

# the **ZRp** brief

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Folder 3

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*an* **ASIAN-MENA COUNSEL – In-House Community  
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*ASIAN-MENA COUNSEL In-House Community Firm of the Year in  
Malaysia 2012 for Telecommunications, Media and Technology and  
Most Responsive Domestic Firm of the Year*

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**ZUL RAFIQUE & partners**

## A BRIEF NOTE...

by Dato' Zulkifly Rafique



### An exciting quarter...

The last three months have been an exciting time for the legal profession in Malaysia. Two major legal conferences are to be held in Kuala Lumpur. The *International Malaysian Law Conference* (iMLC) recently concluded on a very grand note on 28 September 2012. The next gathering of lawyers will be held on 25 November 2012 for the *International Bar Association (IBA) Asia Pacific Regional Forum Conference* and it promises several thought-provoking sessions.

I must say that all that excitement has spilled over to us as we have had a thrilling quarter ourselves. We were recently named *In-House Community Firm of the Year for Telecommunications, Media & Technology* and also the *Most Responsive Domestic Firm of the Year* by the *Asian-Mena Counsel* magazine. Congratulations to all those who made this possible.

The *Asian-Mena Counsel* magazine is distributed to about 28,000 professionals, of which 18,000 fulfill an in-house legal or compliance role across Asia and the Middle East. The magazine is published by *Pacific Business Press* for the region's *In-House Community*.

Our *ZRp Brief* this quarter contains some interesting features. The Rules of Court 2012, which came into force on 1 August 2012, have been examined. There is also a commentary on the Private Retirement Scheme launched in July 2012; and the article on the newly-enacted Mediation Act 2012 should be of interest to many of you. We hope you enjoy reading these features.

On that note, let me conclude by wishing you *Selamat Hari Raya Aidiladha* and also a *Happy Deepavali*.

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### IN BRIEF...

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- *A Science Act?*
- *First case of 'Price-fixing'*
- *Minimum Wages Order 2012 gazetted*
- *Section 114A comes into force*
- *Extension of Legal Professional Privilege*
- *'Lemon Law' in force*
- *Myanmar's Foreign Investment Bill passed*
- *Tobacco Plain Packaging Act upheld*

### BRIEFING...

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Amongst the articles in our features:

- *The Mediation Act 2012*
- *The Rules of Court 2012*
- *The Private Retirement Scheme*

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Our Brief-Case contains the following:

- *Fauzilah Salleh v Universiti Malaysia Terengganu* [2012] 4 CLJ 601, High Court
- *Dato' Thirumoorthy all Nadesan v Maxis Mobile Services Sdn Bhd* [2012] 2 AMR 485, High Court
- *Dato' Mohamad Salim bin Fateh Din v Nadeswaran all Rajah* [2012] 5 AMR 151, High Court

### BRIEFLY...

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Legislation Update:

- Mediation Act 2012
- Evidence (Amendment) (No 2) Act 2012
- DNA Identification Act 2009
- Guidelines/ Rules/ Practice Notes issued between July and September 2012 by Bank Negara Malaysia, Bursa Malaysia and Securities Commission

## IN BRIEF...

- **A SCIENCE ACT?** A Science Act is expected to be tabled in Parliament before the end of this year. According to the Ministry of Science, Technology and Innovation, the new Act will allow the country to thrive on a sound and well-managed framework of science, technology and innovation ecosystem. 
- **AMENDMENTS TO STRATA TITLES ACT** Proposals have been made to amend the Strata Titles Act 1985, where buyers of strata units will obtain their strata titles simultaneously upon delivery of vacant possession of their units. 
- **AMENDMENTS TO THE PRINTING PRESSES AND PUBLICATIONS ACT 1984** Pursuant to the amendments to the Printing Presses and Publications Act 1984 which came into force on 15 July 2012, renewal of a printing press licence is no longer required. The validity of the licence shall remain until it is revoked. Nevertheless, licences which expire before the enforcement date must be renewed. 
- **ENERGY EFFICIENCY BILL** A Bill to govern renewable and efficient energy is in the pipeline. The proposed Energy Efficiency Bill aims to focus on the usage of renewable and efficient energy in various industries, including the construction sector. 
- **FIRST CASE OF 'PRICE-FIXING'** The Cameron Highlands Floriculturist Association (CHFA) became the first cartel to be investigated by the Malaysian Competition Commission. The CHFA is alleged to have increased the prices of its products by 10%, a 'price-fixing' offence under the Competition Act 2010. CHFA has since apologised for the hike. 
- **LAW ACADEMY PROPOSAL REVIVED** The government is planning to revive the proposal to establish a law academy to raise the standard of the legal profession. Membership will be opened to all legal professionals including non-practising lawyers, academicians, legal officers and former judges. A Bill on the proposal was first tabled in 2002 but subsequently withdrawn. 
- **MINIMUM WAGES ORDER 2012 GAZETTED** The Minimum Wages Order (the Order) which comes into force in January 2013, will apply to employers who either (a) hire more than five employees; or (b) carry out professional activities classified under the Malaysian Standard Classification of Occupations regardless of the number of hired employees. For employers who employ five or less employees, the effective date of implementation is 1 July 2013. Under the Order, the minimum wage payable to employees in Peninsular Malaysia is fixed at RM900 per month or RM4.33 per hour, whereas for employees in Sabah and Sarawak and the Federal Territory of Labuan, it is fixed at RM800 per month or RM3.85 per hour. 
- **NATIONAL HARMONY ACT** The National Harmony Act (the Act) will be introduced to replace the Sedition Act 1948. The Act aims to protect the country's multi-racial and multi-religious society and to guarantee the freedom of speech and expression of every citizen without impeding his creativity and innovativeness. The Government will be empowered to take action against those who use sensitive issues to threaten national solidarity under the new Act. 
- **NEW ORDER AND VALIDITY TYPES** Bursa Malaysia has introduced new order and validity types to enhance its trading system. Brokers may now utilise the Market to Limit order, Fill and Kill Market Orders, Fill and Kill Validity Type and Minimum Quantity Type to enter their orders in Bursa's trading system. Previously, only the Market Order and the Limit Order were available. 

- **REVIEW OF ANTI-SUICIDE LAW**  
The Malaysia Law Reform Committee is reviewing the anti-suicide law where an attempt to commit suicide is an offence under section 309 of the Penal Code. The case of a Somalian man who was imprisoned for a suicidal attempt in Malaysia prompted calls for the review. ✚
- **RULES OF COURT 2012** The Rules of Court 2012 (ROC) which came into force on 1 August 2012, will replace the Rules of the High Court 1980 and Subordinate Courts Rules 1980. The ROC aims at streamlining procedures in civil cases at the Subordinate Courts and High Courts. Substantive changes include those made to the mode of proceedings and new provisions for e-filing. ✚
- **SECTION 114A COMES INTO FORCE** The amendment to the Evidence Act 1950, introducing section 114A, came into force on 31 July 2012. The controversial section creates a presumption of publication. Although there are several debates regarding the implications of the new section, the authorities have taken a firm stand that the provision will remain in the Evidence Act 1950. ✚

### AROUND THE WORLD... IN BRIEF

- **ACCIDENT OR COLLISION?** A test case is being made out in Singapore by insurance company, AXA, in its bid to reject any payment to the family of the driver who was killed in a high-speed crash. AXA claims that the driver, a Chinese national, was driving recklessly, as a result of which no payment should be made as the incident should be classified as a 'collision' and not an 'accident'. ✚
- **ANTI-GAY LAW ALLOWED TO BE CHALLENGED** The constitutionality of section 377A of the Singapore Penal Code, a provision which criminalises sex between men, was allowed by the Singapore Court of Appeal, to be challenged. In overturning the decision of the High Court in striking out the application to challenge the provision, the Court of Appeal was of the view that the issue is one 'of real public interest'. ✚
- **DEATH PENALTY NO LONGER MANDATORY** Singapore has reviewed its mandatory death penalty in specific cases involving drug and murder offences. Judges may now exercise their discretion to mete out life imprisonment instead of death sentence, subject to certain conditions. In murder cases, however, when there is an intention to kill, the mandatory death penalty will apply. ✚
- **EXTENSION OF LEGAL PROFESSIONAL PRIVILEGE** The Evidence Act of Singapore has been amended to extend legal professional privilege to legal counsel. The amendments came into force on 1 August 2012. The new section 128A of the Act refers to *Communications with Legal Counsel in Entity*. ✚
- **KU DE TA'S TRADEMARK DISPUTE** The High Court of Singapore will decide whether the trademark registration of *Ku De Ta* in Singapore is lawful. It began in December 2010 when the partners of Bali night club, *Ku De Ta*, sought a court order to stop the night club at Marina Bay Sands Skypark from using the same name. ✚
- **LANDMARK VICTORY FOR THALIDOMIDE'S VICTIM** The Supreme Court of Victoria, Australia, awarded a multi-million dollar settlement to Lynette Rowe who led a class action suit against the distributor of Thalidomide drug. Babies were born with congenital birth defects after pregnant women, to counter morning sickness, consumed the drug between 1950 and 1970. ✚

- **'LEMON LAW' IN FORCE** Singapore's *Lemon Law* came into force in September 2012 with significant amendments made to the Consumer Protection (Fair Trading) Act, Hire Purchase Act and Road Traffic Act for greater consumer protection. 
- **MYANMAR'S FOREIGN INVESTMENT BILL PASSED**  
Myanmar's Foreign Investment Law was passed by Parliament on 2 November 2012. The new ruling is to allow foreign companies to make full investment in undertakings permitted by the Myanmar Investment Commission. 
- **SGX TOUGHENS LISTING RULES**  
Singapore Exchange (SGX) is imposing tougher conditions for listing on the Mainboard. This is due to the recent scandals involving several Chinese accounting firms. 
- **SOUTH CHINA SEA ROW** Tension over the South China Sea's territorial dispute remains unresolved with China pressing its claims against other ASEAN members. A Code of Conduct has been drafted to address the issue. 
- **TOBACCO PLAIN PACKAGING ACT UPHeld** With effect from 1 December 2012, Australia's Tobacco Plain Packaging Act 2011 (the Act) will require tobacco products for retail sales to have plain packaging, with graphic images of the consequences of smoking. Soon after the Act was passed by the Australian parliament, tobacco giants, Philip Morris and British American Tobacco, filed lawsuits to challenge the constitutionality of the law. However, in August 2012, the High Court of Australia dismissed the claims. 

## BRIEFING...

### ALTERNATIVE DISPUTE RESOLUTION

**THE MEDIATION ACT 2012** Touted to be quicker, less costly and more efficient than litigation, mediation has been actively promoted by the Malaysian Bar Council since the establishment of the Malaysian Mediation Centre in 1999.

The Mediation Act 2012 (the Act) came into force on 1 August 2012. In this article, we examine the aspects of the Act and its impact on the dispute resolution process.

**TOWARDS MEDIATION** The newly enacted Act complements the direction taken by the judiciary<sup>1</sup> and the Bar, and represents bold steps by the government in endorsing mediation as a significant dispute resolution process. Greater weight and credibility are now attached to mediation and this indirectly fosters confidence in this method.

**NON-APPLICATION** An important aspect of the Act is its non-application provided in section 2. The Act does not apply to any mediation conducted by a judge, magistrate or officer of the court pursuant to any civil action that has been filed in court, or any mediation conducted by the Legal Aid Department, or any dispute regarding matters specified in the Schedule. The Schedule provides a list of matters that are excluded from the purview of the Act<sup>2</sup>.

- 1 Practice Direction No 5 of 2010 came into effect on 16 August 2010. According to the Practice Direction, Judges of the High Court and its Deputy Registrar and all Judges of the Sessions Court and Magistrates and their Registrars, may "give such directions that the parties facilitate the settlement of a matter before the court by way of mediation". The objective of this Practice Direction is to encourage parties to arrive at an amicable settlement without going through or completing a trial or appeal.
- 2 1. Proceedings involving a question which arises as to the effect of any provision of the Federal Constitution; 2. Suits involving prerogative writs, as set out in the Schedule to the Courts of Judicature Act 1964; 3. Proceedings involving the remedy of temporary or permanent injunctions; 4. Election petitions under the Election Offences Act 1954; 5. Proceedings under the Land Acquisition Act 1960; 6. Proceedings involving the exercise of the original jurisdiction of the Federal Court under Article 128 of the Federal Constitution; 7. Judicial review; 8. Appeals; 9. Revisions; 10. Any proceedings before a native court; and 11. Any criminal matter.

**THE COMMENCEMENT** A party initiates mediation by sending to the person with whom he has the dispute, a written invitation<sup>3</sup> regarding mediation. Upon that person accepting the invitation in writing, the mediation is deemed to have been commenced<sup>4</sup>. Upon the commencement of mediation, the parties shall then enter into a written mediation agreement, which shall be in writing and signed by them<sup>5</sup>.

**THE MEDIATOR** There shall be one mediator for each mediation unless the parties decide otherwise<sup>6</sup>. The parties shall appoint the mediator, or may request for assistance from the Institution<sup>7</sup> to appoint one<sup>8</sup>. The mediator has to give his consent in writing and must, before accepting the appointment, disclose any potential conflict of interests which may affect his impartiality<sup>9</sup>.

He must possess the relevant qualification, special knowledge or experience in mediation or satisfy the requirements of an institution in relation to a mediator<sup>10</sup>. Failure to satisfy the requirements provided in the Act may be a ground to terminate the appointment of the mediator.

The mediator decides how to conduct the mediation<sup>11</sup>. He facilitates the mediation process by assisting the parties in reaching a satisfactory resolution of the dispute and suggests options for the settlement of the dispute<sup>12</sup>. The mediator should act independently and impartially<sup>13</sup>.

In conducting his duties, however, the mediator shall not be held liable for any act or omission unless it is proved to be fraudulent or it involves wilful misconduct<sup>14</sup>.

**THE MEDIATION** The mediation is privately conducted. The mediator may meet the parties together or individually<sup>15</sup>. In conducting the mediation, a non-party<sup>16</sup> may, subject to the consent of the parties and mediator, participate in the mediation<sup>17</sup>.

### CONFIDENTIALITY AND PRIVILEGE

The Act provides that the mediation communication is confidential<sup>18</sup> and privileged<sup>19</sup>. However, such communication may be disclosed when the disclosure (a) is made with the consent of the parties; or (b) is made with the consent of the person who gives the mediation communication; or (c) is required under the Act or for the purpose of any civil or criminal proceedings under any written law; or (d) is required under any other written law for the purposes of implementation or enforcement of a settlement agreement<sup>20</sup>.

The exceptions to the privilege rule apply when (a) the privilege is expressly waived in writing by the parties, the mediator and the non-party; or when the mediation communication (b) is a public document by virtue of the Evidence Act 1950; or (c) is a threat to inflict bodily injury or to commit a crime; or (d) is used or intended to be used to plan a crime, attempt to commit or commit a crime, or to conceal a crime or criminal activity or an ongoing crime or ongoing criminal activity; or (e) is sought or offered to prove or disprove a claim or complaint of professional misconduct or malpractice filed against a mediator; or (f) is sought or offered to prove or disprove a claim or complaint of professional misconduct or malpractice filed against a party, non-party, or representative of a party based on their conduct during any mediation session<sup>21</sup>.

3 The written invitation should briefly specify the matters in dispute.

4 Section 5 of the Act.

5 Section 6 of the Act.

6 Section 7(4) of the Act.

7 According to section 3 of the Act, 'Institution' means a body or organisation that provides mediation services.

8 Section 7(3) of the Act.

9 Section 7(7) of the Act.

10 Section 7(2) of the Act.

11 Section 9(1) of the Act.

12 Section 9(2) of the Act.

13 Section 9(3) of the Act.

14 Section 19 of the Act.

15 Section 11(1) of the Act.

16 A non-party means a person who participates in a mediation other than a party or mediator, and includes counsels of each party, experts in the subject matter of a dispute and witnesses.

17 Section 11(2) of the Act.

18 Section 15(1) of the Act.

19 Section 16(1) of the Act.

20 Section 15(2) of the Act.

21 Section 16(2) of the Act.

**CONCLUSION OF MEDIATION** The Act provides that the mediation shall conclude upon (a) the signing of the settlement agreement<sup>22</sup> which is enforceable and binding on the parties<sup>23</sup>; or (b) the issuance of a written declaration by the mediator stating that to proceed with the mediation would not result in a satisfactory resolution of the dispute<sup>24</sup>; or (c) the issuance of a written declaration by the parties stating that the mediation is terminated<sup>25</sup>; or (d) the withdrawal from a mediation by any party<sup>26</sup>; or (e) the death or incapacity of any party<sup>27</sup>.

**A POSITIVE STEP...** While the new law is a positive step forward in mediation, a successful mediation rests entirely on the cooperation, commitment, determination and consistency between the parties. It also involves the willingness of lawyers to propose settlement of their clients' dispute through mediation.

Thus, in answering the question 'Why Mediate?', the following poem, composed by Judge of the Court of Appeal, Datuk Wira Low Hop Bing, sums it up aptly:

*Mediation is a good alternative dispute resolution,  
Engaging parties together for a great option,  
Determination of issues through parties' power,  
Inspires a win-win situation without being sour,  
Achieves a bridge of goodwill and harmony,  
Terminates a breach of relationship and acrimony,  
Includes an opportunity and cordiality to consult,  
Overall achievement with mutually satisfactory result,  
Natural choice for amicable settlement.* 

22 Section 12(a) of the Act.

23 Section 14(1) of the Act.

24 Section 12(b) of the Act.

25 Section 12(c) of the Act.

26 Section 12(d)(ii) of the Act.

27 Section 12(d)(iii) of the Act.

## CIVIL PROCEDURE

**THE RULES OF COURT 2012** The much anticipated Rules of Court 2012 (ROC) came into effect on 1 August 2012<sup>28</sup>. The ROC, in combining the Subordinate Court Rules 1980 and the Rules of the High Court 1980, aims to streamline civil procedure in the Subordinate Courts and High Courts.

In this article, we examine some of the significant amendments as a result of the ROC.

**JURISDICTION** Under the ROC, certain Orders will apply to the High Court only. These include Orders 30 (Receivers), 31 (Sales of immovable property by order of court), 43 (Accounts and Inquiries), 44 (Proceedings under judgments and orders on the equity side), 50 (Charging orders, stop orders), 51 (Receivers: Equitable execution), 51A (Rateable distribution), 53 (Judicial Review), 56 (Appeals from Registrar of the High Court to a Judge in Chambers), 66 (Obtaining evidence for foreign court), 67 (Reciprocal Enforcement of Judgments), 69 (Arbitration), 70 (Admiralty), 71 (Non-contentious Probate), 72 (Contentious Probate), 80 (Administration and similar actions), 82 (Debenture holders' action: Receiver's register) and 83 (Charge actions), 86 (Inheritance (Family Provision) Act 1971), 87 (Trade Marks Act 1976), 88 (Companies Act 1965) and 89 (Summary Proceedings for Possession of Land). Additionally, all actions or proceedings under the Companies Act 1965 and the National Land Code 1965 shall only commence in the High Court.

Amendments have also been made to the Subordinate Courts Act 1948 to enhance the monetary jurisdiction of the Magistrates' Court from RM25,000 to RM100,000 whilst the Sessions Court will see their monetary jurisdiction increased from RM250,000 to RM1 million. The

28 The firm's Head of the Dispute Resolution Practice Group, Tan Sri Dato' Cecil Abraham, is the Chairman of the Bar Council Task Force on the Combined Rules whilst Mr Nantha Balan, Partner in the Dispute Resolution Practice Group, is a member of the Task Force.

amendments will also empower the Sessions Court to grant injunctions, declarations, specific performance orders, rescission of contracts and cancellation or rectification of instruments. The amendments, which were made pursuant to the Subordinate Courts (Amendment) Act 2010, have yet to come into force. When it is enforced, those orders in the ROC relevant to declarations and injunctions will apply accordingly to the Sessions Court.

**IN THE INTEREST OF JUSTICE** It has been emphasised that the interest of justice is the main consideration in enacting the ROC. The newly introduced Order 1A states that mere technical non-compliance of the ROC no longer plays an important role in determining the outcome of proceedings. The judge is now empowered to put forward the interests of a litigant as opposed to disposing of a case on a mere technicality. This will have a broad equitable impact on the enforcement of the ROC.

### COMMENCEMENT OF PROCEEDINGS

The commencement of legal proceedings has now been simplified under Order 5 of the ROC. The previous modes for filing civil cases in court were by writ of summons, originating summons, petition and originating motion. Order 5 has reduced the modes to writ and originating summons. With regard to interlocutory applications, Order 32 provides that the mode of application is now by way of 'notice of application'. 'Summons-in-chambers' is therefore, no longer applicable.

**TIMELINES** The time limit for entering an appearance is 14 days for writs served within Peninsular Malaysia. If the writ is served out of jurisdiction, a time limit of 21 days is provided. In either case, the court may exercise its discretion to extend time.

On a further issue of timelines, Order 29 rule 1(2BA) has been amended where the hearing date of the *inter partes* application must be fixed within 14 days of the date of the *ex parte* Order, in comparison to 21 days under the previous Rules of the High Court 1980. A defendant may also now, by virtue of Order 29 rule 1(2), make an *ex parte* application for an injunction. Previously a defendant could make only an *inter partes* application for an injunction.

When the Subordinate Courts (Amendment) Act 2010 comes into force, Order 29 will apply to the Sessions Court as well.

### DAMAGES NOT TO BE QUANTIFIED

One of the most significant changes under the new regime is Order 18 rule 12(1A) which ensures that general damages shall not be quantified in claims or counterclaims<sup>29</sup>. This enables the court, where the action is being heard, to be the one and final arbiter of awarding the amount of general damages.

**JUDICIAL REVIEW** The scope of judicial review has also been enlarged through substantial changes under the provisions of Order 53 of the ROC. The time period to make such an application now extends to three months, from the previous 40 days.

Under the former Order 53 rule 2(4), a person adversely affected by the decision of any public authority was entitled to make an application for judicial review. The ROC has now liberalised the scope for judicial review where "*any person who is adversely affected by the decision, action or omission in relation to the exercise of the public duty or function shall be entitled to make the application*".

The focus has, therefore, shifted from the decision maker, which is the public authority, to the nature of the decision, in that it should arise out of a duty or function which has a 'public' element<sup>30</sup>.

29 The decisions in *Skrine & Co v MBF Capital Bhd & Anor & Other Appeals* [1998] 3 MLJ 649 and *Dr Mohd Yusof bin Ismail v Hj Ismail bin Mohd Nor* [2011] 5 MLJ 900 which left the decision of quantification of general damages to the parties, are no longer good law.

30 See *Tenaga Nasional Bhd v Tekali Prospecting Sdn Bhd* [2002] 2 MLJ 707 and *Ahmad Jefri bin Mohd Jahri @ Md Johari v Pengarah Kebudayaan & Kesenian Johor & Ors* [2010] 3 MLJ 145.

**COSTS** Order 59 of the ROC is significant as the courts are granted the discretion to award a gross sum as costs, rather than having the costs taxed. Costs may also be determined at any stage but are to be paid after the conclusion of the proceedings unless there is an order to the contrary. In exercising its discretion, the court shall invite parties to submit on the issue of costs. The submissions on costs shall be tendered as part of the substantive submission of the case. A bill of costs, which should include the particulars of the work done, such as the value of getting up and all disbursements reasonably incurred, will be annexed to the submission<sup>31</sup>. Order 59 also introduces provisions to reflect the *Calderbank* offer<sup>32</sup> of compromise which also applies in Australia and the United Kingdom.

**CONCLUSION** In summary, the restructuring of the ROC has been hailed as a new era of efficient administration of justice in Malaysia. The principal outcome of this new regime is not only to eliminate archaic rules of procedure, but also to ensure that the overriding objective is achieved. Regard therefore, should be paid to Order 2 rule 1(2) which reads as follows:

*These Rules are a procedural code and subject to the overriding objective of enabling the court to deal with cases justly. The parties are required to assist the court to achieve this overriding objective.*

It remains to be seen whether ultimately litigants, their lawyers and the courts are prepared to give effect to the spirit and essence of the ROC. 

## CORPORATE/ INDUSTRIAL RELATIONS

### THE PRIVATE RETIREMENT SCHEME

The Private Retirement Scheme ( PRS) was launched in July 2012 as the final component of the PRS framework. Contributions may be made from September onwards by Malaysians who seek to expand their retirement fund beyond the Employees Provident Fund (EPF).

**INTRODUCTION** On 18 July 2012, Prime Minister Dato' Seri Najib Tun Razak launched the voluntary Private Retirement Scheme (PRS) at the Securities Commission (SC), Malaysia. The PRS forms an integral part of the private pensions industry and aims to improve living standards for Malaysians at retirement, through additional savings.

**WHAT IS A PRS?** A private retirement scheme (PRS) is a voluntary investment scheme to assist individuals in retiring comfortably and is meant to complement Malaysia's mandatory retirement savings schemes made to the EPF. It is defined in section 139A of the Capital Markets Services Act 2007 (CMSA) as a retirement scheme governed by a trust, offered or provided to the public for the sole purpose, or having the effect of building up long term savings for retirement for members where the amount of the benefits is to be determined solely by reference to the contributions made to the scheme and any declared income, gains and losses in respect of such contributions, but does not include (a) any pension fund approved under section 150 of the Income Tax Act 1967; or (b) any retirement scheme or retirement fund established or provided by the Federal Government, State Government or any statutory body established by an Act of Parliament or a State law<sup>33</sup>.

31 See Bar Council Circular No 152/2012: Summary of Substantive Changes.

32 This is based on the English case of *Calderbank v Calderbank* [1975] 3 All ER 333 where it refers to an offer made to settle the dispute which is "Without Prejudice Save as to Costs".

33 Section 139A of the CMSA.

Malaysia is a relatively young population with its citizen's average age of 26. However, the average life expectancy will soon reach the age of 80. There will, therefore, be well over 20 years of post-retirement. Under the PRS, individuals will be provided with an environment to build up retirement funds for career mobility. Employers, on the other hand, may use it as a tool for retaining and attracting talent. Besides Malaysians and foreigners aged 18 and above, the scheme is open to employers already contributing to the EPF on behalf of their employees.

"The development of this third pillar of voluntary private retirement is a matter I hold close to my heart as it is part of my commitment to reform and strengthen the entire pension and retirement landscape."  
- Prime Minister, Dato' Seri Najib Tun Razak.

## CONTRIBUTIONS & INVESTMENT

**CHOICES** Based on their own retirement needs, goals and risk appetite, individuals may choose to invest in a range of retirement funds offered by the PRS. These fund options must be consistent with the objective of building savings for retirement and ensure a prudent spread of risk. The contributions are made on a voluntary basis with no fixed time interval or minimum amount unless specified by the PRS Providers according to their own internal investment policy.

**THE KEY PARTICIPANTS** The following are the key participants in the PRS industry: (a) PRS Administrator; (b) PRS Providers; (c) Private Retirement Schemes; (d) Trustee to PRS (Scheme Trustee); and (e) Trustee to Employer-Sponsored Retirement Schemes (Employer Trustee).

**THE LEGAL FRAMEWORK** The PRS is regulated by the SC. It is governed by the CMSA, the Capital Markets and Services (Private Retirement Scheme Industry) Regulations 2012 ( PRS Regulations) and the Guidelines on Private Retirement Schemes (PRS Guidelines).

The PRS Regulations establish the duties and responsibilities of a PRS Provider and Scheme Trustee, requirements on approval of the PRS, registration and lodgement of the trust deed, disclosure document as well as other provisions on the register of members and meeting of members.

The PRS Guidelines on the other hand, provide a regulatory environment to safeguard the interests of contributors to the PRS.

**THE PRS ADMINISTRATOR** The person responsible for running the PRS is known as the PRS Administrator<sup>34</sup>. The PRS Administrator is a person who is approved to keep all records of transactions or monies received under the PRS in addition to handling administration and customer service matters<sup>35</sup>.

The PRS Administrator will also be responsible for data and research as it will act as a resource centre relating to the PRS industry in Malaysia.

**THE PRS PROVIDER** PRS Providers are professionals who provide and manage a PRS with the purpose of meeting the retirement objective of members by offering a wide range of fund options which are approved by the SC under the PRS framework. Eight PRS Providers have already been identified which are AmInvestment Management Sdn Bhd; American International Assurance Bhd; CIMB-Principal Asset Management Bhd; Hwang Investment Management Bhd; ING Funds Bhd; Manulife Unit Trust Bhd; Public Mutual Bhd and RHB Investment Management Sdn Bhd.

**THE SCHEME** In ensuring that the assets of the funds are segregated from the PRS Provider, the PRS will operate as a trust structure with the Scheme Trustee.

**PRS V EPF** Having a voluntary scheme in addition to the EPF also allows private company employees and self-employed persons to voluntarily contribute towards their retirement in a systematic way.

<sup>34</sup> Section 139A of the CMSA.

<sup>35</sup> Also see section 139H of the CMSA.

Although both the EPF and PRS schemes build up a person's retirement assets and income, the former is mandatory with a statutory monthly contribution of a minimum payment of 11% by the employee and 12% to 13% contribution payment by the employer, whilst the latter is voluntary, with a more flexible contribution frequency. Under the PRS, tax deductions will be given to employers on contributions to PRS made on behalf of employees of up to 19% of the employees' remuneration. As for individuals, the tax relief given for contributions differ in that it is up to RM6,000 a year for EPF and RM3,000 a year for PRS.

**CONCLUSION** Although considered a 'soft' launch, the development of the private pension industry nevertheless has the potential to change the face of the retirement landscape in Malaysia. It is hoped that the PRS will nudge investors towards better investment and savings pools whilst boosting vibrancy in the capital markets. Malaysians could secure an additional and adequate nest-egg when they retire by increasing and supplementing coverage of the PRS on a voluntary basis, including the self-employed.

As the first set of schemes has been available for offer to the public from September onwards, understanding the product offerings is essential. In line with this, a series of educational and awareness programmes will be conducted by the SC, PPA and the PRS providers. This is to equip potential members with relevant information regarding the PRS framework and its key features, so as to enable the same to make informed decisions on their investment choices. 

## BRIEF-CASE...

**ADMINISTRATIVE LAW** – Whether plagiarism occurred – Whether university contributed to such plagiarism – Whether there was a breach of the rules of natural justice

**FAUZILAH SALLEH V UNIVERSITI  
MALAYSIA TERENGGANU**  
[2012] 4 CLJ 601, High Court

**FACTS** At an inquiry held by the university to investigate cases of plagiarism amongst students, the plaintiff was called to attend as a witness. A year later, she was informed that her Master's Degree had been revoked by the university's Chancellor upon recommendation of the university's Board of Directors, on grounds that she had committed plagiarism. The plaintiff, being aggrieved by the decision, brought an action against the university. She contended that there was a breach of the rules of natural justice in that she had not been accorded a right to be heard. As such, she sought a declaration that the revocation was invalid and an order that her Master's Degree be re-conferred to her together with damages, interests and costs.

**ISSUE** The issues were (i) whether there was plagiarism; and (ii) whether the plaintiff was accorded her right to be heard in accordance to the rules of natural justice.

**HELD** In allowing the plaintiff's claim, the court held that although there was plagiarism, the university shared part of the blame as plagiarism would not have occurred had the plaintiff been properly supervised during the process of writing her thesis. The court further held that there was a breach of the rules of natural justice as the plaintiff was not accorded with her right to be heard when the decision to revoke her Master's Degree was made. 

**CIVIL PROCEDURE** – Application to strike out plaintiff's claim – Whether reasonable cause of action disclosed – Whether mental suffering such as shock, depression, stress and paranoia amounted to an actionable tort - Whether damages should be awarded

**DATO' THIRUMOORTHY  
A/L NADESAN V MAXIS MOBILE  
SERVICES SDN BHD<sup>36</sup>**  
[2012] 2 AMR 485, High Court

**FACTS** As a result of the defendant's act in registering a mobile number in the plaintiff's name to a third party without the plaintiff's authorisation or knowledge, the plaintiff claimed that he suffered shock, depression, stress and paranoia as a result of threatening text messages from such third party. He sued the defendant for compensation on the basis of negligence. The defendant applied to strike out the plaintiff's claim on grounds that no reasonable cause of action had been disclosed.

**ISSUE** The issues were (i) whether a reasonable cause of action had been disclosed in the plaintiff's statement of claim; and (ii) whether mental suffering could amount to an actionable tort, compensated by damages.

**HELD** In allowing the defendant's application, the court held that no reasonable cause of action was disclosed in the plaintiff's pleadings. The adverse effects of shock, depression, stress and paranoia suffered by the plaintiff amounted to mere mental suffering. As such, it was not an actionable tort for which damages could be awarded. 

**TORT** – Defamation – Libel – Publication of defamatory statements via online messages/ tweets – Claim for damages – No defence filed – Whether defendant deemed to have admitted each and every averment contained in plaintiff's claim – Quantum of damages

**DATO' MOHAMAD SALIM BIN FATEH  
DIN V NADESWARAN A/L RAJAH**  
[2012] 5 AMR 151, High Court

**FACTS** The plaintiff is a businessman while the defendant is a journalist and columnist in a local newspaper. The defendant had published online messages/tweets which the plaintiff alleged were defamatory of him. The plaintiff claimed for general, special and exemplary damages for the damage caused to him as a result of the publication. No defence was filed by the defendant.

**ISSUE** As a result of failing to file a defence, the defendant was deemed to have admitted each averment in the plaintiff's statement of claim. Thus, the only issue arising was the quantum of damages that ought to be awarded to the plaintiff.

**HELD** The court awarded the plaintiff a sum of RM300,000 for general damages and another RM200,000 for aggravated damages. The amount of damages and aggravated damages must be such as to send a strong message to those who are in the position to disseminate information widely that they must exercise a proper degree of care and diligence not to injure others. 

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36 The defendant was represented by Ms Natalia Izra from **ZUL RAFIQUE & partners**.

## BRIEFLY...

### UNIVERSITIES AND UNIVERSITY COLLEGES (AMENDMENT) ACT 2012

No  
A1433

*Date of coming into operation*  
1 August 2012

*Amendment*  
Sections 2, 5A, 16B; First Schedule and Second Schedule

*Substitution*  
Section 15

*Introduction*  
Part IIA, IVA; section 24E 

### EVIDENCE (AMENDMENT) (NO.2) ACT 2012

No  
A1432

*Date of coming into operation*  
31 July 2012

*Amendment*  
Section 3

*Introduction*  
Section 114A

*Notes*  
Section 114A refers to Presumption of Fact in Publication. 

### PRINTING PRESSES AND PUBLICATIONS (AMENDMENT) ACT 2012

No  
A1436

*Date of coming into operation*  
15 July 2012

*Amendment*  
Sections 3, 6 and 13A

*Substitution*  
Sections 12 and 13B 

### SECURITY OFFENCES (SPECIAL MEASURES) ACT 2012

No  
747

*Date of coming into operation*  
31 July 2012

*Notes*  
An Act to provide for special measures relating to security offences for the purpose of maintaining public order and security and for connected matters. 

### EDUCATIONAL INSTITUTIONS (DISCIPLINE) (AMENDMENT) ACT 2012

No  
A1435

*Date of coming into operation*  
1 August 2012

*Amendment*  
Section 2

*Substitution*  
Section 10 

## PENAL CODE (AMENDMENT) ACT 2012

No  
A1430

*Date of coming into operation*  
31 July 2012

*Amendment*  
Sections 4, 107, 120A, 120B and 130A

*Introduction*  
Sections 124B to 124N, 130KA and Chapter VIB 

## PRIVATE HIGHER EDUCATIONAL INSTITUTIONS (AMENDMENT) ACT 2012

No  
A1434

*Date of coming into operation*  
1 August 2012

*Amendment*  
Section 2

*Substitution*  
Section 47 

## DNA IDENTIFICATION ACT 2009

No  
699

*Date of coming into operation*  
1 September 2012

*Notes*  
An Act to provide for the establishment of a Forensic DNA Databank Malaysia, the taking of DNA samples, forensic DNA analysis, the use of DNA profiles and information in relation thereto, and for matters connected therewith. 

## ROAD TRANSPORT (AMENDMENT) ACT 2012

No  
A1440

*Date of coming into operation*  
15 September 2012

*Amendment*  
Sections 2, 5, 14, 15, 17, 26, 35, 35A, 40, 53A, 54, 56, 59, 66A, 79, 88, 112, 115A, 118 and Second Schedule

*Introduction*  
Section 76A 

## MEDIATION ACT 2012

No  
749

*Date of coming into operation*  
1 August 2012

*Notes*  
An Act to promote and encourage mediation as a method of alternative dispute resolution by providing for the process of mediation, thereby facilitating the parties in disputes to settle disputes in a fair, speedy and cost-effective manner and to provide for related matters. 

## LABUAN COMPANIES (AMENDMENT) ACT 2012

No  
A1428

*Date of coming into operation*  
1 August 2012

*Amendments*  
Sections 18, 111, 121, 130O, 130V and 151 

## CRIMINAL PROCEDURE CODE (AMENDMENT) (NO 2) ACT 2012

No  
A1431

*Date of coming into operation*  
31 July 2012

*Amendment*  
Sections 2, 127A and 153

*Deletion*  
Chapter XIA

*Introduction*  
Sections 116A, 116B, 116C, 388A, 390A, 390B,  
390C and 445 

## CRIMINAL PROCEDURE CODE (AMENDMENT) ACT 2001

No  
A1132

*Date of coming into operation*  
15 September 2012

*Amendment*  
Sections 2, 108A, 117, 255, 316, 332, 334, 340,  
342, 343, 344, 348, 349, 350, 351, and First  
Schedule

*Deletion*  
Sections 157, 352A and Third Schedule

*Substitution*  
Section 352

*Notes*  
The effective date of 15 September 2012 is for  
sections 2, 9, 11, 12, 13, 14, 15, 16, 17, 18, 19  
and 21. 

## GUIDELINES/RULES/CIRCULARS/ DIRECTIVES/PRACTICE NOTES ISSUED BETWEEN JULY AND SEPTEMBER 2012 BY BANK NEGARA MALAYSIA, BURSA MALAYSIA AND SECURITIES COMMISSION MALAYSIA

### BANK NEGARA MALAYSIA (BNM)

- Guidelines & Circulars Listing – Guidelines issued under Representative Offices – Guidelines on Establishment of Representative Offices of Foreign Institutions – *Date Issued: 16 August 2012*
- Guidelines & Circulars Listing – Guidelines issued under Agent Banking – Guidelines on Agent Banking and its related FAQs – *Date Issued: 15 August 2012*
- Guidelines & Circulars Listing – Guidelines issued under Insurance and Takaful - In relation to Prudential Limits and Standards – Guidelines on Directorship for Takaful Operators – *Date Updated: 29 June 2012*
- Guidelines & Circulars Listing – Guidelines issued under Banking - In relation to Financial Reporting – Guidelines on Financial Reporting for Licensed Islamic Banks (GP8-i) – *Date Issued: 14 June 2012*

### BURSA MALAYSIA

- Amendments to the Rules of Bursa Malaysia Depository Sdn Bhd in relation to Exchange Traded Bonds – *Effective Date: 26 September 2012*
- Amendments to the Rules of Bursa Malaysia Securities Berhad in relation to Market Making and Margin Financing – *Effective Date: 26 September 2012*
- Amendment to the Rules of Bursa Malaysia Depository Sdn Bhd in relation to Streamlining the Rules of Bursa Malaysia Depository Sdn Bhd – *Effective Date: 3 September 2012*
- Bursa Malaysia Securities Berhad: Directives on the List of Approved Securities - *Effective Date: 1 August 2012*

- Amendments to the Rules of Bursa Malaysia Derivatives Berhad in relation to Option on Ringgit Malaysia Denominated Crude Palm Oil Futures Contract and other amendments - *Effective Date: 16 July 2012*
- Amendments to the Rules of Bursa Malaysia Securities Clearing Sdn Bhd in relation to the Enhancements to the Central Matching Facility – *Effective Date: 9 July 2012*
- Amendments to the Rules of Bursa Malaysia Securities Berhad for the introduction of New Order, Validity and Quantity Types – *Effective Date: 2 July 2012*
- Amendments to the Rules of Bursa Malaysia Derivatives Clearing in relation to Finality of Transfer of Funds – *Effective Date: 27 June 2012*

## SECURITIES COMMISSION

- Guidelines on Prevention of Money Laundering and Terrorism Financing for Capital Market Intermediaries – *Date updated: 1 August 2012*

## BREAKING NEWS...

### FEDERAL COURT DISMISSES RESIDENTS' APPEAL

The Federal Court, on 6 September 2012, dismissed the appeal by the residents of Bukit Koman, Raub, Pahang, against the decision of the High Court (which was affirmed by the Court of Appeal) in dismissing their application for leave to seek judicial review.

The case began when the residents sought to review the decision of the Director General of Environment, in approving the Preliminary Environmental Impact Assessment (PEIA) report by Raub Australian Gold Mining Sdn Bhd (RAGM). The report was approved in 1997. In March 2008, the residents filed an application for leave to seek judicial review, naming the Director General of Environment as first respondent, and RAGM as the second respondent. The High Court dismissed the application for leave on ground that there was an inordinate delay in filing such application. The residents also lost their appeal at the Court of Appeal.

Tan Sri Dato' Cecil Abraham together with partners, Nantha Balan, Sunil Abraham and legal associate, Farah Shuhadah Razali represented RAGM.

## 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 Editors at:

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