified financial agreement pursuant to a vesting order, all rights and obligations of the transferor, including any property of the transferor which is the subject matter of a financial collateral under a qualified financial agreement, are fully transferred to the transferee and, in particular, upon enforcement by the parties of their rights under such qualified financial agreement, the enforcement shall be in the terms of such agreement as if the transferee had always been a party to such agreement. 

## TORT/ EVIDENCE

**THE KID IS NOT MY SON...** In November 2012, the Ministry of Law of Singapore proposed the Status of Children (Assisted Reproduction Technology) Bill ('the Bill'). The purpose of the Bill is to deal with the status of parents and their children conceived through assisted reproduction technology (ART).

In this article we examine the legal issues relating to the Bill and the implications it may have on other areas of the law.

**THE MIX-UP** On 1 October 2010, Mrs X gave birth to a baby ('Baby X') at a fertility clinic in Singapore through in-vitro fertilisation ('IVF'). It was later discovered that the baby's blood type is B whilst her parents, Mr and Mrs X are A and O respectively. It was then realised that due to an error, a different man's sperm was used to fertilise the egg of Mrs X.

**THE SUIT** In June 2012, Mrs X filed a suit against the fertility clinic. The error was not disputed, and as a result, a fine of SGD20,000 was imposed on the clinic. Although the mistake was admitted, the issue that remains to be decided is the quantum of damages to be awarded.

Mrs X is claiming SGD750,000 (MYR1.8 million) for her loss of earnings following the birth, and medical and other expenses. This is considered to be a landmark case not just in Singapore but in the region as well.

**THE CURRENT LAW** In Singapore, the law that addresses the issue of paternity is found in section 114 of the Singapore Evidence Act (the Malaysian equivalent is found in section 112 of the Evidence Act 1950) which refers to *Birth during marriage conclusive proof of legitimacy*:

*The fact that any person was born during the continuance of a valid marriage*



*between his mother and any man, or within 280 days after its dissolution, the mother remaining unmarried, shall be conclusive proof that he is the legitimate son of that man, unless it can be shown that the parties to the marriage had no access to each other at any time when he could have been begotten.*

This section deals with both paternity and legitimacy. If a man wishes to rebut the presumption of paternity, he would have to prove that he had **no access** to the mother of the child when the child was conceived. **No access** is interpreted to mean 'no sexual intercourse'.

The section is viewed as archaic and outdated given the advancement of science and technology and evidence of deoxyribonucleic acid ('DNA') profiling. In Malaysia, although evidence of DNA profiling has been admissible in court, it is not a method that is expressly provided for in the Evidence Act.

**THE BILL** With the rising number of children born in Singapore through ART, proposals have been made to identify the legal parents of such a child, as well as in cases where a mistake occurs in using the wrong sperm, egg or embryo. Currently, there is no specific legislation which addresses the legal parentage of children conceived through such methods.

With such proposals, the legal parentage and status of children conceived through such methods will be clarified. The Bill is drafted on the premise that a child conceived through ART should have a single set of parents, that is, a legal mother and a legal father.

**Who is the legal mother?** The woman who carries the child is the legal mother. This refers to the gestational mother. In a situation where the wrong egg was used in the fertilisation procedure due to negligence or a mistake, the interested party may apply to court for a declaration that she is the mother of that child.

**Who is the legal father?** In a case where the genetic father is the husband of the gestational mother, the husband will be the legal father.

In a case where the child was not conceived with the sperm of the husband of the gestational mother, the husband is still presumed in law to be the father of that child if he had consented to the ART treatment. However that presumptive rule does not apply if the husband does not accept that child as a child of the marriage.

**What about de facto partners?** If the mother is unmarried but has a de facto partner whose sperm was used to conceive the child, or where the de facto partner consented to the child being a child of the relationship, the mother, the child or the partner may apply to the court for a declaration that the **de facto partner** be declared as the legal father of the child. Such declaration however, would not confer legitimacy on the child.

In cases of an ART mix-up, that is, where the wrong sperm, egg or embryo was used, there can be two couples who may lay claim to be the legal parents of the child, that is, the couple who had undergone the ART treatment, and the couple whose sperm or egg or embryo that was inadvertently used in the treatment.

A worrying feature of the Bill is the possibility of a child becoming parentless if all interested parties disclaim that child in cases where the wrong sperm, egg or embryo was used. To ensure that the child is not left parentless in any situation, a default position is provided under the Bill whereby the gestational mother and her husband who consented to the ART treatment will be the legal parents of the child. This however, does not preclude an interested party from applying to the court for a declaration of parentage, within two years from the date of the discovery of the mistake. The court may make a declaration by taking into account factors such as the best interest of the child, the age of the child and the bond between the child and the applicant.

If the child is capable of expressing an independent opinion, his or her wishes will be considered.

### **Rebutting the presumption of paternity**

The Bill will also amend the section in the Evidence Act to allow any 'relevant' evidence to rebut the presumption of paternity.

**CASE LAW** Whilst the Bill may attempt to clarify legal parentage, the issue that remains controversial is what legal redress is available when unwanted children are conceived through ART. Although the case in Singapore may very well be the first in the region, precedents have already been set in the United Kingdom and Australia.

In 2009, an Australian appeals court<sup>2</sup> awarded damages to a lesbian couple for the cost of raising an unwanted additional child conceived through IVF. However British courts<sup>3</sup> tend to be more conservative on the issue of providing damages for the child's upkeep, unless the child is born with defects<sup>4</sup>.

**CONCLUSION** Although the impending decision of the High Court of Singapore on this matter is being monitored by the legal and medical profession, the baby mix-up incident is a reminder of the fact that our laws should evolve with the advancement of science and technology. Law is a dynamic institution that should reflect the fluidity of society. 

## BRIEF-CASE...


TORT – Defamation – Whether statements in a police report are protected by the defence of absolute privilege – Whether action in defamation may be filed against maker of police report

### **LEE YOKE YAM V CHIN KEAT SENG**

[2012] 9 CLJ 833, Federal Court

**FACTS** The defendant and plaintiff were shareholders and members of the Board of Directors of Billion Shopping Centre Sdn Bhd. Disputes relating to the company arose and the defendant subsequently lodged a police report against the plaintiff alleging that the latter had misappropriated a sum of money from Billion Shopping Centre Sdn Bhd. The plaintiff filed an action in defamation against the defendant on the basis that the police report was libellous and injurious.

**ISSUE** The issue before the Federal Court was whether statements in a police report are protected by the defence of absolute privilege and therefore not subject to an action in defamation.

**HELD** In dismissing the appeal, the Federal Court held that on policy consideration, absolute privilege should be extended to a statement contained in a police report lodged under section 107 of the Criminal Procedure Code. The underlying reason for this is the overriding public interest that a member of a public should be encouraged to make a police report regarding any crime that comes to his notice. 

<sup>2</sup> *G & M v Armellin* [2009] ACTCA 6.

<sup>3</sup> *Udale v Bloomsbury Area Health Authority* [1983] 1 WLR 1098; *McFarlane v Tayside Health Board* [1999] 3 WLR 1301.


<sup>4</sup> *Emeh v Kensington & Chelsea & Westminster Area Health Authority & Ors* [1985] QB 1012.

LABOUR LAW – Employment – Whether rights arising from termination are extinguished by voluntary separation scheme – Whether plaintiffs are also entitled to retirement benefits under employment contract

**ZAINON AHMAD & ORS V  
PADIBERAS NASIONAL BHD**  
[2012] 3 MELR 223, Federal Court

**FACTS** The defendant, formerly known as *Lembaga Padi & Beras Negara* ('LPN') was subject to a corporatisation exercise wherein the former employees of LPN were absorbed into the new entity. As part of its restructuring scheme, the defendant invited applications from its employees to leave their employment under the Voluntary Separation Scheme ('VSS'). Benefits under the VSS were duly paid to the plaintiffs. However, nearly two years after the plaintiffs had ceased employment with the defendant and had received the benefits under the VSS, the plaintiffs claimed that they were also entitled to their retirement benefits.

**ISSUE** The issue before the Federal Court was whether rights arising upon the termination of an employment contract are extinguished by a termination pursuant to a VSS notwithstanding the absence of an express provision to that effect.


**HELD** In dismissing the appeal, the Federal Court held that the VSS was intended to mutually override and terminate the existing contract of employment. Thus, when the plaintiffs exercised their option under the VSS and accepted the amounts paid to them, they were prevented from claiming that they were also entitled to the retirement benefits under their former contract of employment. 

BANKING – Guarantee and indemnity – Interpretation of section 8(2A) of the Bankruptcy Act 1967 – Whether guarantor given same meaning of 'debtor' in section 8(1) of the Bankruptcy Act 1967

**ANDREW LEE SIEW LING V UOB**  
[2013] 1 CLJ 24, Federal Court

**FACTS** A term loan was granted by the respondent to a company known as Monzo (M) Sdn Bhd ('Monzo'). The loan was secured by a charge together with a Letter of Guarantee and Indemnity which were executed by the appellant. An order for sale was subsequently obtained and a summary judgment entered for the sum of MYR1,022,134.75, being the amount due on the date of the winding-up order of Monzo. The appellant disputed the amount, contending that the respondent should not be allowed to claim further interest on the outstanding sum on the basis of section 8(2A)<sup>5</sup> of the Bankruptcy Act 1967 ('the Act').

**ISSUE** The issues before the Federal Court were (i) whether section 8(2A) of the Act acts as a statutory clamp on secured creditors, prohibiting them from claiming further interest; and (ii) whether a guarantor is a 'debtor' envisaged in section 8(1) of the same Act.

**HELD** In dismissing the appeal, the Federal Court held that section 8(2A) of the Act does not apply to the appellant as a guarantor. His liability is separate and independent from any other person. The intent and purpose of section 8(2A) is to clamp interest claimable by the secured creditor against the bankrupt debtor so as to afford protection to the unsecured creditors of the bankrupt debtor and the bankrupt debtor himself. 

<sup>5</sup> Notwithstanding subsection (2), no secured creditor shall be entitled to any interest in respect of his debt after the making of a receiving order if he does not realise his security within six months from the date of the receiving order.

## BRIEFLY...

### ACTS

#### PERUMAHAN RAKYAT 1MALAYSIA ACT 2012

No  
739

*Date of coming into operation*  
**1 January 2013**

#### Notes


An Act to provide for and regulate matters relating to the development and construction of housing accommodation, infrastructure and facilities under the Perumahan Rakyat 1Malaysia programme, to address the need for sustainable housing and community living in urban areas in Malaysia towards creating a strategic socio-economic housing development model, to provide for the establishment of Perumahan Rakyat 1Malaysia Corporation, and to provide for related matters. 

#### MINIMUM RETIREMENT AGE ACT 2012

No  
753

*Date of coming into operation*  
**1 July 2013**

#### Notes

An Act to provide for the minimum retirement age and for any related matters thereto. 

#### LIMITED LIABILITY PARTNERSHIPS ACT 2012

No  
743

*Date of coming into operation*  
**26 December 2012**

#### Notes

An Act to provide for the registration, administration and dissolution of limited liability partnerships and to provide for related matters. 

### AMENDMENT ACTS

#### CENTRAL BANK OF MALAYSIA (AMENDMENT) ACT 2013

No  
A1448

*Date of coming into operation*  
**8 February 2013**

#### Notes


See article on page 7 

#### SUBORDINATE COURTS (AMENDMENT) ACT 2010

No  
A1382

*Date of coming into operation*  
**1 March 2013**

#### Notes

The highlights of the amendments are the increase of the monetary jurisdiction of the Sessions Court from MYR250,000 to a new limit of MYR1 million and the powers of the court to grant injunction, declaration, rescission and cancellation. 




## PENSIONS ADJUSTMENT (AMENDMENT) ACT 2013

No  
A1447

*Date of coming into operation*  
**1 January 2013**

### Notes


The highlights of the amendments are the introduction of provisions regarding adjustment of pensions, disability pensions, retiring allowances or injury allowances, adjustment of lowest pensions and other benefits and the amendment of the maximum reckonable service. 

## ENVIRONMENTAL QUALITY (AMENDMENT) ACT 2012

No  
A1441

*Date of coming into operation*  
**2 January 2013**

### Notes

The highlights of the amendments are the introduction of a prohibition order for prescribed activities and the extended powers of the authorities in the investigation of offences under the Environmental Quality Act 1974. 

## EMPLOYEES' SOCIAL SECURITY (AMENDMENT) ACT 2012

No  
A1445

*Date of coming into operation*  
**1 January 2013**

### Notes

The highlight of the amendments is the extension of age limit for insured persons from fifty-five to sixty. 

## FRANCHISE (AMENDMENT) ACT 2012

No  
A1442

*Date of coming into operation*  
**1 January 2013**

### Notes


The highlight of the amendments is the registration of a franchise. 

## CAPITAL MARKETS & SERVICES (AMENDMENT) ACT 2012

No  
A1437

*Date of coming into operation*  
**28 December 2012**

### Notes

The highlights of the amendments are the distinction between listed and unlisted capital market products and the establishment of a consolidated Capital Market Compensation Fund to include private retirement schemes. 

**GUIDELINES/RULES/CIRCULARS/  
DIRECTIVES AND PRACTICE NOTES  
ISSUED BETWEEN JAN 2013 AND  
APRIL 2013 BY BANK NEGARA  
MALAYSIA, BURSA MALAYSIA AND  
SECURITIES COMMISSION MALAYSIA**

## **BANK NEGARA MALAYSIA (BNM)**

- Guidelines on *Shariah* Standard on *Mudarabah* – *Effective Date: 1 January 2014*
- Guidelines on *Ibra'* (Rebate) for Sale – Based Financing – *Effective Date: 31 January 2013*
- Guidelines on Risk Management and Internal Controls for Conduct of Money Services Business – *Effective Date: 6 December 2012*
- Guidelines on Governance and Operational Requirements for Conduct of Money Services Business – *Effective Date: 15 October 2012*

## **BURSA MALAYSIA**

- Revamp of the Rules of Bursa Malaysia Securities Berhad – *Effective Date: 2 May 2013*
- Amendments to ACE Market Listing Requirements in relation to Corporate Governance and Other Requirements – *Staggered Effective Dates: 29 November 2012, 31 December 2012, 1 June 2013 and 31 December 2013*
- Amendments to Main Market Listing Requirements in relation to Corporate Governance and Other Requirements – *Staggered Effective Dates: 29 November 2012, 31 December 2012, 1 June 2013 and 31 December 2013*

- Amendments to Main Market Listing Requirements and ACE Market Listing Requirements to Facilitate Electronic Payment of Cash Distributions – *Effective Date: 2 January 2013*
- Amendments to Main Market Listing Requirements and ACE Market Listing Requirements to Facilitate Exchange Traded Bonds and Sukuks – *Effective Date: 26 September 2012*

## **SECURITIES COMMISSION**

- Guidelines on Sales Practices of Unlisted Capital Market Products – *Effective Date: 29 March 2013*
- Guidelines on Unlisted Capital Market Products: Structured Products and Unit Trust Schemes – *Effective Date: 28 December 2012*
- Guidelines on Real Estate Investment Trusts – *Effective Date: 28 December 2012*
- Guidelines on Sukuk – *Effective Date: 28 December 2012*
- Guidelines on Disclosure Documents – *Effective Date: 28 December 2012*
- Prospectus Guidelines – *Effective Date: 28 December 2012*
- Guidelines on Private Debt Securities – *Effective Date: 28 December 2012*
- Business Trust Guidelines – *Effective Date: 28 December 2012*
- Guidelines on Private Retirement Schemes – *Updated: 25 October 2012*

## BREAKING NEWS...

### ZUL RAFIQUE & partners NAMED MALAYSIA LAW FIRM OF THE YEAR ZUL RAFIQUE & partners is named **Malaysia Law Firm of the Year** by *Chambers Asia-Pacific*.

"This firm is renowned for having one of the country's top banking and capital market practices, attracting domestic and foreign financial institutions such as Standard Chartered Bank, HSBC, Maybank and OCBC as clients. It is also widely recognised for its outstanding litigation, employment and corporate/ M & A offering. A highlight in the past year saw the team represent the independent, non-executive directors of EON Capital in a dispute which stemmed from a MYR5 billion acquisition." – *Chambers Asia*

The awards ceremony was held on 28 February 2013 at the China World Hotel, Beijing.

The firm's other highlights include acting in a number of environmental disputes for Lynas Malaysia Sdn Bhd and Lynas Pte Ltd following several claims instituted by residents objecting to the construction and operation of the world's largest rare earth plant in Malaysia as well as for Raub Australian Gold Mining Sdn Bhd in a much publicised environmental dispute in Raub, Pahang over the operation of a gold mine.

### ZUL RAFIQUE & partners LISTED IN TOP 100 INTERNATIONAL ARBITRATION FIRMS

ZUL RAFIQUE & partners is now listed by the *Global Arbitration Review* ('GAR') as one of the top 100 approved specialist international arbitration firms in the world. This is an acknowledgement of the firm's international and domestic arbitration capabilities. The firm's personalities referred to in the GAR Top 100 includes Tan Sri Dato' Cecil Abraham and Wilfred Abraham and a track record that includes being the only Malaysian firm to have acted in an ICSID (International Centre for Settlement of Investment Disputes) Case for the

Government of Malaysia involving a claim by *Malaysian Historical Salvors* and the much publicised recent case involving the Government of Lao's application to set-aside the arbitral award handed down in favour of *Thai-Lao Lignite Ltd*.

### ZUL RAFIQUE & partners WINS ISLAMIC FINANCE NEWS AWARDS ZUL RAFIQUE & partners wins **Project Finance Deal of the Year 2012** and **Restructuring Deal of the Year 2012** awarded by *Islamic Finance News*.

The **Project Finance Deal of the Year 2012** award is based on a syndicated trade facilities of up to MYR2,060 million to Boustead Naval Shipyard Sdn Bhd to finance partly the project for the construction/supply of six Second-Generation Patrol Vessels with combatant capabilities for the Royal Malaysian Navy. Led by partner **Lim Mun Lai**, ZUL RAFIQUE & partners acted as counsel for the mandated Lead Arrangers, Facility Agent and Security Agent.

Partner **Ashela Ramaya** led the firm in winning the **Restructuring Deal of the Year 2012** award when we acted as counsel for the Lead Arranger for the issuance by NUR Power Sdn Bhd of MYR650 million Islamic medium term notes based on the Shariah principle of *Mudharabah* which are guaranteed under a syndication by Danajamin Nasional Berhad and Maybank Islamic Berhad. The securities were created by the Issuer's subsidiaries, NUR Distribution Sdn Bhd and NUR Generation Sdn Bhd, which were under receivership.

The *Islamic Finance News* Awards Ceremony was held on 5 March 2013 at the Grand Hyatt, Kuala Lumpur.

## ✦ ZR*p* IN-BRIEF...

The ZR*p* 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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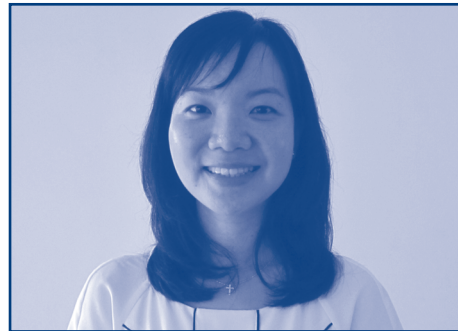
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## ✦ CONGRATULATIONS!



*Leong May Ling*



*Natalia Izra Nasaruddin*



*Chan Kwan Hoe*



*Celine Rangithan*

ZUL RAFIQUE & partners would like to welcome *May Ling, Natalia, Kwan Hoe* and *Celine* into the partnership.