

the **ZRp** brief

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EMPLOYER OF CHOICE 55

How to cut down on time or other resources to clients when you obtain the approval of management," he says. "Over the years, "We try to show the lawyers as much freedom as possible. We do not bother them about practice groups or how they work. We encourage an attitude to market, and we allow people to show their meetings."

"The third office is defined from the beginning themselves. Whereas other firms may attract a type of lawyer or personality, that would be a more uniform culture, at Zul Rafique, our people have been able to work from a more diverse, and they bring a lot of different ways of thinking. It just flows from having the independence," says Zul. The firm has two foreign partners and that added investment of the senior management level means that "we are able to find time and ideas into a discussion, which is really a relief with a lot of other competitors. The firm needs foreign partners as part of the thinking process, and this has had a positive impact on being 'out of the box'."

"Having to find new opportunities on our Employer of Choice list, Zul Rafique has been able to do it. The 'Big Four' law firms,

The well-used firm would still be its culture and social environment. Partners are committed to being responsible and hard on their own. Zul Rafique Malaysia. The successful firm remains focused on its clients. The firm is not just a law firm, but a learning organisation with highly skilled lawyers. The work environment is "There are opportunities to do interesting work with other excellent people."

MALAYSIA ZUL RAFIQUE

When Zul Rafique moved to a new building two years ago, it installed a fully-equipped gym and multipurpose space that is used as a cafeteria and classroom. These new facilities play an integral role in enhancing lawyers' lives, and help the Malaysian firm secure its top ranking position once again as the Employer of Choice in its jurisdiction.

With its high quality, professional working environment, Zul Rafique has been able to attract and retain top talent. The firm's commitment to its clients and its employees has been a key factor in its success. Zul Rafique Malaysia has continued

making other law firms in the industry to pay attention. What is key to the firm's approach is being a quality employer. Zul Rafique says, "Trying to create an environment for the staff that provides them with the sense of having a life away from the firm." The implementation of new legal activities that work around the firm has been very successful, with many of

On the remuneration front, Zul Rafique continues to pay above the average in the market, which its lawyers appreciate. "I feel secure because my salary is better than my peers at other firms," notes one survey respondent. Interaction between senior partners and junior lawyers is encouraged through the firm's in-house training programme, where seniors give talks on their practice areas, updates and share experiences.

The firm's commitment to its clients and its employees has been a key factor in its success. Zul Rafique Malaysia has continued

ZUL RAFIQUE & partners is declared **Employer of Choice 2012** by the *Asian Legal Business (ALB)*

A BRIEF NOTE...

by Dato' Zulkifly Rafique



We are Employer of Choice 2012 !

Time really flies...

It was just yesterday that we were heralding in the New Year and I can't believe that we are now moving towards the third quarter of 2012, and already into the month of *Ramadhan*.

The highlight of this quarter must surely be the announcement that **ZUL RAFIQUE & partners** is once again Employer of Choice. The *Asian Legal Business* declared us *Employer of Choice 2012*, making it our fourth consecutive win.

A survey conducted by ALB was sent out to lawyers across Asia where they were asked questions pertaining to a law firm's performance as an employer.

We would like to thank everyone who voted for us and who made the accolade possible. I subscribe to the words of Orison Marden when he said:

No employer today is independent of those about him. He cannot succeed alone, no matter how great his ability or capability. Business today is more than ever a question of cooperation.

Do follow the latest legal updates in this issue of the *ZRp Brief* and *Selamat Berpuasa*.

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- *Dr Tan Ah Ba v Dr Wong Foot Meow* [2012] 7 MLJ 467, High Court
- *Gurbachan Singh Bagawan Singh & Anor v Vellasamy Pennusamy & Ors* [2012] 2 CLJ 663, Federal Court
- *Bar Malaysia v Index Continent Sdn Bhd* [2012] 3 CLJ 846, High Court

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Legislation Update:

- Peaceful Assembly Act 2012
- Employment (Amendment) Act 2012
- Territorial Sea Act 2012
- Rukun Tetangga Act 2012
- Guidelines/ Rules/ Practice Notes issued between April and June 2012 by Bank Negara Malaysia, Securities Commission Malaysia and Bursa Malaysia.

BREAKING NEWS...

ZUL RAFIQUE & partners WINS EMPLOYER OF CHOICE 2012 ZUL RAFIQUE & partners was declared Employer of Choice 2012 by the Asian Legal Business (ALB). Five Malaysian law firms were short-listed and ZUL RAFIQUE & partners topped the list, making it its fourth consecutive win since 2009.

ALB conducted an online survey between 28 February and 30 March 2012. It was sent out to leading law firms and lawyers across Asia whereby 15 questions were asked pertaining to a law firm's performance as an employer. Respondents who ranged from paralegals to managing partners were asked to anonymously rate their employers and provide feedback on key areas such as work-life balance, remuneration, promotion prospects and IT support. 

IN-BRIEF...


- **A FOREIGN WORKERS ACT?** The Malaysian government is considering a Foreign Workers Act to address the plight of foreign workers. There is also a proposal to substitute whipping of illegal foreign workers, with increased fines. 
- **A TENANCY ACT?** The Consumer Association of Penang has called for a Tenancy Act to address issues arising from landlord-tenant relationships, such as payment of rent and deposits, rate of rental and eviction of tenants. There is also a proposal to establish a Rent Tribunal. 
- **BAHASA MALAYSIA ALLOWED...** Although English is the official language in Sabah and Sarawak court proceedings, the Court of Appeal in a majority decision, ruled that the use of Bahasa Malaysia in court documents is not prohibited. The issue arose in a case where the accused was served with a Notice of Appeal in Bahasa Malaysia by the Public Prosecutor. 
- **COPYRIGHT TRIBUNAL REVIVED** The Copyright Tribunal is expected to be revived this year. Artists and authors may lodge their complaints on copyright-related matters with the Tribunal. The Tribunal was established in 1999, but ceased to function in 2003 due to a lack of response. 
- **DEFAMATORY TWEET** In an unprecedented defamation suit involving posts via *Twitter*, the High Court awarded the aggrieved plaintiff RM500,000 in damages and ordered that the defendant journalist be restrained from publishing further defamatory statements. 
- **ENVIRONMENTAL QUALITY (AMENDMENT) BILL 2012 TABLED** Tabled for its First Reading, the Environmental Quality (Amendment) Bill 2012 contains a provision rewarding informers for assistance in detecting culprits. The Bill also empowers the Director-General of the Department of Environment to issue a stop-work order against environmentally damaging activities and to arrest, without a warrant, anyone who is reasonably believed to have committed or is attempting to commit an offence relating to the environment. 
- **EVIDENCE ACT 1950 AMENDED** The Evidence Act 1950 has been amended to deal with the admissibility of facts in criminal proceedings and the admissibility of evidence obtained under mutual assistance in criminal matters requests. 
- **EVIDENCE ACT (AMENDMENT) (NO 2) BILL PASSED** The Evidence (Amendment) (No. 2) Bill 2012 was passed recently to introduce provisions to presume the liability of Internet users, for contents posted on their registered networks or sites. Such users will, therefore, be presumed guilty unless they prove otherwise. 
- **FOREIGN LAW FIRMS IN MALAYSIA** Amendments to the Legal Profession Act 1976 were tabled in April 2012 to allow the entrance of foreign legal firms into the Malaysian market. Fifteen new sections relating to the grant of license to foreign legal firms, permitted areas of practice and the employment of foreign lawyers have been proposed. 

- **MAFTA TO TAKE EFFECT 2013** Malaysia and Australia have signed a free trade agreement (MAFTA) which will come into force on 1 January 2013. Trade covered under MAFTA includes goods and services, economic and technical co-operation and intellectual property rights. Upon coming into force, Malaysia will enjoy a 100% tariff elimination to export goods while Australia will be granted a progressive elimination of import duties by 2020. ✚
- **MEDICAL (AMENDMENT) BILL 2012 TABLED** Amendments to the Medical Act 1971 were tabled in April 2012, introducing stringent provisions to regulate the standards of the medical profession in Malaysia. A Medical Qualifying Committee is established to oversee the accreditation and qualification of local and international medical training institutions. The amendments also call for a specialist registry under the Malaysian Medical Council to ensure that medical practitioners are genuine specialist experts in their respective fields. ✚
- **MINIMUM WAGE SET** A minimum wage policy has been adopted to ensure employees in the private sector receive a minimum monthly salary of RM900 in the Peninsular Malaysia, and RM800 in Sabah, Sarawak and the Federal Territory of Labuan. The Minimum Wage Order, gazetted on 1 July 2012, will take effect from 1 January 2013. ✚
- **PEACEFUL ASSEMBLY ACT COMES INTO FORCE** The Peaceful Assembly Act came into force on 23 April 2012. Under the Act, holding an assembly in a prohibited place or within 50 metres from a prohibited place is an offence. In addition, the requirement to provide a notice to hold a rally has been shortened from 30 days to 10 days. ✚
- **PRINTING PRESSES AND PUBLICATIONS (AMENDMENT) BILL 2012 TABLED** With the amendments to the Printing Presses and Publications Act 1984, the statute will now contain less stringent provisions for the printing and publishing industry. The amendments will, among others, allow a proprietor of any newspaper in Singapore to import, sell, circulate or distribute such newspaper in Malaysia. ✚
- **SECURITY OFFENCES (SPECIAL MEASURES) BILL 2012 PASSED** The Internal Security Act 1960 (ISA) has now been replaced by the Security Offences (Special Measures) Act 2012. Significant reforms of the new law include the right to apply for *habeas corpus* and the setting up of a special court to hear security offence cases. ✚
- **UUCA TO BE AMENDED** University students above 21 years old are allowed to join political parties following the proposed amendments to section 15 of the University and Universities Colleges Act 1971 (UUCA). However, political activities are barred in campus. ✚


AROUND THE WORLD... IN BRIEF

- **BIRTH CERTIFICATE FOR STILLBORN** Tarlia Bartsch, a woman who gave birth to a stillborn child, has challenged Australian law to allow the issuance of birth certificates for babies who are merely 12 weeks old (as opposed to the current situation of 20 weeks old). She proposed that amendments should be made to the Births, Deaths and Marriages Act to formally recognise the birth of a child regardless of when the baby dies. ✚
- **CHINA TO TIGHTEN INTERNET CONTROL** The Ministry of Industry and Information Technology of China has proposed tougher Internet rules to protect state security and public interest. Online users must now register with their real names in chat forums, blogs and micro-blogs. ✚
- **LADY ROSE V ROSE LADY** An almost similar name has prompted a trademark dispute between two brand names of cosmetic products, namely *Lady Rose* and *Rose Lady*. Ruling in favour of *Lady Rose*, the court ruled that visual similarities and identical use between the two would cause confusion. ✚

- **SINGAPORE CONTEMPT OF COURT**

BILL The Singapore Government has drafted a Bill on contempt of court. Law experts have lauded the move for such law in statutory form to provide for clearer guidelines on what constitutes contempt. 


- **SUBWAY NICHE WINS TRADEMARK**

SUIT A four-year legal battle ended in triumph for *Subway Niche* in an alleged infringement of trademark for using the name *Subway*, a famous American franchise restaurant selling sandwiches. The court held that there was no real evidence to suggest that the public was likely to be confused between the two. 

- **TAIWAN'S PERSONAL DATA**

PROTECTION ACT The Personal Data Protection Act, a new statute, is expected to come into force in November 2012. 

- **'TWITTER JOKE' APPEAL CASE**

ADJOURNED The UK High Court has ordered a new hearing for the appeal of Paul Chambers who was convicted under section 127 of the Communications Act 2003 for sending messages of a menacing character, by means of a public electronic communications network. Chambers posted tweets in January 2010 to blow up the Robin Hood Airport which he claimed was a joke. Believed to be the first case involving a criminal conviction for the content of a tweet in the UK, the '*Twitter* Joke' trial raises the issue of freedom of expression in the social media. 

- **VIDEO LINK REQUEST DENIED** The Court of Appeal in Singapore has denied the request of a South Korean, to allow five witnesses to testify on his behalf via video-link, in his trial for drug charges. In contrast to civil proceedings, video-link testimony in criminal proceedings is allowed only for witnesses who are in Singapore. 

BRIEFING...

ENERGY & UTILITIES

AN ENERGY SURGE IN MALAYSIA? The year 2011 witnessed the execution of a slew of major power purchase agreements and the opening up of the energy project on a tender basis. In addition, Malaysia introduced renewable energy laws to cement the development of renewable energy as part of an important energy source for Malaysia¹.

THE BAKUN DAM June 2011 witnessed the resolution to the *Bakun* dam project with the execution of the power purchase agreement (PPA) between Sarawak Energy Berhad (SEB) and Sarawak Hidro Sdn Bhd. Construction work commenced in 1994, halted in 1997 and was revived in 2000. It was initially planned to provide power supply to West Malaysia through the longest submarine transmission cable in the world. The execution of the *Bakun* PPA aborted such plan. Instead, there was an immediate need to plant up to meet the demand of electricity in West Malaysia from 2016 onwards.

The change of utilisation of the *Bakun* dam was in fact tandem with Sarawak's ambitious plan under the Sarawak Corridor of Renewable Energy (SCORE) development plan launched a couple of years ago. Under SCORE, Sarawak plans to produce up to 28000mw of electricity supply to various new high electricity consumption industries in Sarawak. The *Bakun* dam is to be part of that supply. Apart from the *Bakun* dam, the Murum hydroelectric dam is expected to be completed by the end of 2013, adding an installed capacity of 944mw.

It is reported that the SEB will commence construction of a 600mw coal-fired power station in Balingian, Sarawak in 2012. On the off take side, to date, SEB has signed two PPAs to supply a combined output of 570mw for two new manganese and ferrosilicon alloy smelting plants in Sarawak. It is aggressively pursuing other


¹ This article first appeared in *Financier Worldwide Magazine's 2012 Energy & Utilities Global Reference Guide* © 2012 Financier Worldwide.

buyers and is expected to sign two PPAs in the near future, to supply to the state of Sarawak two new plants — polycrystalline silicon and aluminium smelter.

As a result of SCORE's demand on *Bakun*, there is a need to replace the *Bakun* supply to meet the electricity demand for West Malaysia in the year 2016. Consequent thereto, the Government of Malaysia has awarded TNB *Janamanjung* a contract to build a 1000mw coal-fired plant at its existing plant site. It is to be South East Asia's first 1000mw ultra-supercritical coal-fired power plant. The Government then proceeded to a restricted tender for another 1000mw coal-fired plant and in December 2011, Malakoff Berhad was awarded the project and entered into a PPA with TNB to supply the same. Since then, the Energy Commission seems to be following the tender method.

THE LAWS Other significant developments observed are in the renewable energy sector. A relatively new legislation, the Renewable Energy Act 2011 (REA) came into effect on 1 December 2011 throughout Malaysia, except the state of Sarawak. The REA seeks to implement the feed-in-tariff (FIT) system to catalyse the generation of renewable energy. Under the FIT system, producers and consumers may sell electricity produced from renewable energy resources to power utilities at a fixed premium price for a specific duration. Renewable resources eligible under the system are solar panels, small hydros, biogas and biomass. This would promote the development of diversity in renewable energy resources. A Renewable Energy Fund is established under the Act to finance the FIT scheme.

A regulator, the Sustainable Energy Development Authority was established under the newly-enacted Sustainable Energy Development Authority Act 2011 (SEDA) to monitor the implementation of the FIT system and the REA. The SEDA came into force on 1 September 2011 throughout Malaysia, except for the state of Sarawak.

Both the REA and SEDA are indeed necessary and pivotal in providing a legal framework in regulating the renewable energy industries. 

EVIDENCE/ CYBER LAW

PRESUMPTION OF GUILT – REMEDY OR JEOPARDY?

Netizens in Malaysia, now share a common fear and feeling of uneasiness following the swift passing of the amendments to the Evidence Act 1950.

Pursuant to the amendments, owners or the administrators who facilitate the publication of online content would be liable for anonymous online contents posted on their registered networks or sites and data processing devices, unless it can be proved otherwise.

This article attempts to analyse the aspects of the newly-enacted section.

THE PRESUMPTIONS Section 114A, referred to as the *Presumption of Fact in Publication*, was introduced via the Evidence (Amendment) (No 2) Act 2012 (A1432) (the Amendment Act). The section reads as follows:

- (1) *A person whose name, photograph or pseudonym appears on any publication depicting himself as the owner, host, administrator, editor or sub-editor, or who in any manner, facilitates to publish or re-publish the publication is presumed to have published or re-published the contents of the publication unless the contrary is proved.*
- (2) *A person who is registered with a network service provider as a subscriber of a network service on which any publication originates from is presumed to be the person who published or re-published the publication unless the contrary is proved.*
- (3) *Any person who has in his custody or control any computer on which any publication originates from is presumed to have published or re-published the content of the publication unless the contrary is proved.*
- (4) *For the purpose of this section –*
 - (a) *'network service' and 'network service provider' have the meaning assigned to them in section 6 of the Communications and Multimedia Act 1998; and*

(b) 'publication' means a statement or a representation, whether in written, printed, pictorial, film, graphical, acoustic or other form displayed on the screen of a computer.

THE ANONYMITY ISSUE According to Datuk Seri Mohamed Nazri Aziz, Minister in the Prime Minister's Department, the amendments were tabled to address the issue of Internet anonymity since this very fact makes it extremely difficult, if not impossible, to trace the alleged offender.

THE IMPLICATION According to subsection (1) of the new provision, if your name, photograph or pseudonym appears on any publication on the Internet, representing yourself as the publisher, you are presumed to have published the contents of such publication. For example, if someone creates a blogsite in your name, you are presumed to have published the contents on that site, unless you prove otherwise. If someone posts a comment on your blog, you are also presumed to have published it. This will apply to *Facebook*, *Twitter*, or any form of social networking service, where you are deemed to have published anything posted on their wall, if that posting is published under your name.

A scrutiny of subsection (2) also appears to have serious consequences. If a posting originates from your account with a network service provider, you are deemed to be the publisher unless the contrary is proved.

A further presumption in subsection (3) is for the contents that originate from a computer. You are deemed to be the publisher so long as your computer was the device used to post that content.

THE BURDEN OF PROOF The amendments have caused some uneasiness as they tend to impose the burden on the person to prove his innocence, as opposed to the prosecution to prove his guilt. Considering the rampancy of cybercrime, the concern is that reversing the burden in this manner may perpetuate more crimes. Furthermore, since computers may be easily manipulated and hacked into, the issue is whether it is too risky to put the onus on Internet users to prove their innocence.

A further issue is whether the amendment is a violation of the presumption of innocence.

An analogy has been drawn to section 88 of the Evidence Act 1950 which deals with the *Presumption as to the telegraphic messages*. The section reads:

The court may presume that a message forwarded from a telegraph office to the person to whom it purports to be addressed corresponds with a message delivered for transmission at the office from which the message purports to be sent; but the court shall not make any presumption as to the person by whom the message was delivered for transmission.

If the court shall not make any presumption as to the person by whom the message was delivered for transmission, does it make sense for the court to presume the identity of the person who publishes the messages over the electronic medium?

PRESUMPTION OF FACT The first question that one may ask is whether this presumption is automatically invoked. Although the words '*is presumed*' are used, the section is referred to as a *Presumption of Fact in Publication*. A presumption of fact gives the court the discretion to invoke it and such discretion is based on the facts and circumstances of each case. It could be argued therefore that the presumption is not automatic and the court will have to consider the circumstances of the case before it invokes the presumption. Hence to say that the presumption is an automatic assumption of guilt may not be entirely accurate as the provision is left to judicial interpretation.

SECTION 114 Another interesting point to note is the existing provision in the Evidence Act 1950 which already gives the court the discretion to invoke presumptions. The provision in the current section 114 states that '*the court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct, and public and private business, in their relation to the facts of the particular case.*'

This provision suggests that the court may already invoke a presumption that could have the same effect as section 114A, except for the fact that section 114A is more specific.

REBUTTABLE? The second consideration is that the presumptions in section 114A are rebuttable. In fact, most presumptions are. There are only a couple of presumptions that are irrebuttable, that is, where the law presumes a fact and makes it conclusive proof of it. Hence, it is important to note that the presumptions in the new section 114A are not conclusive proof.

The argument, however, is that there may be difficulties in rebutting this presumption. Not only could the lay person find it difficult to navigate his way through the maze of technology, there may be other legal hindrances, such as the provision in section 90A(7) of the Evidence Act 1950 which refers to evidence given on behalf of the accused person.

The sub-section reads:

Notwithstanding anything contained in this section, a document produced by a computer, or a statement contained in such document, shall not be admissible in evidence ... where it is given in evidence by or on behalf of the person who is charged with an offence in such proceeding the person so charged with the offence being a person who was (a) responsible for the management of the operation of that computer or for the conduct of the activities for which that computer was used; or (b) in any manner or to any extent involved, directly or indirectly, in the production of the document by the computer.

This raises questions on the difficulty to rebut the presumption in the proposed section 114A.

CONCLUSION The authorities have given their assurance that the section is not as oppressive as it sounds, but only time will tell how this controversial section will be interpreted by the Malaysian courts. 

PARTNERSHIP/ COMPANY LAW

LIMITED LIABILITY PARTNERSHIP...

THE BEST OF BOTH WORLDS? A business entity with hybrid features of both a partnership and private company, known as Limited Liability Partnership (LLP), is increasingly adopted by the professionals, particularly accountants and lawyers.

This article attempts to explain the concept of an LLP and how it could alter the business landscape in Malaysia.

LLP ACT 2012 The LLP emerged as a new concept in the business form of partnerships in the United States almost two decades ago. It was introduced in the United Kingdom ten years later, and subsequently many other countries embraced the concept gradually. The rise of the LLP in Malaysia began in 2010 with the implementation of the Labuan Limited Partnerships and Limited Liability Partnerships Act 2010 in Labuan.

The Limited Liability Partnerships Act 2012 ('LLP Act') is expected to come into force soon. This will alter the form of business structures in Malaysia.

FORMATION OF AN LLP There must be at least two partners to form an LLP. They could either be individuals or corporate bodies. If there are fewer than two partners, section 7(1) of the LLP Act allows for the business to be carried on between six months and one year.

According to section 13 of the LLP Act, the name of the business must end with the term Perkongsian Liabiliti Terhad or PLT.

AGREEMENT In order to avoid any undesirable conflict or strife in a partnership, it is generally advisable to document the affairs, as well as the rights, duties and liabilities of partners. In the absence of a written LLP agreement, schedule 2 of the LLP Act, which sets out the default provisions for an LLP, will apply.

LIABILITY One of the most critical drawbacks of a conventional partnership is the unlimited liability for debts and obligations incurred by the acts of other partners. On the contrary, LLP offers the advantage of a limited liability. Claims made against an LLP are only to the extent of its assets and does not involve the personal assets of the partners. At most, partners only lose their business capital invested in the LLP.

Limited liability also means partners in an LLP are not personally liable for the wrongful act, omission or negligence of other partners unless such liability arises from his or her own wrongful act or negligence. If the LLP becomes insolvent, partners are personally liable to repay monies received from the business within a period of two years prior to the winding up of the business².

SEPARATE LEGAL ENTITY A separate legal personality is another advantage offered by an LLP. The law views an LLP as an artificial legal person which is independent of the partners who set up the LLP. Hence, similar to other forms of legal entities, it has the legal rights and obligations to acquire, hold and own assets, develop or dispose assets, enter into contracts, grant security over assets, and sue or be sued in its name.

In addition, any change of partners in an LLP would not affect its existence, rights or liabilities. An LLP also enjoys perpetual succession, unlike a partnership which could be dissolved as a result of lunacy, death or bankruptcy of a partner.

FINANCIAL DISCLOSURE AND

COMPLIANCE Although the rules regarding the financial disclosures and compliance that apply to a company and LLP are quite similar, those involving an LLP are less onerous and less complicated.

Under both local and foreign LLPs, at least one compliance officer must be appointed and he may either be one of the partners of the LLP (who must not be an undischarged bankrupt) or a person qualified to act as a company secretary under the Companies

Act 1965. He must also be a Malaysian citizen or a permanent resident who ordinarily resides in Malaysia. In contrast to private companies, one or more secretaries must be appointed by virtue of section 139 of the Companies Act 1965 who shall be a natural person of full age and who has his or her principal or only place of residence in Malaysia.

Further to the above, the accounts of an LLP are not required to be audited, unless it is stated in the LLP agreement. An LLP must keep its accounts and other financial records updated to substantiate its transaction and financial position. Such records must be retained for a maximum period of seven years from the end of the financial year of the completed transactions or operations³.

Filing of accounts is not required but the Registrar may, by notice in writing, request for inspection of such records. Under section 68 of the LLP Act, the annual declaration of solvency or insolvency must be lodged with the Registrar. Failure to comply with the above requirements shall subject an LLP to prosecution and penalties.

RISK EXPOSURE Unlike the conventional type of partnership where there is unlimited liability, under the LLP, the risk of a partner being personally exposed is significantly reduced, if not eliminated. For example, in a claim for negligence against the partnership, the LLP would protect the personal assets of a partner in the event damages have to be paid out as a result of the errors, omissions or other tortuous conduct of an employee or co-partner of the LLP.

TAX Under the Income Tax Act 1967, a traditional model of a partnership is not considered a tax entity. The same applies to an LLP. Therefore, no tax is imposed on the firm. As each partner is treated as if he is self-employed or as a sole proprietor, tax is therefore assessed in accordance with the partners' share of the partnership income on a personal income tax rate. However, while paying lesser taxes, as opposed to a company, the LLP compromises on corporate tax benefits given to the private limited companies.

² Section 22 of the LLP Act (a 'claw-back' provision).

³ Section 69(2) of the LLP Act


TYPE OF BUSINESSES The LLP appears to be an ideal choice for businesses that offer professional services. Due to the nature of their profession which demands higher care, skill and diligence, an LLP could minimise risk exposure and shield partners from the liability of a negligent partner.

Some countries restrict LLPs to certain classes of professionals such as architects, accountants and lawyers. In China, an LLP is restricted to knowledge-based professions and technical service disciplines.

The LLP Act specifically mentions the LLP for professional practices and its First Schedule includes chartered accountants, advocates and solicitors and company secretaries.

CONCLUSION The infancy of the LLP in Malaysia may not be seen as the reason to play safe. Rather, it is an appealing option to do business in Malaysia, especially, with its tax benefits, flexibility and minimal personal risks.

Suffice to say, it will be a fair certainty to assume that many, if not most, may convert their status of incorporation to an LLP in order to reap the benefits.

With the necessary exposure and awareness, other types of businesses such as the Small and Medium Enterprises (SMEs), sole proprietorships and joint ventures may warm up to the idea of forming an LLP. Having the best of both worlds in today's precarious business climate is becoming a reality. 


BRIEF-CASE...

COMPANIES & CORPORATIONS – Whether contributories had *locus* to take action against liquidators – Allegation that liquidators' conduct was fraudulent and corrupt

**Ooi Woon Chee & Anor v
Dato' See Teow Chuan & Ors**
[2012] 2 CLJ 501, Federal Court

FACTS This case concerned the winding up of Kian Joo Holdings Sdn Bhd by the High Court and the sale of Kian Joo Can Factory Bhd's shares by open public tender. Two revised offers were received for the purchase of the company shares, the highest bid, from Can-One International Sdn Bhd (Can-One), which was accepted by the liquidators who were the appellants in this case. The majority contributories alleged that the acceptance of the offer and the eventual sale of shares to Can-One were null and void as they were tainted with fraud and corrupt practice. The appellants now appeal to the Federal Court against the decision of the Court of Appeal in granting leave to the majority contributories to proceed against the liquidators. They also appeal against the decision to set aside and dismiss the High Court's directions on the completion of sale of the company shares to Can-One.

ISSUE The issues were whether the major contributories were the proper plaintiffs to commence the suit; and whether the directions given by the High Court on the completion of sale could be appealed against.


HELD In allowing the appeal, it was held that leave ought not to be granted because there was no evidence that the company suffered pecuniary loss. Furthermore the directions by the High Court did not fall within the definition of judgment or order by virtue of section 67(1) of the Courts of Judicature Act 1964. They were therefore non-appealable. 

TORT LAW – Breach of confidence
 – Disclosure of dental report - Whether information confidential – Nature of relationship between plaintiff and defendant
 – Whether defendant breached such confidence

**DR TAN AH BA V
 DR WONG FOOT MEOW**
 [2012] 7 MLJ 467, High Court

FACTS The plaintiff claimed that the defendant had breached his professional duty of confidence upon the issuance and disclosure of his dental report to third parties. He also alleged that the report had the sole purpose of defeating his claim against one Dr How, who acted negligently in treating him for dental implants. The plaintiff was forced to accept a lower settlement sum from Dr How as a result of the disclosure of the report. The defendant denied the claim and contended that the report was collected personally by the plaintiff and that he was no longer in control of the report. He further contended that the plaintiff should have withdrawn his claim since the Malaysian Dental Council (MDC) had dismissed the plaintiff's complaint.

ISSUE The preliminary issue was whether the plaintiff's suit was an abuse of the process of the court. The subsequent issue was whether there was a breach of confidence by the defendant in disclosing the dental report.


HELD In allowing the plaintiff's claim, it was held that the MDC's dismissal of the plaintiff's complaint did not finally determine the rights between the parties. The plaintiff, therefore, had the right to sue the defendant in the High Court. The information of the plaintiff was confidential as it arose in a doctor-patient relationship. It was indeed the defendant who issued the report which was neither requested nor handed over to the plaintiff. Without any plausible explanation from the defendant, the conclusion is that it was the defendant who had given the report to Dr How's solicitor. 

CIVIL PROCEDURE – Jurisdiction of the court - Quorum of panel judges – Chairman of panel momentarily left – Whether quorum failure

**GURBACHAN SINGH BAGAWAN
 SINGH & ANOR V VELLASAMY
 PENNUSAMY & ORS**
 [2012] 2 CLJ 663, Federal Court

FACTS Four applicants filed separate applications to the Federal Court for leave to appeal against a decision of the Court of Appeal. An earlier panel of the Federal Court heard their applications but refused leave to appeal. The applicants then applied to the present panel to review and set aside the decision of the earlier panel, and sought to have a new panel hear their leave applications. The applicants argued that the decision of the earlier panel was fatally flawed and ought to be set aside as the Chairman of the panel stepped out and left the panel during the hearing. The respondents, on the other hand, argued that the applications for leave were not filed within one month or reasonable time from the refusal of their leave application, and should on that ground be dismissed by the court. They also argued that the Chairman had stepped out only briefly before returning to the Bench.

ISSUE The issues for consideration were whether there was a quorum failure and whether the delay in filing the applications for leave was a ground to dismiss.


HELD In allowing the applications for leave to be heard by a new panel, it was held that the Chairman did leave the bench for a period before returning and part of the hearing had been conducted by only two judges. The delay in filing the applications for leave was not a factor to consider as such delay was in fact caused by the wait for the written grounds of judgment. 

LEGAL PROFESSION - Promotion of prepaid legal services by unauthorised persons – Whether in breach of Legal Profession Act 1976 - Sections 36 and 37 of the Legal Profession Act 1976

**BAR MALAYSIA V
INDEX CONTINENT SDN BHD**
[2012] 3 CLJ 846, High Court

FACTS The plaintiff sought an interlocutory injunction to restrain the defendant from advertising its prepaid legal services on a subscription basis by the name of *Answers-in-law*. The plaintiff contended that the defendant, not being ‘an authorised person’, was in breach of sections 36 and 37 of the Legal Profession Act 1976 (LPA), in that it gave the impression that the services were offered by an Advocate and Solicitor. It was further contended by the plaintiff that the defendant’s activities, if allowed to continue without being checked, would result in great harm for which damages would not be an adequate remedy.

ISSUE The preliminary issue was whether the plaintiff had *locus standi* to bring the action. Further issues were whether there was a *bona fide* serious question to be tried, and whether the balance of convenience lay in favour of the injunction being granted.

HELD The court held that the plaintiff had *locus standi* to bring this action as it was exercising its statutory duty and power for the benefit and protection of the public. Furthermore, the court was of the view that the services offered by the defendant contravened section 37(3) of the LPA and the question as to whether the packages offered fell within the proviso to section 37(3), amounted to a *bona fide* serious question to be tried. As such, the balance of convenience tilted in favour of an injunction being granted. 

BRIEF-UP...

**EMPLOYMENT (AMENDMENT)
ACT 2012**

No
A1419

Date of coming into operation
1 April 2012

Amendment
Sections 2, 4, 22, 25A, 31, 37, 40, 42, 59, 60, 60D, 60I, 60K, 69, 69B, 73, 77, 79, 82, 86, 101A, 102; Parts V and VII

Substitution
Sections 19 and 25

Introduction
Sections 33A, 44A, 57A, 57B, 90A, 101B and Part XVA 

**STANDARDS OF MALAYSIA
(AMENDMENT) ACT 2012**

No
A1425

Date of coming into operation
15 April 2012

Amendment
Long Title; Sections 2, 10, 13, 15, 16, 17, 18, 22, 25 and Heading of Part V


Introduction
Section 18A and Part VA 

**PEACEFUL
ASSEMBLY ACT 2012**

No
736

Date of coming into operation
23 April 2012

Notes

An Act relating to the right to assemble peaceably and without arms, and to provide restrictions deemed necessary or expedient relating to such right in the interests of the security of the Federation or any part thereof of the public order, including the protection of the rights and freedoms of other persons, and to provide for related matters. 

**POLICE (AMENDMENT)
ACT 2012**

No
A1421

Date of coming into operation
23 April 2012

Amendment
Section 21

Deletion
Sections 27, 27A, 27B and 27C 

**CRIMINAL PROCEDURE CODE
(AMENDMENT) ACT 2010**

No
A1378

Date of coming into operation
1 June 2012


Amendment

Sections 173, 176, 402A, 413, 426, 428, 432 and Second Schedule

Introduction

Chapter XVIIIA (Sections 172A-172F); Sections 183A, 254A, 402B, 402C and 407A

Notes

Further amendments are made to A1378 via Criminal Procedure Code (Amendment) Act 2010 (Amendment) Act 2012 (A1422) which came into force on 1 June 2012. 

**CRIMINAL PROCEDURE CODE
(AMENDMENT) ACT 2012**

No
A1423

Date of coming into operation
1 June 2012

Amendment
Sections 51A, 283 and 396 

**EVIDENCE (AMENDMENT)
ACT 2012**

No
A1424


Date of coming into operation
1 June 2012

Introduction
Section 73AA and Chapter VA 

TERRITORIAL SEA ACT 2012

No
750


Date of coming into operation
22 June 2012

Notes
An Act to provide for the territorial sea of Malaysia and for connected matters. 

**MALAYSIA VOLUNTEERS CORPS
ACT 2012**

No
752

Date of coming into operation
22 June 2012

Notes
An Act to provide for the establishment, duties and powers of the Malaysia Volunteers Corps and to provide for related matters. 

**INCOME TAX (AMENDMENT) ACT
2012**

No
A1429

Date of coming into operation
23 June 2012

Amendment
Section 44 

RUKUN TETANGGA ACT 2012

No
751

Date of coming into operation
22 June 2012

Notes
An Act to make provisions relating to Rukun Tetangga and Voluntary Patrolling Scheme and for connected matters. 

**FISHERIES (AMENDMENT)
ACT 2012**

No
A1413

Date of coming into operation
1 July 2012


Amendment
Section 40 

LEMBAGA KEMAJUAN IKAN MALAYSIA (AMENDMENT) ACT 2012

No
A1416

Date of coming into operation
1 July 2012

Amendment
Section 4


Introduction
Section 11A 

FEDERAL AGRICULTURAL MARKETING AUTHORITY (AMENDMENT) ACT 2012

No
A1417

Date of coming into operation
1 July 2012

Amendment
Section 3

Introduction
Section 17A 

RULES OF THE COURT 2012

No
PU(A) 205/2012

Date of coming into operation
1 August 2012

Notes
The Rules of the High Court 1980 and Subordinate Court Rules 1980 have been merged to become Rules of the Court 2012. The purpose of the Rules of the Court 2012 is to facilitate and standardise civil procedures in court as well as improve the quality of the justice system. 

GUIDELINES/RULES/CIRCULARS/ DIRECTIVES/PRACTICE NOTES ISSUED BETWEEN APRIL AND JUNE 2012 BY BANK NEGARA MALAYSIA, BURSA MALAYSIA AND SECURITIES COMMISSION MALAYSIA

BANK NEGARA MALAYSIA (BNM)

- Guidelines & Circulars Listing – Guidelines issued under Insurance and Takaful – In relation to Prudential Limits and Standards – Guidelines on Valuation Basis for Liabilities of General Takaful Business and its related FAQs – *Date Updated: 23 May 2012*
- Guidelines & Circulars Listing – Guidelines issued under Insurance and Takaful – In relation to Prudential Limits and Standards – Guidelines on Valuation Basis for Liabilities of Family Takaful Business and its related FAQs – *Date Updated: 23 May 2012*

BURSA MALAYSIA

- Bursa Malaysia Derivatives Berhad: Directives on Referral Agent Activities – *Effective Date: 1 June 2012*
- Bursa Malaysia Securities Berhad: Directives on Referral Agent Activities – *Effective Date: 1 June 2012*
- Amendments to the Rules of Bursa Malaysia Derivatives Clearing in relation to Options and for Consistency with the Rules of Bursa Malaysia Derivatives Berhad – *Effective Date: 21 May 2012*
- Amendments to the Rules of Bursa Malaysia Derivatives Berhad in relation to Options on FTSE Bursa Malaysia Kuala Lumpur Composite Index Futures Contract and FTSE Bursa Malaysia Kuala Lumpur Composite Index Futures Contract – *Effective Date: 21 May 2012*

- Amendments to the Rules of Bursa Malaysia Derivatives Berhad – Amendments to the Trading Participants' Manual in relation to Exchange for Related Positions and Negotiated Large Trades – **Effective Date: 9 April 2012**
- Amendments to the Rules of Bursa Malaysia Derivatives Berhad in relation to Exchange for Related Positions – **Effective Date: 9 April 2012**
- Amendments to the Rules of Bursa Malaysia Derivatives Berhad – Amendments to Compliance Guidelines for Future Brokers – **Effective Date: 2 April 2012**
- Amendments to the Rules of Bursa Malaysia Derivatives Berhad in relation to Financing to Related Corporations and Reporting to Management – **Effective Date: 2 April 2012**
- Amendments to the Rules of Bursa Malaysia Securities Clearing Sdn Bhd –To Clarify the Novation Process for On-Market Transactions – **Effective Date: 2 April 2012**
- Amendments to KLSE/MESDAQ Joint Guidelines for Compliance Officers – **Effective Date: 2 April 2012**
- Amendments to the Rules of Bursa Malaysia Securities Berhad in relation to Financing to Related Corporations and Finality of Settlement – **Effective Date: 2 April 2012**

SECURITIES COMMISSION

- Guidelines for the Offering, Marketing and Distribution of Foreign Funds and the related FAQs – **Date Updated: 24 April 2012**
- Guidelines on Compliance Function for Fund Management Companies and the related FAQs – **Date Updated: 16 April 2012**

ZRp IN-BRIEF...

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

mariette.peters@zulrafique.com.my

serene.sam@zulrafique.com.my

laila.nasir@zulrafique.com.my

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The contributors for this **Brief** are:

- **Lukman Sheriff Alias**
- **Mariette Peters**
- **Serene Sam**
- **Norlaila Nasir**
- **Arther Tiong**
- **Toon Zuyin**