

# THE BRIEF *Case*

ZUL RAFIQUE & partners named Outstanding Firm by asialaw Profiles 2019, and Top Tier Firm from Legal 500 Asia Pacific 2018 and IFLR1000 2019.



Thank you for your trust and confidence in us.



## A BRIEF NOTE...

by Dato' Zulkifly Rafique

### *The Playhouse Project...*

ZUL RAFIQUE & partners is delighted to announce that we were declared *Outstanding Firm* by asialaw Profiles 2019, and *Top Tier Firm* from Legal 500 Asia Pacific 2018 and IFLR1000 2019.

Our partner, Ms Loh Mei Mei, was also named one of IFLR1000's *Women Leaders 2018*. Ms Mei Mei fronts the firm's Banking and Finance practice group and has advised on landmark conventional and Islamic financing transactions in Malaysia.

Congratulations to all on the achievement!

ZUL RAFIQUE & partners recognises the challenges and commitment of our female staff outside of office as they usually assume the role of the main caregiver of their family. As such, we have launched the "Playhouse Project", headed by our partner, Ms Idza Hajar, an initiative by the firm which seeks to collaborate with registered nursery institutions and creating a panel list of day care centres/ kindergartens/ play schools for our staff. We believe that with the success of the project, our staff would have the ease of mind which would increase their work performance and productivity.

With that said, we would like to thank all clients and friends for their support over the years and to wish all of you a very *Happy New Year*.

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### page 12 BRIEFLY...

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- Sales Tax Act 2018
- Service Tax Act 2018
- Malaysian Anti-Corruption Commission (Amendment) Act 2018
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- Guidelines/Rules/Circulars/Directives and Practice Notes issued between June and November 2018 by Bank Negara Malaysia, Bursa Malaysia and Securities Commission Malaysia

- **20-MINUTE TIME LIMIT FOR ORAL SUBMISSIONS** Chief Justice *Tan Sri Richard Malanjum* has proposed a time limit of 20 minutes for oral submissions and to highlight the “killer points” first instead of mentioning them towards the end in order to promote effective submissions and expedite court proceedings.
- **30 YEARS LIFE IMPRISONMENT OVER DEATH PENALTY** Those whose sentences have been commuted from death penalty to 30 years life imprisonment following the proposed abolishment of the death penalty punishment in Malaysia will have to serve out their full jail term running from the date the pardons board commutes their death sentences to life imprisonment.
- **CHILDREN AND YOUNG PERSONS BILL** The *Dewan Rakyat* has passed the Children and Young Persons (Employment) (Amendment) Bill 2018 which aims to improve protection for the group in employment and to ensure the labour laws of the country were in line with international standards especially the conventions of International Labour Organization (ILO).
- **GENTING SUES TWENTY-FIRST CENTURY FOX, THE WALT DISNEY CO FOR MORE THAN USD1 BILLION** *Genting Malaysia Bhd* is suing *Twenty-First Century Fox Inc* and *The Walt Disney Co* for more than USD1 billion (MYR4.19 billion) for the termination of a memorandum of agreement (MoA) relating to the development of a Fox-branded theme park at *Resorts World Genting* in Malaysia.
- **GOVERNMENT CAN SUE INDIVIDUALS FOR DEFAMATION** In a landmark ruling, the Federal Court held that public authorities at federal and state levels can sue individuals for defamation. The case concerned the filing of a defamation suit against *Chong* by the Sarawak Government and the State Financial Authority over allegations of disappearing money which was published in a Chinese national daily and a news portal distributed by *Chong*.
- **LOOB AND LA KAFFA'S CHATIME DISPUTE SETTLED** *Loob Holding Sdn Bhd* of *Tealive* and *La Kaffa International Co Ltd* of Taiwan of *Chatime* have reached an out-of-court settlement to resolve their franchise disputes. Both parties have agreed to withdraw all proceedings in Malaysian courts and arbitration in Singapore.
- **MAH SING, LAZADA FIRST TO SELL HOUSES ONLINE IN SOUTHEAST ASIA** *Mah Sing Group Bhd* has joined forces with e-commerce platform *Lazada Malaysia* to become the first to offer properties online in Southeast Asia.
- **MANDATORY CHILDCARE CENTRES BEGINNING 2019** Childcare facilities needs to be made mandatory in an effort to retain women in the workforce as reiterated by the Deputy Women, Family and Community Development Minister. The setting up of childcare centres must be prioritised and will be made mandatory to all ministries by 2019.
- **SERVICES TAX AT 6% AND SALE OF GOODS TAX AT 10%** Starting 1 September 2018, there will be an imposition of 6% tax under the reintroduced Sales and Services Tax (SST), and a 10% tax on the sale of goods.
- **SPECIAL COURT FOR SEXUAL CRIMES AGAINST CHILDREN EXPANDED** The Federal Court Chief Registrar's Office is preparing to expand the Special Court for Sexual Crimes Against Children (“the Court”), which focuses on cases such as child pornography, child grooming and child sexual assault, to Selangor, Pahang and Johor. The Court has been in operation in Putrajaya since June 2017 and in Kuching, Sarawak, since 18 April 2018.
- **SMALL LAW FIRMS CAN COME TOGETHER UNDER GLP** The Bar Council has introduced the Group Law Practice (GLP), an initiative to help lawyers from small firms such as sole proprietorship and small partnerships to increase competitiveness and reduce its operating costs by allowing them to operate under one roof as part of the Bar Council's reforms.

- **TEACHER SUED FOR NOT TEACHING** A former secondary school student in rural Sabah is suing her teacher for not teaching English in her Form Four class back in 2015 which caused her to fail her English subject in the *Sijil Pelajaran Malaysia* (SPM) examination. She claimed that the absence of the teacher was a denial of her rights and her classmates as it was the teacher's duty to teach.
- **WHETHER PRIME MINISTER IS A PUBLIC OFFICER** The Court of Appeal has granted leave to appeal to the Federal Court to decide on the issue of whether or not the Prime Minister is a public officer and whether the definition of 'public officer' should be confined to what is stated in the Interpretation Act 1948 and the Federal Constitution. The case involved the lawsuit against former Prime Minister *Datuk Seri Najib Abdul Razak* and the Government over the alleged misfeasance in public office.
- **FIRST SINGAPORE TRIAL INVOLVING BITCOIN** The Singapore International Commercial Court ("the Court") will hear its first legal dispute involving the cryptocurrency bitcoin between an electronic market maker, *B2C2*, and cryptocurrency exchange operator, *Quoine*, over a "unilateral reversal" of seven orders on its platform. The Court has to decide whether a number of trades done in April last year had been wrongfully reversed and whether proceeds were deducted without authorisation.
- **INDIA: ANTI-CORRUPTION LEGISLATION AMENDED TO COVER BRIBE-GIVER** India has passed the Prevention of Corruption (Amendment) Act 2018 which now criminalises the act of paying bribes to government officials by both businesses and individuals. Those found guilty may be subjected to up to 7 years imprisonment. The amendment widens the scope of those who may be criminalised amid the rise in corruption cases in India.
- **INDIA: DECRIMINALISATION OF ADULTERY** India's Supreme Court has ruled that adultery is no longer a criminal offence after a petition was made out to the Supreme Court claiming the law as arbitrary and discriminatory against men and women. The previous adultery laws dictates that women could not be punished as an abettor and that men were considered to be a seducer instead. Women were also not allowed to file a complaint against an adulterous husband.
- **RECREATIONAL MARIJUANA LEGAL IN CANADA** Canada became the second country after Uruguay to legalise possession and use of recreational cannabis, making it the world's second and largest country with a legal national marijuana marketplace. Under the new law, adults will be able to buy cannabis oil, seeds and plants, and dried cannabis from licensed producers and retailers, and to possess a maximum of 30 grams of dried cannabis in public. Selling of cannabis to a minor will, however, incur imprisonment of up to 14 years.

## AROUND THE WORLD... IN-BRIEF

- **CANADA: FATHER SUES MCDONALD'S OVER HAPPY MEALS** A Quebec father, *Antonio Bramante*, is the lead plaintiff in a class-action lawsuit against *McDonald's*, alleging that the company's *Happy Meals* violate the province's strict youth consumer protection laws against advertising to children under 13 years of age.
- **DUBAI TO BUILD WORLD'S FIRST 'COURT OF THE BLOCKCHAIN'** The Dubai International Financial Centre (DIFC) Courts has announced that it is partnering with the *Smart Dubai* initiative to set up the world's first 'Court of the Blockchain'. The aim of the alliance is to explore how Blockchain can aid verification of court judgments for cross-border enforcement, which includes streamlining the judicial process, removing document duplications and driving greater judicial efficiency across the legal ecosystem.

- **SINGAPORE: COURT REJECTS USE OF WHATSAPP AS EVIDENCE** The High Court of Singapore has dismissed a woman's bid to use *WhatsApp* messages from her deceased husband as evidence to support her claim that he had wanted all his Central Provident Fund (CPF) money to go to their two sons. It was held that a CPF member's funds must be bequeathed through nominations or distributed via intestacy laws. 🌀
- **SINGAPORE: COURT DISMISSES 'BETRAYAL' LAWSUIT** The Singapore High Court has dismissed a lawsuit brought by the former chief executive officer (CEO), *Mr Cheo*, of a social media company called *Netccentric*, who accused his co-founder, *Mr Tiah*, of "betrayal" on the ground that there was no evidence to support *Mr Cheo*'s claim that *Mr Tiah* had agreed to let him remain as *Netccentric*'s CEO for three years. 🌀
- **SINGAPORE: EVENTUAL OWNER PAYS MORTGAGE PENDING PROPERTY TRANSFER IN A DIVORCE** The Court of Appeal in Singapore decided that in divorce cases where one party is given the option to take over the other's share of the matrimonial property, mortgage payments should be borne by the eventual owner of the property since the payment of any outstanding mortgage would solely benefit that person. 🌀
- **SINGAPORE: NETFLIX TAX IN 2020** The Singapore Government, starting 2020, will be able to collect GST on overseas services via the Singapore Goods and Services Tax (Amendment) Bill that was recently passed. Overseas vendor registration regime will be imposed on business-to-consumer services, including video streaming, apps, listing fees on electronic marketplaces, software and online subscription fees. However this only applies to companies with an annual global turnover above SGD1 million and makes more than SGD100 thousand in providing digital services to Singapore. 🌀
- **SINGAPORE: 'PAIN' DAMAGES IS NOT A MATRIMONIAL ASSET** The Singapore High Court overturned an earlier decision by a district judge to include compensation awarded for pain and suffering in the pool of assets to be divided between husband and wife after a divorce as this is not acquired by a spouse's efforts during marriage. 🌀
- **SINGAPORE: UBER APPEALS AGAINST CCCS'S DEAL WITH GRAB** Uber has decided to appeal independently from Grab against the decision of the Competition and Consumer Commission of Singapore (CCCS) that its merger with Grab had driven up prices and violated the city-state's competition laws and on the ground that the CCCS's claims were "unsupported and incorrect". 🌀
- **SOUTH KOREA'S TOP COURT ACQUITS MAN WHO REFUSED TO SERVE IN THE MILITARY** The fate of more than 900 conscientious objectors who refused to serve the mandatory service in South Korea's armed forces is expected to change after the Supreme Court acquitted a man who refused to serve in the military because of his religious beliefs. 🌀
- **SWEDEN: MUSLIM WOMAN REFUSED HANDSHAKE AT INTERVIEW WINS** The Swedish labour court ruled that the company that ended a Muslim woman's interview when she declined to shake the hand of a male interviewer for religious reasons had discriminated against her and ordered the company to pay 40,000 kronor (USD4,350) in compensation. 🌀
- **US: GIRL SCOUTS SUE BOY SCOUTS** The Girl Scouts of the United States of America has filed a lawsuit against the Boy Scouts of America after the latter announced that they would rename the 'Boy Scouts of America' to 'Scouts BSA' as this change could erode their brand and cause confusion. They are seeking damages and an injunction against trademark breaches. 🌀
- **WASHINGTON ABOLISHES DEATH PENALTY** The Supreme Court in Washington has abolished the death penalty and ruled that the punishment was applied in an "arbitrary and racially biased manner". Washington is the 20<sup>th</sup> US State to ban death penalty. 🌀

## FINANCE

**THE 2019 BUDGET... BRIEFLY** The 2019 Budget was unveiled by the Finance Minister, *Lim Guan Eng*, on 2 November 2018 and was passed by the *Dewan Rakyat* on 6 December 2018. The theme of the Budget was “A Resurgent Malaysia, A Dynamic Economy, A Prosperous Society”.

In this article, we brief our readers on the highlights of the Budget 2019.

**TAX** The Goods and Services Tax is zero-rated and has been replaced with the Sales and Services Tax (SST) on 1 September 2018. The Government, starting from 1 January 2019, will grant exemptions for specific business-to-business transactions between service tax registered persons. Imported services will also be subjected to service tax. Online services such as downloaded software, music, video or digital advertising of foreign service providers will be required to register with the Royal Malaysian Customs and thereafter charge and remit the relevant service tax. A credit system for sales tax deduction will be introduced to assist small manufacturers who purchase manufacturing inputs from importers instead of other registered manufacturers.

### SPECIAL VOLUNTARY DISCLOSURE

**PROGRAM** The Special Voluntary Disclosure Program encourages taxpayers to voluntarily declare any unreported income, including offshore accounts, in exchange for reduced penalty rates from 3 November 2018 to 30 June 2019. Penalty for disclosures made between 3 November 2018 and 31 March 2019 is 10% of the tax-payable while the penalty for disclosures between 1 April 2019 and 30 June 2019, is 15%. After 30 June 2019, penalty rates will range from 80% to the maximum 300% as provided under existing laws.

**REAL PROPERTY GAINS TAX (“RPGT”)** The RPGT rate will be revised for disposals of properties or shares in property holding companies after the fifth year. The RPGT rate for companies and foreigners has increased from 5% to 10% while for Malaysian individuals, an increment from 0% to 5%. However low-cost, low-medium cost and affordable housing with prices below MYR200,000 will be exempted.

**STAMP DUTY** The stamp duty on transfer of property valued at more than MYR1 million will increase from 3% to 4%. Stamp duty charges will also be waived for 6 months only, effective January 2019, for first-time home purchases valued between MYR300,001 and MYR1 million. This is part of a National Home Ownership Campaign whereby developers are expected to offer a minimum price discount of 10% for these residential properties.

**FINANCIAL AID** The *Bantuan Sara Hidup* (BSH) grants for the B40<sup>1</sup> households will be continued. Beginning January 2019, every household with a monthly income of MYR2,000 and below will receive MYR1,000, those with a monthly income between MYR2,001 and MYR3,000 will receive MYR750 and those earning MYR3,001 to MYR4,000 monthly will receive MYR500. An additional MYR120 will be given to every child below 18 years old, with an exception to the disabled, with a maximum of four children.

**EMPLOYMENT** Policies will be introduced to encourage employment for those who have passed the retirement age of 60. Effective 1 January 2019, the employer portion of the Employment Provident Fund (EPF) contributions will be reduced to 4% from the current 6%. The mandatory employee contribution will also be zeroed, in order to boost disposable income of working retirees. Further, an additional tax deduction to employers will be given to those who employ them at a minimum monthly salary of MYR4,000. An Industrial Appeals Court will also be set up in order to expedite the resolution of industrial disputes between employers and employees. The Employment Insurance Scheme (EIS) will also be implemented effective 1 January 2019 to assist those who have lost employment. Housewives will be placed under *EPF i-SURI* contribution scheme where husbands are given incentives to contribute to their wives' retirement savings. The Government will contribute MYR40 a month for husbands who contribute at least MYR5 monthly.

**DOMESTIC TOURISM** In a bid to encourage domestic tourism, the Government has proposed to impose a departure levy for all outbound travelers by air effective 1 June 2019. The rate proposed is MYR20 for outbound travelers to ASEAN countries and MYR40 to countries other than ASEAN.


<sup>1</sup> Refers to the bottom 40% of households with a monthly income of MYR3,900 and below

**MINIMUM WAGE** The minimum wage will be raised to MYR1,100 per month for Malaysia effective 1 January 2019.

**SODA TAX** In an effort to tackle obesity, 'sugar sweetened beverages' will be subjected to excise duty. The duty proposed is MYR0.40 per litre, effective 1 April 2019, for non-alcoholic beverages and fruit or vegetable juice containing added sugars of more than 5gm and 12gm per 100ml respectively.

**AFFORDABLE HOUSING** A fund amounting to MYR1 billion will be established by the Central Bank of Malaysia to assist first time buyers earning less than MYR2,300 monthly to purchase affordable homes priced up to MYR150,000. The fund will be available from 1 January 2019 for two years or until exhausted, at participating financial institutions through a concessionary financing rate as low as only 3.5% per annum.

First time home-buyers purchasing residential properties priced up to MYR500,000 will be exempted from stamp duty of up to MYR300,000 on sale and purchase agreements as well as loan agreements for a period of two years until December 2020. Construction and building materials will also be exempted from SST in order to secure commitment from the Real Estate Housing Developers Association (REHDA) for a reduction of 10% in the price of houses. The Government will also provide an alternative source of financing for first time buyers via "Property Crowdfunding" platforms, regulated by the Securities Commission under the peer-to-peer financing framework.

**SMALL MEDIUM ENTERPRISES (SME)** A MYR4.5 billion SME Loan Fund will be made available via commercial financial institutions with a 60% guarantee from *Skim Jaminan Pembiayaan Perniagaan* including MYR1 billion for *Bumiputera* SMEs. The corporate income tax rate will also be reduced from 18% to 17% on the first MYR500,000 of chargeable income for SMEs with less than MYR2.5 million in paid up capital. There will also be a MYR1 billion SME Syariah Compliant Financing Scheme with a subsidy of 2% profit rate, MYR200 million by *Permodalan Usahawan Malaysia Berhad* for wholesale and retail industry including the purchase of business premises to be rented to *Bumiputera* SMES, and MYR100 million to *TEKUN Nasional* to finance small entrepreneurs. 

## PERSONAL DATA PROTECTION

### GENERAL DATA PROTECTION REGULATION (GDPR)...

The internet has dominated people from all walks of life with the online culture taking the world by storm. There is indeed an undeniable shift of information into cyberspace with individuals, companies and organisations taking their businesses online in a race to be the most technologically advance. Alas, issues concerning breaches of data surfaced, with millions of users' data exposed. Thus, in light of the major privacy breaches, the European Union ("EU") has adopted the General Data Protection Regulation<sup>2</sup> ("GDPR") in order to regulate and strengthen data protection of individuals in the EU.

**WHAT IS GDPR?** GDPR is a new set of rules designed to give EU citizens more control on their privacy specifically on personal data protection as every person owns their personal data. It was enacted based on the notion of protecting a person's fundamental right in terms of how their personal data is processed, stored, distributed and used. GDPR was approved and adopted by the EU Parliament in April 2016 and after a two-year transition period, came into force on 28 May 2018. GDPR replaces the Data Protection Directive 95/46/EC.

**WHAT DOES GDPR GOVERN?** GDPR regulates the processing<sup>3</sup> by an individual, a company or an organisation ("data collectors"), regardless of their location of personal data<sup>4</sup> relating to individuals in the EU. However this excludes the processing of personal data of deceased persons or of legal entities and data processed by an individual for personal reasons.

**APPLICABILITY OF GDPR** GDPR only applies to i) a company or entity which processes personal data in the context of activities or establishment in the EU; or ii) a company established outside the EU offering goods or services or monitoring behavior of individuals within the EU.

<sup>2</sup> (Regulation (EU) 2016/679)

<sup>3</sup> Article 4: Processing covers a wide range of operations performed on personal data, including manual or automated means. This includes, collection, recording, organisation, structuring, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination, alignment or combination, restriction, erasure or destruction of personal data

<sup>4</sup> Article 4: Personal data is any information relating to an identified or identifiable living individual

**REQUIREMENTS UNDER GDPR** The objective of the EU's GDPR and Malaysia's Personal Data Protection Act 2010 (PDPA) is to protect an individual's right on their personal data. However there is a stark difference in the requirements of the data processing principles.

There are 3 main requirements under the GDPR that elevates its protection's benchmark in comparison to PDPA. These requirements are: 1) express consent, 2) clear and plain wordings and 3) transparent.

## 1) Express consent

GDPR requires consent to be freely given, specific, informed and unambiguous. Explicit consent is required only for processing sensitive personal data. This generally means that individuals are given the option to choose via the "opt-in" method. In comparison to the PDPA, it is only sufficient for consent to be "deemed" as made.

## 2) Clear and plain wording

Data collectors under the GDPR are obliged to explain to an individual why they want to use the data, what they plan to do with it and for how long they intend to keep the data. The GDPR imposes a duty on data collectors to convey such information to the relevant individuals in clear and plain wording. Lengthy clauses and long illegible terms and conditions full of legal jargons will not meet this second requirement. This reinforces the right of an individual to know how their personal data is being managed by the data collectors.

## 3) Transparent

An individual must be informed prior to their data being collected and kept updated as and when any subsequent changes are made.

## OTHER REQUIREMENTS UNDER GDPR

### 4) Breach notification

In cases of a data breach, it is mandatory under the GDPR for such breach to be reported to the relevant supervisory body within 72 hours, and for individuals whose data was affected to be notified without undue delay upon being aware of such breach.

### 5) Right to access and rectification

Individuals under the GDPR have a right to obtain confirmation from the data controller on whether their personal data are being processed, for what purpose, to whom, for how long and where. They are also entitled to a copy of the personal data in an electronic format. Individuals also have a right, without undue delay, to rectify their inaccurate personal data. This is the same as the Access Principle under section 12 of the PDPA<sup>5</sup>.

### 6) Right to data portability

Individuals under the GDPR have the right to move, copy or transfer their personal data to another controller.

### 7) Obligation on data processor

PDPA puts the responsibility on data user to ensure data processor compliance with the PDPA (usually in Malaysia, this is done via contracts), GDPR however also places an obligation on the data processor directly to abide by the GDPR.

**DOES GDPR AFFECT MALAYSIA?** There has been a lot of debate and uncertainties on the enforcement of GDPR outside of the EU. However, it must be noted that GDPR still applies to companies established outside of the EU that offers goods or services, or monitors behavior of individuals within the EU. Thus, the relevant companies must take measures to assess on the applicability of the GDPR and ensure that their processes and policies are GDPR-compliant as failure to comply will result in hefty fines of up to EUR20 million or 4% of the organisation's global turnover.

**CONCLUSION** GDPR has set a new benchmark for data privacy regulation and information administration in order to meet present digital economy. Perhaps Malaysia and other ASEAN countries could follow suit in harmonising regulations on data protection in order to ensure quality protection on individual's privacy and to ease compliance and flow between Europe and ASEAN countries. 🌀

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<sup>5</sup> Right to access and correct the personal data



## EMPLOYMENT AND INDUSTRIAL RELATIONS

### MINIMUM WAGE TO INCLUDE SERVICE CHARGE IN COLLECTIVE AGREEMENT DISPUTE...

The Industrial Court of Malaysia has ruled on the inclusion of service charge in calculating wages in meeting the minimum wage requirement.

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

**BACKGROUND** The Industrial Court of Malaysia ("the Court") in the case of *Kesatuan Kebangsaan Pekerja-Pekerja Hotel, Bar dan Restoran, Semenanjung Malaysia v Subang Jaya Hotel Development Sdn Bhd (Grand Dorsett Subang Hotel)*<sup>6</sup> ("the Grand Dorsett case") has recently granted an award in favour of the Hotel pertaining to the inclusion of service charge<sup>7</sup> in the calculation of wages to meet the MYR1000 statutory requirement for minimum wage as per the Minimum Wage Order 2016 ("MWO").

The *Grand Dorsett* case is seen to have departed from the Court of Appeal decision made in *Crystal Crown Hotel*<sup>8</sup>, where it was held that service charges shall not be considered as wages for the purpose of calculating minimum wage and therefore the hotel was ordered to pay additional wages to employees under the Collective Agreement in order to meet the statutory minimum wage.

**THE ISSUE** The main issue raised was whether the Hotel could take into account the service charge component of the employee's monthly remuneration to "top up" any amount below the minimum wage, in considering the wages of employees earning less than MYR1000 basic wages a month. The Industrial Court in the *Grand Dorsett* case departed from the Court of Appeal's decision in *Crystal Crown Hotel* on the ground of "achieving industrial peace". The Industrial Court relied on

*Bharat Bank's* case<sup>9</sup> which held that the Court does not merely interpret or give effect to contractual rights and obligations of the parties, but it can "create new rights and obligations between them" which is essential for keeping industrial peace. Therefore, a broader approach was taken in the *Grand Dorsett* case where section 30(4) of the Industrial Relations Act 1967<sup>10</sup> was applied by the Court.

**THE DECISION** The Industrial Court in the *Grand Dorsett* case held that the relevant legislation applicable to the employees earning a basic wage of less than MYR2000 a month in the instant case is the Employment Act 1955 ("EA"). Consequently, section 2 of the EA does not exclude service charges from the definition of "wages" and as such, it cannot be excluded by any judicial decision apart from an Amendment Act. Thus, it is now trite law that service charge is part of "wages" of an employee as defined under section 2 of the EA, which is also the definition of "wages" in the National Wages Consultative Council Act 2011 ("NWCC Act").

The Industrial Court further held that failure to take into account the service charge would cause industrial disharmony, whereby it would lead to a 20% increase of salaries if the employer had to top up the employees' wages to meet the minimum wage as per the MWO. In view of the above, the Hotel was entitled to take into account the service charge paid to the employees to determine "wages" in order to comply with the NWCC Act and MWO.

**COMMENTS** The approach taken by the Industrial Court puts greater emphasis on the need for industrial peace and harmony. Notwithstanding the Court of Appeal's decision in the *Crystal Crown Hotel* case which held that minimum wages is limited to basic wages only, the Industrial Court in the *Grand Dorsett* case departed from the decision by allowing the Hotel to take into account the service charge paid to employees as those service charge payments formed part of wages as defined under section 2 of the EA. ✂

<sup>6</sup> Industrial Court Case No. 23(7)(13)/2-228/15, Award No. 1196 of 2018 dated 28 May 2018

<sup>7</sup> Service charge collected from the Hotel's sales revenue are distributed and paid to Hotel employees in accordance with each employee's service charge points as stipulated under the Collective Agreement between the Hotel and the Union

<sup>8</sup> *Crystal Crown Hotel & Resort Sdn Bhd (Crystal Crown Hotel Petaling Jaya) v Kesatuan Kebangsaan Pekerja-Pekerja Hotel, Bar & Restoran Semenanjung Malaysia* [2015] 1 LNS 1450

<sup>9</sup> *Bharat Bank v Employees of Bharat Bank* [1950] SCR 459

<sup>10</sup> Section 30(4) provides that in making its award in respect of a trade dispute, the Court shall have regard to the public interest, the financial implications and the effect of the award on the economy of the country, and on the industry concerned, and also to the probable effect in related or similar industries.

LAND LAW – Construction – Sale and purchase agreement – Delivery of vacant possession – Extension of time – Right of hearing

UNDANG-UNDANG TANAH – Pembinaan – Perjanjian jual beli – Penyampaian milikan kosong – Pelanjutan masa – Hak pembicaraan

**MENTERI KESEJAHTERAAN BANDAR,  
PERUMAHAN DAN KERAJAAN TEMPATAN  
& ANOR V ANG MING LEE & ORS  
AND OTHER APPEALS**

[2018] 9 CLJ 640, Court of Appeal

**MENTERI KESEJAHTERAAN BANDAR,  
PERUMAHAN DAN KERAJAAN TEMPATAN  
& YANG LAIN V ANG MING LEE & YANG  
LAIN-LAIN DAN RAYUAN-RAYUAN LAIN**

[2018] 9 CLJ 640, Mahkamah Rayuan

**FACTS** BHL Construction Sdn Bhd, the second appellant, is the developer (“the Developer”) of a project to build a condominium (“the Project”). The respondents are purchasers (“the Purchasers”) of condominium units. The Sale and Purchase Agreements (SPA) between the Developer and the Purchasers stipulate the time period for delivery of vacant possession is 36 months. The Developer had applied for an extension of time for delivery of vacant possession to the Controller of Housing, Ministry for Urban Wellbeing, Housing and Local Government (“the Controller”) but this was not approved. Subsequently, the Developer lodged an appeal to the Minister of Urban Wellbeing, Housing and Local Government (“the Minister”). The Developer claimed that such appeal was approved by the Minister (“the Approval Letter”). Aggrieved, the purchasers filed for judicial review and sought to quash the decision of the Controller/Minister, which amended the time period of delivery of vacant possession from 36 to 48 months. The High Court granted the application. Hence, this appeal.

**ISSUE** Whether the Purchasers ought to have been given a right of hearing prior to the decision made by the Controller and/or Minister granting the Developer an extension of time to complete the Project.

**HELD** The Court of Appeal held that the Purchasers must be given an opportunity to be heard and should at least be notified of the Developer’s application for any extension of time to complete the Project and be given a reasonable period of time to state their views before any such decision is taken. Therefore, the decision made, whether by the Controller or Minister, was null and void. ❄️

**FAKTA-FAKTA** BHL Construction Sdn Bhd, salah seorang perayu, adalah pemaju (“Pemaju”) sebuah projek untuk membina sebuah kondominium (“Projek”). Responden adalah pembeli-pembeli (“Pembeli”) unit kondominium. Perjanjian Jual Beli (SPA) antara Pemaju dan Pembeli menetapkan bahawa tempoh masa untuk penyampaian milikan kosong unit adalah 36 bulan dari tarikh SPA ditandatangani. Pemaju telah memohon untuk pelanjutan masa untuk penyampaian milikan kosong kepada Pengawal Perumahan, Kementerian Kesejahteraan Bandar, Perumahan dan Kerajaan Tempatan (“Pengawal”) tetapi tidak diluluskan. Pemaju seterusnya membuat rayuan kepada Menteri Kesejahteraan Bandar, Perumahan dan Kerajaan Tempatan (“Menteri”) dan mendakwa bahawa rayuan tersebut telah diluluskan oleh Menteri (“Surat Kelulusan”). Tidak berpuas hati, pembeli memfailkan semakan kehakiman dan pembatalan keputusan Pengawal/Menteri, yang mengubah waktu penyampaian milikan kosong dari 36 bulan ke 48 bulan. Mahkamah Tinggi membenarkan permohonan itu. Maka, rayuan ini.

**ISU** Sama ada Pembeli sepatutnya diberi hak pembicaraan sebelum keputusan Pengawal dan/atau Menteri memberikan Pemaju lanjutan masa untuk menyelesaikan Projek.

**KEPUTUSAN** Mahkamah Rayuan memutuskan bahawa Pembeli harus diberi peluang untuk didengar dan sekurang-kurangnya diberitahu mengenai permohonan Pemaju untuk sebarang pelanjutan masa untuk menyiapkan Projek dan diberi tempoh masa yang munasabah untuk menyatakan pandangan mereka sebelum sebarang keputusan dibuat. Oleh itu, keputusan yang dibuat, sama ada oleh Pengawal atau Menteri, adalah tidak sah dan dibatalkan. ❄️

COMPANY LAW – Directors – Authority – Rule in Turquand case (*Royal British Bank v Turquand* [1843-60] ALL ER Rep 435)

## KANG HAI HOLDINGS SDN BHD & ANOR V LEE LAI BAN [2018] 2 CLJ 550, Federal Court

**FACTS** The appellants, Kang Hai Holdings (“KHH”) and Kang Hai Realty Sdn Bhd (“KHR”) are the owners of three lands (“the Lands”). The first defendant at the High Court (“Siva”) was a former director of KHH and KHR. Despite having ceased to be a director of KHH, Siva proceeded to engage the respondent, Lee Lai Ban (“Lee”), to extract earth from the Lands. Siva and Lee entered into a tenancy agreement over the lands whereby Lee was to extract and purchase earth. Lee was informed that Siva was never authorised to transact on the company’s behalf. However, Lee continued to extract earth from the Lands. The respondent claimed that, (i) Siva had fraudulently held himself out as a director and manager of KHH and forged a letter which purported to engage Lee to extract and purchase red earth and rock materials from the Lands; (ii) that Lee had known at all material times that Siva was not an authorised representative of the appellants; and (iii) that Siva had received monies from Lee as payment for the extraction which were below market value. The High Court allowed the appellants’ claim against Siva and Lee. The Court of Appeal allowed Lee’s appeal holding that Lee was entitled to invoke protection under the rule in *Turquand’s case*<sup>11</sup> (“the Rule”), whilst Siva’s appeal was dismissed. Hence, this appeal.

**ISSUE** Whether the Rule applies where an outsider dealing with the company is deemed to have constructive notice of the identity of the directors and managers of a company as shown in Form 49.

**HELD** It was held that the law imposes a minimum duty on the outsider to make a minimum check to afford the protection of the Rule. Lee did not make any searches which clearly revealed that Siva was not a director nor a managing director of KHH and KHR and Lee is deemed to have constructive knowledge thereof. Hence, Lee could not plead the Rule. ❧

<sup>11</sup> It stipulates that an “outsider” dealing with a company in good faith is entitled to assume that there has been compliance with the Constitution of the company and that the “outsider” need not question the formalities of the internal proceedings of a company.

UNDANG-UNDANG SYARIKAT – Pengarah – Kuasa – Peraturan kes *Turquand* (*Royal British Bank v Turquand* [1843-60] ALL ER Rep 435)

## KANG HAI HOLDINGS SDN BHD & YANG LAIN V LEE LAI BAN [2018] 2 CLJ 550, Mahkamah Persekutuan

**FAKTA-FAKTA** Pihak perayu, Kang Hai Holdings (“KHH”) dan Kang Hai Realty Sdn Bhd (“KHR”) adalah pemilik tiga tanah (“Tanah”). Defendan pertama di Mahkamah Tinggi (“Siva”) adalah bekas pengarah KHH dan KHR. Walaupun tidak lagi memegang jawatan pengarah KHH, Siva telah menandatangani satu perjanjian sewa ke atas tanah tersebut dengan Lee Lai Ban (“Lee”) di mana Lee diupah untuk mengekstrak dan membeli tanah itu. Lee kemudian diberitahu bahawa Siva tidak pernah diberi kuasa untuk berurusan atas nama syarikat itu. Namun, Lee tetap meneruskan kerja pengekstrakan tanah tersebut. Responden mendakwa bahawa, (i) Siva secara tidak jujur mengaku sebagai pengarah dan pengurus KHH dan memalsukan surat untuk berurusan dengan Lee bagi mengekstrak dan membeli tanah merah dan bahan batu dari Tanah tersebut; (ii) Lee menyedari bahawa Siva adalah bukan pegawai syarikat perayu yang sah; dan (iii) Siva telah menerima wang dari Lee sebagai bayaran untuk pengekstrakan tanah di bawah nilai pasaran. Mahkamah Tinggi membenarkan tuntutan perayu terhadap Siva dan Lee. Mahkamah Rayuan membenarkan rayuan Lee untuk berlindung di bawah peraturan kes *Turquand*<sup>12</sup> (“Peraturan”), dan rayuan Siva dibatalkan. Maka, rayuan ini.

**ISU** Sama ada Peraturan tersebut boleh digunapakai dalam situasi di mana orang luar dianggap mempunyai notis konstruktif mengenai identiti para pengarah dan para pengurus syarikat seperti yang tertera pada Borang 49.

**KEPUTUSAN** Mahkamah Persekutuan memutuskan bahawa orang luar mempunyai tanggungjawab untuk sekurang-kurangnya membuat penyemakan sebelum diberikan perlindungan di bawah peraturan kes *Turquand*. Lee tidak membuat apa-apa penyemakan atau pencarian yang akan menunjukkan bahawa Siva bukan seorang pengarah atau pengarah urusan KHH dan KHR. Maka Lee dianggap memiliki pengetahuan konstruktif. Oleh itu, Lee tidak boleh merayu untuk perlindungan di bawah peraturan kes *Turquand*. ❧

<sup>12</sup> “Orang luar” yang berurusan dengan sebuah syarikat berhak untuk menganggap bahawa syarikat tersebut sudah mematuhi Perlembagaannya dan “orang luar” tersebut tidak perlu mempersoalkan sama ada semua tatacara syarikat tersebut telah dipatuhi.

ADMINISTRATIVE LAW – Judicial review – Decision of state authority refusing appellant entry into Sabah – Immigration Act 1959/63, sections 59A and 65

**AMBIGA A/P SRENEVASAN V DIRECTOR OF IMMIGRATION, SABAH, NOOR ALAM KHAN BIN A WAHID KHAN & 3 ORS**  
[2018] 4 AMR 525, Court of Appeal

**FACTS** The appellant was barred from entering Sabah to participate in a forum in Kota Kinabalu organised by a movement advocating national unity. The appellant wrote a letter to the first respondent, the Director of Immigration, Sabah, on the reasons for barring her entry but received no reply. The appellant then filed for judicial review, an order of certiorari to quash the notice of refusal of entry into Sabah (“the impugned notice”) and an order of mandamus to compel the respondents to allow her entry into Sabah. The High Court dismissed the said application on the grounds that the ouster clause in section 59A of the Immigration Act 1959/63 (“the Act”) expressly provides that any act done or decision made by the state authority under the Act is not subject to judicial review except on grounds of procedural non-compliance or requirements of the Act. Dissatisfied, the appellant appealed.

**ISSUE** The main issue is whether there are any merits to the appeal.

**HELD** In dismissing the appeal, the Court of Appeal held that there was no merit in the appeal as, (i) section 59A(1) of the Act is clear in that the jurisdiction of the court is ousted except on grounds of procedural non-compliance of the requirements of the Act or regulations governing the act or decision and nothing else, (ii) since there is no reason to depart from Sugumar’s case, the respondents are not required to give reasons for the decision to bar the appellant from entering Sabah, (iii) that the right to be heard is not stipulated or provided for in sections 59 and 65 of the Act, and (iv) that although the appellant had travelled to Sabah in the past, that could not be made as a basis for the appellant to rely on the doctrine of legitimate expectation. ✨

UNDANG-UNDANG PENTADBIRAN – Semakan kehakiman – Keputusan pihak berkuasa negeri melarang perayu memasuki Sabah – Akta Imigresen 1959/63, seksyen 59A dan 65

**AMBIGA A/P SRENEVASAN V PENGARAH IMIGRESEN SABAH, NOOR ALAM KHAN BIN A WAHID KHAN & 3 YANG LAIN**  
[2018] 4 AMR 525, Mahkamah Rayuan

**FAKTA-FAKTA** Perayu dilarang memasuki Sabah untuk menyertai forum di Kota Kinabalu yang dianjurkan oleh sebuah gerakan perpaduan negara. Perayu menulis surat kepada responden pertama, Pengarah Imigresen, Sabah, untuk mengetahui sebab-sebab perayu dilarang memasuki Sabah. Akan tetapi, tiada balasan diterima. Perayu kemudian memfailkan semakan kehakiman, perintah certiorari untuk membatalkan notis larangan untuk beliau masuk ke Sabah (“Notis”), dan perintah mandamus untuk membenarkan responden memasuki Sabah. Mahkamah Tinggi telah menolak permohonan tersebut atas dasar bahawa klausa penyingkiran dalam seksyen 59A Akta Imigresen 1959/63 (“Akta Imigresen”) secara nyata memperuntukkan bahawa apa-apa perbuatan yang dilakukan atau keputusan yang dibuat oleh pihak berkuasa negeri di bawah Akta tidak tertakluk kepada semakan kehakiman kecuali atas sebab ketidakpatuhan prosedur atau kehendak Akta. Tidak berpuas hati, perayu membuat rayuan lanjutan.

**ISU** Sama ada rayuan ini mengandungi merit.

**KEPUTUSAN** Mahkamah Rayuan memutuskan bahawa rayuan ini tiada merit oleh kerana, (i) seksyen 59A(1) Akta Imigresen jelas menunjukkan bahawa bidang kuasa mahkamah hanya merangkumi ketidakpatuhan prosedur Akta atau peraturan yang mengawal tindakan atau keputusan Akta, (ii) Mahkamah tidak perlu mengikut keputusan kes Sugumar, oleh itu responden tidak perlu memberi alasan atas keputusan melarang perayu memasuki Sabah, (iii) hak untuk didengar tidak ditetapkan atau diperuntukkan oleh seksyen 59 dan seksyen 65 Akta Imigresen, dan (iv) walaupun perayu pernah mengunjungi Sabah sebelum ini, itu tidak boleh digunakan sebagai asas perayu untuk bergantung kepada doktrin jangkaan yang sah. ✨

## ACT

### GOODS AND SERVICES TAX (REPEAL) ACT 2018

*National Language*

**Akta Cukai Barang dan Perkhidmatan  
(Pemansuhan) 2018**

No

**805**

*Date of coming into operation*

**1 September 2018**

*Notes*

This is an Act to repeal the Goods and Services Tax Act 2014.

### SALES TAX ACT 2018

*National Language*

**Akta Cukai Jualan 2018**

No

**806**

*Date of coming into operation*

**1 September 2018**

*Notes*

This is an Act to provide for charging, levying and collecting of sales tax, and for matters connected therewith.

### SERVICE TAX ACT 2018

*National Language*

**Akta Cukai Perkhidmatan 2018**

No

**807**

*Date of coming into operation*

**1 September 2018**

*Notes*

This is an Act to provide for the charging, levying and collecting of service tax, and for matters connected therewith.

## AMENDMENT ACTS

### MALAYSIAN ANTI-CORRUPTION COMMISSION (AMENDMENT) ACT 2018

*National Language*

**Akta Suruhanjaya Pencegahan Rasuah Malaysia  
(Pindaan) 2018**

No

**A1567**

*Date of coming into operation*

**1 October 2018** except **section 4**

*Notes*

The highlight of the amending Act includes the new section 17A which defines and explains the offence that can be committed by a commercial organisation and the relevant penalty related thereto.

### CUSTOMS (AMENDMENT) ACT 2018

*National Language*

**Akta Kastam (Pindaan) 2018**

No

**A1571**

*Date of coming into operation*

**1 September 2018**

*Notes*

The highlight of the amending Act is the change of name and substitution of the words "the Sales Tax Act 1972 [Act 64] or the Service Tax Act 1975 [Act 151]" with the words "the Sales Tax Act 2018 [Act 806] or the Service Tax Act 2018, or the repealed Sales Tax Act 1972 [Act 64], Service Tax Act 1975 [Act 151] or Goods and Services Tax Act 2014 [Act 762]". New section 141FA on provisions relating to costs and expenses by the Tribunal was also introduced.

## FREE ZONES (AMENDMENT) ACT 2018

National Language

**Akta Zon Bebas (Pindaan) 2018**

No

**A1572**

Date of coming into operation

**1 September 2018**

Notes

The highlight of the amending Act is the amendment to section 2(1) by deleting the definitions of "sales tax", "service tax" and "service".

## SUBSIDIARY LEGISLATION

- PU(A) 265/2018: Minimum Wages Order 2018 – Effective date: 1 January 2019
- PU(A) 269/2018: Self-Employment Social Security (Rates of Contribution for E-Hailing Vehicle Driver) Regulations 2018 – Effective date: 1 November 2018
- PU(A) 290/2018: Loans Guarantee (Bodies Corporate) (Remission of Tax and Stamp Duty) (No. 5) 2018 (Amendment) Order 2018 – Effective date: 19 October 2018
- PU(A) 266/2018: Loans Guarantee (Bodies Corporate) (Remission of Tax and Stamp Duty) (No. 5) Order 2018 – Dated: 17 October 2018
- PU(A) 253/2018: Sales Tax (Goods Exempted from Tax) (Amendment) (No. 3) Order 2018 – Effective date: 9 October 2018
- PU(A) 254/2018: Sales Tax (Rates of Tax) (Amendment) (No. 2) Order 2018 – Effective date: 9 October 2018
- PU(A) 255/2018: Service Tax (Amendment) (No. 2) Regulations 2018 – Effective date: 9 October 2018
- PU(A) 310/2018: Income Tax (Exemption) (No. 4) Order 2018 – Effective date: From the year of assessment 2018
- PU(A) 259/2018: Stamp Duty (Exemption) (No. 3) Order 2018 – Effective date: 1 January 2018 to 31 December 2020

- PU(B) 608/2018: Appointment of Date of Coming into Operation for Employees Provident Fund (Amendment) Act 2016 [Act A1504] – Effective date: 1 January 2019 for section 6
- PU(B) 612/2018: Declaration of Non-Smoking Area 2018 – Dated: 5 October 2018

## GUIDELINES/RULES/CIRCULARS/ DIRECTIVES AND PRACTICE NOTES ISSUED BETWEEN JUNE AND NOVEMBER 2018 BY BANK NEGARA MALAYSIA, BURSA MALAYSIA AND SECURITIES COMMISSION MALAYSIA

## BANK NEGARA MALAYSIA (BNM)

- BNM Policy Document on Standing Facilities for Banking and Islamic Banking – Effective date: 8 May 2018

## BURSA MALAYSIA

- Mode of Submission of Periodic Reports to the Exchange – Effective date: 2 January 2019
- Amendments to the Rules and Directives of Bursa Malaysia Securities Berhad ("BMS Rules and Directives") in relation to the Introduction of e-reporting – Effective date: 2 January 2019
- Amendments to the Rules of Bursa Malaysia Securities Berhad Consequential to the Remuneration Arrangements Allowed under the Marketing Representative Framework by the Securities Commission Malaysia ("SC") – Effective date: 2 October 2018
- Consolidated Main Market Listing Requirements – As at: 1 September 2018
- Consolidated ACE Market Listing Requirements – As at: 1 September 2018
- Consolidated LEAP Market Listing Requirements – As at: 1 September 2018

- Consolidated Rules of Bursa Malaysia Securities Bhd – *As at: 2 October 2018*
- Consolidated Rules of Bursa Malaysia Securities Clearing Sdn Bhd – *As at: 1 September 2018*
- Consolidated Rules of Bursa Malaysia Depository Sdn Bhd – *As at: 1 September 2018*
- Consolidated Rules of Bursa Malaysia Derivatives Bhd – *As at: 1 September 2018*
- Consolidated Rules of Bursa Malaysia Derivatives Clearing Bhd – *As at: 1 September 2018*
- Fees and Charges: Main Market – *Updated on: 1 September 2018*
- Fees and Charges: ACE Market – *Updated on: 1 September 2018*
- Fees and Charges: LEAP Market – *Updated on: 1 September 2018*
- Amendments to Directive No. 13.32-001 (Directives on Liquidity Risk Management Framework) in relation to Stress Testing and Scenario Analysis – *Effective date: 26 July 2018*
- Amendments to Directive No. 13-001 (Directives on Capital Adequacy Requirements) Consequential to the Issuance of the Securities Commission Malaysia's Guidelines on Contracts for Difference ("Guidelines") – *Effective date: 1 July 2018*
- Amendments to the Clearing Participants' Directives No. 5-001 consequential to Securities Commission Malaysia's Guidelines on Contracts for Difference – *Effective date: 1 July 2018*
- SC Guidelines on Unlisted Capital Market Products under the Lodge and Launch Framework – *Effective date: 11 October 2018*
- SC Guidelines on Sales Practices of Unlisted Capital Market Products – *Effective date: 11 October 2018*
- SC Prospectus Guidelines – *Effective date: 11 October 2018*
- SC Guidelines on Seasoned Corporate Bonds and Sukuk – *Effective date: 11 October 2018*
- SC Guidelines on Issuance of Corporate Bonds and Sukuk to Retail Investors – *Effective date: 11 October 2018*
- SC Licensing Handbook – *Effective date: 1 August 2018*
- SC Guidelines on Compliance with the Continuing Professional Education Requirement – *Effective date: 1 August 2018*

## SECURITIES COMMISSION

- SC Guidelines on Exchange-Traded Funds – *Effective date: 2 January 2019*
- SC Guidelines on the Registration and Conduct of Capital Market Services Providers – *Effective date: 2 January 2019*
- SC Guidelines on Issuance of Corporate Bonds and Sukuk to Retail Investors – *Revised on: 11 October 2018*

### WORD OF THE BRIEFCASE

#### ***animus nocendi***

It is a Latin phrase which means 'intention to harm'.

It refers to the subjective state of mind of the author of a crime, with reference to the knowledge of the illegality of his behaviour, and of its possible consequences.



# IFLR1000 WOMEN LEADERS



Loh Mei Mei named IFLR1000's Women Leaders 2018

## 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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