



the **ZRp** brief

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Selamat Hari Raya



Happy Deepavali

Merry Christmas

Gong Xi Fa Cai

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ZUL RAFIQUE & partners

A BRIEF NOTE...

by Dato' Zulkifly Rafique



1Malaysia

In 1991, when Tun Mahathir introduced the concept of *Bangsa Malaysia* as part of his *Vision 20/20*, many were skeptical and even scoffed at the idea saying that it would never materialise. Almost 20 years later, we are indoctrinated with the concept of *1Malaysia*, something that is not very far off *Bangsa Malaysia*. The question is, will we ever say it and mean it at the same time? That really depends on us and our mindset.

When Dr Joe Vitale advocated subscribing to the Laws of Attraction, he had a good point. When you want something badly enough, thinking about it and wanting it will ultimately lead you to make the effort to obtain it. In the same vein, if we really want to unite as Malaysians, irrespective of our creed, culture and colour, it will happen if we embrace it wholeheartedly. Likewise if we want to remain myopic, insular and xenophobic, our thoughts, words and deeds will inevitably be dotted with dollops of racism and bigotry.

I am glad to say that in **ZUL RAFIQUE & partners**, we try to practise our very own *1Malaysia*. From pupils to partners, secretaries to senior associates, we have a healthy balance of Malaysians from various ethnic groups. And in the spirit of *1Malaysia*, we would like to wish you a *Selamat Hari Raya*, *Maaf Zahir & Batin*, a *Happy Deepavali*, a very *Merry Christmas* and *Gong Xi Fa Cai*.

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- *TNB Distribution Sdn Bhd v Saravanan Velasamy & Anor* [2010], High Court
- *Celcom (Malaysia) Bhd v Mohd Shuaib Ishak* [2010] 7 CLJ 808, Court of Appeal
- *Metropolitan International Schools Ltd v (1) Designtecnica Corporation, (2) Google UK Ltd & (3) Google Inc* [2009] EWHC 1765 QB

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Legislation Update:

- *Competition Act 2010*
- *Employment (Part-Time Employees) Regulations 2010*
- *Stamp (Amendment) Act 2010*
- *Guidelines issued between July and December 2010 by Bank Negara Malaysia*

BRIEF-FLASH...

- **ADMIRALTY COURT** An Admiralty Court was launched on 1 October 2010 at the Jalan Duta Court Complex in Kuala Lumpur, to deal with all admiralty and maritime claims. ✚
- **ALLIED HEALTH PROFESSION BILL** The Allied Health Profession Bill which involves 23 professions will be tabled in Parliament next year. The Bill is aimed to register and control the practices of the relevant professionals including microbiologists, chemists, forensic scientists, speech therapists, psychologists, x-ray technicians (diagnostic), dieticians, medical social workers and health education officers. ✚
- **CIPAA TO BE AMENDED** Amendments to the Construction Industry Payment and Adjudication Act (CIPAA) are expected to be tabled in the Dewan Rakyat by the end of this year. The amendments will address payment-related issues in the construction industry. ✚
- **CORPORATE MILESTONE** The Companies Act 1965 will be replaced by a new Companies Act in 2011. The new Act aims to enable businesses to be formed with more ease and at a cheaper cost but with emphasis on corporate governance. Amongst the features is that the number of days for setting up a business would be reduced from three days to one. ✚
- **COMPETITION COMMISSION** The Ministry of Domestic Trade, Co-operatives and Consumerism is in the process of formulating the structure of the Competition Commission for approval by the Public Service Department. The Commission would be responsible for enforcing the Competition Act 2010, which was recently passed by Parliament and is aimed at ensuring fair business practices. ✚
- **COMPETITIVE ENVIRONMENT** With the enforcement of the Competition Act 2010 on 1 January 2012, all firms, including government-linked companies and the small and medium enterprises which seek to ensure a fair and healthy competition, will be protected. The Competition Act would boost foreign investors' confidence in the country's business industry. ✚
- **CONSUMER CLAIMS** Consumers who failed to get compensation from traders or companies that have ignored orders from the Consumer Claims Tribunal may file a complaint with the enforcement division of the Ministry of Domestic Trade, Cooperatives and Consumerism. According to the Ministry, these traders or companies will be charged in court. ✚
- **DISSOLUTION OF PRBS SCHEME VALID** The dissolution of the Petronas Retirement Benefit Scheme (PRBS) by its Board of Trustees on 1 October 2008 was held by the High Court to be valid and lawful. It was said that the suit, by Petronas Carigali Manager, Mohd Azli Abd Aziz, did not have strong merits. ✚
- **E-SHARE** In a move to enhance efficiency in the payment and settlement systems in the stock market, the Securities Commission, Bank Negara Malaysia and Bursa Malaysia have introduced the Electronic Share Payment facility for share transactions. Share sales proceeds may now be paid by the stockbroker directly into the investors' bank accounts on the same day. ✚
- **HEAVIER PENALTIES** Under the proposed amendments to the Direct Selling Act 1993, which is expected to be enforced by the end of this year, offenders would be imposed with heavier penalties. Offenders could be jailed for up to ten years and be liable to a maximum fine of RM5million. ✚
- **IT STAYS AT 58** It has been reported that the Government does not have plans to raise the retirement age to 60. This is despite the fact that the typical retirement age in Asian countries such as Brunei, Indonesia, Singapore and Thailand are between 60 and 62. In 2001, the retirement age in Malaysia was raised from 55 to 56, and in 2008, it was raised further to 58. ✚

- **JURISDICTIONAL RESTRICTION REMOVED** In dismissing the appeal by businessman Datuk Chee Kok Wing, the Court of Appeal on 17 August 2010, affirmed a High Court ruling that cases originating in a Sessions Court in one district can be heard by any Sessions Court elsewhere in the peninsula. This landmark ruling has accorded the Sessions Court a status similar to the High Court as far as criminal cases are concerned. ☞
- **LAW TO NET LOAN SHARKS** It has been reported that the Moneylenders Act 1951 will be amended to increase the penalty for harassing or intimidating a borrower or his family members. The proposed amendments involve 12 new sections, which include making it an offence for any person to assist an unlicensed moneylender and for a moneylender to employ an agent or canvasser for his business. ☞
- **MALAYSIA-NEW ZEALAND FTA** The Malaysia-New Zealand Free Trade Area Agreement has come into force on 1 August 2010. The tariff reduction started on 1 August with free trade fully realised by 2016 for industrial and agricultural products. ☞
- **NATIONAL TRANSPLANTATION ACT** A National Transplantation Act has been proposed to address the donation, transplant and illegal sales of human organs. ☞
- **NO 'PONNI'** The High Court, on 17 August 2010, ruled that Faiza Sdn Bhd should not be allowed to use the 'Ponni' label for its rice products. In allowing an application by Agricultural and Processes Food Products Export Development Authority of India (APEDA) to nullify the trademark used by the company, the court held that the name 'Ponni' originated from the trademark region in India where the 'Ponni' rice was actually produced. ☞
- **PART-TIME WORKERS** The employment of part-timers will be regulated by the Employment (Part-Time Employees) Regulations 2010 that have come into effect on 1 October 2010. Under the Regulations, part-time employees are entitled to salaries and relevant benefits such as medical benefits and leave. The Regulations will benefit people in seeking second jobs, including those in the government service, as they have been given the green light to work after office hours. ☞
- **POWER OF THE SC** Under section 317A of the Capital Markets and Services Act 2007 which came into force on 1 April 2010, the Securities Commission is now empowered to prosecute a director or an officer of a listed company for breach of fiduciary duty. ☞
- **PRICE CONTROL AND ANTI-PROFITEERING BILL** The Price Control and Anti-Profiteering Bill was tabled in Parliament in July 2010 for the First Reading. The Bill is aimed at reforming the law on price control and enacting provisions relating to prohibitions of profiteering. ☞
- **STRATEGIC TRADE ACT** In order to boost foreign investors' confidence and assist in the prevention of terrorist activities in the country, Malaysia is planning to implement the Strategic Trade Act next year. ☞
- **VISUAL ARTS DEVELOPMENT BILL** The Visual Arts Development Bill 2010 is expected to be tabled in Parliament this October. The Bill is expected to promote the role of the National Art Gallery as the nation's visual arts conservation centre. ☞

FOREIGN FLASH

• ASIAN CONSTITUTIONAL COURTS

Malaysia and six other founding members have signed the Jakarta Declaration for the establishment of an Association of Asian Constitutional Courts and Equivalent Institutions. The Association brings together seven Asian countries, enhancing close cooperation in the promotion of the rule of law, democracy and human rights through the exchange of experience and information on constitutional cases and jurisprudence. ✚

• AUSTRALIAN INTERNATIONAL DISPUTES CENTRE OPENS

The Australian International Disputes Centre opened in Sydney on 3 August 2010. ✚

• DAVID JONES SETTLES OUT OF COURT

Australia's largest sexual harassment claim has been settled out of court. A woman who had sued retailer David Jones, its CEO and nine directors for USD37 million agreed to accept USD850,000 as settlement. David Jones, established in 1938, is Australia's oldest department store. ✚

• **EQUALITY ACT** The UK Equality Act 2010 came into force on 1 October 2010. The law is aimed at banning discrimination at the workplace. The laws apply to England, Wales and Scotland. ✚

• **FACEBOOK V TEACHBOOK** Whilst some of us probably view the word 'book' as a mere noun, Facebook has alleged that the use of the suffix 'book' by Teachbook has infringed its trademark. In August 2010, Facebook filed a complaint in a Californian district court against Teachbook, a networking site geared towards teachers. ✚

• **FOR LAWYERS ONLY...** The UK Court of Appeal recently decided that the legal

professional privilege applies to lawyers, to the exclusion of all other professions. In *Prudential PLC & Prudential (Gibraltar) Limited v Special Commissioner of Income Tax and Philip Pandolfo (HM Inspector of Taxes)* [2010] EWCA (Civ) 1904, Prudential had sought to extend the privilege rule to accountants when dispensing advice on tax law but the Court of Appeal emphasised that extending the rule was 'a matter for Parliament, and not the courts'. ✚

• **LENIENCY FOR WHISTLEBLOWER** In a landmark case, the Singapore Subordinate Court merely fined a whistleblower whose whistleblowing resulted in his own conviction for bribery and corruption. Whistleblower Ang Seng Thor did not receive a jail term, although fines amounting to SGD200,000 were imposed. ✚

• **MUSLIM WOMEN FINED?** Muslim women in France could be fined for wearing full-length veils in public under a Bill that was approved by the French Senate. The law makes France the second European country to criminalise the wearing of the burqa or niqab. ✚

• **NO HEADLINES IN COPYRIGHT** In a landmark case, the Federal Court of Australia has ruled that there is no copyright in headlines. In *Fairfax Media Publications Pty Ltd v Reed International Books Australia Pty Ltd* [2010] FCA 984, it was held that headlines, like titles, are simply too insubstantial and too short to qualify for copyright protection. ✚

• **PLAIN WRITING ACT** The Plain Writing Act has been signed into law by President Barack Obama in October 2010. The new law requires that government documents be drafted in a clear, concise and well-organised manner. ✚

BRIEFING...

TORT

A MATTER OF OPINION When the scientist and science writer, Dr Simon Singh (Singh) wrote an article for the *Comment and Debate* section of the *Guardian* published in April 2008, little did he know that it would spark an intense debate about the role of libel action in areas of scientific controversy.

In this article we review the case of *Re British Chiropractic Association (BCA) v Dr Simon Singh* [2010] EWCA Civ 350 and the thin line that distinguishes between defamation and opinion.

COMMENT AND DEBATE In defending a libel action, one has to prove that the defamatory words were true in order to rely on the defence of justification. Alternatively, the defence of fair comment may kick in where the defendant can show that his words, on a matter of public interest, amount to a comment or opinion that could honestly be held on the facts to be true. It is pertinent to note here that the comment made need not be fair at all, provided it is an honestly held comment. It may be biased or exaggerated but it is still protected for reasons of public policy.

It is therefore absolutely crucial to identify the difference between a statement of verifiable fact and one of opinion. The High Court ruled that the printed words were factual assertions rather than an opinion.

FAIR COMMENT Singh's subsequent appeal to the Court of Appeal on the grounds that the trial judge had "*elided the issues of meaning and comment when, though related, they are distinct*" and "*in deciding the meaning of the words the judge overlooked their context*", found favour with Lord Chief Justice Lord Judge, Lord Neuberger MR and Lord Justice Sedley. The Law Lords ruled that Justice Eady had erred in his approach at the High Court and accordingly observed that Singh's honest opinion was after all, entitled to a fair comment¹ defence.


¹ The policy to promote free discussion in public on matters of public interest gives rise to the defence of fair comment. This defence is available to all since the right to comment on a matter of public interest is not a peculiar privilege of the press alone. The burden of proving fair comment lies on the defendant to a libel or slander action.

The Court of Appeal opined that "*The material words, however one represents or paraphrases their meaning, are in our judgment, expressions of opinion*".

The Court of Appeal's judgment has subsequently prompted the BCA to drop the libel suit. The judgment has also strongly endorsed the view that scientific controversies should be settled by scientific debate, rather than litigation.

The British Chiropractic Association claims that their members can help children with colic, sleeping and feeding problems, frequent ear infections, asthma and prolonged crying, even though there is not a jot of evidence. This organisation is the respectable face of the chiropractic² profession and yet it happily promotes bogus treatments. – Dr Simon Singh

DEBATE, DON'T LITIGATE... But, at what cost has this victory come about? Although Singh's counsel will pursue BCA for costs, he is likely to recover only 70% of the EUR200,000 spent in defending the libel suit for the past two years. The case has highlighted the way English libel law had effectively silenced and intimidated many discussions on serious matters of public interest. The case is now a launching pad for libel reform campaigns and a platform to push forward the kind of public defence that would not cost two years and EUR200,000.

As Singh's solicitor succinctly said, "*Until proper public interest defence is in place, it would always be making the unenviable choice of either shying away from hard-hitting debate, or paying through the nose for the privilege of defending it*". 

² Chiropractic is a therapeutic system based on the principle that the body can heal itself when the skeletal system is correctly aligned and the nervous system is functioning properly.

INFORMATION

PERSONAL DATA PROTECTION

ACT The Personal Data Protection Act 2010, a much debated, discussed and deliberated legislation, was introduced on 19 November 2009 for its First Reading and was passed on 5 April 2010 at its Second Reading in the Dewan Rakyat. However, as at today, it has yet to come into force.

This article aims to provide an overview of the PDPA.

INTRODUCTION The Personal Data Protection Act 2010 (PDPA) seeks to protect personal information belonging to an individual, from being misused, by giving the individual the right to know what information about them is being stored and the choice to consent to such information being stored. The PDPA also aims to regulate the collecting, processing, storing and using of the personal individual information in commercial transactions.

APPLICATION OF THE PDPA The PDPA is applicable to any person who falls within the definition of 'data user', that is, any person who either alone or jointly or in common with other persons, processes or authorises, the processing of any personal data or who has control over personal data in respect of commercial transactions.

The PDPA will apply to data users in three circumstances, namely (a) where the data user is established in Malaysia and the data user processes data; (b) where the processing is done by any person employed or engaged by the data user established in Malaysia; and (c) where the data user is not established in Malaysia, but uses equipment in Malaysia to process personal data.

NON-APPLICATION OF THE PDPA The PDPA does not apply to the following, namely (a) the Federal and State Governments; (b) data processed wholly outside Malaysia unless the personal data is intended to be further processed in Malaysia; (c) non-commercial transactions; and (d) personal data processed for the purposes of a credit reporting business.

PRINCIPLES OF THE PDPA The seven personal data protection principles pursuant to the PDPA are as follows:

General Principle – The use of personal data for specific purpose only.

Notice and Choice Principle – To notify the data subject of personal data used and disclosed.

Disclosure Principle – No personal data to be disclosed without consent of the data subject other than the purpose for which the data was collected.

Security Principle – Practical steps to protect the personal data.

Retention Principle – Personal data not to be kept longer than necessary.

Data Integrity Principle – Reasonable steps to ensure personal data is accurate and up to date.

Access Principle – Data subject to be given access and ability to correct personal data.

The Bill is a form of cyber-legislation and Malaysia is the first among ASEAN countries to introduce this law – Datuk Seri Dr Rais Yatim (Information, Communications, Culture and Arts Minister) – The STAR, 5 April 2010: Parliament: Personal Data Protection Bill Passed

RIGHTS OF THE DATA SUBJECT

Right of access to personal data An individual is entitled to be informed by the data user whether personal data of which that individual is the data subject is being processed by or on behalf of the data user.

Right to correct personal data The data subject may make a data correction request in writing to the data user for the necessary correction to be made in the event the data subject finds that his personal data being held by the data user is inaccurate.


Right to withdraw consent In the event a data subject withdraws his consent to the processing of the personal data, the data user shall cease the processing of that personal data upon receiving notice.

Right to prevent processing that is likely to cause damage or distress.

Right to prevent processing for purposes of direct marketing. The data subject may, by notice in writing, require the data user to cease or not to begin the processing of his personal data for the purposes of direct marketing.

The current trend of global trade would give Malaysia no chance to backtrack, as personal data protection law is now a trade prerequisite recognised by international communities. In fact, adequate regulation on personal data is now a prerequisite by many countries for initiating or continuing bilateral trade. – YB Senator Heng Seai Kie ((Former) Information Communication and Culture Deputy Minister II)

OFFENCES & PENALTIES Some of the offences prescribed in the PDPA include failure to adhere to the principles set out in the PDPA, failure to register as data user for specified classes of data users and the continuation by the data user in processing personal data after registration is revoked. The penalties for these offences include the imposition of fines or a term of imprisonment based on the type of offence.

CONCLUSION The PDPA will have a strong impact on organisations in Malaysia. Meanwhile, new technologies and methods will probably have to be developed to meet the requirements set out under the PDPA. 

INDUSTRIAL RELATIONS

PART-TIME WORKER The Employment (Part-Time Employees) Regulations 2010 came into force on 1 October 2010.

We examine specific aspects of the Regulations in this article.

WHO IS AN EMPLOYEE? The Employment (Part-Time Employees) Regulations 2010 (the Regulations) were enacted under the Employment Act 1955 (the Act). As such, we should first look at the definition of 'employee' as spelt out by the Act before we delve into the meaning of 'part-time employee'. The Act applies to 'employee' as defined in the statute. According to Items 1 and 2 of the First Schedule to the Act, an employee is a person whose wages do not exceed RM1,500 per month under a contract of service with an employer; or a person, irrespective of the wages he earns in a month, who has entered into a contract of service and is engaged in manual labour, or supervises and oversees employees in manual labour, or is engaged in any capacity in any vessel registered in Malaysia or is engaged as a domestic servant.

Independent contractors are therefore not included in the definition of part-time workers as they are not even included in the definition of 'employee'.

WHO IS NOT A PART-TIME EMPLOYEE? The Regulations stipulate the categories of employees who are excluded from the Regulations, despite the nature of their working hours. These are casual employees and house working employees.

Casual Employee A casual employee, according to regulation 3(a) of the Regulations is one who is engaged occasionally or on an irregular basis, as and when needed; and whose working hours in one week do not exceed 30% of the normal working hours of a full-time employee. This brings us to the issue of the normal working hours of an employee. According to regulation 4, where the normal hours of work of a full-time employee cannot be ascertained, the normal hours of work of a full-time employee shall be deemed to be eight hours in one day or 48 hours in one week.

House Working Employee A house working employee is one who performs work for an employer within the employee's residence, irrespective of occupation.

WHO IS A PART-TIME EMPLOYEE?

According to regulation 4(2), the normal hours of work of a part-time employee shall be 70% of the normal hours of work of a full-time employee. This would mean that, taking into account regulation 3, which refers to 'casual employee', a part-time employee is an employee who works between 30% and 70% of the hours of work of a full-time employee.

Part-time employees are entitled to the following:

Holidays According to regulation 6 of the Regulations, every part-time employee is entitled to a minimum of seven public holidays, four of which must include National Day, Birthday of the Yang diPertuan Agong, Birthday of the respective Yang diPertua Negeri and Worker's Day, and in addition, any day declared a public holiday under section 8 of the Holidays Act 1951.

Annual leave A part-time employee's entitlement to annual leave depends on the duration of his continuous service with the same employer. If the duration of his continuous service with the same employer is less than two years, he will be entitled to six annual leave days; if he has served continuously between two and five years, his annual leave entitlement is eight days; and if his continuous service with the same employer is more than five years, the part-time employee will be entitled to 11 annual leave days.

Annual sick leave Sick leave is also dependent on the duration of the continuous service of the part-time employee. For a period of less than two years, the part-time employee is entitled to a minimum of 10 days; for the duration between two and five years of continuous service, the part-time employee is entitled to 13 annual sick leave days and if he has served for more than five years continuously, his annual sick leave entitlement is 15 days.

Rest day If the part-time employee works five days or more, with a minimum total of 20 working hours, he shall be entitled to one rest day.


CLAIMS FOR OVERTIME Part-time employees are also entitled to claim for work that is done beyond their regular hours, or during holidays.

Working day According to regulation 5(1), if the part-time employee works beyond his normal hours of work on a working day, he is entitled to be paid his hourly rate. However, if those hours exceed the normal hours of work of a full-time employee, the part-time employee is entitled to be paid one and a half times his hourly rate for every hour that exceeds his normal hours of work.

Holidays If the part-time employee works within his normal hours of work during a paid holiday, he shall be paid two days' wages in addition to the holiday pay that he is entitled to. However, if he works beyond his normal hours of work during a paid holiday, he will be entitled to three times his hourly rate for each hour which exceeds his normal hours of work.

EPF AND SOCSO CONTRIBUTIONS There is no indication in the Regulations as to whether part-time employees are subject to EPF and SOCSO contributions.

However, according to both the EPF Act and SOCSO Act, an employee is one who is employed under a contract of service. Since there is no indication of his hours of work in both statutes, it may be safe to surmise that employers will have to pay EPF and SOCSO contributions on a pro-rated basis.

CONCLUSION Although the Regulations have been hailed to be a breakthrough in the rules and regulations governing the welfare of employees, it must be noted that there are certain aspects of the employees' welfare that have not been addressed, in particular maternity and termination benefits. 

BANKING & FINANCE

THE DODD FRANK ACT The financial crisis of 2007-2010, one of the worst crises since the Great Depression in the 1930s, was triggered by the bursting of the United States 'housing bubble' which peaked in 2006.

In response, the Dodd Frank Wall Street Reform and Consumer Protection Act 2010 (the Dodd Frank Act) was passed in the United States to deal with the recovery and to address the inadequacies in the previous financial structure which contributed to the economic meltdown. It represents the biggest overhaul of the financial regulation since the 1930s and will have an impact on almost every sector of the financial industry.

In this article, we review specific aspects of the Dodd Frank Act.

INTRODUCTION The Dodd Frank Act (the Act) was proposed in the United States House of Representatives on 2 December 2009 by Barney Frank and in the Senate Banking Committee by Chris Dodd. It incorporated President Barack Obama's proposal for financial overhaul which was revealed in June 2009. On 21 July 2010, the Act was officially signed into law by President Obama.

The aim of the legislation is as follows:

To promote the financial stability of the United States by improving accountability and transparency in the financial system, to end 'too big to fail', to protect the American taxpayer by ending bailouts, to protect consumers from abusive financial services practices, and for other purposes.

SIGNIFICANT CHANGES Some of the significant changes made by the Act are as follows:

ESTABLISHMENT OF NEW BODIES *Financial Services Oversight Council*³ – The Financial Services Oversight Council is a 10 voting-member council⁴ which is responsible

for identifying, monitoring and managing systemic risks. It determines which financial entities are systemically significant and is placed under the supervision of the Federal Reserve.

Consumer Financial Protection Bureau⁵ – This Bureau is housed within the Federal Reserve and is responsible for making and enforcing the rules regarding consumer financial products and services. It operates independently without interference from the Federal Reserve.

Federal Insurance Office⁶ – This agency is housed within the Treasury and is responsible for monitoring the insurance industry besides health insurance.

Office of Financial Research⁷ – This office is housed within the Treasury and is self-funded. It is responsible for collecting vast amounts of data from various financial firms to enable independent valuation of positions. The director has the power to subpoena and obtain data from any financial institutions.

COLLINS AMENDMENT⁸ It allows smaller institutions to continue to treat trust preferred securities as Tier 1 capital but not for larger banks. This amendment sets the current risk-based capital and leverage standards for depository institutions and holding companies.

DERIVATIVES REGULATION It establishes a new regulatory framework for the derivatives market. It places the Over-The-Counter derivatives market under the supervision of the Federal Reserve, split between the Securities and Exchange Commission and the Commodity Futures Trading Commission⁹.

3 Section 111 of the Dodd Frank Act 2010

4 Includes Secretary of the Treasury, Chairman of the Federal Reserve, Comptroller of the Currency, Director of the Consumer Financial Protection Bureau, Chairperson of the SEC, Chairperson of the FDIC, Chairperson of the CFTC, Director of the Federal Housing Finance Agency, Chairman of the National Credit Union Administration Board and an independent member appointed by the President.

5 Section 1011 of the Dodd Frank Act 2010

6 Section 502 of the Dodd Frank Act 2010

7 Section 152 of the Dodd Frank Act 2010

8 Section 171 of the Dodd Frank Act 2010

9 Section 712 of the Dodd Frank Act 2010


ORDERLY LIQUIDATION AUTHORITY An orderly liquidation procedure¹⁰ is created for the resolution of failing financial firms which pose a risk to the financial stability of the United States. Usually, the Federal Deposit Insurance Corporation will be appointed as the receiver. The losses will be absorbed by the financial industry instead of taxpayers.

CREDIT RATING AGENCIES A strict regulatory framework is introduced to improve the quality of credit ratings, its objectivity and accountability for any poor analysis¹¹. These agencies are exposed to increased legal liability. Investors now have a private right of action against rating agencies for a 'knowing or reckless' failure to conduct a reasonable investigation¹².

VOLCKER RULE¹³ It bans banking entities from proprietary trading activities and limits banks' investments in hedge fund or private equity funds to 3% of the Tier 1 capital¹⁴.

DEBIT TRANSACTION FEE The Federal Reserve has the authority to regulate the reasonableness¹⁵ of the interchange fee charged for electronic debit transactions by financial institutions with USD10 billion or more in assets. The fee must be proportionate to the cost of the service provided. Exemption is given to certain services provided by smaller banks.

ABOLITION OF THE OFFICE OF THRIFT SUPERVISION¹⁶ The powers of this office will be distributed among the Federal Reserve, Office of the Comptroller of the Currency (OCC) and the Federal Deposit Insurance Corporation (FDIC)¹⁷. The thrift charter will remain albeit weakened.

CONCLUSION It can be said that the Dodd Frank Act has addressed glaring problems with the financial regulation. However, despite its length and bulk, it has failed to address certain important institutions such as Fannie Mae and Freddie Mac. The complexity of the Act invites searches for loopholes by lawyers and regulators. Having said this, the true impact of the Act depends largely on the relevant financial regulatory agencies as most of the rule-making is in their hands. As to its effectiveness and whether it will successfully achieve its stated aim, only time will tell. 



Kuhendran Thanapalasingam from **ZUL RAFIQUE & partners** receiving a token of appreciation from *Associate Professor Dr Yong Chiu Mei* ((Deputy Dean (Students' Affairs & Alumni), Law Faculty, University of Malaya) at the Asian Law Students' Association Arbitration Forum at the Law Faculty, University of Malaya on 16 October 2010.

10 Section 202 of the Dodd Frank Act 2010

11 Section 932 of the Dodd Frank Act 2010

12 Section 933 of the Dodd Frank Act 2010

13 Publicly endorsed by President Obama on 21 January 2010

14 Section 619 of the Dodd Frank Act 2010

15 Section 1075 of the Dodd Frank Act 2010

16 Section 313 of the Dodd Frank Act 2010

17 Section 312 of the Dodd Frank Act 2010

DISPUTE RESOLUTION

THE REVISED UNCITRAL ARBITRATION RULES

The rules for arbitration under the auspices of the Kuala Lumpur Regional Centre For Arbitration (KLRCA) are the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules of 1976. With the sophistication of commercial transactions, a revision of the 1976 Rules was indeed overdue. As such, in June 2010 the UNCITRAL adopted the revised UNCITRAL Arbitration Rules 2010 (the 2010 Rules), which came into effect on 15 August 2010.


INTRODUCTION The 2010 Rules empowers the arbitral tribunal to expedite proceedings and enhance procedural efficiency and thus considerably reduce time and cost. The lay-out of the 2010 Rules remains the same as its predecessor with Introductory Rules (Section I), Composition of the Arbitral Tribunal (Section II), Arbitral Proceedings (Section III) and the Award (Section IV). Whilst three new provisions (articles 4, 6 and 16) have been added, the rest of the amendments are little more than tweaks.

RESPONSE TO THE NOTICE OF ARBITRATION Article 4 of the 2010 Rules deals with the response to the notice of arbitration. A timeline of 30 days is fixed for the respondent to respond, upon receipt of the notice. The response should include the name and contact details of each respondent, any plea that an arbitral tribunal lacks jurisdiction, a proposal for the designation of an appointing authority, proposal for the appointment of a sole arbitrator, a brief description of counterclaims or claims for the purposes of a set-off, an indication of the amounts involved and the relief or remedy sought.

APPOINTING AUTHORITY The 2010 Rules consolidate the procedures for determining an appointing authority under article 6. Unless the parties have already agreed on an appointing authority, this new provision enables parties to propose the names of one or more institutions or persons, including the Secretary-General of the Permanent Court of Arbitration at The Hague to serve as an appointing authority. Additionally, a great deal of autonomy is placed on the appointing authority in ensuring that the arbitral process is conducted in a timely and professional manner. Except for 'intentional wrongdoing', this provision acts as a waiver of liability of the arbitrator, appointing authority and experts appointed by the panel.

CHANGES TO THE EXISTING RULES

Provisions on the appointment and challenge of arbitrators remain largely unchanged except to the extent of firstly, a model statement of independence pursuant to article 11, which is provided for in the annexure to the 2010 Rules; and secondly, a scheduled timetable for resolving a challenge (as opposed to the deadline of 15 days as provided in the former Rules). A welcome addition to the 2010 Rules is article 17(5) that allows third parties to an arbitration agreement to be joined, unless it is prejudicial. The provisions on cost have also been restructured to reflect reasonableness and accountability. Unlike the former Rules which allowed tribunal members to set their own fees, article 41 of the 2010 Rules sets out guidelines for arbitrators in determining the cost. It further requires the arbitrators to justify their fees and expenses. Parties are also entitled to review the arbitral tribunal's determination of cost by appealing to the appointing authority.

CONCLUSION Noteworthy introductions of time, cost and technological usage to the 2010 Rules suggest a leap in the right direction in ensuring that arbitration remains central in commercial settlement of disputes. 

BRIEF-CASE...

TORT LAW – Defamation – Publication of photograph – Whether derogatory according to the ‘ordinary, reasonable fair-minded reader’

DR BERNADINE MALINI MARTIN V MPH MAGAZINE SDN BHD & ORS AND ANOTHER APPEAL [2010] 7 CLJ 525, Court of Appeal

FACTS The plaintiff, a doctor, claimed that a photo of her in a bridal gown was published without her consent in the defendants’ magazine with the words ‘A Special Night’ appearing at the top of the page. She asserted that the publication had portrayed her to be a woman of loose morals and an unsuccessful doctor who had to resort to part-time modelling works to survive. The High Court rejected the plaintiff’s claim and held that the impugned publication was neither derogatory nor sexually provocative. Hence, this appeal.

ISSUE One of the issues for consideration was whether the trial judge was right in dismissing the plaintiff’s claim on the basis that the plaintiff’s photograph as a bride was not ‘sexually provocative’, and as such did not portray the plaintiff to be a woman of ‘low character’.

HELD The Court of Appeal affirmed the decision of the High Court regarding the non-derogatory nature of the said publication. The trial judge had employed the correct test, that is, the ‘ordinary, reasonable, fair-minded reader’ test. The impugned publication was not derogatory of the plaintiff. Furthermore, the suggestion that the said publication gave rise to an implication that the person photographed did so ‘to supplement her income’ was far-fetched, as a single appearance in a magazine was not sufficient to establish herself as a ‘model’.


INDUSTRIAL RELATIONS – Dismissal on grounds of theft – Employee reimbursed for loss – Whether dismissal harsh and excessive

TNB DISTRIBUTION SDN BHD V SARAVANAN VELASAMY AND ANOR, [2010], High Court

FACTS The first respondent, Saravanan commenced employment with the applicant, TNB, on 3 January 1978 as a general worker and at the time of his dismissal, on 21 March 2001, he was Project Supervisor. He was dismissed upon being found guilty of stealing aluminium wire belonging to the applicant. This was despite the fact that the applicant suffered no loss as they were reimbursed for the stolen aluminium by the contractor.

ISSUE The issue for consideration was whether the dismissal was harsh and excessive, bearing in mind that firstly, the claimant did not suffer any loss as they were reimbursed by the contractor, and secondly, the first respondent had an unblemished record and long years of service.

HELD In endorsing the action by the applicant and disagreeing with the decision of the Industrial Court, the High Court held that the dismissal was neither harsh nor excessive and that the long years of service and the unblemished record were irrelevant when deliberating a serious offence. This was in light of the fact that it was committed by an employee who was entrusted to protect the property and interest of his employer.


Such conduct therefore should not be excused as it not only compromised the interests of the employer, it had also set a bad precedent for fellow employees. 

COMPANY LAW – Derivative action – Whether leave was wrongly granted – Whether complainant had *locus standi*

CELCOM (MALAYSIA) BHD V MOHD SHUAIB ISHAK [2010] 7 CLJ 808, Court of Appeal

FACTS The respondent was granted leave by the High Court to pursue a derivative action under section 181A of the Companies Act 1965 in the name of the appellant, against the appellant's directors, Telekom Malaysia Berhad (TM) and Telekom Enterprise Sdn Bhd (TESB) and their directors. The respondent's action was premised on the action of the directors of Celcom in causing Celcom to enter into a conditional sale and purchase agreement which led to the breach of a buyout provision in another agreement that the appellant had entered into. This, it was alleged, resulted in the decrease of the value of the appellant's shares from RM7 per share to RM2.75.

ISSUE The issue for consideration was whether leave was wrongly granted by the High Court, based on its analysis of the *locus standi* of the respondent as a 'complainant'.


HELD It was held by the Court of Appeal that strict interpretation of section 181A of the Companies Act 1965 is required and there is therefore a need to prove a direct causal nexus between the complaint and how he ceased to be a member. For the requirement of good faith of the respondent, it was found that his conflicting conduct raised suspicion on his true motive as he had also commenced a personal action against the appellant which was identical to this derivative action. Furthermore, it was impossible for the appellant's shares to be purchased at RM7 per share as the highest market share price at that time was RM2.75. There was therefore no reasonable commercial sense to this derivative action. 

TORT LAW – Defamation – Publisher – Liability of search engine

METROPOLITAN INTERNATIONAL SCHOOLS LTD V (1) DESIGN TECHNICA CORPORATION, (2) GOOGLE UK LTD & (3) GOOGLE INC [2009] EWHC 1765, Queen's Bench

FACTS The claimant, an online distance learning course provider, alleged that the defendant's web discussion forum contained comments which defamed the claimant. The claimant also alleged that the third defendant had defamed them, on the basis that the third defendant's search engine showed links to the alleged defamatory material upon an Internet user's request to search for the claimant's online distance learning courses. The claimant notified Google and the web forum site of his complaint and issued proceedings when neither removed the offending statement.

ISSUE The central issue was whether the third defendant was the publisher of the defamatory statements.

HELD It was held by the High Court of England and Wales that the third defendant was not a publisher at common law due to two solid reasons. First, a search engine performs automatically in accordance with computer programmes and hence indicates that there had been no input made by the third defendant or anyone else. Secondly, a search engine which is solely controlled by a computer programme reflects that the third defendant had no role to play in formulating the search terms and thus could not prevent the snippets of the defamatory material to appear upon request made by Internet users. The third defendant therefore was able to show that he was not the publisher and did not have the mental element to the publication of the defamatory statement. 


BRIEF-UP...

COMPETITION ACT 2010

No
712

Date of coming into operation
1 January 2012

Notes

An Act to promote economic development by promoting and protecting the process of competition, thereby protecting the interest of consumers and to provide for matters connected therewith. 

EMPLOYMENT (PART-TIME EMPLOYEES) REGULATIONS 2010

No
PUA 303/2010

Date of coming into operation
1 October 2010

Notes

See article on page 7 

STAMP (AMENDMENT) ACT 2010

No
A1380

Date of coming into operation
1 November 2010

Amendments

Sections 2, 36B, 37, 38 and 38A

Introduction

Sections 36AA, 36C, 74A and 74B 

GUIDELINES/RULES/ PRACTICE NOTES ISSUED BETWEEN JULY AND DECEMBER 2010 BY BANK NEGARA MALAYSIA

BANK NEGARA MALAYSIA (BNM)

- Guidelines & Circulars Listing – Guidelines issued under Shariah – Shariah Governance Framework for Financial Institutions – *Date Issued: 26 October 2010*
- Guidelines & Circulars Listing – Guidelines issued under Malaysian International Islamic Financial Centre (MIFC) – Circular on Issuance of Special Employment Pass for Islamic Finance Expatriates Under the MIFC Initiative – *Date Issued: 20 September 2010*
- Resolutions of Shariah Advisory Council Bank Negara Malaysia – *Date Updated: 25 August 2010*
- Guidelines & Circular Listing – Guidelines issued under Insurance & Takaful – Introduction of New Products for Insurance Companies & Takaful Operators – *Date Updated: 25 August 2010*
- Liberalisation of the Foreign Exchange Administration Rules – *Date Updated: 18 August 2010*
- Guidelines & Circulars Listing – Guidelines issued under Banking – In relation to Capital Adequacy – Risk Weighted Capital Adequacy Framework (Basel II) – Disclosure Requirements – *Date Updated: 13 August 2010*
- Guidelines & Circulars Listing – Guidelines issued under Insurance & Takaful – In relation to Financial Reporting – Guidelines on Financial Reporting for Insurers – *Date Issued: 22 July 2010*
- Guidelines & Circulars Listing – Guidelines issued under Banking – In relation to Capital Adequacy – Capital Adequacy Framework for Islamic Banks (CAFIB) – Disclosure Requirements (Pillar 3) – *Date Updated: 15 July 2010*

✦ 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. We welcome feedback and comments and should you require further information, please contact the Editor at:

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✦ BRIEF-TAKE...



Dazrin Darbi (right) from **ZUL RAFIQUE & partners**, presenting the **ZULKIFLY RAFIQUE** award to Second Year law student, *Nathalie Ker Si Min* from HELP University College at the awards ceremony on 3 November 2010.



Thaya Baskaran from **ZUL RAFIQUE & partners** facilitating a workshop at the Asian Law Students' Association Arbitration Forum at the Law Faculty, University of Malaya on 16 October 2010.