



# THE ZR<sub>p</sub> BRIEF

ZUL RAFIQUE & partners wins Labour and Employment Law Firm of the Year  
at the ALB Malaysia Law Awards 2015



The Industrial Relations Practice Group:

Seated from left: *Jacinta Johnson, Wong Keat Ching, P Jayasingam* and *P Thavaselvi*  
Standing from left: *Teoh Alvare, Stephanie Ang, Tan Hao Wei, Fareez Shah* and *James Gan*



## A BRIEF NOTE...

by Dato' Zulkifly Rafique

### *A year to look forward to...*

As we ring in a new year with new beginnings, resolutions, hopes and dreams, 2015 looks set to be a memorable year to look forward to.

With that in mind, I am proud to announce that **ZUL RAFIQUE & partners** received three awards at the *Asian Legal Business* (ALB) Malaysia Law Awards 2015 ceremony which was held in Kuala Lumpur, on 27 March 2015.

The first is the *Labour and Employment Law Firm of the Year* award, which is a huge honour to commemorate the significant contribution by our Employment & Industrial Relations practice group.

The second and third awards were for *Debt Market Deal of the Year* and *Malaysia Deal of the Year*, which were awarded as recognition for our role in *SapuraKencana's Loan Facility*. I would like to congratulate the Banking & Finance team for this.

At **ZUL RAFIQUE & partners**, we place much importance on the value and quality of our services, and constantly strive to act in the best interest of our clients.

On that note, **ZUL RAFIQUE & partners** welcomes 2015 with a big thank you to all our clients and friends for their support towards our growth over the years and hope that we continue achieving success in the years ahead.

## CONTENTS

### *page 2* **IN BRIEF...**

The highlights in this Folder include:

- **ZUL RAFIQUE & partners** wins at ALB Malaysia Law Awards 2015
- Amendments to Bursa Malaysia Listing Rules
- Netting of Financial Agreements Act 2015
- New BNM funding rules
- New SC guidelines on equity crowdfunding
- Shariah Index launched
- Argentina: Triumph for Google and Yahoo!
- China: Ban on use of web pseudonyms
- France: 'Deep Sleep' Bill passed
- India: Amendments to arbitration law
- Singapore: New liquor law comes into force
- UK: Law against 'revenge porn' passed
- US: No 'Blurred Lines' in copyright infringement

### *page 5* **BRIEFING...**

Amongst the articles in our feature:

- *Womb for rent?*
- *Litigation Funding: Boon or Bane?*
- *What to expect when you are expecting...*
- *Changes to Malaysian criminal law*

### *page 11* **BRIEF-CASE...**

Our Brief-Case contains the following:

- *Gurbachan Singh Bagawan Singh & Ors v Vellamy Pennusamy & Other Appeals* [2015] 1 CLJ 719, Federal Court
- *Index Continent Sdn Bhd v Bar Malaysia* [2013] 9 CLJ 433, Court of Appeal

### *page 12* **BRIEFLY...**

Legislation Update:

- Netting of Financial Agreements Act 2015
- Malaysian Airline System Berhad (Administration) Act 2015
- Companies Commission of Malaysia (Amendment) Act 2015
- Inland Revenue Board of Malaysia (Amendment) Act 2015
- Penal Code (Amendment) Act 2014
- Guidelines/Rules/Circulars/Directives and Practice Notes issued between January and March 2015 by Bank Negara Malaysia, Bursa Malaysia and Securities Commission Malaysia

- **ZUL RAFIQUE & partners WINS AT ALB MALAYSIA LAW AWARDS 2015** ZUL RAFIQUE & partners won three awards at the Asian Legal Business (ALB) Malaysia Law Awards 2015. The first was for *Labour and Employment Law Firm of the Year*, and the second and third were for *Debt Market Deal of the Year* and *Malaysia Deal of the Year*. The second and third awards were specifically for the role of the firm in the *SapuraKencana* loan facility.
- **AMENDMENTS TO BURSA MALAYSIA LISTING RULES** In an effort to promote business efficacy and enhance market quality, Bursa Malaysia has issued various amendments to its Main and ACE Market Listing Requirements. The amendments, among others, involve liberalisation of related party transaction requirements by dispensing with certain compliance requirements. These amendments have taken effect from 27 January 2015, while enhancements to the foreign Listing Requirements will take effect from 1 July 2015.
- **AR-RAHNU ACT IN THE PIPELINE?** To regulate the Islamic pawn broking industry in Malaysia, the Government is considering implementing the *Ar-Rahnu* Act by next year. Currently regulated by the Pawnbrokers Act 1972, specific regulations are necessary to cater to current market needs and increase the transparency of the evolving *Ar-Rahnu* business, which involve banks, cooperatives and even private limited players.
- **BOOM GATES IN RESIDENTIAL AREA ALLOWED** The Federal Court has ruled that since guardhouses and boom gates were authorised structures under the Town and Country Planning Act 1976, the Street, Drainage and Building Act 1974 and the Local Government Act 1976 respectively, placing boom gates across public roads and guardhouses in residential areas which affords regulated access was not an obstruction in law, especially if it was for security reasons.
- **CHILD ACT 2001 TO BE REPLACED** A new Act to replace the Child Act 2001 will be tabled in Parliament, and would most likely be renamed the Child Act 2015. The new Act is set to feature a myriad of amendments, one of which includes the proposal to abolish whipping of minors in court. This is in accordance with the Convention on the Rights of the Child, which Malaysia ratified in 1995 to uphold its commitment to the protection and welfare of children. Additionally, offences involving abuse and neglect of children would also be addressed.
- **IMPLEMENTATION OF GST** With effect from 1 April 2015, the Goods and Services Tax ("GST") has been introduced in Malaysia at the rate of 6%. The GST replaces the existing sales tax and services tax, totalling 16%. The rationale for the implementation of the GST is to strengthen Malaysia's financial resources and enhance the capability, effectiveness as well as the transparency of Malaysia's tax administration and management.
- **INTERNET LAWS TO BE AMENDED** In a bid to crackdown cybercrime and protect public interest, both the Communications and Multimedia Act 1998 and the Communications and Multimedia Commission Act 1998 are set to be amended this year. Key provisions regarding governance and enforcement will be heavily reviewed, and issues relating to copyright infringement and the abuse of video-sharing website, YouTube, will also be discussed.
- **LAW ON CORPORATE LIABILITY** In line with the government's efforts to significantly clamp down corruption in Malaysia, a new law on corporate liability is expected to be passed this year. The new law is expected to render companies responsible for corruption, unless it is proved that adequate preventive measures were taken by the company to prevent bribery from taking place.
- **NETTING OF FINANCIAL AGREEMENTS ACT 2015** The Netting of Financial Agreements Act 2015, which provides a legal framework governing close-out netting for financial transactions in Malaysia, takes effect from 30 March 2015.

- **NEW BNM FUNDING RULES** New governing rules on how local banks should account for deposits and other financial instruments have been issued by *Bank Negara Malaysia*, and will take effect from 1 June 2015. This measure seeks to improve the loan-to-deposit ratio of Malaysian banks and facilitate a smooth transition to full implementation of the liquidity coverage ratio by 2019.
- **NEW SC GUIDELINES ON EQUITY CROWDFUNDING** The Securities Commission ("SC") has released *Guidelines on Regulation of Markets* under section 34 of the Capital Markets and Services Act 2007, to introduce requirements for the registration of equity crowdfunding ("ECF") platforms and to provide governance arrangement for the operator of such platforms. These guidelines provide, amongst others, for eligible issuers to raise up to MYR3 million within a year, and for ECF investors to be given a six-day cooling off period to withdraw their investment. With effect from 10 February 2015, these guidelines replaced the *Guidelines on Regulation of Markets* which was issued on 28 September 2007.
- **SHARIAH INDEX LAUNCHED** Prime Minister, Dato' Seri Najib Tun Razak, has launched the Malaysian Shariah Index ("the Index") at the Putrajaya International Convention Centre. The Index will measure the compliance of eight major areas, namely, judiciary, politics, economics, health, education, culture, infrastructure and environment, and social. Besides that, the Index seeks to ascertain the Shariah-compliance and to improve the quality of implementation of national policies.
- **SPECIALISED ENVIRONMENTAL COURTS** In light of the recent natural disaster that affected several states, the idea of setting up specialised environmental courts in the respective High Courts to deal with civil cases and administrative actions concerning environmental issues, has been mooted by the judiciary. The present Environmental Courts deal strictly with the prosecution of environmental offences and do not address civil claims.
- **UNPAID CHILDCARE LEAVE POLICY** With effect from 1 January 2015, female civil servants are now allowed unpaid childcare leave of up to five years, irrespective of

the number of children they need to care for. Under this new ruling, the definition of 'childcare' has been extended to include adopted children and stepchildren.

## AROUND THE WORLD... IN BRIEF

- **ARGENTINA: TRIUMPH FOR GOOGLE AND YAHOO!** The Supreme Court of Justice of Argentina, in a recent landmark case (*Belen Rodriguez v Google*), ruled that search engines *Google* and *Yahoo!* are not responsible for third party content that appears in online search results. Instead, search engines will only be held liable for infringing third party content if there is knowledge that the content is infringing and that they had failed to remove or block access to it. As this is the first case of its kind decided by the highest court of a South American country, this judgment signifies a crucial precedent for Latin America.
- **AUSTRALIA: DATA RETENTION LAW PASSED** As part of a range of counter-terrorism measures, a controversial law requiring telecommunication firms to retain customers' digital data for a period of two years, has been passed in Australia, amid privacy abuse concerns. Mooted as a central tool for law enforcement and intelligence agencies in their fight against terrorism, this data retention law has been highly criticised and branded as 'a form of mass surveillance'.
- **CANADA: DOCTOR-ASSISTED SUICIDE ALLOWED** The Supreme Court of Canada, in a unanimous decision, has ruled that doctors may assist patients suffering from severe and incurable medical conditions to die, overturning a 1993 ban against it. The Canadian government has been given a year to rewrite its law on assisted suicide.
- **CHINA: BAN ON USE OF WEB PSEUDONYMS** In an effort to eliminate the vulgar culture and protect users' rights, the Cyberspace Administration of China has introduced a series of internet-related restrictions, which includes prohibiting web users from posting messages under the names

of famous people. Set to take effect from 1 March 2015, web users will be required to sign a pledge and register accounts under their real names, even if they want to post under nicknames. To avoid all forms of illegal and unhealthy internet activity, these restrictions would extend to include users of microblogs and smartphone chat apps.

- **FRANCE: COURT SAYS “NO” TO BABY**

**NUTELLA** A French court has blocked parents from naming their baby girl *Nutella*, after the Registrar flagged the unusual name to local prosecutors, who decided to commence legal proceedings in a family court. The judgment, amongst others, ruled that since the name *Nutella* corresponds to the commercial name of a hazelnut spread, it would be against the child’s interest to live with a name that would subject her to mockery and unkind remarks.

- **FRANCE: ‘DEEP SLEEP’ BILL PASSED**

The French Parliament recently passed a ‘Deep Sleep’ Bill (“the Bill”), granting terminally-ill patients the option to cease medical treatment and request to enter into an irreversible comatose state, until their death. The Bill has drawn widespread criticism, with some quarters calling it a euphemism for euthanasia, which is illegal in France.

- **INDIA: AMENDMENTS TO ARBITRATION**

**LAW** India, in its efforts to attract more foreign investors, plans to amend its arbitration law, set time limits for courts and ease judicial rules in deciding corporate disputes. Among the suggestions include limiting courts’ authority to overrule arbitration awards and fixing time limits and fees to settle legal cases. The Indian government also plans on setting up separate commercial courts in order to expedite the resolution of corporate disputes.

- **INDIA: SECTION 66A DECLARED**

**UNCONSTITUTIONAL** India’s Supreme Court has repealed a controversial law that made the posting of online comments that are ‘grossly offensive’ or has ‘menacing character’ on social media and other internet platforms a crime punishable by imprisonment of up to three years. Upon considering the legality of section 66A of India’s Information Technology Act 2000, it was ruled that the law was unconstitutional and significantly limits the freedom of speech.

- **IRELAND: LANDMARK CASE ON WITHDRAWAL OF LIFE SUPPORT**

The High Court in Dublin recently ruled that doctors are allowed to withdraw life support from a clinically brain-dead pregnant woman. This case has addressed a deeply divisive issue in Ireland, due to its controversial constitutional ban on abortion.

- **SINGAPORE: FACEBOOK PAGE**

**OWNERSHIP** In a case involving Indonesian-Chinese billionaire Frank Cintamani and a Singaporean content producer, the Singapore High Court held that ownership cannot be claimed by persons responsible for setting up a Facebook page. Instead, based on the terms agreed upon registration on Facebook, users merely ‘own’ the contents posted, while exclusive ownership lies with Facebook Inc.

- **SINGAPORE: NEW LIQUOR LAW COMES INTO FORCE**

The Singapore Liquor Control (Supply and Consumption) Act 2015 (“the Act”) has come into force on 1 April 2015. The Act bans the retail sale of alcohol and prohibits citizens from consuming it in public places, including void decks, parks or beaches between 10:30pm and 7:00am daily. Harsher restrictions are also implemented in high-risk areas which are designated as Liquor Control Zones.

- **SINGAPORE: UPKEEP CLAIM REJECTED**

**IN IVF MIX-UP** The High Court of Singapore rejected a woman’s claim for damages to raise her child conceived through an in-vitro fertilisation sperm mix-up by Thomson Medical, for cogent policy considerations. Regardless of wrongful birth, it was further emphasised that the birth of a healthy child ‘should not be treated as matter for compensation’.

- **SINGAPORE: VICTORY FOR *KU DE TA***

**(BALI)** The Ku De Ta club at Marina Bay Sands Skypark (“Ku De Ta SG”) may be forced to change its name, following a judgment by the Singapore Court of Appeal ruling in favour of the partners of a beachfront club in Bali using the Ku De Ta name. The judgment, amongst others, ruled that Nine Squares, the licensor of the Ku De Ta SG marks, did not own the trademarks and only held them on trust for the Bali partners, who retain exclusive rights to

use and license the name. Nine Squares was ordered to transfer registration of the marks and provide an account of all profits made to the Bali partners.

- UK: LAW AGAINST 'REVENGE PORN' PASSED** England and Wales join Japan and California in passing a new law to ban the sharing of sexually explicit images of their former lovers online without their consent. The new law covers 'photographs or films which show people engaged in sexual activity or depicted in a sexual way or with their genitals exposed.' Those convicted of sharing such images or films on social networking sites could face up to two years in prison.
- UK: SMOKING IN CARS WITH CHILDREN BANNED** In a move to protect children from the hazards of second-hand smoke, a ban has been introduced in England to prohibit drivers from smoking in cars with child passengers, failing which a GBP50 fine would be imposed. This ban, which would not apply to anyone driving alone or driving in a convertible car with the top down, is set to come into force on 1 October 2015.
- US: CHUBBY NOODLE V FAT NOODLE** The owner of Chubby Noodle, a San Francisco-based restaurant, has filed a trademark infringement lawsuit against Fat Noodle, another restaurant set to launch its operations in the same city. Since the words 'chubby' and 'fat' are synonymous, Chubby Noodle alleged that this confusion would make consumers believe that the two companies are related.
- US: NO BLURRED LINES IN COPYRIGHT INFRINGEMENT** A Los Angeles jury found the hit song, *Blurred Lines*, by Robin Thicke and Pharell Williams to have infringed the copyright of Marvin Gaye's 1977 hit, *Got to Give it Up*. Thicke and Williams have been ordered to pay USD7.3 million to Marvin Gaye's estate, as a result of the copyright infringement.

## CONTRACT/ MEDICAL LAW

**WOMB FOR RENT?** News on the controversial abandonment of one of the Australian twin babies with Down's Syndrome, born *via* a surrogate mother in Thailand took the world by storm, with countries now questioning the laws on international surrogacy and the legal, ethical and social issues relating to the same.

This article seeks to analyse the existing surrogacy laws in various countries.

### WHAT IS A SURROGACY AGREEMENT?

The word 'surrogate', derived from the Latin word 'subrogare', means 'appointed to act in the place of'. A surrogacy agreement is an arrangement made for a woman ("surrogate mother") to carry and deliver a baby for another individual or couple.

There are several types of surrogacy – traditional as opposed to gestational; or altruistic in comparison to commercial.

Traditional surrogacy is when the surrogate mother is also the ovum donor, thus forging a biological relation to the child. The process of traditional surrogacy involves the intra-uterine insemination procedure, in which the sperm taken from the biological father is transferred into the uterus of the surrogate mother to enable the process of fertilisation.

Gestational surrogacy (also known as the 'host method') does not involve the surrogate mother's ovum. This is where the surrogate becomes pregnant *via* embryo transfer. The embryo comprises the biological parents' sperm and ovum respectively *via* in-vitro fertilisation, and is then transferred to the surrogate mother who acts as the human incubator for the period of gestation. The surrogate mother in such a case is commonly referred to as the gestational carrier.

Altruistic surrogacy is a situation where the surrogate receives no financial reward for her pregnancy or the relinquishment of the child, although usually all expenses related to the pregnancy and birth are paid by the intended parents, such as medical expenses, maternity clothing, and other related expenses.

Commercial surrogacy is a form of surrogacy in which a gestational carrier is paid to carry a child to maturity in her womb. This method is usually resorted to by infertile couples who are able to afford it.

Commercial surrogacy is sometimes referred to by the emotionally charged and potentially offensive terms 'womb for rent', 'outsourced pregnancies' or 'baby farms'.

## THAILAND

Following recent controversies involving the Australian Down's Syndrome baby, and a Japanese man who was later found to have fathered more than a dozen babies *via* different Thai surrogates, the Thai Government has drafted a Surrogacy Bill which was recently passed in the Thai Parliament.

The new legislation bans foreigners from paying Thai women to be surrogates and the use of agents or any promotion of women willing to be surrogate mothers for others. Also, under the new legislation, only married Thai couples, or couples with one Thai partner who has been married for at least three years, are allowed to seek surrogacy. Even then, Thai surrogate mothers would have to be over the age of 25. Commercial surrogacy remains banned. Anyone caught hiring a surrogate mother could face a maximum jail sentence of 10 years.

## MALAYSIA

In Malaysia, surrogacy is unregulated, with the exception of a *fatwa*<sup>1</sup> issued by the *Fatwa* Committee of the Malaysian National Council of Islamic Religious Affairs, which declared that surrogacy is *haram* (forbidden) in Islam even if the sperm and ovum were taken from a married couple, as this will cause genetic confusion to the unborn baby. It is to be noted however that a *fatwa* is not binding.

However, if the gestational mother chooses to hand over the baby after birth to the commissioning parents and consents to the adoption of the child, there is no prohibition in the Malaysian Adoption Act 1952 preventing the child from being legally adopted by the commissioning parents.

<sup>1</sup> A *fatwa* is the opinion of a scholar based on that scholar's understanding of Islam, the scholar's knowledge of the subject in question and the social milieu that raised the issue or question.

## INDIA

In 2008, the Supreme Court of India, in the case of *Baby Manji Yamada v Union of India and Another*<sup>2</sup> ruled that commercial surrogacy is permitted.

However, due to the exploitation of surrogate mothers, there is in place the Assisted Reproductive Technologies (Regulation) Bill 2010 ("the Indian Bill") which is a legislation that aims to regulate surrogacy in India. The Indian Bill defines surrogacy as 'an arrangement in which a woman agrees to a pregnancy, achieved through assisted reproductive technology, in which neither of the gametes belong to her or her husband, with the intention to carry it and hand over the child to the person or persons for whom she is acting as a surrogate'.

## AUSTRALIA

A distinction is made between altruistic surrogacy and commercial surrogacy, with the former referring to a situation where the surrogate mother is given no financial gains for carrying the child, except for reimbursements of medical and legal expenses from the commissioning parents. Commercial surrogacy, on the other hand, involves payment made to the surrogate mother for carrying the child.

In most Australian states and territories, altruistic surrogacy is legal while commercial surrogacy is prohibited.

In cases where children are born outside Australia to an Australian citizen *via* surrogacy arrangements, commissioning parents of the child may apply for citizenship according to the legal requirements set out in the Australian Citizenship Act 2007 and the policy guidelines set out in the Australian Citizenship Instructions.

## CONCLUSION

Although the benefits of surrogacy cannot be denied, the problem ultimately lies in the lack of regulation and enforcement, if any, especially when dealing with cross-border surrogacy. Therefore, considering the increasing popularity and demand for surrogacy worldwide, there is indeed a need for proper legislation to regulate surrogacy arrangements involving all three parties, that is, the surrogate mother, the commissioning parents and the child in order to better protect their rights.

<sup>2</sup> AIR 2009 SC 84.

## DISPUTE RESOLUTION

### LITIGATION FUNDING: BOON OR BANE?

More often than not, pursuing a claim through litigation or arbitration is expensive. Even those with the ability to pay are discouraged by the uncertainties surrounding potential legal costs that could escalate during such proceedings.

The introduction of litigation funding is said to have significantly altered the dispute resolution scene, by preventing costs from being a stumbling block to costly litigation or arbitration matters.

### WHAT IS LITIGATION FUNDING?

Also known as legal financing, litigation funding allows a party to litigate or arbitrate without having to pay for its costs. Instead, a third party professional funder who has no direct interest in the proceedings will pay part or the whole cost incurred, in return for a share of the proceeds in a successful dispute. Simply put, these third party funding companies will offer financial assistance to litigants in exchange for a percentage share of the settlement.

### UNITED KINGDOM

The concept of litigation funding in the UK was initially frowned upon, as it contravened the English doctrine of 'maintenance'<sup>3</sup> and 'champerty',<sup>4</sup> which were deemed to be against public policy. However, due to the developments in the methods of funding litigation, the concept gradually expanded throughout the years.

Litigation funding was first introduced and applied in matters concerning insolvencies. The first notable case allowing litigation funding dates back to 1880,<sup>5</sup> where the UK court held that a liquidator of a company or trustee of a bankrupt individual would be permitted to sell a right of action relating to their properties by assignment, and this would not constitute maintenance or champerty.

The concept of litigation funding subsequently achieved its milestone in 1967, when the UK Criminal Law Act 1967 abolished the offences and torts of maintenance and champerty, with the exception of any illegal contracts or champertous agreements contrary to public policy.<sup>6</sup> Since then, there have been numerous cases<sup>7</sup> where the courts have explicitly endorsed and recognised litigation funding as a pathway to justice.

Today, litigation funding in the UK is divided into four different forms, namely conditional fee agreements, damages based agreements, fixed fees and third party funding.

### AUSTRALIA

Litigation funding has been a prominent feature in Australia's dispute resolution landscape since the mid-1990s, and has enjoyed progressive judicial acceptance. For instance, in the case of *Campbells Cash and Carry Pty Limited v Fostif Pty Limited*,<sup>8</sup> the court held that litigation funding was not an abuse of process or contrary to public policy.

### HONG KONG

As a common law country, Hong Kong has always maintained a sceptical approach towards the concept of litigation funding. However, the landmark case of *Re Cyberworks Audio Video Technology Ltd*<sup>9</sup> signified the start of a shift in approach, when the court in that case, for the first time, provided a written endorsement on the legality of third-party litigation funding in the context of insolvencies.

### MALAYSIA

Litigation funding is still very much an alien concept in Malaysia, despite the Securities Commission's efforts to spearhead the litigation funding initiative for investors in July 2011. This is largely due to the fact that a pure contingency fee arrangement is statutorily prohibited in Malaysia.<sup>10</sup> Nevertheless, it is interesting to note the views expressed in *Quill Construction Sdn Bhd v Tan Hor Teng*,<sup>11</sup> where the court, in deciding whether there was a cause of action for

<sup>3</sup> This is an unlawful interference by a third party who has no interest in a suit, but provides either party with the assistance to institute, carry on or defend civil proceedings.

<sup>4</sup> This is an aggravated form of maintenance, whereby the third party who offers financial assistance to fund litigation is given a share of the proceeds of the suit.

<sup>5</sup> *Seear v Lawson* (1880) 15 Ch D 426, CA.

<sup>6</sup> Sections 13(1), 14(1) and 14(2) of the UK Criminal Law Act 1967.

<sup>7</sup> *R (on the application of Factortame) v The Secretary of State for Transport* [2002] EWCA Civ 932 and *Gulf Azov Shipping Co Ltd v Chief Humphrey Irikefe Idisi* [2004] EWCA Civ 292.

<sup>8</sup> (2006) 229 CLR 386.

<sup>9</sup> [2010] 2 HKLRD 1137.

<sup>10</sup> Legal Profession Act 1976, section 112.

<sup>11</sup> [2006] 2 CLJ 358.

maintenance and champerty, acknowledged the fact that since the UK has abolished such actionable torts, any similar tortious claims will be unsustainable. The fact that the court was inclined to follow the trend in the UK on maintenance and champerty may be indicative of the direction of litigation funding in Malaysia.

*..I find that the causes of action of maintenance and champerty are, like in England, defunct in this country. They can no longer support tortious claims. Any remnants of these doctrines may perhaps be confined to cases involving a contract which is void because it is contrary to public policy or being illegal. – James Foong J in Quill Construction Sdn Bhd v Tan Hor Teng.*

## BOON?

Since litigation funding is sometimes extended to law firms who wish to share the risks and rewards of contentious matters with their clients in order to increase their case load, this mechanism fits perfectly to give leeway for advocates to focus solely on representing their clients to the best of their abilities, rather than having to worry about the financial aspects surrounding the case.

*The growth of litigation funding is to be encouraged as a means of ensuring access to justice by allowing corporations and others with meritorious claims to conduct litigation in a way that does not put undue strain on their balance sheets. – Association of Litigation Funders: Litigation Finance*

## BANE?

However, as lucrative as the idea of litigation funding may seem, every mechanism is prone to its drawbacks. Since litigation funding is akin to speculative business ventures, it would inevitably promote frivolous and vexatious litigation, which would result in the abuse of court processes.

While this financing tool provides valuable means of access to justice for those who may not have the available funds to do so, its application is

currently limited to high valued commercial cases. This is because litigation funding is an entirely success-dependent process where funders would normally look to fund cases involving higher claims and better prospects of success. Litigation funding is, after all, a form of business investment, which makes it vulnerable to associated risks.

An example of a case which demonstrates the substantial risks and consequences that third-party funders may face is the high profile case of *Excalibur Ventures LLC v Texas Keystone Inc. & Ors.*<sup>12</sup> In this case, Excalibur failed in its claim for approximately USD1.6 million from *Texas Keystone and Gulf Keystone*, despite raising a whopping USD50 million from litigation funders to proceed with the litigation. To add salt to injury, the litigation funders in this case were made liable to pay indemnity costs to the defendants, failing which they may be joined as parties to the proceedings.

*The development and promotion of any form of litigation funding is not without risks; we should not forget that aspect of the prohibition's original rationale. What can be used for the benefit of all can also be abused to the benefit of some. There still remains the risk that litigation funding can be used as a means to promote unmeritorious claims, in the expectation that, once the opposing side is aware of the existence of funding, they are more likely to be brought to settle in order to buy off the claim. – Lord Neuberger<sup>13</sup>*

## CONCLUSION

As the basic model of litigation funding is business-oriented and based on securing an appropriate return from investments, there is bound to be competition among third parties offering such funding services. As such, it is particularly important to create a proper statutory framework and establish regulatory authorities to address the legal services aspects of this litigation funding industry, in order to guarantee compliance of the necessary procedures. Ultimately, it is important to strike a balance between the right of equal access to justice and the interest of the public.

<sup>12</sup> [2013] EWHC 3436 (Comm).

<sup>13</sup> In his inaugural keynote address in the Harbour Litigation Funding First Annual Lecture in Gray's Inn on 8 May 2013, entitled *From Barretery, Maintenance, and Champerty to Litigation Funding*.

## EMPLOYMENT & INDUSTRIAL RELATIONS

### WHAT TO EXPECT WHEN YOU ARE EXPECTING...

The Court of Appeal, in the recent decision of *Airasia Bhd v Rafizah Shima Mohamed Aris*,<sup>14</sup> ruled on the extent in which the Federal Constitution applies in an employment contract between private parties, and the applicability of the Convention on the Elimination of All Forms of Discrimination against Women ("CEDAW") in Malaysia.

In this article, we analyse the case that has altered the current landscape of women's rights in the Malaysian workforce.

### THE FACTS

The appellant, Airasia Bhd, executed a Training Agreement and Bond in October 2006 ("the Agreement") with the respondent, a female employee of the appellant. The Agreement contained a term prohibiting the respondent from getting pregnant during the duration of the training period, which was for approximately four years. When the respondent subsequently confirmed her pregnancy before the end of the four-year period, the respondent's employment was terminated.

The appellant commenced a civil suit at the Sessions Court for breach of agreement and a summary judgment was entered against the respondent.

On appeal, the respondent filed an action for a declaration that the term in the Agreement was illegal, null and void as it is discriminatory against her right as a married woman, and contravened the Federal Constitution as well as the Convention on the Elimination of All Forms of Discrimination against Women ("CEDAW"). The High Court held in favour of the respondent. Thus, the appellants appealed to the Court of Appeal.

### THE ISSUES

The issues before the Court of Appeal were (1) whether the Agreement is discriminatory

against the rights of women and contravened the Federal Constitution and CEDAW; and (2) whether CEDAW has any force of law in Malaysia.

### THE DECISION

In allowing the appeal, it was held that as a branch of public law, constitutional law concerns only the contravention of an individual's rights by a public authority, and therefore did not apply to the Agreement in question, which was a lawful contract between private parties.

Additionally, while Malaysia is signatory to CEDAW, without express incorporation into domestic law or local legislation, the provisions of international obligations in the said convention did not have any binding effect. Furthermore, the Agreement did not restrain or prohibit marriage or pregnancy if the respondent completed the said training programme in the manner stipulated in the Agreement. Therefore, the Agreement was not discriminatory against the rights of women.

### THE IMPLICATIONS

This decision, which ruled on the non-application of CEDAW in Malaysia, effectively distinguishes the views adopted in the highly applauded case of *Noorfadilla Ahmad Saikin v Chayed Basirun & Ors*.<sup>15</sup> In that case, the High Court judge, who referred to CEDAW to clarify the meaning of 'equality' and 'gender discrimination', ruled that CEDAW has the force of law and is binding on members states, including Malaysia which ratified this said Convention in 1995.

While the Court of Appeal in this case is not bound by judicial precedent to follow a decision emanated from the High Court, this recent decision appears to have cast a reasonable doubt on the legal status of women in the Malaysian workforce.

### CONCLUSION

Notwithstanding the above, in line with Malaysia's standpoint to promote gender equality and more importantly, to eliminate all forms of discrimination against women, this decision may just act as a catalyst for the Government to take all the necessary steps to incorporate CEDAW into domestic law or local legislation.

<sup>14</sup> [2015] 2 CLJ 510.

<sup>15</sup> [2012] 1 CLJ 769.

## CRIMINAL LAW

### CHANGES TO MALAYSIAN CRIMINAL LAW

The Malaysian Penal Code (Amendment) Act 2014 ("the Act") came into force on 31 December 2014. The Act was passed after two controversial clauses relating to the national flag and vandalism, were withdrawn from the Amendment Bill.

In this article, we discuss the significant amendments and new provisions included in the recently amended law.

Amongst the various amendments made and new provisions introduced into the Penal Code (Amendment) Act 2014 ("the Act"), the notable changes are discussed as follows:-

#### *SERIOUS V NON-SERIOUS*

New sections 52A and 52B have been introduced to interpret and differentiate between a 'non-serious offence' and a 'serious offence'.

A 'non-serious offence'<sup>16</sup> denotes one that is punishable with imprisonment for a term of not more than 10 years, while 'serious offence'<sup>17</sup> denotes an offence punishable with imprisonment for a term of 10 years or more.

#### *GREVIOUS HURT*

Section 320(h)<sup>18</sup> is amended to reduce the threshold of the number of days that a person in severe bodily pain is considered to be 'grievously hurt' from 20 to 10.

#### *REPEAT OFFENDERS*

New section 75A introduces enhanced penalties for repeat offenders. Under this new section, mandatory imprisonment sentences may be imposed on persons convicted of multiple serious offences.

## *ORGANISED CRIMES*

In an effort to tackle organised crimes, six new provisions imposing heavier punishment have been introduced.

These offences include the acts of harbouring a member of an organised criminal group,<sup>19</sup> consorting with an organised criminal group,<sup>20</sup> recruiting persons to be members of an organised criminal group,<sup>21</sup> participating in an organised criminal group<sup>22</sup> and accepting gratification to facilitate or enable organised criminal activity.<sup>23</sup> Penalties are also enhanced for the commission of serious and/or non-serious offences by organised criminal groups or members thereof.<sup>24</sup>

## *SECRECY CLAUSE*

The secrecy clause<sup>25</sup> in the amendments prohibits government officers from revealing any information obtained in the course of duty to the public. It is to stop 'leakage of information that jeopardises the country's defence'.

This particular clause was strongly opposed by the opposition, claiming that it goes against the efforts to promote Malaysia as a corruption-free government. Besides restricting the freedom of information, critics claim that the secrecy clause contravenes the essence of the Whistleblower Protection Act 2010. Moreover, it has been argued that there are already sufficient laws in place to protect government secrets, such as the Official Secrets Act 1972 and the Financial Services Act 2013.

## *DOMESTIC VIOLENCE*

New section 326A essentially provides that anyone who causes hurt to his spouse during a marriage shall receive hefty imprisonment sentences.

Additionally, section 352A provides that anyone who assaults or exerts criminal force on his spouse during a marriage may be sentenced up to six months imprisonment, or fined up to MYR2,000, or both.

<sup>16</sup> Section 52A.

<sup>17</sup> Section 52B.

<sup>18</sup> 'Any hurt which endangers life, or which causes the sufferer to be, during the space of ten days, in severe bodily pain, or unable to follow his ordinary pursuits.'

<sup>19</sup> Section 130X.

<sup>20</sup> Section 130Y.

<sup>21</sup> Section 130Z.

<sup>22</sup> Section 130ZA.

<sup>23</sup> Section 130ZB.

<sup>24</sup> Section 130ZC.

<sup>25</sup> Section 203A: *Disclosure of information*.

This has been said to prevent women from becoming 'punching bags'.

## *GANG RAPE*

Prior to the amendments, the act of rape was distinguished from the act of facilitating rape, with separate charges preferred respectively.

The newly incorporated section 375B now provides that where a woman is raped by persons acting in furtherance of their common intention, each of the persons involved in the act of raping shall be deemed to have committed gang rape, with the imposition of a punishment between 10 and 30 years' imprisonment.

## *RAPE*

Additional circumstances are also included for the offence of rape under section 376 of the Penal Code. The circumstances include the result of a woman who becomes insane<sup>26</sup> or commits suicide<sup>27</sup> by reason of the rape, the transmission of HIV, AIDS or other sexually transmissible diseases or virus from the act of raping,<sup>28</sup> and instances of knowledge of the mental disability, emotional disorder or physical handicap of the woman at the time of rape.<sup>29</sup>

Under the amendments, the minimum term of imprisonment for a person convicted of rape has also been increased from five years to 10.

Punishment for unnatural offences, on the other hand, such as sexual connection by using an object<sup>30</sup> and inciting a child to an act of gross indecency<sup>31</sup> has also been increased, ranging from imprisonment of no fewer than five years to a maximum of between 15 to 30 years, and shall also be liable to whipping.

## *CONCLUSION*

The changes implemented into the newly amended Penal Code were made in view of national security and to safeguard public interest. As the law is deemed to be progressive in nature, such changes will be improved upon with time to afford better protection to victims of crime.

LEGAL PROFESSION/ COMPANY LAW/  
CIVIL PROCEDURE – Solicitor-client relationship  
– Existence and scope of duties – Whether fiduciary entitled to restitution of expenditure incurred in securing benefit for beneficiaries – Whether court may lift a company's corporate veil despite it not being pleaded

## **GURBACHAN SINGH BAGAWAN SINGH & ORS V VELLASAMY PENNUSAMY & OTHER APPEALS** [2015] 1 CLJ 719, Federal Court

## *FACTS*

The first appellant, an advocate and solicitor, who was instructed to act for the respondents (purchasers) at an auction, bid successfully in his own name at the very same auction. He then invited the purchasers to buy back their allotted plots in the estate land from him, declaring that he was no longer their solicitor. He proceeded to set up a new company, the fourth appellant, and transferred ownership of the estate land to it. The respondents commenced legal proceedings against the appellants. The High Court found in favour of the appellants, which was later reversed in the Court of Appeal. The appellants appealed to the Federal Court.

## *HELD*

The Federal Court dismissed the appeals and held that a solicitor-client relationship continued to exist until the first appellant's declaration that he was no longer their solicitor. It was also held that even though the first appellant breached his fiduciary obligation by unlawfully obtaining a profit out of his trust, he is nevertheless entitled to restitution of the expenditure incurred.

It is also trite law that parties are bound by their pleadings. However, despite it not being pleaded, the Federal Court held that there were justifications in lifting the corporate veil of the fourth appellant, as it was merely a façade to transfer ownership of the estate land, for the first appellant to evade his fiduciary obligations.

<sup>26</sup> Section 376(2)(h).

<sup>27</sup> Section 376(2)(j).

<sup>28</sup> Section 376(2)(i).

<sup>29</sup> Section 376(2)(k).

<sup>30</sup> Section 377CA.

<sup>31</sup> Section 377E.

LEGAL PROFESSION/ CIVIL PROCEDURE – Advertising of service connecting general public to legal firms – Whether such acts contravened provisions of Legal Profession Act 1976 – Whether Malaysian Bar had *locus standi* to commence action and apply for injunction

**INDEX CONTINENT SDN BHD V BAR  
MALAYSIA** [2013] 9 CLJ 433, Court of Appeal

### FACTS

The appellant, a private limited company, launched a service of connecting the general public to respective law firms providing legal assistance (“the impugned service”). The respondent in this case, which is the Malaysian Bar, alleged that the appellant’s acts contravened the Legal Profession Act 1976 (“the LPA”). The respondent, therefore, sought an interlocutory injunction (“the injunction”) against the appellant in the interest of the public. The High Court decided in favour of the respondent. The appellants appealed.

### ISSUE

The main issue before the Court of Appeal was whether the respondent had the *locus standi* to apply for the said injunction. The appellant contended that since the act in question constituted a criminal act, it should therefore fall within the purview of the Attorney General, under article 145 of the Federal Constitution.

### HELD

In allowing the appeal, it was stated that the respondent did not have *locus standi* to apply for the said injunction, based on the fact that as a corporate body, it must act through some functionary or representative, which is the Bar Council. The Bar Council is established under section 47 of the LPA to manage the Malaysian Bar’s affairs. Since the respondent’s powers to commence an action through the Bar Council are strictly limited to matters concerning the affairs of the Malaysian Bar, an infringement of section 37<sup>32</sup> of the LPA, which is criminal in nature, falls under the jurisdiction of the Attorney General as the Public Prosecutor instead.

<sup>32</sup> This section provides for a list of circumstances and the respective punishment for an unauthorised person who acts as an advocate and solicitor.

### ACTS

**NETTING OF FINANCIAL  
AGREEMENTS ACT 2015**

*No*  
**766**

*Date of coming into operation*  
**30 March 2015**

#### Notes

This is an Act to provide for the enforceability of netting provision in financial agreements and to provide for related matters.

**MALAYSIAN AIRLINE SYSTEM BERHAD  
(ADMINISTRATION) ACT 2015**

*No*  
**765**

*Date of coming into operation*  
**20 February 2015**

#### Notes

This is an Act to provide special laws for the administration of the Malaysian Airline System Berhad, its wholly owned subsidiary companies, and its partially owned subsidiary companies providing goods or carrying out services or both, that are essential to the operations of the Malaysian Airline System Berhad; the appointment of an administrator with the powers to administer and manage the Malaysian Airline System Berhad, its wholly owned subsidiary companies, and its partially owned subsidiary companies providing goods or carrying out services or both; to provide for the establishment of a new entity which will replace the Malaysian Airline System Berhad as the national carrier; and to provide for related matters.

## AMENDMENT ACTS

### ARCHITECTS (AMENDMENT) ACT 2015

No  
A1480

*Date of coming into operation*  
**1 June 2015 for paragraphs 3(d) and (p) and section 23**

*Notes*  
The highlights of the amending Act include the removal of the word 'Professional' wherever appearing, except in the definition of 'Professional Architect' in section 3. New Parts VB and VC, which provide for special provisions relating to inspectors of works and architectural technologists respectively, have been introduced. Under this amending Act, sections 9 and 22 of the Architects Act 1967, which is the principal Act, have been deleted.

### COMPANIES COMMISSION OF MALAYSIA (AMENDMENT) ACT 2015

No  
A1478

*Date of coming into operation*  
**20 February 2015 (except for sections 9, 10, 11, 13, 14 and 15)**

*Notes*  
The highlights of the amending Act include the introduction of new Parts IIIA, IIIB, IIIC and IVA which deal respectively with the functions and powers of the Registrar, issuance of guidelines and practice notes, licensing as well as investigation and enforcement. The introduction of sections 38A, 38B, 38C, 38D and 38E, provide respectively for compounding of offences, offences by body corporate, destruction, concealment, mutilation and alteration of records, tipping-off and appeals.

### CONTROL OF SUPPLIES (AMENDMENT) ACT 2015

No  
A1473

*Date of coming into operation*  
**10 January 2015**

*Notes*  
The highlights of the amending Act include various amendments to sections 6, 20, 22 and 26, which deal respectively with regulations, removal and storage of controlled articles, penalties and power of court to confiscate.

### MALAYSIA CO-OPERATIVE SOCIETIES COMMISSION (AMENDMENT) ACT 2014

No  
A1470

*Date of coming into operation*  
**7 January 2015**

*Notes*  
The highlight of the amending Act includes the introduction of section 62A which provides for representation in civil proceedings, wherein it is stated that any officer of the Commission authorised by the Executive Chairman, may on behalf of the Commission, institute proceedings or appear in proceedings and may make all appearances and applications and do all acts in respect of the proceedings on behalf of the Commission.

## INLAND REVENUE BOARD OF MALAYSIA (AMENDMENT) ACT 2015

No  
A1475

*Date of coming into operation*  
**6 January 2015**

### *Notes*

The highlight of the amending Act includes the introduction of section 28A which provides for the power of the Board to establish companies under the Companies Act 1965.

## PENAL CODE (AMENDMENT) ACT 2014

No  
A1471

*Date of coming into operation*  
**31 December 2014**

### *Notes*

The highlights of the amending Act include the introduction of sections 52A and 52B, which interpret and differentiate between a 'non-serious offence' and 'serious offence'; section 75A which provides for the mandatory imprisonment sentence for repeat offenders of multiple serious offences; and six new provisions on organised crimes, namely, sections 130X, Y, Z, ZA, ZB and ZC. Section 203A, which is the secrecy clause, provides for disclosure of information. Issues on domestic violence, gang rape as well as rape are also addressed respectively under new sections 326A and 352A, 375B as well as the amended section 376.

## GUIDELINES/RULES/CIRCULARS/ DIRECTIVES AND PRACTICE NOTES ISSUED BETWEEN JANUARY AND MARCH 2015 BY BANK NEGARA MALAYSIA, BURSA MALAYSIA AND SECURITIES COMMISSION

### *BANK NEGARA MALAYSIA (BNM)*

- Operational Guidelines and Procedures on Special Relief Facility 2015 – *Updated as at: 18 February 2015*
- Guidelines on Financial Reporting under Insurance & Takaful for Takaful Operators – *Date issued: 28 January 2015*
- Guidelines on Financial Reporting under Banking for Banking Institutions – *Date issued: 28 January 2015*
- Guidelines on Appointed Actuary: Appointment and Duties (for reinsurers and retakaful operators) – *Effective date: 1 January 2015*

### *BURSA MALAYSIA*

- Consolidated Rules of Bursa Malaysia Securities Bhd – *As at: 1 April 2015*
- Amendments to the Rules of Bursa Malaysia Securities Bhd in relation to the Goods and Services Tax Act 2014 – *Effective date: 1 April 2015*
- Amendments to the Rules of Bursa Malaysia Securities Clearing Sdn Bhd consequential to the Goods and Services Tax Act 2014 – *Effective date: 1 April 2015*
- Amendments to the Rules of Bursa Malaysia Depository Sdn Bhd in relation to the Removal of Schedule of Fees from the Rules and consequential to the Goods and Services Tax Act 2014 – *Effective date: 1 April 2015*
- Amendments to the Bursa Malaysia Derivatives Bhd in relation to the Goods and Services Tax Act 2014 and the Removal of the Prescription of Detailed Fees – *Effective date: 1 April 2015*

- Amendments to the Rules of Bursa Malaysia Derivatives Clearing Bhd consequential to the Goods and Services Tax Act 2014 – *Effective date: 1 April 2015*
- Amendments to ACE and Main Market Listing Requirements in relation to Goods and Services Tax Act 2014 and Removal of Schedule of Fees from the ACE and Main Listing Requirements – *Effective date: 1 April 2015*
- ACE and Main Market Consolidated Listing Requirements – *As at: 1 April 2015*
- Amendments to ACE and Main Market Listing Requirements in Various Areas – *Staggered effective dates: 27 January 2015 and 1 July 2015*
- Directive on the List of Approved Securities – *Effective date: 27 January 2015*
- Bursa Malaysia Derivatives Berhad granted registration as a Foreign Board of Trade by the United States Commodity Futures Trading Commission – *Dated: 23 January 2015*
- Amendments to the Rules of Bursa Malaysia Depository Sdn Bhd to Cater for Non Face-to-Face Verification in relation to Securities Account Opening – *Effective date: 15 January 2015*

## SECURITIES COMMISSION

- Licensing Handbook – *Date revised: 1 April 2015*
- Guidelines on Unlisted Capital Market Products under the Lodge and Launch Framework – *Date issued: 9 March 2015*
- Guidelines on the Registration of Venture Capital and Private Equity Corporations and Management Corporations – *Date issued: 9 March 2015*
- Guidelines on Regulation of Markets under Section 34 of Capital Markets & Services Act 2007 – *Effective date: 10 February 2015*

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:

knowledge@zulrafique.com.my

This publication is intended only to provide general information and is not intended to be, neither is it a complete or definitive statement of the law on the subject matter. The publisher, authors, consultants and editors expressly disclaim all and any liability and responsibility to any person in respect of anything, and of the consequences of anything, done or omitted to be done by any such person in reliance, whether wholly or partially, upon the whole or any part of the contents of this publication.

All rights reserved. No part of this publication may be produced or transmitted in any material form or by any means, including photocopying and recording or storing in any medium by electronic means and whether or not transiently or incidentally to some other use of this publication without the written permission of the copyright holder, application for which should be addressed to the Editors.

The contributors for this **Brief** are:

- *Mariette Peters*
- *Amylia Soraya*
- *Iris Tang Shu Ni*

Publisher:  
**ZUL RAFIQUE & partners** Consultancy Sdn Bhd  
D3-3-8, Solaris Dutamas, No.1, Jalan Dutamas 1  
50480 Kuala Lumpur, Malaysia

Printer:  
**NC Print Sdn Bhd** (197139-T)  
AS 101, Jalan Hang Tuah 4, Salak South Garden  
57100 Kuala Lumpur, Malaysia