



# the *ZRp* brief

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ZUL RAFIQUE & *partners*

*together...  
in partn*

At the Law Career Convention at University of Malaya

From left: Michael Cheng Heng Kher, Raine Chin Chiang Ruu, Nur Wahida Noor Freezailah, Muizz Azli

ZUL RAFIQUE & *partners*

## A BRIEF NOTE...

by Dato' Zulkifly Rafique



### Count your blessings...

As I jot this note, I can hardly believe that we have reached the end of September. How time flies! And as the *Hari Raya Aidilfitri* approaches, I look forward to the holidays during the first week of October to rest, recharge and rejoice with family and friends.

However, as we reach the end of the Holy Ramadhan, let us take a moment to ponder, to count our blessings for what we have, and to say a prayer for the underprivileged.

Life moves at an unreasonable pace sometimes and in our never-ending quest for material things we tend to forget that no matter how many things we acquire, no matter how much success we achieve, we are ultimately judged for how we treat others.

It is therefore an apt time to take stock of what we have and how we have lived our lives. In this context I am reminded of the poignant words of Winston Churchill:

*We make a living by what we get, we make a life by what we give.*

On that reflective note, I would like to wish all our Muslim friends *Selamat Hari Raya Aidilfitri, Maaf Zahir dan Batin*.

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- Tackling Cyber Crime
- New Takeover Regulations In Indonesia
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#### Amongst the articles in our features:

- *A Bitter Pill to Swallow*
- *Identity Fraud*
- *Much Ado about a Bill*
- *Rise and Fall of the Brothers*

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#### Our Brief-Case contains the following:

- *AM-EL Holdings Sdn Bhd & Ors v AEH Capital Sdn Bhd*  
[2008] 4 CLJ 657, Court of Appeal
- *Tan Chong Keat v Pengurusan Danaharta Nasional Bhd*  
[2008] 4 CLJ 748, Court of Appeal
- *Wan Sagar Wan Embong v Harun Taib*  
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#### Legislation Update:

- Pensions (Amendment) Act 2008
- Statutory and Local Authorities Pensions (Amendment) Act 2008
- Guidelines/ Rules/ Practice Notes issued by Bank Negara Malaysia and Securities Commission

## # BRIEF-FLASH...

- **ANOTHER BLOGGER HELD** A blogger, whose pseudonym is 'Penarik Beca', was arrested by the Federal Commercial Crimes Investigation Department (CCID) under the Sedition Act 1948 for allegedly defacing the Royal Malaysian Police logo by replacing the tiger symbol with one of a barking dog. ✂
- **APPEAL AVENUE** The Federal Court, in a landmark judgment delivered in July 2008, has held that election petitioners who lose their case in the High Court on a preliminary objection have a right to appeal. The judgment which was delivered in favour of Barisan Nasional candidate, Wan Sagar Wan Embong, departed from an earlier ruling made by the Federal Court in 2004 where it was said that the apex court could not hear such appeals on the ground that the High Court had not heard the merits of the petition. ✂
- **'BUILD-THEN-SELL' DEFERRED?** Although the Government had in 2006 agreed to the concept of 'build-then-sell', developers are finding it difficult to secure loans from banks for their projects. This is because the banks feel that the risks are greater. ✂
- **BAR FAILS IN BID TO NULLIFY APPOINTMENT** The Malaysian Bar failed in its attempt to nullify the appointment of Dr Badariah Sahamid as judicial commissioner. Dr Badariah Sahamid was appointed in March 2007 but the Malaysian Bar had questioned the legality of her appointment on the basis that she had not been in active practice for ten years. ✂
- **DISCIPLINE OF PROFESSIONALS** The Federal Court of Malaysia ruled in August that the disciplinary bodies of professional organisations have the flexibility to conduct proceedings against their respective members. This is on condition that the rules of natural justice are not violated. ✂
- **DNA IDENTIFICATION BILL TABLED** The DNA Identification Bill was tabled for second reading despite accusations that it was politically motivated. Datuk Seri Abdullah Ahmad Badawi explained that the tabling of the Bill is beneficial to the country in fighting and preventing crime and is not related to the case of Datuk Seri Anwar Ibrahim. ✂
- **FINE-TUNING FIC GUIDELINES** The Government is seeking to revise the FIC Guidelines with a view to attract more foreign investors and it is expected to be ready by year end. ✂
- **LEGALISING PLEA BARGAINS** The Criminal Procedure Code is expected to be amended to incorporate plea bargains into the administration of criminal justice. A plea bargain, which is supposed to create a favourable situation to both the prosecution and accused, is currently subscribed to in Malaysia in an indirect way. ✂
- **MONEYLENDERS ACT EXTENDED TO SARAWAK** The Moneylenders Act 1951 was extended to Sarawak with effect from 1 May 2008. The outdated Moneylenders Ordinance 1912 which was applicable to Sarawak has been replaced. ✂
- **MORE ISLAMIC FUND MANAGEMENT LICENCES** Another batch of Islamic Finance Licences will be issued by the Securities Commission by the end of the year. The licences are currently granted to Kuwait Finance House, DBS Bank of Singapore and CIMB-Principal. ✂

- **RACE RELATIONS ACT FOR MALAYSIA?** An Act on race relations is due to be enacted. The purpose of the Act is to prevent racial conflicts. ☞
- **SEXUAL HARASSMENT LAW** Whilst the Human Resource Minister is zealous about incorporating sexual harassment laws into the Employment Act 1955, the Malaysian Employers Federation has objected, stating that the current legislative framework already provides for such laws. ☞
- **TACKLING CYBER CRIME** In order to combat cyber crime, MIMOS has collaborated with the Ruhr-University Bochum of Germany to conduct joint research into ways to deal with various types of computer hacking and fraud such as phishing, pharming and others. ☞

### FOREIGN FLASH

- **CHINA'S NEW EMPLOYMENT LAW** China's new employment contract law, which took effect from 1 January 2008, has employers crying 'foul' over the mandatory terms that are favourable to employees relating to overtime, pension and insurance contributions. The new law also has provisions to punish officials who ignore labour abuses with penalties that include imprisonment. ☞

- **HACKING CHARGES DROPPED** Owen Thor Walker, who was arrested in November 2007, was discharged without a conviction. In fact the police said that Walker, owing to his skills and expertise, would be an asset to them in combating cyber crime. Walker, who had begun committing crimes at school, had designed an encrypted virus that was undetectable by anti-virus software. ☞
- **NEW TAKEOVER REGULATIONS IN INDONESIA** The Indonesian Capital Market Supervisory Agency and Financial Institution, Bapepam-LK, issued a revised version of its Takeover Regulations (No KEP259/BL/2008) which took effect from 30 June 2008. The main feature is that it has raised the percentage needed to become a Controller to 50% from the previous 25%. Furthermore, if a Controller by any ordinary means has more than 80% of the issued shares of the company that was taken over, it has two years to divest itself of those shares or a portion thereof based on how they were acquired. Also included in the revised version is a new method of calculating the tender offer price in a direct takeover of a public listed company. New sanctions for breach of the Takeover Regulations have also been introduced. ☞
- **SINGAPORE LIBERALISES LEGAL PROFESSION** The Legal Profession Act of Singapore has been amended to give more room for foreign firms to operate here. The view of the country echoed by the Law Minister, K Shanmugam is that the presence of both local and foreign law firms will enhance the legal landscape of Singapore. ☞

## BRIEFING...

### COMPANY LAW

**A BITTER PILL TO SWALLOW...** Poison pills refer to methods and strategies to avoid a hostile takeover. Although some refer to it as the 'shareholders rights plan', the rest argue that poison pills do nothing but undermine the rights of shareholders.

We examine several aspects of a poison pill and whether such strategy serves its purpose.

**WHAT IS A POISON PILL?** The poison pill was invented by lawyer Martin Lipton of Wachtell, Lipton, Rosen & Katz, in 1982 in the United States, as a response to tender-based hostile takeovers of EL Paso Electric by General American Oil. It was an anti-takeover measure designed to make the target company's shares less attractive to the acquiring company in the hope of frustrating the takeover.

It derives from its original meaning of a literal poison pill carried by various spies throughout history, taken when discovered, to eliminate the possibility of being interrogated for the enemy's gain.

#### TYPES OF POISON PILL

**Preferred stock plan** This type of poison pill allows a target company to issue a new series of preferred shares that provides shareholders the right to redeem it at a premium price after a takeover. This measure is said to raise the cost of an acquisition and cause dilution of the shares held by the acquiring company.

**Flip-over rights plan** The 'flip-over' plan allows stockholders to buy the acquiring company's shares at a discounted price after the merger. An example of a flip-over is when

shareholders are given the right to purchase stocks of the acquiring company on a 2-for-1 basis in any subsequent merger. However, the plan has its own weakness. They are only effective if the acquiring company acquires 100% interest in the target company.

**Flip-in rights plan** This plan is designed to deal with the problem of an acquiring company who is not trying to purchase 100% interest in the target company. They can be effective in dealing with acquiring companies who seek to acquire a controlling influence in a target company while not even acquiring majority control. When triggered (ie if anyone acquires more than a set percentage of the target company's shares), the poison pill allows the existing shareholders (except the acquirer) to acquire additional shares at below market price. By purchasing more shares cheaply, not only will the shareholders get instant profits, but more importantly, they increase the number of outstanding shares which will then dilute the percentage of shares held by the acquiring company. As a result, the takeover attempt will be more difficult and expensive. This form of poison pill is sometimes called a 'shareholders rights plan' because it provides existing shareholders with rights to buy more shares in the event of a control acquisition.

**Back-end rights plan** It is also known as note purchase rights plan. Under this plan, shareholders receive a rights dividend, which gives shareholders the ability to exchange this right along with a share of stock for cash that are equal in value to a specific 'back-end' price stipulated by the issuer's management board.

**LEGALITY OF A POISON PILL** In Malaysia, United Kingdom and Australia, the legal position on poison pill is clearly stated. The law requires that once a *bona fide* takeover offer has been made or is imminent, the management board of the target company is prohibited from taking defensive action which would frustrate or defeat the bid without first receiving its shareholders' approval. This rule

has been encapsulated in section 35 of the Malaysian Code on Takeovers and Mergers 1998. Similar provisions may be found in various rules of the UK's City Code on Takeovers and Mergers. In Australia, the act of the board of companies in frustrating a takeover offer is limited by the Listing Requirements of the Australian Stock Exchange. However, unlike the UK rules, the Australian Panel does not specify any precise limits to the operation of the rule.

**United States** In the United States, on the other hand, where its takeover activities outperform the exercise of takeover elsewhere, the legality of poison pills was unclear for some time, until it was upheld as a valid corporate instrument by the Delaware Supreme Court in *Unitrin Inc v American General Corporation* (1995). The rule set out was that the management of a company has the right to maintain a takeover defence against a takeover bid without the need of its shareholders' approval. However, such defensive action must meet an enhanced scrutiny standard. In other words, the target company's board must show that it had reasonable grounds for believing that the takeover will pose danger to its corporate policy and effectiveness and that the defensive action taken was a reasonable response to the threat posed.

**CONCLUSION** The law has placed a limit on the usage of poison pills by requiring the management to obtain the approval of its shareholders first before it can be implemented. In reality, despite its function of resisting hostile takeovers, the trend has been for shareholders to vote against poison pill because from the point of view of a shareholder, takeovers can be financially rewarding. Nevertheless, the poison pill approach is just one of the many defences available. A company will still have a wide variety of defensive action to take if they become the target of a hostile takeover bid. 

## CYBER LAW

**IDENTITY FRAUD** Identity theft occurs when someone illegally obtains your personal information, such as identity card number, and uses it to open accounts or initiate transactions in your name.

Identity fraud and identity theft are two terms used interchangeably to refer to fraud that involves stealing money or getting other benefits by pretending to be someone else.

In this article, the legal implications of identity fraud are assessed.

**WHAT IS IT?** The term is relatively new and is actually a misnomer, since it is not inherently possible to steal an identity. The person whose identity is used can suffer various consequences when they are held responsible for the perpetrator's actions. In many countries, specific laws make it a crime to use another person's identity for personal gain. Identity theft may be divided into the following categories:

**Financial identity theft** (using another person's identity to obtain goods and services). This is where the thief takes out bank loans, credit cards, making counterfeit money orders, emptying ATM envelope deposits, and even passing off bad cheques.

**Criminal identity theft** (posing as another when apprehended for a crime). In this case, the criminal identifies himself to the police as another individual. The criminal will merely use a fake identity or stolen documents or personal information of another person.

**Identity cloning** (using another person's information to assume his or her identity in daily life). This is where the criminal acquires personal identifiers to escape the authorities or to avoid arrests. The criminals here might also attempt to obtain identification or fraudulent documents consistent with cloned identities to make the impersonation more convincing. In most cases, concealment can go on undetected for an indeterminate amount of time.

Identity theft may be used to facilitate crimes including illegal immigration, terrorism, and espionage. It may also be a means of blackmail. There are also cases of identity cloning to attack payment systems, including online credit card processing and medical insurance. Some individuals may impersonate others for non-financial reasons – for instance, to receive praise or attention for the victim's achievements.

**HOW IS IT CARRIED OUT?** What the criminal needs to do is to obtain personal identification documents of an individual to impersonate him and this can be done without breaking into his home. In public places, for example, criminals may engage in 'shoulder surfing', watching an individual from a nearby location as he punches in his telephone calling card number or credit card number, or listening in on his conversation if he gives his credit card number over the telephone to a hotel or rental car company. They could also be stealing mail or rummaging through rubbish containing personal information, eg copies of cheques, credit card or bank statements, or other records that typically bears a person's name, address, and even telephone number (dumpster dumping); researching about the person in government registers, Internet search engines, or public records search services; stealing payment or identification cards, either by pickpocketing or surreptitiously skimming through a compromised card reader; stealing personal information in computer databases (Trojan horses, hacking); advertising bogus job offers

(either full-time or work-from-home basis) to which the victims will reply with their full name, address, curriculum vitae, telephone numbers, and banking details. People also tend to respond to 'spam' (unsolicited e-mail) that promises them some benefit but requests identifying data, without realising that in many cases, the requester has no intention of keeping his promise. There are cases of criminals impersonating a trusted company/ institution/ organisation in an electronic communication to promote revealing of personal information (phishing) or by browsing through social network sites online (MySpace, Facebook, Bebo, etc) for personal details that have been posted by users.

### **WHAT ARE THE LEGAL PROTECTIONS EXISTING?**

In Australia, each state has enacted laws that dealt with different aspects of identity or fraud issues. On the Commonwealth level, the *Criminal Code Amendment (Theft, Fraud, Bribery & Related Offences) Act 2000* has amended certain provisions within the *Criminal Code Act 1995* to deal directly with this matter, and the offender could be liable for up to 5 years' imprisonment. Each state has also enacted their own privacy laws to prevent misuse of personal information and data. The *Federal Privacy Act* is applicable only to Commonwealth and Australian Capital Territory government agencies.

In the United Kingdom, personal data is protected by the *Data Protection Act 1998*, which covers all personal data that an organisation may hold, including names, birthday and anniversary dates, addresses, telephone numbers, etc. Under English law (which extends to Wales but not necessarily to Northern Ireland or Scotland), the deception offences under the *Theft Act 1968* increasingly contend with identity theft situations.

In the United States, the increase in crimes of identity theft led to the drafting and passing by Congress in 1998 of the *Identity Theft and Assumption Deterrence Act* that now makes

the possession of any 'means of identification' to 'knowingly transfer, possess, or use without lawful authority' a federal crime, alongside unlawful possession of identification documents. This offence, in most circumstances, carries a maximum term of 15 years' imprisonment, a fine, and criminal forfeiture of any personal property used or intended to be used to commit the offence. In 2004, the *Identity Theft Penalty Enhancement Act* was passed by Congress, which added two years to prison sentences for criminals convicted of using stolen credit card numbers and other personal data to commit crimes. Violators who use that data to commit 'terrorist offences' would get five extra years.

In Malaysia, we do not possess specific laws to address this situation but are merely dependent upon different provisions provided under different Acts. Examples from the *Penal Code* would be sections 463 - 477A, which address offences relating to forgery, forgery of documents, falsification of accounts and counterfeit devices. There is also section 416 of the same Act for cheating by personation and section 205 for false personation for the purpose of any act or suit as further examples. We also have in the *Counsellors Act 1998*, identity falsification that is covered under section 44; section 17 of the *International Trade in Endangered Species Act 2008*; and section 124 of the *Insurance Act 1996* as examples of how scattered the law on identity falsification in Malaysia is. There is a need for a codification of these laws to assist enforcement, especially when the number of cases involving identity fraud or theft is on the rise. 

## LAW OF EVIDENCE

**MUCH ADO ABOUT A BILL** Much has been said about the newly tabled DNA Bill, with whispers that it is politically motivated whilst the politically neutral dissidents claim that it is a legislation that needs proper consultation before it is enforced.

We examine the controversy surrounding the DNA Bill and whether the hue and cry is much ado about nothing...

**WHAT IS DNA?** DNA, or Deoxyribonucleic Acid, is the building block of the human race and can be found within almost every cell of the human body. There are 46 chromosomes contained within a cell's nucleus. DNA holds information about the nature in which the body grows and functions, and appears as cells that the body can easily replicate as and when necessary. Within the structure of DNA there are what scientists refer to as 'bases'. Bases are the four building blocks containing the information needed by the DNA.

It is important to remember that although DNA information may be found by examining hairs or skin flecks located at a crime scene, it is not necessarily conclusive that the individual to whom the sample belongs is actually party to any crime. The DNA evidence may be used but not solely as a means of bringing about a case for the prosecution. It may only be used as means of strengthening the prosecution's case and should be used under the advice of an expert witness.

DNA, although individual to each and every one of us, may still be secreted in harmless ways and more often than not without the individual's knowledge. Of course, having said this, it is important to remember that blood and other bodily fluids secreted at the scene of a crime are normally secreted under circumstances outside the norm. As a result of

this, DNA evidence is useful and can provide the final link in a criminal investigation. In fact DNA profiling has been used successfully in several cases dealing with several issues such as establishing paternity (*Lau Zhan Chen v Makoto Togase & Ors* – 1995), in murder trials (*PP v Hanif Basree* – 2008), drug trafficking (*PP v Muhd Pudzi bin Ab Rahman* – 2007) and rape (*Kamaruddin bin Mat Diri v Pendakwa Raya* – 1999).

**THE CONTROVERSY** The tabling of the DNA Bill has caused a hue and cry not only amongst politicians, but lawyers and laymen as well. Following are some of the issues raised with regard to the controversy.

**Conclusive Proof** Clause 24 of the Bill reads:

Notwithstanding any written law to the contrary, any information given from the DNA Databank shall be admissible as a conclusive proof of the DNA identification in any proceeding in any court.

The element of conclusiveness in this clause has caused several lawyers to object on the basis that such a clause would usurp the powers of the court in assessing and weighing the relevant evidence.

**Intimate and non-intimate** The Bill makes a distinction between intimate and non-intimate samples in clauses 12 and 13.

Examples of intimate samples are blood and semen whilst non-intimate samples are hair and buccal swabs. Whilst the taking of intimate samples requires consent, non-intimate samples may be taken against the person's will, where the police may use 'all means necessary'. The argument is that this may fall foul of article 5 of the Federal Constitution which guarantees one's personal liberty. A further issue that arises is whether the police may use extreme force to obtain a non-intimate sample from a detainee or suspect.

Furthermore, according to clause 14 of the Bill, the refusal to provide a sample amounts to an offence, whereas in many other jurisdictions, similar refusal will only attract the presumption of adverse inference.

Clause 14 of the Bill reads:

If a person from whom a non-intimate sample is to be taken under this Act:

- (a) refuses to give such sample;
- (b) refuses to allow such sample to be taken from him; or
- (c) obstructs the taking of such sample from him,

commits an offence and shall, on conviction, be liable to a fine not exceeding ten thousand ringgit or to imprisonment for a term not exceeding one year or to both.

**Privacy** The argument against the enforcement of this Bill is that it encroaches into the privacy of a person. Clause 18, which provides for the removal of DNA profile from the databank, is said to raise issues of privacy as it may contradict the impending Data Protection Act which is supposed to guarantee such right.

**CONCLUSION** The Bill does not have any caveat regarding the strength of DNA as a means of evidence in court; instead it proposes to eliminate doubt on the conclusiveness of DNA as forensic evidence. This may seem to be a dangerous path to follow as it may allow for DNA evidence to be held as conclusive, notwithstanding the proper nature of the matter. ✎

## CORPORATE LAW

**RISE AND FALL OF THE BROTHERS** On 14 September 2008, Lehman Brothers Holdings Inc announced that it would file for liquidation after huge losses in the mortgage market and a loss of investor confidence crippled it and it was unable to find a buyer. Its collapse came after the US Treasury refused to bail out the 158-year-old bank. The bankruptcy of Lehman Brothers is the largest bankruptcy filing in the US history. Trouble began brewing for the company just over a year ago when it had to close down its sub-prime lender, BNC Mortgage, due to the sub-prime mortgage crisis.

We examine the origins of Lehman Brothers and the legal implications of its collapse.

**WHO ARE THEY?** Lehman Brothers (LB), founded in 1850 by two cotton brokers in Montgomery has its headquarters in New York, with regional headquarters in London and Tokyo. It operates in a network of offices around the world and grew into one of Wall Street's investment giants, despite many difficulties faced as a result of the Civil War.

**THE CRISIS** LB's slow collapse began as the mortgage market crisis unfolded in 2007, when its stock began a steady fall from a peak of USD82 a share. The fears were based on the fact that the firm was a major player in the market for sub-prime and prime mortgages, and that as the smallest of the major Wall Street firms, it faced a larger risk that large losses could be fatal.

As the crisis deepened in 2007 and early 2008, the investment bank defied expectations more than once, just as it had many times before, as in 1998, when it seemed to teeter after a worldwide currency crisis, only to rebound strongly.

By summer of 2008 a series of write-offs was accompanied by new offerings to seek capital to bolster its finances. LB also fought a running battle with short sellers. The company accused them of spreading rumors to drive down the stock's price. LB's critics responded by questioning whether the firm had come clean about the true size of its losses. As time passed and losses mounted, an increasing number of investors sided with the critics.

On 9 June 2008, LB announced a second quarter loss of USD2.8 billion, far higher than analysts had expected. The company said it would seek to raise USD6 billion in fresh capital from investors. Those efforts, however, faltered and the situation worsened after the government announced on 8 September, a takeover of Fannie Mae and Freddie Mac.

On 10 September, the investment bank said that it would spin off the majority of its remaining commercial real estate holdings into a new public company. And it confirmed plans to sell a majority of its investment management division in a move that it expects to generate USD3 billion. It also announced its latest round of bad news, an expected loss of USD3.9 billion, or USD5.92 a share, in the third quarter after USD5.6 billion in write-downs.

**THE DOWNFALL** By the weekend of 13-14 September, the Treasury had made clear that no bailout would be forthcoming. Treasury Secretary Henry M Paulson Jr and Federal Reserve officials did encourage other financial institutions to buy LB, but by the end of the weekend the two main suitors, Barclays and Bank of America, had both declined. LB had reached the end of the line.

Other big investment banks including Bear Stearns and Merrill Lynch have been similarly affected, but both these companies accepted their losses and were sold for way below their previous market values. Merrill Lynch is to be taken over by the Bank of America in a \$50 billion takeover to save it from collapse. The board of LB has a similar

opportunity, ie a chance to sell half its capital to a Korean state-owned bank for a fraction of its former value but failed.

Another distress signal from the US financial system was a report that insurance agent AIG was looking for a huge emergency loan of USD40 billion. The Federal Reserve reacted by asking JP Morgan Chase and Goldman Sachs to organise loans of up to USD75 billion for AIG, while the New York State officials struck a deal allowing the insurer to borrow USD20 billion of capital from its own subsidiaries.

**THE REACTION** In response to the collapse, the US Securities and Exchange Commission (SEC) plan to stiffen rules targeting manipulative short selling. The rules would require brokers to deliver shares that have been sold short. The SEC will consider it securities fraud when short sellers deceive brokers about their intention or ability to deliver shares to buyers.

**THE IMPACT** Malaysia is reported unlikely to be impacted in a big way by the collapse of two venerable Wall Street institutions, LB and Merrill Lynch, says analysts. According to Wong Ming Tek, head of research at HwangDBS Vickers Research, the collapse of these two giants will have no direct impact on Malaysia. He added, "Any impact is likely to be indirect".

However, news of their collapse will affect investor sentiment as it sent stock markets in Europe and Asia reeling. According to the head of equities broking at JP Morgan in Malaysia, it will inevitably affect our stock market valuations.

It is however, notable that Merrill only has a small research presence here whilst LB does not have a presence in Malaysia. 🌀

## 🌀 BRIEF-CASE...

**MONEYLENDERS** – Loan on security – Exemption by Minister – Whether loan agreement illegal – section 2A(2) Moneylenders Act 1951

**AM-EL HOLDINGS SDN BHD & ORS  
V AEH CAPITAL SDN BHD** [2008] 4 CLJ  
657, Court of Appeal

**FACTS** This is a hearing of two appeals from two conflicting High Court judgments in respect of one loan transaction involving the same parties, same facts and identical issues. AM-EL Holdings Sdn Bhd & Ors (AM-EL) executed a loan agreement with AEH Capital Sdn Bhd (AEH). Upon default, AEH applied for foreclosure of the 47 condominiums charged as security. In opposing the action, AM-EL argued that the loan transaction was unlawful as it was not in compliance with the Moneylenders Act 1951 (Act). In this action, AM-EL successfully precluded AEH from foreclosing on the condominiums.

**ISSUE** One of the issues for consideration was whether the loan was valid and in accordance with the Act, bearing in mind that an order was granted to exempt the loan from the provisions of the Act.

**HELD** It was held that since an Exemption Order was valid and of full legal effect, the activities of moneylending entered into by AEH relating to credit leasing/ share financing were exempted from the provisions of the Act. 🌀

**CIVIL PROCEDURE/ CONTRACT** – Guarantee – Demand for payment – Guarantee to secure loan – Certificate of indebtedness – Whether certificate of indebtedness proof of debt – Order 18 rule 12 of the Rules of the High Court 1980

**TAN CHONG KEAT V PENGURUSAN DANAHARTA NASIONAL BHD** [2008] 4 CLJ 748, Court of Appeal

**FACTS** This was an appeal against the judgment of the High Court in favour of the respondent in respect of a claim for monies owing, together with interest, against the appellant. The appellant executed a guarantee for a loan granted to one Island Hill Sdn Bhd by Ban Hin Lee Bank Berhad. Upon default, the bank brought an action to recover all sums due to it from the borrower and the appellant. The High Court entered judgment against the appellant and hence the appeal. The appellant's appeal was based on the following grounds, namely that (a) the respondent had failed to prove the sums claimed by it and hence the claim should be dismissed; and (b) the certificate of indebtedness of the sums owed by the borrower to the bank was unreliable as there was documentary evidence to show a reduction of the interest rate by the bank on more than one occasion.

**ISSUE** One of the issues for consideration was whether the certificate of indebtedness was sufficient to prove that a debt was owed.

**HELD** In dismissing the appeal, the court held that the appellant's submission that the respondent had failed to prove the sums due to the bank was without merit as the certificate of indebtedness was proof of the debt. ❧

**CONTRACT/ BANKRUPTCY** – Validity of agreement upon divorce and bankruptcy – Whether manner of sale and terms of agreement contravened Syariah Court's consent order – Whether Official Assignee bound by Syariah Court order

**MAZITA MD KHIR JOHARI V HAMDAN RASUL** [2008] 4 CLJ 771, High Court

**FACTS** The Syariah Court, in the course of divorce proceedings, made a consent order in respect of the matrimonial home which was jointly purchased by the plaintiff and the defendant. The defendant was subsequently adjudged a bankrupt which resulted in his half share in the property being vested in the Official Assignee (OA). The plaintiff then entered into a sale and purchase agreement with the OA to purchase the defendant's half share. The defendant refused to vacate the house, claiming that the sale and purchase agreement contravened the terms of the Syariah Court order.

**ISSUE** One of the issues for consideration was whether the OA was bound by the Syariah Court order.

**HELD** It was held that the terms of the sale and purchase agreement contradicted the Syariah Court order as it referred only to half share of the plaintiff instead of the whole house as was stipulated in the consent order. Furthermore, there was no reason why the OA was not bound by the Syariah Court order as the defendant's half share in the proceeds of sale would still vest in the OA had the house been sold in accordance with the Syariah Court order. ❧

**ELECTION/ CONSTITUTIONAL LAW –**

Dismissal of election petition on preliminary objection by election judge – Appeal against dismissal – Whether appealable – Election Offences Act 1954

**WAN SAGAR WAN EMBONG V HARUN TAIB** [2008] 5 CLJ 14, Federal Court

**FACTS** The appellant, a Barisan Nasional candidate, lost to the respondent, a Parti Islam SeMalaysia (PAS) candidate in the March 2008 general elections for the State Legislative Assembly constituency in Terengganu. He filed an election petition in the High Court and the petition was struck out by the judge based on a preliminary objection raised by the respondent. Hence the current appeal. The respondent, in relying on section 33(4) of the Election Offences Act 1954 (Act) and the Federal Court case of *Gan Joon Zin v Fong Kui Lun & Ors (2004)* (*Gan's case*), raised a preliminary objection against this appeal on the ground that the decision of the election judge was final and not appealable as it is related to an interlocutory matter. The essence of section 33(4) of the Act and *Gan's case* is that there is no right of appeal against a decision on interlocutory matters.

**ISSUE** Whether an appeal may lie against the decision of the election judge in ordering the petition to be struck out based on the preliminary objection raised by the respondent.

**HELD** In allowing the appeal, it was held that the order made by the election judge could not be regarded as an interlocutory order as it disposes off the petition. It followed therefore that the appellate court was not barred from hearing such a matter. ❄️

**CONTRACT/ LAND LAW –**

Housing developers – Delay in completion – Whether purchasers may recover damages for delay – Whether statutory contract excludes section 56(3) of the Contracts Act 1950 – Whether doctrine of frustration applicable – Whether respondents' duty to prove damages – Housing Development (Control and Licensing) Act 1966

**SENTUL RAYA SDN BHD V HARIRAM A/L JAYARAM** [2008] 4 MLJ 852, Court of Appeal

**FACTS** The appellant, a housing developer, had agreed to construct and sell to the public, apartments in a condominium. Upon delay in delivery of vacant possession of the apartments, the respondents brought an action against the appellant to recover damages. The High Court found in favour of the respondents on the issue of liability. Hence, the current appeal.

**ISSUE** One of the grounds of appeal was that since time was at large, whether it was incumbent on each and every respondent to give notice under section 56(3) of the Contracts Act 1950 (Act), if they wanted to make time of the essence again.

**HELD** In dismissing the appeal, it was held that section 56(3) of the Act had no application in this case as the section dealt with contract generally whilst the present case was a special contract that was prescribed and regulated by statute. Clause 22(2) of the Housing Developments (Control and Licensing) Act 1966 makes the housing developer immediately liable to a purchaser in liquidated damages once the date of completion passes, hence expressly excluding the operation of section 56(3) of the Act. ❄️

## BRIEF-UP...

### EMPLOYEES PROVIDENT FUND (AMENDMENT) ACT 2007

No  
A1300

*Date of coming into operation*  
1 July 2008

*Amendments*  
Sections 2, 3, 18, 20, 26, 29A, 31, 33, 39, 41, 43, 45, 49, 50, 54, 54A, 54C, 58, 59, 63, 64, 70E, 71, 73, First Schedule and Third Schedule

*Incorporation*  
Sections 31A, 33A, 44A, 51A, Part VA, 55A, 57A and 70G

*Deletion*  
Sections 40 and 55 

### PENSIONS (AMENDMENT) ACT 2008

No  
A1335

*Date of coming into operation*  
1 July 2008

*Amendments*  
Sections 6A, 10, 12, 12A and 23 

### STATUTORY AND LOCAL AUTHORITIES PENSIONS (AMENDMENT) ACT 2008

No  
A1336

*Date of coming into operation*  
1 July 2008

*Amendments*  
Sections 6A, 10, 12, 13 and 26 

### GUIDELINES/RULES/ PRACTICE NOTES ISSUED BETWEEN JULY AND SEPTEMBER 2008 BY BANK NEGARA MALAYSIA/ SECURITIES COMMISSION

#### BANK NEGARA MALAYSIA (BNM)

- Updates to Guidelines on International Currency Business Unit (Takaful Operator) – *Updated: 25 September 2008*
- Updates to Guidelines on Minimum Capital Funds Unimpaired by Losses for Islamic Banks – *Updated: 23 September 2008*
- Updates to Guidelines on Classification for NPLs & Provision for Substandard, Bad and Doubtful Debts – *Updated: 12 August 2008*

#### SECURITIES COMMISSION (SC)

- Guidelines on Real Estate Investment Trusts – *Revised Edition: 21 August 2008*
- Guidelines on Online Transactions and Activities in relation to Unit Trusts – *Revised Edition: 19 August 2008*
- Practice Note on Stamp Duty Exemption – Practice Note to clarify the types of M&A proposals that would qualify for exemption from stamp duty as stated in the Stamp Duty (Exemption) (No. 8) Order 2007 – *Date Issued: 11 July 2008; Effective Date: 1 January 2008*

## GET MOTIVATED !

### GIVING YOUR DREAMS SUBSTANCE

... BY JOSH HINDS

Setting goals is wonderful; it confirms that we have taken those first awkward steps towards attaining what we desire in our lives. The simple fact that you have taken the time to plan out what you want to achieve puts you in a distinct class. Amazingly, very few people take the time to keep a running list of goals. Sadly, even fewer people actually work their goals. So take the time right now to give yourself a little pat on the back! You deserve it.

You are part of the elite group of people who have chosen to take an active role in their own success. If the whole idea of goal-setting (and goal-achieving) is a new one to you, do not worry; the important thing is that you have decided to take the bull by the horns and get started!

Here is a technique to add substance to the goals you have set! Remember, the more real the goal is in your mind, the easier your subconscious mind can get around your desires and jump into action and start helping you realise them!

This technique assumes you have already decided on the things you would like to achieve. If you're not there yet then take the time to record your goal, dreams and the action steps you believe are necessary to reach them. Be sure to give yourself the room to adjust those items as needed. It's a journey and one that you should derive enjoyment from. Remember, you are taking the word 'chance' out of the equation and are taking an active role in reaching the destinations you set for yourself.

After you have listed out your goals and

dreams, the next step is to actually visualise yourself reaching your intended goal. It is through visualisation that we can actually program ourselves to reach that which we desire.

My friend, it's one thing for you to say, "I want to get a new job", and quite another to say, "In my dream job, I will be in charge of marketing at a growth oriented company. I will find employment in such and such an industry. To reach this destination I will send out a certain amount of resumes and do follow-ups with those companies until I secure the employment I am looking for".

The idea is that you are rehearsing these events in your mind. You are giving them vast amounts of power because as the saying goes, "That which the mind can conceive, it can achieve". When using visualisation with your goals try and do it as vividly as you can. The more real they appear the better.

Another technique is to imagine yourself sitting in a movie theater. See your goals and dreams playing out before you on a large screen. Find a technique that works for you (the key word being *what works for you*).

Hopefully from the example above you see the difference that a little visualisation can play in making our goals more "concrete" in our minds? To say I want to find my dream job is one thing, but to identify it and imagine myself doing this job (and taking the necessary steps to become employed) creates an added energy that will propel you towards making it a reality!

Here's To Your Success,  
Josh Hinds

Josh Hinds of <http://GetMotivation.com> specializes in helping people to achieve maximum success and live the life of their dreams. He is the author of *Why Perfect Timing is a Myth: Tips for Staying Inspired and Motivated Day in and Day out!* available at <http://GetMotivation.com/booklet/>

## ✚ ZRp IN-BRIEF...

The ZRp Brief is published for the purposes of updating its readers on the latest development in case law as well as legislation. We welcome feedback and comments and should you require further information, please contact the Editors at:

Mariette Peters - mariette.peters@zulrafique.com.my

Joanne Ching - joanne.ching@zulrafique.com.my

Hoe Mei Lai - mei.lai@zulrafique.com.my

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The contributors for this **Brief** are:

- *Mariette Peters*
- *Joanne Ching Shan Mae*
- *Hoe Mei Lai*
- *Khoo Boon Han*
- *Alhadi Harun*
- *Jonathan Tan*

**Publisher:**

Zul Rafique & partners Consultancy Sdn Bhd  
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Puchong, 47100 Selangor Darul Ehsan  
Tel: 03-80628285; Fax: 03-80628295

## ✚ BRIEF-TAKE...

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Dato' Cecil Abraham  
(cecil@zulrafique.com.my)

Dato' Cecil Abraham, who was admitted to the Malaysian Bar in 1970, joined **ZUL RAFIQUE & partners** as a consultant in August 2007.

Dato' Abraham is a trial lawyer and practises exclusively as an advocate in the High Courts of Malaya, Sabah and Sarawak, in all areas of commercial law. He has an extensive appellate court practice in the Court of Appeal and the Federal Court of Malaysia. Dato' Abraham has also acted as Counsel in many landmark cases of a commercial nature involving banks, finance companies and multi-nationals listed in the Kuala Lumpur Stock Exchange and also in defamation cases.

Dato' Abraham was recently appointed to the International Centre for Settlement of Investment Disputes (ICSID) Panel of Conciliators and Arbitrators. ICSID is an autonomous international institution established under the *Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (also known as the Washington Convention) with over one hundred and forty member States.

Members of this Panel are designated by the ICSID Contracting States and the Chairman of the Administrative Council. Dato' Abraham is one of four members designated by Malaysia and is due to serve until 2014. ✚