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THE BRIEF *Case*

Dato' Zulkifly Rafique is named **Regional Managing Partner of the Year** at the *ALB South East Asia Law Awards Ceremony* held in Singapore in May 2017.

ZUL RAFIQUE *& partners*

A BRIEF NOTE...

by Dato' Zulkifly Rafique

On being multilingual...

The second quarter of 2017 has been good to **ZUL RAFIQUE** *& partners*. I am humbled yet honoured to be named **Regional Managing Partner of the Year** at the *Asian Legal Business* South East Asia Law Awards held in Singapore on 18 May 2017.

When I founded the firm 17 years ago, little did I realise that we would come this far and for this, I would like to thank my colleagues, clients and friends for accompanying us throughout our journey.

We were also declared **Labour and Employment Law Firm of the Year 2017** as well as **Employer of Choice 2017** by the *Asian Legal Business*. This is the firm's second win in the former category and eighth win in the latter.

The BriefCase also makes its debut as a multilingual newsletter, with the inclusion of Bahasa Malaysia and Mandarin.

We understand that businesses know no borders, and with the emerging trend of globalisation, there is an increasing importance in being multilingual. Hence, with the introduction of Bahasa Malaysia and Mandarin in the BriefCase, we hope to break down the language barriers and foster better ties with our clients and readers.

As said by Ludwig Wittgenstein, "The limits of my language mean the limits of my world".

With that said, we hope you enjoy the BriefCase of this quarter. And to all our Muslim friends, *Salam Aidilfitri, Maaf Zahir dan Batin*.

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IN-BRIEF

- **A SPLIT COMMISSION?** The Cabinet has approved the proposal to split the Judicial and Legal Services Commission, with the Judicial Services to be headed by the Chief Registrar of the Federal Court, and the Legal Services to fall within the purview of the Attorney General.

- **BANKRUPTCY (AMENDMENT) ACT 2017 PASSED** The Bankruptcy (Amendment) Act 2017 has been gazetted on 18 May 2017. The amendments, among others, include revising the minimum debt level from MYR30,000 to MYR50,000, granting immunity to social guarantors, and introducing voluntary arrangement, a pre-bankruptcy rescue mechanism between debtors and their creditors.

- **COURTS (MODES OF COMMENCEMENT OF CIVIL ACTIONS) BILL 2016 PASSED** The Senate has approved the Courts (Modes of Commencement of Civil Actions) Bill 2016 ("the Bill"). The Bill aims to standardise the modes of commencement of all civil applications in the High Court, Sessions Court, and Magistrates' Court, consequential to the enforcement of the Rules of Courts 2012 ("the Rules") on 1 August 2012. The Bill requires all civil actions to be commenced either by originating summons or writ, unless exempted by the Rules.

- **FEES DISCOUNTED** The changes in the Solicitors' Remuneration Order 2005 means that lawyers may provide up to 25 per cent discount on their fees for sale and purchase of second-hand houses and commercial units that do not fall under the Housing Development (Control and Licensing) Act 1966.

- **GUIDELINES FOR ADMINISTRATORS OF SOCIAL NETWORK GROUPS** On 3 May 2017, the Malaysian Communications and Multimedia Commission (MCMC) issued an advisory for the administrators of social network or messaging application groups such as, amongst others, *Facebook*, *WhatsApp*, and *WeChat*. The advisory contains an extensive list of Do's and Don'ts to be observed by the administrator in managing the affairs and contents of the group, failing which legal action may ensue.

- **KLRCA REVISED ARBITRATION RULES 2017 ENFORCED** The KLRCA Revised Arbitration Rules 2017 ("the revised Rules") has come into effect on 1 June 2017. The revised Rules include the model arbitration clause and model submission agreement, commencement of arbitration, joinder of the parties, and power of the Director of the KLRCA to consolidate disputes.

- **LABUAN BUSINESS ACTIVITY TAX (AMENDMENT) ACT 2017 PASSED** The Labuan Business Activity Tax (Amendment) Act 2017 came into force on 19 May 2017.

- **LANDMARK DECISION ON LAND ACQUISITION** The Federal Court in *Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat & Another Case*, has declared section 40D of the Land Acquisition Act 1960 unconstitutional, and *ultra vires* article 121 of the Federal Constitution. It was held by the Federal Court that only judges are empowered to determine the compensation sum, which means that the presiding judge, who sits with assessors, is no longer bound by the opinion of the latter in determining such compensation.

- **LANDMARK RULING ON SECURITIES LAW** The Federal Court in a landmark case, *PP v Gan Boon Aun*, has ruled that principal officers and directors are liable if the companies they represent provide misleading information. It was held that such liability, which is based on section 122(1) of the former Securities Industry Act 1983, does not violate the Federal Constitution.

- **MALAYSIAN CODE ON CORPORATE GOVERNANCE** A new Malaysian Code on Corporate Governance ("the Code") has been issued by the Securities Commission Malaysia. The Code, which came into force on 26 April 2017, aims to promote good governance to ensure sustainability and resilience of the capital market in Malaysia.

- **NO MORE RESERVE FUND FOR BANKS** *Bank Negara Malaysia* has announced that both Islamic and conventional banking institutions are no longer required to maintain a reserve fund with effect from 3 May 2017.

- **PRICE LIMIT RAISED** The minimum price for foreign purchases of landed properties in Penang has been increased from MYR2 million to MYR3 million. The increase is justified by the depreciation of the Malaysian Ringgit.

IN-BRIEF

- **SELF-EMPLOYMENT SOCIAL SECURITY ACT 2017 PASSED** The Self-Employment Social Security Act 2017 which has been gazetted, now extends the protection under the Social Security Organisation (SOCSO) to self-employed persons, where they are required to contribute 1.25 per cent of their monthly income to SOCSO every month.

- **SEXUAL OFFENCES AGAINST CHILDREN BILL 2017 PASSED** The Sexual Offences Against Children Bill 2017 ("the Bill"), a law that aims to protect children from sexual offences has been passed. The Bill criminalises child pornography, child grooming, and sexual assault on a child.

- **SHORT-SELLING OF CORPORATE BONDS** New guidelines, *Guidelines on Regulated Short-Selling of Corporate Bonds*, have been introduced by Securities Commission Malaysia, to allow regulated short-selling of corporate bonds in the Malaysian capital market. Under the guidelines, principal dealers, primarily banks, will be permitted to conduct regulated short-selling of corporate bonds, and to expand the range of bonds that may be short-sold. The guidelines came into effect on 13 April 2017.

AROUND THE WORLD... IN-BRIEF

- **CHINA: FIRST SEP-BASED INJUNCTION GRANTED** The Beijing Intellectual Property Court in a landmark decision, *Iwncomm v Sony*, has ordered a permanent injunction and damages close to RMB9 million against *Sony* for past infringement of a standard essential patent ("SEP"). *Sony* was found to have committed direct infringement by performing exit-factory testing on its handsets, as well as contributory infringement, by facilitating the use of the SEP by its end users of *Sony*'s handsets.

- **EUROPEAN UNION: BAN ON HEADSCARF NOT DISCRIMINATORY** On 14 March 2017, the Court of Justice of the European Union ruled that any internal policy that bans the wearing of any political, philosophical or religious sign is not discriminatory. This was in relation to *Samira Achbita & Anor v G4S Secure Solutions NV* and *Bougnaoui v Micropole SA*, cases where female employees were dismissed for refusing to remove their *hijab*, a headscarf worn by many Muslim women as part of their religion.

- **HONG KONG: PWC OPENS LAW FIRM** The Big Four accountancy firm, *PricewaterhouseCoopers* (PwC) continues to expand in the Asian legal services market through the opening of a new firm, *Tiang & Co* ("the Firm") in Hong Kong, three months after setting foot in the Singaporean legal fray. The Firm is associated with *PwC Legal International Pte Ltd*, a licensed foreign law practice in Singapore and its global legal network.

- **INDIA: 26-WEEK MATERNITY LEAVE** Pursuant to the enactment of the Maternity Benefit (Amendment) Act 2017, organisations with more than 10 people will have to give its employees paid maternity leave for 26 weeks, an increase from the previous 12 weeks. The 26-week leave, however, applies only to a woman's first two children.

- **INDONESIA: A NEW REGULATION ON PPAS** The Government has issued a new regulation, Regulation No 10 of 2017 on the Basic Provisions of Electricity Sales Purchase Agreement ("the Regulation") which limits room for negotiation and risk allocation in power purchase agreements (PPAs). The Regulation applies to the State-owned utility, *Perusahaan Listrik Negara* (PLN) and other independent power producers. The features of the Regulation include the introduction of the Build-Own-Operate-Transfer structure with a maximum term of 30 years, and payment exemption for PLN when the grid is disrupted by *force majeure* events that affect its power consumption abilities.

IN-BRIEF

- **NEW ZEALAND: RIVER RECOGNISED AS LEGAL PERSON** With the signing of the *Te Awa Tupua* Bill into law, the *Whanganui River* will now be recognised as a legal person, with related rights, duties, and liabilities. Two guardians are appointed to protect such interests.

- **NEW ZEALAND: TOUPEE OR NOT TOUPEE** A high court in Auckland has granted a convicted murderer the right to wear his toupee in prison, on the basis that it is within his human right, ruling that his "fundamental right to freedom of expression was ignored". In *Smith v Attorney General*, Philip John Smith sought to judicially review a decision made by the Prison Director of Auckland Prison, revoking an authorisation to the former to be issued with a custom-made hairpiece.

- **SINGAPORE: AMENDMENTS TO COMPANIES ACT** The amendments to the Companies Act which took effect from 31 March 2017 will see ownership and control of business entities more transparent and will thus prevent the misuse of corporate entities for illicit purposes.

- **SINGAPORE: HACKED LEGAL DATA REMAIN CONFIDENTIAL** The Court of Appeal, in *Wee Shuo Woon v HT SRL*, has ruled that documents protected by legal professional privilege do not lose its confidential status, even if posted on *WikiLeaks*. In that case, *HT SRL*, a company, sued ("the Suit") its former employee *Wee Shuo Woon* for breach of employment contract. Subsequently, the computer system of the company was hacked and some hacked data including emails containing legal advice and information pertaining to the Suit were posted on *WikiLeaks*.

- **SINGAPORE: LOSS OF GENETIC AFFINITY** The Court of Appeal ("the Court") in *ACB v Thomson Medical Pte Ltd and others*, has held that the woman involved in an *in-vitro fertilisation* (IVF) mix-up is entitled to compensation as she was found to have suffered a loss of "genetic affinity". The Court, however, emphasised that the child should not be regarded as a "continuing source of loss" to the parents. The case involved an IVF mix-up where the sperm of a stranger was mistakenly used to fertilise the woman's eggs.

- **UK: COURT REINSTATES ANIMAL CHARITIES** The Supreme Court in *Illot v The Blue Cross and Ors* has overturned a decision ("the Decision") of the Court of Appeal which ruled in favour of *Illot*, a woman who was excluded from her mother's will of GBP500,000 that was given to three animal charities. It was held that the Court of Appeal erred when calculating the reasonable financial provision. The Supreme Court proceeded to allow the appeal by the charities against the Decision.

- **UK: PARENTS PROSECUTED FOR TERM TIME HOLIDAYS** The Supreme Court in a landmark case, *Isle of Wight Council v Platt*, has held that parents who take their children out of school for term time holidays, without the permission of the head teacher, may be prosecuted. This was following a case where a judge ruled that a businessman, who took his daughter for a seven-day holiday, had to pay a GBP120 fine for the daughter's unauthorised absence.

- **VIETNAM: CAPITAL ADEQUACY REGULATION INTRODUCED** The State Bank of Vietnam has issued a regulation (" the Regulation") mandating banks and foreign bank branches in Vietnam, with effect from 1 January 2020, to maintain a minimum capital adequacy ratio. The Regulation is oriented towards Basel II standards on adequacy ratios of credit institutions, which requires the minimum capital adequacy ratios to be maintained at 8 per cent. Presently, the minimum capital adequacy ratio for banks in Vietnam is set at 9 per cent.

- **VIETNAM: THE GAME IS ON** A decree, issued by the Government, which takes effect from 15 March 2017, will now allow its citizens to game in the casinos. In order to have access and game in the casino, he must be a Vietnamese citizen of at least 21 years old, earns a minimum regular income of VND10 million, and has obtained the permission from his siblings, spouses, and/or parents. The casino operator, on the other hand, is required to issue an electronic card to track the identities of and activities undertaken by every Vietnamese player.

CONTRACT LAW – Agreement – Whether there was *consensus ad idem* – Correspondence showed counter offers and rejection of offers – Whether contract was concluded – Whether there was binding contract – Contracts Act 1950, section 2(a)

PHILIP BELL BOOTH & ANOR V NAVARATNAM NARAYANAN

[2016] 9 CLJ 37, Court of Appeal

FACTS The appellants, in attempting to secure a contract with KLCC, purported to use the services of the respondent to secure the project, with the promise of giving the latter 5 per cent owned by the second appellant in *Aquawalk Sdn Bhd* ("Aquawalk"). The respondent introduced the first appellant to the Chief Executive Officer of KLCC and a contract was eventually concluded between Aquawalk and KLCC. The respondent then demanded his 5 per cent shareholding but the appellants refused. The respondent then commenced this suit alleging that the appellants had breached the promise. The High Court judge concluded that on the totality of evidence, there was *consensus ad idem* between the parties. The appellants appealed to the Court of Appeal.

ISSUE The main issue was whether there was a concluded contract between the appellants and the respondent.

HELD In allowing the appeal, the Court of Appeal held that the finding of the trial judge was based on insufficient appreciation of evidence. Numerous offers were made by the first appellant to the respondent but from the chronology of events, it was clear that each and every time an offer was made, the respondent rejected the offer and presented a counter-offer which could clearly be seen in the correspondence between the parties. It, therefore, could not be said that there was a concluded contract.

Contracts Act 1950, section 2(a)

When one person signifies to another his willingness to do or to abstain from doing anything, with a view to obtaining the assent of that other to the act or abstinence, he is said to make a proposal.

UNDANG-UNDANG KONTRAK – Perjanjian – Sama ada wujud *consensus ad idem* – Surat-menyurat menunjukkan tawaran balas dan penolakan tawaran – Sama ada kontrak telah dimuktamadkan – Sama ada wujudnya kontrak yang mengikat – Akta Kontrak 1950, seksyen 2(a)

PHILIP BELL BOOTH & ANOR LWN NAVARATNAM NARAYANAN

[2016] 9 CLJ 37, Mahkamah Rayuan

FAKTA-FAKTA Perayu-perayu ("pihak perayu"), dalam percubaannya untuk mendapatkan suatu kontrak dengan KLCC, dikata telah menggunakan perkhidmatan pihak responden untuk mendapatkan projek tersebut, dengan menjanjikan 5 peratus saham milik perayu kedua dalam *Aquawalk Sdn Bhd* ("Aquawalk") kepada pihak responden. Seterusnya, pihak responden memperkenalkan perayu pertama kepada Ketua Pegawai Eksekutif KLCC dan suatu kontrak telah dimuktamadkan di antara Aquawalk dan KLCC. Pihak responden kemudiannya telah menuntut 5 peratus pegangan saham tetapi tuntutan tersebut telah ditolak oleh pihak perayu. Pihak responden pun memulakan tindakan ini dan mendakwa bahawa pihak perayu telah memungkiri janji tersebut. Hakim Mahkamah Tinggi mendapati bahawa berdasarkan keseluruhan keterangan, *consensus ad idem* telah wujud di antara kedua-dua belah pihak. Pihak perayu kini merayu kepada Mahkamah Rayuan.

ISU Isu utama adalah sama ada terdapat suatu kontrak yang dimuktamadkan di antara pihak perayu dan pihak responden.

KEPUTUSAN Dalam membenarkan rayuan ini, Mahkamah Rayuan telah memutuskan bahawa keputusan hakim perbicaraan adalah berdasarkan pemahaman keterangan yang tidak mencukupi. Beberapa tawaran telah dibuat oleh perayu pertama kepada pihak responden, akan tetapi kronologi kejadian jelas menunjukkan bahawa setiap kali tawaran dibuat, pihak responden telah menolak tawaran tersebut, dan membuat tawaran balas, dan ini adalah jelas menurut surat-menyurat di antara kedua-dua belah pihak. Maka, ianya tidak boleh dikatakan bahawa wujudnya suatu kontrak yang muktamad.

LAND LAW – Malay reservation land – Charge – Definition of 'Malay' – Whether Malay reservation land may be charged to non-Malay – Kedah Malay Reservations Enactment No 63, sections 2 and 6

JAMALUDIN BIN JAAFAR V AFFIN BANK BHD AND ANOTHER APPEAL

[2016] 12 MLJ 88, Court of Appeal

FACTS The appellant, an individual, had charged his land, a Malay reserve land, to Affin Bank, the respondent. The respondent obtained judgement in default against the appellant and filed a bankruptcy notice followed by a creditor's petition. The appellant opposed the petition, but the application was dismissed. The appellant now appeals on the ground that the third party charge, registered in favour of the respondent as security for the loan granted to one Teh Two Kea (t/a Leong Hin Company), was null and void as the respondent is not a 'Malay' within the meaning of section 2 of the Kedah Malay Reservations Enactment No 63 ("the Kedah Enactment").

ISSUE The main issue was whether section 6 of the Kedah Enactment allowed a Malay reserve land to be charged to the respondent bank, a non-Malay.

HELD In allowing the appeal, the Court of Appeal held that since the respondent is not listed in the Second Schedule, it is therefore a non-Malay. Section 6 of the Kedah Enactment prohibits a non-Malay from holding any right or interest, including a charge in the Malay reserve land that had been charged to it by the appellant. The fact that the bank is a non-natural person is irrelevant. This is because a non-natural person such as a commercial bank, a private limited company or even a society, could qualify as 'Malay' under the Kedah Enactment.

Kedah Malay Reservations Enactment No 63, section 2

"Malay" means a person professing the Muslim religion and habitually speaking the Malay language whose parents one at least is a person of Malayan race or Arab descent.

UNDANG-UNDANG TANAH – Tanah rizab Melayu – Gadaian – Definisi 'Melayu' – Sama ada tanah rizab Melayu boleh digadaikan kepada seorang bukan Melayu – Enakmen Rizab Melayu Kedah No 63, seksyen-seksyen 2 dan 6

JAMALUDIN BIN JAAFAR LWN AFFIN BANK BHD DAN SATU LAGI RAYUAN

[2016] 12 MLJ 88, Mahkamah Rayuan

FAKTA-FAKTA Pihak perayu, seorang individu, telah menggadaikan tanahnya, sebidang tanah rizab Melayu, kepada Affin Bank, pihak responden. Pihak responden telah memperolehi penghakiman ingkar terhadap pihak perayu dan seterusnya memfailkan notis kebankrapan, diikuti dengan petisyen pemiutang. Pihak perayu telah membantah petisyen tersebut, akan tetapi permohonannya telah ditolak. Pihak perayu kini merayu, atas alasan bahawa gadaian pihak ketiga yang telah didaftar untuk kepentingan pihak responden sebagai sekuriti bagi pinjaman yang diberikan kepada Teh Two Kea (b/s Leong Hin Company), adalah terbatal dan tidak sah. Ini adalah kerana pihak responden bukan seorang 'Melayu' seperti yang dimaksudkan dalam seksyen 2 Enakmen Rizab Melayu Kedah No 63 ("Enakmen Kedah tersebut").

ISU Isu utama adalah sama ada seksyen 6 Enakmen Kedah tersebut membenarkan sebidang tanah rizab Melayu digadai kepada responden bank yang merupakan seorang bukan Melayu.

KEPUTUSAN Dalam membenarkan rayuan ini, Mahkamah Rayuan telah memutuskan bahawa oleh sebab responden tidak disenaraikan dalam Jadual Kedua, maka ianya adalah seorang bukan Melayu. Seksyen 6 Enakmen Kedah tersebut melarang seorang bukan Melayu memegang sebarang hak atau kepentingan, termasuk gadaian dalam tanah rizab Melayu, yang telah digadaikan kepadanya oleh pihak perayu. Fakta bahawa bank merupakan seorang bukan semulajadi adalah tidak relevan. Ini adalah kerana seorang bukan semulajadi seperti bank komersial, syarikat sendirian berhad ataupun suatu persatuan, layak sebagai seorang 'Melayu' di bawah Enakmen Kedah tersebut.

COMPANY LAW – Suit by company – Board Resolution – Warrant to act – Whether Board Resolution required for company to appoint solicitor – Companies Act 1965, section 131B

ULIMAS SDN BHD V HI-SUMMIT CONSTRUCTION SDN BHD & OTHER APPEALS

[2017] 2 CLJ 636, Federal Court

FACTS The respondent, a company, had filed a suit ("the Suit") against *Ulimas Sdn Bhd* (first appellant), *Bright Focus Sdn Bhd* (second appellant), and *Konsortium Lapangan Terjaya Sdn Bhd* (third appellant)("the appellants") claiming shares or equity in the third appellant, a joint venture company. It was alleged that the appellants had unlawfully transferred the respondent's shares in the third appellant to the first appellant. Prior to the hearing, the appellants raised a preliminary objection claiming that the law firm acting on behalf of the respondent lacked authority to act in the Suit. Counsel for the respondent failed to produce a resolution of the Board of Directors of the respondent authorising the law firm to act on their behalf, but instead submitted a warrant to act signed by two of the three directors of the respondent. The writ was subsequently struck out by the High Court. The Court of Appeal allowed the respondent's appeal. The appellants appealed to the Federal Court.

ISSUE The main issue was whether a Board Resolution was required for the respondent to commence and continue with the Suit.

HELD In dismissing the appeal, the Federal Court held that there is no provision in the Companies Act 1965[1] requiring a formal Board Resolution in order for a company to appoint solicitors. Further, section 131B of the Companies Act 1965 provides that the power of management in a company rests solely in the hands of the Board of Directors. Thus, the warrant to act was sufficient for the law firm to act on behalf of the respondent company as there was unanimous assent by all directors of the respondent to commence and continue with the Suit.

UNDANG-UNDANG SYARIKAT – Tindakan oleh syarikat – Resolusi Lembaga – Waran untuk bertindak – Sama ada Resolusi Lembaga diperlukan untuk perlantikan peguamcara oleh syarikat – Akta Syarikat 1965, seksyen 131B

ULIMAS SDN BHD LWN HI-SUMMIT CONSTRUCTION SDN BHD & RAYUAN-RAYUAN LAIN

[2017] 2 CLJ 636, Mahkamah Persekutuan

FAKTA-FAKTA Pihak responden, suatu syarikat, telah memfailkan suatu tindakan ("Tindakan tersebut") terhadap *Ulimas Sdn Bhd* (perayu pertama), *Bright Focus Sdn Bhd* (perayu kedua), dan *Konsortium Lapangan Terjaya Sdn Bhd* (perayu ketiga) ("pihak perayu"), menuntut saham ataupun ekuiti dalam perayu ketiga, suatu syarikat usaha-sama. Didakwa bahawa pihak perayu telah memindahkan saham-saham responden daripada perayu ketiga kepada perayu pertama secara tidak sah. Sebelum perbicaraan tersebut, pihak perayu telah membangkitkan bantahan awal dengan tuntutan bahawa firma guaman yang mewakili pihak responden tidak mempunyai kuasa untuk bertindak dalam Tindakan tersebut. Peguam bagi pihak responden telah gagal membentangkan resolusi Lembaga Pengarah pihak responden yang memberi kuasa kepada firma guaman untuk mewakili mereka, tetapi sebaliknya telah menghantar suatu waran untuk bertindak, yang ditandatangani oleh dua daripada tiga pengarah responden. Writ tersebut kemudiannya telah dibatalkan oleh Mahkamah Tinggi. Mahkamah Rayuan telah membenarkan rayuan responden. Pihak perayu sekarang merayu kepada Mahkamah Persekutuan.

ISU Isu utama adalah sama ada Resolusi Lembaga diperlukan oleh responden untuk memulakan dan meneruskan Tindakan tersebut.

KEPUTUSAN Dalam menolak rayuan ini, Mahkamah Persekutuan telah memutuskan bahawa tidak ada peruntukan dalam Akta Syarikat 1965[2] yang memerlukan Resolusi Lembaga rasmi untuk perlantikan peguamcara oleh syarikat. Selanjutnya, seksyen 131B Akta Syarikat 1965 memperuntukkan bahawa kuasa pengurusan sesuatu syarikat itu terletak semata-mata dalam tangan Lembaga Pengarah. Maka waran untuk bertindak adalah mencukupi bagi membenarkan firma guaman bertindak bagi pihak responden, disebabkan adanya persetujuan sebulat suara oleh semua pengarah responden untuk memulakan dan meneruskan Tindakan tersebut.

[1] The Companies Act 1965 is repealed and has been replaced with the Companies Act 2016

[2] Akta Syarikat 1965 telah dimansuhkan dan digantikan dengan Akta Syarikat 2016

BANKRUPTCY

AN UPDATE ON INSOLVENCY ACT 1967

The former Bankruptcy Act 1967 ("the previous Act") has been renamed Insolvency Act 1967 ("the new Act") pursuant to the amendments made *via* the Bankruptcy (Amendment) Act 2017. Although the amendments have been gazetted, its enforcement date is yet to be appointed.

In this article, we attempt to highlight some changes made to the insolvency laws in Malaysia.

BACKGROUND In 2015, it was reported that there were more than 300,000 bankrupts in Malaysia, with a majority of bankrupt individuals within the age group of between 25 and 44 years. Common reasons cited are the failure to repay hire purchase loans and default in personal loans. As such, several changes were made to improve and enhance insolvency laws in Malaysia.

FROM BANKRUPTCY TO INSOLVENCY Although 'bankruptcy' and 'insolvency' are technically two different terminologies, the Bankruptcy Act 1967 is now known as the Insolvency Act 1967.

VOLUNTARY ARRANGEMENT One of the prominent changes is the pre-bankruptcy rescue mechanism known as voluntary arrangement. A voluntary arrangement, which is common in other jurisdictions such as Singapore and the United Kingdom, is a proposal by a debtor to his creditors in connection to the repayment or settlement of the sum owed.

Scope of application An individual debtor, before he is adjudged bankrupt, may propose a voluntary arrangement to his creditors. An insolvent firm, on the other hand, may propose a voluntary arrangement upon obtaining consent from all or majority of its partners. However, this rescue mechanism is available to neither an undischarged bankrupt debtor, nor a limited liability partnership under the Limited Liability Partnerships Act 2012.

Appointment of nominee A debtor who intends to propose a voluntary arrangement is required to appoint a qualified nominee[3] to serve as an independent party to oversee and supervise the implementation of the voluntary arrangement.

Application for Interim Order In addition, a debtor is also required to apply for an Interim Order ("the Order") for the voluntary arrangement from court[4] ("the Court"). The debtor has to demonstrate to the Court that (i) no prior application was made by the applicant in the last 12 months, and (ii) the nominee is willing to act for such voluntary arrangement. The Order is valid for 90 days only and no extension may be granted. During the subsistence of the 90-day period, bankruptcy and other legal proceedings may not be commenced against the debtor, unless permitted by the Court.

Creditors' Meeting During the period of the Order, the nominee shall arrange for a meeting ("the Meeting") with all of the debtor's creditors to secure their approval for the debtor's proposed voluntary arrangement. In the Meeting, the proposed voluntary arrangement will be put to a vote. In order to obtain the approval for the voluntary arrangement, the nominee needs to garner a majority support and at least three-fourths in value of the creditors who are present personally or by a proxy at the Meeting, and voting on the resolution.

However, any proposal or modification to the proposed voluntary arrangement affecting the rights of secured creditors may not be passed, unless they consent. Subsequently, the decision of the Meeting has to be reported to the Court by the nominee and a sealed report containing the terms of the voluntary arrangement has to be served to the debtor and creditors.

Binding effect The proposed voluntary arrangement, if passed at the Meeting, takes effect and binds all creditors who have been notified of the Meeting and entitled to vote at the Meeting, as if they were a party to such voluntary arrangement.

Review However, upon an application by a debtor, nominee or person entitled to vote at the Meeting, the approved voluntary arrangement may be reviewed by the Court on the ground that (i) it unfairly prejudices the interests of the debtor or creditors, or (ii) there was present material irregularity in connection to the Meeting.

[3] See sections 2F and 2G of the new Act for meaning of 'qualified nominee'

[4] The 'court' means the court having jurisdiction in bankruptcy under the new Act

SOCIAL GUARANTOR A social guarantor is a person who offers a guarantee not for profit-making purposes but for any of the following, namely (i) education loan, scholarship, grant for research purposes, (ii) hire-purchase transaction for personal or non-business use, and (iii) housing loan for personal dwelling.

Immunity Under the previous Act, a bankruptcy action may be commenced against a social guarantor when the Court is satisfied that the creditor concerned has exhausted all means of recovering the sum owing. This position is changed under section 5(3) of the new Act, where a social guarantor enjoys immunity from any bankruptcy action.

BANKRUPTCY PROCEEDINGS Some notable changes, both substantive and procedural, have been made to the commencement of bankruptcy proceedings under the new Act.

Increased threshold The previous Act sets the threshold for bankruptcy proceedings at MYR30,000. Under the new Act, the monetary threshold is increased to MYR50,000.

Leave of Court In the past, bankruptcy proceedings may be initiated against a guarantor (other than a social guarantor), when the statutory requirements stipulated in the previous Act are fulfilled. Pursuant to the amendments, a creditor will have to first obtain permission from the Court, before commencing bankruptcy proceedings against a guarantor (other than a social guarantor) under the new Act. In applying such permission, the creditor has to satisfy the Court that he has exhausted all modes of execution and enforcement to recover the debts owed to him by the debtor. This renders the initiation of bankruptcy proceedings more difficult, but offers better protection to the guarantor (other than a social guarantor).

Service of bankruptcy notice The service of bankruptcy notice ("the Notice") has also been amended. In the previous Act, the service of the Notice is required to be effected according to the manner prescribed by the Notice. The Notice is now required to be personally served on a debtor. Further, the court may order for substituted service of the Notice, if the creditor can factually prove that the debtor intends to defeat, delay, or evade personal service by (i) leaving or staying outside of Malaysia, or (ii) absenting himself from his residence or place of business.

DISCHARGE OF BANKRUPT Two new provisions concerning the discharge of a bankrupt have been introduced to the new Act, namely, section 33C on the automatic discharge of a bankrupt and section 33B(2A) on the non-objection to discharge a bankrupt.

Automatic discharge The previous Act allowed the Director General of Insolvency ("the Director") to exercise his discretion in discharging a bankrupt debtor after five years from the pronouncement of the bankruptcy order. The position in the new Act has been enhanced where a bankrupt shall be discharged from bankruptcy, on the expiration of three years from the date of submission of his statement of affairs, once he (i) achieves the target contribution of his provable debt, and (ii) renders an account of monies and property to the Director.

Non-objection Under the previous Act, a creditor may object to the discharge of a bankrupt by furnishing a notice of objection stating the reasons of his objection. However, the new section 33B(2A) of the new Act allows the discharge of a bankrupt without objection, if the bankrupt is (i) a social guarantor, (ii) a person with disabilities under the Persons with Disabilities Act 2008, (iii) a deceased bankrupt, or (iv) suffering a serious illness certified by a Government Medical Officer.

"A bankrupt individual who fulfills the criteria for release has the potential to be released faster to stimulate the country's economic growth and development and at the same time creditors would benefit when reasonable contributions are made by debtors." – Datuk Seri Azalina Othman, Minister in the Prime Minister's Department.

CONCLUSION The changes made to the new Act are welcomed as the interests of both debtors and creditors are protected and an alternate avenue for settlement of debts has been introduced. Furthermore, the interests of debtors are also enhanced as the creditors will now have to comply with more stringent procedural requirements under the new Act.

破产法

1967年破产法令之点评 在《2017年破产法令（修正）法案》（后称“修正案”）的修订下，原有的Bankruptcy Act 1967（后称“前法令”）已更名为Insolvency Act 1967（后称“新法令”）。虽然修正案已在宪报上颁布，但是修正案的生效日期还未定夺。

我们将在这篇文章介绍修正案为马来西亚破产法令所带来的改变。

序言 截至2015年，数据显示马来西亚拥有超过三十万名破产人士，当中以二十五岁至四十四岁者居高。无法偿还车贷和拖欠个人贷款是致使他们破产的主要原因。针对上述现象，政府已修订马来西亚原有的破产法令，以改进并增强相关的法律条文。

更名 虽然“Bankruptcy”和“Insolvency”是不同含义的词汇，但是原有的Bankruptcy Act 1967已更名为Insolvency Act 1967。

自愿安排 在修正案中，“自愿安排[5]”是其中一项显著的改变。自愿安排是指欠债人在破产前向他的债权人提出有关偿还贷款或债务结算的建议。这项新拯救机制[6]在国外如新加坡和英国是非常普遍的。

适用范围 在被宣布破产之前，欠债人可向债权人提出自愿安排。一个无法偿还债务的企业必须在取得全数或大部分合伙人的同意之后，才可以提出自愿安排。然而，破产人士及有限责任合伙[7]不能申请这一项拯救机制。

委任代名人 有意提出自愿安排的欠债人必须委任一名由新法令所规定的合格代名人[8]作为独立的一方，以监督和管理关于实施自愿安排的事宜。

申请临时庭令 除此之外，欠债人也必须为该自愿安排向法庭[9]申请临时庭令（后称“庭令”）。在申请该庭令时，欠债人必须向法庭表明以下事项：（一）申请人在过去的十二个月里不曾提出任何申请；（二）该代名人愿意办理欠债人提出的自愿安排。庭令的有效期限为九十天，而且该庭令的有效期是不能被延长的。在庭令实施的九十天内，除非获得法庭的批准，任何针对欠债人的破产诉讼和其他法律程序都不能启动。

债权人会议 在庭令的生效期内，代名人必须召开一个债权人会议（后称“会议”），并邀请所有债权人出席。该会议的目的是让债权人通过所提议的自愿安排。在会议中，债权人或其代表将对所提议的自愿安排进行表决。代名人需获取出席会议并在会议中表决的债权人或其代表的多数支持，而且支持 该自愿安排的债权人或其代表须持有至少所有出席会议并在会议中表决的债权人债务总额的四分之三，该自愿安排才可以通过。

可是，有关自愿安排的建议或修改，除非获得有抵押债权人[10]的同意，任何影响有抵押债权人的建议或修改都不能在会议里通过。接着，代名人必须向法庭呈报该会议的决定,并把一份含有相关自愿安排条款的报告送达[11]至欠债人和债权人。

约束力 若该自愿安排在会议里通过，该自愿安排将生效并约束所有已接获会议通知并有表决权的债权人。尽管他们没有出席会议，该自愿安排的条款依然对他们有约束力，等同他们也是参与该自愿安排的一方。

审核 欠债人、代名人或在会议中有表决权的人士可入禀法庭申请审核已获准的自愿安排。申请审核的理据为：（一）该自愿安排不公平地损害欠债人或债权人的利益；或（二）该会议涉及了严重的不当行为。

社会担保人 社会担保人是一名以非盈利目的，为以下其中一项事项提供担保的人士：（一）教育贷款、奖学金、研究基金；或（二）私人或非商业用途车贷；或（三）个人住宅的房屋贷款。

豁免 在前法令下，当债权人向法庭证实他已用尽所有向欠债人追讨债务的途径后，该债权人便可入禀法庭对该社会担保人启动破产诉讼。新法令的第5(3)条文改变了该法律立场。在该条文下，任何对社会担保人的破产诉讼将被豁免。

破产诉讼 新法令在启动破产诉讼方面，作出了多项显著的程序性和实质性的调整。

更高的债务门槛 新法令设下的债务门槛已从原有的马币三万令吉提高至马币五万令吉。

法庭的许可 在前法令下，只要债权人符合法定要求，便可以对担保人（社会担保人除外）启动破产诉讼。修订后，新法令要求债权人在对担保人

5 Voluntary Arrangement
6 A new rescue mechanism
7 Limited Liability Partnerships Act 2012
8 关于“合格代名人”的规定，请参阅新法令第2F和2G条文
9 法庭指的是拥有破产法令相关的管辖权限的法庭
10 Secured creditors
11 Service of document

（社会担保人除外）启动破产诉讼前，得先获取法庭的许可。在申请该法庭的许可时，债权人得向法庭证明债权人已用尽所有执行[12]及强制执行[13]去追讨欠债人的债务。这让启动破产程序更为困难，却对担保人（社会担保人除外）提供了更好的保护。

破产通知书的送达 破产通知书相关的送达程序也已修订。在前法令下，破产通知书必须根据通知书里规定的方式送达。如今，破产通知书必须以面交的方式[14]送达至欠债人。此外，当债权人向法庭确实地证明该欠债人以：（一）出境马来西亚或滞留国外；或（二）不在他的住所或营业地点为理由，意图挫败、耽搁或逃避该破产通知书的当面交送，法庭便可允许以交替送达[15]的方式送达该破产通知书。

脱离穷籍 新法令内增设了两项脱离穷籍的新条文，分别为：第33C[自动脱离穷籍]和第33B(2A)[无异议脱离穷籍]的相关条文。

自动脱离穷籍 前法令允许报穷局总监在破产令宣告的五年后，使用其自主裁量权解除破产人士的穷籍。新法令已加强该法律立场，破产人士在提呈资产负债状况说明书的三年后将自动解除穷籍，惟该破产人士需：（一）达到特定的债务偿还目标，并（二）呈交一份财务和资产报告给报穷局总监。

无异议脱离穷籍 前法令允许债权人反对有关破产人士脱离穷籍。债权人可在反对书里列明反对原因并递交该反对书予报穷局总监。然而，在新法令内新增的第33B(2A)条文下，若破产人士是:(一)社会担保人；或（二）在2008年残疾人士法令下的法定残疾人士；或（三）已故破产人士；或（四）由政府医生[16]证实患有重病的破产人士，该条文将无异议地解除相关破产人士的穷籍。

总结 新法令除了保护欠债人和债权人双方的利益，同时也增设一个解决债务问题的新途径，所以备受各界欢迎。此外，因新法令对债权人提出更严谨的程序要求，欠债人的利益保障也相对地被提高。

[12] Execution
[13] Enforcement
[14] Personal service
[15] Substituted service
[16] Government Medical Officer

TORT

LOSS OF GENETIC AFFINITY... A NEW HEAD FOR DAMAGES? The Court of Appeal of Singapore recently delivered a landmark judgment in *ACB v Thomson Medical Pte Ltd and others*[17], awarding damages for "loss of genetic affinity", a first in Singapore. The case involved a baby conceived with a wrong sperm in an *in-vitro fertilisation* (IVF) mix-up.

In this article, we examine the facts, issues, and rulings of the case.

FACTS In 2010, the appellant, and her husband went to the Thomson Medical Centre (Singapore), the respondent, to undergo an IVF treatment. Only after the birth of the baby ("Baby P"), did they realise that a mistake was made, resulting in the fertilisation of the appellant's ovum and a stranger's sperm, instead of the appellant's husband.

THE SUIT The appellant sued the respondent for negligence and breach of contract, and sought, among others, damages for Baby P's upkeep. This included education costs, travelling expenses, medical expenses, and cost of feeding and caring for Baby P until she is financially self-reliant. The respondents conceded liability but argued that no damages should be awarded for the upkeep of the child.

ISSUE The main issue in the High Court was whether the appellant was entitled to bring a claim for the upkeep costs of Baby P.

HIGH COURT The High Court refused to award the upkeep costs claiming that the case was distinguishable from cases of unwanted pregnancies whereby cost was a concern. In this case, the appellant had wanted a child, albeit with her husband.

[17] [2017] SGCA 20

The High Court judge was also of the opinion that there were cogent policy considerations against finding liability for upkeep, including (i) the moral offence of awarding compensation for the birth of a normal and healthy child, (ii) the detrimental impact such award of damages might have on Baby P's well-being, and (iii) how such award would be antithetical to the essence of a parent-child relationship.

COURT OF APPEAL The Court of Appeal ("the Court"), in arriving at its decision, had considered the following factors.

Upkeep costs The Court held against the award of upkeep costs citing that the obligation to maintain one's child is an obligation at the heart of parenthood thus cannot be a legally cognisable head of loss. Further, to recognise the upkeep claim would be fundamentally inconsistent with the nature of the parent-child relationship which would place the appellant in a position where her personal interests as a litigant would conflict with her duties as a parent.

Genetic affinity In this case, the Court had created a new compensation award for "loss of genetic affinity", which basically refers to the cost and hurt to a parent for the deprivation of having a baby with her spouse *via* reproductive technology due to the negligence of a third party.

The Court recognised that the ordinary human experience is that parents and children are bound by blood-ties and the sharing of physical traits, and that the biological experience carries deep socio-cultural significance. Thus, the emotional bond between parent and child is forged in part through a sense of common ancestry and recognition, and physical appearance. In fact, it was also found that certain quarters find that genetic continuity and biological lineage is deeply important to religious and cultural belongings.

Therefore, the Court held that the appellant's interest in maintaining the integrity of her reproductive plans in the specific sense, whereby she made a conscious decision to have a child with her husband, to maintain an intergenerational link to preserve such "affinity", is one that should be recognised and protected. The appellant, being denied of such experience due to the negligence of others, has lost something of profound significance and has suffered serious wrong, which should sound in damages.

The end result was the Court placed the compensation sum at 30 per cent of the financial costs of raising Baby P, with the precise sum to be assessed by the High Court.

WHO IS BABY P'S FATHER? Although the dispute between Thomson Medical Centre and Baby P's family has been resolved, the question that remains is the status of the biological father of Baby P. Although he was not a party to the case, the question that arises is, what happens if he makes a claim on Baby P? Does he have the right as a biological parent?

In 2013, the Status of Children (Assisted Reproduction Technology) Act 2013 ("the Act") came into force in Singapore, and according to the Act, interested parties involved in such mix-ups can apply to the court to be declared as parents of the child within two years of the mistake being discovered. However, the Act makes no mention of cases occurring prior to its enforcement date.

CONCLUSION Technological advances in the field of medicine are constantly modernised, thus the law too should evolve with time and adapt itself to such changing circumstances. While the case is deemed as a development in the legal field, the grey area of legal rights of the biological father remains to be established and clarified.

Following this decision, Singapore has decided to work on a bioethics casebook ("the Casebook"), which seeks to assist courtrooms to navigate the complexities involving medical and biological research. Authors include worldwide experts in law, medicine, and ethics. The Casebook, an initiative by the UNESCO Bioethics, is expected to be published by early 2018.

These developments may require authorities in Malaysia to consider not only laws dealing with assisted reproductive technology but also to amend existing laws dealing with the presumption of fatherhood and legitimacy as provided for in section 112 of the Malaysian Evidence Act 1950.

INTELLECTUAL PROPERTY

GENERICIDE... DEATH OF A BRAND What do *Thermos, Escalator,* and *Aspirin* have in common? They are all victims of 'genericide', the term used to explain the killing of a brand name from its generic use in everyday conversations.

In this article, we discuss the general concept of trademark, its misuse, and measures taken to protect trademarks.

INTRODUCTION Trademark is a word, name, slogan, symbol, design, or other designation that identifies and distinguishes the source of a product or service. Trademarks must be distinctive in order for the consumers to recognise the mark from one goods or services to another.

Genericide occurs when a trademark is so well established that the public comes to understand it as the name of the product or service itself, instead of identifying the exclusive source of the product or services, rendering it as a generic term. Trademarks that become generic are no longer entitled to protection as it loses its distinctiveness, thus losing its function as a trademark.

TRADEMARK GRAVEYARD Genericide is indeed the cruelest irony. Companies spend millions building their brand and making it into a household name only to have it destroyed by its own popularity. Some examples of brands that have suffered as a result of genericide include *Escalator, Aspirin,* and *Cellophane*.

In *Haughton Elevator Co v Seeberger*[18], it was held that the word *escalator* had become generic due to the company's own negligence. The company had used the word *escalator* together with the generic term 'elevator' in its advertisements as well as in a draft standard safety code, in which they failed to capitalise the word *escalator*, as provided in their original trademark application. *Escalator* is now a generic term that refers to a moving stairway.

In *Bayer Co v United Drug Co*[19], *Aspirin*, the brand name for acetylsalicylic acid, was created in 1897 and trademarked by German Pharmaceuticals, *Bayer AG*. It was, however, forced to give up its right to the *Aspirin* trademark in the *Treaty of Versailles* in 1919.

In *DuPont Cellophane Co v Waxed Products Co*[20], *Cellophane* was created by chemist Jacques E Brandenberger and patented in 1912. *Cellophane* was deemed genericised in the United States as it was found that the word was used in a generic sense a number of times, including by Mr Brandenberger himself.

Most recently, however, in *Elliott v Google, Inc*,[21] *Google* managed to defeat a genericide lawsuit. The court ruled that *Google* still retains its trademark even if the term 'Google' has become known for searching the Internet. One of the reasons given was because *Google* is much more than merely a search engine.

HOW TO PREVENT GENERICIDE There are several steps that may be taken to protect the trademarks. For instance, if the product is new and there is no existing generic term for it, it is then important to create one. The generic term, and not the trademark, should be used to show plurality. For example, it should be two OREO cookies, instead of two OREOs.

In addition, the trademark should not be used as a verb. For instance, "Please make copies of this on the XEROX copier", instead of, "Please XEROX these".

It is also important to use the trademark across all media and advertising consistently. Do not use the trademark as the name of the product itself in the advertisements or within internal correspondences. It is important to educate the public on the proper usage of the trademarks and the consequences of such misuse.

[18] *Haughton Elevator Co v Seeberger (Otis Elevator Co.)*, 85 USPQ 80 (Comm Pat 1950)

[19] *Bayer Co v United Drug Co* 272 F 505 (SDNY 1921)

[20] *DuPont Cellophane Co v Waxed Products Co* 85 F 2d 75 (2d Circa 1936)

[21] *Elliott v Google, Inc* No.15-15809 (9th Cir. 2017)

AMENDMENT ACT

LABUAN BUSINESS ACTIVITY TAX (AMENDMENT) ACT 2017

National Language
Akta Cukai Aktiviti Perniagaan Labuan (Pindaan) 2017

No
A1532

Date of coming into operation
19 May 2017

Notes
The highlight of the amending Act is the introduction of section 21(2) which imposes a penalty of a fine not more than MYR1 million or imprisonment for a term not exceeding two years, or both, for any contravention or non-compliance with its regulations.

SUBSIDIARY LEGISLATION

- PU (B) 174/2017: Rent of Parcel or Provisional Block – *Effective date: 1 January 2018*
- PU (A) 158/2017: Child (Child Protection Team and Child Welfare Team) Regulations 2017 – *Effective date: 1 June 2017*
- PU (A) 133/2017: Capital Markets and Services (Amendment of Schedules 2 and 3) Order 2017 – *Effective date: 18 May 2017*
- PU (A) 138/2017: Central Bank of Malaysia (Prescribed Financial Institution) Order 2017 – *Effective date: 15 May 2017*
- PU (A) 124/2017: Competition (Appeal Tribunal) Regulations 2017 – *Effective date: 2 May 2017*

GUIDELINES / RULES / CIRCULARS / DIRECTIVES AND PRACTICE NOTES ISSUED BETWEEN APRIL AND JUNE 2017 BY BANK NEGARA MALAYSIA, BURSA MALAYSIA AND SECURITIES COMMISSION MALAYSIA

BANK NEGARA MALAYSIA (BNM)

- BNM Policy Document on Capital Funds for Islamic Banks – *Effective date: 3 May 2017*
- BNM Policy Document on Capital Funds – *Effective date: 3 May 2017*
- BNM Policy Document on Regulated Short-Selling of Securities in the Wholesale Money Market – *Effective date: 2 May 2017*
- BNM Policy Document on Code of Conduct for Malaysia Wholesale Financial Markets – *Effective date: 2 May 2017*
- BNM Policy Document on *Kafalah – Effective date: 1 January 2018 except for Part E which shall take effect immediately upon the issuance of the policy document on 13 April 2017*

BURSA MALAYSIA

- Consolidated Rules of Bursa Malaysia Depository Sdn Bhd – *As at: 21 April 2017*

SECURITIES COMMISSION

- SC Guidelines on Compliance Function for Fund Management Companies – *Revised on: 9 May 2017*
- SC Guidelines on Licensing Handbook – *Revised on: 9 May 2017*
- SC Guidelines for the Offering, Marketing and Distribution of Foreign Funds – *Revised on: 4 May 2017*
- Malaysian Code on Corporate Governance 2017 – *Effective date: 26 April 2017*
- SC Guidelines on Regulated Short-Selling of Corporate Bonds – *Effective date: 13 April 2017*

BRIEF-TAKE

The Employment & Industrial Relations Practice Group of
ZUL RAFIQUE *& partners* is named **Labour and Employment Law Firm of the Year**
at the *ALB Malaysia Law Awards* held in Kuala Lumpur in April 2017.

THE BRIEFCASE

The BriefCase 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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