



THE ZR_p BRIEF

ZUL RAFIQUE & partners as a co-sponsor at
the Malaysian Legal and Corporate Conference in October 2015



From left:
Hamdi Abdullah, Tang Ai Leen, Norliza Rasool Khan, Lim Joo Ho, Foong Ling Siew and David Lee.



A BRIEF NOTE...

by Dato' Zulkifly Rafique

To end is to begin...

It has been a good year for **ZUL RAFIQUE & partners**. Earlier this year, we were declared *Labour and Employment Law Firm of the Year* by the Asian Legal Business, and more recently, awarded *In-House Community Firm of the Year 2015* by the ASIAN-MENA Counsel. Congratulations to those who made these possible.

The end of the year is indeed a good time to ponder and reflect. In light of the harried world we live in, I would like to remind all of us to stop and smell the roses once in a while. Let's count our blessings and be grateful for what we have.

However, to end is also to begin. Therefore, as the year draws to an end, it is also an opportunity for us to look forward to our goals, aspirations and plans in the future.

Allow me to quote TS Eliot:

For last year's words belong to last year's language. And next year's words await another voice. And to make an end is to make a beginning.

On that note, I would like to thank all our clients and friends for their never ending support. I wish you all the very best for the new year ahead.

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Legislation Update:

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- Guidelines/Rules/Circulars/Directives and Practice Notes issued by *Bank Negara Malaysia* and *Bursa Malaysia* between October and December 2015

- **AMENDMENT TO SECURITIES LAWS** One of the amendments under the Capital Markets and Services (Amendment) Act 2015 ("the Amendment Act") is to address a loophole in the existing law that allows the parties to exclude liability for statements made in marketing materials relating to corporate bonds. The substituted section 256 of the Capital Markets and Services Act 2007 now provides that any document, agreement or contract that seeks to exclude or restrict the liability of the person making statements in such document, is void. The Amendment Act, together with the Securities Commission (Amendment) Act 2015, came into force on 15 September 2015.
- **CROSS-DRESSING LAW CONSTITUTIONAL** The Federal Court has reversed the ruling of the Court of Appeal on the constitutionality of section 66 of the Syariah Criminal (Negeri Sembilan) Enactment 1992 ("the Enactment"), which prohibits cross-dressing. The Court of Appeal had previously held that the Enactment discriminated against Muslim men suffering from gender identity disorder.
- **HAZE RELATED LAWS DRAFTED** Laws addressing issues regarding transboundary haze are currently in the drafting process. Such laws will enable the Government to act against parties involved in forest fires which are the source of the problem. It is said that the proposed law will have extra-territorial effect, permitting action to be taken against foreign parties.
- **MINIMUM WAGE INCREASE** It has been announced in Budget 2016 that the minimum wage for workers in the private sector will be increased from MYR900 to MYR1,000 monthly in Peninsular Malaysia, and from MYR800 to MYR920 monthly for those in Sabah, Sarawak and Labuan. The revision, which takes effect from 1 July 2016, is not applicable to domestic services or domestic maids.
- **MOBILE APPS OFFERING PUBLIC TRANSPORTATION TO BE REGULATED** The Land Public Transport Act 2010 ("the Act") will be amended to regulate mobile applications that offer public transportation. The amendments will not ban the mobile applications from offering such transportation, but operators are required to comply with the conditions stipulated in the Act. The amendments include prohibiting a driver from ferrying passengers if the vehicle used is purchased *via* a bank loan, as that would breach the hire-purchase agreement.
- **NATIONAL SECURITY COUNCIL BILL PASSED** The National Security Council Bill 2015 ("the Bill") has been passed by the *Dewan Rakyat* to address threats to the nation. The Bill provides special powers for national security operations, including powers to arrest, impose a curfew as well as to screen persons for dangerous items. Any person who flouts the order commits an offence and would be liable to a maximum fine of MYR5,000, or imprisonment of not more than three years, or both.
- **NEW BANKRUPTCY ACT PROPOSED** The proposal of a new Bankruptcy Act, to replace the existing Bankruptcy Act 1967, is expected to be tabled in Parliament in 2016. The highlight of the proposed law is that individuals who have been declared bankrupt will be given an opportunity to redeem themselves.
- **'NO-MARRIAGE' CLAUSE CHALLENGED** A former cadet officer who was expelled from *Universiti Pertahanan Nasional Malaysia* ("the University") on the ground that she had breached a 'no-marriage' clause, has initiated judicial review proceedings, seeking an order to compel the University to allow her to complete her studies, and reinstate her scholarship, as well as her rank as a cadet officer. The decision is expected to be delivered on 22 January 2016.

- **PATENTS ACT TO BE AMENDED**

Amendments to the Patents Act 1983 are expected to be tabled in Parliament. The proposed amendments are to ensure the readiness of Malaysia to accede to the Budapest Treaty on the International Recognition of the Deposit of Microorganisms for the Purpose of Patent Procedure 1977, which allows an applicant to make a single deposit involving a micro-organism with one depository authority, instead of doing so in each and every contracting state, where a patent application is filed for it.

- **SPECIAL COURT FOR ENVIRONMENTAL CRIMES**

The Government plans on setting up a special court to hear cases relating to environmental crimes, in order to hasten the disposal of cases. The current fine of MYR50,000 imposed on companies for polluting the environment is said to be inadequate.

AROUND THE WORLD... IN BRIEF

- **ASEAN: KL DECLARATION SIGNED**

ASEAN leaders have signed a Kuala Lumpur Declaration on the Establishment of the Asean Community ("the Declaration") on 22 November 2015. The Declaration comprises three core pillars, namely, the Asean Political Security Community (APSC), Asean Economic Community (AEC), and Asean Socio-Cultural Community (ASCC).

- **AUSTRALIA: MEDICINAL CANNABIS TO BE APPROVED**

The Turnbull government plans to legalise the cultivation of cannabis for medicinal and scientific purposes by this year. The Government's proposal would allow the Australian Department of Health to license and regulate cannabis growers. The proposed law, however, does not include cultivating marijuana for recreational use.

- **INDIA: FIGHT AGAINST GENDER DETERMINATION RULING**

In a landmark case, a woman in India is challenging the decision of a court that absolved her ex-husband of charges for illegally testing the

gender of her foetuses and pressuring her to terminate her pregnancy. Foetal gender testing is illegal under the Pre-Natal Diagnostic Techniques Act 1994.

- **INDONESIA: SHARIAH LAW IN ACEH**

Aceh has become the only province in Indonesia to adhere to *Shariah* law which includes criminalising adultery, homosexuality, rape, and sexual harassment. Non-Muslims are given a choice of whether to be tried under *Shariah* law or the regular Indonesian criminal laws.

- **JAPAN: FIRST SAME-SEX MARRIAGE CERTIFICATE**

The Shibuya ward of Tokyo is the first in Japan to recognise same-sex unions after their legislators voted in March to grant marriage certificates to such couples. Setagaya, another ward in Tokyo, followed suit. Under the local ordinances, equal rights including those involving hospital visitations and apartment rentals are encouraged to be accorded to same sex couples.

- **NEPAL: NEW CONSTITUTION APPROVED**

The Parliament of Nepal has approved a new Constitution. The passage of the new Constitution was welcomed by the Nepalese, as Nepal was governed by an interim Constitution since the monarchy was abolished in 2008.

- **SINGAPORE: NEW MONEYLENDING RULES**

New borrowing rules governing licensed moneylenders took effect from 1 October 2015. The restrictions under the new borrowing rules will not be applicable to loans granted to businesses which have been registered for at least two years before the grant of the loan. A credit bureau for moneylenders will be set up for the moneylenders to assess the credit risk of borrowers.

- **US: PETA FILES LAWSUIT FOR COPYRIGHT OWNERSHIP**

Animal rights organisation, People for the Ethical Treatment of Animals (PETA), has filed a lawsuit on behalf of a macaque monkey who snapped selfie photographs, seeking to declare the monkey as the author and owner of the photograph. PETA argued that the US Copyright Law does not prevent an animal from owning copyright.

INTELLECTUAL PROPERTY

MONKEYING AROUND... If one were to ask who owns the copyright in famous photographs such as the *Afghan Girl*, *The Terror of War*, and *Migrant Mother*, it is indisputably Steve McCurry, Nick Ut, and Dorothea Lange respectively.

But who owns the copyright in a photograph, if the image is captured by a monkey? This is the question prompted by the dispute over the 'monkey selfie' that has been circulating the Internet.

In this article, the issue addressed is who owns the copyright in a photograph, especially when the photographer is not human.

THE FACTS British wildlife photographer, David Slater, was visiting Indonesia on an assignment to capture photos of the endangered Celebes crested macaque. Slater claimed to have left his camera in a national park in North Sulawesi, Indonesia ("the National Park"), when a female macaque took his camera and snapped multiple selfies, one of which was a photograph of it smiling cheekily at the camera. The photograph, now famously known as 'the monkey selfie', was published in various magazines and on websites including Wikimedia, a non-profit organisation behind Wikipedia. This resulted in the automatic addition of the photograph into the Wikimedia Commons, an online source of images, which may be accessed free of charge by the public.

THE DISPUTE Slater claimed copyright ownership over the photograph and requested for Wikimedia to either remove the image or pay for its use. This was disputed by Wikimedia as it claimed that since Slater was not the one who had actually taken the photo, he did not own the copyright. It was argued on the ground that since copyright cannot vest in a non-human, it now falls within the public domain. The United States (US) Copyright Office had also previously advised¹, that for a work to acquire copyright, it must be created by a human being, to the exclusion of plants and animals.

¹ Compendium of US Copyright Office Practices, Third Edn.

THE LAW ON COPYRIGHT OWNERSHIP The ownership of copyright would depend very much on the definition of 'author', since the author of a work is the first owner of any copyright in it. According to section 26 of the Malaysian Copyright Act 1987 ("the Act"), copyright shall vest initially in the author. The definition of 'author' is found in section 3 of the Act. In relation to photographs, 'author' is described as the person by whom the arrangements for the taking of the photograph were undertaken.

If Slater was subject to Malaysian copyright law, it could be argued that since he was the one who bought the equipment, travelled to the National Park, and had set up his equipment to take pictures of the macaque, he should be regarded as the author. Even if the monkey had pressed the button resulting in the disputed image, it could be further argued that the monkey is akin to a human assistant who helps prepare a shot. The creativity of the composition of the scene should vest in Slater, and so should the copyright.

In the United Kingdom (UK), copyright is governed by the Copyright Designs and Patents Act 1988. The definition of authorship is quite similar to that found in the Malaysian Copyright Act 1987. Hence, it would also be in favour of Slater.

It is interesting, however, to note that in Singapore, in section 7 of the Copyright Act 1987 (Chapter 63), 'author' in relation to a photograph, means the person who took the photograph. It may therefore be difficult for Slater to argue that he is the author. At the same time, it may be bizarre to argue that the monkey was the one who took the photograph, and therefore owns the copyright.

On that note, one may find unusual, the lawsuit filed in the US by animal rights organisation, People for the Ethical Treatment of Animals (PETA), on behalf of the macaque monkey (which now goes by the name of Naruto), on the ground that animals too should be capable of owning copyright, as there is nothing in the US copyright law to state that an author must be confined to a human being.

CONCLUSION There needs to be clarity on the definition of 'author' and to stipulate if it is confined to or goes beyond human beings. The law is generally silent on this issue, and should be articulated soonest, for otherwise it could compromise the creative industry. 

AVIATION

RISE OF THE MACHINES Drones have gone from being weapons of war to waiters in restaurants, and the gadget is now the latest must-have amongst hobbyists, business owners and civil servants alike.

However, the latest incident involving a photo of a plane landing at the Kuala Lumpur International Airport, captured by a camera-mounted drone, caused an uproar leading to calls for laws on the operation of such drones.

In this article, we examine the general mechanics of drones and the various rules and regulations in place in specific countries.

INTRODUCTION A drone, also known as an unmanned aerial vehicle (UAV), unmanned aerial system (UAS), or even autonomous underwater vehicle (AUV), is basically a remote-controlled vehicle that's capable of flight.

Drones are most often associated with the military in its use for search and rescue, surveillance, and firefighting. More recently, drones have been used for commercial purposes including filmmaking, land surveying, farming, and photography.

MALAYSIA Currently there are rules and regulations for UAV users under the Aeronautical Information Circular (AIC) 4/2008 ("the AIC Circular"), issued under section 24O of the Civil Aviation Act 1969.

The AIC Circular defines a UAV as 'an aircraft which is designed to operate with no human pilot on board'.

Under the AIC Circular, any civil UAV that weighs more than 20kg will have to undergo a Department of Civil Aviation (DCA) airworthiness certification process. A UAV weighing not more than 20kg is prohibited from flying in controlled airspace or within an aerodrome traffic zone, unless the permission of the air traffic control unit has been obtained. The smaller UAVs are also not

allowed to fly more than 400ft in height, and are prohibited from flying for the purposes of aerial work².

Failure to comply with the requirements will result in a maximum fine of MYR50,000 or a prison sentence of not more than three years, or both. Companies, on the other hand, are liable to a maximum fine of MYR100,000.

SINGAPORE In Singapore, headlines were created in February 2015 when a restaurant unleashed its robotic staffers, giving patrons their first taste of 'domestic' drones.

Drones are now regulated by the Unmanned Aircraft (Public Safety and Security) Act 2015, which makes it necessary for operators to have a permit to fly a drone that weighs more than 7kg, for commercial purposes including surveying and aerial advertising.

A person found guilty of using a drone to carry dangerous materials such as weapons or hazardous chemicals, on a drone, may be liable to a maximum fine of SGD100,000, or a maximum imprisonment term of five years, or both.

UNITED STATES In the US, the Federal Aviation Administration (FAA) Modernisation and Reform Act of 2012 ("the FAA Act")³ should be highlighted, in particular section 336.

Generally, individuals who do not require the authorisation of the FAA to fly an unmanned aircraft are those who fulfil the following requirements of section 336 of the FAA Act, namely, that (1) the aircraft is flown strictly for hobby or recreational use; (2) the aircraft is operated in accordance with a community-based set of safety guidelines and within the programming of a nationwide community-based organisation; (3) the aircraft is limited to not more than 55lbs, unless otherwise certified through a design, construction, inspection, flight test, and operational safety program administered by a community-based organisation; (4) the aircraft

² Aerial work is defined under the Civil Aviation Regulations 1996 as 'an aircraft operation in which an aircraft is used to provide services, other than public transport services, such as in agriculture, construction, photography, surveying, observation and patrol, search and rescue, aerial advertisement, and in other similar activities'.

³ Elaboration on guidelines of model aircraft can be found in the *Interpretation of the Special Rule for Model Aircraft* which was issued in Washington DC on 18 June 2014.

is operated in a manner that does not interfere with and gives way to any manned aircraft; and (5) when flown within 5 miles of an airport, the operator of the aircraft provides the airport operator and the airport traffic control notice prior to operation.

AUSTRALIA The Australian Civil Aviation Safety Authority (CASA), empowered under the Civil Aviation Act 1988 and Civil Aviation Regulations 1988, is the body responsible for regulating UAVs, or remotely piloted aircrafts (RPA).

Part 101 of the Civil Aviation Safety Regulations 1998 (CASR 101), made under the Civil Aviation Act 1988, consolidates all rules applicable to UAVs. Under the CASR 101, a micro UAV is defined as an unmanned aircraft with a mass of less than 100g, while a large UAV is defined as an unmanned aircraft above the weight of 100kg. Approval of the CASA is required for large UAVs. It is also illegal to fly any drone for commercial gain without certification from CASA.

A drone which is allowed to be operated only in daylight must adhere to the 400ft maximum height rule, and is not allowed to be flown over populous areas such as beaches, parks, and private backyards.

There is also a restriction of flying within a three nautical mile radius of an airfield, or closer than 30m to people, or vehicles, boats and buildings, which are not the operator's own private property.

CONCLUSION Drone technology has evolved rapidly over the years, making a leap from military technology to consumer gadgetry. Although the robotics may be used in a variety of ways for the common good, including infrastructure, agriculture, tourism, search and rescue, and even law enforcement, there are however irresponsible quarters who have misused the technology. Regulations and guidelines on the usage of drones, therefore, must be outlined, coupled with awareness and education on responsible usage. 

FINANCE

BUDGET 2016... SOME HIGHLIGHTS The Budget 2016 was first unveiled on 23 October 2015 by the Malaysian Prime Minister and Minister of Finance, Dato' Sri Mohd Najib Tun Haji Abdul Razak, and was passed by the *Dewan Rakyat* on 16 November 2015.

In this article, we examine some of the tax highlights of Budget 2016.

PERSONAL INCOME Taxpayers will now have to pay 26% (from the previous 25%) if their annual income is between MYR600,000 and MYR1 million, and 28% (from the previous 26%) for those earning above MYR1 million.

The fixed income tax rate for non-resident individuals⁴ will be increased by 3%, raising it from 25% to 28%, from the year of assessment 2016.

Taxpayers with children below the age of 18 will now be subject to a tax relief of MYR2,000 (in comparison to the previous MYR1,000) for each child, from the year of assessment 2016. Tax relief for those with children above 18 years old who are studying in institutions of higher education has now been increased from MYR6,000 to MYR8,000 for each child from the year of assessment 2016. For those with disabled children, the existing tax relief of MYR6,000 for each child is maintained. However, if such disabled child is studying in an institution of higher education, a further relief of MYR8,000 is added, bringing the total tax relief for a disabled child to MYR14,000.

Tax relief in the amount of MYR4,000 is also given to a taxpayer whose spouse has no income.

A novel aspect of Budget 2016 is the tax relief for those who provide for their parents. An amount of MYR1,500 is granted for each parent, on condition that such parent is at least 60 years old, and does not have a monthly income exceeding MYR2,000.

⁴ An individual will be considered non-resident for income tax purposes if he is physically present in Malaysia for less than 182 days (whether consecutive) during the calendar year regardless of the citizenship or nationality.

SUBSIDIES Under the *Bantuan Rakyat 1Malaysia* (BR1M) scheme, a programme providing cash assistance for low income households, the budget allocation has been increased from MYR4.9 billion in 2015 to MYR5.9 billion.

The BR1M handout for a single individual with a monthly income not exceeding MYR2,000 has been raised from MYR350 to MYR400. Households with a monthly income of MYR3,000 and below will receive an increased BR1M of MYR1,000 from the previous MYR950, whilst those with an income of between MYR3,000 and MYR4,000 will be entitled to an increased handout of MYR800 from MYR750 previously.

To increase proficiency in Bahasa Malaysia and English, a sum of MYR135 million is allocated for upholding Bahasa Malaysia and strengthening the English Language.

Given the importance of the English Language to face current global competition, another two initiatives, namely the Dual Language Programme and Highly Immersive Programme, will be implemented as an option at a cost of MYR38.5 million. In this respect, 300 schools have been identified as a pilot project. – Dato' Sri Mohd Najib Tun Razak, Prime Minister

EMPLOYMENT Except for domestic services and domestic maids, the minimum wage has been increased from MYR900 to MYR1,000 monthly in Peninsular Malaysia, and from MYR800 to MYR920 monthly for those in East Malaysia. This will take effect from 1 July 2016.

The eligibility for mandatory contribution for the Social Security Organisation (SOCSO) has also been increased from a monthly salary of MYR3,000 to MYR4,000.

GOODS AND SERVICES Goods and services tax (GST) is zero-rated for all types of controlled medicines under Group A, B, C and D of the Poisons List⁵, including an addition of 95 brands of over-the-counter medicine. Food items including organic milk for infants and children, soybean-based milk, lotus root and water chestnut, mustard seeds, and jaggery powder are also zero-rated.

GST relief is also provided for re-importation of goods that were exported temporarily for the purposes of promotion, research, or exhibition.

Under the oil and gas industry, relief is given for the re-importation of equipment, including those for oil and floating platforms that are temporarily exported for the purposes of rental and leasing.

Relief is also provided for teaching materials and equipment procured by skills and vocational training providers conducting approved programmes under the National Skills Development Act 2006.

Mobile phone users who subscribe to prepaid telecommunication services or prepaid cards will also receive rebates equivalent to the amount of GST paid, which will be credited directly to their prepaid accounts. This will be effective from 1 January to 31 December 2016.

To strengthen natural disaster management, a sum of MYR180 million will be provided, including for establishing the National Disaster Management Agency under the Prime Minister's Department.

A sum of MYR730 million is provided for the Flood Mitigation Projects nationwide. Meanwhile, MYR60 million is allocated to implement the National Flood Forecasting and Warning Programme and to develop a National Earthquake and Tsunami Sub-Centre in Sabah. – Dato' Sri Mohd Najib Tun Razak, Prime Minister

PROPERTY In order to encourage the completion of abandoned housing projects and to assist affected house purchasers, exemption on stamp duty is given on financing instruments to contractors who revive the project, as well as the original purchasers of the abandoned house.

A 20% stamp duty exemption on *Shariah*-compliant loan instruments to finance the purchase of houses is also provided. 

⁵ Issued under the Poisons Act 1952 (Revised – 1989).

EVIDENCE – Standard of proof – Civil action –
Fraud – Dispute arising from contract

**SINNAIYAH & SONS SDN BHD V
DAMAI SETIA SDN BHD** [2015] 7 CLJ 584,
Federal Court

FACTS The respondent (“the defendant”) appointed the appellant (“the plaintiff”) as the project manager for its construction contract. Dispute arose and the appellant sued the respondent for unpaid management fees and financial advances given. The respondent, on the other hand, disputed the appellant’s claim, and counterclaimed for a sum paid by the appellant fraudulently to its own account instead of into the subcontractor’s account. The appellant’s claim was dismissed in the High Court and Court of Appeal, hence the present appeal.

ISSUE The issue for consideration was the standard of proving fraud in a civil case, and whether it was dependent on the nature of fraud, as decided previously by the Federal Court in *Ang Hiok Seng v Yim Yut Kiu*⁶.

... in a civil claim even when fraud is alleged the civil standard of proof, that is, on the balance of probabilities, should apply. And perhaps it is not out of place here to restate the general rule at common law that, ‘in the absence of a statutory provision to the contrary, proof in civil proceedings of facts amounting to the commission of a crime need only be on a balance of probabilities’.
– Richard Malanjum, Chief Judge, Sabah and Sarawak.

HELD In dismissing the appeal, the Federal Court overruled the principle expounded in *Ang Hiok Seng v Yim Yut Kiu*, and held that when fraud is the subject matter of a civil suit, the standard of proof is on a balance of probabilities. The standard of proof required in a criminal case which is beyond reasonable doubt, is irrelevant. ❄️

⁶ [1997] 1 CLJ 497.

CONSTRUCTION LAW – Construction contract – Government construction contract – Whether exempted from the Construction Industry Payment and Adjudication Act 2012 – Scope of exemption – Construction Industry Payment and Adjudication (Exemption) Order 2014

**MUDAJAYA CORPORATION BHD V
LEIGHTON CONTRACTORS (M) SDN BHD**
[2015] 5 CLJ 848, High Court

FACTS The plaintiff was appointed as a contractor by a company who had won a bid from the Energy Commission to carry out construction works. The plaintiff then appointed the defendant, a sub-contractor, to carry out the works. A payment dispute arose between the plaintiff and defendant, in which the defendant invoked the provisions of the Construction Industry Payment and Adjudication Act 2012 (“the CIPA Act”). The plaintiff, on the other hand, sought a declaratory order that the contract entered into between the parties fell within the terms of the Exemption Order⁷ which provides for exemptions of government construction contracts.

ISSUE The issue was whether the contract in question was exempted from the application of the CIPA Act.

HELD In dismissing the plaintiff’s application, the court ruled that the CIPA Act applies to all written construction contracts for construction works which are carried out in Malaysia, regardless of the parties, unless it has been shown that the contracting parties or the construction contracts in question are exempted. Government construction contracts that are exempted are those (i) built on urgent or emergency conditions and circumstances; or (ii) related to national security or security related facilities. In the present case, the construction contract was not exempted, as it did not fulfil the requirements stipulated in the Exemption Order. ❄️

⁷ The Construction Industry Payment and Adjudication (Exemption) Order 2014 exempts government construction contracts specified in the First Schedule from all the provisions of the CIPA Act.

TORT – Breach of confidence – Report on financial status – Whether information confidential in nature – Whether information used in unauthorised manner – Whether cause of action established

GEH THUAN HOOI V SERENE LIM PAIK YAN & ORS [2015] 6 CLJ 246, High Court

FACTS The plaintiff (husband) and the first defendant (wife) obtained a divorce in the High Court in which the plaintiff applied to vary the maintenance order. The first defendant, intending to dispute the disclosure made by the plaintiff, engaged the second defendant, a consulting firm managed by the third defendant, to investigate the plaintiff's financial status. The second defendant then prepared a report containing confidential information about the plaintiff's bank accounts, Employees Provident Fund (EPF) account, income tax and directorship/ shareholding in companies. These details were obtained without the plaintiff's consent. The plaintiff, therefore, sued the defendants for breach of confidence, alleging that the report contained confidential information.

ISSUE The issue for consideration was whether the plaintiff had proved his case for breach of confidence against the defendants.

HELD In deciding in favour of the plaintiff, it was held that three essential elements must be proved in a case of breach of confidence in the context of a non-contractual case. The three elements are as follows, namely, (i) that the information is confidential in nature; (ii) that the information must have been communicated under circumstances imputing an obligation of confidence; and (iii) that there was unauthorised use of the information. The High Court held that there was indeed a breach of confidence as firstly, the information in the report is confidential and private. Secondly, the information was obtained illegally by the third defendant considering he was not an accredited investigator and thus owed the plaintiff an obligation of confidence, and lastly, because there was an unauthorised use of the plaintiff's information when the report was exhibited in the variation proceedings.✂

BANKING – Islamic Banking – *Al Bai Bithaman Ajjil* – Whether sections 67 and 67A of the Companies Act 1965 were contravened – Whether dealing by company in its own shares rendered transactions illegal and unenforceable

LOW CHIN MENG V CIMB ISLAMIC BANK BHD [2015] 5 CLJ 324, Court of Appeal

FACTS In order to secure an *Al Bai Bithaman Ajjil*⁸ ("BBA") from the respondent bank, LCL Corporation Bhd ("the Company") and the respondent entered into asset purchase and asset sale agreements using as security, 16 million shares of the appellant (who was a major shareholder of the Company) which the appellant transferred to the Company by way of *hibah* (gift). Upon default of repayment by the Company, the respondent sold the shares, and sued the Company and appellant for the shortfall. The High Court decided in favour of the respondent. On appeal, the appellant claimed that the transactions were invalid and unenforceable as they contravened sections 67⁹ and 67A¹⁰ of the Companies Act 1965.

ISSUE The issue was whether the dealing by the Company in its own shares, involving the execution of asset purchase and asset sale agreements under the BBA, contravened both sections 67 and 67A of the Companies Act 1965.

HELD In dismissing the appeal, it was held that the execution of asset purchase and asset sale agreements did not infringe section 67 as they were a necessary part of the Islamic finance procedure for the purpose of granting the second BBA facility. It was also ruled that the purported purchase under the asset purchase agreement was not within the ambit of section 67A, as it was done pursuant to the requirement of an Islamic financing transaction that requires a sale and buy-back of the shares. Thus, the transactions under the BBA did not infringe sections 67 and 67A of the Companies Act 1965, and were therefore valid and enforceable.✂

⁸ *Al Bai Bithaman Ajjil* (BBA) is a contract of a deferred payment sale which is the sale of goods on a deferred payment basis at an agreed selling price, which includes a profit margin agreed by both parties.

⁹ Dealing by a company in its own shares, etc.

¹⁰ Purchase by a company of its own shares, etc.

ACTS

VETERANS ACT 2012

No
740

Date of coming into operation
15 October 2015

Notes

This is an Act to establish the National Veterans Council, to provide for the registration of veterans, and veterans associations and to provide for matters connected therewith.

AMENDMENT ACTS

CHEMISTS (AMENDMENT) ACT 2015

No
A1493

Date of coming into operation
1 November 2015

Notes

The highlight of the amending Act includes the amendments to section 7 where the functions of the Malaysian Institute of Chemistry have been enhanced. New provisions on training, education, examination and professional development for its members have been introduced. Section 19(2) has also been amended to enhance punishments, to include suspension and termination of membership.

RETIREMENT FUND (AMENDMENT) ACT 2015

No
A1496

Date of coming into operation
21 October 2015

Notes

The highlight of the amending Act includes the introduction of Section 4A and Section 21A. Section 4A allows the Retirement Fund (Incorporated) to act as an agent of the Government of Malaysia for the purpose of paying pension, gratuity and other benefits from the Consolidated Fund. Section 21A imposes an obligation of secrecy on members of the Board, Investment Panel Committee, officers and servants of the Retirement Fund (Incorporated) and other persons who have access to information relating to its affairs.

GUIDELINES/RULES/CIRCULARS/ DIRECTIVES AND PRACTICE NOTES ISSUED BY BANK NEGARA MALAYSIA AND BURSA MALAYSIA BETWEEN OCTOBER AND DECEMBER 2015

BANK NEGARA MALAYSIA (BNM)

- Guidelines on Granting of Credit Facilities – *Effective date: 1 December 2015*
- Life Insurance and Family Takaful Framework – *Date issued: 23 November 2015*
- Guidelines on Establishment and Operations of Representative Offices in Malaysia – *Date updated: 5 November 2015*

- Money Services Business (Remittance Business) (Amendment) Regulations 2015 – *Date issued: 30 October 2015*
- Financial Services (Financial Ombudsman Scheme) Regulations 2015 – *Date issued: 29 October 2015*
- Islamic Financial Services (Financial Ombudsman Scheme) Regulations 2015 – *Date issued: 29 October 2015*
- Observation Period Reporting (Capital Adequacy Ratios and Liquidity Coverage Ratio) – *Date issued: 16 October 2015*

BURSA MALAYSIA

- Amendments to the Rules of Bursa Malaysia Derivatives Berhad in relation to the replacement of 'London Gold AM Fix' with 'LMBA Gold Price AM' as the Reference Price for Gold Futures ("FGLD") Contract – *Effective Date: 16 November 2015*
- Consolidated Rules of Bursa Malaysia Derivatives Bhd – *Date updated: 16 November 2015*
- Amendments to Bursa Malaysia Securities Berhad Main Market Listing Requirements relating to Sustainability Statement in Annual Reports and Issuance of the Sustainability Report Guide and Toolkits – *Date issued: 8 October 2015*
- Consolidated Main Market Listing Requirements – *Date updated: 8 October 2015*
- Consolidated ACE Market Listing Requirements – *Date updated: 8 October 2015*

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