

the **ZRp** brief

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Folder 1

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ZUL RAFIQUE & partners wins **Corporate Finance Deal of the Year 2013**
awarded by **Islamic Finance News**

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ZUL RAFIQUE & partners

A BRIEF NOTE...

by Dato' Zulkifly Rafique



Great years ahead...

It has been a good start to the year for **ZUL RAFIQUE & partners**.

In February, we received news that **ZUL RAFIQUE & partners** won the **Corporate Finance Deal of the Year: Sime Darby Global US\$800 million Dual Tranche Sukuk** which was awarded by *Islamic Finance News*.

The deal involved a landmark transaction which represents **Sime Darby Berhad** as the first Asian conglomerate to establish Asia's first internationally rated multi-currency **Sukuk** programme under the *Shariah* principle of *Ijarah*. The transaction was led by partners Loh Mei Mei, Lim Mun Lai and Celine Rangithan. I would like to congratulate them for a job well done.

The *Islamic Finance News* award ceremony was held at the Shangri-La Hotel, Kuala Lumpur, Malaysia on 19 February 2014. *Islamic Finance News* is the industry's leading, capital markets focused e-newsletter, providing coverage of the global Islamic financing market. It is published by **REDmoney**, a publishing and events company focusing purely on the global Islamic finance market.

I would like to thank all our clients and friends for their invaluable support for making this happen. I hope **ZUL RAFIQUE & partners** would continue to achieve greater success this remaining year and for many years ahead.

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- *CIPA Act 2012*
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- *Locus standi revisited*
- *British legal chiefs adopt Islamic law*
- *Foreign currency contracts banned in Vietnam*
- *Hong Kong gazettes Islamic bond law*
- *Oxford v Oxford*

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- *Badan Pengurusan Bersama Paradesa Rustika v Sri Damansara Sdn Bhd* [2013] 9 CLJ 813, Federal Court
- *The New Straits Times Press (Malaysia) Bhd & Anor v Admal Sdn Bhd* [2013] 9 CLJ 955, Court of Appeal

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- *The IFSA: A new legal order for Islamic Finance*
- *Locus Standi revisited... MTUC & 13 Ors v Menteri Tenaga, Air dan Komunikasi & Anor*
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Legislation Update:

- Credit Reporting Agencies Act 2010
- Merchant Shipping (Amendment & Extension) Act 2011
- Merchant Shipping (Oil Pollution) (Amendment) Act 2011
- Guidelines/Rules/Circulars/Directives and Practice Notes issued between December 2013 and March 2014 by Bank Negara Malaysia, Bursa Malaysia and Securities Commission

✦ IN BRIEF...

- **CIPA ACT 2012** The Construction Industry Payment and Adjudication ("CIPA") Act 2012 which was passed on 18 June 2012 and gazetted on 22 June 2012 has come into force on 15 April 2014. The CIPA Act 2012 aims to facilitate efficient, smooth and uninterrupted construction works by supporting payment to contractors, pending final determination. ✦
- **CODE OF CONDUCT FOR MONEY SERVICES BUSINESS** Bank Negara Malaysia ("BNM") Deputy Governor, Dato' Muhammad Ibrahim, has indicated that BNM would like the money services business to establish a Code of Conduct for the industry in 2014. This is to ensure the industry's compliance with the Money Services Business Act 2011. ✦
- **COMMUNITY SERVICE FOR PARENTS?** Datuk Rohani Abdul Karim, Minister in the Ministry of Women, Family and Community Development has proposed that the Child Act 2001 be amended to include community service as one of the sentences for negligent parents who cause the death of their children. The suggestion has already been forwarded to the Attorney-General's Chambers. She also mentioned that apart from the Child Act 2001, the provisions in the Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007 and the Destitute Persons Act 1977 would also be tightened. ✦
- **DOCTORS REQUEST EXEMPTION FROM PDPA** The Malaysian Medical Association has made a request to the Commissioner of Personal Data Protection to be exempted from having to register as 'data users' under the recently enforced Personal Data Protection Act 2010 ("PDPA"). The request was made on the basis that the Medical Act 1971 already provides for patients' data to be protected and for action to be taken against violation of patients' confidentiality. ✦
- **GST BILL PASSED** The Goods and Services Tax ("GST") Bill was passed in the *Dewan Rakyat* on 7 April 2014, paving its way to replace the current consumption tax, which consists of sales tax and services tax of 10% and 5% respectively. This will take effect from April 2015. ✦
- **LOCUS STANDI REVISITED** The Malaysian Federal Court has recently reviewed the test on *locus standi* for judicial review application, ruling that to fulfill the "adversely affected" requirement, the applicant must now show a real and genuine interest in the subject matter. He no longer needs to prove that his rights are affected, as previously established in 1988 by the Supreme Court in *Government of Malaysia v Lim Kit Siang*. ✦
- **MACC ACT TO BE AMENDED** The proposed amendment to section 36 of the Malaysian Anti-Corruption Commission ("MACC") Act 2009, will give the Malaysian Anti-Corruption Commission the power to compel any individual to declare his assets without any prior investigation. Such amendment has gained support from both Transparency International Malaysia and the Malaysian Bar Council. A further proposal is to amend the MACC Act 2009, to hold chief executive officers and companies liable for corruption activities involving their employees. This amendment will be pushed for an early tabling in Parliament this year. Under the proposed amendment, corporate entities may avoid liability only upon proof that they have put in place adequate preventive systems training, education and instructions on the implications of bribery. ✦

- **SAFE DRINKING WATER BILL** The Safe Drinking Water Bill, expected to be tabled in Parliament this year, will allow the Health Minister to shut down a water treatment plant, with the agreement of the Energy, Green Technology and Water Minister, if he has any reason to believe that its water poses a public health hazard. The Bill is part of the government's efforts to safeguard the rights of consumers and to protect them from potential health hazards. ✚
- **SECTION 114 OF WASIA TO BE GAZETTED** Section 114 of the Water Services Industry Act 2006 ("WASIA") is expected to be gazetted in April. Under section 114 of the WASIA, the Federal Government, *via* the National Services Commission ("SPAN"), has the right to acquire control of the operations of the concessionaires in which a team of administrators facilitated by SPAN will manage and control water supply in Selangor and deliberate on the issue of ownership by the State Government. ✚

AROUND THE WORLD... IN BRIEF

- **BRITISH LEGAL CHIEFS ADOPT ISLAMIC LAW** The Law Society of England and Wales has produced a guideline for solicitors on drafting "Sharia compliant" wills, allowing solicitors to write wills that deny women an equal share of inheritances and exclude unbelievers, children born out of wedlock and those who have been adopted, from being counted as legitimate heirs. ✚
- **FIRST FEMALE LAW FIRM IN SAUDI ARABIA** The opening of the first all-female law firm in Saudi Arabia has been hailed as a historic moment for the country's legal profession. The firm, which has a total of four lawyers led by Bayan Mahmoud Al-Zahran, specialises in employment and business disputes. Al-Zahran is also the first Saudi woman lawyer to have appeared at the General Court in Jeddah to defend a client. ✚
- **FOREIGN CURRENCY CONTRACTS BANNED IN VIETNAM** The State Bank of Vietnam imposed a new rule which requires all contracts enforceable in the country to be calculated, denominated and paid in Vietnamese Dong ("VND") with effect from 10 February 2014. This ends the practice of US Dollar ("USD") contracts, rendering them unenforceable in Vietnam. ✚
- **FRANCE'S 75% TAX RATE GAINS APPROVAL BY TOP COURT** The highest court in France has approved a 75% tax on high earners, that will last for two years, affecting income earned in 2013 and in 2014. It makes employers liable for the 75% tax on salaries exceeding EUD1 million (GBP830,000), despite the ruling that the initial proposal to tax individual income was unconstitutional. ✚
- **HONG KONG GAZETTES ISLAMIC BOND LAW** Following the development of a taxation framework for Islamic bonds ("*Sukuk*") to enhance Hong Kong's competitiveness, the Loans (Amendment) Bill 2014 was gazetted in January to accommodate the issuance of *Sukuk* under the Hong Kong Government Bond Program. ✚
- **INDIAN PRESIDENT SIGNS HISTORIC ANTI-GRAFT LAW** Two years after a mass anti-corruption movement that swept the country, the Indian president has finally signed a powerful anti-graft law that creates a corruption ombudsman at the federal level, with powers to prosecute all politicians and civil servants. Similar institutions will be created in the individual states of India. ✚

- **LAW REQUIRING USE OF FATHER'S NAME DISCRIMINATORY** Children of married couples in Italy will now be allowed to carry their mother's surname following a ruling by the European Court of Human Rights ("ECHR") that the previous law was incompatible with the principle of gender equality enshrined in Italy's modern constitution. ✚
- **MEXICAN PRESIDENT SIGNS CONTROVERSIAL OIL AND GAS LAW** The Mexican President has signed a controversial law that changes three articles in the Mexican Constitution allowing foreign investments in oil, gas and electricity. Private companies will be allowed to sign contracts to drill for oil and gas with state-controlled firm Pemex, which will get a share of the profits. ✚
- **OXFORD V OXFORD** The UK Intellectual Property Enterprise Court has ruled that Oxford Law School Ltd had infringed the Oxford University UK and Community trademarks. Proceedings were brought by the world famous university against Oxford Law School, a company offering short-term tuition for courses administered by separate professional regulatory bodies. ✚
- **SINGAPORE NON-LEGAL PROFESSIONALS TO BE PART OF LAW FIRM** Singapore plans to introduce an alternative business structure to the legal industry which would allow non-legal professionals to own part of a law firm. Amendments will be made to the Legal Profession Act of Singapore, and are expected to be implemented next year. A proposal is also made to establish the Legal Services Regulatory Authority to regulate business criteria for law practice entities. ✚

✚ BRIEF-CASE...

ADMINISTRATIVE LAW/CIVIL

PROCEDURE – Judicial review application
 – Decision of Minister in refusing disclosure of concession agreement and audit report
 – Whether appellants had *locus standi* to apply for judicial review – Rules of High Court, Order 53 rule 2(4)

**MALAYSIAN TRADE UNION
 CONGRESS & 13 ORS V MENTERI
 TENAGA, AIR DAN KOMUNIKASI &
 ANOR, Federal Court**

FACTS The first appellant requested from the first respondent, a copy of a concession agreement regarding the supply of treated water to the state of Selangor and Federal Territory, as well as an audit report relating to it. The request was denied. Following the refusal, the appellants applied for a judicial review of the first respondent's decision.

ISSUE Whether the appellants had *locus standi*; and what was required to establish *locus standi*.

HELD In allowing the appeal, the court held that it is not necessary for the applicant in a judicial review proceeding to establish infringement of a private right or the suffering of special damage as was previously established in *Government of Malaysia v Lim Kit Siang* [1988] 2 MLJ 12.

What the appellant had to do was to pass the "adversely affected" test by showing that he had a real and genuine interest in the matter. Although the first appellant had established *locus standi*, the second to 14th appellants had failed to show that they were "adversely affected" by the first respondent's decision, as they did not make a similar request for disclosure. ✚

LAND LAW – Whether the account kept prior to the commencement of the Building and Common Property (Maintenance and Management) Act 2007 is a building maintenance account

**BADAN PENGURUSAN BERSAMA
PARADESA RUSTIKA V SRI
DAMANSARA SDN BHD**
[2013] 9 CLJ 813, Federal Court

FACTS Prior to the commencement of the Building and Common Property (Maintenance and Management) Act 2007 (“the Act”), the respondent, the developer of Paradesa Rustika Condominium (“the Condominium”) collected monthly maintenance and sinking fund charges (“the account”) from the purchasers of the condominium units. When that sum was transferred to the appellant, the Joint Management Body (“JMB”) of the Condominium, it was claimed that there was a shortfall in the monies collected in the account kept by the respondent. The respondent argued that the sum was used to reimburse itself towards the maintenance and rehabilitation of the condominium.

ISSUE Whether the account kept by the respondent prior to the commencement of the Act formed part of a building maintenance account under section 16 of the Act and whether any money remaining in the account should be transferred to the JMB.

HELD Nothing in the Act states that the account kept by the respondent prior to its commencement is a building maintenance account. Neither does the Act require any money still available in such account to be transferred to a building maintenance account. The respondent is therefore not obliged to transfer any money remaining in the account to the JMB. Furthermore, the account kept by the respondent was part of the sinking fund under the deed of mutual covenant between the respondent and the purchasers.

INTELLECTUAL PROPERTY – Copyright infringement – Originality – Whether NST “Spell-It-Right” concept eligible for copyright protection – Whether there was substantial copying of the NST “Spell-It-Right” concept

**THE NEW STRAITS TIMES PRESS
(MALAYSIA) BHD & ANOR V
ADMAL SDN BHD** [2013] 9 CLJ 955,
Court of Appeal

FACTS The appellant and the respondent entered into a discussion to form a joint venture to organise an English spelling competition amongst the appellant’s readers. The concept behind the joint venture was presented by the respondent to which the appellant’s input was also incorporated. When that joint venture failed, the appellants collaborated with RHB to organise their own spelling competition known as “RHB-NST Spell-It-Right”. The respondent claimed that the concept behind the competition was a copyright infringement because it incorporated features contained in the “NST Spell-It-Right”. The trial judge ruled in favour of the respondent which led to the present appeal by the appellants.

ISSUE Whether the “NST Spell-It-Right” concept was eligible for copyright protection and whether there was substantial copying of the “NST Spell-It-Right” concept.

HELD In allowing the appeal, the court held that the “NST Spell-It-Right” concept was not eligible for copyright protection as there was no originality behind the concept which was a mere compilation of existing public information. The concept, although concerns a spelling competition, involved similar rules and regulations that relate to the function of any other competition of this nature. Even if the concept was eligible for copyright protection, there was no substantial copying and the inclusion of common features into the concept ought to be excluded in determining the extent of copying.

BRIEFING...

BANKING

THE IFSA: A NEW LEGAL ORDER

FOR ISLAMIC FINANCE Bank Negara Malaysia (“BNM”) has always been a champion of Islamic finance in terms of regulatory mechanisms and its implementation.

In this article we discuss the impact of the newly implemented Islamic Financial Services Act 2013 (“IFSA”).

AD-DEEN Muslims believe that religion (*ad-deen*) is a complete code of conduct, providing guidelines for all aspects of private and public life, including economic and legal affairs. Thus, there is a demand among Muslims for a banking system with proper *Shariah* regulations and with a *Shariah* operational framework. Based on this demand, the first Islamic financial institution in Malaysia, Tabung Haji was set up under the Pilgrims Management Fund Board (Lembaga Urusan Tabung Haji) in 1962 which came into operation the following year. Bank Islam Malaysia Berhad was subsequently formed in 1983 followed by Bank Muamalat Malaysia Berhad in 1999¹.

ISLAMIC BANKING The Islamic Window concept² was introduced by BNM to allow commercial banks and financial institutions to offer Islamic financial products. However, these institutions were required to have a separate fund for Islamic banking activities.

From a system based on Islamic windows, a shift was gradually made towards financial institutions adopting Islamic subsidiaries and the establishment of full-fledged Islamic banks.

Former Minister of Finance, Tan Sri Nor Mohamed Yakcop in delivering his keynote address during the International Islamic Banking Conference in 2003, emphasised that the implementation of the Islamic financial system in Malaysia placed importance on substance rather than form. Efforts are therefore continuously made by BNM to ensure that regulations pertaining to Islamic finance are consistent with *Shariah* principles.

SHARIAH ADVISORY COUNCIL In 1997, the *Shariah* Advisory Council (“SAC”) of BNM was established as the highest *Shariah* authority in Islamic finance in Malaysia. However, it was noted by the High Court in *Arab Malaysian Finance Bhd v Taman Ihsan Jaya Sdn Bhd & Ors*³, that there is neither necessity nor reason to refer to the SAC for any ruling on the concepts of financing facilities. Nevertheless these rulings ought to be taken into consideration, although they are not binding upon the court.

In the case of *Bank Islam Malaysia Bhd v Lim Kok Hoe & Anor and Other Appeals*⁴, Justice Raus Shariff in the Court of Appeal rectified this position by stating that the question whether a bank’s business is in accordance with Islam needs consideration by eminent jurists who are qualified in the field of Islamic jurisprudence⁵. The IFSA was enacted to answer a critical question, namely whether Malaysian law provides clarity and certainty to Islamic financial institutions for the purposes of compliance and governance.

1 Nik Norzul Thani et.al, *Law and Practice of Islamic Banking and Finance*, (2010).

2 Islamic windows refer to special facilities provided by conventional banks for Muslims who wish to engage in Islamic banking services.

3 [2009] 1 CLJ 419 at para 30. The case consisted of *Bai’ Bithaman Ajil* facilities (“BBA”) provided to the defendants, involving a property purchase agreement and property sale agreements which set out the terms of the BBA facility. The defendants had defaulted on the payment of the banks’ selling price. It was not in dispute whether the defendants had to pay the instalments of specific sums which made up the total of the banks’ selling price but rather whether financing transactions for profit was approved by Islam and/ or were contrary to the provisions of the Islamic Banking Act 1983 or the Banking and Financial Institutions Act 1989.

4 The case consisted of an appeal for a common judgment delivered on 12 cases concerning Islamic financing in the form of BBA facilities provided by the plaintiff, Bank Islam Malaysia Berhad.

5 [2009] 6 CLJ 22 at p37.

IFSA & SHARIAH PRINCIPLES Sections 27 to 38 of the IFSA govern the requirements imposed for *Shariah* compliance of Islamic financial institutions. Section 28⁶ not only requires that Islamic financial institutions comply with *Shariah* principles and rulings made by the SAC, it also imposes requirements for full *Shariah* compliance. Based on section 28, any person who fails to uphold these statutory duties will be punished with imprisonment of a term up to but not exceeding eight years and/ or a maximum fine of MYR25 million.

FORMER PROVISIONS The establishment of *Shariah* advisory bodies was previously governed by the Islamic Banking Act 1983, Takaful Act 1984, Banking and Financial Institutions Act 1989, Development Financial Institutions Act 2002, Bank Simpanan Nasional Act 1974 and Capital Markets and Services Act 2007. However, the powers of the SAC were limited to giving advice and issuance of rulings. There were no available provisions that provided for legal repercussions should the rulings be ignored by the financial institutions.


There are now provisions in the Central Bank of Malaysia Act 2009 that allow the court or arbitrator to refer to the SAC on questions regarding *Shariah* matters. The rulings passed will then be binding on the financial institution as well as the court or the arbitrator⁷. However, as far as compliance with rulings of the SAC was concerned, there were no provisions with regard to penalties.

This however has changed with the implementation of the IFSA, with penalties for non-compliance found in sections 28 and 29⁸. With all the statutory duties imposed by the IFSA on operators, it is

hoped that a clear message is sent – that *Shariah* principles and *Shariah* advisory rulings are to be strictly complied with.

CLARITY? Critics have argued that the legal position enjoyed by the various *Shariah* advisory bodies are anomalous and that they need further legislative clarification⁹. This has been dealt with in section 29 of the IFSA. Section 29 of the IFSA empowers BNM to issue and regulate standards pertaining to *Shariah* matters. Sanctions similar to those imposed for non-compliance pursuant to section 28 of the IFSA, will apply if the standards set by the IFSA are ignored.

Furthermore, institutions are required to establish their own *Shariah* Committee with audits on *Shariah* compliance to be carried out by the institution under section 37¹⁰ of the IFSA. BNM may also appoint an auditor for the same purpose under section 39¹¹ of the IFSA.

CONCLUSION In a nutshell, the IFSA provides for the regulation and supervision of Islamic financial institutions, payment systems and other relevant entities. Furthermore, it places guidelines on the oversight of the Islamic money market and Islamic foreign exchange market to promote financial stability while complying with *Shariah* standards for related, consequential or incidental matters. 

6 *Duty of institution to ensure compliance with Shariah.*

7 Sections 56-57 of the Central Bank of Malaysia Act 2009. Section 56 refers to *Reference to Shariah Advisory Council for ruling from court or arbitrator*, whilst section 57 refers to *Effect of Shariah rulings*.

8 *Power of bank to specify standards on Shariah matters.*

9 Nik Norzul Thani et al, *Law and Practice of Islamic Banking and Finance*, (2010), at p357.

10 *Appointment of person by institution to conduct audit on Shariah compliance.*

11 *Designation and revocation of designation of payment system.*

ADMINISTRATIVE LAW/ CIVIL PROCEDURE

LOCUS STANDI REVISITED... MTUC & 13 ORS V MENTERI TENAGA,

AIR DAN KOMUNIKASI & ANOR In February 2014, the Malaysian Federal Court reviewed the test on *locus standi* in the suit between the Malaysian Trades Union Congress ("MTUC") and the Government, for access to the concessionaire agreement involving Syarikat Bekalan Air Selangor Sdn Bhd ("SYABAS").

In this article we examine the case and how it has changed the law prior to it.

WHAT IS LOCUS STANDI *Locus standi* which literally means a 'place to stand', refers to the right of a party to appear and be heard before a court.

THE FACTS The Government of the State of Selangor, the Federal Government and SYABAS entered into a tripartite agreement ("the Agreement") whereby SYABAS was granted a 30-year concession to supply treated water to the State of Selangor and the Federal Territory, according to the water tariffs provided. Under the Agreement, SYABAS was entitled to increase the water tariffs provided they manage to achieve a 5% reduction in the non-revenue water. SYABAS was successful in reaching the target and thereafter applied for an increase of the water tariffs by 15% with effect from 1 November 2006.

MTUC, a society of trade unions, applied to the Minister for a copy of the Agreement and the Audit Report justifying the 15% tariff increase. This was however refused on the ground that the two documents were deemed classified.

THE SUIT The MTUC and 13 others then applied for judicial review seeking the right to have access to the Agreement and the Audit Report and for the documents to be declared public documents on the grounds that the Minister's decision to deny access to the documents were deemed unreasonable and a breach of article 8 of the Federal Constitution.

The Judicial Commissioner ruled in favour of the appellants. That decision was however reversed by the majority in the Court of Appeal. An appeal was then made to the Federal Court.

THE ISSUE The Federal Court was faced with the question of whether the ruling of the previous case of *Government of Malaysia v Lim Kit Siang* [1988] 2 MLJ 12 applied. In that case, the then Supreme Court decided that in order to establish *locus standi* for judicial review, an applicant must prove an infringement of a private right or the suffering of special damage.

THE DECISION In allowing the appeal, the Federal Court held that in establishing *locus standi*, what is important is for the applicant to pass the "adversely affected" test, ie to show that he has real and genuine interest in the subject matter. It is no longer necessary for the applicant to establish infringement of a private right or the suffering of special damage. Thus, in this case, the court ruled that only MTUC had the *locus standi* to bring the action as it was adversely affected by the Minister's decision not to disclose the two documents.

THE IMPLICATION In redefining the concept of *locus standi*, it appears that the Federal Court has widened the scope for applicants to challenge the legality of ministerial decisions. 

LEGAL PROFESSION

LIMITED LIABILITY PARTNERSHIP The Limited Liability Partnership Act 2012 (the "LLP Act") came into force on 26 December 2012.

In this article we discuss the implications of the enforcement of the LLP business model on the legal profession in Malaysia.

WHAT IS AN LLP The LLP is a business model that is a hybrid of a partnership and a corporation. As the LLP in Malaysia has the status of a body corporate, it has a separate legal identity from the partners. Therefore, it has a perpetual succession, is able to own property, sue or be sued and shield its partners from liabilities. However, the liabilities are limited to those arising from any business debts incurred by the LLP or the wrongful acts of another partner. This means that the partner who commits any wrongful acts will not be able to escape liability as he shall be jointly liable with the LLP for the damage, loss or injury suffered by a third party. The LLP also has the flexibility of a conventional partnership through an internal agreement between the partners. The LLP model was introduced to provide the business community with an alternative business vehicle to complement the traditional choices of sole proprietorships, partnerships and companies (local and foreign).

LLP AND THE LEGAL PROFESSION


According to the LLP Act, subject to specific conditions, a limited liability partnership may be formed for the purpose of carrying on a professional practice¹². In the First Schedule of the LLP

Act, an advocate and solicitor is listed in the category of 'Professional Practice'. It appears therefore that the LLP Act applies to the legal profession to allow law firms to adopt the LLP as their business model.

However, despite recognition under the LLP Act that law firms may convert its status to LLP, the main regulation which governs the legal profession in Malaysia is the Legal Profession Act 1976 (the "LPA"). Although the LPA is silent on the business structure of legal practice, clause 1.01(l) of the Bar Council Rulings¹³ defines a "firm" or a "law firm" as a firm of advocates and solicitors in a partnership or a sole proprietorship. This impliedly means that the business of legal practices may be carried out only in the form of sole proprietorships or partnerships.

Further, under section 10 of the LLP Act, read together with the First Schedule of the same Act, it states that the LLP may only be registered upon approval of the relevant governing body ('governing body' under the First Schedule refers to the Malaysian Bar and the Sabah Law Association and Association of Sarawak.)

Thus, this means that only upon approval of the Malaysian Bar, may a law firm convert its status into an LLP and since the LPA has yet to be amended, no law firms may convert just yet.

CONCLUSION Notwithstanding the LLP Act, the laws governing the legal profession must first be amended in order for law firms to effectively adopt the LLP structure. Currently, a draft of the LPA Bill is being prepared by the Bar Council and discussions on its provisions are ongoing between the Bar Council and the Attorney-General. 

12 Section 2 of the LLP Act defines "professional practice" as the practice as specified in the first column of the First Schedule which is governed by the written law as specified in the second column of the First Schedule, respectively. See also section 8 of the LLP Act 2012. The others include chartered accountants and secretaries.

13 According to section 77 of the LPA, the Bar Council may make rules for regulating the professional practice, etiquette, conduct and discipline of advocates and solicitors.

LEGAL PROFESSION

TO BILL OR NOT TO BILL... (THE CONTINGENCY FEES CONUNDRUM)
Contingency fees have been accepted in some form or another in most major jurisdictions such as the United States, Britain, Japan and Australia.

In this article we discuss the general concept of contingency fees, recent proposals on its implementation and the issues and feasibility of introducing such fee arrangement in Malaysia.

WHAT IS 'CHAMPERTY'? *Champerty* comes from the Latin term "*campi partitio*" which means "division of proceeds". It is commonly known as "contingency fees". Contingency fees refer to payment to a lawyer based on a specific percentage or portion from whatever settlement or trial award his client may recover in the action that he handles.

It is based on the concept of risk-sharing whereby the lawyer risks earning nothing for the work done in cases where no compensation is awarded by the courts while the client only stands to lose the portion of the compensation to be awarded which would have gone to his or her lawyer.

THE LEGALITY OF CONTINGENCY FEES
Contingency fees are deemed unlawful by virtue of section 112(1)(b)¹⁴ of the Legal Profession Act 1976 ("the LPA"). However, in 2010, the Malaysian Bar Council drafted the Proposed Rules on Contingency Fees¹⁵

("the Proposed Rules") in which the *Ad Hoc* Committee on Contingency Rules had recommended that the Proposed Rules, made pursuant to section 77 of the LPA¹⁶, form an exception to section 112.

The Proposed Rules set out the following terms:

- (1) The Proposed Rules are to be confined to accident cases only;
- (2) There shall be a minimum retainer fee of MYR500;
- (3) Party and party costs are fixed at 10% of the compensation;
- (4) A practitioner who recovers compensation on behalf of his or her client is allowed to charge for solicitor-client costs, which are capped at a maximum of 20% of the compensation as well as disbursements incurred in excess of party and party costs;
- (5) The scale of fees is the maximum permissible under the Proposed Rules and parties may contract below the maximum scale; and
- (6) There shall be a written contract specifying the terms and conditions of the retainer.

Despite efforts to legalise contingency fees, it remains unlawful by virtue of section 112 of the LPA.

IN THE MATTER OF KURUBALAN S/O MANICKAM RENGARAJU
The Singapore case of *Law Society of Singapore v Kurubalan s/o Manickam Rengaraju*¹⁷, sparked a debate on the rationale of *champerty* with some vehemently arguing that it is time to legalise it¹⁸, while others support the status quo.

¹⁴ Except as expressly provided in any written law, or by rules made under this Act, no advocate and solicitor shall enter into any agreement by which he is retained or employed to prosecute any suit or action or other contentious proceeding which stipulates for or contemplates payment only in the event of success in such suit, action or proceeding.

¹⁵ Renamed "Conditional Fee Rules".

¹⁶ Without prejudice to any other power to make rules provided under this Act, the Bar Council may, with the approval of the Attorney General make rules for regulating the professional practice, etiquette, conduct and discipline to this section and the rules shall not come into operation until they have been published in the Gazette.

¹⁷ [2013] SGHC 135.

¹⁸ Seow Tzi Yang and Debra Lam - *Time to Pop the Champers! Why Champerty Makes Sense* - Singapore Law Watch - Issue 1/ Jan 2014.

In that case, disciplinary proceedings were taken against the respondent, Kurubalan s/o Manickam, an advocate and solicitor, who was alleged to have been engaged in **champerty** by entering into an agreement with the complainant for a percentage of the proceeds from the claim in respect of a motor vehicle accident in which the complainant was involved. This amounted to a violation of section 107(1)(b) and (3) of the Legal Profession Act (Cap 161) of Singapore. The Disciplinary Tribunal determined that there was sufficient gravity for disciplinary action against the respondent and ordered the respondent to pay the costs of the proceedings. The Disciplinary Tribunal further ordered the respondent to be suspended from practice for a period of six months.


Although the decision of the Tribunal did reflect Singapore's position on the prohibition of **champerty**, the judges appeared to have created an exception, albeit *obiter dicta*. The court in **Kurubalan** stated that while the prohibition on **champerty** in Singapore is good law, "it would be permissible and even honourable for an Advocate and Solicitor to act for an impecunious client in the knowledge that he would likely only be able to recover his appropriate fees or disbursements if the client were successful in the claim and could pay him out of those proceeds, or if there was a costs order obtained against the other side".

The judges in the Tribunal hearing of **Kurubalan** seemed to have placed importance on the policy consideration of equal access to justice. Thus, the Tribunal believed that the law on **champerty** should not apply to limit lawyers who are acting genuinely in the best interest of the client who, due to non-affordability to pay the cost of civil litigation, are denied their right to seek justice.

YAY OR NAY? The idea of legalising contingency fees received mixed reviews from various quarters.

Those who support it claim that contingency fees arrangements provide access to the courts for those who are unable to pay the cost of civil litigation. The risk-sharing feature creates a powerful incentive for lawyers to work diligently, while reducing frivolous litigation by discouraging lawyers from presenting claims that have negative value or lacking merit. While some quarters would argue that monetary incentives are not always a good idea, the fact remains that our economy on its own is structured on incentives. In addition, contingency fees encourage out-of-court settlement which will save the client's time and expense of a possibly long and uncertain trial.

Those who are against contingency fees, on the other hand, claim that it neither guarantees civil justice nor access to the courts. This is due to the fact that lawyers are given the option to "cherry pick" the strongest and most valuable claims which are likely to succeed. Other cases might be turned away on the basis of cost and risk. Furthermore, contingency fees may also increase the tendency for corrupt or unethical practices in legal proceedings, such as suppressing evidence or to suborn witnesses due to the fact that payment is only made if the lawyer manages to win the case. Further, it may also promote litigation, especially frivolous or non-meritorious suits since clients need not worry about the costs incurred.

CONCLUSION As Malaysia strives to be a major hub for legal services in the region and as competition for legal work increases, perhaps introducing some form of regulated contingency fee arrangement should be considered, to provide clients the option to choose. This however, should be upon the condition that such arrangements are tightly regulated in order to avoid abuse and the risk of unethical behaviour. 

BRIEFLY...


ACT

CREDIT REPORTING AGENCIES ACT 2010

No
710

Date of coming into operation
15 January 2014

Notes

It is an Act to provide for the registration and regulation of persons carrying on credit reporting businesses and for matters connected therewith and incidental thereto. 


AMENDMENT ACTS

MERCHANT SHIPPING (AMENDMENT AND EXTENSION) ACT 2011

No
A1393

Date of coming into operation
1 March 2014

Notes


The highlight of the amendment is the substitution of Part IX in the Act which deals with the liability of owners of Malaysian ships and other ships and compulsory insurance as well as the insertion of the Sixteenth Schedule which covers the Convention on Limitation of Liability for Maritime Claims 1976. A new section 381A which covers compulsory insurance for removal of wreck was also introduced. Parts III, IV, VI, VIII, IX and X of the Merchant Shipping Ordinance 1952 is also now extended to the States of Sabah and Sarawak. 

MERCHANT SHIPPING (OIL POLLUTION) (AMENDMENT) ACT 2011

No
A1394

Date of coming into operation
1 March 2014

Notes

The highlights of the amendments include the amendment of the short title thus all references to the Merchant Shipping (Oil Pollution) Act 1994 shall be construed as references to the Merchant Shipping (Liability and Compensation for Oil and Bunker Oil Pollution) Act 1994. New sections 3A, 5A, 6A and 11A which deal with the liability for bunker oil pollution, its restrictions for damages and limitation of liability as well as compulsory insurance against such liability are introduced. 

GUIDELINES/RULES/CIRCULARS/ DIRECTIVES AND PRACTICE NOTES ISSUED BETWEEN DECEMBER 2013 AND MARCH 2014 BY BANK NEGARA MALAYSIA, BURSA MALAYSIA AND SECURITIES COMMISSION

BANK NEGARA MALAYSIA (BNM)

- Guidelines on Investment Account — *Date issued: 14 March 2014*
- Guidelines on Introduction of New Products — *Date issued: 7 March 2014*
- Guidelines on Murabahah — *Date issued: 23 December 2013*

- Guidelines on Single Counterparty Exposure Limit for Islamic Banking Institutions — ***Date issued: 17 December 2013***
- Guidelines on Single Counterparty Exposure Limit — ***Date issued: 16 December 2013***

BURSA MALAYSIA

- Practice Note 18: Perusal of Draft Circulars and Other Documents — ***As at: 2 January 2014***
- Consolidated Questions & Answers in relation to Bursa Malaysia Securities Bhd Main Market Listing Requirements — ***As at: 2 January 2014***
- Consolidated Questions & Answers in relation to Bursa Malaysia Securities Bhd ACE Market Listing Requirements — ***As at: 2 January 2014***
- Consolidated Main Market Listing Requirements of Bursa Malaysia Securities Berhad — ***Date updated: 2 January 2014***
- Consolidated ACE Market Listing Requirements of Bursa Malaysia Securities Berhad — ***As at: 2 January 2014***
- Amendments to Bursa Malaysia Securities Berhad Main Market Listing Requirements in relation to the Review of Timeframe for Issuance of Annual Reports and Other Enhancements — ***Date updated: 27 December 2013***
- Amendments to Bursa Malaysia Securities Berhad ACE Market Listing Requirements in relation to the Review of Timeframe for Issuance of Annual Reports and Other Enhancements — ***Effective date: 27 December 2013***
- Fee Incentive Scheme for Issuance of Structured Warrants — ***Date issued: 19 December 2013***
- Practice Note 22: Transfer of Listed Corporations to the Main Market of Bursa Malaysia Securities Berhad — ***As at: 18 December 2013***
- Consolidated Main Market Listing Requirements of Bursa Malaysia Securities Berhad — ***Date updated: 18 December 2013***
- Amendments to Bursa Malaysia Securities Berhad Main Market Listing Requirements in relation to a Transfer of Listing by a Listed Corporation from the ACE Market to the Main Market — ***Date issued: 18 December 2013***
- Consolidated Rules of Bursa Malaysia Depository Sdn Bhd — ***Date updated: 9 December 2013***
- Amendments to the Rules of Bursa Malaysia Depository Sdn Bhd in relation to the Introduction of Limited Liability Partnerships — ***Effective date: 9 December 2013***
- Consolidated Rules of Bursa Malaysia Securities Bhd — ***As at: 2 December 2013***
- Participating Organisations' Directives and Guidance — ***As at: 2 December 2013***
- Revised Bursa Access Fees — ***Effective date: 2 December 2013***

- Amendments to the Rules of Bursa Malaysia Securities Berhad in relation to Dynamic Price Limits — *Effective date: 2 December 2013*
- Amendments to the Participating Organisations' Trading Manual in relation to Dynamic Price Limits and the Implementation of a New Bursa Trading System — *Effective date: 2 December 2013*

SECURITIES COMMISSION

- Guidelines on Prevention of Money Laundering and Terrorism Financing for Capital Market Intermediaries — *Date issued: 15 January 2014*
- Guidelines on Sukuk — *Effective date: 8 January 2014*
- Guidelines on Private Debt Securities in relation to Bond — *Effective date: 8 January 2014*
- Guidelines on Unit Trust Funds in relation to Collective Investment Schemes — *Date updated: 7 January 2014*
- SC Equity Guidelines — *Date updated: 18 December 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 Editors at:

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Brief-Take



Seated: Professor Richard Powell from Nihon University, Japan and Dr Nur Jaanah Abdullah from University of Malaya with the pupils from **ZUL RAFIQUE & partners** at our KISS (Knowledge & Information Sharing Session) on the Role of Language in the Law – November 2013



At **ZUL RAFIQUE & partners** Pupil's Dinner – December 2013



From left: Raja Irfan, Jaime Omar Walford, Janice Ooi, Amylia Soraya and Chen Yu Szen at the Construction Industry Payment and Adjudication Act 2012 Conference in Kuala Lumpur – February 2014



At the Malaysian Bar Annual Dinner and Dance – March 2014