

# the **ZRp** brief

Brief: 11/2013

Folder 3

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**ASIAN LEGAL BUSINESS** **ALB**

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OF CHOICE 2013**

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**ZUL RAFIQUE & partners**

## A BRIEF NOTE...

by Dato' Zulkifly Rafique



### *Good employer, great employee...*

In June 2013, **ZUL RAFIQUE & partners** was declared *Employer of Choice 2013* by Asian Legal Business. This is our fifth consecutive win since 2009.

The general public has always attributed the success of an organisation to independent and success-driven employees but good employers are also one of the main contributors to such success.

So what makes a good employer? A good employer provides for a holistic environment in which their employees' needs are met in order for the employees to be able to develop and grow both professionally and personally.

Here in **ZUL RAFIQUE & partners** we believe that our employees are an important asset of the firm. We strive to build and sustain an engaging workforce between employer-employee, instilling passion and enthusiasm in all. Thus, considerations such as advancement and learning opportunities, work/life balance and recognition are highly regarded. After all, a great employee stems from a good employer.

On another note, we celebrated our 14th birthday on 1 December 2013. Time has flown and another year has gone by. I hope you had a good year in 2013 and I wish you all the best for 2014.

## in this issue...

### **IN BRIEF...**

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The highlights in this Folder include:

- *Arbitration Rules enhanced*
- *GST*
- *Personal Data Protection Act 2010 in force*
- *SPAC rules enhanced*
- *Cyber arbitration proceedings in India*
- *NZ Financial Markets Conduct Bill passed*

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Amongst the articles in our feature:

- *The judge counsel*
- *The Competition Commission*
- *Gender equality in the workplace*
- *Liberalisation of the legal profession*

### **BRIEF-CASE...**

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Our Brief-Case contains the following:

- *Shahidan Shafie v Atlan Holdings Bhd & Anor* [2013] 4 CLJ 1029, High Court
- *Tenaga Nasional Bhd v Irham Niaga Sdn Bhd & Anor* [2013] Court of Appeal
- *Lim Eng Chuan Sdn Bhd v United Malayan Banking Corporation & Anor* [2013] 5 CLJ 425, Federal Court
- *Alex Nandaseri de Silva v Sarath Wikrama Surendre* [2013] High Court

### **BRIEFLY...**


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Legislation Update:

- *Personal Data Protection Act 2010*
- *Capital Markets and Services (Amendment) Act 2011*
- *Safeguards (Amendment) Act 2012*
- *Guidelines/Rules/Circulars/Directives and Practice Notes issued between September 2013 and November 2013 by Bank Negara Malaysia, Bursa Malaysia and Securities Commission Malaysia*

## IN BRIEF...


### • **1 JANUARY 2014 FOR WAGE POLICY**


The national minimum wage policy is expected to be implemented fully from 1 January 2014. This is to accommodate companies that filed for deferments for more time to restructure their finances. 

- **AIRLINES FINED** The Malaysian Competition Commission ("MyCC") has ruled that the Malaysia Airlines/AirAsia Collaboration Agreement 2011 ("the Agreement") has violated the Competition Act 2010. The Agreement is said to have had as its objective, the sharing of markets in the air transport services sector within Malaysia. This infringes section 4(2) of the Competition Act 2010. Both airlines have been fined MYR10 million each. 

- **AMENDMENTS TO ANTI-MONEY LAUNDERING LAW** Amendments to the Anti-Money Laundering and Anti-Terrorism Financing Act 2001 has been tabled in Parliament for first reading in order to further strengthen our financial system. 

- **ARBITRATION RULES ENHANCED** The Kuala Lumpur Regional Centre for Arbitration ("KLRCA") has revised some rules to enhance the incorporation of international trends and best practices. The amendments were made to the KLRCA Arbitration Rules, KLRCA i-Arbitration Rules and KLRCA Fast Track Rules. 


- **GST** The sales tax and service tax will be abolished and replaced by a single tax known as the Goods and Services Tax ("GST"). The GST rate, fixed at 6%, will take effect from 1 April 2015. 

- **LAWS FOR ABUSED MEN?** Minister of Women, Family and Community Development, Datuk Rohani Abdul Karim has suggested that laws be drafted to protect men from being abused. She cited a new trend of male abuse and suggested that they be given equal protection as women. 

### • **MALAYSIA TO BE TRANSFORMED INTO A REGIONAL DATA CENTRE HUB**

The first Malaysian Data Centre Alliance was recently launched to oversee the collective development of data centres in Malaysia as the government furthers its efforts towards making Malaysia the preferred regional data centre hub in the region. 


### • **PENAL CODE AMENDMENTS TABLED**

The Penal Code may be amended to include provisions relating to gang rape, criminal force against a spouse, the use of unrecognised honorary titles, increased penalties for repeat offenders, interception of communication, protection of witness identity, rewarding acts of courage against crimes and the use of electronic monitoring devices. 


### • **PERSONAL DATA PROTECTION ACT 2010 IN FORCE**

The Personal Data Protection Act 2010 has come into force on 15 November 2013. It is an Act to regulate the processing of personal data in commercial transactions and to provide for matters connected therewith and incidental thereto. 

### • **POLICY OWNERS NO LONGER TRUSTEES**

With the coming into force of the Financial Services Act 2013 ("the Act"), policy owners can no longer name themselves as the trustee to their life policies. This ruling, which is prescribed by Schedule 10 of the Act, changes the previous position under the (now repealed) Insurance Act 1996. The ruling states that policy owners 'may appoint any person other than himself to be the trustee of the policy moneys.' 

### • **REVIEW OF FOREIGN PROPERTY OWNERSHIP**

Real estate ownership by foreigners is being reviewed by the Johor State Government, in an attempt to control foreign investments and to increase income for the State. 

- **SPAC RULES ENHANCED** The Securities Commission, via the issuance of practice notes, has tightened the rules governing special purpose acquisition companies (SPACs) in order to enhance investor protection and market efficiency. The key changes include the requirement for promoter of a SPAC to only enjoy a maximum of 90% discount on their shares vis-à-vis what the Initial Public Offering ("IPO") investors will be paying, 40% discount on the shares of the initial investors of a SPAC, higher moratorium for mineral and oil and gas SPACs and prohibition against the use of proceeds from the IPO for remuneration of the management team or their related parties. ✚

**AROUND THE WORLD...  
IN BRIEF**

- **BRITAIN THE NEXT MARKETPLACE FOR SUKUK** In recognising the opportunity provided by Islamic finance for the UK's financial services industry, Britain plans to issue a GBP200 million *sukuk* next year, making it the first country outside the Islamic world to sell a bond that can be bought by Islamic investors in accordance with their faith. ✚
- **CYBER ARBITRATION PROCEEDINGS IN INDIA** The implementation of arbitration proceedings conducted online (cyber-arbitration) in India has given rise to certain legal issues, including the validity of the arbitration agreement. However, it appears that a cyber-arbitration agreement and online document submission may be allowed under Indian law, in particular section 7(3) of the Arbitration and Conciliation Act 1996 read with section 4 of the Information Technology Act 2000. ✚
- **EU DATA PROTECTION LEGISLATION CRITICISED** The new European data protection law is intended to strengthen data protection for European citizens

and prevent abuse and accidental data losses from companies. The new 'one continent one rule' system allows individuals to erase their personal data and strengthen online privacy. However, the vague wording of the draft law could make it easy for businesses to circumvent the rules, rendering them ineffective. ✚

- **HUDUD LAW IN BRUNEI** The Sultan of Brunei announced the phased introduction of tough Islamic punishments including death by stoning for crimes such as adultery. This is the monarchy's latest step towards conservatism. ✚
- **INDIAN LAND ACQUISITION BILL PASSED** The Indian Parliament passed the Land Acquisition Bill ("the Bill") which seeks to provide fair and just compensation to farmers and to those who lose their livelihood due to acquisition. The President has given his assent to the Bill, thereby enacting it into law. ✚
- **INTERNATIONAL COMMERCIAL MEDIATION CENTRE AND SINGAPORE INTERNATIONAL COMMERCIAL COURT IN THE PIPELINE** The Singapore Government is considering setting up a new independent Mediation Centre and a Singapore International Commercial Court to deal with regional and international commercial disputes. ✚
- **NZ FINANCIAL MARKETS CONDUCT BILL PASSED** The Financial Markets Conduct Bill ("the Bill"), described as 'a once in a generation shake up of securities laws' has been passed by the New Zealand Parliament. The Bill replaces several statutes including the Securities Act 1978, Securities Markets Act 1988, Unit Trusts Act 1960, the Superannuation Schemes Act 1989 and certain aspects of the KiwiSaver Act 2006. ✚

- **SHIPBUILDING INSURANCE ARBITRATION** Korean law firm *Kim & Chang* has secured a historic victory in a shipbuilding insurance arbitration, in which it represented Korean insurer, *Dongbu*, in a claim against Ukrainian reinsurer *Lemma*. The arbitration was the first decided under the 2011 Rules of Korean Commercial Arbitration Board. The choice of Korean law also proved to be a win for the firm, a departure from the use of English law which traditionally governs international insurance and reinsurance contracts. 
- **SINGAPORE LAUNCHES NEW CYBER SECURITY PLAN** Singapore announced its National Cyber Security Masterplan 2018, the focus of which will be on Singapore's critical infrastructure. 
- **TV CAMERAS TO BE ALLOWED INTO COURT OF APPEAL** In increasing public awareness of the judicial system, a long-standing ban that has been in place since the Criminal Justice Act 1925 has been partially lifted, allowing only the lawyers' arguments, judges' comments and sentencing remarks to be recorded in the highest courts in England and Wales. 
- **UK CODE OF PRACTICE ON SURVEILLANCE CAMERA** In addressing the concerns regarding the abuse or misuse of surveillance by the State in public places, a 12-point Code of Practice on the Use of Surveillance Cameras ("the Code") has been introduced under the Protection of Freedoms Act 2012. The introduction of the Code was prompted following a scandal involving West Midlands Police in 2010, which installed about 200 spy-cameras in largely Muslim areas of Birmingham. 

## BRIEFING...

### LEGAL PROFESSION

**THE JUDGE COUNSEL** A judge is a well respected, highly regarded, perhaps, even feared person. He holds office as a public servant with a noble duty of upholding justice. Stringent requirements are set out before an individual may hold such a position. A judge generally sits on the bench for many years, earning respect from advocates and solicitors, fellow colleagues and the public at large.

So, what happens when a judge retires from the judiciary and returns to the Bar as an advocate and solicitor? Is this prohibited? Is it ethical?

This article seeks to answer those queries.

### THE LAWS

**MALAYSIA** There is no law prohibiting the professional or commercial conduct of judges after retirement. However, many quarters are of the view that a retired judge should be prohibited from appearing as counsel in court and that judicial procedures should be amended to reflect such position.

According to the President of the Malaysian Bar, Christopher Leong, such prohibitions are necessary because retired judges could have undue advantage when appearing before judges who were once their subordinates. It is also against judicial convention for retired judges to appear in court. He further states that it would embarrass the opposing counsel as well as the judge presiding over the case.

In support of the prohibition, former Bar Council President, RR Chelvarajah and former Chief Justice of Malaysia, Tun Zaki Azmi, are concerned that public confidence in the judiciary would be affected if retired judges are allowed to return to practice. There is also the risk of opening floodgates for the opposing counsel to apply to disqualify those judges for conflict of interest.

Therefore, retired judges are instead recommended to become consultants who could advise counsel appearing in court. There are also suggestions to amend the *Judges' Code of Ethics* and to reformulate policies to discourage retired judges especially of the Appeal Court, from appearing as counsel in a High Court or subordinate court.

On the contrary, Tun Arifin bin Zakaria, Chief Justice of Malaysia and Datuk Seri Gopal Sri Ram, former Federal Court judge, are of the opinion that retired judges should not be prohibited from returning to practice because their expertise and experience may be instrumental to the legal development, especially in constitutional or commercial cases. Judges have the right to do as they wish, upon retirement, and they should not be prevented from supplementing their income or from pursuing their love for the law.


In a recent Federal Court ruling<sup>1</sup>, it was held that a retired Federal Court judge may act as counsel in a civil matter before the apex court. This is pursuant to the constitutional right of a citizen to earn a living under article 5 of the Federal Constitution, which provides for the *Liberty of the Person*. As a result, there was no legal basis to deny former judge Datuk Seri Gopal Sri Ram from acting as counsel in that case.

**SINGAPORE** In Singapore, the law does not forbid former judges of the High Court or Court of Appeal, who have held office for a period of three years or more, from returning to private practice provided they act only as a solicitor, and not as advocate or counsel<sup>2</sup>.

**UNITED KINGDOM** The prevailing convention in the UK is against former judges returning to practice. There is some doubt regarding when such convention was first developed but it has been recently made official in the *Judges' Council's Guide to Judicial Conduct* under section 9.1.

**AUSTRALIA** It has never been the practice of the Australian government to require persons offered judicial appointment to undertake that they would never return to legal practice after leaving office. However, the Bar and solicitors' governing bodies will impose restrictions upon retired judges appearing in court. The State constitutions also provide for the suspension of the judicial pension if a retired judge engages in legal practice.

**CONCLUSION** Although there is no specific legislation in Malaysia that prohibits a retired judge from continuing to practise as an advocate and solicitor, the fact remains that ethical and conflict of interest issues may arise. Such issues may lead not only to the loss of the public's trust in the judiciary, it may also undermine the legal profession.

Therefore, any activity by a retired judge is guided only by his conscience; unless the authorities take measures to amend the Judges' Code of Ethics 2009 to include regulations that deal with the conduct of judges after their retirement or resignation. 

<sup>1</sup> In a dispute between Pasukhas Constructions Sdn Bhd and MTM Millenium Holdings Sdn Bhd

<sup>2</sup> Section 26(2) of the Singapore Legal Profession Act (Chapter 161)

## COMPETITION LAW

### THE COMPETITION COMMISSION

The Competition Act 2010 which deals with anti-competitive practices in Malaysia, came into force on 1 January 2012.


This article seeks to outline the role and functions of the Malaysian Competition Commission.

**THE COMPETITION ACT 2010** The Competition Act 2010 ("the CA") came into force on 1 January 2012 and aims to provide a comprehensive legal framework on anti-competitive practices, as well as to promote a competitive market environment in Malaysia. The CA applies to all competition matters within and outside Malaysia provided such activities affect competition in the domestic market. The CA, however, excludes matters relating to energy, communication and multimedia as they are governed by the Energy Commission Act 2001 and the Communications and Multimedia Act 1998 respectively.

**THE MALAYSIAN COMPETITION COMMISSION (MYCC)** The MyCC is an independent body established under the Competition Commission Act 2010 ("the CCA") to enforce the Competition Act 2010. Its main role is to protect the competitive process for the benefit of businesses, consumers and the economy. It also looks to ensuring conducive and effective competition practices within Malaysia, in line with international best practices.

**FUNCTIONS OF THE MYCC** The CCA empowers the MyCC to carry out functions such as (1) implementing and enforcing the provisions of the CA; (2) issuing guidelines in relation to the implementation and enforcement of competition laws; (3) acting as advocate for competition matters; (4) carrying out general studies in relation to issues connected with competition in the Malaysian economy or particular sectors of the Malaysian economy and; (5) informing and educating the public regarding the ways in which competition may benefit consumers.

**POWERS OF THE MYCC** The MyCC has wide powers, including investigative powers to conduct investigations upon suspicion of infringement, direction of the Minister<sup>3</sup> or complaint by any person<sup>4</sup>. Such investigative powers are similar to that of police officers in relation to corresponding police investigations<sup>5</sup> in which the MyCC may, upon reasonable belief of an infringement, impose interim measures<sup>6</sup>. If the MyCC determines that there is in fact a violation of the CA, it may impose a fine or any other direction it deems appropriate<sup>7</sup>. The most recent examples are the MYR10 million fine each on AirAsia Bhd and Malaysia Airlines and the proposed fine of MYR4.5 million on Megasteel Steel Sdn Bhd.

The MyCC may also conduct market reviews to determine whether any feature or combination of features of a market prevents, restricts or distorts competition in a market<sup>8</sup> in which a report shall be published and made accessible to the public<sup>9</sup>. 

3 Minister of Domestic Trade  
4 Sections 13 and 14 of the CA  
5 Section 17 of the CA  
6 Section 35(2) of the CA  
7 Section 11 of the CA  
8 Section 12 of the CA  
9 Section 12 of the CA

## CONSTITUTIONAL LAW

### GENDER EQUALITY IN THE WORKPLACE

The Government has been urged to enact specific laws which would be able to promote gender equality. There is currently no law prohibiting gender discrimination except for article 8 of the Malaysian Federal Constitution.

This article addresses the issue of gender discrimination, Malaysia's current legal position and relevant laws related thereto.

**THE CEDAW** The Convention on the Elimination of All Forms of Discrimination against Women ("CEDAW") was adopted in 1979 by the United Nations General Assembly. It is the leading United Nations treaty on women's rights and consists of 30 articles. Malaysia acceded to the CEDAW on 5 July 1995.

Article 1 of the CEDAW defines "discrimination against women" as follows:

*...any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.*

Article 11(1)(b) of the CEDAW reads:

*State Parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights, in particular...the right to the same employment opportunities, including the application of the same criteria for selection in matters of employment.*

Article 11(2)(a) of the CEDAW requires State parties to take appropriate measures to prohibit dismissal on the grounds of pregnancy.

The word "gender" was incorporated into article 8(2) of the Federal Constitution in 2001 in order to comply with Malaysia's obligation under the CEDAW. It now reads:

*... there shall be no discrimination against citizens on the ground only of religion, race, descent, place of birth or gender in any law or in the appointment to any office or employment under a public authority...*

## CASE LAW DEVELOPMENT

### *Beatrice Fernandez v Sistem Penerbangan Malaysia & Anor*<sup>10</sup>

This case involved the applicant, a flight attendant who had served 11 years with Malaysia Airlines ("MAS"). The terms and conditions of service of the applicant were governed by a collective agreement which required a flight attendant to resign if she became pregnant, failing which, to face termination of her services. In this case, upon pregnancy, the applicant refused to resign and her services were terminated accordingly.

The Court of Appeal held that a constitutional safeguard such as the right to equality arose only within the domain of public law, in the event of a contravention of individual rights by public authority, the State or any of its agencies. As there was no proof that MAS was a government agency, the right to equality was not extended to the applicant.

The court also examined the construction of article 8 under the Aristotelian classification doctrine which affords equality only to persons in the same class. Thus, equality for the applicant was measured against the rights of other flight attendants in the same category.

<sup>10</sup> [2005] 2 CLJ 713



Article 8(1) of the Federal Constitution was also held not to apply as a collective agreement is not considered “law”.

Furthermore, article 8(2), which prohibits discrimination based on gender since it was incorporated in 2001, had not been in existence at the time of the applicant’s termination and, therefore, could not be applied retrospectively.

Pursuant to this decision, an appeal was made to the Federal Court in which the application for leave to appeal was dismissed.

**Noorfadilla binti Ahmad Saikin v Chayed bin Basirun and Ors**<sup>11</sup> In July 2011, the High Court delivered a landmark decision in this case when it held that refusal to employ women on the grounds of pregnancy alone is a form of gender discrimination and thus unconstitutional under article 8 of the Federal Constitution.

The case involved Noorfadilla binti Ahmad Saikin (“the plaintiff”) who applied for the post of an untrained relief teacher pursuant to a circular from the Ministry of Education. After a successful interview, the plaintiff received confirmation on her post and was asked to report for duty immediately. However the offer to her was revoked upon knowledge of her pregnancy.

The learned judge, Justice Dato’ Zaleha binti Yusof in coming to her decision, opined that the court had “no choice” but to refer to the CEDAW in clarifying the term ‘equality’ and the concept of gender discrimination under article 8(2) of the Federal Constitution. Justice Zaleha noted that the CEDAW is not a mere declaration but a convention and thus “has the force of law and is binding on member states, including Malaysia”.

The judge also referred to several instances where Malaysia had expressed its commitment to ensuring that the principles

enunciated under the CEDAW were given full effect under Malaysian law. An example of this was the **Putrajaya Declaration and Programme of Action on the Advancement of Women in Member Countries of Non-Aligned Movement** in which Malaysia had pledged to take all necessary measures, in the areas of law and policy, to eliminate discrimination against women in the public and private sector.

In applying articles 1 and 11 of the CEDAW, the learned judge held that to discriminate based on pregnancy is a form of gender discrimination “because of the basic biological fact that only women have the capacity to become pregnant”.


This decision was nominated for a Gavel award by Women’s Link Worldwide<sup>12</sup>, and for the International Gender Justice Uncovered Award.

*Gender mainstreaming... facilitates the integration of women’s differing experience and needs into the development process as well into the society and helps to change the negative social norms that discriminate against women.*

– Dato’ Zaleha Yusof

It is to be noted that unlike the case of **Noorfadilla**, the issue of the applicability of the CEDAW to the terms and conditions of the collective agreement in the case of **Beatrice Fernandez** was not addressed.

**CONCLUSION** Gender equality has plagued the courts for decades. Although employers should not deny an employee any benefit or even dismiss them merely on the basis of pregnancy, the issue of economic viability also has to be considered.

The Malaysian courts, in departing from its earlier approach, have now acknowledged the importance of gender equality and Malaysia’s obligation under the CEDAW. It is interesting to see if this trend will continue. 

11 [2012] 1 CLJ 769

12 *Women’s Link Worldwide* is an international human rights non-profit organisation which works to ensure gender equality is a reality around the world.

## LEGAL PROFESSION

### LIBERALISATION OF THE LEGAL

**PROFESSION** The Legal Profession (Amendment) Act 2012, which would allow for the liberalisation of the legal profession, has recently been gazetted.

Although the amendments are not in force yet, the legal profession is now bracing itself for the challenges ahead.

This article seeks to outline its development chronologically.

### CHRONOLOGY OF EVENTS

**September 1994** – Malaysia formally ratifies the establishment of the World Trade Organisation (“WTO”).

**January 1995** – The General Agreement on Trade in Services (“GATS”) comes into force, binding on all members of the WTO. The legal service, being one of the professional services, is included under the GATS.

**May 2008** – A dialogue on the Malaysia International Islamic Financial Centre (“MIFC”) initiatives is held at Bank Negara Malaysia (“BNM”) between BNM, the Attorney-General’s Chambers (“AGC”), the Bar Council (“BC”) and members of the Malaysian Bar. BNM proposes to allow the entry of five foreign legal firms into Malaysia under a stand-alone model to practise in the Islamic finance sector. The BC on the other hand, proposes that the entry of foreign firms be done *via* a joint legal venture (“JLV”) model.

**April 2009** – In a press statement, the Prime Minister announces the immediate liberalisation of 27 services sub-sectors encompassing health and social services, tourism services, transport services, business services, computer and related services. The liberalisation includes the removal of 30% Bumiputera ownership requirement for investment in some services sectors.

The Prime Minister further announces that the legal profession will be liberalised to allow up to five top international law firms with expertise in international Islamic finance to practise in Malaysia. These firms, however, will be allowed to offer legal services only in international Islamic finance. This move is part of the measures to develop Malaysia as an international Islamic financial hub.

**September 2009** – The GATS committee (now known as the Trade in Legal Services (“TILS”) Committee) prepares its *Memorandum on the Liberalisation of the Legal Services Sector in Malaysia: Proposed Roadmap for Liberalisation of the Legal Services Sector in West Malaysia (“the September 2009 Memorandum”)*, which is submitted to the Prime Minister, MITI, AGC, BNM and also to the then Minister in the Prime Minister’s Department, Dato’ Seri Nazri Abdul Aziz.

**October 2009** – The Committee submits a *Memorandum on the Proposal to Repeal Part IIA of the LPA 1976* to AGC, to be considered concurrently with the September 2009 Memorandum.

**November 2010** – Representatives from TILS and AGC meet to discuss the regulation of international partnerships and qualified foreign law firms in Malaysia, as well as the permitted practice areas for both models under the proposed amendments to the LPA.

**July 2011** – AGC organises a final meeting with BC through TILS to obtain its final feedback on drafts for clauses 40A to 40N of the Legal Profession (Amendment) Bill 2011 and Legal Profession (Licensing of International Partnership and Qualified Foreign Law Firms and Registration of Foreign Lawyers) Rules 2011.

**August 2011** – Consultation and briefings are held between BNM and BC on the impact of liberalisation.

**August and September 2011** – Consultations are held on the issue of liberalisation between AGC and BC.


**October 2011** – The Prime Minister unveils the Budget for the year 2012 with the primary focus on accelerating investments in the services sector. To achieve this goal, the government will liberalise 17 additional services subsectors in phases in 2012, one of which involved legal services.

**April 2012** – The Legal Profession (Amendment) Bill 2012 is tabled by Deputy Minister in the Prime Minister's Department Datuk Liew Vui Keong. Instead of allowing only five international law firms to offer legal services in Islamic Finance, the Bill permits foreign law firms or individual lawyers to practise in Malaysia through an international partnership.

**July 2012** – The Bill for the Amendment Act is passed.

**September 2012** – The Legal Profession (Amendment) Act 2012 is gazetted. However, no date is appointed for which the amendments are to come into force.

**September 2013** – A further amendment is made to the Legal Profession (Amendment) Act 2012 culminating in the Legal Profession (Amendment) Act 2012 (Amendment) Act 2013. These amendments introduce an exception to the "fly-in fly-out" prohibition which now allows a foreign lawyer to enter Malaysia for up to 60 days in a calendar year, advising on non-Malaysian law.

**CONCLUSION** Although the latest initiative to liberalise the Malaysian legal profession, is commendable, these changes are still subject to debate. Thus, the authorities must ensure that the changes made involve an element of protectionism towards our local lawyers in order for them to survive the impact of such liberalisation. 


## BRIEF-CASE...

COMPANY & CORPORATIONS – General mandatory offer – Control of more than 33% of shares in company – Whether minority shareholders may compel defendants to make the mandatory take-over offer to all shareholders – Whether abuse of process of court – Securities Commission Act 1993 and Malaysian Code on Take-Overs and Mergers

### SHAHIDAN SHAFIE V ATLAN HOLDINGS BHD & ANOR [2013] 4 CLJ 1029, High Court

**FACTS** The plaintiff, a shareholder of Naluri Bhd, filed an action for an order to compel the defendants jointly and severally to make a mandatory take-over offer to all shareholders of Naluri Bhd on the basis that the defendants had acquired more than 33% of the shares of Naluri Bhd.

**ISSUE** The issue before the High Court was whether minority shareholders of the company could compel the defendants to make the mandatory take-over offer to all shareholders.


**HELD** In dismissing the claim, it was held that the minority shareholders had no right to compel the defendants as this power is given to the Securities Commission ("SC") under the Securities Commission Act 1993 ("Act") and the Malaysian Code on Take-Overs and Mergers. It was for the plaintiff to lodge a complaint with the SC for any breach before pursuing any claim whether it is public or private law remedy. The court ought not to entertain any application where the complaint had not been placed with the appropriate authority as it would amount to an abuse of the powers of the court when a complaint and relief mechanism has been specifically provided for in the Act. 

**COMPANY & CORPORATIONS** – Separate legal entity – Lifting the veil of incorporation – Circumstances when corporate veil may be pierced – Whether appellant personally liable for acts and liabilities of subsidiary

**TENAGA NASIONAL BHD V IRHAM  
NIAGA SDN BHD & ANOR<sup>14</sup>**  
July 2013, Court of Appeal

**FACTS** The respondents entered into 5 different agreements with TNB Transmission Network Sdn Bhd (“TNBT”) which is a subsidiary of the appellant. A civil action involving the agreements was instituted by the appellant and TNBT in the Shah Alam High Court against the respondents. The dispute was subsequently referred to arbitration following a stay order of the original suit. After obtaining an award in their favour, the respondents in attempting to enforce the award, instituted the present suit against the appellant. The appellant applied to strike out the respondent’s suit which was then dismissed by the High Court.

**ISSUES** The issue before the Court of Appeal was whether the corporate veil of TNBT may be lifted in order for the appellant to be personally liable for the acts and liabilities of TNBT.

**HELD** In allowing the appeal, the court held that ownership and control are not sufficient to justify piercing the corporate veil. Such control must instead be coupled with some “impropriety” linking the use of the company structure to circumvent liability. Since fraud could not have been established against the appellant, the corporate veil remained intact and the appellant was not liable for the acts of TNBT. 


<sup>14</sup> Tan Sri Dato’ Cecil Abraham and Natalia Izra Nasaruddin from **ZUL RAFIQUE & partners** represented Tenaga Nasional Bhd

**AGENCY** – Power of attorney – Capacity – Whether a company as a donor is allowed to grant power of attorney – Whether power of attorney remains valid upon winding up – Powers of Attorney Act 1949

**LIM ENG CHUAN SDN BHD V UNITED  
MALAYAN BANKING CORPORATION  
& ANOR** [2013] 5 CLJ 425, Federal Court

**FACTS** The first respondent, UMBC, granted an overdraft facility to the appellant, secured by a debenture which included a fixed charge over seven pieces of land, a charge under the National Land Code (“the NLC”) and an irrevocable power of attorney (“PA”) in favour of the first respondent for valuable consideration. Upon default of the facility, the appellant was ordered to be wound up. The first respondent, pursuant to the PA, entered into a sale and purchase agreement with the second respondent for the sale of lands. The appellant, who managed to pay the monies owing, obtained a stay of the winding-up order and filed to set aside the sale of lands. The High Court dismissed the application which was upheld by the Court of Appeal.

**ISSUE** The issues before the Federal Court were (i) whether a company as a donor may grant a PA pursuant to section 6(1)(a) of the Powers of Attorney Act 1949 (“POA”); and (ii) whether such PA survived and remained valid upon winding up of a donor company.

**HELD** By virtue of section 3(1) of the POA, a company may grant a PA provided it complies with Form II of the First Schedule and that the PA granted by a company is not revoked upon the winding-up of the company, but upon its dissolution. Since the company had not been dissolved and had obtained a permanent stay of the winding-up proceedings, the PA survived and was valid. 

MEDIATION/EVIDENCE – Without prejudice – Confidentiality – Admissibility and relevancy – Practice Direction on Mediation – Mediation Rules of the Malaysian Mediation Centre (MMC) – Evidence Act 1950 – Whether letters in relation to mediation admissible as evidence in court

**ALEX NANDASERI DE SILVA V  
SARATH WICKRAMA SURENDRE**  
[2013] High Court

**FACTS** The plaintiff filed a suit against the defendant for defamation and the parties went through a mediation process. The plaintiff claimed that the matter had been mediated and that it was agreed that the plaintiff would withdraw the matter upon the defendant publishing an apology letter. No such letter was published. The plaintiff subsequently included in the Bundle of Documents, five letters, three of which concerned what had transpired during the mediation proceeding.

**ISSUE** The issue before the High Court was whether the three letters in relation to mediation are admissible as evidence in court.

**HELD** The court refused leave to the plaintiff to file the letters as Practice Direction on Mediation and MMC Mediation Rules provide that the communications during mediation are confidential and are “without prejudice” and will not be allowed to be used in a court of law unless consented to by both parties. The letters were also not relevant within the meaning of section 5 of the Evidence Act 1950 (“the Act”) as they were not relevant to the facts in issue and were protected from disclosure in the full trial by virtue of section 23 of the Act.

## BRIEFLY...


### ACT

#### PERSONAL DATA PROTECTION ACT 2010

No  
709

*Date of coming into operation*  
15 November 2013

#### Notes

It is an Act to regulate the processing of personal data in commercial transactions and to provide for matters connected therewith and incidental thereto. 


### AMENDMENT ACTS

#### CAPITAL MARKETS AND SERVICES (AMENDMENT) ACT 2011

No  
A1406

*Date of coming into operation*  
3 October 2014

#### Notes


The highlight of the amendment is the introduction of Subdivision 4 of Division 3 of Part III which deals with rules regarding the establishment of a trade repository. 

## SAFEGUARDS (AMENDMENT) ACT 2012

No  
A1439

*Date of coming into operation*  
1 September 2013

### Notes

The highlight of the amendment is the inclusion of section 40A which deals with bilateral safeguards, namely the power of the Government to investigate and impose safeguard measures in accordance with the terms and conditions agreed upon in a trade agreement entered into by the Government. 

## GUIDELINES/RULES/CIRCULARS/ DIRECTIVES AND PRACTICE NOTES ISSUED BETWEEN SEPTEMBER 2013 AND NOVEMBER 2013 BY BANK NEGARA MALAYSIA, BURSA MALAYSIA AND SECURITIES COMMISSION

### BANK NEGARA MALAYSIA (BNM)

- Guidelines on Anti-Money Laundering and Counter Financing of Terrorism – Designated Non-Financial Businesses and Professions & Other Financial Sectors – *Date issued: 30 October 2013*
- Guidelines on Registration Procedure to Carry on Adjusting Business – *Date issued: 10 October 2013*
- Guidelines on Anti-Money Laundering and Counter-Financing of Terrorism (AML/CFT) - Money Services Business (Sector 3) – *Date issued: 4 September 2013*

- Guidelines on Anti-Money Laundering and Counter Financing of Terrorism (AML/CFT) - Insurance & Takaful (Sector 2) – *Date issued: 4 September 2013*
- Guidelines on Anti-Money Laundering and Counter Financing of Terrorism (AML/CFT) - Electronic Money and Non-Bank Affiliated Charge & Credit Card (Sector 4) – *Date issued: 4 September 2013*
- Guidelines on Anti-Money Laundering and Counter Financing of Terrorism (AML/CFT) - Banking and Deposit-Taking Institutions (Sector 1) – *Date issued: 4 September 2013*

### BURSA MALAYSIA

- Consolidated Rules of Bursa Malaysia Bonds Sdn Bhd – *As at: 15 November 2013*
- Consolidated Rules of Bursa Malaysia Securities Clearing Sdn Bhd – *Date updated: 15 November 2013*
- Consolidated Rules of Bursa Malaysia Derivatives Clearing Bhd – *As at: 15 November 2013*
- Consolidated Rules of Bursa Malaysia Derivatives Bhd – *As at: 15 November 2013*
- Amendments to the Rules of Bursa Malaysia Depository Sdn Bhd Consequential to the Personal Data Protection Act 2010 – *Effective date: 15 November 2013*
- Amendments to the Rules of Bursa Malaysia Bonds Sdn Bhd (“BURSA BONDS”) Consequential to the Personal Data Protection Act 2010 – *Effective date: 15 November 2013*
- Rules Amendments Consequential to the Personal Data Protection Act 2010 – *Effective date: 15 November 2013*

- Amendments to the Rules of Bursa Malaysia Securities Berhad (“Bursa Securities”) Consequential to the Personal Data Protection Act 2010 – **Effective date: 15 November 2013**
- Amendments to Bursa Malaysia Securities Berhad ACE Market Listing Requirements Consequential to the Personal Data Protection Act 2010 – **Effective date: 15 November 2013**
- Amendments to Bursa Malaysia Securities Berhad Main Market Listing Requirements Consequential to the Personal Data Protection Act 2010 – **Effective date: 15 November 2013**
- Amendments to the Rules of Bursa Malaysia Securities Clearing Sdn Bhd Consequential to the Personal Data Protection Act 2010 – **Effective date: 15 November 2013**
- Amendments to the Rules of Bursa Malaysia Derivatives Berhad (“Rules Of Bursa Derivatives”) Consequential to the Personal Data Protection Act 2010 – **Effective date: 15 November 2013**
- Consequential Amendments to Bursa Malaysia Securities Berhad ACE Market Listing Requirements – **Effective date: 16 October 2013**
- Amendments to the Rules of Bursa Malaysia Derivatives Berhad (“Rules Of Bursa Derivatives”) for the introduction of Gold Futures Contract – **Effective date: 7 October 2013**

## SECURITIES COMMISSION

- Guidelines on Private Retirement Scheme – **Date updated: 15 November 2013**

## 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 Editor at:

amylia.soraya@zulrafique.com.my

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The contributors for this Brief are:

- *Mariette Peters*
- *Amylia Soraya*
- *Victoria Yap*

## FROM THE TAGLAW ALBUM

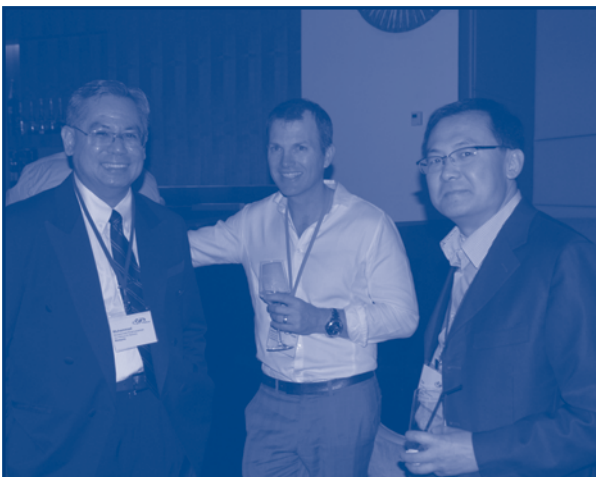
At the TAGLaw Asia-Pacific Regional Meeting in Kuala Lumpur, Malaysia on 25 August 2013



*Dato' Zulkifly Rafique* (left)



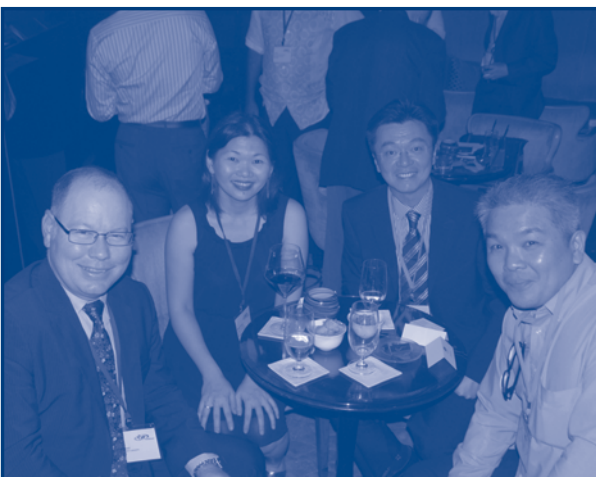
*Tan Sri Dato' Cecil Abraham* (centre)



*Khairuzzaman Muhammad* (left)



*Lukman Sheriff Alias* (centre)



*Wong Keat Ching* (second from left)



*Hamdi Abdullah* (centre)