the ZRp brief

Brief: 5/07 Folder 1/January-March KDN No: PP12857/8/2007

A Brief Note...

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My New Year Resolution is...

The one thing that most people do at the beginning of the year is to make New Year Resolutions. Have you ever noticed how motivated people are at the beginning of the year? January is an interesting month to observe – gym subscriptions increase; smokers who try quitting provide us with smoke-free air and health kiosks are packed !

For some reason however, our willpower tapers after several weeks and by the end of February, we are back at status quo. Looks like New Year resolutions are easier made than adhered to.

My New Year Resolution therefore is NOT to make any resolution. Instead, I am going to pretend that every day is the first day of the year. Now isn't that an interesting thought?

Everyday is a new day and if we embraced each day with novelty, perhaps our motivation level will increase; perhaps we will be overflowing with energy we never knew we possessed and we may just decide to live life to the fullest. What can I say? I am an optimist !

So while you enjoy our first issue of 2007, which is packed with legal updates, let me wish you a Happy and Successful New Year !

On that note, I am off to the gym...

in this issue...

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BRIEF-FLASH...

- **A CONSTITUTIONAL COURT?** A proposal has been made to set up a constitutional court for the purpose of resolving issues of conflicting jurisdictions. This was a response to the suggestion by legal academics that judges of both the syariah and civil courts should together hear cases involving apostasy and conversion.

- **BLOGGERS BLOCKED?** Two bloggers have been sued for defamation in what has been anticipated to be a great intrusion into the freedom of speech. The suits have drawn comments from several quarters including WAMI (Writers' Alliance for Media Independence) and Bloggers United.

- **CCC TO BE IMPLEMENTED** The implementation of the Certificate of Compliance and Completion (CCC) is expected to take effect from April 2007. With such implementation, the responsibility to issue the Certificate will shift from the local authorities to professionals (engineers and architects).

- **CHEER FOR FOREIGN HOUSE BUYERS** With effect from 21 December 2006, foreign nationals are allowed to purchase residential properties worth more than RM250,000 per unit without the requirement for approval from the Foreign Investment Committee.

- **COURT OF APPEAL RULES AGAINST COMPANY** InventQ Jaya Sdn Bhd which was ordered to be wound up for failure to pay an amount of RM240 million to the government, lost its appeal in its application for a stay of execution.

- **DBR FOR UNIT TRUSTS** A disclosure-based regulation (DBR) for the launching of new unit trust funds will take effect from 1 March 2007. A DBR is expected to reduce the time required to approve a fund and to register a trust deed and prospectus.

- **DOCUMENT FOR LEGAL FRAMEWORK FOR BUSINESS** A consultative document entitled 'Creating a Conducive Legal and Regulatory Framework for Businesses' has been issued by the Companies Commission of Malaysia (CCM) as part of its proposed recommendations under its corporate law reform programme. The Corporate Law Reform Committee (CLRC) was established by the CCM in December 2003 to undertake a review of the Companies Act 1965.

- **E-JUDICIARY** As part of a pilot project in the implementation of an e-judiciary, 11 courts have computerised their administration system. The project is expected to expand nationwide with the following components in place, namely case management system, court recording and transcription system and a common information technology infrastructure.

- **EASY LAY-OFF** The Human Resources Ministry is studying a proposal to make it easier for employers to reduce their workforce. Under the proposed amendments to the Employment Act 1967, the amount of compensation awarded by the Industrial Court to retrenched workers would be capped and there would be a review of the rights of probationary workers to seek redress.

- **FLEXIBILITY TO BANKS** With effect from 3 January 2007, flexibility has been given to all licensed banking institutions under the purview of Bank Negara Malaysia (BNM) to determine their own internal policies governing their equity related exercises. Banking institutions will also be exempted from the provisions of s 47 of the Banking and Financial Institutions Act 1989.

- **FRANCHISING REGULATIONS TO BE AMENDED** Amendments to the Franchising Regulations 1999 are expected to be finalised in April 2007. The amendments are aimed at facilitating the registration of foreign franchises in Malaysia.

- **FOREIGN WORKERS' BILL SOON?** The Foreign Workers' Bill is expected to be tabled in Parliament in April. This will allow the Ministry to control and manage the foreign workers in this country that have now reached 2 million.

- **ISKANDAR REGIONAL DEVELOPMENT AUTHORITY ACT 2007 IN FORCE** The Iskandar Regional Development Authority Act 2007 has taken effect from 17 February 2007.

- **MARINE ARBITRATORS** Fifteen maritime arbitrators will be trained at the Kuala Lumpur Regional Centre for Arbitration (KLRCA) beginning February 2007. This batch, which will be the first in the country, consists of master mariners and maritime lawyers.

- **MONEYLENDERS ACT TO HAVE MORE BITE?** In the light of rampant harassment by illegal moneylenders in the country, there may be several amendments to the Moneylenders Act 2001, in particular those relating to police procedures.

- **NEW REGULATION BY MALAYSIA DEPOSIT INSURANCE CORPORATION (MDIC)** A new regulation has been issued by the Malaysia Deposit Insurance Corporation whereby trust account holders and new joint account holders at commercial and Islamic banks now need to disclose relevant information to enjoy separate deposit insurance coverage of up to RM60,000 from other accounts held by them individually.

- **NEW SYARIAH INDEX** By 1 November 2007, the Kuala Lumpur Syariah Index (KLSI) will be replaced by the FTSE Bursa Malaysia Emas Syariah Index.

- **OPR STILL AT 3.5%** On 26 January 2007, the decision was made by the Monetary Policy Committee (MPC) of Bank Negara Malaysia that the Overnight Policy Rate (OPR) should remain at 3.50%.

- **PAPERLESS PASSPORT APPLICATION** A study on implementing a paperless international passport application system this year is in its final stages. All that would be required is for applicants to present their MyKads to the service counter officers.

- **SBL GUIDELINES REVISED** A set of revised guidelines on securities borrowing and lending (SBL) has been issued by the Securities Commission. This is in tandem with regulated short-selling that commenced in January 2007.

- **SC AND CCM TO MERGE?** It was reported that the Securities Commission (SC) and Companies Commission of Malaysia (CCM) may merge to be under the purview of the Ministry of Finance. Although attempts have been made in the past to fuse the two regulatory authorities, nothing has materialised thus far.

- **SINGLE-PRICING REGIME DEFERRED TO JULY** Instead of the original date fixed for 1 April 2007, the implementation of the single-pricing regime for unit trusts has been deferred to 1 July 2007.

- **SOLID WASTE MANAGEMENT BILL TO BE TABLED** The Solid Waste Management Bill will be tabled in

Parliament soon. The Bill has been in the pipeline for more than 8 years.

FOREIGN FLASH

- **A PHONE BY ANY OTHER NAME...** The trademark battle between Cisco Systems and Apple Computer continues over the use of the name iPhone. Among the issues for consideration is to what extent Cisco Systems had put the iPhone mark to genuine use, bearing in mind that it became the owner of the iPhone mark as early as 2000 but was believed not to have revived the mark until early 2006 (under the law on UK and Community Trade-Marks, a mark that has not been put to 'genuine use' for a continuous period of 5 years is liable to be revoked).

- **BEST PRACTICES IN ISLAMIC FINANCE** In the name of standardisation and uniformity, the International Capital Market Association (ICMA) and the International Islamic Financial Market (IIFM) have decided to collaborate in formulating best practices for the development and growth of Islamic financial products.

- **LARGEST DUBAI LISTING LAUNCHED** In February 2007, the largest Medium Term Note (MTN) programme was launched in Dubai and listed on the Dubai International Financial Exchange (DIFX).

- **FIRST INTERNATIONAL BOND IN MONGOLIA** Mongolia's largest bank, the Trade & Development Bank of Mongolia (TDBM) has issued the first Euro Medium Term Note programme which is valued at USD50 million.

- **FIRST PPP IN FRANCE COMPLETED** The first public-private partnership (PPP) established under France's 2004 PPP Regulations has been completed. The transaction, which involved a contract worth 250 million Euro for the upgrade of the national sports academy, was the first transaction to fall under the purview of the Regulations which came into force on 27 June 2004.

- **THIN IS NOT IN** Under a self-regulatory code, Italy's fashion industry has undertaken to ban stick-thin or anorexic models in their task in re-defining beauty. The code was signed by the President of the Italian Fashion Chambers.

- **SHAREHOLDERS CELEBRATION DOWNUNDER** In going against the trend of insolvency practice, the High Court of Australia recently ruled in favour of the shareholders of the Sons of Gwalia, when it decided that such shareholders would rank equally with the creditors. Sons of Gwalia Ltd is a Perth-based mining company. The decision of the High Court was based on the fact that the company had failed to notify the Australian Stock Exchange that it lacked the sufficient gold reserves to keep going. This resulted in losses incurred by shareholders.

- **SINGAPORE TO REVISE TRADE MARKS LAW?** Singapore is preparing to embrace the amendments made to the Trade Marks Act. The first reading of the amendment bill was made in November 2006.

- **SINGAPORE IN TOP TEN** According to a survey conducted by the International Chamber of Commerce (ICC), Singapore was ranked ninth among the top ten best-performing countries in addressing piracy.

BRIEFING...

INSURANCE

HAVING PEACE OF MIND... Whilst life, motor and even medical insurance are the more common matters that are made the subject of insurance, insuring part of the human anatomy is also not unheard of…but can one insure his peace of mind?

We answer this poser in the case analysis of *Fidler v Sun Life Assurance Co of Canada* (2006).

BACKGROUND FACTS Fidler was a bank receptionist and was covered by a group policy that included long-term disability benefits. After being diagnosed with chronic fatigue syndrome and fibromyalgia, she began receiving long-term disability benefits with effect from January 1991. Under the terms of the policy, she was only entitled to continued benefits after two years if she was unable to do any job. In May 1997, the insurer informed Fidler that her benefit payments would be terminated as the insurer's video surveillance detailed activities inconsistent with Fidler's claim that she was incapable of performing light or sedentary work. In December 1998, the insurer confirmed its decision to terminate the benefits.

Fidler commenced an action. One week before the trial was scheduled to start, the insurer offered to reinstate her benefits and to pay all arrears with interest. As a result, the only issue at the trial in the Supreme Court of Canada was Fidler's entitlement to damages.

TRIAL COURT The trial judge awarded her $20,000 in aggravated damages for mental distress but, concluding that the insurer had not acted in bad faith, dismissed her claim for punitive damages.

COURT OF APPEAL The Court of Appeal unanimously upheld the award for mental distress, and the majority of the Court awarded Fidler an additional $100,000 in punitive damages, finding palpable and overriding error on the question of bad faith on the part of the insurer.

THE SUPREME COURT It was held by the Supreme Court that the plaintiff must prove her loss and that the court must be satisfied that the degree of mental suffering caused by the breach was of a degree sufficient to warrant compensation. On the present facts, given the nature of a disability insurance contract, it would have been within the reasonable contemplation of the parties, at the time the contract was made, that mental distress would likely flow from a failure to pay the required benefits.

The award of punitive damages by the Court of Appeal was set aside as such damages are designed to address the purposes of retribution, deterrence and denunciation. However, an insurer will not necessarily be liable for such damages by incorrectly denying a claim that is eventually conceded or judicially determined, to be legitimate. The question in each case is whether the denial was the result of the overwhelmingly inadequate handling of the claim, or the introduction of improper considerations into the claims process. The trial judge was right in holding that the insurer had not acted in bad faith. He considered every salient aspect of how the insurer handled the claim and concluded that its denial of benefits was the product of a real, albeit incorrect, doubt as to whether Fidler was incapable of performing any work.

RIGHT TO INSURE PEACE OF MIND What is interesting to note is that the case of *Warrington v Great-West Life Assurance Co* (1990) was referred to. In that case, it was held that aggravated damages may be awarded without a separate actionable conduct if the contract is one for 'peace of mind'. In the court's view, a long-term disability insurance contract is such a contract.

In *Warrington*'s case, the courts unanimously declined to interfere with the trial judge's award of aggravated damages by concluding that the insurance contract in this case is such a contract that 'aggravated damages are available as additional compensation if the insured establishes that a breach of that [peace of mind] contract caused her mental distress'. In previous decisions, it was possible to claim in circumstances where there was a breach of contract resulting in a terrible vacation - *Jarvis v Swan Tours Ltd* (1973); breach of contracts for wedding services - *Wilson v Sooter Studios Ltd* (1988); luxurious chattels - *Wharton v Tom Harris Chevrolet Oldsmobile Cadillac Ltd* (2002); and in certain disability insurance contracts - *Warrington and Thompson v Zurich Insurance Co* (1984).

After considering the aforementioned cases, the Supreme Court of Canada in the present case laid down the test. The Court must be satisfied that:

(1) an object of the contract was to secure a psychological benefit that brings mental distress upon breach within the reasonable contemplation of the parties; and

(2) the degree of mental suffering caused by the breach was of a degree sufficient to warrant compensation.

With that, the Court held that the 'peace of mind' class of cases should not be viewed as an exception to the general rule of the non-availability of damages for mental distress in contract law, but rather as an application of the reasonable contemplation or foreseeability principle that applies generally to determine the availability of damages for breach of contract. Thus, where the very nature of the contract is to provide peace of mind, damages will be awarded.

ENERGY & UTILITIES

SPAN... SPINNING AROUND THE WATER INDUSTRY It is difficult to fathom the possibility of water, a necessity and basis of life, being transformed into a commodity for profits. The provisioning of water is sometimes perceived from a human rights perception, public good standpoint and an environmental angle.

In this article, we examine whether revamping of the water industry maintains these philosophies and the extent of the powers of the Suruhanjaya Perkhidmatan Air Negara (SPAN) or National Water Services Commission.

BEFORE... Formerly, the commodity of water was under the purview of the state government. However, the Federal Constitution was amended to capture the transfer of jurisdiction from the states to the federal government, in the interest of centralising the water supply and sewerage services.

NOW... Two statutes pertaining to water have recently been enacted, namely the Water Services Industry Act 2006 (WSIA) and the Suruhanjaya Perkhidmatan Air Negara Act 2006 (SPANA). Although both statutes have been passed, only the SPANA has taken effect, that is from 1 February 2007. The SPANA is applicable to Peninsular Malaysia and the Federal Territories of Putrajaya and Labuan.

The SPANA provides for the establishment of the SPAN - a body empowered to supervise and regulate water supply services and sewerage and to enforce the water supply and sewerage laws, with the aim of providing safer, cleaner and uninterrupted services.

The WSIA, on the other hand, aims to provide transparency and efficiency in the water supply industry. Thus, any eligible private body has the capacity to apply for individual licences to supply water and provide sewerage services. This will foster competition, something that is directly needed to liberalise the water industry and increase efficiency, given the general public dissatisfaction over the currently low quality of water and high tariffs.

SURUHANJAYA PERKHIDMATAN AIR NEGARA (SPAN)

Members The Commission is to consist of the Chairman, Chief Executive Officer and between eight to ten other persons, who have experience, capacity and professionalism in matters relating to finance, engineering, business or administration, or to be otherwise suitable for appointment. These appointments are to be made by the Minister and they are to be appointed based on the opinion of the Minister. Thus the appointment of the officers of the Commission is based on the sole discretion of the Minister, and this may not be entirely advantageous, as it does not provide for a check and balance system.

Powers of the Minister Pursuant to section 11(1) of the SPANA, the Minister may at any time revoke the appointment of any member of the Commission, other than the Chief Executive Officer, without assigning any reason for the revocation.

In reality, the Commissioners should advise the Minister independently, without fear or favour. Therefore, any power to revoke the Commissioners' appointment arbitrarily may not serve the aim of the Commission entirely.

Functions of the Commission Section 15 of the SPANA provides for the functions of the Commission, which includes advising the Minister on the national policy objective, implementing and enforcing the WSIA, supervising and monitoring water supply services and sewerage services activities and reviewing and recommending tariffs.

However, it should be noted that the prime objective of restructuring the water industry by the government is to ensure affordable and accessibility of water to all citizens. However, this key function of the Commission has not been spelt out in the Act, ie to ensure that every person has access to sufficient, affordable, physically accessible, safe and acceptable water for personal and domestic use.

SPAN Fund The Commission has been empowered to administer and control the SPAN Fund. This fund is a contribution from fees and other administrative charges, for the operational purpose of SPAN. The Minister is to approve the yearly expenditure and an audited account statement together with activities undertaken by SPAN will be tabled in Parliament. Theoretically, a check and balance system is evident here.

TRANSFORMATION It is still far too early to judge the success of SPAN or the SPANA. As long as SPAN aims to transform the water service industry towards operational efficiency, economic sustainability which translates into an enhanced infrastructure, being beneficial to consumers and offering affordable services, the SPANA would be a success.

TORT - MEDICAL NEGLIGENCE

THE EMERGENCE OF THE NEW MEDICINE MAN ... The decision of the Federal Court in *Foo Fio Na v Dr Soo Fook Mun* (December 2006) has put a check on complete dependence on the *Bolam* principle in all medical negligence cases. Medical practitioners can no longer escape liability in negligence cases simply by saying that they had done the act within acceptable standards.

We examine the implications of the decision of the Federal Court and the extent of the liability that is to be attached to medicine men in the light of the abolition of the *Bolam* principle.

BACKGROUND FACTS The appellant, Foo Fio Na was involved in a car accident on 11 July 1982. When initial treatment proved unsuccessful, the first respondent, Dr Soo, performed surgery on her. The day after the first operation, the appellant became paralysed. After she was examined by a neurosurgeon who found the basis for the paralysis, a second operation was performed. The appellant, however, continued to be wheelchair-bound.

At the trial, the appellant alleged that although the first respondent had recommended the first operation, he did not explain the risks of the surgery. Furthermore, the consent for the second operation was obtained after the first operation had been performed and when the plaintiff was totally paralysed in both upper and lower limbs. At that time, she could not have affixed the thumbprint by herself and neither could she resist the affixing of it by someone else. The thumbprint was also affixed in the absence of the plaintiff's brother and friend although the first respondent knew of their existence.

HIGH COURT The trial judge ruled that consent was improperly obtained and that the respondent was negligent in performing the first operation, coupled with the fact that he did not take immediate steps to remedy the paralysis.

COURT OF APPEAL The decision was then reversed by the Court of Appeal and it was held that the test of the standard of proof of medical negligence, which has always been used in the Malaysian jurisdiction, is the *Bolam* test. It was stated:

> The Court of Appeal ought not to alter the approach; for the time being, the Bolam test maintains a fair balance between law and medicine.

WHAT IS THE *BOLAM* TEST In the landmark case of *Bolam v Friern Hospital Management Committee* (1957), the plaintiff suffered from manic-depression and was given electro-convulsive therapy. During the course of the treatment, he sustained fractures which he alleged could have been avoided if the doctors were to prescribe relaxant drugs or manual control.

In determining whether there was a breach of duty of care, it was held by Judge McNair:

> The test is the standard of the ordinary skilled man exercising and professing to have that special skill. A man need not possess the highest expert skill; it is well established law that it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular art. ... A doctor is not guilty of negligence if he has acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art; a doctor is not negligent if he is acting in accordance with such a practice, merely because there is a body of opinion that takes a contrary view.

In interpreting the *Bolam* test, an issue that arises is whether it is up to the court or the medical profession to determine the standard of reasonable care. Subsequent English cases

seemed to show that the doctors should be the one to set the bar for their peers.

ROGERS V WHITAKER The application of the *Bolam* principle was considered in several cases subsequently, most notably by the High Court of Australia in *Rogers v Whitaker* (1992).

In that case, the respondent brought an action against the appellant, an ophthalmic surgeon, for failure to inform her of the possible risk of sympathetic opthalmia in her left eye as a result of surgery on her right eye.

It was stated:

> …a doctor has a duty to warn a patient of material risk inherent in the proposed treatment. A risk is material if, in the circumstances of the particular case, a reasonable person in the patient's position, if warned of the risk, would be likely to attach significance to it or if the medical practitioner is or should reasonably be aware that the particular patient, if warned of the risk, would be likely to attach significance to it. This duty is subject to the therapeutic privilege, ie an opportunity afforded to the doctor to prove that he or she reasonably believed that a disclosure of a risk would prove damaging to a patient.

THE *BOLAM* TEST IN MALAYSIA In Malaysia, the *Bolam* principle was adopted in *Chin Keow v Government of Malaysia* (1967), *Elizabeth Choo v Government of Malaysia* (1960), *Kow Nan Seng v Nagamah* (1981) and *Dr Chin Yoon Hiap v Ng Eu Khoon* (1998).

FEDERAL COURT As a result of the decision of the Court of Appeal, the appellant successfully applied for, and obtained, leave to the Federal Court to determine the question of law on whether the *Bolam* test should apply in relation to all aspects of medical negligence. In granting leave, the court confined the question of law to the 'particular aspect of medical negligence that relates more specifically to the duty and standard of care of a medical practitioner in providing advice to a patient on the inherent or material risk of the proposed treatment'.

The Federal Court allowed the appeal by the appellant. Siti Norma Yaakob FCJ, in delivering the judgment, ruled:

> …the *Rogers v Whitaker* test would be more appropriate and a viable test of this millennium than the *Bolam* test. To borrow a quote from Lord Wolfe's inaugural lecture in the new Provost Series, delivered in London in 2001, the phrase 'Doctor knows best' should now be followed by the qualifying words, 'if he acts reasonably and logically and gets his facts right'.

ANALYSIS One of the main concerns arising from the decision in *Foo Fio Na* is that it will inevitably lead to the practice of defensive medicine. Out of fear of a negligence suit or prosecution, doctors may not opt for high-risk procedure or treatment which may prove to be highly beneficial to the patient should it succeed.

In fact, Gopal Sri Ram JCA in his judgment in *Foo Fio Na* observed:

> …if the law played too interventionist a role in the field of medical negligence, it will lead to the practice of defensive medicine. The cost of medical care for the man on the street would become prohibitive without being necessarily beneficial.

The recent case of *Foo Fio Na* however, may mean that there will be more court intervention in medical profession. Doctors need to exercise more caution in administering any treatment for their patient as they can no longer work on the premise that what they have done is deemed acceptable to their peers.

As echoed by Siti Norma Yaakob FCJ:

> …there is a need for members of the medical profession to stand up to the wrongdoings, if any, as is the case of professionals in other professions. In so doing, people involved in medical negligence cases would be able to obtain better professional advice.

CORPORATE CRIME

THE RISE AND FALL OF REPCO... The Repco Saga had caused a stir in the Malaysian financial market during the economic downturn in 1998. Low Thiam Hock who is infamously known as Repco Low, the executive chairman of Repco Holdings Berhad was charged in 1999 under section 84(1) of the Securities Industries Act 1983 (SIA) for the manipulation and rigging of the price of Repco Holdings shares.

In this article, we take a roller-coaster ride with Repco Low.

BACKGROUND FACTS The alleged manipulation occurred on 3 December 1997, upon the re-quotation of Repco Shares on the stock exchange after its suspension. The suspension was earlier requested by Repco Holdings Berhad pending its finalisation of negotiation for the sale of Everise Ventures Sdn Bhd (gaming subsidiary of Repco Holdings Berhad) to Glowbitz Amalgamated Sdn Bhd (a wholly-owned subsidiary of Rekapacific Berhad) for RM500 million in cash. Repco Holdings Berhad announced that both parties had mutually agreed to rescind the said deal on 2 December 1997. There was a misleading appearance of the price of Repco shares through the acquisition of 227,000 units of those shares which allegedly caused the price of the shares to close at RM113 per unit on 3 December 1997, which is an escalation of RM4.50 above its pre-suspension price. The escalation of the Repco share price occurred when the stock market as a whole was on downward trend.

On 18 September 1999, Low was charged with instructing a dealer's representative of Sime Securities Sdn Bhd to buy Repco Holdings shares at any price offered by sellers on the Kuala Lumpur Stock Exchange. The offence was allegedly committed at Sime Securities Sdn Bhd on 3 December 1997.

In 1999, Repco was taken over by the national debt restructuring agency also known as Pengurusan Danaharta Nasional Berhad, when it defaulted on its RM340 million loan repayments to Sime Bank. Pricewaterhouse Coopers was then appointed by Danaharta to manage Repco's corporate affairs. Repco is now in the process of being wound up by Danaharta. Sime Bank's chief executive officer Datuk Ismail Zakaria was charged with exceeding his authority for giving a RM175 million loan to Everise Capital Sdn Bhd, a subsidiary of Repco Holding, to buy shares. In 1995, Repco Inc, the largest independent US futures brokers collapsed and an internal probe discovered that it was owed millions by Repco since the mid-1990's.

LATEST DEVELOPMENT On 14 November 2006, Low was acquitted and discharged without calling for his defence against the charge of misleading the share market under the SIA. In reaching the decision, Akhtar Tahir J said that the prosecution had failed to prove that Low had instructed a dealer's representative to buy Repco shares at any offer price. He also ruled that there was no evidence to show that Low was aware of the dealer's act. In his Lordship's words:

> It's not the duty of the court to look for the nature of offence committed if the prosecution itself cannot come to a conclusion on what is the exact offence committed.

The Securities Commission will be recommending to the Public Prosecutor to appeal against the decision of the Sessions Court.

INDUSTRIAL RELATIONS

COLLECTIVE AGREEMENTS... TO WHAT EXTENT DO THEY BIND? The case of *Aero Manufacturing Sdn Bhd Selangor v Kesatuan Kebangsaan Pekerja-Pekerja Syarikat-Syarikat Pembuatan Keluaran Getah* (Award No. 125 of 2007) raises the issue of whether a collective agreement remains binding after the company is succeeded after a winding-up order.

FACTS The Union filed an application under section 33(1) of the Industrial Relations Act 1967 (IRA) to interpret the Collective Agreement signed between Aero Manufacturing Sdn Bhd (Aero Manufacturing) and itself to bind Aerofoam Industries Sdn Bhd (Aerofoam Industries). This was on the basis that Aerofoam Industries was the successor, assignee or the transferee of Aero Manufacturing. The company, Aero Manufacturing, raised a preliminary objection that the Union did not have locus standi to bring this application on behalf of its members because it no longer had any members in Aero Manufacturing, which ceased to exist pursuant to a winding-up order.

ISSUES There were two issues that the Industrial Court had to address, namely, (a) whether a Union has locus standi to file an application under section 33(1) of the IRA in respect of a collective agreement when it no longer has any members to represent; and (b) to what extent does section 17(1)(a) of the IRA bind a new employer?

HELD In respect of the first issue, the Industrial Court held that since at the time the application was filed by the Union, Aero Manufacturing had ceased to exist and there were no longer any employees in the said company, logically, there were no employees to enjoy the benefits of the collective agreement that required interpretation, let alone for the Union to represent.

In respect of the second issue, the Industrial Court held that the fact that the employees of Aero Manufacturing were transferred to Aerofoam Industries on the same terms and conditions of their services does not automatically mean that Aerofoam Industries is the successor, assignee or transferee of Aero Manufacturing under section 17(1)(a) of the IRA. In so deciding, the Industrial Court distinguished the 2001 Federal Court case of *Kesatuan Kebangsaan Wartawan Malaysia & Anor v Syarikat Pemandangan Sinar Sdn Bhd & Anor* on the following grounds, namely:

- that in the case of *Syarikat Pemandangan Sinar*, when the company was placed under receivership, the succeeding company acquired the former company's publishing rights before it re-employed its employees. In the present case, however, Aero Manufacturing transferred only its employees without transferring any of its rights whatsoever; and

- that in the case of *Syarikat Pemandangan Sinar*, the company had also sold all its physical assets including its land, plants, machineries & stock-in-trade to the succeeding companies. In the present facts, however, there was no such transfer. In fact, Aero Manufacturing was not even in existence as it had been wound up and the only reason why the employees were transferred to Aerofoam Industries was to avoid their eventual termination.

ANALYSIS Since the Industrial Court had disposed off the Union's application pursuant to the preliminary objection by the company that the Union did not have locus standi to bring an application on behalf of its members, what remains to be an interesting poser is whether it would have made a difference if the employees themselves had brought an application to interpret the provision of the collective agreement under section 33 of the IRA 1967, without the intercession of the Union.

CONSTRUCTION

THE ISKANDAR DEVELOPMENT REGION... THE RENAISSANCE OF JOHOR? Named after the Sultan of Johor, the Iskandar Development Region (IDR) is a project that is purported to convert the southernmost state of Johor into a metropolis similar to Shenzhen (China) or even Hong Kong.

In this article, we examine the rationale and expectations of the IDR.

The IDR encompasses 2,217sq km of land, which is two and a half times the size of Singapore. Touted as the largest urban development in South East Asia, the IDR is expected to attract a total of USD105 billion in 20 years with possible global investments, particularly from the US, Europe and Middle East.

Malaysia is confident in reaching that goal, especially since the IDR is expected to include several prominent economic projects such as the Pasir Gudang Industrial Estate, Senai Airport and Port of Tanjung Pelepas.

To facilitate the administration of the IDR, the Iskandar Regional Development Act was passed and took effect from 17 February 2007. By virtue of the Act, the Iskandar Regional Development Authority is established, a body to provide direction and coordination, especially between government agencies, in order to promote and enhance the overall progress of development within the Iskandar Development Region. Corporate heavyweights such as Tan Sri Robert Kuok, Datuk Seri Andrew Sheng, Tun Musa Hitam, Tan Sri Samsudin Osman and Tan Sri Kishu Tirathai have been appointed members of the Advisory Council.

SHIPPING

THE SUA CONVENTION... A CASE FOR RATIFICATION? The *Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation 1988* (1988 SUA Convention) and the *Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms located on the Continental Shelf 1988* (1988 SUA Protocol) were adopted in Rome on 10 March 1988. In 2005, amendments were made to the SUA Convention and its related protocols.

Malaysia has ratified neither the SUA Convention nor its related protocols. In this article, we examine whether Malaysia has sufficient reasons to hop on board.

THE BACKGROUND The genesis of the 1988 SUA Convention and 1988 SUA Protocol is based on the hijack of the Italian Cruise Ship, *Achille Lauro*.

Both the 1988 SUA Convention and Protocol were designed to ensure the progressive elimination of causes underlying international terrorism and to pay special attention to all situations, including colonialism, racism and situations involving gross violation of human rights and fundamental freedoms - all of which may give rise to international terrorism.

The word 'terrorism' is not defined in the 1988 SUA Convention but article 3 provides a list of several offences which may be considered as endangering the safety of international maritime navigation.

THE 2005 AMENDMENTS The International Maritime Organisation (IMO) Legal Committee undertook a review of the 1988 SUA Convention. The amendments were designed to combat the threat of maritime terrorism and to provide the legal basis for action to be taken against persons

committing unlawful acts against the safety of navigation. The amendments were adopted at an International Diplomatic Conference organised by the IMO in London from 10 to 14 October 2005.

The 2005 amendments contain two significant changes.

First, it broadens the list of offences to include those involving the use of ship as a weapon and the transport of weapons of mass destruction (WMD). Hence, this would prevent the proliferation of WMD.

Secondly, it introduces provisions for the boarding of ships on the high seas or in an exclusive economic zone (EEZ) where there are reasonable grounds to suspect that the ship or a person on board the ship is, has been, or is about to be, involved in the commission of an offence under the 1988 SUA Convention.

MALAYSIA AND THE 1988 SUA CONVENTION Malaysia has not ratified the 1988 SUA Convention despite the IMO's concerns of the unlawful acts which threaten the safety of ships and the security of their passengers and crew.

Since Malaysia is one of the states bordering this vital sea lane, there are pertinent points or factors that she should consider in her deliberation of whether to ratify the 1988 SUA Convention. There may not be any real and present danger of terrorism in the Malaysian waterways but the significance of the 1988 SUA Convention remains crucial.

The provisions governing Malaysia's territorial waters in respect of such unlawful acts may be found in section 121 of the Penal Code. The section reads:

> Whoever wages war against the Yang di-Pertuan Agong or against any of the Rulers or Yang di-Pertua Negeri, or attempts to wage such war, or abets the waging of such war, shall be punished with death, or imprisonment for life, and if not sentenced to death shall also be liable to fine.

A literal reading of the section, however, leads to a restrictive application of the same as it refers to waging war against the Yang Dipertuan Agong only. It is therefore argued that section 121 of the Penal Code may be invoked so long as the said act is proved to be an act which is grave and severe to the security of the country.

In any event, a broad reading of section 121 of the Penal Code will not extend to offences committed in Malaysia's EEZ. This highlights the importance of the 1988 SUA Convention and the 2005 Protocols. The ratification of the Convention will enable the extension of jurisdiction for Malaysia for such unlawful acts. In other words, it means that the Convention will apply to Malaysia's EEZ and the High Seas.

Ratifying the SUA Convention and the protocols would mean that if an act of terrorism is committed in Malaysia and the perpetrators subsequently flee to Singapore, the latter will have jurisdiction to charge them, regardless of the fact that the offence had not taken place in Singapore. This will be possible as Singapore is a party to the 1988 SUA Convention. In the same scenario, but without ratification by Malaysia, Singapore will have no jurisdiction to charge the perpetrators.

A further point worth noting is that Malaysia stands to benefit as the ratification of the 1988 SUA Convention will only enhance regional and international cooperation as state parties are obliged to render assistance and communicate the commission of such unlawful acts that may affect the other state parties.

Furthermore, the SUA Treaties complement the practical maritime security measures adopted by IMO - including SOLAS chapter XI-2 (Special Measures to Enhance Maritime Security) and the International Ship and Port Facility Security (ISPS) Code, which took effect from July 2004. These measures

regulate the legal situation in the unfortunate event that a terrorist attack should occur.

Finally, the 1988 SUA Convention is akin to an Extradition Treaty whereby if a country is not a party to any Extradition Treaty but is a party to the Convention, that particular country automatically has powers to extradite the perpetrators to their county of origin.

CONCLUSION The paramount consideration should be the prevention of terrorist acts. The phrase 'measures are taken to ensure the security…' is often heard but the poser is: What exactly are these measures?

The 2005 Protocols were developed by the IMO's Legal Committee to provide an adequate basis for the arrest, detention, extradition and punishment of terrorists acting against shipping or fixed platform or when using ships to perpetrate acts of terrorism. Therefore, there may not be any basis NOT to ratify the SUA Convention and its related protocols.

BRIEF-UP...

GUIDELINES/RULES/ PRACTICE NOTES ISSUED BETWEEN JANUARY AND MARCH 2007 BY BANK NEGARA MALAYSIA/ SECURITIES COMMISSION/ BURSA MALAYSIA SECURITIES BHD/ FOREIGN INVESTMENT COMMITTEE/ COMPANIES COMMISSION OF MALAYSIA

BANK NEGARA MALAYSIA (BNM)

- *Liberalisation of Investment in Shares and Interest-in-Shares Policy* - 3 January 2007
- *Operational Framework for MGS Switch Auction* - 10 January 2007
- *Rationalisation of Discount House Industry and Framework on Investment Banks (Joint release with Securities Commission)* - 29 December 2006
- *Introduction of Callable Malaysian Government Securities (MGS) and MGS Switch Auction* - 7 December 2006

SECURITIES COMMISSION (SC)

- The following Guidance Notes on Collective Investment Schemes have been revoked - *Guidance Note 7 (in relation to Amendment to the Procedures for Registration* and *Lodgment of Prospectus)* and *Guidance Note 13 (in relation to Appointment of Delegate Not Licensed by SC)*
- *Guidance Note 17 to the SC Guidelines on Unit Trust Funds - In relation to (a) Procedures & Format of Submissions; & (b) Documents Required to be Submitted to the SC* - Date Issued: 15 February 2007; Effective Date: 1 March 2007
- *Guidance Note 18 to the SC Guidelines on Unit Trust Fund Prospectus - In relation to Procedures for Registration & Lodgment of Prospectus* - Date Issued: 15 February 2007; Effective Date: 1 March 2007
- *Guidance Note 19 to the SC Guidelines on Unit Trust Fund - In relation to Procedures for Registration & Lodgment of Deed* - Date Issued: 15 February 2007; Effective Date: 1 March 2007
- *Guidance Note 4 to the SC Guidelines on Real Estates Investment Trusts - In relation to Definition of Non-Real Estate-Related Assets* - 8 February 2007
- *Guidance Note 5 to the SC Guidelines on Real Estate Investment Trusts - In relation to Revaluation of Real Estate* - 8 February 2007

- *Guidance Note 6 to the SC Guidelines on Real Estate Investment Trusts - In relation to Remuneration of Trustee & Management Company* - 8 February 2007

- *SC Guidelines on Collective Investment Schemes - Issued pursuant to the Guidelines on Unit Trust Funds - In relation to Valuation* - 16 January 2007

- *SC Guidelines on Anti-Money Laundering - Guidelines on Prevention of Money Laundering & Terrorism Financing for Capital Market Intermediaries* - 11 January 2007

- *SC Guidelines on Prospectus - Part 1: Public Offerings, Abridged Prospectus & Supplementary Prospectus* - Revised Edition: 15 January 2007

- *SC Guidelines on Prospectus - Part 3: Procedures for Registration - Public Offerings, Abridged Prospectus, Supplementary Prospectus & Schedule of Fees* - Revised Edition: 15 January 2007

- *SC Guidelines on Securities Borrowing & Lending* - Date Issued: 27 December 2007; Effective Date: 3 January 2007

- *Practice Note to the SC Guidelines on Exemption from Stamp Duty & Real Property Gains Tax - To clarify the types of M&A that would qualify for exemption from stamp duty as stated in Stamp Duty (Exemption) (No. 12) Order 2006 and from RPGT as stated in Real Property Gains Tax (Exemption) (No. 7) Order 2006* - 19 December 2006

- *Guidance Note 15 to the SC Guidelines on Collective Investment Schemes - Issued pursuant to the Guidelines on Unit Trust Funds - In relation to Valuation of Bonds* - Date Issued: 15 December 2006; Effective Date: 3 January 2007

- *Practice Note 1 to the SC Guidelines on FIC Applications - Acquisition of Interests, Mergers & Take-overs by Local & Foreign Interests and Guidelines on the Acquisition of Properties by Local & Foreign Interests* - 5 December 2006

BURSA MALAYSIA SECURITIES BERHAD (BMSB)

- *Directive on paragraph 8.15 of the Listing Requirements of BMSB - In relation to Announcement on Level of Public Shareholding Spread - Issued pursuant to letter dated 2 December 2005: BMSB imposed requirement for ALL listed issuers to make periodic announcements on the level of public shareholding spread half-yearly* - 7 February 2007

- *Directive on paragraph 8.15 of the Listing Requirements of BMSB for the MESDAQ Market - In relation to Announcement on Level of Public Shareholding Spread - Issued pursuant to Rule 2.20 of the Listing Requirements of BMSB for the MESDAQ Market & paragraph 3.0 of Guidance Note No. 13/2007* - 7 February 2007

- *Amendments to the Listing Requirements for Main Board/Second Board in relation to Listing Fees, Practice Note 8 of 2001 & Part C of Appendix 6A* - 17 January 2007

- *Amendments to the Listing Requirements for MESDAQ Market in relation to Listing Fees & Appendix 6A* - 17 January 2007

- *Practice Note 19/2006 to the Listing Requirements on Public Shareholding Spread - Issued in relation to paragraph 8.15 of the Listing Requirements and pursuant to paragraph 2.08 of the Listing Requirements* - 28 December 2006

- *Amendments to the Listing Requirements for Main Board/Second Board in relation to Requirements on Provision of Financial Assistance & Public Shareholding Spread* - 28 December 2006

- *Amendments to the Listing Requirements for MESDAQ Market in relation to Requirements on Public Shareholding Spread* - 28 December 2006; Effective Date: 2 July 2007

- *Amendments to the Listing Requirements for Main Board/Second Board in relation to Listing Fees for Convertible Equity Securities, Debt Securities, Trust Units and Exchange Traded Funds* - 22 December 2006; Effective Date: 1 January 2007

- *Amendments to the Listing Requirements for MESDAQ Market in relation to Listing Fees for Convertible Equity Securities and Debt Securities* - 22 December 2006; Effective Date: 1 January 2007

- *Amendments to the Listing Requirements for Main Board/Second Board and MESDAQ Market in relation to Various Enhancements* - 14 December 2006; Effective Date: 15 January 2007

FOREIGN INVESTMENT COMMITTEE (FIC)

- *FIC Press Release on the Guidelines on Acquisition of Properties by Foreign Interests - With no restrictions imposed* - Effective Date: 21 December 2006

COMPANIES COMMISSION OF MALAYSIA (CCM)

- *Consultative Document on Members' Rights & Remedies* - 8 January 2007

- *Guidelines on Application to Strike Off the Name of a Company under section 308 of the Companies Act 1965* - 11 January 2007; Effective Date: 12 January 2007

- *Consultative Document on Creating A Conducive Legal & Regulatory Framework for Businesses* - 15 January 2007

ISKANDAR REGIONAL DEVELOPMENT AUTHORITY ACT 2007

No
664

Date of coming into operation
17 February 2007

Notes
This is an Act to incorporate the Iskandar Regional Development Authority, to provide for the proper direction, policies and strategies in relation to development within the Iskandar Development Region, to provide for coordination between government agencies to promote trade, investment and development within the Iskandar Development Region.

SURUHANJAYA PERKHIDMATAN AIR NEGARA ACT 2006

No
654

Date of coming into operation
1 February 2007

Notes
An Act to provide for the establishment of the Suruhanjaya Perkhidmatan Air Negara with powers to supervise services and sewerage services and to enforce the water supply and sewerage services laws and for related matters.

PROTECTION OF NEW PLANT VARIETIES ACT 2004

No
634

Date of coming into operation
1 January 2007

Notes
This is an Act to provide for the protection of the rights of breeders of new plant varieties, and the recognition and protection of contribution made by farmers, local communities and indigenous people towards the creation of new plant varieties; to encourage investment in and development of the breeding of new plant varieties in both public and private sectors and to provide for related matters.

EXCHANGE CONTROL (AMENDMENT) ACT 2005

No
A1241

Act amended
Exchange Control Act 1953

Date of coming into operation
1 January 2007

Amendments
Section 4 and **Fifth Schedule**

Incorporation
Sections 4A and **10A**

BRIEF-CASE...

TELECOMMUNICATIONS - Jurisdiction of Consumer Claims Tribunal - Interpretation of Consumer Protection Act 1999 and Communications & Multimedia Act 1998

TELEKOM MALAYSIA BHD V TRIBUNAL TUNTUTAN PENGGUNA & ANOR [2007] 1 CLJ 300, High Court

FACTS The bill issued by the applicant, pertaining to the use of telecommunication services, was disputed by the second respondent, the consumer. The second respondent brought his claim before the first respondent, the Consumer Claims Tribunal ('the Tribunal'). The claim was allowed.

ISSUE The issue for consideration was whether the Tribunal had jurisdiction to hear the dispute, bearing in mind that the service of telecommunications did not fall within the scope and ambit of the Consumer Protection Act 1999.

HELD It was held that telecommunications services did not fall within the scope of the Consumer Protection Act 1999 but was within the ambit of the Communications and Multimedia Act 1998 as the definition of 'communications' in section 6 of the latter statute refers to communication, whether between persons and persons, things and things, or persons and things, in the form of sound, data, text visual images, signals or any other form or any combination of those form. Such definition is wide enough to cover telecommunication.

COMPANY LAW - Meeting - Whether meeting was properly adjourned - Common law power to adjourn meeting

DATUK JOHARI ABDUL GHANI & ORS v QSR BRANDS & ORS

[2007] 1 CLJ 85, Court of Appeal

FACTS QSR was a public listed company and a special resolution was moved pursuant to section 145 of the Companies Act 1965. The resolution sought to be moved at the meeting was in respect of the removal of certain directors, including the third respondent. The meeting incidentally was chaired by the third respondent. The third respondent adjourned the meeting but NOT according to article 74 of the Articles of Association of the company.

According to Article 74, 'the Chairman of the meeting may …adjourn the meeting to some place and time fixed for the purpose of declaring the result of the poll'.

ISSUE The issue for consideration was whether the decision of the third respondent to adjourn the meeting was valid.

HELD The facts of the case disclosed that the third respondent had not acted according to article 74 of the Articles of Association of the company. This begged the subsequent question of whether he was exercising his common law power of adjournment, which he had as Chairman of the meeting.

The correct approach in determining whether the common law power of adjournment has been properly exercised is illustrated in the case of *Byng v London Life Association* (1989). However according to the facts of the case, the third respondent had failed to exercise his common law power of adjournment in a proper and reasonable manner.

LEGAL PROFESSION - Whether solicitors were negligent in providing advice

MAELSTROM RESOURCES SDN BHD v SHEARN DELAMORE

[2007] 1 CLJ 50, High Court

FACTS The plaintiff obtained legal advice from the defendant regarding the patentability of certain invention. It was stated by the defendant, among other things, that there was 'no fear of any possible infringement of the said patent by the plaintiff'. After the discharge of the defendant from acting for the plaintiff, the plaintiff obtained three different opinions confirming infringement and conflict of interest.

ISSUE The issue for consideration was whether the defendant owed a duty of care to the plaintiff in that at the time of giving the opinions, the defendant knew or ought to have known that there was a foreseeable risk in exploiting the invention, and that the failure to advise the plaintiff of the risk and instead advising the plaintiff to 'go ahead and exploit' the invention constituted a breach of the duty of care.

HELD In finding for the plaintiff, it was held that the defendant should have properly advised the plaintiff with respect to the legal impediments that he would have to face over a period of time. Phrases used by the defendant such as 'go ahead and exploit' and 'have no fear of any possible infringement' had prompted the plaintiff to exploit his invention.

Reference was made to cases such as *Caparo Industries Plc v Dickman & Ors* [1990] 1 All ER 568 and *Arab-Malaysian Finance Bhd v Steven Phoa Cheng Loon & Ors* [2003] 2 AMR 6.

LABOUR LAW - Employment - Wrongful dismissal - Application for interlocutory injunction to continue with job

DR DAVID VANNIASINGHAM RAMANATHAN V SUBANG JAYA MEDICAL CENTRE SDN BHD

[2007] 1 CLJ 107, Court of Appeal

FACTS The appellant had been practising as a medical practitioner at the respondent's hospital since 1985 under successive agreements, referred to as 'Agreement Active Status'. On 1 June 2005, the respondent issued to the appellant a Notice of Non-Renewal, which gave the appellant 60 days' notice of the respondent's intention not to renew the agreement.

As a result of the non-renewal of the agreement, the appellant filed for reinstatement to his former office and also sought for various injunctions to the effect that he would continue to function at the respondent's hospital until a decision was made.

ISSUE The issue for consideration was whether the High Court should grant the interlocutory injunction sought for.

HELD Where a trade dispute, 'particularly one involving allegation of wrongful dismissal', is with the Industrial Court, the High Court should refrain from interfering by giving interlocutory injunctions or relief to either party.

The case of *Penang Han Chiang Associated Chinese School Association v National Union of Teachers in Independent Schools, West Malaysia* (1988) 1 MLJ 302 is an authority against the granting of such injunction.

INSURANCE/ PROCEDURE - Whether expert's report on the cause of fire taken into account - Whether interference of the appellant court was warranted

ASEAN SECURITY PAPER MILLS SDN BHD V CGU INSURANCE BERHAD

[2007] 2 CLJ 1, Federal Court

FACTS The appellant's claim was based on a fire insurance policy amounting to RM32 million. The respondent refused to pay on the ground that the claim was fraudulent. The appellant's case, however, was that the fire was due to 'spontaneous combustion'. The High Court found in favour of the appellant but the Court of Appeal overruled the High Court on the ground that the warehouse was set on fire on the instructions of one Balasingham, a shareholder of the appellant.

ISSUE The issue for consideration was whether the Court of Appeal had erred in disregarding the evidence of experts regarding the cause of fire, and whether the Court of Appeal had erred in holding that the company was bound by Balasingham's acts.

HELD The failure of the Court of Appeal to have regard to the expert's evidence in arriving at its decision had resulted in a serious and substantial miscarriage of justice which invites appellate interference.

The Court of Appeal was also erroneous in holding that the appellant was bound by Balasingham's acts, considering that Balasingham held only 5.28% of the shares in the appellant.

ZR*p* IN-BRIEF...

The ZR*p* 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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Suite 17.01, 17th Floor, Menara PanGlobal
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Printer:
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