

# THE BRIEF *Case*



Congratulations to the Banking & Finance Practice Group of **ZUL RAFIQUE & partners**  
for winning four (4) awards at the **Islamic Finance News Awards Ceremony**  
held on 22 February 2017



## A BRIEF NOTE...

by Dato' Zulkifly Rafique

### *Of happiness and sorrow...*

It has been a bittersweet first quarter for **ZUL RAFIQUE & partners**.

On 8 March 2017, we were informed of the sudden demise of one of our former legal associates, Muhammad Zayd Bohorudin. Zayd's passing is a reminder to us all that life is fragile, unpredictable, and sometimes so very short. May he be placed amongst the pious. We would like to express our deepest sorrow and condolences to his family and friends.

On a more optimistic note, it is with pleasure to announce that we were declared *Best Law Firm in Trade Finance* and had also won *Malaysia Deal of the Year* and *Infrastructure & Project Finance Deal of the Year* for the Sime Darby TNBES Renewable Energy Term Financing-*i* Facility, as well as *African Deal of the Year* for the Yinson Production (West Africa)'s USD780 million commodity *Murabahah* financing, all of which were awarded by the *Islamic Finance News*.

The *Islamic Finance News* Awards ceremony was held in Kuala Lumpur on 22 February 2017. We would like to acknowledge our Banking and Finance practice group for taking us to the forefront.

With that said, we would like to thank all clients and friends for their support and trust in us.

We look forward to a productive year ahead with you.

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- Strata Titles (Amendment) Act 2016
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- Guidelines/Rules/Circulars/Directives and Practice Notes issued between January and March 2017 by Bank Negara Malaysia, Bursa Malaysia and Securities Commission Malaysia

- **ACQUISITION OF LAND DECLARED ILLEGAL** The Court of Appeal in *United Allied Empire Sdn Bhd v Pengarah Tanah dan Galian Selangor & Ors* held that the compulsory acquisition of a private land by the Selangor Islamic Religious Department (Jais) to build a “mega mosque” is illegal. It was held that the gazette of the preliminary notice is mandatory, and that the rights of landowners to challenge a land acquisition do not end when formal possession of the land is taken, pursuant to the Land Acquisition Act 1960. The ruling enhances the protection of landowners’ rights in Malaysia as the procedural requirements must be fulfilled before a private land may be acquired.
- **AMENDMENTS TO CO-OPERATIVE SOCIETIES ACT 1993** The Co-Operative Societies Act 1993 (“the Act”) will undergo significant amendments to consolidate the cooperative financial services sector. The amendments to the Act are expected to be tabled in June 2017. The aims of the amendments include tightening the existing loopholes of the Act as well as enhancing the sustainability of small credit cooperatives.
- **COMPANIES ACT 2016 ENFORCED** The Companies Act 2016, a new law providing for the registration, administration, and dissolution of companies and corporations, has taken effect from 31 January 2017. The Companies Act 1965 has been repealed.
- **COURT OF APPEAL OVERTURNS DECISION IN TRANS MAN CASE** The Court of Appeal in *Tan Pooi Yee v Ketua Pengarah Jabatan Pendaftaran Negara* has overturned the decision of the High Court in legally recognising the post-operative gender of the applicant who was born a female.
- **HERBERT SMITH FREEHILLS TO OPEN IN MALAYSIA** *Herbert Smith Freehills* is expected to open an office in Kuala Lumpur, Malaysia in May 2017, after receiving a Qualified Foreign Law Firm licence from the Bar Council. It is the second ‘stand-alone’ foreign law firm to launch in Malaysia. The new office in Kuala Lumpur will serve as a hub for its Islamic finance services.
- **LANDMARK CASE ON EXCLUSION CLAUSE** The Court of Appeal in a landmark decision held that the exclusion of liability clauses in an agreement between a bank and its customer cannot be relied on to absolve the liability of the bank in contract or tort. In this case, the bank relied on the exclusion clause, when a couple who took up a loan with the bank to finance the purchase of a property, sued the bank for negligence. The suit was based upon the failure of the bank to make payment on an invoice, resulting in the termination of the Sale and Purchase Agreement.
- **NO EXTENSION OF TIME FOR DEVELOPERS** The High Court, in a landmark decision, ruled that the Housing Controller has no power to grant an extension of time to developers who delay the completion of housing projects. The ruling is significant as the developers are now required to pay liquidated damages to the purchasers for late delivery of vacant possession.
- **RIDE-SHARING REGULATIONS TO BE TABLED** Laws regulating ride-sharing applications, such as *Uber* and *Grabcar*, are expected to be tabled in Parliament. The highlights of the regulations include blacklisting drivers who flout the law, and prohibiting the practice of “fishing” where the drivers, in their attempt to earn more money in a single trip, switch their status from “occupied” to “available” even when they have already picked up passengers.
- **STRATA MANAGEMENT ACT 2013 TO BE REVIEWED** The Ministry of Urban Wellbeing, Housing and Local Government intends to review the Strata Management Act 2013 (“the Act”) to address issues on the liability of developers and joint management bodies (JMB). The review will be followed by an amendment to the Act in which all developers will be required to settle arrears of a project before the project is handed over to the JMB. The current position on the liabilities for developers and JMB after the completion of project is ambiguous and unclear.

## AROUND THE WORLD... IN-BRIEF

- **AUSTRALIA: DRAGON LAW LAUNCHED**

*Dragon Law*, a Hong Kong-based legal start-up was launched in Australia and New Zealand in February 2017, making them the fourth and fifth countries to gain access to the platform since its establishment in 2015. It serves as a *Do-It-Yourself* platform for businesses to draft legal documents relevant to their commercial needs in a quick and cost-effective manner.

- **CAMBODIA: ELECTION LAW AMENDED**

The Cambodian Parliament has amended the 1998 election law to prohibit the engagement of political parties in activities that harm national security. The amendments also aim to prohibit a convicted politician from standing for election and to allow the Supreme Court to dissolve a political party over the conviction of its leader. The amendments have been criticised as they have the effect of undermining the multi-party democracy in Cambodia and turning the nation into a one-party state.

- **PAKISTAN: VALENTINE'S DAY BANNED**

The Islamabad High Court has issued an order ("the Order") banning the celebration of Valentine's Day in Pakistan with effect from 13 February 2017. The ban resulted from a petition submitted by a citizen who alleged that the promotion of Valentine's Day is against the Islamic teachings. The Order prohibits the display of adverts as well as the sale of merchandise associated with Valentine's Day.

- **SINGAPORE: SIAC INVESTMENT**

**ARBITRATION RULES ENFORCED** The Singapore International Arbitration Centre (SIAC) has unveiled the Investment Arbitration Rules of the Singapore International Centre ("the Rules"), a specialised set of rules to resolve issues present in the conduct of international investment arbitrations. The Rules came into force on 1 January 2017.

- **SINGAPORE: IS GOVERNMENT A**

**"PERSON"?** In a majority decision, the Singapore Court of Appeal has ruled that the Government

is not entitled to invoke the Protection from Harassment Act ("the Act"), an anti-harassment law allowing persons to stop the publication of false statements against them. The issue was whether the Government could be regarded as a "person" under section 15 of the Act which provides for a person, who is a victim of a false statement, to seek relief from the court.

- **THAILAND: ACT ON DIGITAL DEVELOPMENT FOR ECONOMY AND SOCIETY ENFORCED**

The Act on Digital Development for Economy and Society came into force on 25 January 2017. The National Digital Economy and Society Committee is established to set out and advise on guidelines and policies under the digital economy framework.

- **UK: THE LOW DOWN ON HIGH HEELS**

In January 2017, the Petitions Committee and Women and Equalities Committee ("the Committee") published a report entitled *High heels and workplace dress codes* ("the Report") which revealed the unpleasant experiences of workers who were affected by discriminatory dress codes. In the Report, the Committee urged the Government to review the existing employment law relating to dress codes and to ensure that such law is better understood and more effective.

- **UK: BREXIT BILL PASSED**

The House of Lords ("the House") by 274 to 118 votes, passed the unamended European Union (Notification of Withdrawal) Bill 2016-17 ("the Bill") which has received the Royal Assent. The passage of the Bill is significant as the Government may now invoke Article 50 of the Lisbon Treaty to leave the European Union. The Supreme Court previously ruled that Article 50 cannot be triggered without an Act of Parliament authorising the Government to do so.

- **US: WITHDRAWAL FROM TPPA**

The President of the United States (US), on 24 January 2017, signed an executive order to withdraw the participation of the US from the 12-nation trade deal, Trans-Pacific Partnership Agreement (TPPA). However, the executive order on TPPA is deemed to be merely symbolic, as the trade pact has not been ratified by the US Congress.

COMPANY LAW – Mergers and take-overs – Mandatory general offer by controlling shareholders – Failure of – Whether shareholder has *locus standi* to sue – Capital Markets and Services Act 2007, sections 218, 357, and 360

**MAK SIEW WEI V DATO' DR NORBIK  
BASHAH BIN IDRIS & ORS** [2016] 11 MLJ 772,  
High Court

**FACTS** The plaintiff and the defendants were shareholders of a company ("the Company"). The plaintiff sued the defendants in the High Court ("the Suit"), alleging that the defendants had contravened section 218(2)<sup>1</sup> of the Capital Markets and Services Act 2007 ("the Act") and section 9(1)<sup>2</sup> of the Malaysian Code on Take-Overs and Mergers 2010, in failing to undertake a mandatory offer for the shares in the Company upon obtaining control. In applying to strike out the Suit, the defendants argued that in the absence of a ruling by Securities Commission Malaysia ("SC"), the alleged contravention did not give rise to a private cause of action under section 357<sup>3</sup> of the Act. The plaintiff, therefore, it was argued, did not have *locus standi* to commence the Suit against them. The plaintiff, however, contended that he was entitled to initiate the Suit pursuant to section 360<sup>4</sup> of the Act.

**ISSUE** The main issue was whether the plaintiff had *locus standi* to commence the Suit.

**HELD** In dismissing the application, the court held that a person, who claims to be aggrieved by a breach of section 218 of the Act, may resort to sections 357 and 360 for *locus standi* to recover his losses, and to seek other relief, without first obtaining a ruling by the SC. ❄️

UNDANG-UNDANG SYARIKAT – Percantuman dan pengambilalihan – Tawaran mandatori oleh pemegang-pemegang saham yang mengawal – Kegagalan membuat tawaran – Sama ada pemegang saham mempunyai *locus standi* untuk mengambil tindakan – Akta Pasaran Modal dan Perkhidmatan 2007, seksyen-seksyen 218, 357, dan 360

**MAK SIEW WEI V DATO' DR NORBIK  
BASHAH BIN IDRIS DAN LAIN LAIN** [2016] 11  
MLJ 772, Mahkamah Tinggi

**FAKTA-FAKTA** Pihak plaintif dan defendan-defendan ("Defendan") adalah pemegang-pemegang saham sebuah syarikat ("Syarikat tersebut"). Pihak plaintif telah mengambil tindakan terhadap Defendan di Mahkamah Tinggi ("Tindakan tersebut"), dan mendakwa bahawa Defendan telah melanggar seksyen 218(2)<sup>5</sup> Akta Pasaran Modal dan Perkhidmatan 2007 ('Akta tersebut') dan seksyen 9(1)<sup>6</sup> Kod Pengambilalihan dan Percantuman 2010, atas kegagalan melaksanakan suatu tawaran mandatori bagi saham-saham Syarikat, setelah memperolehi kawalan ke atas Syarikat tersebut. Dalam permohonan membatalkan Tindakan tersebut, Defendan berhujah bahawa selagi tiada keputusan oleh Suruhanjaya Sekuriti Malaysia ("SS") berhubung dengan pelanggaran tersebut, maka tidak ada sebarang kausa tindakan persendirian yang timbul di bawah seksyen 357<sup>7</sup> Akta tersebut. Oleh itu, dihujahkan bahawa pihak plaintif tidak mempunyai *locus standi* untuk mengambil Tindakan tersebut terhadap Defendan. Walau bagaimanapun, pihak plaintif menegaskan bahawa dia berhak memulakan tindakan menurut seksyen 360<sup>8</sup> Akta tersebut.

**ISU** Isu utama adalah sama ada pihak plaintif mempunyai *locus standi* untuk memulakan Tindakan tersebut.

**KEPUTUSAN** Dalam menolak permohonan tersebut, mahkamah memutuskan bahawa seseorang yang terkilan dengan pelanggaran seksyen 218 Akta tersebut boleh bergantung kepada seksyen-seksyen 357 dan 360 untuk *locus standi* yang diperlukan bagi memulihkan kerugian yang dialami, serta mendapatkan relif lain, tanpa memperolehi keputusan SS terlebih dahulu. ❄️

<sup>1</sup> Compliance with Code and rulings

<sup>2</sup> Mandatory offer

<sup>3</sup> Civil liability of person in contravention of the securities laws

<sup>4</sup> Power of court to make certain orders

<sup>5</sup> Pematuhan Kod dan perintah-perintah

<sup>6</sup> Tawaran mandatori

<sup>7</sup> Tanggungan sivil orang yang melanggar undang-undang sekuriti

<sup>8</sup> Kuasa mahkamah untuk membuat perintah tertentu

CONSTITUTIONAL LAW – Constitutionality of provision – Sections 3 and 4 of Sedition Act 1948 – Effect of – Whether article 10(2)(a) of Federal Constitution contravened

**MAT SHUHAIMI BIN SHAFIEI V KERAJAAN MALAYSIA** [2017] 1 MLJ 436, Court of Appeal

**FACTS** The appellant was charged (“the Charge”) under section 4(1)(c) of the Sedition Act 1948 (“the Act”) at the Sessions Court for publishing a seditious article online. After his motion to strike out the Charge at the Criminal Court was dismissed, the appellant then applied (“the Application”) to the Civil Court for a declaration that section 3 of the Act, read together with section 4, was inconsistent with article 10 of the Federal Constitution (FC). The application was dismissed. Hence, the current appeal to the Court of Appeal.

**ISSUES** The main issues were: (i) whether the Application was barred by the doctrine of *res judicata*; and (ii) whether section 3(3) of the Act was a proportionate restriction under article 10(2)(a) of the FC.

**HELD** In allowing the appeal, the court held that the Application could be heard as it concerns the validity of section 3(3) of the Act against the proportionality of restrictions under article 10(2)(a) of the FC. The court further ruled that section 3(3) of the Act, which displaces the proof of intent for offences under the Act, is not a proportionate restriction under article 10(2)(a) of the FC, thus contravening article 10 of the FC, rendering section 3 invalid. ❄️

UNDANG-UNDANG PERLEMBAGAAN – Keperlembagaan peruntukkan – Seksyen-seksyen 3 dan 4 Akta Hasutan 1948 – Implikasi – Sama ada artikel 10(2)(a) Perlembagaan Persekutuan dilanggar

**MAT SHUHAIMI BIN SHAFIEI V KERAJAAN MALAYSIA** [2017] 1 MLJ 436, Mahkamah Rayuan

**FAKTA-FAKTA** Pihak perayu telah dituduh (“Pertuduhan tersebut”) di bawah seksyen 4(1)(c) Akta Hasutan 1948 (“Akta tersebut”) di Mahkamah Sesyen kerana menerbitkan suatu rencana dalam talian yang menghasut. Setelah usul perayu untuk membatalkan Pertuduhan tersebut di Mahkamah Jenayah ditolak, pihak perayu seterusnya memohon (“Permohonan tersebut”) kepada Mahkamah Sivil untuk suatu deklarasi bahawa seksyen 3 Akta tersebut, dibaca bersama seksyen 4, adalah bercanggah dengan artikel 10 Perlembagaan Persekutuan. Permohonan tersebut telah ditolak. Maka, rayuan ini ke Mahkamah Rayuan.

**ISU-ISU** Isu-isu utama adalah: (i) sama ada Permohonan tersebut dilarang oleh doktrin *res judicata*; dan (ii) sama ada seksyen 3(3) Akta tersebut adalah larangan berkadar di bawah artikel 10(2)(a) Perlembagaan Persekutuan.

**KEPUTUSAN** Dalam membenarkan rayuan ini, mahkamah memutuskan bahawa Permohonan tersebut boleh didengar kerana ianya berkenaan dengan kesahan seksyen 3(3) Akta tersebut terhadap larangan berkadar di bawah artikel 10(2)(a) Perlembagaan Persekutuan. Mahkamah selanjutnya memutuskan bahawa seksyen 3(3) Akta tersebut yang mengecualikan pembuktian niat untuk kesalahan-kesalahan di bawah Akta tersebut, adalah suatu larangan yang tidak berkadar di bawah artikel 10(2)(a) Perlembagaan Persekutuan. Ini seterusnya melanggar artikel 10 Perlembagaan Persekutuan, yang menjadikan seksyen 3 tidak sah. ❄️

CONTRACT LAW – Agreement – Breach of contract – Letter of quotation – Letter of award – Letter of acceptance – Whether there was a valid and binding contract – Whether there was a breach of contract

**PERCETAKAN KOLOMBONG RIA SDN BHD  
V WAWASAN IKTISAS SDN BHD** [2016] 6 MLJ  
584, Court of Appeal

**FACTS** Based on a letter of quotation provided by the appellant (a printing company), the respondent (a private company), by a letter of award ("letter of award"), awarded the appellant a contract for the printing and supply of parking coupons ("the coupons") for a period of two years, subject to certain terms and conditions. The appellant accepted ("letter of acceptance") the letter of award and executed the 'Agreement to Print and Supply' ("the agreement"). The respondent, however, did not sign the agreement, and failed to accept delivery, failed to order the coupons as agreed, and failed to pay the costs for the change of design of the coupons which had already been printed in large quantities by the appellant. The appellant commenced an action for breach of contract. The High Court dismissed the appellant's claim. The appellant now appeals.

**ISSUE** The main issue was whether there was a valid and binding contract between the appellant and the respondent in respect of the printing and supply of the coupons.

**HELD** In allowing the appeal, the Court of Appeal held that the letter of quotation, letter of award, and the letter of acceptance showed the intention of both parties to have a valid and binding contract in the absence of a formal agreement. Thus, it was held that the respondent had breached the contractual obligation to accept delivery of or to order the estimated volume of coupons from the appellant as agreed in the contract. ❄️

UNDANG-UNDANG KONTRAK – Perjanjian – Kemungkinan kontrak – Surat sebut harga – Surat anugerah – Surat penerimaan – Sama ada wujudnya kontrak yang sah dan mengikat – Sama ada berlakunya pelanggaran kontrak

**PERCETAKAN KOLOMBONG RIA SDN BHD  
V WAWASAN IKTISAS SDN BHD** [2016] 6 MLJ  
584, Mahkamah Rayuan

**FAKTA-FAKTA** Berdasarkan sepucuk surat sebut harga yang disediakan oleh pihak perayu (suatu syarikat percetakan), pihak responden (suatu syarikat persendirian), melalui sepucuk surat anugerah ("surat anugerah tersebut") telah menganugerahi pihak perayu satu kontrak percetakan dan pembekalan kupon letak kereta ("kupon tersebut") untuk tempoh dua tahun, tertakluk kepada terma-terma dan syarat-syarat tertentu. Pihak perayu telah menerima ("surat penerimaan") surat anugerah tersebut dan menandatangani suatu 'Perjanjian Untuk Mencetak dan Membekal' ("perjanjian tersebut"). Walau bagaimanapun, pihak responden tidak menandatangani perjanjian itu, dan gagal menerima penghantaran tersebut serta gagal menempah kupon tersebut seperti yang dipersetujui, dan gagal membayar kos mengubah rekabentuk kupon yang telahpun dicetak dalam kuantiti yang banyak oleh pihak perayu. Pihak perayu pun memulakan tindakan pelanggaran kontrak. Mahkamah Tinggi menolak tuntutan pihak perayu. Pihak perayu sekarang merayu.

**ISU** Isu utama adalah sama ada wujudnya satu kontrak yang sah dan mengikat di antara pihak perayu dan pihak responden berkenaan dengan percetakan dan pembekalan kupon.

**KEPUTUSAN** Dalam membenarkan rayuan, Mahkamah Rayuan memutuskan bahawa surat sebut harga, surat anugerah, dan surat penerimaan telah menunjukkan niat kedua-dua belah pihak untuk mewujudkan suatu kontrak yang sah dan mengikat, walaupun tiada sebarang perjanjian rasmi. Oleh itu, mahkamah memutuskan bahawa pihak responden telah melanggar obligasi kontrak untuk menerima penghantaran ataupun untuk menempah jumlah kupon yang dianggarkan oleh pihak perayu, seperti yang dipersetujui dalam kontrak. ❄️

## PRACTICE AND PROCEDURE

### YOU HAVE BEEN SERVED (ELECTRONICALLY)!

In the last decade or so, the emergence and proliferation of social media has changed our lifestyle in many ways, from keeping abreast of the world breaking news to knowing the latest updates of our loved ones.

Could social media also play a role in administrating justice – the agent of service for litigants to notify the other party in a timely manner?

In this article, we discuss the role of social media in the service process.

**BACKGROUND** A civil proceeding between two litigants begins either with a writ or originating summons, depending on the nature of the dispute. In Malaysia, after the originating summons is issued, the Rules of Court 2012 (“the Rules”) require such originating summons to be served on the defendants, either by personal service, that is, by leaving a copy with the person to be served (“the Person”) or in the form of AR registered post. The object of service is to notify a party that a claim has been made against him so that he is given an equal chance to defend his case before the court.

**SUBSTITUTED SERVICE** It is not uncommon for a Person to evade the service of such documents. When such situation arises, the applicant may apply to the court for an order for substituted service. Under Order 62, rule 5 of the Rules, it is provided that when the court is satisfied that personal service is impracticable, the court may order for a substituted service and direct steps to be taken by the applicant to notify the Person.

Under this circumstance, considering the convenience and timeliness of electronic media including social media, could substituted service be done electronically?

**SUBSTITUTED SERVICE THROUGH ELECTRONIC MEANS** In Singapore, the Singapore Rules of Court allows substituted service to be effected by electronic means including emails.

Last year, the Singapore High Court in *Storey, David Ian Andrew v Planet Arkadia Pte Ltd and others*<sup>9</sup> granted an application for substituted service through email, Skype and Internet message board. The High Court further held that the phrase “electronic means” in Order 65, rule 5(4) is wide enough to include *WhatsApp* and other smart phone messaging platforms that are linked to mobile phone numbers.

However, one of the arguments against substituted service through electronic means other than emails, is the fear that other electronic means may not be effective at notifying the Person. The court in *Storey*, in addressing the concern expressed, laid down the following measures to curtail the risk, namely, that (i) the electronic service should be accompanied by either posting on the front door of the Person, or AR registered post; (ii) the applicant should furnish proof that the electronic platform in question is used by the Person; and (iii) the applicant should show that the electronic platform in question was recently used by the Person.

The use of social media for service of documents has already been endorsed in the United Kingdom, as early as 2009, *via Twitter*, in *Blaney v Persons Unknown*<sup>10</sup>, and *via Facebook*, in *Ako Capital LLP and Master Fund Limited v TFS Derivatives and others*.

Similar methods have also been endorsed in Australia<sup>11</sup> and New Zealand<sup>12</sup>. In 2013, the New South Wales Court of Appeal recognised that posting on a recipient's *Facebook* page is a permissible means of substituted service, if evidence shows that the *Facebook* page belongs to the Person and that such posting is able to notify the Person.

**CONCLUSION** The Rules are silent on substituted service through electronic means, thus may render such mode of substituted service to be infeasible in Malaysia. In light of the progress in other jurisdictions, perhaps it is high time for Malaysian courts to embrace technology in the administration of justice. ❄️

<sup>9</sup> [2016] SGHCR 7

<sup>10</sup> (1 October 2009) IHQ/12/0653 (Ch.) (Unreported)

<sup>11</sup> *MKM Capital Pty Ltd v Corbo & Poyser* (Supreme Court (ACT), 12 December 2008, unrep)

<sup>12</sup> *Axe Market Gardens Limited v Axe* (CIV-2008-485-2676) (Unreported)



## CORPORATE LAW

### THE COMPANIES ACT 2016... KEY

**FEATURES** The Companies Act 2016 ("the new Act") came into force on 31 January 2017, save for section 241 and Division 8 of Part III, which relate to the company secretary's registration with the Registrar of Companies and corporate rescue mechanism respectively. The new Act has replaced the Companies Act 1965 ("the previous Act").

In this article, we examine the key features of the new Act.

**SINGLE DOCUMENT CONSTITUTION** According to the new Act, companies are no longer required to have a Memorandum and Articles of Association<sup>13</sup>. Save for companies limited by guarantee, newly established companies have the option either to adopt a constitution, or not have a constitution at all. In the event that the company does not adopt a constitution, the company and its directors and members shall have the rights, powers, duties and obligations as set out in the new Act. As for existing companies, their current Memorandum and Articles of Association will be deemed to be their constitution unless otherwise resolved by the company.

**UNLIMITED CAPACITY** Under the new Act, a company may now choose not to specify its objects, and instead may exercise all functions of a body corporate and shall have full capacity to carry on or undertake any business or activity<sup>14</sup>. This is unlike the previous Act in which the objects clause of a company defines the capacity of a company to carry out commercial activities.

**INCORPORATION OF COMPANIES** The previous Act required a minimum of two resident directors. Under the new Act, the requirements for incorporation of companies are less stringent. The incorporation of a private company will now require only a single director and a member<sup>15</sup>. The minimum number of directors for the incorporation of a public company, however, remains at two.

**ANNUAL GENERAL MEETING** The previous Act required both public and private companies to hold an Annual General Meeting every calendar year. Under the new Act<sup>16</sup>, this is no longer a requirement for private companies<sup>17</sup>. However, members representing at least five per centum of the paid up capital of a private company with voting rights, may require a meeting of members to be convened by the directors, if it has not been held for more than twelve months, provided that the proposed resolution is not defamatory, vexatious or frivolous<sup>18</sup>.

**VOTING POWER OF PROXIES** The new Act provides that where a member entitled to vote on a resolution has appointed a proxy, the proxy shall be entitled to vote on a show of hands, provided that he is the only proxy appointed. If there is more than one proxy, the proxies shall only be entitled to vote on poll and that the proportions of the member's holdings by each proxy are specified<sup>19</sup>. According to the previous Act, a proxy shall not be entitled to vote except on poll and that a member shall not be entitled to appoint more than two proxies to attend and vote at the same meeting, unless the proportions of his shareholding represented by each proxy is specified.

*"The initiative to modernise the legal framework is to cultivate the spirit of entrepreneurship among the public, as there are various policies that will have a positive impact on companies.*

*Among the policies is the introduction of the concept of the establishment of a company by just one shareholder and one director for ease of doing business." – Datuk Seri Jamil Salleh, (Companies Commission of Malaysia (CCM) chairman).*

**NO PAR VALUE** Previously, the shares of companies are issued with par or nominal value. Currently, the new Act introduces no par value regime for shares. Thus, all shares issued by a company before or upon the enforcement of the new Act shall have no par or nominal value<sup>20</sup>. Any amount standing to the credit of the share

<sup>13</sup> Section 31 of the Companies Act 2016

<sup>14</sup> Section 21 of the Companies Act 2016

<sup>15</sup> Section 196 of the Companies Act 2016

<sup>16</sup> Section 340 of the Companies Act 2016

<sup>17</sup> The requirements for public companies remain the same

<sup>18</sup> Section 311(4) of the Companies Act 2016

<sup>19</sup> Section 294 of the Companies Act 2016

<sup>20</sup> Section 74 of the Companies Act 2016

premium account and capital redemption reserve of a company shall also become part of the share capital of the company. However, a company may within 24 months, upon the coming into force of the new Act, use the amount standing to the credit of its share premium account for specific purposes, including paying for the premium on redemption of debentures or redeemable preference shares issued before the new Act was enforced<sup>21</sup>.

**SHARE CERTIFICATE** According to the previous Act, a share certificate serves as evidence of the title of the members to the shares. However, under the new Act, the issuance of a share certificate is no longer required unless (i) an application has been made by a shareholder for a share certificate relating to his shares; or (ii) the constitution of the company provides for the issuance of a share certificate<sup>22</sup>.

**SOLVENCY STATEMENT** The new Act introduces a new feature, a solvency statement. A solvency statement is a statement based on the opinion of each director that the company satisfies the solvency test<sup>23</sup> in relation to a transaction. In forming the opinion, a director shall inquire into the state of affairs and prospects of the company and consider all the liabilities of the company, including contingent liabilities<sup>24</sup>. If the solvency statement is made without reasonable grounds for the opinion stated in the statement, the director commits an offence which attracts imprisonment for a term of not more than five years, or a maximum fine of MYR500,000, or both<sup>25</sup>.

**CAPITAL REDUCTION** Under the previous Act, reduction of capital of a company, if so permitted by the Articles of Association, may be effected only by a special resolution and confirmation by the High Court ("the Court"). Under the new Act, an alternate way for capital reduction has been introduced. The new Act allows for reduction of capital to be effected in two ways, either by way of (i) a special resolution and confirmation by the Court<sup>26</sup>, or (ii) a special resolution supported by a solvency statement<sup>27</sup>, subject to the provisions of the constitution of a company<sup>28</sup>.

**FINANCIAL ASSISTANCE IN DEALING WITH OWN SHARES** The previous Act prohibited a company from giving any financial assistance to purchase or subscribe its own shares or shares of its holding company, although a public company may purchase its own shares if so authorised by its Articles of Association. Under the new Act, although a similar prohibition is maintained<sup>29</sup>, one of the exceptions introduced<sup>30</sup> allows a company, except a listed company, to give financial assistance of not more than 10 per cent of the shareholders' fund<sup>31</sup> for the purpose of acquiring its own shares or shares of its holding company.

**CORPORATE RESCUE MECHANISMS** The new Act unveils two corporate rescue mechanisms, namely, corporate voluntary arrangement and judicial management.

*Corporate voluntary arrangement* A corporate voluntary arrangement (CVA) is a proposal by the directors allowing a company to be placed under a voluntary arrangement with its creditors over the payment of its debts. A nominee will be appointed to supervise the implementation of the CVA. Proposal for a CVA may also be made by (i) a judicial manager, if the company concerned is under a judicial management order, or (ii) a liquidator, if a company is being wound up<sup>32</sup>.

*Judicial management* A company or its creditors may apply to the Court for an order to place the company concerned under a judicial management (JM) by a judicial manager<sup>33</sup> when a company is or will be unable to pay its debt, and there is either (i) reasonable probability of rehabilitating the company as a going concern, or (ii) when the interests of the creditors would be better served than resorting to a winding up.

The JM order shall last six months, subject to the terms imposed by the Court<sup>34</sup>.

<sup>21</sup> Section 618(3) of the Companies Act 2016

<sup>22</sup> Section 97 of the Companies Act 2016

<sup>23</sup> Section 113(3) of the Companies Act 2016. The section also provides for the criteria for such solvency test

<sup>24</sup> Section 113(4) of the Companies Act 2016

<sup>25</sup> Section 114 of the Companies Act 2016

<sup>26</sup> Section 116 of the Companies Act 2016. The Court also refers to the High Court or a judge of the High Court

<sup>27</sup> Section 117 of the Companies Act 2016

<sup>28</sup> Section 115 of the Companies Act 2016

<sup>29</sup> Section 123 of the Companies Act 2016

<sup>30</sup> Section 125 and 126 of the Companies Act 2016

<sup>31</sup> The aggregate amount received by the company in respect of the issued shares and the reserves of the company

<sup>32</sup> Section 396 of the Companies Act 2016

<sup>33</sup> Section 404 of the Companies Act 2016

<sup>34</sup> Section 406 of the Companies Act 2016

## LAND LAW

**A NEW LANDSCAPE** Amendments have been made to three Acts, namely the National Land Code 1965 ("the NLC"), Strata Titles Act 1985 ("the STA"), and Land Acquisition Act 1960 ("the LAA"). The amendments to the NLC and STA came into force on 1 January 2017 while the enforcement date for the amendments to the LAA is yet to be announced.

In this article, we attempt to highlight the key changes made by the amendments to the present land regulatory system.

**BACKGROUND** The amendments to the NLC seek to modernise the land administration of the country. The present land acquisition procedures under the LAA are also clarified and enhanced further by the amendments. In addition, the STA is also amended to address the issues of subdivision application and the issuance of strata title.

### AMENDMENTS TO THE NATIONAL LAND CODE 1965

*Acquisition of industrial land by foreign entities* The previous section 433B(1)(aa) of the NLC does not require approval of the State Authority ("the State") for the acquisition of industrial land by foreign entities. However, following the deletion of paragraph (aa) by the recent amendments, the approval of the State will now be required for the acquisition of industrial land by foreign entities.

*Qualified title for underground land* The previous section 92C of the NLC required the details of an alienated underground land to be specified in the final title. Now, when an underground land is being alienated, the current section 92C(1A) allows a qualified title to be issued and registered first, before the final title is released.

*Extension of term of years* Section 76 of the NLC provides that a land may be alienated by the State either perpetually or for a term not exceeding 99 years. The new section 90A allows the proprietor of the land or the management corporation, in the case of land with subdivided buildings, to apply to the State for an extension on the term of years of alienated land. However, the extension must be applied before the term of years specified in the land title expires.

*Heavier penalties* The penalties imposed for offences under the NLC have increased tremendously. The revision, among others, include the increment of the fine amount for unlawful occupation under section 425 of the NLC from MYR10,000 to MYR500,000, and the maximum term of imprisonment from one to five years. The fine for unlawful extraction or removal of rock materials from a land under section 426 of the NLC is also increased from MYR50,000 to MYR500,000, although the term of imprisonment is maintained.

### AMENDMENTS TO THE STRATA TITLES ACT 1985

*Rent collection* Rent collection for land with subdivided buildings previously fell under the NLC. Following the introduction of section 96A to the NLC, coupled with the insertion of section 4C, and a new Part IVA to the STA, rent collection for subdivided buildings will now be governed by the provisions of the new Part IVA of the STA. By virtue of the amendments, the rent for the existing strata titles will be payable at the beginning of a calendar year. The rent for the strata titles will now be due from the beginning of the following year.

*Forfeiture and vesting* A new Part IVB has been introduced to the STA to govern the forfeiture and vesting of subdivided buildings. When a parcel owner fails to pay rent on time, the Land Administrator ("the Administrator") may declare that that parcel is to be forfeited by the State and be vested and registered under the name of any statutory authority to hold the parcel for the benefit of the State. The new section 23P of the NLC provides that the forfeiture may be challenged on appeal to the High Court, pursuant to section 418 of the NLC. However, such appeal will be time-barred by a statutory three-month period.

*Acquisition of subdivided building or land* The STA was previously silent on the management of the strata register and the affairs of the management corporation in the event of a land acquisition. A new Seventh Schedule is now introduced to the STA to provide procedures on managing the strata register and the affairs of the management corporations when land acquisition takes place.

### AMENDMENTS TO THE LAND ACQUISITION ACT 1960

*Enquiry and award* Section 19 of the LAA provides that when the State is of the opinion that a land is urgently required for public purpose or public utility which is beneficial for the economic developments

of the nation or to the public, a Certificate of Urgency ("the Certificate") may be issued by the State Director to direct the Administrator to take possession of the land. The new section 19A(1) of the LAA, however, requires the Administrator to continue with a full enquiry and to make an award despite the possession of the land which has been taken pursuant to the Certificate.

*Temporary occupation and use of land* The previous section 57 of the LAA provided that the State is permitted to procure the temporary occupation or use of any land under four circumstances, namely (i) public purposes, (ii) beneficial economic developments of the nation and public, (iii) the purposes of mining, residential, agricultural, commercial, industrial, recreational, or any combination of such purposes, and (iv) public works. Following the amendments to section 57, a land may now also be acquired for temporary occupation or use if the land has been indicated in a development plan under the town and country planning laws. The duration for such temporary occupation or use is subject to a three-year cap from the commencement date of such occupation or use.

*Compensation sum* Before making an offer for the compensation, the new section 58(2A) of the LAA allows the Administrator to obtain a written opinion on the value of the land from a valuer before making an offer of compensation. Besides that, the Administrator may substitute the monetary compensation, in full or in part, by making an equitable arrangement with a person who has an interest in the land. Once an equitable arrangement is reached, the particulars of such equitable arrangement have to be recorded. The State is also permitted to temporarily occupy the land even when the landowner does not agree with the compensation sum offered. If there is no agreement to the compensation sum, the Administrator may refer to the High Court pursuant to section 60 of the LAA.

**CONCLUSION** A modernised and effective land administration system is crucial to the economic developments of the nation. It is hoped that the amendments will effectively transform the land regulatory regime in Malaysia and contribute to the efforts of making Malaysia a competitive nation.

## ACTS

### INTEREST SCHEMES ACT 2016

*National Language*

**Akta Skim Kepentingan 2016**

No  
**778**

*Date of coming into operation*

**31 January 2017**

*Notes*

This is an Act to provide for the registration, administration and dissolution of schemes relating to interests, and related matters.

### COMPANIES ACT 2016

*National Language*

**Akta Syarikat 2016**

No  
**777**

*Date of coming into operation*

**31 January 2017** except **section 241** and **Division 8 of Part III**

*Notes*

This is an Act to provide for the registration, administration and dissolution of companies and corporations, and to provide for related matters.

## AMENDMENT ACTS

### CRIMINAL PROCEDURE CODE (AMENDMENT) ACT 2016

*National Language*

**Akta Kanun Tatacara Jenayah (Pindaan) 2016**

No

**A1521**

*Date of coming into operation*

**1 March 2017** except **sections 17, 18** and **19**.

*Notes*

The highlights of the amending Act include the introduction of sections 265A, 265B, and 265C for protected witness, new section 399B for the admissibility of evidence relating to organised criminal group as *prima facie* proof of facts, and new section 425A which allows for trials to take place, in the absence of the accused.

### EVIDENCE (AMENDMENT) ACT 2017

*National Language*

**Akta Keterangan (Pindaan) 2017**

No

**A1527**

*Date of coming into operation*

**1 March 2017**

*Notes*

The highlight of the amending Act is the introduction of the new section 32A which provides for the admissibility of evidence given by a protected witness pursuant to section 265A of the Criminal Procedure Code.

### COMPANIES COMMISSION OF MALAYSIA (AMENDMENT) ACT 2015

*National Language*

**Akta Suruhanjaya Syarikat Malaysia (Pindaan) 2015**

No

**A1478**

*Date of coming into operation*

**31 January 2017** for **sections 9, 10, 11, 13, 14** and **15**.

*Notes*

The highlights of the amending Act include the introduction of new Parts IIIA, IIIB, and IIIC which provide for the functions and powers of the Registrar, powers of the Companies Commission to issue guidelines, practice notes, etc, and licensing respectively.

### LIMITED LIABILITY PARTNERSHIP (AMENDMENT) ACT 2015

*National Language*

**Akta Perkongsian Liabiliti Terhad (Pindaan) 2015**

No

**A1477**

*Date of coming into operation*

**31 January 2017**

*Notes*

The highlight of the amending Act is section 48 which provides for the compliance officer of a foreign limited liability partnership to notify the Registrar of the Companies Commission if that foreign limited liability partnership goes into liquidation or dissolution.

### REGISTRATION OF BUSINESSES (AMENDMENT) ACT 2015

*National Language*

**Akta Pendaftaran Perniagaan (Pindaan) 2015**

No

**A1476**

*Date of coming into operation*

**31 January 2017**

*Notes*

The highlights of the amending Act include substituting the definition of "Registrar".

## GAS SUPPLY (AMENDMENT) ACT 2016

*National Language*

**Akta Bekalan Gas (Pindaan) 2016**

No

**A1515**

*Date of coming into operation*

**16 January 2017**, except **section 4A** which came into force on **9 September 2016**.

*Notes*

The highlights of the amending Act include the introduction of section 1A on the application of the Gas Supply Act 1993 ("the Act") in Sarawak. The functions and duties of the Energy Commission are also changed via the substitution of section 4. Further, the scope of licensed activities under section 11 of the Act has been altered. New provisions, namely, sections 11A, 11B, 11C, 13A, 13B, 13C, 13D, and 35A are inserted to govern the issuance of licence, obligations of licensee, and other related matters. Besides that, a new Part VIA on general competition practices has been added and that the anti-competition conducts will come under the purview of the Gas Competition Appeal Tribunal, a new entity established under Chapter 6.

## STRATA TITLES (AMENDMENT) ACT 2016

*National Language*

**Akta Hakmilik Strata (Pindaan) 2016**

No

**A1518**

*Date of coming into operation*

**1 January 2017** except **section 29**.

*Notes*

The highlights of the amending Act include the introduction of a new Part IVA on collection of rent by the State Authority and Part IVB on forfeiture and vesting of subdivided buildings. Further, the effects of acquisition of subdivided building or land are stated in the new Part VIIIA and Seventh Schedule. On the other hand, section 19A on transfer of ownership of strata titles has been deleted.

## NATIONAL LAND CODE (AMENDMENT) ACT 2016

*National Language*

**Akta Kanun Tanah Negara (Pindaan) 2016**

No

**A1516**

*Date of coming into operation*

**1 January 2017** except **sections 34, 35, 45, 48, 49, 56** and **76**.

*Notes*

The highlights of the amending Act include the introduction of section 90A which allows the extension of the term of years of an alienated land. A new section 92C(1A) is also inserted to allow the issuance and registration of a qualified title for the alienated underground land. New section 292A, on the other hand, provides for the electronic lodgement of instrument. The approval of the State will now be required for the acquisition of industrial land by foreign entities following the deletion of section 433B(1)(aa) of the National Land Code.

## EMPLOYEES PROVIDENT FUND (AMENDMENT) ACT 2016

*National Language*

**Akta Kumpulan Wang Simpanan Pekerja (Pindaan) 2016**

No

**A1504**

*Date of coming into operation*

**1 January 2017** for **sections 11, 13, 15, 20** and **21**.

*Notes*

The highlights of the amending Act include the introduction of the new section 55B, which provides that contribution that was credited into a member's account after he attained the age of 55 years can only be withdrawn when he attains 60 years old or such other age prescribed by the Minister.

## CHILD (AMENDMENT) ACT 2016

National Language

**Akta Kanak-kanak (Pindaan) 2016**

No

**A1511**

Date of coming into operation

**1 January 2017**

Notes

The highlights of the amending Act include the introduction of several provisions for the establishment, membership, functions, operations, and funding of the National Council for Children. The new section 7A is introduced for the establishment of Child Welfare Teams. The new section 40 has enhanced the powers of Court For Children ("the Court") in relation to children in need of protection and rehabilitation. Chapter 3A is also inserted to provide for the power of the Court in making a community service order and other incidental matters.

## SUBSIDIARY LEGISLATION

- PU(A) 67/2017: Solicitors' Remuneration (Amendment) Order 2017 – Effective Date: 15 March 2017
- PU(A) 51/2017: Companies Commission of Malaysia (Licensing of Secretaries) Regulations 2017 – Effective Date: 15 February 2017
- PU(A) 37/2017: Companies Regulations 2017 – Effective Date: 31 January 2017
- PU(A) 36/2017: Interest Schemes Regulations 2017 – Effective Date: 31 January 2017
- PU (B) 529/2016: Computerisation System of Strata Titles – Effective Date: 1 January 2017

## GUIDELINES/RULES/CIRCULARS/ DIRECTIVES AND PRACTICE NOTES ISSUED BETWEEN JANUARY AND MARCH 2017 BY BANK NEGARA MALAYSIA, BURSA MALAYSIA AND SECURITIES COMMISSION MALAYSIA

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

- BNM Policy Document on Wa'd – Effective date: 1 January 2019
- BNM Policy Document on KLIBOR Rate Setting – Effective date: 1 January 2017

### **BURSA MALAYSIA**

- Consolidated Rules of Bursa Malaysia Securities Bhd – As at: 27 February 2017
- Consolidated Rules of Bursa Malaysia Securities Clearing Sdn Bhd – As at: 27 February 2017
- Consolidated Main Market Listing Requirements – Effective date: 31 December 2016
- Consolidated ACE Market Listing Requirements – Effective date: 31 December 2016

### **SECURITIES COMMISSION**

- SC Asset Valuation Guidelines – Effective date: 20 March 2017
- SC Equity Guidelines – Effective date: 20 March 2017
- SC Prospectus Guidelines – Effective date: 20 March 2017
- SC Guidelines on Unlisted Capital Market Products under the Lodge and Launch Framework – Effective date: 16 January 2017

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We, at **ZUL RAFIQUE & partners**, express our deepest sorrow and condolences to the family of  
**Muhammad Zayd Bohorudin**  
(24 June 1985 - 8 March 2017)



*When the news of your sudden demise broke,  
It felt like a bad dream, a twisted and cruel joke.  
It was impossible, unbelievable,  
and for some of us, even surreal.*

*Only upon witnessing your deep slumber,  
So peaceful, tranquil and unencumbered,  
Did we grasp that you were with us no more.  
And as our tears quietly and freely flow,  
We desperately wish, plead and implore  
For life to give you an encore.*

*In our unbridled sadness looms a rainbow,  
Devoid of hues, it resonates with our sorrow,  
A dull, dreary, arching monochrome,  
A sign that you have been called home.*

*And as our splintered hearts seek to mend,  
We gradually begin to comprehend  
That this goodbye is really the end,  
So, rest in peace, our dearest friend.*