

the *ZRp* brief

Brief: 7/09

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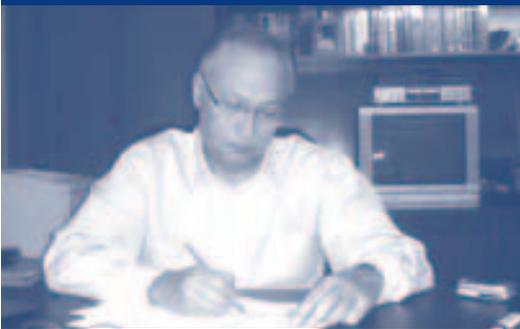
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Q. i. u. m.

the child in you  me

A BRIEF NOTE...

by Dato' Zulkifly Rafique



"CIUM"...

I was doing a little spring cleaning when I was struck by an old greeting card which showcased the faces of happy children waving sparklers as they watch a senescent lady stir dodol in a humongous pot. The poignancy of the scene was not just that they were happy children, but that they were bumptious little kids of various ethnic backgrounds, jumping, jostling and appearing to be oblivious to the cultural and religious divide.

It made me think of how peaceful the world would be if we all could see things through the eyes and mind of a child – devoid of prejudice and biases. With that in mind, we decided to have a theme for the firm – "CIUM", an acronym for the "Child In U and Me". It is a theme to remind us to stop and smell the roses; to transport ourselves to our childhood; to become risible again.

In accordance with such theme, we have planned to showcase art pieces created by children. We have begun by organising an art competition for children (between the ages of 6 and 10) of the staff members of ZUL RAFIQUE & partners.

Fifteen children have participated and we will be declaring the winner soon. Although art is beyond my ken, I must admit that the thought of choosing a little "Latif Maulan" amongst us gives me a measure of excitement.

Until the next issue...

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Amongst the articles in our features:

- *Capital Markets Reform*
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- *Get A (Second) Life!*
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- Bai Bithamin Ajil Contracts Valid?
- Putting the "Mc" back in Curry
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- UK Banking Act 2009
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Our Brief-Case contains the following:

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[2009] 3 CLJ 405, Federal Court
- *Pantai Bayu Emas Sdn Bhd & Ors v Southern Bank Bhd*
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- *Bank Pertanian Malaysia v Ahmad Zaki Ismail*
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Legislation Update:

- Continental Shelf (Amendment) Act 2009
- Private Higher Educational Institutions (Amendment) Act 2009
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- Judges' Code of Ethics 2009
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BRIEFING...

CORPORATE LAW

CAPITAL MARKETS REFORM On 8 May 2009, the Securities Commission (SC) and Bursa Malaysia Securities Berhad (Bursa Malaysia) announced a new framework for listings and equity fund-raising. Touted as one of the most comprehensive reforms to the country's capital markets, the changes are intended to make Bursa Malaysia an attractive listing platform for both Malaysian and foreign companies.

In this article, we examine several aspects of the new framework.

TWO IN ONE Under the new framework, both the Main Board and Second Board will be merged into a single board known as the Main Market for established corporations. The MESDAQ Market, which currently caters only for high-growth and technology companies, will be transformed into a sponsor-driven ACE Market, which will be open to companies of all sizes and economic sectors and no longer need to have a minimum operating history or profit track record to enter the market. The two new markets will come on-stream on 3 August 2009, with the existing Listing Requirements of Bursa Malaysia for both the Main Board and Second Board and MESDAQ Market to be replaced with the Main Market Listing Requirements (MMLR) and the ACE Market Listing Requirements (AMLR) respectively.

THE CHANGES Upon the merging of both the Main Board and Second Board into the Main Market on 3 August 2009, the following changes will take effect:

- SC's approval under section 212 of the Capital Markets and Services Act 2007

(CMSA) will only be required in four situations, namely, initial public offering (IPO); reverse takeovers and backdoor listings; secondary listings and cross listings; and the transfer of listings from the ACE Market to the Main Market;

- All other equity-based corporate proposals such as acquisitions (other than reverse takeovers and backdoor listings), disposals, placements of securities, rights offering and issuance of warrants will no longer require the SC's approval as Bursa Malaysia will assume the role of SC in granting such approvals.

On the other hand, upon the transformation of the MESDAQ Market into the ACE Market, the SC's approval under section 212 of the CMSA will no longer be required for the listing of companies on the ACE Market as Bursa Securities will assume the role of SC in granting approvals. Prospectuses relating to IPOs and rights offering for the Main Market and ACE Market will, however, still be reviewed by, and registered with, the SC.

"It is hoped that the new framework and the new board structure will enhance the attractiveness of Bursa Malaysia as a listing destination, providing efficient access to capital investment."

THE NEW GUIDELINES To give effect to the new framework, SC has also released five guidelines, namely, the Equity Guidelines, Principal Adviser Guidelines, Prospectus Guidelines, Asset Valuation Guidelines and Structured Warrants Guidelines. Save for the Structured Warrants Guidelines which is effective from 8 May 2009, all the other guidelines will take effect from 3 August 2009.

THE NEW EQUITY GUIDELINES Under the new Equity Guidelines, an applicant seeking listing on the Main Market via the profit track record test must now have an uninterrupted aggregate profit after tax of at least RM20 million over the past 3 to 5 years, with a minimum profit after tax of RM6 million for the year prior to listing. Applicants wishing to list under the market capitalisation test are required to have a minimum market capitalisation of RM500 million, with no prescribed minimum profit requirement. The SC will review IPO applications together with the prospectus for the Main Market listings, hence reducing the approval time from the current 74 working days to 60 working days.

AMENDMENTS TO THE LISTING REQUIREMENTS In conjunction with the announcement, the Listing Requirements of Bursa Malaysia for both the Main Board and Second Board have also been revised with immediate effect from 8 May 2009, with the following key amendments:

- **Listing and issuance of Structured Warrants** Pursuant to the amendments, an issuer of Structured Warrants must submit its listing application to Bursa Malaysia for the issue of Structured Warrants through an eligible broker. The amendments also allow an issuer to apply to list a further issue of its Structured Warrants which forms part of the existing listed series of Structured Warrants, subject to the conditions, amongst others, that such further issue is for the purpose of facilitating market making, and the issuer holds no more than 50% of the existing issue at the time of application for the further issue.
- **Real Estate Investment Trust (REIT)** Pursuant to the amendments, a trustee of a REIT is required to publish a notice of any meeting in a Bahasa Malaysia daily newspaper and one other newspaper as may be approved by the SC, as opposed to only one nationally circulated Bahasa Malaysia or English daily newspaper. In addition, when a REIT proposes to undertake a proposal which involves new

issue of units or enter into a transaction which requires unit holders' approval under the SC's Guidelines on REIT, it must submit one draft copy of the circular and other documents proposed to be sent to its unit holders to Bursa Malaysia for perusal before issuance to unit holders.

- **Listing of securities in foreign currency** Securities may be listed and quoted on Bursa Malaysia in other foreign currencies, as opposed to the pre-amendment requirement of Ringgit Malaysia only.

The key amendments to both the MMLR and AMLR are as follows:

- **Enhanced listing process** Under the MMLR and AMLR, the listing process has been simplified by merging the initial listing application for approval-in-principle for the admission of securities with the application for quotation of securities on the respective markets. In other words, only a single application is required to be submitted to Bursa Malaysia for approval in an IPO. In addition, the listing process of rights issue of securities and simpler corporate exercises on a stand-alone basis such as subdivision, consolidation of shares or bonus issues, has also been enhanced by the adoption of the SPEEDS process. Amongst others, the process now allows provisional allotment letters to be credited via the SPEEDS processing, which expedites commencement of trading of rights arising from a rights issue and enables continuous trading of securities.
- **Secondary issuance of securities** For both the MMLR and AMLR, Bursa Malaysia will assume the SC's function in approving all secondary issuance of securities and all other equity-based corporate proposals which no longer require the SC's approval. Underwriting arrangement will no longer be mandatory for a rights issue of securities. In a rights issue, a listed issuer may now fix the books closing date before

shareholders' approval has been obtained, provided it has fulfilled such conditions as may be prescribed by Bursa Malaysia, including procuring from shareholders holding more than 50% of the voting shares in the listed issuer, their written undertaking to vote in favour of the rights issue.

- **Review of shareholding spread** Pursuant to the MMLR, after listing, the shareholding spread has to be maintained at 25% of the total listed shares, but the requirement on minimum number of public shareholders as a continuing listing obligation has been removed. Under the AMLR, at least 25% of the total number of shares for which listing is sought has to be in the hands of 200 (instead of 1,000 under the MESDAQ Listing Requirement) public shareholders holding not less than 100 shares each upon admission. For both the MMLR and AMLR, directors of associated companies will be considered as part of the 'public' shareholders.
- **Structured Warrants** Pursuant to the MMLR, issuance and listing of put warrants will be allowed. An issuer may issue put warrants based on a local and foreign underlying financial instrument. However, when an issuer issues put warrants based on local underlying shares, the issuer must ensure that the underlying shares are part of the securities that have been prescribed by Bursa Malaysia Securities Clearing Sdn Bhd as securities under the Rules of Bursa Malaysia, unless such put warrant is issued together with a call warrant with the same underlying shares. An issuer must ensure that the expiry date of the put warrant is not earlier than 6 months and not later than 5 years from the date of issue. Pursuant to the amendments introduced by the AMLR, Structured Warrants can no longer be listed on the ACE Market.
- **Exchange Traded Funds (ETF)** When an ETF proposes to undertake a proposal which involves new issue of units or enters into a transaction which requires unit holders' approval under the SC's Guidelines on ETFs, it must submit one draft copy of the circular and other documents proposed to be sent to its unit holders to Bursa Malaysia for perusal before issuance to unit holders. This is not applicable to the ACE Market as ETFs are only listed on the Main Market.
- **Special Purpose Acquisition Companies (SPAC)** As part of the effort to promote private equity activity, spur corporate transformation and encourage mergers and acquisitions, the SC and Bursa Malaysia are also introducing the listing of SPAC, which are essentially shell companies without operations that go public with the intention of merging with or acquiring operating companies or businesses with the proceeds of their IPO. A SPAC seeking a listing on the Main Market must have at least 25% of its voting securities in the hands of at least 1,000 voting securities holders. This, too, is not applicable for the ACE Market.
- **Foreign listing** The requirement imposed on foreign corporation with a primary listing on Bursa Malaysia to convert any financial statement given to Bursa Malaysia that is prepared in a currency other than Ringgit Malaysia into Ringgit, is now removed. The same amendments have been made to the ACE Market.

CONCLUSION It is hoped that the new framework and the new board structure will enhance the attractiveness of Bursa Malaysia as a listing destination, providing efficient access to capital and investment. 

ADMINISTRATIVE LAW

THE ENFORCEMENT AGENCY INTEGRITY COMMISSION BILL 2009

In a move to restore public trust in public enforcement agencies, the Enforcement Agency Integrity Commission Bill was read for the second time in Parliament in June 2009.

In this article, we examine several aspects of the Bill to see whether it would fulfill its objective.

THE BILL The Enforcement Agency Integrity Commission Bill 2009 (the Bill) originated from recommendations by the Independent Police Complaints and Misconduct Commission (IPCMC) in 2005 and was thus introduced on 11 March 2008. The objective of the Bill is to improve the integrity of the enforcement agencies, to reduce misconduct amongst enforcement officers as well as to promote public confidence in the enforcement agencies. It effectively replaces the infamous Special Complaints Commission Bill, which was withdrawn in December 2007 after much criticism over the leeway given to the police in handling complaints against them.

THE AGENCIES Essentially, the Bill serves as a platform for the public to lodge complaints of misconduct against an enforcement officer from any of the 21 enforcement agencies enumerated in its Schedule. Amongst them are the Immigration Department, the National Registration Department, the Royal Malaysian Police, the Ministry of Health (Enforcement Division) and the Ministry of Housing and Local Government (Enforcement Division). The Bill

however, is not intended to apply to the Malaysian Anti-Corruption Commission, which together with IPCMC and the Judicial Appointments Commission, form part of the 'integrity agenda', coined by the former Prime Minister, Tun Abdullah Ahmad Badawi.

The scope of misconduct has been expressly enumerated under section 24 of the Bill to include acts or omissions that are: (1) contrary to written law; (2) unreasonable, oppressive or discriminatory; and (3) based on a mistake of law or fact, as well as failure to follow rules and procedures laid down by law or appropriate authority and the commission of any criminal offence.

THE COMPLAINTS COMMITTEE

Complaints of misconduct made by the public must be in writing with the necessary particulars of the officer in question, stating the particular misconduct that had taken place. The Complaints Committee will receive the complaint and conduct a preliminary investigation to determine the nature of the misconduct and whether to proceed with a full investigation.

Thereafter, the findings of the Complaints Committee will be reported to the Commission established under section 3 of the Bill, with recommendations to either refer the complaint to the Disciplinary Authority, or the Malaysian Anti-Corruption Commission; or for the commencement of a full investigation into the misconduct; or for the rejection of the complaint. After considering the recommendations and making a decision, the Commission will then publicise as well as inform its findings to the complainant.

CONCLUSION With the passing of the Bill, it brings about a new paradigm of optimism as to the level of professionalism, reliability and honour that the general public can appreciate. ✨

CYBER LAW

GET A (SECOND) LIFE! *Second Life* is the name of a virtual world created by Linden Lab and launched in 2003. Each person is represented by an alter ego called an 'avatar' that represents their chosen digital persona.

In this article, we examine several aspects of *Second Life* and whether rules and regulations extend to such virtual world.

WHAT A VIRTUAL WORLD... Ever thought of leading a second personality and doing things that you would never have thought you could do in this judgmental world? If you have, the virtual world is the chance for you to lead a "Second Life". But is this virtual world practical, or even legal for that matter?

Launched in 2003, *Second Life* is the largest virtual world where users or the so-called residents create their own avatar to survive in a vast number of locations or "islands" that have been created for different purposes including education, socialising, entertainment and commerce. Those who open a resident account with *Second Life* can explore, meet other residents, socialise, participate in individual and group activities, and create and trade virtual property and services with one another or travel throughout the virtual world. Users must download a software which is a three dimensional modeling tool that allows a resident to create and build virtual objects whilst retaining the copyright for any content they create.

This concept has been so widespread that even learning institutions are creating a virtual shopping centre with a view to explore ways to divulge marketing strategies. Contrary to majority thinking that online learning does not

require participation or engagement, in *Second Life*, there is real time interaction, which means students need to engage in discussion as if they were sitting in a classroom. As stated by John Lester, the Community and Education Manager at Linden Lab, "There is a real human being behind every avatar – the people are very real. It's just the medium that is different."

AVATAR ANONYMOUS *Second Life* may be viewed as an ideal alternative world to live in as it caters for various test cases which do not involve real life consequences, thereby allowing mistakes to be made. Caution however, must be had to the blurring line between virtual and real activities, especially those which are illegal. Some users might argue that activities that are illegal or unethical in real life, are acceptable in the virtual world. In many instances, it remains unclear what authority has jurisdiction over virtual activities that spill over into the real world. One disturbing fact about the virtual world is that avatars are largely anonymous and the way the users behave in the virtual world remains untested.

UTOPIA? *Second Life* has not only raised concerns about users being engrossed in the virtual world, but also the erosion of users' ability to recognise the difference between virtual and real. In fact, very recently, it was reported that *Second Life* plans to provide stricter control of adult content. In another report, it was stated that a *Second Life* land developer, citing the US Digital Millennium Copyright Act, had demanded that YouTube delete a video recording of an interview where the avatar was digitally altered to create an embarrassing image.

CONCLUSION It remains to be seen how much of an impact *Second Life* will have on the real world in the long run, but as it stands now, most people are rushing to savour a slice of *Second Life*. ✂

COPYRIGHT LAW

COLDPLAY IN HOT SOUP? In December 2008, an action in copyright infringement was filed against British band, *Coldplay* by Joe Satriani on the basis that the former had copied a song composed by the latter.

In this article, we examine the vital elements that need to be proved to establish an infringement in copyright. For instance, what does copying mean and how does subconscious copying factor into a claim for copyright infringement.

*"I used to rule the world
Seas would rise when I gave the word
Now in the morning I sleep alone
Sweep the streets I used to own..."*

Any music aficionado would know that these lines are from *Coldplay's* award-winning song, *Viva La Vida*. However, those familiar with *Coldplay* will also know that a suit has been filed against them by guitar maestro, Joe Satriani.

"IF I COULD FLY" V "VIVA LA VIDA"

Satriani's claim is based on the allegation that *Viva La Vida* is a rip-off from his 2004 hit *If I Could Fly*. Anyone comparing both songs would definitely agree that there are similarities between the two, but the issue is, are these similarities sufficient to establish a claim in copyright infringement? *Coldplay* in their defence responded that the similarities are purely coincidental. The question then that many harbour is whether the similarities are striking enough to rebut the defence of coincidence.

"HE'S SO FINE" V "MY SWEET LORD" The Satriani-Coldplay feud brings to mind other notable cases in the music annals, namely *Bright Tunes Music Corp v Harrisongs Music Ltd*

(420 Supp 177, 1976) and *Selle v Gibb* (F Supp 1173 ND 111 1983).

In *Bright Tunes Music Corp v Harrisongs Music Ltd*, former *Beatle*, the late George Harrison, was sued for his song *My Sweet Lord*. The allegation was that the song was based on *He's So Fine*, composed by Ronald Mack and performed by the *Chiffons*. *He's So Fine* was a hit in 1963 whilst *My Sweet Lord* was released in 1970. It was held by the court that there had been copyright infringement by Harrison but that the copying was subconscious. Harrison was ordered to pay over half a million US dollars.

"LET IT END" V "HOW DEEP IS YOUR LOVE"

Selle v Gibb saw a claim against the *Bee Gees* on the basis that the latter had plagiarised Ronald Selle's *Let It End* to create one of their best-selling hits ever, *How Deep Is Your Love*. Selle, who composed his song in 1975, claimed that although the lyrics of his song were different from that of *How Deep Is Your Love*, the tune was the same.

In deciding in favour of the defendants, the judge held that the plaintiffs were unable to prove that the defendant had access. Furthermore, the plaintiff had failed to refute the testimony of witnesses who described in minute details how that song was created.

A MATTER OF PROOF AND PRESUMPTIONS

In establishing a claim in copyright infringement of a musical composition, the plaintiff must prove the following, namely: (a) ownership of the copyright in the disputed work; (b) originality of the work; (c) copying of the work by the defendant; and (d) a substantial degree of similarity between the two pieces of work.

In the Satriani-Coldplay feud, although lawyers for *Coldplay* have expressed doubts on the originality of Satriani's work, the issues of copying by the defendant and whether there is in fact substantial similarities between the two appear to be greater impediments to the plaintiff.

WHEN DOES COPYING MAKE YOU A “COPY CAT” ...

On the issue of copying, the question is whether *Coldplay* had actually copied the work. Unless there is direct evidence to prove the act of copying, only circumstantial evidence is available and the most convincing piece of such evidence would be to establish access.

An example of direct evidence of access would be that the work was sent directly to the defendant.

If the plaintiff lacks direct evidence of access, then an inference of access may be made in cases where both works have such striking similarity that it rebuts any possibility of independent creation or coincidence.

CRYPTOMNESIA The issue of access raises the interesting theory of subconscious copying. Subconscious copying or subconscious plagiarism is also known as cryptomnesia. This is based on the theory that any impression created never leaves the brain and that the mind is sufficiently powerful to recall impressions of yesteryears. In the context of intellectual property, what is based on a new creation may in fact be a recollection of subconscious memories.

Carl Jung in his book, *Man and His Symbols*, explained the phenomenon:

An author may be writing steadily to a preconceived plan, working out an argument or developing the line of a story, when he suddenly runs off at a tangent. Perhaps a fresh idea has occurred to him, or a different image, or a whole new sub-plot. If you ask him what prompted the digression, he will not be able to tell you. He may not even have noticed the change, though he has now produced material that is entirely fresh and apparently unknown to him before. Yet it can sometimes be shown convincingly that what he has written bears a striking similarity to the work of another author – a work that he believes he has never seen.

Cryptomnesia was recognised in the case of *Francis Day & Hunter v Bron* (1963) Ch 587. In that case, the composer of a song called *Why* was sued for copyright infringement by the plaintiff who wrote *Spanish Town*. The defendant claimed that he had never even heard *Spanish Town*, let alone copy that song.

Although the plaintiff failed in his claim, the court was prepared to recognise the psychological possibility of subconscious copying and that subconscious copying may amount to copyright infringement since no element of *mens rea* is required for infringement.

The decision in *Bright Tunes Music Corp v Harrisongs Music Ltd* was also based on cryptomnesia, raising alarm bells amongst musicians that what is perceived to be their master pieces could very well be a subconscious copy of a previous work.

“We know not whether it is rare or common, general or idiosyncratic, nor indeed whether it is possible to remember, not a mere isolated phrase, but a ‘substantial’ part of the remembered work without remembering that one is remembering.” - Lord Justice Diplock in Francis Day & Hunter v Bron

CONCLUSION It would be interesting to see if cyptomnesia is used by Satriani in his claim. In any event, whilst musicologists, musicians and fans of both *Coldplay* and Satriani document their views on the battle of the bands, the rest of the music world wait in anticipation for the outcome of the case. However, judging from the accolades they have been receiving, until a verdict is reached, *Coldplay* still appears to rule the world! 🎸

BRIEF-FLASH...

- **BAI BITHAMIN AJIL CONTRACTS VALID?** On 31 March 2009, the Court of Appeal, in a matter involving Bank Islam, ruled that the bank's practices in relation to Bai Bithamin Ajil contracts (also known as deferred payment sale contracts) are Syariah-compliant and valid. The Court of Appeal in ruling accordingly, reversed the decision of Justice Dato' Abdul Wahab Patail at the High Court. ☞
- **A FAIR TRADE PRACTICES ACT?** According to the Domestic Trade and Consumer Affairs Ministry, the Fair Trade Practices Act is in the midst of being drafted. Besides fair trade practices, the Bill is expected to address competitiveness and market efficiency. ☞
- **AMENDMENTS TO EMPLOYMENT LAW** The Code of Conduct for Industrial Harmony is expected to be incorporated into the Industrial Relations Act 1967 sometime next year. ☞
- **E-COURTS TO BE ESTABLISHED?** The laws may be amended to accommodate the e-filing of court documents. This is part of the efforts of the government to enhance the efficiency of the justice system. ☞
- **GREEN LAW** A law to enhance the development of renewable energy may be in the pipeline. ☞
- **ISA OR ANTI-TERRORISM ACT?** There have been calls to rename the Internal Security Act, the Anti-Terrorism Act. The Internal Security Act, which has come under fire recently, is expected to be

reviewed, but whether the provisions relating to detention without trial will be removed, is uncertain. ☞

- **NEW BIOSAFETY RULING** A new ruling under the BioSafety Act is expected to be announced soon. The ruling will stipulate the processes and procedures for biotechnology companies. ☞
- **PUTTING THE "MC" BACK IN CURRY** In a passing off action by McDonald's, the Court of Appeal recently ruled that a local Indian food restaurant, McCurry Restaurant, had the right to use the prefix "Mc" in its business signage. It was held that McDonald's did not have the exclusivity to the prefix "Mc" and that reasonable persons would not associate McCurry with McDonald's. ☞
- **SC GUIDELINES REVISED** The Securities Commission has revised guidelines to allow exchange-traded funds from recognised jurisdictions to be cross-listed on Bursa Malaysia. The revised guidelines were issued on 11 June 2009. ☞

FOREIGN FLASH

- **A REGIONAL SCHEME** A scheme for cross-border securities offering has been implemented in Malaysia, Thailand and Singapore. It is said that the scheme enables issuers in Malaysia, Thailand and Singapore to comply with just one set of common disclosure standards, referred to as the ASEAN Standards. Limited additional requirements are prescribed by the respective jurisdictions and these are referred to as the Plus Standards. ☞

- CYBER SECURITY PLAN LAUNCHED IN US** The US has announced plans to secure American computer networks against cyber attacks. In the light of numerous hacking attacks, President Obama has said that he would personally appoint a 'cyber tsar'. ❧
- FRENCH INTERNET PIRACY BILL DEBATED** The French Internet Piracy Bill, which was rejected, has returned to Parliament for another round of debate. The law, known as HADOPI (the acronym for *Haute Autorite pour la Diffusion des Oeuvres et la Protection des Droits sur Internet*) operates under a "three-strike" system where file sharers would first be warned by e-mail, then a letter and finally termination ❧ their connection.
- UK BANKING ACT 2009** In an effort to strengthen the stability and confidence in the UK banking system, the UK government has introduced the Banking Act 2009, which came into effect on 21 February 2009. The Act implements a new permanent special resolution regime, which provides the authorities with tools to deal with failing banks and building societies, and replaces temporary powers provided by the Banking (Special Provisions) Act 2008 which expired on 20 February. ❧
- UK TESCO LAW?** The UK is expected to see changes in the legal landscape as a result of the Legal Services Act 2007. The changes are expected to permit supermarkets to sell legal services. ❧

❧ BRIEF-CASE...

EVIDENCE/ LEGAL PROFESSION –
 Privilege – Whether privilege waived by client
 – Whether waiver may be implied

DATO' ANTHONY SEE TEOW GUAN V SEE TEOW CHUAN & ANOR [2009] 3 CLJ 405, Federal Court

FACTS The appellants were directors and shareholders of a company. A appellants obtained a legal opinion from their solicitor. The opinion contained various allegations that were defamatory of the respondents. The appellant then published that opinion to several persons. The respondents brought a defamatory action against the appellants. The solicitor who wrote the opinion was called as a witness but she refused to answer any questions pertaining to that opinion on the basis that it was privileged.

ISSUE The issue for consideration was whether a waiver of the privilege may be implied.

HELD The common law rule of waiver by implication or imputation is not recognised by cases under the law. Moreover, the third parties in question were not outsiders as they were the Chairman of the Board of Directors, Directors, Financial Controller and the auditors of the company. The privilege therefore still applied to the opinion rendered by the solicitor. ❧

BANKING/ CONSTITUTIONAL LAW – Vesting order obtained in High Court of Malaya – Whether such order was effective to pursue claim in Sabah and Sarawak

**PANTAI BAYU EMAS SDN BHD & ORS
V SOUTHERN BANK BHD** [2009] 2 CLJ
630, Federal Court

FACTS The respondent commenced legal proceedings against the appellant in the High Court in Sabah and Sarawak to recover amounts owing under the banking facilities granted to the appellant. Subsequently, the respondent assigned all its rights, assets and liabilities including legal proceedings involving the respondent to CIMB Bank Bhd and obtained a vesting order from the High Court of Malaya to effect that assignment. Based on the vesting order, the respondent and CIMB Bank Bhd made an application for substitution of the respondent by CIMB Bank Bhd as the plaintiff. The appellant applied to strike out the respondent's application but was dismissed by both High Court and thereafter, on an appeal made by the appellant, by the Court of Appeal. This is an appeal to the Federal Court by the appellant.

ISSUE Whether a vesting order made by the High Court of Malaya was effective in transferring to and vesting in CIMB Bank Bhd, all the respondent's rights, assets and liabilities including all legal proceedings involving the respondent in Sabah and Sarawak.

HELD In dismissing the appeal, the court stated that the vesting order was effectual in transferring the respondent's business located in any part of Malaysia to CIMB Bank Bhd and was effective throughout Malaysia. The decision was based on section 7(2) of the Courts of Judicature Act 1964 and article 121(3) of the Federal Constitution. ❧

ADMINISTRATIVE LAW/ EMPLOYMENT LAW – Bank employee suspended by disciplinary committee based on common law rights and remedies – Lack of specific disciplinary regulations – Whether committee empowered to mete out punishment in absence of disciplinary regulations

**BANK PERTANIAN MALAYSIA V
AHMAD ZAKI ISMAIL** [2009] 2 CLJ 565,
Federal Court

FACTS The respondent was suspended from work and was subjected to a domestic inquiry before a disciplinary committee (DC) set up under section 10B of the Bank Pertanian Malaysia Act 1969. The DC found the respondent guilty of misconduct and negligence but relied on the common law rights and remedies governing employer-employee relationship to discipline the respondent as there were no disciplinary regulations made under the Act to mete out the necessary punishment. The respondent seeks to have his suspension and the DC's decision declared null and void. This is an appeal against the Court of Appeal's decision in rendering the disciplinary proceedings null and void.

ISSUE The issue for consideration was whether the appellant had the substantive right to discipline the respondent based on common law in the absence of relevant disciplinary regulations.

HELD In allowing the appeal, it was held that the power to punish could be implied to be with the DC. Although there were no regulations made under the Act, it could not have been the intention of the Act that no punishment should be meted out. ❧

BANKING/ CIVIL PROCEDURE – Whether business conducted amounted to a banking transaction – Whether subject to the Banking and Financial Institutions Act 1989 – Sections 2 and 3 of the Islamic Banking Act 1983 – Section 2 of the Money Lenders Act 1951

LIGHT STYLE SDN BHD V KFH IJARAH HOUSE (MALAYSIA) SDN BHD [2009] 3 CLJ 370, High Court

FACTS The plaintiff defaulted in the repayment of a revolving trade line facility of RM5.6 million granted by the defendant. The defendant filed two civil suits and pending the civil suits, served a notice of demand under section 218 of the Companies Act and initiated winding up proceedings against the plaintiff. The plaintiff argued that the section 218 notice is a duplicity of the civil suits and that the financing transactions were unenforceable for contravention of Banking and Financial Institutions Act 1989 (BAFIA), Islamic Banking Act 1983 (IBA) and Money Lenders Act 1951 (MLA).

ISSUE The issue for consideration was whether the defendant had carried out banking business without a license and had consequently offended BAFIA or IBA.

HELD It was held that the defendant was not operating a banking business under the BAFIA and IBA and as such there is no contravention of those statutes. The court also highlighted that section 125 of the BAFIA provides for the validity of the transactions even if there is a contravention of the BAFIA. The court further held that there is no contravention of the MLA because there is nothing in the agreements to suggest any money lending transaction. ❄

BANKING – Islamic banking – Bay Al Inah facility – Foreclosure of charged property – Whether facility is shariah-compliant – Section 66 of the Contracts Act 1950

MAJLIS AMANAH RAKYAT V BASS BIN LAI [2009] 2 CLJ 433, High Court

FACTS To secure a third party charge, the plaintiff granted to the customer a Bay Al Inah facility (a sale followed by a buy-back at a discounted price) where the plaintiff sold assets to the customer for over RM24,000 upon deferred payment and then repurchased the assets for cash payment of RM21,000.

Upon default by the customer, the plaintiff applied for an order for sale of the defendant's land. The defendant objected on the basis that the facility is not shariah-compliant. The plaintiff argued that even if the facility was not shariah-compliant, the court should invoke section 66 of the Contracts Act (which deals with the obligation of a person who has received an advantage under a void agreement, or contract that becomes void) to grant an order for sale for the sum of RM21,000.

ISSUE The issue for consideration was whether the order for sale should be granted.

HELD In allowing the plaintiff's application, it was held that since there was no actual challenge to the contract, the court did not have to deal with the issue. However for the purposes of granting relief, the court could consider whether the sum claimed was equitable on the basis of the case of *Malayan Banking Bhd v Ya'kup Oje*. ❄

BRIEF-UP...

CONTINENTAL SHELF (AMENDMENT) ACT 2009

No
A1351

Date of coming into operation
1 May 2009

Amendments
Sections 2, 3, 4 and 6

Incorporation
Sections 2A, 2B and 4A 

PRIVATE HIGHER EDUCATIONAL INSTITUTIONS (AMENDMENT) ACT 2009

No
A1352

Date of coming into operation
1 June 2009

Amendments
Sections 2, 3, 6, 7, 11, 12, 20, 24, 28, 31, 33, 35, 37, 38, 39, 40, 41, 43, 44, 46, 47, 48, 49, 51, 54, 56, 60, 61, 64, 66, 67, 68, 69, 74, 80, 82, 85 and 88

Incorporation
Sections 24A, 48A and 64A

Deletion
Sections 13, 45 and 50 

LABUAN OFFSHORE FINANCIAL SERVICES AUTHORITY (AMENDMENT) ACT 2008

No
A1337

Date of coming into operation
15 June 2009

Amendments
Sections 2, 4 and 28A-C

Incorporation
Section 17A 

JUDGES' CODE OF ETHICS 2009

No
PU(B) 201 of 2009

Date of coming into operation
1 July 2009 



Pupils attending an in-house lecture: (Clockwise from left) Irene Suresh; Teoh Alvare; Ang Yong Chiang; Rofitah Ahmad Fuad; Zatil 'Ismah Azmi; Kamal Ishmael Mohammed Ariff and Muhammad Nizamuddin Abdul Hamid

**GUIDELINES/RULES/
PRACTICE NOTES ISSUED BETWEEN
APRIL AND JUNE 2009
BY BANK NEGARA MALAYSIA/
BURSA MALAYSIA SECURITIES BHD/
SECURITIES COMMISSION**

BANK NEGARA MALAYSIA (BNM)

- *Guidelines & Circular Listing – Guidelines issued under Banking – In relation to Prudential Limits & Standards – Guidelines on Introduction of New Products – Updated: 18 May 2009*
- *Guidelines & Circular Listing – Guidelines issued under Insurance & Takaful – In relation to Prudential Limits & Standards – Guidelines on Investment Management for Takaful Operators – Date Issued: 23 April 2009*
- *Guidelines & Circular Listing – Guidelines issued under Insurance & Takaful – In relation to Prudential Limits & Standards – Revised Guidelines on Derivatives for Insurers – Updated: 2 April 2009*

BURSA MALAYSIA SECURITIES BERHAD (BMSB)

- *Main Market Listing Requirements – Effective Date: 3 August 2009*
- *ACE Market Listing Requirements – Effective Date: 3 August 2009*
- *Practice Note issued in relation to the Main Market Listing Requirements – PN20A: Listing Procedures for Structured Warrants – In relation to an application for Listing of Structured Warrants under paragraph 5.03 (PART I) and Further Issue under paragraph 5.11 (PART II) – Effective Date: 8 May 2009*

SECURITIES COMMISSION (SC)

- *Guidelines issued under Collective Investment Schemes – Guidelines on Exchange-Traded Funds – Date Issued/ Effective Date: 11 June 2009*
- *Guidelines issued under Asset Valuation – Guidelines on Asset Valuation and FAQs – Date Issued: 8 May 2009; Effective Date: 3 August 2009*
- *Guidelines issued under Equity – Guidelines on Equity and FAQs – Date Issued: 8 May 2009; Effective Date: 3 August 2009*
- *Guidelines issued under Principal Advisers – Guidelines on Principal Adviser and FAQs – Date Issued: 8 May 2009; Effective Date: 3 August 2009*
- *Guidelines issued under Prospectus – Guidelines on Prospectus and FAQs – Date Issued: 8 May 2009; Effective Date: 3 August 2009 [except for Prospectus Guidelines on Structured Warrants, which comes into effect on 9 May 2009]*
- *Guidelines issued under Structured Warrants – Guidelines on Structured Warrants and FAQs – Date Issued/ Effective Date: 8 May 2009*



Madam Lim Teh Guat (Pantry Manager)

✦ ZRp IN-BRIEF...

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

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✦ BRIEF-TAKE...



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Ashela Ramaya has been in the legal industry for ten years, of which five years were spent in **ZUL RAFIQUE & partners**. Prior to joining **ZUL RAFIQUE & partners**, Ashela was attached to Southern Bank Berhad as senior legal adviser.

Ashela is a Legal Associate with the Banking & Finance practice group. She graduated with a Bachelor of Laws (Honours) from the University of London and was called to the Malaysian Bar in 1999.

She is principally involved in corporate banking work, syndications, project financing, offshore financing, Islamic financing, structured financing, debt capital market financing, and investment banking.

Despite her busy days at work, Ashela devotes her pastime in charities, socialising and horse riding as she believes that time must be allocated for both work and fun. Thus the saying, "All work and no play makes Jack a dull boy".

A simple advice given by her to young lawyers is that they ought to take up as many challenges and responsibilities as possible with a view to build up their confidence and character. ﷲ