

the ZRp brief

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Merry Christmas & A Happy New Year



From left: Aniz, Cherrien, Joe, Natalia

ZUL RAFIQUE & partners would like to wish everyone *Merry Christmas & A Happy New Year*

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ZUL RAFIQUE & partners

A BRIEF NOTE...

by Dato' Zulkifly Rafique



For keep's sake...

It is said that the tradition of making New Year's resolutions dates back to the era BC when King Janus ruled Rome. January was named after Janus, a mythical King who was said to have looked to the past and future. New Year resolutions made during that time were based on seeking forgiveness from enemies.

New Year resolutions today, however, have evolved – from losing weight to kicking bad habits like smoking or gambling. Many of us make New Year resolutions but how many of us manage to keep them? In fact I think most of us would be lucky if those resolutions last past Valentine's Day.

So, why is so difficult to keep our New Year resolutions? Do we lack the will power and discipline? Are we not committed enough? Are we too ambitious when we make those resolutions? Or do resolutions wither when the novelty of the New Year runs out?

So the next time you make a New Year resolution, make it with the intention to keep it. Perhaps our New Year resolution should be to keep the resolutions we make!

Have a happy and productive New Year!

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Legislation Update:

- *Capital Markets & Services (Amendment) Act 2011*
- *Securities Commission (Amendment) Act 2011*
- *Money Services Business Act 2011*
- *Guidelines/ Rules/ Practice Notes issued between October and December 2011 by Bank Negara Malaysia, Securities Commission Malaysia and Bursa Malaysia.*

BRIEF-FLASH...

- **ACCESSION TO ANTARCTIC TREATY**
Malaysia has acceded to the 1959 Antarctic Treaty. The accession would allow Malaysia to establish its own scientific research base in the Antarctic. ✚
- **CAPITAL MARKETS & SERVICES ACT 2007 AND SECURITIES COMMISSION ACT 1993 AMENDED** Amendments have been made to the Capital Markets & Services Act 2007 and the Securities Commission Act 1993 to promote the development of capital markets in line with global standards pursuant to the strategies outlined in the Capital Market Masterplan 2. The amendments came into force on 3 October 2011. ✚
- **CIPA BILL FOR NEXT YEAR?** The Construction Industry Payment & Adjudication (CIPA) Bill has been drafted and is expected to be tabled in Parliament in March next year. The Bill is aimed at protecting the interests of relevant parties including subcontractors and suppliers in respect of payment-related issues. ✚
- **IMMUNITY OF TRADE UNIONS** The High Court recently ruled that trade unions cannot be sued for defamation, as they enjoy immunity under the Trade Unions Act 1959. The ruling was made in the case where Malayan Banking Bhd sued the National Union of Bank Employees (NUBE). ✚
- **LANDMARK RULING ON THE UUCA** The Court of Appeal allowed the appeal by four university students who sought a declaration that section 15(5)(a) of the Universities and University Colleges Act 1971 (UUCA) is unconstitutional. In the landmark ruling, the court held that the section (which prohibits students from expressing their support, sympathy or opposition to any political parties) is a violation of article 10 of the Federal Constitution which provides for the freedom of speech and expression. ✚
- **LISTING REQUIREMENTS AMENDED AND CORPORATE DISCLOSURE GUIDE INTRODUCED** Bursa Malaysia has amended its Listing Requirements for the Main Market and ACE Market and issued a Corporate Disclosure Guide to assist listed issuers to elevate their standards of disclosure. The amendments, which will take effect on 3 January 2012, are said to enhance the quality of information for financial reporting, and promote greater transparency in respect of share schemes for employees. ✚
- **LOTUS V LOTUS RESOLVED** The dispute between Group Lotus and Team Lotus is over, with parties agreeing to a settlement. Team Lotus has been rechristened as *Catherham F1 Team* whilst Group Lotus will be rebranded purely as *Lotus*. ✚
- **MONEY SERVICES BUSINESS ACT IN FORCE** The Money Services Business Act 2011 came into force on 1 December 2011. The Act provides a single, uniform regulatory framework for licensees carrying on money changing, remittance and wholesale currency businesses. ✚
- **NATIONAL SPACE ACT TO BE INTRODUCED** An Act to regulate the law and policy of space activities is set to be introduced. Scheduled for mid-2012, the National Space Act will address issues relating to space exploration, launch and operation of satellites and earth station operations. ✚
- **NATIONAL WAGES CONSULTATIVE COUNCIL ACT TAKES EFFECT** The National Wages Consultative Council Act came into force on 23 September 2011. It repeals the Wages Council Act 1947. The National Wages Consultative Council will conduct studies on matters concerning minimum wages and make recommendations to the Government on minimum wages according to sectors, type of employment and regional areas. ✚

- **PEACEFUL ASSEMBLY ACT PASSED** The Peaceful Assembly Act was passed despite protests from activists and opposition leaders. The Act outlines the parameters in respect of public assemblies. The law will replace section 27 of the Police Act 1967 relating to the regulation of assemblies, meetings and processions. ✚
- **PR1MA BILL PASSED** The Perumahan Rakyat 1Malaysia (PR1MA) Bill, which was tabled for the Second Reading, seeks to facilitate loans and ownership of property by middle-income earners. ✚
- **SC UPDATES LICENSING HANDBOOK** Securities Commission Malaysia has updated its Licensing Handbook as at 3 October 2011. It sets out the single licensing regime under the Capital Markets & Services Act 2007, criteria for applying and varying a licence, as well as ongoing obligations imposed on licensed persons. ✚
- **STRINGENT FINANCIAL RULES** Bank Negara Malaysia has announced new financial guidelines to promote prudent, responsible and transparent retail financing practices. Scheduled to be enforced in January 2012, the guidelines will apply to home and vehicle financing, credit and charge cards, as well as personal financing which includes overdraft facility. ✚
- **TRADE DESCRIPTIONS ACT 2011** The Trade Descriptions Act 2011 which replaces the Trade Descriptions Act 1972 came into force with effect from 1 November 2011. ✚
- **AUSTRALIAN CARBON TAX LAW PASSED** The controversial carbon tax was passed by the Australian Parliament after years of contentious debates. Known as the Clean Energy Act, it is scheduled to take effect on 1 July 2012. ✚
- **BETWEEN A PAD AND A TABLET** The ban on the sale of Samsung's Galaxy Tablet has been lifted in the latest twist in the legal drama between Samsung and Apple. ✚
- **CALIFORNIA DREAM ACT PASSED** The California Dream Act was passed in October 2011. Illegal immigrants in the US are now eligible to apply for financial state aid to enter college. ✚
- **CHINA MULLS OVER GOOD SAMARITAN LAW** Following the tragic hit-and-run accident of a toddler in Guangdong, which raised the issue of apathy, China is now mulling over the need to enact a law to compel the public to render assistance when there is a peril. ✚
- **DOWN UNDER OVER** Famous Australian 80's band *Men At Work* lost a copyright suit brought by Larrikin Music, owners of copyright to the song *Kookaburra Sits on the Old Gum Tree*. The High Court of Australia found in favour of Larrikin Music, who alleged that the extremely popular song *Down Under*, in particular, the flute melody, was copied from Kookaburra. ✚
- **FACEBOOK SETTLES PRIVACY ISSUE** Facebook has agreed to tighten consent rules on privacy and to close access to deleted accounts in 30 days or less. This is part of a settlement with the US regulators over abuse of data, a case which began in 2009. ✚

FOREIGN FLASH

- **AMENDMENTS TO SINGAPORE TELCO ACT PASSED** Singapore has passed the amendments made to the Telecommunications Act which now empowers the government to curb monopolistic behaviour in the telecommunications sector. ✚

- **LANDMARK UK CASE ON COHABITEES' LEGAL RIGHTS** In *Kernott v Jones*, a landmark decision, the UK Supreme Court ruled that a man who left his partner 18 years ago after being together for 8 years, was entitled to only 10% of the value of the house they had shared. Although the couple had purchased a house together in 1985 and took out a joint mortgage, he had left in 1993 whilst she had continued paying the mortgage. ✚
- **LANDMARK COMPETITION CASE IN SINGAPORE** The Competition Commission of Singapore slapped huge fines on SISTIC, one of the well-known ticketing agent companies, for coveting exclusive contracts and dominating the market. This would set a significant ruling as this is the first time the Commission found a business guilty of 'abuse of dominance.' ✚
- **NEW CONSUMER DATA PROTECTION LAW IN THE PIPELINE FOR SINGAPORE** The Ministry of Information, Communications and the Arts (MICA) of Singapore is seeking feedback on its proposed framework to regulate the collection, use, disclosure, transfer and security of personal data. ✚
- **NEW RULES FOR BRITISH TAKEOVERS** Changes to the UK Takeover Code have come into force on 19 September 2011. The new rules were introduced following the purchase of *Cadbury* by *Kraft*. ✚
- **PROPOSAL TO EASE SINGAPORE EVIDENCE RULES** The Ministry of Law in Singapore is proposing several amendments to its Evidence Act. The proposals are intended to address issues relating to expert evidence, legal professional privilege and the admissibility of computer evidence. ✚
- **SPH V YAHOO!** Singapore Press Holdings (SPH) has filed a copyright infringement suit against *Yahoo*. The suit is based on the allegation that Yahoo! reproduced news content belonging to SPH. ✚
- **SINGAPORE LEADS IN INTELLECTUAL PROPERTY RIGHTS PROTECTION** According to a report by the World Economic Forum, Singapore is the best place in Asia and second (to Finland) in the world to protect intellectual property rights. ✚
- **SUBWAY V SUBWAY NICHE** International sandwich chain, *Subway* is involved in a legal tussle with *Subway Niche*, a *nyonya kueh* chain. *Subway Niche* boss, Lim Eng Wah is being sued for infringing Subway's registered trademark. ✚
- **TRANSGENDERS WIN APPEAL IN AUSTRALIA** Despite incomplete gender-reassignment surgery, the High Court of Australia legally recognised a pair of transgenders as male, although they retained some female sexual organs. The court ruled that one's gender is identified by the external physical characteristics without requiring the knowledge of the sexual organs. ✚

BRIEFING...

CORPORATE

SECURITIES COMMISSION ACT AND CAPITAL MARKETS & SERVICES ACT AMENDED ...The Securities Commission Act 1993 (SCA) and the Capital Markets & Services Act 2007 (CMSA) have been amended recently.

This article outlines some of the key changes relating to private retirement schemes, licensing of capital markets intermediaries, regulations of Over-The-Counter (OTC) derivatives, management of systemic risks in the capital markets and recognition of foreign auditors.

PRIVATE RETIREMENT SCHEME A major change, brought about by the amendments to the CMSA, is the introduction of a regulatory framework for private retirement schemes (PRS).

With effect from 3 October 2011, no person shall establish, offer or provide a PRS or establish, operate or hold himself out as a PRS administrator, except with the approval of the Securities Commission (SC). Any person who contravenes this requirement is liable to a fine of up to RM10 million or to imprisonment for a term not exceeding 10 years or to both.

In order to protect the interests of contributors to PRS, there are various duties, obligations and responsibilities that must be undertaken or assumed by PRS providers, administrators and trustees as set out in the CMSA.

LICENSING As a result of the amendments, holders of Capital Markets Services Licences and Capital Markets Services Representatives Licences are no longer required to renew their licences annually. The licences are valid in perpetuity, unless the holder surrenders or ceases his licence, or the licence is suspended or revoked by the SC.

The licence holders are, however, required to complete and submit the Anniversary Reporting for Authorisation of Activity (ARAA) to the SC on the anniversary date of their licence.

In addition, the approval of the SC is also required before the holder of the Capital Markets Services Licences appoints a chief executive officer.

OTC DERIVATIVES Another major change observed is the introduction of a regulatory framework for OTC derivatives. This is in line with global regulatory reform towards improving transparency and regulatory oversight of the OTC derivatives market. The powers of the SC, under section 15 of the SCA, have correspondingly been expanded to cover securities, futures contracts and derivatives.

Prior to 3 October 2011, the regulatory framework in the CMSA for futures contracts catered only for exchanged traded options and futures contracts. A new definition of 'derivatives' has been introduced, capturing all types of derivatives, including OTC derivatives and those other than futures contracts. References to 'trading in futures contracts' have been replaced by 'dealing in derivatives'. Dealings in OTC derivatives (and not just futures contracts) will now be a regulated activity. Any person dealing in OTC derivatives will be required to report such information, as may be specified by the SC, to a trade repository. Any person who fails to comply with the reporting obligations or who submits any false or misleading information or a material omission to the trade repository, commits an offence and shall, on conviction, be liable to imprisonment for a term not exceeding 10 years or to a fine not exceeding RM3 million or to both.

The trade repository will become operational within the period of two years or such extended period not exceeding one year as may be determined by the Minister of Finance.

MONITOR, MITIGATE AND MANAGE

SYSTEMIC RISK The functions of the SC have been extended, pursuant to the Securities Commission (Amendment) Act 2011, to include, amongst others, the taking of all reasonable measures to monitor, mitigate and manage systemic risks arising from the securities and derivatives markets.

In line with this, the CMSA has been similarly amended to give the SC extended powers for the purposes of monitoring, mitigating and managing systemic risk in the capital markets. A systemic risk in the capital markets refers to a situation where there is, or is likely to be, an impairment in the orderly functioning of the capital markets, or an erosion of public confidence in the integrity of the capital markets, or where a significant market participant (that is, any issuer, investor, service provider, stock exchange or central depository) or a number of them suffer or are likely to suffer financial distress.

A person who fails to comply with the SC's requirements or directives is liable on conviction to a fine not exceeding RM10 million or to imprisonment for a term not exceeding 10 years or to both.

RECOGNITION OF FOREIGN AUDITORS

The Audit Oversight Board is now allowed to recognise a foreign auditor who conducts the audit of financial statements of corporations listed on Bursa Malaysia. Following the amendments, an auditor under section 320 of the CMSA (duties of auditor of listed corporations), has the same meaning defined in section 31A of the SCA, which includes a foreign individual auditor or a foreign audit firm as a recognised auditor of a public interest entity. The Audit Oversight Board is empowered to approve or refuse the grant of recognition of an applicant as a recognised auditor.

The amendments also empower the SC to share information and cooperate with other supervisory authorities both domestic and foreign, who manage systemic risk in the capital market – Securities Commission

INFORMATION TECHNOLOGY

UNDER A CLOUD... On 6 June 2011, Apple launched its *iCloud* services. Although many of us have been subscribing to cloud computing services, knowingly or otherwise, the phrase has got the computer-illiterate scratching their heads and knitting their eyebrows.

In this article, we examine the basic concept of cloud computing and the legal issues arising from it.

WHAT IS CLOUD COMPUTING? The first thing to note is that cloud computing has absolutely nothing to do with rain clouds. The word 'cloud' originates from the cloud symbol commonly used to illustrate the Internet. Cloud computing is an information technology system that provides various computing services such as networks, software, storage and a selection of applications over the Internet. The two main cloud computing services available are Software as Services (SaaS) and Hardware as Services (HaaS). There is a considerable overlap and the distinction between the two is hardly apparent. SaaS are web-based applications hosted by service providers which may be accessed via the Internet. Web-based email such as Hotmail and Gmail and social networking sites such as Facebook and MySpace are examples of SaaS that are widely used. HaaS, on the other hand, offers computing capacity through data centres of the service providers which allow users to run applications on virtual machines which may quickly be scaled up or down in response to their needs. Examples of HaaS include Microsoft Azure and Google App Engine.

ISSUES ARISING In the wake of the global recession, cloud computing offers benefits in the form of the following, namely, reduction in costs of hardware, efficiency in terms of accessibility to services from anywhere and 'pay for what you use' services.

However, such benefits offered need to be weighed against the risks and legal issues involved such as data security and protection, confidentiality issues especially those between solicitor and client, and jurisdiction matters relating to the Internet.

DATA PROTECTION AND SECURITY

A common uncertainty is how does a cloud provider maintain the security of the consumer's data? In Malaysia, the only legislation relating to data protection is the Personal Data Protection Act 2010 (PDPA) which, however, has not been enforced. The PDPA would apply to any form of processing personal data. Personal data refers to data in possession of the data user which relates directly or indirectly to a data subject who may be identified or is identifiable from that information.

Who are data subjects and data users? A data subject is an individual who is the subject of personal data while a data user is a person who, either alone or jointly, or in common with other persons, processes or authorises the processing of any personal data, or has control over personal data, but does not include a data processor. Generally, persons processing personal data are data users and data processors. A data processor, however, is not governed by the PDPA. The PDPA applies when the data user is established in Malaysia and when the personal data is processed wholly in Malaysia. A data user based outside Malaysia, but processing data within Malaysia, is also subject to the PDPA.

Storing personal data in the cloud creates the possibility of disclosure to a third party if the data subject has given his prior consent to the processing of personal data. There is also no adequate protection when it comes to the transferring of data for storage on servers located across the world. The PDPA does not apply where the data is processed wholly outside Malaysia. Therefore, it depends solely on the service provider to inform potential clients that their data may be transferred outside Malaysia and is therefore not entitled to protection under the PDPA.

A further point to note is that the PDPA provides protection only to personal data in respect of commercial transactions and does not apply to non-commercial transactions and credit reporting business.

PRIVATE & CONFIDENTIAL Data storage via cloud computing raises issues relating to confidentiality. Companies may have to find out how service providers handle confidential information and whether the methods of

storing data are sufficiently secure. The concern of violation of data privacy may be addressed by incorporating privacy policy clauses in the contract. Ultimately, it is entirely up to the companies to negotiate with the service provider on the security and protection of confidential information.

WHERE'S MY DATA? A key question with cloud computing services is the location of the processing and storage of data. The cloud may be the ultimate form of globalisation. Data in the cloud may be located anywhere in the world and even in multiple data centres worldwide. In fact, some countries such as China, Indonesia and South Africa do not have data protection laws to begin with. Because of the plurality of laws, sending and processing data across the world may, in the process, fail to comply with laws and regulations in some parts of the world. Certain countries have more stringent privacy and data protection laws than others. The European Union (EU), on the other hand, provides a rigid legal regime, where personal data may be transferred only to countries that provide an adequate level of data protection.

The issue of jurisdiction is not solved by contractual terms as laws in some countries can trump contractual terms. Potential users have to be well aware of such issues before entering into a contract with their service provider.

CONCLUSION At present, there are no rules or laws specifically regulating cloud computing services. Businesses wishing to subscribe to cloud computing services should be mindful of the legal obligations to their clients and to ensure that the services they would potentially subscribe to are safe and secure. Perhaps, the best option for the companies would be to negotiate for better terms with the service providers to reap the benefits of cloud computing. 

CONSTITUTIONAL LAW

THE UKM4... QUO VADIS? According to section 15(5)(a) of the Universities & University Colleges Act 1971, no student of the University and no organisation, body or group of students of the University which is established by, under or in accordance with the Constitution, shall express or do anything which may reasonably be construed as expressing support for or sympathy with or opposition to any political party, whether in or outside Malaysia.

On 31 October 2011, in a landmark ruling, the Court Appeal declared that section 15(5)(a)¹ is unconstitutional and violated the freedom of speech.

In this article, we examine this controversial section and its relationship to constitutional rights and fundamental liberties.

THE UKM4 The incident that took place on 22 April 2010 set the wheels in motion and provided the centre stage for what would become one of Malaysia's landmark cases.

Four political science students (famously dubbed the UKM4) from Universiti Kebangsaan Malaysia (UKM) had travelled to Hulu Selangor to witness the by-election campaigning process. There were also members of the public who were in the same vehicle as the students. The car carrying the students was stopped at a police road-block and when searched, the car was found to contain several packets of flyers and video compact discs concerning the election. The officials assumed that these items belonged to the students and hauled them for questioning, and recorded their statements.

THE PROVISIONS Although the students were not charged in court, the university authorities initiated internal proceedings against them by virtue of section 15(7) of the UUCA which provides that 'any student of the University who breaches subsection (1) or (5) shall be liable to disciplinary action.'

Although they were found not guilty by the university's disciplinary board, UKM 4 brought an action challenging the constitutionality of section 15(5)(a) of the UUCA, naming the Malaysian Government, the Higher Education Minister and UKM as the respondents.

LEGAL BATTLE The High Court held that section 15 of the UUCA is valid and constitutional.

In the Court of Appeal, however, it was ruled that although section 15(5)(a) disallows university students from expressing support or sympathy for any political party, article 10(1)(a) of the Federal Constitution clearly provides for the contrary, in that every citizen has the right to freedom of speech and expression. Furthermore, article 119(a) makes it explicit that every Malaysian citizen who has attained the age of 21 is entitled to vote in that constituency in any election to the House of Representatives or the Legislative Assembly.

QUO VADIS? Many quarters are now questioning the status of section 15(5)(a).

The Prime Minister is reported to have said that section 15(5)(a) will be amended².

This is in line with the current legal and political climate in our country reflected by the lifting of specific emergency laws. University students may therefore, view this with some optimism. 

¹ Section 15 was introduced on 1 February 2009 by the Universities and University Colleges (Amendment) Act 2009 (A1342).

² The STAR – 29 November 2011 - *Changes to section 15 of UUCA for Parliament next year.*

COMMERCIAL LAW

TRADE DESCRIPTIONS ACT 2011

The Trade Descriptions Act 2011 (2011 Act), which came into force on 1 November 2011, repealed the Trade Descriptions Act 1972 (1972 Act).

The purpose of the 2011 Act is to promote good trade practices by prohibiting false trade descriptions and false or misleading statements, conduct and practices in relation to supply of goods and services, thereby protecting the interest of consumers.

In this article, we examine the changes marked by the 2011 Act.

ONLY REGISTERED OWNERS Section 9 of the 2011 Act provides that a Trade Description Order³ is available only to registered trademark owners. Under the 1972 Act, the Order was available to common law or unregistered trademark holders as well.

The application for a Trade Description Order is to be made to the High Court and the applicant is now required to specifically identify the infringing mark or get-up. A Trade Description Order under the 2011 Act is valid for only one year from the date on which it was made, unlike the 1972 Act, where the validity of such Order was for five years.

NO 'TIPPING-OFF' Section 44 of the 2011 Act makes tipping-off an offence. This provision, however, does not apply to advocates and solicitors who disclose information to their clients.

EVIDENCE OF *AGENT PROVOCATEUR*

Section 53 of the 2011 Act now makes the evidence of an *agent provocateur* admissible. This was not provided for in the 1972 Act. Any statement made to an *agent provocateur* by a person subsequently charged with an offence under this Act is admissible in court.

HALAL CERTIFICATES AND LOGOS

A rather interesting consequence of the 2011 Act is the standardisation of *halal* certificates and logos in accordance with sections 28 and 29. Under section 28, the Minister of Domestic Trade, Co-operative and Consumer Affairs has the power to assign definite meanings to expressions that are used in the course of a trade and impose requirements to have goods certified, marked or accompanied by any information. The Department of Islamic Development Malaysia (JAKIM) and State Religious Departments will be the only bodies authorised to issue *halal* certificates and logos. Displaying logos or certificates or using expressions that are not issued by the bodies is an offence under the 2011 Act.

PERSONAL DOMESTIC USE The 2011 Act has also provided personal or domestic use as a defence. This defence is only available to individuals and not to corporate bodies.

SHAM CONTEST The 2011 Act makes it an offence to hold a sham contest. This is provided in section 20.

CONCLUSION The amendments appear to tie up some loose ends of the 1972 Act. However, as the 2011 Act is only recently implemented, the full extent of its effect is yet to be demonstrated. 

3 A Trade Descriptions Order is an order granted by the High Court pronouncing that a trademark (or any mark or get-up) is a false trade description. In criminal proceedings, the Trade Descriptions Order is conclusive proof that the infringing trademark specified in the Order is a false trade description.

CONTRACT/ CONSUMER LAW

WHEN FATE HANDS YOU A LEMON...

In June this year, the Tribunal for Consumer Claims ruled that buyers of new vehicles are entitled to a replacement or refund if such vehicle is found to be defective.

The Tribunal's chairman, Tuan Pretam Singh, said that although there are currently no specific laws applicable, the principles in Lemon laws may be referred to.

What are Lemon laws and how do they protect the consumer? We attempt to answer these questions in this article.

WHAT CONSTITUTES A LEMON?

The word *lemon* originates from the US in reference to cars that repeatedly fail to meet standards of quality and performance. Although Lemon laws were originally enacted to protect consumers by providing remedies against defects in cars, there have been suggestions to extend the laws to other consumer goods. In the UK, legislation has already been modified to deal with developments in consumer protection law through the UK Sale and Supply of Goods to Consumers Regulations 2002. They provide a balanced and practical model containing provisions to repair and replace items when the need arises.

LEMON LAWS IN MALAYSIA? Although we have the Sale of Goods Act 1957 and the Consumer Protection Act 1999 aimed at protecting consumers, current laws do not mandate that a vendor must replace or refund a defective car but merely to undertake repairs during the warranty period. Although no specific Lemon laws exist in our legal framework, buyers of new vehicles may seek legal redress in the civil court for a replacement or a refund. The Tribunal had investigated a complaint by a purchaser who bought a defective car. Despite repeated complaints, the vendor

failed to repair her car. The Tribunal ordered the vendor to repair the damaged portion to the satisfaction of the buyer within two weeks or face further action. Tuan Pretam Singh added that customers must not be compelled to sign unfair contracts that are detrimental to their interest, failing which the sellers could be fined up to RM200,000.

THE SINGAPORE TASK FORCE

In December 2010, Singapore conducted a public consultation regarding the proposed amendments to its Consumer Protection (Fair Trading) Act and the Hire Purchase Act to include provisions for repair and replacement of defective goods. Although most of the key features and principles of Lemon laws are already incorporated in existing legislation, it was recommended by the Lemon Law Task Force to add express provisions for repair and replacement for defective goods, alternative remedies of reduction in or refund of price and the removal of value caps in the Hire Purchase Act.

DEFECT OR WEAR & TEAR? The grey area as to whether the defects in Lemons are attributed to poor quality control or simple wear and tear is an issue for retailers. The motor industry would be largely affected since the replace or refund of a vehicle is a relatively higher cost than the same for a mobile phone or toy. It must be noted that the Tribunal's ruling only appears to cover newly purchased products, but not used goods, which leaves the secondary market untouched.

CONCLUSION Lemons laws are vital to safeguard customers against goods with latent defects. Nevertheless the implications and scope of such laws must be studied thoroughly to avoid a double-edged sword situation. 

EMPLOYMENT LAW

THE NATIONAL WAGES CONSULTATIVE COUNCIL ACT

2011... The National Wages Consultative Council Act 2011 (NWCCA) came into force on 23 September 2011, repealing the Wages Council Act 1947.

This article aims to provide an overview of the NWCCA.

INTRODUCTION Wages for employees in the private sector were previously determined by 3 methods, namely the market power based on labour supply and demand; the collective agreement as a result of negotiations between unions and employers; and standards set by the Wages Council established under the Wages Council Act 1947 (WCA).

Among the three methods above, it was the Wages Council that set the minimum wage, which was limited to specific categories of workers, namely, catering and hotel, cinema workers, shop assistants, security personnel, private clinic attendants in Peninsular Malaysia and Sabah, and general workers in farms in Sabah and Sarawak.

The WCA is now repealed by the NWCCA⁴. The NWCCA paves the way for the establishment of the National Wages Consultative Council (the Council), an independent body tasked to study employees' remuneration and set a minimum wage based on the tri-partite principle of involving the Government, employees and employers.

APPLICATION OF THE NWCCA The NWCCA applies to only employees within the scope of the First Schedule to the Employment Act 1955, the Schedule to the Sabah Labour Ordinance, and the Schedule to the Sarawak Labour Ordinance.

RECOMMENDATIONS BY THE COUNCIL

After consulting the public on rates of minimum wages, collecting and analysing data and information, and conducting research on wages, the Council is to make recommendations to the Government through the Minister of Human Resources on the coverage, commencement and implementation of recommended minimum wage rates according to sectors, types of employment and regional areas.

After considering the Council's recommendations, the Government may agree with the recommendations or direct the Council to review and make fresh recommendations. If the Ministry agrees with the recommendations, it will make a Minimum Wages Order, which is subject to a review by the Council at least once in every two years.

MINIMUM WAGES ORDER The basic wages agreed to in an employment contract must not be lower than the minimum wages rates specified in the Minimum Wages Order.

OFFENCES & PENALTIES Under the NWCCA, employers who fail to pay the basic wages as specified in the minimum wage order, will be slapped with a maximum fine of RM10,000 per employee, if convicted.

The penalty for subsequent offences is a maximum daily fine of RM1,000 whereas repeated offences attract a maximum fine of RM20,000 or imprisonment not exceeding 5 years. 

4 Any wages council order, rules, regulations, notices, forms, directions and letters of authorisation made, issued or given under the repealed WCA would continue in force until it is revoked or replaced by the NWCCA.

CONTRACT/ FAMILY LAW

RIGHTS OF COHABITEES On 9 November 2011, the UK Supreme Court in *Kernott v Jones* ruled that where cohabiting couples own their home in equal shares, the court may declare that a change in circumstances (often as a result of the breakdown of that relationship) has altered the ownership, even when the parties did not expressly agree to the same.

In this article, we examine the implications of this case and a comparison of such situation in Malaysia.

INTRODUCTION Patricia Jones and Leonard Kernott, who never married, met in 1980 and moved in together the following year before buying a house in 1985 for GBP30,000 with a GBP6,000 deposit paid by Ms Jones. The mortgage and upkeep of the home were shared. They had two children before separating in 1993. The children remained on the property with Ms Jones who fulfilled the mortgage payments post-separation. After Mr Kernott claimed a beneficial interest in the property, Ms Jones applied to the County Court for a declaration under section 14 of the Trusts of Land and Appointment of Trustees Act 1996 that she owned the entire beneficial ownership in the property.

The County Court held that the common intention to jointly share the beneficial ownership in the property had changed after their separation in 1993 with Mr Kernott no longer contributing to the running of the home and making very little contribution towards supporting their children. Mr Kernott appealed on the basis it was wrong for a court to infer a change in the common intention. The Court of Appeal found in favour of Mr Kernott but the Supreme Court upheld the appeal by Ms Jones and found Mr Kernott was only entitled to 10% of the property formerly owned by the couple.

COHABITEES IN THE UK The lack of legislation in regulating the rights of cohabitees leads to uncertainty. The decision in *Kernott v Jones* shows that although property is owned in equal shares, the court has the ability to alter the ratio if the presumption is rebutted by evidence that it was no longer the common intention of the parties to hold the property jointly.

Although this judgment may allow for more equitable outcomes for unmarried couples in the division of their assets at the end of their relationship, it reduces the element of uncertainty.

The decision also highlights the pressing need for legislation to clearly outline the rights and obligations of cohabitees. This will ensure that the interests of the parties are upheld and intervention by the court is reduced. Parties may, however, do this themselves through a simple declaration of trust regarding the ownership of property.

COHABITEES IN MALAYSIA Although Malaysian law does not prohibit cohabitation among non-Muslims⁵, there are, however, no rules governing the division of assets when there is a breakdown of the relationship.

Malaysian non-Muslim cohabitees could rely on the rules of equity that have been applied in English cases like *Kernott v Jones*, pursuant to section 47 of the Law Reform (Marriage & Divorce) Act 1976. It further confirms the likelihood that Malaysian courts will look to previous English cases to decide matters on the division of assets among cohabitees who suffer relationship breakdown. 

5 For Muslim couples, cohabitation is prohibited by Shariah law

LEGAL PROFESSION

FORBIDDEN DISCLOSURE... In the legal profession, communication between a lawyer and his client, for the purpose of obtaining legal advice is privileged. An interesting issue that arises is who exactly is a 'lawyer'.

We examine this aspect in this article and the rationale for such a rule.

WHO IS AN 'ADVOCATE'? According to section 126 of the Evidence Act 1950, an *advocate* is not permitted to disclose communications made to him by his client.

The section reads:

No *advocate* shall at any time be permitted, unless with his client's express consent, to disclose any communication made to him in the course and for the purpose of his employment as such advocate by or on behalf of his client, or to state the contents or condition of any document with which he has become acquainted in the course and for the purpose of his professional employment, or to disclose any advice given by him to his client in the course and for the purpose of such employment.

This section is based on the principle that the conduct of legal business without privileged communication is impossible. Securing full, unreserved communication and trust between the two is necessary in order to render such assistance effectual.

Commonly referred to as the legal professional privilege (LPP), section 126 raises an important issue concerning the definition of an *advocate*.

The use of the term *advocate* in section 126 may create some confusion as a legal practitioner in Malaysia is referred to as an *advocate and solicitor*. In fact, section 3 of the Legal Profession Act 1976 reads:

...an *advocate and solicitor* and *solicitor* where the context requires means an *advocate and solicitor* of the High Court admitted and enrolled under this Act or under any written law prior to the coming into operation of this Act.

However in the Federal Court case of *PP v Haji Kassim*⁶, the term *advocate* was read synonymously with *advocate and solicitor*.

In any event, section 3 of the Interpretation Acts 1948 & 1967 defines *advocate* to mean a person entitled to practise as an *advocate* or as an *advocate and solicitor* under the law in force in any part of Malaysia.

The meaning of *advocate* therefore in section 126 means *advocate and solicitor*.

THE AKZO CASE In September 2010, the Court of Justice of the European Union (ECJ) addressed the issue of LPP for corporate counsel in the case of *Akzo Nobel Chemicals Ltd and Akros Chemicals Ltd v European Commission*⁷.

The gist of the ruling by the ECJ is that internal company communications with in-house lawyers are not covered by LPP on the basis that lawyers directly employed by their clients do not have sufficient degree of independence to justify privilege for their advice.

THE MALAYSIAN POSITION Since an *advocate and solicitor* may not include an in-house legal counsel (as a legal counsel generally refers to a company's legal adviser), the subsequent issue is whether the LPP extends to in-house counsel via any other legislation.

On this point, reference may be made to section 129 of the Evidence Act which provides for *Confidential Communications with Legal Advisers*. The section reads:

No one shall be compelled to disclose to the court any confidential communication which has taken place between him and his *legal professional adviser* unless he offers himself as a witness, in which case he may be compelled to disclose any such communications as may appear to the court necessary to be known in order to explain any evidence which he has given, but no others.

6 [1971] 1 MLJ 115

7 C-550/07

A reading of section 129 reveals that it is the client's prerogative to refuse to answer questions put to him regarding communications between him and his *legal professional adviser*. What should be noted is that the term *legal professional adviser*, which is broader than advocate (as found in section 126), may include persons such as company legal advisers, foreign legal advisers, lecturers and members of the academia. The reading of section 129 means that although the client is entitled to refuse to answer questions put to him about communications passing between him and his legal professional advisers, there appears to be no corresponding provision to enjoin the latter from disclosing those communications.

QUALIFIED LEGAL COUNSEL The situation in Singapore is quite similar to Malaysia. However, the Ministry of Law of Singapore is currently conducting a public consultation on the proposed changes to the Evidence Act, which includes the extension of the LPP to in-house counsel.

A new section 128A of the Singapore Evidence Act is proposed to extend the LPP to *qualified legal counsel*. The term *qualified legal counsel* includes persons who are employed to undertake the provision of legal advice or assistance in connection with the application of the law or any form of resolution of legal disputes. It will also include Legal Service Officers posted to a Government ministry or department or a statutory body.

CONCLUSION The debate to extend the LPP to in-house counsel may not have reached a feverish level in Malaysia but with the liberalisation of the legal profession and the proposed entry of lawyers who may not be admitted as *advocate and solicitor* of the High Court of Malaya, the issue of whether to extend the LPP to non-advocates may very well be addressed. 

BRIEF-CASE...

TORT – Defamation – Publication of Proclamation of Sale – Third party – Absolute privilege – Judicial Immunity

NG HONG CHAI & ANOR V PUBLIC BANK BHD, KHOR LIANG KHEK & ANOR (THIRD PARTIES) [2011] 7 CLJ 498, High Court

FACTS The defendant bank foreclosed against the plaintiff for failure to settle a loan. A licensed auctioneer ('third party') was appointed by the court to conduct the auction sale. The plaintiff, however, managed to settle the loan before the auction date. The defendant instructed the third party to discontinue the auction sale but the third party proceeded to post the Proclamation of Sale ('POS') on the front gate of the plaintiff's house. The plaintiff sued the defendants for defamation.

ISSUE The issues for consideration were (i) whether the contents of POS were defamatory; (ii) whether the defendant was liable for the act of the third party; and (iii) whether the defendant was entitled to the defence of judicial immunity and absolute privilege.

HELD In dismissing the plaintiff's claim, the High Court ruled that it was wrong to post the POS. However, that itself did not prove defamation. Since the publication was done by court appointed auctioneers, the element of publication was not proved against the defendant, who was not in a position to know of the physical posting of the POS. The third party acted as appointee of the court and not as an agent of the defendant. Even if they were, they had acted against the instructions of the defendant and as such, the defendant could not be held liable. The publication of the POS fulfilled all the criteria of an absolute privilege. An action for defamation could not arise from the discharge of a legal duty of a court officer, although the third party to whom the authority had been delegated may have acted negligently.

CONTRACT LAW – Letter of Undertaking – Illegality – Public policy – Contracts Act 1950, section 24(e)

DATO' SHAZRYL ESKAY ABDULLAH V MERONG MAHAWANGSA SDN BHD & ANOR (NO 3) [2011] 6 CLJ 858, High Court

FACTS The plaintiff's claim against the first defendant was for RM20 million due under a letter of undertaking for services rendered. The plaintiff claimed to have secured, for the first defendant, among other things, a project (the bridge project). The plaintiff also claimed to have used his influence with the Government to have secured this project. The first defendant, however, alleged that the plaintiff's claim that he successfully procured the said project from the Government based on his close relationship with the Government and the then Minister of Finance, was contrary to public policy, fraudulent and illegal.

ISSUE The issue for consideration was whether the contract was illegal pursuant to section 24(e) of the Contracts Act 1950 and whether the plaintiff was entitled to the RM20 million.

Section 24. What considerations and objects are lawful, and what not.

The consideration or object of an agreement is lawful, unless -

(a) it is forbidden by a law;

...

(c) it is fraudulent;

...

(e) the court regards it as immoral, or opposed to public policy.

HELD Although the contract was neither illegal nor contrary to public policy, the project did not materialise and therefore according to the letter of undertaking, the plaintiff was not entitled to the RM20 million.

ARBITRATION – Arbitrator applying to remove co-arbitrator – Whether arbitrator had *locus standi* – Arbitration Act 2005, section 37(2)(b)

SUNDRA RAJOO V MOHAMED ABD MAJED & ANOR [2011] 6 CLJ 923, High Court

FACTS The applicant and first respondent were co-arbitrators in arbitration A330 and A331, where the claimant was Virgoz Oils & Fats (Virgoz) and the respondents were Haryana Oils & Soya Ltd (Haryana) and Sangrur Agro Ltd (Sangrur). By virtue of his appointment by Virgoz in previous arbitrations, the first respondent was perceived to be biased and as a result, Haryana and Sangrur refused to participate in A330 and A331. The applicant, therefore, applied to remove the first respondent as co-arbitrator and to seek disclosure of his past and present appointments by Virgoz.

ISSUE The issue for consideration was whether the applicant had *locus standi* to seek such relief, bearing in mind that he was not the litigant but a co-arbitrator.

Section 37 – Application for setting aside

(1) An award may be set aside by the High Court if ... the award is in conflict with the public policy of Malaysia.

(2) ...an award is in conflict with the public policy of Malaysia where -

(b) a breach of the rules of natural justice occurred -

HELD The applicant had a legitimate ground, at common law, to seek the assistance of the court to arrest the mischief from the beginning, as he was a co-arbitrator, and, after having received remuneration for work, might become personally liable in contract, negligence or breach of his fiduciary duty for having participated in an award that had a real likelihood to be set aside pursuant to section 37(2)(b) of the Arbitration Act 2005.

LEGAL PROFESSION – Advocate and Solicitor – Admission as *Peguam Syarie* – Qualifications – Application by non-Muslim advocate and solicitor – Articles 5, 8 and 10 of the Federal Constitution

VICTORIA JAYASEELE MARTIN V MAJLIS AGAMA ISLAM WILAYAH PERSEKUTUAN & ANOR
[2011] 7 CLJ 233, High Court

FACTS The applicant's application to be admitted as *Peguam Syarie* in Wilayah Persekutuan was denied by the respondent on the ground that she was not a person who professed the religion of Islam. The applicant sought judicial review and contended that the denial of admission was *ultra vires* the Administration of Islamic Law (Federal Territories) Act 1993 (Act 505) and contravened articles 5, 8 and 10 of the Federal Constitution. She prayed for an order of certiorari to quash the respondent's decision and an order of *mandamus* to compel the respondent to receive and process her application to be admitted as *Peguam Syarie*.

ISSUE The issues for consideration were whether the requirement of being a Muslim to be qualified for the admission as *Peguam Syarie* was *ultra vires* Act 505 and contravened article 5, 8 and 10 of the Federal Constitution and whether the civil court had jurisdiction to determine the qualification of non-Muslim advocates and solicitors for the admission as *Peguam Syarie*.

HELD In dismissing the application, it was held that the respondent is empowered to regulate the qualification of a *Peguam Syarie*. Such power is wide enough to enable the respondent to impose a condition that besides having sufficient knowledge of Islamic law, a *Peguam Syarie* must be a Muslim. The allegation of loss of livelihood under article 5 was rejected as the applicant was not deprived to practice as an *Advocate and Solicitor* in the civil courts. Further, the court found article 10 to be irrelevant as the applicant could not enforce her application or force the respondent to accept her application as a member.

CONTRACT/ INTELLECTUAL PROPERTY – Industrial design – Infringement of – Ownership of Industrial design – Whether intellectual property rights had been assigned

ACUMEN MARKETING SDN BHD & ANOR V PUTRAJAYA HOLDINGS SDN BHD & ORS [2011] 7 CLJ 821, High Court

FACTS The subject matter of the dispute concerned the industrial design of certain *Nyonya and Baba* streetlamps (the N&B streetlamps), initially registered in the name of the first plaintiff's related company and copyright in the reflector system designed by the second plaintiff. By a deed of assignment dated June 2002, the intellectual property rights in the N & B streetlamps were assigned to the first plaintiff. The first plaintiff applied to register the assignment only in June 2004 and the registration was backdated to 18 June 2001 by the Registrar. Later, the first plaintiff was awarded a direct contract for the project of installing streetlights and poles by the first defendant and a formal contract was executed by both parties on 26 August 2002. The plaintiffs, however, alleged that sometime in March 2002, there was the installation of mock up streetlamps at the compound of the first defendant modelled after the N & B streetlamps. The plaintiffs claimed against the defendants for infringement of copyright and industrial design of the N & B streetlamps.

ISSUE The issue was whether the intellectual property rights of the N & B streetlamps had vested in the first defendant pursuant to the contract entered with the first plaintiff.

HELD In dismissing the plaintiff's claim, the court ruled that the intellectual property rights of the N & B streetlamps vested in the first defendant pursuant to the negotiations as early as June 2001. Furthermore, the backdated registration of the plaintiff's industrial registration was declared null and void because section 30 of the Industrial Designs Act 1996 did not provide for retrospective registration.

BRIEF-UP...

NATIONAL WAGES CONSULTATIVE COUNCIL ACT 2011

No
732

Date of coming into operation
23 September 2011

Notes
See article on page 11

INTERNATIONAL ORGANISATIONS (PRIVILEGES AND IMMUNITIES) (AMENDMENT) ACT 2011

No
A1405

Date of coming into operation
16 September 2011

Amendment
Sections 2, 3, 4, 11, First, Second, Third and Fifth Schedules

Introduction
Sections 1A, 1B, 6A, 6B, 8A, Seventh and Eighth Schedules

TRADE DESCRIPTIONS ACT 2011

No
730

Date of coming into operation
1 November 2011

Notes
See article on page 9

CAPITAL MARKETS & SERVICES (AMENDMENT) ACT 2011

No
A1406

Date of coming into operation
3 October 2011

Amendment
Sections 2, 10, 26, 28, 60, 61, 63, 64, 65, 69, 70, 71, 72, 73, 74, 75, 76, 78, 92, 98, 107, 111, 121, 122, 125, 126, 137, 139, 140, 160, 164, 167, 169, 208, 232, 317A, 320, 320A, 353, 354, 355, 356, 368, 369, 371, Subsubheading of Subdivision 3 of Division 3 of Part III and Subsubheading of Subdivision 5 of Division 4 of Part III

Introduction
Sections 92A, 362A, 378A, Subdivision 4 of Division 3 of Part III, Part IIIA and Part IXA

Substitution
Sections 62, 66, 80, 99, 101, 104, 105 and 378

Deletion
Sections 68, 100, 102, 103, and Schedule 10

Notes
See article on page 5

SECURITIES COMMISSION (AMENDMENT) ACT 2011

No
A1403

Date of coming into operation
3 October 2011

Amendment
Sections 2, 15, 22A, 24, 31A, 31C, 31E, 31L, 31N, 31O, 31P, 31Q, 31R, 31S, 31T, 31W, 31X, 31Y, 31ZB, 31ZD, 126, 134, 146, 147, 150A, 152A, 159, Division 4 of Part IIIA and Schedule 1

Introduction
Sections 31EA, 150B and 159A

Deletion
Section 31ZA

Notes
See article on page 5

RENEWABLE ENERGY ACT 2011

No
725

Date of coming into operation
1 December 2011 (except for sections 17 and 18) throughout Malaysian except the state of Sarawak

Notes
An Act to provide for the establishment and implementation of a special tariff system to catalyse the generation of renewable energy and to provide for related matters.

MONEY SERVICES BUSINESS ACT 2011

No
731

Date of coming into operation
1 December 2011

Notes
An Act to provide for the licensing, regulation and supervision of money services business and to provide for related matters.

GUIDELINES/RULES/CIRCULARS/ DIRECTIVES /PRACTICE NOTES ISSUED BETWEEN OCTOBER AND DECEMBER 2011 BY BURSA MALAYSIA, SECURITIES COMMISSION MALAYSIA AND BANK NEGARA MALAYSIA

BURSA MALAYSIA

- Directives on Submission by Participating Organisations of Periodic Reports by Electronic Transmission to Bursa Malaysia Securities Bhd – *Effective Date:* 1 January 2012
- Amendments to the Rules of Bursa Malaysia Derivatives Berhad in relation to Negotiated Large Trades – *Effective Date:* 29 November 2011
- Amendments to the Main Market Listing Requirements in relation to Disclosure and other obligations – *Effective Date:* 22 September 2011
- Amendments to the ACE Market Listing Requirements in relation to Disclosure and other obligations – *Effective Date:* 22 September 2011
- Corporate Disclosure Guide – *Issued:* 22 September 2011

BANK NEGARA MALAYSIA (BNM)

- Guidelines & Circulars Listing – Guidelines issued under Development Financial Institutions - In relation to Prudential Limits and Standards - Guidelines on Corporate Governance for Development Financial Institutions - **Date Updated: 18 November 2011**
- Guidelines & Circulars Listing – Guidelines issued under Banking – In relation to Prudential Limits & Standards – Classification and Impairment Provision for Loans/ Financing - **Date Updated: 9 November 2011**
- Guidelines & Circulars Listing – Guidelines issued under Banking – In relation to Prudential Limits & Standards – Guidelines on Introduction of New Products - **Date Updated: 17 October 2011**
- Guidelines & Circulars Listing – Guidelines issued under Insurance & Takaful – In relation to Prudential Limits & Standards – Guidelines on Takaful Operational Framework - **Date Updated: 23 September 2011**
- Guidelines & Circulars Listing – Guidelines issued under Development Financial Institutions – In relation to Prudential Limits & Standards – Guidelines on Fit and Proper for Key Responsible Persons for Development Financial Institutions - **Date Issued: 15 September 2011**
- Guidelines & Circulars Listing – Guidelines issued under Banking – In relation to Capital Adequacy – Risk-Weighted Capital Adequacy Framework (Basel II) – Internal Capital Adequacy Assessment Process (Pillar 2) – **Date Updated: 2 December 2011**
- Guidelines & Circulars Listing – Guidelines issued under Banking – In relation to Capital Adequacy – Capital Adequacy Framework for Islamic Banks (CAFIB) – Internal Capital Adequacy Assessment Process (Pillar 2) – **Date Updated: 2 December 2011**

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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