the ZRp brief

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ZUL RAFIQUE *& partners* celebrate their 15th Anniversary *Bollywood* style

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ZUL RAFIQUE *& partners*

A BRIEF NOTE...
by Dato' Zulkifly Rafique

Loyalty, Trust, Support...

In celebrating the 15th year anniversary of **ZUL RAFIQUE** *& partners*, a Gala Dinner was held on 21 November 2014, at a hotel in Kuala Lumpur.

It was a night dedicated to the staff members of the firm, who have served with utmost dedication and loyalty for the past 15 years.

ZUL RAFIQUE *& partners*, being a service provider, place much importance on the value and quality of services provided to its clients, and such value is created from satisfied, loyal and productive staff.

Good employees who are intelligent, hardworking and diligent are indeed hard to come by, but the rarest gems would be those who have stood by the firm through thick and thin, from the day it was first established on 1 December 1999.

Loyalty is often misconstrued as blind obedience when in fact, loyalty comes in many forms – integrity, trust, and support.

We truly believe that our staff is the driving force of the firm's success.

With that said, we would like to thank all our clients and friends for their continuous support towards the growth of **ZUL RAFIQUE** *& partners* over the years, and hope that we continue to achieve success in the years ahead.

Wishing you a Happy and Prosperous New Year.

in this issue...

IN BRIEF...

- **COURT AWARDS MYR300,000 FOR DISCRIMINATION OVER PREGNANCY** The High Court has ordered the Government to pay a woman damages totalling MYR300,000 for violating her constitutional rights by refusing to employ her as a temporary teacher. Noorfadilla Ahmad Saikin took action against the Government in 2010 after Hulu Langat district education officers revoked her appointment as a temporary teacher, upon discovering that she was pregnant.

- **COURT STRIKES DOWN LAW ON CROSS-DRESSING** The Court of Appeal, in a landmark decision, unanimously ruled that section 66 of the Syariah Criminal (Negeri Sembilan) Enactment 1992, which criminalises cross-dressing by Muslim men, is invalid as it contravenes the Federal Constitution. The appellate court held that the law is unconstitutional as it discriminates against Muslim men suffering from an incurable medical condition known as Gender Dysphoria or Gender Identity Disorder.

- **DEFINITION OF 'DOMESTIC VIOLENCE' EXPANDED** The Domestic Violence Act 2012 has been amended to expand the definition of domestic violence to include psychological and emotional abuse. This signifies a progressive step in assisting women who suffer from non-physical violence.

- **DISCRETIONARY TRADES GUIDELINES REVISED** The paragraph on discretionary trades under the ***Guidelines on Market Conduct and Business Practices for Stockbroking Companies and Licensed Representatives*** has been amended. The amendment was made to Paragraph 7.0 to clarify the control measures needed for a dealer's representative of a stockbroking company to carry out discretionary trading on behalf of customers.

- **DISMISSAL OF BANK EMPLOYEES UPHELD** The Federal Court upheld the dismissal of nine bank employees whose services were terminated as a result of their involvement in unlawful picketing. The employees, who had picketed in October 2003 at the premises of the bank, were dismissed in 2004.

- **INTERNATIONAL ARBITRAL RULING IN FAVOUR OF MALAYSIA** On 30 October 2014, an international tribunal ruled that M+S Pte Ltd, a Malaysia-Singapore joint venture, need not pay a development charge on three parcels of former railway land. The joint venture was formed to develop six plots of land, and the dispute arose when neither Malaysia nor Singapore could agree to whether development charges should have been imposed on those parcels.

- **LIBERALISATION OF PROFESSIONAL SERVICES** In line with the Government's intention to attract foreign direct investments, amendments to three Bills were passed to liberalise professional services such as engineering, architecture and quantity surveying. The amending laws are the Registration of Engineers (Amendment) Bill 2014, Architects (Amendment) Bill 2014 and the Quantity Surveyors (Amendment) Bill 2014.

- **MALAYSIAN AIRLINE SYSTEM BHD (ADMINISTRATION) BILL 2014 TABLED** The Malaysian Airline System Bhd (Administration) Bill 2014 ("the Bill") has been tabled in the Malaysian Parliament for its first reading. The Bill, amongst others, looks to provide for the establishment of a new entity, known as Malaysia Airlines Berhad ("MAB"), to replace Malaysian Airline System Bhd ("the Company") as the national carrier and to also appoint an administrator with powers to administer the Company as well as its owned and partially-owned subsidiary companies. The Bill would be applicable for a period of 5 years, or until MAB's listing on Bursa Malaysia, whichever is earlier.

- **MINIMUM MYR1M REAL ESTATE PRICE TAG FOR FOREIGN PURCHASERS** The National Land Council has agreed that the Guidelines on Real Estate Acquisition, Economic Planning Unit, and Prime Minister's Department ("the Guidelines") will take effect retrospectively from 1 March 2014. In line with the announcement by Prime Minister Dato' Seri Najib Tun Razak during Budget 2014, the Guidelines have amended the increased minimum price for real estate that could be purchased by foreigners from MYR500,000 per unit to MYR1 million.

- **REVIEW FOR PROPOSED AMENDMENTS TO TRADE UNIONS ACT** The government is set to review the proposed amendments to the Trade Unions Act 1959, to ensure that they are in accordance with the changes to the Industrial Relations Act 1967.

- **SIX BILLS PASSED** The *Dewan Negara* has passed six Bills, namely the Netting of Financial Agreements Bill 2014, Inland Revenue Board of Malaysia (Amendment) Bill 2014, Malaysia Co-operative Societies Commission (Amendment) Bill 2014, Companies Commission of Malaysia (Amendment) Bill 2014, Registration of Businesses (Amendment) Bill 2014 and Limited Liability Partnership (Amendment) Bill 2014.

- **SPECIAL COURT TO HANDLE GST VIOLATION CASES** To deal with violators of the Goods and Services Tax ("GST") Act 2014 and the Price Control and Anti-Profiteering Act 2011, a proposal has been made to establish a special court having similar judiciary powers to the Sessions Court. This is to ensure that proper action is taken against unscrupulous traders using GST as an excuse to arbitrarily raise their prices.

- **UPDATED LIST OF *SHARIAH*-COMPLIANT SECURITIES** The Securities Commission Malaysia has released an updated list of ***Shariah***-compliant securities approved by its ***Shariah*** Advisory Council. The list takes effect from 28 November 2014 and features a total of 673 ***Shariah***-compliant securities.

AROUND THE WORLD... IN BRIEF

- **AUSTRALIA: DATA RETENTION BILL** A Data Retention Bill ("the Bill") has been introduced by the Australian government in a bid to target piracy, identification of suspected paedophiles, cyber security and organised crimes. The Bill is intended to allow telecommunications companies to keep phone and computer usage data for two years.

- **CHINA: FIRST DOMESTIC VIOLENCE BILL DRAFTED** China has drafted its first Bill against domestic violence. The law defines domestic violence and offers clear guidance on restraining orders. The duties of the police and courts are also prescribed.

- **INDIA: NEW RULES FOR FOREIGN INVESTMENT IN CONSTRUCTION** India has relaxed the rules for foreign direct investment in the construction industry, in a bid to encourage development of smaller projects. Previously, 100% of foreign direct investment was allowed in real estate development with a lock-in period of three years, during which the investment cannot be repatriated. Under the new rules, the minimum built-up area for projects in which foreign investments are allowed will be reduced from 50,000 square meters to 20,000. The minimum capital investment by foreign companies has also been cut to USD5 million from USD10 million. Investors are also allowed to expatriate the investment on completion of the project or three years after the final investment is made.

- **INDONESIA: NEW REGULATIONS ON CAPITAL MARKETS** New regulations on capital markets in Indonesia have been issued by the Otoritas Jasa Keuangan (OJK). This is one of the measures taken by Indonesia's Financial Services Authority in preparation for the ASEAN Economic Community (AEC).

- **JAPAN: SUPREME COURT BACKS DEMOTED PREGNANT WOMAN** A woman in Japan has sued her employer for demoting her. She claimed that she asked for a less strenuous role during her pregnancy, but that she was not reinstated to her former position after returning to work. The Supreme Court has ordered for the case to be retried by the lower courts.

- **SINGAPORE: FIRST CASE UNDER THE UN ACT** The law under the United Nations has been invoked for the first time in Singapore, with regard to criminal charges against a Singapore-registered shipping firm for allegedly financing activities related to weapons of mass destruction in North Korea. The Chinpo Shipping Company (Private) Limited was charged with transferring USD72,000 on 8 July 2013 from its Bank of China account to CB Fenton and Co, a shipping agent in Panama Canal.

- **SINGAPORE INTERNATIONAL COMMERCIAL COURT** A new court, known as the Singapore International Commercial Court ("SICC"), has been established. The SICC is an international court with specialist jurists hearing international commercial disputes, including those governed by foreign law, where parties have agreed to use the SICC.

- **SINGAPORE: SHISHA BAN** A ban on the sale, import and distribution of shisha has taken effect from 28 November 2014. The ban was made pursuant to the publication of the Prohibited Tobacco Products Regulations made under section 15 of the Tobacco (Control of Advertisements and Sale) Act.

- **UK: LANDMARK CASE ON MESOTHELIOMA** The UK Supreme Court has ruled that Percy McDonald, an asbestos-related cancer victim, should receive compensation although he did not work directly with the toxic substance. The Supreme Court, in its judgment, stated that according to the Factories Act 1961, the occupier of the premises is responsible for everyone on site and not just direct employees. The Supreme Court further ruled that asbestos industry regulations apply to all factories using the toxic substance and not just to those who are involved in the asbestos industry.

- **UK: AMENDMENTS TO INHERITANCE LAW TAKE EFFECT** The new rules, made law by the Inheritance and Trustees' Powers Act 2014, have come into force in England and Wales, offering increased inheritance rights to a surviving spouse or civil partner, when their spouse or partner dies without leaving a will. Where there are no children, the surviving partner will now inherit their spouse's entire estate. On the other hand, for those with children, the surviving spouse will now get the first GBP250,000 and half of the remainder, rather than just interest on that amount. Such changes were catered to reflect a fairer inheritance system for those who deserve it.

- **US: HARVARD SUED OVER ADMISSION POLICIES** A lawsuit was filed by a non-profit group against the world-renowned Ivy League institution, Harvard University ("the University"), accusing it of racial profiling in its admission policies. The University was accused of giving racial preferences to White, African American and Hispanic over Asian American applicants, thus breaching civil rights laws and undermining the Fourteenth Amendment to the US Constitution.

- **VENEZUELA: ORDER BY ICSID TO PAY USD1.6 BILLION TO EXXON** The World Bank's International Centre for Settlement of Investment Disputes ("ICSID") has ruled for Venezuela to pay oil giant, Exxon Mobil, USD1.6 billion in compensation for expropriated assets. Exxon Mobil had initially claimed up to USD16.6 billion over the nationalisation of its Cerro Negro Project and other losses in 2007.

- **VIETNAM: NEW IMMIGRATION LAWS** New immigration laws in Vietnam, which takes effect from 1 January 2015, will govern the entry, exit, transit and residence of foreigners.

BRIEFING...

DISPUTE RESOLUTION

THE 'FRIENDLY' CLAUSE The dispute resolution clause, which compels parties to conduct negotiations in good faith, is now an enforceable condition precedent to the right to invoke arbitration.

In this article, we analyse the aspects of this clause, which came to light following a recent judgment of the Commercial Court in London in ***Emirates Trading Agency LLC v Prime Mineral Exports Private Limited***[1].

WHAT DOES IT ENTAIL? Otherwise known as the multi-tiered dispute resolution clause, this age-old principle of law was introduced to facilitate prompt and expeditious non-judicial resolution of disputes between parties through friendly discussions[2].

In other words, parties are constantly urged to cultivate the habit of settling their disputes amicably before resorting to arbitration or litigation.

IN THE UK While the insertion of negotiation clauses in contracts have been the common practice for a considerable amount of time, English courts have, in recent years, treated such clauses with hostility.

The judicial resistance of English courts towards friendly clauses stemmed largely from the landmark case of ***Walford v Miles***[3], where the House of Lords held that 'a bare agreement to negotiate which lacked the necessary certainty is unworkable in practice'.

As certainty of terms is one of the basic requirements for the formation of a valid contract, the English courts have ensured that the fundamental principles of contract law are strictly adhered to in determining whether a particular clause is enforceable.

THE *IRON ORE* CASE The landmark case of ***Emirates Trading Agency LLC v Prime Mineral Exports Private Limited*** ("the ***Iron Ore*** case") that was decided in July 2014, typified a notable departure from the traditional approach previously adopted by the English Courts.

FACTS According to the facts, an agreement for the purchase of iron ores ("the Agreement") was signed in October 2007 between Emirates Trading Agency LLC ("ETA") and Prime Mineral Exports Private Limited ("PMEPL"). Following ETA's failure to perform their contractual obligations, PMEPL served a notice of termination and claimed liquidated damages for the amount of USD45 million. The claim was ultimately referred to arbitration in June 2010 despite several meetings between both parties.

THE DISPUTE ETA alleged that the arbitration tribunal lacked jurisdiction to determine PMEPL's claim on the basis that clause 11 of the Agreement, which clearly requires parties to engage in friendly negotiations for a continuous period of four weeks, was a condition precedent to arbitration, which PMEPL failed to comply with.

In deciding that it had jurisdiction, the arbitration tribunal held that such a clause was unenforceable, and in any event, the condition precedent had been fulfilled.

Dissatisfied with the verdict, ETA applied to the High Court pursuant to section 67 of the Arbitration Act 1996 for a declaratory order that the arbitration tribunal lacked jurisdiction.

THE DECISION Upon interpreting clause 11 of the Agreement, the High Court dismissed ETA's contention that friendly discussions to resolve any disputes must last for four continuous weeks and stated that it could not have been within the reasonable contemplation of both parties.

Although parties are compelled to negotiate in good faith, failure to reach a compromise within a stipulated period of time shall automatically activate the right to invoke arbitration. As such, PMEPL's fulfilment of the condition precedent provided the arbitration tribunal with the necessary jurisdiction to hear and determine the claim.

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1 [2014] EWHC 2104 (Comm).
2 ***Dave Greytak Enterprises, Inc v Mazda Motors of America Inc***, 622 A 2d 14 (Del Ch 1992).
3 [1992] 2 AC 128.

ENFORCEABILITY Despite the dismissal of ETA's application for cogent reasons, the High Court employed a different approach when dealing with the issue of enforceability. The High Court ruled that an obligation to resolve disputes by friendly discussions is now enforceable.

RATIONALE By enforcing the obligation to conduct negotiations in good faith, the High Court had in fact honoured the parties' decision to include such a clause in the first place. This is especially crucial to ensure that parties do not deviate from their contractual obligations.

Besides preserving the public interest, enforcement of friendly clauses is in line with the purpose of avoiding costly and time-consuming arbitration or litigation which would otherwise be inevitable, had parties not first tried to resolve their differences.

More importantly, a sufficiently clear friendly discussion clause will guarantee that parties continue to observe implied moral and ethical standards of behaviour and engage in a fair, honest and genuine discussion aimed at resolving a dispute.

BOUND BY JUDICIAL PRECEDENT?

Although the principle of judicial precedent dictates that courts are bound by decisions of previous cases, the High Court, in deciding the ***Iron Ore*** case, distinguished the previous case of ***Walford v Miles*** on the basis that the friendly discussion clause was not time-limited.

Instead, the High Court's approach was derived from authorities across several international jurisdictions, with particular reference to cases from Australia[4] and Singapore[5], all of which reiterated the fact that good faith negotiations seeking to resolve disputes are cost and time efficient and sufficiently clear to be enforceable.

GUARANTEEING ENFORCEABILITY Since the English courts have demonstrated their willingness to enforce clear and unambiguous friendly discussion clauses, there are several important elements that must be present in the construction of such clauses to ensure its enforceability[6], namely:

1) *Mutual agreement to resolve disputes by friendly discussions*
   Before an obligation to conduct friendly discussions may be enforced, there must be mutual agreement by all parties for the insertion of such a clause, failing which the clause would be invalidated.

2) *Certainty of terms*
   To eradicate the possibility of parties alleging the lack of clarity of their obligations, friendly discussion clauses must be drafted with precision and the negotiation procedures must be adequately detailed. This includes specifying key procedural issues and stipulating the exceptions applicable.

3) *Drafting of the terms*
   Parties seeking to make friendly discussion clauses compulsory should pay special attention to the drafting of the terms. For example, the word 'may' needs to be substituted with the word 'shall' in order to reflect the obligatory nature of such clauses.

4) *Time-frame*
   It is exceptionally important to include a limited period for friendly discussions to take place between the parties. This is intended to grant the respective parties the right to commence arbitration or litigation in the event a compromise could not be reached within the stipulated time-frame, or after such period has lapsed.

A CHANGE IN APPROACH Regardless of the outcome of the ***Iron Ore*** case, the decision to enforce an agreement to negotiate embodies a significant development in the approach of English courts to such clauses. This will act as a guideline for future cases where judges are entrusted with the task of determining the enforceability of friendly clauses.

However, the issue which remains to be addressed is the relief available to the innocent party, in the event there is a failure to comply with an agreement to negotiate. Although there are suggestions on the possibility of claiming damages in appropriate circumstances, it is difficult to ascertain the quantum of damages due to the uncertain nature surrounding the outcome of negotiations between parties.

Therefore, while this decision provides the much-needed clarification on the legal effect of such clauses, the extent to which it will be followed by other courts remains to be seen.

[4] ***United Group Rail Services Limited v Rail Corporation New South Wales*** [2009] NSWCA 177.

[5] ***International Research Corp PLC v Lufthansa Systems Asia Pacific Pte Ltd & Anor*** [2012] SGHC 226.

[6] Latham & Watkins: Client Alert Commentary, ***Four Elements to Improve Enforceability of a Multi-tiered Dispute Resolution Clause,*** 20 August 2014.

INDUSTRIAL RELATIONS

DISMISSAL FOR UNLAWFUL PICKETING… TOO HARSH? In October 2014, the Federal Court in ***Harianto Effendy Zakaria & Ors v Mahkamah Perusahaan Malaysia & Anor***[7], upheld the dismissal of nine former bank employees by Bumiputera Commerce Bank Berhad (now known as CIMB Bank) ("the Bank") for unlawful picketing at the premises of the Bank.

THE FACTS The appellants, who were members of the National Union of Bank Employees ("NUBE"), were employees of the second respondent, Bumiputra Commerce Bank Berhad. They participated in a trade union picketing in relation to a trade dispute between NUBE and the second respondent. However, the second respondent alleged that the picketing was unlawful as it was conducted within the premises, and that the appellants' conduct had disrupted their business and operations. Upon a thorough investigation and subsequent domestic inquiry, the appellants were found guilty for misconduct and their services were thereafter terminated.

INDUSTRIAL COURT The Industrial Court/first respondent upheld the second respondent's decision to terminate the appellants' services and held that although the misconduct was minor, the punishment of dismissal was necessary as such misconduct affected the second respondent's goodwill in the banking industry.

THE HIGH COURT The appellants filed an application for judicial review to quash the award, and contended that the first respondent had failed to consider relevant matters and erred in arriving at a totally perverse decision. The High Court ruled in favour of the first respondent and concluded that no error of law was committed in respect of the findings of facts relating to the appellants' misconduct.

THE COURT OF APPEAL An appeal was then filed to the Court of Appeal on the basis that the dismissal was too harsh and actuated by discriminative practice. The Court of Appeal unanimously dismissed the appellants' appeal and ruled that since there was grave misconduct involving the core of the second respondent's existence, dismissal would have been the inevitable punishment.

> "The Federal Court noted the fact that the second respondent was in the banking industry and the banking industry belonged to a special kind of business and services rendered to the public. Therefore a high standard of care and conduct was expected of an employee in the banking industry." – per Hasan Lah FCJ

THE FEDERAL COURT The issues before the Federal Court were, namely, (1) whether the appellants' misconduct constituted just cause or excuse for dismissal; (2) whether the punishment of dismissal was too harsh; and (3) whether a high standard of conduct is expected from employees in the banking industry.

THE DECISION The Federal Court dismissed the appellants' appeal and held that there was no fixed rule of law to suggest that employees with unblemished records of service should not be dismissed for a single instance of insolence. It is important to consider the nature of the misconduct, whether they showed any remorse, and the nature of the employer's business. As the appellants' misconduct was clearly an act of wilful disobedience to which they showed no remorse, the dismissal was justified. Furthermore, the banking industry belonged to a special kind of business which renders services to the public, and therefore a high standard of conduct was expected of its employees.

> "The Federal Court agreed with the observation made by the Court of Appeal that the charge against the appellants was a very grave misconduct involving the core of the second respondent's business and the appellants must have been aware that dismissal would have been the inevitable punishment." – per Hasan Lah FCJ

[7] [2014] 6 MLRA 85, Federal Court.

DATA PROTECTION

FORGET ME (NOT?)... What is the right of erasure, or the right to be forgotten? This was highlighted in the ruling by the Court of Justice of the European Union in May 2014 which typifies a remedy available under data protection law.

The landmark case of ***Google Spain SL, Google Inc. v Agencia Española de Protección de Datos (AEPD), Mario Costeja González***[8] is analysed in this article.

THE *GOOGLE* CASE ***Google Spain SL, Google Inc v Agencia Española de Protección de Datos (AEPD), Mario Costeja González***, also known as the ***Google*** case, dates back to March 2012, when Mario Costeja Gonzalez filed a complaint with the Spanish Data Protection Agency ("AEPD") against ***Google*** and the newspaper ***La Vanguardia***. The complaint was filed after he discovered that a ***Google*** search for his name produced results referring to the auction of property seized from him for non-payment of contributions relating to social security. Although he did not dispute the veracity of that information, his contention was that such data was outdated and no longer relevant.

The AEPD upheld his complaint against ***Google*** on privacy grounds, ordering the search engine to eliminate about 100 links from all future searches for Costeja's name. However, on the basis of the right to information, the complaint against the newspaper was rejected since the information on its site had been published legally.

Google appealed to Spain's National Court against the decision of the AEPD. The Court then asked the Court of Justice of the European Union ("CJEU") for an interpretation of the European law on online data protection[9].

In response to the request by Spain's National Court, the Advocate General of the CJEU issued a preliminary finding in June 2013, stating that the European Directive on data protection does not establish a right to be forgotten and that such a right cannot be used in an attempt to get search engines to suppress information.

THE RULING In May 2014, in contradicting the initial preliminary finding, the CJEU ruled that search engines are responsible for the personal data displayed in their results for searches of an individual's name, even when the data is stored on other websites.

In simple terms, the ruling by the CJEU allows people to request ***Google*** to remove specific information about themselves, from its search index.

RIGHT TO INFORMATION V RIGHT TO PRIVACY The ruling reignites the debate between the right to information and the right to privacy, with the latter gaining momentum in light of recent scandals involving leaks of highly sensitive information.

Staunch proponents of the right to privacy claim that this ruling represents a significant leap towards restoring and safeguarding digital dignity. It is especially relevant for individuals genuinely seeking to remove links directing to any prejudicial information or outdated personal data. This ruling embodies the simple yet fundamental human right that an individual deserves a chance to reclaim their personal privacy, instead of having to worry about easy access to information about their past ***via*** any search engine, or that their embarrassing stories or previous mistakes would be overanalysed, magnified or even misinterpreted.

On the other hand, the UK House of Lords EU Sub-Committee on Home Affairs, Health and Education, openly criticised[10] and branded this right to be forgotten ruling as 'unworkable, unreasonable and wrong' in principle. This is because it does not take into consideration other search engines, and their availability

[8] Case C-131/12, 13 May 2014.

[9] Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data.

[10] European Union Committee – Second Report, ***EU Data Protection Law: 'A right to be forgotten'?*** Paragraph 56, 23 July 2014.

of resources to handle requests made under this ruling. More importantly, it was also stated that search engines should not be tasked with deciding on whether links should be removed based on vague, ambiguous and unhelpful criteria.

THE IMPLICATIONS Whilst proponents of the right to privacy and data protection have applauded this decision, the reality is, it may not be viable to exercise the right to be forgotten since each individual's personal data would have been circulated across numerous search engines and shared in billions of web pages, making it practically impossible to monitor and ensure that all undesirable information would be successfully expunged.

In fact, ***Google*** has outlined some challenges faced, or will be faced, when handling requests under the right to be forgotten. Since each request involves a different set of circumstances which would require an assessment based on its merits, ***Google*** would have to embark on an endless hiring spree to handle the overflowing requests . Moreover, even at such an early stage, there are already signs of abuse of process, predominantly revolving around business competitors who take advantage of this ruling by reducing each other's web presence.

Furthermore, while information cannot be deliberately 'forgotten', this ruling gives ***Google*** and other search engines the right to remove any links from appearing in their search results. As such, access to any related links would then, in theory, be more cumbersome since they will no longer appear from a ***Google*** search or any other search engines which are bound to remove those links.

However, such links may still remain accessible via search engines that are not subjected to an order of erasure.

CONCLUSION The ruling may provide one with the right to be forgotten, but in this digital age, efforts to erase one's digital footprint are definitely a challenge.

[11] France tops the list of most requests made under this ruling (17,500 as at 1 August 2014).

BRIEF-CASE...

LEGAL PROFESSION – Professional fees – Letter of appointment agreeing to fees conditional upon success – Whether letter contravened section 112(1)(b) of the Legal Profession Act 1976

INDUSTRIAL CONCRETE PRODUCTS BERHAD V HUANG KHAIRUN KUMAR & ASSOCIATES [2014] 7 CLJ 52, Court of Appeal

FACTS The appellant appointed the respondent to secure a refund of sales tax ("the refund") erroneously paid to the Royal Customs and Excise Department. One of the terms of the appointment was that the respondent would be entitled to a stipulated commission if the appellant receives the refund. The respondent, however, failed to secure the refund, and the appellant, therefore, proceeded to engage the services of Top Tier Services Sdn Bhd ("Top Tier") to undertake the task. Top Tier succeeded. The respondent then issued a letter of demand for the professional fees promised by the appellant in its letter of appointment. The appellant argued that since the respondent was never appointed as its exclusive agent, the commission was rightfully paid to Top Tier. In response, the respondent contended that they were entitled to the commission since all obligations imposed under the terms of appointment had been discharged. The High Court allowed the respondent's claim for the stipulated commission. The appellant appealed.

ISSUES The main issue before the Court of Appeal was whether the letter of appointment was illegal on the basis of it contravening section 112(1)(b) of the Legal Profession Act 1976 ("the Act") which states that 'a solicitor cannot enter into an agreement with a client whereby his entitlement to professional fees was conditional on success'.

HELD In allowing the appeal, the Court of Appeal held that since the respondent was a firm of solicitors and the services undertaken by them were contentious in nature, the letter of appointment was illegal as it contravened section 112(b) of the Act.

CONSTITUTIONAL LAW/ TORT – Costs – Custodial death – Claim for damages on misfeasance of public office, assault, battery and false imprisonment – Whether High Court rightfully awarded damages – Whether High Court judge erred in failing to consider second appellant's role in custodial death

DATUK SERI KHALID BIN ABU BAKAR & ORS V N INDRA P NALLATHAMBY & ANOTHER APPEAL [2014] 9 CLJ 15, Court of Appeal

FACTS Following the custodial death of one Kugan a/l Ananthan ("deceased"), the plaintiff/ respondent who is the mother of the deceased as administratrix of the estate, commenced legal proceedings against the defendants for damages based on the tort of negligence, breach of statutory duties, public misfeasance, assault, battery and false imprisonment. The High Court allowed the respondent's claim and awarded damages in the sum of MYR801,700. Dissatisfied with the decision of the High Court, the appellants appealed to the Court of Appeal.

ISSUES The first appeal concerned the question of whether damages were rightfully awarded for false imprisonment, public misfeasance and exemplary damages. In the second appeal, the second appellant disputed the extent of liability and further alleged that the High Court judge failed to address his findings that there were other police officers involved in the circumstances leading to the deceased's death which the second appellant could not have been responsible for.

HELD In allowing the appeal in part, the Court of Appeal set aside the award for false imprisonment on the basis that the deceased was lawfully detained. In affirming the awards of damages for public misfeasance and exemplary damages, the Court of Appeal further held that the High Court's decision was justified to reflect the severity of the breach of the deceased's constitutional rights. The Court of Appeal also ordered for the second appellant's liability to be amended and reduced to 45% upon ruling that the High Court judge had failed to address his findings when determining the liability of the second appellant.

INDUSTRIAL RELATIONS – Dismissal of employees – Unlawful picketing – Whether appellants' misconduct constituted punishment of dismissal –Whether punishment of dismissal too harsh – Whether high standard of conduct expected from employees in banking industry

HARIANTO EFFENDY ZAKARIA & ORS V MAHKAMAH PERUSAHAAN MALAYSIA & ANOR [2014] 6 MLRA 85, Federal Court

FACTS The appellants, who were employees of the second respondent (Bumiputra Commerce Bank Berhad), were dismissed for unlawful picketing. In upholding the second respondent's decision to terminate the appellants' services, the first respondent (Mahkamah Perusahaan Malaysia) held that although the misconduct was minor, the punishment of dismissal was necessary as such misconduct affected the second respondent's goodwill in the banking industry. The appellants filed an application for judicial review to quash the award. The High Court ruled in favour of the first respondent. An appeal to the Court of Appeal was unanimously dismissed. The appellants then appealed to the Federal Court.

ISSUES The issues before the Federal Court were, (1) whether the appellants' misconduct constituted just cause or excuse for dismissal; (2) whether the punishment of dismissal was too harsh; and (3) whether high standard of conduct is expected from employees in the banking industry.

HELD The Federal Court dismissed the appellants' appeal and held that there was no fixed rule of law to suggest that employees with unblemished records of service cannot be dismissed for a single instance of insolence. It is important to consider the nature of the misconduct, whether they showed any remorse, and the nature of the employer's business. As the appellants' misconduct was clearly an act of wilful disobedience to which they showed no remorse, the dismissal was justified. More importantly, the banking industry belonged to a special kind of business which renders services to the public, and therefore a high standard of conduct was expected of its employees.

BRIEFLY...

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

BANK NEGARA MALAYSIA (BNM)

- Guidelines on Prohibited Business Conduct – *Date issued: 17 November 2014*
- Guidelines on *Shariah* – *Date issued: 5 November 2014*
- Guidelines on Money Services Business – *Dates issued: 3 and 4 November 2014*

BURSA MALAYSIA

- Directives on the Registration Process for a Registered Representative and Compliance Order – *Effective date: 1 December 2014*
- Amendments to the Directive on Applications to the Exchange and Fees Pursuant to Chapter 3 of the Rules – *Effective date: 1 December 2014*
- Amendments to the Rules of Bursa Malaysia Derivatives Berhad for the Revision of the Contract Specifications of 5-Year Malaysian Government Securities (MSG) Futures Contract – *Effective date: 1 December 2014*
- Chapter 8: Trading of Rules of Bursa Malaysia Securities Berhad – *Date updated: 17 November 2014*

SECURITIES COMMISSION

- Licensing Handbook – *Date revised: 4 December 2014*
- List of *Shariah*-Compliant Securities by the *Shariah* Advisory Council of the Securities Commission Malaysia – *Effective date: 28 November 2014*
- Guidelines on Market Conduct and Business Practices for Stockbroking Companies and Licensed Representatives – *Date revised: 20 November 2014*

THE 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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