

# the brief

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## Words & Phrases

*Ignorantia juris non excusat:*

Ignorance of the law  
is no excuse

## in this issue...

### # BRIEFING... 1

What are Exchange Traded Funds and what does the future hold for such funds? Find out in ***Having Such Fund !***, our first article in **Briefing**. ***Equality Amongst Equals*** revisits gender issues with emphasis on the plight of former air stewardess, Beatrice Fernandez. In ***Connecting the Consumer***, we examine recent developments in the communications sector and whether they will ultimately benefit the consumer.

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Four reports are in our **Brief-Case - *Classic Lane (M) Sdn Bhd v Citibank Malaysia (L) Ltd & Anor*** wherein the definition of 'securities' is examined; ***Subramaniam NS Dhurai v Sandrakasan Retrasamy & Ors*** where the Court of Appeal revisits the law in ***Adorna Properties v Boonsom Boonyanit; Lee Guan Par v Hotel Universal Sdn Bhd*** that deals with the right of the landlord and ***The Ritz Hotel Casino Limited & Anor v Datu Seri Osu Haji Sukam***, a case which deals with the issue of whether gambling is against public policy.

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The Government (Investment) (Amendment) Act 2005 and the Malaysian Communications & Multimedia Commission (Amendment) Act 2004 are some of the statutes reviewed in **Brief-Up**. We have also listed the Rules, Guidelines and Practice Notes issued by the Securities Commission, Bursa Malaysia Securities Berhad and Bank Negara Malaysia between July and September 2005.

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When is a kiss not just a kiss? Find out in our newflash, **Briefly**. Other local highlights include ***Park At Your Own Risk*** and ***A Constructions Contracts Act?*** In our foreign section, the plight of Kazaa, the popular file-swapping network, is highlighted in ***Copyright Wronged !***

# # BRIEFING

## CORPORATE

**HAVING SOME FUND!** A topic that is generating much interest in the Malaysian investment community is the country's first Exchange Traded Fund (ETF). What are ETFs and what does the future hold for such funds? We examine some of these issues in this article.

**WHAT IS AN ETF** An ETF is an open-ended investment fund that tracks a particular index. ETFs combine the best features of unit trusts and shares. ETFs are structured as unit trusts in that such funds invest in a portfolio of securities. At the same time, ETFs are also tradeable on Bursa Malaysia like any other shares listed on the bourse, during the usual trading hours.

The ABF Malaysian Bond Index Fund (ABFM) was listed on the Main Board of Bursa Malaysia on 18 July 2005. A pertinent issue is whether the introduction of ETFs on Bursa Malaysia is beneficial to the investment community as a whole and able to establish a strong foothold in the Malaysian investment community.

In order to examine what the future holds for ETFs in Malaysia, it is important to understand the objectives of the Securities Commission (SC) for introducing ETFs to the Malaysian investment community. The objectives are to add variety to the current investment funds listed on Bursa Malaysia, to keep up with developments in other jurisdictions and to improve liquidity within the equity market. This is keeping in line with the Capital Markets Master Plan.

**WHY ETFS** A main feature of an ETF is that it is able to improve liquidity within the equity market. In order to fully appreciate this feature, it is important to comprehend how

ETFs carry out this function of market making. Each ETF has a net asset value (NAV) that is calculated with reference to the market value of the portfolio of securities held by it. However, the trading price of an ETF on Bursa Malaysia will be determined by the supply and demand of the market. The trading price of an ETF may not be equivalent to its NAV. This disparity creates arbitraging opportunities to arbitrage any discounts and premiums that may arise between the price of the ETF and its NAV. These arbitraging activities ensure that the traded price of an ETF is usually very close to its NAV.

In this respect, since ETFs have the unique structure of an open-ended fund, this means that ETF units can be created and redeemed by the institutional investors instantaneously on a stock exchange, unlike the inflexibility of a unit trust fund, which usually trades at end of day prices. Besides this, the underlying index and the constituent securities of an ETF are transparent, as price quotations are disclosed during trading hours.

Another attraction of ETFs is the fact that ETFs only incur a low minimum investment. ETFs are traded in board lots, which are normally priced at an affordable rate. ETFs that track a bond index provide a much lower entry cost in comparison to a direct bond issue. In this regard, ETFs serve as an appropriate tool to complete the average investor's asset allocation options. For example, the Bond ETF will be invested in ringgit-denominated sovereign and quasi-sovereign issues such as Malaysian Government Securities (MGS). This provides a chance for retail investors to invest in MGS-quality instruments indirectly, for which there is no secondary market at present. Investors will be able to buy shares in a Bond ETF for as little as RM100, which is in stark comparison with a typical board lot which can cost up to RM5 million.

With regard to the benefits of ETFs to Malaysia, although the development of such funds in Australia and Singapore has been encouraging, the most impressive and commendable ETF success story is in the United States (US). ETFs were first launched

on the American Stock Exchange (AMEX) in 1993. The AMEX is the only primary exchange that offers a full range of equities, options and ETFs. Besides being a national equities market, AMEX leads the industry in ETF listings with a total number of 164 listed ETFs as at 23 June 2005, which is quite impressive. The extraordinary growth of ETFs resulted in the formation of a whole new class of securities that has developed to more than US\$200 billion in assets.

The reason ETFs had accomplished such astounding success in these countries lies in the fact that such funds appeal to the market majority, that is, the average middle-income investor. It cannot be denied that the high cost of investing is a major deterrent for middle-income investors. A very good example is the Central Provident Fund members in Singapore. It is to be noted that the average investor does not have access to professional investment expertise. Nor do they have sufficient information about their investment. This is where the benefits of ETFs come in as the average investor will be attracted to the fact that such funds are traded in board lots, which can be obtained at an affordable rate. It is a great perk of ETFs that updated trading information is available to the public through licensed securities dealers. This is where ETFs have an edge over unlisted index funds, where information is usually only available from the fund manager and his appointed distributors.

It is the view that if ETFs have been considerably successful in developed countries such as the US, Australia and Singapore, then there is no reason why it shouldn't be so in Malaysia. What we need as a propellant to the likely success of ETFs is the implementation of programmes, which seek to educate and inform the public of the key features, benefits and mechanisms of ETFs (as in the US and Singapore).

While there are various reasons to invest in an ETF, it must be noted that there are risks attached to such a fund.

Since ETFs are based on an underlying basket of securities, they are subject to the same

market fluctuations as these securities. Besides this, there is also the risk of tracking errors, which is the difference between the returns of an ETF and the returns of the index that the ETF attempts to duplicate. ETFs may not hold all the constituent securities of an underlying index in the same weightings as the constituent securities of the index. Thus, the securities underlying the ETF may outperform or under-perform the index. As a result it must also be remembered that listing on Bursa Malaysia does not absolutely guarantee liquidity for an ETF.

## **GUIDELINES ON EXCHANGE TRADED FUNDS**

The SC protects the investors' interests by regulating the investment powers and restrictions of an ETF vide clauses 11.01 to 11.13 of the Guidelines on Exchange Traded Funds ('ETF Guidelines'). It is commendable that the provisions of the ETF Guidelines which took effect from 21 June 2005, are drafted in such a way that all investments of an ETF fall within the purview of such Guidelines. For instance, clauses 11.02 to 11.09 regulate the investments of ETFs in foreign markets, securities that are not traded under the rules of an eligible market, warrants and options contracts, other collective investment schemes, futures contracts, securities lending and liquid assets. As for other investments that are not specified, clause 11.13 provides that the management company must seek the prior approval of SC before investing. This safeguard is to prevent the management company from abusing its powers. Any non-compliance may result in penalties to be imposed by the SC. With this, it is hoped that the ETF Guidelines serve their purpose of alleviating or at least lessening the risks associated with ETFs to promote the public's acceptance of such funds.

**CONCLUSION** Despite such risks, ETFs are widely expected and touted to be a success story in the Malaysian context. The basis for this proposition is the view that the Malaysian capital market and investment community will substantially benefit from the diversification, liquidity, transparency and convenience that ETFs bring. ❧

## BANKING LITIGATION

**ORDER OF THE COURT?** Is a financier having an absolute assignment, allowed to realise his security without having to register a National Land Code (NLC) charge (despite the issuance of an individual title)? We examine this issue that was raised in the recent High Court decision of **Hong Leong Bank v Goh Sin Khai (2005)**

### HONG LEONG BANK V GOH SIN KHAI

The answer to the issue raised in **Hong Leong Bank v Goh Sin Khai** was answered in the affirmative. Stressing the fact that the contract was of paramount importance, it was stated by Syed Ahmad Helmy J:

'There is no statute or rule in common law that once an individual title or strata title is issued, the absolute assignment is extinguished. Likewise, there is nothing to say that the assignor takes a transfer of the property and creates a charge in favour of the lender. In the absence of any statutory provision or rule of common law, the court must give effect to the intention of the parties that is reflected in the contractual provisions of the assignment.'

**DÉJÀ VU** The issue raised in **Goh Sin Khai** revisits the issue in the Federal Court case of **PhilleoAllied Bank (M) Bhd v Bupinder Singh Avatar Singh & Anor ('PhilleoAllied')** and the High Court decision of **Ooi Chin Nee v Citibank Berhad ('Ooi Chin Nee')**. In **PhilleoAllied**, the specific question was whether a lender may, without obtaining an order of sale from the court, realise his security consisting of immoveable property in respect of which there was no issue document of title and no registered charge. The Federal Court reasoned that an absolute assignment to a financier of the rights and interest of a purchaser under a sale and purchase agreement as security for the repayment of a

loan creates an equitable mortgage which enables a mortgagee to exercise his common law power of sale without the necessity of a court order.

It is important to note that no issue document of title was issued in **PhilleoAllied's case**.

**CASES DISTINGUISHED** In **Ooi Chin Nee**, the facts were that the plaintiff purchased a parcel from a developer and obtained a loan from the defendant, a bank. In a situation similar to that of **PhilleoAllied**, the plaintiff in **Ooi Chin Nee** signed a deed of assignment through which he surrendered all his rights over the said property to the defendant. Upon default, the defendant subsequently sought to sell the property by way of public auction. The plaintiff applied to court for an injunction to prevent the defendant from auctioning off the said property.

RK Nathan J distinguished **Ooi Chin Nee** from **PhilleoAllied** in that in the latter, no issue document of title was issued, whereas in the former there was an issue document of title and clause 4.05 of the deed of assignment clearly stated that 'once a separate title had been issued, a statutory charge must be created over the said property.' This means that the charge must be registered. Once this is established, then Order 83 of the Rules of the High Court 1980 stipulates that the defendant must apply to court for leave to foreclose. It was held that in pursuance of their contractual rights, the plaintiff must get the property transferred to his name and then register a charge in the defendant's favour when there is an issue document of title.

**CONCLUSION** Thus the answer to the question: 'Is it an obligation on the part of the absolute assignee to register an NLC charge and to apply to the court for an order for sale, after the issuance of an individual title' depends very much on the intention of the parties as reflected in the deed of assignment, as shown in the contrasting cases of **Ooi Chin Nee** and **Goh Sin Khai**. ☞

## COMMUNICATIONS/ MULTIMEDIA

### CONNECTING THE CONSUMER...

We examine recent developments in the communications sector and whether they will ultimately benefit consumers.

In a public inquiry conducted earlier this year, the Malaysian Communications and Multimedia Commission ('the Commission') undertook a detailed examination of over 25 facilities and services for inclusion in the Access List and a range of new and emerging technologies that may be relevant to existing or new Access List facilities and services.

Subsequently, the Commission issued two new determinations, the first being the Determination on the Access List and the second being the Determination on the Mandatory Standard on Access. These determinations came into operation on 1 July 2005 and supersede their predecessors.

**THE 'A' LIST** The Access List is one that specifies a number of regulated network facilities and network services; subjecting their provider ('Access Provider') to certain obligations. An Access Provider supplying such facilities and services is obliged to allow other operators ('Access Seekers'), who make reasonable written requests, to use them. Access Providers are required by section 149 of the Communications and Multimedia Act 1998 to provide such facilities and services to Access Seekers on an equitable and non-discriminatory basis.

The Access List increases the number of regulated facilities and services from 9 to 23. Benefits that consumers may enjoy with such expansion are greater competition in broadband services and hassle-free switching to other mobile service providers.

**IN THE LOOP** Local loop unbundling has been mandated and it essentially allows network operators to utilise the local loop of

another operator to provide its services to end-users. What this means is that new operators will now be able to provide broadband services to end-users to whom they previously had no access. Therefore, if a customer is dissatisfied with broadband services currently provided by his service provider, he has the option of obtaining similar services from other operators. Such competition is likely to promote competitive pricing and enhance the quality of service across the board.


### DON'T LEAVE HOME WITHOUT IT...

Mobile phone users stand to benefit from Mobile Number Portability. This service enables a mobile subscriber to retain his mobile number when changing network operators within the country. This eliminates the inconvenience involved in having to inform friends and associates of a mobile number change, as well as the chances of being issued a mobile number which previously belonged to someone else and having to answer his or her phone calls.

Like broadband subscribers, mobile consumers would now be able to easily switch to other mobile network providers for better service. From the consumer's perspective, Mobile Number Portability will increase competition in the mobile industry and thus quality of service, as users choose their networks based on better performance, value-added services and lower cost.

### MANDATORY STANDARD ON ACCESS

The Mandatory Standard on Access is a mandatory standard which sets out model terms and conditions for the provision of access to regulated facilities and/or services in the Access List. Both these determinations play a vital role in regulating the provision of regulated facilities and services.

**CONCLUSION** As the Access List and Mandatory Standard on Access have only just come into operation, industry players are currently trying to implement the new services. Consumers are only likely to see them on the market next year. 

## CONSTITUTIONAL LAW/ INDUSTRIAL RELATIONS

**EQUALITY AMONGST EQUALS...** In the wake of the plight of former air stewardess, Beatrice Fernandez, some have questioned the effectiveness of article 8 of the Federal Constitution which to many, guarantees equal rights. What exactly is the purview and ambit of article 8 and to what extent are equal rights protected by virtue of such article?

**FACTUAL MATRIX** The applicant joined Sistem Penerbangan Malaysia (MAS) as a Grade B flight stewardess and was bound by the terms and conditions of a collective agreement wherein clause 2 required all stewardesses in the applicant's category to resign on becoming pregnant. The applicant became pregnant but refused to resign, resulting in the termination of her contract of service by MAS. The applicant then sought a declaration that certain clauses of the agreement that dealt with provisions for maternity leave and retirement age for different categories of female employees of MAS, contravened article 8 of the Federal Constitution and that consequently the agreement was null and void.

**ARTICLE 8...PAST AND PRESENT** The statutory focus of the case was article 8 of the Federal Constitution. Article 8 was amended in 2001 for the purported betterment of women in general. Article 8(2) which did not contain the words **or gender** now reads as follows:

Except as expressly authorised by this Constitution, there shall be no discrimination against citizens on the ground only of religion, race, descent, place of birth or gender in any law or in the appointment of any office or employment under a public authority or in the

administration or in any law relating to the acquisition, holding or disposition of property or the establishing or carrying on of any trade, business, profession, vocation or employment.

**APPLICATION OF ARTICLE 8... TO WHAT EXTENT?** The question is to what extent does article 8 prohibit discrimination? According to both the Court of Appeal and Federal Court, article 8 of the Federal Constitution does not apply to the situation in this case as it involved the rights of an individual vis-à-vis a collective agreement. To invoke article 8, the applicant should show that some law or action of the executive discriminates against her so as to controvert her rights under the said article.

It was further stated in the Federal Court:

'Constitutional law does not extend its substantive or procedural provisions to infringements of an individual's legal right by another individual. Further, reference to the 'law' in article 8 of the Federal Constitution does not include a collective agreement entered into between an employee and a trade union of workmen.'

**EQUALITY?** The issue that arises is, if at all, how does article 8 of the Federal Constitution promote equality? Does 'equality' in this context mean an absence of discrimination altogether?

On this point, it is interesting to note the 1977 Federal Court case of **Datuk Haji Harun bin Haji Idris** where it was stated by the then Lord President, Tun Suffian that:

'...the equality provision in article 8 is not absolute. It does not mean that all laws must apply uniformly to all persons in all circumstances everywhere.'

His Lordship referred to an even earlier case, **PP v Khong Teng Khen** where it was stated that:

'...the law may classify persons into women and men, or into wives and husbands and provide different rights and liabilities attaching to the status of each class.'

Although the case of **Datuk Haji Harun bin Haji Idris** did not specifically deal with discrimination against women, the point driven home vis-à-vis article 8 was that equality is better theorised than practised:

'...(equality) is easy to state but difficult to apply because first, equality can only apply among equals and in real life there is little equality, and secondly, while the concept of equality is a fine and noble one it cannot be applied wholesale without regard to the realities of life.'

The reality of the situation is that in the service industry, especially in relation to air stewardesses, a manager in the airline's corporate services was quoted:

'Let's face reality. Customers prefer to be served by young, demure and pretty stewardesses, especially Asian ladies. We need frontliners who are mentally and physically alert, young, pretty and quick to respond to emergencies as safety and security of passengers is our priority.'

The suggestion that ensued was that women over 40 may have domestic problems that could affect their work, especially if they had children. The underlying issue appears to be the probability of deteriorating looks, weight gain after delivery and other realities of life but should article 8 of the Federal Constitution be used as a façade to the cold hard facts?

**CONCLUSION** One may remain empathetic towards the plight of the applicant, but whether prejudicial, patronising or blatantly perverse, the legality of the policies executed by the defendants appears watertight. In any event, if one takes the stand that the applicant has been treated unfairly, it may be worth contemplating the words of Abdul Hamid Mohamed FCJ in the Court of Appeal where his Lordship said:

'It cannot be argued that the collective agreement is discriminatory just as it cannot reasonably be argued that the provision of the law giving maternity leave only to women is discriminatory as against men.'

## INDUSTRIAL RELATIONS

### UNFIXING A FIXED-TERM CONTRACT

Job security is an aspect of importance to any employee as the expectations which come with it include promotions, monetary increments and other related benefits.

We examine the nature and legal implications of fixed-term contracts and the approach of the courts in giving effect to such contracts.

**HOW IS IT FIXED?** A fixed term contract is one that is stated to last for a set period of time. There is usually a date stated as to when the contract will be deemed to have ended and it comes to an end automatically upon the expiry of the period specified therein. The commercial reasons for employing workers on a fixed-term contract are recognised as the need of the employer for a more productive and efficient work place. Examples of when an employer enters into fixed-term contracts are: when (a) the work is seasonal – that is when the workload is expected to be higher; (b) there is a temporary absence of permanent staff; (c) there is a need for the performance of specific tasks such as short-term research projects funded from outside the employers' undertaking.

It has been recognised that an employer may need the services of a highly skilled person for a short term to handle some part of his business or operations and so he ought to be given the liberty to embark on a project. Thus in the 2002 Industrial Court case of **Pelabuhan Tanjung Pelepas Sdn Bhd v Thangasamy Brown a/l DN Gnanayutham**, the court gave effect to an agreement between an employer and employee wherein a 6-month term was expressly stated in the offer of employment, and that there was nothing in the evidence before the court to indicate that the employee's services were required on an

ongoing basis as part of the employer's company's operations such that the former's engagement was intended by both parties to be for permanent employment in the ordinary way.

Although employers may have a genuine need for fixed-term employment, employees have to be protected against being deprived of their rights as at the outset, the concept of a fixed-term contract goes against the principle of security of tenure of employment as it allows the employer to terminate the employee's services simply on the ground that his contract of employment had expired. In fact it was observed by the Industrial Court in ***Innoprise Corporation Sdn Bhd v Sukumaran Vanugopal*** (1993) that:

'...industrial jurisprudence leans in favour of permanency to ensure security of tenure of employment but fixed-term contracts go against this philosophy because the absence of a good reason for fixed-term contracts deprive a man of such security...'

### **DETERMINING A GENUINE FIXED-TERM CONTRACT**

Owing to a need to protect employees' security of tenure and to guard against the practice of dismissal without just cause or excuse, the courts have taken the position that only genuine fixed-term contracts would be upheld. Thus where aspersions are cast on the genuineness of such contracts, the termination of a fixed-term contract without assigning any reasons would amount to a dismissal without just cause or excuse and the employee may claim for the remedy of reinstatement under section 20 of the Industrial Relations Act 1967.

The importance of determining whether a fixed-term contract is genuine was explained in the Industrial Court case of ***Han Chiang High School/ Penang Han Chiang Associated Chinese Schools Association v National Union Of Teachers in Independent Schools, West Malaysia***. In that case, certain teachers who had been employed on

fixed-term contracts claimed that they had been dismissed without just cause and excuse. They argued that the intention of the school was to rid itself of the union, which was why the school relied on the fixed-term contracts to flush out the teachers who were members of the union. The Industrial Court upheld the dismissal to be without just cause and excuse and observed:

'...it would be an obvious loophole if any employer could evade the statutory protection by making a series of contracts of finite duration with his workmen.'

In determining whether a fixed-term contract is genuine, it was held that the following factors must be considered:

- nature of the employee's job functions;
- purpose of the employment;
- intention of the parties;
- background of employer/ company

**CONCLUSION** Fixed-term contracts should only be allowed in genuine cases and if such contract is not genuine, any termination by reason of expiry or non-renewal of the contract period or termination by merely giving the notice period may attract a claim under section 20 of the Industrial Relations Act 1967 and if the Industrial Court should find in favour of the claimant, an order may be made to reinstate or to grant compensation in lieu of reinstatement together with full backwages. ❧

*Every job is a self-portrait of the person who does it. Autograph your work with excellence - Unknown*



## MONEYLENDING

### REDEFINING A MONEYLENDING TRANSACTION - EXEMPTION OF CORPORATE AH LONGS? PU (B)

219/2005 has been welcomed with a sigh of relief. We examine this Exemption Order made pursuant to section 2A(2) of the Moneylenders Act 1951 that has the effect of exempting specific companies from the provisions of such Act.

### EFFECT OF THE AMENDMENTS TO THE MONEYLENDERS ACT 1951

The Moneylenders Act 1951 ('the MA 1951') as amended by the Moneylenders (Amendment) Act 2003 ('the Amendment Act') effective 1 November 2003, had an unforeseen consequence of severely limiting the ability of legitimate companies to engage in particular types of inter-company loans and related financing activities. The Amendment Act significantly expanded the definition of 'moneylenders' to any persons (companies or individuals) who lend sums of money to borrowers in consideration of larger sums being repaid to them.

The business of moneylending under the new definition simply means making a financial gain from lending a sum of money to the borrowers. There is no requirement that the transactions be frequent or short or long term. The Amendment Act prohibits a person from extending even a single interest-bearing loan, whatever the repayment terms, to a borrower unless he has a valid licence under the Act. It followed therefore that companies (excluding those already exempted by

section 2A of the MA 1951) offering interest-bearing loans to their subsidiaries, holding or related companies, directors or shareholders fell within the ambit of the MA 1951.

The Amendment Act also deleted paragraph (h) of section 2A which previously exempted bona fide persons carrying on business not having a primary object of lending money from the provisions of the Act. The amendment of the definition section read together with the deletion of paragraph (h) had the effect of expanding the categories of persons falling within the scope of the MA 1951.

**PU (B) 219/2005** To the relief of many companies and their officers, on 27 June 2005, after numerous dialogues with and exemption applications made to the Ministry of Housing and Local Government, the Minister made a notification in the Gazette pursuant to subsection 2A(2) of the Act. By this notification, companies exempted by virtue of the exemption order are those that lend money to their related corporations, subscribe or purchase debt securities, or companies holding licences issued by specific institutions and banks.

**CONCLUSION** This long-awaited exemption therefore marks the removal of difficulties faced by businesses operating in Malaysia in having to undergo the licensing process, if they wish to engage in inter-company and internal loans and related areas as described above. ❧

*Neither a borrower nor a lender be; for loan oft loses both itself and friend and borrowing dulls the edge of husbandry - Shakespeare (Hamlet)*

## **BRIEF-CASE...**

**SECURITIES LAW** – What constitutes 'securities' under the Exchange Control Act 1953

### **CLASSIC LANE (M) SDN BHD V CITIBANK MALAYSIA (L) LTD & ANOR** *2005, High Court*

**FACTS** The plaintiff, Classic Lane (M) Sdn Bhd, obtained a USD15 million offshore term loan facility from Public Bank (L) Ltd in 1993, which was approved by Bank Negara Malaysia ('BNM'). In 1996, the plaintiff obtained refinancing for the loan ('1996 loan') from Citibank Malaysia (L) Ltd, the first defendant. Under the 1996 loan, various securities were required and the second defendant was appointed thereunder as the security agent.


In late 1999, the first defendant agreed to extend the payment period for the last instalment pending restructuring of the 1996 loan. However, the plaintiff failed to fulfil the conditions precedent in the restructuring whereby the first defendant declared an event of default pursuant to the 1996 loan.

The plaintiff subsequently applied for a declaration that the 1996 loan and the security documents thereunder were void and illegal. The defendants then applied to strike out the plaintiff's suit. The senior assistant registrar dismissed the defendants' application and consequently, the defendants appealed.

**ISSUE** The question for determination before the court was whether, pursuant to section 4 of the Exchange Control Act 1953 ('ECA') and ECM 10, the approval of BNM was necessary for the execution of the security documents under the 1996 loan.

**HELD** His Lordship held section 4 of the ECA did not extend to securities. The signing of a guarantee in Malaysia was not an 'act

which is preparatory' within the meaning of section 4(2) of the ECA and no prior approval of the Controller was required for the signing of guarantees under the said section.


The court also held that the taking of securities was not a 'dealing' within the context of section 4 of the ECA based on the reasoning that 'dealing' under the said section does not include the issuance of a guarantee. 

**TENANCY** – Dispute pertaining to a tenancy agreement – Civil Law Act 1956, section 28A

### **LEE GUAN PAR V HOTEL UNIVERSAL SDN BHD** *2005, Court of Appeal*

**FACTS** A dispute arose in relation to a tenancy agreement between the appellant and the respondent, in particular whether there was consensus in extending the tenancy for another three years. The respondent gave notice to the appellant to deliver vacant possession but the appellant ignored it and continued to be in possession of the same without paying rental.

**ISSUE** One of the issues for consideration was whether the respondent was justified in resorting to forceful entry of such premises and also entitled to double rental under section 28(4)(1) of the Civil Law Act 1956 ('CLA').

**HELD** Since the appellant had not paid the rental, he had repudiated the tenancy and hence the respondent's entry into the said premises was not unlawful. In fact when the appellant persisted in remaining in occupation of the premises without paying any rent, he was wilfully in unlawful occupation thereof and was in law a trespasser, thereby entitling the respondent to claim double rental as provided in section 28 of the CLA. 

LAND LAW - Whether transfer of land was null and void – Indefeasibility of title – National Land Code 1965, section 340(2)

**SUBRAMANIAM NS DHURAI V  
SANDRAKASAN RETRASAMY & ORS**


2005, Court of Appeal

**FACTS** Land belonging to the respondent was transferred to the third defendant (the appellant in this case) by the first defendant who had no valid title but had obtained the issue document of title to facilitate the transfer. The respondent in alleging that the transfer was facilitated through forged documents, relied on section 340(2)(b) of the National Land Code 1965 ('NLC') to render the transfer null and void.

**ISSUE** Whether transfer of land to the appellant was null and void.

**HELD** The first defendant had no interest in the land and was incapable of passing any such interest to the appellant. Furthermore the appellant was found NOT to be a bona fide purchaser. The transfer therefore had to be set aside.

**ANALYSIS** The case of *Adorna Properties v Boonsom Boonyanit* (2001) was referred to and the issue of whether it was good law was addressed.

Although in our view, Justice Gopal Sri Ram, in his observation, had accurately expounded the law as laid down in section 340(2) and (3) of the NLC, it was decided that based on the doctrine of binding precedent, the Court of Appeal had no choice but to be bound by the decision of the Federal Court in *Adorna Properties v Boonsom Boonyanit*.

CONTRACT/ PROCEDURE - Application for registration of judgment pursuant to the Reciprocal Enforcement of Judgments Act 1958 – Whether against public policy


**THE RITZ HOTEL CASINO LIMITED  
& ANOR V**

**DATU SERI OSU HAJI SUKAM**

2005, High Court

**FACTS** The applicants were two foreign judgment creditors who applied to register a foreign judgment for a gambling debt amounting to over RM7 million, incurred by the respondent, Datu Seri Haji Osu Sukam, in a casino in London. The application was made pursuant to the Reciprocal Enforcement of Judgments Act 1958.

**ISSUE** One of the issues for consideration was whether it was contrary to public policy to enforce a judgment recovered in an English Court for a gambling debt, taking into account the nature and implications of such activity.

**HELD** The application was dismissed on the basis that the debt incurred was based on an activity that was contrary to public policy. It was held that gambling is injurious to public welfare and against the teaching of religion and the Rukun Negara.

*If you must play, decide upon three things at the start: the rules of the game, the stakes, and the quitting time* - Chinese Proverb


## BRIEF-UP...

### SUPPLEMENTARY SUPPLY (2004) ACT 2005

*Act No*  
**A1240**

*Act amended*  
**Supplementary Supply (2004) Act 2005**

*Date of coming into operation*  
**17 June 2005**

*Notes*  
An Act to apply a sum from the Consolidated Fund for additional expenditure for the service of the year 2004 and to appropriate that sum for certain purposes for that year. 

### GOVERNMENT INVESTMENT (AMENDMENT) ACT 2005

*Act No*  
**A1242**

*Act amended*  
**Government Investment Act 1983**


*Date of coming into operation*  
**17 June 2005**

*Amendments*  
**Title, sections 1, 2, 3, 5, 6, 8, 9, 9A, 9B, 9C, 10, 16 and 17**

*Introduction*  
**Sections 2A and 5A**

*Deletion*  
**Section 18 and Schedules A & B**

*Notes*  
The amendment to the title seeks to change the name of the Act to the Government Funding Act, 1983 and to reflect the purpose of the Act, to empower the Government to issue Islamic instruments under various Syariah principles and for different tenures.

Sections 6, 9B and 9C are amended to reflect the current practices of trading and transfer of Islamic instruments issued by the government under the scriptless system. 


### MALAYSIAN COMMUNICATIONS AND MULTIMEDIA COMMISSION (AMENDMENT) ACT 2004

*Act No*  
**A1231**

*Act amended*  
**Malaysian Communications and Multimedia Commission Act 1998**

*Date of coming into operation*  
**1 August 2005**

*Amendments*  
**Sections 6, 10 and 39**

*Notes*  
The amendment to section 6 seeks to increase the number of members of the Commission representing the Government to three members. The amendment to section 10 allows a member of the Commission to hold office for a maximum of five terms of two years each. 

## OTHER ACTS ENFORCED BETWEEN JULY - SEPTEMBER 2005

Armed Forces (Amendment) Act 2005 – 15 August 2005

Insurance (Amendment) Act 2005 – 5 August 2005

Merchant Shipping (Oil Pollution) (Amendment) Act 2005 – 15 September 2005

## RULES/ GUIDELINES/ PRACTICE NOTES ISSUED BY SECURITIES COMMISSION BURSA MALAYSIA SECURITIES BHD BANK NEGARA MALAYSIA BETWEEN JULY - SEPTEMBER 2005

### BURSA MALAYSIA SECURITIES BERHAD (BMSB)

- Amendments to the Rules of BMSB Pursuant to the SC Guidelines on Exchange Traded Funds - 18 July 2005
- Amendments to the Listing Requirements (For Main Board and Second Board) Consequential to the Securities Commission's Guidelines on Exchange Traded Funds and Other Amendments - 23 June 2005

### SECURITIES COMMISSION (SC)

- Practice Note 1 to the SC Guidelines on Dealing in Unlisted Debt Securities by a Universal Broker – Application of the Guidelines to Cross-Selling of Unlisted Debt Securities to Eligible Individuals by

Dealer's Representatives Not Certified by PPKM - 12 July 2005

- SC Guidelines on Online Transactions of and Online Activities in relation to Unit Trusts Requirements – Compliance Checklist - 1 July 2005
  - Guidance Note 5 to the SC Guidelines on Unit Trust Funds In relation to the Amendment to the Investment Restrictions and Limits on Investment in other Collective Investment Schemes - 30 August 2005
  - Guidance Note 6 to the SC Guidelines on Unit Trust Funds – Introduction to New Specialised Funds - 30 August 2005
  - Circular on the SC Guidelines on Unit Trust Funds - Investments in Foreign Markets - 27 May 2005
  - SC Guidelines on Exchange-Traded Funds - 21 June 2005
  - Practice Note 1 to the SC Prospectus Guidelines – Issued Pursuant to Chapter 22 (Specific Requirements For Acquisition of Foreign Securities and Assets) of the Prospectus Guidelines on Public Offerings – In Relation to Listing of Companies with Existing Foreign-Based Operations / Subsidiaries / Associated Companies or that Involving Acquisition of Foreign Securities or Assets - 28 June 2005
  - SC Guidelines on Performance of Supervision Functions at Group Level for Capital Market Intermediaries - 29 June 2005
  - SC Guiding Principles for Outsourcing of Back Office Functions for Capital Market Intermediaries - 29 June 2005
- ### BANK NEGARA MALAYSIA
- Revised Guidelines on Medical & Health Insurance Business – 26 August 2005


## BRIEFLY...

### LOCAL

#### **A KISS IS NOT JUST A KISS...**

The Federal Court will have to decide whether the Datuk Bandar of Kuala Lumpur has the power to enact by-laws on indecent behaviour and to issue summonses against those caught for allegedly behaving indecently in public.

This question raised stemmed from an incident where a couple were charged in the Kuala Lumpur City Hall Court with hugging and kissing at the KLCC park in August 2003. The charge was brought under section 8 of the Park By-Laws (Federal Territory) 1982 where it is stated that 'no person shall behave in an indecent manner in any park'. The by-laws also define 'park'.


Although much criticism arose from what the public perceived to be trivial, the main issue, which is said to be constitutional in nature, is whether the parent Act, that is the Local Government Act 1976 (in particular sections 101 and 102) empowers the Datuk Bandar to make local by-laws on matters of decency and morality. 

#### **"LET THE POLICE GO AND DO THEIR OWN WORK..."**

"Get rid of section 113 (which allows the police to record confessions from suspects) of the Criminal Procedure Code. Let the police go and do their own work".

In a significant move, on 29 August 2005, Deputy Public Prosecutors were directed to immediately stop using cautioned statements and confessions in criminal trials. The move is aimed at avoiding accusations of police abuse. Furthermore confessions (which are usually made in the absence of counsel), have been described as a 'lazy, fault-prone way of launching prosecutions, and are therefore routinely vulnerable to challenge.' It has also been very time-consuming as judges have had to conduct lengthy 'trials-within-a-trial' to determine the admissibility of cautioned statements (It was reported that it took 14 days for a single cautioned statement to be declared inadmissible in the 1994 case of *R Kanaperan*, who faced seven charges of defaming several persons over an alleged sex scandal).

Though this move has been lauded by several quarters, stating that it would raise the bar on investigations, some have remain sceptical lamenting that such directive may result in the exclusion of credible evidence while others have opined that until and unless the law is amended accordingly (sections 112, 113 and 115 of the Criminal Procedure Code and section 24 of the Evidence Act), it would be unlawful to stop anyone tendering cautioned statements in court.

The de-facto Law Minister, Datuk Seri Radzi Sheikh Ahmad has proposed that such laws be repealed altogether. Datuk Seri Radzi who is the chairman of the Parliamentary Select Committee on Amendments to the Penal Code and Criminal Procedure Code said that a report on the relevant changes may be presented to Parliament in March 2006. 

#### **PARK AT YOUR OWN RISK?**

'Park at Your Own Risk' disclaimers may not have any bearing in the light of a decision of the Consumer Claims Tribunal where

RM25,000 was awarded to a massage therapist and his wife who lost their car in a parking lot.

Although disclaimer notices are found not only at parking lot entrances, but also on parking tickets, the tribunal held that such exclusion clauses are not absolute as there is an implied guarantee of reasonable care and skill that there is security for cars parked in the premises.

Leave however has been granted to review the decision of the Tribunal.✚

## A CONSTRUCTION CONTRACTS ACT ?

A Construction Contracts Act may be enacted to govern the construction industry. Mooted by the Construction Industry Development Board (CIDB), the proposed Act is expected to deal with several issues, many of which have become rather pressing in recent years, in the light of sudden winding-up of major contractors.

While we may still be at a discussion stage of such legislation, statutes of a similar nature are not new in countries such as New Zealand, Australia and the UK. For instance New Zealand has already implemented its own legislation in the form of the Construction Contracts Act 2002 which built upon some of the perceived deficiencies in the UK legislation. In New Zealand, the emphasis is on getting paid and establishing a clear mechanism.

It was reported that Works Minister, Datuk Seri Samy Vellu expects to deal with the matter speedily to enable the Bill to be tabled in Parliament soon.✚

## FOREIGN

### COPYRIGHT WRONGED !

Popular file-swapping network Kazaa was found by the Federal Court in Sydney, Australia to have breached copyright, stating that they actively encouraged users to share files, the vast majority of which were copyrighted material. Although lawyers for Kazaa said they would appeal, many in the recording industry see this as a victorious end to a 18-month battle between the legal Australian unit of the Universal Music Group and Kazaa's owners.

Kazaa was the successor to Napster, the file-sharing network that was forced by lawsuits to shut down in July 2001. Kazaa was introduced in the Netherlands in early 2001 and by 2004, almost 317 million users had downloaded its software.

The Australian ruling mirrored the ruling of the US Supreme Court in June 2005 where it held that makers of the file-sharing services Grokster and Morphers could be held liable for contributing to the infringement of copyright. Although Kazaa's lawyers argued that the company's software was no different in function from a photocopier in that it bore no responsibility for how its software was used by those who downloaded it, it was held by the Federal Court that most of the files swapped using Kazaa were copyrighted music and that Kazaa was aware of it but had done too little to discourage it.

"It's a great day for artistes. It's a great day for anyone who wants to make a living from music," declared Michael Speck, record industry spokesman.

Australian courts do not have jurisdiction overseas but their rulings have influenced the development of law in Commonwealth countries including Britain and Malaysia.✚

## ZRp IN-BRIEF...

The ZRp Brief is published for the purposes of updating its readers on the latest development in case law as well as legislation.

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